

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1590/4/12/23

BETWEEN:

MICROSOFT CORPORATION

Applicant

– and –

COMPETITION AND MARKETS AUTHORITY

Respondent

– and –

ACTIVISION BLIZZARD, Inc.

Intervener

**SECOND WITNESS STATEMENT OF
CHRIS PREVETT**

I, CHRIS PREVETT, Interim General Counsel at the Competition and Markets Authority (“**the CMA**”), The Cabot, 25 Cabot Square, London E14 4QZ, WILL SAY as follows:

1. I am authorised by the CMA to make this statement in support of the CMA’s response to the application for review lodged by Microsoft Corporation (“**Microsoft**”) pursuant to section 120 of the Enterprise Act 2002 (“**EA02**”).
2. I am the Interim General Counsel at the CMA, having been appointed to that position on 26 July 2022. I joined the CMA on 22 July 2014 and have since held various positions within the CMA. I initially held the position of Legal Director and was promoted to the role of Senior Legal Director of Mergers, Markets and Sector Regulation at the CMA in August 2018. Prior to joining the CMA, I was employed as a Senior Associate with Travers Smith LLP, and prior to that, I was employed as an Associate at Slaughter and May, during which I had a period of secondment to the Office of Fair Trading.
3. The purpose of this statement is to provide the Tribunal with the evidence requested at paragraph 15 of the Tribunal’s ruling of 17 July 2023 ([2023] CAT 48, the

“**Adjournment Ruling**”) in relation to the joint application of Microsoft and the CMA to adjourn the substantive hearing (the “**Joint Application**”), also supported by the intervener, Activision Inc. (“**Activision**”).

4. I believe that the facts set out in this witness statement are true to the best of my knowledge and belief. Where such facts are not within my own knowledge, they have been provided to me by the CMA officials working on the relevant issue or case or else are otherwise derived from information received in the course of my official duties, and are true to the best of my knowledge, information and belief. Where I set out facts that are not within my knowledge in this statement, I identify the source from where they derive and confirm that they are true to the best of my knowledge and belief.
5. In this witness statement I refer to a number of documents, true copies of which are attached as EXHIBIT CP2 to this witness statement and referenced in the format “[Exhibit CP2/tab/page]”.

THE CMA’S REASONS FOR MAKING THE JOINT APPLICATION

6. In paragraph 15(1) of the Tribunal’s ruling dated 17 July 2023 ([2023] CAT 48), the President indicated that I should address by way of general background the factors which ought to inform public bodies and good administration, as set out by Sir John Donaldson MR in *R. v. Monopolies and Merger Commission ex parte Argyll Group*, [1986] 2 All ER 257 at 266. As to those factors:
 - (a) First, as the public authority tasked with a general duty to seek to promote competition for the benefit of consumers within and outside the UK¹, the CMA has always been concerned in this case to reach the right outcome as a matter of substance in the interests of UK consumers. In pursuing that course, the CMA must, as and when presented with a germane submission from an interested party, consider an arguable claim that a material change of circumstances and/or a special reason to depart from its final report has arisen under s.41(3) EA02. Further, in the event of the parties notifying a restructured transaction as a new anticipated merger,

¹ Section 25(3), Enterprise and Regulatory Reform Act 2013.

the CMA must also consider whether there is a new relevant merger situation and the reference test for the purpose of s.33(1) EA02 is satisfied.

- (b) Second, where a submission is made claiming a material change of circumstance and/or special reason, the Inquiry Group must consider that rapidly, and in accordance with its duty of expedition under s.103 EA02. The need to act rapidly must, of course, be balanced against the need for the CMA to give fair and proper consideration to the matters before it, including any representations received by (in this case) the merging parties and interested third parties. I have set out in paragraphs 23 to 25 below the consultation process that the CMA envisages adopting in relation to its consideration of whether there has been a material change of circumstances and/or special reasons under s.41(3) EA02. Once it has been notified, the CMA is also committed to considering whether Microsoft's restructured deal gives rise to a new relevant merger situation as regards the reference test under s.33 EA02, and any consequent matters which may need to be addressed, expeditiously, and following appropriate consultation with third parties. An important reason for making the Joint Application is the CMA's belief that an adjournment provides a valuable opportunity to seek to achieve an outcome which is in the interests of UK consumers *more quickly* than continuing with the litigation under the current timetable.
- (c) Third, as when exercising all its functions, the CMA is (and has always been) acutely conscious of the need to act in this matter in the public interest and having regard to the legitimate interests of individual citizens (whether natural or legal persons). The CMA made the Joint Application because it believes that there is a realistic chance of a more certain outcome more quickly that resolves its competition concerns and protects consumers, whilst allowing a modified form of the transaction to go ahead.
- (d) Fourth, and as explained by Mr Bailey in the hearing on 17 July 2023, the CMA considers that a potential benefit of the adjournment is the possibility of achieving greater certainty, in particular for UK consumers, more quickly than litigation, given the delay, for example, as a result of any subsequent appeals.

