

**ANTICIPATED ACQUISITION BY MICROSOFT
CORPORATION OF ACTIVISION BLIZZARD, INC.**

**ACTIVISION BLIZZARD'S RESPONSE TO THE
PROVISIONAL FINDINGS**

2 March 2023

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1. This is Activision Blizzard’s response to the CMA’s Provisional Findings of 8 February 2023 (the “**Provisional Findings**”). Activision Blizzard strongly disagrees with the CMA’s provisional conclusion that the proposed acquisition by Microsoft of Activision Blizzard (the “**Transaction**”) may result in a substantial lessening of competition in console gaming and cloud gaming services in the UK.
2. Activision Blizzard is uniquely positioned to explain the shortcomings of the CMA’s conclusion that Activision Blizzard would have made its games available on cloud gaming services. This response is limited to that issue and should be read in conjunction with Microsoft’s response to the Provisional Findings.

Executive Summary

3. The evidence before the CMA unequivocally shows that Activision Blizzard has [X] – including day and date releases – [X] in the next five years.
 - (a) **Activision Blizzard’s senior leadership has [X].** Activision Blizzard’s [X], attached as Annex 1, clearly shows that CEO approval is required for Activision Blizzard to [X] and [X].
 - (b) **Activision Blizzard has consistent and well-documented business reasons why [X].**
 - (i) **The technical limitations of cloud gaming mean [X].** Cloud streaming technology is beset by flaws that vary depending on the distance someone lives from the servers and the quality of their connection. Activision Blizzard is laser focused on delivering the best quality it can to all of its gamers [X]. Particularly for a game like *Call of Duty*, which requires quick reactions and is data rich, the technical limitations of cloud gaming [X].
 - (ii) **Activision Blizzard considers that cloud gaming [X].** It is estimated to account for only [X] of total consumer spend on gaming by 2025, a tiny slither of the gaming market. Other companies, including Google and Microsoft, have tried to make cloud gaming work and have come up against both the technical difficulties and the simple fact of lack of consumer demand. Activision Blizzard must [X], in order to maximise investment return, which Activision Blizzard’s internal documents clearly show.
 - (iii) **Cloud gaming is a transient technology.** The computing power of consumer electronics hardware – in particular mobile phones – is developing so rapidly that it will soon [X], further constraining the future growth and reach of cloud gaming. All forms of local processing (e.g. smart TVs, laptops, tablets and phones) have increasingly powerful processing capabilities, that are more efficient and available than streaming. Sony, of course, continues to be an extraordinary consumer electronics brand producing not just the PlayStation but local devices such as TVs, all backed by its IP war chest in music, video and games. And game systems are

everywhere. Roku can easily deliver games and are.¹ [§]. There are also serious new devices being launched in recent years, such as the Steam Deck, that appeal to play on native devices.² Gaming on the smart TV is everywhere.³

(iv) **Activision Blizzard is [§].** Activision Blizzard’s growth strategy has been to invest in its [§] businesses. In 2021, free-to-play revenues already accounted for a [§] of all *Call of Duty* revenues across all platforms globally, and *Warzone* on average well over [§] MAUs (above [§]% of total deduplicated MAUs on console and above [§]% on PC). Mobile phones are incredibly powerful devices now – Samsung has a 1 TB phone available, an extraordinarily powerful device.⁴ The combination of extraordinary phone processing power and the fact that mobile gaming is already extremely popular means that cloud gaming is unnecessary and inefficient.

(c) To reach the opposite conclusion, the CMA would have to reject—without any basis—the sworn testimony of Activision Blizzard’s most senior executives and Activision Blizzard’s documents, which consistently show that [§]. The Provisional Findings, inexplicably, ignore this evidence in favour of a selective reading of what the documents show. This is unacceptable.

Activision Blizzard’s senior leadership has [§] of putting Activision Blizzard’s content on cloud gaming

4. Commercial decision making at Activision Blizzard is governed by structures and requirements that are set out in the [§].⁵ [§]. This applies to decisions across the business units and to decisions regarding game development and publishing, game distribution and digital advertising.
5. The [§] sets out who within the company has the authority to make each type of major commercial decision based on type and size of planned activity. [§] for use in interactive products such as cloud gaming require the approval of Bobby Kotick.
6. Bobby Kotick has [§] setting out a strategy or plan to do so in the future. As Bobby Kotick stated [§].⁶

¹ <https://www.androidpolice.com/roku-tips-and-tricks/>

²² <https://www.popularmechanics.com/technology/gadgets/a42724581/steam-deck-review-handheld-pc-gaming/>

³ <https://www.ign.com/articles/samsung-2023-neo-qlcd-4k-tv-game-bar-30-gaming-features>

⁴ <https://www.samsung.com/us/business/mobile/phones/galaxy-s/galaxy-s22-ultra-1tb-unlocked-sm-s908udrnxaa/>

⁵ Annex 1

⁶ [§].

