Neutral citation [2024] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

15 February 2024

Before:

SIR MARCUS SMITH
(President)
DEREK RIDYARD
TIMOTHY SAWYER, CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

DR LIZA LOVDAHL GORMSEN

Applicant and Proposed Class Representative

- and –

(1) META PLATFORMS, INC
(2) META PLATFORMS IRELAND LIMITED
(3) FACEBOOK UK LIMITED

Respondents and Proposed Defendants

Heard at Salisbury Square House on 8 and 9 January 2024

JUDGMENT

APPEARANCES

Mr Robert O'Donoghue, KC, Mr Nicholas Bacon, KC, Ms Sarah O'Keefe, Mr Ben Smiley, Mr Tom Coates and Mr Greg Adey (instructed by Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Applicant.

Mr Tony Singla, KC and Mr James White (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Respondents.

A. INTRODUCTION

1. By a collective proceedings claim form dated 11 February 2022, Dr Liza Lovdahl Gormsen applied to commence opt-out collective proceedings under section 47B of the Competition Act 1998 against the three above-named Respondents. The Respondents are all members of the "Meta" corporate group which, amongst other things, owns and operates "Facebook", an online personal social network.[1] We shall refer:

   (1) To the social network itself as "Facebook".

   (2) To those who use or subscribe to it as "Users". For the present, we refer to Users without differentiating between Users that are natural persons (i.e. human beings) and users that are legal, but not natural persons (i.e. corporations and the like). That is a distinction to which we will come in due course.

   (3) To the Respondents, who provide Facebook to Users, and who monetise their product in a manner that we will describe (albeit in general terms) as "Meta".

   (4) To Dr Gormsen as the "Proposed Class Representative" or "PCR".

2. At a hearing which took place just over a year ago (on 30 and 31 January and 1 February 2023), we declined to permit the PCR to commence collective proceedings. In our ruling under neutral citation number [2023] CAT 10 (the "First Ruling") we set out our reasons for declining the PCR's application. As we noted in the First Ruling,[2] whilst the Tribunal must consider the making of a collective proceedings order of its own motion, having regard to all matters, whether raised by the parties before it or not, the Tribunal will pay particular regard to those matters actually raised before it. At the original application, the

[1] As defined by the PCR. Meta does not agree with the characterisation of Facebook as an online personal social network. The precise characterisation of the Facebook service is a matter for trial.
[2] First Ruling at [3] to [4].

central issue was whether the test in *Pro-Sys Consultants v. Microsoft*[3] was met.[4] For reasons which turned on the manner in which the case was framed, we unanimously concluded that the test was not met. That was because – for reasons given in the First Ruling, and which we will not repeat here – "[w]ithout significantly more articulation, there is no blueprint to trial, and the PCR has unequivocally failed the *Pro-Sys* test".[5]

3. Instead of dismissing the application, the First Ruling offered a stay to the PCR "so as to enable the PCR to file additional evidence setting out a new and better blueprint leading to an effective trial of these proceedings".[6] More specifically, the First Ruling stated:[7]

> "…there can be no question of acceding to the application at this stage. Meta invited us – if this was our conclusion – to put the application "out of its misery", and to refuse it. We decline to do so, unless that is an order that the Proposed Class Representative asks us to make. Our preference – consistent with the importance of access to justice articulated by the Supreme Court in *Merricks* – is that the Proposed Class Representative have another go. But we wish there to be no misunderstanding: the methodology so far advanced by the PCR will need a root-and-branch re-evaluation, and mere tinkering with the methodology will not do. If the PCR is minded to simply "tinker", then it is probably better for the application to be refused, and for the PCR to seek a review of our decision in the Court of Appeal. (To be clear: this should not be taken as a hint that we would be minded to give permission to appeal: that will have to be applied for in the usual way.)"

4. The PCR did not appeal, but submitted the significantly revised application that is now before us. The revised application is contained in a substantial Draft Collective Proceedings Claim Form (the "Draft Claim Form"), running to 139 printed pages and 222 paragraphs, supported by evidence from a newly instructed expert economist (Professor Fiona Scott Morton).[8] It is fair to say – and we say this with approval – that the PCR has undertaken the root-and-

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[3] The original decision is the decision of Rothstein J, [2013] SCC 57 at [118]. It is fair to say that the test in this jurisdiction has undergone substantial evolution as a flexible procedural, non-merits based, control over collective proceedings before the Tribunal. It is a non-statutory test, based on the Tribunal's "gatekeeper" function on certification and the need – in all litigation before the Tribunal, but particularly collective proceedings – for those proceedings to be effectively managed to trial.
[4] First Ruling at [4(1)]. There was a subsidiary question (described at [4(2)]) which need not concern us further.
[5] First Ruling at [57].
[6] First Ruling at [62].
[7] First Ruling at [58].
[8] We refer to Professor Scott Morton's first report dated 6 October 2023 ("Scott Morton 1") and her second report dated 20 December 2023 ("Scott Morton 2").

branch re-evaluation that the Tribunal intimated was necessary, such that very little (if anything) of the original methodology remains.

5. This is, therefore, an application that has already received substantial consideration from the Tribunal and which has been stayed for the very specific reasons set out in the First Ruling. It would be entirely inappropriate for us to consider this application as a *de novo* application. Rather, the following points, in descending order of importance, arise:

   (1) Most important is the question of whether the *Pro-Sys* test is, this time round, satisfied. Closely allied to this question is whether the claims articulated in the Draft Claim Form are arguable. Although there was no application to strike the claim out before us, Mr Singla, KC on behalf of Meta rightly submitted that the Draft Claim Form constituted an amended collective proceedings claim form,[9] and that the Tribunal could not and should not permit the amendments unless satisfied that the draft proposed amendments were arguable (as well as meeting the *Pro-Sys* test). Mr O'Donoghue, KC, who (on this occasion, but not on the last) appeared for the PCR, did not dispute the essential correctness of this proposition. The PCR's position was that both the arguability and the *Pro-Sys* test were met; that the amendments should be permitted; and the collective proceedings be permitted to proceed.

   (2) Secondly, although Meta rightly eschewed questions of how these proceedings were to be funded, and the return to the funder in this case, Meta identified a point in the funding agreement that (so Meta submitted) needed to be drawn to our attention. Although – as was common ground – whatever is agreed as between funder and class representative in terms of reward for risk is subject to the Tribunal's ultimate control, such that it might be said that Meta's point was premature,[10] we are grateful to Meta for raising the matter and consider that it is appropriate to say something on the point.