(1) The CMA’s duty under section 41(3) EA02 to assess whether there has been a material change in circumstances or special reasons not to adopt the proposed final order

7. In its report of 26 April 2023 (the “**Final Report**”), the CMA decided, in accordance with s.36 EA02, that:

- (a) the anticipated acquisition of Activision by Microsoft (the “**Merger**”) constitutes arrangements in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
- (b) the creation of that situation may be expected to result in a substantial lessening of competition (“**SLC**”) in the supply of cloud gaming services in the UK, due to vertical effects resulting from input foreclosure;
- (c) the CMA should take action for the purpose of remedying, mitigating or preventing the SLC or any adverse effect which has resulted from, or may be expected to result from, the SLC; and
- (d) the prohibition of the Merger would be the only effective and proportionate remedy to the SLC and any adverse effects which have resulted from, or may be expected to result from, the SLC.

8. The CMA now has a duty under s.41(2) EA02 to take such action under s.82 or s.84 EA02 (which concern, respectively, final undertakings and final orders) as it considers to be reasonable and practicable:

- (a) to remedy, mitigate or prevent the SLC; and
- (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the SLC.

9. Under s.41(3) of the Act, the CMA’s decision under s.41(2) must be consistent with the decisions in the Final Report unless there has been a material change of circumstances since the preparation of the Final Report, or the CMA otherwise has a special reason for deciding differently.

10. On 19 May 2023, in accordance with paragraph 2(1)(a) of Schedule 10 to the Act, the CMA gave notice of the order that it proposed to make in accordance with s.41 and s.84 EA02 and invited written representations from any interested person(s) [CP2/1/1]. The effect of the final order as proposed would be (*inter alia*) to prohibit Microsoft from acquiring an interest in Activision for a period of 10 years without the prior written consent of the CMA.
11. On 26 June 2023, Microsoft submitted a 20-page response to the CMA’s consultation on the proposed order (the “**Microsoft Submission**”) [CP2/2/3], in which it argued that there was a material change of circumstance or special reason to make a different form of order from that set out in the Final Report under section 41(3) EA02. In my experience, submissions of this nature are very rare given the high legal standard to meet any test for material change of circumstance or special reason under s.41(3) EA02 (as exceptions to a legal duty), and the relatively short period between the publication of a final report and the making of the final order. That is not to say that, notwithstanding a high legal standard, certain developments arising after a final report will not be capable of amounting to an arguable material change of circumstance or special reason. Any decision on whether there has been a material change of circumstance or special reason under s.41(3) EA02 which means that the CMA should not adopt the proposed order is a matter for the group of CMA panel members appointed to investigate the Merger (the “**Inquiry Group**”) on the basis of the strength of the evidence before it, assessed against the findings and evidential basis in the Final Report.
12. In summary, it relies on two events since the Final Report:
13. First, Microsoft relies on the fact that, on 15 May 2023, the European Commission issued a decision approving the Merger that had been notified to the Commission on the condition that Microsoft complies with legally-binding commitments offered to the Commission on 20 April 2023 [CP2/3/23]. Microsoft explains that (amongst other things):
 - (a) The commitments require Microsoft to grant royalty-free, worldwide licenses to stream Activision games for a period of ten years from the closing date of the Merger on the terms set out in the commitments [CP2/2/9]. Microsoft submits that the commitments also require it to comply with the agreements that it has entered

into with NVIDIA, Boosteroid and Ubitus (which are addressed in the Final Report) [CP2/2/10].

