RE-AMENDED PURSUANT TO THE TRIBUNAL ORDER OF 4 FEBRUARY 2022
AMENDED PURSUANT TO THE TRIBUNAL ORDER OF 14 DECEMBER 2021

IN THE COMPETITION APPEAL TRIBUNAL **Case Number: ~~[x]~~1403/7/7/21**

BETWEEN:

DR. RACHAEL KENT

Proposed Class Representative

– and –

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Proposed Defendants

RE-AMENDED COLLECTIVE PROCEEDINGS CLAIM FORM

I. INTRODUCTION

1. This is an application for a collective proceedings order ("**CPO**") to commence opt-out, collective proceedings under section 47B of the Competition Act 1998 (the "**Act**"). It is filed pursuant to Rule 75 of the Competition Appeal Tribunal Rules 2015 (SI 1648/2015, the "**Rules**").

2. In this Claim Form, the Proposed Class Representative ("**PCR**"), Dr Rachael Kent, sets out in turn:[1]

[1] While the PCR is conscious of the indication in the Tribunal's 2015 Guide to Proceedings that the Claim Form should be in three parts (para 6.11), the basis of the claims is set out first to limit duplication / extensive cross-referencing, and it is hoped that the adopted structure will assist the Tribunal in the circumstances of the present case. The PCR has addressed each of the matters required in Rule 75.

a. **Section II**: a summary of the claim.

b. **Section III**: the relevant parties.

c. **Section IV**: the relevant background to the infringements.

d. **Section V**: the infringements.

e. **Section VI**: the loss and damage suffered.

f. **Section VII**: the proper forum.

g. **Section VIII**: the eligibility of the claim for collective proceedings.

h. **Section IX**: the relief claimed.

3. The claims which the PCR seeks to combine (the "**Claims**") are for loss and damage caused by Apple's breach of statutory duty by its infringements of Article 102 Treaty on the Functioning of the European Union ("**TFEU**") (prior to 31 December 2020), and section 18 of the Competition Act 1998 (the "**Act**").

4. Dr Kent does not have, at this early stage and prior to disclosure and factual and expert evidence, all of the information and/or documentation that will ultimately be relevant to the determination of these Claims. This Claim Form is thus without prejudice to any amendments and/or further statements of case that may be required in due course.

5. The following are served with this Claim Form **[Tab 1]**:

   a. An application for permission to serve each of the Proposed Defendants at their registered foreign service addresses, accompanied by a witness statement by Lesley Jane Hannah ("**Hannah 1**");

   b. An economic expert report by Mr Derek Holt of AlixPartners ("**Holt 1**") **[Tab 2]**;

   c. A draft CPO as required by Rule 75(5)(b) and Rule 80 **[Tab 3]**;

   d. A draft Notice of the CPO as required by Rule 75(5)(c) and Rule 81 **[Tab 4]**;

e. A witness statement by the PCR ("**Kent 1**"), **[Tab 5]**, which addresses *inter alia* the requirements of Rule 78. Exhibited to that witness statement is:

   i. the PCR's *curriculum vitae* **[Tab 6]**;

   ii. the terms of reference of the PCR's consultative group of advisers **[Tab 7]**;

   iii. the "**Litigation Funding Agreement**" **[Tab 8]**;

   iv. the PCR's after-the-event insurance policy **[Tab 9]**;

   v. the "**Litigation Plan**" **[Tab 10]**;

   vi. the "**Notice and Administration Plan**" [**Tab 11**];

   vii. the **"Litigation Budget" [Tab 12]**; and

   viii. the **"Litigation Timetable" [Tab 13]**.

6. For the purposes of this Claim Form, the PCR adopts the following technical terms:

   a. "**API**" means an application programming interface, being a set of definitions and protocols for building and integrating application software, that allows third-party developers to program their apps to connect to operating system-provided functionality.

   b. "**app**" means individual software applications. Such apps, as defined herein, are "native" in that they are designed for specific operating systems and can be downloaded to mobile devices from an app store, as distinct from "web apps" which can be accessed via a web browser only.

   c. "**app store**" means an app which functions as a digital distribution platform for other apps, and which allows users to search for, download and manage such apps from a single interface.

   d. "**App Store**" means Apple's proprietary app store as pre-installed on all iOS Devices.

e. “**Apple ID**” means the personal account iOS Device users use to access Apple services, such as the App Store, and includes the information iOS Device users use to sign in, as well as all their contact, payment and security details.

f. “**Apple Pricing Tiers**” means the pricing tiers designated by Apple for iOS App-related payments. The Apple Pricing Tiers are specific to the currency of the country where the iOS App is distributed.

g. “**ASPPS**” means the App Store Payment Processing System.

h. “**Commission**” means the commission charged by Apple on each Relevant Purchase.

i. “**iOS**” means Apple’s proprietary mobile operating system.

j. “**iOS App**” means an iOS app developed by a third-party developer (i.e. not Apple).

k. “**iOS Device**” means an iPhone or iPad.

l. “**iOS Device users**” includes all users of iOS Devices, whether legal or natural persons, except for:

    i. officers, directors or employees of the Proposed Defendants, their subsidiaries and any entity in which they have a controlling interest;

    ii. all members of the PCR’s and Proposed Defendants’ respective legal teams and all experts and professional advisors instructed and retained by them and all funders or insurers involved, in connection with these collective proceedings;

    iii. all members and staff of the Tribunal, their parents, their spouses or civil partners or any persons with whom they cohabit, and their children assigned at any point to these collective proceedings;

    iv. any judge involved in any appeal in the present collective proceedings (whether in respect of the grant of permission to appeal or the hearing of any substantive appeal), and their parents, their spouse or civil partner or any person with whom they cohabit, and their children;

v. any deceased person; and

vi. any registered corporate entity or other registered entity with legal personality which has been struck off or dissolved pursuant to the Companies Act 2006 or equivalent legislation applying outside the UK, or which has experienced the onset of insolvency within the meaning of section 240(3) of the Insolvency Act 1986 or equivalent legislation applying outside the UK, or which is dormant within the meaning of the Companies Act 2006 or equivalent legislation applying outside the UK.

m. "**Proprietary App**" means an iOS App developed by Apple.

n. "**Relevant Purchase**" means:

i. any purchase of an iOS App in the App Store, which an iOS Device user pays a fee to download (a "**Relevant App Purchase**"); or

ii. any one-time purchase by an iOS Device user within an iOS App, for which the iOS Device user pays a fee (a "**Relevant In-App Purchase**"); or

iii. any recurring purchase by an iOS Device user within an iOS App, for which the iOS Device user pays a fee (a "**Relevant Subscription Purchase**"),

subject to the following exclusions:

i. the in-app purchase of real-time person-to-person services between two individuals; and

ii. the in-app purchase of physical goods or services that will be consumed outside of the iOS App.

o. "**UK version of the App Store**" means the version of the App Store installed on an iOS Device where the Apple ID associated with that iOS Device specifies the Country/Region as the UK.

II. SUMMARY

7. The two Proposed Defendants are members of the Apple corporate group.[2] Apple is, as is well known, the maker and distributor of a range of extremely popular devices, including iOS Devices. It is estimated that, in 2020, there were approximately 29 million iPhone users and 19 million iPad users in the United Kingdom ("**UK**") alone.[3]

8. These Claims concern the operation of Apple's ecosystem for iOS Devices, and in particular the system that surrounds the download and subsequent use of iOS Apps on those Devices.

9. In overview, in that ecosystem, due to restrictive terms and conditions and technical restraints imposed by Apple:

    a. iOS is the only operating system permitted for use on iOS Devices.

    b. iOS Apps for use on iOS Devices can only be downloaded from Apple's App Store.

    c. Payments for Relevant Purchases can only be made using Apple's ASPPS.

    d. Apple charges the Commission on all Relevant Purchases, which has largely been set at 30%.

10. As described in a recent US House of Representatives Report,[4] at p341:

> "*Apple owns the iOS operating system as well as the only means to distribute software on iOS devices. Using its roles as an operating system provider, Apple prohibits alternatives to the App Store and charges fees and commissions for some categories of apps to reach customers.* ***It responds to attempts to circumvent its fees and commissions with removal from the App Store.*** *Because of this policy,* ***developers have no other option than to play by Apple's rules to reach customers***

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[2] And "Apple" is used herein to refer to that corporate group. Paragraphs 24-32 below explain the role of each of the Proposed Defendants in the Apple group.

[3] Holt 1, Table 10.6.

[4] Investigation of competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020 ("**US Committee Report**").

who own iOS devices. Owners of iOS devices have no alternative means to install apps on their phone. *"* (emphasis added).

11. In the circumstances, the Proposed Defendants (collectively or individually):

    a. occupy a position of dominance (indeed, a position of near or complete monopoly) in each of: (i) the market for the distribution of iOS Apps to iOS Device users ("**iOS App Distribution Market**"); and (ii) the market for the provision of payment processing services for Relevant Purchases ("**iOS Payment Processing Market**");

    b. have abused their dominant position: (i) by imposing restrictive terms which require iOS App developers to distribute iOS Apps exclusively via the App Store, and require that all Relevant Purchases are made using the ASPPS; and (ii) by charging excessive and unfair prices in the form of the Commission.

12. Essentially, Apple has rendered iOS Device users in the UK (and elsewhere) an entirely captive class, reliant on it as the sole source of all iOS Apps and digital purchases within them, in other words, Apple is the iOS Device user's single essential trading partner for all such purchases. It has then exploited that market, by setting an excessive and unfair Commission which bears no relationship to the costs of providing the services in question. That conduct is unlawful pursuant to section 18 of the Act, and Article 102 TFEU.

13. Users of iOS Devices have lost out due to this unlawful anticompetitive conduct. They have paid more Commission for Relevant Purchases than they would have done under circumstances of normal and effective competition. On a preliminary estimate, aggregate losses suffered by the approximately 19.6 million[5] proposed class members are between £535m and £1,459m (excluding interest).[6]

14. Dr Kent is the owner of an iPhone and has made Relevant Purchases in the period set out in this Claim Form. She has thus suffered loss. She brings this claim on behalf of a straightforward and readily identifiable class of users of iOS Devices who have made

[5] See Holt 1 para 10.3.3.

[6] See Holt 1 para 1.8.4. The estimated aggregate losses relate to UK domiciled Class Members only. Including simple interest, the estimated loss is between £621m and £1,691m. See Holt 1 para 1.8.6.

one or more Relevant Purchases from the UK version of the App Store, pursuant to the class definition at paras 19 below, whose claims are eligible for inclusion in collective proceedings. Those claims are brought on an opt-out basis for UK domiciled members of the class and on an opt-in basis for non-UK domiciled members of the class.

15. The PCR sent a short Letter Before Action on 23 March 2021. By that letter, the PCR set out a summary of the Claims and invited the Proposed Defendants to consent to service out of the jurisdiction. The Proposed Defendants responded on 16 April 2021, denying the allegations and refusing to consent to service out of the jurisdiction.[7]

III. PARTIES

A. PCR

16. The PCR, Dr Kent, has over 15 years of academic and practical experience of consumer welfare issues relating to smart mobile technology, most recently as a Digital Health Consultant advising government, individuals and businesses and, in parallel, as a Lecturer in Digital Economy & Society Education at King's College London where her research focusses on how consumers negotiate and integrate apps and digital platforms into their everyday lives. She also works as a digital health consultant, and provides support and strategic advice based on her research into the impact of digital platforms and apps on mental health.

17. The PCR's suitability to act in her role is addressed in Kent 1 **[Tab 5]**, and below at paras 152-154.

18. The PCR's address for service is Hausfeld & Co LLP, 12 Gough Square, London EC4A 3DW (hard copy) or hausfeldprojectpantheruk@hausfeld.com; lhannah@hausfeld.com; and lstreatfeild@hausfeld.com (email).[8]

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[7] See Hannah 1, paras 16-22.

[8] Her private address can be provided confidentially to the Tribunal on the Tribunal's request.

B. Class

19. The "**Proposed Class**" (and thus the "**Proposed Class Members**") for the purposes of the claim consists of:

> *"All iOS Device users who, during the Relevant Period, used the UK version of the App Store and made one or more Relevant Purchases.*"

20. For the purposes of this class definition, and as utilised in this Claim Form, "**Relevant Period**" means the period between 1 October 2015 and the date of final judgment or earlier settlement of the present collective proceedings.

21. All persons who fall within the definition of the Proposed Class and who are domiciled in the UK on the date of domicile to be determined by the Tribunal are proposed to be included in the Proposed Class.

22. All persons who fall within the definition of the Proposed Class and who are not domiciled in the UK on the date of domicile to be determined by the Tribunal are proposed to be permitted to opt into the proceedings.

23. The suitability of these proceedings as collective proceedings, including more detail as to the Proposed Class, is set out below at para 151 *et seq*.

C. Proposed Defendants

24. The Proposed Defendants are members of the Apple corporate group. They form part of the Apple undertaking.

25. **Apple Inc.** The First Proposed Defendant is Apple Inc., company number C0806592, whose registered address is One Apple Park Way, Cupertino, California. Its address for service is 28 Liberty Street, New York 10005, United States of America.