[9] Albeit more in the form of a total re-write than a series of specific amendments to an existing pleading.
[10] Mr Bacon, KC, for the PCR, addressed us on this point in response to Mr Singla, KC. This, in substance, was his point, namely that the provisions identified by Meta as objectionable would be the subject of later review by the Tribunal, as appropriate, and that therefore the Tribunal did not need to trouble itself with this issue now.

(3) Thirdly, two technical points regarding the framing of the PCR's application arose and were addressed by the parties in writing after the hearing. One of these is straightforward; the second raises important and difficult questions as to class composition and the scope and nature of the claims being brought by the PCR.

6. We consider these various points in turn, below.

B. "ARGUABILITY" AND THE *PRO-SYS* TEST

(1) The law

7. Given the case-law preceding this application, we consider that it would be undesirable to attempt any further articulation of a procedural test that has received more than its fair share of scrutiny in recent time. We propose to apply the approach stated in the case law, and pause only to make the following points:

(1) Neither the question of "strike-out" (as we will refer to the arguability question, even though the question before us is one of amendment, not strike-out) nor the *Pro-Sys* test involve a consideration of the merits of a proposed claim. Both tests, in different ways, are concerned with the management of cases to trial: strike out seeks to "weed out" cases that are substantively unarguable; *Pro-Sys* seeks to ensure that arguable cases do not go "off the rails" in terms of case management and that (after an efficient and swift pre-trial process) the Tribunal is presented with a case that can substantively be tried with a minimum of procedural fuss and a maximum of focus on the substantive issues to be resolved.

(2) The types of case that come before the Tribunal for certification are many and varied. It would be folly to seek to be unduly prescriptive about the form or length of pleadings or the form and length of the supporting expert evidence. However, the proposed class representative must – in each case – consider what material the Tribunal actually <u>needs</u> to see in order properly to determine an application for certification. In particular:

(i) As with all of the best pleadings, facts not evidence should be pleaded. The adduction of evidence is a matter for trial, and whilst the Tribunal will want to understand how a claim will be made out, it does not need to be shown, in granular detail, the material on which the proposed class representative would (at trial) intend to rely.

(ii) Points should not be anticipated. The respondents to collective proceedings can be expected to resist certification; but the basis and/or manner on which they do so cannot necessarily be predicted. Unless a particular point actually needs to be established in order to make good a claim, it is unwise to anticipate it.[11]

(iii) In most competition cases, and doubtless without exception all collective proceedings, the claim will be made good by reference to the class. Claims tend not to be individuated, and the manner in which they are framed needs to reflect this. The Tribunal attaches great importance to theories of harm, their clear articulation, and an explanation as to how the facts supporting the theory will be obtained so that the Tribunal can be assured that the claim, as pleaded, is triable and can be case managed.

(3) There is, inevitably, a nexus between the manner in which a case is put (what has to be pleaded) and how that case is to be vindicated in court at trial (which is a question of evidence and law). It follows that there is something of a nexus between strike-out (the pleaded claim is unarguable) and *Pro-Sys* (case management): how a case is put, and whether it can properly be put, is closely related to how evidence is adduced, and so case management.

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[11] The First Ruling at [40] made clear that where a point had been taken by a respondent, the PCR would need to show, methodologically, how that point would be addressed. We stress that what points need to be addressed and what points do not need to be addressed is a matter of judgment, informed by the *Pro-Sys* test. The PCR does not need to fully articulate the answer to every point, but must satisfy the Tribunal that there is no insurmountable (in case management terms) barrier to an orderly trial. But the PCR does not have to be overly imaginative in speculating as to what points a defendant might, in the future, take, and making an application longer by dealing with pointless hypotheticals.

(2) The pleadings in the present case

8. Meta raised a series of root-and-branch objections to the manner in which the PCR's claim was framed, contending that the claim as articulated in the Draft Claim Form was not arguable (such that the amendments to the application should not be permitted) and in any event did not meet the *Pro-Sys* test.

9. We have already noted that questions of arguability and the questions of case management often cannot be considered independently of each other.[12] That is particularly so here, where the claims that the PCR seeks permission to bring assert infringements of the Chapter II prohibition and/or Article 102 TFEU in an unfamiliar and novel context, namely data or information abuse on or involving Facebook. In these circumstances, the prolixity of the Draft Claim Form, particularly when combined with the absence of a clearly articulated and self-standing theory of harm, is problematic. A crisp articulation of the intended claim – followed, if necessary, by a more detailed expansion of the harder points – would have been helpful. As it is, the Draft Claim Form pleads a case that is difficult to follow.

10. We conclude that although Meta have raised a series of important points in regard to arguability and case management, those points are insufficient to justify dismissing the application. Instead, we consider that the amendments should be allowed, and the case be certified to proceed as a collective action. In reaching this conclusion, we say nothing about the substance of either the PCR's case nor Meta's defence to that case, which of course is a matter for trial. The following paragraphs explain the reasons for this conclusion. We seek to do so by reference to the PCR's pleaded case as we understand it.

11. The paragraphs which follow explain how Meta's attacks on the Draft Claim Form fail by reference to the terms in which the case contained in the Draft Claim Form has been put. Our focus is unashamedly on the manner in which the case has been pleaded: we do not seek to articulate Meta's attack, because the real questions before us are:

[12] See paragraph 7 above.

(1) Has an arguable case been pleaded? And

(2) If so, is that case properly case-manageable according to the *Pro-Sys* test?

12. In resolving these questions, we were considerably assisted by the focussed submissions of Meta. We were also assisted by the expert reports of Professor Scott Morton. The fact that we have not referenced these in any detail is an indication of the importance that we attach to the articulation of the PCR's case in the pleadings. We have tested the pleadings (and the support they receive from the expert reports) against the criticisms mounted by Meta: but it is the pleadings, and not the criticisms, that (when all is said and done) matter.[13]

(3) The PCR's case

(a) Facebook

13. Facebook is an online personal social network which is provided at no monetary cost to its Users and which is monetised by Meta by using the Users' data to run third party advertiser ("Advertiser") advertisements. The technical processes by which this is achieved does not matter for present purposes (although it will doubtless become relevant later on, if the litigation proceeds): it is sufficient to note that User data is central to connecting (through advertisements) Advertisers with Users, and that (given what Advertisers pay) the data that enables such connections to be made is valuable.[14]

(b) The need for consent

14. The Draft Claim Form rests on an unarticulated assumption that Users must consent to their data being used in this way. Whilst it may be – and certainly, this is a point that Meta themselves did not raise – so obvious that consent is a prerequisite to lawful use that the point does not need to be articulated, we consider that there is merit – from a case management perspective – in this

[13] We have something to say about the volume of the materials adduced before us at the end of this judgment.
[14] The monetisation of data is pleaded at paragraph 40 of the Draft Claim Form.

implied point being made explicit. For instance: it may be that the PCR is contending that this information is property; or it may be the PCR's case is that Users' data can only lawfully be used where the consent requirements of the GDPR are met. That would appear to be the implication in paragraph 101 of the Draft Claim Form. Clearly, the basis for the need for consent is important in terms of articulating what is sufficient to constitute consent and whether consent was, in fact, obtained by Meta. Whilst, no doubt, in a run-of-the-mill case, these matters might be said to be so obvious as to require no further articulation, this is not a run-of-the-mill case and the Tribunal, at least, will be assisted by a clear understanding of where both parties are coming from on points such as this.