7. Similarly, Bobby Kotick previously told the CMA at the Main Parties Hearing [REDACTED].⁷ Armin Zerza holds the same view, and explained to the CMA that technical factors, scale and the economics of cloud gaming mean that cloud gaming [REDACTED].⁸
8. Activision Blizzard's [REDACTED] at the highest levels is reflected in multiple internal documents (which far outnumber those cited in the Provisional Findings), which are not addressed by the CMA:
 - (a) [REDACTED]⁹ [REDACTED].
 - (b) [REDACTED]¹⁰
 - (c) [REDACTED]¹¹
 - (d) [REDACTED]¹²
 - (e) [REDACTED]¹³
 - (f) [REDACTED].¹⁴ [REDACTED].
 - (g) [REDACTED].¹⁵

Activision Blizzard has clearly explained the reasons why it does [REDACTED]

Technical Limitations

9. Cloud gaming services must grapple with technical constraints that degrade the gameplay experience. Cloud gaming differs, for example, from watching a video, as it requires instantaneous two-way communications as well as processing. Specifically, cloud gaming requires:
 - (a) sending all gamer control inputs for a game over the cloud to a remote server;
 - (b) processing of those inputs at the remote server, and
 - (c) retransmission back over the cloud of the audio-visual output of that processing.
10. All of this must happen instantly, smoothly, and consistently to provide an adequate gaming experience. The process is even more complex for games with high-fidelity graphics and for multiplayer online games, where sometimes more than 100 players are

7 [REDACTED].
 8 [REDACTED].
 9 [REDACTED].
 10 [REDACTED].
 11 [REDACTED].
 12 [REDACTED].
 13 [REDACTED].
 14 [REDACTED].
 15 [REDACTED].

inputting their commands simultaneously. Cloud gaming [§<], the seamless and instantaneous gameplay experience offered by local processing on a PC or console, and it is [§<] that experience without being in reasonably close geographical proximity to the cloud server and having an excellent internet connection (a much faster internet connection with much larger bandwidth than is required for a satisfactory online multiplayer experience).

11. This limitation of cloud gaming [§<] the consumer experience. In *Call of Duty*, for example, a gamer must precisely target opposing players and objects and shoot with equally precise timing. Even slight latency can ruin a gamer’s experience – or the experience of others in the same game – by interfering with that precision. This conflicts with Activision Blizzard’s goal, to offer its gamers the best quality experience, and would risk tarnishing its reputation amongst the knowledgeable and vocal gaming community.
12. The evidence before the CMA of these technical limitations is overwhelming. First, Activision Blizzard’s senior executives have consistently testified on the subject before the CMA, FTC and European Commission:
 - (a) During the Main Parties Hearing, Armin Zerza explained the limitations of cloud gaming and how that negatively affects the consumer experience, because it interrupts game play: “[§<].”¹⁶
 - (b) Bobby Kotick explained to the FTC that [§<] continues to undermine cloud gaming: “[§<]”¹⁷
 - (c) Armin Zerza also testified to the FTC on the limitations of the technology and how that informs Activision Blizzard’s view: “[§<]”.¹⁸
 - (d) Bobby Kotick explained at the EC Oral Hearing that [§<] is a fatal flaw of cloud gaming, as the “[§<].”¹⁹
13. Second, the [§<] in Activision Blizzard’s internal documents:²⁰
 - (a) In an internal email exchange, an Activision Blizzard employee notes that “[§<]”²¹
 - (b) An email from [§<]” of cloud gaming.²²
 - (c) An internal presentation from January 2020 notes with respect to [§<]”, showing Activision Blizzard’s concerns around user experience.²³

¹⁶ [§<].

¹⁷ B. Kotick [§<]

¹⁸ A. Zerza, [§<].

¹⁹ Bobby Kotick, [§<].

²⁰ See also the documents cited at para. 16 on lack of scale.

²¹ [§<].

²² [§<].

²³ [§<].

- (d) An internal presentation on [REDACTED]?” The document also asks the team to “[REDACTED]”, explicitly referring to concerns about technical limitations.²⁴
- (e) [REDACTED] dismissed a developer’s suggestion to consider [REDACTED].²⁵
14. Third, the technical limitations are referred to by third parties:
- (a) Nvidia GeForce’s own website notes that “*Competitive games like Call of Duty: Warzone demand maximum frame rates and the lowest system latency.*”²⁶
- (b) IONOS, a web hosting and cloud services provider, notes on its website that there are several disadvantages of streaming games, including: “*The biggest disadvantage of cloud gaming compared to conventional gaming is its dependence on an Internet connection... Problems may arise on slow connections, because slow data transfer rates can result in stutters, lower resolution, and heavily offset rendered inputs....*”²⁷
- (c) Kingston Technology’s website notes that “*Cloud gaming is now in a transitional period. It hasn't yet eclipsed the traditional model of purchasing and playing games at home...The technical limitations of the service mean that in some parts of the world, Cloud gaming just isn't viable yet for many of the high-demand, high-speed AAA titles on the market, although to completely rule it out would be wrong.*”²⁸

Scale

15. Cloud gaming suffers from a lack of scale because it is an unproven technology that [REDACTED] to the download-to-play experience, and therefore struggles to convince or interest gamers and has not been taken up enthusiastically by game publishers. Google’s own website notes that it had to shut down its cloud gaming service, Stadia, as “*it hasn't gained the traction with users that we expected so we've made the difficult decision to begin winding down our Stadia streaming service.*”²⁹
16. Activision Blizzard would need to carry out [REDACTED] to enable a game to run smoothly on a cloud provider’s systems, all while ensuring uniformity of the gaming experience across platforms. For Activision Blizzard as an independent company, [REDACTED]. This has been copiously evidenced to the CMA:
- (a) At the Main Parties Hearing, Armin Zerza explained that Activision Blizzard [REDACTED].³⁰ [REDACTED]³¹

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ <https://www.nvidia.com/en-gb/geforce/campaigns/frames-win-games/cod-warzone/>.

