Neutral citation [2024] CAT 72

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1698/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 December 2024

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

CLARE SPOTTISWOODE CBE

Applicant / Proposed Class Representative

- and –

(1) AIRWAVE SOLUTIONS LIMITED

(2) MOTOROLA SOLUTIONS UK LIMITED

(3) MOTOROLA SOLUTIONS INC

Respondents / Proposed Defendants

RULING (SERVICE OUT OF THE JURISDICTION)

A. INTRODUCTION

1. By an application dated 5 December 2024, the Proposed Class Representative, Clare Spottiswoode CBE (the "Applicant") seeks permission pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Rules") to serve the Collective Proceedings Claim Form of the same date (the "CPCF") including supporting documents out of the jurisdiction on the Third Proposed Defendant, Motorola Solutions, Inc ("MSI"), which is based in the United States of America ("USA"). MSI is a US corporation incorporated under the laws of the State of Delaware. The Applicant relies on three jurisdictional gateways in Practice Direction 6B ("PD6B") of the Civil Procedure Rules (the "CPR"), paragraph 3.1(9)(a) (damage suffered within the jurisdiction in respect of a tort), 3.1(9)(c) (tort claim governed by the law of England and Wales), and 3.1(3) (where anchor defendants are within the jurisdiction).

2. The Applicant also seeks extension of time for service of the CPCF (including supporting documents) as well as permission for alternative service on MSI:

   (1) via couriered hard copy to the UK solicitors for all three Proposed Defendants (if known at the time permission is granted), together with an email to MSI's in-house legal representatives, under Rule 111(2) of the Rules; or

   (2) pursuant to Article 10(b) or (c) of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention"), in accordance with the relevant laws of the relevant states of the USA, by instructing a "process server" in the USA as "other competent persons" with capacity to validly serve MSI with the CPCF and supporting documents in both the State of Illinois (as MSI's place of Principal Executive Offices) and the State of Delaware, via (i) the relevant registered agent for MSI and (ii) the Secretary of State, in each of Delaware and Illinois.

3. The Application is said to be urgent and is being considered on very short notice to the Tribunal (albeit the Tribunal was informed in advance of the filing of the CPCF and application that it was to be made and required expedition). The Application is supported by the witness statement of Euan Maclean Burrows of Ashurst LLP, the Applicant's solicitors. This refers to a potential limitation argument which it is said could be made if the Order sought is not made promptly, an argument which the Applicant considers lacks merit in any event.

B. THE PARTIES

4. The Applicant is an individual with an extensive business and regulatory background, which is set out in her witness statement dated 5 December 2024.

5. The Proposed Defendants are all members of the well-known global telecommunications corporate group of Motorola. As to the Proposed Defendants:

   (1) The First Proposed Defendant, Airwave Solutions Limited ("ASL") is a company incorporated under the laws of England and Wales, with its registered office in London. ASL is the sole owner and operator of a bespoke closed, secure, terrestrial trunked service radio (TETRA) communications network, known as the "Airwave Network". The Airwave Network is used to supply communications services for a number of public safety organisations in Great Britain, including fire, police and ambulance services ("Airwave Services").

   (2) The Second Proposed Defendant, Motorola Solutions UK Limited ("MSUK") is a company incorporated in England and Wales, with its registered office in London. It is the immediate parent company of ASL and shares the same registered business address.

   (3) The Third Proposed Defendant, MSI, has its registered office in Chicago, Illinois. It is the ultimate parent company of ASL and MSUK.

For the purposes of this Ruling, "Motorola" refers to the Proposed Defendants collectively. At all material times, ASL, MSUK and MSI were entities said to form part of a single economic unit in which MSI had the ability to and did in fact exercise decisive influence over ASL and MSUK during the claim period referred to below. On this basis they may be treated as a single undertaking for the purposes of UK competition law.

C. THE CLAIM

6. The claim is set out in detail in the CPCF issued on 5 December 2024. In summary, the claim which is proposed to continue in these collective proceedings and for which the Applicant seeks to be class representative under a Collective Proceedings Order ("CPO") is a stand-alone claim for damages under section 47A of the Competition Act 1998 (the "CA 1998"). The claim is for loss and damage allegedly caused by breaches of statutory duty by Motorola in that it abused its dominant position contrary to section 18 of the CA 1998 by imposing excessive and unfair prices on purchasers of services ("Airwave Services") using or in relation to the Airwave Network (the "Infringements"). The claim period is 1 January 2020 to 31 July 2023 (or such later date as the Tribunal may order). The CPCF will shortly be served within the jurisdiction on ASL and MSUK.