(c) On-Facebook Data and Off-Facebook Data

15. The Draft Claim Form pleads explicitly that some form of consent was obtained from Users by Meta, albeit that Facebook's terms and conditions are (so the PCR pleads) not transparent.[15]

16. For the purposes of the Draft Claim Form, a critical distinction is drawn between "On-Facebook Data" and "Off-Facebook Data". Paragraph 7 of the Draft Claim Form pleads:

> "The Claims are based on the contention that Facebook abused its dominant position in the Personal Social Network Market, in breach of the Chapter II prohibition and/or Article 102 TFEU. During the Claim Period, Facebook imposed on its UK users ("Users") various requirements that involved extraction of data concerning the activities of Facebook.com Users (including highly sensitive personal data) off-Facebook.com, notably User data from activity on: (i) Meta products and services other than Facebook.com (e.g. Instagram); and (ii) third party websites and apps ("Off-Facebook Data"). These data were then combined with the data that Facebook collects on-platform concerning Users…and monetised by Facebook without a corresponding value transfer to Users to obtain multi-billion revenues on the advertising side of the market, by permitting advertisers to target adverts at Users based on these data."

17. This plea makes a number of averments the significance of which is not completely clear:

    (1) To what extent does it matter, for the purposes of the claim, that the data includes "highly sensitive personal data"? As we understand it, the data

[15] Draft Claim Form at paragraphs 44*ff*.

providing the basis for the claim (Off-Facebook Data) is not characterised by its personal sensitivity, but by the fact that it is Off-Facebook Data. It may be that the sensitivity of the data goes to its value and the question of loss, but that is a point not articulated in this part of the pleading at least.

(2) We can see that the unarticulated distinction between Off-Facebook Data that is provided to Meta via other Meta products (e.g. Instagram) and Off-Facebook Data that is derived from third party websites and applications might very well be of some importance. Yet the label "Off-Facebook Data" is indiscriminately applied.

(3) How does Facebook's monetisation of On-Facebook or Off-Facebook data fit with the PCR's theory of harm? We do not say that the point is an irrelevant one. But it is difficult to see its relevance here, where a key part of the claim (the nature of the data) is being articulated. The point that is being made is that Facebook is deriving a lot of value from data for which it does not pay or does not pay enough, and is supportive of the excess pricing abuse to which we will come. But this part of the pleading is not (as we read it) concerned with that part of the case.

(d) Market definition and dominance

18. It is not necessary to say more about market definition or Meta's dominance in that market. Market definition is an analytical tool which will doubtless matter as these proceedings continue. But we see no point in saying more about the nature of the "Personal Social Network Market" nor on the question of Meta's dominance in that market, save to say that we proceed on the assumption that dominance arguably exists as framed by the PCR. To the extent that these are controversial matters, the controversy can be dealt with by case management and at trial and neither questions of arguability nor case management arise.

19. It is common ground between the parties that this is a "two-sided" or "multi-sided" market, and we anticipate that network effects between the market in which Users are buying Meta's services and the market in which Advertisers are buying Meta's services may well prove to be important. But, again, we do

not see these (again, doubtless difficult) points giving rise to questions of arguability or case management. We will come, in due course, to consider the position of Users who are also Advertisers: but do not consider that point at this stage.

(e) The "price" paid by Users

20. We noted earlier that Facebook is provided to Users for no monetary consideration. In other words, money does not flow from Users to Meta, although it very much does flow from Advertisers to Meta, in part facilitated by the data provided by Users to Meta.

21. It is the provision of data by Users that constitutes the manner in which Users pay for Facebook. The PCR contends that the provision of data is, in short, the "price" agreed between Users and Meta pursuant to which Facebook is provided, by Meta, to Users. This point is implicit in, and underpins, the entirety of the Draft Claim Form.[16]

22. This "price", according to the PCR, has two elements: the "price" paid by Users in the provision by them of On-Facebook Data; and the "price" paid by Users in the provision by them of Off-Facebook Data. No pleaded complaint is made in regard to the "price" paid in respect of On-Facebook Data. The claim turns on the "price" charged in respect of Off-Facebook Data.[17]

23. This split in the price between On-Facebook Data and Off-Facebook Data was reflected in neither the service received by Users nor in the manner in which Meta monetised the data it obtained from Users. More specifically:

    (1) *As regards the service received by Users.* It was not contended – and appears to form no part of the PCR's case – that a differentiated service is provided to Users providing different data. All Users participate in the same Facebook social network.

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[16] See, e.g., paragraph 8 of the Draft Claim Form ("Facebook's collection of Off-Facebook Data as a condition of access to its social media service involves an unfair bargain (or barter) between Users and Facebook").
[17] As can be seen from paragraph 8 of the Draft Claim Form. The nature of Off-Facebook Data is further articulated in paragraphs 61*ff* of the Draft Claim Form.

