IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1696/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11th-12th December 2025

Before:

The Honourable Mr Justice Johnson
John Davies
Lesley Farrell
(Sitting as a Tribunal in England and Wales)

BETWEEN:

DR MARIA LUISA STASI

Applicant

v

MICROSOFT CORPORATION AND OTHERS

Respondent

A P P E A R AN C E S

Sarah Ford KC, Robert Marven KC and Ben Lewy (instructed by Scott+Scott UK LLP) on behalf of Dr Maria Luisa Stasi
Brian Kennelly KC and Aislinn Kelly-Lyth (instructed by Linklaters LLP) on behalf of the Microsoft Corporation and Others

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Thursday, 11th December 2025

(10.30 am)

MR JUSTICE ADAM JOHNSON: Can I start with the customary warning? Some of you are joining us livestream on our website. So, I must start, therefore, with the customary warning.

An official recording is being made, and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Very Good. Ms Ford. Thank you.

Application by APPLICANT

MS FORD: Mr Chair, members of the Tribunal, I appear with Mr Marven, KC, and Mr Lewy for the proposed class representative. Mr Kennelly appears with Ms Aislinn Kelly-Lyth for Microsoft. This is my application for a Collective Proceedings Order in respect of proposed collective proceedings against Microsoft.

The Tribunal may have seen from the parties' agreed agenda that there are essentially three matters in dispute between the parties. There is the question of the blueprint to trial, the question of whether the collective proceedings should be opt-in or opt-out and questions of funding.

In terms of the division of labour on this side of the Tribunal, I will be addressing the blueprint to trial and the opt-in, opt-out question. Mr Marven KC will then be addressing matters concerning funding.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: By way of a road map to my submissions, I propose to start with a summary of the conduct with which these proposed collective proceedings are

concerned. I will then show the Tribunal some of the regulatory proceedings that we say lend support to the allegations that we are making.

Thirdly, I will outline how we say the conduct in question should be characterised and tested for and the reason for that is because Microsoft seek to suggest that it should be analysed and tested as a margin squeeze and that is not our pleaded case.

Fourthly, I will show the Tribunal the authorities on what is required by way of a blueprint to trial, and fifthly I will take the Tribunal through the relevant parts of our expert economic evidence and show how we say these allegations can be assessed.

I will then move on to address opt-in and opt-out and then hand over to Mr Marven.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: Starting with our explanation of, in a nutshell, what we say this case is about, there are two relevant markets. The first is the market for paid server operating systems. An operating system is a piece of software that controls a computer's basic functions and provides users with a user interface. There are operating systems which run on desktop computers and operating systems which run on servers. We are, in this case, concerned with server operating systems.

Microsoft's server operating system is called Windows Server and also in the same market are paid versions of the Linux based operating systems. The reference in our proposed market definition to paid server operating systems excludes open-source versions of Linux, for which the user doesn't actually have to pay. That's the first market we say is relevant.

The second relevant market is the market for Cloud Computing Services. Cloud Computing refers to the delivery of computing services, for example, servers, storage, databases, networking, software, analytics over the internet.

Microsoft is a provider of Cloud Computing Services. It does so through its platform Microsoft Azure. Microsoft competes with two other hyper-scalers, Amazon Web

Services and Google Cloud.

Microsoft refers to Amazon and Google, together with a third cloud services provider, Alibaba Cloud, as Listed Providers and that's a term which appears in our class definition.

There are then in the market also a large number of smaller cloud service providers and those are referred to as Non-listed Providers.

It is the class representative's case that Microsoft has a dominant position in the market for paid server operating systems in the United Kingdom in respect of its operating system Windows Server. We say Microsoft has abused and continues to abuse its dominant position by seeking to leverage its dominant position in relation to Windows Server in order to strengthen its position in the market for Cloud Computing Services.

A summary of our case on abuse is pleaded in the collective proceedings Claim Form starting at paragraph 5. I would ask, please, if the Tribunal could turn that up. It is in volume 1 of the bundle, tab B3 starting at page 9, please.

We identify two licensing abuses. The first is what we have termed the “SPLA Pricing Abuse”. SPLA refers to Microsoft's Service Provider Licence Agreements. Microsoft operates a programme which allows rival cloud service providers such as Amazon and Google to resell Windows Server to their own customers. Those resellers are known as service providers and the service providers enter into a Service Provider Licence Agreement with Microsoft SPLA.

The SPLA Pricing Abuse arises, we say, because the wholesale prices that Microsoft charges for Windows Server under the SPLA agreements are higher than the prices for equivalent licences charged to users of Microsoft Azure. We say the consequence is to inflate the prices of Windows Server on rival Clouds, such as Amazon and Google, and make it cheaper for users of Windows Server to operate it on Microsoft Azure

instead.

That is the abuse that we have summarised at paragraph 5.1 in the collective proceedings Claim Form.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: The second abuse, paragraph 5.2, is what we have termed the “Re-licensing Abuse”. That arises because Microsoft allows a customer that has an on-premises licence to use Windows Server to operate that software on Microsoft Azure without having to pay any further licensing fees.

By way of explanation of the terminology that we will see in the class definition and in the evidence, the customer purchases a bundle of rights called Software Assurance and one of the rights is called Azure Hybrid Benefit. It is Azure Hybrid Benefit that permits the customer to use Windows Server on Microsoft Azure without paying further licencing fees. And in Professor Wickelgren's expert report, he sometimes refers to that as "Bring your own licence" or "BYOL".

However, the customer is not permitted to use their existing on-premises licence if they want to operate Windows Server on a rival Cloud. Instead, the customer has to pay a substantial re-licensing fee to use Windows Server on competing Cloud providers. That is what, in our submission, gives rise to the Re-licensing Abuse.

It is our case that the two abuses together, the SPLA Pricing Abuse and the Re-licensing Abuse, form part of a coherent abusive strategy to leverage Microsoft's dominant position in relation to Windows Server in order to strengthen its position in the market for Cloud Computing Services.

That strategy is not limited to pricing conduct. It also involves what we have termed the Quality Abuses and those are what we have pleaded starting at paragraph 7 in our collective proceedings Claim Form.

It is the proposed class representative's case that Microsoft degrades the user

experience of Windows Server when it's used on other Clouds, and that includes refusing to supply certain of its products via its SPLAs to rival Cloud providers, including Microsoft 365, Windows Desktop 10/11 and Visual Studio, and it reserves newer features for Microsoft Azure customers. It also limits security updates.

As the Tribunal will appreciate, it is difficult to quantify the impact of the Quality Abuses on members of the class in monetary terms. It is for that reason that we have made clear in our pleading that we have not included the Quality Abuses in the quantum of the claim.

However, that doesn't mean that they are irrelevant. We say that they remain highly relevant, because they are part of a coherent strategy as a whole, and we say that they are relevant to the anti-competitive intent which underlies that strategy.

They suggest, we would say, that what's going on here is not simply a vertically integrated undertaking seeking to achieve efficiencies. It is, we say, a coherent strategy.

One of the relevant features of the market for Cloud Computing Services is that it is sticky. What I mean by that is that once a customer has chosen a Cloud computing platform and it has migrated its computing from on-premises into the Cloud, it will find it difficult to switch to an alternative provider of cloud services even if it would be cheaper for it to do so.

The class that we say has been harmed by Microsoft's conduct, and on behalf of which these proposed collective proceedings are brought, are the users of Listed Providers' rival Clouds, who have chosen not to switch to Microsoft Azure. They continue to operate Windows Server on the Listed Providers and as a consequence, we say, they pay an overcharge for doing so.

The proposed class is defined at paragraphs 50 to 51 of our Claim Form.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: The Tribunal will have seen there is a class and there is a sub-class. The class is concerned with the victims of the SPLA Pricing Abuse. So, it is defined as:

"All organisations, other than Excluded Organisations, which during the claim period obtained a licence to use Windows Server from a Listed Provider."

There is then a sub-class which comprises those members of the class who were victims of the Re-licensing Abuse in that they held an on-premises licence with software assurance, but they were then charged re-licensing fees to use Windows Server on a Rival Cloud. That's defined as:

"Any class member who held an on-premises licence with software assurance to use Windows Server during a sub-class claim period."

There is no double recovery as between the class and the sub-class. The reason for that is that the class as a whole has suffered an overcharge on what they pay to licence Windows Server, but the sub-class has had to pay the entirety of the re-licensing fee rather than simply the overcharge. So, the sub-class will recover the re-licensing fee as a whole, but it won't recover again in respect of the overcharge part of that re-licensing fee.

That is the conduct with which these proposed proceedings are concerned. The conduct we have identified has been the subject of regulatory scrutiny both in this country and abroad. We have pleaded that in our Claim Form, paragraphs 186 to 195. That's on page 65 of the bundle. What we have set out are relevant complaints or regulatory investigations which have taken place before the European Commission, in Japan, in the Netherlands, in France, in Germany and in the United States.

To be clear, this is and remains a standalone claim in the sense that there is no binding regulatory decision that we rely on, but we say that these regulatory materials feed into the matters in dispute between the parties in a number of respects.

Firstly, in our submission they provide powerful support for the class representative's

allegations that Microsoft's conduct is abusive.

Secondly, we point to aspects of the methodology that has been used to investigate Microsoft's conduct, in particular, by the CMA, and we say that that provides support for the class representative's own proposed approach to the methodology. We say that the CMA's approach was inconsistent with Microsoft's case that its conduct can only be evaluated by means of a price cost test.

Thirdly, Microsoft has settled a complaint made to the European Commission and it has changed its conduct post-settlement to enable -- to facilitate that -- put into practice that settlement. We say that that enables the class representative's expert to analyse a counterfactual scenario where certain of the discriminatory conduct, of which we complain, has been ended in respect of certain smaller cloud services providers.

Finally, we say that these regulatory materials are relevant to the opt-in, opt-out question, both in terms of demonstrating the strength of the claims and, we would say, in terms of demonstrating why opt-in would not be a practical possibility.

I will show the Tribunal a couple of examples starting, please, with the CMA market investigation. This is in volume 4 of the bundle. It is E, 27, page 1972. Sorry. Starts at 1954, please. What the Tribunal should have there is the CMA's Final Report, "Market investigation into cloud infrastructure services dated 31st July 2025".

If the Tribunal turns, please, to page 1965, we can see in paragraph 1 of the summary section an explanation of what the CMA is doing in this report. It explains:

"Our task in this investigation has been to decide whether competition is working well in cloud services markets, and if it is not, to decide what action should be taken to remedy any harms to competition. Our final decision is that competition is not working well, so we have made recommendations to address this."

If the Tribunal turns on, please, to page 1972, the CMA there, paragraphs 1.5 to 1.7,

gives a brief explanation of the nature and purpose of market investigations generally, and explains that:

"A market investigation allows the CMA the opportunity to assess whether competition in a market is working effectively with the focus on the functioning of the market as a whole rather than on a single aspect of it or the conduct of a particular firm within it."

It explains:

"Where a market investigation reference is made, Part 4 of the Enterprise Act empowers the CMA to examine whether any relevant feature of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom. These powers enable the CMA to determine whether there are market-wide features, or a combination of features, that have an adverse effect on competition (AEC)."

We will see in the relevant findings the CMA makes, it refers to an adverse effect on competition.

If the Tribunal turns over, please, to paragraph 1.7, the CMA is careful to explain that the process it's engaging in is:

"... 'investigative and inquisitorial, not accusatorial' so involvement in a market investigation or being subject to remedies does not imply that participants have infringed the law or are suspected of wrongdoing."

So, the CMA is not in this document purporting to make any findings of infringement, but, of course, we say it does not mean that the conduct in question is not capable of amounting to an infringement and, insofar as the CMA has concluded that Microsoft's conduct has reduced competition in the relevant market, in our submission it is strongly supportive of the proposed class representative's allegation of abusive conduct.

Chapter 7 of this document is the chapter where the CMA considers Microsoft's licensing practices. The summary of their assessment and their conclusions begins

at page 2512. Paragraph 7.750, as to market power under the heading "Ability", we see the CMA saying:

"Microsoft has significant market power in relation to each of Windows Server, SQL Server, Windows 10/11, Visual Studio and its productivity suites. Microsoft has moderate to high market shares in all of these products and customers are generally unable or unwilling to switch away from using this software."

So, two points to emphasise about this paragraph. Firstly, the CMA's finding supports the class representative's case that Microsoft has a dominant position in relation to Windows Server and, secondly, it finds that customers are generally unable or unwilling to switch away from using that software.

Under the heading "Incentive", page 2514, we see the CMA's findings concerning Microsoft's differential pricing. So, at 7.760, the CMA finds:

"Microsoft sets a high input price for Amazon and Google for hosting Windows Server and SQL Server."

Then, at 7.761:

"The price that Amazon and Google face for hosting Windows and SQL Server has increased substantially since 2018. The input cost for Amazon and Google is higher than the customer-facing price that Microsoft charges its own customers that qualify for Azure Hybrid Benefit to use Windows Server on Azure."

That in our submission provides support for the allegations we make about discriminatory pricing.

How is Microsoft able to do that? The CMA explains that at 7.762. It says:

"Many customers are unlikely to switch away from the relevant Microsoft software products to use other software on Amazon and Google. This means that the risk to Microsoft of losing software customers (and associated revenues) by raising Amazon and Google's cost is lower, so Microsoft has greater incentive to partially foreclose

them."

As to the effect of Microsoft's licensing practices, that's addressed at 7.766, over the page. Under the heading "Effect", the CMA says:

"We have considered whether Microsoft's licensing practices have the effect of reducing competition in cloud services markets by materially disadvantaging Amazon and Google, who consequently complete less effectively. This is not a binary consideration of whether Amazon and Google can complete but rather a consideration of whether they complete materially less effectively than they otherwise would and whether this harms competition in the relevant markets."

We do place a degree of emphasis on the fact that the CMA is saying the relevant enquiry is not a binary consideration of whether Amazon and Google can or can't compete. It is relevant to ask whether they compete materially less effectively than they otherwise would and therefore harm the competition.

I emphasise that because, again, the class representative's approach accords in our submission with that of the CMA. We would say Microsoft's preferred approach is a much more binary enquiry.

MR JUSTICE ADAM JOHNSON: Just by way of clarification may I ask, going back to paragraph 7.762 -- you read this out -- the reference at the end to Microsoft having a greater incentive to partially foreclose, what should I understand "partial foreclosure" to refer to?

MS FORD: I will go on to show the Tribunal the discussion that the CMA includes about whether or not it should use a price cost test. What it indicates there is the difference between compete foreclosures and partial foreclosure. It is essentially an impact on competition which falls short of saying that they are unable to compete at all. It is very clear that the CMA considers that a partial foreclosure is problematic in competition terms. I will deal with that.

MR JUSTICE ADAM JOHNSON: Yes, please do.

MR DAVIES: So, what does that mean for the definition of foreclosures itself, just foreclosures without partial? Are you saying foreclosure is an inability to compete at all?

MS FORD: It is usually foreclosure from the market, essentially. So, an absolute foreclosure essentially involving a participant exiting a market. We will come on to see what the CMA specifically says about that in the context of ...

MR JUSTICE ADAM JOHNSON: Yes. Thank you.

MS FORD: I was about, I think, to show the Tribunal 7.767 --

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: -- which is where the CMA makes the finding that:

"Amazon and Google are being materially disadvantaged by Microsoft's licensing practices in relation to Windows Server and SQL Server. They pass through at least some of the input costs of Microsoft software, and customers generally perceive them to be more expensive than Microsoft."

