

MICROSOFT/ACTIVISION BLIZZARD

**SONY INTERACTIVE ENTERTAINMENT
OBSERVATIONS ON THE CMA'S REMEDIES NOTICE**

**CONFIDENTIAL
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Microsoft/Activision Blizzard

Sony Interactive Entertainment's Observations on the CMA's Remedies Notice

1. Sony Interactive Entertainment (“SIE”) welcomes the opportunity to comment on the CMA’s notice of possible remedies (“Remedies Notice”) in connection with its provisional findings (“PFs”) on the *Microsoft/Activision Blizzard* transaction (the “Transaction”).
2. Based on a compelling body of evidence – including 3 million Microsoft and Activision documents, over 50 requests for information, more than 2,100 emails from the public, and multiple categories of economic data – the PFs find that Microsoft could substantially lessen competition (“SLC”) in consoles and cloud gaming by withholding Activision content, in particular *Call of Duty*, from its competitors. SIE agrees with the CMA’s assessment. SIE also concurs with the CMA’s view, as set out in the Remedies Notice, that the harm the Transaction would cause could only be addressed through prohibition or structural remedies.
3. The Remedies Notice considers an argument made by Microsoft that a behavioural commitment would be suitable because of “*existing and potential contractual arrangements with third-party platforms relating to access to Call of Duty.*”¹ Microsoft appears to suggest that such arrangements could prevent any loss of competition arising from the Transaction. But the existence of such arrangements today says nothing about whether they are capable of addressing the competition concerns identified in the PFs, in particular given that those concerns reflect the CMA’s determination that the merged entity’s post-Transaction incentives would be very different from Activision’s current incentives.
4. In any event, the Remedies Notice explains that none of the circumstances in which the CMA would approve the Transaction based on a behavioural remedy are present. The CMA could not be clearer that “*the circumstances in which the CMA might select a behavioural remedy as the primary source of remedial action are not present in this case,*”² including because of the dynamic nature of the two markets in which an SLC is identified.
5. Accordingly, the CMA explains that “*any behavioural remedy in this case is likely to present material effectiveness risks.*”³ SIE agrees. As explained below, the dynamic and evolving nature of the gaming industry; the competitive lever that a behavioural commitment would give Microsoft over PlayStation’s fate (for example, by controlling *Call of Duty* pricing and quality); and Microsoft’s history of non-compliance with behavioural commitments mean that behavioural remedies are not suited to this case.
6. This paper proceeds first by examining the structural remedies proposed in the Remedies Notice: full prohibition and divestiture of parts of Activision’s business. **Section I** explains

¹ Remedies Notice, para. 18.

² Remedies Notice, para. 18.

³ Remedies Notice, para. 44.

how prohibiting the Transaction would effectively address the competitive harms identified in the PFs. **Section II** shows that divesting parts of Activision’s business would also address the CMA’s competition concerns.

7. The paper then turns to an examination of behavioural remedies. **Section III** explains why behavioural remedies are not suitable in this case. Using Microsoft’s proposal to SIE regarding access to *Call of Duty* as illustration, it explains that any access commitment would be inadequate. It also suggests, through an examination of Microsoft’s past conduct, why any behavioural commitment offered by Microsoft should be treated with caution. **Section IV** concludes.

I. The Transaction Should Be Prohibited

8. The CMA’s Merger Remedies Guidelines (the “Guidelines”) explain that, when considering remedies, the CMA must respect the need to achieve as comprehensive a solution as is reasonable and practicable to address the competitive harm the CMA has identified and any adverse effects resulting from it.⁴ The CMA will therefore seek remedies that can effectively address the harm and its effects in the least costly, intrusive, and disproportionate manner.⁵
9. The Remedies Notice identifies prohibition of the Transaction as a “*comprehensive solution*” to the competition concerns the CMA has identified in the PFs. It also finds that the risks of this remedy “*are very low.*”⁶ SIE agrees. Prohibiting the Transaction would safeguard against the foreclosure strategies Microsoft could employ to withhold or degrade access to Activision content. It would, by definition, restore the pre-Transaction competitive conditions. And it would do so in a clear-cut, proportionate, and straightforward manner.

