



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1731/7/7/25

BETWEEN :

ALEXANDER WOLFSON

Applicant /
Proposed Class Representative

- v -

- (1) **MICROSOFT CORPORATION**
(2) **MICROSOFT LIMITED**
(3) **MICROSOFT IRELAND OPERATIONS LIMITED**

(together “Microsoft”)
Respondents /
Proposed Defendants

REASONED ORDER (SERVICE OUT OF THE JURISDICTION)

UPON the Proposed Class Representative’s application for a collective proceedings order (the “**CPO Application**”) pursuant to section 47B of the Competition Act 1998 and Rule 75 of the Competition Appeal Tribunal Rules 2015

UPON the Proposed Class Representative’s application dated 12 May 2025 pursuant to Rule 31 (2) of the Competition Appeal Tribunal Rules 2015 (the “Rules”) for permission to serve the CPO Application on the First and Third Proposed Defendants out of the jurisdiction (the “**Service Out Application**”)

AND UPON reading the first witness statement of Kathryn Louise Pollock made on behalf of the Proposed Class Representative in support of the Service Out Application and the accompanying exhibit

IT IS ORDERED THAT:

1. The Proposed Class Representative (“**the PCR**”) has permission to serve the CPO Application and the Service Out Application and supporting documentation out of the jurisdiction on:
 - (a) the First Proposed Defendant (“**Microsoft US**”), whose registered address is 1 Microsoft Way, Redmond, WA 98052-8300, USA and whose address for service is understood to be Corporation Service Company, 300 Deschutes Way SW STE 208 MC-CSC1, Tumwater, WA 9850, USA; and
 - (b) the Third Proposed Defendant (“**Microsoft Ireland**”), whose registered address is 70 Sir John Rogerson's Quay, Dublin 2, Dublin, D02R296 Ireland.
2. Microsoft US has 22 days after service on them of the CPO Application in which to respond by filing an acknowledgment of service.
3. Microsoft Ireland has 21 days after service on them of the CPO Application in which to respond by filing an acknowledgment of service.
4. Microsoft US and/or Microsoft Ireland may apply to have this order set aside or varied but must make any such application no later than the latest date by which they may dispute the Tribunal’s jurisdiction as set out under Rule 34.
5. The costs of the application are reserved.

REASONS

(1) The Proposed Defendants

1. The CPO Application is in respect of claims against the Proposed Defendants under section 47B of the Competition Act 1998 (the “**CA98**”).
2. The proposed class (the “**Proposed Class**” and “**Proposed Class Members**” or “**PCMs**”) comprises all UK-domiciled natural and legal persons who, between 1 October 2015 and the date of issue of the Claim Form (the “**Claim Period**”) made purchases in the UK of licences for certain Microsoft software products, as more specifically detailed in the Claim Form and Appendix A thereto.
3. Microsoft US is registered in Redmond, Washington, USA. It has regional operational centres (“**ROCs**”) that support its operations in different regions. The PCR alleges that Microsoft US has at all times set the terms and conditions on which Microsoft’s software is licensed globally.
4. Microsoft Ireland is a company registered in the Republic of Ireland which is majority-owned by Microsoft US. It is a ROC which supports Microsoft US’s operations in Europe, the Middle East and Africa. As one of its functions as a ROC, Microsoft Ireland is the licensing entity used for the purposes of licensing Microsoft’s software in the UK and the EEA.
5. Microsoft UK is a private limited company registered in England & Wales which is also majority-owned by Microsoft US.
6. The PCR alleges that the Proposed Defendants, collectively referred to as “**Microsoft**”, together constitute a single undertaking for the purposes of the Chapter II Prohibition and Article 102 TFEU.

