

IN THE COMPETITION APPEAL TRIBUNAL
BETWEEN:

Case Number: ~~FX~~1408/7/7/21

ELIZABETH HELEN COLL

Proposed Class Representative

– and –

- (1) ALPHABET INC.**
- (2) GOOGLE LLC**
- (3) GOOGLE IRELAND LIMITED**
- (4) GOOGLE COMMERCE LIMITED**
- (5) GOOGLE PAYMENT LIMITED**

Proposed Defendants

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”), Elizabeth Coll, sets out in turn:¹

¹ The PCR notes para 6.11 of the Tribunal’s 2015 Guide to Proceedings but first sets out the basis of the claims in order to assist the Tribunal and limit duplication / extensive cross-referencing. The PCR has addressed each of the matters required in Rule 75.

- a. **Section II:** a summary of the Claim (as defined below).
 - 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 the Proposed Defendants’ breaches of statutory duty by its infringements of Article 102 of the 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. The PCR 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 the 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 Proposed Defendants (1) – (3) at their registered foreign service addresses, accompanied by a witness statement by Luke Valentine Streatfeild (“**Streatfeild 1**”) with a tabulated bundle of documents exhibited “**LVS1**”;
 - 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 (“Coll 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. “**Android**” means Google’s proprietary licensable smart mobile operating system.
 - b. “**Android App**” means an app developed for Android by a third-party developer (i.e. not by Google).
 - c. “**Android Device**” means a smart mobile device (smartphone or tablet) that runs on any version of Android, including Android Forks.
 - d. “**Android Fork**” means a version of Android that has been modified from the open-source version of the Android source code and has not been approved as “Android-compatible” by Google.

- e. “**API**” means an application programming interface, being a set of definitions and protocols for building and integrating application software, that allows app developers to program their apps to connect to operating system-provided functionality.
- f. “**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 smart mobile devices from an app store, as distinct from “web apps” which can be accessed via a web browser only.
- g. “**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.
- h. “**Bundled App**” means a Proprietary App forming part of the **GMS Bundle** (including Google Play Services).
- i. “**Commission**” means the commission charged by Google on each Relevant Purchase using the PSPPS.
- j. “**GMS Bundle**” means the bundle of Proprietary Apps and services that Google licenses together, as specified and amended by Google from time to time.
- k. “**GMS Device**” means a smart mobile device (smartphone or tablet) which runs on the Google Android operating system and on which the **GMS Bundle** has been pre-installed.
- l. “**GMS Device users**” includes all users of **GMS 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 assigned at any point to these collective proceedings;
 - iv. any judge and Court staff 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);
 - 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. **“Google Android”** means a version of Android that has been approved as “Android-compatible” by Google.
- n. **“Google Android Device”** means a smart mobile device that runs on Google Android and is approved as “Android compatible” by Google.
- o. **“Play Store”** means Google’s proprietary app store, formerly known as Android Market.
- p. **“Proprietary App”** means an ~~Android App~~ developed for Android by Google.
- q. **“PSPPS”** means the Play Store payment processing system.
- r. **“Relevant Purchase”** means:
 - i. any purchase of an Android App in the UK version of the Play Store, which a GMS Device user pays a fee to download (a **“Relevant App Purchase”**); or

- ii. any one-time purchase by a GMS Device user within an Android App downloaded from the UK version of the Play Store, for which the GMS Device user pays a fee (a “**Relevant In-App Purchase**”);
or
- iii. any recurring purchase by a GMS Device user within an Android App downloaded from the UK version of the Play Store, for which the GMS Device user pays a fee (a “**Relevant Subscription Purchase**”),

subject to the following exclusions to the extent that they were applicable at the time of the Relevant Purchase:

- i. in-app payments that are primarily for the purchase or rental of physical goods or services that will be consumed outside of the Android App;
 - ii. in-app payments that are primarily remittances in respect of credit card bills or utility bills;
 - iii. in-app payments for peer-to-peer services;
 - iv. in-app payments for online auctions;
 - v. in-app payments for tax exempt donations;
 - vi. in-app payments for content or services that facilitate online gambling; and
 - vii. in-app payments in respect of any product category deemed unacceptable under Google’s Payments Center Content Policies (available here: https://pay.google.com/intl/en_in/about/policy/?visit_id=636308113142509927-1253831182&rd=3) from time to time.²
- s. “**UK version of the Play Store**” means the version of the Play Store where its settings specify the UK as the Google Play country.

² See para 81 (a)-(d) below.

II. SUMMARY

7. The five Proposed Defendants are members of the Google corporate group. As set out below, they comprise a single undertaking (referred to herein as “**Google**”) for competition law purposes.³ The proceedings concern various abusive practices in which Google has engaged, and continues to engage, in relation to its Android ecosystem for smart mobile devices (smartphones and tablets). In summary, Google has imposed a network of contractual and technical restrictions that hinder the competition that Google’s “Play Store” would otherwise face from rival methods of Android App distribution. Google then interposes itself between GMS Device users and Android App developers by forcing the latter to use Google to process the payments for all Relevant Purchases. As a result, Google is able to charge a Commission on each and every Relevant Purchase made by GMS Device users. This Commission, which is usually set at 30%, is excessive and unfair, causing GMS Device users to suffer loss and damage.

8. As described in a recent US House of Representatives Report:⁴

“...Google’s Play Store now functions as a gatekeeper, which Google is increasingly using to hike fees and favor its own apps”.

9. As more fully set out below, the PCR contends as follows:

- a. Google occupies a position of dominance (indeed a position of “super-dominance”) in each of: (i) the market for the licensing of smart mobile operating systems (the “**Licensable OS Market**”); and (ii) the market for the distribution of Android Apps to Android Device users (“**Android App Distribution Market**”). Further, it holds a monopoly in (iii) the market for the provision of payment processing services for Relevant Purchases (“**Play Store Payment Processing Market**”). See paras 101-105 below.

³ Paras 20-26 below explain the role of each of the Proposed Defendants within the Google undertaking.

⁴ Investigation of competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020 (“**US Committee Report**”), p. 213.

- b. In breach of Article 102 TFEU and section 18 of the Competition Act 1998, Google has abused its dominant positions by engaging in the following, mutually reinforcing exclusionary and exploitative practices, which do not constitute competition on the merits:
- i. bundling the Play Store with other important Proprietary Apps, with the consequence that smart mobile device manufacturers (“OEMs”) who wish to pre-install such apps on their devices have no choice but to install, and prominently display, the Play Store: see paras 38.c-43 below;
 - ii. imposing a series of contractual and technical restrictions which restrict the ability of Android App developers to distribute Android Apps to GMS Device users via distribution channels other than the Play Store: see paras 63-72 below; and
 - iii. requiring that payments for Relevant Purchases be made exclusively through Google’s PSPPS, thus preventing Android App developers from utilising other payment processing service providers in respect of Relevant Purchases: see paras 76-82 below; and
 - iv. charging the excessive and unfair Commission in respect of all Relevant Purchases: see paras 151-165 below.
10. Ms Coll is the owner of a GMS Device 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 Proposed Class (as defined at para 15 below) of users of GMS Devices who have made one or more Relevant Purchases, whose claims are eligible for inclusion in collective proceedings. Those claims are brought on an opt-out basis for UK domiciled members of the Proposed Class and on an opt-in basis for non-UK domiciled members of the Proposed Class, and seek an aggregate award of damages. On a preliminary estimate, the aggregate losses suffered by the approximately 19.5 million Proposed Class Members (as

defined at para 15 below) are between GBP 263m and GBP 752m (excluding interest).⁵

11. The PCR sent a Letter Before Action on 8 July 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 22 July 2021, denying the allegations and refusing to consent to service out of the jurisdiction.⁶

III. PARTIES

A. PCR

12. The PCR, Ms Coll, has over nineteen years of experience in consumer research, policy and advocacy, and sustainability consultancy; and possesses extensive academic and practical knowledge of consumer issues in the field of technology. She is currently an independent consultant advising organisations in areas such as e-commerce, consumer internet of things, AI, data privacy, and the impact of platforms on consumers' access to choice, redress and fair treatment. Previously, she held roles including: Head of Digital at Consumers International; and Digital Policy Manager at Citizens Advice (the UK body with statutory duties with regards to consumer protection), where she designed and promoted research, and thought leadership and advocacy projects which were influential in shaping regulatory guidance for consumer protection in digital markets, at both national and international level.
13. The PCR's suitability to act in her role is addressed in Coll 1 [Tab 5], and below at paras 185-187.

⁵ 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 GBP 322m and GBP 920m. See Holt 1 para 1.8.6.

⁶ See Streatfeild 1, paras 20-29.

14. The PCR's address for service is Hausfeld & Co LLP, 12 Gough Square, London EC4A 3DW (hard copy) or hausfeldprojecttigeruk@hausfeld.com; lhannah@hausfeld.com; and lstreatfeild@hausfeld.com (email).⁷

B. Class

15. The “**Proposed Class**” (and thus the “**Proposed Class Members**”) for the purposes of the claim consists of:

“All GMS Device users who, during the Relevant Period, used the UK version of the Play Store and made one or more Relevant Purchases.”

16. For the purposes of this definition of the Proposed Class, 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.
17. 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.
18. 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.
19. The suitability of these proceedings to be certified as collective proceedings, including more detail as to the Proposed Class, is set out below at para 181 *et seq.*

C. Proposed Defendants

20. The Proposed Defendants are members of the Google corporate group. They form part of the Google undertaking.
21. **Alphabet Inc.** The First Proposed Defendant is Alphabet Inc., whose principal place of business is 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States. Alphabet Inc. is the holding company for the Google group of

⁷ Her private address can be provided confidentially to the Tribunal on the Tribunal's request.

companies and is responsible for setting global policies in relation to products and services developed by its subsidiaries. In the circumstances, Alphabet Inc. is directly liable for each of the infringements particularised below.

22. **Google LLC.** The Second Proposed Defendant is Google LLC, a Delaware limited liability company with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States. It is the primary operating subsidiary of the publicly traded holding company Alphabet Inc.⁸ The sole member of Google LLC is XXVI Holdings, Inc., a Delaware corporation with its principal place of business in Mountain View, California, and a wholly owned subsidiary of Alphabet Inc.⁹ Google LLC is the entity: (a) with which OEMs contract, and which prescribes the contractual terms requiring OEMs to pre-install and prominently display the Play Store on GMS Devices; and (b) which is responsible for imposing technical restrictions in respect of the download of Android Apps via potential distribution channels other than the Play Store. It is also one of the entities with which Android App developers contract. In particular, Google LLC requires Android App developers to enter into the Developer Distribution Agreement (“**DDA**”) before being permitted to distribute Android Apps to GMS Device users via the Play Store.¹⁰ The DDA is a non-negotiable contract between Google LLC, Google Ireland Limited (see below), Google Commerce Limited (see below) and Android App developers.¹¹ Google LLC also sets the policies in relation to the Play Store, which are subject to unilateral modification by Google from time to time and prescribe the criteria which Android Apps must satisfy before Google will approve an Android App for distribution via the Play Store. Google LLC prescribes the restrictive terms detailed below and the

⁸ See Complaint filed by 37 US Attorneys General against Google LLC, Google Ireland Limited, Google Commerce Limited, Google Asia Pacific Pte. Limited, Google Payment Corp., and Alphabet Inc. on 7 July 2021 (“**US AG Complaint**”), para 35.

⁹ See US AG Complaint, para 35.

¹⁰ A copy of the DDA is enclosed at Annex A.

¹¹ See para 1 of Annex A, where “Google” is defined as “Google LLC, a Delaware limited liability company with principal place of business at 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States; Google Ireland Limited, a company incorporated in Ireland with principal place of business at Gordon House, Barrow Street, Dublin 4, Ireland; Google Commerce Limited, a company incorporated in Ireland with principal place of business at Gordon House, Barrow Street, Dublin 4, Ireland”.

level of Commission; Google LLC is also the counterparty to the Google Play Terms of Service (“**Google Play Ts & Cs**”) for GMS Device users in the UK.¹²

23. **Google Ireland Limited.** The Third Proposed Defendant is Google Ireland Limited, a company incorporated in Ireland with its principal place of business at Gordon House, Barrow Street, Dublin 4, Ireland. Google Ireland Limited is another of the entities with which Android App developers contract under the DDA, which contains the above-described restrictive terms and the level of Commission.
24. **Google Commerce Limited.** The Fourth Proposed Defendant is Google Commerce Limited, a company incorporated in with a registered address at Gordon House, Barrow Street, Dublin 4, Ireland. Google Commerce Limited has a UK establishment, (Google Commerce Limited UK Establishment) under section 1046 of the Companies Act 2006, with the registered address at Belgrave House, 76 Buckingham Palace Road, London, SW1W 9TQ. Google Commerce Limited is a further entity with which Android App developers contract under the DDA, which contains the above-described restrictive terms, and fixes the level of the Commission; it is also responsible for the distribution of Android Apps through the UK version of the Play Store in the UK as the agent / merchant of record for Android App developers.¹³ Further, Google Commerce Limited is the entity with which GMS Device users contract under the Google Play Ts & Cs for the purposes of downloading, viewing, using or purchasing content on the Play Store.
25. **Google Payment Limited.** The Fifth Proposed Defendant is Google Payment Limited, a company incorporated in the UK with its principal place of business at 5 New Street Square, London, EC4A 3TW. Google Payment Limited is responsible for the processing of payment transactions in the UK on behalf of fellow Google group companies, including of payment transactions for purchases

¹² See Annex B.

¹³ See: <https://support.google.com/googleplay/android-developer/answer/10532353?hl>

through the Play Store.¹⁴ As such, it is the entity that receives the payments in respect of Relevant Purchases.

26. Proposed Defendants (2)-(5) are members of the Alphabet Inc. corporate group. Proposed Defendants (3)-(5) are all subsidiaries of Proposed Defendant (2), which is in turn the primary operating subsidiary of Proposed Defendant (1) as set out above. Proposed Defendants (2)-(5) are therefore jointly and severally liable with Alphabet Inc. for the infringements set out herein on the basis that they each form part of the same undertaking as Alphabet Inc. and/or they each implemented (aspects of) the infringements set out herein and/or they were each aware of those infringements and/or Alphabet Inc. has some significant element of influence or control over Proposed Defendants (2)-(5) as its subsidiaries. It is alleged that the Proposed Defendants (3)-(5) were implementing policies in the UK determined by Proposed Defendants (1) and (2) in the US.¹⁵
27. This Claim Form is filed alongside an application for permission to serve Proposed Defendants (1)-(3) out of the jurisdiction. That application relies on gateways (3) and (9) of para 3.1 of Practice Direction 6B.