II. A Structural Divestiture Could Also Address The Competition Concerns Raised By The Transaction

10. SIE agrees with the Remedies Notice that divesting parts of Activision’s business could also address the CMA’s competition concerns. The Remedies Notice proposes divesting either: (i) Activision’s *Call of Duty* business; (ii) its Activision business segment; or (iii) both its Activision and Blizzard business segments.⁷ These divestment options would ensure that critical Activision content, such as *Call of Duty* and, under the CMA’s third option, *World of Warcraft*, would remain in independent hands. Post-divestment, there would also be no need for further monitoring or enforcement.
11. In considering divestment options, the CMA would need to ensure that the divested entity would be able to compete viably, on a standalone basis, and without support of those parts of Activision’s business that might remain with Microsoft (*e.g.*, the King business). SIE is

⁴ Guidelines, para. 3.3.

⁵ Guidelines, para. 3.4

⁶ *Ibid.*

⁷ Remedies Notice, paras. 14, 28.

not aware of the extent to which the Activision business units identified in the Remedies Notice are integrated together as a whole such that divesting one or more of these units could impair the divested entity's ability to compete and innovate on a standalone basis. SIE trusts that the CMA will take this account in weighing up different remedy options.

III. CMA Guidance, Microsoft's Recent Proposal, And Microsoft's Past Conduct Show That Behavioural Commitments Are Not Suitable In This Case

12. The Remedies Notice does not propose a behavioural remedy to address the competitive harm identified in the PFs. Instead, it states that the CMA will consider the possibility of a behavioural remedy in response to Microsoft's submissions about existing and potential contractual protections.⁸ Notably, the Remedies Notice does not discuss what a behavioural remedy might entail. And it expresses scepticism that any behavioural remedy could effectively resolve the competition concerns the PFs found.⁹
13. For several reasons, behavioural remedies are not suitable in this case. First, none of the circumstances identified in the Guidelines for behavioural remedies are present (**Section III.A**). Second, behavioural remedies in this case would raise the risks that the Guidelines seek to avoid (**Section III.B**). Third, behavioural remedies cannot adequately address the myriad ways Microsoft could circumvent its obligations (**Section III.C**). This is confirmed by the agreement, alluded to in the Remedies Notice, that Microsoft has proposed to SIE to maintain *Call of Duty* on PlayStation (**Section III.D**). Microsoft's past conduct of violating behavioural commitments and promises to the public further shows that its representations must be treated with caution (**Section III.E**).

A. None Of The Circumstances Identified In The Guidelines For A Behavioural Remedy Are Present Here

14. The Guidelines set out a well-established framework for when a behavioural remedy can in principle address an SLC arising from a merger. As a preliminary point, the Guidelines explain that behavioural remedies are less likely to deal with the source of a competition concern; less likely to have an effective impact on the competition concern and its resulting effects; more likely to create significant costly distortions in market outcomes; and often require monitoring and enforcement once implemented.¹⁰

⁸ Remedies Notice, para. 18.

⁹ Remedies Notice, para. 44.

¹⁰ Guidelines, para. 3.46. The CMA has recently stated that behavioural remedies are often ill-equipped to address competition concerns in dynamic markets like tech. See CMA, [The Berkeley Spring Forum on M&A and the Boardroom: UK CMA General Counsel Sarah Cardell](#) (28 April 2022); and the CMA, the Australian Competition Consumer Commission (ACCC), and Bundeskartellamt, [Joint statement on merger control enforcement](#) (20 April 2021).