(2) Proceedings taking place in England

7. The proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Rules. This is on the basis that:

- (a) the PCR and Microsoft UK are based in England;
 - (b) it is expected that most members of the proposed class will be domiciled in England and Wales;
 - (c) the applicable law should be the law of England and Wales, by virtue of the application of Article 6(3)(a) of *Regulation (EC) No 864/2007* of 11 July 2007 (“**Rome II**”) and, after 11pm on 31 January 2020, the retained elements of Rome II.
8. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

(3) Service out of the jurisdiction

9. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, the application must satisfy the following requirements:
- (a) There is a serious issue to be tried on the merits of the claim (i.e. a real as opposed to a fanciful prospect of success).
 - (b) There is a good arguable case that the claim falls within one of the paragraphs or “gateways” set out in CPR Practice Direction 6B at paragraph 3.1. “Good arguable case” means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon. Insofar as this involves an issue of fact, the claimant must supply a plausible evidential basis for the application of the gateway.
 - (c) In all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

(4) The claim

10. By the collective proceedings claim form, the PCR seeks to commence opt-out collective proceedings under section 47B of the Competition Act 1998 (the “**Act**”). The claims which the PCR seeks to bring are for loss and damage caused by Apple’s breach of statutory duty by its infringements of Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) and section 18 of the Act.
11. Ms Pollock’s witness statement explains that Microsoft’s activities include selling new perpetual licences and subscriptions for its software products. In return for a one-off payment, perpetual licences (“**PLs**”) give the user the right to use the licensed product for an unlimited period. In contrast, under Microsoft’s cloud-based subscription service – originally called Office 365 and now called Microsoft 365 Copilot - users pay periodic subscription fees to Microsoft in exchange for the right to use specific software products for the period of the subscription (“**SLs**”). It is also possible to purchase pre-owned perpetual licences (“**POLs**”) for Microsoft’s products.
12. There are a number of companies that specialise in the sale and purchase of POLs for Microsoft products (known in the industry as “**POL Resellers**”). To incentivise customers to switch from PLs to SLs, in or around August 2014 Microsoft introduced a campaign called “**From SA**” (which is shorthand for ‘from Software Assurance’) that entitled eligible customers with PLs to discounted subscription prices for SLs. Customers that had previously purchased PLs and moved to SLs would have had no need for their PLs and could in principle have resold them (for example, to a POL Reseller).
13. The case advanced by the PCR is that that since at least 1 October 2015 – the date from which the Tribunal has jurisdiction to consider claims for damages - Microsoft engaged in a course of conduct that had the purpose and/or effect of limiting the number of POLs for Microsoft products that became available for resale (the “**Infringing Conduct**”). The Infringing Conduct is alleged to have consisted of the following:
 - (a) Microsoft offered bespoke terms to some existing customers, giving them a discount to migrate to SLs in return for them agreeing not to resell their existing PLs;

- (b) From 1 May 2020, Microsoft modified its From SA subscription terms by adding an eligibility condition that applied from that date in respect of all customers who wished to migrate to SLs. The condition provided that customers would be entitled to receive a discount for SLs on condition they agreed to retain their PLs throughout the customer's subscription period. The condition applied until June 2021; and
 - (c) Microsoft engaged in conduct, including deployment of legal threats, aimed at dissuading some customers from selling surplus PLs to third parties.
- 14. The PCR alleges that the Infringing Conduct was designed to and/or did in fact suppress the competitive constraint posed by POLs to the sale of new Microsoft PLs and SLs (collectively "**New Licences**"). In particular, the PCR contends that the Infringing Conduct substantially limited the supply of POLs for resale, and thereby:
 - (a) impeded the ability of PCMs to access POLs as a lower-priced alternative to purchasing New Licences; and
 - (b) undermined a significant competitive constraint on Microsoft's pricing of New Licences, meaning that Microsoft could charge more for PLs and SLs than it would have done but for the Infringing Conduct.
- 15. The PCR alleges that the Infringing Conduct has caused the Proposed Class to suffer loss and damage in that:
 - (a) PCMs paid higher prices for POLs and New Licences than they would have paid absent the Infringing Conduct;
 - (b) PCMs acquired fewer POLs and more New Licences than they would have done absent the Infringing Conduct; and
 - (c) PCMs sold fewer POLs than they would have sold absent the Infringing Conduct.
- 16. The PCR contends that, for the reasons set out in detail in the Claim Form, the Infringing Conduct constitutes an abuse by Microsoft of its dominant position in the relevant markets, those markets comprising:

