MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„ Microsoft's Acquisition of Activision-Blizzard: Consoles, Vertical Integration, and the Relevant Market and Input Foreclosure Analyses under EU Competition Law "

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	ao. Univ.-Prof. Mag. Dr. Siegfried Fina

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Introduction

This Paper analyzes the European Commission's review of Microsoft's proposed acquisition of Activision Blizzard, predicting and explaining its likely conclusion in the "high-performance gaming console" market. When I began writing this Paper, the European Commission was still considering the anticompetitive effects of the acquisition on the console gaming market.[1] As I conclude writing this, the European Commission has just approved the transaction, finding no risk of competitive harm in the console market because Microsoft has no incentive to make *Call of Duty* exclusive to Xbox, and finding the behavioral remedies sufficient to address the cloud gaming concerns.[2] Thus, the value-added of this Paper has shifted from predicting the Commission's response to explaining why it came to this conclusion. The Commission tends to release much more truncated decisions where it is not challenging a merger,[3] meaning that it is still useful to go into greater detail than the decision is likely to provide, so that decisions with respect to future transactions within the video game industry can be more clearly analyzed and predicted.

Section I summarizes the key facts of this merger challenge as well as the opinions of numerous experts and non-experts concerning this transaction. Section II summarizes vertical merger law within the European Union. Section III discusses possible upstream and downstream markets (in the context of the console market) the Commission could take as its market definitions and assesses whether each of these markets is appropriately delineated. Section IV summarizes key details of the video game console market: consoles are two-sided markets, they benefit from direct and indirect network effects, they rely on exclusives and "killer apps" to generate console sales, and sequels are disproportionately important among AAA games. With these aspects of the market understood, I then use that knowledge to assess the input foreclosure theory of harm (Section V): Are Microsoft's *Call of Duty* contractual commitments a sufficient remedy? Are exclusives harmful to consumers in the console market? Are exclusives harmful to consumers in the software gaming market? How harmful would foreclosure of Activision's non-*Call of Duty* titles be in the console market? Section VI then discusses the benefits of vertical integration: the elimination of double marginalization and the reduction of transaction costs; Microsoft might be able to run Activision better than Activision's current leadership; and

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[1] *See* Eur. Comm'n, *Mergers: Commission Opens In-Depth Investigation into the Proposed Acquisition of Activision Blizzard by Microsoft* (Nov. 8, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6578 ("The preliminary investigation suggests that Microsoft may have the ability, as well as a potential economic incentive, to engage in foreclosure strategies *vis-à-vis* Microsoft's rival distributors of console video games, such as preventing these companies from distributing Activision Blizzard's console video games on **consoles** or degrading the terms and conditions for their use of or access to these video games.").

[2] *See* Eur. Comm'n, *Mergers: Commission Clears Acquisition of Activision Blizzard by Microsoft, Subject to Conditions* (May 15, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705 ("Microsoft **would have no incentive to refuse to distribute Activision's games to Sony**, **which is the leading distributor of console games** worldwide, including in the European Economic Area ('EEA') where there are four Sony PlayStation consoles for every Microsoft Xbox console bought by gamers. Indeed, Microsoft would have strong incentives to continue distributing Activision's games via a device as popular as Sony's PlayStation."; *and* finding that Microsoft's commitments "**fully address** the competition concerns identified by the Commission and **represent a significant improvement for cloud game streaming compared to the current situation**.") (emphasis in original).

[3] "[T]he Commission will only define markets in a definite way when this is necessary to arrive at a conclusion for a case. Markets are therefore defined in all cases that raise competition concerns. Otherwise, market definition issues are discussed in the decision, but the precise definition of the market is ultimately left open." Stephan Simon & Nicolas Listl, *Part 3: Definition of the Relevant Market*, *in* 2 EU COMPETITION LAW: MERGERS AND ACQUISITIONS BOOK ONE [hereinafter EU COMPETITION BOOK ONE] 207, 209 (Christopher Jones & Lisa Weinert eds. 2021).

Microsoft's acquisition of Activision may actually increase the availability of Activision's games overall, even if excluded from Sony in particular. Section VII states Commission's likely conclusion with respect to the console market, based on my preceding analysis. I then conclude.

Section I: Background Details of the Proposed Acquisition

On January 18, 2022, Microsoft announced that it would acquire Activision Blizzard for $68.7 billion, one of the largest acquisitions in history for any industry, and the largest in gaming.[4] On March 31, 2022, several U.S. senators sent a letter to the FTC "outlin[ing] concerns that the deal could disenfranchise current Activision Blizzard employees following allegations of sexual misconduct and other hostile workplace practices."[5] August 24, 2022, "Microsoft launched a website that highlighted its 'vision for gaming,' and the positives of [this acquisition]. . . . According to Xbox, the acquisition will mean more games on more devices, more choices for how to purchase games, and variety for mobile gamers."[6]

On September 1, 2022, Phil Spencer (CEO of Microsoft Gaming) promised "that new Call of Duty games would still be released on PlayStation on the same day as it launches elsewhere" for at least three years, but PlayStation called the promise "inadequate."[7] The U.K.'s Competition and Market Authority (CMA) expressed concern over the planned acquisition, particularly the control it gave Microsoft over Call of Duty and how many users would switch to Microsoft's console were Call of Duty made exclusive.[8] Spencer later clarified that the intent "was not to take Call of Duty away from PlayStation gamers and that as long as there is a PlayStation to ship to, Xbox will ship Call of Duty to Sony's console."[9] On November 11, 2022, Xbox "offered Sony a 10-year deal to keep Call of Duty on PlayStation."[10] Sony has not yet accepted this offer.

On December 8, 2022, the Federal Trade Commission (FTC) sued to block Xbox's acquisition of Activision Blizzard, claiming that it "could 'harm competition in high-performance gaming consoles and subscription services by denying or 'degrading rivals' access to its popular content.' The FTC cited the acquisition of ZeniMax Media [by Microsoft] as one example of this, and how games like Redfall and Starfield will not be appearing on rival

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[4] Matt Kim, *Microsoft's Activision Blizzard Acquisition: The Complete Timeline of the News So Far*, IGN INDIA (Feb. 23, 2023), https://in.ign.com/call-of-duty-modern-warfare-2-1/179859/feature/microsofts-activison-blizzard-acquisition-the-complete-timeline-of-the-news-so-far. For the announcement itself, see also Cara Lombardo, *Microsoft to Buy Activision Blizzard in All-Cash Deal Valued at $75 Billion*, WALL ST. J. (Jan. 18, 2022), https://www.wsj.com/articles/microsoft-to-buy-activision-blizzard-games-11642512435?mod=hp_lead_pos1.

[5] Kim, *supra* note 4. A link to the letter is available here: https://arstechnica.com/gaming/2022/04/report-us-senators-urge-ftc-to-scrutinize-microsoft-activision-merger/. Elizabeth Warren, Bernard Sanders, Sheldon Whitehouse, & Cory A. Booker, *Letter to FTC Re: Activision Microsoft Deal* (Mar. 31, 2022).

[6] Kim, *supra* note 4. The website is viewable here: https://news.microsoft.com/activision-blizzard-acquisition/.

[7] Kim, *supra* note 4. Spencer's statement is viewable here: Phil Spencer, CEO (Microsoft Gaming), *Gaming for Everyone, Everywhere: Our View on the Activision Blizzard Acquisition*, MICROSOFT (BLOGS) (Sept. 1, 2022), https://blogs.microsoft.com/on-the-issues/2022/09/01/gaming-everyone-everywhere/.

[8] *See* CMA, Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc., Decision on Relevant Merger Situation and Substantial Lessening of Competition, CMA/15/2022, ME/6983/22 (Sept. 1, 2022), https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry. The entire inquiry is viewable via that link as well (last updated May 11, 2023).

[9] Kim, *supra* note 4.

[10] *Id.*

consoles."[11] On December 20, 2022, a group of California gamers filed a private antitrust action against Microsoft; their complaint largely approximates the FTC's.[12] However, on March 20, 2023, the private case was dismissed (though given twenty days to refine their legal challenge) because the federal judge in San Francisco ruled that the plaintiffs' claim "'lacks allegations' supporting their claim."[13] On April 10, the gamers filed an amended complaint,[14] and Microsoft followed with another motion to dismiss.[15]

On February 3, 2023, the European Commission "issued a formal warning to Microsoft over its acquisition plans, claiming that Microsoft could be 'incentivized to keep Call of Duty away from rival consoles.'"[16] February 8, 2023, the UK's CMA "published a provisional report of its investigation that raised several concerns about Xbox's plans to acquire Activision Blizzard. This included risk of higher prices for gamers, fewer choices, and less innovation for UK gamers."[17]

On February 21, 2023, Microsoft "signed a binding 10-year contract to bring Call of Duty games to Nintendo device owners 'the same day as Xbox, with full feature and content parity.' . . . On the same day, Microsoft announced a 10-year deal to bring all of its PC games to Nvidia's GeForce Now streaming service, including Activision Blizzard titles."[18] Microsoft also met with EU regulators on the same date.[19] March 14, 2023, Microsoft signed a similar 10-year

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[11] *Id.* The FTC's investigation can be tracked here: https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter. Microsoft / Activision Blizzard, In the Matter of, FTC Matter/File Number: 2210077, (No. 9412) (last updated Apr. 3, 2023).

[12] The docket is viewable here: https://www.bloomberglaw.com/product/blaw/document/X1Q6OI9RFP82?criteria_id=652a7c7df535d34bf5dfc101c539f84d&searchGuid=8199f4d3-dde0-4e5c-a96b-fbfd91fa8c19. Demartini et al v. Microsoft Corp. (N.D. Cal. Dec. 20, 2022) (No. 3:22-cv-08991).

[13] Mike Scarcella, *Microsoft Wins Dismissal of Gamers' Suit Over $69 Billion Activision Deal*, REUTERS (Mar. 21, 2023), https://www.reuters.com/legal/microsoft-wins-dismissal-gamers-suit-over-69-bln-activision-deal-2023-03-21/.

[14] *See* Katie Buehler, *Gamers File Amended Challenge to Microsoft-Activision Deal*, LAW360 (Apr. 11, 2023), https://www-law360-com.ezproxy.law.stanford.edu/articles/1595871/gamers-file-amended-challenge-to-microsoft-activision-deal (summarizing the changes made to the complaint). The amended complaint is available here: https://www.bloomberglaw.com/product/blaw/document/X7HF8VFM6P7896ANM0VGUF93TQT (Amended Complaint, Demartini et al., *supra* note 12 (filed Apr. 10, 2023)). *See also* Dorothy Atkins, *Gamers Say Microsoft, Activision Deal Aims to Eliminate Sony*, LAW360 (May 1, 2023), https://www-law360-com.ezproxy.law.stanford.edu/articles/1602931/gamers-say-microsoft-activision-deal-aims-to-eliminate-sony (summarizing the plaintiffs' main arguments in their revised complaint, as well as Microsoft's response to the amended complaint).

[15] *See* Rachel Riley, *Microsoft Says Gamers Fall Short in Suit over Activision Deal*, LAW360 (Apr. 20, 2023), https://www-law360-com.ezproxy.law.stanford.edu/articles/1599451/microsoft-says-gamers-fall-short-in-suit-over-activision-deal (summarizing Microsoft's arguments in its motion to dismiss the amended complaint). The motion to dismiss the amended complaint is available here: https://www.bloomberglaw.com/product/blaw/document/X4Q4BPBGOU69MIR6M1MPFUUTH8K (Motion to Dismiss First Amended Complaint, Demartini et al. *supra* note 12 (filed on Apr. 19, 2023).

[16] Kim, *supra* note 4. The European Commission's investigation can be tracked here: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_10646.

[17] Kim, *supra* note 4. For the report itself, see CMA, ANTICIPATED ACQUISITION BY MICROSOFT OF ACTIVISION BLIZZARD, INC. PROVISIONAL FINDINGS REPORT (2023), https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry.

[18] Kim, *supra* note 4.

[19] *See* Tom Phillips, *Without Sony on Board, Microsoft's Dual Announcements Felt like a Sandwich without the Filling*, EUROGAMER (Feb. 21, 2023), https://www.eurogamer.net/without-sony-on-board-microsofts-dual-announcements-today-felt-like-a-sandwich-without-the-filling (narrating the key moments of the meeting).

agreement with cloud gaming service Boosteroid.[20] All of these agreements are not publicly available, although both Sony and the FTC have attempted to compel discovery of them in the ongoing FTC investigation.[21] March 15, Microsoft signed another ten-year deal with Ubitus, "a Japanese cloud gaming service, allowing the company to add Xbox PC games as well as Activision Blizzard products like Call of Duty to its offerings."[22] Ubitus is "the leading provider of cloud gaming services for the Nintendo Switch."[23] March 17, Microsoft "offered formal commitments to the European Union antitrust authorities."[24] Those commitments were later revealed to be Microsoft's agreements to make Activision's games available on rival cloud gaming platforms.[25]

On March 24, the CMA narrowed its scope of review to cloud gaming, changing its mind with respect to the console market "after weighing 'a significant amount' of new evidence that Microsoft would be unlikely to profit from restricting access to blockbuster franchise *Call of Duty* on rival consoles such as Sony Corp.'s PlayStation."[26] The same article reports that the CMA's narrowing scope "echoes a similar step at European Union level where the bloc is said to be only focusing on cloud gaming services."[27] This presumption of the EU's narrowed focus is supported by the narrower behavioral remedies Microsoft submitted to the European Commission: sources said "Microsoft has offered 10-year licensing deals for cloud gaming services, citing Nvidia, Ukraine-based cloud gaming provider Boosteroid and Japan's Ubitus as

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[20] Ashley Bardhan, *Microsoft Signs Another 10-Year* Call of Duty *Deal*, KOTAKU (Mar. 14, 2023) https://kotaku.com/microsoft-call-of-duty-deal-activision-xbox-boosteroid-1850223974.

[21] *See* Bryan Koenig, *FTC Says Microsoft Withholding Activision Access Talk Docs*, LAW360 (Mar. 15, 2023), https://www-law360-com.ezproxy.law.stanford.edu/articles/1586205/ftc-says-microsoft-withholding-activision-access-talk-docs.

[22] Marco, Wutz, *Microsoft Announces Call of Duty Deal with Switch Cloud Game Provider*, SPORTS ILLUSTRATED (Mar. 15, 2023), https://videogames.si.com/news/microsoft-ubitus-call-of-duty-deal.

[23] *Id.*

[24] Al Bawaba, *Microsoft Offers EU Concessions for Activision Blizzard Bid Nod*, AL BAWABA (Mar. 19, 2023), https://www.albawaba.com/business/microsoft-offers-eu-concessions-activision-blizzard-bid-nod-1512546.

[25] *See* Bryan Koenig, *EU Oks Microsoft-Activision Deal on Cloud Gaming Promises*, LAW360 (May 15, 2023), https://www-law360-com.ezproxy.law.stanford.edu/articles/1677588/eu-oks-microsoft-activision-deal-on-cloud-gaming-promises ("The commission said, however, that Microsoft has sufficiently addressed those [cloud gaming] concerns through the multi-streaming service availability commitment and through a promise to license games for free to any cloud game streaming providers, allowing EEA gamers to 'stream any Activision Blizzard's PC and console games.'").

[26] Katharine Gemmell, *Microsoft's $69 Billion Activision Deal Gets Boost from UK (4)*, BLOOMBERG L. (Mar. 24, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/antitrust/XFB81688000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvN2Y5Yzk3YmRjYTY3NGU5YzBlODhmZTBkOWQwMDdlN2YiXV0--2ea2e0f93f2dcd07daa5ef9a41246662581c6e55&bna_news_filter=antitrust&criteria_id=7f9c97bdca674e9c0e88fe0d9d007e7f&search32=-ozAZV3LRG6MERF6p9NOUw%3D%3DViIPhE6tpEBlMnQFrAkv6b7uYhjFIFs9Qe3Q7SknhU4OMYjJV7QMtZAOEqTIp0pC73uQ3rSn_fhF74MWb_a_nk2U8QdwJd0Kx4BtMhubLgPqHtmoLEQLFE_zdpXcXr9cV93QSYZz63Fh9kqO9eIHSg%3D%3D (quoting CMA, *CMA Narrows Scope of Concerns in Microsoft-Activision Review*, CMA (Mar. 24, 2023), https://www.gov.uk/government/news/cma-narrows-scope-of-concerns-in-microsoft-activision-review).

[27] Gemmell, *supra* note 26.

examples. . . . The Commission is likely to accept such licensing deals and clear the deal, other people with direct knowledge of the deal have told Reuters."[28]

The reason for the EU's narrowed focus was that Microsoft lacked the incentive to make *Call of Duty Exclusive* to Microsoft's consoles, and even if it did, the effects of such a decision would not harm competition in the European Economic Area because *Call of Duty* "is less popular in the EEA than in other regions of the world, and is less popular in the EEA within its genre compared to other markets. Therefore, even without being able to offer this specific game, Sony could leverage its size, extensive games catalogue and market position to fend off any attempt to weaken its competitive position."[29]

The reason for the CMA's change in opinion was that it had received new evidence that "relates to Microsoft's financial incentives to make Activision's games, including Call of Duty (CoD), exclusive to its own consoles. While the CMA's original analysis indicated that this strategy would be profitable under most scenarios, new data (which provides better insight into the actual purchasing behaviour of CoD gamers) indicates that this strategy would be significantly loss-making under any plausible scenario. On this basis, the updated analysis now shows that it would not be commercially beneficial to Microsoft to make CoD exclusive to Xbox following the deal, but that Microsoft will instead still have the incentive to continue to make the game available on PlayStation."[30]

On March 28, the Japan Fair Trade Commission approved the transaction.[31] On April 17, South Africa's Competition Commission followed suit by also approving the deal.[32] On May 2, Ukraine's Antimonopoly Committee approved the deal.[33]

So far, the U.K.'s CMA has been the only competition authority to block the transaction: On April 26, the CMA released its final report,[34] deciding to prevent the deal "over concerns the deal would alter the future of the fast-growing cloud gaming market, leading to reduced innovation and less choice for UK gamers over the years to come."[35] The CMA found that "Microsoft already accounts for an estimated 60-70% of global cloud gaming services and has other important strengths in cloud gaming from owning Xbox, the leading PC operating system (Windows) and a global cloud computing infrastructure (Azure and Xbox Cloud Gaming)."[36] Moreover, the CMA did not find Microsoft's licensing commitments to bring Activision's titles to cloud gaming competitors to be merger-specific: "The evidence available to the CMA

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[28] Reuters, *Microsoft's EU Remedies Target only Cloud Streaming Rivals*, ECON. TIMES (Mar. 21, 2023), https://economictimes.indiatimes.com/tech/technology/microsofts-eu-remedies-target-only-cloud-streaming-rivals-sources-says/articleshow/98848909.cms?from=mdr (summarizing the details of the Nvidia deal as well).
[29] Eur. Comm'n, *Supra* note 1.
[30] CMA, *supra* note 26.
[31] Gareth Allan, *JFTC Says Microsoft-Activision Deal Doesn't Limit Competition*, BLOOMBERG (Mar. 28, 2023), https://www.bloomberglaw.com/product/blaw/document/RS8185T1UM0X.
[32] *See* Oli Welsh, *What's Happening with Microsoft's Acquisition of Activision Blizzard*, POLYGON (May 12, 2023), https://www.polygon.com/23546288/microsoft-activision-blizzard-acquisition-deal-merger-ftc-latest-news.
[33] Ben Lyons, *Ukraine's Regulation Body Has Approved Microsoft's Activision Blizzard Acquisition*, GAMEREACTOR (May 2, 2023), https://www.gamereactor.eu/ukraines-regulation-body-has-approved-microsofts-activision-blizzard-acquisition-1262863/.
[34] CMA, Final Report, Microsoft / Activision Blizzard Merger Inquiry (Apr. 26, 2023), https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf.
[35] CMA, *Microsoft / Activision Deal Prevented to Protect Innovation and Choice in Cloud Gaming* (Apr. 26, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.
[36] *Id.*

indicates that, absent the merger, Activision would start providing games via cloud platforms in the foreseeable future."[37] Most significantly, the CMA found Microsoft's behavioral remedies insufficient because they "did not sufficiently cover different cloud gaming service business models, including multigame subscription services. [They] w[ere] not sufficiently open to providers who might wish to offer versions of games on PC operating systems other than Windows. [And they] would standardise the terms and conditions on which games are available, as opposed to them being determined by the dynamism and creativity of competition in the market, as would be expected in the absence of the merger."[38] Both Microsoft and Activision have vowed to appeal the CMA's decision to the UK Competition Appeals Tribuanl.[39] Both have hired renown lawyers to assist them in the appeal,[40] although most commentators are skeptical they will be successful because the CMA's appeal process is very restrictive and limited.[41] The CMA's decision is globally binding,[42] and the appeal process "will take many months to resolve."[43]

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[37] *Id.*

[38] *Id.*

[39] *See* Gemmell, *supra* note 26 ("'We remain fully committed to this acquisition and will appeal,' Brad Smith, vice chair and president of Microsoft, said. 'The CMA's decision rejects a pragmatic path to address competition concerns and discourages technology innovation and investment in the UK.' . . . 'We've already begun the work to appeal to the UK Competition Appeals Tribunal. We're confident in our case because the facts are on our side, this deal is good for competition,' Bobby Kotick, Activision's chief executive officer, [wrote] in a note to employees.").

[40] *See* Chris Scullion, *Microsoft Hires an 'EU-Beating' Lawyer to Help Overturn UK Regulator's Activision Merger Block*, VGC (May 6, 2023), https://www.videogameschronicle.com/news/microsoft-hires-an-eu-beating-lawyer-to-help-overturn-uk-regulators-activision-merger-block/; *and* Tim Bradshaw & Jane Croft, *Activision Blizzard Hires Legal Heavyweight to Fight UK's Block of Microsoft Deal*, FIN. TIMES (May 9, 2023), https://www.ft.com/content/209f948f-9101-4977-a4c5-16c77d1ca07c.

[41] *See, e.g.*, Leah Nylen & Katharine Gemmell, *Microsoft's Activision Deal Chances Evaporate after UK Blow*, BLOOMBERG NEWS (Apr. 26, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/antitrust/X2NTNK24000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvN2Y5Yzk3YmRjYTY3NGU5YzBlODhmZTBkOWQwMDdlN2YiXV0--2ea2e0f93f2dcd07daa5ef9a41246662581c6e55&bna_news_filter=antitrust&criteria_id=7f9c97bdca674e9c0e88fe0d9d007e7f&search32=-ozAZV3LRG6MERF6p9NOUw%3D%3DViIPhE6tpEBlMnQFrAkv6b7uYhjFIFs9Qe3Q7SknhU4OMYjJV7QMtZAOEqTIp0pC73uQ3rSn_fhF74MWb_a_nk2U8QdwJd0Kx4BtMhubLgPqHtmoLEQLFE_zdpXcXr9cV93QSYZz63Fh9kqO9eIHSg%3D%3D (stating that "the transaction has slim chances" because the UK appeal process "rarely changes the outcome as the tribunal only reviews the decision's legality"); *and* Due Diligence, *Why Microsoft's Activision Blizzard Deal Could Be on Its Last Life*, FIN. TIMES (Apr. 26, 2023), https://www.ft.com/content/32dbd9da-d0bc-4f54-a719-3f1e7f624ac1 ("One lawyer told [Due Diligence] that the companies face an uphill battle in appealing against the CMA's ruling; its decisions are rarely overturned. Another described it as 'pointless' and 'time consuming.'").

[42] Tassia Sipahutar, *Five Things You Need to Know to Start Your Day*, BLOOMBERG (Apr. 26, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/antitrust/XC65HV5C000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvN2Y5Yzk3YmRjYTY3NGU5YzBlODhmZTBkOWQwMDdlN2YiXV0--2ea2e0f93f2dcd07daa5ef9a41246662581c6e55&bna_news_filter=antitrust&criteria_id=7f9c97bdca674e9c0e88fe0d9d007e7f&search32=-ozAZV3LRG6MERF6p9NOUw%3D%3DViIPhE6tpEBlMnQFrAkv6b7uYhjFIFs9Qe3Q7SknhU4OMYjJV7QMtZAOEqTIp0pC73uQ3rSn_fhF74MWb_a_nk2U8QdwJd0Kx4BtMhubLgPqHtmoLEQLFE_zdpXcXr9cV93QSYZz63Fh9kqO9eIHSg%3D%3D (stating that, if the appeal is unsuccessful, the UK's decision "has the power to stop the deal altogether").