The CMA equally makes a finding that customers' choice as between competing cloud providers was being influenced by Microsoft's licensing practice. That's at 7.769. What it says there is:

"Windows Server and SQL Server are used disproportionately on Azure compared to on Amazon and Google. We consider that the very large difference is at least partly because some customers' choice of cloud is influenced by Microsoft's licensing practices."

That's obviously recording the outcome of one of the analyses that the CMA conducted, which is to examine the proportion of customers that choose Windows Server or Microsoft Azure as compared to other providers. As I will come on to show the Tribunal, Professor Wickelgren also proposes to conduct that sort of analysis. The

CMA's findings when it did so were that some customers' choice of cloud is influenced by these licensing practices.

The CMA's conclusion is summarised at 7.775 and 7.776. It says:

"In summary, Microsoft's licensing practices have the effect of reducing competition in cloud services markets by materially disadvantaging Amazon and Google, who consequently compete less effectively."

Then under the heading "Conclusion":

"Considering all the evidence in the round, Microsoft's licensing practices are adversely impacting the competitiveness of Amazon and Google in the supply of cloud services, particularly in competing for customers that purchase cloud services which use the relevant Microsoft software as an input. As a result, Microsoft faces weaker competitive constraints from Amazon and Google, its most significant competitors, which is reducing competition in cloud services markets."

That is essentially the headline conclusion. I have indicated I would like to show the Tribunal the approach that the CMA took to Microsoft's submissions and, in particular, the suggestion that the CMA should be applying a price cost test. That analysis starts at 7.615, which is on page 2476.

MR JUSTICE ADAM JOHNSON: Sorry. Just give me the page again.

MS FORD: 2476.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: The analysis begins under the heading "Profit margins and mark-ups". They indicate:

"In this section we consider submissions by Microsoft, Amazon and Google on the profit margins that are available (or would be available) to Google and Amazon when supplying customers that use Windows Server and SQL Server on the cloud."

Microsoft's submission is summarised at 7.617. The CMA says:

"Microsoft submitted that the critical issue is whether Microsoft's prices are materially too high or rivals' margins too low. Microsoft further submitted that its analysis of the margins it would earn if it were subject to SPLA licensing costs is critical to our consideration of the adverse effect on competition, because it provides clear evidence that competitors can effectively compete across the market. It submitted that this is because the analysis shows that the margins Google and Amazon could earn are so high that on any reasonable threshold, they provide evidence of there being no adverse effect on competition."

So, that is what Microsoft was telling the CMA. The Tribunal will appreciate that there are obvious parallels with the submissions that are being made in these proceedings about why the class representative should adopt Microsoft's preferred methodology.

The CMA's position is then set out, starting at 7.620. It says:

"We consider that a material increase in input costs that is not common across all competitors is likely to lead to a material competitive disadvantage for those competitors that are affected, as long as the input is sufficiently important."

"Rivals' margins can be relevant evidence of partial foreclosure. However, they do not provide determinative evidence and should be interpreted in the round with other evidence. We set out our reasoning below."

They go on to explain at 7.622:

"If a rival that incurs a high input cost cannot make a profit supplying the relevant product (i.e., their margin is negative), this would be evidence in support of foreclosure. However, it does not follow that any positive margin would be inconsistent with foreclosure or that there is a particular margin threshold associated with foreclosure."

In other words, while we would generally expect foreclosure to result in a lowering of margins, a firm with positive margins may still be partially foreclosed.

That goes in my submission to the question the Tribunal was asking about the

distinction the CMA is drawing.

At 7.624 it goes on to explain that in its view this is not a bright line analysis. So, it says:

"... there is a range of positive margin levels ... at which foreclosure may be happening. We therefore do not consider it appropriate to define a bright line or a strict threshold for margins below which we would automatically find that rivals' ability to compete is materially affected and they consequently compete less effectively. However, as set out below, we find it informative to look at industry-wide margins as one factor to inform our assessment."

Then, at 7.625:

"More generally, we do not consider it necessary or appropriate to define a threshold or a benchmark in relation to each feature of the market ... let alone define them for particular elements of each feature."

In our submission again, as I will come on to show the Tribunal, this non-bright line approach, this consideration in the round, is entirely consistent with the approach the class representative proposes to take. What we see is that the CMA has actually expressly rejected the use of an as-efficient competitor test and that comes through from 7.633, over the page and footnote 2440. 7.633 is summarising Microsoft's submissions. It says:

"Microsoft submitted several sets of analyses (both before and after the publication of the PDR) setting out the margins it would earn if it were subject to the SPLA licensing costs it charges AWS and Google for Windows Server and SQL Server."

Then the footnote to that statement says:

"Microsoft's estimates of the margins it would earn if it were charged SPLA prices were put forward by Microsoft as the outcome of an as-efficient competitor test, aimed at establishing whether an equally efficient rival could profitably supply if faced with the

relevant input cost. We note that use of an as-efficient competitor test, which focuses on whether an as-efficient competitor earns a negative margin, is not provided for in our guidance and we do not consider that an application of an as-efficient competitor test is necessary or determinative for the statutory questions we must answer in the context of this market investigation. To the extent an as-efficient competitor test focuses on whether a rival is loss-making or not, it does not account for a rival being materially disadvantaged even while continuing to earn a positive margin. We note that this type of analysis can be used as a tool when assessing potential infringements of competition law but as noted above, we are not investigating whether the conduct in question infringes the Competition Act '98."

Two points about that. First, the CMA is making clear that it is not applying an as-efficient competitor test in assessing Microsoft's conduct, but, secondly, what Microsoft say in relation to this is "Oh, well, it is simply because they are applying a different statutory test. They are conducting a market investigation".

In our submission, the rationale comes through from the CMA's explanation as to why it is not a bright line test, and it is not sensible to purely look at an as-efficient competitor test applies equally when one is assessing whether conduct is abusive in the round. So, it is not determinative to say "This was a market investigation. You can disregard the approach".

You see similar points are made at 7.655. This is at the end of the passage of consideration, 2486. Under the heading "Conclusions on margins and mark-ups":

"Amazon and Google's current profit margins can be useful indicators but they are not determinative of partial foreclosure."

They say:

"... partial foreclosure could still be taking place despite positive margins being generated."

They also go on in the subsequent paragraph, 7.656, to explain that they perceive practical difficulties in interpreting margins in the particular context of the cloud services market, and the conclusion at 7.658 is:

"... despite the uncertainties and limitations of this analysis, the level of these estimated mark-ups and margins is consistent with partial foreclosure. We consider this finding below in the round with other evidence."

So, the takeaway in our submission from that, the CMA rightly does not consider a price cost test to be determinative. Margins are to be interpreted in the round with other evidence. In our submission that's entirely consistent with the methodology that we propose to take.

The CMA's decision on remedies is then set out in section 10 of this report starting at page 2561, please.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: The relevant passage is paragraph 10.3(b) on 2562:

"Remedy 2: a recommendation to the CMA Board to prioritise commencing an SMS "Strategic Market Status" investigation of Microsoft's digital activities in respect of cloud services using its Digital Markets Competition and Consumers Act powers, taking into account all relevant factors at the time, and if an SMS designation is made, to consider imposing appropriate interventions."

For the Tribunal's note there is a summary of the relevant powers, DMCC powers, at paragraphs 10.18 and following in this section.

What, in our submission, is particularly insightful is the CMA's rationale for not choosing to proceed by way of its Enterprise Act 2002 powers. It explains that starting at page 2585. The Tribunal should see the heading there "Microsoft Licensing Practices". At 10.94 they explain:

"We consider that in order to be effective a package of licensing remedies would need

to comprise a combination of rules-based and principle-based measures."

They identify three things that those could potentially include. The first is:

"An obligation on Microsoft to apply a fair, reasonable and non-discriminatory approach in relation to pricing its software products regardless of which cloud they are hosted on."

That is essentially addressing what we have termed the SPLA Pricing Abuse. The second potential element is:

"Restrictions on Microsoft's ability to favour its own cloud through licensing practices which grant unequal access to software products and product functionality depending on which cloud the software products are deployed on."

That, in our submission, is directed at what we have termed the Quality Abuses.

Then the third potential element:

"Changes to contractual licensing practices relating to the transfer and/or deployment by end customers of previously purchased software products on the cloud of their choice."

That, in our submission, is directed at what we have termed the Re-licensing Abuse.

10.97 identifies the risks that the CMA perceives in implementing these measures using their powers under the Enterprise Act 2002, and sub-paragraph (a), in our submission, is particularly relevant because the CMA is identifying what it perceives to be a risk of circumvention of its remedies. So, it says factors such as Microsoft's position of significant market power, the nature of the practices, the potential for change in Microsoft's software products or supply arrangements, and connections to wider elements of Microsoft's business in that it would be challenging to address the potential for circumvention without the ability to iteratively develop these measures.

Similarly in 10.98 they say -- they are referring to the possibility of a simpler form of remedy than they referred to in 10.98. They say:

"We do not consider this would be effective in addressing the adverse effect on competition we have found, and we consider that it would carry even higher circumvention risks than a comprehensive package of remedies. For example, a remedy implemented using our Enterprise Act 2002 powers which simply removed the concept of Listed Provider, and/or allowed customers to transfer their licences to any platform would not address:

"The variety of mechanisms through which Microsoft is able to directly and indirectly influence the pricing of its products;

"The variety of ways through which Microsoft would be able to respond, noting among other things that Microsoft is a vertically integrated provider which could be incentivised to implement a licence transfer in a way that favours its own business, for example, through direct or indirect pricing mechanisms; or.

"Future contractual changes ..."

That's the CMA's rationale for proceeding in the way it suggests it will.

The short point I make about that is that what is being described there is not narrow margin squeeze type conduct. What the CMA is perceiving is a coherent strategy of direct and indirect measures.

That is the position in relation to the CMA's Final Report. The US Federal Trade Commission has also indicated its intention to investigate Microsoft's licensing practices. The Tribunal will find that in volume 3 of the bundle.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: Tab E, 24, page 1939. What the Tribunal should have there is a Reuters article dated 12th March, 2025. It is entitled "Trump's FTC advances broad antitrust probe of Microsoft, Bloomberg News reports".

If we go over the page, it says:

"The FTC had last year opened a sweeping antitrust investigation into Microsoft,

including into its software licensing and cloud computing businesses."

The third paragraph says:

"The FTC is examining allegations that Microsoft is potentially abusing its market power in productivity software, such as by imposing punitive licensing terms to prevent customers from moving from its Azure cloud service to rival platforms."

The third --

MR DAVIES: Excuse me. What is productivity software?

MS FORD: I believe that Windows Server would fall within the software. I don't think a definition is provided in this article. I don't know if those behind me know. The point has been very fairly made that because a definition is not provided in the article, we are not in a position to confirm what is referred to by productivity software.

MR DAVIES: Thank you.

MS FORD: The third regulatory element that we refer to is the CISPE settlement. That's in the same volume of the bundle, tab 26 at page 1953. What the Tribunal should have there is a press release dated 18th July 2025. It is from an organisation called CISPE, which is the Cloud Infrastructure Service Providers in Europe. CISPE filed a complaint with the European Commission on 9th November 2022 alleging that Microsoft used its dominance in productivity software -- that term again -- to direct customers towards its own Azure cloud infrastructure.

On 18th July 2024 it was reported that Microsoft had reached a settlement with CISPE and this press release is summarising the details of that settlement. So, we see the first paragraph:

"The Cloud Infrastructure Services Providers in Europe, representing leading European cloud providers, has reached a landmark agreement with Microsoft that will further reform licensing terms for Microsoft software operating on CISPE member's European cloud infrastructure."

"Under the terms of this agreement, Microsoft will enable qualified CISPE members to offer Microsoft software to their customers on a pay-as-you-go basis via the CSP Hoster program -- with stronger privacy for customers of European cloud providers. This will produce pricing conditions more comparable to those of Microsoft's own platform, Azure."

The next paragraph then goes on to identify what are termed the "Key benefits of qualified CISPE members after our settlement with Microsoft".

The Tribunal will see there's a hyperlink there. The document that it is hyperlinked to is in volume 5 of the bundle, tab 72, page 2907 --

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: -- a document headed "Wins secured by CISPE". The first point made in this list of benefits is:

"Microsoft's CSP Hoster licensing program created to mitigate price discrimination between Azure direct sales and existing licensing programmes for CSPs in response to CISPE and individual members' complaints."

The second head:

"Bring your own licence of Microsoft software on European Cloud Service Providers' platforms: Flexible Virtualisation Benefit created by Microsoft in response to CISPE ..."

So, what appears to have happened is that Microsoft has ended some of its discriminatory conduct towards smaller Cloud providers, but if we go back to the original press release, so E, 26, 1953, what we see in the paragraph towards the bottom of the page that begins "Importantly", it says:

"... the program remains closed to hyperscale cloud providers designated by Microsoft as 'Listed Providers' ..."

So, there will be no changes to the terms offered to customers of Amazon and Google.

So, these proposed changes don't benefit the members of the proposed class.

Note also the third bullet point on this page "Customer Privacy Benefit". It says:

"CISPE members can now host Microsoft workloads as pay-as-you-go for their customers on independent European infrastructure without sharing customer details with Microsoft ..."

They go on to say:

"... addressing a core concern raised by CISPE."

As to what was the core concern raised by CISPE, we can see what CISPE told the CMA at E, 19, page 1239.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: This is CMA's "Cloud services market Investigation, Licensing working paper". Within this we go, please, to page 1315. The relevant paragraph is 5.27, where it says:

"A cloud provider and CISPE submitted that customers are unwilling to speak openly about the issues they face in relation to Microsoft's licensing practices because they fear retaliation from Microsoft through onerous audits (used to verify compliance) or worse terms in subsequent negotiations."

I will be coming on to make the submission that this fear of retaliation from Microsoft is a relevant consideration when it comes to the opt-in, opt-out issue in these proceedings.

Finally, by way of essentially update on the regulatory position, the European Commission has launched investigations under its Digital Markets Act into Cloud c Computing Services, and the press release in relation to that is in bundle 5, tab I, 73, page 2908.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: It says:

"Commission launches market investigations on Cloud Computing Services under the Digital Markets Act."

It says there are going to be three market investigations.

"Two market investigations will assess whether Amazon and Microsoft should be designated as gatekeepers for their Cloud Computing Services, Amazon Web Services and Microsoft Azure, under the DMA, in other words, whether they act as important gateways between businesses and consumers despite not meeting the DMA gatekeeper thresholds for size, user number and market position. The third market investigation will assess if the DMA can effectively tackle practices that may limit competitiveness and fairness in the cloud computing sector ..."

That, as the Tribunal will see, is a relatively recent development, November 18th, this year.

That is essentially a headline review of the regulatory background to the allegations that we advance.

I am coming on to address the way in which we categorise the conduct with which this claim is concerned. We have indicated in our collective proceedings Claim Form that conduct is capable of being characterised in a number of different ways, and taking that approach is supported by the authorities. If I can ask the Tribunal to please look in the authorities bundle, first volume, authorities bundle tab 6, page 115.

This is a paragraph in Mr Justice Mann's judgment in a High Court claim called Purple Parking. What he says at paragraph 102 is:

"... a court is entitled to look at conduct and ask the overall question of whether there is an abuse by reference to various ways of committing that abuse, and is not forced to find one single appropriate label to the abuse (particularly at the behest of the defendant) and apply some test applicable only to that form."

In our submission that's a particularly pertinent observation in the present case,

because the proposed defendant Microsoft is suggesting in its response that this Tribunal should essentially reformulate the abuse that we have alleged into something akin to a margin squeeze by a vertically integrated undertaking, a term which doesn't appear in our Claim Form at all, and then apply a test which is applicable only, if at all, to Microsoft's preferred description of this conduct.