IV. BACKGROUND TO THE INFRINGEMENT

28. The Claims concern interconnected aspects of Google's "ecosystem" in relation to Android Devices. The impugned conduct involves various, mutually reinforcing practices in relation to (i) the distribution of Android Apps to Android Device users and (ii) the processing of payments made for (and within) Android Apps distributed through the Play Store. This Section describes the relevant aspects of Google's ecosystem and provides the relevant context for the contentions in Section V below concerning Google's infringing conduct.

¹⁴ See para 1, page 15 of Google Payment Limited's full accounts made up to 31 December 2019, Annex C.

¹⁵ *Unlocked Ltd v Google Ireland Ltd* [2018] EWHC 1363 (Ch).

A. The operation of smart mobile devices

29. Smart mobile devices such as smartphones and tablets are ubiquitous in the UK. 79% of all adults in the UK owned a smartphone in 2019,¹⁶ and in 2020 85% of internet users aged 16-64 used a smartphone to go online.¹⁷ 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.¹⁸
30. Smart 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. The operating system is updated regularly.
31. 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 smart mobile device which uses another operating system.
32. 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.
33. 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.

¹⁶ 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.

¹⁷ See Ofcom's Online Nation Report 2021, p16, accessible at: https://www.ofcom.org.uk/data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf.

¹⁸ See <https://www.statista.com/statistics/387447/consumer-electronic-devices-by-internet-access-in-the-uk/>.

B. Google's ecosystem

34. Google's "ecosystem" consists of its own and third-party hardware, its proprietary operating system (Android), and its Proprietary Apps and services. Google manufactures and distributes its own Android Devices, e.g. its "Pixel" smartphones and tablets, but has a very low (approximately 1%) share of the global and UK markets for smart mobile devices.¹⁹ However, Google has a very large share of the worldwide market (excluding China) for the licensing of smart mobile operating systems (as opposed to non-licensable smart mobile operating systems, such as Apple's iOS operating system, which can only be found on Apple smart devices).²⁰
35. Android controls the basic functions of Android Devices. It is owned by Google. Unlike Apple and its iOS operating system, Google does not only deploy Android in the production of its own branded smart mobile devices. Rather, OEMs can avail themselves of a basic version of Android for free under an open-source licence (the "**AOSP Licence**"). This means that, in principle, any OEM can access the underlying Android source code and deploy Android on their own smart mobile devices. Android is the most widely-used licensable smart mobile operating system in the world. The availability of a free version of Android since 2007 has led to the rapid adoption of Android by OEMs and Android is now installed on almost 100% of non-iOS smart mobile devices worldwide.²¹
36. The AOSP Licence does not, however, grant OEMs the right to distribute Google's key Proprietary Apps such as Google Search, Google Chrome, Google Maps, Gmail, YouTube and the Play Store. The Play Store, originally named "Android Market", is Google's digital "marketplace" from which Android Apps can be downloaded: see further, paras 45-47 below. Further, the Android AOSP Licence does not grant OEMs the right to access "**Google Play Services**", a layer of Google proprietary software that provides APIs for third-party apps to integrate with and benefit from access to services in the Google ecosystem, such as Google's

¹⁹ See <https://gs.statcounter.com/vendor-market-share/mobile-tablet/united-kingdom/#yearly-2020-2020-bar>.

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 See <https://gs.statcounter.com/os-market-share/mobile/worldwide>.

proprietary cloud services, and basic functionalities such as push notifications, location services and maps. Without access to Google Play Services, many third-party apps would either crash or lack key functionality.²²

37. In order to obtain the right to pre-install and distribute many of Google’s key Proprietary Apps, as well as Google Play Services, Google requires OEMs to enter into a Mobile Application Distribution Agreement (“**MADA**”) with the Second Proposed Defendant.²³ The MADA is a licence agreement which, *inter alia*, sets the terms on which OEMs are able to access and distribute a bundle of specified Proprietary Apps (as well as Google Play Services) collectively known as “**Google Mobile Services**” (i.e. the GMS Bundle as defined above).²⁴

38. The MADA imposes a number of obligations on OEMs, including the following:²⁵
 - a. First, OEMs may not take any actions that may cause or result in the fragmentation of Google Android (see paras 69-71 below).

 - b. Second, all smart mobile devices running on Google Android, including those on which OEMs do not pre-install Proprietary Apps, must pass the compatibility testing suite (“**CTS**”) and send the CTS report to Google. The CTS is an automated testing tool that can be run on a target device or simulator to determine its compatibility (for Google’s purposes). It is developed, amended and adopted by Google and is available via the Android webpage.²⁶

 - c. Third, for any devices that have pre-installed the GMS Bundle (i.e. GMS Devices), OEMs must send the final software build of their GMS Devices for

²² Commission Decision in Case AT.40099 – *Google Android* C(2018) 4761 final (“**Google Android Decision**”), recital 142. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

²³ *Google Android* Decision, Article 1 (3).

²⁴ *Google Android* Decision, recital 182, where the Commission confirms that the latest MADA (dated 1 March 2014) listed 30 mandatory Google apps, including the Google Play Store.

²⁵ *Google Android* Decision, recitals 176-180.

²⁶ *Google Android* Decision, recital 161.

final approval by Google (which enables Google to, *inter alia*, verify that the placement requirements for the GMS Bundle have been complied with).

d. Fourth, once an OEM decides to pre-install one or more of the Proprietary Apps that form part of the GMS Bundle on its devices (and make use of Google Play Services), it must pre-install all, and prominently place some, of the apps forming part of the GMS Bundle (including the Play Store) on the GMS Device.

39. The Proprietary Apps forming part of the GMS Bundle (including Google Play Services) are referred to herein as the “**Bundled Apps**”.²⁷ The Bundled Apps include apps such as YouTube which have been described as “*must have*” Android Apps from a consumer perspective.²⁸ OEMs therefore have no real choice but to enter into a MADA if they wish to market and distribute commercially viable Android Devices that meet user expectations, since it is only by entering a MADA that they can obtain the right to pre-install and distribute any of the Bundled Apps.²⁹

40. The list of Bundled Apps imposed on OEMs varies between each MADA and Google has sole discretion to vary the contents of the GMS Bundle.³⁰ According to the European Commission’s *Google Android Decision* (Case AT.40099), however, Google has sought to ensure consistency across the MADAs signed with OEMs.³¹

41. According to the document “GMS 3.0 for Android Partners”, submitted as an annex to a MADA signatory’s non-confidential response to the request for information of 17 June 2015 from the European Commission, the list of Bundled Apps at that point in time included: Google Chrome, Gmail, Google Search, Google Maps, YouTube, the Play Store, Google Drive, Google Play Music, Google Play Movies,

²⁷ *Google Android Decision*, recital 176-180.

²⁸ See *Google Android Decision*, recital 292(2) and US AG Complaint, paras 113 and 115.

²⁹ *Google Android Decision*, recital 600.

³⁰ *Google Android Decision*, recital 183.

³¹ *Google Android Decision*, recital 191.

Google Hangouts and Google Photos; Android System WebView, AndroidForWork, Browser Provider, ConfigUpdater, Google Account Manager, Google Backup Transport, Google Calendar Sync, Google Contacts Sync, Google One Time Init, Google Partner Setup, Google Play Services, Google Services Framework, Google Text-to-speech Engine, Market Feedback Agent, Partner Bookmarks, Setup Wizard and Widevine.³²

42. Between March 2009 and April 2017, Google entered into MADAs with up to 300 OEMs.³³ The list of participating OEMs includes Samsung,³⁴ HTC,³⁵ Huawei, Lenovo, LG and Sony.³⁶ The term of each MADA is typically up to 5 years, after which Google negotiates a new MADA or an extension with each OEM.³⁷
43. Following the publication of the *Google Android* Decision in July 2018, OEMs wishing to pre-install the Google Chrome and Google Search Android Apps (two of Google's suite of Proprietary Apps which previously formed part of the GMS Bundle) must enter into a separate licence.³⁸ The PCR notes that the *Google Android* Decision only examined, and only made an infringement finding in respect of, Google's requirement that OEMs must pre-install Google Search and Google Chrome.³⁹ As far as the PCR is aware, all of Google's MADAs continue to require an OEM to pre-install all of the Bundled Apps if the OEM decides to pre-install one or more of the Bundled Apps on its devices. The PCR understands that, since 29 October 2018, Google has charged OEMs a fee for the licence of any Proprietary Apps and services.⁴⁰

³² *Google Android* Decision, recital 183, fn 171.

³³ *Google Android* Decision, recital 189.

³⁴ See copy of Google/Samsung MADA dated 1 January 2011, enclosed at Annex D.

³⁵ See copy of Google/HTC MADA dated 1 January 2011, enclosed at Annex E.

³⁶ *Google Android* Decision, recital 189.

³⁷ *Google Android* Decision, recital 190.

³⁸ *Epic Games, Inc and others v Apple Inc and others* [2021] CAT 4, para 54.

³⁹ *Google Android* Decision, fn 169.

⁴⁰ See <https://www.reuters.com/article/us-google-antitrust-aptoid-idUSKCN1MW2CL> and <https://www.ft.com/content/bf58b436-d15f-11e8-a9f2-7574db66bcd5>.

44. For the avoidance of doubt, in this Claim Form, the term - “**GMS Device**” - means a smart mobile device which runs on the Google Android operating system and, additionally, on which the GMS Bundle has been pre-installed; the term - “**Google Android Device**” - means a smart mobile device that runs on Google Android, i.e. has been approved as “Android-compatible” by Google; and the term - “**Android Device**” - means a smart mobile device that runs on any version of Android. Android Device is therefore a catch-all term to refer to devices that run on Android Forks, Google Android Devices and GMS Devices.

The Play Store

45. The Play Store is Google’s digital marketplace through which GMS Device users can browse and download Android Apps. Google launched Android Market, the Play Store’s predecessor, in 2008, the same year as the commercial release of the first Android smartphone,⁴¹ and renamed it the Play Store in March 2012. Both Proprietary Apps and Android Apps can be downloaded through the Play Store for use on GMS Devices.⁴² Android Market was originally launched with fewer than 50 apps. By October 2018, the Play Store hosted 3.3 million Android Apps⁴³ with approximately 724,000 Android App developers having released an Android App on the Play Store.⁴⁴
46. Consumers spent an estimated USD 17.3 billion globally on the Play Store in the first half of 2020.⁴⁵ That revenue figure represents a 21% increase compared to the revenue generated by the Play Store in the first half of 2019.⁴⁶ The Play Store facilitated 53.2 billion first-time Android App downloads in the first half of 2020, up 27% from the same period in 2019.⁴⁷ It is estimated that consumer spending on

⁴¹ See <https://www.cnet.com/news/a-brief-history-of-android-phones/>.

⁴² See <https://9to5mac.com/2011/10/21/jobs-original-vision-for-the-iphone-no-third-party-native-apps/>.

⁴³ See The Netherlands Authority for Consumers & Markets Public Market study into mobile app stores Case no.: ACM/18/032693 / Date: 11 April 2019 (“**ACM Report**”), page 21. Available at: <https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf>.

⁴⁴ See <https://www.statista.com/statistics/276437/developers-per-appstore/>.

⁴⁵ See <https://sensortower.com/blog/app-revenue-and-downloads-1h-2020>.

⁴⁶ See <https://sensortower.com/blog/app-revenue-and-downloads-1h-2020>.

⁴⁷ See <https://sensortower.com/blog/app-revenue-and-downloads-1h-2020>.

the Play Store in 2020 was USD 38.6 billion globally, which is a 30% increase from the same period in 2019.⁴⁸

47. In 2015, there were 231,741 new Android App developers who released apps via the Play Store and, in 2016, there were 235,499 new Android App developers who released apps via the Play Store.⁴⁹ Across these two years, the revenue from Android App developer fees was USD 5.8 million per year on average.

C. Google's relationship with Android App developers

48. An Android App developer who wishes to create one or more Android Apps for distribution to GMS Device users through the Play Store needs access to Google's app development software and services. To gain access to such software and services, it must enter into the DDA.⁵⁰
49. Section 2.1 of the DDA states that it constitutes a "legally binding contract" between the Android App developer and Google. Entering into the DDA provides the developer access to development tools, APIs, tutorials and testing software (called "testing tracks") via the Google Play Console, to ensure that the Android App works properly before it is released on the Play Store. Google also offers Android App analytics and reporting tools that allow Android App developers to measure and track how their Android Apps are performing in terms of downloads and sales. Before an Android App can be distributed on the Play Store, it must first be submitted for review and approval by Google.
50. As consideration for the rights and licences granted under the DDA, and a publisher Developer Account in the Google Play Console, Android App developers pay Google a one-off registration fee of USD 25.⁵¹ The fee is applicable to all Android App developers, irrespective of their chosen business model (see below). Under

⁴⁸ See <https://sensortower.com/blog/app-revenue-and-downloads-2020>.

⁴⁹ See <https://www.statista.com/statistics/742304/annual-new-developer-google-play/>.

⁵⁰ See <https://support.google.com/googleplay/android-developer/answer/6112435?hl=en#zippy=%2Cstep-accept-the-developer-distribution-agreement>.

⁵¹ See <https://support.google.com/googleplay/android-developer/answer/6112435?hl=en#zippy=%2Cstep-pay-registration-fee>.

section 10.1 of the DDA, the term of agreement will continue to apply until terminated.

51. There is a range of business models which may be employed (individually or in combination) by Android App developers (subject to the detailed restrictions set out below) in the Play Store. The options are as follows:
 - a. The paid model, whereby GMS Device users pay once to download an Android App and use all of its functionality;
 - b. The “paymium” model, whereby GMS Device users pay to download an Android App and have the option to buy additional features, content, or services within the Android App;
 - c. The “freemium” model, whereby GMS Device users pay nothing to download an Android App and are offered optional purchases within the Android App for premium features, additional content, subscriptions, or digital goods;
 - d. The subscription model, whereby the Android App is typically free and GMS Device users can start a subscription through a purchase in the Android App to access content, services, and experiences for renewable or non-renewing durations;
 - e. Free Android Apps, whereby GMS Device users don’t pay to download or use an Android App;
 - f. Free Android Apps with physical goods and services purchases, whereby the Android App is free to download and the Android App developer generates revenue by selling physical goods or services; and
 - g. Free Android Apps with advertising, whereby the Android App is free to download and monetisation occurs via displayed ads.