[43] Katharine Gemmell, *Big Tech Has Formidable Foe in Britain's Antitrust Watchdog (2)*, BLOOMBERG (Apr. 27, 2023),

However, "[a]n EU approval could offer a glimmer of hope for Microsoft's giant deal, as such a move would put pressure on the UK as the only major market to outright block the acquisition."[44] The European Commission was originally supposed to make a decision by April 25, but then moved the decision date back to May 22.[45] However, numerous recent sources have indicated that the Commission is expected to give its final decision May 15.[46] The Commission is expected to approve the transaction, in large part due to the behavioral remedies offered by Microsoft in the cloud gaming space.[47] Along those lines, Microsoft signed a ten year agreement with cloud gaming platform Nware on Apr. 27, 2023 to further increase its chances of approval by the European Commission.[48] Without an extension, the merger agreement expires on July 18.[49] The EU's final decision "won't be precedential for the CAT, but psychologically and politically, it hurts the CMA to be an extremist outlier that claimed to protect competition in cloud gaming but Microsoft's competitors in that field want the CMA decision overturned and the transaction to be consummated."[50]

i. Literature review of opinions on this deal.

While this Paper is focused on the European Commission's decision, the Commission's historical close cooperation with the United States' competition authorities mean that the FTC's arguments and other U.S.-specific arguments are not irrelevant; the Commission has diverged

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https://www.bloomberglaw.com/product/blaw/bloomberglawnews/antitrust/XEN09QT4000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvN2Y5Yzk3YmRjYTY3NGU5YzBlODhmZTBkOWQwMDdlN2YiXV0--2ea2e0f93f2dcd07daa5ef9a41246662581c6e55&bna_news_filter=antitrust&criteria_id=7f9c97bdca674e9c0e88fe0d9d007e7f&search32=-ozAZV3LRG6MERF6p9NOUw%3D%3DViIPhE6tpEBlMnQFrAkv6b7uYhjFIFs9Qe3Q7SknhU4OMYjJV7QMtZAOEqTIp0pC73uQ3rSn_fhF74MWb_a_nk2U8QdwJd0Kx4BtMhubLgPqHtmoLEQLFE_zdpXcXr9cV93QSYZz63Fh9kqO9eIHSg%3D%3D.

[44] Tom Warren, *The UK Doesn't Want Microsoft's Activision Blizzard Deal, So What Happens Next?*, VERGE (May 1, 2023), https://www.theverge.com/2023/5/1/23702716/microsoft-activision-blizzard-uk-deal-what-happens-next.

[45] *See* William D'Angelo, *EU Regulator Following Remedies by Microsoft Extends Deadline to Rule on Activision Deal—News*, VGCHARTZ (Mar. 17, 2023), https://www.vgchartz.com/article/456611/eu-regulator-following-remedies-by-microsoft-extends-deadline-to-rule-on-activision-deal/.

[46] *See, e.g.*, Mehrotra A., *Microsoft Activision Deal Is Expected to Clear EU Regulatory Investigation Soon*, NEOWIN (May 10, 2023), https://www.neowin.net/news/microsoft-activision-deal-is-expected-to-clear-eu-regulatory-investigation-soon/.

[47] *Id.*

[48] Kris Holt, *Microsoft Inks Another Cloud Gaming Deal after the UK Blocked Its Activision Takeover*, ENGADGET (Apr. 28, 2023), https://www.engadget.com/microsoft-inks-another-cloud-gaming-deal-after-the-uk-blocked-its-activision-takeover-172518808.html?utm_source=ground.news&utm_medium=referral&guccounter=1&guce_referrer=aHR0cHM6Ly9ncm91bmQubmV3cy8&guce_referrer_sig=AQAAAAlTWrFahu4nSGU-M9Kl0NxCIgt1eaJFXQC6ThI8vZGBJmniIRj-SaqNNuduVswp8OPSd65ekdac7TObCftXBlhJgdoTu6teeyS2Q0HW42KlYZL3WQ-haIDZmuVPdmSoPzz76BHlHbJgY05SAwUTsuYeYouA0R1SJ4FqejMl-sWa.

[49] Nylen & Gemmell, *supra* note 41.

[50] Florian Mueller, *European Commission Focuses on Consumers, Approves Microsoft's Acquisition of Activision Blizzard—Subject to Commitments—while UK CMA Won't Be Able to Defend Its Miscarriage of Justice*, FOSS PATENTS (BLOG) (May 15, 2023), http://www.fosspatents.com/2023/05/european-commission-focuses-on.html.

from the U.S. authorities on a few occasions,[51] but those occasions are exceptional.[52] The information sharing between the authorities likely means that the Commission at least considered the FTC's arguments behind the scenes.[53] Thus, throughout I will make reference to the FTC's

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[51] "The first significant case where the Commission and the U.S. agencies disagreed about the competitive effects of a merger was in *Boeing/McDonnell Douglas* (1997). The U.S. Federal Trade Commission viewed the transaction as overall competitively benign, while the Commission was concerned about the reduction of global producers of large commercial aircraft and the strengthening of Boeing's existing position, and thus conditioned its approval of the transaction on a package of remedies. . . . Ironically, however, this major disagreement led the EU and U.S. agencies to invest considerable time and effort in enhancing transatlantic cooperation and case coordination. Indeed, that case arguably le[d] to the 1998 Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws. . . . These steps contributed to the increased coordination and cooperation between the respective agencies . . . and helped reduce (if not avoid) conflicts in competition law enforcement. . . . In September 2003, the three agencies issued a joint document on Best Practices on Cooperation in Merger Investigations. That document articulated a framework for more and better communication, enhanced coordination on timing, consistent and more coordinated collection and evaluation of evidence, and the consistent evaluation of remedies." Gavin Bushell, *Part 1—Introduction*, EU COMPETITION BOOK ONE, *supra note* 3, at 23, 26-28 (citing Case M.877—*Boeing/McDonnell Douglas* (1997); Decision of the Council and of the Commission of 29 May 1998 Concerning the Conclusion of the Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ L 173, 18.6.1998, 26-27; *and* ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf).

[52] "From the European Union's perspective, the challenge of multi-jurisdictional merger control are primarily managed by close cooperation between the Commission and its principal third country counterparts, most notably . . . with the United States of America. Over the years, a particularly close and sophisticated cooperative relationship in the field of merger control has developed between the Commission and the United States' two federal antitrust agencies. In spite of the small number of highly-publicised instances in which different conclusions were reached on the two sides of the Atlantic in relation to the same mergers, this relationship has proved both enduring and worthwhile. Following the implementation of Brexit, it appears crucial that a similar level of cooperation can be developed and maintained also with the UK's Competition and Markets Authority (CMA) which since 1 January 2021 can have parallel jurisdiction to the Commission. It is yet to be seen, how this possibility of parallel reviews will turn out in practice." Lisa Weinert, *Part 10: The International Dimension*, *in* EU COMPETITION LAW VOLUME II: MERGERS AND ACQUISITIONS BOOK TWO [hereinafter EU COMPETITION BOOK TWO] 1475, 1476 (Christopher Jones & Lisa Weinert eds. 2021). *See also id.* at 1494 ("[T]here has been a genuine and a growing convergence of approach between the Commission and its US counterparts regarding the assessment of concentrations, in spite of considerable differences in their respective laws and legal systems. The enforcement guidelines of the Commission on the one hand and of the US antitrust agencies on the other are surprisingly similar, at least insofar as the assessment of the likely impact of a merger between competing firms (horizontal mergers) is concerned. And while criticism about a lack of convergence in competition law enforcement more generally keeps being raised on a regular basis, it must be conceded at least for the area of merger control that the authorities can generally be considered as finding common ground ever since the first cooperation agreement was concluded.") (citing Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, OJ L 95, 27.4.1995 at 47-52).

[53] The EU/US Cooperation Agreement "contains provisions stating that the authorities on both sides will exchange information with each other so as to facilitate competition law enforcement on both sides of the Atlantic, and so as to enable the authorities on both sides to better understand each other's enforcement activities." *Id.* at 1495 (citing Agreement, *supra* note 52). *See also id.* at 1496 ("The Agreement provides that the EU and US authorities should assist each other in their respective enforcement activities, to the extent that this is 'compatible with the assisting Party's laws and important interests, and within its reasonably available resources.' Such cooperation takes place on a regular basis, to the extent possible within the constraints imposed by the confidentiality obligations of both sides, and can take many forms, including the exchange of relevant factual information and the exchange of views regarding all aspects of the assessment of the likely impact of a merger on competition."). Shared information "includes publicly accessible information and as appropriate the authorities' respective analyses as to market definition, competitive effects, theories of harm, and necessary remedial measures. An improved level of information sharing and thus cooperation between the agencies can be achieved through the use of waivers of

console market arguments and the U.S. class action to assess their merits in the EU context. Likewise, while the CMA and Commission's cooperation is less formalized than the Commission's relationship with the U.S. and still nascent,[54] I will discuss some of the CMA's console market analysis to assess its merits in the EU context.

a) Academic articles analyzing this transaction.

As far as I could find, very few law papers or articles have been written on this deal. Fabian Ziermann proposes market definitions for the analysis and potential theories of harm in the context of EU competition law.[55] Ziermann proposes a genre-based market delineation (e.g., MMORPGs, FPS, battle royale, etc.).[56] Under this delineation, Ziermann is concerned with the deal's horizontal effects: after Microsoft acquires *World of Warcraft* through this acquisition, it will not want to further invest in *The Elder Scrolls Online*, because the MMORPG market is too crowded for a single publisher to not cannibalize its own revenue where it has multiple titles within that space.[57] Ziermann also express vertical concerns over "Microsoft's ability to foreclose competing digital storefronts . . . . Due to the franchise brand loyalty, 19% of users in the US indicated that the CoD franchise constitutes the most important franchise to spark a console change. 46% of users indicated that Xbox including Activision game titles would lead consumers to consider switching subscription services."[58] Finally, he considers *CoD* to meet "the [European] Commission's must-have content test."[59]

Alba Ribera Martínez summarizes the European Commission's analysis of the videogame industry markets in five previous merger reviews and two sanction cases.[60] In summary, the European Commission's "line of decisions has been undecisive, at best."[61] Martínez argues that "the device-agnostic video gaming subscription services and cloud-based streaming services are

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confidentiality. . . . Confidentiality waivers are an important tool and have thus become routine in practice, as also the undertakings are ultimately benefiting significantly from the smoothening of the review process and the reduction of investigative burden." *Id.* at 1503.

[54] "Following the implementation of Brexit, it appears crucial that a similar level of cooperation [as that with the U.S.] can be developed and maintained also with the UK's Competition and Markets Authority (CMA) which since 1 January 2021 can have parallel jurisdiction to the Commission. It is yet to be seen, how this possibility of parallel reviews will turn out in practice." *Id.* at 1476. *See also id.* at 1513-14 ("[I]t is paramount that the EC and the CMA can quickly find common ground on cooperation and enforcement in merger cases. This applies all the more, as the Brexit has also caused the CMA to be removed from the European Competition Network ('ECN'), and it is thus no longer part of cooperation and enforcement consistency discussions among the European authorities. A first step towards cooperation was taken in the Trade and Cooperation Agreement ('TCA') announced by the EU and the UK on 24 December 2021 and concluded only seven days after. The TCA includes a chapter on competition but it is very general. . . . The TCA . . . foresees that EU and UK authorities '*shall endeavour to cooperate and coordinate*,' including by sharing information, and authorizes them to enter into a separate agreement on cooperation and coordination. However, the TCA is silent on the specifics of such cooperation.") (quoting Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, OJ L 444/14 (31.12.2020), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN).

[55] Fabian Ziermann, COMPETITION L. HUB, Microsoft/Activision — *Market Definition and Theories of Harm under EU Competition Law*, SSRN (June 21, 2022) (last revised Aug. 29, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4142356.

[56] *Id.* at 9-13.

[57] *Id.* at 23-28.

[58] *Id.* at 17-18.

[59] *Id.* at 18.

[60] Alba Ribera Martínez, *A Fortnite and Odd Days: The Console Wars*, 6 MARKET & COMPETITION L. REV. 51 (2022).

[61] *Id.* at 59.

further eroding the already 'blurred' differences between hardware and platforms"[62] Since even mobile devices, given a sufficient internet connection, will be able to stream cloud-based games, the idea is that this new technological development will make the differences between mobile devices, consoles, and PCs not nearly as relevant, such that perhaps cloud-gaming will eliminate the concept of a "console" market. Martínez agrees with Ziermann's genre delineation: "[G]ame genres do act as moderators to delineate video gaming markets. . . . Thus, if no delineation of the market for video game software is done based on game genres, there is a clear risk of enforcement falling into the trap of false negatives."[63] Martínez also argues that gaming subscription services are not in the same market as pay-to-play games: "They do not seem to be substitutable. Following the SSNIP [Small but significant and non-transitory increase in price] test, purchasing a game will be quite inelastic compared to acquiring a full-on subscription service. The user wants to purchase that game and that game only, irrespective of a moderate and consistent increase in price concerning the rest of the games available in the market. However, when signing into a subscription service, a small increase in price might shift the user to consider other subscription services catered by different providers, i.e., *PlayStation Plus*, insofar as gamers tend to play across platforms, including PCs, and are not hampered from accessing titles and content provided by different brands."[64] Martínez concludes that the greater competitive risk is within the gaming subscription market, because the acquisition would result in Xbox Game Pass gaining "100 million subscribers as a result of incorporating the target's library of games to the service," and that this would give Microsoft a sufficient financial incentive to foreclose Activision's games from other subscription services, including Sony's.[65]

Eli Pales argues that "the Activision acquisition poses a substantial threat to competition and consumer welfare. The $69 billion deal imperils consumer choice, reduces the incentive to produce quality games, and ultimately risks higher consumer prices."[66] Pales divides the video game market into free-to-play and premium games: "Free-to-play games are those that cost nothing to download and play. . . . By contrast, premium games cost a set amount of money to buy. They range in price, but full-priced games generally cost between $60-70."[67] Pales argues that the acquisition would increase the barriers of entry for any new console competitors, and that Sony and Nintendo could not compete with the exclusives Activision could generate.[68]

Shanqi Xu analyzes the horizontal effects of the merger to see if it will "bring improvement to the Game Department of Microsoft," using a SWOT [Strength, Weakness, Opportunities, Threats] analysis.[69] While he uses the term "horizontal effects," he does not use this term in the antitrust sense but instead looks at how it will likely benefit Microsoft's game development from a business perspective. Xu concludes that "in the short term . . . Activision Blizzard will provide Microsoft with more competitive value in games, and in the long term, Microsoft will be able to take advantage of the technology foundation they have built to explore

[62] *Id.* at 64.
[63] *Id.* at 67.
[64] *Id.* at 74.
[65] *Id.* at 76.
[66] Eli Pales, *Microsoft and Activision Blizzard: Examining the Largest Tech Acquisition of All Time*, SSRN, at 4 (BERKELEY J. ENT. & SPORTS L. forthcoming) (May 11, 2022) (last revised Dec. 19, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106912.
[67] *Id.* at 5.
[68] *Id.* at 42-43.
[69] Shanqi Xu, *The Impact of Microsoft's Acquisition of Activision Blizzard*, 903 (2022).

newer and larger markets."[70] Likewise, Meiyue Xiong considers the deal to be "worthwhile indeed for both sides," but does not evaluate any antitrust arguments.[71] Sergio Lenarduzzi also analyzes the business motivations behind the transaction: the goals of the acquisition "increasing the market size of the sector in which [Microsoft] already performs, enlarging [Microsoft's] services into a new segment, that is the mobile one, avoid the commissions of app store[s] such as the Apple and Google's stores, and finally to increase the possibility of action in [Microsoft's] metaverse environment."[72]

Florian Mueller argues that FTC's complaint is filled with arbitrary market definitions.[73] He argues that the term "high-performance video game consoles" is poorly defined and that "Nintendo is actually competing in that market."[74] Mueller finds the AAA market even worse: "the FTC presents no objective criterion. In the end, it's about budget. Actually, games like Candy Crush and Minecraft became extremely successful despite (at least initially) small budgets. Consumers do not care about game makers' budgets . . . they want to have fun."[75] Thus, Mueller believes the FTC's case would be dismissed "for market definition reasons alone."[76] Mueller is even optimistic that Microsoft and Activision will win the CMA case on appeal.[77]

Julie Carlson of the Information Technology & Innovation Foundation think tank argues that the fact that Microsoft did not make *Minecraft* exclusive, "which is Microsoft's most popular video game," after Microsoft acquired Mojang (the developer of *Minecraft*), is evidence that, for *Call of Duty* as well, "the cost of foreclosure would exceed the benefits."[78] Carlson does not view Microsoft's decision to make *Starfield* and the next *Elder Scrolls* title exclusive as relevant evidence because those series are much less popular than *Call of Duty*: "When a game title is not very valuable, the cost to making that title exclusive to the Xbox is relatively low. That is, Microsoft does not lose very many customers accessing that title on Sony's console because there are not very many customers to begin with. For a popular game franchise like *Call of Duty*, the cost of making those titles exclusive is much higher suggesting a weaker incentive to make the content exclusive post-merger."[79]

b) Popular media analyzing this transaction.

Numerous opinion pieces critiquing or praising this transaction within online media sources have been penned. Brad Smith (Vice Chairman of Microsoft, so not an unbiased source)

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[70] *Id.* at 908.
[71] Meiyue Xiong, *An Acquisition Deal in the Gaming World*, 2 HIGHLIGHTS BUS., ECON. & MGMT. 452, 452 (2022).
[72] Sergio Lenarduzzi, *Why Microsoft Decided to Buy Activision Blizzard?*, Master's Degree Programme in Management, Final Thesis, at 22 (2022).
[73] Florian Mueller, *FTC's Microsoft-ActivisionBlizzard Complaint Misleads About Bethesda Post-Acquisition History and Reminds of Apple Arcade Antitrust Class Action Dismissed in Northern District of California*, FOSS PATENTS (Dec. 9, 2022), http://www.fosspatents.com/2022/12/ftcs-microsoft-activisionblizzard.html.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See* Florian Mueller, *#UnblockABK: How Microsoft Can/Will Acquire Activision Blizzard Despite the UK Competition & Market Authority's Abusive Arbitrary Ruling*, FOSS PATENTS (BLOG) (Apr. 28, 2023), http://www.fosspatents.com/2023/04/unblockabk-how-microsoft-canwill.html ("The [CMA] decision is not merely *wrong*. It's actually *nuts*. I'm sure it won't stand.") (emphasis in original).
[78] Julie Carlson, *What's Past Is Prologue: Microsoft's Acquisition of Activision Blizzard Does Not Raise Foreclosure Concerns*, INFO. TECH. & INNOVATION FOUND. (Oct. 24, 2022), https://itif.org/publications/2022/10/24/microsofts-acquisition-of-activision-blizzard-does-not-raise-foreclosure-concerns/.
[79] *Id.*

wrote to the *Wall Street Journal* that "[a]cquiring Activision Blizzard would enable Microsoft to compete against [Sony and Nintendo] through innovation that would benefit consumers. While modern consumers can stream videos or music on multiple devices on low-cost subscription plans, many games can often only be individually purchased and downloaded onto one device. Microsoft wants to change that by offering consumers the option to subscribe to a cloud gaming service that lets them stream a variety of games on multiple devices for one reasonable fee. It would also benefit developers by allowing them to reach a much broader audience."[80] He finds the threat of foreclosing *Call of Duty* from PlayStation "economically irrational. A vital part of Activision Blizzard's 'Call of Duty' revenue comes from PlayStation game sales. Given the popularity of cross-play, it would also be disastrous to the 'Call of Duty' franchsie and Xbox itself, alienating millions of gamers."[81]

Oli Welsh of *Polygon* (a gaming journalism site) argues that "the case that this deal will greatly reduce competition in gaming is a weak one, and relies on a very narrow conception of the global game industry. As powerful as Call of Duty, Warcraft, and *Candy Crush* are, there is no world in which acquiring them makes Microsoft any kind of monopolistic threat in an industry where titans like Epic Games, Tencent, and Sony itself can reach the top of the revenue charts using completely different strategies in different arenas."[82] Welsh views he competitive risk in the console market to be, "at best, a distraction from more valid concerns, like Microsoft's early lead in subscriptions and cloud gaming."[83] Welsh agrees with Smith that it makes no business sense for Microsoft to make *Call of Duty* exclusive.[84]

IGN, a gaming journalism website, interviewed two legal experts who had conflicting opinions on the transaction.[85] Sam Castree of Sam Castree Law argues that "Microsoft has the better of the argument [with the FTC]. He pointed out Microsoft's past willingness to keep its franchises on other platforms, as well as Microsoft's resources and ability to appeal any losses as far as it could possibly go. 'I think that the FTc's plan to define a bunch of hyper-specific sub-markets within the gaming sector is just plain incorrect.'"[86] Meanwhile, Mark A. Lemley of Stanford Law School "believes the FTC will be victorious" because "I think the FTC has a strong case that interoperability is important and it is at risk. Microsoft has offered to make some concessions to keep certain games like Call of Duty open, but it's not clear how enforceable those promises would be. Previous experience with conduct-related promises suggests they don't

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[80] Brad Smith, *Microsoft's Activision-Blizzard Acquisition Is Good for Gamers*, WALL ST. J. (Dec. 5, 2022), https://www.wsj.com/articles/microsofts-activision-blizzard-acquisition-is-good-for-gamers-competition-sony-cross-play-ftc-11670260780.
[81] *Id.*
[82] Oli Welsh, *Opinion: The Microsoft Activision Circus Needs to Be Over and Done with*, POLYGON (Mar. 14, 2023), https://www.polygon.com/23638155/microsoft-sony-activision-blizzard-opinion.
[83] *Id.*
[84] "Just look at its handling of *Minecraft*; no regulators were there to strong-arm Microsoft into legal agreements to keep the game available on PlayStation and Nintendo. And yet, nine years later, there it remains, because it's in Microsoft's interest to keep it there. The same is true of Call of Duty, as Valve boss Gabe Newell pointed out when he confidently dismissed Microsoft's offer of a 10-year deal to keep it on Steam as unnecessary. At this level, a game's value is in the size of the audience it captures, not in its usefulness as a marketing lure for a console that isn't even that central to Microsoft's business plan. Indeed, Microsoft, under gaming chief Phil Spencer, has been banging the drum of a platform-agnostic gaming future for years, and has been the one leading a reluctant Sony into initiatives like cross-platform play on *Fortnite* and other games." *Id.*
[85] Rebekah Valentine, *Will the FTC Block Microsoft from Acquiring Activision Blizzard? Legal Experts Are Divided*, IGN INDIA (Feb. 23, 2023), https://in.ign.com/call-of-duty-modern-warfare-2-1/179853/news/will-the-ftc-block-microsoft-from-acquiring-activision-blizzard-legal-experts-are-divided.
[86] *Id.* (quoting Castree).

end up being a good substitute for structural merger remedies."[87] Finally, David Hoppe of Gamma Law "thinks the constant challenges from the FTC might dissuade Microsoft entirely . . . even if it can ultimately prevail."[88]

The Editorial Board of the *Washington Post* argues that a "legally binding consent decree" would be sufficient to solve any concerns with the transaction.[89] Meanwhile, Connor Kinser, a high school student reporter, argues that the deal "could be bad for gamers" because Microsoft could make Activision's games exclusive to the Xbox, which would mean PlayStation and Switch players "wouldn't be able to play with their friends who have an Xbox. . . . I don't know a lot of people who both own a Xbox and a PlayStation."[90] James Moore argues that Microsoft "could use [Activision's games] to drive people to [Microsoft's] various platforms at the expense of its rivals. If you can only play your favourite franchise through Microsoft, then it's Microsoft products you will buy and Microsoft subscriptions you will take out."[91]

c) Responses from the CMA's investigation of this transaction.