In our submission that's clearly an illegitimate approach. The Tribunal should approach the question certification by reference to the class representative's case as pleaded.

To show the Tribunal how we characterise this conduct, can we please turn up collective proceedings Claim Form, page 74 of the bundle, B3, page 74? There is a heading "Abuse". There's a headline allegation where we say:

"Microsoft has abused, and continues to abuse, its dominant position by seeking to leverage its dominant position in the market Server Operating Systems in order to strengthen its position in the market for Cloud Computing Services."

We go on to identify four ways by which we say that conduct should be characterised. The first is the heading at paragraph 209. We say it is "Unlawful self-preferencing/leveraging".

That is a form of abuse which is addressed in the leading case of Google Shopping, which is concerned with how Google displayed the results of its rival comparison shopping services in its general search results. I would ask the Tribunal to please turn that up. It is in volume 5 of the authorities bundle, tab 60, starting at 3879.

We are starting here in the General Court's judgment, and I will come on to show the Tribunal that the Court of Justice upheld the General Court. Paragraphs 151 and 152 are citing the broad and very familiar test concerning methods different than competition on the merits and exclusionary effects.

There we see:

"... Article 102 applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition."

MR JUSTICE ADAM JOHNSON: Sorry. Which paragraph are you reading from?

MS FORD: 151 under the heading "Findings of the Court".

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: 152:

"... Article 102 prohibits a dominant undertaking from, among other things, adopting practices that have an exclusionary effect by using methods other than those that are part of competition on the merits ..."

That is the test that we see time and time again in the authorities from the European Court, abuse of dominance.

It we go over to 163, the Court explains what is meant by the term "leveraging" in this context. It refers to Tetra Laval v Commission. It says:

"Leveraging is a generic term in relation to the impact which a practice identified on one market may have on another market. The term may designate several different practices that are capable of being abusive, such as, in particular, tied sales as in ... Microsoft v Commission, margin squeeze practices as in the case ... of Telefónica, or loyalty rebates, as in the case ... [of] Michelin ..."

It goes on at 164 to make the point that several different kinds of leveraging have been found to be abusive:

"... while the leveraging practices of a dominant undertaking are not prohibited as such by Article 102, the fact remains that that article is applicable to such practices. Thus, although there is no need at this stage to rule on the conditions for their prohibition, it

must be noted ... that several kinds of leveraging have previously been found to be contrary to Article 102."

It gives examples.

"In particular, in the judgment of 17 September 2007, Microsoft v Commission ... the Court considered that the practices at issue, namely bundling and the refusal to supply interoperability information, formed part of a leveraging infringement, consisting in Microsoft's use of its dominant position in the client personal computer operating systems market to extend that dominant position to two adjacent markets."

That is an example that the General Court gives of leveraging in that context.

What it goes on to emphasise in paragraph 165 is that it is a case specific assessment in each case, as one would expect. So, it says:

"... the actual scope of special responsibility imposed on the dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened ..."

It is then turning to the circumstances of the particular case before it, Google, and it says:

"... the Commission ..." -- this is 166 -- "did not rely solely on leveraging practices in order to conclude that there was an infringement of Article 102.

"The Commission considered that, through leveraging, Google was relying on its dominant position in the market for general search services in order to favour its own comparison shopping service on the market for specialised comparison shopping search services by promoting the positioning and display of that comparison shopping service and of its results on its general results pages, as compared to competing comparison shopping services whose results ... were prone to be demoted ..."

That's the conduct that's giving rise to concern. What we see from this judgment is that the Commission relied on three specific circumstances to put forward its case as

to why that particular form of leveraging was problematic. So, 169 says:

"The Commission explained in particular that, on account of three specific circumstances -- namely the importance of traffic generated by Google's general search engine for comparison shopping services ...; the behaviour of users when searching online ...; and the fact that diverted traffic from Google's general results pages accounts for a large proportion of traffic to competing comparison shopping services cannot be effectively replaced by other sources" --.by reason of those three specific circumstances -- "this favouring was liable to lead to a weakening of competition on this market."

The judgment then goes on to look at each of those circumstances in greater detail. So, 170 is dealing with the importance of traffic generated; 172 is dealing with user behaviour; 173 is dealing with the impact of the diverted traffic.

196 in this judgment is referring back again to the specific circumstances:

"... the Commission states, 'To demonstrate why the conduct is abusive and falls outside the scope of competition on the merits' ..."

It refers to:

"... the Commission lists the numerous aspects which it took into account to demonstrate why the practice is abusive and deviates from competition on the merits and, in particular, as is apparent from paragraphs 170 to 173 above, the three criteria relating to the importance of traffic ..., user behaviour ..., and the fact that the traffic diverted cannot be effectively replaced."

Its conclusion at 197 is that:

"... the Commission's analysis resulting in a finding of abuse is not in any way 'inconsistent' within the meaning of case-law [that the Court has] cited ... with the case-law on abusive leveraging cited in recital 334 of the contested decision, insofar as it may be concluded that there is an infringement on the basis, first, of suspect

elements in the light of competition law (in particular an unjustified difference in treatment) ... and, secondly, of specific circumstances in accordance with the case-law referred to in 165 above, relating to the nature of the infrastructure from which that difference in treatment arises ..."

So, the test for abusive conduct in the context of leveraging is specifically drawing on the circumstances of the market, the product involved, the behaviour of the users in conjunction within that case unjustified difference in treatment.

That approach is then upheld by the Court of Justice. In hard copy it is in volume 6 of the authorities, tab 64, starting at page 4046.

MR JUSTICE ADAM JOHNSON: Sorry. I missed the page reference.

MS FORD: 4046.

MR JUSTICE ADAM JOHNSON: 4046. Thank you.

MS FORD: Above 138 the Court should have "Findings of the Court of Justice".

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: What we can see from 138 is that the grounds of appeal was that:

"... the General Court committed an error of law in finding that the Commission established that the conduct at issue fell outside the scope of competition on the merits."

Again, that is the relevant test that's being applied. I emphasise that because it's Microsoft's case that in taking the approach the class representative has, it hasn't sufficiently identified what falls outside competition on the merits. So, I am drawing attention to the fact that that is the test that the Court of Justice is addressing in this case.

139 to 146 is the Court of Justice's summary of the paragraphs I have just shown the Tribunal in the General Court's judgment. 147 makes clear that what the appellants were disputing was whether the three specific circumstances were relevant for the

purposes of determining whether the conduct at issue fell within the scope of competition on the merits.

At 165, a few pages on, you can see the Court of Justice citing the relevant test and referring to methods other than those which are part of competition on the merits.

Then at 166 to 168, what the Court of Justice does is explain that the competition on the merits test takes into account the conduct itself, the markets in question or the functioning of competition in those markets and the potential for exclusionary effects.

So, it says:

"That demonstration, which may entail the use of different analytical templates ..."

MR JUSTICE ADAM JOHNSON: I am sorry. Where are you?

MS FORD: Sorry. I am reading from paragraph 166. So, paragraph 165 the Court has cited the test.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: Paragraph 166 says:

"That demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). That demonstration must, moreover, be aimed at establishing on the basis of specific, tangible points of analysis and evidence that that conduct, at the very least, is capable of producing exclusionary effects ..."

It goes on at 168 to press the conclusion:

"It follows from the case-law that the relevant factual circumstances include not only those that concern the conduct itself, but also those that concern the market or markets in question, or the functioning of competition on that or those market(s). Thus, circumstances relating to the context in which the conduct of the undertaking in

a dominant position is implemented, such as the characteristics of the sector concerned, must be regarded as relevant."

This is all in the context of considering the competition on the merits test.

Then the outcome of the particular case, 169 to 170. The specific circumstances that the Commission relied on in the context of Google:

"... are ... capable of characterising the existence of practices falling outside the scope of competition on the merits."

That's the end of 170. That's the way we put this case. We say that Microsoft is engaging in unlawful self-preferencing or leveraging by using its dominant position in the market for paid server operating systems to gain a competitive advantage and reduce competition from Rival Clouds in the market for Cloud Computing Services.

As I will come on to show the Tribunal, the class representative and the class representative's economist identify the relevant features of the market, the relevant features of competition, which render that conduct in our submission abusive in exactly the same way as the Court of Justice has set out in Google Shopping.

The second way we characterise Microsoft's conduct is as an unlawful multi-product rebate. The Tribunal will see that pleaded in collective proceedings Claim Form, paragraph 210, starting right at the bottom of page 75. What we say there is there are two relevant products, Windows Server, Operating System and Cloud Computing Services, and we say that Microsoft's licensing practices essentially amount to offering a rebate on a price of a product where Microsoft is dominant so the operating systems, provided the customer also purchases Cloud Computing Services from Microsoft rather than from Microsoft's competitors.

I am going to come on and show the Tribunal what we say is the correct test for that, when we look at the Commission's draft guidelines for that, when we look at exclusionary conduct.

The third way in which we characterise the relevant conduct is as unlawful discrimination. That's pleaded in paragraph 211 of the Claim Form. The authority we cite there in subparagraph 211.2 is the opinion of the Advocate General in the MEO case. Could you please turn that up? It is in volume 5 of the authorities bundle, tab 58, 3847.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: There is a heading there "A practice of second degree price discrimination may be found to infringe point (c) of the second paragraph of Article 102 only after it has been examined in the light of all the circumstances of the case".

MR JUSTICE ADAM JOHNSON: Sorry. I have lost you there.

MS FORD: Sorry. I am reading the heading that is in italicised script just above paragraph 70.

MR JUSTICE ADAM JOHNSON: Yes. Thank you.

MS FORD: Paragraph 70 itself makes the point:

"In order to conclude that there is a restriction [of competition], it is necessary in every case to examine the actual or potential effect of the measure complained of, having regard to all the circumstances of the case."

What the Advocate General then does in paragraph 71 is to draw a distinction between what he terms first degree price discrimination and second degree price discrimination. First degree price discrimination is what he describes in paragraph 72. He says:

"[It] is practised against competitors of the dominant undertaking. Most often, it refers to price discrimination practices which are designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. More generally, it covers every pricing practice which is designed to foreclose from the market or weaken the competitive position of operators present on the same market ..."

Just pausing there. There is that relevant distinction between absolute foreclosure and weakening of competition that we also saw the CMA applying. Here he is referring to: "First degree price discrimination ... at the same level (vertically speaking) as the dominant undertaking."

He then goes on in the subsequent paragraph to deal with -- sorry. I should draw your attention to 73. He says:

"These price discrimination practices are, because of the immediate exclusionary effects ... the ones which the competition supervisory authorities and courts are generally asked to examine."

So, these are -- first degree price discrimination is the most pernicious form of price discrimination, is what the Advocate General is saying.

He goes on to deal in 74 second degree price discrimination. That is discrimination:

"... which affects 'trading partners' on the market downstream or upstream from the dominant undertaking. It includes, in particular, cases where a dominant undertaking decides to charge its customers, that is to say, entities with which it is not in direct competition, different prices."

He explains at 75, over the page, that those practices are less obviously harmful to competition.

What he then does in 76 is to draw a further distinction:

"... between undertakings that are vertically integrated and [so] have an interest in displacing competitors on the downstream market those that have no such interest."

That's the distinction he draws in the second half of that paragraph:

"... a distinction must immediately be drawn between undertakings that are vertically integrated and will therefore have an interest in displacing competitors on the downstream market and those which have no such interest."

In 77, he says:

"In the case of vertically integrated undertakings, the application by a dominant undertaking of discriminatory prices on the downstream or upstream market is in reality similar to first degree price discrimination" -- in reality similar to the most pernicious form of price discrimination -- "which indirectly affects the undertaking's competitors."

It says:

"Such discrimination may have the effect of weakening the competitors of the dominant undertaking on the downstream market."

He gives an example in paragraph 78, Deutsche Bahn v Commission:

"By applying different rates to container transporters operating on 'western journeys' in respect of equivalent services connected with the use of railway infrastructure, Deutsche Bahn had unquestionably placed those trading partners at a disadvantage in competition with itself and its subsidiary."

He goes on to make the point at 97 to 99 that whether price discrimination is abusive, the test is whether it distorts the competitive relationship between trading partners. It is an "in normal circumstances of the case" type assessment.

Our case is Microsoft is dominant in the market for paid server operating systems. It imposes discriminatory prices on customers which chose to obtain their Cloud Computing Services from a Rival Cloud operated by a Listed Provider, when compared to the prices it offers to customers who obtain their Cloud Computing Services from Microsoft Azure.

We say Microsoft is a vertically integrated undertaking. It is active in the downstream market for Cloud Computing Services in competition with the Listed Providers, and so its discriminatory pricing practices equate to the first degree price discrimination identified by Advocate General, because it impacts Microsoft's competitors and it has the effect we say of weakening competition on the market.

Again, as I will come on to show the Tribunal, consistent with the case law, the approach we have taken to verify that abuse is again to engage in the multi-factorial analysis of all the relevant circumstances.

The final way in which we characterise Microsoft's conduct is to say that it constitutes a sui generis abuse. That point, that's pleaded in our Claim Form, paragraph 212 on page 77.

It is well established that the categories of permissible abuse are not closed and what we have done is pleaded a series of factors that we say render this particular conduct abusive, irrespective of what label one seeks to pin on it. The Tribunal will see that the factors that we have identified include, for example, the fact that they create exclusionary effects. That's sub-paragraph (a) in paragraph 212 and (d), the fact that it involves a practice falling outside the scope of function on the merits.

So, those are the four ways in which we put our case. One of the criticisms that Microsoft has sought to level at us is that it says we have not identified a limiting principle which is capable of distinguishing between practices that are abusive and those that constitute competition on merits. That's, for example, its response in paragraph 6.1. To be clear, we fully accept that it is necessary for this Tribunal to be able to adjudicate between practices which are lawful and practices which are unlawful, but what we say one gets from the authorities that we have looked through, and one more that I am going to show the Tribunal, is that it is not a bright line exercise. It is not a binary and prescriptive exercise, as Microsoft seeks to suggest.

The final authority we rely on for that proposition is the Opinion of Advocate General Rantos in Servizio. That is volume 6 of the authorities bundle, starting at tab 63 at 3996.

MR JUSTICE ADAM JOHNSON: Did you say 3996?

MS FORD: 3996.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: We are starting at paragraph 52. What the referring court is asking quite pertinently is:

"... to draw a clear line between practices which come within the scope of so-called 'normal' competition and those which do not."

We will see the response of the Advocate General is essentially one doesn't draw a clear line in that way.

In paragraph 53, he explains that references to normal competition equates to competition on the merits, which is obviously the terminology we see in Microsoft's response.

At paragraph 54, you see the point being made that the list of abusive practices is not exhaustive.

In paragraph 55, he says:

"The concept of 'competition on the merits' is therefore abstract, since it does not correspond to a specific form of practices and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition."

He goes on to point out:

"... the Court has excluded the idea of an 'abuse in itself' ... The concept of 'competition on the merits' thus expresses an economic ideal the background to which is the current trend in EU competition law to favour an analysis of the anticompetitive effects of the conduct ... rather than an analysis based on its form ..."

There he is indicating that there is a relevant inter-relationship between the concept of competition on the merits, on the one hand, and the concept of exclusionary effects, on the other hand. What he does in the paragraphs, which follow, is to go on and spell

out the fact of that inter-relationship.

So, for example, in paragraph 56 he says:

"... the question as to whether an exclusionary practice is a means consistent with competition on the merits is closely linked to the factual, legal and economic context of that practice. Indeed, the material scope of the dominant undertaking's special responsibility must be considered in the light of the specific circumstances of each case."