52. For Android Apps marketed for distribution in the UK, Google permits Android App developers to set prices at any amount⁵² within the following range: GBP 0.50 - 300.00.⁵³
53. Each Android App must follow the rules set out in the Play Store Policy Centre and be approved by Google in order to gain access to and be distributed on the Play Store.⁵⁴ The Policy Centre contains the rules that Google applies in deciding, at its sole discretion, whether to approve an Android App, and each subsequent update of that Android App, for distribution in the Play Store. Google’s review process for Android Apps is automated and consists of checking the compliance with the DDA and Google’s Developer Programme Policy (“DPP”).⁵⁵

(v) Relevant Purchases: the contractual nexus between Google, the Android App developer and GMS Device users

54. Under section 3.1 of the DDA, the Android App developer appoints Google Commerce Limited as its agent to make its Android Apps available in the Play Store to GMS Device users in the UK.
55. As set out in section 3.2 of the DDA, the DDA covers both Android Apps that users can access for free and Android Apps that users pay a fee to access. In order for an Android App developer to charge GMS Device users a fee to download an Android App or for digital goods and services within an Android App, i.e., offer Relevant Purchases, it must have a valid Payment Account under a separate agreement with a Payment Processor. Section 1 of the DDA defines “Payment Processor” as “[t]he entity authorised by Google to provide services that enable Developers with Payment Accounts to be paid for products distributed via Google

⁵² See section 3.3 of the DDA and <https://android-developers.googleblog.com/2021/03/sub-dollar-pricing-expansion-in-20.html>.

⁵³ See https://support.google.com/googleplay/android-developer/answer/10532353?visit_id=637582338854875754-4144155189&rd=1.

⁵⁴ See https://support.google.com/googleplay/android-developer/answer/9899234?hl=en-GB&ref_topic=9877468.

⁵⁵ See Annex F.

Play”.⁵⁶ While this will be a matter for Google to confirm, the PCR understands that Google is likely to appoint a Google entity to be the “Payment Processor” under the DDA. In any event, Google does not permit the use of any payment processing service other than the PSPPS in respect of Relevant Purchases.

56. If an Android App developer intends to offer Relevant Purchases then, under section 3.4 of the DDA, a “Service Fee” will be deducted by Google Commerce Limited (acting as the developer’s agent and merchant of record) from the sales price charged for each Relevant Purchase. This service fee is the Commission as defined above.
57. The contractual and technical restrictions by which Google ensures that Android App developers exclusively use PSPPS in relation to the processing of Relevant Purchases are set out below at paras 76-82.
58. These provisions of the DDA are reflected in the Google Play Ts & Cs between Google and GMS Device users. When a GMS Device user makes a Relevant Purchase, she must accept the Google Play Ts & Cs.⁵⁷ That agreement governs *“Your use of Google Play and the apps and games (including Android Instant Apps), music, movies, books, magazines, or other digital content or services (referred to as “Content”) available through it”* (Section 1. Introduction). The agreement establishes that *“Content on Google Play is offered by Google Commerce Limited, and when you download, view, use, or purchase Content on or using Google Play, you will enter into a separate contract based on these Terms (as applicable) with Google Commerce Limited”* (Section 3. Purchases and Payments).
59. Thus, GMS Device users contract with Google Commerce Limited as agent for Android App developers. As set out at para 25 above, Google Payment Limited is responsible for processing of payment transactions in the UK on behalf of fellow Google group companies, including of payments for purchases through the Play

⁵⁶ Defined in the DDA as: The entity authorized by Google to provide services that enable Developers with Payment Accounts to be paid for Products distributed via Google Play.

⁵⁷ See Annex B.

Store.⁵⁸ As such, it is the entity that receives the payments from GMS Device users in respect of Relevant Purchases, including the Commission.

D. Restrictions imposed by Google in relation to Android App distribution and payment processing for Relevant Purchases

60. Against the background set out above, this claim concerns, in particular, restrictions imposed by Google on (i) the process for the distribution of Android Apps to Android Device users and (ii) payment processing in respect of Relevant Purchases. The relevant restrictions are set out at paras 61-82 below.

(i) Restrictions in relation to App distribution

61. There are currently three main ways in which Android Apps may, in theory, be distributed to Android Device users:

- a. Pre-installation on an Android Device;
- b. Direct download from a website; and
- c. Distribution through an Android app store (which may itself be either pre-installed or directly downloaded from the internet).

62. Notwithstanding the theoretical possibility of obtaining Android apps via the three methods set out above; at all material times Google has imposed a range of technical and contractual restrictions on GMS Device users, OEMs and Android App developers that restrict the competition that Google would otherwise face in relation to the distribution of Android Apps to Android Device users.

Technical Restrictions on GMS Device users

63. As a result of its inclusion in the GMS Bundle (see paras 38.c-43 above), the Play Store is the only app store pre-installed on all GMS Devices (in contrast with OEMs' proprietary app stores which are only pre-installed on that OEM's devices).

⁵⁸ See para 1, page 15 of Annex C.

Further, it is technically extremely difficult for GMS Device users to uninstall the Play Store from their Android Device.⁵⁹

64. In addition, Google ensures that downloading other app stores (and/or individual apps) directly from a developer website to a GMS Device is only possible through a process known as “sideloading”. This process requires technical knowledge and a willingness on the part of the GMS Device user to change their Android Device settings and bypass a number of security warnings issued by Google.⁶⁰ Only if that process is undertaken could another app store or individual app be “sideloaded” onto the device.⁶¹ According to the European Commission, the installation of apps directly from a website, i.e. through sideloading, “*is technically complex and does not constitute a satisfactory distribution channel*”.⁶² Many users “*may, therefore, be under the impression that no alternative app stores to the Play Store exist on Android devices*”.⁶³
65. As an example of the steps taken by Google to restrict sideloading, when a user attempts to sideload Aptoide (a third-party Android app store), Google presents them with a warning that the app is “unsafe”. This is despite the fact that, according to an independent study of Android app stores published in 2017, Aptoide was ranked as the safest Android app store, ahead of the Play Store.⁶⁴ Google has also removed Aptoide from Android Devices without users’ knowledge, a practice that

⁵⁹ Some GMS Devices are shipped with the OEM’s own app store pre-installed alongside the Play Store. For example, the Samsung Galaxy Store is pre-installed on all Samsung-manufactured GMS Devices. Over half of Android Devices in the UK have the Samsung Galaxy Store pre-installed.

⁶⁰ See Holt 1, para 5.3.6(f).

⁶¹ The PCR understands that, in response to developer feedback, Google are planning to make changes in Android 12 (2021’s Android release) to make it easier for people to use other app stores on their Android Devices. No further details have yet been published. See <https://android-developers.googleblog.com/2020/09/listening-to-developer-feedback-to.html>.

⁶² *Google Android Decision*, recital 271, fn 295.

⁶³ *Google Android Decision*, recital 634.

⁶⁴ See US AG Complaint, para 97 and Yuta Ishii, Takuya Watanabe, Fumihiko Kanei, Yuta Takata, Eitaro Shioji, Mitsuaki Akiyama, Takeshi Yagi, Bo Sun, and Tatsuya Mori. 2017. *Understanding the Security Management of Global Third-Party Android Marketplaces*. In Proceedings of 2nd International Workshop on App Market Analytics, Paderborn, Germany, September 5, 2017 (WAMA’17), published and accessible in the [ACM Guide to Computing Literature](#).

was barred by a Portuguese court in October 2018.⁶⁵ It is understood that, as a result of Google’s restrictions on GMS Device user conduct, between June 2018 and June 2019 Aptoide’s user base decreased by 15-20%.⁶⁶

66. Even if an GMS Device user successfully sideloads an Android App / rival Android app store, Google blocks the auto-update functionality of apps and app stores that are sideloaded (requiring manual updates that trigger the same security warnings at each stage).⁶⁷

67. Google unilaterally blocks the sideloading of apps through its Google Play Protect and Advanced Protection Programme.⁶⁸

68. Google also unilaterally blocks the sideloading of apps that it deems to be harmful. However, Google makes no effort to differentiate between harmful Android Apps and app stores and non-harmful Android Apps and app stores. Instead, Google labels all non-Play Store apps and app stores as harmful.⁶⁹

Contractual Restrictions on Android Device OEMs

69. At the same time, Google has entered into agreements with OEMs that prevent the sideloading of rival Android app stores or individual Android Apps.⁷⁰ In that regard, in order to be eligible to enter into a MADA, Google requires OEMs first to enter into an anti-fragmentation agreement (“AFA”) with the Second Proposed Defendant.⁷¹ The AFAs contain the following obligations:

⁶⁵ See <https://www.reuters.com/article/us-google-antitrust-aptoide-idUSKCN1MW2CL>.

⁶⁶ US AG Complaint, para 97.

⁶⁷ ACM Report, p47 and US AG Complaint, para 92.

⁶⁸ *Epic Games, Inc. v Google LLC and others*, 3:20-cv-05671 (13 August 2020) (“**Epic’s Complaint**”), para 99. Available here: https://cdn.vox-cdn.com/uploads/chorus_asset/file/21759099/file0.243586135368002.pdf

⁶⁹ See US AG Complaint, para 227.

⁷⁰ US Committee Report, p.220-221.

⁷¹ *Google Android* Decision, Article 1 (3).

- a. *"[COMPANY] will only distribute Products that are either: (i) in the case of hardware, Android Compatible Devices; or (ii) in the case of software, distributed solely on Android Compatible Devices";*
- b. *"[COMPANY] will not take any actions that may cause or result in the fragmentation of Android"; and*
- c. *"[COMPANY] shall not distribute a software development kit (SDK) derived from Android or derived from Android Compatible Devices and [OEM] shall not participate in the creation of, or promote in any way, any third party software development kit (SDK) derived from Android, or derived from Android Compatible Devices".⁷²*

70. Android-compatible devices are those which comply with the Android Compatibility Definition Document ("**CDD**") and pass the CTS (together the "**Android Compatibility Tests**"). Such devices are referred to herein as "**Google Android Devices**". The CDD sets out the software and hardware requirements for a Google Android Device. The CTS is an automated testing tool that can be run on a device or simulator to determine compatibility with Google's requirements. The Android Compatibility Tests have been developed by Google and are amended and determined at Google's sole discretion.⁷³

71. The Android Compatibility Tests require OEMs to implement Google's restrictions and warnings in relation to sideloading (as set out at para 65 above). If OEMs were to modify the version of Android installed on their Android Devices to permit frictionless sideloading of individual Android Apps and rival Android app stores, such versions of Android would be deemed impermissible Android Forks by Google, meaning that the OEM concerned would not be eligible to enter into a

⁷² Google Android Decision, recital 157.

⁷³ Google Android Decision, recital 163.

MADA and would not be able to distribute any of the Bundled Apps on their devices.⁷⁴

Contractual Restrictions on Android App developers

72. Under section 4.5 of the DDA, an Android App Developer must not use the Play Store to distribute or make available any app that has a purpose that facilitates the distribution of apps for use on Android Devices outside of the Play Store. This prevents app developers from offering any app on the Play Store that could be used to download other apps, i.e., any app that could compete with the Play Store in app distribution. When first imposed in 2009, this restriction was set out in a section of the DDA labelled “Non-Compete”.⁷⁵ Clause 8.3 of the DDA provides that if an Android App does not comply with the terms of the DDA it will not be selected by Google for distribution within the Play Store or will be removed if it is already available. Under clause 10.3, the DDA between Google and the developer will also be terminated.
73. Through the contractual and technical restrictions set out at paras 63-72 above (together the “**App Distribution Restrictions**”), taken individually and/or collectively, the Play Store is maintained, in practice, as the sole mechanism by which Android Apps are distributed to the very large majority of Android Device users.
74. Google enforces the App Distribution Restrictions and, if an app developer does not comply with the App Distribution Restrictions, will reject the app submitted for review; and/or, restrict the discoverability of the app in the Play Store; and/or, remove the app (and any previous versions of that app) from the Play Store; and/or, terminate the developer’s account (which means that all apps in the Android App developer’s catalogue will be removed from the Play Store and the app developer will no longer be able to publish new apps). According to the latest statistics, during its standard app review process, in 2020 Google prevented “*over 962K*

⁷⁴ See US AG Complaint, para 102.

⁷⁵ See US AG Complaint para 104.

*policy-violating app submissions from getting published,” while “119K malicious and spam developer accounts were banned”.*⁷⁶ Further, in response to an attempt by Amazon to distribute its app store directly to GMS Device users through the Play Store, Google updated section 4.5 of the DDA and forced Amazon to disable the relevant workaround.⁷⁷ The Amazon app store can only be installed on GMS Devices via sideloading.

(ii) Restrictions in relation to payment processing

75. Further, as noted at para 57 above, Google ensures that all payments for Relevant Purchases are made using its proprietary billing system, the PSPPS. It does so through the imposition of the following contractual and technical restrictions:

Contractual restrictions

76. Under section 2 of the Payments section of the DPP, apps distributed via Google Play “*must use Google Play’s billing system as the method of payment if they require or accept payment for access to features or services, including any app functionality, digital content or goods*”. Examples of such features or services “*include, but are not limited to, in-app purchases of:*

- (1) Items (such as virtual currencies, extra lives, additional playtime, add-on items, characters and avatars);*
- (2) subscription services (such as fitness, game, dating, education, music, video, and other content subscription services);*
- (3) app functionality or content (such as an ad-free version of an app or new features not available in the free version);*
and

⁷⁶ See <https://9to5google.com/2021/04/21/google-play-store-2020/>.

⁷⁷ See US AG Complaint, para 105 and 106.

(4) cloud software and services (such as data storage services, business productivity software, and financial management software)”.⁷⁸

77. Accordingly, under the terms of the DPP, Android App developers must exclusively use the PSPPS for processing payments for Relevant Purchases; Android App developers are contractually prohibited from including the API of an alternative payment processing service to process such purchases.

78. The contractual requirement that Android App developers may only use Google’s PSPPS for processing payments for Relevant Purchases is reinforced by the “anti-circumvention” provision at para 3 of the Payments section of the DPP. Under that paragraph, apps that offer Relevant Purchases “*may not lead users to a payment method other than Google Play’s billing system. This prohibition includes, but is not limited to, leading users to other payment methods via:*

(1) An app’s listing in Google Play;

(2) In-app promotions related to purchasable content;

(3) In-app webviews, buttons, links, messaging, advertisements or other calls to action; and

(4) In-app user interface flows, including account creation or sign-up flows, that lead users from an app to a payment method other than Google Play’s billing system as part of those flows”.