As part of its investigation, the U.K.'s CMA sought opinion from the public and other industry participants. Seventy-five percent of 2,100 submissions by members of the public were in favor of the Microsoft's acquisition.[92] The public's views in favor of the merger were summarized as follows: the merger will help Microsoft compete against the stronger console companies (Sony and Nintendo); it will not harm rival consoles because Microsoft has made commitments "to keep Activision content, including Call of Duty, non-exclusive;" it is "unlikely that Microsoft would make Call of Duty exclusive due to its multiplayer nature;" Call of Duty has competition from other games; "the merger will push Sony to innovate, such as by improving its subscription service or creating more games to compete with Call of Duty;" the merger is a reaction to Sony's business practice of creating exclusives; Microsoft's plans to add Call of Duty to Game Pass "will lower the price of accessing games for consumers;" Microsoft would not make Activision's content exclusive because it would lose the software sales for sales that could be made on rival consoles; "consumers could revert to buying games on a buy-to-play basis if Microsoft were to raise the price of Game Pass post-Merger;" it "will lead to more funding and higher-quality games in the industry;" Activision will benefit from Microsoft's leadership; it's "pro-competitive in the mobile segment because it will create new options for mobile games and allow Microsoft to compete against Google and Apple;" there are other potential competitors in the cloud gaming space "such as Netflix;" and "some industry participants have said they are not opposed to the Merger."[93]

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[87] *Id.* (quoting Lemley).
[88] *Id.*
[89] Editorial Bd., *Opinion: How Both Sides Can Win in the FTC's Antitrust Case Against Microsoft*, WASH. POST (Jan. 11, 2023), https://www.washingtonpost.com/opinions/2023/01/11/ftc-microsoft-activision-takeover/.
[90] Connor Kinser, Reporter, *Opinion: Microsoft Offer to Buy Activision Blizzard for $68.7 billion Could Be Bad for Gamers*, ORANGE & BLACK (Jan. 19, 2023), https://oandbnews.com/5718/students-arts-culture/opinion-microsoft-offer-to-buy-activision-blizzard-for-68-7-billion-could-be-bad-for-gamers/.
[91] James Moore, *Head-to-Head for Big Tech and the Competition Gurus*, INDEP. — DAILY EDITION, at 41 (Sept. 5, 2022) (accessed via LexisNexis here: https://plus.lexis.com/document?crid=13f04e17-2c36-4396-b464-daa992d89d9a&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A669T-57M1-JCS0-D3R9-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=382507&pdmfid=1530671&pdisurlapi=true).
[92] CMA, Microsoft/Activision Blizzard Phase 2 Merger Inquiry: Summary of Responses from Members of the Public to the Issues Statement (linked here: http://www.fosspatents.com/2022/12/setback-for-sony-in-uk-public.html).
[93] *Id.*

The public views against the transaction were summarized as follows: this merger will lead to similar dominance as that which Microsoft has in the OS space; Microsoft has the resources to create games that compete with Sony's exclusives without this transaction; it will lead to consolidation "and would set a harmful precedent in the gaming industry of acquiring large publishers rather than encouraging organic growth;" it would pave the way for future acquisitions of other major third-party publishers (such as EA); "Microsoft will make Call of Duty exclusive to Xbox, just as it did with Bethesda after it acquired ZeniMax Media;" Microsoft will be incentivized to make Call of Duty exclusive, which "will adversely affect gamers who cannot afford an additional console and they would therefore switch to Xbox at the launch of the next console generation;" "Microsoft would be able to deteriorate the quality of Call of Duty games on PlayStation post-Merger, which could cause consumers to switch to Xbox;" "Microsoft can capture the multi-game subscription market after the Merger because it can afford to add games to Game Pass at a loss;" "Microsoft is already dominant in cloud gaming, and the Merger could affect the future of new entrants into that space;" "the Merger will raise barriers to entry for smaller studios and independent developers;" and "the Merger will lead to an increase in Microsoft's bargaining power in relation to game publishers."[94]

Other than Sony, no company expressed that they oppose the deal. The Chairman of 4J Studios (a SME indie developer best known for porting *Minecraft* to consoles and handheld platforms) noted that "[d]uring the phase of Microsoft ownership we have never been under any pressure to favour Microsoft owned formats . . . . Microsoft have also brought significant stability and rigour to our contractual and commercial relationships."[95]

Anonymous "Market Participant A" argues that "Microsoft is seeking to propagate innovation and embrace the move towards subscription services and cloud gaming . . . . By contrast, it seems that Sony may be looking at this transaction through the lens of a hardware company and not with the future development of the industry in mind. There is no evidence to suggest that this deal would inhibit Sony or any other rival's ability to compete in the multi-game subscription or cloud gaming markets."[96]

Anonymous "Market Participant B" argues that "we do not believe that any title can be considered a 'must have' in the interactive entertainment market,"[97] contrary to Sony's argument and the CMA's findings that, if Microsoft were to make *Call of Duty* exclusive, it would destroy the console competitive environment.

Anonymous "Market Participant C", an indie developer, argues that further consolidation in the video game industry is likely as companies switch to "cloud-based platform" models for video game distribution, and that, in such an environment encouraging consolidation, if Microsoft doesn't acquire Activision, China-based Tencent, who is "already an investor in Activision," would.[98] Since the Chinese market is closed to Western companies but Microsoft is not, an acquisition by Tencent would be detrimental; thus, since Microsoft's acquisition would foreclose such a possibility, it "would not be against the interest of UK consumers."[99]

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[94] *Id.*

[95] 4J Studios Response to the Provisional Findings. This and the remaining participant responses can be found here: https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry.

[96] Microsoft Corporation / Activision Blizzard, Inc. Merger Inquiry, *Response to the CMA's Issues Statement*, at 6 (Nov. 2022) (linked to via this post: http://www.fosspatents.com/2022/12/microsofts-ten-year-call-of-duty-offer.html).

[97] Market Participant B's Response to the Provisional Findings (Feb. 20, 2023).

[98] Market Participant C's Response to the Provisional Findings.

[99] *Id.*

Anonymous "Market Participant D", a developer and publisher of AAA titles, states "that it is difficult to predict exact effects of the anticipated acquisition," but that they "do not . . . expect any significant impact of the Merger on our company."[100]

Anonymous "Market Participant E", a multiplatform developers, argues that "on PlayStation, it simply isn't a level playing field for every publisher and developer," while on Xbox, "despite Xbox having much smaller player numbers and console sales than PlayStation, our games sell just as well on Xbox, since more players are finding our games there."[101] Thus, Participant E is "of the opinion that the acquisition . . . can only be a good thing for smaller-to-mid sized businesses like ours" because it will improve Xbox's player-base ecosystem, which the Participant deems superior to PlayStation's ecosystem, at least for small developers, for the aforementioned reasons.[102] Participant E believes the transaction will "create a more level playing field between Xbox and PlayStation, which . . . is sorely needed. PlayStation needs better competition, to force the platform to up its game, and this will surely help to do that."[103]

Finally, anonymous "Market Participant F" notes that the acquisition could lead to "more innovative consumer friendly initiatives" (presumably referring to Microsoft's subscription and cloud gaming services (described below)) and that a change in management at Activision "might be good for some of our colleague's working in the [Activision] studios."[104]

Section II: Summary of Relevant Vertical Merger Law

Although "[t]he origins of the Merger Regulation stretch back 55 years," the Merger Regulation itself is a more recent creation, dating back to 1990.[105] Vertical mergers involve "companies operating at different but complementary levels of the production or distribution chain."[106] The Vertical Merger Guidelines[107] were developed in 2008 to supplement the Horizontal Merger Guidelines: "They developed guidance as to how the Commission assesses concentrations where the merging parties are active on different relevant markets (so-called 'non-horizontal mergers'). The two broad types of non-horizontal mergers distinguished in the guidance are vertical mergers and conglomerate mergers. Critically, the Vertical Merger Guidelines start out with an important premise: that non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers (because there is no concentration of market share). The Commission recognised that unlike horiztonal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market. As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers. Equally

[100] Market Participant D's Response to the Provisional Findings.
[101] Market Participant E's Response to the Provisional Findings.
[102] *Id.*
[103] *Id.*
[104] Market Participant F's Response to the Provisional Findings.
[105] Bushell, *supra* note 51, at 5 (discussing the history of Council Regulation (EC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings (OJ L 395, 30.12.1989, at 1; corrected version OJ L 257, 21.9.1990, at 13); *and* Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (OJ L 24, 29.1.2004, at 1-22) [hereinafter referred to as the "Merger Regulation"]). For more on the history of EU merger control, see *id.*
[106] Claes Bengtsson, Josep M. Carpi, & Anatoly Subočs, *Part 4—The Substantive Assessment of Mergers*, *in* EU COMPETITION BOOK ONE *supra* note 3, at 313, 429.
[107] These Guidelines are also referred to as the Non-Horizontal Merger Guidelines. Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, OJ C 265, 18.10.2008, 6-25.

important, the Commission recognised that vertical and conglomerate meergers provide substantial scope for efficiencies."[108]

The Guidelines are supplemented by important Notices. The Market Definition Notice "provides guidance on the Commission's approach to product and geographic market definition. This Notice is of general application and not limited to merger control. Notably, in June 2020, the Commission launched a public consultation on its Market Definition Notice, and asked whether the Market Definition Notice is still 'fit for purpose'. The consultation closed in October 2020, and revised notice is anticipated in an attempt to bring it up to date with modern day economic realities and modes of assessment (the current text was adopted in 1997). Market definition is a critical component of merger control (as well as in antitrust enforcement). It is the key lens through which it can be determined whether merging companies are actual—or potential—competitors and whether their combination will lead to the creation or strengthening of a dominant position. It is the keystone of any theory of harm as to whether a certain merger should be prohibited. The revised Notice will be expected to shape the Commission's merger control practice in future, particularly with a focus on large and potentially dominant platforms operating in dynamic, multifaceted markets. The current text has detailed sections on the definition of the product and geographic markets, the basic principles for market definition, the process of definition in practice, the evidence relied on for market definition, and the calculation of market shares."[109]

The Remedies Notice "was adopted by the Commission in October 2008, replacing the Remedies Notice of 2001. The Notice on Remedies has been supplemented by a set of model texts, providing guidance on the drafting of commitments and the trustee arrangements. The Notice has detailed sections on guiding principles, different types of remedies, suitability criteria for purchasers, removal of links with competitors, other remedies, review clauses, aspects of procedure for Phase I and Phase II remedies, requirements for the implementation of remedies including on the divestiture process and the approval of the purchaser/sale agreements, monitoring and divestment trustees and obligations on the parties."[110]

In line with the "one-stop shop" concept, mergers with an EU dimension are reviewed by the European Commission, rather than by individual member states.[111]

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[108] Bushell, *supra* note 51, at 36-37. *See also id.* at 57 (The Non-Horizontal Merger Guidelines "explain in detail the analytical framework applied to the assessment of concentrations involving companies active in vertical or complementary markets. Like its sister publication, it has detailed sections on market share and concentration levels, vertical and conglomerate mergers and the concerns they can give rise to (such as non-coordinated effects input and customer foreclosure, information spill overs, and coordinated effects).").

[109] *Id.* at 57-58. For the 1997 Market Definition Notice, see Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. C372/5. The current status of the review of this notice can be found here: Review of the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (Nov. 8, 2022), https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en#period-of-consultation.

[110] Bushell, *supra* note 51, at 60 (summarizing Commission Notice on Remedies Acceptable under Council Regulation (EC) Nº 139/2004 and under Commission Regulation (EC) Nº 802/2004, 2008 O.J. C267/1).

[111] "The Merger Regulation is based on the principle of a precise allocation of competencies between national and European authorities. The basic idea underlying the allocation of jurisdiction for the review of mergers is the so-called 'one-stop shop' concept: concentrations with EU dimension should be reviewed by a single authority with EU-wide decision making power. In line with that concept, Article 21(2) of the Merger Regulation explicitly confers upon the European Commission the sole jurisdiction of to take the decisions provided for in the Regulation in cases falling within its scope. In turn, the first subparagraph of Article 21(3) of the Merger Regulation denies Member States the right to apply their national legislation on competition to concentrations with EU dimension." Bushell, *supra* note 51, at 69.

Finally, vertical mergers are more likely to be approved or only require behavioral remedies, rather than structural remedies: "[V]ertical mergers are generally less likely to give rise to competition concerns because, unlike horizontal mergers, they do not entail a loss of direct competition between the merging firms in the same market . . . . In addition, because of the complementarity between the merging firms' activities, vertical mergers may enhance efficiency gains, essentially by eliminating double mark-ups . . . and reducing transaction costs."[112]

Section III: Relevant Markets Analysis

The Court of Justice held that "a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition."[113] There are two dimensions to defining the boundaries of the relevant market: "One relates to the product under consideration ('the relevant product market'), the other relates to the geographic area in which competition takes place ('the relevant geographic market')."[114] The Commission follows the "smallest market principle": "When defining the market, the Commission tries to delineate the narrowest product and geographic market on which economic power can be exercised."[115]

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[112] Bengtsson et al., *supra* note 106, at 430.
[113] Simon & Listl, *supra* note 3, at 207. *See also id.* at 208 ("In the context of merger control, the main purpose of market definition is to identify in a systematic way the competitive constraints that the merging parties face. If customers can easily turn to alternative suppliers they will be able to defeat any attempt from the merging parties to exercise market power by increasing their prices post-merger. In this way the precise economic consequences of a concentration can begin to be measured. The definition of a relevant market thus reduces complexity, as it allows the Commission to focus its analysis on the most important competitive constraints facing a merged entity. It also allows the calculation of market shares and concentration indices which are meaningful for the assessment of market power. Finally, it allows the market to be placed in the value chain of an entire industry and makes it possible to distinguish between horizontal, vertical and conglomerate effects. It must however be underlined that market definition is not an end in itself. It is a necessary pre-condition for the proper assessment of a merger but is not sufficient for a finding of market power. In particular, the market shares which are calculated once a market has been defined should not be relied upon alone to definitely determine the existence of market power. The Commission has therefore rightly qualified market definition as a 'tool.'").
[114] *Id.* at 208.
[115] *Id.* at 209.

Competitive constraints are central to identifying the relevant market; the Commission focuses on three constraints: demand substitutability,[116] supply substitutability,[117] and potential competition.[118] To assess all of these constraints, the Commission relies on the 'SSNIP test.'"[119]

[116] "Demand substitution is considered the most important factor . . . . If customers can easily switch to available substitute products or to suppliers located elsewhere, then the merging parties cannot exercise market power and raise prices. The most important step in market definition therefore consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of product/services and geographic location of suppliers." *Id.* at 212.

[117] "[S]upply-side substitution requires that companies that are currently not producing a product or not selling in a geographic area start doing so in the short term without having to invest significant amounts of money. In other words, it seeks to identify those potential competitors of the merging companies that could quickly enter the markets served by the merging companies if, for example, they would attempt to raise prices. The competitive constraints arising from supply-side substitutability are in general less immediate than demand-side substitution and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis." *Id. See also id.* at 220 (Supply-side substitution "occurs when firms switch production to the relevant product or geographic area and market them in response to small and permanent changes in relative prices. . . . Effective supply-side substitution therefore widens the market under consideration. Under certain circumstances, the market not only includes actual competitors but also producers who are not selling the product today but who could easily do so were circumstances to change."[117] "The application of the hypothetical monopolist test generally follows the same principles as for the assessment of demand-side substitution as regards the size of the price increase and its starting point. In addition, two additional qualifications are made: the supply response must occur 'in the short term' and 'without incurring significant additional costs or risks', though this is implicitly accounted for by the question of whether a SSNIP would be profitable. The 'short-term' is defined in the Relevant Market notice as '*such a period that does not entail a significant adjustment of existing tangible and intangible assets*'. No clear definition is given as to the maximum time frame that can be taken into account. However, the Horizontal Merger Guidelines stipulate that entry by potential competitors is only taken into consideration when it can take place within two years. . . . The second condition is the absence of 'significant additional costs or risks'. This means that the supplier must own all the assets necessary to produce the product in question."[117] "In addition, a third condition is necessary which is not mentioned in the Notice: a producer must find it profitable to switch production to the market in question."[117] "In practical terms this means that the current sales of all products in the market will be added together to calculate the total market value or volume. Market shares will also be attributed to all producers in the market, including those that are currently not selling the product in question but which are capable of an immediate supply response.").

[118] This constraint "is not taken into account when defining markets. The constraints which potential competitors can exercise in a market can be important, but they require a detailed analysis of specific factors and circumstances related to the conditions of entry. This analysis is only carried out after the relevant market has been defined and only if the position of the parties on such a market indicates that a concentration could raise competition concerns. The difference between potential competition and supply-side substitution is a matter of time horizon. Potential competition only becomes effective in the long run, and typically involves significant investments, while supply-side substitution has more immediate effects." *Id.* at 212-13.

[119] "In order to make these concepts operational the Relevant Market Notice has adopted the 'hypothetical monopolist test' as a method to ascertain the boundaries of the relevant market, This test has also been called the 'SSNIP test', with 'SSNIP' being an acronym for a small, but significant non-transitory increase in price. The test originated in the US horizontal merger guidelines in 1982 and has since become the widely accepted concept for defining markets. The aim of the test is to ascertain whether the parties' customers would switch to readily available substitutes or to suppliers elsewhere in response to a hypothetical small permanent increase in price in the products and areas being considered. The application of the test begins with identifying the products or services affected by the merger and then identifying the narrowest possible theoretical product market definition and geographic area that encompasses the products of both parties. It then asks whether a firm which controlled the entire output of the product and geographic area in question (thus a hypothetical monopolist) would be able to profitably raise the price permanently by a small amount. If such a price increase is not profitable, because there are sufficiently close substitutes or because consumers would switch to products in a different region, then the relevant market is expanded to include the next best substitute product or area and the test is applied again. . . . The process continues until a set of products (or geographic areas) is found w[h]ere a hypothetical monopolist could profitably impose a

A vertical merger involves at least two separate markets: the market of the acquiror, and the market of the target. Thus, I will first explain Microsoft and Activision-Blizzard's relevant markets in the gaming industry.

i. Microsoft's Markets

Microsoft is a console manufacturer, producing the Xbox series of gaming consoles.[120] They also own the Windows operating system,[121] as well as the Microsoft Store (a PC gaming and application marketplace),[122] making them integrated into the PC market as well. Microsoft has a gaming subscription service, Xbox Game Pass, which allows users to download and play numerous games for a flat monthly fee on either PC or Xbox.[123] Microsoft publishes and develops "first-party" games.[124] Finally, Microsoft's Ultimate Xbox Game Pass competes in the cloud gaming market, where users stream games directly to their TVs or computers, removing the hardware demands of gaming.[125] Microsoft has a marginal mobile presence, although it hopes to expand into it via the acquisition of Activision-Blizzard (which owns some of the most popular mobile games, such as *Candy Crush*).[126]

The Commission's preliminary investigation expressed concern over Microsoft's foreclosure of Activision games on competing consoles, multi-subscription services, and cloud game streaming services.[127] By way of comparison, the FTC challenge focuses on Microsoft's "high-performance console[]," cloud gaming, and "mult-game content library subscription services" markets.[128] For this Paper, I will be focusing on the Commission's investigation of the console market.[129]

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small, permanent increase in relative prices. If on this market, the merging parties have market power, they can exercise it against the interests of consumers. . . . The hypothetical monopolist test only requires that a sufficient number of customers at the margin react to a price increase to make it unprofitable, not all customers or the average customer. Thus, if in response to a hypothetical 5% price increase, the overall quantity demanded decreases by a sufficient amount so that the margin lost on those products which are no longer sold outweighs the increased margin on the products still sold, then this will eliminate the monopolist's ability to profitability raise prices."[119] Small but significant price increase generally is "in the range of 5% to 10% for market definition purposes." *Id.* at 213-14.

[120] *See* Microsoft, *Xbox Consoles*, XBOX, https://www.xbox.com/en-US/consoles?xr=footnav (accessed Mar. 22, 2023). *See also Xbox*, WIKIPEDIA, https://en.wikipedia.org/wiki/Xbox (accessed Mar. 22, 2023).

[121] *See* Microsoft, *Windows*, MICROSOFT, https://www.microsoft.com/en-us/windows (accessed Mar. 22, 2023). *See also Microsoft Windows*, WIKIPEDIA, https://en.wikipedia.org/wiki/Microsoft_Windows (accessed Mar. 22, 2023).

[122] *See* Microsoft, *Microsoft Store App*, MICROSOFT, https://apps.microsoft.com/store/apps (accessed Mar. 22, 2023). *See also Microsoft Store*, WIKIPEDIA, https://en.wikipedia.org/wiki/Microsoft_Store (accessed Mar. 22, 2023).

[123] *See* Microsoft, *Xbox Game Pass*, XBOX, https://www.xbox.com/en-US/xbox-game-pass?xr=shellnav (accessed Mar. 22, 2023).

[124] In the industry, games published by console manufacturers on their own platforms are called "first-party" games. For a list of Microsoft's 23 game development studios (not including the Activision-Blizzard studios), see Microsoft, *Welcome to Xbox Game Studios*, XBOX, https://www.xbox.com/en-US/xbox-game-studios (accessed Mar. 22, 2023).

[125] *See* Microsoft, *Xbox Cloud Gaming (Beta)*, XBOX, https://www.xbox.com/en-US/cloud-gaming (accessed Mar. 22, 2023).

[126] *See supra* note 6 and accompanying text.

[127] Eur. Comm'n, *supra* note 1.

[128] FTC, In the Matter of Microsoft Corp. and Activision Blizzard, Inc., Administrative Part 3 Complaint (Redacted Public Version), Docket No. 9412, ¶ 14, (Dec. 8, 2022) [hereinafter "FTC Complaint"], available at https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

[129] Due to the CMA's decision, cloud gaming has become the market of interest. For some informative opinions on this market, Florian Mueller has written the most criticizing the CMA's decision. *See, e.g.*, Mueller, *supra* note 77.

ii. Activision-Blizzard's Markets

Activision publishes games for consoles, PC, and smartphones.[130] Call of Duty and Candy Crush are some of their most popular franchises, but they also publish World of Warcraft (the most popular MMO) and StarCraft II (an important game in the eSports community).[131] The FTC challenge focuses on Activision's "AAA games."[132]

iii. Refining the "Console Market" Definition

Should the Commission accept the FTC's proposed "high-performance consoles" market for its own analysis? Unsurprisingly, the FTC and Microsoft have conflicting "console market" definitions, with the FTC's being narrower and Microsoft's and Activision's being broader. The FTC's "High-Performance Consoles" market includes only "the most recent generation of Microsoft Xbox and Sony PlayStation consoles—the Xbox Series X|S and the PS5;"[133] it does not include the Nintendo Switch because the FTC deems the Switch to be "highly differentiated from the Xbox and PlayStation consoles in significant ways."[134] More specifically, the FTC argues that Microsoft and Sony's consoles "are characterized by greater computational power, different content portfolios, different form factors and technical specifications, generally higher prices, and different release cadences than the Nintendo Switch."[135] Finally, the FTC excludes gaming PCs and mobile devices.[136] Meanwhile, implicitly (based on the chart provided in its answer to the FTC's Complaint), Microsoft includes Sony's, Nintendo's, and Xbox consoles within its console market definition.[137]

Activision's answer to the Complaint is more explicit: "[T]he FTC's made-for-litigation markets defy economic reality. The FTC has invented highly gerrymandered relevant product markets . . . . But even a cursory view of well-established facts demonstrate that these markets

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Meanwhile, Helen Thomas is more sympathetic to the CMA's arguments. *See* Helen Thomas, *Closed for Business? Sizing up Big Tech's UK Temper Tantrum*, FIN. TIMES (May 11, 2023), https://www.ft.com/content/4d56b838-ddc5-408b-904e-2ccbf46de624 (stating that the CMA's concerns "are shared by regulators globally, including in the US and Europe. Even if, as speculated, the European Commission clears the deal next week, that will be down to its greater comfort with behavioural remedies, where it is Europe that looks more like the outlier globally than the UK"). For the view that the CMA's decision may threaten the viability of behavioral remedies in vertical mergers in the future, see Stéphane Dionnet & Max Küttner, *UK: CMA Blocks Microsoft's Acquisition of Activision Blizzard; 'Game over' for Behavioral Remedies?*, MONDAQ (May 11, 2023), https://www.mondaq.com/uk/gaming/1314132/cma-blocks-microsofts-acquisition-of-activision-blizzard-game-over-for-behavioral-remedies ("Although the CMA has blocked the deal on the grounds of what looks like a well-established foreclosure theory of harm (cf. ICE/Trayport), its decision is also the expression of more novel and overall, rather vague concerns over the strengthening of a digital ecosystem. More importantly, however, the case reveals a worrisome stance on behavioral remedies, which have traditionally played an important role in removing vertical concerns.").

[130] *See* Activision-Blizzard, *About Our Company*, ACTIVISION-BLIZZARD, https://www.activisionblizzard.com/about-us (accessed Mar. 22, 2023).

[131] *See* https://www.activision.com/; https://www.blizzard.com/en-us/; *and* https://www.king.com/ (all owned and controlled by Activision-Blizzard).

[132] FTC Complaint, *supra* note 128, ¶¶ 43-59, 66(b), 97-102, 110. AAA games are discussed in Section IV, subsection iii below.

[133] FTC Complaint, *supra* note 128, ¶ 64.

[134] *Id.* ¶ 65.

[135] *Id.* ¶ 66. The FTC explains these arguments further in *id.* ¶¶ 66(a)-72.

[136] *Id.* ¶ 71.

[137] Microsoft, In the Matter of Microsoft Corp. and Activision Blizzard, Inc., Amended Answer and Defense of Respondent Microsoft Corp., at 4 (Jan. 4, 2023) [hereinafter "Microsoft's Answer"], https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

are entirely artificial. For example, the concept of a 'high-performance console' market that excludes the Nintendo Switch is patently ridiculous. Nintendo competes directly with PlayStation and Xbox, offering many of the same games and targeting the same gamer demographics. . . . Different strategies of competing for consumer spend[ing], like the Switch's innovative mobile capability, do not define a separate relevant market."[138]

Activision even argues that "[m]ulti-game subscription services do not exist in a market unto themselves, but rather are simply another way for gamers to pay for and access games. The investigative record is chock-full of evidence that gamers frequently switch between multigame subscriptions and other methods of purchasing and downloading games. Indeed, Activision's aversion to subscription is driven in no small part by the substantial cannibalization effect that multi-game subscriptions have on full game sales—*i.e.*, gamers can and do directly substitute game purchases for subscription access."[139] Likewise, "[t]he FTC's contrived cloud gaming market suffers a similar flaw: cloud gaming is simply a new . . . gaming feature that aims to offer a different way to access content, not a separate market."[140]

In the following subsections, I will evaluate the legitimacy of the FTC's console market definition and whether the Commission should accept it. While neither Activision nor Microsoft's Answers specifically address whether gaming PCs or mobile devices are part of the console market, implicitly Activision's arguments that subscription services and cloud gaming are just other ways to access games opens up the possibility to include these devices, because these devices may also simply be other means to play popular games such as *Call of Duty: Warzone* (which is even available on mobile devices).

d) Should mobile devices be part of the console market?