Then he goes on to identify some common considerations in paragraph 57. Paragraph 58 he says, firstly:

"... I note that 'competition on the merits' must be interpreted in close correlation with the equally settled principle of the case-law of the Court that an undertaking in a dominant position has a 'special responsibility' not to allow its conduct to impair genuine undistorted competition in the internal market."

Paragraph 61 makes the point -- he says:

"In the second place ... the form or type of conduct that is adopted by a dominant undertaking is not decisive in itself. What matters is whether the conduct tends to restrict competition or is capable of having that effect. However, if conduct clearly departs from normal market practice, that may be considered a relevant factor to be taken into account in the assessment of whether there is abuse ..."

Paragraph 62:

"... conduct that does not come within the concept of 'competition on the merits' is generally characterised by the fact that it is not based on obvious economic reasons or objective reasons."

Then 63:

"... 'competition on the merits' ... refers to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods

and services."

In our submission what one gets from this, and it is entirely consistent with the other cases that we have looked at, is that it is a relatively nuanced assessment. It is a multi-factorial assessment and there's an obvious inter-relationship between the concepts of competition on the merits and the enquiry as to exclusionary effects.

Sir, I see the time.

MR JUSTICE ADAM JOHNSON: Yes. That is probably a good point to take a short break. Can I ask you before we take a break, Ms Ford, how are you doing in terms of your overall submissions? I think we have today set aside for this hearing with a possibility of overspill tomorrow.

MS FORD: We do, yes.

MR JUSTICE ADAM JOHNSON: How are you going so far?

MS FORD: (Inaudible) be finished by lunchtime. Mr Marven obviously (inaudible). We will end up going into tomorrow but (inaudible) two days (inaudible). I think Mr Kennelly and I have had a brief discussion about timing. There is an understanding on the other side as well.

MR JUSTICE ADAM JOHNSON: Yes. Very good. We do not want you to feel short changed. This is an important case. You need to say what you think needs to be said. Let's resume in ten minutes or so.

(Short break)

MR JUSTICE ADAM JOHNSON: Thank you. Yes, Ms Ford. Carry on. Thank you.

MS FORD: The gravamen of the criticism that Microsoft advanced against us in its response was to seek to suggest that we had gone wrong by not applying a price-cost test. That we say is wrong as a matter of law. I have already explained that the class representative is not defining the conduct in question as a margin squeeze and, insofar as Microsoft is seeking to suggest otherwise, that we would say is a classic challenge

on the merits and it is not a basis to resist certification, but in any event the authorities don't support the suggestion that a price-cost test is obligatory.

The relevant authority is the Court of Appeal in Royal Mail and Ofcom. It is in the authorities bundle, tab 13, starting at page 806.

If the Tribunal looks, please, at paragraph 14 to start with on page 809, you will see that Ofcom had made a finding that the Royal Mail had abused its dominant position on the bulk mail delivery market by introducing discriminatory pricing.

Paragraph 15. One of the grounds of appeal that was then aired before the Court of Appeal was:

"... that Ofcom had wrongly failed to properly take into account an as-efficient competitor test ...",

which is obviously another name for a price-cost test. That is what's being advanced by Royal Mail.

Paragraph 18 of the lead judgment, which was given by Lord Justice Arnold, is referring to the classic test of competition on the merits for identifying an abuse.

Paragraph 20 identifies relevant considerations in the case law and they include:

"... the structure of the market; the extent of the dominant position; the nature of the conduct; evidence as to the dominant undertaking's intent; the extent of the likely impact on the market, assessed at the time of the conduct; and the evidence as to any actual effects which eventuated."

Now those criteria are referred to in subsequent authorities as "the Royal Mail factors" and, as I will come on to show the Tribunal, the class representative's expert economist relies on various of these in his assessment.

Paragraph 21 records that:

"It is common ground that there is no obligation on a competition authority considering whether a dominant undertaking has abused its position by its pricing practice to test

the effects of that practice by reference to a notional competitor which is as efficient as the dominant undertaking and thus has the same costs ..."

What the Court of Appeal then does is conduct a thorough review of the Court of Justice authorities on as-efficient competitor tests beginning at paragraph 23.

Its conclusions are at paragraphs 38 to 41. Lord Justice Arnold says:

"In my judgment, however, the case law does not establish that an as-efficient competitor test which is relied upon by the undertaking under investigation must be treated as highly relevant to, let alone determinative of, the question of whether a pricing practice is anti-competitive. On the contrary, it is clear from Post Danmark II that the AEC test is one tool among others for the purposes of assessing whether there is an abuse of a dominant position. It is also clear from that case ... that there may be circumstances in which carrying out an AEC test is either impracticable or inappropriate. I do not consider that those statements are only applicable to rebate schemes ..."

So, at 39 it says:

"I do not accept the submission of counsel for Royal Mail that it is only legitimate to disregard an AEC test where the emergence of an AEC is practically impossible, which is contradicted by what the Court said in TeliaSonera ..."

He also rejects the submission in paragraph 40 that Post Danmark had been silently overruled by Intel.

Paragraph 41 is essentially the conclusion:

"Above all, as the CJEU has consistently held, all the circumstances of the case must be considered. There may be other evidence which establishes that a pricing practice is anti-competitive even if an AEC test relied upon by the dominant undertaking appears to show otherwise."

Paragraphs 81 to 83 are in the judgment of Lord Justice Males. He is essentially

agreeing with Lord Justice Arnold. He has also reviewed the authorities and he says: "From these authorities I would derive the following propositions.

"First, there is no obligation on a competition authority to carry out an AEC test before concluding that a pricing practice is an abuse."

That is Post Danmark.

"Second, while an AEC test has been a useful tool for determining whether there has been abusive conduct in some pricing cases ... such a test is not always relevant ... That will be the position in particular where the dominant undertaking holds a very large market share together with structural advantages which make the emergence of an 'as efficient competitor' practically impossible. However, I see no reason to conclude that this is the only situation in which such a test will be irrelevant. Whether the test is relevant depends on whether and to what extent it provides useful information. This is a matter of economic judgment rather than law."

For the Tribunal's note, there is another authority in the bundle, tab 34, page 1968, which is Stopford v Alphabet, which then goes on to apply Royal Mail. They quote extensively from what Lord Justice Arnold said in his judgment and also from Lord Justice Males' judgment.

What they do, is they go on and refuse an application for summary judgment which had sought to suggest that the as-efficient competitor test was mandatory in every case. That was authorities bundle 34, page 1989.

So, we say that any suggestion that the class representative has somehow slipped up by failing to apply a price-cost test, as Microsoft appear to be saying, is simply wrong as a matter of law.

Conversely, there is another recent judgment of the Tribunal in the bundle, Kent v Apple. That's at authorities bundle tab 40, page 2325. That is an example of the Tribunal applying the Royal Mail factors in determining the existence of an abuse -- in

certifying an allegation of abuse, I should say.

Tab 40, 2325. This was an allegation of exclusive dealing and my learned friend Mr Kennelly appeared on behalf of the defendants in that case as well.

If we go to 2480 -- on the previous page the Tribunal will see the heading "Exclusive dealing abuse", "Legal framework for exclusive dealing". What it is setting out in 447 is the general principles about the undertaking's special responsibility not to allow its conduct to impair distorted competition.

Sub-paragraph (3) on page 2481 says:

"Relevant considerations include: the structure of the market; the extent of the dominant position; the nature of the conduct; evidence as to the dominant undertaking's intent; the extent of the likely impact on the market, assessed at the time of the conduct; and the evidence as to any actual effects which eventuated."

They say:

"... (we will refer to these below as the 'Royal Mail relevant factors')."

Then for completeness, just to show the Tribunal, then coming on to assess those, paragraph 465, page 2488, what we see is the Tribunal then coming on to take into account those factors in considering the allegation of abuse in that case.

Again, our position will be that that accords entirely with the approach that we have taken. That's probably a convenient moment to pick up the question the Tribunal posed before the brief adjournment about what partial foreclosure might look like in this context, because one can essentially offer an example. This is a stylised example, a hypothetical example.

Assume you had a competitor who is capable of earning a 60% margin on a particular group of customers and a 10% margin on another group of customers. It is entirely probable, entirely possible that that competitor will choose to focus their competitive efforts on the group of customers in respect of which they can earn a higher margin.

The opportunity cost of competing might well mean that that then leads to a weakening of competition in relation to that group of customers in respect of which they earn a lesser margin.

That is not an entirely hypothetical situation in this sense. If we go back, please, to page 2479 in the bundle, which is the CMA's Final Report, paragraph 7.628 --

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: -- we see here:

"Google submitted that the estimated margins are too low to support effective competition."

That was in response to Microsoft's argument that:

"... AWS and Google's estimated margins are inconsistent with material foreclosure effects, as the margins that Google and AWS could earn are positive and ample."

Google responds that:

"... the estimated margins are too low ... As discussed in more detail in the counterstrategies section, Google also submitted that the gross margins on its Windows Migration incentive programme are well below margins typically observed for the supply of cloud infrastructure services."

The point that Google is making is that there is a particular sector of the market in respect of which it is earning a much lower margin. We will come on to see when I show you the class representative's expert's opinion that that's a factor he has taken into account as well.

Just to pull all the threads together in terms of what we say is the correct approach to establishing abuses of this nature, we have cited the Commission's draft guidelines to the application of Article 102 of the treaty to abusive exclusionary conduct by dominant undertakings.

That is in volume 2, tab 18 of the bundle, page 1183. I may have given a wrong

reference there.

MR JUSTICE ADAM JOHNSON: 1183, you said?

MS FORD: I did, but I am told it might be 2183.

MR DAVIES: No, it is 1183.

MS FORD: I am grateful. No, that's an authority. It should be --

MR JUSTICE ADAM JOHNSON: 1183 in the main bundle.

MS FORD: That's where I am going wrong. I apologise.

MR JUSTICE ADAM JOHNSON: You are looking at 1183 in the authorities bundle.

MS FORD: I apologise.

MR JUSTICE ADAM JOHNSON: Don't worry.

MS FORD: I am grateful.

MR JUSTICE ADAM JOHNSON: Not at all.

MS FORD: So, the status of these draft guidelines, they are not yet adopted and even once adopted they would be of persuasive authority rather than in any sense binding, but we refer to them as a further illustration of the sort of multifactorial analysis that we say applies to establishing exclusionary conduct. They have also been referred to in the class representative's expert's reports.

Paragraph 6 within these guidelines explains what is meant by exclusionary abuse and exclusionary effects. It says:

"... dominant undertakings can harm consumers, by hindering through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition. Such behaviour, if not objectively justified, is hereinafter referred to as 'exclusionary abuse' and its effects are hereinafter referred to as 'exclusionary effects'."

It goes on to clarify:

"Those effects refer to any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking, such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion, the hampering or elimination of effective access to markets, or to parts thereof, or the imposition of constraints on the potential growth of competitors."

That again is relevant to the question the Tribunal is asking about the difference between partial and full foreclosure, in the sense that the Commission is emphasising it is not necessary to show a complete inability to compete. Any hindrance to competitors is relevant and indeed it is not just a hindrance to a competitor's ability to compete. The Commission refers to a hindrance to their incentive to compete as well. That is going to be important to bear in mind when we see Microsoft's submissions that large competitors such as Amazon and Google remain able to compete. So implicitly they say there is no harm. We say, and Professor Wickelgren says, that Microsoft's conduct hinders Amazon's and Google's incentives to compete in respect of that group of customers that have a preference for Windows Server and that's where the harm arises.

Paragraph 10 in this document, we see the familiar point that these general principles need to be applied to the facts and circumstances of the particular case and that the list of abusive practices is not exhaustive.

At page 1199, this is the section where the Commission sets out guidance about how one goes about distinguishing lawful from unlawful conduct. Paragraph 45:

"... it is generally necessary to establish whether the conduct departs from competition on the merits ... and whether the conduct is capable of having exclusionary effects ..."

That in our submission is entirely consistent with the case law I have shown the Tribunal. Both of those elements are means by which the Tribunal might distinguish between conduct which is abusive and conduct which is lawful.

Paragraph 46 goes on to make the point that:

"... certain factual elements may be relevant to the assessment of both. Depending on the circumstances of the case, it may be necessary to carry out a comparatively more detailed assessment of ..." one rather than the other.

I have placed a degree of emphasis on these particular paragraphs because Microsoft's skeleton has sought to suggest that there are two separate questions, literally competition on the merits and conduct capable of having exclusionary effects, and that if a particular factor only goes to exclusionary effects, then it can effectively be disregarded as irrelevant.

We say that's not right. It is very clear they are both elements which are relevant to distinguishing between conduct which is lawful and that which is unlawful, and indeed the Commission is making clear, and case law makes clear, that they are factors which are interrelated.

Paragraph 47 makes the point that for recognised categories of conduct, case law has developed specific legal tests. The Tribunal will see the same point being made in paragraph 53. Examples are given there of:

"... exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze ..."

Unsurprisingly Microsoft place emphasis on that point to say, "Well, they're applying the price cost test". I've shown the Tribunal the careful analysis in the appeal in Royal Mail, the fact that there is no obligation to apply a price-cost test to margin squeeze and it is just one potential tool that's available. In my submission, there's no necessary inconsistency between the sorts of high-level statements one gets in these guidelines and the much more detailed analysis that is conducted by the Court of Appeal.

To the extent that there were any inconsistencies, then our submission is the Court of

Appeal should be followed on this particular issue.

Paragraph 55. What we see the Commission doing here is identifying factors relevant to conduct departing from competition on the merits. What we will come to see is that some of these factors are mentioned by the class representative's expert. So, for example, factor a):

"Whether the dominant undertaking prevents consumers from exercising their choice based on the merits of the products ..."

The Tribunal will recall the CMA's finding that Microsoft's licensing practices are influencing consumers' choice of cloud provider.

Factor d):

"Whether the dominant undertaking's conduct consists of, or enables, biased or discriminatory treatment that favours itself over its competitors."

The Tribunal will appreciate that is a core element of the class representative's case.

Factor f):

"Whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market."

Again, we rely on that point.

Paragraph 56 is another passage that Microsoft relies on, because it gives margin squeeze as an example of conduct where a price-cost test is required. Again, I have addressed the Tribunal on that. We say what the Court of Appeal says in Royal Mail is the binding authority on this particular point.

Page 1204, over the page. This is the section which is dealing with exclusionary effects. Paragraph 69 you see:

"The assessment of whether a conduct is capable of having exclusionary effects must

take into account all the facts and circumstances that are relevant to the conduct at issue. That assessment should aim to establish, on the basis of specific, tangible points of analysis and evidence, that the conduct is at least capable of producing exclusionary effects."

It is essentially citing European Super League, but it is also according to the wording used by the Court of Justice when we looked at Google Shopping.

Paragraph 70 then sets out the facts and circumstances that might be taken into account in assessing exclusionary effects. So, once again the class representative's expert has relied on a number of these factors and the Tribunal will note they are also consistent with the Royal Mail factors that we have seen the Court of Appeal apply. So, for example, factors in a) and b), the position on the dominant undertaking, conditions on the relevant market; factor in d), the extent of the exclusionary conduct; factor in (f), evidence of an exclusionary strategy, are factors that we rely on.

We then move on to the section of the guidelines which address whether specific categories of conduct are liable to be abusive. There is, in this context, a particular dispute between us as to the correct approach to mixed bundling and multi-product rebates and the correct test to apply to that.

Paragraph 86 in this document. It explains what is meant by mixed bundling in the second sentence:

"In cases of mixed bundling (or 'multi-product rebates') the two products are available for purchase on a standalone basis and are also sold jointly, typically at a discount compared to the sum of the standalone prices."