15. In light of these concerns, the CMA has made clear that it will generally only consider behavioural remedies in three circumstances.¹¹ As the Remedies Notice notes, none of these circumstances are present in this case:

- **Whether divestiture or prohibition is feasible.** The CMA may consider behavioural remedies if divestiture or prohibition are not feasible (*e.g.*, a transaction has closed and the businesses are integrated). Divestiture and prohibition are eminently feasible in this case: the Transaction has not yet completed and Activision remains an independent entity.
- **Whether the SLC is expected to have a short duration.** If an SLC is expected to be of a very short duration, the CMA may consider a behavioural remedy as a stopgap before broader industry developments rectify the harm resulting from a transaction. But there is nothing to suggest that this is the case here. Activision content, in particular *Call of Duty*, is and will continue to be an essential input for the gaming industry. The tremendous success of *Call of Duty: Modern Warfare II* is testament to the ongoing importance and irreplaceability of the franchise.¹² And the PFs specifically identify an SLC in cloud gaming, which is a nascent area that could take decades to evolve to maturity.
- **Whether behavioural measures can preserve substantial customer benefits that would be removed by structural remedies.** A third reason the CMA may consider a behavioural remedy is where there are substantial customer benefits that would be preserved by a behavioural remedy but not a structural one. There is no evidence of that being the case here. In particular, any behavioural commitment from Microsoft to grant rivals access to *Call of Duty* could pose a greater, not lesser, risk for consumers, as the myriad ways Microsoft could withhold or degrade access would be extremely difficult to monitor and police. If Microsoft failed to comply with its commitment, it would likely only risk paying a fine (possibly many years later). But rivals' access to *Call of Duty* would be immediately foreclosed, irreparably damaging their ability to compete and ultimately harming consumers.

B. Behavioural Remedies Would Raise Risks That The Guidelines Seek To Avoid

16. The Guidelines and the Remedies Notice make clear that behavioural remedies should avoid four specific types of risk.¹³ For the reasons explained below, these risks are all apparent in the present case:

¹¹ Guidelines, paras. 7.1, 7.2, and 3.48. *See also* Remedies Notice, para. 15.

¹² [REDACTED]

¹³ Guidelines, para. 7.4; Remedies Notice, para. 41.

- **Specification risk** arises where the form of conduct required to address competitive harm and its effects cannot be specified with sufficient detail and clarity. For two reasons, this is likely to be the case here.
 - First, given that the gaming industry is a dynamic and evolving market, particularly in the nascent sectors of multi-game subscription (“MGS”) services and cloud gaming, any access commitment that Microsoft might make to competitors is unlikely to capture these developments with sufficient specificity to ensure competition in the future.
 - Second, as explained in Section III.D below, the commitment that Microsoft is prepared to make, evidenced by its most recent proposal to SIE regarding access to *Call of Duty*, would only oblige Microsoft to use its [REDACTED] to ensure parity between Xbox and PlayStation, and [REDACTED]. This commitment falls far short of specifying with sufficient clarity what would constitute compliant behaviour to enable effective enforcement.
- **Circumvention risk** concerns the possibility that other forms of adverse behaviour may arise if certain forms of behaviour are restricted. This is the case here. As described in Section III.C below, there are multiple ways Microsoft could foreclose access to Activision content post-Transaction, and it is doubtful that a behavioural remedy would capture each and every one of them. But even if a behavioural remedy could, it would be difficult both to detect and bar Microsoft from adopting a particular foreclosure strategy in time to prevent irreparable harm to rivals’ competitiveness. And as the PFs find, Microsoft would have a strong incentive to employ the foreclosure strategies at its disposal to reduce competition.
- **Distortion risk** concerns the possibility that a behavioural remedy may create market distortions that reduce effectiveness or increase costs. As explained in Section III.D below, Microsoft’s recent proposal to SIE regarding *Call of Duty* raises this risk as well. The pricing terms Microsoft has proposed for buy-to-play would effectively give Microsoft a lever to raise the prices SIE could charge gamers to play their favourite game. And for MGS services, Microsoft has proposed a licensing arrangement that would [REDACTED]. This would make PlayStation Plus commercially unviable, forcing SIE either to raise its MGS prices or not offer *Call of Duty* on MGS at all.
- **Monitoring and enforcement risk** concerns the possibility that behavioural remedies cannot be appropriately monitored and enforced. As noted, the many strategies of foreclosure available to Microsoft make it difficult for any behavioural remedy to be effectively monitored and practically enforced. And, given the fast pace at which the gaming industry is evolving, it would be challenging to tailor a remedy that would provide the means to monitor Microsoft’s ongoing compliance.