In *Activision Blizzard/King*,[141] the Commission suggested that mobile devices are separate from the console market: "In *Activision Blizzard/King* (2016) the Commission concluded that there are indications that the market for publishing of game software should be segmented according to the frame platforms in: (i) PC games; (ii) console games; and (iii) mobile games. The provision of those services differed significantly along the following lines: pricing policy (upfront for PC and console and mostly free for mobiles), production costs (large initial investment for PC and console), characteristics (type of design and graphics, length of sessions, multiplayers, etc.), and distribution channels (mobile apps versus digital download platforms or traditional retailing). The discussion raised elements of supply-side substitutability noting that the same games may be developed for all platforms, and whether substitutability should be assessed on the basis of the underlying software platform such as games for social networks and games for mobiles. However, the Commission did not conclude on this. The Commission was equally indecisive on the geographic scope of the market in *Vivendi/Activision* (2008) but found markets to be at least EEA wide in *Activision Blizzard/King* (2016)."[142]

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[138] Activision-Blizzard, In the Matter of Microsoft Corp. and Activision Blizzard, Inc., *Answer and Defenses of Respondent Activision Blizzard, Inc.*, at 5 (Jan. 4, 2023) [hereinafter "Activision's Answer"], https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.
[139] *Id.*
[140] *Id.*
[141] Case M.7866—*Activision Blizzard/King* (2016).
[142] Henri Piffaut, *Part 8—Merger Control in Specific Sectors: Chapter 2—Telecommunications, Media and Internet Services*, *in* EU COMPETITION BOOK TWO, *supra* note 52, at 939, 1016.

Likewise, in the U.S., in *Epic v. Apple*, the court stated that "[s]ubstantial evidence . . . show[s] that mobile gaming is a distinct submarket."[143] The evidence the court considered when making this finding was that the mobile gaming market "'has not significantly cannibalized revenues from the PC or console gaming markets,' which suggests that consumers are not necessarily substituting among them."[144] The court also noted the different types of user bases for mobile gaming compared to "[m]ultiplatform gaming," and that most mobile games are not available on either consoles or PC.[145] Finally, the court added that industry experts do not treat game transactions for iOS devices as being in competition with transactions on consoles or PC.[146] Thus, we can exclude mobile devices from the console market (and mobile games from the game publishing market).

e) Should the Nintendo Switch be part of the console market?

Should we exclude the Nintendo Switch, as the FTC suggests?[147] In *Epic v. Apple*, the court calls the Switch a "hybrid platform," meaning it is a platform with both mobile and console elements.[148] Nevertheless, the court stated that it "would not at this time find that the Switch . . . [is] part of the mobile game transactions market."[149] The FTC argues the Switch should not be included in the same market as the Sony and Microsoft current generation consoles because the Switch has substantially less technical power,[150] there is less price competition between the Switch and the other consoles,[151] many third-party games available on the PS5 and Xbox Series X/S are not available on the Switch,[152] and the Switch has a mobile option, whereas Sony and Microsoft's consoles do not.[153] Additionally, if users do have multiple consoles, they typically have both the Switch and either the PS5 or Xbox Series X/S; it is much less common for a user to have both of Sony and Microsoft's consoles, suggesting that they fulfill a similar product niche, whereas the Switch has its own distinct utility.[154]

Nevertheless, marketing to different niches would not be enough on its own to find a separate market. The U.S. court found in *Epic* that Apple's walled garden niche helped to differentiate it from Google's more open system, promoting "interbrand competition."[155] To the extent that we view exclusive games as an anti-consumer means of differentiating consoles, rather than judging consoles by their technical specifications, Nintendo's success could be reflective of its ability to create technical hardware that satisfies a previously unmet consumer

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[143] Epic Games, Inc. v. Apple Inc., 599 F. Supp. 3d 898, 1019 (N.D. Cal. 2021), *aff'd in part, rev'd in part and remanded*, No. 21-16506, 2023 WL 3050076 (9th Cir. Apr. 24, 2023).
[144] *Id.* at 1019-20.
[145] *Id.* at 1020.
[146] *Id.*
[147] FTC Complaint, *supra* note 128, ¶¶ 65-72.
[148] Epic Games, *supra* note 143, at 1032.
[149] *Id.* at 1020.
[150] FTC Complaint, *supra* note 128, ¶ 66(a).
[151] *Id.* ¶ 66(d).
[152] *Id.* ¶ 66(b).
[153] *Id.* ¶ 66(c).
[154] "'[D]ual console owners' are more likely to own one High-Performance Console and a Nintendo Switch than two High-Performance Consoles. NPD Group, a trusted source for video game industry data, shows that as of 2020, nearly 40 percent of PlayStation and Xbox owners also owned a Switch, while only [REDACTED] percent of PlayStation console owners owned an Xbox and only [REDACTED] percent of Xbox owners own a PlayStation." *Id.* ¶ 69.
[155] Epic Games, *supra* note 143, at 1038.

desire (a console that can fulfill both mobile and TV-based gameplay),[156] whereas the PS5 and Xbox Series X/S are so technically indistinguishable that they must rely on exclusive games to differentiate themselves.

Additionally, while the type of AAA games that the Switch has differ to some degree from those offered by the PS5 and Xbox Series X/S, Nintendo still has plenty of AAA games: *Legend of Zelda: Breath of the Wild*, *Super Mario Odyssey*, and numerous *Pokémon* games, to name some of the most popular Switch games. These games may not be the most technically demanding (in the sense that they do not require high-end computing software to render), but they certainly were expensive to produce,[157] are sequels to very valuable franchises, and induce people to buy a Switch, all factors that would seem to be more relevant when classifying a game as AAA, especially as that term is used in the industry, rather than by the FTC. Nintendo's just-released *Zelda* game, *The Legend of Zelda: Tears of the Kingdom*, "may very well be the year's biggest hit."[158] While the aforementioned games are all first-party titles, *Call of Duty*'s absence on Switch, along with much of Activision's catalogue, should not be the decisive factor in the market analysis. Instead, that should factor into one's analysis of the harms and benefits of this transaction: Can a console compete without *Call of Duty*? Nintendo's Switch would suggest so; it does not even have that series.[159]

Consumers appear to view the Nintendo Switch as competing with Sony and Microsoft's consoles. When statistics are collected for the performance of consoles during this console generation, they often include statistics on Nintendo's console.[160] The Switch is more frequently judged against the performance of Sony and Microsoft's consoles than it is against mobile devices or handheld gaming devices.[161]

What of Valve's Steam Deck?[162] Due to its open architecture, and the fact that the Deck syncs with one's Steam library, the Deck is often compared to low to mid-range PCs.[163] Since it

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[156] This proposition is complicated by the fact that Nintendo's most popular games are first-party exclusives: users may multi-home with Nintendo not just because the console fulfills an unmet consumer demand, but also because the games available on the Switch are unavailable elsewhere, including PC, and the Switch is a comparatively inexpensive console.

[157] *See* Ollie Barder, *'Zelda: Breath of the Wild' Needs to Sell 2 Million Copies to Break Even on Its Development Costs*, FORBES (June 30, 2016), https://www.forbes.com/sites/olliebarder/2016/06/30/zelda-breath-of-the-wild-needs-to-sell-2-million-copies-to-break-even/?sh=ef10f43615f0.

[158] Jason Schreier, *Nintendo's 'The Legend of Zelda: Tears of the Kingdom' Goes on Sale Amid Raves*, BLOOMBERG NEWS (May 12, 2023), https://www.bloomberglaw.com/product/blaw/document/RUK7G9DWLU68?criteria_id=da791fcc23ecf23b0ee00c93c834af74&searchGuid=e7461dcc-b1e2-4d0b-9a2e-8f680007da9b.

[159] Although Nintendo recently entered into a long-term contract with Microsoft to have future iterations of *Call of Duty* release on Nintendo's consoles, should this acquisition go through. *See supra* note 18 and accompanying text.

[160] *See* VGChartz, *Current Generation Video Game Console Unit Sales Worldwide from 2017 to 2021*, STATISTA, https://www.statista.com/statistics/276768/global-unit-sales-of-video-game-consoles/.

[161] But non-hybrid handheld gaming devices are severely limited. The Switch and devices like it (such as the Steam Deck) may have simply replaced the handheld gaming market, which used to be occupied by devices such as Nintendo's 3DS and the PlayStation Vita.

[162] *See* Valve, *Steam Deck*, STEAM, https://store.steampowered.com/steamdeck (accessed Mar. 22, 2023).

[163] *See* Laura Maidman, *Steam Deck vs. Gaming PC*, CHILLBLAST (Apr. 8, 2022) (last updated May 30, 2022), https://www.chillblast.com/learn/steam-deck-vs-gaming-pc/amp/ ("The big selling point of the Steam Deck is that it's a portable *gaming PC* . . . Although the Steam Deck uses clever optimization, a lightweight operating system, and a relatively low-resolution screen to deliver solid performance at decent detail levels in many modern games, it's not a patch on the capability of a fully-fledged gaming PC.") (emphasis added). *But see* Jordan Minor, *The Steam Deck Replaces the PlayStation and Xbox, Not the Switch*, PC MAG (Jan. 14, 2023), https://www.pcmag.com/opinions/the-steam-deck-replaces-the-playstation-and-xbox-not-the-switch (referring to the

syncs with the Steam library, someone with an established Steam library (i.e., a PC gamer) would be the most likely buyer. Like the Switch, it can be played from TVs or portably, although the Deck is designed to at least have the potential to play genres that are more frequently played on PC, such as strategy games. But the Steam Deck is not well-suited for these games, given its control scheme, relative to a desktop or laptop gaming PC, for the reasons outlined above.

Additionally, the Steam Deck requires more technical awareness than a console: the Steam Deck technically syncs with one's *entire* Steam library, but the Deck is only capable of playing a subset of Steam games, particularly ones that are not too technically demanding or are not so old that they run on incompatible software. The Proton computability tool, which is used to run games that are designed officially for Windows on Linux,[164] sometimes requires technical tinkering to get some games to work well.[165] While Steam has "Steam-Deck verified ratings" to help users easily identify compatible games, the lesser ratings ("playable" and "not recommended") are less clear about their performance with certain games,[166] and games are less frequently optimized with the Steam architecture in mind, unlike in the case of consoles. In sum, the Deck is less "plug-and-play" than a console, which is one of the key defining features between the PC gaming and console markets.[167]

Still, the Steam Deck, may demonstrate that a new market is emerging for these hybrid devices that are both portable and can be played from TVs. The Deck's similarity with the Switch likely means that the Commission will group them in the same market; if the Switch is deemed a console, so shall the Deck. In any case, it's unlikely that the Deck's inclusion would significantly influence the Commission's market share analysis, due to the Deck's comparatively small number of users, although it may influence the Commission's analysis of how likely a new console entrant would be.

Steam Deck as a "high-powered handheld PC," but also adding that "[t]he Steam Deck doesn't replace my Nintendo Switch. Instead, it makes me no longer want a PlayStation 5 or Xbox Series X|S"). In essence, Minor views the Deck as being in greater competition with Sony and Microsoft's consoles than with the Switch: "[M]any differences keep me from fully making the Steam Deck swap. For starters, the Steam Deck is too big. The Switch is already borderline oversized, not counting the Switch Lite. The Steam Deck, although ergonomically comfortable, is bulky. Combine that with brief battery life for demanding games, along with frequent patches that require an internet connection, and I almost never take my Steam Deck outside of my apartment. Of course, playing in bed, on the couch, or docked to a TV is still leagues more convenient than sitting at a desk, and synced cloud saves make the Steam Deck a wonderful extension of regular PC gaming. Still, the hardware isn't quite as convenient as a traditional handheld gaming system." On the other hand, he views the deck as "the most approachable and user-friendly gaming PC[] of all time."

[164] The Steam OS is Linux-based.

[165] This drawback of Proton was pointed out to me by a friend who uses Linux. *See also* Minor, *supra* note 162 ("There's a bit of a hard-core bubble in the way we talk about the Steam Deck and its relative ease of use for mainstream audiences. If you don't already know what the Steam Deck is, I wouldn't recommend it unless you're willing to put in work for your entertainment," *and* "[B]eing a PC means it comes with annoyances you don't get with consoles. To have the freedom to customize graphics and install whatever software you want, you must know how to deal with compatibility issues or controller mapping tweaks that make a game playable.").

[166] *See, e.g.*, Mortismal Gaming, *BioShock — Review After 100%*, YOUTUBE, https://www.youtube.com/watch?v=7cZVfOTRDSQ, at 18:10-18:31 ("[BioShock] runs pretty well on the Steam Deck. It has a 'playable' rating from Steam for what I think is some pretty benign reasoning, which is simply that sometimes BioShock will give you compatibility warnings if you're playing it on Steam Deck but the game still works anyway, and then if you want to rename your saves you have to use the in-game virtual keyboard.").

[167] See the following subsection for more details.

f) Should gaming PCs be part of the console market?

Finally, should gaming PCs be included in the console market definition (perhaps revising it to a "premium gaming systems" definition)? As discussed above, in *Activision Blizzard/King*, the Commission separated PC games from console games; if it follows that rationale, gaming PCs should be excluded.[168]

Likewise, the FTC argues that "[g]aming PCs are distinct from High-Performance Consoles due to differences in price, hardware, performance, and functionality (*i.e.*, where and when a game can be played), among other factors."[169] PCs have multiple purposes beyond gaming; most people have a PC in addition to their consoles, although comparatively few would have their PCs primarily for gaming (especially when they already have a current generation console).

There are several factors that make gaming PCs unique relative to consoles. First, computers' operating systems vary and often are determinative over which games one can play on one's PC. The three primary operating systems are Windows, MacOS, and Linux. The vast majority of games only officially run on Windows (or least the vast majority of PC gamers play on Windows),[170] because Windows controls DirectX, a graphics processing software that many games rely on.[171] Of course, Microsoft owns Windows, giving it some interest in the PC gaming market as well. But just because it controls the most popular gaming operating system does not mean Microsoft gets the same kind of licensing revenue from games. PCs are open systems, meaning there are several different digital distribution channels through which one can buy his or her games: Steam (the most popular option by far), Epic Games Store, GOG, Microsoft Store, and Origin, to name the most widely used ones. Only for sales through the Microsoft Store would Microsoft be receiving a cut for third-party video game sales. On the other hand, it partly explains why Microsoft is more willing to release its games on day one on PC, whereas gamers typically have to wait for Sony to release its console exclusives on PC:[172] The more games on PC, the more attractive Windows (which plays almost all of those games) is, whereas Sony has no platform that benefits even marginally; it only benefits through software sales.[173]

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[168] *See supra* note 141 and accompanying text.

[169] FTC Complaint, *supra* note 128, ¶ 71.

[170] Document 1, DeMartini et al., *supra* note 12, ¶ 96 n.1 (stating that "roughly 90% of computer gaming occurs on Windows computers).

[171] As previously mentioned, Proton allows users to play many Windows games on Linux. The Steam Deck may disrupt Windows' control over the PC gaming operating system market. The Steam Deck "runs on SteamOS, an Arch-based distro with built-in Proton support. You can run almost any Windows game on the Deck using Proton. . . . Steam Proton is the compatibility layer that allows SteamOS to run Windows games on the Deck. It enables users to install and run Windows games that do not offer native Linux versions." *See* Rubiat Hossain, *What Is Steam Proton and How Does It Run Windows Games on Steam Deck*, MAKE USE OF (June 2, 2022), https://www.makeuseof.com/what-is-steam-proton-how-does-it-run-windows-games-on-steam-deck/. Thus, Windows may soon no longer be needed to play many games.

[172] Minor, *supra* note 162 ("Unlike Microsoft, which puts its first-party games on PC the same day that the titles hit Xbox, these PlayStation ports tend to appear a few years later. *God of War* and *Horizon* came to PC essentially as playable commercials for upcoming PS5 sequels.").

[173] *See* Eur. Comm'n, *Mergers: Commission Opens In-Depth Investigation into the Proposed Acquisition of Activision Blizzard by Microsoft*, EUROPA (Nov. 8, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6578 ("[A]t this stage of the investigation, the Commission has concerns that the proposed acquisition may reduce competition on the market for **PC operating systems**. In particular, the Commission is concerned that Microsoft may reduce the ability of rival providers of PC operating systems to compete with Microsoft's operating system Windows, by combining Activision Blizzard's

Returning to the differences between PCs and consoles: consoles are sold as complete units that will be capable of playing any games bought for them, whereas PCs are not guaranteed to be able to play a game unless one has invested in sufficient hardware. Thus, PCs tend to require more technical knowledge to use as gaming devices; although one could buy a PC marketed as a "gaming PC" without having to buy the individual components, one would have to pay more attention about when his or her PC has become obsolete for the purposes of AAA gaming. For PCs, one has be attentive of the technical requirements of a game, which requires knowing each individual component of one's PC and whether it meets the recommended or minimum benchmarks. Meanwhile, under most circumstances,[174] if a game says it will play on a PS5, for example, it should be able to run on a PS5. Consoles have clearer, more predictable gaming life expectancies than a gaming PC, especially since, because consoles have standardized architecture, games are more likely to be optimized for them than for a PC, which can be composed of idiosyncratic components.[175] The technical knowledge required to build a gaming PC is even greater; in that submarket, gamers tend to care most about graphics cards and base their system upgrades around those cards and required compatible parts. If one has interest and money, one could upgrade his or her PC to be even more powerful than current generation consoles, to take advantage of modern but performance-intensive graphics processing techniques such as raying tracing (although, since most AAA games are designed with the current generation consoles in mind, very few games can have their fidelity substantially improved on PC; nonetheless, gaming PCs have the potential to attract the ultra-premium gaming crowd because of the potential for greater fidelity).

The discussion of building a PC brings up another important distinction between consoles and gaming PCs: gaming PCs tend to have much higher hardware costs than consoles.[176] A midrange current generation Nvidia or AMD graphics card typically costs at least as much as a current generation console, not even factoring in the other component costs.[177] If one buys a pre-built PC, it will likely be even more expensive, or at least will be more expensive to upgrade in

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games and Microsoft's distribution of games via cloud game streaming to Windows. This would discourage users to buy non-Windows PCs.") (emphasis in original).

[174] But see the launch of *Cyberpunk 2077* on PS4. *See* Luke Plunkett, *Sony Pulls* Cyberpunk 2077 *from PlayStation Store, Says Buyers Can Get a Refund*, KOTAKU (Dec. 17, 2020), https://kotaku.com/sony-pulls-cyberpunk-2077-from-playstation-store-says-1845908592 (reporting on how *Cyberpunk 2077* was pulled from the PS4's PlayStation Store because it performed so technically poorly that it was practically unplayable). However, Sony's response just proves the rule of the "plug-and-play" nature of consoles: the same article quotes Sony as stating that "SIE strives to ensure a high level of customer satisfaction, therefore we will begin to offer a full refund for all gamers who have purchased Cyberpunk 2077 via PlayStation Store." Part of those customer expectations is that any game bought for a console should be able to run on that console.

[175] *See* Mortismal Gaming, *The State of PC Gaming in 2023*, YOUTUBE (Mar. 21, 2023), https://www.youtube.com/watch?v=-YB2DG5W5-0 at 2:50-3:25 (discussing the reasons why multiplatform games are currently tend to release in their worse state on PC).

[176] *Id.* at 5:49-7:12.

[177] *See* Benchmarks, *NVIDIA GeForce RTX 2070 Review*, https://benchmarks.ul.com/hardware/gpu/NVIDIA+GeForce+RTX+2070+review (listing the graphics card's price at $499). By comparison, the standard model of the PS5 costs (MSRP) $500. Kevin Webb, *The PlayStation 5 Is Still Hard to Find. Here Are the Latest Details on How to Get PS5 Restock Updates, Where to Buy, and Upcoming Exclusive Games*, BUS. INSIDER (Feb. 7, 2023) (edited by Steven Cohen), https://www.businessinsider.com/guides/tech/where-to-buy-ps5#:~:text=How%20much%20does%20a%20PS5%20cost%3F,-The%20PlayStation%205&text=The%20PlayStation%205%20comes%20in,the%20digital%20edition%20is%20%24400.

the future.[178] When consoles release, they sell at a loss,[179] even after the bulk discounts they likely receive from component manufacturers, meaning it is simply not possible to build a PC that is as powerful as a console at the time of release at the same price point.[180] A gaming PC may save a gamer money if they buy a substantial number of games, since the increased marketplace competition described above tends to result in more frequent software sales, and the open architecture of PCs and their marketplaces makes it easier for indie developers, who have lower-priced games, to release their games on PC, but the significantly greater upfront capital required to have a gaming PC likely attracts a different category of gaming consumers; it is no wonder that the gaming community has terms for "PC gamers" and "console gamers."[181]

Finally, PCs have distinct peripherals and are better suited to certain genres, both factors which influence the PC gaming environment relative to consoles. Unless one buys a dedicated controller that is compatible with one's PC, PC games are usually played with a keyboard and mouse. Even games that recommend playing with a controller can usually be played with a keyboard and mouse because that is the "default" control system available to users on PC. PC games are also typically played on a desk, a short distance away from the computer, or laptop, allowing mobility, rather than on a couch in front of a TV.[182] All of these factors make PCs much better suited to strategy games or computer roleplaying games, which both often require a substantial number of controls and small UIs to convey all the necessary information; while console titles in these genres exist, they are much more numerous on PC or at least receive preferential treatment on PC (presumably because of the larger userbase).[183] Meanwhile, consoles tend to be better suited to local coop games, since it is easier for multiple players to play from a couch than in front of someone's desktop monitor, or fighting games, which most players prefer to play with a controller.

If all this were not enough, the fact that even Sony, who does not have an operating system market (unlike Microsoft), is now releasing its first-party titles on PC strongly suggests that Sony views gaming PCs as distinct enough from current generation consoles that the increased software sales on PC make up for any marginal cannibalization of console sales. In theory, if gaming PCs did compete heavily with consoles, then releasing console exclusives on

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[178] I am speaking from personal experience: Back when I bought pre-built PCs, they were typically built in cases that made it very difficult to replace components within anything larger. Meanwhile, I could purposely build my own PC (by selecting an appropriately spacious case) to fit larger components in the future.

[179] *See* Matthew Humphries, *Sony Says $499 PS5 No Longer Sells at a Loss*, PC MAG (Aug. 4, 2021), https://www.pcmag.com/news/sony-says-499-ps5-no-longer-sells-at-a-loss#:~:text=Sony's%20chief%20financial%20officer%2C%20Hiroki,the%20actual%20cost%20of%20manufacturing ("Sony's chief financial officer, Hiroki Totoki, has this week confirmed that the company's $499 PS5 console is no longer selling at a loss. Typically, when a new games console launches its price point is below the actual cost of manufacturing. But over time, through a combination of bulk component orders and the refining of the hardware design, the cost falls below the retail price. The PS3 was sold at a loss for nearly four years, the PS4 was profitable within six months of its launch, and the PS5 has taken eight month."). In Section IV, I will discuss some of the reasons why it benefits console companies in the long run to initially sell their hardware at a loss.

[180] *See* Mortismal Gaming, *supra* note 175.

[181] One popular PC-gaming-centric journalism source is labeled with these consumer terms in mind: PC GAMER, https://www.pcgamer.com/.

[182] But see my discussion of the Steam Deck above. If one classifies the Deck as a PC, then that is an example of a device frequently played on a TV or couch.

[183] Paradox grand strategy games, such as *Stellaris*, typically receive DLC on PC far sooner than on console. Likewise, the *Pathfinder* games (a cRPG franchise) were released on PC first and have better performance on PC.

PC would reduce the console's desirability as a platform.[184] Of course, Sony is not releasing its first-party exclusive at the same time on PC as it does on PS5, suggesting it views some marginal competitive effect from gaming PCs. But Sony *never* releases its first-party exclusives on Xbox, suggesting that the competitive effect from Microsoft's consoles is significantly stronger than on PC. The reduction in console sales from releasing software on PC must be small enough that Sony views that increased revenue from software sales on PC to be greater than the reduced console sales (and the lifetime software purchases these console buyers would have made); one can infer that Sony presumes that many of the buyers of its games on PC would have never bought a Sony console in the first place.