That we say is essentially the effect of Azure Hybrid Benefit.

88, final sentence, tells us:

"Mixed bundling by a dominant undertaking is examined using different legal criteria and will be discussed in section 4.3.2."

Following that reference through, if we go to 1232, just above paragraph 152 is a section healed "Multi-product rebates". That says:

"Dominant undertakings may also market two or more separate products together and offer the buyer a certain inducement, such as a rebate ... compared to the case in which it purchases the products separately on a standalone basis. This practice is also known as 'mixed bundling' or 'bundled rebates'."

Paragraph 153:

"For this type of abuse, the guidance provided by the case-law in relation to exclusive dealing and conditional rebates, depending on the cases, applies by analogy."

154 tells us:

"Multi-product rebates that are conditional on customers buying all or most of their requirements of at least one of the products from the dominant undertaking are subject to the specific legal test set out in section 4.2.1".

We are then cross-referred back to a separate section of the guidelines, which is E, 18, 1212. Section 4.2.1, "Exclusive dealing". Paragraph 78 refers to:

"... various forms of obligation to purchase or sell all or most of a customer or a supplier's requirements from/to the dominant undertaking, or incentive schemes that are conditional on a customer or supplier purchasing or selling all or most of their requirements from/to the dominant undertaking."

Those fall within the exclusive dealing definition.

79 explains:

"Exclusive dealing can stem from arrangements creating a formal exclusivity requirement, or from arrangements which do not explicitly, but de facto amount to exclusivity requirements."

Paragraph 82 explains that:

"Exclusive dealing by a dominant firm has a high potential to produce exclusionary

effects ..."

83 identifies the factors that are to be taken into account in assessing that. Elements to be taken into account include:

"The extent of the undertaking's dominant position on the relevant market ...

The share of the market that is affected by the conduct ...

The conditions and arrangements of the exclusivity conditions.

The possible [exclusionary] strategy ..."

As we will see, that is the test which Professor Wickelgren has considered in his report. Microsoft has criticised that in paragraph 14 of its skeleton. It says the four-part test referred to is, in fact, relevant only to cases of exclusive dealing which are entirely different. I have shown the Tribunal that is not correct. The guidelines indicate that that the case law in exclusive dealing can be applicable by analogy, in particular, where the de facto effect of the arrangements is to require the customer to get all or most of their requirements from the dominant undertaking. We say that's an empirical enquiry, but it is the class representative's case that that is the effect of the conduct in question here.

Finally, just to pick up what these guidelines say about self-preferencing. If we go, please, to page 1233, paragraph 156 explains that:

"Self-preferencing consists of a dominant undertaking actively giving preferential treatment to its own products compared to those of its competitors, mainly by means of non-pricing behaviour."

Microsoft's skeleton, paragraph 33 has placed emphasis on the words "mainly by means of non-pricing behaviour".

As we have explained, the course of conduct alleged by the class representative includes non-pricing conduct as well as pricing conduct, and it is Microsoft that is seeking to re-characterise the case that we are bringing by seeking to focus solely on

pricing conduct.

Paragraph 161 in these guidelines then identifies factors that are of relevance to this sort of abuse:

"... leveraging market that constitutes an important source of business for competitors in the leveraged market ...

"The preferential treatment is likely to influence the behaviour of users ...

"The preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities in the leveraging market ..."

Paragraph 162 says one must take into account the overall effect of the practices.

Again, what we will see when we come to Professor Wickelgren's report is that he's cross-referring to these sorts of factors in his assessment.

I am moving on from the draft guidelines to look at the requirement for a blueprint to trial.

MR JUSTICE ADAM JOHNSON: Just so I'm clear, the non-pricing conduct elements that form part of your case, do I have this right, they form part of the course of conduct relied on, but their effects are excluded when it comes to assessing economic effect or loss?

MS FORD: They are excluded when we come to seek to quantify the effects because of the obvious difficulty in trying to quantify the impact on the class having a degraded user experience. It is extremely difficult to quantify that in monetary terms. They are excluded from the claim for that purpose. We have expressly pleaded them as forming part of the course of conduct as a whole, and we say that they are relevant specifically to intent, because what we see here in our submission is not just an exercise in seeking to obtain efficiencies on the part of a vertically integrated undertaking, we say a course of conduct which includes Quality Abuses, as we have defined them, which on any view can't be explained as being efficiency based.

MR JUSTICE ADAM JOHNSON: So, they are part of your multi-factorial analysis.

MS FORD: They are and we will see Professor Wickelgren drawing on those as well.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: The Tribunal will have appreciated that the way in which Microsoft seeks to resist certification in this case is to suggest that we have not set out an adequate blueprint of the trial. The actual term blueprint to trial doesn't appear either in the Competition Act or Competition Appeal Tribunal rules. The test that a class representative's methodology has to satisfy is the test in the Canadian case of Pro-Sys. That was endorsed as the applicable test in this jurisdiction by the Supreme Court in Merricks. I will very briefly show the Tribunal a couple of passages from that. Authorities bundle tab 11, page 680.

Paragraph 40 is where the Supreme Court is setting out what it terms "the Microsoft case". What is required is:

"... the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

What we see at 41, is the Supreme Court emphasising that this is a "low threshold" and that's been reiterated on numerous occasions in other authorities in this jurisdiction. We have cited some of them in our reply at paragraph 53.

Picking up while we are here at paragraph 59 in the Supreme Court's judgment, this is the Supreme Court making clear that:

"... the Act and the Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test. This is because the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment is dealt with separately from certification."

I emphasise that, because in our submission the sorts of points that Microsoft is seeking to raise about our methodology are, in reality, points about the merits. Microsoft has not, we say quite rightly, sought to strike out or obtain summary judgments in respect of the proposed claims and, we say, the blueprint to trial requirement is not intended as a means of introducing merits challenges by the back door. In essence, it is a procedural requirement. It is a case management requirement, and it is a requirement that the Tribunal should satisfy itself that it is in the position to determine the dispute between the parties. Indeed, this Tribunal has expressly warned against it being used as a means of excluding a viable claim.

You can see that in the Google Ad Tech Collective Action, authorities bundle tab 33, page 1954. The Tribunal should see the heading "The Microsoft Test".

MR JUSTICE ADAM JOHNSON: Uh-huh.

MS FORD: The Tribunal cites what was said by the Court of Appeal in Gutmann about the purpose of the test:

"To enable the CAT to form a judgment on commonality and suitability the class representative is required to put forward a 'methodology' setting out how the issues that they have identified will be determined or answered at trial. In practice the methodology is prepared by an expert economist instructed by the proposed class representative. The methodology advanced will be counterfactual and therefore hypothetical in nature. It posits how the market would operate absent the alleged unlawful conduct and provides a benchmark against which to measure a defendant's actual conduct. It constitutes a critical document that the CAT will examine when

determining commonality and suitability."

It says the test to be applied is the Pro-Sys v Microsoft test, which is the one I just showed the Tribunal in Merricks.

You can see at the bottom of paragraph 28 the Tribunal saying:

"We will, as a convenient shorthand, refer to the Microsoft test as requiring a 'blueprint to trial'."

The Tribunal then goes on to summarise the methodology which was in issue in that case. The conclusion that it reaches at paragraph 36, page 1958, is that it was satisfied:

"... the averments in the Claim Form are triable and that, should the matter proceed to trial, the harm to the class and the loss and damage suffered by it can be quantified."

Paragraph 38 over the page on 1960 then gives a warning. The warning is:

"The Microsoft test is not a barrier to access to justice. If it were, it would be clearly contrary to the decision of the Supreme Court in Merricks. The general rule -- in collective proceedings as in the case of individual claims -- is that arguable claims ought to proceed to trial."

It says:

"Of course, in the case of collective proceedings there are a number of additional requirements ... that need to be satisfied."

These are the ones set out in 78 and 79 of the Rules.

"Clearly where these requirements are not satisfied, an application for a Collective Proceedings Order should fail."

But it says, paragraph 39:

"The Microsoft test does not fall within this class of rule -- a pre-condition to certification. The Microsoft test concerns the management to trial of a properly pleaded claim: it is only when the Tribunal can see no clear way of trying the case that

the Microsoft test should act as a bar to certification."

It goes on to say:

"Even then the proposed class representative will be given the opportunity to revisit the claim ..."

So, in my submission the question the Tribunal needs to ask itself when we come to consider Professor Wickelgren's proposed methodology is "Can I see a clear way of trying this case?"

The final point to emphasise about the blueprint to trial is that there is no obligation on the proposed class representative to try and anticipate what the proposed defendant might say. It is not a failure of the class representative's methodology to the extent that it doesn't do so.

The authority for that proposition is in Gormsen v Meta, which is in volume 3 of the authorities bundle, tab 29 at page 1838. The passage I am referring to is (ii) on this page where it says:

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

So, with that summary of what, in our submission, the requirement for a blueprint to trial entails, I am moving on to show the Tribunal the methodology that we have set out in the first and second report of Professor Wickelgren, starting with Wickelgren 1, which is in volume 1, bundle D8, 338.

Can I just ask the Tribunal to review the brief summary that's given of his expertise in paragraphs 1 to 4 on page 344?

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: Section 3 of his report, starting at page 350, is a detailed section setting

out the factual background and market context. What Professor Wickelgren does in this section is draw on two other expert reports which the class representative has adduced.

The first one is the report of Mr William Hooper, who has expertise in information technology. That can be found in the bundle at D9, 457 for the Tribunal's notes.

The second one he relies on is the report of Mr Rich Gibbons, who has expertise in Microsoft's licensing practice. His report is at D10, 588.

The Tribunal will note that Microsoft itself has not put forward any factual matters about -- factual evidence about these sorts of matters, which one might reasonably think would lie within its own knowledge, matters about its own products and matters about its own licensing practices.

What the background section does is include relevant features of the market which then contribute to Professor Wickelgren's subsequent assessment of the abusive conduct.

So, just to give a couple of examples, if we look at page 351, paragraph 37, section 3.1.1 is making the point that there are huge economies of scale in cloud infrastructure.

Then on page 355, section 3.1.5, this is making the point that the cloud market is very sticky, the point I have already made to the Tribunal. It explains why people stick with their cloud provider even though it might be cheaper for them to switch.

Section 4, on market definition, begins at page 375. We can see it identifies in section 4.2, on page 377, the relevant market for paid server operating systems and then in section 4.3, at page 381, the relevant market for Cloud Computing Services.

In this section as well, there are relevant features of the market which subsequently feed into his assessment of abusive conduct. So, for example, if we look at paragraph 169 on page 378, what he is considering in this context is the extent to

which Linux Server exerts a competitive constraint on Windows Server.

What he observes in this passage and over the page is that particular segments of customers have strong preferences for either Windows Server, on the one hand, or Linux Server, on the other, or particular application, and that switching between those two possibilities is both expensive and costly.

As we will see, that is a dynamic of the market which becomes strongly relevant to the question of abuse, because if we ask how it is that Microsoft can risk charging more for using Windows Server on Rival Clouds without risking having its customers switching away from Windows Server, the answer is that switching is unlikely because of these particular features of the market. I showed the Tribunal that was also a feature the CMA took into account in assessing this (inaudible).

Section 5, "Analysis of Market Power and Dominance", starting at page 384. The Tribunal will see at paragraph 202 Professor Wickelgren's provisional conclusion that: "... Microsoft has a position of dominance in the global Paid Server Operating Systems market."

Again, this section contains observations and analysis which then feed into the subsequent assessment of abuse.

So, for example, starting at paragraph 256, he is discussing indirect network effects in the market for paid server operating systems.

At 266, a few pages further on, page 399, he makes the point that a preference within a particular organisation for using a Windows desktop operating system and the Microsoft ecosystem business applications generally is likely to influence the choice of Windows Server as a server operating system. Again, that dynamic is one which feeds into the extent to which Microsoft can price higher to Rival Clouds without risking losing its Windows Server customers.

So, that is the detailed context in which Professor Wickelgren then comes on to assess

the exclusionary conduct.

Section 6 is the section of his report where he considers the issues of abuse. Section 6.1 on page 401 summarises the conduct which is in issue. The Tribunal will see two bullets there. The first bullet is "Pricing conduct" and the second bullet is "Non-pricing conduct".

Paragraph 275 summarises the SPLA abuse and the Re-licensing Abuse.

Paragraph 276 summarises the quantum discrimination.

Section 6.2 on page 403 then considers whether Microsoft applied dissimilar conditions to equivalent transactions with trading partners. In this case non-Azure sellers purchased Windows Server licences and whether that thereby placed them at a competitive disadvantage to both itself and third-party sellers of Azure. Now that is obviously the relevant test deriving from Article 102.

Section 6.2.1.1 on page 404. He explains in that section that his analysis of publicly available pricing calculators provides direct evidence of discriminatory pricing of Windows Server. Those are the provisional conclusions he expresses in 6.2.1.1.

6.2.1.2, over on page 405, he cites evidence of complaints about discriminatory pricing both from customers and from Rival Clouds.

6.2.1.3 he cites evidence of quality discrimination.

6.2.1.4 he refers to a public announcement by Microsoft that at least some complaints of customers were valid and the introduction of supposedly responsive changes, which didn't apply to Listed Providers.

Now Microsoft's criticism of this section of the report in its skeleton at paragraph 12 is that demonstrating that dissimilar conditions have been applied is not sufficient to make out an abuse. Indeed, lower prices offered by a vertically integrated undertaking can benefit consumers.

Two points in response to that. The first is in my submission it is not a fair description

of what Professor Wickelgren has done. He is not setting out dissimilar conditions in isolation. Consistently with the case law that we have seen, he has set out in detail the context in which this occurs, the market dynamics, the customer preferences, the various factors that feed into an assessment of whether these differences are benign differences or whether they are potentially abusive differences.

Secondly, the particular contention that lower prices to Microsoft's customers as compared to its rivals' customers might in some way be a benefit to consumers was a point that Microsoft raised for the first time in its response. So, it is in our submission not fair to criticise Professor Wickelgren for not having anticipated and addressed it in his first report, but, as we will come on to see, he does address it in his second report.

Section 6.2.2, page 408, this explains why Professor Wickelgren anticipates that rivals were competitively disadvantaged by price and quality discrimination. 298 sets out his expectation that:

"... the higher cost and lower quality user experience that Microsoft forced upon Rival Clouds is likely to have prevented rivals from competing effectively for new and existing cloud customers that rely upon Microsoft software."

That's what he is setting out in 298.

What the Tribunal will see is that in expressing that expectation he is drawing on the context and understanding of the market that he has already set out. So, he refers to the fact that there are large set of customers with strong preferences for Windows Server. He refers to the cost of licences as a proportion of the total cost of the Cloud Computing Services. He says licensing costs make up approximately 30% of Cloud Computing Services, so they are a significant factor.

He then goes on at 299, page 408, to address an obvious factor in this analysis, which is that Microsoft is competing against, amongst others, Amazon and Google. These are obviously large competitors and they have, as he describes it, “deep pockets”.

What he goes on to explain is that the mere fact that Microsoft's competitors might in theory have the funds to try to mitigate the effect of Microsoft's differential pricing doesn't mean that it would necessarily be rational for them to do.

So, what he is explaining in my submission in this passage is that when investigating whether there is a competitive harm here, it is not the end of the story to simply say "These are sizeable competitors". If because of Microsoft's conduct these competitors have less incentive to compete for that proportion of the market that has a preference for Windows Server, then there is still scope for competitive harm no matter how large those competitors are.