Technical restrictions

79. In order to use the PSPPS, an app developer must integrate the Play Store’s “*Billing Library*” into its app at the initial development stage and configure access to the Google Play Developer API.⁷⁹ The Billing Library provides access to Android APIs that connect the app developer to the Play Store. From there, the app

⁷⁸ See <https://support.google.com/googleplay/android-developer/answer/9858738>.

⁷⁹ See <https://developer.android.com/google/play/billing/getting-ready>.

developer can carry out tasks such as access GMS Device user purchase information, query for updates about purchases and prompt a user to make new purchases.⁸⁰ As part of integrating the PSPPS into its app, the developer must also configure access to the Google Play Developer API. The Google Play Developer API provides functionality not available in the Billing Library, such as the functionality to securely verify purchases and issue refunds to users.⁸¹

80. Android App developers must use Google’s “Billing Library” and Google Play Developer API to embed the PSPPS into their Android Apps.⁸² If an Android App developer fails to embed Google’s PSPPS (and instead attempts to insert other payment processing services), that Android App is liable not to be approved and Google will likely reject the Android App when submitted for review; and/or, restrict the discoverability of the Android App; and/or, remove the Android App from the Play Store; and/or, terminate the Android App developer’s account.

81. For the avoidance of doubt, para 2(b) of the Payments section of the DPP identifies certain types of transactions relating to Android Apps that must use purchase methods other than the PSPPS. Those relevant exceptions are “*where:*

- a. *the payment is primarily:*
 - i. *for the purchase or rental of physical goods (such as groceries, clothing, housewares, electronics);*
 - ii. *for the purchase of physical services (such as transportation services, cleaning services, airfare, gym memberships, food delivery, tickets for live events); or*
 - iii. *a remittance in respect of a credit card bill or utility bill (such as cable and telecommunications services);*
- b. *payments include peer-to-peer payments, online auctions, and tax exempt donations;*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

- c. *payment is for content or services that facilitate online gambling, as described in the Gambling Apps section of the Real-Money Gambling, Games, and Contests policy;*
 - d. *payment is in respect of any product category deemed unacceptable under Google’s Payments Center Content Policies”.*⁸³
82. Accordingly, those purchases made within an Android App (set out at para 81(a)-(d) above) do not constitute Relevant Purchases and are not covered by these Claims.
83. The effect of the contractual and technical restrictions set out at paras 76-82 above (together the “**Payment System Restrictions**”), individually and/or collectively, is that Android App developers are forced to use the PSPPS for the purposes of processing Relevant Purchases, and therefore have to pay the Commission. Google thus interposes itself between Android App developers and GMS Device users making Relevant Purchases, meaning that Android App developers are required to pay the Commission to Google (which would not be the case if Android App developers were able to use a different payment processing provider for the purposes of processing Relevant Purchases).
84. The Payment System Restrictions are enforced strictly and, as with the enforcement of the App Distribution Restrictions, if an app developer does not comply with the Payment System Restrictions, Google will reject the Android App submitted for review; and/or, restrict the discoverability of the Android App in the Play Store; and/or, remove the Android App (and any previous versions of that Android App) from the Play Store; and/or, terminate the developer’s account (which means that all Android Apps in the developer’s catalogue will be removed from the Play Store and the Android App developer will no longer be able to publish new Android Apps). For example, in August 2020, Google ejected Epic Games Inc.’s (“**Epic Games**”) popular online game “Fortnite” from the Play Store for introducing its

⁸³ See https://support.google.com/googleplay/android-developer/answer/9858738?hl=en&ref_topic=9857752.

own in-app payment system in breach of Google’s DPP. Fortnite remains unavailable to GMS Device users via the Play Store.

(iii) Commission

85. Google charges the Commission on all Relevant Purchases.
86. In particular, since March 2011, the Commission is 30% of all prices (net of taxes) payable by each GMS Device user in the UK when making Relevant Purchases in consideration for Google’s services as agent / merchant of record under the Google Play Ts & Cs, subject to the following qualifications and/or exceptions:⁸⁴
- a. Only since 24 May 2012 has it been possible to make Relevant Subscription Purchases.⁸⁵ Between May 2012 and 31 December 2017, Google charged a 30% Commission on such subscriptions. Since 1 January 2018, while the Commission has remained 30% for the first year of subscription services, Google has charged 15% for subsequent renewals of subscription services.⁸⁶ This change in Commission for Relevant Subscription Purchases after the first year of the subscription reflects similar changes made by Apple in September 2016.⁸⁷
 - b. Since 1 July 2021, for all Relevant Purchases from Android App developers who have officially enrolled in the “**15% service fee tier**”,⁸⁸ Google has charged a 15% Commission on the first USD 1 million of revenue earned from Relevant Purchases.⁸⁹ This change in Commission for Relevant Purchases reflects similar, but not identical, changes made by Apple on 1 January 2021.⁹⁰

⁸⁴ See <https://support.google.com/googleplay/android-developer/answer/112622?hl=en-GB>.

⁸⁵ See <https://android-developers.googleblog.com/2012/05/in-app-subscriptions-in-google-play.html>.

⁸⁶ See <https://android-developers.googleblog.com/2017/10/playtime-2017-find-success-on-google.html>

⁸⁷ See <https://www.theverge.com/2017/10/19/16502152/google-play-store-android-apple-app-store-subscription-revenue-cut>.

⁸⁸ See <https://support.google.com/googleplay/android-developer/answer/10632485?hl=en-GB>.

⁸⁹ *Ibid.*

⁹⁰ See <https://www.cnbc.com/2020/11/18/apple-will-cut-app-store-fees-by-half-to-15percent-for-small-developers.html>.

87. The Commission applies to all payments processed through the PSPPS. Therefore, there is no authorised means for Android App developers to circumvent the PSPPS and the related Commission.
88. Google does not disclose disaggregated financial figures for Relevant Purchases. 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 3.6 billion in 2015 to USD 11.1 billion in 2020.⁹¹

V. INFRINGEMENT

89. The Claims are for loss and damage caused by Google'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, Google's conduct amounts to an abuse of a dominant position, as set out in this section.

E. Relevant markets

90. The precise definition of the relevant product and geographic markets will be a matter for factual and further expert evidence. Without prejudice to that point, the PCR sets out below its case as to the relevant markets on the basis of the information presently available to her.

(i) Relevant product markets

91. **Licensable OS Market.** There is a discrete economic market for the licensing of smart mobile operating systems. This market covers all licensable smart mobile operating systems (including Android, and other licensable smart mobile operating systems such as Windows Mobile), for both smartphones and tablets, on the basis that both are powered by the same or similar operating systems.⁹²

⁹¹ See Holt 1, table 7.1.

⁹² Holt 1, section 4.3.

92. Conversely, the Licensable OS Market excludes the following operating systems, which are not sufficiently substitutable with licensable smart mobile operating systems:
- a. PC operating systems, since they cannot be used by OEMs to power smart mobile devices and since smart mobile operating systems require specific functionalities that are different to those of PC operating systems;⁹³
 - b. basic and feature smart phone operating systems, since they have reduced functionalities and cannot be installed on smart mobile devices;⁹⁴ and
 - c. non-licensable smart mobile operating systems such as iOS and Blackberry OS, since neither Apple nor Blackberry grant licences to use their operating systems to third parties.⁹⁵
93. **Android App Distribution Market.** There is also a discrete economic market for the distribution of Android Apps to Android Device users.⁹⁶ That relevant market includes all potential means of distributing Android Apps to Android Device users (see para 61 above).
94. The following are excluded from the Android App Distribution Market:
- a. apps which do not distribute other apps to Android Devices, as they do not provide the relevant functionality of distribution;⁹⁷ and
 - b. app stores for other devices (such as game consoles) and/or other mobile operating systems, as such app stores cannot be installed on Android Devices.⁹⁸

⁹³ Holt 1, para 4.3.2.

⁹⁴ Holt 1, para 4.3.3.

⁹⁵ Holt 1, para 4.3.4.

⁹⁶ Holt 1, section 4.4.

⁹⁷ Holt 1, para 4.4.3. (a).

⁹⁸ Holt 1, paras 4.4.3. (b), (c) and (d).

95. Mr Holt’s provisional conclusion that there is a discrete market for the distribution of Android Apps differs from the *Google Android* Decision,⁹⁹ in that the Commission did not consider whether methods of distributing Android Apps to users other than via app stores (e.g. direct downloads) also formed part of the relevant product market. The Commission therefore relied on a narrower market than that defined by Mr Holt (but this is immaterial for the purposes of assessing Google’s dominance since Google is dominant on either approach). Otherwise, the Commission’s reasoning in relation to the definition of this product market is consistent with Mr. Holt’s including in the following respects:

- a. other apps do not belong to the same product market as app stores¹⁰⁰ since the latter serve different purposes to apps themselves;¹⁰¹
- b. app stores for other licensable smart mobile operating systems do not belong to the same product market as Android app stores given that, from a demand-side perspective, such app stores have been specifically developed for non-Android Devices and cannot run on Android Devices.¹⁰² From a supply-side perspective, developers of app stores for other licensable smart mobile OSs are unlikely to switch to Android as the development of an app store for a given operating system requires significant time and resources;¹⁰³ and
- c. app stores for non-licensable smart mobile operating systems, such as the iOS App Store, do not belong to the same product market as Android app stores.¹⁰⁴ From a demand-side perspective, such app stores have been specifically developed for non-Android Devices and cannot run on Android Devices.¹⁰⁵ From a supply-side perspective, developers of app stores for non-

⁹⁹ See *Google Android*, section 7 on market definition (and specifically section 7.4, relating to Android app stores).

¹⁰⁰ *Google Android* Decision, section 7.4.1.

¹⁰¹ *Google Android* Decision, recital 270.

¹⁰² *Google Android* Decision, recital 285.

¹⁰³ *Google Android* Decision, recital 295.

¹⁰⁴ *Google Android* Decision, section 7.4.5.

¹⁰⁵ *Google Android* Decision, recital 307.

licensable smart mobile operating systems¹⁰⁶ 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.

96. **Play Store Payment Processing Market.** Further, there is a distinct relevant market for payment processing services for Relevant Purchases.
97. First, as set out in Holt 1, paras 4.5.3 and 4.5.4, payment processing services and app distribution services serve distinct needs on the part of GMS Device users and Android App developers and therefore constitute separate functionalities in distinct markets.
98. Secondly, as explained in Holt 1, para 4.5.7, payment processing services which are available within Android Apps that sell physical goods and services (and which cover a very limited number of other exemptions as set out at para 81 (b) and (c) above) are not a substitute for the payment processing services available for Relevant Purchases given the Payment System Restrictions.

(ii) Geographic markets

99. As regards the Licensable OS Market, the geographical scope of that market is likely worldwide, excluding China: see Holt 1, paras 4.3.6 and 4.3.7. Mr. Holt relies on the reasoning set out in the *Google Android* Decision, with which he agrees, noting that there do not appear to be significant limitations that prevent smart mobile operating systems from being rolled out on a worldwide basis and that operating system agreements between OEMs and operating system developers are generally worldwide in scope, with the exception of China.¹⁰⁷
100. The geographic scope of the Android App Distribution Market and the Play Store Payment Processing Market is (at least) UK-wide in each case: see Holt 1, paras 4.4.4-4.4.6. Pending disclosure, it is not possible to determine the precise

¹⁰⁶ 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 *Google Android* Decision, recital 83.

¹⁰⁷ See Holt 1, para 4.3.6.

geographic scope of either the Android App Distribution Market or the Play Store Payment Processing Market. On the one hand, demand-side considerations appear to delineate the market by country with countries often having country-specific storefronts. Further, Google sets certain app distribution and payment processing requirements for Android App developers on a country-by-country basis, including in-app sales currency and price range requirements.¹⁰⁸ On the other hand, supply conditions appear international.¹⁰⁹ In any event, the precise geographic scope of these markets does not affect Mr Holt’s economic analysis at this preliminary stage, and (if relevant) will be a matter for disclosure and evidence in due course.

F. Dominance

101. Google is dominant on each of the three relevant markets described above.

102. **Licensable OS Market.** Google enjoys a position of dominance (indeed, “super-dominance”) on the Licensable OS Market as defined above. In that regard:

- a. According to the *Google Android* Decision, Google held the leading share by volume of this market in 2016, with a market share of 96.4%.¹¹⁰ Further, the Google Android operating system was installed on the largest number of smart mobile devices designed for licensable smart mobile operating systems in July 2016.¹¹¹
- b. Google’s high share of the Licensable OS Market is reinforced by a number of substantial barriers to entry and expansion in that market.¹¹² For example, the development of a smart mobile operating system requires a significant upfront investment. Further, Google is able to benefit from network effects that are inherent in the market, which are exacerbated by the fact that Google

¹⁰⁸ US AG Complaint, para 74.

¹⁰⁹ Holt 1, para 4.4.5.

¹¹⁰ Holt 1, para 5.2.2.

¹¹¹ Holt 1, para 5.2.3.

¹¹² Holt, para 5.2.4.

grants access to the Google Android operating system for free, something its potential competitors may not be able to afford to do.¹¹³

103. **Android App Distribution Market.** Google also enjoys a position of dominance (indeed, “super-dominance”) in the Android App Distribution Market, given that:

- a. Between 2011 and 2016 more than 90% of all apps on Android Devices downloaded from Android app stores were downloaded via the Play Store and, in the same period, the Play Store was pre-installed on more than 90% of Android Devices globally (excluding China);¹¹⁴
- b. It faces limited countervailing bargaining power from OEMs, app developers and Android Device users and/or other competitive constraints in this market.¹¹⁵
- c. There are also a number of significant barriers to entry and expansion in the Android App Distribution Market, including the fact that larger app stores such as the Play Store can benefit from economies of scale, unlike smaller competitors, and that setting up an app store requires a significant investment. Further, Google benefits from a “first-mover” advantage, which it has preserved in various ways including a number of contractual provisions (such as the requirement pursuant to the MADA for OEMs to pre-install the Play Store, and the prohibition on distributing alternative app stores via the Play Store).¹¹⁶

104. **Play Store Payment Processing Market:** Google also holds a dominant (indeed, monopoly) position in the Play Store Payment Processing Market. As set out above, Google requires Android App developers to use Google’s own payment processing system (i.e. the PSPPS) in respect of all Relevant Purchases made by

¹¹³ Holt 1, para 5.2.8.

¹¹⁴ Holt 1, para 5.3.1.