For all these reasons, separating the PC gaming system market from the console market likely makes even more sense than separating the Switch from the "premium console market."

iv. Refining the Gaming Software Publishing Market

The Commission has two significant decisions assessing the video game software markets: *Vivendi/Activision* (2008)[185] and *Activision Blizzard/King*: "Regarding electronic game devices and software, the Commission left open in its decision in *Vivendi/Activision* (2008) whether online and offline games are part of the same relevant market. It noted that online games have different characteristics (internet connectivity, creation of a gaming community, persistent nature of game), target groups and pricing structures than offline games. However, the delineation would be blurred somewhat due to, for instance, the growing number of offline games with online functionalities. In *Activision Blizzard/King* (2016) the Commission concluded that there are indications that the market for publishing of game software should be segmented according to the frame platforms in: (i) PC games; (ii) console games; and (iii) mobile games. The provision of those services differed significantly along the following lines: pricing policy (upfront for PC and console and mostly free for mobiles), production costs (large initial investment for PC and console), characteristics (type of design and graphics, length of sessions, multiplayers, etc.), and distribution channels (mobile apps versus digital download platforms or traditional retailing). The discussion raised elements of supply-side substitutability noting that the same games may be developed for all platforms, and whether substitutability should be assessed on the basis of the underlying software platform such as games for social networks and games for mobiles. However, the Commission did not conclude on this. The Commission was equally indecisive on the geographic scope of the market in *Vivendi/Activision* (2008) but found markets to be at least EEA wide in *Activision Blizzard/King* (2016)."[186]

Should the Commission consider AAA games to be a separate market? The FTC's Complaint strongly implies that AAA games are their own submarket for video games, while Microsoft and Activision consider the term too vague to constitute a market. The FTC does not specifically define AAA gaming content as its own market. Nevertheless, the FTC does identify such content as "a substantially important input for High-Performance Consoles."[187] The FTC defines AAA games as those that "are costly produce because of the creative talent, budgets, and time required for development. Gamers highly anticipate the release of AAA games."[188] Microsoft's Answer meanwhile argues that "the term 'AAA' lacks a defined meaning in the

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[184] For more on the importance of console exclusives in generating console sales, see Section IV, subsection iii below.
[185] Case M.5008—*Vivendi/Activision* (2008).
[186] Piffaut, *supra* note 142, at 1016.
[187] FTC Complaint, ¶ 97.
[188] *Id.* ¶ 3.

industry."[189] Activision agrees with Microsoft's assessment (that the term lacks a defined meaning), but also states that "some industry participants" refer to Activision's games as "AAA."[190] Activision also argues that "AAA" content is not a "substantially important input" for video game platforms because successful video game content has been "offered by a wide array of video game publishers and developers over the course of the past 20 years, and because the term 'substantially important' is vague and undefined."[191]

Surprisingly, the private Complaint brought by the group of California gamers goes to the most effort to define the AAA gaming market: AAA games "are video games with the highest production values, the best graphical and visual experiences, are the most marketed and widely distributed, and are highly anticipated by industry participants."[192] Such games are "unique in the industry" and "unlikely to be substituted for other video games" because they "have distinct customers due to their widespread appeal and marketing to the general public as opposed to more limited marketing for other non-Triple-A games."[193] On the supply side, "only a small number of companies" are able to publish AAA games.[194] Finally, AAA games "have a unique pricing structure compared to other games and command the highest prices. They also often offer additional editions of the game that command a higher price with additional cosmetics, physical goods, or other benefits."[195] For these reasons, the Complaint concludes that AAA games constitute "a relevant product market within the meaning of Section 7 of the Clayton Act."[196]

In the following subsections, I will discuss the merits and flaws of this division into "AAA games" and "non-AAA" games.

a) AAA games vs. indie games.

As discussed, the FTC's challenge focuses on Activision's production of AAA games. The distinction between AAA games and "other non-mobile games" is important not only because it strengthens their argument in favor of precluding the Switch (which lacks many third-party AAA games, if one defines that as meaning high-fidelity games),[197] but also because it strengthens their argument that games like the ones Activision publishes cannot easily be replaced by a competitor. All entertainment markets, including games, "consist of two separate,

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[189] Microsoft's Answer, *supra* note 137, ¶ 3.
[190] Activision's Answer, *supra* note 138, ¶ 3.
[191] *Id.* ¶ 97.
[192] Document 1, *DeMartini et al.*, *supra* note 170, ¶ 165.
[193] *Id.* ¶¶ 166-67.
[194] *Id.* ¶ 168.
[195] *Id.* ¶ 169.
[196] *Id.* ¶ 170.
[197] But, as I noted before, the defining feature of AAA within the industry is not graphical fidelity but instead the production and marketing budget allocated to the game; while there is a correlation between spending a lot on a game and it having higher graphical fidelity, those capital investments can go into other features of the game that still make it AAA as far as the industry is concerned. Indeed, all of the features present in the FTC's AAA definition (costly production budgets and consumer anticipation) are present in Nintendo's most popular franchises. One simply has to infer that the FTC is associating high budgets with games that require better hardware to run them, but many things factor into game development besides graphical fidelity. *See* Rocket Brush Studio, *How Much Does It Cost to Develop a Game*, ROCKET BRUSH STUDIO (BLOG) (May 6, 2022), https://rocketbrush.com/blog/how-much-does-it-cost-to-develop-a-game (discussing the "different expenses in game development", but estimating that "[t]he average AAA game takes about four years to develop, with an average cost of about $80 million and higher. But this amount can vary significantly depending on the type of game and its level of complexity. . . . Overall, the cost of making an AAA game has further increased over the years due to the increasing demand for high-quality graphics and gameplay.").

but intertwined sub-markets in which the kinds of products that are exchanged overlap only partially. The first sub-market consists of mainly artistic products that are produced for modest budgets by smaller-sized firms. A widely used label for such offerings is 'independent,' such as in independent films, games, or music. Here, independent can refer to the producer's status and the source of funding (as in produced outside 'the industry'). But it can also mean the product's very own character: the product is considered independent because it ignores commercial, 'mainstream' requirements and industry 'rules.' . . . The second sub-market encompasses products with a commercial focus, produced for higher budgets by bigger-sized firms which are an essential part of the global entertainment industry, such as the film and game studios, the major (music) labels, or the 'big' publishers."[198] Under this dichotomy, AAA games (and studios that publish them) are part of the latter submarket. There are very few companies that are part of this submarket: Ubisoft, Take-Two, Electronic Arts, and (until this acquisition goes through) Activision-Blizzard are the largest third-party publishers in this space.[199]

Are indie games and AAA games so distinct from each other that they should each constitute separate submarkets? Across all entertainment industries, "there is evidence that such cross-market substitution does indeed exist, at least to a certain degree."[200] Thus, major publishers "must not only manage their critical resources and deal with competition from other majors and studios, but also fend of competition from independent producers."[201] An indie developer released *Minecraft*, for example, which became one of the most successful games of all time.[202] Nevertheless, such indies are the exception rather than the rule; far more indies fail, whereas the resources behind a AAA game typically result in safer financial bets, especially for the sequels that predominate this space.[203]

Still, this competitive pressure from indies or "AA" games suggests that "chains of substitution" may apply, such that all of these are within the same market: "The concept of 'chains of substitution' refers to a situation where two or more products can be regarded as belonging to the same product market without being direct substitutes for each other, because their pricing is constrained by another product, which is a substitute for both products."[204] One

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198 Thorsten Hennig-Thurau & Mark B. Houston, *Why Entertainment Markets Are Unique: Key Characteristics*, *in* ENTERTAINMENT SCIENCE: DATA ANALYTICS AND PRACTICAL THEORY FOR MOVIES, GAMES, BOOKS, AND MUSIC (THORSTEN HENNIG-THURAU & MARK B. HOUSTON, AUTHORS), 125, 125-26 (2019).
199 *DeMartini et al.*, *supra* note 170, ¶ 168.
200 Hennig-Thurau & Houston, *supra* note 198, at 128.
201 *Id.*
202 B.J. Ard, *Creativity Without IP? Vindication and Challenges in the Video Game Industry*, 79 WASH. & LEE L. REV. 1285, 1315 (2022) (noting that some indies "become breakout hits—*Minecraft* and *Stardew Valley* both originated with solo developers—but countless others never find their audience").
203 This is not to say that AAA games never do financially poorly. Just like movies with blockbuster budgets, such investments result in a greater *likelihood* of success, but do not guarantee such success. Notable AAA failures include *Anthem* (*see* Jason Schreier, *How BioWare's Anthem Went Wrong*, KOTAKU (Apr. 2, 2019), https://kotaku.com/how-biowares-anthem-went-wrong-1833731964) and *Forspoken* (*see* Anthony Wood, *Square Enix: Forspoken Sales Were 'Lackluster' and Its Reception 'Challenging'*, IGN (Mar. 10, 2023), https://www.ign.com/articles/square-enix-forspoken-sales-were-lackluster-and-its-reception-challenging), among countless other games. But these were new franchises. Sequels to established franchises (including *Call of Duty*) tend to do well even if they are critically (and by popular opinion) poorly received. *See* Kirk McKeand, *Mass Effect: Andromeda Was a Financial Success*, PC GAMES^{N} (July 28, 2017), https://www.pcgamesn.com/mass-effect-andromeda/mass-effect-andromeda-sales-numbers ("EA have just released their latest earnings report and it seems like Mass Effect: Andromeda was a sales success."). I will discuss the importance of sequels in the AAA gaming space in the next Section.
204 Simon & Listl, *supra* note 3, at 267.

type of chains of substitution "concerns products which have all the same basic functionality but come in different sizes or qualities for a continuum of end users."[205] As an example, consider the hotel market: "Economy two-star hotels are not a close substitute for luxury five-star hotels. However, in between these two extremes there are other categories. A rise in the price of the most inexpensive hotel might affect the demand for hotels adjacent to it in quality and size, which in turn will affect conditions in hotels adjacent to them, and so on until the 'ripple effect' extends to the entire hotel market."[206]

Given this potential chain of substitution, it may be more fruitful to consider AAA classification when considering the effects of input foreclosure: "[A]t the stage of product market definition it is almost impossible to identify the boundaries of the relevant product market for differentiated (consumer) goods precisely. Rather, the market definition exercise will help identify[] which products pose a competitive constraint on the products of the merging parties, although to a varying degree. It is then determined in the competitive assessment to what degree the products under investigation are constrained by other products; and ultimately, to what extent the merging parties are constraining each other."[207]

As will be discussed more below, AAA exclusives can be vital to console sales; indie games are much less likely to induce a potential customer to buy a console, especially since it is far more likely that one's multipurpose PC (or last-generation console) can play an indie game, particularly if one has a Windows operating system.[208] Just like a movie theater cannot survive on indie movies alone, a gaming console cannot survive only (or even just predominately) on indie/non-AAA games.

Given the importance of AAA games in generating console sales, it is important to discuss the "colossal entry barriers": "At the heart of the resource-based theory is the logic that firms can achieve a sustained competitive advantage in an industry if they own a distinct set of 'strategic resources' and implement strategies that make use of these resources. Via such strategies, strategic resources can create massive entry barriers (or, in the language of the resource-based theory, 'resource position barriers.'). What are those strategic resources, and

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[205] *Id.*

[206] *Id.* at 224. *See also id.* at 268 ("This concept, and the difficulty to find clear delineations, is explained in *SEB Internationale/WMF Group* (2016), concerning cookware: '*There is no established scale to measure quality and the limit between each price categories [sic.] is very blurry. There are products are [sic] at every price points [sic.] and, whereas a product which cost [sic.] say EUR 30 may not necessarily compete with a EUR 60 product, it will compete with a EUR 45 product which will in turn compete with the EUR 60 product*.'")

[207] *Id.* at 272. *See also* Bengtsson et al., *supra* note 106, at 441-43 ("As a pre-requisite for the theory of harm based on input foreclosure, the input supplied by the merged firm should in principle be important to its downstream competitors so as to appreciably raise their costs, or otherwise affect their downstream competitiveness. An important starting point is thus to assess the supply patterns prior to the merger (as well as their likely developments absent the merger) and the alternatives available to the downstream rivals. The importance of a product or a service is often determined by the significance of the cost that it represents relative to the final price of the downstream product or service. Thus, in several decisions, the Commission has considered that foreclosure could not affect downstream rivals' competitiveness because the input cost contributed only a small fraction of the overall selling price of the downstream product. Conversely, if the input cost is relatively high, the Commission is more likely to consider that the merged firm supplying it would have the ability to affect downstream competition. However, there may also be cases where the supply of input—despite it representing only a small share of final prices—is very important for downstream competition. For instance, the input may be an essential facility, or an important component without which the final product could not be manufactured or competitively sold on the market. It may also be a significant means of differentiation for the downstream product.").

[208] *See supra* Section III(iii)(e) and accompanying text (starting with text on the Steam Deck, connected to note 162).

what makes them powerful? According to resource-based theory, they are firm-controlled assets and capabilities that are rare, valuable, inimitable (i.e., cannot be easily copied by competitors or substituted by other resources), and sustainable. Such resources create a long-lasting competitive advantage which is responsible for the 'strategic' character of strategic resources. Resource-based theory thus tells us that success in entertainment's commercial sub-market depends on two things: the possession of such strategic resources, along with their transformation into successful market actions via powerful strategies. . . . We have identified four types of strategic resources that can help making the difference: (a) financial production and marketing resources, (b) distribution resources, (c) access to or control of creatives and their past works, and (d) technological resources."[209] To make this analysis more specific to the gaming industry: AAA game development "entails significant production costs. Studios employ hundreds of programmers and artists, many dedicated to crafting the increasingly photorealistic graphics and animation that gamers have come to expect, at an estimated running expense of $10,000 per month per employee over several years. Demands have also increased with the growing popularity of 'open worlds' in which players can freely explore large virtual areas. Some open worlds now exceed 100 square miles of virtual space, requiring developers to populate every street, alley, and forest. As a result, contemporary AAA games routinely cost $100 million or more for development alone."[210]

In sum, the high barriers to entry make it difficult for a new independent publisher to fill the hole left by Activision-Blizzard's acquisition. As the following Section will make clear, this is all the more so the case where users have sticky loyalty to particular franchises (meaning, even games of the same quality and genre are not fungible with one another), which seems to be the case with AAA games especially.

On the other hand, AAA games, whether as it is defined by the FTC or in the private Complaint, is a vague market definition when analyzed precisely, rather than just on a "I know it when I see it" basis. As Mueller argues, "the FTC presents no objective criterion. In the end, it's about budget. . . . Consumers do not care about game makers' budgets . . . they want to have fun. That's why it's not a suitable market definition. That's why it's not a suitable market definition."[211] I do not entirely agree with the analysis that "[c]onsumers do not care about game makers' budgets," although it depends on how much the individual consumer pays attention to the video game industry and how much they care about the things that only AAA games can offer (often, high-fidelity or a hyper-realistic open world; an indie company could not make the world of *Red Dead Redemption 2*, for example). It is very easy to find articles assessing the state of the "AAA games industry" and comparing it to the state of indie games, suggesting that consumers *do* pay attention to the budgets of games.[212] While these articles decry the state of the

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[209] Hennig-Thurau & Houston, *supra* note 198, at 129.
[210] Ard, *supra* note 202, at 1309-10.
[211] Mueller, *supra* note 73.
[212] *See, e.g.*, Jake Tucker, *The AAA Games Industry Is Doomed*, NME (Feb. 3, 2023), https://www.nme.com/features/gaming-features/the-aaa-games-industry-is-doomed-3391969 ("Even at a surface level, the issues are obvious: video games used to be made by a handful of people and sold for about the same price as they do today. Now, games are hideously expensive, take years to make and the audience now spends more money and time on their favourite games – spending less of both on newer releases. . . . As graphical fidelity has improved, the amount of work required to create assets has increased and the only way to feasibly release a game without ten years of dev time is to staff up. The investment required to actually release something into the world now is so much higher; the business of creating games is now nearly unrecognisable from where it was 25 years ago." But the same article notes that "there are now more games clamouring for people's attention," which implies strong cross-market competition between indie and AAA games.); Emma Roth, *Why Are AAA Games So Bad? Are*

AAA industry, it is in part because of their large budgets; consumers expect more of a game that costs more (and only AAA games are priced at $60-70, so the price of the game itself signals whether it had a "AAA" budget or an indie budget).[213] Nevertheless, millions of copies of AAA games are sold all the time, despite the higher price tag of AAA games (which typically cost $60-70; meanwhile, indie games often cost around $20) and the more frequent usage[214] of microtransactions or other monetization schemes. This is because AAA games provide features that are impossible on indie budgets.

Budgetary differences lead to noticeably different games and game design decisions: AAA studios "have to play safe, while small teams can swing at risky, dangerous and exciting ideas. The flip side of this freedom is a decrease in product quality due to a smaller budget. The gameplay here is unlikely to be perfect, the graphics will not reach great heights, as well as the animation. . . . The gameplay is unlikely to be particularly deep: you don't have enough budget to hire many game designers, and one person can complete a limited number of tasks in a day. That is, on one side of the scale, the development time is too long; on the second – a smaller scale. Most small studios choose the latter simply because they need money to either keep developing updates or prepare a sequel. This is why there is a lot of radical design in indie games. They're eyeing opportunities that AAA studios can't take advantage of. Opportunities that are too difficult to realize with a multi-million dollar budget and a dozen people who are working on the same as you – and the same professionals. This is why small indie games are often built around a single concept or game mechanic. Developers don't have the time or budget to build many systems that can work together, so they release simplified mechanics that can recreate the main intent – the gameplay. Instead, you can try everything that is usually not enough freedom – this is how Geometry Wars, Katamari Damacy and Trials HD appeared. You usually won't find that many concept games in the AAA environment. On the other hand, you won't find the deep gameplay that AAA games have in low-budget games. Their creators are limited in the resources and time of specialists – they simply do not have time to build a system of ranks, stealth, combat, parkour, cinematics, and so on. They also lack the budget and time to

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Video Games Getting Worse? Ugh!, WHATNERD (Jan. 26, 2021), https://whatnerd.com/aaa-games-are-getting-worse/ ("The term "AAA" (pronounced "triple-A") didn't become relevant until the late 1990s, when more and more companies started spending exuberant amounts of money developing games. **In short, AAA games are video games that have been developed by major game studios with huge budgets.** . . . AAA games are supposed to have top-notch graphics, audio and sound, character design, and gameplay. They're also expected to sell millions of copies to recoup the costs of production. . . . Soon, the world of gaming will become a AAA game graveyard. Indie publishers will rise to the top because they actually put time and effort into creating new types of games, and they can take the risks that AAA developers can't." (emphasis in original) In essence, this sentiment would belie the FTC's argument that AAA games are essential inputs, since Roth is happy to switch to indie games. But the greater financial performance of AAA may still make them a business necessity for large companies (and perhaps indicate a "silent majority" that actually enjoys them, if they are choosing to still buy them).);

[213] It's also worth noting that the commission considers significant price differentials when evaluating if two products are in the same market: "[P]rices of the products or services in question can also give an indication as to whether they are viewed by customers as being effective alternatives. This assumption is based on the idea that products in the same market should have similar prices. The Commission has stated that persistent price differences between products for the same end use serve as a strong indication that, from a customer's point of view, these products have different performance characteristics and do not serve as direct and effective substitutes. The Commission has, therefore, in several cases concluded that, *prima facie*, large differences in absolute price levels do not make them reasonable substitutes. As a rule of thumb the Commission usually considers differences of absolute price levels between two products of up to 20% as small enough not to exclude one single product market." Simon & Listl, *supra* note 3, at 238-39.

[214] If we're not including mobile games among the indie grouping.

create a large amount of content. This means that indie sandboxes are usually not created. You also won't see a lot of different weapons and armor or detailed customization here, unless these aspects are significantly simplified. The budget is usually not enough for hiring voice actors, especially complex cinematics cannot be done either."[215] Perez perhaps over-generalizes in the comparison; there are indie games with better animation than AAA games (*Cuphead*, for example); but the generalizations are broadly accurate.

Given the broad consumer and industry usage of the term "AAA industry", and the fact that these games produce experiences that can only be done with big budgets, while it may not make sense for the Commission to consider AAA games to be a separate *market*-input for consoles, the Commission should be more concerned when a source of this input is foreclosed (or has the potential to be foreclosed; in a following Section, I will examine how likely it is that Microsoft will foreclose Activision's portfolio from Sony's console.). AAA games tend to drive console adoption, not indies.

b) Should games be divided by genres?

What of other segmentation of video game software? Fabian Ziermann, in the context of EU Competition Law, argues for "a genre delineation,"[216] where MMORPGs and puzzle games, for example, would be in different markets. Ziermann's arguments are relevant to U.S. antitrust law analysis as well. On the demand substitutability side, Ziermann notes that "[c]onsumers have long expressed preferences for genres. Such preferences can be identified in relation to spending behavior, different gender demographics, different regional preferences, differences in market growth, different demand developments, different experiences, and preferences relating to subscription services, to name but a few."[217] Publishers respond to these consumer preferences by publishing "games in different genres in order to maximise the range of consumers interested in their games.' This implies that genre markets are concentrated and that publishing multiple games within one genre, or innovating for multiple games within one genre, would lead to the cannibalization of one's consumers and profits. Instead, publishers compete in multiple genres to gain market share within each genre, once the contestable market share in another genre has been acquired."[218] Of course, Ziermann's analysis is not entirely accurate with all publishers. Paradox publishes numerous games within the grand strategy genre; since it has become associated with that genre, and there is not much AAA competition within it, that publishers publishes numerous games within the same genre. Likewise, back in the day Interplay was known for publishing computer roleplaying games and so had numerous titles within that genre. But, the most financially successful publishers do appear to diversify the genres of their games, based on demand within each genre.

On the supply side, "[w]hereas the same team may be able—hypothetically—to create both [puzzle games and MMORPGs], the investment in time, resources, and expertise, required for a few-minute long puzzle game experience is hardly interchangeable with developing a game like WoW, which required five years of development. In comparison, a casual mobile app game requires three to nine months of development."[219] Game genres are different enough that a development team that has no experience developing in that genre will tend to struggle to create

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[215] Janelle Perez, *AAA Games vs Indie Games*, CAL. BUS. J., HTTPS://CALBIZJOURNAL.COM/%D0%90%D0%90%D0%90-GAMES-VS-INDIE-GAMES/ (accessed Mar. 22, 2023).
[216] *See* Ziermann, *supra* note 55, at 7-13.
[217] *Id.* at 10-11.
[218] *Id.* at 11.
[219] *Id.* at 12.

a game within that genre. But large publishers in particular often have enough development teams or human resource capacity to find the talent needed to make a game in any genre. As the AAA distinction suggests, the decisive factor may be resources: a company with a lot of resources can hire the talent needed to enter a new genre relatively easily, whereas a smaller company may struggle to operate outside a small number of genres.

Nevertheless, despite these arguments in favor of genre market division, I believe the Commission would have been unlikely to accept such narrow classifications. While consumers have their preferences for particular genres, I doubt that consumer surveys would find that consumers are completely or marginally inelastic between genres; if the entire market of FPS games is more expensive than for strategy games, the level of quality held equal, I believe at some reasonable price increase, users would play games in a different genre. Very few moviegoers only watch one type of film. Likewise, very few gamers only play one genre of game. Instead, genre concentration is relevant when analyzing the likelihood of foreclosure, the effects of foreclosure, and the expected harms from it.

Section IV: Understanding the Video Game Console Industry

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i. Two-Sided Markets

Under EU Competition Law, "[m]ulti-sided markets are markets where platforms try to attract several types of customer[s] and the demand from one type of customer depends on the demand from another type of customer. Therefore, not just the average price level but also the price structure, *i.e.* the price charged to each side of the market, matters for the number of transactions and therefore for profitability."[221] For a multi-sided market, "the different sides . . . (i) must be defined distinctly, since one side is not generally a substitute for the other side; (ii)

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[220] JONATHAN BURNS, IBISWORLD, VIDEO GAMES IN THE US 5 (2023).
[221] *See* Simon & Listl, *supra* note 3, at 284.

must be defined separately, since they may be different in scope; but (iii) the interaction between the different sides must also be considered, since the competitive landscape on one side of the market will impact the competitive interaction on the other side(s)."[222] In the case of consoles, one side of the market is consumer of video games, while the other side is developers of video games.

The above diagram depicts the video game industry from a business perspective. The video game console market is a two-sided market. Two-sided markets are "composed of two distinct user networks that provide each other with network benefits through a platform by either buying or selling applications for the platform."[223] In the case of the console market, video games are complementary inputs; consoles primarily have value to the extent that consumers can purchase (good) games for them.

ii. Direct & Indirect Network Effects

Table 1
Value Dimensions of Platform Technology

Value Dimensions	Conceptualization	Source of Value	Mechanism
Platform Technical Quality	Intrinsic technology attributes that enhance the core functioning of the technology because of improved services, productivity, or interconnectivity between layers of the system	Technical Function/ Performance	Increased technical performance and new/improved functions/ design can help users realize gains in productivity, ease of use, and better services from consumption of complementary applications
		Compatibility	Interoperability with other platforms' complements extends the range of use for the consumer
Platform Complement Benefits[a]	The complements-related benefits consumers enjoy from using the platform	Complement Variety	Complements of diverse type can match a broader audience of heterogeneous users with different tastes—the greater the variety of complements, the greater the appeal of the platform to a broad audience of users
		Complement Quality	Complements of higher-quality increase consumers' utility—the more high-quality complements, the greater the benefits to users from using the platform and its complements
Network Benefits	The benefits consumers enjoy from other platform users and complementors joining the platform because of cross-network externalities	Installed User Base	Indirect network effects: the greater the number of platform users, the larger the market and potential demand for complementors' products and, thus, the expected availability of complements Direct network effects: the greater the number of platform users, the greater the user's opportunities to benefit from interacting with other users.