- (a) an EEA wide market for operating systems running on desktop computers, laptops, notebooks, and certain tablets (“PCs”) that use the same operating systems as desktop computers, laptops or notebooks;
 - (b) an EEA wide market for PC productivity suites; and
 - (c) a possible EEA wide market for Client Access Licences (“CALs”).
17. The PCR’s case is that the rules for determining the law applicable to the Claim are set out in:
- (a) Rome II, which applies from the start of the Claim Period up to 11pm on 31 December 2020 (known as IP Completion Day) (the “**Pre-Brexit Period**”); and
 - (b) Rome II, as amended by s.11 of the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019* (SI 2019/834) (“**UK Rome II**”), which applies from the end of the Pre- Brexit Period to the date of the Claim Form (the “**Post-Brexit Period**”).
18. The basic, default rule is contained in Article 6(3)(a) of Rome II and UK Rome II, which provides that the law applicable to a tort arising from a restriction of competition is the law of the country where the market is affected. The PCR alleges that the Infringing Conduct had the object and/or effect of preventing, restricting or distorting competition in the UK, in particular by preventing, restricting or distorting the development of a market for POLs for Microsoft’s software products, and thereby restricting the competitive constraint that POLs were able to exert on New Licences. Therefore, the market or markets which the PCR alleges were affected by the Infringing Conduct are in the UK, making English law applicable to the Claims. On that basis, the PCR alleges that in the Pre-Brexit Period the Infringing Conduct breached Article 102 TFEU and the Chapter II Prohibition; and that in the Post-Brexit Period the Infringing Conduct breached the Chapter II Prohibition.

(5) Serious issue to be tried

19. I am satisfied, on the basis of the matters set out in Ms Pollock’s witness statement and the CPO Application, that there is a serious issue to be tried on the merits of the claim. The report of the PCR’s expert economist, Dr Pinar Bagci, includes a detailed analysis

of the relevant markets, Microsoft's dominance, Microsoft's alleged anticompetitive conduct and the quantification of aggregate damages. This analysis supports the PCR's case and has set out a plausible methodology for establishing class-wide loss on an aggregate basis. Although that methodology (a simulation model) is not the approach which has conventionally been used to calculate damages (which would be a comparator approach), Dr Bagci explains her reasons for considering that a conventional approach would not be optimal in the circumstances of this case. She considers that a simulation model is appropriate in the circumstances, and she explains that it is an approach which she considers offers a realistic prospect of establishing loss on a class-wide basis.

20. I consider that there is a serious issue to be tried as to whether each of the Proposed Defendants was party to the Infringing Conduct, and/or implemented it. The PCR's case is as follows:

- (a) Microsoft US has at all times set the terms and conditions on which Microsoft's software is licensed globally. During the Claim Period, the terms and conditions contained the provisions which the PCR alleges constitute part of the Infringing Conduct. Microsoft US accordingly developed, or at least was party to, the strategy which was part of the Infringing Conduct.
- (b) Microsoft Ireland has negotiated and/or been party to software licensing agreements, for the use of Microsoft software in the UK, that contain the terms and conditions which the PCR alleges constitute part of the Infringing Conduct. Microsoft Ireland also participated in the conduct which the PCR alleges constitutes part of the Infringing Conduct. Microsoft Ireland also developed, or at least was party to, the strategy which was also part of the Infringing Conduct.
- (c) Microsoft UK, the anchor defendant for the purposes of the Necessary and Proper Party Gateway, has negotiated software licensing agreements, for the use of Microsoft software in the UK, that contain the terms and conditions which the PCR alleges constitute part of the Infringing Conduct. It also participated in the conduct which the PCR alleges constitutes part of the Infringing Conduct.