¹¹⁵ Holt 1, section 5.3.

¹¹⁶ Holt 1, para 5.3.6.

GMS Device users, with the consequence that there are no other providers offering payment processing services in relation to Relevant Purchases.¹¹⁷

105. Google is able to conduct itself independently of competitors and consumers in the three relevant markets identified above, and does so in the respects set out below.

G. Exclusionary Abuses

106. The Chapter II prohibition and Article 102 TFEU render it unlawful for a dominant undertaking to adopt practices which have an exclusionary effect on competitors and which strengthen its dominant position by using methods other than those that constitute competition on the merits.

107. The structure of Google’s ecosystem is set out in detail above. Google is the archetype of a 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*”.¹¹⁸ While Google’s ecosystem is not a “closed” system in relation to the distribution of Android Apps to Android Device users, and in relation to payments for / within Android Apps, because, in theory, it is (i) technically possible for GMS Device users to obtain Android Apps other than via the Play Store and hence (ii) technically possible for GMS Device users to avoid using PSPPS when making payments for / within Android Apps. However, as further pleaded at paras 108-149 below, Google engages in exclusionary conduct in both the Android App Distribution Market and the Play Store Payment Processing Market, as a result of which the competition that Google faces from rival methods of Android App distribution, and from rival payment processing methods for purchases of / within Android Apps, is substantially restricted. Such conduct by Google constitutes a departure from competition on the merits.¹¹⁹ Google’s ecosystem has been

¹¹⁷ Holt 1, section 5.4.

¹¹⁸ See e.g. Competition and Markets Authority, *A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce*, December 2020, p17.

¹¹⁹ E.g. Case 85/76 *Hoffmann-La Roche v Commission* (“**Hoffmann-La Roche**”), paras 89-81; Case C-413/14P *Intel v Commission* (“**Intel**”), paras 136-139.

described as “*closed on strategic layers of the app-ecosystem*”¹²⁰ and the “*most closed*” of the available open-source operating system software.¹²¹

108. Specifically, Google has engaged, and continues to engage, in the following exclusionary conduct that constitutes abuses of its dominant positions on the Android App Distribution Market and the Play Store Payment Processing Market:
- a. the bundling of the Play Store together with the other Bundled Apps in the GMS Bundle;
 - b. the imposition of the App Distribution Restrictions as defined at para 73 above; and
 - c. the imposition of the Payment System Restrictions as defined at para 83 above.

(i) Bundling

109. Bundling / tying are expressly identified as conduct that may constitute an abuse of a dominant position in section 18(2) of the Act and Article 102 TFEU:¹²²

“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.”

110. While the terms “bundling” and “tying” are often used interchangeably, bundling refers to the situation in which products are offered only as a package, whereas in

¹²⁰ See ACM Report, p62.

¹²¹ *Google Android* Decision, recital 1161.

¹²² Bundling / 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 Training Limited v The Law Society of England and Wales* [2017] CAT 10, (“*Socrates*”) para 141.

the case of tying the dominant undertaking may supply the “tied” product (but not the “tying” product) on its own.¹²³

111. Bundling will constitute an abuse of a dominant position where the following four conditions are satisfied:¹²⁴

- a. the products comprising the bundle are separate products;
- b. the undertaking is dominant in the market for one of the bundled products;¹²⁵
- c. the dominant undertaking does not give customers a choice to obtain the bundled products separately; and
- d. the bundling is capable of restricting competition.

112. 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.¹²⁶

113. As set out at para 37 above, if an OEM wishes to pre-install any one or more of the Bundled Apps, as specified by Google in the relevant MADA, that OEM must agree to pre-install all of the Bundled Apps on its Google Android Devices. Thus, the Bundled Apps comprise a bundle in the sense that the constituent products are only offered as a package and are not available separately (see para 43 above).

Separate products

¹²³ See *Socrates*, para 140 and fn 15, citing the *Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings* (the “**Commission Article 102 Guidance**”). The legal requirements for a tying case are set out at paras 137-139 below.

¹²⁴ See (albeit strictly in relation to a case of tying rather than bundling) Case T-201/04 *Microsoft Corp. v Commission* EU:T:2007:298 (“*Microsoft*”), para 859 and 867. These conditions have been applied by the Tribunal in the context of the Chapter II prohibition (although again, strictly, in relation to a case of tying rather than bundling). See *Socrates*, paras 143-176.

¹²⁵ See Commission Article 102 Guidance, para 50, fn 3.

¹²⁶ *Microsoft*, paras 859 and 869.

114. Whether two products are to be considered distinct “*has to be assessed by reference to consumer demand.*”¹²⁷ 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.¹²⁸ The fact that there are independent companies on the market who specialise in the manufacture and sale of the bundled products constitutes serious evidence of the existence of a separate market for those products.¹²⁹
115. The following factors demonstrate that there is independent demand for the Play Store and for the other Bundled Apps, such that the Play Store should be considered to be a distinct product in its own right:¹³⁰
- a. **Functional differences**¹³¹ There are obvious functional differences between the Play Store and the other Bundled Apps. The Play Store enables customers to search for, purchase and download Android Apps onto their GMS Device. No other app within the bundle of Bundled Apps has this functionality.
 - b. **Other undertakings supply app stores** A number of independent companies provide app stores for the distribution of Android Apps (including both certain OEMs’ self-branded app stores and third-party app stores, such as Aptoide).
 - c. **Non-Android versions of other Bundled Apps** Google develops and markets versions of other Bundled Apps (such as YouTube and Google Maps) that are designed to work on other smart mobile operating systems

¹²⁷ *Microsoft*, para 917.

¹²⁸ *Microsoft*, para 925.

¹²⁹ *Microsoft*, para 927.

¹³⁰ See further Holt 1, para 6.2.5. See also, by analogy, *Google Android* Decision, recitals 756 – 772 (concerning the distinctness of the Play Store and Google Search).

¹³¹ See also *Microsoft*, para 926.

such as Apple iOS, and which can be downloaded via other non-Android app stores, such as Apple's App Store.

- d. **Demand** There is evidence that despite the bundling of the Play Store with the other Bundled Apps, OEMs have sought the installation of the Play Store without wishing also to install all of the other Bundled Apps.¹³²

116. It is noted that Google did not contest the Commission's conclusion in the *Google Android* Decision that the Play Store constituted a distinct product from both Google Search and Google Chrome (which, prior to the *Google Android* Decision, formed part of the bundle of Bundled Apps: see para 43 above).¹³³

Dominance

117. Google holds a dominant position on the market for at least one of the bundled products, namely the Play Store. Paras 103-104 above are repeated. Further, until the removal of Google Search from the bundle of Bundled Apps following the *Android Decision*, Google was also dominant in the market for at least another of the bundled products, namely the market for general search services (as the European Commission found in Section 9.5 of the *Google Android* Decision).

No choice

118. The third criterion, relating to coercion, is satisfied when a dominant undertaking gives its customers no choice of purchasing the bundled products separately.¹³⁴

119. This criterion is satisfied in the present case because, as set out at para 43 above, it is a term of the MADA that an OEM cannot pre-install any one of the Bundled Apps without also being obliged to pre-install each of the other Bundled Apps (as specified by Google from time to time).

¹³² See *Google Android* Decision, recital 761 and the Google internal email referred to in fn 822.

¹³³ *Google Android* Decision, recitals 762 and 885.

¹³⁴ *Microsoft*, para 955 and para 961.

120. It is irrelevant, in this context, that OEMs may not be required to pay anything extra for the Play Store or that GMS Device users are not obliged to use the Play Store as opposed to (in particular) an OEM’s proprietary app store that may also be pre-installed on a device.¹³⁵ The critical point is that OEMs have no choice but to obtain all of the Bundled Apps together, if they want to obtain any one of them.

Capable of restricting competition

121. Bundling will only constitute an abuse of a dominant position if it is capable of restricting (or “foreclosing”) competition.¹³⁶ 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.¹³⁷

122. It is also not necessary to show that the anti-competitive effects harm GMS Device users directly. The Chapter II prohibition also covers conduct which indirectly harms GMS Device users 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.”¹³⁸

123. In the present case, the bundling of the Play Store with the other Bundled Apps is capable of restricting competition on the Android App Distribution Market. The effect of the bundling is that OEMs wishing to pre-install and distribute any one of the Bundled Apps other than the Play Store on their Google Android Devices (and also to have access to the critical APIs distributed through Google Play Services: see para 36 above) are required also to pre-install (and prominently display) the Play Store. Given the popularity and attractiveness of the other Bundled Apps to GMS Device users, the bundling of the Play Store with the other Bundled Apps makes it likely that OEMs will pre-install (and then prominently display) the Play

¹³⁵ *Google Android Decision*, recitals 770-771.

¹³⁶ *Microsoft*, para 867.

¹³⁷ *Socrates*, para 150.

¹³⁸ *Streetmap.EU Ltd v Google Inc.* [2016] EWHC 253 (Ch), para 88.

Store,¹³⁹ and less likely that they will pre-install an alternative app store on their Android Device, either (i) exclusively or (ii) alongside their proprietary app store.¹⁴⁰

124. The bundling of the Play Store with the other Bundled Apps is thus capable of restricting competition in that it:

- a. provides Google with a significant competitive advantage that competing providers of Android app stores cannot offset, in circumstances where:
 - i. the number of apps available via the Play Store has increased rapidly over time, and the Play Store has also attracted a very large and increasing number of app developers;¹⁴¹
 - ii. pre-installation is an important channel for the distribution of app stores on Android Devices.¹⁴² The practical effect of the bundling provisions of the MADA is that the Play Store is pre-installed on practically all Google Android Devices (outside China), being some 918 million smart mobile devices in 2016;¹⁴³
 - iii. it is impossible for an OEM who is party to the MADA to uninstall the Play Store from its GMS Devices, meaning that the most that a competing app store provider could achieve is to have its competing app store displayed side by side with the Play Store. Further, OEMs who have already pre-installed the Play Store will be disincentivised from pre-installing another app store, for the reasons explained at Holt 1, para 6.2.11 (b). Moreover, while GMS Device users can technically “sideload” a competing app store (or specific apps) onto

¹³⁹ Holt 1, para 6.2.10.

¹⁴⁰ Holt 1, para 6.2.11.

¹⁴¹ *Google Android* Decision, recitals 607 and 610.

¹⁴² *Ibid*, recital 633.

¹⁴³ *Ibid*, recital 784.

their GMS Devices without using the Play Store, a significant number of GMS Device users will not do so and will instead use the app store that is pre-installed and prominently displayed on their device, i.e. the Play Store, either because they do not know that sideloading is possible or because they are unable/unwilling to go through the process of doing so;¹⁴⁴

iv. competing app stores cannot offset the competitive advantage that Google ensures for itself by alternative distribution channels such as direct downloads (including because of the App Distribution Restrictions: see further below) or pre-installation agreements with OEMs or mobile network operators.¹⁴⁵ This is apparent from the statistics showing the vastly greater number of app downloads made through the Play Store in comparison to other app stores.¹⁴⁶

b. helps Google to maintain and strengthen its dominant position in the Android App Distribution Market in that it:

i. makes it harder for competing app stores to attract developers and/or secure downloads from Android Device users, meaning that developers lose out on revenues and valuable user data;¹⁴⁷

ii. increases barriers to entry by shielding Google from competition that could challenge its dominant position in the Android App Distribution Market, since potential competitors (i) must spend resources to overcome the “status quo” advantage conferred by the pre-installation (and prominent display) of the Play Store on GMS Devices and (ii) cannot bid for exclusive pre-installation on devices

¹⁴⁴ See, by analogy, *Google Android Decision*, recitals 801-803.

¹⁴⁵ See, by analogy, *Google Android Decision*, recitals 823-834.

¹⁴⁶ See *Google Android Decision*, p. 130, table 5.

¹⁴⁷ See, by analogy, *Google Android Decision*, recital 860.

manufactured by OEMs who are subject to the MADA (namely all major OEMs outside China);¹⁴⁸

- iii. reduces competing app store providers' incentives to develop innovative features, which those providers would be more willing to explore if their revenues / access to user data were not restricted;¹⁴⁹
- iv. is capable of harming, directly or indirectly, consumers who, as a result of Google's interference with the normal competitive process, have less choice as to how they download their apps.¹⁵⁰

125. Further, the bundling of the Play Store with the other Bundled Apps has the result that OEMs are likely to pre-install and prominently display the Play Store on their Android Devices because they wish to be able to pre-install other Bundled Apps (e.g. YouTube) and not because of the merits of the Play Store itself. This constitutes a departure from competition on the merits.

126. In the premises, the bundling of the Play Store with the other Bundled Apps constitutes an abuse of Google's dominant position on the Android App Distribution Market, contrary to the Chapter II prohibition and Article 102 TFEU.

Objective justification

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

¹⁴⁸ See, by analogy, *Google Android* Decision, recital 861.

¹⁴⁹ See, by analogy, *Google Android* Decision, recital 862.

¹⁵⁰ See, by analogy, *Google Android* Decision, recital 863.

(ii) App Distribution Restrictions

128. Both the Chapter II prohibition and Article 102 TFEU prohibit a dominant undertaking from “(b) *limiting production, markets or technical development to the prejudice of consumers*”.
129. The App Distribution Restrictions, as described at paras 63-72 above, not only have the effect that rival app stores cannot be downloaded through the Play Store, but also that “sideloading” other app stores (or directly downloading specific apps from the internet) is technically complex and does not constitute a satisfactory alternative distribution channel for Android Apps (if GMS Device users are even aware that it is a technical possibility). This reduces the competitive constraint that rival app stores, or direct downloads of specific apps, would otherwise impose on the Play Store,¹⁵¹ and does so by recourse to methods that do not constitute competition on the merits. In the language of Article 102(b) TFEU, the App Distribution Restrictions limit production, markets and technical development to the prejudice of GMS Device users because they prevent the emergence of competition to the Play Store that would be likely to benefit GMS Device users in the form of greater choice, better quality and lower prices.
130. In the absence of any objective justification for the App Distribution Restrictions, which is a matter for Google to plead and prove, the imposition of the App Distribution Restrictions constitutes an abuse of Google’s dominant position on the Android App Distribution Market and/or the Licensable OS Market, contrary to Chapter II prohibition and Article 102 TFEU.

(iii) Payment System Restrictions

131. Google’s imposition of the Payment System Restrictions as defined at para 83 above constitutes an abuse of its dominant position on the Play Store Payment Processing Market, in that those restrictions (i) amount to an exclusive dealing

¹⁵¹ See Holt 1, para 6.2.13.

obligation and/or (ii) involve the tying of Google's PSPPS (the tied product) to the Play Store (the tying product).