[a]Platform complement benefits are the focus of this article. [224]

The above table indicates the three factors relevant to console purchase decisions: the console's technical quality, the quantity and quality of games on the platform, and network benefits. This subsection will focus on explaining those network benefits.

[222] *Id.* at 285.
[223] Vardit Landsman & Stefan Stremersch, *Multihoming in Two-Sided Markets: An Empirical Inquiry in the Video Game Console Industry*, 75 J. MKTG. 39, 39 (2011).
[224] Carmelo Cennamo, *Building the Value of Next-Generation Platforms: The Paradox of Diminishing Returns*, 44 J. MGMT. 3038, 3043 (2016).

Consoles rely on direct and indirect network effects. "Direct network effects are present when the number of adopters of a network directly impacts the utility of consumers."[225] Meanwhile, indirect network effects are where "the value of hardware to consumers increases as more software from content creators becomes available on the hardware."[226] Indirect network effects are "characterized by the intensity of the feedback loop where more hardware adopters result in more software supply which, in turn, results in more hardware adopters."[227] Due to this feedback loop, network effects are so important that consoles are often sold at a loss so that they can gain more users: "When a platform is faced with multiple sides, the presence of network externalities distorts platform prices. Network externalities can even cause the price on one side of a platform to be less than marginal cost."[228]

Prior to making their console purchasing decision, consumers are evaluating the quantity and quality of games and gamers on each platform (discussed in the following subsections). However, after making the purchasing decision, most consumers would be very inelastic to improved catalogue qualities on a competing console; due to the great expense of consoles, most consumers are "locked-in" to the console platform that they pick. In essence, this means most consumers do not multihome; they only have one console, especially if we do not include the Switch in the relevant market.[229] Multihoming "refers to the choice of an agent in a user network to use more than one platform."[230]

Due to this lack of multihoming in and the two-sided nature of these markets, one would expect console markets to "'tip' in favor of the largest-share platform. As a platform increasingly beats other platforms in terms of market share, other platform attributes (e.g., the extent of platform-level multihoming) become less important in buyers' platform choice. A large market share of a platform provides a clearer signal of the superior value the platform offers for buyers than attributes that are more difficult for a consumer to measure."[231]

However, for the console market's almost entire history, this has not been the case: there have been stably two to three major console competitors, despite fierce price competition: from Atari vs. Nintendo; to Nintendo vs. Sega; to Nintendo vs. Sega vs. Sony; to finally the current market of Nintendo vs. Sony vs. Microsoft. This may be because consoles rely on "local network effects. Thus, consumers do not benefit from general connectivity to an entire network; they benefit from connectivity to acquaintances, that is, local network effects. . . . People may think globally, but in general, they act locally and are influenced by the opinions and choices of their acquaintances instead of the entire installed base. Several studies have shown that replacing the

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[225] Richard T. Gretz, Ashwin Malshe, Carlos Bauer, & Suman Basuroy, *The Impact of Superstar and Non-Superstar Software on Hardware Sales: The Moderating Role of Hardware Lifecycles*, 47 J. ACAD. MKTG. SCI. 394, 396 (2019).
[226] *Id.* at 394.
[227] *Id.* at 396.
[228] Mark J. Tremblay, *Market Power and Mergers in Multi-Sided Markets*, 1 (Sept. 10, 2018). ("[W]hen first released, gaming console prices are often less than console marginal costs.").
[229] Assuming the FTC's cited study above was properly conducted.
[230] Landsman & Stremersch, *supra* note 223, at 39.
[231] *Id.* at 42 (internal citations omitted). *See also* Yuki Inoue, *Winner-Takes-All or Co-Evolution Among Platform Ecosystems: A Look at the Competitive and Symbiotic Actions of Complementors*, 2-3 (2019) ("The winner-takes-all mindset may be induced by the influence of indirect network effects whereby, in a two-sided market, as the scale grows on one side, profits increase on the other. This effect implies that complementors and consumers interact and that the number of complementors and customers grows exponentially; it could thus produce a winner-takes-all market in which a single platform takes almost all of the complementors and consumers. The possible influence of direct network effects would accelerate the winner-takes-all situation.").

assumption of global network effects with the assumption of local network effects will lead to more realistic explanations of how consumers adopt new products in markets with network effects and the competitive outcomes in markets with network effects."[232]

iii. Exclusivity and Superstar Games

Table 1 Literature review

Reference	Context	Feedback Loop Analysis	Consideration of Hardware Lifecycle	Research Focus: (software quality vs availability)	Key Results
Stremersch et al. (2007)	Various industries (e.g., CD, DVD, video games, laser discs)	Model hardware demand and software supply	Focus on product introduction. Includes time trend as a control variable	Diminishing effects of indirect network effects	Product availability and indirect network effects produce weaker-than-expected results.
Binken and Stremersch (2009)	Video games	Model hardware demand	Includes product age as a control variable	Strengthening effects of software quality	Superstar software exerts a disproportionally large effect on hardware unit sales.
Corts and Lederman (2009)	Video games	Model hardware demand and software supply	Includes product age as a control variable	Strengthening effects of software quality	Software 'hits' (e.g., high quality software) has a positive and significant effect on hardware demand and perceived utility.
Kim et al. (2014)	Video games	Model hardware demand and software supply	Includes product age as a control variable	Strengthening effects of software quality	"Only high-quality software offerings increase hardware sales" (p. 100)
Kretschmer and Claussen (2016)	Video games	Model hardware demand and software supply	Includes product age as a moderator for the impact of backward compatible software	Strengthening effects of software availability -- specifically backward compatible software	Access to backward compatible software increases hardware adoption. This effect diminishes with console age.
Nair et al. (2004)	Personal digital assistant	Model hardware demand and software supply	No hardware lifecycle effects considered	Strengthening effects of software availability	Indirect network effects explain about 22% of log-odds ratio of the sales of different PDA's
Clements and Ohashi (2005)	Video games	Model hardware demand and software supply	Includes product age as control variable and instrument	Strengthening effects of software availability	Penetration pricing is important early in the life of the console, whereas installed base is important later on.
Dubé et al. (2010)	Video games	Model hardware demand and software supply	Includes product age as a control variable	Strengthening effects of software availability	Indirect network effects can lead to a strong and economically significant increase in market share dominance.
Gretz and Basuroy (2013)	Video games	Model hardware demand and software supply	Hardware lifecycle effects considered	Strengthening effects of software availability	Indirect network effects and hardware quality play an important role on product adoption.
Gandal et al. (2000)	Compact disks	Model hardware demand and software supply	No hardware lifecycle effects considered	Strengthening effects of software availability	"A 10% increase in CD titles would have as large an effect as a 5% [hardware] price cut" (p. 57)
Dranove and Gandal (2003)	Digital video disc	Model hardware demand	No hardware lifecycle effects considered	Strengthening effects of software availability	Indirect network effects play a positive and significant effect in the DVD market and serves as an entry barrier for alternative products.
This project	Video games	Model hardware demand and software supply	Hardware lifecycle effects considered	Strengthening effects of both, software quality and availability	* The importance of superstar and non-superstar software is moderated by the hardware lifecycle. * Non-superstar software is important in the later stages of the hardware's life. * Superstar software is important in the earlier stages of the hardware's life.

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The above table summarizes the research on the role of software quantity and quality in producing hardware sales (including in the context of video game consoles), depending on the hardware's lifecycle: "While theory suggests that software availability creates a positive effect on hardware sales, two sets of empirical studies with complementary findings have emerged. The first stream of literature focuses on the amount of available software in general and shows that a greater amount of available software increases hardware demand. A second stream of research examines the software–hardware demand link separately for different types of software. In particular, this literature categorizes software into superstars (i.e., software of exceptional quality) and non-superstars (i.e., the balance of software that may even include good-to-average quality products). These studies show that the positive effect of the amount of available software on hardware sales exists only for superstar software. Several studies in this stream of research document a positive impact of the amount of superstar software available on hardware demand."[234]

What are "superstar" games? "The phenomenon of superstars pertains to relatively small numbers of entities that earn enormous amounts of money and dominate the activities in which

[232] Pontus Huotari, Kati Järvi, Samuli Kortelainen, & Jukka Huhtamäki, *Winner Does Not Take All: Selective Attention and Local Bias in Platform-Based Markets*, 114 TECH. FORECASTING & SOC. CHANGE 313, 315 (internal citations omitted).
[233] Richard T. Gretz et al, *supra* note 225, at 397.
[234] *Id.* at 395.

they engage."[235] In these empirical studies, researchers categorize games as "superstars" if they cross a Metacritic threshold (often 90 out of 100),[236] or (occasionally) if they meet a certain revenue threshold.[237] Despite *Call of Duty*'s consistent popularity, most of the franchises games, especially the most recent games, do not cross the Metacritic threshold under that "superstar" classification;[238] if it is ratings that matter, *Call of Duty* may not be a superstar that especially drives console sales. But if it is revenue that matters, few franchises are as consistently profitable with each entry.[239]

Exclusive games help entice gamers to buy a company's console. Binken & Stremersch find that the introduction of an exclusive superstar software title "increase[s] hardware unit sales by an average of 16% (196,000 units)" beyond the effects of other hardware and software attributes.[240] While they found this "effect persists only for the first five months after the superstar's introduction,"[241] they were writing in 2009, when there were very few "live service" games, [242] and games had a much shorter revenue cycle on average. Thus, with games now played for years, an individual exclusive's effects could persist for much longer than before. However, since *Call of Duty* has a new entry released every year, Binken & Stremersch's findings are likely relevant; many fans of the franchise likely move onto the next entry in the franchise once it is released.

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[235] *Id.* at 398.

[236] *See, e.g.*, *id.* at 398 ("Binken and Stremersch (2009), along with other researchers (e.g., Kim et al. 2014), categorize games as high quality or superstars if they cross a threshold composite critical review score which is usually quite high. For example, Binken and Stremersch (2009) use a cutoff of minimum 90 out of 100 composite score from third-party critics, which very few games achieve. We note that this is not influenced by the game's revenue, as critic scores are released before the game. However, games that achieve this critical threshold tend to be much more successful commercially than the games that do not. Importantly, those games that achieve this rarified level of critical acclaim have other features in common in addition to a greater likelihood of commercial success. First, superstar games tend to be more engrossing, challenging and complex to play, and second, superstar games are usually more expensive than other games.").

[237] *See* Cennamo, *supra* note 224, at 3048-50 ("In line with my conceptualization of complements' quality is my assumption here that if a game achieves higher sales, it must offer higher consumption benefits to customers; in other words, it is of higher quality relative to peer games. Following Corts and Lederman's (2009) methodology, I determine the number of hits, log (h), by counting the number of titles whose total sales (over the entire life span) fall above the 75th percentile of the sales distribution of all titles developed for consoles of the same generation.").

[238] The last *Call of Duty* game to surpass a Metacritic score of 90 was *Call of Duty: Modern Warfare 2*, released in 2009. *See Activision's Scores*, METACRITIC, https://www.metacritic.com/company/activision?filter-options=games&num_items=30&sort_options=metascore (accessed Mar. 23, 2023) (sort the scores "By Metascore" to see the *Call of Duty* games that crossed the 90 threshold: only the original *Call of Duty* (released in 2003), *Call of Duty 4: Modern Warfare* (released in 2007), and the *Modern Warfare 2* have scores greater than 90).

[239] *See* Derek Strickland, *Call of Duty Franchise Has Now Made over $31 Billion in Lifetime Revenues*, TWEAKTOWN (Nov. 7, 2022) (last updated Dec. 1, 2022), https://www.tweaktown.com/news/89379/call-of-duty-franchise-has-now-made-over-31-billion-in-lifetime-revenues/index.html ("Remember that Call of Duty sold 25 million copies of games during the Vanguard era, which was regarded as the lowest point for the franchise in many years.").

[240] Jereoen L.G. Binken & Stefan Stremersch, *The Effect of Superstar Software on Hardware Sales in System Markets*, 73 J. MKTG. 88, 89.

[241] *Id.*

[242] A "live service game is a type of video game that's designed to keep people engaged, so they play it for as long as possible. That means that instead of making one game and moving on to the next, companies create a game they can update for years to come. . . . Live service games will usually release new types of content in the form of skins, weapons, and maps on a seasonal basis." *See* Sergio Velasquez, *What Are Live Service Games and How Do They Work?*, MAKE USE OF (Mar. 10, 2022), https://www.makeuseof.com/live-service-games-what-how-work/.

Call of Duty's annual cycle notwithstanding, it is very likely that the superstar effect for many games lasts longer than five months now. The video game industry is "a superstar industry, showing disproportionate returns to quality, with a small number of high-quality games that are very popular"[243] In the console market, "high-quality software titles are likely to have a positive effect on hardware unit sales . . . . Superstar software titles are so desirable that they can easily trigger the adoption of the system by consumers."[244] Exclusive superstar software titles have an even larger effect on hardware sales for the system they are sold for: "If a superstar software title is introduced on multiple systems, the new hardware adopters will be dispersed across multiple systems. If the introduction of a superstar title is exclusive to just one system, the new hardware adopters will all adopt the same system. In line with this, exclusive superstar software titles could prove to be a crucial factor in positive feedback markets because of their ability to tip the market outcome toward one specific system during a systems war."[245] Song et al. estimate "that an exclusive software title (90 or higher) increases a platform's hardware sales by approximately 3,269 units on average. An additional multi-homing title (90 or higher) increases a platform's hardware sales by approximately 2,024 units."[246] These superstar games produce disproportionate returns because "consumers buy only eight games on average throughout the life of a console. These precious titles are consumed sequentially in intense bursts. Gamers spend a great deal of time—–40 to 100 hours—–with each title. Therefore, a relatively small value on availability exists in the video game industry."[247] Thus, even a small number of superstar exclusives could make a console purchase worthwhile, at least for a consumer who does not already own a current-generation console.

Yet, this also means that, since few consumers multi-home, lock-in blocks consumers on all platforms from the "superstars" of each console. In essence, the incentive to create more superstars may be offset by the disutility of blocking access to each superstar, especially since such products are likely the least fungible of all games; superstars tend to be unique and each worth playing, and it is pure chance whether your locked-in platform ends up with the superstar titles you wish. The only way to anticipate superstar releases on a platform is to know the exclusive franchises and how likely those franchises will be of high quality and in a genre that you like. This perhaps points to another reason why sequels are so favored (discussed in the next subsection): they make console lock-in decisions less risky.

However, the importance of superstar games declines as consoles mature. Gretz et al. find that "[s]uperstars are most influential when hardware is new, but the disproportionately large effect that superstar software exerts on hardware purchases cannot be generalized throughout the life of the console, and it is limited to newer hardware. In contrast, non-superstar software has a positive impact on hardware demand later in the hardware lifecycle, and this impact increases

[243] Binken & Stremersch, *supra* note 240, at 89.
[244] *Id.* at 90.
[245] *Id.* at 91. *See also* Haeyop Song, Jaemin Jung, & Daegon Cho, *Platform Competition in the Video Game Console Industry: Impacts of Software Quality and Exclusivity on Market Share*," 99 (2017) ("[T]he results demonstrate that high-quality software has a disproportionately significant effect on hardware demand. The high-quality exclusive software is an important factor affecting consumers' utility, and it tends to be developed in hardware manufacturers' vertically integrated subsidiaries. In addition, this study also identifies that high-quality multi-homing software plays a role in platform growth in a platform's later stage."); *and id.* at 101 ("[T]he video game industry's entrants rely on large-scale successes. The only difference is that high-quality games are called 'AAA games' in the video game industry. These titles are so desirable that consumers will spend several hundred dollars on the proprietary machines and accessories to play them. Thus, the high-quality software will more strongly influence hardware unit sales.").
[246] Song et al, *supra* note 245, at 108.
[247] *Id.* at 109.

with hardware age. Our findings reveal that eventually the amount of available non-superstar software impacts hardware adoption more than the amount of available superstar software."[248]

iv. The Importance of Sequels in the AAA Space

A feature of AAA games "is the continuous proliferation of sequels. Of the worldwide top 100 selling games of 2018, eighty were sequels, including all but one of the top twenty."[249] Publishers invest in franchises because players are loyal to a franchise and resistant to substitutes. Note that Commission considers customer loyalty when assessing substitutability: "Consumer loyalty can limit demand substitution and is therefore an important element in defining the relevant product market."[250] By wielding trademarks and related licensing rights to protect their franchises, publishers insulate themselves against competition. Publishers bolster these efforts through additional non-legal strategies to cultivate and lock in their established fan bases."[251] Players rely on previous experiences with a game's franchise as a heuristic for the game's quality: "Players cannot inspect game quality firsthand prior to purchase and hundreds of new titles are released for Nintendo, PlayStation, and Xbox home consoles each year; the number is an order of magnitude greater for PC games and greater still for mobile games. Many consumers also regret prior bad purchases. Consumer reliance on known franchises makes sense in light of these dynamics and the industry's focus makes sense as a response to this consumer strategy."[252]

Meanwhile, publishers prefer sequels because the huge costs of AAA game development it a financially risky endeavor, and sequels, with their loyal fanbases, hedge against that risk by almost guaranteeing a minimum number of purchases: "Publishers' strategy of investing heavily in graphics and other high-budget assets intensifies their reliance on established franchises. There is a feedback loop between the two. When investors put $100 million toward a game, they want assurances that the game will sell enough copies to return a profit. One way to increase that likelihood is to create sequels for games that sold well in the past—if the seventeenth installment of Call of Duty sold twenty-million copies, it is a good bet that the nineteenth installment will also sell."[253]

Collectively, this means players will be less likely to switch from *Call of Duty* to another franchise, even if the game in that franchise is of the same quality and genre, and it means publishers will be less likely to create new franchises to fill the void left by *Call of Duty* on PlayStation if Microsoft makes it exclusive (or another Activision franchise). While I have not yet found a study on this, I suspect that franchise loyalty may be a stronger determinant of console sales than even the critical acclaim of a game. This may explain why "around 24%" of survey respondents indicated "they would divert away from PlayStation if *CoD* were no longer available on that platform,"[254] even though most [all? NEED TO FIND CITATION] of the recent *Call of Duty* games have had Metacritic and User Scores well-below the "superstar" threshold used in the previously cited studies.[255]

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[248] Gretz et al., *supra* note 225, at 395.
[249] Ard, *supra* note 202, at 1311-12.
[250] *Id.* at 237.
[251] *Id.* at 1351.
[252] *Id.* at 1352.
[253] *Id.* at 1355.
[254] CMA, Summary of Provisional Findings, ¶ 46 (Feb. 8, 2023), https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry.
[255] *See supra* note 237.

Call of Duty's persistent success despite mediocre to above average reviews might also be due to its multiplayer character and the power of network effects in those types of games: "Many games also accrue value through the growth of their player bases; this provides established games another asset that cannot be appropriated. . . . The point is most evident for online multiplayer games. Take the popular battle-royale game Fortnite. It has attracted over 350 million registered users, with a record of over 12 million online at the same time. A large player base is valuable for a multiplayer game because it facilitates matchmaking, allowing players to find others of comparable skill levels to play against at any time of day. This gives Fortnite a competitive advantage. A new entrant could not out-compete Fortnite simply by introducing a game with better graphics, gameplay, and other design features; it would need to be sufficiently better to overcome the network effects supporting the incumbent game."[256]

Sequels play into the network effect because they are safe bets, when it comes to having a sufficiently large network: If a franchise has consistently had millions of players, it is predictable that its sequel will also have millions of players. Meanwhile, a new franchise does not have the customer loyalty needed to ensure the minimum necessary network; this makes new multiplayer games even riskier, both from the publisher and player's perspective.

On the one hand, the network effect makes it less likely that Microsoft will make *Call of Duty* exclusive; part of *CoD*'s appeal is that so many people play it across both consoles and PC. By making *CoD* exclusive, Microsoft would be hurting the intrinsic value that players receive from the franchise, reducing *CoD* sales not just due to the exclusivity but also because the game would be a worse product for the exclusivity (all else held equal). On the other hand, if brand loyalty is particularly strong, the platform switching effect may be strong enough to overcome the software sales reduction from exclusivity, even after factoring in the importance of network effects. Still, the fact that Microsoft's signature franchise, *Halo*, is also a first-person multiplayer shooter makes it possible that Xbox's FPS exclusive market may be too crowded for it to make financial sense to make *CoD* exclusive as well; there is likely a strong overlap between players who would buy an Xbox due to *Halo* as those who would buy an Xbox due to *CoD*, although more research needs to be done to verify this (perhaps these brands are strong enough that *CoD* and *Halo* attract different categories of consumers, and release scheduling strategies would reduce the software cannibalizing effects).

Section V: Input Foreclosure Theory of Harm

As is the case with most vertical mergers that raise preliminary anticompetitive concerns, the Commission was worried that Microsoft would foreclose Activision's most popular games from other consoles. Input foreclosure may occur where the merger gives "the merged entity the ability and incentive to use its upstream market power to restrict access to supplies for downstream competitors"[257] or otherwise provide access on unfavorable terms.[258] The

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[256] Ard, *supra* note 202, at 1354.
[257] Bengtsson et al., *supra* note 106, at 432. *See also id.* at 439 ("A merger may significantly impede effective competition through input foreclosure when, post-merger, the merged entity would be likely to restrict access in this way to the products or services that it supplied, or would have supplied, absent the merger, thereby raising its downstream rivals' costs. The expression 'restricting access to inputs' means here the supply of the products or services in question on less favourable conditions than would have obtained in the absence of the merger, and not necessarily the complete denial of access.").
[258] A firm "may either stop supplying competing downstream firms ('complete foreclosure') or supply its products or services at a higher price, or otherwise on less favourable conditions, than it would have done had the merger not occurred ('partial foreclosure')." *Id.* at 439. "Generally speaking, the Commission also considers other more subtle

Commission's foreclosure analysis is broken into three parts: ability,[259] incentives,[260] and effects,[261] although "in practice, [these factors] are often examined together, in particular because, logically, they are closely intertwined."[262]

Absent any contractual commitments, Microsoft obviously has the ability to foreclose Activision's future games by making them exclusive to Microsoft's consoles. As discussed previously, it is quite common for console manufacturers to make their first-party developers' games exclusive to their consoles.

But Microsoft would only be *incentivized* to make these games exclusive if the increased Xbox console sales outweighed the lost video game sales on other consoles. Ultimately, outside of any contractual commitments, the likelihood that Microsoft will make Activision's games exclusives will depend upon an evaluation of what stage this console generation is in. Since there are more potential purchasers of a console at the beginning of a console generation (because the purchasers do not already have a console and few purchasers multihome), exclusivity is most efficacious at producing new console sales during the early stages of a console's lifecycle.[263] Meanwhile, "[w]ith the maturation of consoles . . . , the negative consequences of [making a game multiplatform] may fade, and from a sales perspective, it makes little sense for such firms to invest in reducing the level of multihoming for their applications at a later stage in the consoles' life cycle."[264] While the current generation consoles have been on the market officially

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strategies than a mere refusal to deal in order to determine whether the merged firm could ultimately restrict competitive access to inputs for downstream rivals. These strategies can consist in price increases (or avoiding a price decrease) for the products or services that it supplies upstream to third parties . . . , delaying or disrupting supplies, supplying less innovative versions of the products concerned, or otherwise making the conditions of supply less favourable than they would have been in the absence of the merger." *Id.* at 440-41.

[259] "The ability to foreclose downstream rivals requires that the merged entity control a critical input. I.e. the input must be important for downstream competition, and the merged entity must have significant market power over it." Hans Zenger, *Analyzing Vertical Mergers*, CPI ANTITRUST CHRONICLE 1, 3 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3713352.

[260] "Vertical integration may create an incentive to raise input prices toward third parties, since this makes the merged downstream unit more competitive against those firms. . . . Therefore, a vertical merger is likely to cause material upward pricing pressure toward a rival if: (i) losing access to the input would cause a significant diversion of sales to the merged downstream business and (ii) if such downstream recapture would be profitable for the merged entity." *Id.*

[261] "For foreclosure to be a concern, it must cause competitive harm in the downstream market. . . . This requires (i) that the merged entity will face only limited competition from rivals that are not subject to foreclosure (e.g. other integrated firms) and (ii) that the upward pricing pressure caused by RRC is not overturned by downward pricing pressure from the elimination of double marginalization ('EDM') or other efficiencies. Indeed, the merged downstream unit may have an incentive to compete more aggressively post-merger, since additional downstream sales will also tend to increase demand for the upstream input. Such EDM is likely to be material if (i) incremental downstream sales would generate significant new demand for the upstream input (e.g. because of untapped demand for the integrated product among previous non-consumers) and (ii) if upstream margins are significant, so such additional sales would materially contribute to profits." *Id.* at 4.

[262] Bengtsson et al., *supra* note 106, at 439.