C. The Different Mechanisms Available To Microsoft To Avoid Its Obligations Mean Any Behavioural Remedy Is Not Suitable In This Case

17. As the PFs recognise, Microsoft could deploy multiple strategies to fully or partially foreclosure access to Activision content.¹⁴ In relation to *Call of Duty*, SIE has also explained that, in addition to withholding access to existing or future *Call of Duty* titles, Microsoft could adopt one or several partial foreclosure strategies to impair PlayStation's competitiveness.¹⁵ These strategies could include:
- raising the price of *Call of Duty* on PlayStation;
 - degrading the quality and performance of *Call of Duty* on PlayStation compared to Xbox;
 - degrading *Call of Duty* to ignore PlayStation-specific features (e.g., better controller haptics) or not prioritising investment in such features;
 - restricting, degrading, or not prioritising investment in the multiplayer experience on PlayStation; or
 - making *Call of Duty* available on MGS only on Game Pass.
18. A behavioural remedy would not be able to protect fully against these kinds of strategies. To take three examples:
19. First, on pricing, Microsoft would be licensing a critical gaming input to its horizontal competitor, and would therefore have a clear incentive to raise the price of *Call of Duty* to degrade PlayStation's competitiveness. And there is an obvious economic change in incentive between negotiating with an independent Activision today and an Activision acquired by Microsoft. Today, Activision is incentivised to reach an agreement with SIE to distribute *Call of Duty*. Post-Transaction, the merged entity would benefit from a failure to distribute *Call of Duty* on PlayStation. This dramatically improves the merged entity's bargaining position and would allow Microsoft to obtain a higher revenue share for its content than would be achieved on the merits with an independent Activision.
20. It is not clear how any behavioural commitment could adequately address such a concern in a dynamic industry such as gaming. Even a monitoring trustee backed by a licensing commitment based on fair, reasonable, and non-discriminatory ("FRAND") terms raises intractable practical problems: Who would set prices and how? What level of information sharing and communications would be permissible? How would it be determined whether prices were fair? How would non-discrimination be ensured given that Microsoft would be making a purely internal accounting transfer? And who would make the determination as to

¹⁴ PFs, para. 7.124.

¹⁵ [REDACTED]

fairness, reasonableness, and non-discrimination?¹⁶ The situation is therefore diametrically different to a regulated industry where the CMA has, on a few occasions, considered licensing commitments that a sectoral regulator has the expertise and resources to act as a price regulator on an ongoing basis.¹⁷

21. Second, the partial foreclosure mechanisms described above could arise even without an active decision on the part of Microsoft to degrade *Call of Duty* on PlayStation. Instead, partial foreclosure could result simply from Microsoft's differing incentives post-Transaction as compared to an independent Activision. Post-Transaction, Microsoft will need to make choices about the support it will provide to develop any PlayStation version of *Call of Duty*. Even if Microsoft operated in good faith, it would be incentivised to support and prioritise development of the Xbox version of the game, such as by using its best engineers and more of its resources. There would be no practical way for the CMA (or SIE) to monitor how Microsoft chooses to allocate its resources and the quality/quantity of engineers it devotes to the PlayStation version of *Call of Duty*, to ensure that SIE would be treated fairly and equally.
22. Third, swiftly detecting any diversions from, and ensuring compliance with, a commitment as to technical or graphical quality would be challenging. For example, Microsoft might release a PlayStation version of *Call of Duty* where bugs and errors emerge only on the game's final level or after later updates. Even if such degradations could be swiftly detected, any remedy would likely come too late, by which time the gaming community would have lost confidence in PlayStation as a go-to venue to play *Call of Duty*. Indeed, as *Modern Warfare II* attests, *Call of Duty* is most often purchased in just the first few weeks of release. If it became known that the game's performance on PlayStation was worse than on Xbox, *Call of Duty* gamers could decide to switch to Xbox, for fear of playing their favourite game at a second-class or less competitive venue.