Exclusive dealing

132. 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.¹⁵²
133. As explained at paras 76-82 above, the Payment System Restrictions require (as intended by Google) that payments for any Relevant Purchase must be processed via the PSPPS and not via any competing payment processing system provider. The consequence is that the Android App developer must accept Google interposing itself between that developer and GMS Device users for each and every Relevant Purchase which, in turn, enables Google to extract the Commission on every Relevant Purchase. This amounts to an exclusive dealing obligation which distorts competition.
134. This stands in contrast to payment processing services where the payment is primarily for *physical* goods and services (and a small number of exempt digital goods and services) within Android Apps (see para 81 above), in respect of which app developers are prohibited by Google from using the PSPPS, and may instead choose their own payment processing services provider, and so are not forced to pay the Commission.¹⁵³
135. The anti-competitive effects of this exclusive dealing obligation are exacerbated by the Play Store's dominant position on the Android App Distribution Market, allowing Google to ensure that it is the exclusive provider of payment processing services for Relevant Purchases on GMS Devices. The result for GMS Device users is that when they use the Play Store to access Android Apps (as the overwhelming majority of GMS Device users do), they must use the PSPPS to make Relevant

¹⁵² As acknowledged in *Hoffmann-La Roche* at para 90.

¹⁵³ See Holt 1, para 4.5.7.

Purchases; and they must pay the Commission demanded by Google, each time that they do so.

136. Insofar as Google may seek to argue that such exclusivity is objectively justified, the burden of proof is on Google to make that good.¹⁵⁴ The PCR will respond to any arguments that Google may make in this regard at the appropriate time as necessary.

Tying

137. As noted at para 109 above, tying (like bundling) is expressly identified as conduct that may constitute an abuse of a dominant position: see section 18(2)(d) of the Act and Article 102(d) TFEU.

138. 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:¹⁵⁵

- 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 is capable of restricting competition.

¹⁵⁴ E.g. *Intel*, para 140; *Socrates*, para 166.

¹⁵⁵ *Microsoft*, paras 859 and 867. These conditions have been applied by the Tribunal in the context of the Chapter II prohibition. See *Socrates*, paras 143-176.

139. 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.¹⁵⁶

140. As set out in paras 76-82 above, by the Payment System Restrictions, Google requires that payments for Relevant Purchases must be made via the PSPPS. This involves the tying of the PSPPS (the tied product) to the Play Store (the tying product).

Separate products

141. The relevant principles relating to the “separate products” requirement set out at paras 114-116 above are repeated. The following factors demonstrate that there is independent demand for payment processing systems, which should therefore be considered a distinct product from the Play Store:¹⁵⁷

- a. **Functional differences.**¹⁵⁸ There are obvious functional differences between the Play Store and the PSPPS. The Play Store enables GMS Device users to search for, purchase and download Android Apps onto their GMS Devices. The PSPPS 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.¹⁵⁹
- c. **Demand.** There is current demand from Android App developers and GMS Device users for alternative payment systems. Indeed, some Android App developers, such as Epic Games (the creator of the well-known Fortnite app)

¹⁵⁶ *Microsoft*, paras 859 and 869.

¹⁵⁷ 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.

¹⁵⁸ See also *Microsoft*, para 926.

¹⁵⁹ See e.g. Holt 1, para 4.5.5(b).

have sought to develop their own payment processing systems. However, they are prevented from both (i) using either their own or third-party payment processing services in respect of Android Apps distributed via the Play Store, and (ii) offering users a choice of additional payment processing options alongside PSPPS.¹⁶⁰

Dominance

142. Google holds a dominant position on the market for the tying product, i.e. the Play Store. It is not necessary also to show that Google holds a dominant position on the market for the tied product, i.e. the PSPPS, but in fact Google does so (indeed, it holds a monopoly in the Play Store Payment Processing Market). Paras 103-104 above are repeated in this regard.

No choice

143. The third criterion is satisfied when a dominant undertaking deprives its customers of the choice of purchasing the tying product without the tied product.¹⁶¹ This may involve one or both of the following:¹⁶²

- a. **Contractual coercion:** the tying obligation is imposed by the terms of the agreement between the dominant undertaking and its customers; and/or
- b. **Technical coercion:** the tied product is physically integrated into the tying product, so it is impossible to take one product without the other.

144. This criterion is satisfied in the present case as, by the Payment System Restrictions, Google employs both contractual and technical coercion to ensure the use of the PSPPS for Relevant Purchases, as set out at paras 76-82 above.

¹⁶⁰ See *Epic Games Inc. v Google*, complaint for injunctive relief at paras 22-23.

¹⁶¹ *Microsoft*, paras 955 and 961.

¹⁶² *Microsoft*, para 963.

145. The coercion is principally imposed on Android App developers, who are prevented from using any competing payment processing system for Relevant Purchases. This then, in turn, applies to GMS Device users who are also required to use the PSPPS in order to make Relevant Purchases.¹⁶³

Capable of restricting competition

146. The relevant principles relating to the requirement that tying be “*capable of restricting competition*” are equivalent to those relating to bundling, as to which paras 121-126 above are repeated.

147. The anti-competitive effects of Google’s requirement to use the PSPPS for all Relevant Purchases are as set out at para 140 above. In short, the tying prevents the use by the Android App developer of any other providers of payment processing services in relation to the processing of Relevant Purchases, with the result that the Android App developers cannot avoid paying the Commission to Google in respect of all Relevant Purchases.

Objective justification

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

(iv) Mutually reinforcing nature of Google’s exclusionary conduct

149. The above exclusionary practices are each abusive in their own right, but they are also mutually reinforcing, in that they have the combined effect of limiting the competitive pressure that Google would otherwise face from other methods of distributing Android Apps (including pre-installation of other app stores by OEMs on their devices and/or direct downloads of app stores and/or or direct downloads of specific apps) and other payment processing methods. Taken together, the bundling of the Play Store with the other Bundled Apps, the App Distribution

¹⁶³ See, by analogy, *Microsoft*, para 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.*”

Restrictions and the Payment System Restrictions constitute an overall commercial strategy which has the capacity to restrict competition in a manner which goes beyond the extent to which each practice is capable of restricting competition when assessed in isolation.¹⁶⁴

(v) Relevant counterfactual

150. Absent the exclusionary abuses as pleaded above in relation to the Android App Distribution Market and the Play Store Payment Processing Market:

- a. the Android App Distribution Market would have developed into a more competitive market, in that there would have been greater prospects for entry / expansion by rival Android app stores, and for the development of alternative methods of Android App distribution. Further, Android App developers and Android Device users would have had greater incentives to “multi-home” (i.e. use different app stores rather than just the Play Store) due to likely reductions in the costs (on the developer side) and prices (on the user side). The effect of such greater competition would have been to drive down the level of the Commission, and to improve quality and innovation.¹⁶⁵
- b. the Play Store Payment Processing Market would also have developed into a more competitive market, in that Android App developers would have had the freedom to use different payment processing providers in relation to Relevant Purchases, removing Google’s ability to interpose itself between Android App developers and GMS Device users and to charge the Commission on every Relevant Purchase. This would (in turn) be expected to cause Google to lower the Commission to a more competitive level. This would have led to much better outcomes for both Android App developers and GMS Device users.¹⁶⁶

¹⁶⁴ Case C-307/18 *Generics (UK) Ltd & Others v Competition and Markets Authority*, at para 172.

¹⁶⁵ See further Holt 1, para 6.2.18.

¹⁶⁶ See further Holt 1, paras 6.3.14 – 6.3.15.

H. Excessive Pricing

(i) **Legal Framework**

151. 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 prices*”.

152. The “*starting point*”¹⁶⁷ 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.

153. 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.*¹⁶⁸ Green LJ and Vos LJ¹⁶⁹ reiterated that there is no single method or way in which the abuse might be established and that there is

¹⁶⁷ *Competition and Markets Authority v Flynn Pharma Ltd* [2020] EWCA Civ 339; [2020] Bus LR 803 (“*CMA v Flynn*”), Green LJ, para 56.

¹⁶⁸ [2020] EWCA Civ 339; [2020] Bus LR 803.

¹⁶⁹ Sir Stephen Richards agreed with both judgments.

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.¹⁷⁰

154. Insofar as a claimant seeks to establish an abuse by way of the methodology set out in *United Brands*,¹⁷¹ the claimant may:¹⁷²

- 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 standard¹⁷³ such as a return on sales or return on capital employed benchmark;¹⁷⁴ (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*”¹⁷⁵ (the ‘unfair limb’).

155. Within this analysis,¹⁷⁶ 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*”,¹⁷⁷ but it has long been recognised that this is not sufficient by itself “*since otherwise true value would be defined as anything that an exploitative and abusive dominant undertaking could get away with*”.¹⁷⁸ This risk is particularly acute in circumstances of dependency: as explained by Advocate-General Jacobs in Case

¹⁷⁰ See Green LJ, para 97(iii)-(iv); Vos LJ para 266.

¹⁷¹ Which Vos LJ indicated would be the first step in most cases; see para 252.

¹⁷² See Green LJ, para 97(iv)-(vi).

¹⁷³ Which does not have to be a benchmark price: see Green LJ, paras 120-125; Vos LJ, paras 248-254.

¹⁷⁴ Although no particular approach is required: see Green LJ, para 97(v); Vos LJ, para 253.

¹⁷⁵ See Green LJ, para 97(vi).

¹⁷⁶ It is not a separate question: see Green LJ, para 172; Vos LJ, para 282.

¹⁷⁷ See Green LJ, para 171.

¹⁷⁸ See Green LJ, para 125; the so-called “*cellophane fallacy*”.

395/97 *Tournier*,¹⁷⁹ 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.¹⁸⁰

156. It is important, when conducting such an assessment, not to lose sight of the underlying facts driving the analysis in question.¹⁸¹

(ii) *Prima facie* case

157. At present, the PCR does not have access to Google’s data concerning the costs incurred by and revenue earned by Google in the relevant period. Mr Holt makes clear that his assessment is preliminary, and that he expects to update his assessment in the light of disclosure.¹⁸²

158. However, despite that considerable gap in the information currently available to the PCR, the threshold of a “*triable issue*”¹⁸³ 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 Google’s costs, it is alleged by the PCR that all Commission charged by Google on Relevant Purchases is excessive and unfair, including those charges of 15% more recently imposed.

¹⁷⁹ [1989] ECR 2521, para 65 of his Opinion.

¹⁸⁰ See Green LJ, para 167.

¹⁸¹ See e.g. Vos LJ, para 243.

¹⁸² See Holt 1, paras 7.1.2, 7.1.8. 7.3.39-7.3.40.

¹⁸³ 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

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

a. **Public reports.**

- i. Google's net revenue from the Play Store was over USD 15bn in 2016 and USD 38.6bn in 2020.¹⁸⁴ It is understood that the Commission charged by Google accounts for the vast majority of that revenue.¹⁸⁵
- ii. However, the recent US Committee Report, notes that Apple's costs for running the App Store, an app distribution platform that is similar in scope and scale to the Play Store, have been publicly estimated to be less than USD 100m.¹⁸⁶

b. **Mr Holt's analysis.** Mr Holt has undertaken preliminary analysis which suggests an exceptional profit margin for the Play Store (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 Google's Return on Capital Employed ("ROCE") compared to relevant adjusted Weighted Average Cost of Capital ("WACC").¹⁸⁷ In particular:

- i. Figure 7.1 at para 7.3.30 of Holt 1 shows that the estimated ROCE in relation to Play Store Distribution Services is very significantly above Google's calculated WACC during the Relevant Period. Whilst Google's estimated ROCE has declined slightly in recent

¹⁸⁴ See <https://www.businessofapps.com/data/app-revenues/> and <https://sensortower.com/blog/app-revenue-and-downloads-2020>

¹⁸⁵ See <https://sensortower.com/blog/app-revenue-and-downloads-2020>

¹⁸⁶ US Committee Report, at pp. 344-345. No timescale is provided for those costs.

¹⁸⁷ See Holt 1, para 7.3.1-7.3.31 and paras 7.4.3-7.4.28 respectively. This analysis is robust to a number of sensitivities: see paras 7.3.34-7.3.36 and 7.4.31-7.4.33.

years, so has Google's WACC. Therefore, Mr Holt provisionally concludes that the profitability of the Play Store Distribution Services has persistently been excessive for the Relevant Period (rather than eroding, which would have been expected in a competitive market).¹⁸⁸ Even on very conservative estimates of operating costs, it appears that the returns generated are excessive.¹⁸⁹

- ii. Figure 7.4 at para 7.4.27 of Holt 1 shows that, not only is the estimated ROCE very significantly higher than the WACC estimated for Google payment processing services for Relevant Purchases, it has increased substantially year on year (rather than eroding, which would have been expected in a competitive market).¹⁹⁰ This indicates a persistently massive and increasing profitability for Google's payment processing services for Relevant Purchases during the Relevant Period. Even taking into account very conservative assumptions, ROCE is still far in excess of the WACC.¹⁹¹

Further information, held by Google, would be needed to refine this estimate.¹⁹²

- c. **Drop in Commission to 15%.** The fact that Google was able to unilaterally cut its Commission to 15% for all Android App developers (on the first USD 1 million of revenue earned from Relevant Purchases),¹⁹³ as explained above, is an indication that the prior level of 30% was excessive.
- d. **Android App developers' concerns.** Android App developers believe that the fees charged by Google grossly outstrip the costs to Google. Epic Games has noted that the costs of running a digital app store appear to be negligible

¹⁸⁸ See Holt 1, para 7.3.31.

¹⁸⁹ See Holt 1, para 7.3.36.

¹⁹⁰ See Holt 1, para 7.4.28.

¹⁹¹ See Holt 1, para 7.4.33.

¹⁹² See Holt 1, paras 7.3.39-7.3.40, 7.4.4.