Now it is fair to say that Microsoft do not like this point. This is the point that in their skeleton they dub "the irrationality point". The reason they don't like it, in our submission, is because it cuts across the simple story that they would like to tell.

Microsoft would like to argue that if you apply a price-cost test to Amazon or a price-cost test to Google, they are sufficiently large not to be completely foreclosed from the market and that's the end of the allegation against Microsoft. That is the story they would like to tell.

We say that argument fails because the price-cost test is not the right test, but it also fails because of the points that Professor Wickelgren is canvassing here, which is that competitive harm is still possible in circumstances where a rival is disincentivised from competing effectively.

Indeed, as I showed the Tribunal, that is a point that the CMA made in its Final Report as well and a point which was emphasised in the Commission guidelines.

MR DAVIES: Can I just ask a quick factual question that I appreciate you might not have the answer to, to hand?

When Professor Wickelgren says:

"... cross-subsidised to cover the costs and outbid Microsoft on discounts on software

products that Microsoft produces and controls",

do you know how explicit is that? How much would a customer see? Would a customer see, "Microsoft is charging this, but we are only going to charge you this much for the Microsoft product" or is it really just about what the bottom line is, what the final price to the customer is, and that is somehow absorbing?

MS FORD: I can come on to show the information on the following page in this document, which is the publicly available information which Professor Wickelgren has drawn on to substantiate some of what he is setting out. There are such things as pricing calculators. I think that's the right term. Yes. He is referring to an Azure pricing calculator and an Amazon pricing calculator, and the publicly available information that he has been able to ascertain, pending disclosure. I will show the Tribunal exactly what he has been able to determine in relation to that.

It actually fits in quite nicely, because the second criticism that Microsoft makes of this section in paragraph 13 of its skeleton is that this is a theory which is purely conceptual according to Microsoft and they say it could be made in any case of virtual integration. They say:

"It would be surprising if Amazon and Google did not compete for Windows Server sales by taking a lower profit on those sales and the sales of Linux virtual machines and, in fact, Microsoft understands that they do so".

Just picking up that latter point first, that is an assertion, which is unsupported by any evidence, to the effect that Microsoft's understanding is that Amazon and Google do compete. Now that, in our submission, is a pure merits point. It is joining issue in the absence of any evidence with the class representative's case that Amazon and Google are disincentivised from competing. In our submission that is simply not a good basis for resisting certification.

Coming back to the first point and the point that, in my submission, is responsive to

the Tribunal's question, it is not fair to suggest that what Professor Wickelgren has done is purely conceptual. What he does in section 6.3 is to set out two pieces of provisional analysis which test his theory, each of which can then be expanded on post certification.

So, if we go over to 303, page 408, he explains what he is considering in this case in this context. It is (i):

"Whether Microsoft is leveraging its dominance in paid server OS into Cloud Computing Services",

and (ii) over the page:

"Whether such leveraging is profitable because it is anti-competitive or whether there is some efficiency-based explanation for its conduct."

What he does at 6.3.1 is to look at whether there's evidence that there has been a weakening in the competitive constraints against Microsoft which enabled it to increase its prices for base compute. When he refers to "base compute", what he is talking about is the price that is paid for the hardware, the underlying virtual machine, before one then factors in licensing costs.

Figure 9 is the figure I was referring to that's based on publicly available information. What it does, is compare the price of Windows on Azure in blue with the price of Windows on Amazon in orange. In this case, the example is from 2022. It is for a comparable Windows Server.

If we look at Windows on Azure in blue, what has been ascertained from the publicly available information is that Microsoft charged $23 a month for Windows on Azure, which is the pale blue portion at the top there, and it charged $238 for base compute. So, we get a total of $261 for those on Azure.

Compare that with Windows on Amazon orange. Microsoft charged $115 per month for Windows on Amazon. That is the pale orange portion. Amazon's base compute

price -- that's the dark orange portion -- is actually lower than Microsoft's. It is under $200, but because of the higher licencing fees, its total prices are higher. Its total prices are $310.

Professor Wickelgren makes the point at 305 that:

"An equally efficient rival paying Microsoft's higher Windows fees, offering a quality degraded version of the product associated software, applies a sufficiently weaker competitive pricing constraint than would apply absent the discrimination."

He says:

Consequently, “Microsoft is able to set higher prices for base compute" -- here $43 higher -- while remaining cheaper than its rivals.

Section 6.3.2 goes on to consider the second limb, which is whether Microsoft's conduct is profitable and whether there might be some efficiency-based explanation for it.

What he does in this section is look at three metrics. Those are preliminary analyses that can then be explored in greater detail post certification.

First, figure 10 over on page 411. What he shows in this graphic is that Microsoft appears to have increased its share of the cloud computing market since the relevant conduct began. It increases from 25% in 2019 to 35% in 2022.

Secondly, in paragraph 313, he is referring back here in footnote 376 to section 3.1 of the report, which was a section I showed the Tribunal as we went through. It is the section where he sets out the factual background and the large economies of scale of cloud computing infrastructure, and that understanding of the market dynamic is the basis for his observation in this paragraph that increasing Azure sales will reduce smaller viable cloud scale and increase their costs. That's the second dynamic that he is identifying here.

Thirdly, paragraph 314, he considers that the consequence of this conduct is to

segment the cloud computing market. Again, what we see is him referring back to the context. He refers back to section 4.2, where he explains the two segments of the market, the Linux segment and the Windows Server segment.

315 is addressing the Windows Server segment. He explains that Microsoft faces less pricing pressure on its base compute prices because it has raised its rivals' costs. So, it is able to sell higher volumes of Cloud Computing Services at a higher price.

He then comes to address the Linux segment. In the Linux segment Microsoft sets the same high base price because it doesn't want to positively favour the users of a rival operating system and so it is less competitive for users wanting paid Linux Server OS. Again, that is not just supposition. It is borne out by the publicly available pricing data.

So, if we look at figure 11 on this page, that shows that the cost of Linux base compute on Azure, the blue column, is higher than the cost of Linux base compute on Google, yellow, and Amazon, which is orange.

This is where the hypothetical example that I gave to the Tribunal just after the short adjournment feeds in, because here we have a situation where Microsoft's competitors, Amazon and Google, obtain higher margins in the Linux segment than they do in the Windows Server segment and that feeds into his assessment of their incentives in competing.

What he then does is test that by looking at the share of new cloud customers captured by Azure since the relevant conduct began. We looked earlier at the share of the total market, and we saw that it had raised its share of the total market, but what he is now looking at is the share of new customers. This is figure 12 on page 413.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: What that shows is that the percentage of new customers captured by Azure in 2021 and 2022 was 55% in 2021 and 65% in 2022. That can be compared

to the share of the new customers that are captured by Amazon, 15%, and by Google, 15%, reducing to 8%.

So, what this suggests, in our submission, is that this is a strategy which is working for Microsoft. It is capturing a disproportionately large proportion of the new cloud customers compared to Amazon and Google.

MR DAVIES: Just to be clear, these are the new cloud customers regardless of which paid operating system they use? So, it is not quite showing the segmentation at this point. Is that right?

MS FORD: Yes, I think you are right to say --

MR DAVIES: Because in principle, following the logic, you would expect them to be increasing particularly fast for Windows and perhaps even decreasing for Linux. Right?

MS FORD: (Inaudible). When we come to Professor Wickelgren's second report, what he says is with the benefit of further information post certification that is the exercise he wants do. He wants to compare to see whether or not there is a disproportionately large capture of customers -- new customers who favour Windows Server by Microsoft as compared to Linux.

MR DAVIES: Thank you.

MR JUSTICE ADAM JOHNSON: I am looking at the time, Ms Ford. That may be good time to break.

MS FORD: Just by way of progress, I am very nearly through his first report. I will then address his responsive report and then hopefully relatively briefly deal with the position on opt-in, opt-out and then hand over to Mr Marven.

MR JUSTICE ADAM JOHNSON: Very good. Let's break there. We will return at 2 o'clock. Thank you very much.

(1.02 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE ADAM JOHNSON: Thank you, Ms Ford. Thank you.

MS FORD: We were looking at Professor Wickelgren's first report, and we had reached section 6.4 on page 413 which is where he considers Azure's hybrid benefit and much of the approach has essentially already canvassed with the Tribunal.

The point to flag up is that the approach he takes, if the Tribunal looks at footnote 379, he is cross-referring to the test in paragraph 83 of the draft guidelines.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: The Tribunal has my submissions about why we say that is the correct test for those purposes and what he then goes on to do is to consider the relevant factors that feed into the effect of the exclusionary conduct, the degree of market power, the portion of the market affected by the conduct, the terms of the arrangement, the existence of anti-competitive strategy and that is the basis of his preliminary opinion that Microsoft has leveraged its dominance in that respect.

One can see the conclusion at 326, which is the conclusion to the entirety of the provisional early exclusionary conduct, and he says:

"Having considered the publicly available information it is my preliminary view that Microsoft has leveraged its dominance in Paid Server OS in order to restrict competition in the market for Cloud Computing Services. I expect this conduct to have had collateral effects on purchasers within the proposed class."

He then goes on to deal in section 6.6 over the page, 415, to consider what would be the counterfactual absent the unlawful conduct. His expectation, as he sets out in paragraph 330, is that Rival Clouds purchasing Windows Server licences for end users to use on their cloud services would in a lawful counterfactual pay the same price that Microsoft charges for those licences to end users that use Azure.

It is then based on that counterfactual that he then goes on to set out his methodology for assessing damages in Section 7 of the report.

What he explains in paragraph 339 is that he has here a clean reference market for Paid Server OS, and that's the pricing on the Azure platform and he considers that the impact of the conduct is the difference between the pricing of Windows Server on Azure and the pricing of those products that Microsoft offers customers on the Listed Providers.

The way he then goes about calculating the damages to the class are illustrated in figures 13 and 14.

Figure 13 is on page 418; this is the SPLA overcharge figure. What he essentially does is calculate the total use of Windows Server on Listed Providers and multiply that by the difference between the price on Listed Providers, taking into account pass on and the licensing price on Azure.

Then for the Re-licensing Abuse, he sets out that graphically on page 424. He calculates there the total extent of re-licensing of a Windows Server from a Listed Provider, multiplied by the difference between the price for re-licensing and the price per core with Azure Hybrid Benefit.

That exercise is then the basis of his preliminary estimates, which are then set out in table 15, which is on page 434.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: In fact, the damages calculation is relatively straightforward.

Microsoft raises two criticisms of that. I am addressing Microsoft's skeleton at paragraphs 15 and 16.

First of all, they criticise the fact that Professor Wickelgren went on to assume that the entirety of any observed difference between SPLA fees for Listed Providers and the implied price paid by Microsoft's customers for deploying Windows Server on Azure

must constitute an abusive overcharge. They say that's an unjustified assumption and they put forward their case that there are various pro-competitive reasons why prices on Azure would be expected to differ from those on Rival Clouds.

They say indeed one of the benefits for consumers of vertically integrated firms is that they can charge less for their downstream products due to the elimination of double marginalisation.

The idea that there might be pro-competitive reasons for differential pricing is a merits challenge and it is one that Microsoft raised for the first time in its response.

We make the point again that there is no factual evidence from Microsoft as to what these pro-competitive reasons might conceivably be. Microsoft does rely on Professor Scott Morton's report, but that is not underpinned by any evidence from Microsoft itself.

I have shown the Tribunal that Professor Wickelgren did consider in his preliminary analysis whether in his view there were any obvious efficiency justifications, and his provisional conclusion was that there were not.

To the extent that Microsoft positively identifies any such efficiencies that go beyond the general assertion that there might some, then that can equally be taken into account in the analysis. That's referring to paragraph 15.

Secondly, paragraph 16 criticises the fact that Professor Wickelgren assumed that Microsoft would only reduce SPLA fees without increasing Azure prices and they say this implies irrational behaviour by Microsoft in the counterfactual and, again, then rely on Professor Scott Morton's analysis to suggest that that would be irrational, because it would always be more profitable to at least partially achieve this equality by raising prices on Azure.

Once again this is another point that was taken for the first time in the response, and it is another point that is not supported by any factual evidence from Microsoft with any

positive assertion that that's what Microsoft would do in a lawful counterfactual. The reliance is on Professor Scott Morton's report, and it is making a point in the abstract based on economic theory about what might or might not be rational or irrational. It is, in our submission, a far cry from positive evidence to the effect that that is what Microsoft would do in that situation.

Again, to the extent that Microsoft does adduce evidence in due course about what it would do in the counterfactual, then that can be evaluated and taken into account at that juncture.

So, the position on the first report in our submission, we don't accept that there is any basis for criticism, even based on the first report, that there hasn't been a blueprint to trial.

Professor Wickelgren has then proceeded to set out in his second report his specific response to the criticisms that have been advanced. That's in Wickelgren 2, which is in D12, starting at 655.

What he does first, is, he addresses the differences of opinion between himself and Professor Scott Morton concerning what is the appropriate theory of harm in this case. I am looking at section 4.1, "Squeezing margins in the Cloud computing market". What he does is he explain that he doesn't consider that the margin squeeze framework is the appropriate way to be assessing this conduct.

As to what is meant by "margin squeeze", he explains that in paragraph 24, he says:

"A margin squeeze is a form of pricing conduct, recognised in Europe but not the US, which is based on the idea that a vertically integrated seller can set its upstream and downstream prices at levels that prevent a downstream rival from being able to provide an effective competitive constraint in the downstream market. This can, in some circumstances, foreclose competition within the downstream market and result in harm to purchasers in that market."

So that's what he is referring to by “margin squeeze”.

At paragraph 25, he starts setting out why in his view this is not an appropriate means of assessing theory of harm and the point he makes is the point he initially raised in Wickelgren 1, that Amazon and Google are two of the biggest companies in the world and while their ability to compete might be foreclosed, it is more likely that their incentive to complete is going to be impacted by this conduct and they are incentivised to focus their efforts on the Linux segment of the market.

In our submission, he is entirely correct that a reduction in an incentive to compete is capable of being abusive and I have shown the Tribunal both the CMA's findings in his Final Report and the Commission guidelines at paragraph 6 as support for that proposition.

Insofar as Microsoft takes a different view, we say again that that is a merits challenge. It is not a relevant absence of a blueprint to trial.

The second point he emphasises, at paragraph 27, and this is again a point that was evident throughout his first report, is that the class representative's case is not purely pricing conduct. It is a multi-faceted course of conduct, including discriminatory pricing, a multi-product rebate and quality diminished Microsoft software products on the Listed Providers platforms.

He makes the point that a standard margin squeeze test will ignore key aspects of the relevant conduct that's being alleged.

Microsoft's response to this in its skeleton, paragraph 20, was to suggest that Professor Wickelgren has misunderstood the class representative's claim. He hasn't. He is quite right. I have shown the Tribunal the relevant pleaded passages. We have not sought to quantify the impact of those Quality Abuses, but we do say that they form part of the overall course of conduct to be assessed and taken into account.

So, it is not right to say that the Quality Abuses are not alleged as abusive conduct.

Microsoft's skeleton, paragraph 21, then makes a further point. They say:

"In any event, reference to the Quality Abuses cannot assist for certification purposes in circumstances where Professor Wickelgren has offered no methodology either for evaluating or quantifying the impact of those alleged abuses or for integrating any such evaluation into the assessment of liability overall."

Insofar as that passage refers to quantifying the impact of the alleged Quality Abuses, we have made quite clear that we have not sought to do so, but insofar as it is referring to evaluating the impact of those Quality Abuses, in my submission it was made quite clear throughout Professor Wickelgren's report that he is taking those pricing elements into account in his assessment of the conduct and that is entirely consistent in our submission with the relevant case law.