¹⁶ For example, in a postscript to its decision in *Optis Cellular Technology v Apple*, the Court of Appeal indicated that the appeal, which concerned, among other things, what constituted a FRAND licence, “illustrate yet again the dysfunctional state of the current system for determining SEP/FRAND disputes.” *Optis Cellular Technology LLC & ors v Apple Inc. & ors* [2021] EWHC 2564 (Pat), para. 115. See also *Unwired Planet International Ltd & anor v Huawei Technologies (UK) Co Ltd & anor* [2020] UKSC 37.

¹⁷ For example, in *MasterCard / VocaLink*, the CMA noted the presence of the Payment Services Regulator, the regulatory body with oversight over the merging parties, as a point in favour of adopting behavioural remedies to prevent price increases: “The CMA considers it relevant to its evaluation of the Proposed Undertakings that the Merger affects a regulated sector. The regulation of participants in regulated payment systems...is central to the functions of the Payment Systems Regulator (PSR). This gives the CMA greater confidence in the effectiveness of the Proposed Undertakings than it might have if the sector were unregulated [...]. The PSR's oversight of the sector will supplement the CMA's own powers to ensure ongoing compliance with the Proposed Undertakings.” CMA's Decision that undertakings might be accepted in *MasterCard / VocaLink* (30 January 2017), para. 24.

D. Microsoft’s Proposal To Keep *Call of Duty* On PlayStation Illustrates Why A Behavioural Commitment Would Be Difficult

23. The Remedies Notice explains that the CMA is open to the theoretical possibility of a behavioural remedy specifically because Microsoft informed it of “*existing and potential contractual arrangements with third-party platforms relating to access to Call of Duty.*”¹⁸
24. As the CMA is aware, SIE made known its concerns about the Transaction to Microsoft almost a year ago. In the intervening period, Microsoft has not shown any real commitment to reaching a negotiated outcome. They have dragged their feet, engaged only when they sensed the regulatory outlook was darkening, and favoured negotiating in the media over engaging with SIE. Microsoft’s most recent proposal, which SIE received [REDACTED], is telling.
25. That proposal fails to provide adequate protection for PlayStation’s access to *Call of Duty* or for competition. Instead, it reveals Microsoft’s lack of commitment to ensuring full and equal access to *Call of Duty*, confirms the risks of a behavioural remedy outlined in the Guidelines, and reinforces SIE’s belief that Microsoft intends to use *Call of Duty* strategically to dominate the gaming sector.
26. For buy-to-play and MGS services on consoles, as well as for cloud, Microsoft’s proposal suffers from four main deficiencies: (i) the standard of the parity obligation; (ii) Microsoft’s scope to deviate from the agreement; (iii) pricing; and (iv) term.
- **Standard of parity obligation.** Microsoft’s proposal does not offer a clear commitment to parity that is legally hard-edged and enforceable, despite its repeated public utterances to the contrary.¹⁹ Under its proposal, Microsoft is obliged to use [REDACTED] parity between PlayStation and Xbox and their respective MGS services. This is a vague and weak commitment that does not give SIE the assurance that *Call of Duty* will remain on PlayStation on terms that would maintain PlayStation’s competitiveness.
 - **Scope to deviate.** Microsoft’s proposal allows too wide a scope for Microsoft to deviate from its weak commitment on parity. Under the proposed terms, Microsoft would [REDACTED] This is a vague and low bar that would essentially [REDACTED] than Microsoft would be willing to invest. And given that Microsoft would be incentivised not to invest in the performance of *Call of Duty* on PlayStation, as a weakened PlayStation

¹⁸ Remedies Notice, para. 18.