21. My conclusion that the PCR's case gives rise to a serious issue to be tried is supported by the decision of Nicklin J in the case of *JJH Enterprises Limited (trading as*

ValueLicensing) v Microsoft Corporation and Others (Case No.: 1570/5/7/22 (T)) (“**the VL Proceedings**”). In the VL Proceedings, the claimant (“VL”) is pursuing a claim against the same defendants as the Proposed Defendants in the current case alleging an abuse of dominance based on the same alleged conduct as that alleged in the CPO Application. The main distinction between the two sets of proceedings is that VL is a POL Reseller and therefore a supplier of Microsoft’s software at a different level of the supply chain. VL claims that it lost additional sales and profits as a result of Microsoft’s conduct, whereas the claims in the present case are brought on behalf of the ultimate consumers of Microsoft’s software.

22. In the VL Proceedings, Microsoft UK applied for strike out/summary judgment of the claim against it and Microsoft US and Microsoft Ireland sought to set aside permission to serve out of the jurisdiction on the basis that they were not necessary and proper parties. All the applications were dismissed by Mr Justice Picken in a judgment dated 14 April 2022 ([2022] EWHC 929 (Comm)). Microsoft US and Microsoft Ireland did not dispute that there was a serious issue to be tried as against them and the three Microsoft entities did not dispute that there was a serious issue to be tried as to whether they were all part of the same undertaking for competition law purposes. Picken J rejected Microsoft UK’s complaint that there was no serious issue to be tried as against it.
23. Ms Pollock drew the Tribunal’s attention, pursuant to the PCR’s duty of full and frank disclosure, to certain additional arguments raised in Microsoft’s defence to VL’s claim, some or all of which Microsoft may wish to rely on in defence of these claims. These include: a dispute as to the appropriate market definition; a denial that it held a dominant position; a denial that there was any impediment to competition and in any event a contention that its conduct was objectively justified; and a denial that it engaged in any strategy or campaign to stifle competition. Microsoft has also recently amended its defence to argue that:
 - (a) section 18 of the *Copyright, Designs and Patents Act 1988* and Article 4(2) of *Directive 2009/24/EC* do not confer an absolute entitlement to resell software licences; and further or alternatively

- (b) the specific features of the Proposed Defendants' business and of Windows and/or Office and/or CALs are such that they preclude any lawful right or entitlement to resell them.

The latter argument includes the contentions that (i) CALs are not within the scope of *Directive 2009/24/EC*, so the right of resale does not apply to them; and (ii) multi-user licences for Windows and/or Office cannot lawfully be subdivided and resold.

24. Ms Pollock also drew attention to certain additional arguments that Microsoft might wish to turn to in relation not some but not all of the claims:

- (a) *Actionable losses*: Microsoft might wish to argue that, in some respect, a subset of the PCMs have not suffered actionable losses. For example, Microsoft might wish to argue that there were some PCMs who did sell their PLs (in spite of Microsoft's attempts to stop them from doing so) and that some of those PCMs made enough profit on those sales that it was sufficient to wipe out any losses that they suffered on their purchases of New Licences.
- (b) *Limitation*: unlike VL's claim, the claims in these proceedings relate to the period from 1 October 2015 onwards. The PCR relies on section 32 of the Limitation Act 1980 on the basis that the abuse was deliberately concealed by Microsoft from the PCMs, and/or the wrongs complained of constituted deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered for some time. Microsoft may dispute this reliance, if there are matters that it wishes to contend were sufficient to draw the alleged Infringing Conduct to PCMs' attention

25. I am satisfied, on the basis of the material before the Tribunal, that these are matters for determination at trial, with the benefit of factual and expert evidence, and/or full and detailed submissions, rather than grounds for refusing the PCR permission to serve the CPO Application out of the jurisdiction.

(6) Good arguable case as to jurisdictional gateway

(i) Gateway 3 – the Necessary or Proper Party Gateway

26. The PCR relies on CPR PD6B 3.1(3) which applies where a claim is made against a defendant on whom the claim form has been or will be served and:

(a) there is between the claimant and the defendant a real issue which it is reasonable for the Tribunal to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

27. Microsoft UK is incorporated in England and Wales and has its registered address in England and can be served within the jurisdiction of England and Wales as of right. Microsoft UK's legal representatives, WFG LLP, have confirmed that they have instructions to accept service on behalf of Microsoft UK. The PCR intends to serve the Claim Form on Microsoft UK. I consider, for reasons given above, that that the Claims raise a serious issue to be tried against Microsoft UK.