- (b) The commitments are supported by a monitoring and enforcement regime, including a fast-track resolution regime if any cloud gaming providers consider Microsoft is failing to comply with its obligations and significant adverse consequences for Microsoft if it is found to have breached its commitments [CP2/2/11].
14. The Microsoft Submission contends that these commitments fundamentally change the factual basis on which the assessment of the cloud gaming agreements was conducted in the Final Report, including in particular as to the level of certainty that they provide. Microsoft's position is that the commitments therefore constitute a material change of circumstance and, separately, a special reason to depart from the Final Report (particularly in light of the requirements of comity) [CP2/2/15].
15. Second, Microsoft relies on the fact that the terms of the proposed order are far-reaching and provide for restrictions which are unnecessary to prevent a SLC arising in relation to cloud gaming services in the UK. In particular, Microsoft argues that it is disproportionate for prohibition to extend to: (i) the acquisition by Microsoft of an interest in all subsidiaries of Activision (in particular Activision's King segment, which is focused on native mobile games); and (ii) the acquisition by Activision of all subsidiaries of Microsoft (the vast majority of which have no gaming activities and most of which have no activities in, or connection to, the UK) [CP2/2/21].
16. In addition to the Microsoft Submission, there are two further possible material changes of circumstance or special reasons relevant to the Group's consideration of s.41(3) EA02 and whether to make a final order and its terms.
17. Third, as discussed at the CMC on 17 July 2023, on 16 July 2023, various media outlets reported that Sony had signed an agreement with Microsoft providing access to Call of Duty following the Merger (the "**Sony Agreement**"). I understand, based on the oral submissions of Microsoft's leading counsel at the CMC on 17 July 2023, that Microsoft considers that this constitutes a further material change of circumstance or special reason

under s.41(3) EA02 [CMC3 Transcript (uncorrected), page 35, lines 15-23; page 37, lines 2-8].

18. At the time of filing this statement, the CMA has not seen a signed version of the Sony Agreement. I have, however, read the statement of [REDACTED] dated 19 July 2023, which outlines the terms of the Sony Agreement. The Inquiry Group will of course consider any such materials in connection with its assessment of the appropriate form of final order under s.41 as and when they are received.
19. Fourth, as the Tribunal is also aware, the CMA expects to receive a notification from Microsoft for a restructured deal to acquire Activision. Once any notification is made, it is possible Microsoft may submit that the restructured deal can amount to a further material change of circumstance or special reason under s.41(3) EA02.
20. The President of the Tribunal helpfully confirmed at the CMC on 17 July 2023 that, although the Joint Application has been conditionally granted on the basis of a potential material change of circumstances or special reason to impose a different form of formal order under s.41(3) EA02, this did not preclude the CMA's consideration of Microsoft's restructured deal under s.33(1) EA02 [CMC3 Transcript (uncorrected), page 76, line 14 – page 77, line 5].
21. The CMA's assessments under s.41(3) and s.33(1) EA02 may well therefore take place in parallel. They would be distinct insofar as: (1) the CMA must consider whether there is a material change of circumstance or special reason under s.41(3) on the grounds set out above; and (2) as explained at the hearing on 17 July 2023, the CMA may still consent to Microsoft acquiring an interest in Activision under the terms of the proposed final order [CMC3 Transcript (uncorrected), page 22, line 23 – page 23, line 2].
22. Whilst further investigation would be required, it is arguable that the matters outlined above may give rise to a material change of circumstance and/or special reason under s.41(3). Ultimately, any decision would be for the Inquiry Group. The Inquiry Group extended the statutory timetable for making a final order in order to give full and proper consideration to Microsoft's submissions on the draft final order [CP2/4/44]. Nothing in this statement is intended to prejudge either the Inquiry Group's consideration of the representations made by the parties and third parties or its final decision.