¹⁹ For example, Rima Alaily, Microsoft’s Corporate Vice-President and Deputy General Counsel, recently claimed that Microsoft is offering to “*grant long term 100% equal access to Call of Duty to Sony, Nintendo, Steam and others [...] When we say equal, we mean equal. 10 years of parity. On content. On pricing. On features. On quality. On playability.*” GamesIndustry.biz, [Microsoft’s acquisition of Activision Blizzard could harm gamers, says UK regulator](#) (8 February 2023).

would provoke switching to Xbox, [REDACTED] is effectively meaningless.

- **Pricing for buy-to-play.** Under Microsoft's proposal, SIE can licence *Call of Duty* from Microsoft for a price based on [REDACTED]. As a result of this licensing fee, Microsoft effectively has a lever over SIE to fix the PlayStation retail price for *Call of Duty* and soften competition against Xbox. Microsoft's proposal would therefore reduce competition between PlayStation and Xbox in terms of pricing, as compared to the pre-Transaction scenario where SIE and Microsoft negotiate terms for *Call of Duty* with an independent Activision on the merits, and then compete against one other on retail prices.
- **Pricing for MGS.** Microsoft's proposal in MGS services is even more troubling:
 - Microsoft proposes to licence [REDACTED] if SIE agrees to pay [REDACTED]. Under the terms of the proposal, that amount [REDACTED].²⁰
 - This would commercially destroy SIE's MGS business model. A yearly subscription to PlayStation Plus Extra, SIE's mid-tier MGS service, is priced at around \$100, and the buy-to-play retail price of *Call of Duty* today is around \$70. Under Microsoft's proposed terms, SIE would therefore be required to pay [REDACTED]. As the chart below shows, this would leave SIE with only [REDACTED] full \$100 annual subscription.

²⁰ For reference, 43.5 million PlayStation users accounting for 41% of PlayStation's total user base played *Call of Duty* for more than 2 hours in 2021.

SIE's Retained Earnings in MGS Under Microsoft's Proposal



- Microsoft could, moreover, drive up the price for *Call of Duty* even further [REDACTED]
[REDACTED] The remainder for SIE [REDACTED] SIE would be forced either to raise the price of its MGS service, or not offer *Call of Duty* on MGS at all.
- As a result of this proposal, *Call of Duty* would become a Game Pass exclusive by default and thereby dominate MGS services in the future. It is not surprising that this would result from Microsoft's proposal, as this is Microsoft's desired outcome. Microsoft has already told the CMA that it plans on "differentiating" Game Pass by "not making Activision titles available in the same manner or at the same time on other subscription services."²¹
- **Term.** Microsoft proposes a [REDACTED] term for buy-to-play and MGS services on consoles and a [REDACTED] for cloud. Neither is a sufficient time period to enable SIE to develop a rival to the industry's most important franchise – as the CMA itself recognises, it is "very unlikely that a game on the same scale as *CoD* would emerge in the near future."²² Accordingly, once these licensing periods end and Microsoft forecloses PlayStation's access to *Call of Duty*, gamers would be left with little choice as to which platform could host their favourite games.

²¹ Microsoft's Response to the CMA's Phase 1 Decision, para. 4.2

²² PFs, para. 9.48.