²⁷ <https://www.ionos.com/digitalguide/server/know-how/what-is-cloud-gaming/>.

²⁸ <https://www.kingston.com/en/blog/gaming/cloud-gaming-advantages-disadvantages>.

²⁹ <https://blog.google/products/stadia/message-on-stadia-streaming-strategy/>.

³⁰ [REDACTED].

³¹ [REDACTED].

- (b) Similarly, Bobby Kotick explained the [REDACTED] making a commercial success of cloud gaming before the FTC: "... [REDACTED].³² [REDACTED]."³³
 - (c) At the [REDACTED], Bobby Kotick elaborated further on the point when explaining that [REDACTED]."³⁴
 - (d) Activision Blizzard's internal documents speak to the [REDACTED]. In a presentation by the [REDACTED].³⁵
 - (e) An email from [REDACTED]."³⁶
 - (f) [REDACTED] explicitly refers to total addressable market in response to a developer's suggestion to consider [REDACTED] (emphasis added).³⁷
 - (g) An email exchange between [REDACTED].³⁸
17. Activision Blizzard's view is also entirely consistent with how gamers play games. A survey prepared by Ampere explains that distribution by download is dominant when it comes to Xbox Game Pass Ultimate subscribers. According to this report, "*Most usage is download-focused. As such, bucketing hybrid services such as Xbox Game Pass Ultimate and PlayStation Now into a cloud gaming market sizing is misleading and over-estimates the impact of this distribution technology in the near-term.*"³⁹
18. Indeed, cloud gaming currently accounts for only just over [REDACTED]% of consumer gaming spend and is forecast to account for only [REDACTED]% of consumer gaming spend in 2025. Such a small portion of relevant consumer spending [REDACTED], cloud gaming.

[REDACTED]

Source: Microsoft data

Cloud gaming will be taken over by the power of local processing

19. Activision Blizzard believes that cloud gaming's relevance, [REDACTED]. The computing power of consumer electronics hardware – in particular mobile phones – is developing so rapidly that it will [REDACTED]. All forms of local processing (e.g. smart TVs, laptops, tablets and phones) have increasingly powerful processing capabilities, making streaming inefficient, unnecessary and undesirable. Smart TVs today are promoted explicitly to gamers (Figure 2) and services such as Utomik promote subscription *download* of a game to a PC or other

³² B. Kotick IH Tr [REDACTED].

³³ B. Kotick IH Tr. [REDACTED].

³⁴ Bobby Kotick, [REDACTED].

³⁵ [REDACTED]

³⁶ [REDACTED].

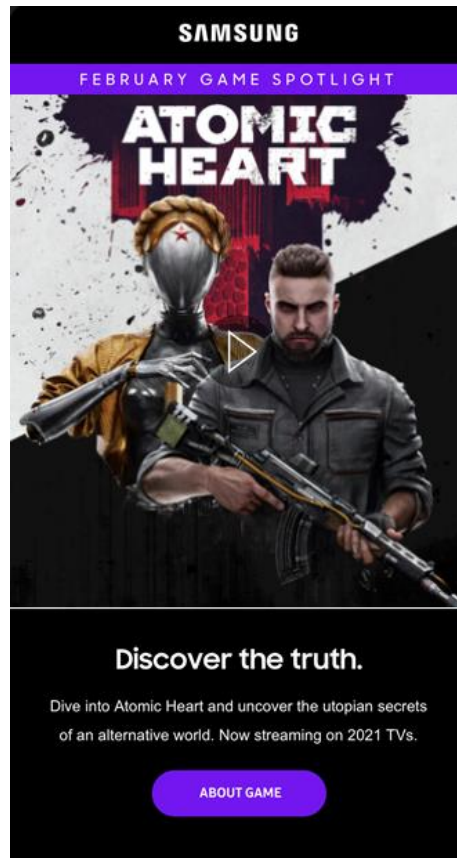
³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ Ampere analysis, "*Games content subscription market dominated by services offering download distribution*", 16 March 2022, available at <https://www.ampereanalysis.com/insight/games-content-subscription-market-dominated-by-services-offering-download-distribution>.

device (Figure 3). Today's iPhones are up to 20x more powerful than ten years ago. Consumers are, today, very comfortable playing games on their mobile devices: 94% of all gamers globally do so. New game systems are everywhere.⁴⁰