Section 4.2 is headed "A more appropriate theory of harm" and this is setting out Professor Wickelgren's preferred approach. These are not new, the points he is making here are not new. What he is doing is elaborating on the three mechanisms for competitive harm that he first identified at various points in Wickelgren 1.

Mechanism 1, which is 4.2.1.1, paragraph 31, he identifies foreclosure from the Windows Server segment. The point he makes is that a credible threat of open-ended price and quality penalties for customers of Rival Clouds enables Microsoft to raise the costs of Amazon and Google and prevent it from gaining sales in the Windows Server segment.

Microsoft's response to that is to say it has to be verified by a price-cost test. In our submission that is simply not right as a matter of law, for all the reasons I have suggested.

Mechanism 2, over the page, refers to restricting smaller rivals' access to economies of scale. Microsoft's skeleton at paragraph 28 claims this is not relevant because the proposed claim relates to customers of Listed Providers.

Again, we say that's not right, because there are two relevant enquiries here.

The Tribunal has to ask, first: has Microsoft engaged in abusive conduct?

Secondly, what is the harm caused to members of the proposed class?

The fact that Microsoft's conduct might impact smaller rivals is relevant to the overall assessment of whether this conduct is abusive. So, it is not right to suggest that that is irrelevant.

Mechanism 3, on page 658, artificial segmentation of the Cloud market. This is the point that we have been canvassing exchanges up to now, the idea that Microsoft's conduct makes Windows Server customers substantially less profitable for Amazon and Google than paid Linux server customers, and so it incentivises Amazon and Google to cede that part of the market and target paid Linux server customers instead. He goes into a bit more detail here as to why that is problematic. So, from the perspective of Amazon and Google he explains in paragraph 38:

"This means AWS and GCP set base compute prices that attract and maximise the profit earned on customers who do not use Windows Server for their Cloud Computing Services. If instead AWS and GCP were to set base compute prices to also compete for Windows Server customers, this would require these firms to make those lower prices available to both Windows Server and Linux Server customers. This would reduce their profit because it would significantly reduce their margins on Paid Linux Server OS customers ... revenues from Paid Linux Server OS customers are much bigger for AWS and GCP, they therefore have a strong incentive to concentrate their pricing, marketing and other efforts to attract those customers rather than Windows Server customers."

What he has done there is really elaborate on the mechanism by which they might conceivably be incentivised to focus on that portion of the market in relation to which they get larger margins, rather than the entirety of the market.

He also addresses why this is problematic from the perspective of Microsoft. That is paragraph 39, he explains:

"The theory then suggests that given the reduction in the competitive constraints that [Microsoft faces from Amazon and Google] ... Microsoft increases Azure sales and can set (higher) prices that maximise profits by focusing on Windows Server customers. This steers customers in the Microsoft Server segment of the market to Azure and limits competition between Microsoft and the other Listed Providers."

He goes on to consider what would be the situation if they didn't do that:

"If, instead, Windows Server and other Microsoft software products were available to AWS and GCP customers on similar terms to those that they were available on Azure, then I would expect that the relatively homogeneous nature of base compute would result in more direct, head-to-head, competition between Azure and AWS/GCP, leading to lower base compute prices on Azure (and potentially on AWS and GCP). The theory of harm suggests that by creating this artificial segmentation of the market ... Microsoft's conduct has the effect of harming the Proposed Class who are penalised by Microsoft's discriminatory pricing while remaining customers of the Listed Providers."

That theory of harm has been borne out to some extent by contemporaneous documents that were cited by the CMA in its Final Report. He refers at paragraph 42 to one of Google's internal documents from 2022 and what the CMA says about that:

"One of Google's internal documents from 2022 divides customers based on the proportion of the customer's usage of Windows Server and suggests it is less effective in competing for customers with relatively higher Windows Server use."

Professor Wickelgren points out:

"This constitutes contemporaneous evidence that Amazon and Google see a trade-off between competing for Windows Server segment of customers and a Paid Linux

Server ... segments of customers ..."

That, in my submission, is an entirely plausible and credible theory of harm, and it is one which derives some support from the contemporaneous documents.

Turning to what Microsoft say about it in their skeleton, at paragraph 30, breaking this down, first they say:

"Leaving aside the factual point that Cloud providers do not compete solely to sell Windows Server virtual machines, since Cloud providers focus on the overall workloads that the customers demand."

Pausing there, that is a factual assertion. That is a factual assertion for which Microsoft has adduced no factual evidence. So, it is a merits challenge, and it is not a basis to resist certification.

They then go on to say:

"The Tribunal will note the paradoxical nature of a suggestion that conduct that results in Microsoft base compute prices being higher than rivals is conduct that puts those rivals at a competitive disadvantage."

That puts the class representative's case the wrong way round, because we say that it is because Microsoft has put its rivals at a competitive disadvantage that it is able to raise its base compute prices. I have shown the Tribunal that that's not pure conjecture. Professor Wickelgren has conducted provisional analysis in Wickelgren 1 which tested that particular point.

We then get:

"Professor Wickelgren's added nuance does not cure the fundamental problem that his irrationality point could apply to any situation of vertical integration and would make the efficiencies of vertical integration impossible to achieve."

That is, in our submission, precisely the reason for placing his theory of harm in the context of the specificities of these markets, these customers and these products, as

Professor Wickelgren did in his first report and as he continues to do in Wickelgren 2. Of course, insofar as Microsoft does identify concrete efficiencies, which it has yet to do, then those can be evaluated.

Finally, we get:

"Nor does it account for the incentives that Amazon and Google would have for moving customers from Windows Server to Linux."

That is precisely the relevance of the evidence that Professor Wickelgren cited in his first report about customers having strong preferences for either Windows Server, on the one hand, or Linux, on the other. So, it is not straightforward to persuade customers to switch.

Again, insofar as Microsoft wanted to say otherwise, it was open to it to adduce evidence, but it hasn't done so, but again we say this is another merits challenge and it is not a basis for resisting certification.

What Professor Wickelgren has then gone on to do in his section 4.2.2, and then section 5, is to identify specifically the range of relevant factors that were mentioned in the Commission's draft guidelines which he considers to be relevant to assessing whether Microsoft's conduct has exclusionary effects on the competition and the merits.

What we will see as we work through them is that, again, these are not new. These are factors that were already mentioned and taken into account in Wickelgren 1, but what he has done is draw the express connection between the approval, which is advocated in the draft guidelines, and his proposed approach.

Starting at page 660, the first criterion is "The extent of Microsoft's dominance of the market for paid server operating systems". We saw that at paragraph 70(a) of the guidelines, where they explained:

"... in general, the greater the extent of the dominant position of an undertaking, the

more likely it is that its conduct is capable of having exclusionary effects".

He has cross-referred to his preliminary assessment in Wickelgren 1 and he refers to the information that he envisages seeking post certification in order to progress that analysis.

The next criterion he refers to is "Conditions on the relevant market". This is on page 661. That was the guidelines 70(b).

He refers to network effects at 54.

At 55, he refers to economies of scale in Cloud Computing Services.

In 56, he refers to homogeneity of base compute services.

And at 57, he refers to the sticky nature of demand in the market.

I have shown the Tribunal that these were all factors which fed into his preliminary assessment of the abusive nature of this conduct.

5.3, the extent of the alleged abusive conduct. This is the factor that is identified in the guidelines, paragraph 70(d). What this is drawing on is his analysis of the extent to which there is a Windows Server segment of the market. It also factors in questions about the duration of the conduct, both of which were already addressed in Wickelgren 1.

He then addresses whether the dominant undertaking's conduct consists of or enables biased or discriminatory treatment that favours itself over its competitors, page 662.

Again, I have shown the Tribunal that's a factor identified in the guidelines, paragraph 55(d), and I have shown the Tribunal that was a factor that was analysed at some length in Wickelgren 1.

The next factor, 5.5, "Whether the preferential treatment takes place on a leveraging market that constitutes an important source of business for competitors in the leveraged market, which competitors cannot effectively replace through other means".

That's a factor identified in the guidelines at paragraph 161(i). This draws in all the

evidence he had set out about the ways in which Windows Server is differentiated from paid Linux server in a way that generates specific preferences for particular customers for one or the other solution.

He also refers to the proportion of Cloud Computing Services' costs which licensing represents, which again I have shown the Tribunal was a factor that he had originally taken into account.

The next factor is over the page, 5.8 [as said], whether a hypothetical competitor as efficient as the dominant undertaking would be able to adopt the same conduct.

This is the factor that's identified in the guidelines, paragraph 55(f). The point here is really quite a straightforward one. Listed providers don't have a dominant paid server operating system that would enable them to conduct themselves in the way that Microsoft does and to leverage into increased sales in the Cloud Computing Services market.

So, by virtue of that, they are not in a position to replicate the sort of conduct that Microsoft engages in.

Next one on 663 -- I think that's probably an incorrect page reference.

663 something.

MR JUSTICE ADAM JOHNSON: Yes. Page 663, 5.6.

MS FORD: 5.6, a hypothetical competitor as efficient as the dominant undertaking would be able to adopt the same conduct.

I think that's possibly the point I just addressed.

664, whether the preferential treatment is likely to influence the behaviour of users irrespective of the intrinsic qualities of the leveraged product.

That is the factor that's identified in EC guideline 161(ii). It was a factor which was considered on a preliminary basis in Wickelgren 1, because Professor Wickelgren was analysing the effect to which Microsoft was managing to win the lion's shares of new

cloud computing customers.

As I indicated in response to a question from the Tribunal, he is now proposing elaborating on that analysis post certification. That's the point he makes at paragraph 74. What he suggests there is, he's going to analyse the introduction by Microsoft of degrees of discrimination and the impact of market of Windows Server workloads over time. So, he is essentially envisaging carrying forward the initial material that he was able to work with based on publicly available information.

The next one, whether the discriminatory treatment raises rivals' costs or limits access to consumers, over at 665. That's a relevant factor identified in the guidelines at 613, concerning whether the preferential treatment is contrary to the interest of the dominant undertaking's customers in the leveraging market.

In this case, the customers in the leveraging market are the end customers who want to use Windows Server, and it's not in their interests to end up having to pay more to use Windows Server because Microsoft has inflated the costs of licensing insofar as they are derived from Amazon and Google.

That was the subject of preliminary analysis in Wickelgren 1, based on the publicly available information, that was the figure 9 that we showed the Tribunal. Again, he's proposing building on that post certification, and he explains this in paragraph 77. What he's envisaging doing there is comparing the relative profits of the Listed Providers in the paid Linux Server workflows to the profits they would have achieved having to absorb costs to compete with Microsoft in Windows Server workflows.

There is a response to this in Microsoft's skeleton, paragraph 41, what they say there is:

"Just because a shop makes a higher margin on apples than oranges, that doesn't mean it is not competing effectively in the market for oranges."

That, in my submission, doesn't explain how it is in the interest of Microsoft's Windows

Server customers to end up having to pay more for the same product insofar as it is used on a rival Cloud.

The factor at 665 is evidence of exclusionary intent. That's the factor that's identified as potentially relevant in the EC guidelines 70(f) and that's something which we have indicated we propose to seek disclosure from Microsoft on, but we have also relied on the point that the Quality Abuses already suggest that something is going on here that goes well beyond purely vertical efficiencies.

Whether discriminatory treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities, this is page 666. That arises under paragraph 161(iii) for the draft guidelines. What Professor Wickelgren proposes to investigate here is whether, absent any interest in the downstream mark, the Cloud computing market, Microsoft would have an interest in engaging in price and quality discrimination. The provisional suspicion is it would not.

Page 666 also refers at 5.11 to the combined effect of these factors and that's the point that was made in the draft guidelines at 162.

He sets out here three standard methodologies by which he proposes to address the combined effect of all the conduct.

The first one is at 86 and 87, what he is proposing there is to compare the licensing costs charged to Listed Providers and those charged to Microsoft Azure customers. What he says is netting off any double marginalisation and taking into account any specific efficiencies advanced by Microsoft.

These points now having been raised by Microsoft positively in their response, he is indicating that he will take them into account in his analysis.

Microsoft makes two points about this; this is paragraph 45(a) of their skeleton.

Firstly, they say it is a rehash of what appears in Professor Wickelgren's first report. In our submission, a more accurate description would be it is entirely consistent with

what he said the first-time round, because he had already set out a blueprint to trial.

Secondly, what they suggest is missing, they say:

"Professor Wickelgren makes no proposal for carrying out his assessment, because he will wait for Microsoft to identify any pro-competitive effects."

In our submission that is not an absence of a methodology, and it is not a reversal of the burden of proof. It simply reflects the fact that if Microsoft wishes to suggest that there is some justification for their discriminatory conduct, then they should identify it. It is no part of the test for certification that the class representative has to try to anticipate the case that is going to be run by the proposed defendant in advance. That is the point I showed the Tribunal from the Gormsen v Meta judgment; it is not a failure of our methodology that we haven't sought to divine exactly what Microsoft says is the explanation for its conduct.

In paragraphs 88 to 89, Professor Wickelgren is here referring to the fact that Microsoft has settled with the CISPE providers, which I showed the Tribunal. He makes the point that because Microsoft has undertaken to cease its discriminatory conduct in relation to those particular smaller providers, that then provides the opportunity for what he terms the natural experiment, because he proposes to compare the extent of the sales while the conduct complained of was going on and the extent of the sales when it has stopped.

Microsoft's skeleton, 45(a), addresses this proposal. What they say is:

"It is hopeless as a basis for evaluating the alleged competitive harm."

The reason, according to Microsoft, why it is hopeless is that the CISPE settlement is clearly not informative of what Microsoft would do if it were to charge equivalent prices to all rival Cloud providers, including Google and Amazon. What would be informative of what Microsoft would do in those circumstances is evidence from Microsoft, but we haven't been provided with any.

This is in our submission again a pure merits challenge and simply not a basis to resist certification.

In any event, what this enabled Professor Wickelgren to do is compare sales with the discriminatory conduct and sales post the discriminatory conduct.

In our submission that is a good prima facie basis of evaluating the impact of the alleged harm. To the extent that Microsoft wants to suggest that there is a relevant difference between the Listed Providers and the CISPE parties, it is open to it to raise that argument. It is a merits argument, and it doesn't in our submission impact the blueprint to trial.

Paragraphs 90 to 91, Professor Wickelgren is here proposing to analyse the changes in the base compute price which have occurred as Microsoft's conduct was implemented. Over time as the conduct was brought in, what impact did it have on the base compute price? Again, that is consistent with the initial analysis that he set out in its first report.

Microsoft's objection to that is the same as previously. It asserts that it would not lower prices for Azure, but it hasn't provided any evidence. Again, we say merits challenge, not an absence of blueprint to trial.

Coming back to the test that, in our submission, this Tribunal should be asking, the question is: can the Tribunal see a way to try these proposed claims in the light of the methodology that Professor Wickelgren has set out?

In my submission, the methodology and the allegations are eminently triable and the challenges that Microsoft has advanced are transparently challenges to the merits, and those challenges can be assessed at trial, but they provide no basis to resist certification.

Sir, unless I can assist further, those are my submissions on the blueprint to trial point.

MR JUSTICE ADAM JOHNSON: Thank you.

MS FORD: Moving on to deal with opt-in, opt-out.

MR JUSTICE ADAM JOHNSON: Yes, thank you.

MS FORD: The class representative seeks certification on an opt-out basis. Microsoft has sought to suggest there should be separate opt-in and opt-out classes.

The leading case on this is the Court of Appeal in Evans v Barclays Bank, which is volume 3 of the authorities bundle, tab 26 at 1635. This is on appeal to the Supreme Court. So, until the Supreme Court hands down its judgment, this present judgment represents the present state of the law.