(2) *The manner in which Meta monetised the data it obtained from Users.* Although the technical details were not before us, it is not the PCR's pleaded case that the monetisation of Off-Facebook Data somehow constituted a separate body of data, deployed and monetised independently of On-Facebook Data. It would be very unlikely were Meta to hamper its business operations in this way. It follows from this that the revenue received by Meta from its operations cannot without more be split or allocated as between Off-Facebook and On-Facebook Data. Indeed, it is a specific averment in the Draft Claim Form that Off-Facebook and On-Facebook Data are aggregated:

> "88. Off-Facebook Data is extremely valuable to Facebook both in isolation and, more importantly, when combined with data that Facebook also collects on-platform, including both data that Users explicitly provide in creating their profiles (e.g. their name, gender, date of birth, email address, relationship status, etc) and data generated from Users' activities on the Facebook platform itself (e.g. the content they have "liked", the groups they have joined, the ads on Facebook that they have clicked on, etc).
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> 89. By merging these datasets and associating the Off-Facebook Data from individual Users with their individual Facebook accounts via the use of unique identifiers, Facebook is able to create extraordinarily rich and detailed profiles on its Users, for use in targeted advertising services. In this respect, it is reported that (i) Facebook has software in 61 of the 100 most popular smartphone apps, (ii) the Facebook (or Meta) Pixel is installed on over eight million websites; and (iii) Facebook tags are present on up to 50% of the internet's most popular websites, dwarfing the coverage of other platforms (other than Google), and meaning that Facebook can build an effective picture of Users' browsing history.
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> 90. While data collected on-platform and Off-Facebook Data on a given User is separately useful and valuable to Facebook, combining these two datasets into a single dataset on that User enables Facebook to make further inferences about the User's characteristics, preferences, and the types of products and services they are likely to purchase, inferences which could not have been discerned from considering the two datasets separately."

Of course, that does not mean that the incremental value to Meta of the Off-Facebook Data cannot be ascertained or evidenced. All we are saying is that the two forms of data are monetised indiscriminately by Meta. A "before and after" analysis (showing revenues to Meta derived from only On-Facebook Data, when that was the only data collected by Meta ("before"), as against revenues to Meta derived from both On-

Facebook and Off-Facebook Data ("after")) would be one way of demonstrating the incremental value of Off-Facebook Data.

(f) Pleaded allegations of abuse of dominance

24. Taking the dominance of Meta in the relevant market as read (as we do), we turn to the two abuses pleaded by the PCR in support of the claim she seeks permission to bring on the class' behalf.[18]

25. Two abuses are alleged, and they are pleaded as alternative or mutually supporting allegations.[19] We propose to consider them as self-standing allegations: if, as we find they do, they pass muster, there is no need to consider whether they mutually reinforce one another. That question would only become relevant were one or other alleged abuse to fail either on arguability or the *Pro-Sys* test. Turning to the two alleged abuses:

(1) *Meta's collection of Off-Facebook Data was an abuse of dominance because it was a condition imposed on Users pursuant to a "take-it-or-leave it" offer for the social network services which Facebook provides.* Viewed entirely on its own, this averment comes dangerously close to contending that any dominant undertaking, offering products on standard form conditions, which it declines to vary (hence: "take-it-or-leave it"), is abusing its dominance. We do not consider such a proposition, so stated, to be arguable. But, on careful consideration, we do not consider that the PCR is advancing so extreme a case but is asserting that as regards Off-Facebook Data, the failure, on the part of Meta, to offer Users a choice as to whether or not Off-Facebook Data could be used by Meta, was an abuse of dominance. Paragraph 8(a) of the Draft Claim Form provides:

> "…Facebook's collection of Off-Facebook Data pursuant to a "take-it-or-leave it" offer for the social network services which Facebook provides involves an unfair trading condition. This is because Facebook requires Users to give up Off-Facebook Data and/or accept a service predicated on

[18] It is worth noting that these claims are very differently framed from the claims framed on the original application. Further, a number of claims have been dropped, notably the abuse relating to misleading and unclear terms, which was a claim that was regarded as difficult to maintain for reasons given in our First Ruling.
[19] See paragraph 8 of the Draft Claim Form, and in particular paragraph 8(b) ("Further or alternatively…).

> the extraction of Off-Facebook Data as a condition for using the Facebook social network service. Very similar practices also involving Facebook have already been found by the German Federal Supreme Court to be abusive, in reasoning that has recently been endorsed by both the Tribunal and the Court of Appeal…The PCR further submits that the collection of Off-Facebook Data as a condition of providing the Facebook social network services is neither necessary nor proportionate to any legitimate objective of providing such services. This is evidenced *inter alia* by the fact that Facebook for many years before the Claim Period operated Facebook.com highly profitably without imposing the collection of Off-Facebook Data as a condition of providing the service; indeed…when Facebook tried to impose such measures in 2007, user backlash and the existence of at least some competition at that time forced Facebook to shut down the measures in question."

Although the plea is open-ended and mixes the pleading of fact (which is essential) and evidence (which should be omitted), as we understand the case being made, the plea is as follows:

(i) There was no reason why Meta could not offer exactly the same Facebook service to Users providing only On-Facebook Data. In short, the service was viable if Users provided On-Facebook Data only.

(ii) The imposition of a "take-it-or-leave-it" price deprives Users of an important choice as regards their data. As we have noted, the Draft Claim Form makes clear that Off-Facebook Data can be highly intrusive into Users' personal lives, and offering a choice provides Users with a degree of agency over their own data.

(iii) Furthermore, given that the Off-Facebook Data is extremely valuable in Meta's hands, even if monetised seamlessly and not separately by Meta,[20] Users' consent to that data ought to be specifically obtained so that they can themselves bargain over the terms on which their data is used, possibly deriving monetary benefit from this. That is a mischief that arises out of Meta's (alleged) dominance, since if there were effective competition between Meta and other providers, there might be competition between rival providers as to the amount of data each User would have to surrender to the provider in question.

[20] See paragraph 23(2) above.

Assuming that the foregoing is a broadly accurate summary of the essential parts of the PCR's case, it does seem to us to be both arguable as an abuse, and capable of proper management to trial. Of course, the difficulties of such a case are also clear, and we would not wish for our summary above to be read in any way as a suggestion that the PCR's plea of abuse is anything other than arguable and triable. The difficulties that we see are: (i) that the distinction between On-Facebook and Off-Facebook Data is much more fluid and less clear-cut than this summary would suggest; (ii) that the viability of Facebook (this being a two-sided market) might very well depend on Meta's monetisation of such data; (iii) that the implication of differentiating between On-Facebook and Off-Facebook Data (which the offering of choice in terms of the provision of such data inevitably gives rise to) is that Users will be able to charge a price for such data going beyond simply the "free" use of Facebook; and that the effective imposition of such a price would be destructive of Meta's business model. In articulating such points – which have barely been hinted at by Meta, which have, entirely understandably, been "keeping their powder dry" – we again are not endorsing them: we are merely considering the sort of issues that we might, in due course, have to try. Whilst unquestionably complex, we see no issue in their triability or in managing the case to trial.

(2) *Meta's collection of Off-Facebook Data involves the imposition of an unfair price within the meaning of United Brands.* It would be inappropriate to seek to articulate the precise nature of the *United Brands* test for the species of abuse of dominance arising from pricing too high. We would only make the following points:

(i) The *United Brands* test is a flexible one, reflecting the fact that it is markets, not courts, that set prices, and that (even in cases of dominance or alleged dominance) courts must tread carefully in finding prices to be abusive.