Figure 1: Samsung and LG Promotional Material



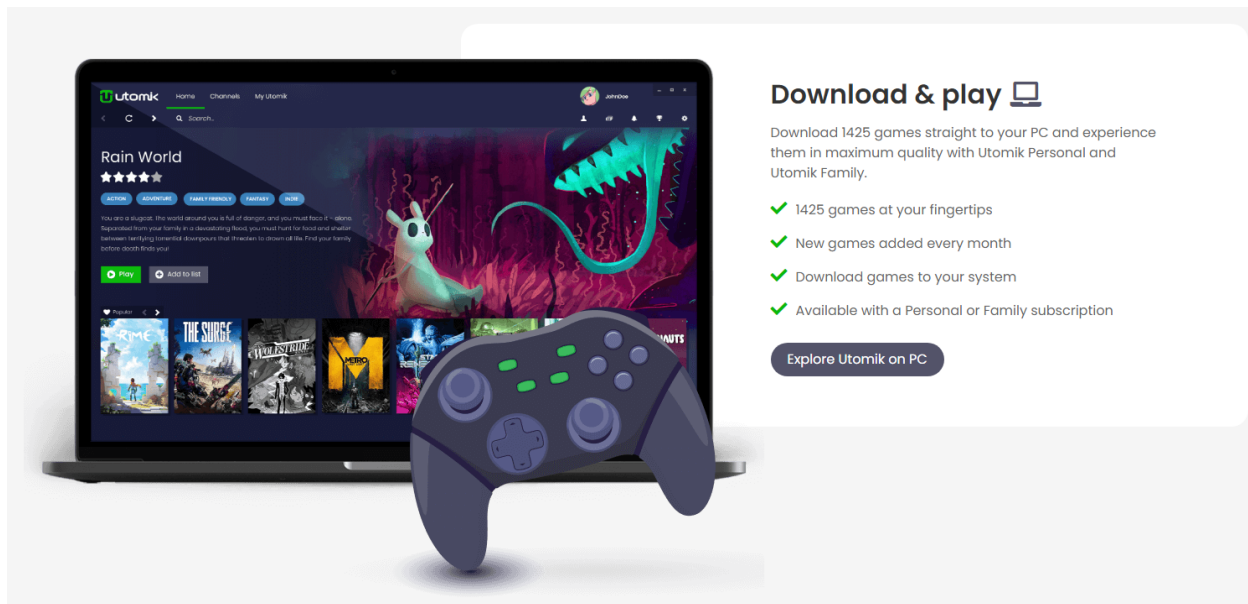
OLED TVs

Experience the power of OLED TVs

Self-lit OLED pixels create beautiful picture quality with infinite contrast, perfect black and over a billion colors.

⁴⁰ <https://www.yankodesign.com/2023/02/07/tiny-handheld-gaming-console-concept-offers-a-game-boy-style-43-display-with-2gb-of-ram/amp/>

Figure 2: Utomik promotional material – download and play



20. Native mobile gaming (i.e. playing a game via an app on a mobile phone) already [X] in terms of quality of consumer experience, and Activision Blizzard, from its position as an independent company, [X]. All of the evidence before the CMA supports this.
- Bobby Kotick explained during the CMA Main Parties Hearing that cloud gaming [X].⁴¹
 - Bobby Kotick also referred to the superiority of local processing in his testimony to the FTC: “[...] [X]”⁴²
 - Armin Zerza confirmed to the CMA at the Main Parties Hearing that local processing is, in Activision Blizzard’s view, [X].⁴³

Activision Blizzard’s growth strategy is to invest in its [X] businesses

21. Instead of [X], Activision Blizzard’s growth strategy has been to invest in its [X] businesses. Bobby Kotick testified accordingly to the FTC: “[X]”⁴⁴ It is unsurprising that Activision Blizzard sees value in pursuing this, [X]: over 60% of the overall gaming market is already made up by mobile gaming, with worldwide consumer spending on

⁴¹ [X]. Bobby Kotick also explained to the FTC that [X].

⁴² Kotick [X].”

⁴³ [X].

⁴⁴ [X].

games growing significantly faster than for other devices.⁴⁵ Native mobile gaming quality will continue to improve as the technological developments in mobile devices continue at their current fast pace.⁴⁶

22. Bobby Kotick gave further details of what this focus means at the Main Party Hearing. Activision Blizzard is prioritising [REDACTED].⁴⁷ Indeed, *Call of Duty: Mobile* has been very successful as a *native* app. *Call of Duty: Mobile* has MAUs of approx. [REDACTED], or ~[REDACTED]% of the total MAUs of the franchise,⁴⁸ and mobile gaming revenues from the King division and titles such as *Call of Duty: Mobile*, as well as ancillary revenue, represented approximately 47% of Activision Blizzard’s revenues in 2022.⁴⁹ In addition, Activision Blizzard will [REDACTED] consistent with its strategy of developing a [REDACTED].
23. Armin Zerza also commented, during the Main Parties Hearing, on the ability to match the quality of games on a PC or console on a mobile: “[...] [REDACTED].”⁵⁰
24. For the reasons outlined above, Activision Blizzard is focused on [REDACTED] gaming [REDACTED]. [REDACTED] gaming is the overwhelming engine for growth in the gaming industry today and allows Activision Blizzard to maintain a direct relationship with its gamers. In 2021, free-to-play revenues already accounted for a [REDACTED] of all *Call of Duty* revenues across all platforms globally, and *Warzone* on average [REDACTED] of MAUs (above [REDACTED]% of total deduplicated MAUs on console and above [REDACTED]% on PC).⁵¹

The Provisional Findings commit fundamental errors in their interpretation of Activision Blizzard’s internal documents

25. The Provisional Findings suggest that Activision Blizzard [REDACTED] become important inputs to cloud gaming services absent the Transaction.⁵² This contradicts all available evidence, including the sworn testimony of the two executives whose [REDACTED] for Activision Blizzard to [REDACTED] toward cloud gaming.
26. The Provisional Findings argue that Activision Blizzard’s documents “[REDACTED]”.⁵³ To the contrary, all the cited documents show is that [REDACTED]. There is nothing unusual about gaming employees discussing or seeking more information about developments within the industry. Further, the evidence shows that, [REDACTED] – especially at the highest levels, whose approval would be required due to the [REDACTED] described above – have never been convinced that [REDACTED]. Moreover, the Provisional Findings ignore the plain observation that Activision

⁴⁵ See e.g. Mashable, “60% of entire gaming market is now dominated by mobile gaming, study finds”, available at: <https://sea.mashable.com/tech-1/20432/60-of-entire-gaming-market-is-now-dominated-by-mobile-gaming-study-finds>.