26. Apple Inc. is the headquarters of Apple. It designs, manufactures and markets personal computers (Macs) and iOS Devices along with a variety of related software and services.

27. Apple Inc is responsible for determining the terms upon which iOS App developers distribute iOS Apps on the App Store to iOS Device users, including by way of the restrictive contractual terms and technological restrictions detailed below. In particular,

Apple Inc requires iOS App developers to enter into the Apple Developer Program Licence Agreement ("**DPLA**") before being permitted to distribute iOS Apps to iOS Device users. The DPLA is a non-negotiable contract between Apple Inc and iOS App developers.[9] Apple Inc also sets the App Store Review Guidelines (the "**Guidelines**"), which are subject to unilateral modification by Apple from time to time and prescribe the criteria which iOS Apps must satisfy before Apple will approve the iOS App for distribution via the App Store.[10]

28. In the circumstances, Apple Inc is directly liable for the infringements particularised below.

29. **Apple Distribution International Ltd.** The Second Proposed Defendant is Apple Distribution International Ltd. ("**Apple Distribution**"), company number 470672, whose registered address is Hollyhill Industrial Estate, Hollyhill, Cork, Republic of Ireland. It is a member of the Apple corporate group, and is listed as a "significant subsidiary" in Apple Inc's annual filed reports. It is ultimately wholly owned by Apple Inc.[11]

30. Under the DPLA, Apple Distribution is appointed as the "commissionaire", i.e. the agent on behalf of the iOS App developer to collect the Commission from the iOS Device user in the UK.[12] Apple Distribution has been the commissionaire for UK iOS Device users since 25 September 2016.[13] Prior to 25 September 2016, the relevant commissionaire was iTunes S.à.r.l, a company registered in Luxembourg which ceased activity on 25 October 2016. It appears that this was due to a "*merger/split*",[14] which publicly available information suggests was with Apple Distribution.[15]

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[9] See para 1.2 of Annex A, where "Apple" is defined as Apple Inc.

[10] Accessible at https://developer.apple.com/app-store/review/guidelines/ (last accessed on 5 May 2021), see Annex B.

[11] It is wholly owned by Apple Operations Europe Ltd, in turn wholly owned by Apple Operations International, in turn wholly owned by Apple Inc.

[12] See para 2 of Exhibit A to Schedule 2 of the DPLA, dated 3 December 2020 (version 117). See Annex C.

[13] See para 2 of Exhibit A to Schedule 2 of the DPLA, dated 4 January 2018 (version 107). See Annex D.

[14] According to filings on the Luxembourg Business Register, see Annex E.

[15] See e.g. https://www.appleworld.today/2016/09/20/apple-is-moving-its-itunes-business-to-ireland/

31. Apple Distribution is the counterparty to the Apple Media Services Terms and Conditions ("**Apple Ts &Cs**") for iOS Device users in the UK.[16] In the circumstances, iOS Device users contract with Apple Distribution when making Relevant Purchases.

32. Apple Distribution is therefore jointly and severally liable with Apple Inc for the infringements set out herein on the basis that it forms part of the same undertaking as Apple Inc and/or it implemented the infringements and/or was aware of them and/or Apple Inc has some significant element of influence or control over Apple Distribution as its wholly owned subsidiary.[17]

33. The PCR has served with this Claim Form an Application for Permission to serve each of the Proposed Defendants out of the jurisdiction. That Application relies on gateway (9) of para 3.1 of Practice Direction 6B.

IV. BACKGROUND TO THE INFRINGEMENT

A. The operation of mobile devices

34. Mobile devices such as smartphones and tablets are ubiquitous in the UK. 79% of all adults in the UK owned a smartphone in 2019.[18] Public sources suggest that 60% of adults in the UK consider that their smartphone is the most important device which they use to connect to the internet, at home or elsewhere.[19]

35. Mobile devices require an operating system. Operating system software is the core software that provides basic functionality to users, including for example button controls, touch and motion commands and the user interface, including icons and other visual elements. The operating system manages all device hardware and any additional, non-core, software (namely apps) that is subsequently loaded onto the device. It is updated regularly.

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[16] See Section L of Annex F.

[17] See *Nokia Corporation v AU Optronics Corporation and Others* [2012] EWHC 731(Ch), confirming that knowledge of infringements perpetrated by the parent is not necessary in order for a subsidiary to be held jointly and severally liable with its parent for the infringement, at para 82.

[18] See Ofcom's Communications Market Report 2019, p4, accessible at: https://www.ofcom.org.uk/__data/assets/pdf_file/0028/155278/communications-market-report-2019.pdf

[19] See https://www.statista.com/statistics/387447/consumer-electronic-devices-by-internet-access-in-the-uk/

36. Wide-ranging functions can be performed through apps akin to those performed by software on desktop or laptop computers allowing users to add functionalities to those devices, access certain content, or get access to certain services. Apps must be programmed to function on the specific operating system on which they will be downloaded and run. An app developed for one operating system will not function on a mobile device which uses another operating system.

37. Many apps are free to download and to run. Other apps charge a fee either for their download or to unlock specific functionalities within them. This requires the use of a payment processing service, which is integrated within the app by an operating system-specific API.

38. App stores function as digital distribution platforms for other apps which allow users to search for, download and manage such apps from a single interface.

B. *Apple's system*

39. Apple's "ecosystem" consists of its hardware, operating system (iOS), Proprietary Apps and services. Apple manufactures and distributes iOS Devices as well as personal computers known as 'Macs'. Apple has a significant share of the market for mobile devices.[20]

40. iOS controls the basic functions of iOS Devices.[21] It is owned by Apple. iOS is preinstalled on all iOS Devices and Apple does not permit any other operating system to be installed on iOS Devices.[22] Apple's business model is based on the vertical integration of iOS into Apple's iOS Devices so that rival operating systems, such as the Google Android operating system, cannot be used. iOS cannot be accessed by iOS Device users or iOS App developers outside Apple's "closed" ecosystem.[23]

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[20] See e.g. the relevant statistics at https://gs.statcounter.com/os-market-share/mobile/united-kingdom and https://gs.statcounter.com/os-market-share/tablet/united-kingdom

[21] For a brief summary of the history of iOS, see https://www.finder.com/ios-operating-system

[22] According to Apple, the "*unauthorised modification of iOS is a violation of the iOS end-user software license agreement and because of this, Apple may deny service for an iPhone, iPad or iPod touch that has installed any unauthorised software*". See https://support.apple.com/en-us/HT201954

[23] See https://techland.time.com/2011/07/01/why-competing-with-apple-is-so-difficult/

(i) The App Store

41. The first iPhone was launched in 2007.[24] In that first year, iOS Devices (then only iPhones) were sold to end-users with very few pre-installed Proprietary Apps and Apple had no proprietary means to distribute iOS Apps. At that time, there were no authorised means for iOS Device users to find and download iOS Apps.[25]

42. However, in 2008, a year after launching the first iPhone, Apple launched the App Store. Both Proprietary Apps and iOS Apps can be downloaded through the App Store for use on iOS Devices.[26]

43. At all relevant times, through the methods described in more detail below, Apple has made the App Store the exclusive way to distribute iOS Apps directly to iOS Device users.

44. At its launch in 2008, the App Store had around 500 iOS apps available.[27] As of March 2021, the App Store has 28 million registered developers,[28] including approximately 500,000 publishing developers as part of the Developer Program (described in more detail below).[29] The App Store facilitated 18.3 billion iOS App downloads in the first half of 2020.[30]

45. The App Store is the product generating the greatest revenue in Apple's services category. It is estimated that consumer spending on the App Store in 2020 was USD $72.3 billion globally, which is a 30.3% increase from the same period in 2019.[31] Global

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24 See https://www.bbc.co.uk/news/newsbeat-47056309

25 See https://9to5mac.com/2011/10/21/jobs-original-vision-for-the-iphone-no-third-party-native-apps/

26 See https://9to5mac.com/2011/10/21/jobs-original-vision-for-the-iphone-no-third-party-native-apps/

27 See https://www.businessofapps.com/data/app-statistics/#:~:text=Content%20Menu&text=The%20iOS%20App%20Store%20launched,available%20for%20users%20to%20download.

28 Registered developers are those who have signed the Apple Developer Agreement and gained access to Apple's basic app development tools where they can learn to use a coding language (Swift) in Apple's integrated development environment (Xcode), and attend Apple conferences and events, for free. See https://www.apple.com/uk/newsroom/2021/03/apples-worldwide-developers-conference-is-back-in-its-all-online-format/

29 See https://www.statista.com/statistics/276437/developers-per-appstore/

30 See Holt 1 para 3.3.5.

31 See https://sensortower.com/blog/app-revenue-and-downloads-2020

spending on the App Store can be split by app category and by geography. By app category, games accounted for the highest revenue on the App Store (71% of total App Store global revenue) in 2018.[32] By geography, between 2012-2017, the average spend per UK iOS Device user was USD $65, approximately £46.[33] The UK is in the top 10 countries for highest spend per iOS Device user globally.[34]

(ii) Apple's relationship with iOS App developers

46. An iOS App developer who wishes to create one or more iOS Apps for distribution to iOS Device users needs access to the Apple's advanced app development software. To gain access to such software, it must enter into the DPLA.[35]

47. The heading to the DPLA states that it constitutes a "legal agreement" between the iOS App developer and Apple. Entering into the DPLA enrols the iOS App developer in the Apple Developer Program and provides the developer with access to more sophisticated development tools, APIs and testing software (TestFlight), to ensure that the iOS App works properly before it is released on the App Store. Apple also offers iOS App analytics and reporting tools that allow iOS App developers to measure and track how their iOS Apps are performing in terms of downloads and sales.

48. Before an iOS App can be distributed via the App Store, it must first be submitted for review and approval by Apple.

49. As consideration for the rights and licences granted under the DPLA, and participation in the Apple Developer Program, iOS App developers pay Apple an annual Program fee.[36] The DPLA defines "Program" as "*the overall Apple development, testing, digital signing, and distribution program contemplated in this Agreement*".[37] The Program fee is set out on the Program website and is 99 USD in local currency where available (although prices may vary by region) and is applicable to all iOS App developers,

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[32] See https://techcrunch.com/2019/03/28/consumer-spending-in-apps-to-reach-156b-across-iOS-and-google-play-by-2023/

[33] See https://sensortower.com/blog/per-capita-app-store-spending

[34] See https://sensortower.com/blog/per-capita-app-store-spending

[35] DPLA, "Purpose" section and section 1.1.

[36] Section 8 of the DPLA.

[37] Section 1.2 of the DPLA

irrespective of business model. The Program fee is £79 in the UK. Under section 11.1 of the DPLA, the term of agreement automatically renews for successive one year terms.

50. As of 2017, there were approximately 500,000 iOS App developers enrolled in the Apple Developer Program worldwide paying this annual fee (which totals approximately $50 million per year in revenue).[38] The current figure is unknown and has been redacted by Apple in public documents.

51. Certain iOS App developers are also part of the Developer Enterprise Program, under which large organisations can develop and deploy proprietary organisation-specific iOS Apps. Those developers pay an annual fee of USD 299 (calculated in local currency where available) in addition to the Program fee.[39]

52. There are a range of business models which may be employed by iOS App developers (subject to the detailed restrictions set out below) in the App Store. The options are as follows:[40]

    a. The paid model, whereby iOS Device users pay once to download an iOS App and use all of its functionality;

    b. The "paymium" model, whereby iOS Device users pay to download an iOS App and have the option to buy additional features, content, or services within the iOS App;

    c. The "freemium" model, whereby iOS Device users pay nothing to download an iOS App and are offered optional purchases within the iOS App for premium features, additional content, subscriptions, or digital goods;

    d. The subscription model, whereby the iOS App is typically free and iOS Device users can start a subscription through a purchase in the iOS App to access content, services, and experiences for renewable or non-renewing durations;

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[38] See https://www.statista.com/statistics/276437/developers-per-appstore/

[39] See https://developer.apple.com/support/purchase-activation/

[40] See https://developer.apple.com/app-store/business-models/

e. Free iOS Apps, whereby iOS Device users don't pay to download or use an iOS App;

f. Free iOS Apps with physical goods and services purchases, whereby the iOS App is free to download and the developer generates revenue by selling physical goods or services; and

g. Free iOS Apps with advertising, whereby the iOS App is free to download and monetisation occurs via displayed ads.

53. Under section 7.2 of the DPLA, if an iOS App developer intends to charge iOS Device users a fee to download the iOS App or within the iOS App, the developer must enter into a separate agreement ("**Schedule 2**") before any commercial distribution of the iOS App may take place via the App Store.[41]

54. Under sections 1.1 and 1.3 and Exhibit A.2. of Schedule 2 to the DPLA, the iOS App developer appoints an Apple entity as its commissionaire (pursuant to Article 91 of the Luxembourg Code de Commerce) for the marketing of and delivery of iOS Apps to iOS Device users located in the UK. Article 91(1) of the Luxembourg Code de Commerce provides that a commissionaire is someone who acts in his own name or under a corporate name on behalf of a principal. As set out above, since 25 September 2016, the relevant Apple entity for the UK has been Apple Distribution.