7. As to the Infringements, the allegations are summarised in paragraphs 23 to 30 of Mr Burrows' witness statement as follows:

> "23. The [Applicant] contends that ASL held a dominant position throughout the Claim Period in the market for the supply of radio communications network services for public safety in Great Britain. Since at least early 2006, ASL has been the sole provider of Airwave Services pursuant to a Private Finance Initiative Framework Agreement signed on 29 February 2000 (the **PFI Framework Agreement**). ASL also owns the physical infrastructure assets that make up the Airwave Network. The PFI Framework Agreement initially anticipated the Airwave Network being provided for a period of 15 years from approximately 2005 up to late 2019. The Government has procured a replacement network called the Emergency Services Network (the **ESN**) which was due to be operational such that a transition would have occurred by 2020. However, due to delays with the development and implementation of the ESN, the Government negotiated with the Proposed Defendants to extend the provision of

Airwave Services beyond the end of 2019 until the ESN becomes operational.

24. The [Applicant] contends that ASL abused its dominant position by continuing to charge the same prices for Airwave Services beyond 31 December 2019 as were previously applicable under the PFI Framework Agreement and refusing to negotiate substantial price reductions, or otherwise failing to reduce the prices, for the period beyond 2019. The [Applicant] alleges that those prices were excessive and unfair, as:

    (a) the circumstances from 1 January 2020 onwards were, and are, materially different to those during the term of the PFI Framework Agreement, as the Proposed Defendants had fully recouped their investments in developing, building and rolling out the Airwave Network and had already enjoyed the opportunity to earn a reasonable return on that investment over the 19-year term of the PFI Framework Agreement and could not have charged twice for those development costs in conditions of effective competition or effective price; and

    (b) in the exercise of the Proposed Defendants' market power, they set and/or maintained prices at a level that was substantially and persistently above the efficient costs of continuing to operate the Airwave Network and above the competitive level, and they thereby earnt supernormal profits at the expense of the Proposed Class Members during the Claim Period.

25. The Proposed Claims are brought on a stand-alone basis, but are based on and refer to the [Competition and Markets Authority's ("CMA's")] Mobile Radio Network Services Market Investigation Reference (2020-2021) [the "Charge Control Order"] and Final Report, dated 5 April 2023 (the **Final Report**). In the Final Report, the CMA concluded that the Proposed Defendants possessed '*unilateral market power and are able […] to charge prices significantly above the level we might expect in a competitive market and to make supernormal profits.*'

26. The features of the market that the CMA identified when arriving at this conclusion are summarised in the following terms:

    '*(a) The Airwave Network is a critical piece of infrastructure on which the emergency services in Great Britain, and ultimately lives, depend.*

    (b) The Airwave Network is the only network of its kind in Great Britain and is provided by a monopolist. No other such networks exist nor are they likely to be constructed and ready for use before ESN (or an alternative network) is able to replace it.

(c) The Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement, Airwave Solutions still owns them (and the related business) and the transfer of those assets is not a credible option that the Home Office could either pursue or threaten to pursue.

(d) The Home Office has tendered and contracted for a replacement network – ESN – but it is taking much longer than anticipated to deliver and replace the Airwave Network. ESN will not be ready until at least 2026, likely 2029 and possibly later.

(e) The Home Office and the emergency services in Great Britain are locked in with the incumbent supplier of communications network services – Airwave Solutions (and Motorola) – beyond the period over which prices were, or should have been, constrained by the terms of the PFI Agreement (and Airwave Solutions should have recouped its investment and had a chance to earn a reasonable return).

(f) The Home Office has very weak bargaining power.

(g) There is asymmetry of information between the parties.

(h) There is a lack of effective constraints provided by the terms of the PFI Agreement on the price of the provision of the network after 2019, including the benchmarking provisions which are likely to be ineffective.'

27. For these reasons, the CMA concluded that these features of the relevant market restricted or distorted competition for the supply of emergency services in Great Britain, resulting in an adverse effect on competition (**AEC**). As a result, the Proposed Defendants were able to set and maintain prices substantially above the competitive level. The CMA estimated that the impact of the AEC was that the Proposed Defendants were expected to make total supernormal profits of around £1.27 billion between 1 January 2020 and 31 December 2029, equivalent to £200 million per year more than would be expected in a well-functioning market.