¹⁹³ See <https://support.google.com/googleplay/android-developer/answer/10632485>.

at a large scale, such that they estimate that stores charging 30% are marking up their costs by 300-400%.¹⁹⁴

Unfair Limb

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

- a. **Persistent rate.** The Commission was set in March 2011¹⁹⁵ and has remained stable for over a decade (subject to the limited exceptions addressed above). The persistence of high prices, given the substantial growth of Google, and the Play Store in particular,¹⁹⁶ indicates that, as a result of its dominant position, Google has reaped trading benefits which it would not have reaped under conditions of normal and sufficiently effective competition.
- b. **Nature of the differential.** As explained above, the profit margin assessed by Holt 1 is consistently very high throughout the whole of the Relevant Period.¹⁹⁷
- c. **Drop in Commission to 15%.** The recently announced drop in the percentage rate for the Commission to 15% for all Android App developers (on the first USD 1 million of revenue earned from Relevant Purchases)¹⁹⁸ serves to highlight the unfair nature of the Commission. Google's announcement made clear that the purpose of the reduced Commission rate was in recognition that “[t]hese are funds that can help developers scale up

¹⁹⁴ 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.

¹⁹⁵ See Box 4.5 in the Australian Competition and Consumer Commission's ("ACCC") interim report ("ACCC Interim Report") on its digital platform services inquiry, dated March 2021. Available here: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

¹⁹⁶ See: <https://www.statista.com/statistics/185729/google-play-quarterly-growth-of-available-apps/>

¹⁹⁷ Holt 1, para 7.3.32.

¹⁹⁸ See <https://support.google.com/googleplay/android-developer/answer/10632485>.

*at a critical phase of their growth by hiring more engineers, adding to their marketing staff, increasing server capacity, and more”.*¹⁹⁹ Rather than being a response to competitive pressure, this appears to be a response to regulatory criticism, adverse publicity and a suite of legal claims (as set out at paras 169-171 below).

d. **Other sources of Play Store revenue.** In addition to the Commission, Google charges a USD 25 registration fee, through which Google generates an estimated USD 5.8m in revenue per annum.²⁰⁰ Google also generates revenue through Play Store Search Ads, in-app advertising through its Google AdMob services and, since October 2018, the fee charged to OEMs to licence the Play Store.²⁰¹ In light of the public information regarding the differential between the costs of running the iOS App Store, an app distribution platform that is similar in scope and scale to the Play Store, and the Play Store’s revenue from the Commission, the existence of these other sizeable sources of revenue reinforces the unfair nature of the additional charges that Google imposes in respect of the Play Store by way of the Commission.

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

i. **Attempts to bypass:** Android App developers have sought, but have been unable, to bypass elements of the Commission paid to Google. When Epic Games sought to do so in respect of its Fortnite Android App, and to offer a 20% reduction in in-app prices, it was not permitted by Google.²⁰²

ii. **Complaints:** As set out at para 171 below, a number of Android App developers have brought claims contending that the Commission is unfair and abusive. Epic Games has brought a claim against Google

¹⁹⁹ See <https://android-developers.googleblog.com/2021/03/boosting-dev-success.html>.

²⁰⁰ Holt 1, para 7.3.15.

²⁰¹ Holt 1, para 7.3.15.

²⁰² See Epic’s Complaint, para 29.

in California, where it describes how, when collecting payments from Android Device users, “*Google then taxes the transaction at an exorbitant 30% rate*”, referring to the Commission as a “*supra-competitive 30% tax*”, and explaining that “[*t*]his 30% commission is often **ten times** higher than the price typically paid for the use of other electronic payment solutions”.²⁰³ Class actions have been brought by numerous other Android App developers (in addition to class actions on behalf of Android Device users) in California, which refer to the Commission as a “*supracompetitive 30% transaction fee*” and an “*astounding and exploitative 30% take rate*” which is leading to “*colossal profits*”.²⁰⁴

161. In the premises, the Commission does not reflect the economic value of the Play Store and / or the amount of commission which would be paid in conditions of workable competition. To the contrary, it is a fee which Android App developers are effectively compelled to accept as they are de facto dependent on Google for distribution of their Android Apps. Android App developers have stridently objected to it and it is not a commission that reflects the value to GMS Device users.

162. **Unfair in comparison to other products.** There are a number of factors which indicate that the Commission rate set by Google is also unfair in comparison to other products. Mr Holt has given preliminary consideration to other products/services which might serve as relevant comparators for these purposes. Having discounted certain comparators on the basis that they do not constitute competitive benchmarks (including the commission charged for purchases made via other Android App stores, and the commission charged by Apple for purchases made via its App Store),²⁰⁵ Mr Holt has identified potentially relevant comparators

²⁰³ Epic’s Complaint, paras 24 and 26.

²⁰⁴ See *Pure Sweat Basketball Inc. v Google LLC and others*, 3:20-cv-05792 (17 August 2020), paras 3, 14 and 62.

²⁰⁵ Holt 1, paras 7.3.50-7.3.62.

in the form of certain PC games distribution platforms and the Microsoft app store which have informed his preliminary price benchmarking analysis.²⁰⁶

163. Mr Holt’s preliminary view is that a competitive benchmark for the Android 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 Play Store Distribution Services 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*”.²⁰⁷
164. Mr Holt also considers that payment processing service providers serve as relevant price comparators for the purposes of assessing whether the Commission is unfair. He notes, in this regard, that certain payments for or within Android Apps downloaded from the Play Store cannot be processed using the PSPPS (see para 81 above) and are instead processed by alternative payment processing service providers.²⁰⁸ Mr Holt identifies at this preliminary stage a sample of four online payment processing service providers as potential comparators, each of whom charge a Commission of 3% or less.²⁰⁹ Mr Holt concludes that these comparators “*offer payment processing systems with fully comparable core functionalities to [the PSPPS] but charge very significantly lower fees*”, and suggests that the Commission is set at an excessive and unfair level.²¹⁰
165. Mr Holt’s analysis of the available evidence on payment processing fees indicates a competitive benchmark for Google’s Commission in the region of 1.5-3%. He allows (on a conservative basis) that there may be potential additional payment

²⁰⁶ Holt 1, paras 7.3.63-7.3.96 and 7.3.100-7.3.102.

²⁰⁷ Holt 1, paras 7.3.102.

²⁰⁸ Holt 1, para 7.4.1.

²⁰⁹ Holt 1, paras 7.4.35-7.4.39.

²¹⁰ Holt 1, para 7.4.39.

processing costs and thus provisionally adopts a benchmark of 5% for payment processing services for Relevant Purchases.²¹¹

Counterfactual

166. In a sufficiently competitive market, it is likely that the Commission would either come down to levels based on app distribution comparators (in the range of 10-20%) or payment processing comparators of around 5%: see Holt 1, paras 7.5.1 – 7.5.4. While Mr Holt cannot be specific at this stage, some evidence suggests that the Commission for Relevant Purchases would be more likely to fall towards the payment processing benchmark.²¹² Mr Holt thus considers a range of 5-15% to be a good indication of a competitive level for the Commission associated with Relevant Purchases.²¹³

I. Effect on trade

167. 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 Android App developers or providers of payment processing services to offer cross-border services (or services within the UK).

J. Joint and several liability

168. Each of the five Proposed Defendants is jointly and severally liable for any loss caused as a result of Google's conduct as pleaded above. Para 26 above is repeated.

K. Other proceedings

169. 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, Google's conduct already forms / has formed the subject matter of a number of high-profile regulatory

²¹¹ Holt 1, para 7.4.39.

²¹² Holt 1, para 7.5.3.

²¹³ Holt 1, para 7.5.4.

investigations and private claims in several jurisdictions around the globe, including the UK and EU.

170. For example, the following investigations by competition authorities have either been completed or are underway:

- a. In July 2018, the European Commission concluded its investigation into Google's conduct relating to the Android operating system and certain Android Apps, finding that Google had abused its dominant position, and fining Google EUR 4.34 billion.²¹⁴ The Commission found that Google had: (1) tied the Google Search app with the Play Store; (2) tied its mobile web browser, Google Chrome, with the Play Store and the Google Search app; (3) made the licensing of the Play Store and the Google Search app conditional on agreements that contained anti-fragmentation obligations, preventing hardware manufacturers from selling devices based on Android Forks, taking actions that might cause or result in the fragmentation of Android, or distributing software development kits derived from Android; and (4) granted revenue share payments to OEMs and Mobile Network Operators on condition that they pre-install no competing general search service (and in some instances, no competing app distribution service) on any device with an agreed portfolio.
- b. In April 2019, the Dutch antitrust regulator published a market study that considered, amongst other things, the closed nature of the Google ecosystem, the effect of Google bundling its services with essential parts of the software infrastructure those services run on (Google Android), and the impact of the Commission charged by Google in connection with the Play Store.²¹⁵
- c. In the US, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law conducted an investigation into competition in digital markets, focussing on the dominance and business practices of dominant online platforms, including Google. In October 2020,

²¹⁴ See *Google Android* Decision.

²¹⁵ See ACM Report.

the Committee published its report and recommendations (the US Committee Report) finding, inter alia, that Google's Play Store functions as a gatekeeper.²¹⁶

- d. The Australian Competition & Consumer Commission (ACCC) is conducting an inquiry into markets for the supply of digital platform services (including app distribution). In its Interim report No. 2, published in March 2021, the ACCC identified a number of areas where action is required and put forward potential measures to address areas of particular concern, such as the effect of Google's distribution and payment system restrictions on Android App developers. Regarding the level of Commission levied, 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*".²¹⁷
- e. On 15 June 2021, the UK CMA announced that it is conducting a market study into mobile ecosystems in the UK, focussing (amongst other things) on whether Apple and Google's "*effective duopoly over the supply of operating systems (iOS and Android)*" and "*app stores (App Store and Play Store) ... could be resulting in consumers losing out across a wide range of areas*".²¹⁸ According to the Statement of Scope for the market study: "*While both Apple and Google produce a range of products and services within their ecosystems that provide great value to consumers, there are increasing concerns that their control over these gateways gives them the power to dictate the terms under which competition within their ecosystems can take place, which they can use to impose high fees or favour their own products and services over those of rivals*".²¹⁹

²¹⁶ See US Committee Report, page 213.

²¹⁷ See page 72 of the ACCC Interim Report.

²¹⁸ See <https://www.gov.uk/government/news/cma-to-scrutinise-apple-and-google-mobile-ecosystems>.

²¹⁹ See page 5 of the CMA's statement of scope. Available here: https://assets.publishing.service.gov.uk/media/60c8683a8fa8f57cef61fc18/Mobile_ecosystems_statement_of_scope.pdf.

Should the CMA decide to open investigations in due course and make a relevant finding of infringement against the Proposed Defendants, the PCR reserves the right to provide further or amended particulars following the publication of any such relevant finding of infringement.

171. Further, a number of legal proceedings are underway in several jurisdictions around the world:

- a. *Epic Games, Inc. and Epic International S.À.R.L v Alphabet Inc. and others (UK)*:²²⁰ In December 2020, Epic Games filed a claim in the Tribunal against Google, alleging (amongst other things) that it has unfairly restricted competition from alternative channels for the distribution of apps to GMS Device users, reserved to itself the sole payment processing mechanism for purchases of in-app content by consumers who have obtained their Android Apps from the Play Store, and used its market position to obtain unfair prices for the distribution of Android Apps via the Play Store and/or in relation to the purchase of digital in-app content within those Android Apps.²²¹ The claim follows Google's decision to remove Epic Games' Fortnite from the Play Store following Epic Games' introduction of a direct payment feature that would have allowed users to circumvent Google's in-app Commission. Epic Games does not seek damages from Google, but rather a series of orders requiring Google to alter its conduct.
- b. *Epic Games, Inc. v Google LLC (Australia)*: In March 2021, Epic Games announced that it had filed a claim against Google with the Federal Court of Australia. Epic Games reportedly alleges that Google has abused its control over the Android operating system, restricting competition in payment processing and app distribution on the Play Store, thereby stifling innovation, reducing consumer choice and inflating prices.²²²

²²⁰ Case No. 1378/5/7/20.

²²¹ See the Tribunal's summary, published on 14 January 2021, available here: https://www.catribunal.org.uk/sites/default/files/2021-01/1378_Epic_Google_Notice_140121.pdf.

²²² See summary of Epic's claim here: <https://www.epicgames.com/site/fr/news/epic-games-files-legal-proceedings-against-google-in-australia>.

- c. *In re: Google Play Store Antitrust Litigation* (US):²²³ This consolidated action in the US combines several claims issued by US Android App developers²²⁴ (including Epic Games) and GMS Device users²²⁵ concerning Google’s alleged anti-competitive conduct on the market for the distribution of Android Apps to Android Device users through the Play Store, as well as the market for processing payments for Android mobile app digital content.²²⁶
- d. Most recently, on 7 July 2021, 36 US states and the District of Columbia filed a claim against Google, accusing it of violating US antitrust law by its conduct in respect of the Play Store. According to the complaint, “[c]onsumers are harmed because Google forces them to pay a supracompetitive commission of up to 30% to purchase any non-“free-to-download app”, “[b]ecause Google’s tie prevents their use of other payment processors for in-app purchases, consumers are harmed by paying Google’s supracompetitive commission of up to 30%” and “[t]o collect and maintain this extravagant commission, Google has employed anticompetitive tactics to diminish and disincentivize competition in Android app distribution”.²²⁷

²²³ MDL No. 2981.

²²⁴ *Epic Games, Inc. v Google LLC and others*, 3:20-cv-05671 (13 August 2020); *Pure Sweat Basketball Inc. v Google LLC and others*, 3:20-cv-05792 (17 August 2020); *Peekya Services, Inc. v Google LLC and others*, 3:30-cv-06772 (29 September 2020).

²²⁵ *Carr v Google LLC and others*, 3:20-cv-05761 (16 August 2020); *Bentley v Google LLC and others*, 3:20-cv-07079 (9 October 2020); *Herrera v Google LLC*, 3:20-cv-07365 (20 October 2020); *McNamara v Google LLC and Alphabet Inc.*, 3:20-cv-07361 (20 October 2020); *Carroll and others v Google LLC and others*, 3:20-cv-07379 (21 October 2020); *Paige v Google LLC and Alphabet Inc.*, 1:20-cv-03158 (30 October 2020); *Roberts v Google LLC*, 3:20-cv-07824 (5 November 2020); *Gamble and Hess v Google LLC*, 3:20-cv-07984 (13 November 2020); *Esquivel v Alphabet Inc.*, 3:20-cv-08337 (25 November 2020); *Stark v Google LLC and others*, 4:20-cv-08309 (24 November 2020); *Blumberg v Google LLC and Alphabet Inc.*, 1:20-cv-03557 (7 December 2020); *McCready v Google LLC and Alphabet Inc.*, 1:20-cv-03556 (7 December 2020); *Kavulak v Google LLC and others*, 5:20-cv-09421 (30 December 2020); *Ratliff v Google LLC and Alphabet Inc.*, 3:20-cv-00833 (30 December 2020); *Alexander v Google LLC*, 3:21-cv-01201 (8 January 2021); *Black v Google LLC and Alphabet Inc.*, 4:21-cv-00077 (18 February 2021).