⁴⁶ See e.g., Techradar, “Best gaming phone 2023: the top mobile game champions”, available at: <https://www.techradar.com/news/best-phone-for-gaming>;

⁴⁷ [REDACTED].

⁴⁸ Microsoft Corporation’s HSR Filing, 4(d)-1, 1 February 2022, para. 25.

⁴⁹ Activision Blizzard’s 2022 10-K filing, 23 February 2023, page 52.

⁵⁰ [REDACTED]

⁵¹ Slide 38 of Microsoft’s response to the CMA working papers - ToH 1

⁵² Provisional Findings, paras. 8.237 and 8.272.

⁵³ Provisional Findings, para. 8.213.

Blizzard has no involvement in cloud gaming today and that none of its documents that set company strategy, [REDACTED] cloud gaming.⁵⁴

[REDACTED] document

27. The Provisional Findings misrepresent a [REDACTED], to suggest that Activision Blizzard was [REDACTED].⁵⁵
28. In fact, the draft merely highlights how Activision Blizzard discusses various opportunities for developing business and growth, including new and emerging aspects of the gaming industry. Not all such opportunities, unsurprisingly, become approved commercial strategy. Cloud gaming is one such opportunity that, although discussed as a new technology, [REDACTED]. Activision Blizzard is also sceptical that there will be [REDACTED] as devices continue to become more powerful. Additionally, this same document states that Activision Blizzard had no intention to enable access to its content for that purpose.
29. None of the theoretical, brainstorming ideas reflected in the document have ever come to fruition in the more than two years since the document was produced. The document was a working draft, and did not find its way into any final [REDACTED]. The simple reason for this is that the ideas were killed before they ever progressed to serious consideration, and Activision Blizzard's [REDACTED].
30. The Provisional Findings do *not* cite Activision Blizzard internal documents when these show the economically justified [REDACTED] Activision Blizzard's senior leadership to [REDACTED]. See for example an internal document from September 2020 referring to "[REDACTED]";⁵⁶ or an internal document from January 2020: [REDACTED],⁵⁷ or any of the other, numerous documents cited above.⁵⁸

[REDACTED] Presentation

31. The Provisional Findings cite an Activision Blizzard internal document which states that "[REDACTED]" and notes possible considerations relating to cloud gaming in the near-, near-mid, and long-term,⁵⁹ to argue that Activision Blizzard is pursuing cloud gaming. The Provisional Findings also cite this document to suggest that such considerations [REDACTED].⁶⁰ Read in context with the entire body of Activision Blizzard's documents, many of which were produced by employees as higher levels in the organisation, however, it is clear that these snippets are consistent with Activision Blizzard's [REDACTED], as outlined below
32. Indeed, the document clearly shows that Activision Blizzard does not [REDACTED]. It is merely brainstorming ideas. The Provisional Findings also ignore the fact that the cited document is more than two years old and that none of the brainstorming ideas have come to pass.

⁵⁴ [REDACTED].

⁵⁵ Provisional Findings, para. 8.213 (a); [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ Provisional Findings para. 8.213 (b), [REDACTED], slides 2 and 13.

⁶⁰ Provisional Findings para. 8.213 (c)-(d); [REDACTED].

Specifically, Activision Blizzard’s “[REDACTED]” is not available on cloud game streaming, even though the document identified it as a “near-term” consideration in 2020. Activision Blizzard has not invested in [REDACTED], even though such an idea was a “near-mid-term” “recommendation” made in the document. Activision Blizzard does not [REDACTED], despite this being a “recommendation” at the time. The indeterminate nature of this “recommendation” is highlighted by the fact that no such proposal ever made its way into Activision Blizzard’s [REDACTED].

33. As the CMA is aware, cloud game streaming is still a nascent, experimental technology with an uncertain future. It is unremarkable that Activision Blizzard has evaluated the technical performance and potential use cases for cloud game streaming in order to determine whether it presents business opportunities for Activision Blizzard. Activision Blizzard has carried out such evaluations for an array of other business models and technologies in the gaming industry that have led nowhere. Indeed, it *would* be remarkable if none of Activision Blizzard’s employees had ever evaluated cloud gaming. However, Activision Blizzard’s employees consistently reached the same two conclusions: [REDACTED].⁶¹

[REDACTED] Document

34. The Provisional Findings also refer to a document from [REDACTED].⁶² But it is clear that, at the time when this document was produced, Activision Blizzard’s [REDACTED]. What has happened in the year and a half since the production of this document is consistent with Activision Blizzard’s long-term strategy. [REDACTED] discussed in this document have never come to fruition.