28. For the reasons given at paragraphs 20 to 24 of the Application […] it is clear that there is a serious issue to be tried given that:

    (a) the allegations of abuse of dominance in the Proposed Claims relate to facts and matters and analogous theories of harms that have been the subject of the CMA's Final Report, based on a very detailed investigation and analysis of the relevant market, the conduct of the Proposed Defendants and its likely impact on their customers, and the Tribunal's judgment of 22 December 2023 [*Airwave Solutions v CMA* [2023] CAT 76] (the **CAT judgment**); and

(b) the Proposed Class Members being purchasers of Airwave Services who have suffered loss as a result of the excessive charges imposed by the Proposed Defendants.

29. In accordance with the duty of full and frank disclosure, the [Applicant] acknowledges that the CMA's AEC finding does not in and of itself amount to a conclusion that the Proposed Defendants contravened the Chapter II prohibition. Nonetheless, a number of elements of the allegations of abuse of dominant position are similar to, and overlap with, the CMA's examination of the market context, statements of fact and conclusions in the Final Report. The Final Report will therefore be relied upon by the [Applicant] as relevant evidence in support of the factual basis for the Proposed Claims as well as to corroborate the allegations of dominance, abuse and theory of harm in the Proposed Claims. However, at trial the [Applicant] will also rely on other relevant factual evidence and independent expert evidence to make good the Proposed Claims under the sections 18, 47A and 47B of [the CA 1998].

30. The Proposed Defendants sought judicial review of some (but not all) of the CMA's findings to the Tribunal. That application was dismissed in its entirety in the CAT judgment."

8. On 11 November 2024 the Court of Appeal heard a rolled-up permission to appeal application and appeal hearing from the Tribunal's judgment ([2023] CAT 76). The Court of Appeal has reserved its judgment on that appeal.

9. The Applicant seeks to bring the proceedings on an opt-out basis on behalf of all purchasers of Airwave Services during the Claim Period.

10. The Applicant relies on the expert report of Joseph Bell of Oxera Consulting LLP dated 5 December 2024 to provide an estimated and preliminary overcharge of £517 million plus £105 million interest during the Claim Period, giving an estimated total aggregate damages figure in the region of £623 million.

D. LEGAL FRAMEWORK

11. As the Third Proposed Defendant is not based within the jurisdiction, permission of the Tribunal is required for service of the CPCF on it outside the jurisdiction pursuant to Rule 31(2)-(3) of the Rules. So far as is material to the Application, Rule 31(2)-(3) provides as follows:

"(2) Where the permission of the Tribunal is required for service of the claim form on one or more foreign defendants out of the jurisdiction, the claimant shall make an application for permission verified by a statement of truth setting out—

(a) the address of such foreign defendant or, if not known, in what place that defendant is, or is likely, to be found; and

(b) that the claimant believes that the claim against any such foreign defendant has a reasonable prospect of success; and

(c) if under rule 30(3)(b), the claimant contends that the proceedings are to be treated as taking place in England and Wales, which ground set out in paragraph 3.1 of Practice Direction 6B of the CPR is relied on;

…

(f) any material facts relied on.

(3) Where paragraph (2) applies, the Tribunal shall not give permission for service out of the jurisdiction unless satisfied that the Tribunal is the proper place in which to bring the claim."

12. The Applicant contends that the current proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Rules. In such a case, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd v. Mastercard Inc* [2015] CAT 7 at [17]-[18].

13. There are numerous cases both in the High Court and the Tribunal dealing with the requirements for service out of the jurisdiction. The principles and relevant test have been helpfully summarised by the Tribunal in *Epic Games v. Apple* [2021] CAT 4 at [78]:

"(a) There is a serious issue to be tried on the merits of the claim: i.e. that there is a real as opposed to fanciful prospect of success on the claim. This is the same test as would be applied if the claimant were resisting a summary judgment application by the defendant: *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7 at [71].