[263] *See* Inoue, *supra* note 231, at 3 ("Researchers have suggested that winning in a winner-takes-all market by exerting indirect network effects requires first establishing an installed base. A platform with a smaller installed base will face negative growth via the indirect network effects mechanism if the platform lacks specialized markets.").

[264] Landsman & Stremersch, *supra* note 223, at 51. While their analysis specifically refers to the decision of an independent publisher or developer to enter into an exclusivity deal with a console platform, presumably it also becomes more attractive for console companies to release their titles on multiple platforms as well, due to the greater software sales and fewer potential new console adopters. *See also* Song et al., *supra* note 245, at 109 ("The results indicated that complementary products do not have equal consumption utility; rather, consumers have homogenized patterns of consumption, wherein relatively small numbers of attractive products have disproportionately large

for several years, supply chain issues have made it difficult until somewhat recently to acquire a current generation console, so there may be many "potential purchasers," such that this current market is more akin to a young console market. However, since *Call of Duty* is a multiplayer franchise, and therefore benefits from the network effects described above (meaning exclusivity likely degrades *Call of Duty*'s quality as well), and especially since PlayStation has the largest userbase of current *Call of Duty* players, the benefits are unlikely to outweigh the costs. While the CMA initially provided evidence that enough users would switch, its revised analysis came to the conclusion that it would be unprofitable to make *Call of Duty* exclusive.

i. Are Microsoft's contractual commitments a sufficient solution to nullify the input foreclosure theory of harm?

But Microsoft has already preempted its ability to foreclose *Call of Duty* by making it exclusive, via its contractual commitments. The core reason behind the divergence between the Commission and the CMA is their respective faith in behavioral remedies: "[I]n vertical cases, the Commission has been ready to accept remedy solutions other than the standard structural divestitures that are the norm for addressing horizontal concerns, when it considered that those commitments eliminated the competition concerns entirely and were comprehensive and effective. For instance, the Commission has accepted, in a number of cases, conduct-based remedies aimed at safeguarding third parties' ability to continue to compete (such as access remedies or non-discrimination obligations etc.)."[265] While the CMA and Commission are in agreement with respect to the competitive effects on the console market, this is simply because they both believe, regardless of these contractual commitments, Microsoft has no profit incentive to make these games exclusive. Nevertheless, let's discuss their original concerns in detail.

The Commission's primary concern was that Microsoft would foreclose Sony from Activision-Blizzard's input of games. While Activision-Blizzard has many games, most of the focus was on *CoD*; some surveys suggested that users prefer *CoD* so much that they will switch from PS5 to Xbox Series X/S solely on the basis of that franchise being exclusive. Of course, Microsoft has tried to undermine that argument by signing contracts with several companies to ensure that *CoD* will remain on those companies' platforms for at least ten years, on the same terms and of the same quality as on Microsoft's console. Microsoft extended such a contract to Sony, but Sony has yet to accept it, in part perhaps because it would undermine Sony's foreclosure argument. Microsoft has not, at the time of this writing, disclosed the terms of its agreements with these other companies (beyond the length of the agreements), although the FTC has tried to compel discovery of these contracts.

Microsoft's contractual commitments are behavioral remedies. Any remedies can only be accepted "if they entirely remove the competition concerns raised by the merger,"[266] and if they are "*proportionate to the competition problem*."[267] However, "the requirement of effectiveness takes precedence over the requirement of proportionality."[268] The principal of proportionality plays a role in two contexts: "First, the principle of proportionality comes into play when two possible remedies exist, each of them effective. In that case, the Commission is obliged to accept

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compensation, dominating their respective industries. Furthermore, the high-quality exclusive software has a crucial role in the nascent stage of platform development, whereas high-quality multi-homing software can be a valuable resource in the mature stage of platform development.").

[265] Bengtsson, *supra* note 106, at 431.

[266] Simon Vande Walle, *Part 7—Remedies*, *in* EU COMPETITION BOOK ONE, *supra* note 3, at 775, 778.

[267] *Id.* at 779 (explaining the principle of proportionality, a general principle of EU law).

[268] *Id.* at 780.

the remedy that is less burdensome for the parties. . . . Second, the principle of proportionality implies that the commitments have to address the competition problems caused by the merger but no more than that."[269] In the case of access remedies, "the parties should normally grant such access to third parties on a non-discriminatory and transparent basis. In many cases, the remedy also requires that the access be given on fair and reasonable terms, resulting in a commitment grant access under FRAND (fair, reasonable and non-discriminatory) terms. . . . [T]he access remedy must still meet the overarching requirement for all non-divestiture remedies, namely that it must be equivalent in its effects to a divestiture."[270] As discussed below, Microsoft's commitments entirely remove the competition concerns so long as its contracts are easily enforceable and do not contain any serious loopholes.[271] The ten-year commitment is long enough for this type of remedy.[272]

The more the contracts bind Microsoft to ensure a certain performance quality, for example, on other companies' consoles or cloud gaming services, the less likely the Commission will be concerned about input foreclosure with respect to that franchise. Monitoring concerns seem somewhat less credible here in the sense that each company that Microsoft contracts with would be incentivized to monitor whether Microsoft is complying with its contractual obligations. On the other hand, given the complex and unpredictable nature of game development, it is unlikely that Microsoft committed to ensuring the games will run with equal performance on all the different hardware, especially since it includes platforms that have never had *CoD* games, such as the Switch. Rather, it is likely that, if Microsoft made any performance commitments, they are limited to somewhat vague standards ("commercially reasonable efforts" to publish the games in a similar technical state on each company's platform and similar efforts to fix any bugs, perhaps), which may make it easier for Microsoft to publish lower quality versions of *CoD* on the other companies' platforms without quite breaching the terms of these agreements.

But Microsoft is facing countervailing business incentives that may make them try their best to publish these games in a similar technical state on each console, even if not legally (or at least in practice) required to do so. This is because a poor performing *CoD* on another company's hardware would likely tarnish the reputation of the brand, which would harm future sales. While a lower-performing *CoD* could induce consumers to buy Microsoft's console to get the best-performing version of it, I doubt consumer elasticity is that strong; the quality would have to be substantially lower for consumers to buy Microsoft's console to play *CoD*. Surveys so far conducted have only indicated that consumers would switch consoles if *CoD* were completely unavailable on another platform, not whether they would switch if *CoD* performed marginally or even moderately better on Microsoft's console. On the other hand, consumers who

[269] *Id.* at 781.
[270] *Id.* at 821.
[271] These contractual commitments are very similar to the behavioral remedies provided by TV mergers; in that context, they were deemed sufficient: "In two recent vertical mergers in the media sector, access remedies were imposed to remove concerns of input foreclosure. TV channels are an input for TV distributors, who bundle them and distribute them to their subscribers as a package. In two mergers between TV distributors and owners of popular TV channels, the Commission was concerned that the owner of the TV channels would refuse to supply the TV channels or increase the price for the TV channels, thereby foreclosing TV distributors that compete with the merged entity's downstream TV distribution business. In both cases, these concerns were removed by commitments under which the owner of the TV channels committed to license these channels on fair, reasonable and non-discriminatory terms." *Id.* at 825.
[272] "Access commitments and other behavioural commitments often remain in place for a long period of time. The Commission has accepted commitments with a duration of several years (*e.g.* eight years or ten years)." *Id.* at 843.

have not yet adopted a console may be more inclined to pick Microsoft's console if it has the best-performing version of *CoD*. No studies I found directly answered the question of how responsive consumers are to a better-performing version of a multiplatform game being on a different console, but it seems reasonable to presume that the effect is weaker than exclusivity. Since first-party exclusivity has been fairly standard within the industry for the past several decades, exclusivity does not appear to tarnish brand reputation nearly as much as a game releasing in an abysmal state on one platform but not on others.[273] Since it is incredibly uncertain whether the marginal increase in console sales outweighs this reputational harm, it is likely that the reputational harm and lost software sales of releasing a poorly performing version of *CoD* on these companies' platforms would harm Microsoft financially more than the number of console users they would gain from such a tactic.[274]

As far as other performance obligations that I expect in these contracts (releasing on the same date for each company, releasing all DLC for each platform on the same day, cross-platform play), they are much easier to observe compliance with and so should be easily privately enforceable by means of these contracts.

ii. Are exclusives harmful to consumers in the context of console competition?

But suppose that Microsoft's contracts are insufficient, such that there is still concern about the competitive harm if Microsoft foreclosed *CoD* or made it much worse on other companies' platforms. What is the likely competitive harm of making *CoD* exclusive or in some way "better" on Microsoft's platform? Antitrust law is concerned with protecting competition, not competitors, meaning it is concerned with maximizing consumer welfare. If the market is just composed of Sony and Microsoft, and the barrier to entry is high, then we would be specifically concerned with Sony's fate. But if the market includes other competitors, such as Nintendo, then there is no reason to care about Sony in and of itself, except to the degree that a less competitive Sony will lead to a less competitive market overall and will thereby reduce consumer welfare.

The difficulty here is that consoles primarily compete via "input foreclosure"; far more than hardware differences between consoles of the same generation, users pick their consoles based on network effects and the library of games on each console, such as the console exclusives.[275] For the past several console generations, Nintendo consoles have been principally known for their first-party exclusives. Likewise, Sony is known for its high-quality first-party exclusives. Even if we view exclusives as harming consumers, in some sense this is then a

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[273] Consider how much *Cyberpunk 2077*'s unplayable state on PS4 ruined the reputation of that game.

[274] *Cf.* Welsh, *supra* note 82. ("Sony argued that Microsoft, if it did deign to release Call of Duty on PlayStation, might choose to intentionally cripple the PlayStation version with deliberate bugs or performance issues. As well as irresponsibly stoking console-warrior conspiracy theories, this absurd claim is disrespectful to Call of Duty's developers, to the entire industry — and, frankly, to the regulators themselves, if Sony thinks they are credulous enough to believe the industry and community of games operate this way.").

[275] "When a platform's applications are multihomed on other platforms, the platform may not be able to differentiate itself through the applications of its network of sellers. Differentiation provides brands with greater resistance to competitive attacks . . . . Thus, in two-sided markets, in which buyers and sellers endow each other with network benefits, a platform for which few applications are multihomed can achieve greater differentiation than a platform for which many applications are multihomed." Landsman & Stremersch, *supra* note 223, at 41. *See also* Song et al., *supra* note 245, at 103 ("Some literature has illustrated that complementary products' exclusivity can contribute to platform competition. By securing complementary applications with exclusivity agreements, and thereby denying access to rivals, a platform might reduce its competitors' effective participation in the content and consumer markets."); *and* GameCentral, *Game Pass and Phil Spencer May Not Survive Without Activision—Reader's Feature*, METRO (May 13, 2023) ("Contrary to Phil's recent statement about exclusives not selling consoles, PlayStation have all but proven that this is the case over the past two generations.").

prisoner's dilemma: in an optimal world, perhaps there would be no exclusives, but in a world where there are exclusives, then every platform needs exclusives to help differentiate itself; Microsoft's improved exclusive catalogue after this acquisition would increase its competitiveness and, given that it has the smallest market share of the two or three (depending on the market definition) competitors, this increased competitiveness puts pressure on Sony and Nintendo to make better consoles and/or better exclusives.[276]

Microsoft's improved competitive effectiveness may actually benefit competition, at least in the console market.[277] As discussed above, the console market is not one prone to "winner-takes-all" scenarios, even with a strong exclusive catalogue, but instead one where a small number of console platforms are stably available and sufficiently competitive with one another that they are sold at a loss and in intensive price competition with one another. It is unlikely that *CoD* or even Activision's entire library of games would be enough to eliminate Sony from the market; it would only weaken Sony's position, but that could be to the benefit of consumers. According to one developer, the Xbox is a more attractive platform to publish on because "[t]here are numerous means of players finding your game on Xbox," while the PlayStation gives greater attention "to larger titles from huge publishing labels, and/or developers and publishers who are willing to spend lots of money on paid marketing within the PlayStation console."[278] PlayStation is able to get away with not treating small developers as well as Xbox because PlayStation has a larger userbase, such that developers' games need to reach a smaller percentage of the PlayStation userbase to be as profitable as on Xbox. If the two platforms had more similar userbases, especially due to console exclusives, then PlayStation may need to find ways to attract developers, such as through better marketing treatment, which would increase consumer welfare by connecting more consumers with games that they would enjoy.

iii. Are exclusives harmful to consumers in the context of video game competition?

The final component of the commission's foreclosure analysis is the likely effect of foreclosure on consumer welfare. The proposition that video game exclusives are completely bad (beyond any increased console competition) for consumers is a bit more complicated than that in practice.

First, since exclusives are one of the primary determinants for consumers when picking a console, console companies have an incentive to invest in their first-party games so that they will be critically well-received, will push and demonstrate the technical extent of the console hardware, and will cover a wide range of genres, to attract as many consumers as possible. Thus, some of the savings produced from the elimination of double-marginalization, transaction costs,

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[276] *Cf.* Mueller, *supra* note 73 ("The FTC should also ask itself whether Sony's strategy centered around exclusive content actually contributed to those decisions on Bethesda titles [to make them exclusive] that had not even been released at the time of that acquisition," and "it's possible that even those few Bethesda titles that were released post-acquisition as Microsoft platform exclusives would have been made available on all platforms if Sony didn't emphasize exclusives as aggressively as it does."). *See also* Fiona M. Scott Morton, *Principles for Platform Mergers with an Application to Microsoft-Activision*, 2-3 (Dec. 5, 2022) (please note that Prof. Morton is "serving as an economic expert on behalf of Microsoft in connection with their proposed acquisition of Activision Blizzard") ("[T]o the extent a regulator wants to promote competitive balance between platforms, it would prefer that attractive content be obtained by the smaller platform; this works against tipping and is procompetitive.").

[277] *See* Riordan Zentler, *Game On: Xbox Is Losing Badly to Nintendo and PlayStation*, SPOKESMAN-REV. (May 11, 2023), https://www.spokesman.com/stories/2023/may/11/game-on-xbox-is-losing-badly-to-nintendo-and-plays/ (arguing that Xbox's declining hardware sales are due to "just the lack of impressive exclusive games that prevents people from joining (or rejoining) the Xbox ecosystem").

[278] CMA Market Participant E, *supra* note 101.

and only having to optimize for a single console's hardware will likely be reinvested into making a better game.

Second, although a console company may be incentivized to preferentially treat its games relative to third-party games, to the extent that there is healthy a console ecosystem alternative, the third-party companies will be incentivized to switch to the console market that treats them more favorably. Since a console company wants to keep its portfolio of games extensive and diverse, the console company will be incentivized to compromise with the third parties at least to the extent that they will remain with the console. The better the game (or the more popular the franchise), the more bargaining power the third parties would have, because the more likely that those games would lead to console sales. There is likely some degree of abuse that a console company could get away with without pushing out third parties; the comment above may suggest that Sony has gotten away with such abuse due to its stronger userbase. But the more consoles compete, the less abuse each can get away with; thus, the fact that exclusives increase console competition cannot be completely detethered from game quality as well, because it effects the bargaining environment between third parties and the console company.[279]

Third, particularly for the most popular genres, companies will attempt to fill the void left by a newly-made exclusive title. If *CoD* is no longer available on PlayStation, that will leave a gigantic market hole that Sony and other third-party developers will likely seek to fill. Sony already owns Bungie, developer of *Destiny* and (until it was sold to Microsoft) *Halo*; they have the resources to develop a critically-acclaimed FPS. One may argue that, with *CoD*'s departure from the Sony ecosystem, developers will face less competition and therefore will put less effort into developing an innovative or more polished game. But, since Sony will be searching for shooters to fill the void left by *CoD*, to limit the hemorrhaging of users, Sony will be effectively competing with *CoD*, to create a more attractive first-party exclusive than Microsoft. Meanwhile, third-party developers will likely continue to develop titles for multiple platforms; in other words, they will still have to compete against *CoD* on the Xbox. Since developers typically design their games to be identical on each console, even the version designed for the PS5 will be designed as if it were competing against *CoD*.

Additionally, since independent publishers and developers benefit from a more competitive console market (because it improves the bargaining power of the publishers when negotiating licensing fees for each game), independent game companies will react strategically to any perceived market dominance from Microsoft's use of Activision's exclusives: "[C]omplementors [i.e., game developers] who are positively influenced by the performance of competitor platform ecosystems avoid adopting a winner-takes-all strategy, and the platform grows (or declines) symbiotically along with the other platforms."[280] Thus, independent companies would be eager to enter exclusivity arrangements with Sony to supply titles to stabilize the competitive environment between the platforms if *CoD* proves to be too desirable of an exclusive.

On the other hand, "I think one of the most frustrating things in life is being excluded, especially when it's not in your control. I like the Playstation controller more; it fits my hands

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[279] *See* Inoue, *supra* note231, at 3 ("Since superior complementary goods promote the total sales of the platform, the platform providers themselves often offer attractive complementary goods or induce capable complementors to do so. However, even if a platform achieves a large installed base, the lack of a sufficient complementary goods volume would cause the platform ecosystem to decline. Accordingly, platform providers should pay attention to the profits not only of consumers but also of complementors.").
[280] Inoue, *supra* note 231, at 5.

better. And simply because I like the controller more I could get punished for it if Microsoft is allowed to go through with this."[281] In other words, exclusivity is a means of console competition that is harmful to consumers, because it diverts consumer attention away from the quality of the direct product (the console itself) to a different product (the exclusive game) that is artificially being tied to the console. Yes, console companies release exclusive games all the time, but our merger laws allow us to block anti-consumer behavior that companies can get away with when making unilateral decisions, in part because mergers are much easier to control. In the end, the benefits of exclusivity (increased console competition and perhaps greater investment in those exclusive games) would have to be so strong that it outweighs the consumer harm voiced by this quote. But since Microsoft does not have the incentive to make *Call of Duty* exclusive, the Commission never weighed the benefits as compared to the costs.

iv. How harmful would foreclosure of non-Call of Duty titles be?

Assuming the *CoD* contractual remedies are sufficient, does Activision-Blizzard have any other products that could seriously threaten competition through their foreclosure? Activision-Blizzard's most popular franchises (by revenue) are *Call of Duty*, *Candy Crush*, and *World of Warcraft*. Both *Candy Crush* and *World of Warcraft* are not console titles, so they are not relevant to the console market analysis. Besides these titles, IGN highlights these franchises: *Diablo*, *Overwatch*, *Starcraft*, *Tony Hawk's Pro Skater*, *Spyro the Dragon*, *Skylanders*, *Hearthstone*, *Guitar Hero*, *Crash Bandicoot*, and *Geometry Wars*.[282] *Guitar Hero* and *Skylanders* have not been relevant to the market for years.[283] *Hearthstone* is a mobile-focused title. *Starcraft* is a PC-focused franchise. *Geometry Wars* is not a AAA title. *Tony Hawk's Pro Skater* and *Spyro the Dragon* have recently received critically well-received remasters but not new entries to their franchises in several years.[284] *Crash Bandicoot* did receive a critically-acclaimed sequel recently,[285] but there is no reason to think future sequels would be any more attractive than the numerous exclusives offered by Sony, at least to the degree that *Call of Duty* is expected to be. *Overwatch 2* is already on PS5 and has an abysmal user score (and an average critic score) on Metacritic,[286] so it would be unlikely to induce users to switch from PS5 to the Xbox. *Diablo IV* is already set to release on PS5 before this deal finalizes,[287] and each of the *Diablo* games has a very long lifespan, so *Diablo V* is likely many, many years off. While, after the acquisition, Microsoft could pull *Diablo IV* from PS5, this seems highly unlikely given that

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[281] Kinser, *supra* note 90.

[282] *See* Ryan_Dinsdale, *Microsoft and Activision Respond to UK Government's Concerns over Xbox's Activision Blizzard Deal*, IGN INDIA (Feb. 8, 2023), https://in.ign.com/policy/179134/news/microsoft-and-activision-respond-to-uk-governments-concerns-over-xboxs-activision-blizzard-deal. Click through the images below the heading "The 13 Biggest Franchises Microsoft Will Own After the Xbox and Activision Deal" to see this list of games.

[283] *But see Activision CEO Predicts AI Revolution in Gaming, Dreams about AI-Powered 'Guitar Hero' Reboot*, FIDELITY (May 12, 2023) (quoting Bobby Kotick as stating "You know if you take an example of a thing like Guitar Hero, I've always had this vision for what a new Guitar Hero product could be but without having AI and then the processors embedded either in phones, in computers, or in-game consoles that allow you to actually have the speed of processing to enable that AI, we've never been in a place where AI is going to have practical reality and applicability for games until now.").

[284] For Spyro, see *Spyro Reignited Trilogy (Xbox One)*, METACRITIC, https://www.metacritic.com/game/xbox-one/spyro-reignited-trilogy. For Tony Hawk, see *Tony Hawk's Pro Skater 1 + 2 (Xbox One)*, METACRITIC, https://www.metacritic.com/game/xbox-one/tony-hawks-pro-skater-1-+-2.

[285] *See Crash Bandicoot 4: It's About Time (Xbox Series X)*, METACRITIC, https://www.metacritic.com/game/xbox-series-x/crash-bandicoot-4-its-about-time.

[286] *See Overwatch 2 (PlayStation 5)*, METACRITIC, https://www.metacritic.com/game/playstation-5/overwatch-2.

[287] *See Diablo IV*, PLAYSTATION, https://www.playstation.com/en-us/games/diablo-iv/.

the development team has already invested the resources into releasing the game on PS5,[288] and the always-online nature of *Diablo IV* means it also benefits from network effects (described above), meaning, all else equal, the more players, the better. In sum, Activision does not have many established franchises that would drive console sales outside of *CoD*; the Commission is likely to find insufficient harm (in the console market at least) to block the deal if the *CoD* behavioral remedies are deemed sufficient.

Section VI: Benefits of Vertical Integration in the Video Game Console Industry

Vertical mergers are more likely to be approved because they are more likely to result in increased efficiencies that are merger specific (meaning, the efficiencies would not occur but for the merger).[289] The "Non-Horizontal Merger Guidelines stipulate that in order to take efficiencies into account, they must fulfil[l] three cumulative criteria: (i) be to the benefit of consumers, (ii) be merger specific and (iii) be verifiable."[290] These benefits would have to outweigh any potential negative effects.

Efficiencies are more likely to be passed onto consumers if they result in reduced variable costs, rather than reduced fixed costs.[291] The Commission may consider whether benefits directly accrued to customers will be clawed back by the merged entity.[292]

i. Vertical integration would eliminate or reduce licensing and contracting fees, and those savings are likely to be reinvested into the game.

Vertical integration saves development and publishing costs through the elimination of double marginalization and some transaction costs. Third-party publishers must pay console companies licensing fees to publish games on their platforms. First-party titles do not face such licensing fees. Additionally, first-party titles likely face simpler contract negotiations relative to third-parties, because there is less of an incentive to bargain hard, and there is greater transparency between the parties. The key question is whether all these savings are passed onto

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[288] This is not a sunk-cost fallacy statement. Instead, it is simply the realization that, going forward, there is minimal marginal cost to keep the game on PS5, whereas making a game exclusive could potentially result in some savings were the game in early development. Thus, there is less to be gained from ending support for *Diablo IV* on PS5. Since *Diablo IV* is always online, under the current implementation pulling support would effectively make users' games worthless, which would produce tremendous amounts of backlash (although Microsoft could potentially remove the online-only requirement). Additionally, there might already be a contractual commitment to keep *Diablo IV* on the PS5.

[289] "The Commission has taken into account efficiencies also in the assessment of vertical mergers, which as stipulated in the non-Horizontal Merger Guidelines '*provide substantial scope for efficiencies*'." Bengtsson, *supra* note 106, at 605.

[290] *Id.* at 616.

[291] "When the likely harm to consumers is an increase in prices and the likely countervailing efficiencies are cost savings, it is important to distinguish between marginal cost savings and fixed cost savings. In most economic models, there is a straightforward connection between a firm's marginal cost and the price at which its products are sold. This close link makes it relatively easy to establish that a fall in marginal cost will give the firm an incentive to decrease its price. A similar straightforward link does not exist between fixed cost savings and prices." *Id.* at 619.

[292] "[I]n the *Deutsche Börse/NYSE Euronext* merger (2012), . . . the parties argued that the claimed efficiencies, such as reduced collateral requirements, accrued to customers directly and thus did not have to be passed on through lower prices by the parties. The Commission however considered that the merged entity could raise prices and therefore claw back at least part of those savings, in particular given the lack of significant competitive pressure in the relevant derivatives trading and clearing markets. The General Court agreed and confirmed that the Commission was entitled to take into account the potential claw back by the merged entity of the gains which accrued directly to consumers." *Id.* at 621.

consumers (whether via lower prices or greater investment in each game) or captured by the console company. Finally, optimizing for a single console provides some marginal savings relative to optimizing for multiple consoles: "[S]ingle-homing sellers may have lower costs (e.g., they avoid the cost of adapting their applications to multiple platforms)."[293]

As discussed above, to the extent that console companies face competitive pressure from other consoles, I would expect them to design first party games that would attract users to their consoles, so I'd expect at least some of those savings to be reinvested into the games, especially here where the company has a lower market share. For first-party exclusives, the return on investment for a high-quality game has the potential to be much higher than it would be for a third-party developer, because the return is not only based on the game's individual sales but also the lifetime purchases of the new users that the game pulls into one's ecosystem. If Microsoft keeps the games multiplatform, it would also be incentivized to invest some of those savings into the game (although to a likely lesser extent), to the extent that additional investment provides greater returns than the opportunity cost of such investment, in order to sell more games.