E. Microsoft Has In The Past Not Complied With Behavioural Commitments Or Has Not Respected Public Statements

27. Microsoft has in the past made commitments to regulators that it did not keep:
- First, the European Commission (“EC”) found in 2004 that Microsoft committed an abuse via its dominant Windows operating system (“OS”) by depriving rivals of indispensable interoperability information. The EC ordered Microsoft to supply the input to rivals at reasonable fees, an order Microsoft agreed to follow. This would be broadly the same kind of promise that Microsoft would be making to licence Activision content to rivals. Microsoft later violated the EC’s order by demanding unreasonable royalty fees and patent payments for the interoperability information, leading the EC to fine the software company \$1.3 billion.²³ As Neelie Kroes, then-EC Competition Commissioner, stated: “*Microsoft was the first company in 50 years of EU competition policy that the commission has had to fine for failure to comply with an antitrust decision...I hope that today’s decision closes a dark chapter in Microsoft’s record of noncompliance.*”²⁴
 - Second, the EC raised concerns in 2009 that Microsoft had illegally tied its Internet Explorer browser to Windows OS.²⁵ To resolve the case, Microsoft promised the EC that, among other things, Windows would include an internet browser choice screen to enable users to select their default browser.²⁶ But Microsoft removed the browser choice screen from its Windows service pack released between 2011 and 2012, causing the EC to fine Microsoft \$731 million for violating its commitments.²⁷ Microsoft later took “*full responsibility*” for the breach and “*apologiz[ed]*” for it.²⁸
28. While not a violation of a behavioural commitment, Microsoft’s conduct in relation to the ZeniMax acquisition provides additional evidence of why a behavioural commitment should be approached with caution. When Microsoft proposed acquiring ZeniMax, it told the EC that “*it would not have the incentive to cease or limit making ZeniMax games available for purchase on rival consoles.*”²⁹ Microsoft also publicly stated to investors that “*we highly encourage cross-platform play [because] if it’s good for the gaming ecosystem, it’s good for us...[w]e don’t have intentions of just pulling all of Bethesda content out of [competitor*

²³ The New York Times, [Europe Fines Microsoft \\$1.3 Billion](#) (28 February 2008).

²⁴ *Ibid.*

²⁵ Commission Decision of 16 December 2009 in *Case COMP/C-3/39.530 – Microsoft (tying)*.

²⁶ Commission Decision of 6 March 2013 in *Case AT.39530 – Microsoft (tying)*, paras. 1-7.

²⁷ Reuters, [EU fines Microsoft \\$731 million for broken promise, warns others](#) (6 March 2013).

²⁸ TechCrunch, [Microsoft will not appeal \\$731M fine over browser antitrust violations: ‘We take full responsibility’](#) (6 March 2013).

²⁹ Commission Decision of 5 March 2021 in *Case M.10001 – Microsoft / ZeniMax*, para. 114. *See also* PFs, para. 7.288.

*platforms].”³⁰ But soon after the acquisition closed, Xbox’s head Phil Spencer revealed that, all along, the deal was about “*delivering great exclusive games*” for Xbox.³¹ Mr. Spencer later confirmed that the upcoming releases of two of Bethesda’s most popular titles, *Starfield* and *Elder Scrolls*, would be Xbox exclusives.³² In response to the news, Pete Hines, Bethesda’s marketing boss, said “*Sorry, all I can really say is, ‘I apologize,’ because I’m certain that’s frustrating to folks, but there’s not a whole lot I can do about it.*”³³*

IV. Conclusion

29. In conclusion, to address the competitive harm caused to consoles and cloud gaming, the Transaction should be prohibited or subject to a structural remedy. SIE is extremely sceptical that an agreement with Microsoft could be reached, much less monitored and enforced effectively. As a result, a behavioural commitment that was designed to form the basis of an agreement between Microsoft and SIE should not be accepted by the CMA because there is no realistic prospect of such an agreement being reached that would maintain effective competition. More generally, behavioural remedies are unsuited to this case because of the lever they would give Microsoft over PlayStation and the difficulty the CMA would encounter in specifying, monitoring, policing, and enforcing any behavioural commitment.

³⁰ Seeking Alpha, [Microsoft Corporation \(MSFT\) Management Presents at Jefferies Interactive Entertainment Virtual Conference \(Transcript\)](#) (13 November 2020).

³¹ GQ, [How Xbox outgrew the console: inside Phil Spencer’s multi-billion dollar gamble](#) (15 November 2021).

³² The Verge, [Xbox boss says Microsoft’s Bethesda deal was all about exclusive games for Game Pass](#) (11 March 2021).

³³ IGN News, [Bethesda Apologizes for Starfield Xbox Exclusivity: Can Be ‘Frustrating’ For PlayStation Owners](#) (16 June 2021).