(b) There is a good arguable case that the claim falls within one or more of the categories of case, generally referred to as "gateways", set out in CPR Practice Direction 6B at para 3.1. For this requirement, "good arguable case" means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon. Where this depends on an issue of law, the Tribunal would normally decide that issue as opposed to determining whether there is a good arguable case 7 on it: *AK Investment CJSC* at [81]. Insofar as this involves an issue on the facts, the effect of the test is as follows:

> '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.'
>
> Per Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at [7], as approved in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9].

(c) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction. This is reflected in rule 31(3) of the 2015 Rules. As regards this requirement, the task of the Tribunal is first, to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; and then to determine whether England is clearly or distinctly the appropriate forum: *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808 at [101]."

See also Dicey, Morris & Collins, *The Conflicts of Laws* (16th ed.), paras. 11-100 and Rule 31(2) of the Rules.

14. On each of these requirements the burden of proof is on the Applicant.

E. THE TRIBUNAL'S ASSESSMENT

15. The Application itself contains the information required by Rule 31(2)(a)-(c) as well as the material facts relied upon within Rule 31(2)(f). I am satisfied that it is likely that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Rules.

(1) Serious issues to be tried on the merits

16. In support of its contention that there are serious issues to be tried, the Applicant relies on a significant amount of material and evidence:

(1) the matters set out in Mr Burrows's statement, the CPCF and the expert report of Joseph Bell already referred to.

(2) The Final Report of the CMA.

17. Whilst I am satisfied on the basis of the material relied upon in the Application that there are serious issues to be tried in the merits, I note that this is a relatively low threshold, and the issue of merits will no doubt arise and be reviewed at the certification state and in the proceedings themselves in the event a CPO is granted.

18. PD 6B, paragraph 3.1 so far as is relied upon by the Applicant, provides as follows:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 [of the CPR] where:
>
> …
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> …
>
> (9) A claim is made in tort where –
>
> (a) damage was sustained, or will be sustained, within the jurisdiction;
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales."

(2) The gateways

19. I am satisfied that there is a good arguable case that the claim falls within each of the 3 gateways relied upon by the Applicant.

(a) Damage sustained within the jurisdiction (para.3.1(9)(a))

20. As regards the gateway in para. 3.1(9)(a) (damage sustained within the jurisdiction), the Tribunal is a UK jurisdiction. "Damage" in this gateway refers to "actionable harm, direct or indirect, caused by the wrongful act alleged": *FS Cairo (Nile Plaza) LLC v. Brownlie* [2021] UKSC 45 at [81]. In relation to this gateway, it has been held in the context of an abuse of dominance claim alleging an overcharge for goods supplied that if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought: *Apple Retail UK Ltd v. Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat) at [99]. In the present case there is a good arguable case that damages have been sustained within the jurisdiction (in this case, the UK) as the Proposed Class Members are based in the UK, have made allegedly inflated payments for using Airwave Services in the UK.

(b) Claim governed by the law of England and Wales (para.3.1(9)(c))

21. As regards the gateway in para. 3.1(9)(c) (claim governed by the law of England and Wales), as the Tribunal is a UK jurisdiction, it is enough that the claim is governed by the law of any part of the UK.

22. Losses sustained by the Claimants which predate 11pm on 31 January 2020 are governed by Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"). Losses which postdate 11pm on 31 January 2020 are governed by the retained version of Rome II (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) (Retained EU Legislation) ("Retained Rome II"), which is in equivalent terms to Rome II. References below to provisions in Rome II are also to the equivalent provisions in Retained Rome II.

23. Article 4(1) of Rome II sets out the general rule that, unless otherwise provided for:

> "…the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective

> of the country or countries in which the indirect consequences of that event occur".

24. Article 6(3)(a) of Rome II makes specific provision for competition claims, and states that states that *"[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected"*.

25. Recitals (21) and (22) of Rome II explain that Article 6 is a clarification of the general rule in Article 4(1), i.e. Article 6 is intended to state a version of the principle that the applicable law is that of the country where the damage occurs, particularised for competition law. Thus, in *Westover v Mastercard* [2021] CAT 12 at [50], the Tribunal stated:

> "The general rule is that the governing law is the law of the country where the damage occurs: Art 4. That is considered to strike a fair balance between the defendant and the claimant: recital (16). Thus Art 6(3)(a) can be seen as a particular application of this approach: where there is a restriction of competition then the market affected is likely to correspond to the place where the anti-competitive damage occurs."