(ii) The *United Brands* test involves consideration of whether a price set by a dominant undertaking is first excessive and – if excessive – unfair. Generally speaking both excess and

unfairness are assessed by considering the overall price charged for a service offered by a dominant undertaking in light of the totality of the service provided. Comparables are extremely important in assessing abuse. Incremental increases of price in respect of an existing service that does not change are not, even presumptively, unlawful. A dominant undertaking is entitled to increase price without improving the quality or quantity of its offering, although of course such matters will not be disregarded when considering whether an abuse does or does not exist.

(iii) It is clear from the pleading that the PCR is contending that in this case an unfair price can be established from the fact that Meta switched from a price that was based on On-Facebook Data to one based, additionally, on Off-Facebook Data. Thus, paragraph 8(b) of the Draft Claim Form states:[21]

> "**[1]** Further or alternatively, Facebook's collection of Off-Facebook Data involves directly or indirectly imposing an unfair price, within the meaning of the *United Brands* line of case law, adapted to the particular circumstances of the present case. Off-Facebook Data from Users generates tremendous value for Facebook through monetisation via advertisers and yet Facebook extracted these additional data without a corresponding value transfer to Users. By making access to its platform contingent on Users giving up access to their Off-Facebook Data without a corresponding value transfer to Users, Facebook demanded an unfairly high and abusive "price" or "payment in kind" for the provision of social networking services. **[2]** Conversely, by taking the valuable personal data comprising Off-Facebook Data without paying for it (i.e. by offering a zero monetary price) as a condition of providing social networking services in return, Facebook offered an unfairly low and abusive price for Users' Off-Facebook Data."
>
> ([1] and [2] added by the Tribunal)

(iv) This (sub-)paragraph itself appears to be articulating two different cases ("Conversely…"). This is unhelpful in terms of understanding precisely what the PCR is saying, but it would appear, from this paragraph, that the PCR is framing two distinct cases within this second abuse argument. We differentiate them

[21] Emphasis added.

by the numbering "[1]" and "[2]" and propose to treat them as genuine alternatives. (If case [2] is simply intended as a re-articulation of case [1], then it is confusing to the reader. We proceed on the basis that two different cases are pleaded.

(v) Taking matters out of order, and beginning with case [2], what appears to be averred is that Meta's "price" for Facebook is unfairly high because the service is offered for "zero monetary price". In other words, the price charged is unfairly high given the data extracted from Users. We do not consider that this case, so understood, can properly be related to the Off-Facebook Data extracted by Meta from its users. The distinction drawn is between the product (Facebook) and the price (data), without differentiating between the different data streams. We do not consider this alternative case to be arguable when framed as it is.

(vi) Turning, then, to the primary case (case [1]), the point here is that Meta's shift from a price based solely on On-Facebook Data to a price based on On-Facebook Data plus Off-Facebook Data was (in and of itself) both excessive and unfair.[22] In other words, the abusive price is established by reference to an incremental increase in price which is, in and of itself, both excessive and unfair. As we have described, this is not the way in which the *United Brands* jurisdiction has typically been seen, and certainly not the way in which Meta have monetised their data (which, as we have described, has been seamless[23]).

(vii) The *United Brands* test is not intended to be read as a statute and is explicitly "open-textured" or flexible. Whilst we consider that a purely incremental price increase (i.e. where there is a price increase but no improvement in service) would be difficult, in and of itself, to be characterised as an abusive price, that is not the case that is being advanced. Rather, the position is said to be

[22] We assume, in the PCR's favour, that this incremental increase in price can be established on the facts.
[23] See 25(1)(iii) above.

this. The Facebook product was profitable and certainly viable at no monetary price to the User using only On-Facebook Data, to which (given that it is intrinsic to the service) consent can readily be inferred. The service needs some data simply to operate. That is very much not the case with Off-Facebook Data which – at least so far as data obtained from applications that are nothing to do with Meta are concerned – might be said to be qualitatively different from On-Facebook Data. Depending on how the Facebook offering to Users has evolved over time,[24] one can see how an excessive/unfair price case might be derived from an incremental increase in price. If (by way of example) the original price (i.e. the consensual provision of On-Facebook Data) can be said to be on the cusp of the excessive and the unfair, then extraction of additional data (Off-Facebook Data) might be said, for that reason alone, itself to be excessive and unfair because of its purely incremental nature. Equally, it may be that there are characteristics of the incremental price (here: the nature Off-Facebook Data) that render it inappropriate to levy as a price at all.

Although – as with any pleading – the point could doubtless be better put, the case as pleaded is arguable and manageable to trial.

26. In short, we conclude that the abuses articulated by the PCR are both arguable and triable.

(g) Causation, loss and damage

27. The next question that arises for consideration is whether a causal nexus between infringement and loss and damage has been established. All parties were agreed that the following statement in *BritNed Development Ltd v. ABB AB* accurately represented the law in this regard:[25]

[24] The position of the PCR was that it had not evolved. That, of course, would be a matter for trial. We assume no significant improvement over time, but that is absolutely a question of fact.
[25] [2018] EWHC 2616 (Ch) at [10], affirmed [2019] EWCA Civ 1840 at [28].

> "In English law, competition law infringements are vindicated as statutory torts. To establish a claim, two things must be shown: (i) an infringement of competition law; and (ii) actionable harm or damage, caused by that infringement…Proving actionable damage inevitably involves demonstrating a causal link between the infringement and the damage, generally using the "but for" test of causation."

28. We have found, for the reasons we have given, pleaded and arguable infringements of competition law, namely the two abuses considered above. The question is whether those abuses can causally be linked to a pleadable loss. The relevant parts of the Draft Claim Form state:

> "173. Facebook's breaches of statutory duty particularised above have caused loss and damage to the Proposed Class. Without prejudice to the generality of the aforesaid, as a result of the abusively unfair bargain, or barter, made by Facebook with UK Users, the Proposed Class Members were not adequately compensated for the economic value of their Off-Facebook Data collected and monetised by Facebook, which resulted from the abusive conduct, and have therefore suffered pecuniary loss.
>
> 174. Such loss and damage is within the scope of section 47A(3)(a) of the Act, which refers to a claim for damages.
>
> 175. In the counterfactual, Users would not have been subject to the unfair trading condition which made the provision of Facebook's social network services conditional (or, by reason of Facebook's use of choice architectures and the absence of any effective means of limiting such collection, effectively conditional) on the collection of Off-Facebook Data and/or would not have [been] subject to the unfairly high "price" imposed by virtue of the collection of Off-Facebook Data and/or would not have received an unfairly low zero-price in return for their Off-Facebook Data.
>
> 176. In the counterfactual, Users would thus have benefitted from a fair bargain in relation to the collection of their Off-Facebook Data. The value that would have accrued to Users in that fair bargain represents the loss they have suffered by reason of Facebook's abuse (given that the PCR contends that Users currently receive nothing in return for the collection of their Off-Facebook Data). Accordingly, the same (or substantially the same) counterfactual and methodology for quantifying damages applies whether, as a matter of legal classification, the abuse is articulated as an unfair trading condition or an unfair price. Scott Morton 1 sets out a plausible or credible proposed methodology for establishing that Proposed Class Members have suffered loss and for estimating the loss suffered by the Proposed Class in the form of the value that would have accrued to them pursuant to a fair bargain in the aggregate..."