55. An iOS App developer must price their iOS App at one of the Apple Pricing Tiers, specific to the currency of the country where the iOS App is distributed. In March 2020, the App Store was available in 155 countries or regions[42] and offered 94 price tiers.[43] In USD, the lowest tier is USD $0.99. In GBP, the lowest tier is GBP £0.99.

56. When publishing iOS Apps on the App Store, iOS App developers must abide by the Guidelines. The Guidelines set out the principles that Apple applies in deciding, at its sole discretion, whether to approve an iOS App, and each subsequent update of that iOS

41 See Annex C for the latest version of Schedule 2.

42 See https://www.apple.com/uk/ios/app-store/principles-practices/

43 See Holt 1, para 9.2.32.

App, for distribution in the App Store. Apple's review process for iOS Apps is said to consist of checking the safety, performance, business, design and legal requirements.[44]

(iii) Relevant purchases: the role of Apple, the iOS App developer and iOS Device users

57. Schedule 2 provides as follows:

    a. Under section 1.2(e) of Schedule 2, the iOS App developer authorises and instructs Apple to issue invoices for the purchase price of Relevant Purchases payable by iOS Device users.

    b. Under section 3.1 of Schedule 2, Relevant Purchases are marketed by Apple on behalf of the iOS App developer at prices set by the developer (subject to Apple's Pricing Tiers). Apple is solely responsible for the collection of all fees payable by iOS Device users.

    c. Under section 3.5 of Schedule 2, Apple deducts its Commission from the price paid by the iOS Device user before remitting the remainder to the iOS App developer.

58. This system is reflected in the contracts between Apple and iOS Device users. When an iOS Device user makes a Relevant Purchase in the UK, she must accept the Apple Ts & Cs.[45] That agreement *"governs your use of Apple's services ("Services"), through which you can buy, get, license, rent or subscribe to content, Apps (as defined below), and other in-app services*" (Section A). It establishes that *"[e]ach Transaction is an electronic contract between you and Apple and/or you and the entity providing the Content on our Services"* (Section B).

59. Unless the Relevant Purchase relates to one of Apple's Proprietary Apps, Apple's role, as the "*commissionaire*" of the iOS App developer (as explained above), is as an "*agent for App Providers in providing the App Store and is not a party to the sales contract or user agreement between you and the App Provider*" (Section G). Apple Distribution is, as set out above, the commissionaire for iOS Device users located in the UK, and is the "*merchant of record*" (Section B).

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[44] See Introduction in Guidelines, in Annex B.

[45] See https://www.apple.com/legal/internet-services/itunes/uk/terms.html, see Annex F.

60. In short, iOS Device users contract with Apple as agent for iOS App developers. As agent, Apple extracts the Commission and remits the remainder of the payment for Relevant Purchases to the iOS App developer. The Commission is therefore paid by iOS Device users to Apple.[46]

C. *Terms imposed by Apple on iOS App developers and iOS Device users*

(i) App Distribution

61. At all material times, Apple has taken a range of steps to ensure that the App Store is the default and only authorised means for iOS Device users to download and purchase iOS Apps.

62. Apple pre-installs the App Store onto all iOS Devices, and requires that any iOS App may only be distributed via the App Store. As such, iOS Device users cannot download iOS Apps onto their iOS Devices from any competing distributor, app store or other source. This follows from the contractual and technical restrictions described below:

    a. **The DPLA**:

        i. Under section 3.2(g) of the DPLA, an iOS App may be distributed only if selected (i.e. approved) by Apple (in its sole discretion) for distribution via the App Store.

        ii. Under section 3.3.2 of the DPLA, interpreted code may not be used to create a store or storefront for other code or apps (i.e. an app store).

        iii. Under section 3.3.3 of the DPLA, an iOS App may not provide, unlock or enable additional features or functionality through distribution mechanisms other than Apple's own mechanisms, of which the App Store is the only one for commercial means[47] (save with Apple's prior written approval or as permitted under section 3.3.25).

[46] As the European Commission described it, "*Apple becomes the intermediary for all IAP transactions and takes over the billing relationship, as well as related communications for competitors*": See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061

[47] Rather than testing purposes.

iv. Under section 7 of the DPLA, iOS Apps developed under the DPLA may only be commercially distributed through the App Store.[48]

v. Under section 7.6 of the DPLA, no other distribution methods for iOS Apps developed using Apple Software are permitted (other than those provided for by the DPLA itself).

b. **The Guidelines**. Apple can cease to market, offer and allow downloads of iOS Apps if Apple reasonably believes that an iOS App developer has not complied with the Guidelines: DPLA, Schedule 2, section 7.3. Pursuant to section 3.2(2)(i) of the Guidelines, it is "*unacceptable*" for an iOS App to create "*an interface for displaying third-party apps, extensions, or plug-ins similar to the App Store or as a general-interest collection*." That description covers an app store. It is therefore expressly impermissible to develop a rival app store.

c. **Restrictions on iOS Device users, including technical restrictions.**

i. The App Store is the only app store pre-installed on all iOS Devices, and it is technically impossible for iOS Device users to uninstall the App Store from their iOS Device.

ii. Downloading other app stores to an iOS Device is technically impossible unless the device has been through a "jailbreaking" process which involves freeing it from any restrictions, and requires significant technical knowledge, and a different system for each version of iOS.[49] Only if that process is undertaken could another app store be "sideloaded" onto the device. Apple prohibits the jailbreaking of iOS Devices and provides that "*unauthorised modification of iOS is a violation of the iOS end-user software license agreement and because of this, Apple may deny service for an iPhone, iPad or iPod touch that has installed any unauthorised software*".[50] In the circumstances, the installation of another app store

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[48] The three other specified mechanisms do not relate to commercial distribution.

[49] See Holt 1, para 6.2.2.(c)

[50] See https://support.apple.com/en-us/HT201954

(which amounts to the installation of unauthorised software) leads to a denial of service by Apple to iOS Devices users.

63. Through the contractual and technical restrictions set out at para 62 above (the "**App Distribution Restrictions**"), whether individually or collectively, Apple's App Store is maintained as the only mechanism by which iOS Apps can be distributed to iOS Device users.

64. Apple enforces these conditions stringently and will reject iOS Apps submitted for review and/or expel, or threaten to expel, from the Developer Program iOS App developers seeking to make alternative means of app distribution available to iOS Device users. For example, Apple rejected the Facebook Gaming app (a storefront for Facebook games) from the App Store, and it was only launched after it removed the app's mini games feature to pass the App Store approval process.[51]

(ii) Payment Systems

65. Similarly, Apple requires that all payments for Relevant Purchases are made using its proprietary ASPPS. These requirements arise from the following:

    a. For Relevant In-App Purchases and Relevant Subscription Purchases:

        i. **DPLA** Apple's "*In-App Purchase API*" is defined in the DPLA as "*the Documented API that enables additional content, functionality or services to be delivered or made available for use within an Application with or without an additional fee*."[52] Section 3.3.1 makes clear that iOS Apps may only use Apple's 'Documented API' in the manner prescribed by Apple and must not use any third-party APIs. This includes payment processing service APIs, such that an iOS App cannot include the API of an alternative payment processing service. Therefore, iOS Apps can only use the ASPPS for processing payments for Relevant In-App Purchases and Relevant Subscription Purchases.

[51] See Holt 1, para 6.2.2.(b)

[52] Section 1.2. See Annex A.

ii. **Guidelines** The contractual requirement that iOS App developers may only use Apple's ASPPS for processing payments for Relevant In-App Purchases and Relevant Subscription Purchases is made express in the Guidelines. Under section 3.1.1 if an iOS App developer wishes to allow iOS Device users to unlock features or functionality within an iOS App in return for payment, they must use Apple's ASPPS (and, specifically, the In-App Purchase API). iOS Apps and the apps' metadata may not include buttons, external links or other 'calls to action' that direct iOS Device users to purchasing mechanisms other than Apple's ASPPS.

iii. **Practical restrictions** iOS App developers use Apple's "StoreKit Framework" to embed the ASPPS (including the In-App Purchase API) into their iOS Apps.[53] If an iOS App developer fails to embed Apple's ASPPS (and instead attempts to insert other payment processing services), that iOS App is liable not to be approved and the iOS App developer is likely to be removed from the Developer Program: See Guidelines, Introduction.

b. For Relevant App Purchases, which are paid for by an iOS Device user upon download in the App Store, there is simply no technical way to circumvent Apple's direction of the purchase through its ASPPS. Apple will only approve such an iOS App for distribution via the App Store if it uses Apple's ASPPS. If it does not, it will not be approved for distribution via the App Store and cannot be distributed to iOS Device users in any other way.

66. For the avoidance of doubt, section 3.1.3 of the Guidelines identifies certain types of transactions relating to iOS Apps that may use purchase methods other than the ASPPS. However, for those transactions, which are excepted from the restrictions otherwise imposed by Apple, iOS App developers "*cannot either within the app or through communications sent to points of contact obtained from account registration within the*

[53] See https://developer.apple.com/documentation/storekit

*app (like email or text), encourage users to use a purchasing method other than in-app purchas*e." The relevant exceptions are as follows:

a. Under section 3.1.3(a)-(c) and (f) of the Guidelines, certain purchases made outside the iOS App may also be used and/or function within it, including for content subscriptions in reader apps, apps operating across multiplatform services, enterprise services, and free apps acting as a standalone companion to a paid web-based tool.

b. Under section 3.1.3(d) of the Guidelines, for purchases of real-time person-to-person services between two individuals (for example, tutoring students, medical consultations, real estate tours and fitness training), iOS App developers may use purchase methods other than the ASPPS within the app.

c. Under section 3.1.3(e), for purchases of physical goods and services to be consumed outside of the app (for example, ride-hailing and food delivery services), iOS App developers must use purchase methods other than the ASPPS.

67. Accordingly, purchases made within an iOS App in respect of: real-time person-to-person services between two individuals (sub-para (b) above); and physical goods and services to be consumed outside of the iOS App (sub-para (c) above), do not constitute Relevant Purchases and are not covered by these Claims.

68. The effect of the contractual and technical restrictions set out at paras 65-66 above (the "**Payment System Restrictions**") is, individually and/or collectively, that Apple requires that <u>any</u> Relevant Purchases must be made through the ASPPS. iOS App developers may not offer or use any competing payment processing options instead of or in addition to Apple's ASPPS.

69. These restrictions are enforced strictly. For example, when Epic Games Inc. ("**Epic Games**"), an iOS App developer, sought to introduce an alternative payment processing system within its iOS App, Apple suspended it immediately from the App Store and

prevented iOS Device users from installing updates.[54] In 2020, when Facebook informed iOS Device users about the level of Commission charged by Apple, Apple threatened to remove Facebook's iOS App from the App Store.[55]

(iii) Commission

70. Apple charges the Commission on all Relevant Purchases.

71. In particular, section 3.4 and Exhibit B, section 1, of Schedule 2 provide that the Commission is 30% of all prices payable by each iOS Device user in the UK in consideration for Apple's services as commissionaire under Schedule 2, subject to the following qualifications and/or exceptions:

    a. Since February 2011, it has been possible to make Relevant Subscription Purchases. Between February 2011 and October 2016, Apple charged a 30% Commission on such subscriptions. Since October 2016, while the Commission has remained 30% for the first subscription, Apple has charged 15% for subsequent renewals: see para 3.4(a) of Schedule 2.

    b. From 1 January 2020, for Relevant Purchases from iOS App developers who have qualified and been approved by Apple for the App Store Small Business Program (those who have earned no more than $1m in total proceeds in the previous year), Apple will charge a 15% Commission: see para 3.4(c) of Schedule 2.

    c. There have also been occasional *ad hoc* exceptions, such as the reduction of the Commission on online events in September 2020 in response to the Covid-19 pandemic, and individually negotiated exceptions for streaming iOS Apps.[56]

72. As such:

    a. Since 2008, Apple has charged a 30% Commission on the price paid for each Relevant App Purchase (subject to sub-para (d) below).

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[54] See Holt 1, para 6.3.7.

[55] See Holt 1, para 6.3.8.

[56] See Holt 1, para 3.4.2. (c).

b. Since 2009, Apple has also charged a 30% Commission on the price paid for each Relevant In-App Purchase (subject to sub-para (d) below).

c. From February 2011 to October 2016, Apple charged a 30% Commission on the price paid for each Relevant Subscription Purchase. Since October 2016, Apple has charged a 30% Commission on the price paid for the first year of each Relevant Subscription Purchase and a 15% Commission on the price paid for each subsequent auto-renewing Relevant Subscription Purchase made by iOS Device users who have accrued greater than one year of paid subscription service.

d. Since January 2021, Apple has dropped its Commission for all Relevant Purchases to 15% for iOS App developers that generate revenue of less than $1m in the previous year.

73. The Commission applies to all payments processed through the ASPPS. Therefore, there is no authorised means for iOS App developers to circumvent the ASPPS and the related Commission.