26. There is a good arguable case that this gateway is satisfied:

(1) The geographic scope of the market is at least as wide as the UK. The countries where the competitive relations were affected and the countries where the market is are England and Wales. Insofar as the relevant conduct occurred in Northern Ireland or Scotland, the relevant law is materially the same and this Tribunal is a UK tribunal.

(2) The damage was sustained in the UK in that the services were brought and paid for in the UK and the loss was in the form of an overcharge.

(c) Necessary or proper party

27. As regards the gateway in para. 3.1(3) (necessary or proper party where anchor defendant), ASL and MSUK are potential anchor defendants who are domiciled in the UK and are capable of being served with the CPCF within the jurisdiction. Companies within the same corporate group may be liable for competition law infringements on a joint and several liability basis as alleged here: *Sainsbury's*

Supermarkets Ltd v. Mastercard Inc [2016] CAT 11 at [363]; *JJH Enterprises Ltd v. Microsoft Corp* [2022] EWHC 929 (Comm) at [35]-[38]; *CMA v. Volkswagen AG* [2023] EWCA Civ 1506 at [84]. MSI forms part of the same economic undertaking as these UK-based companies that are alleged to be direct participants in the alleged infringements. ASL and MSUK are therefore potential anchor defendants, who have been or will soon be served within the jurisdiction as of right by the Applicant.

28. ASL and MSUK are alleged to be liable on the basis that they are part of the same economic entity or undertaking as ASL. They are both subsidiaries of MSI (directly in the case of MSUK and through MSUK in the case of ASL) and the undertaking that they all represent is alleged to have infringed competition law and to be liable on a joint and several liability basis. I am satisfied that there are real issues to be tried between the Applicant and ASL and MSUK, the anchor defendants.

29. As regards the "necessary or proper party" requirement, in *Altimo Holdings v Krygyz Mobil Tel Ltd* [2011] UKPC 7 at [87] the Privy Council considered the "proper party" test as follows:

> "…the question whether D2 is a proper party is answered by asking: 'Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?': *Massey v Heynes & Co* (1888) 21 QBD 330 at 338…D2 will be a proper party if the claims against D1 and D2 involve one investigation…and in *Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457* , at [48], where Clarke LJ also used, or approved, in this connection the expressions 'closely bound up' and 'a common thread': at [46], [49]."

30. In *Iiyama (UK) Ltd v. Samsung Electronics Co. Ltd* [2018] EWCA Civ 220 at [121], the Court of Appeal found that this requirement was satisfied:

> "121. We are also satisfied that Morgan J was correct to conclude that the two South Korean companies, SECL and LGD, were and are proper parties to have been joined to the existing claims against SEL, SEL(UK) and Semiconductor in the LCD Action, for the reasons he gave at [73] of his judgment. In the same way, Samsung SDI, Samsung SDI Malaysia and LG Inc were in our judgment proper parties to be joined to the claims in the CRT Action against LG UK and LG Wales. They were all parties to the relevant cartel, were either addressees or associated with addressees of the CRT Decision, and were involved directly or indirectly in the manufacture, selling and distribution of CDTs. Furthermore, just as in the LCD Action, the claims against Samsung SDI, Samsung SDI Malaysia and LG Inc involve the same or

> substantially the same issues as would be raised in a trial elsewhere, such a trial would involve substantially the same witnesses and experts (if any), and it would be undesirable to require the parties to litigate the claims against LG UK and LG Wales in England and Wales and the claims against the other defendants elsewhere. The conditions of "gateway 3" contained in paragraph 3.1(3) of CPR PD 6B are therefore satisfied. It is unnecessary to consider "gateway 9" in paragraph 3.1(9) in addition."

31. There is a good arguable case that MSI is a necessary and proper party to the claim against ASL and MSUK in that:

(1) MSI was the subject of the CMA's market investigation and Charge Control Order.

(2) MSI is the ultimate parent company of ASL and MSUK and exercised control and decisive influence over ASL's commercial policy and strategy in the supply of the Airwave Services in the UK. They form part of the same economic entity and ASL's conduct can be attributed to MSI, thus making MSI jointly and severally liable for the Infringements.