28. I am satisfied that the PCR has established a good arguable case that the claims against Microsoft US and Microsoft Ireland fall within Gateway 3. This is on the basis that they are alleged to have been parties to the same Infringing Conduct as Microsoft UK and/or to have participated in the Infringing Conduct that Microsoft UK implemented and/or to have been part of the same undertaking as Microsoft UK. The claims against them are closely connected with the claims against Microsoft UK. It would be inefficient, expensive, and there would be a risk of inconsistent outcomes in respect of the same issues if duplicative proceedings were to take place in other jurisdictions.

29. Ms Pollock draws attention to the fact that in the VL Proceedings, Microsoft US and Microsoft Ireland did not dispute that they were necessary and proper parties to the VL Claims in the event that the claims against Microsoft UK proceeded.

(ii) Gateway 9 – the Tort Gateway

30. Gateway 9 applies where a claim is made in tort and:

- (a) damage was sustained, or will be sustained, within the jurisdiction;
- (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
- (c) the claim is governed by the law of England and Wales.

31. The claims in these proceedings are for abuse of a dominant position contrary to section 18 of the Act and article 102 TFEU. They are therefore claims in tort within the meaning of Gateway 9: *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat), [2018] FSR 27. The class definition requires members of the proposed class to be UK-domiciled and to have purchased Relevant Licences (as defined in the Claim Form) in the UK during the Claim Period. It follows that, on the basis of the facts alleged, damage has been sustained by the PCMs within the jurisdiction for the purposes of limb (a) of Gateway 9.

32. Pursuant to limb (b) of Gateway 9, the damage which is alleged to have been sustained resulted from an act committed within the jurisdiction. The PCR alleges that Microsoft UK has been knowingly engaged in the development and/or implementation of the Infringing Conduct and more generally the Microsoft undertaking has developed and/or implemented the Infringing Conduct in the UK in order to prevent or restrict customers in the UK from selling their PLs or purchasing POLs. On this footing, I am satisfied that the PCR has established a good arguable case that at least some of the alleged anticompetitive conduct was committed within the jurisdiction.

33. I am satisfied, on the basis of the facts and matters set out above, that the PCR has established a good arguable case that the claim in question is governed by the law of England and Wales for the purposes of limb (c) of Gateway 9.

(7) Forum

34. I am satisfied, on the basis of the following factors, that England and Wales is clearly or distinctly the appropriate forum in which to bring the claims:

- (a) To the extent that the claims pass through gateway 9(c), the governing law is the law of England and Wales.

- (b) The PCR is habitually resident in England and Wales;
- (c) Most of the PCMs will be domiciled in England and Wales;
- (d) The case is concerned with abuse of a dominant position in a UK market;
- (e) The losses caused by Microsoft's conduct were suffered in the UK as a result of purchases of licences in the UK; and
- (f) One of the Proposed Defendants, Microsoft UK, is a company registered in England and Wales. The claims will proceed against Microsoft UK, as of right. It would be desirable to avoid the risk of proceedings against the Proposed Defendants being fragmented, with the duplication and risk of irreconcilable judgments that that leads to;
- (g) Witnesses that may be called on behalf of the class are likely to be (or to be related to) proposed class members and so are highly likely to be present in this jurisdiction;
- (h) Documentary evidence presented on behalf of the class is likely to be in the possession of proposed class members and so is likely to be present in this jurisdiction;
- (i) The PCR's legal representatives and experts are all based in the UK.

35. This conclusion is consistent with the decision of Picken J in the VL Proceedings referred to above in which he rejected various arguments raised by Microsoft in objecting to the suitability of England and Wales as a forum, holding that was “*very clearly the most appropriate forum*” for proceedings against Microsoft US and Microsoft Ireland.

Andrew Lenon KC
Chair of the Competition Appeal Tribunal

Made: 16 June 2025
Drawn: 16 June 2025