74. Apple does not disclose disaggregated financial figures for Relevant Purchases (which it appears to term "*billings for digital goods and services*").[57] However, as explained in more detail in Holt 1, it is estimated that the Proposed Defendants' revenue from the Commissions collected on Relevant Purchases has increased from USD $6.5 billion in 2015 to USD $18 billion in 2020.[58]

V. INFRINGEMENT

75. The Claims are for loss and damage caused by Apple's breach of statutory duty by its infringements of Article 102 TFEU (prior to 31 December 2020), and section 18 of the Act ("**the Chapter II prohibition**"), as a result of the facts and matters summarised above. In particular, Apple's conduct amounts to abuse of a dominant position, as set out in this section.

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[57] See https://www.apple.com/newsroom/pdfs/app-store-study-2019.pdf

[58] See Holt 1, table 7.1

A. *Relevant markets*

(i) Product market

76. By virtue of the facts and matters set out above, there are two key product markets in issue in these proceedings, namely: (a) the iOS App Distribution Market; and (b) the iOS Payment Processing Market.

77. **iOS App Distribution Market:** Mr Holt has conducted a preliminary analysis in Holt 1, and concludes that there is a discrete economic market for the distribution of iOS Apps to iOS Device users.[59] That relevant market includes all actual and potential means of distributing iOS Apps to iOS Device users.

78. In short, iOS App developers require their iOS Apps to be distributed to iOS Device users. At present, and as a direct consequence of the App Distribution Restrictions, the only available means of distribution is via the App Store. In the absence of the App Distribution Restrictions, iOS Apps could be distributed via other channels of distribution including (but not limited to) other app stores (which might include generic app stores or specialist app stores catering for particular categories of apps) and direct downloads from websites.[60]

79. The following are excluded from the relevant market:

    a. apps which don't distribute other apps to iOS Devices, as they do not provide the relevant functionality of distribution;[61]

    b. app stores for other devices (such as game consoles) and/or other mobile operating systems, as they cannot be installed on iOS Devices.[62]

80. Mr Holt's evidence is consistent with the preliminary finding of the European Commission (addressed further at para 134 below) that "*[f]or app developers, the App Store is the sole gateway to consumers using Apple's smart mobile devices running on*

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[59] Holt 1, section 4.3.

[60] Holt 1, para 4.3.1 and para 112 below.

[61] Holt 1, para 4.3.5.

[62] Holt 1, paras 4.3.6 and 4.3.7.

Apple's smart mobile operating system iOS."[63] It is also consistent with the *Google Android* Decision,[64] in which the European Commission concluded, *mutatis mutandis,* that app stores for Android devices constituted a distinct product market because, amongst other things:

a. other apps do not belong to the same product market as app stores[65] since the latter serve different purposes to apps themselves.[66]

b. the App Store does not belong to the same product market as Android app stores,[67] given that, from a demand-side perspective, the App Store has been specifically developed for iOS Devices and cannot run on Android devices;[68] and from a supply-side perspective, developers of app stores for non-licensable smart mobile operating systems[69] such as iOS, are unlikely to start developing app stores for Android because their business model is based on vertical integration of their operating system into their own smart mobile devices.

81. **iOS Payment Processing Market:** For the reasons Mr Holt gives at section 4.4 of Holt 1, there is a distinct relevant market for payment processing services for Relevant Purchases.

82. First, as set out in Holt 1, para 4.4.4, payment processing services and app distribution services serve distinct needs on the part of iOS Device users and iOS App developers and therefore constitute separate functionalities in distinct markets.

83. Secondly, as explained in Holt 1, para 4.4.7, payment processing services which are available within iOS Apps that sell physical goods and services (and a very limited number of exempt digital goods and services set out in section 3.1.3. of the Guidelines)

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63 See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061

64 Commission Decision in Case AT.40099 – *Google Android* C(2018) 4761 final. On market definition, see section 7 of the Decision (and specifically section 7.4, relating to Android app stores).

65 See section 7.4.1. of the *Google Android* Decision.

66 See recital (270) of the *Google Android* Decision.

67 See section 7.4.5. of the *Google Android* Decision

68 See recital (307) of the *Google Android* Decision.

69 Apple's smart mobile operating system is termed a "non-licensable" system since it is developed only for use in its own smart mobile devices, and is not available to be installed on other devices. See recital (83).

are not a substitute for the payment processing services available for Relevant Purchases given the Payment System Restrictions.

(ii) Geographic Market

84. Pending disclosure, it is too early to determine the geographic scope of either the iOS App Distribution Market or the iOS Payment Processing Market. While demand side considerations appear to delineate the market by country, supply conditions appear international.[70] The choice of geographic market does not, however, affect Mr Holt's economic analysis at this preliminary stage, and (if relevant) will be a matter for evidence in due course.

B. Dominance

85. As set out above, Apple does not permit any competition on either of the two relevant markets. In particular:

    a. Due to the App Distribution Restrictions, Apple occupies a market share of around 100% in the iOS App Distribution Market.

    b. Due to the Payment System Restrictions, Apple occupies a market share of around 100% in the iOS Payment Processing Market.

86. Apple is thus able to conduct itself independently of both potential competitors – be they distributors of iOS Apps or payment processing services providers – each of which have been completely excluded from the relevant markets; and its two sets of customers, namely iOS App developers and iOS Device users. Apple is therefore dominant – by virtue of being a monopolist - in each relevant market.

C. Exclusionary Abuses

(i) Exclusive Dealing

87. The Chapter II prohibition in section 18 of the Act and Article 102 TFEU prevent a dominant undertaking from adopting practices that have an exclusionary effect on

[70] See Holt 1, paras 4.3.11. and 4.4.11.

competitors and from strengthening its dominant position by using methods other than those that constitute competition on the merits.

88. An exclusive dealing obligation deprives or restricts customers of the dominant undertaking from accessing alternative sources of supply. It forecloses actual and/or potential competition from other suppliers.[71]

89. The structure of Apple's ecosystem is set out in detail above. Apple is the archetype of the digital gatekeeper with ecosystems of complementary products and services which the Competition and Markets Authority ("**CMA**") noted "*can insulate these core services from competition, making it harder for rivals to compete*".[72] The App Distribution Restrictions and the Payment System Restrictions are not methods of competition on the merits.[73]

90. In particular, Apple imposes two types of exclusive dealing obligations contrary to the Chapter II prohibition and Article 102 TFEU.

App Distribution Restrictions

91. As set out at para 62 above, the effect of the App Distribution Restrictions (as intended by Apple) is to require iOS App developers to distribute iOS Apps exclusively via the App Store. iOS App developers are not permitted to distribute iOS Apps by any other means or channels of distribution, including via a different app store or direct from the developer's or other website; and iOS Device users are thereby denied any other means of accessing iOS Apps.

92. The imposition of the App Distribution Restrictions within Apple's closed ecosystem has thus allowed Apple to shut out all actual and potential competition on the iOS App Distribution Market, thereby depriving iOS Device users of any choice as to the means of accessing iOS Apps.

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71 As acknowledged in *Hoffmann-La Roche* at [90].

72 See e.g. Competition and Markets Authority, *A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce,* December 2020, p17.

73 E.g. Case 85/76 *Hoffmann-La Roche v Commission*, paras 89-91; Case C-413/14P *Intel v Commission* paras 136-139.

Payment System Restrictions

93. As explained at paras 65-66 above, the Payment System Restrictions require (as intended by Apple) that payments for any Relevant Purchase must be processed via the ASPPS; iOS App developers are not permitted to engage the services of competing payment processing providers. Indeed, the European Commission has indicated that Apple interposes itself between the iOS App developer and the iOS Device user, becoming the "*intermediary*" and taking over "*the billing relationship, as well as related communications for consumers*".[74] The requirement on iOS App developers to use the ASPPS therefore amounts to an exclusive dealing obligation which distorts competition. In particular, any iOS App developer seeking access to iOS Device users is forced to use the ASPPS, is denied the option of engaging a rival payment processing provider and must accept Apple interposing itself between iOS App developer and iOS Device user in respect of each and every Relevant Purchase.

94. This exclusive dealing obligation therefore is designed to foreclose, and has the effect of foreclosing, all actual and potential competition on the iOS Payment Processing Market, by preventing any other provider of payment processing services from competing with Apple's own service. This stands in contrast to payment processing services for *physical* goods and services (and a small number of exempt digital goods and services) within iOS Apps, in respect of which payment processing services providers such as Stripe and PayPal compete to provide services.[75]

95. The anti-competitive effects of this exclusive dealing obligation are exacerbated by the App Store's monopoly position on the iOS App Distribution Market, allowing Apple to ensure that it is the monopoly provider of payment processing services for Relevant Purchases on iOS Devices. The upshot for iOS Device users is that they must deal with the App Store to access iOS Apps; they must use the ASPPS to make Relevant Purchases; and they must pay the Commission demanded by Apple, each time that they do so.

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[74] See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061

[75] See Holt 1, para 4.4.7.

Objective justification

96. Insofar as Apple may seek to argue that such exclusivity is objectively justified, the burden of proof is on Apple to make that good.[76] The PCR will respond to any arguments that Apple may make in this regard at the appropriate time as necessary.

(ii) Tying

97. Tying is expressly identified as conduct that may constitute an abuse of a dominant position in section 18(2) of the Act and Article 102 TFEU:[77]

> *"Conduct may, in particular, constitute such an abuse if it consists in—*
>
> ...
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts."*

98. The case law has established that tying will constitute an abuse of a dominant position contrary to the Chapter II prohibition/Article 102 TFEU where four conditions are satisfied:[78]

a. the tying and the tied products are separate products;

b. the undertaking is dominant in the market for the tying product;

c. the dominant undertaking does not give customers a choice to obtain the tying product without the tied product; and

d. the tying forecloses competition.

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[76] E.g. Case C-413/14P *Intel v Commission* para 140; *Socrates Training Limited v The Law Society of England and Wales* [2017] CAT 10 para 166.

[77] Tying practices may also be caught by the Chapter II prohibition even where they do not fall within the precise terms of section 18(2)(d). See *Socrates*, [141].

[78] Case T-201/04 *Microsoft Corp. v Commission* EU:T:2007:298, [859] and [867]. These conditions have been applied by the Tribunal in the context of the Chapter II prohibition. See *Socrates,* [143]-[176].

99. If these conditions are met, it is for the dominant undertaking, which bears the burden of proof, to demonstrate the existence of any objective justification for its conduct.[79]

100. As set out in paras 65-66 above, by the Payment System Restrictions, Apple requires that payments for Relevant Purchases must be made via the ASPPS. This involves the tying of the ASPPS (the tied product) to the App Store (the tying product).

Separate products

101. Whether two products are to be considered distinct "*has to be assessed by reference to consumer demand.*"[80] The key question is whether there is independent demand for the tied product (i.e. the ASPPS).[81] It is not necessary to demonstrate that there is demand for the tying product (i.e. the App Store) without the tied product: iOS App developers who want to reach iOS Device users have no choice but to use the ASPPS.[82]

102. A range of factors are relevant to the assessment of whether two products are distinct, including the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and the commercial practice of the dominant undertaking.[83] The fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product.[84]

103. The following factors demonstrate that there is independent demand for payment processing systems, which should therefore be considered a distinct product from the App Store:[85]

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[79] *Microsoft,* [859] and [869].

[80] *Microsoft,* [917].

[81] *Microsoft,* [918].

[82] *Microsoft,* [919].

[83] *Microsoft,* [925].

[84] *Microsoft,* [927].

[85] These factors were also cited by the General Court in *Microsoft* in support of its conclusion that the Windows operating system and Windows Media Player constituted two separate products.

a. **Functional differences**[86] There are obvious functional differences between Apple's App Store and the ASPPS. The App Store enables customers to search for, purchase and download iOS Apps onto their iOS Device. The ASPPS enables payments to be made for Relevant Purchases.

b. **Other undertakings supply payment processing services** The provision of payment processing services is well established as a standalone service and (it is well known) is provided by a number of undertakings such as Paypal and Stripe.[87]

c. **Demand** There is current demand from iOS App developers and iOS Device users for alternative payment systems. Indeed, some iOS App developers, such as Epic Games (the creator of the well-known Fortnite app) have sought to develop their own payment processing systems. However, they are prevented from using their own payment processing systems in respect of iOS Apps distributed via the App Store.[88]

Dominance

104. Apple holds a dominant position on the market for the tying product, i.e. the iOS App Distribution Market. Paras 85-86 above are repeated.

Coercion

105. The third criterion, relating to coercion, is satisfied when a dominant undertaking deprives its customers of the choice of purchasing the tying product without the tied product.[89] Coercion can take one or both of the following forms:[90]

a. **Contractual coercion:** the tying obligation is imposed by the terms of the agreement between the dominant undertaking and its customers; and/or

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[86] See also *Microsoft,* [926].

[87] See e.g. Holt 1, para 7.4.35.

[88] See *Epic Games Inc. v Apple,* complaint for injunctive relief at [19].

[89] *Microsoft,* [955] and [961].

[90] *Microsoft,* [963].

b. **Technical coercion:** the tied product is physically integrated into the tying product, so it is impossible to take one product without the other.

106. This criterion is satisfied in the present case as, by the Payment System Restrictions Apple employs both contractual and technical coercion to ensure the use of the ASPPS for Relevant Purchases.