(3) Proper forum

32. The factors that may be taken into account in determining the proper forum are wide ranging. As stated by the Tribunal in *Epic Games v. Apple* [2021] CAT 4 at [132]:

> "The governing approach to determination of whether England is clearly the appropriate forum derives from Lord Goff's classic speech in *The Spiliada* [1987] AC 460. Lord Goff there emphasised that the fundamental consideration is the interests of all the parties and the ends of justice. As numerous judgments have subsequently shown, a range of factors may therefore be taken into account, including (i) the residence or place of business of the parties; (ii) the location of likely witnesses; (iii) the existence of parallel proceedings; (iv) the applicable law (v) the cost and delay; (vi) a legitimate personal or juridical advantage; and (vii) the jurisdictional gateway relied on. See note 6.37.16 in *Civil Procedure 2020 (the 'White Book')*, However, this is not an exhaustive list, and the relevance and importance of any factor will vary significantly from one case to another in the "evaluative or balancing exercise" which the court or tribunal has to carry out: per Lord Neuberger in *VTB Capital* at [97]."

33. The UK and specifically the Tribunal sitting in England and Wales is clearly the proper forum for the determination of the claims set out in the CPCF in view of the following:

(1) Two anchor defendants are based in the UK. The Proposed Class Representative is resident in the UK.

(2) It would be undesirable for the same claims to be litigated across multiple jurisdictions with the two of the Proposed Defendants in England and Wales, and MSI in the USA.

(3) The Proposed Class members are based in the UK and are to claim in respect of loss and damages suffered in the UK.

(4) The claim sought to be proceeded with relates to an alleged abuse of a dominant position within the UK.

(5) The applicable law is English law.

F. CONCLUSION

34. In all the circumstances it is appropriate for the Tribunal to exercise its jurisdiction to permit the service out of the CPCF (and supporting documents) on MSI in the USA. As to where in the USA service may be on the following addresses:

(1) MSI's registered office at 500 W Monroe Street, Ste 4400, Chicago, IL 60661-3781, USA.

(2) MSI's registered agent's address for service in the State of Illinois (the State of Illinois being MSI's place of Principal Executive Offices) at C T Corporation System, 208 SO Lasalle Street, Suite 814, Chicago IL 60604-1101, USA.

(3) MSI's registered agent's address for service in the State of Delaware (the State of Delaware being MSI's place of incorporation) at The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington DE 19801, USA; and

(4) the respective Secretaries of State in the States of Delaware and Illinois, USA.

35. In its Application, the Applicant has expressed concern over potential limitation issues, if service were to be merely on MSI's registered office through the Central Authority route under Article 5 of the Hague Service Convention, which can take up to six months. Service through that route would introduce undesirable delay in the proceedings. The Applicant has therefore proposed using an alterative service route under Article 10(a) or (b). To the extent that permission is required to serve on the relevant addresses this is granted. In this connection, the following should be noted:

(1) The urgency and requests for extensions of time seem to be premised on the basis that limitation continues to run from the date of service. However, in general, time for limitation purposes ceases to run once the claim form has been issued.

(2) In general, the practice of the Tribunal is to leave it to the parties to select whichever permissible route to take in serving in the relevant jurisdiction. It is for the claimant to take the necessary steps to effect valid service in the country where service is to be effected, taking into account what methods of service is permissible in that jurisdiction.

(3) Whilst the Tribunal notes that it is the Applicant's intention to serve using the Article 10(a) or (b) route rather than the Article 5 (Central Authority) route, it is not for the Tribunal to direct which route the Applicant should use.

36. In the event that MSI instructs solicitors in England and Wales who confirm that they are instructed to accept service, then that may also be permitted. The Tribunal does not consider it appropriate in all the circumstances to permit or direct service on MSI's solicitors in England and Wales without such solicitors confirming that they are instructed to accept service. This would in effect be giving permission to serve out of the jurisdiction, whilst at the same time giving permission to serve within the jurisdiction. Such an order would need to be

properly justified, particularly in a case where there is no evidence that MSI will seek to evade service, and no attempts have been made to serve out of the jurisdiction in the normal way.

37. The Applicant's request for extensions of time for service may not be necessary as a party has six months to serve a claim form out of the jurisdiction, so that is not granted, but liberty to apply is given.

38. As this Application has been determined on the papers *ex parte*, the Third Proposed Defendant may apply to set aside this decision on the basis that the Tribunal does not have jurisdiction, or such jurisdiction should not be exercised pursuant to Rule 34 of the Rules.

Hodge Malek KC
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 10 December 2024