Vertical integration can "reliev[e] the pressure" on the developers of marketing and acquiring licensing deals, so that the studios can "pursue smaller projects alongside their larger endeavors. Grounded and Pentiment [both developed by Obsidian] are prime examples of this, where Xbox's safety net helped the developer juggle multiple balls at once."[294] In other words, developers in these integrated companies can take bigger creative risks because they have a greater safety net and greater resources to try different projects.

ii. Microsoft might be able to run Activision more effectively than Activision's current management.

Just prior to the announcement of the acquisition, several scandals tarnished Activision's reputation: it came to light that many of Activision's female employees, especially among its Blizzard division (which develops *WoW, Diablo,* and *Starcraft*), faced severe sexual harassment, to the point that one employee took her own life, and that Activision's upper management knew and did nothing about it.[295] While Activision has made efforts recently to address these concerns,

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[293] Landsman & Stremersch, *supra* note 223, at 40. *See also* Carmelo Cennamo, Hakan Ozalp, & Tobias Kretschmer, *Platform Architecture and Quality Tradeoffs of Multihoming Complements*, INFO. SYS. RSCH. 1, 12 (2018 forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839741 ("The rise of [multiplatform games] in the videogame sector is well-documented and is attributed to a decrease in the costs of porting games to different consoles relative to the upfront, fixed costs of developing the game. However, while the relative [multiplatforming] costs may have been decreasing and are a small percentage of the overall development and marketing cost of a game, Lee (2013) shows that porting costs vary significantly across consoles."

[294] *See* Rebekah Valentine, *Obsidian, and Why Xbox's Acquisition Strategy Is Staying Out of the Way*, IGN (June 14, 2022) (last updated June 16, 2022). While Activision, as a publisher and developer, likely faces less pressure from marketing and acquiring deals than did Obsidian, the point remains that Activision's developers have a greater safety net to take creative risks.

[295] *See* Polygon Staff, *Activision Blizzard Sexual Harassment Lawsuit: Everything We Know*, POLYGON (last updated July 22, 2021) (providing a timeline of the California sexual harassment lawsuit and the events connected to it). *See also* Neo Teigen, *Opinion: Why Activision Blizzard and Microsoft Are Depending on Overwatch 2's Success*, LOS ANGELES TIMES (Nov. 21, 2022) ("The California Department of Fair Employment and Housing (DFEH) had also sued Activision-Blizzard for having a 'frat boy' workplace culture and the tragic suicide of female worker Kerri Moynihan. The company allegedly paid female workers less, used dedicated lactation rooms for meetings, and inappropriately joked about rape and sexual encounters. Kerri Moynihan was on the receiving end of these actions after explicit images of her were shared around in the workplace by coworker Greg Restuito; she committed suicide shortly after in a Disneyland hotel at the age of 32. The DFEH believed that Activision Blizzard played a major role leading up to Moynihan's death, and accused the company of covering up its actions."), https://highschool.latimes.com/hs-insider/why-activision-blizzard-and-microsoft-are-depending-on-overwatch-2s-

such as by hiring an officer to oversee DEI and increased its share of women in game development leadership roles,[296] it is unclear how much these measures will improve Activision's workplace culture. The acquisition will likely involve the removal of the CEO Bobby Kotick, [297] possibly along with other C-suite management. To the extent that Microsoft's management is superior with respect to catching and punishing sexual harassment, along with removing the junior employees directly responsible or culpable for the harassment, Microsoft may better run the company, to the benefit of the employees.[298] Along these lines, Welsh notes that "Activision Blizzard is a horribly run company, where the ruthlessness of Bobby Kotick's leadership team is grinding its creative workforce into dust. Blizzard, in particular, seems near the point of total collapse. . . . [T]he labor neutrality agreement it signed with the Communications Workers of America union last year would be a genuine sea change for all Activision Blizzard staff, which could easily trigger a positive halo effect across the entire industry. To put it another way: Wouldn't you rather have Phil Spencer as your boss than Bobby Kotick?"[299]

On the other hand, Microsoft is known for acquiring game companies and then letting them run "business as usual;" this is how it has treated Bethesda and Obsidian (although those were seemingly better-run companies than Activision).[300] Since Microsoft's acquisition of Mojang in 2014, Microsoft has managed its acquired companies by "encouraging them to focus on making games with creative independence and using Microsoft's enormous resources. . . . Independence doesn't mean isolation, though. McGuane says that in Obsidian's case, for instance, she speaks with someone at the studio every few days, and there are connection points all throughout all the Xbox-owned studios."[301] Perhaps this kind of control will still allow Microsoft to prevent future sexual harassment. Or perhaps if Microsoft manages Activision in that manner, the company's culture (and the treatment of its employees) may not be any better than it has been while Activision has been independent. Finally, Activision's efforts to improve its workplace culture may suggest that these improvements are not "merger specific,"

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success/. For more on this lawsuit (including access to the relevant docket (Bloomberg Law subscription required)), see Maeve Allsup, *Activision Blizzard Sued Over 'Frat Boy' Culture, Harassment (1)*, BLOOMBERG L. (July 21, 2021), https://news.bloomberglaw.com/daily-labor-report/activision-blizzard-sued-by-california-over-frat-boy-culture.

[296] *See* Cecilia D'Anastasio, *Activision, Once Dinged for 'Frat Boy' Culture, Hires More Women*, SEATTLE TIMES (May 11, 2023), https://www.seattletimes.com/business/activision-once-dinged-for-frat-boy-culture-hires-more-women/?utm_medium=social&utm_campaign=owned_echobox_f&utm_source=Facebook#Echobox=1683830568.

[297] *See* Cara Lombardo, *Microsoft to Buy Activision Blizzard in All-Cash Deal Valued at $75 Billion*, WALL ST. J. (Jan. 18, 2022) ("Bobby Kotick, Activision's longtime CEO, is expected to leave after the deal closes, according to people familiar with those plans.").

[298] As well as to gamers; a better work environment will almost certainly lead to better games.

[299] Welsh, *supra* note 82.

[300] *See* Tom Warren, *Microsoft Completes Bethesda Acquisition, Promises Some Xbox and PC Exclusives*, VERGE (Mar. 9, 2021) (quoting Pete Hines (Bethesda's marketing chief) as stating that "the expectation is that Bethesda Softworks and our studios will continue as we have in the past, just with more support and resources than we've ever had before"). *See also* Valentine, *supra* note 294 ("According to Urquhart [former CEO of Obsidian], acquisition by a giant like Microsoft was a leap of faith. But what ultimately sold him on the idea were two things. The first was the substance of what Xbox was pitching: it wanted to let its acquired studios 'be who they are' and retain their creative freedom and studio culture, largely unbothered by Xbox mandates."), https://www.ign.com/articles/obsidian-xbox-acquisition-strategy-staying-out-way.

[301] Valentine, *supra* note 300.

because there are alternative means of improving Activision's workplace environment, such that this is not a benefit that should be considered by the Commission.

iii. Microsoft's acquisition of Activision may actually increase the availability of Activision games.

To stave off regulatory concerns over this acquisition, Microsoft has extended availability contracts to companies like Nintendo, whose platforms do not already have *Call of Duty* available. Even if Microsoft did not release future iterations of *Call of Duty* on Sony's PlayStation, *Call of Duty* would be available on as many, if not more, platforms as it is currently.[302]

Additionally, to induce consumers to join Microsoft's subscription or cloud gaming services, Microsoft will make Activision's catalogue of games available on their release date, increasing the number of options consumers have to play these games. Under Activision, *Call of Duty* is not available on *any* gaming subscription services at release. *Call of Duty* is Activision's most valuable brand; lacking their own subscription service, they do not have any incentive to make it available, because they would be losing software sales for minimal benefit. While Activision could create its own company-specific subscription service, these services tend to be the most beneficial when they offer as wide a variety of games as possible; Microsoft has the catalogue to do this (especially after this acquisition), but Activision does not. Meanwhile, Microsoft may be more willing to lose software sales to increase the number of users on its platforms. As the *Washington Post*'s editorial board notes, "it's possible consumers will end up paying *lower* prices overall for top-notch games than they pay today— . . . even more certainly if they opt into a subscription model that would also give them the opportunity to play more games on a variety of devices . . . for less money."[303] Of course, if Microsoft gains so many users that it dominates the subscription market, then this could actually be detrimental to consumers in the long run. But, so long as there remains effective competition in this space, it simply increases the number of ways one can play Activision's games. My Paper has not covered the gaming subscription market, so I cannot definitely say whether this will be deemed a benefit or not. In the context of cloud gaming, the Commission was apparently satisfied that Microsoft's contractual commitments would increase Activision's access on competing cloud gaming platforms.[304]

Section VII: Likely Conclusion with Respect to the Video Game Console Market

As expected, the Commission concluded that there would be no competitive harm by the merger in the console gaming market (or any market, for that matter, after factoring in Microsoft's contractual commitments). But why did the Commission find no competitive effects in the console market?

First, Microsoft is already entering into contracts with several companies, even extending a similar offer to Sony, to keep *Call of Duty* multiplatform for at least ten years. Activision lacks other series that are so successful that they could pull away so many consumers as to allow

[302] *See* Dring, *supra* note ("150 million more devices will be able to access Call of Duty. Of course, those aren't 150 million more people. Because that would assume that all of those people want Call of Duty and have no other console or means to play it. But the sentiment behind it is true. If this deal goes through, Call of Duty will be available in more places to more people.").
[303] Editorial Board, *Opinion: How Both Sides Can Win in the FTC's Antitrust Case Against Microsoft*, WASH. POST (Jan. 11, 2023), https://www.washingtonpost.com/opinions/2023/01/11/ftc-microsoft-activision-takeover/.
[304] *See* Eur Comm'n, *supra* note 2.

Microsoft to dominate the console market. Thus, if *Call of Duty* is multiplatform, and the performance requirements of these contracts are sufficient, then there isn't likely to be any competitive harm.[305]

Second, the Commission rarely find competitive harm from a vertical merger, especially where behavioral commitments are provided. On a purely statistical basis, this result was predictable: "Prohibitions are rare. In three decades of EU merger control, the Commission has only prohibited 30 concentrations, an average of one prohibition per year. By contrast, there have been more than 450 cases where remedies were made binding. In short, the vast majority of concentrations that raise competition problems are approved with remedies."[306] While remedies often entail divestiture, in the vertical integration context purely behavioral commitments are more common than in the horizontal context.[307]

Third, even if *Call of Duty* is made exclusive, or the contracts do not suffice as a behavioral remedy, it will likely improve competition at the console level and perhaps even at the gaming level. The exclusives will make Microsoft's platform more competitive relative to Sony and Nintendo. Whether exclusivity harms gaming innovativeness or quality is inconclusive: there are many countervailing factors encouraging Microsoft to invest as much, if not more, in making *Call of Duty* a more attractive exclusive franchise to generate more console sales. Meanwhile, Sony and even third-party developers will still have to design their FPS games as if they were competing against *Call of Duty*: Sony because the FPS will have to be more attractive than *CoD* to induce console sales, third party developers because they will still be competing against *CoD* on Microsoft's platform. However, since most users do not multihome, these game quality improvements may be outweighed by the costs of exclusivity: namely, consumer welfare is reduced because a user on one platform, who likely locked-in his or her console purchase before the exclusive was released, is blocked from playing an exclusive on another platform that that user would have loved to play, were it not for the exclusivity.

Conclusion

This Paper has explained why the Commission was unlikely to find likely competitive harm from this acquisition within the console market. I believe the Commission did not accept the FTC's "premium gaming console" market, because it improperly excludes Nintendo's Switch from this market. Instead, the Commission likely excluded mobile devices, gaming PCs, and potentially the Steam Deck, but not the Switch. While I do not believe the Commission accepted the FTC's downstream market, that of AAA games, due to chains of substitution, I do believe it did factor into the Commission's input foreclosure analysis. Very few companies possess the resources to develop AAA games, and these types of games are the ones most likely to generate

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[305] *Cf.* Welsh, *supra* note 82 ("The regulators must know their antitrust case is not strong in this instance, and having extracted some 'behavioral remedies' . . . from Microsoft, they will likely fold. It has already been indicated the EU will be the first domino to fall.").
[306] Walle, *supra* note 266, at 763.
[307] "Like most competition authorities across the world, the Commission has a policy that favours structural remedies over behavioural remedies. However, this still leaves room for behavioural remedies in some cases. . . . The debate is also linked to questions about how interventionist the Commission should be in regard to vertical and conglomerate mergers. Those are the type of mergers where the choice between behavioural and structural remedies presents itself most acutely. In th[ose] type[s] of mergers, divestitures are sometimes extremely difficult to conceive, leaving the Commission with a choice between prohibiting the transaction or accepting a behavioural remedy." *Id.* at 771.

console sales. Therefore, from both a supply side and demand substitutability analysis, AAA games act like a separate submarket for videogames.

The Paper provided an overview of all the research analyzing the two-sided characteristics of consoles, their direct and indirect network effects, the importance of exclusive superstars, and the importance of sequels within the AAA market. All of these features indicate that, if a console is under-competitive, as the Xbox currently is, exclusivity may actually increase the competitiveness within the console market because exclusives are one of the premium factors that consumers evaluate when choosing a console. Input foreclosure of games only becomes harmful when it leads a platform to dominate the market in a winner-takes-all scenario. But due to local network effects, the catalogue of exclusives available on competing platforms, and the ability to develop a new competing exclusive within the same genre on a different platform, winner-takes-all scenarios are incredibly unlikely within the console market, especially over the entire lifespan of the console. As to whether exclusives harm game quality is more inconclusive: if platforms preferentially treat their own games over third-party games, third-party developers may face unfair competition within each platform ecosystem. But since third-party developers can threaten to switch to competing platforms, there is a limit to how abusive the platforms can be to these developers; due to the importance of indirect network effects, the platform would like to keep as many good games on its platform as possible.

In this particular case, Microsoft's behavioral commitments are likely sufficient to remove any risks of competitive harm, but even if they are not, the benefits of vertical integration will likely outweigh the harms.

My conclusion begs the question: If this deal will not allow Microsoft to dominate the console market, why did it pay so much for Activision-Blizzard? I believe other markets outside of the console market primarily motivated Microsoft's decision. First, Phil Spencer has indicated that he believes that, in the medium-term, consoles will be supplanted by cloud-gaming.[308] My Paper did not analyze the cloud-gaming market, but the CMA found competitive harm there, where Microsoft's market position is much stronger.[309] Meanwhile, the Commission was satisfied by Microsoft's behavioral remedies. Second, Microsoft appears to view subscription gaming services, instead of individualized gaming purchases, to also be the future of gaming distribution. This acquisition improves Microsoft's catalogue of subscription games and makes it an even better deal for consumers, at least in the short term. My Paper did not analyze the subscription gaming market, but within that market, Microsoft has the strongest position and is experiencing tremendous growth. Third, Microsoft has expressed some interest in developing a metaverse platform, and Activision may be able to help with that development.[310] Fourth, this

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[308] Lenarduzzi, *supra* note 72, at 24 ("According to Spencer, the real new competitors of the Xbox ecosystem are not Nintendo or Sony anymore, but they are Amazon and Google, corporations that are focusing on how to get gaming to everyone worldwide, largely because neither [Sony nor Nintendo] own[s] its own cloud infrastructure comparable to Microsoft's Azure platform.") (citing this transcript https://www.microsoft.com/en-us/Investor/events/FY-2022/Microsoft-and-Activision-Blizzard-Conference-Call).

[309] But Microsoft's deal with Nvidia is designed to assuage this concern. *See* Christopher Dring, *Did Microsoft Do Enough to Convince Europe to Let Them Buy Activision Blizzard? | Opinion*, GAMES INDUSTRY.BIZ (Feb. 22, 2023) (last updated Feb. 23, 2023) ("By bringing its games to Nvidia GeForce Now, which is a streaming service (but not a subscription service), Xbox will hope it can counter those concerns, too. You could argue that this ten-year deal might not be enough. Game streaming is a nascent distribution model after all, and it might take most of those ten years before it becomes a substantial business (if it does at all). But regardless, it was an answer to a concern that Microsoft had previously not countered.").

[310] "Microsoft argued that the acquisition 'will provide building blocks for the metaverse.'" Pales, *supra* note, at 24 (quoting *Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across*

transaction helps Microsoft establish itself within the mobile market: "A successful app store entrant will need technological and legal skills to succeed as well as significant financial incentive to make the effort worthwhile. The combination of Microsoft and Activision fits that description and is therefore likely to help break the mobile app distribution bottleneck."[311] Fifth, *Call of Duty* is a consistently very well-selling franchise in its own right, and Microsoft will benefit from that reliable source of revenue, along with revenue from Activision's other titles. Sixth, even if this deal will not lead to Microsoft's dominance within the console market, it will at least improve the competitiveness of its consoles, so this deal has some financial benefit even within that market.

Future research should analyze the CMA's claim that there is a high risk of competitive harm within the cloud gaming market. Hopefully this Paper can inform the inquiries experts engage in to analyze the competitive effects of future video game industry mergers.

every device, MICROSOFT (Jan. 18, 2022), https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activisionblizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device).

[311] Morton, *supra* note 276, at 4. *See also* Mueller, *supra* note 73 ("As an app developer who has been impacted by the mobile app store tyranny, I'm extremely disappointed to see the FTC ignore (for litigation purposes) the procompetitive dimension of the deal with a view to mobile app stores. In October this blog was first to point to what Microsoft said in a filing with the UK Competition & Markets Authority about '[s]hifting consumers away from the Google Play Store and App Store on mobile devices.'").

Annex

Abstract: This Paper analyzes the European Commission's review of Microsoft's proposed acquisition of Activision Blizzard, predicting and explaining its likely conclusion in the "high-performance gaming console" market. When I began writing this Paper, the European Commission was still considering the anticompetitive effects of the acquisition on the console gaming market.[312] As I conclude writing this, the European Commission has just approved the transaction, finding no risk of competitive harm in the console market because Microsoft has no incentive to make *Call of Duty* exclusive to Xbox, and finding the behavioral remedies sufficient to address the cloud gaming concerns.[313] Thus, the value-added of this Paper has shifted from predicting the Commission's response to explaining why it came to this conclusion. The Commission tends to release much more truncated decisions where it is not challenging a merger,[314] meaning that it is still useful to go into greater detail than the decision is likely to provide, so that decisions with respect to future transactions within the video game industry can be more clearly analyzed and predicted.

Section I summarizes the key facts of this merger challenge as well as the opinions of numerous experts and non-experts concerning this transaction. Section II summarizes vertical merger law within the European Union. Section III discusses possible upstream and downstream markets (in the context of the console market) the Commission could take as its market definitions and assesses whether each of these markets is appropriately delineated. Section IV summarizes key details of the video game console market: consoles are two-sided markets, they benefit from direct and indirect network effects, they rely on exclusives and "killer apps" to generate console sales, and sequels are disproportionately important among AAA games. With these aspects of the market understood, I then use that knowledge to assess the input foreclosure theory of harm (Section V): Are Microsoft's *Call of Duty* contractual commitments a sufficient remedy? Are exclusives harmful to consumers in the console market? Are exclusives harmful to consumers in the software gaming market? How harmful would foreclosure of Activision's non-*Call of Duty* titles be in the console market? Section VI then discusses the benefits of vertical integration: the elimination of double marginalization and the reduction of transaction costs; Microsoft might be able to run Activision better than Activision's current leadership; and Microsoft's acquisition of Activision may actually increase the availability of Activision's games overall, even if excluded from Sony in particular. Section VII states Commission's likely conclusion with respect to the console market, based on my preceding analysis. I then conclude.

[312] *See* Eur. Comm'n, *supra* note 1 ("The preliminary investigation suggests that Microsoft may have the ability, as well as a potential economic incentive, to engage in foreclosure strategies *vis-à-vis* Microsoft's rival distributors of console video games, such as preventing these companies from distributing Activision Blizzard's console video games on **consoles** or degrading the terms and conditions for their use of or access to these video games.").

[313] *See* Eur. Comm'n, *supra* note 2 ("Microsoft **would have no incentive to refuse to distribute Activision's games to Sony**, **which is the leading distributor of console games** worldwide, including in the European Economic Area ('EEA') where there are four Sony PlayStation consoles for every Microsoft Xbox console bought by gamers. Indeed, Microsoft would have strong incentives to continue distributing Activision's games via a device as popular as Sony's PlayStation."; *and* finding that Microsoft's commitments "**fully address** the competition concerns identified by the Commission and **represent a significant improvement for cloud game streaming compared to the current situation**.") (emphasis in original).

[314] "[T]he Commission will only define markets in a definite way when this is necessary to arrive at a conclusion for a case. Markets are therefore defined in all cases that raise competition concerns. Otherwise, market definition issues are discussed in the decision, but the precise definition of the market is ultimately left open." Simon & Listl, *supra* note 3, at 209.

Zusammenfassung: In diesem Papier wird die Prüfung der geplanten Übernahme von Activision Blizzard durch Microsoft durch die Europäische Kommission analysiert und das wahrscheinliche Ergebnis auf dem Markt für "Hochleistungsspielkonsolen" vorausgesagt und erläutert. Als ich mit der Abfassung dieses Papiers begann, prüfte die Europäische Kommission noch die wettbewerbswidrigen Auswirkungen der Übernahme auf den Markt für Konsolenspiele. Während ich dieses Papier schreibe, hat die Europäische Kommission die Übernahme soeben genehmigt und festgestellt, dass keine Gefahr einer Beeinträchtigung des Wettbewerbs auf dem Konsolenmarkt besteht, da Microsoft keinen Anreiz hat, Call of Duty exklusiv für die Xbox anzubieten, und dass die Abhilfemaßnahmen ausreichen, um die Bedenken hinsichtlich des Cloud-Gaming auszuräumen. Der Mehrwert dieses Papiers besteht also nicht mehr darin, die Reaktion der Kommission vorherzusagen, sondern zu erklären, warum sie zu diesem Schluss gekommen ist. Die Kommission neigt dazu, sehr viel kürzere Entscheidungen zu veröffentlichen, wenn sie einen Zusammenschluss nicht anfechtet, was bedeutet, dass es immer noch nützlich ist, mehr ins Detail zu gehen, als die Entscheidung wahrscheinlich hergibt, damit Entscheidungen in Bezug auf zukünftige Transaktionen in der Videospielindustrie klarer analysiert und vorhergesagt werden können.
In Abschnitt I werden die wichtigsten Fakten dieser Fusionsanfechtung sowie die Meinungen zahlreicher Experten und Nicht-Experten zu dieser Transaktion zusammengefasst. Abschnitt II gibt einen Überblick über das Recht der vertikalen Fusionen in der Europäischen Union. In Abschnitt III werden mögliche vor- und nachgelagerte Märkte (im Zusammenhang mit dem Konsolenmarkt) erörtert, die die Kommission als Marktdefinition heranziehen könnte, und es wird geprüft, ob jeder dieser Märkte angemessen abgegrenzt ist. Abschnitt IV fasst die wichtigsten Details des Videospielkonsolenmarktes zusammen: Konsolen sind zweiseitige Märkte, sie profitieren von direkten und indirekten Netzwerkeffekten, sie sind auf Exklusivtitel und "Killer-Apps" angewiesen, um Konsolenverkäufe zu generieren, und Fortsetzungen sind unter den AAA-Spielen überproportional wichtig. Nachdem ich diese Aspekte des Marktes verstanden habe, verwende ich dieses Wissen, um die Abschottungstheorie des Schadens zu bewerten (Abschnitt V): Sind die vertraglichen Verpflichtungen von Microsoft für Call of Duty eine ausreichende Abhilfe? Sind Exklusivtitel für die Verbraucher auf dem Konsolenmarkt schädlich? Sind Exklusivrechte schädlich für die Verbraucher auf dem Software-Spielemarkt? Wie schädlich wäre eine Abschottung von Activisions Nicht-Call of Duty-Titeln auf dem Konsolenmarkt? In Abschnitt VI werden dann die Vorteile der vertikalen Integration erörtert: die Beseitigung der doppelten Marginalisierung und die Verringerung der Transaktionskosten; Microsoft könnte in der Lage sein, Activision besser zu führen als die derzeitige Führung von Activision; und die Übernahme von Activision durch Microsoft könnte die Verfügbarkeit der Spiele von Activision insgesamt erhöhen, selbst wenn sie von Sony im Besonderen ausgeschlossen wird. In Abschnitt VII wird die wahrscheinliche Schlussfolgerung der Kommission in Bezug auf den Konsolenmarkt auf der Grundlage meiner vorangegangenen Analyse dargelegt. Ich schließe damit.