(2) Third party consultation on any changes to the proposed order

23. On 14 July 2023, the Inquiry Group published a notice under s.41A(2) EA02, extending the period for the discharge of its duty under s.41(2) EA02 by six weeks [CP2/4/44]. The Inquiry Group considered that there were special reasons for extending this period, as there was insufficient time remaining for full and proper consideration of the Microsoft Submission. As such, the final order must now be made by the statutory deadline of 29 August 2023 if the reference is not otherwise finally determined within the meaning of s.79(1) EA02.
24. Given the Inquiry Group has received a submission from Microsoft that there has been a material change of circumstance or there are otherwise special reasons for the final order to depart from the Final Report, recognising the request of the President of the Tribunal in paragraph 15(3) of the Ruling about the need for third parties to have an opportunity to comment on the submissions put forward by Microsoft, the Inquiry Group has approved that the CMA should publish details regarding Microsoft's submissions as soon as possible and provide a short window for third party submissions.
25. Further, if the Inquiry Group reaches the provisional view that there has been a material change of circumstance, or there are otherwise special reasons for modifying the proposed order, the CMA would give notice of the modified order in accordance with the requirements paragraphs 2(4) to 2(6) of Schedule 10.² The CMA would set out the proposed modifications and the reasons for them and give third parties a chance to respond. Whilst it will be for the Inquiry Group to determine the precise process to be followed, and this will depend on the progress of any further evidence gathering, my current expectation is that the Inquiry Group may be able to reach a provisional view in the week beginning 7 August 2023. Third parties would then have a period of 7 days to make representations.

² This is subject to an exception in paragraph 9 of Schedule 10 where the CMA considers that there are special reasons to dispense with the requirements of the Schedule. This would be a matter for the Inquiry Group.

(3) Why the first adjournment application did not refer to Microsoft’s proposal to modify the transaction

26. In its application of 28 June 2023 [CP2/5/45], the CMA sought an adjournment on the basis that: (i) the CMA had not at that time been able to instruct leading counsel with previous experience of this matter to appear at the substantive hearing and had encountered significant difficulty in obtaining suitable alternative representation; (ii) First Treasury Counsel, who had been instructed as leading counsel for the CMA, had confirmed that it was not possible for the CMA’s case to be prepared and presented effectively on the current timescales with a hearing at the end of July; and (iii) there had been a range of other developments in relation to the proceedings which either had already, or would soon, divert significant resources of the CMA away from the preparations for the hearing, including an increase in the scale of work that would be involved in relation to the consultation procedure on the final order [CP2/5/47-48].
27. This application did not refer to discussions between Microsoft and the CMA about a modified transaction because the adjournment was not sought in order to pursue any such discussions. On 28 June 2023, there were no ongoing discussions between Microsoft and the CMA. An adjournment was instead sought on the distinct basis that it was necessary to secure a fair hearing, for the reasons summarised above.
28. The CMA’s application of 28 June 2023 was opposed by Microsoft and refused by the Tribunal in a ruling on 29 June 2023 ([2023] CAT 43). In the light of that ruling, the CMA made arrangements to put together a counsel team (including by moving counsel away from other cases, as explained in a letter to the Tribunal dated 5 July 2023). [CP2/6/51]. The Joint Application was made on the distinct basis from the first application for adjournment, as explained in the parties’ submissions at and in advance of the CMC on 17 July 2023.

(4) Extent to which the FTC’s failure to obtain an interim injunction from the US courts is relevant to the Joint Application

29. The FTC’s failure to obtain a preliminary injunction was irrelevant and immaterial to the CMA’s decision to participate in the Joint Application. The CMA’s decision was taken on the basis of its assessment that the public interest is now best served by an adjournment

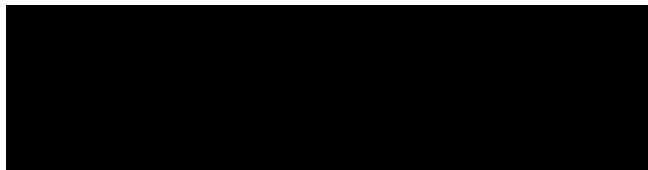
for the reasons outlined at the beginning of this statement. The CMA believes that there is a realistic chance that the adjournment will lead to an outcome that is in the interests of consumers, and that gives the parties (and the public) greater certainty more quickly, without the cost and delay of litigation.

30. While the CMA cannot comment on whether or not the US developments were a relevant consideration for Microsoft in deciding whether to make the Joint application, as this is a matter for Microsoft, I confirm the US developments were irrelevant to the CMA's decision to participate in the Joint Application.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:

A large black rectangular redaction box covering the signature area.

Name: **Chris Prevett**
Interim General Counsel, CMA

Dated: **20 July 2023**