107. The coercion is principally imposed on iOS App developers, who are prevented from using any competing payment processing system for Relevant Purchases. This then, in turn, applies to iOS Device users who are also required to use the ASPPS in order to make Relevant Purchases.[91]

Foreclosure

108. Tying will only constitute an abuse of a dominant position if it has anti-competitive effects.[92] This does not require proof of actual effects. It is sufficient to show anti-competitive effects which may potentially exclude competitors which are as efficient as the dominant undertaking.[93]

109. It is not necessary to show that the anti-competitive effects harm consumers directly. The Chapter II prohibition also covers conduct which indirectly harms consumers by impairing an effective competitive structure. As the High Court held in *Streetmap:* "*[t]he impugned conduct must be reasonably likely to harm the competitive structure of the market.*"[94]

110. The anti-competitive effects of Apple's requirement to use the ASPPS for all Relevant Purchases are set out in para 68 above. In short, the tying prevents the use by the iOS App developer of any other payment processing services, and therefore excludes competing providers of payment processing services from the relevant market. As such, competition on the iOS Payment Processing Market is completely extinguished.

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91 See, by analogy, *Microsoft,* [962] where the GC recognised that, in most cases, the coercion to use Windows Media Player "*is applied primarily to OEMs, and is then passed on to consumers.*"

92 *Socrates,* [147].

93 *Socrates,* [150].

94 *Streetmap.EU Ltd v Google Inc.* [2016] EWHC 253 (Ch), [88].

Objective justification

111. Apple bears the burden of proof to invoke any purported objective justification. The PCR will respond to any arguments that Apple may make in due course.

(iii) Relevant counterfactual

112. Absent the App Distribution Restrictions and the Payment System Restrictions:

a. The iOS App Distribution Market would have developed as a competitive market.[95] In particular, competing app distributors would have entered the market and offered alternative means of distributing iOS Apps, including generic and/or specialist iOS app stores.[96] Moreover, at least some iOS App developers would have made iOS Apps available for direct download by iOS Device users directly from their websites (just as Mac users can download MacOS apps to their Apple personal computer by direct downloads from a developer's website – or indeed from a variety of MacOS app stores: see Holt 1, para 6.2.6.(b)). iOS Device users would have used those other forms of app distribution.[97]

b. The iOS Payment Processing Market would also have developed as a competitive market.[98] In particular, other payment processors would have entered the market (as they have where the use of the ASPPS is not mandated). Some rival app stores would have introduced their own payment processing solutions and/or iOS App developers would be able to choose their own payment processing provider for purchases of and within their iOS Apps.

113. As regards the amount of commission in a competitive market: (i) third parties in both the iOS App Distribution Market and the iOS Payment Processing Market would have charged lower rates than the Commission charged by Apple; and (ii) Apple would have charged lower rates of commission to compete with those third parties.[99] In the premises,

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95 See Holt 1, section 6.2.

96 See Holt 1, para 6.2.6- 6.2.14.

97 See Holt 1, paras 6.2.15- 6.2.20.

98 See Holt 1, paras 6.3.13- 6.3.14.

99 See Holt 1, paras 6.2.21-6.2.25; 6.3.13-6.3.14; 6.4.2.

iOS Device users would have paid lower rates of commission. On the basis of the information currently available, Mr Holt's preliminary estimate is that the level of commission that would have been paid is in the range of 5-15% (see Holt 1, para 8.3.2), as detailed further below. In due course, that estimate will be refined.

D. <u>Excessive Pricing</u>

(i) Legal Framework

114. Excessive pricing is a well-established form of abuse of a dominant position. Section 18 of the Act and Article 102 TFEU expressly prohibit dominant undertakings from "*directly or indirectly imposing unfair purchase or selling pric*es".

115. The "*starting point*"[100] for excessive pricing is paras 248-253 of the seminal case of Case 27/76 *United Brands* [1978] ECR 207, according to which:

    a. **Para 249** The court should ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

    b. **Para 250** A price which bears no reasonable relation to the economic value of the product is abusive.

    c. **Para 252** One method of determining whether a price is abusive is to compare the selling price with the cost of production, to determine whether the difference is excessive (the so-called "*excessive limb*"), and, if so, whether the price is unfair either in itself or when compared to competing products (the so-called "*unfair limb*").

    d. **Para 253** Other methodologies may be utilised to determine whether the price of a product is unfair.

[100] *Competition and Markets Authority v Flynn Pharma L*td [2020] EWCA Civ 339; [2020] Bus LR 803 ("***CMA v Flynn***"), Green LJ, para 56.

116. The nature of the exercise that must be conducted for a finding of excessive pricing was considered in detail by the Court of Appeal in *Competition and Markets Authority v Flynn Pharma Ltd*.[101] Green LJ and Vos LJ[102] reiterated that there is no single method or way in which abuse might be established, that there is a margin of manoeuvre in determining which methodology (or methodologies) to employ in establishing such an abuse and it is a highly fact sensitive exercise.[103]

117. Insofar as a claimant seeks to establish an abuse by way of the methodology set out in *United Brands*,[104] the claimant may:[105]

    a. compare the cost of production with the selling price in order to disclose the profit margin; determine whether that is "excessive", in particular by comparing the price charged against a benchmark or standard[106] such as a return on sales or return on capital employed benchmark;[107] (the 'excessive limb') and

    b. then compare the price against "*a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these*", there being "*no fixed list of categories of evidence relevant*"[108] (the 'unfair limb').

118. Within this analysis,[109] demand side factors are taken into account, particularly in relation to the concept of economic value. In broad terms, economic value encompasses "*what it is that users and customers value and will reasonably pay*",[110] but it has long been recognised that this is not sufficient by itself "*since otherwise true value would be defined*

[101] [2020] EWCA Civ 339; [2020] Bus LR 803.

[102] Sir Stephen Richards agreed with both judgments.

[103] See Green LJ, para 97(iii)-(iv); Vos LJ para 266.

[104] Which Vos LJ indicated would be the first step in most cases; see para 252.

[105] See Green LJ, para 97(iv)-(vi).

[106] Which does not have to be a benchmark price: see Green LJ, paras 120-125; Vos LJ, paras 248-254.

[107] Although no particular approach is required: see Green LJ, para 97(v); Vos LJ, para 253.

[108] See Green LJ, para 97(vi).

[109] It is not a separate question: see Green LJ, para 172; Vos LJ, para 282.

[110] See Green LJ, para 171.

as anything that an exploitative and abusive dominant undertaking could get away with".[111] This risk is particularly acute in circumstances of dependency: as explained by Advocate-General Jacobs in Case 395/97 *Tournier*,[112] the usefulness of the criteria of the importance of the product, in that case, music for discotheques, "*breaks down in a situation where a given category of users is completely dependent for its functioning on the supply of music and where because of the absence of competition that category must, in effect, pay whatever price is required of it*". As Green LJ went on to explain in *CMA v Flynn*, the dependency of the buyer will therefore be a relevant factor in determining the true economic value.[113]

119. It is important, when conducting such an assessment, not to lose sight of the underlying facts driving the analysis in question.[114]

(ii) Prima facie case

120. At present, the PCR does not have access to important information, in particular in relation to the costs incurred by and revenue earned by Apple in the relevant period. Mr Holt makes clear that his assessment is preliminary, but that he expects to update his assessment in the light of disclosure.[115]

121. However, despite that considerable gap in the information currently available to the PCR, the threshold of a "*triable issue*"[116] as to the excessive and unfair nature of the Commission is clearly satisfied. For the avoidance of doubt, at this preliminary stage, and pending sight of Apple's costs, it is alleged by the PCR that all Commission charged by Apple on Relevant Purchases is excessive and unfair, including those charges of 15% more recently imposed.

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[111] See Green LJ, para 125; the so-called *"cellophane fallacy*".

[112] [1989] ECR 2521, para 65 of his Opinion.

[113] See Green LJ, para 167.

[114] See e.g. Vos LJ, para 243.

[115] See Holt 1, paras 7.1.2, 7.1.9. 7.3.35-7.3.36.

[116] Lord Briggs, with whom Lord Thomas (and, prior to his death, Lord Kerr) agreed, *Mastercard Inc v Merricks* [2020] UKSC 51 ("***Merricks***"), para 46.

Excessive Limb

122. The evidence currently available indicates that the Commission satisfies the excessive limb. In particular, it appears that Apple enjoys an extraordinary profit margin in respect of its App Store. This follows from:

   a. **Public reports** The recent US Committee Report, suggests that:

      i. Apple's net **revenue** from the App Store (alone, aside from any other elements of the Apple ecosystem) was over $15bn in 2019/2020.[117] It is understood that the Commission charged by Apple accounts for the vast majority of that revenue.[118]

      ii. However, Apple's **costs** for running the App Store have been publicly estimated to be less than $100m.[119]

   These figures indicate an exceptionally large profit margin.

   b. **Mr Holt's analysis** The exceptional nature of that profit margin is also confirmed by preliminary analyses undertaken by Mr Holt (although that analysis is inevitably constrained by the information that is publicly available). Mr Holt has undertaken profitability analyses based on publicly available information to estimate Apple's Return on Capital Employed ("**ROCE**") compared to relevant adjusted Weighted Average Cost of Capital ("**WACC**").[120] In particular:

      i. Figure 7.1 at para 7.3.28 of Holt 1 shows that the estimated ROCE is very significantly in excess of Apple's calculated WACC in the Relevant Period in relation to Commission for app distribution services, with that difference increasing significantly over time (rather than eroding, which would have been expected in a competitive market).[121] Even on very conservative

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[117] See US Committee Report, at pp. 344-345. Some estimates cited therein put the revenue earned by the App Store even higher.

[118] See Holt 1, para 7.3.18.

[119] US Committee Report, at pp. 344-345. No timescale is provided for those costs.

[120] See Holt 1, para 7.3.1-7.3.29 and paras 7.4.3-7.4.28 respectively. This analysis is robust to a number of sensitivities: see paras 7.3.32-7.3.34 and 7.4.31-7.4.33.

[121] See Holt 1, para 7.3.29.

estimates of operating costs, it appears that the returns generated may be excessive.[122]

ii. Figure 7.4 at para 7.4.27 of Holt 1 shows that the estimated ROCE is considerably higher than the WACC estimated for Apple for payment processing services, with that difference increasing significantly over time (rather than eroding, which would have been expected in a competitive market).[123] Even taking into account very conservative assumptions, ROCE is still far in excess of the WACC.[124]

Further information would be needed to refine this estimate, held by Apple.[125]

c. **Drop in Commission to 15%** The fact that Apple was, overnight, able to cut its Commission to 15% for small iOS App developers, as explained above, is an indication that the prior level of 30% was excessive.

d. **App developers' concerns iOS** App developers believe that the fees charged by Apple grossly outstrip the costs to Apple. Epic Games has noted that the costs of running a digital store appear to be negligible at a large scale, such that they estimate that stores charging 30% are marking up their costs by 300-400%.[126]

Unfair Limb

123. **Unfairness in itself** There are a number of factors, apparent even at this pre-certification stage of proceedings, which indicate that the % rate set by Apple is unfair in itself. In particular:

a. **Persistent rate** The Commission was set in 2009, and has remained stable for over a decade (subject to the limited exceptions addressed above). The persistence of high prices, given the extraordinary growth of Apple, and the App Store in

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[122] See Holt 1, para 7.3.34.

[123] See Holt 1, para 7.4.27-7.4.28.

[124] See Holt 1, para 7.4.33.

[125] See Holt 1, paras 7.3.35-7.3.36, 7.4.4.

[126] See https://www.mcvuk.com/development-news/new-epic-games-store-takes-on-steam-with-just-12-revenue-share-tim-sweeney-answers-our-questions/. See further evidence given to the US House of Representatives, as recorded in the US Committee Report at p345.

particular,[127] indicates that, as a result of its dominant position, Apple has reaped trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

b. **Nature of the differential** As explained above, the profit margin disclosed pursuant to the Holt 1 is not only exceptionally large, it is increasing. In a competitive market, returns above the WACC would be expected to erode over time.[128]

c. **Drop in Commission to 15%** The recently announced drop in the percentage rate for the Commission for certain iOS App developers serves to reinforce the unfair nature of the Commission. Apple's announcement made clear that the purpose of the reduced Commission rate was to allow iOS App developers to "*invest more resources into [their] business and continue building the kind of quality apps your customers love*".[129] It was only extended to 'small' businesses. This reduction was not the result of competitive pressure (since there is none) but rather appears to be a response to regulatory criticism, adverse publicity and a suite of legal claims (as set out at paras 134-137 below). Indeed, the fact that Apple can halve, in a single fell swoop, the percentage rate charged on all of the Commission imposed on Relevant Purchases, indicates that those prices were not previously competitive or fair.

d. **Other sources of App Store revenue** Apple also charges a $99 per annum Program fee, which generated an estimated $50m in revenue for Apple in 2017.[130] Apple also generates an estimated $2bn per annum (in 2020, it having increased exponentially in recent years) in revenue through Apple Search Ads, offered to iOS App developers in the App Store.[131] In light of the public information regarding the differential between the costs of running the App Store and its revenue, this

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[127] The number of apps on the App Store has grown from 5,000 in summer of 2008 to 2.2 million in January 2017. See https://www.businessofapps.com/guide/app-stores-list/

[128] Holt 1, para 7.3.29.