29. Meta contended that the PCR had failed to articulate a true connection between the abuses of dominance pleaded and the loss and damage flowing from those abuses. Further, it was suggested by Meta that the PCR had failed to articulate the basis for a collective bargain model for establishing the price that would be

paid to the Users in the class had the abuses not occurred (which is, of course, the measure of loss in a tortious claim). We do not consider there to be substance in Meta's contentions:

(1) We accept that the case as pleaded is, in some instances, less clear than it might be (e.g. the reference to receiving an "unfairly low zero-price" in paragraph 175; and the reference to a "fair bargain" in paragraph 176). These phrases are suggestive of a disgorgement or gains-based measure of "loss", which would be (to put it no higher than this) an ambitious claim and one we expressly rejected as sustainable in our First Ruling.

(2) However, we consider that the PCR's plea, properly understood, is not based on a disgorgement or gains-based measure of "loss". We consider that the loss pleaded is no more than the conventional form of "negotiating damages", where:[26]

> "…the person who makes wrongful use of [another's] property prevents the owner from exercising his right to obtain the economic value of the asset in question."

In other words, the relevant loss is the loss of the right to obtain value or the loss of the value of the right/asset of which (here) the class member – the User – has been deprived. Such claims are well-established under English law, and the loss pleaded is plainly arguable.

(3) Thus, the PCR has clearly stated an arguable claim: had the (alleged) abuse of dominance not occurred, Meta would never have received the use of the Off-Facebook Data, either because the terms should never have been "take-it-or-leave-it" or because the price (to the extent it consisted of Off-Facebook Data) was an unlawful one. In each case, Meta has obtained something it should not have done; and, more importantly, each member of the class has lost something. True it is that this loss is not physical. No class member can point to <u>damage</u> in the sense of something held by them being lost or destroyed. Data is inherently capable of duplication, and all class members will have been able to continue to use their data and licence other people, apart from

[26] *Morris-Garner v. One Step (Support) Ltd*, [2018] UKSC 20 at [30].

Meta, to use it. But that is not the point. The point is that each member of the class has (arguably) sustained a loss (in the form of negotiating damages), which is sufficient to found a successful cause of action.

(4) Thereafter, the quantification of that loss is a matter to be assessed taking account of all manner of risks, possibilities and chances. We see no reason why the loss might not be quantified by reference to a "Nash equilibrium", if that is the evidence that the PCR chooses to lead on the point.

30. In short, we see the causation, loss and damage pleaded by the PCR as falling clearly within the legal principles and approach articulated in *BritNed*.[27]

(4) Conclusion

31. We are very grateful to Meta for their submissions on how the PCR's claim is expressed. It has obliged us to consider with some care the case expressed in a long and complex pleading. We are satisfied that the case is arguable and that once the claim is properly understood it is actually (and subject to the points at the end of this ruling) straightforward to manage. That is not to say that the issues arising are not going to be exceedingly complex and difficult to try: they obviously will be. But this is nothing to the point in terms of the *Pro-Sys* test.

32. We will therefore permit the amendments contained in the Draft Claim Form, subject to this one condition. Whilst we consider that the Draft Claim Form contains two clearly arguable abuses of dominance, themselves resulting in a clearly arguable claim for loss and damage, we consider that everyone – the PCR, Meta and (not least) the Tribunal – would be well served if the Draft Claim Form were to contain (in no more than ten pages) a clear articulation of the case pleaded in the subsequent 139 pages. If those 139 pages could be pruned, then so much the better: but that is not a requirement of certification.

33. As we have already stated, we consider the trial management of these claims to be relatively straightforward, even though the claims obviously give rise to

[27] [2018] EWHC 2616 (Ch) at [10] to [18], with particular reference to [12(6)] to [9], substantially affirmed at [2019] EWCA Civ 1840 (with some qualification of the broad-brush in *Asda*).

issues of massive substantive complexity: the questions of case management are not, we consider, in any way extraordinary. We debated with the parties the extent to which directions to trial could be made at once: Meta considered that it was premature to do so, and we (on mature consideration) agree. However, we expect the parties to liaise in short order as to appropriate directions going forward, with a view to this matter being tried in the course of the first half of 2026 at the latest.

C. FUNDING

34. We are very grateful to Meta for raising this point. We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care:

    (1) First, there is the question of whether – in terms of straightforward allocation – a funder is taking more from the class than they properly should.

    (2) Secondly, there is a danger of perverse incentives arising; or (to put it more accurately) in a conflict between funders' interests and class interests manifesting itself. The problem, as we see it, is that funders are (as the law presently stands) precluded from aligning themselves with the class: they cannot, without more, lawfully, seek a return that is based on the damages recovered by the class. To this extent, therefore, the "perverse incentives" are imposed on funders.

35. Both of these points arise against a context of commercial – and largely confidential – negotiation between the PCR and the funder, into which the Tribunal should be slow to venture. The collective actions regime in this jurisdiction depends on funders being ready and willing to assume the very considerable financial risk in funding litigation that is, on any view, large, complex and enormously expensive. It is not for this Tribunal, on certification, to review the commercial arrangements that have been reached between the class representative and the funder. That was a point made by Mr Bacon, KC, for the PCR, and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or

judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders.

36. That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or *in extremis* a blanket refusal to certify. In correspondence subsequent to the hearing, the PCR's solicitors wrote to the Tribunal (we refer to their letter dated 5 February 2024) making a number of points.

    (1) First, this was a point which Meta helpfully drew to our attention, in assisting the Tribunal in reaching its decision to certify. It is for the Tribunal to certify or not certify proceedings, and any PCR will need to stand ready to justify the application in all regards, including as to funding, should the Tribunal (as opposed to the respondent) seek to explore any such point. Meta, through Mr Singla, KC, were doing no more than identifying a point for the Tribunal's attention.