²²⁶ See, by way of example, the Transfer Order filed on 5 February 2021 in action *In re: Google Play Store Antitrust Litigation*, MDL No. 2981, available here: <https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2981-Transfer%20Order-01-21.pdf>.

²²⁷ See US AG Complaint, paras 13, 14 and 4.

VI. LOSS

A. Legal test

172. 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.²²⁸ 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.

173. The assessment will be carried out with the aid of the “*broad axe*” if necessary.²²⁹ Moreover, the compensatory principle – which is a basic feature of the law and procedure for the determination of civil claims for damages – 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*”.²³⁰

174. Google’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

175. 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.

²²⁸ *Sainsbury’s Supermarkets Ltd v MasterCard* [2020] UKSC 24, para 194.

²²⁹ *Merricks*, per Lord Briggs at paras 47-53.

²³⁰ *Merricks*, per Lord Briggs para 58.

176. 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 GMS 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 GMS Device user in the US multiplied by an estimate of the number of GMS Device users in the UK.²³¹ Following disclosure it is expected that it will be possible to significantly refine this estimate on the basis of UK Play Store sales data.²³²
 - b. Mr Holt has estimated the likely overcharge on Relevant Purchases (i.e. the amount by which the total Commission paid by Android App developers exceeds the total Commission that would have been paid in the counterfactual, i.e. in the absence of Google’s abusive conduct). Mr Holt explains his position in Chapter 8 of Holt 1. In summary, he compares a ‘blended’ Commission of between 30 and 29% (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 14 – 25% of the overall purchase price was ‘overcharge’ in this period.²³³
 - c. Mr Holt has estimated the level of consumer “incidence” (i.e. the level of overcharge borne by Android Device users) in Chapter 9 of Holt 1. His conclusion is that consumer incidence is significant, with a conservative estimate of around 40%, and a range of between 30-50%.²³⁴

²³¹ Holt 1, para 10.2.1-10.2.5.

²³² Holt 1, para 10.2.1.

²³³ Holt 1, Table 10.2.

²³⁴ Holt 1, para 9.4.12.

177. On the above calculations, Mr Holt estimates loss of between GBP 263m (excluding interest) (for a competitive benchmark of 15% and an incidence of 30%) and GBP 752m (excluding interest) (for a competitive benchmark of 5% and an incidence of 50%).²³⁵
178. 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 GMS 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).²³⁶ Including interest, the preliminary estimate of aggregate damages is between GBP 322m and GBP 920m.²³⁷

C. Loss per Proposed Class Member and distribution

179. The following section of the Claim Form addresses the Proposed Class, including an estimate of the size of the Proposed Class (which Mr Holt estimates is c. 19.5m).²³⁸ By that estimate, the estimated average damages per Proposed Class Member is between GBP 14 and GBP 39 excluding interest, and GBP 17 and GBP 47 with interest.²³⁹
180. 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 Proposed Class Member in the Relevant Period.²⁴⁰ This provisional view is based on the ready ease with which each GMS Device user can

²³⁵ Holt 1, Table 10.3 at para 10.2.8-10.2.9.

²³⁶ See <https://www.financial-ombudsman.org.uk/businesses/complaints-deal/ppi> and <https://www.ft.com/content/54bd0d52-fb3d-11e5-b3f6-11d5706b613b>.

²³⁷ Holt 1, Table 10.4 at para 10.2.10.

²³⁸ Holt 1, para 10.3.3.

²³⁹ Holt 1, para 10.3.4.

²⁴⁰ See Notice and Administration Plan, para 12.11.

determine and provide proof of the value of Relevant Purchases.²⁴¹ 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

181. Three of the Proposed Defendants ((1) – (3)) are domiciled outside of the UK and do not have a UK place of business on which the PCR can effect service within the jurisdiction. Those three Proposed Defendants have not consented to be served out of the jurisdiction and, in the circumstances, the PCR includes with this Claim Form, an application for permission to serve each of those three Proposed Defendants out of the jurisdiction.

182. In that Application, the PCR explains that a claim brought on behalf of GMS Device users (primarily consumers) using the UK version of the Play 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 brought in the UK.

B. Action taking place in England and Wales

183. Moreover, while the action could be treated as taking place as either in England and Wales or Scotland (as it is on behalf of all GMS Device users 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 Brighton;
- b. The PCR's legal representatives are located in London. The Proposed Defendants' legal representatives are also located in London.

²⁴¹ Notice and Administration Plan, para 4.3; Coll 1, para 42.

- 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

184. 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.

185. As explained above and in Coll 1, the PCR is an independent consultant focusing on consumer technology policy issues. She is member of the Proposed Class as she owns a GMS Device and made Relevant Purchases during the Relevant Period.²⁴²

186. As to whether or not it is just and reasonable for the PCR 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));

²⁴² Coll 1, paras 27 and 53.

- 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)).

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

- a. The PCR, in her current professional role as an independent consultant and having spent her career in consumer protection and public policy research, has particular experience of consumer issues in digital markets. She explains in Coll 1, para 29, that her motivation to act as the class representative in these proceedings stems from her personal and professional commitment to create digital markets and systems that work for consumers and meet their needs for access, choice, protection and fair treatment. In light of her experience, her capacity, and her commitment, as explained in detail in Coll 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 paras 63 of Coll 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, as set out at para 17 of Coll 1.
- d. Further, as explained in more detail at paras 65-73 of Coll 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 GBP 11,290,031 in claim funding.²⁴³ 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 GBP 10,000,000.²⁴⁴ This includes adverse costs cover of up to GBP 2,000,000 through to the making of a CPO.²⁴⁵ This level of cover is adequate and appropriate given that Google 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 170-171 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 74-80 of Coll 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 Members of the progress of the proceedings;

²⁴³ Coll 1, para 66.

²⁴⁴ Coll 1, para 71.

²⁴⁵ *Ibid.*

- (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.
- (4) The PCR has engaged a very experienced consultative group of advisers with expertise and experience in group claims management, banking and payment systems, competition law, consumer law and consumer rights matters.²⁴⁶ As explained in Coll 1 and the exhibits thereto, she also has assistance, along with her experienced legal team, from Epiq Class actions and Claims Solutions, and Palatine Communications.

B. Proposed class

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

188. In defining the scope of the Proposed Class, Ms Coll 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”

189. A description of the Proposed Class, as required by Rule 75(3)(a), is set out at paras 15-16 above. Key elements of that description are further elaborated upon below.

190. **First**, if certified, the Claims will be properly brought on behalf of GSM Device users as the category of customer which has suffered harm as a result of the abuses by Google pleaded herein.

191. **Second**, as to the definition of GSM Device users:

²⁴⁶ Coll 1, paras 58-61.

- a. In accordance with para 6.37 of the Guide, the Proposed Class does not exclude legal persons. While it is envisioned that most GMS Device users will be natural persons, the PCR considers that legal persons may also in some cases have suffered loss as a result of Google's conduct as pleaded herein.
- b. There are proportionate exclusions in respect of those individuals involved in the litigation (contained in paras 6.1.i-6.1.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 paras 6.1.v-6.1.vi above, these are excluded to ensure simplicity and efficiency in the progress of the Claims. It is not envisaged, 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,²⁴⁷ that this will exclude a significant number of potential claims.

192. **Third**, as to the criteria that the GMS Device user is a user of the UK version of the Play 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 GMS Device users.²⁴⁸ It should also ensure minimal (if any) overlap with claims brought elsewhere. It is not envisaged that the criteria will cause complexity, as it can be readily determined whether a GMS Device user has such an account: the Google account(s) in question will specify the Country/Region as the UK.²⁴⁹

193. **Fourth**, as explained above, the definition of Relevant Purchases covers all purchases in respect of which Google imposes the unlawful Commission. It is also straightforward for any individual GMS Device user to see if she has made any

²⁴⁷ Notice and Administration Plan, para 4.6.

²⁴⁸ Particularly in circumstances where those not domiciled in the UK can opt-in, as set out in Coll 1, para 48.

²⁴⁹ See Coll 1, para 42; Notice and Administration Plan, para 4.3.

Relevant Purchases, and therefore is a member of the Proposed Class, as those purchases are displayed in a GMS Device user's purchase history accessible through the Play Store app or online.

194. **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 GMS Device user's loss through payment by that GMS 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 GMS Device users whose loss arising from the Proposed Defendants' conduct crystallised prior to 1 October 2015 are therefore time-barred.²⁵⁰
- b. By contrast, claims arising on or after 1 October 2015 are subject to a six-year limitation period.

195. Overall, as Ms Coll confirms in para 44 of Coll 1, the common issues apply across the Proposed Class, such that it is not overly broadly defined.

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

196. 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.

197. 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:

²⁵⁰ See for example *Dixons v MasterCard* [2019] CAT 5 at para 31.

- a. A GMS Device user can check whether they have been using the UK version of the Play Store by checking the Country/Region in their Play Store app settings. In the case of users that at some point during the Relevant period were, but are no longer, GMS Device users, such users can check whether they have been using the UK version of the Play Store online by following this link: <https://play.google.com/store>, clicking on the Google account icon in the top right-hand corner, clicking on the ‘Payments and Subscriptions’ tab, clicking on ‘Manage Payment Methods’ and then selecting the ‘Settings’ tab. The UK should be listed under ‘Country/Region’.
 - b. A current GMS Device user can check their Play Store purchase history in their Google account(s), which is accessible via their Play Store App. In the case of consumers that at some point during the Relevant period were, but are no longer, GMS Device users, such users can view their purchase history online by following this link: <https://play.google.com/store>, clicking on the “Account” tab, clicking on the “Order History” tab, and filtering “Categories” by “Apps”. In both instances, the purchase history lists the Relevant Purchases made. If the GMS Device user has made a Relevant Purchase, in the Relevant Period, they will fall within the Proposed Class.
198. Therefore, members of the Proposed Class will be able easily to tell or work out if they fall within its scope. As Ms Coll indicates, *“It will be straightforward for a GMS Device user to work out whether they are in the Proposed Class, by simply checking their purchase history and Google Play Store country within their Play Store app or registered Google account(s) online. In fact, I have easily made that check myself on my own GMS Device ”*.²⁵¹
199. Furthermore, these Claims are brought against the Proposed Defendants, members of the Google undertaking, which only stretch back to 2015. It is envisaged that Google should hold customer records relevant to the Claims.

²⁵¹ Coll 1, para 42.

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

200. 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))

201. 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 19.5 million Proposed Class Members: see Holt 1, para 10.3.3. The PCR envisages that Google will be able to provide a precise estimate of the class size.

C. Eligibility for collective proceedings

202. 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))

203. Paras 196-199 above are repeated.

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

204. 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.

205. 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.²⁵² In the present case, the main issues are as follows:

- a. The definition of the relevant economic markets.

²⁵² 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 price when making Relevant Purchases than they would have done absent the infringements and, if so, the aggregate loss suffered by the Proposed Class Members.
 - e. The rate and duration of the Proposed Class Members' entitlement to pre-judgment interest.²⁵³
206. 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 Proposed Class.
207. Each of these issues would require to be resolved if individual Proposed Class Members were separately to litigate their claims on an individual basis.²⁵⁴ 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))

208. 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.²⁵⁵ 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

²⁵³ As set out at para 178 above, simple interest is sought and therefore no individual consideration of the specific financing costs incurred by the Proposed Class Members will be required.

²⁵⁴ See *Merricks*, para 55.

²⁵⁵ See *Merricks*, para 62.

the multi-factorial balancing exercise, which the Tribunal must conduct, each weighs in favour of the matters being suitable for collective proceedings.²⁵⁶

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

209. 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 GBP14 and GBP39 excluding interest, and GBP17 and GBP47 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))

210. The benefits of continuing the collective proceedings outweigh any costs to the parties. While there are inevitably costs associated with bringing proceedings and administering claims on behalf of a class of 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 GBP 263m and GBP 752m 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.

211. Moreover, as outlined in Coll 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 [Tab 8] and ATE Policy [Tab 9].

²⁵⁶ See *Merricks*, para 64.

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

212. 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))

213. 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.

214. As set out at para 201 above, the Proposed Class consists of approximately 19.5 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 197 above.

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

215. The Claims are also suitable for an aggregate award of damages, as a practical and proportionate method of assessing damages in collective proceedings.²⁵⁷

216. At para 176 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.

217. However, it is notable that in this case it may be possible to refine that estimate, including on the basis of the Proposed Defendants’ records²⁵⁸ (it is possible, for

²⁵⁷ Guide, para 6.78.

²⁵⁸ As envisioned in para 6.78 of the Guide.

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

218. As to distribution, the fairest method is likely to be ascertainable after the size of the Proposed Class and the amount of aggregate damages are determined, and consideration at the certification stage is liable to be premature.²⁵⁹ 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.²⁶⁰

Alternative dispute resolution (Rule 79(2)(g))

219. 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 envisaged that such resolution is likely to be possible.

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

220. 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.

Strength of the claims (Rule 79(3)(a))

221. 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 established categories of abuse of dominance. Competition authorities in multiple jurisdictions including the UK, Australia, and the United States are currently investigating Google in respect of conduct regarding the Play Store, and private litigants are seeking damages and other remedies for the unlawful and supra-competitive charges imposed by Google. The President of the Tribunal has

²⁵⁹ *Merricks*, paras 77 and 80.

²⁶⁰ See *Merricks*, para 58.

described the allegations levelled by Epic Games against Google in this jurisdiction, which are similar in a number of respects to the allegations made in this application, as “*readily arguable*”.²⁶¹

222. 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)).²⁶²

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

223. 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 GMS Device users, primarily consumers.²⁶³ As the PCR 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.²⁶⁴ Collective consumer claims of this size are precisely the type of proceedings for which the opt-out procedure was introduced.²⁶⁵

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

IX. RELIEF

225. The PCR claims:

²⁶¹ *Epic Games, Inc and others v Apple Inc and others* [2021] CAT 4.

²⁶² Coll 1, para 7.

²⁶³ 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.

²⁶⁴ Coll 1, para 51.

²⁶⁵ 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 GBP 40 or GBP 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.

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

HAUSFELD & CO LLP

Amended on 13 September 2022

Statement of truth

I believe that the facts stated in this Amended Claim Form 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.



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The PCR, Elizabeth Coll

~~28 July 2021~~ 13 September 2022