[129] See https://developer.apple.com/news/?id=i7jzeefs

[130] Holt 1, para 7.3.14.

[131] Holt 1, para 7.3.15.

further revenue reinforces the unfair nature of the additional charges that Apple makes in respect of the App Store by way of the Commission.

e. **Response by iOS App developers:**

i. **Attempts to bypass:** iOS App developers have sought, but have been unable, to bypass elements of the Commission paid to Apple. When Epic Games sought to do so in respect of its Fortnite iOS App, and to offer a 20% reduction in in-app prices, it was not permitted by Apple.[132] Similarly, while iOS App Developers such as Netflix and Spotify have stopped accepting payments within their iOS Apps (by disabling the ASPPS in their iOS Apps), they are still contractually restricted from informing iOS Device users within the iOS App of the alternative purchasing methods available outside the iOS App.

ii. **Complaints:** As set out at para 136 below, a number of iOS App developers have brought claims contending that the Commission is unfair and abusive. Epic Games has brought a claim against Apple in California, where it refers to the Commission as an "*oppressive 30% tax on the sale of every app*", an "*exorbitant 30% fee*", and a "*supra-competitive 30% tax*", "a *rate that is far higher than what could be sustained under competitive conditions*".[133] Class actions have been brought by iOS App developers Donald R Cameron and Pure Sweat Basketball, Inc in California, which refer to the Commission as a *"supra-competitive 30% commission", an "overly expensive 30% commission"*, leading to *"enormous, supra-competitive profits"*.[134]

124. In the premises, the Commission does not reflect the economic value of the App Store. To the contrary, it is a fee paid under duress by iOS App developers who are rendered wholly dependent on Apple for distribution of their iOS Apps. The iOS App developers

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[132] See Epic's Complaint, paras 19-20.

[133] Epic's Complaint, paras 3, 11, 97, 101.

[134] Complaint by Donald R Cameron and Pure Sweat Basketball, Inc, paras 3, 4 and 34.

have stridently objected to it: it is not a commission that reflects that which iOS Device users value and will reasonably pay.

125. **Unfair in comparison to other products** Mr Holt has also given preliminary consideration to other products/services which might serve as relevant comparators.

126. Mr Holt has not identified strong price comparators in the form of other app stores charging competitive levels of commission.[135] First, as described above, there are no competing app stores for iOS Apps by virtue of Apple's abuses. Second, Mr Holt has considered whether Android app stores might serve as relevant price comparators, but his preliminary assessment is that Google Play Store and other Android app stores do not charge competitive levels of commission due to Google's market power and its anticompetitive conduct in respect of Android app stores.[136] However, Mr Holt has identified comparators in the form of certain PC games distribution platforms and the Microsoft app store which have informed his price benchmarking analysis.[137]

127. He comes to a preliminary view that a competitive benchmark for the iOS App Distribution Market would fall in the range of 10-20%, with a mid-point of 15%. He explains that this is a conservative estimate. However, "*in the event that further analysis of the profitability of the App Store would point to high and persistent profitability even at this level of commission, it is possible that even 15% may be higher than what I would expect in a well-functioning competitive market*".[138]

128. Mr Holt also considers that payment processing service providers serve as relevant price comparators for the purposes of assessing whether the Commission is unfair, noting that the Commission is not levied on all iOS Apps requiring payment processing services, including those which offer physical goods and services.[139] Mr Holt identifies at this preliminary stage a sample of four online payment service providers as potential

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[135] Holt 1, para 7.1.10, paras 7.3.49-7.3.57.

[136] Holt 1, para 7.1.10, paras 7.3.53-7.3.57.

[137] Holt 1, paras 7.1.9 and 7.3.58-7.3.91.

[138] Holt 1, paras 7.3.92-9.3.93.

[139] Holt 1, para 7.4.1.

comparators, each of whom charge a commission of 3% or less.[140] Mr Holt concludes that these comparators "*offer payment processing systems with fully comparable core functionalities to [the ASPPS] but charge very significantly lower fees*", and thus show *prima facie* that the Commission is set at an excessive and unfair level.[141]

129. Mr Holt's analysis of the available evidence on payment systems fees indicates a competitive benchmark for Apple's commission in the region of 1.5-3%. He allows (on a conservative basis) that there may be potential additional payment processing costs and thus provisionally adopts an iOS Payment Processing Market benchmark of 5%.[142]

Counterfactual

130. In the light of his assessment of the currently available evidence (noting that he cannot identify a price benchmark based on costs pre-disclosure), Mr Holt considers that the Commission would either come down to levels based on app distribution comparators (in the range of 10-20%) or payment processing levels of around 5%. While he cannot be specific at this stage, some evidence suggests that the commission for Relevant Purchases would likely to fall towards the payment processing benchmark.[143] He thus considers a range of 5-15% to be a good indication of a competitive level for the fees associated with Relevant Purchases.[144]

E. *Effect on trade*

131. The infringements set out above may appreciably affect trade between Member States of the European Union or within the UK or a part of it. In particular, the infringements affect the ability of app developers or payment processors to offer cross-border services (or services within the UK).

[140] Holt 1, paras 7.4.34-7.4.39.

[141] Holt 1, para 7.4.39.

[142] Holt 1, para 7.4.39.

[143] Holt 1, para 7.5.3.

[144] Holt 1, para 7.5.4.

F. Joint and several liability

132. Each of the two Proposed Defendants is jointly and severally liable for any loss caused. Paragraphs 24-32 above are repeated.

G. Other proceedings

133. These Claims are of a standalone nature under section 47A of the Act (as required to be confirmed pursuant to Rule 75(3)(f)). However, Apple's conduct already forms the subject-matter of a number of high-profile regulatory investigations and private claims in a variety of jurisdictions around the globe, including the UK and EU.

134. In particular, the following investigations by competition authorities are underway:

a. In June 2020, the European Commission opened a formal investigation, following a complaint from music streaming app Spotify, into Apple's conduct in relation to the App Store. On 30 April 2021, the European Commission announced that it had formed the preliminary view that Apple has abused its dominant position under Article 102 TFEU for the distribution of music streaming apps through its App Store, taking issue with "*the mandatory use of Apple's own in-app purchase mechanism imposed on music streaming app developers to distribute their apps via Apple's App Store*" and with the fact that "*Apple applies certain restrictions on app developers preventing them from informing [iOS Device users] of alternative, cheaper purchasing possibilities*."[145] Margrethe Vestager stated on the same day that "*Apple deprives users of cheaper music streaming choices and distorts competition. This is done by charging high commission fees on each transaction in the App store for rivals and by forbidding them from informing their customers of alternative subscription options.*"[146] In conclusion, the European Commission's preliminary view is that Apple's rules raise the costs of competing for iOS App developers, which "*leads to higher prices for consumers*".[147]

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145 See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061

146 *Ibid.*

147 *Ibid.*

b. In parallel with the European Commission, the Dutch antitrust regulator is investigating whether Apple abuses its dominant position in respect of the App Store. The investigation follows the publication of a Dutch market study that considered, amongst other things, the extent of the commissions charged by Apple in connection with the App Store. On 1 December 2020, following its market study into the Dutch payment services market, the Dutch regulator published a report asserting, amongst other things, that technology companies, including Apple, must ensure that their platforms allow access to competing providers of payment services.[148]

c. On 4 March 2021, the UK CMA announced that it is investigating Apple's conduct in relation to the distribution of iOS Apps on iOS Devices in the UK, in particular, the terms and conditions governing iOS App developers' access to Apple's App Store. [149]

d. In the US, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law conducted an investigation into competition in digital markets focusing on the dominance and business practices of dominant online platforms, including Apple. In October 2020, the Committee published its report and recommendations (the US Committee Report) finding, inter alia, that Apple has leveraged its monopoly power in iOS mobile app distribution to discriminate against and exclude rivals and charge a supra-competitive Commission within the App Store.[150]

e. The Australian Competition & Consumer Commission ("**ACCC**") is conducting an inquiry into markets for the supply of digital platform services (including app distribution), and has indicated that a claim brought by Epic Games in Australia against Apple will be relevant to the investigation.[151] In its Interim report No. 2, published in March 2021, the ACCC identified a number of areas where action is

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148 See https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store

149 See https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour

150 Staff Of H. Comm. On The Judiciary, 116th Cong., Investigation Of Competition Of Digital Markets: Majority Staff Report And Recommendations 39 (Comm. Print 2020).

151 See https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1241895&siteid=202&rdir=1

required and have put forward potential measures to address areas of particular concern. One such area of particular concern is the effects of Apple's distribution and payment system restrictions on iOS App developers. Regarding the level of Commission specifically, the ACCC "*considers that it is highly likely that the commission rates are inflated by the market power that Apple and Google have in their dealings with app developers*".[152]

f. In South Korea, Apple's Commission has attracted scrutiny from the Korea Fair Trade Commission ("**KFTC**"). In April 2021, it was announced that the KFTC plans to launch a five-month study that will include a comprehensive survey into Apple's (and Google's) conduct in their app marketplaces, their relationship with iOS App developers, their proprietary in-app payment systems and the disadvantages or unfair treatment iOS App developers might have experienced in the process of app reviews and display.[153]

135. A number of private proceedings are also underway in the US. The following consumer class actions have been brought against Apple by US iOS Device users in the US:

a. *Apple Inc. v Pepper*: In 2011, a group of claimants sued Apple contending that it unlawfully monopolised the market for iPhone app distribution, enabling it to levy supra-competitive commissions that have resulted in iOS Device users over-paying for iPhone apps.[154] In its 2019 ruling,[155] the US Supreme Court held that the iOS Device users have standing to bring the claim.[156]

b. *Lawrence v Apple Inc.*: In May 2019, a consumer class action was brought against Apple alleging that Apple's exercise of monopoly power in the retail market for

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[152] See page 72 of the report accessible at https://www.mlex.com/Attachments/2021-04-28_7895V7DFGC5WSK1D/Digital_platform_services_inquiry_March_2021_interim_report.pdf

[153] See https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1287378&siteid=202&rdir=1

[154] *In re Apple iPhone Antitrust Litigation*, Case 4:11-cv-06714 (Second Amended Consolidated Complaint, filed 9 May 2013).

[155] *Apple Inc. v Pepper et al.* No. 17-204, 587 U.S. (2019)

[156] *Ibid.,* The US Supreme Court held, at page 6 that "*The iPhone owners purchase apps directly from the retailer Apple [...]. The iPhone owners pay the alleged overcharge directly to Apple.*"

the sale of iPhone apps has resulted in iOS Device users paying higher prices for iOS Apps, and a loss of consumer choice.[157]

c. *Beverage, et al. v Apple Inc.*: In September 2020, a complaint was filed against Apple on behalf of users of the Fortnite iOS App, created by Epic Games. The complaint centres on Apple's removal of Fortnite from the App Store and Apple's unjust use of monopolistic power to foreclose competition for app distribution and payment processing, and raise prices for iOS Device users on the App Store by imposing its 30% Commission.[158]

136. Various actions have also been brought against Apple on behalf of iOS App developers in the US:

a. *Cameron and Pure Sweat Basketball Inc v Apple Inc.*: In June 2019, iOS App developers Donald Cameron and Pure Sweat Basketball sued Apple for abusing its monopoly power by charging a 30% Commission and a $99 annual developer fee, and mandating that prices end in $0.99. The iOS App developers argue, *inter alia*, that such charges are supra competitive, depress output of paid iOS App and in-app transactions, and ultimately harm competition, iOS App developers and consumers of apps and in-app products.[159]

b. *Epic Games, Inc. v Apple Inc.*: In August 2020, Epic Games issued proceedings against Apple after it removed Epic Games' Fortnite game from the App Store.[160] Fortnite was removed after Epic Games introduced a direct payment feature that would have allowed users to circumvent Apple's in-app Commissions. Epic Games is not seeking damages for itself, and claims that Apple's Commissions are exorbitant and that lower charges would result in lower prices for iOS Device users.

c. *SaurikIT LLC v Apple Inc.*: In December 2020, SaurikIT filed a claim against Apple regarding its monopolisation of the iOS app distribution and iOS app payment processing markets. The complaint alleges that Apple has excluded SaurikIT's app

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[157] *Lawrence v Apple Inc.*, Case 3:19-cv-02852, filed 23 May 2019.

[158] *Beverage, et al. v Apple Inc*, Case 20-cv-370535, filed 17 September 2020.

[159] *Cameron and Pure Sweat Basketball Inc v Apple Inc*, Case 5:19-cv-03074, filed 4 June 2019.

[160] *Epic Games, Inc. v Apple Inc.*, Case 4:20-cv-05640, filed 13 August 2020

distribution service, Cydia, and all other competitors from both markets, depriving them of the ability to compete with the App Store and to offer iOS App developers and iOS Device users better prices, better service, and more choice.[161]

137. In November 2020, further to Epic Games' claim against Apple in the US (see above), Epic Games brought a further claim in the Federal Court of Australia. On 8 December 2020, Epic Games filed a similar claim against Apple Inc. and Apple (UK) Limited in the Competition Appeal Tribunal. However, in *Epic Games, Inc and others v Apple Inc and others* [2021] CAT 4, the claim was dismissed on jurisdictional grounds.