    (2) Secondly, the funding arrangements which we describe below, were justified: but after the event, in the letter we have described. It is, after the hearing, difficult for us to engage in such after-the-event justification, and we do not do so.

    (3) Thirdly, the funder proposed a series of changes to the arrangements, in response to concerns raised by the Tribunal. We are very grateful to the funder and to the PCR in listening to the concerns we articulated. That is particularly so where the Tribunal's response to points concerning funding must inevitably be binary: either the Tribunal certifies the proceedings or (where the funding terms are the only issue) it does not. The Tribunal cannot, self-evidently, impose alternative funding terms on the funder or the PCR.

37. This was a case which required calling out. We stress that although the terms that we describe below were identified as confidential, we can see no justification in withholding these terms from public scrutiny and considerable benefit: a regime built around access to justice ought to be as open as possible,

including in particular as to the price that is paid (admittedly, indirectly) by the class on whose behalf these claims are ultimately brought.

38. We stress that Mr Bacon, KC was not in a position to articulate any justification for the provisions we here describe. He had no instructions. We respect that, and our description is simply based on our understanding of the relevant contractual provisions. We have – because they came after the event – taken no account of the subsequent explanations and justifications advanced by the funder, not least because Meta has not been able to respond.

39. The provisions in the funding arrangements to which Meta drew our attention were (we will come to the changes proposed in a moment) as follows:[28]

(1) Under the funding arrangements, the funder is entitled to a "Commission" calculated initially by reference to the "Project Costs". These, in essence, are the costs and expenses of the litigation, including costs ordered to be paid to the defendants. We are not going to be too specific about the quantum of the Project Costs, but will work to the following figures (as a worked example):

> Project Costs of £90 million, comprising £50 million (which materially understates the true figure, but which is sufficiently realistic to enable us to articulate our concerns) as the costs of funding the litigation (the "Total Commitment"), plus exposure to adverse costs orders, limited to about £40 million. Thus, if all goes badly, the funder's exposure is about (say) £90 million. But that exposure only really exists if the case is lost.[29]

(2) The funder recovers Project Costs[30] plus a multiple of the Total Commitment, which begins at a multiplier of six (i.e. recovery equals Project Costs + (Total Commitment x 6) = (assuming Project Costs to be the same as Total Commitment) a recovery of £50 million plus £50

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[28] The fact that we have singled out these provisions for special consideration says nothing about the acceptability or otherwise of the other funding provisions, save that we are prepared to certify on the basis of the documents before us (subject to the further revisions to the Draft Claim Form that we have identified, and the technical amendments referred to below).

[29] There is an element of unreality here: Project Costs include the costs of funding the litigation and any adverse costs incurred. However, adverse costs are really only likely to be substantial if the litigation is substantially lost, in which case there will be no fund out of which the Project Costs can be paid, there being no recourse against either the class or the PCR.

[30] Even if the claim is very successful, there may well be adverse costs orders, as well as orders for costs flowing the other way.

million x 6 = £350 million). The multiplier ratchets up according to the date on which the case either settles or there is a judgment on liability and quantum.

(3) Expressed in tabular form, the position is as follows:

Multiplier	**Date to**	**Project Costs**	**Total Commitment x Multiplier**	**Commission**
6	1 Apr 2025	£50m	£300m	£350m
8	1 Mar 2026	£50m	£400m	£450m
10	31 Dec 2026	£50m	£500m	£550m
14	After 31 Dec 2026	£50m	£700m	£750m

(4) Given an exposure of £90 million, a return of £350m represents a return of 3.8 times that exposure, which is defensible. What is not on the face of it defensible is the return 21 months later of 8.3 times that exposure.

40. As we have indicated, these funding arrangements underwent significant change. In broad terms:

(1) Provision was made to switch back to a damages based funding arrangement, were the law to change to permit this. Since this would have the effect of aligning funder interests with class interests, that is obviously to be welcomed.

(2) The operation of the ratchet was materially softened, in a manner that we do not consider it necessary to articulate, but which affected both time frames and trigger points.

41. In conclusion, we say only this:

(1) The funding arrangements as they presently stand do not stop us from making an order permitting these proceedings to continue. Subject to the technical points to which we come, we are minded to certify.

(2) We would not want there to be any suggestion in the Tribunal's certification of these collective proceedings that we are in any way approving or endorsing or expressing any kind of approval of the terms on which these proceedings are funded. It is simply that of the two choices we have – to certify or not to certify – we consider the option of certification to be the right course in this case.

D. TECHNICAL POINTS

(1) Introduction

42. In light of our conclusion that the PCR's application should succeed, we must go on to determine two issues regarding class definition. Since this issue only arose contingently (viz: if, contrary to Meta's primary position, the application should succeed), the parties agreed to address us on these points in written submissions shortly after the certification hearing.

(2) The first issue

43. The first issue relates to the PCR's relevant period for her class definition, following the decision in *Neill v. Sony Interactive Entertainment Europe Limited* ("*Neill*").[31] The PCR acknowledged that her class definition, which defined the relevant period as extending to the "date of final judgment or earlier settlement of the present collective proceedings" required amending to reflect the conclusion in *Neill* that such a definition was impermissible.

44. The PCR proposed amending the end date in the class definition to 6 October 2023, the date when she filed her revised CPO application. Proposed class members falling within that class period would be entitled to a "claim period" extending to a date of judgment or earlier settlement.

45. Meta noted that the PCR's original claim form proposed a class definition with a relevant period of 14 February 2016 to 31 December 2019. They submitted that there was no clear basis for the extension of this period in the Draft Claim

[31] [2023] CAT 73.

Form to 6 October 2023, given that this was not in issue in the First Ruling. Meta did not object to the proposed amendments, provided that:

(1) Where a User within the class deactivates or deletes their Facebook account in the period prior to final judgment or earlier settlement, that User's claim ends at the latest on the date their account is deactivated or deleted. We understand this point to be controversial and objected to by the PCR, because a "deactivated" User's data might nevertheless continue to be used by Meta, and the "deactivated" User continue to sustain loss. We consider that the PCR's objection to this limitation on class to be well-founded, and we reject Meta's position in this regard.

(2) For Users added to proceedings by virtue of the extension of the claim period from 1 January 2020 to 6 October 2023, as they joined the class period between those dates, the proceedings include their claims during the period during which they are class members. This is a helpful clarification of the PCR's definition of class, and we propose to certify on the basis of this qualification. It is not clear to us the extent to which the Draft Claim Form needs to be re-framed to make the point express, and we leave that to the judgment of the PCR.