[REDACTED] Email

35. The Provisional Findings misinterpret an [REDACTED].⁶³ [REDACTED].
36. Other evidence is clearly supportive of the fact that Activision Blizzard has not added and [REDACTED]. This includes internal documents, sworn witness testimony before the FTC, and evidence submitted to the CMA at the Main Parties Hearings:
- (a) An internal document from [REDACTED]’’.⁶⁴
 - (b) An email from [REDACTED]’’.⁶⁵
 - (c) An email from [REDACTED] ’’ (emphasis added).⁶⁶
 - (d) An email from [REDACTED]in reference to Microsoft.⁶⁷

⁶¹ [REDACTED].

⁶² Provisional Findings, para. 8.213 (e); [REDACTED].

⁶³ Provisional Findings, para. 8.213(f); [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

- (e) An email from [REDACTED] of cloud gaming.⁶⁸
- (f) Bobby Kotick and Armin Zerza confirmed to the FTC and CMA that cloud gaming [REDACTED].⁶⁹ Cloud gaming will [REDACTED] a high performing internet connection and be expensive for distributors bearing the cost of hosting servers. As a result, cloud gaming does not offer [REDACTED], and will ultimately be overtaken by mobile hardware.

[REDACTED] Email

- 37. The Provisional Findings refer to an email from [REDACTED],⁷⁰ [REDACTED] as evidence for why Activision Blizzard’s internal documents supposedly do not [REDACTED]. However the CMA appears to overlook that the statement is made only with respect to the subset of customers benefiting from [REDACTED] and is therefore clearly not true for every household. In Activision Blizzard’s view, [REDACTED] for the subset of consumers benefiting from a solid internet connection and location proximity to servers [REDACTED]. [REDACTED] notes in the same email that [REDACTED], indicating that technical viability and latency will continue to be an issue for a sizeable proportion of gamers. It is precisely because not all gamers will have a “[REDACTED]” that Activision Blizzard has not placed and [REDACTED]. Furthermore, it is manifestly incorrect to overlook the numerous internal documents⁷¹ raising precisely such concerns.
- 38. The Provisional Findings also, on the basis of this email, argue that Activision Blizzard [REDACTED]. This reading is wrong. As stated above, [REDACTED].
- 39. All that the document shows is that individuals at Activision Blizzard have [REDACTED].⁷² Through such evaluations, Activision Blizzard has repeatedly concluded that [REDACTED]. Inexplicably, the Provisional Findings fail to cite the statement made in the *same* document, that “[REDACTED]” of cloud gaming. Nor do the Provisional Findings consider that the document is two years old, and Activision Blizzard has not made its games commercially available on any cloud gaming service in the meantime.
- 40. Indeed, the fact that Activision Blizzard has not placed its games on any cloud gaming service in the 2 years since this email *is* the most relevant piece of evidence. Activision Blizzard’s leadership has [REDACTED]. For example:⁷³
 - (a) An internal presentation from January 2020 notes with respect to [REDACTED] showing Activision Blizzard’s concerns around user experience.⁷⁴
 - (b) An email from [REDACTED],⁷⁵ reflecting the same concerns about undermining the consumer experience.

⁶⁸ [REDACTED], page 1.

⁶⁹ [REDACTED].

⁷⁰ Provisional Findings, para. 8.215.

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED], slide 10.

⁷⁵ [REDACTED], page 1

- (c) An internal presentation from 12 August 2020 on whether Activision Blizzard could use [REDACTED]”, indicating that this is one of Activision Blizzard’s concerns regarding this service.⁷⁶
- (d) An email from [REDACTED]”⁷⁷
41. The Provisional Findings nowhere confront the much larger number of internal documents that show Activision Blizzard’s strategy was [REDACTED]. Instead, the CMA relies on a single document, taken out of context, that proves only that Activision Blizzard discusses potential opportunities with platform partners all the time. More often than not, these discussions never progress to serious engagement and are killed for commercial reasons, technical reasons, or both. That is precisely what happened in the case of the email chain cited in the Provisional Findings.

[REDACTED] Discussions

42. The Provisional Findings allege that Activision Blizzard was “[REDACTED]”.⁷⁸ It considers this statement is supported by Activision Blizzard’s internal documents. But no Activision Blizzard internal documents relied upon in the Provisional Findings demonstrate that Activision Blizzard was considering [REDACTED]. In fact cloud gaming has never been a part of Activision Blizzard’s [REDACTED] as Activision Blizzard’s documents plainly show.

CMA’s Mistaken [REDACTED] Conclusions

[REDACTED]

43. Despite receiving the above testimony and documents prior to issuing the Provisional Findings, the CMA nonetheless persists in distorting a handful of emails from December 2021 and February 2022 to falsely claim that Activision Blizzard was [REDACTED]. However, [REDACTED].
44. Specifically, the Provisional Findings distort an email from 8 December 2021 between [REDACTED]⁷⁹ to suggest that [REDACTED]⁸⁰ This interpretation is factually incorrect. The document does not show that [REDACTED] could consider them.⁸¹
45. The Provisional Findings then misinterpret a subsequent e-mail from 19 December 2021 from [REDACTED] stating “[REDACTED]”.⁸²
46. The mention in the document of [REDACTED] clearly refers to a draft [REDACTED], which is a threshold step to even preliminary business discussions. [REDACTED]. Activision Blizzard employees regularly consider various opportunities for growth before presenting these to decision makers. Moreover, the document being referred to [REDACTED] was merely a deck for discussion

⁷⁶ [REDACTED], slide 7.