138. The PCR reserves the right to provide further or amended particulars following the publication of any relevant findings of infringement against the Proposed Defendants by the European Commission and/or the CMA.

VI. LOSS

A. Legal test

139. The basic test for quantum is well established. The victim of a tort must be put in the position that he/she would have been in had the wrong not occurred.[162] It will be a matter for expert evidence to establish the competitive and/or non-excessive commission that would have applied in the absence of any infringements found by the Tribunal.

140. The assessment will be carried out with the aid of the "*broad axe*" if necessary.[163] Moreover, while the compensatory principle is a basic feature of the law and procedure for the determination of civil claims for damages, that is expressly and radically modified under section 47C of the Act, which permits the Tribunal to award damages without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person. This removes the ordinary requirement for the separate assessment of each claimant's loss "*in the plainest terms*".[164]

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[161] *SaurikIT LLC v Apple Inc,* Case 4:20-cv-08733, filed 10 December 2020.

[162] *Sainsbury's Supermarkets Ltd v MasterCard* [2020] UKSC 24, para 194.

[163] *Mastercard v Merricks* [2020] UKSC 51, per Lord Briggs at paras 47-53.

[164] *Mastercard v Merricks*, per Lord Briggs para 58.

141. Apple's breaches of statutory duty have caused loss and damage to the Proposed Class during the Relevant Period. That loss and damage is the difference between the Commission in fact paid by them and the commission which they would have paid in the absence of the infringements set out above.

B. Damages claimed

142. At this stage, any assessment of quantum is necessarily very high-level. At present, Mr Holt has analysed the quantum on the basis that all the PCR's allegations of abusive conduct are upheld. Following certification, and with the benefit of disclosure and evidence, Mr Holt could assess quantum by reference to each of the alleged abuses separately, if appropriate.

143. The PCR proposes to seek an aggregate award of damages. At this stage, and prior to disclosure, the PCR relies on estimates of such losses. Mr Holt's preliminary analysis for aggregate damages pursuant to section 47C is set out in Chapters 8-10 of Holt 1. In overview:

a. Mr Holt has estimated the total iOS Device user expenditure on Relevant Purchases. This is currently estimated by reference to publicly available material, and in particular by multiplying the average spend on Relevant Purchases per iOS Device user in the US multiplied by an estimate of the number of iOS Device users in the UK.[165] Following disclosure it is expected that it will be possible to significantly refine this estimate on the basis of UK App Store sales data.[166]

b. Mr Holt has estimated the likely overcharge on Relevant Purchases. Mr Holt explains his position in Chapter 8 of Holt 1. In summary, he compares a 'blended' Commission of between 30 and 27% (taking account of those Relevant Purchases where a Commission of 15% was charged) from 2015-2020 to his estimated competitive commission of between 5-15%. He thus finds that between 12 – 25% of the overall purchase price was 'overcharge' in this period.[167]

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[165] Holt 1, para 10.2.1-10.2.6.

[166] Holt 1, para 10.2.1.

[167] Holt 1, Table 10.2

c. Mr Holt has estimated the level of consumer incidence (i.e. the level of overcharge borne by iOS Device users) in Chapter 9 of Holt 1. His conclusion is that consumer incidence is significant, with a conservative estimate of around 50%, and a range of between 40-60%.[168]

144. On the above calculations, Mr Holt estimates loss of between £535m (for a competitive benchmark of 15% and an incidence of 40%) and £1,459m (for a competitive benchmark of 5% and an incidence of 60%).[169]

145. The PCR also claims simple interest on the losses suffered, at a rate of 8%. This rate reflects the fact that the Proposed Class is comprised of iOS Device users (many of whom are consumers, who face higher interest rates than commercial claimants), and is consistent with the approach adopted to consumer redress in materially similar contexts (such as compensation paid in respect of mis-sold payment protection insurance, pursuant to the redress scheme set up by the Financial Conduct Authority).[170] Including interest, the preliminary estimate of aggregate damages is between £621m and £1,691m.[171]

C. Loss per Proposed Class Member and distribution

146. The following section of the Claim Form addresses the Proposed Class, including an estimate of the class size (which Mr Holt estimates is 19.6m[172]). By that estimate, the estimated average damages per Proposed Class Member of iPhone users is between £27.31 and £74.50 excluding interest, and £31.70 and £86.33 with interest.[173]

147. While the distribution of any award of damages will be a matter for detailed consideration after any aggregate award of damages is obtained, the PCR provisionally intends to distribute damages by reference to the Relevant Purchases actually made by each

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[168] Holt 1, para 9.4.20.

[169] Holt 1, Table 10.3 at para 10.2.8-10.2.9.

[170] See https://www.financial-ombudsman.org.uk/businesses/complaints-deal/ppi and https://www.ft.com/content/54bd0d52-fb3d-11e5-b3f6-11d5706b613b

[171] Holt 1, Table 10.4 at para 10.2.10.

[172] Holt 1, para 10.3.3.

[173] Holt 1, para 10.3.4.

Proposed Class Member in the Relevant Period.[174] This provisional view is based on the ready ease with which each iOS Device user can determine and provide proof of the value of Relevant Purchases.[175] The PCR's current preliminary proposal for the notice, administration and distribution of any aggregate award of damages is set out in the Notice and Administration Plan (see sections 9-11 of [**Tab 11**]).

VII. FORUM

A. Jurisdiction

148. The Proposed Defendants are each domiciled out of the UK. The Proposed Defendants have not consented to be served out of the jurisdiction. In the circumstances, the PCR includes with this Claim Form, an Application for Permission to serve each of the Proposed Defendants out of the jurisdiction.

149. In that Application, the PCR explains that a claim brought on behalf of iOS Device users (primarily consumers) using the UK version of the App Store, in respect of damage suffered in the UK, under a collective proceedings regime designed to facilitate the bringing of claims that would otherwise be uneconomical on the part of UK residents, should plainly be facilitated in the UK.

B. Action taking place in England and Wales

150. Moreover, while the action could be treated as taking place as either England and Wales or Scotland (as it is on behalf of all consumers in the UK), the proceedings should be treated as taking place in England and Wales. In particular, and having regard to the factors specified in Rule 18(3):

    a. The PCR is located in London;

    b. The PCR’s legal representatives are located in London. The Proposed Defendants’ legal representatives are also located in London.

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[174] See Notice and Administration Plan, para 12.11.

[175] Notice and Administration Plan, para 4.3; Kent 1, para 28.

c. Given the relative population sizes of the constituent countries of the UK, it is likely that the significant preponderance of the members of the Proposed Class are resident in England and Wales. For the same reasons, the majority of the Relevant Purchases are likely to have been made in England and Wales.

VIII. ELIGIBILITY FOR COLLECTIVE PROCEEDINGS

A. The PCR

151. Under Rule 78, the Tribunal may authorise a person to act as the representative in collective proceedings:

  a. whether or not that person is a class member; but

  b. only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

152. As explained above and in Kent 1, Dr Kent is a lecturer in Digital Economy and Society Education at King's College London. She is member of the Proposed Class as she owns an iPhone and paid the Commission during the Relevant Period.[176]

153. As to whether or not it is just and reasonable for Dr Kent to act as a representative, as set out in Rule 78(2), the Tribunal will consider:

  a. whether she would fairly and adequately act in the interests of the class members (Rule 78(2)(a));

  b. whether she has, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members (Rule 78(2)(b));

  c. whether, if there is more than one applicant to be the representative in connection with the same claims, she would be the most suitable (Rule 78(2)(c)); and

  d. whether she will be able to pay the defendant's recoverable costs, if ordered to do so (Rule 78(2)(d)).

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[176] Kent 1, paras 25 and 32.

154. As to each of those considerations, in turn:

a. Dr Kent, in her professional role as a lecturer in Digital Economy and Society Education, has particular experience relating to the impact of digital platforms on consumers. She explains at Kent 1, para 20, that her motivation to act as the class representative in these proceedings stems from her personal and professional commitment to supporting consumer rights and welfare, to promoting positive outcomes for consumers of digital technology, and preventing abuses by technology companies. In light of her experience, her capacity, and her commitment, as explained in detail at paras 14-23 of Kent 1, she would act fairly and adequately in the interests of the Proposed Class Members (pursuant to Rule 78(2)(a)).

b. Furthermore, as is set out in para 40 of Kent 1, she has no material interest that is in conflict with the interests of the Proposed Class Members: rather, her interests are aligned (pursuant to Rule 78(2)(b)).

c. With regard to Rule 78(2)(c), the PCR is not aware of any other applicant to be the representative in connection with the same claims.[177]

d. Further, as explained in more detail at paras 42-51 of Kent 1, the PCR has adequate funding for the claim and will be able to pay the Proposed Defendants' recoverable costs if ordered to do so (pursuant to Rule 78(2)(d)). The PCR has entered into a Litigation Funding Agreement with third-party funder, Vannin Capital (the "**Funder**"), to enable her to be able to pay the costs of the proceedings. The Funder has committed to providing the PCR with £11,290,031 in claim funding.[178] A comprehensive budget has been agreed in connection with the funding arrangements and is exhibited **[Tab 12]** alongside a copy of the Litigation Funding Agreement **[Tab 8]**. The PCR has also obtained an after-the-event insurance policy (the "**ATE Policy**") which provides total adverse costs cover of £10,000,000.[179] This includes adverse costs cover of up to £2,000,000 through to

[177] Kent 1, para 12.

[178] Kent 1, paras 42 and 43.

[179] Kent 1, para 49.

the making of a CPO.[180] This level of cover is adequate and appropriate given that Apple will already have substantial knowledge of the factual and legal issues that will arise for determination in the present proceedings, which overlap substantially with the issues arising in respect of the proceedings which are the subject of the ongoing investigations and legal proceedings in the UK, Europe and around the world (see paras 134-137 above). This will mitigate the extent to which the Proposed Defendants are reasonably required to incur costs in defending the present collective proceedings.

e. In addition, and further to Rule 78(3), which states that the Tribunal shall take into account all of the circumstances in evaluating the PCR's ability to act fairly and adequately:

   i. The PCR is a member of the Proposed Class and so Rule 78(3)(a) applies;

   ii. The PCR is not a 'body' for the purposes of Rule 78(3)(b);

   iii. The PCR has prepared a Litigation Plan for the proceedings (see paras 52-58 of Kent 1 and exhibited thereto at **[Tab 10]**), which includes (as per Rule 78(3)(c)):

      (1) a method for bringing the proceedings on behalf of the Proposed Class Members and for notifying Proposed Class Member of the progress of the proceedings;

      (2) a procedure for governance and consultation which takes into account the size and nature of the Proposed Class; and

      (3) estimates of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the PCR shall provide.

   iv. The PCR has engaged a very experienced consultative group of advisers with expertise and experience in group claims management, digital markets and consumer rights matters.[181] As explained in Kent 1 and the

[180] *Ibid*.

[181] Kent 1, paras 35-38.

exhibits thereto, she also has assistance, along with her experienced legal team, from Epiq Class actions and Claims Solutions, and Palantine Communications.

B. Proposed class

(i) Description of proposed class (Rule 75(3)(a))

155. In defining the scope of the Proposed Class, Dr Kent has considered the guidance on class definition contained in para 6.37 of the Guide as follows:

> *"[T]he class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim"*
>
> *"If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile*"

156. A description of the Proposed Class, as required by Rule 75(3)(a), is set out at paras 19-20 above. Key elements of that description are further elaborated upon below.

157. **First**, if certified, the Claims will be properly brought on behalf iOS Devices users as the category of customer which has suffered harm as a result of the abuses by Apple pleaded herein.

158. **Second**, as to the definition of iOS Device users:

    a. In accordance with para 6.37 of the Guide, the Proposed Class does not exclude legal persons. While it is envisioned that most iOS Device users will be natural persons, the PCR considers that it would be arbitrary to exclude legal persons.

    b. There are proportionate exclusions in respect of those individuals involved in the litigation (contained in paras 6(l)(i)-(iv) above), which are consistent with those contained in other collective proceedings and which ensure the proper conduct of these proceedings.

    c. As to deceased persons and the equivalent exclusion for companies which have ceased to operate contained in para 6(l)(v-vi) above, these are excluded to ensure

simplicity and efficiency in the progress of the Claims. It is not envisioned, given the recent Relevant Period, the wide demographic of the Proposed Class, and the fact that the most popular/highest grossing apps include gaming, dating, music/entertainment and lastly business apps,[182] that this will exclude a significant number of potential claims.