46. Again, it goes without saying, but we say it for the avoidance of doubt, that it would be premature to seek to determine all of the implications of the PCR's class and claim period definitions at this stage, particularly those relating to limitation, provided the class definition meets the certification threshold.

47. The use of 6 October 2023 as an end date addresses the issue of an indeterminate class definition as articulated in *Neill*. We approve the PCR's proposed changes to her "claim period" and "class period".

(3) The second issue

48. The second issue relates to whether the PCR's proposed class definition should be amended to exclude "business users", and, if so, how this could be pragmatically achieved.

49. This is a definitional question that is best approached in stages:

(1) So far, we have used a definition of "User" that embraces natural and legal persons: we refer to paragraph 1(2) above. We consider, to be clear, that the claim articulated by the PCR could be certified on the basis of this (wide) definition of the class.

(2) The definition of "Users", both in the PCR's original claim form and in the Draft Claim Form, is significantly different and narrower. The PCR's original claim form specifically excluded "businesses and bodies of persons corporate or unincorporate". The Draft Claim Form removes this qualification and refers only to "individuals who are natural persons", and thus excludes from the class legal persons.

(3) The dispute between the parties is whether this narrowing of the class "solves" a problem. The point that Meta make is that a class limited to natural persons is, in itself, too wide, because consumer and business Users have a different value exchange with Facebook/Meta, flowing from the two-sided nature of the market. Professor Scott Morton's methodology, Meta submit, does not engage with this issue, focusing instead on consumer Users only. Meta say that it is not possible to ignore the use to which Users deploy Facebook. In particular, the PCR's definition of User could include advertisers, notwithstanding Professor Scott Morton's view that the welfare of advertisers is unaffected or even increased by the alleged abusive conduct. The definition of the class articulated by the PCR would leave the claim certified without a methodology setting out a blueprint to trial relating to abuse, causation and loss in relation to business Users in the class.

50. It is thus apparent that Meta's "technical" objection is a fundamental one, going as it does to the coherence of the class and the manner in which the PCR articulates her claim. It is important to articulate with precision why we reject the objection, which we do. We consider that Meta's point is an extremely important one, but not one that goes to certification: it seems to us to be far more relevant to the merits of the claim and Meta's likely defence to that claim. As to this:

(1) As we have noted, we would have been prepared to certify these proceedings on the basis of a class defined by reference to Users comprising both natural and legal persons. By definition, therefore, this would include Advertisers who are also Users, and Users who use Facebook to promulgate their business and who are not (purely) consumers.

(2) There are, therefore, within this class, a number of different interests which, however, we do not consider requires any narrowing of the class as we define it. Just to enumerate three:

(i) *Users that are also Advertisers.* It is possible that a User might overpay in terms of surrendering their Off-Facebook Data for nothing; but who, as Advertisers, underpay for the services they receive from Meta as an Advertiser. We regard that as unlikely (Meta will, presumably, be maximising its profits), but even if that is the case, it does not seem to us to follow that the mere fact that a person is a buyer in both markets comprising the "two-sided market"[32] (i.e. active both as a User and as an Advertiser) means that losses/gains arising out of those positions should be aggregated. It seems to us that there are good arguments for saying that whilst there will be network effects between the two markets, any claim a User might have against Meta is (as a matter of law) conceptually distinct from any claim an Advertiser might have against Meta.

(ii) *Users deriving different levels of benefit from Facebook.* It is so self-evident that it should not need stating that the benefit Users derive from Facebook will vary from User to User. In short, their consumer surplus will be subjective and not uniform. That will be true in the case of any class: for example, credit card users will derive entirely different benefits from their cards, and as a result will use such cards more or less as a result: that – in, say,

[32] We do not regard the label "two-sided market" as helpful, for the reasons articulated in *BGL Holdings Ltd v. Competition and Markets Authority*, [2022] CAT 36.

a claim for interchange fee overcharge - will affect their level of loss and damage. So too here. There will be persons who participate in Facebook minimally, simply to keep track of what others are doing; there will be those who actively engage socially; there will be those who derive an incidental "business" benefit (e.g. a teacher advertising a school concert on behalf of their pupils); and there will be those Users that are only businesses. All of these Users will have varying levels of consumer surplus, and we completely fail to see why those varying level require any kind of parsing or categorisation of Users within the general class of User.

(iii) *Passing-on Users*. It may be that Users that are businesses pass-on any overcharge to (some) Users that are purely consumers. Pass-on where the price is zero will be analytically difficult, and (at this stage) we do no more than consider the possibility of pass-on. As it seems to us, this is a question of quantification of loss (specifically, double-counting would have to be avoided) which (again) requires no parsing of the class of Users, as we define it.

51. For these reasons, we regard the objections that Meta has articulated to the narrower class defined by the PCR – Users that are natural persons – as unsustainable and wrong. The points we have addressed above are undoubtedly relevant to the assessment of network effects, loss and damage – but these are matters for trial, not certification.

52. We stress that we are not obliging the PCR to expand the class defined in the Draft Claim Form. There are perfectly sensible reasons (not least in regard to the broad nature of loss to the class: i.e. the surrender of personal data) for confining the class to Users who are natural persons. But we do not consider the points articulated by Meta to have any bearing on this question.

E. DETERMINATION

53. We have, quite deliberately, focussed on the areas where Meta was identifying points of concern. Of course, the PCR had conscientiously set out how and why the other requirements for certification had been met. We see no point in listing these requirements: either we must deal comprehensively with each point (which would needlessly lengthen and delay this ruling) or else state that we have considered certification in the round; and consider (subject to the point made above about a short clarificatory pleading as to how the case is put in general terms) these proceedings should be certified as collective proceedings before this Tribunal.

54. We appreciate that the responsible PCR needs to be in a position to deal with any issue raised by the Tribunal, as well as points raised by the respondent in opposition to certification. That being said, it is incumbent upon all – lawyers and experts – to ensure that what their work focusses on is that which is necessary to decide certification. The Tribunal will – if a case is certified – come to trial in due course. PCRs should also take some comfort from this: where a PCR has sought, responsibly, to be brief and to focus on what material is required for certification, the Tribunal will not allow an application to fail on technical grounds. As has been said on many occasions, collective proceedings are concerned with access to justice, and the certification process needs to be seen in that light.

55. This ruling is unanimous.

Sir Marcus Smith
President

Derek Ridyard

Timothy Sawyer, CBE

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 15 February 2024