⁷⁷ [REDACTED], page 1.

⁷⁸ Provisional Findings, para. 8.220.

⁷⁹ The Provisional Findings mistakenly refer to the document as being dated December 2022.

⁸⁰ Para. 8.217 (a); [REDACTED].

⁸¹ [REDACTED].

⁸² Para. 8.217 (b); [REDACTED]. See also SO para. 299. Activision Blizzard’s internal document, [REDACTED].

and not an actual [§] and is described in its cover email as a “[§]”.⁸³ The statement therefore cannot be relied upon to indicate a concrete step toward implementing any plans.

47. Further, [§] statement that “[§]” reflects only his personal thoughts and his recollection of discussions with [§], not any actual discussions with [§].
48. The Provisional Findings also distort an additional Activision Blizzard document from December 2021 to argue that Activision Blizzard was planning to [§].⁸⁴ But [§] email starting the chain clearly states that [§] approached Activision Blizzard (not the other way round) [§]. The response from [§] asking follow-up questions about the parameters [§] only confirms [§] interest in [§]. It does not demonstrate any intent of Activision Blizzard.
49. Importantly, the communication with [§] was never presented to [§] to [§].⁸⁵ [§].⁸⁶ The CMA is therefore wrong to conclude that Activision Blizzard was seriously engaging with [§].
50. Finally, the Provisional Findings reference an Activision Blizzard document from February 2022 to suggest that [§].⁸⁷ As discussed above, that is completely untrue. This document was created by [§] In fact, the author of the document [§].⁸⁸
51. Indeed, in an email dated 8 February 2022 [§] He explicitly confirmed that Activision Blizzard’s “[§].”⁸⁹ This is an explicit confirmation of Activision Blizzard strategy that the Provisional Findings plainly ignores.

[§]

52. The Provisional Findings also specifically refer to an email thread that originates from outreach by [§], to suggest that [§].⁹⁰ This is misleading. Activision Blizzard does not have – and never had – plans to [§].⁹¹
53. The economics of cloud gaming are [§]. As[§].”⁹² [§].
54. Cloud gaming providers [§]. Here, [§].

Conclusion on [§]

⁸³ [§] submitted to the CMA on 23 February 2023 in response to RFI 14.

⁸⁴ Provisional Findings, para. 8.217 (c); [§]. The Provisional Findings mistakenly refer to this document as being dated December 2022.

⁸⁵ See paras 4 and 5 above.

⁸⁶ [§].

⁸⁷ Provisional Findings, para. 8.217 (c); [§].

⁸⁸ See [§]”. See also [§]”

⁸⁹ See [§].

⁹⁰ Provisional Findings para. 8.218, [§].

⁹¹ [§].

⁹² [§].

55. The Provisional Findings’ reliance on distorted interpretations of Activision Blizzard’s documents discussing [§<] at preliminary stages cannot stand in the face of the substantial evidence that Activision Blizzard’s strategy – as set by its senior leaders – is to [§<]. Activision Blizzard’s internal documents in fact persistently show its strategy is to [§<].
- (a) As explained to the CMA previously and reiterated during the 1 March 2023 response hearing,⁹³ Activision Blizzard has consistently held [§<]. Activision Blizzard believes this problem [§<].⁹⁴
56. Despite this abundance of evidence⁹⁵ on the limits of cloud gaming, the Provisional Findings claim otherwise.

[§<] *testing data*

57. The Provisional Findings claim that Activision Blizzard content was successful during [§<] testing phase,”⁹⁶ and on that basis suggest that Activision Blizzard [§<]. This analysis is flawed on a number of levels, not least because it ignores the testimony and experience of senior executives in favor of what seems to be a preordained outcome needed to support a speculative and otherwise unsupported SLC related to cloud gaming.
58. First, the Provisional Findings recognise that data from the testing phase may not be representative of current [§<] users, however, go on to place “limited weight” on the data. This is an error and in fact, no weight at all should be placed on this data:
- (a) The document cited by the Provisional Findings only shows [§<] an informal situational update via email, [§<].⁹⁷ The statement that “[§<]” was based on [§<], which naturally sought to portray [§<] in the most positive light. Activision Blizzard is [§<]. In particular, it is not clear [§<]. For example:
- (i) [§<];
- (ii) [§<];
- (iii) [§<].
59. The data is therefore unreliable on the number of users overall and on the importance of individual titles. Indeed, such is the uncertainty that [§<], also referred to by the CMA. The [§<].
60. [§<].

⁹³ Issues Statement Response paras. 1.10, 4.29, 4.36, 5.38 and 5.44.

⁹⁴ See in particular the documents cited at paras. 8 and 13.

⁹⁵ See also the documents cited in paragraph [25]: [§<].

⁹⁶ Provisional Findings, para. 8.255 (b).

⁹⁷ [§<].

61. The Provisional Findings must not place any weight on the data and analysis based from an [REDACTED] by presenting it in the best possible light and without any analytical rigor.