159. **Third**, as to the criteria that the iOS Device user is a user of the UK version of the App Store, this is an appropriate way to ensure that the Proposed Class is focused on customers in the UK, capturing the majority of UK-based iOS Device users.[183] It should also ensure minimal (if any) overlap with claims brought elsewhere. It is not envisioned that the criteria will cause complexity, as it can be readily determined whether an iOS Device user has such an account: the Apple ID in question will specify the Country/Region as the UK.[184]

160. **Fourth**, as explained above, the definition of Relevant Purchases covers all purchases in respect of which Apple imposes the unlawful Commission. It is also straightforward for any individual iOS Device user to see if she has made any Relevant Purchases, and therefore is a member of the Proposed Class, as those purchases are displayed in an iOS Device user's Purchase History.

161. **Fifth,** as to the "Relevant Period", which covers purchases from 1 October 2015 onwards, this is the earliest date on which the limitation rules permit the Relevant Period to begin. In summary terms:

    a. Stand-alone claims which "arose" prior to that date are subject to a two-year limitation period (i.e., they must be brought within two years of the crystallisation of the iOS Device user's loss through payment by that iOS Device user of a Commission when making a Relevant Purchase) (Rules 119(2)-(3) of the Tribunal Rules, read with Rules 31(1)-(3) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372)). The claims of iOS Device users whose loss arising from the

182 Notice and Administration Plan, para 4.6.

183 Particularly in circumstances where those not domiciled in the UK can opt-in, as set out in Kent 1, para 28.

184 See Kent 1, para 24; Notice and Administration Plan, para 4.3.

Proposed Defendants' conduct crystallised prior to 1 October 2015 are therefore time-barred.[185]

b. By contrast, claims arising on or after 1 October 2015 are subject to a six-year limitation period.

162. Overall, as Dr Kent confirms in para 28 of Kent 1, the common issues apply across the Proposed Class, such that it is not overly broadly defined.

(ii) Identifiable class (Rule 79(1(a))

163. The Claims are brought on behalf of an objectively identifiable class of persons. In accordance with para. 6.37 of the Guide, it is possible to identify, using the class definition set out above, whether any person falls within the Proposed Class based on objective and straightforward factual enquiries set out below.

164. There is a simple mechanism for determining whether a person is part of the Proposed Class. As explained at para 4.3 of the Notice and Administration Plan:

a. An iOS Device user can check whether they have been using the UK version of the App Store by checking the Country/Region in their Apple ID.

b. An iOS Device user can check their Purchase History in their Apple account. That Purchase History lists the Relevant Purchases made. If the person has made a Relevant Purchase, in the Relevant Period, they will fall within the Proposed Class.

Therefore, members of the Proposed Class will be able easily to tell or work out if they fall within its scope. As Dr Kent indicates, "*I have made such a check myself, which I found to be straightforward and the necessary information to be readily available*".[186]

165. Furthermore, these Claims are brought against the Proposed Defendants, members of the Apple undertaking, which only stretch back to 2015. It is envisioned that Apple should hold customer records relevant to the Claims.

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185 See for example *Dixons v MasterCard* [2019] CAT 5 at para 31.

186 Kent 1, para 25.

(iii) No sub-classes (Rule 75(3)(b))

166. It is not presently envisaged that it will be necessary to define sub-classes of claimants (Rule 75(3)(b)). As explained further below, the relevant issues of fact and law are common across the Proposed Class.

(iv) Estimate of class size (Rule 75(3)(c))

167. As to the requirement in Rule 75(3)(c) to identify the size of the class, it is estimated that the Proposed Class comprises approximately 19.6 million Proposed Class Members: see Holt 1, para 10.3.3. The PCR envisions that Apple will be able to provide a precise estimate of the class size.

C. *Eligibility for collective proceedings*

168. Rule 79(1) sets out that the Tribunal may certify claims as eligible where the claims are: (i) brought on behalf of an identifiable class of persons; (ii) raise common issues; and (iii) are suitable to be brought in collective proceedings. Further, Rule 79(3) sets out matters the Tribunal may take into account in addition to suitability for collective proceedings in determining whether the proceedings should be opt-in or opt-out proceedings. These are addressed in turn below.

(i) Identifiable class of persons (Rule 79(1)(a))

169. Paras 163-165 above are repeated.

(ii) Common issues (Rule 79(1)(b))

170. The Claims raise common issues, defined in section 47B(6) of the Act and Rule 73(2) as the same, similar or related issues of fact or law.

171. To determine whether a matter is a common issue, the Tribunal must determine the main issues in a case, and then whether or not they are common to the class.[187] In the present case, the main issues are as follows:

a. The definition of the relevant economic markets.

[187] See the judgment of Lord Briggs in *Merricks*, para 62.

b. Whether the Proposed Defendants hold a dominant position on those relevant markets.

c. Whether the Proposed Defendants have abused and/or continue to abuse their dominant positions.

d. Whether any abuse(s) of dominance by the Proposed Defendants has caused Proposed Class Members to pay a higher Commission when making Relevant Purchases than they would have done absent the infringements and, if so, the magnitude of that overcharge.

e. The rate and duration of the Proposed Class Members' entitlement to pre-judgment interest.[188]

172. Each of these issues raise the same, similar or related issues of fact or law on behalf of each of the Proposed Class Members. They are therefore common to the class.

173. Each of these issues would require to be resolved if individual Proposed Class Members were separately to litigate their claims on an individual basis.[189] The PCR has served Holt 1 alongside this Claim Form, which sets out Mr Holt's preliminary position, as well as describing in more detail the methodology he will employ in due course, with the further information that will become available.

(iii) Suitability to be brought in collective proceedings (Rule 79(1)(c))

174. The Claims are suitable to be brought by way of collective proceedings under Rule 79(2)(a) given that the principal issues are common issues and are therefore suitable for determination in collective proceedings.[190] Furthermore, each of the matters set out in rule 79(2) regarding the suitability of claims for collective proceedings are met in the circumstances of the present case, as set out below. In the multi-factorial balancing

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[188] As set out at para 145 above, simple interest is sought and therefore no individual consideration of the specific financing costs incurred by the Proposed Class Members will be required.

[189] See *Merricks*, para 55.

[190] See *Merricks*, para 62.

exercise which the Tribunal must conduct, each weighs in favour of the matters being suitable for collective proceedings.[191]

Appropriate means (Rule 79(2)(a))

175. The proceedings present an appropriate means for the fair and efficient resolution of the common issues. Indeed, collective proceedings in all likelihood represent the only economically viable method for individual Proposed Class Members to obtain compensation for losses suffered as a result of the infringements in question. The Claims are likely to be relatively low in value on an individual basis (as set out above, between £27.31 and £74.50 excluding interest, and £31.70 and £86.33 with interest) but very substantial in aggregate. They are thus a prime example of the type of claims for which the collective proceedings provisions now contained in the Act were designed.

Costs and benefits (Rule 79(2)(b))

176. The benefits of continuing the collective proceedings outweigh any costs to the parties. While there are inevitably costs associated with bringing the proceedings and administering the claims on behalf of a class with a substantial size, as is set out in the costs budget at **[Tab 12]**, such costs remain fair and proportionate in view of the aggregate value of the Claims (which, as set out above, presently totals between £535m and £1,459m excluding interest) and are outweighed by the benefits to Proposed Class Members from being able to pursue compensation for losses suffered due to the infringements, which would otherwise not be practically possible. To take just one example, it would not be feasible for individual Proposed Class Members to provide costly expert evidence, necessary to support the claims for infringement set out above.

177. Moreover, as outlined in Kent 1, the costs of this litigation, to the extent that the PCR is not successful, will be covered by the Funder on the basis of the PCR's Litigation Funding Agreement and ATE Policy.

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[191] See *Merricks*, para 64.

Pre-existing proceedings (Rule 79(2)(c))

178. The PCR is not aware of any separate proceedings making claims of the same or a similar nature on behalf of the Proposed Class Members.

Proposed class and identifiability of class (Rule 79(2)(d)-(e))

179. The criteria at Rule 79(2)(d) and Rule 79(2)(e) both go to the Proposed Class. The former stipulates that the size and the nature of the class is relevant to the suitability of the proceedings to being dealt with as such, and Rule 79(2)(e) makes clear that the Tribunal can consider whether it is possible to determine in respect of any person whether that person is or is not a member of the class.

180. As set out at para 167 above, the Proposed Class consists of approximately 19.6 million members. A group of individuals of this number, each with substantially the same claims could only bring their claims by way of collective proceedings of this nature. Any other mechanism for grouping together claims would simply not present a viable method of resolving the claims. Yet, while large, it is indeed "*possible to determine whether or not a person is a member of the Proposed Class*", as set out at para 164 above.

Aggregate Award (Rule 79(2)(f))

181. The Claims are also suitable for an aggregate award of damages, as a practical and proportionate method of assessing damages in collective proceedings.[192]

182. At para 143 above, the PCR summarises the methodology by which Mr Holt currently assesses the aggregate damages due to the Proposed Class. It is unnecessary to consider individual purchases to arrive at a single global award. The Claims for damages by the Proposed Class Members are inherently suitable for an aggregate award of damages.

183. However, it is notable that in this case it may be possible to refine that estimate, including on the basis of the Proposed Defendants' records[193] (it is possible, for example, that the

[192] Guide, para 6.78.

[193] As envisioned in para 6.78 of the Guide.

value of commerce of the Relevant Purchases can be derived exactly from Apple's customer sales data or estimated from closely related data).

184. As to distribution, the fairest method is likely to be ascertainable after the size of the class and the amount of aggregate damages are determined, and consideration at the certification stage is liable to be premature.[194] At this stage, as explained in the Litigation Plan **[Tab 10]** and Notice and Administration Plan **[Tab 11]**, the PCR considers that each Proposed Class Member will easily be able to provide appropriate evidence of the Relevant Purchases they have made during the Relevant Period, allowing the proportion of the overall award attributable to them to be determined. This is just, in the sense of being fair and reasonable.[195]

<u>Alternative dispute resolution (Rule 79(2)(g))</u>

185. The PCR is open to any proposals which would fairly compensate the Proposed Class Members for their losses. At this stage of the proceedings it is not envisioned that such resolution is likely to be possible.

(iv) Opt-in or opt-out proceedings (Rule 79(3))

186. These proceedings are brought on an opt-out basis (although it will be possible for members of the Class domiciled out of the UK to opt-in). Each of the factors in Rule 79(3) are addressed below.

<u>Strength of the claims (Rule 79(3)(a))</u>

187. The Claims are strong. The underlying facts on which the Claims are based are a matter of public record and not in dispute. The infringements alleged involve well established categories of abuse of dominance. Competition authorities in multiple jurisdictions including the UK, European Union and the United States are currently considering enforcement action against Apple in respect of conduct regarding the App Store, and private litigants are seeking damages and other remedies for the unlawful and supra-

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194 *Merricks*, paras 77 and 80.

195 See *Merricks*, para 58.

competitive charges imposed by Apple. Recently, the President of the Tribunal described the allegations levelled by Epic Games against Apple as "*readily arguable*".[196]

188. For the avoidance of doubt, the PCR believes that the Claims which it is sought to combine in the proceedings have a real prospect of success (pursuant to Rule 75(2)(h)).[197]

Practicability of opt-in proceedings (Rule 79(3)(b))

189. It is not practicable for the proceedings to be brought on an opt-in basis given the relatively modest amounts that each Proposed Class Member could recover, the complexity and costs involved, the size of the Proposed Class and the fact that Proposed Class Members are individual iOS Device users, primarily consumers.[198] As Dr Kent explains, it could not be expected that a high proportion of the Proposed Class would take the necessary steps to participate on an opt-in basis.[199] A consumer class action of this size is precisely the type of claim for which the opt-out procedure was introduced.[200]

190. The option of opting-in is available to those Proposed Class Members not domiciled in the UK.

IX. RELIEF

191. The PCR claims:

    a. damages on behalf of the Proposed Class, to be assessed on an aggregate basis pursuant to section 47C(2) of the Act;

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196 *Epic Games, Inc and others v Apple Inc and others* [2021] CAT 4

197 Kent 1, para 6.

198 All of which have been recognised by the CAT as factors relevant to opt-in certification in principle: see *Gibson v Pride Mobility Products Limited* [2017] CAT 9 at para [124].

199 Kent 1, para 30.

200 See by analogy *Gibson v Pride Mobility Products Limited* [2017] CAT 9 in which the Tribunal held that the claims would have been suitable for an opt out proceeding given the size of the class (around 27,000-32,000 people), that it comprised consumers and that the individual amounts in question were relatively small (in that case £40 or £195 per consumer; and see further Private Actions in Competition Law: A consultation on options for reform (April 2012), at para 5.27, confirming that the primary justification for introducing the opt-out regime was to protect the interests of consumers where individual claims were low.

b. simple interest thereon, at the rate of 8% per annum (or such other rate as the Tribunal may consider appropriate);

c. the PCR's costs; and

d. such further or other relief as the Tribunal may see fit.

MARK HOSKINS Q.C.

RONIT KREISBERGER Q.C.

JENNIFER MacLEOD

~~AARON KHAN~~

MICHAEL ARMITAGE

MATTHEW KENNEDY

HAUSFELD & CO LLP

Amended on 16 December 2021
Re-Amended on 7 February 2022

Statement of truth

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

……………………………………………………………

The PCR, Dr Rachael Kent

~~10 May~~ ~~16 December 2021~~ 7 February 2022