The CMA has not provided evidence of [REDACTED]

62. The Provisional Findings also refer to emails with other parties involved with [REDACTED].⁹⁸ This is a willfully misleading interpretation of the documents.
63. The Provisional Findings go so far as to suggest, based on just three documents relating to [REDACTED]⁹⁹, [REDACTED]¹⁰⁰ and [REDACTED] that Activision Blizzard was [REDACTED]. However the e-mails cited only reflect the fact that [REDACTED].
- (a) The Provisional Findings cite a document that discusses potential negotiation positions with a full range of partners, including [REDACTED]. These are not fixed or determined offers to the parties involved and merely explore the most attractive potential partnerships on the best terms possible. In fact, the document says with respect to [REDACTED]. It is entirely unsurprising that Activision Blizzard is approached by third parties interested in its content.
- (b) With respect to [REDACTED], the Provisional Findings misread emails between [REDACTED] from January 28, 2021 to March 2021 discussing [REDACTED]. The Provisional Findings mistakenly read this document as suggesting that Activision Blizzard has [REDACTED]. However, these emails do not set out Activision Blizzard's strategy on cloud and simply reflect high-level brainstorming and consideration of possibilities at the time, rather than real, genuine commercial opportunities. This is clear on the face of the document, which states "[REDACTED]", "[REDACTED]", and refers to [REDACTED] 12 times. The email exchange also happened two years ago and no [REDACTED] has taken place.
- (c) The Provisional Findings cites an email exchange from February 2021 regarding [REDACTED], and claims that [REDACTED]. This is plain wrong on any reasonable interpretation of the document. The document simply states "[REDACTED]". It does not mention [REDACTED] at all. But in any case, Activision Blizzard's executives have persistently given evidence before the CMA that [REDACTED], as discussed at paragraphs 15 to 17 above.
64. Even if these three internal documents said what the Provisional Findings claim, they are contradicted by overwhelming evidence to the contrary. Activision Blizzard consistently [REDACTED] cloud services, as discussed in paragraphs 8, 13, 35 and 39 above, as well as in an internal note from June 9, 2020 which states, with respect to [REDACTED]: "[REDACTED]".¹⁰¹
65. The CMA entirely ignores this extensive body of evidence and the testimony of Activision Blizzard's business leaders in favour of a few scattered documents, taken out of context,

⁹⁸ Provisional Findings paras 8.226 – 8.229.

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

proving only that Activision Blizzard internally discusses potential – and even remote – business opportunities.

Conclusion

66. The Provisional Findings are wrong, and Activision Blizzard has no plans to [§<]. The reasons for this are clear. [§<]. This is roundly supported by the testimony of senior management and internal documents. And evidence from third parties is consistent with Activision Blizzard’s concerns. Even players with significant capabilities such as Google or Amazon, have faced significant challenges in building their cloud gaming offering, and, in the case of Google Stadia, have in fact decided to discontinue their service.
67. The CMA must decide on a balance of probabilities whether the Transaction may be expected to result in an SLC. The ‘balance of probabilities’ threshold is requires that it is more likely than not that an SLC will result. The Court of Appeal has endorsed the approach of expressing an expectation as a more than 50% chance¹⁰²
68. If a conclusion is inherently unlikely, the evidence required to show a more than 50% chance would need to be clear and compelling. As noted by Lord Hoffman in *Rehman*, “*it would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian*”.¹⁰³
69. The evidence required to allow the Panel to reach the conclusion that it would have been *likely* for Activision Blizzard to [§<] in spite of the clear and evidenced resistance from the most senior levels of management in the organization would therefore need to be particularly clear and compelling. It is not, and the CMA certainly does not establish a more than 50% chance “*in light of the totality of the evidence available to it*”.¹⁰⁴
70. The CMA is also required to read the evidence in its “*full and in its proper context*” to establish any such conclusion.¹⁰⁵ A recent report by the CMA on the its learnings from the Illumina / PacBio investigation notes that:¹⁰⁶ “*The CMA of course needs to be careful when interpreting merging parties’ internal documents, ensuring not to cherry pick documents, and instead to look at the merging parties’ documents as a whole and in the context of other evidence gathered. The background to and context surrounding those documents (eg the author, intended audience, and purpose for which the document was created) will therefore also be useful in helping the CMA to understand how much weight to give internal documents. This evidence will be particularly persuasive when internal documents from different levels and areas of an organisation (eg, documents prepared by sales, marketing, finance, operations and senior management teams) appear to tell the same story.*

¹⁰² [IBA Health Ltd v OFT](#) [2004] EWCA Civ 142, at 46.

¹⁰³ *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 at [55], as cited by the Competition Appeal Tribunal in *Durkan v Office of Fair Trading* [2011] CAT 6 at [94] and *BGL (Holdings) Limited v Competition and Markets Authority* [2022] CAT 36 at [56].

¹⁰⁴ [Intercontinental Exchange v CMA](#) [2017] CAT 6, at 124.

¹⁰⁵ [Stagecoach Group plc v Competition Commission](#) [2010] CAT 14, at 131.

¹⁰⁶ [Looking forward to the future: investigating the proposed acquisition of PacBio by Illumina](#), 13 May 2020.

71. As set out above, the CMA has failed to read the evidence in its full and proper context. The Provisional Findings contain multiple instances of the CMA quoting selectively or misrepresenting the documentary evidence. And the CMA often takes statements out of context to support its own case, for example by failing to consider the seniority of the author and the clear position of Activision Blizzard's senior management [X].
72. In sum, the Provisional Findings cannot be supported based on the extensive evidence before the CMA. The CMA's findings are entirely unsubstantiated and must be revised to reflect the reality of Activision Blizzard's position in respect of cloud gaming.