MR JUSTICE ADAM JOHNSON: Uh-huh.

MS FORD: This was a case which concerned the proposed collective proceedings against respondent banks (inaudible) Article 101 of the treaty in the context of FX trading. It was a class that comprised financial institutions who engaged in FX trading.

The context is that the majority of the Tribunal below considered that the claim was extremely weak and in the light of that it certified on an opt-in basis. That was the judgment that the Court of Appeal overturned and directed that the claim should proceed on an opt-out basis.

Paragraph 82, on page 1671, sets out the relevant test in CAT Rule 79(3). It explains: "The CAT may take into account all matters it thinks fit, including the matters set out in CAT rules 79(2) and (3)."

(3):

"In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2) -- (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

That's the test to be applied.

Paragraph 88, page 1672, the Court of Appeal is citing with approval two authorities on the underlying statutory purpose.

The first is a Canadian authority which was endorsed by Lord Briggs in the Supreme Court in Merricks. Essentially stating:

"The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public."

That was a Canadian case which was endorsed by the Supreme Court.

It also cross-refers at 89 to Le Patourel for the legislative intention which is behind the creation of the collective damages regime generally.

The Tribunal will see what's said there at paragraph 29 from Le Patourel:

"... the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought

about by the ability to aggregate claims."

Lord Justice Green, giving the judgment, does refer to the strength of claims criterion and practicability criterion in the context of the circumstances of this particular claim.

In relation to strength of claims what he says is essentially at paragraph 93, if I could invite the Tribunal to review that. This is obviously in the context of a judgment which had found the relevant claims to be extremely weak.

He goes on to consider the practicability criterion, which starts at 118. The Tribunal can see at 118 what was said by the appellants. They say:

"The CAT majority erred in the inferences drawn from the undisputed facts that absent an opt-out order there would be no claim."

They are making reference to class members being large and sophisticated entities and suchlike.

What the CAT does, is it, at 119, refers again to Merricks. It goes on to consider the particular evidence that was available in this case to members of this class, and makes some observations about access to justice at paragraph 123. Again, I would invite the Tribunal to review that.

Making the point:

"Access to justice is not just about the size and sophistication of the class members but encompasses also the size of the claim and whether it would be proportionate or practicable for the class members ... to commence proceedings to recover that loss."

It points out that there is reference in the regime to consumers and SMEs, but there is nothing suggesting it was limited in that way.

That's the treatment of this issue in the Court of Appeal in FX.

There are a few other judgments from the Tribunal which in my submission are potentially closer to the circumstances of these proposed proceedings.

The first is McLaren, the reason I refer to McLaren is because Microsoft's tactic of

suggesting that the proposed opt-out class should be split into an opt-in class and an opt-out class was one that had been tried previously in McLaren and was rejected by the Tribunal.

Volume 2 of the authorities bundle, tab 16, page 1073. The Tribunal should have a heading there, "Opt-in or opt-out: large business purchases". This is in the context of a follow-on damages claim arising from a cartel in deep sea shipping. The class was comprised of persons who purchased or finance vehicles over the relevant period.

The Tribunal can see from 151:

The respondents submitted that, if the Tribunal was inclined to certify the claim, then collective proceedings in respect of 'Large Business Purchasers' should only be permitted on an opt-in basis. They suggested that Large Business Purchasers should be defined as “a business that either Purchased or Financed, in the United Kingdom, at least 20,000 New Vehicles or New Lease Vehicles, other than one produced by an Excluded Brand ..."

So, there was a suggestion of a split class and there was a suggestion as to where the line should potentially be drawn, subject to the Tribunal's views on that.

The Tribunal was unpersuaded, we can see that from paragraph 161, and they identify four reasons why that proposal should be rejected, and those are reasons which, in our submission, apply with equal force in these proceedings.

First of all, at paragraph 162, they say:

"... the respondents' argument that opt-in proceedings would be practicable for Large Business Purchasers has an element of bootstraps. It is based only on a division of an otherwise single class in a way that splits out a relatively small number of members that might be expected to have suffered higher losses. It is likely that, within any large class, sub-groups of that kind may be found to exist. The mere fact that they exist cannot mean that it is the right approach to sub-divide the class."

Any class is going to have these divisions.

The second point, at 163, they question the efficiency of conducting claims sought to be combined by a single proposed class representative, raise common issues and are otherwise suitable for certification on both an opt-in and opt-out basis. It says:

"It seems to us that, even if they were jointly case managed, the effect would be ... to increase overall costs."

They say the respondents being liable for costs if the claims succeed is not a complete answer.

They say:

"The Tribunal is obliged under the governing principles of the CAT rules ... to seek to ensure that cases are dealt with justly and at proportionate cost, saving expense so far as is practicable."

So, the second proposition, it is not efficient to split an otherwise single class in this way.

Third point, at 164, the respondents don't dispute that if certification is appropriate at all, then it should be on an opt-out basis for the majority of the class. The Tribunal says that is correct:

"... a large number of claimants, the great majority of whom are likely to have small claims. Taken as a whole they are unlikely to be readily contactable. Opt-in proceedings would not be practicable for the vast majority."

Then, 165, they look at how one goes about splitting the class and they say:

"We don't see how the class could be subdivided in a way that is both sufficiently clear and doesn't lead to arbitrary distinctions and potential unfairness."

They make the point:

"... a threshold will appear arbitrary. There is no obviously good reason to require an acquirer of 20,000 vehicles to opt in if they wish to benefit, but to allow an acquirer

of 19,999 vehicles to participate on an opt-out basis."

Then they make the point:

"It will not necessarily be apparent to class members which category they are in."

In our submission each of those objections applies in equal force in this case.

At 166 the Tribunal is considering some evidence that was put in on behalf of the proposed class representative in that case and the point they found persuasive towards the bottom of page, beginning "more persuasive" are the points made about the broad range of businesses that may fall in the large business purchaser category: "... such that communication through one or a limited number of industry bodies is unlikely to be feasible and book-building more difficult, with a consequential effect on costs and, potentially, viability."

As and when I come to make submissions on the circumstances of this case, I will say that the same applies in terms of the variety of businesses involved in the class.

167, the class representative in that case had raised a concern that was what was really going on was an attempt to reduce the value of the claim and thereby to threaten its viability. What the Tribunal said there was:

"... it emphasises the need for the Tribunal to determine what benefits or advantages could actually flow from the respondents' proposed approach and which the Tribunal ought to take into account. If they do not exist or can be achieved in another way, then that is also a relevant factor."

What they then go on to do, is to look at the supposed advantage that the respondents have identified in that case, which related to benefits in terms of disclosure. They considered that in paragraphs 168 to 170, and they were not persuaded that was a genuine advantage to splitting the class.

That is an example of this tactic being tried previously.

MR JUSTICE ADAM JOHNSON: Can I just go back to 163, just to clarify my

understanding, which is the second of the points that the Tribunal makes.

They say:

"... we would seriously question the efficiency of conducting claims sought to be combined by a single PCR, that raise common issues and are otherwise suitable for certification, on both an opt-in and opt-out basis. It seems to us that, even if they were jointly case managed, the effect would be bound to increase overall costs."

Are you able just to expand on that reasoning? It is not amplified, is it, in --

MS FORD: That's the extent of the reasoning.

Presumably what they are referring to is the fact that one has two separate classes, and so one has to address the case in respect of those two separate classes insofar as there is a relevant distinction separately ... of course what begs the question is: is there really a relevant distinction? Of course, if there is not a relevant distinction, there is no justification for splitting the class in the first place.

MR JUSTICE ADAM JOHNSON: Yes, although if you have an opt-in group, then you would easily be able to identify, ultimately if the claim was successful, who the recipients of any distribution would be. That would be a practical benefit.

MS FORD: Yes, although one can achieve that benefit by means of an opt-out class in the same way, because individual recipients in the class could register their interest and indicate that they are a member of the class and therefore entitled to benefit.

MR JUSTICE ADAM JOHNSON: At any rate what you think 163 is referring to, is the extra case management that would be involved in managing both an opt-in and an opt-out group.

MS FORD: Yes.

MR JUSTICE ADAM JOHNSON: I mean, the case would unfold in the same way, wouldn't it, as regards both groups? I mean, members of the opt-in group, for example, would they be required to give disclosure on an individual basis to the

claimants or ...

MS FORD: There is some consideration of that in paragraphs 168 to 170. What the Tribunal essentially says is that there is no reason to have a separate opt-in group in order to facilitate the relevant disclosure. It is not something which is necessary in order to achieve those positive outcomes. It is absolutely right that --

MR JUSTICE ADAM JOHNSON: That's the same point, looked at from another direction?

MS FORD: Yes.

The point really is, insofar as this case would proceed in the same way vis-a-vis these class members, there is no justification whatsoever for splitting them out and treating them as two separate classes. They have been formulated into a class into which there are common issues and --

MR JUSTICE ADAM JOHNSON: Yes. I see. Thank you.

MS FORD: This does tie into a relevant dynamic in this case because, as we are going to come on to see, Hammond and Stephan was another case where the Tribunal has certified claims brought on behalf of business class and there was a suggestion in that case on behalf of the respondent, Amazon, the proposed defendant, that they would be prepared to provide contact details to enable the class members to be contacted.

We contrast that positive suggestion to try and facilitate contacting class members with the situation that has eventuated in this case, where we were originally provided some somewhat Delphic information about the class from Microsoft in correspondence back in April 2025. We asked for the underlying information that underpinned those assertions and we were told, "No, you can't have that information". Some information has subsequently emerged in the form of a witness statement, which was not produced with the response, and which has essentially come in, I think it was, late

November.

The point we make there is that in contrast to the Amazon position where the respondent was saying, "Look, we will attempt to facilitate your efforts to try and contact these people to make opt in potentially practicable", actually we have had completely the opposite dynamic in this context.

The case I was referring to is Hammond and Stephan. It is tab 38 in volume 3 of the bundle at page 2277.

MR JUSTICE ADAM JOHNSON: Would you mind giving me that page reference again?

MS FORD: 2277.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: The Tribunal should have there "Opt-out or opt-in?"

This is a claim that was brought on behalf of a class of retailers and it alleged abuse of a dominant position by Amazon. So, it is another example of a business class.

At 148, we can see the submission on behalf of Amazon:

"... if the Stephan Application were to be granted, the CPO should be only on an opt-in basis."

At 151, you see the emphasis on the fact that they are businesses not consumers.

At 152, you see the Tribunal recording that proposed class members are diverse and a very small minority of them have much larger claims than the rest. The same points can be made in many collective cases, but they are not the primary consideration.

That echoes, in my submission, the similar point that was made in McLaren, to the effect you will find that dynamic in any proposed class.

153 is the point that I was canvassing with the Tribunal. Amazon had expressly offered to provide the class rep in that case with the contact details. Even in those circumstances the Tribunal is saying it does not mean that it is necessarily practicable

to proceed by way of opt-in proceedings. They say there are other relevant factors. The ones they identify in 153 are: the very large number of proposed class members; the fact that although a minority of proposed class members are large merchants, most are small ones; the fact that the average loss per class member was relatively modest; and the damages arose from the continuing accumulation of small losses rather than the purchase of a few large items.

Then at (4), the class members' reluctance to identify themselves in litigation against a potential trading partner.

The Tribunal will anticipate when I come on to make my submissions, I will be saying that those factors apply in this case as well.

The final authority briefly to address is the one that Microsoft relies on in its skeleton at paragraph 54, which is the Commercial and Interregional Card Claims, that is authorities bundle 30, page 1869. This is the one that Microsoft has cited and said this is an example of the proposed approach being accepted by the Tribunal in previous cases.

The important difference, in my submission, between Commercial and Interregional Cards and these proceedings is that in Commercial and Interregional Cards the proposed class representatives chose to formulate their claims to comprise an opt-in and an opt-out class. The Tribunal can see that from paragraph 1, page 1869. They say:

"This is the second attempt by two corporate entities (the 'PCRs') to obtain Collective Proceedings Orders ... in relation to two opt-out claims and two opt-in claims, against the proposed defendants, ... Mastercard and Visa ..."

Of course, if the proposed class representative takes the view, taking into account all the circumstances of their particular proposed collective proceedings, that an opt-in class is practical and workable and if they then consciously formulate their proposed

proceedings in that way, in our submission, that's a very different proposition from a proposed defendant coming along and resisting certification by proposing the bifurcation of a single formulated class for reasons no doubt of its own.

In our submission, this case is not of any assistance to the Tribunal in the circumstances of the present proceedings.

In our submission, the two relevant criteria, the strength of the claims and practicability, each point strongly in favour of certification of on opt-out basis in the particular circumstances of this case.

As to the strength of the claims, we say that these proposed claims are strong. We rely on the various regulatory proceedings around the globe in respect of this conduct that I have shown the Tribunal are being investigated and we rely in particular on the findings of the CMA that I've shown the Tribunal, to the effect that Microsoft's licensing practices have the effect of reducing competition in cloud services markets by materially disadvantaging Amazon and Google.

Microsoft makes the point that the CMA is applying the statutory test for a market investigation in that context, but in our submissions is really not a very big step to conclude that Microsoft has conducted itself abusively in circumstances in which its licensing practices has been found to reduce competition in cloud services markets and to materially disadvantage is competitors.

We say that this is a case where the merits of the potential claims are strong and that points in favour of an opt-out class.

As to the criterion of practicability, we rely on five factors.

The first is the size and diversity of the class. The proposed class is large. It is estimated to comprise around 59,000 members. That's Professor Wickelgren's first report at 376 to 379. It is also a diverse class. What the class members have in common is that they each use Windows Server on a Listed Provider's Cloud, but

beyond that they are spread across a large number of industries and sectors, and it follows that they also don't have common industry organisations or common trade associations by which they can be identified and communicated with. That is the first factor. Size and diversity of the class.

Secondly, the average size of the claims. Professor Wickelgren estimates that the average per class member will be in the tens of thousands of pounds. This is the point to which Microsoft's belated witness statement goes. It puts forward confidential information and, so, the way I propose to deal with that is to point the Tribunal to the relevant numbers and not, if possible, to read them out.

MR JUSTICE ADAM JOHNSON: Uh-huh.

MS FORD: It is in the confidential bundle tab 67, page 1804.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: For the relevant information is that contained in a table in annex 1.

MR JUSTICE ADAM JOHNSON: Yes.

MS FORD: What I propose to do is address the two points that Microsoft relies on this information for at its skeleton, paragraphs 52 and 54.

What they firstly do is they point to the customers who are spending under $1,000 per annum on Azure, so that is the first row of the table.

What they do is they highlight the figure in the final column which shows the percentage share of total Azure revenue which is made up of those customers. The Tribunal will see that figure. We would invite the Tribunal to look at the number of such customers that have such claims. That's the column that's headed "Value" and a sort of hashtag indicating a number and the share of the total customers that represents. We would invite the Tribunal to look at those two figures and to also take into account the share of total customers that spend up to 1 million. So, the number of those customers that spend up to 1 million in the first essentially four rows of the

table and the share of the total spend that is attributable to those customers.

In our submission what this shows is that the vast majority of the proposed class in numerical terms have relatively modest cloud spend and are likely to have relatively modest claims, and just as we saw in the case law the other classes the Tribunal has considered, the vast majority of those classes also have relatively modest spends and claims, we say it is clearly not practical for that portion of the class to opt-in.

Microsoft also point to the customers that are spending between 1 to 20 million per annum. So that is the fourth, fifth and sixth rows of the table. What they do is they draw attention to the proportion of Azure revenue that's made up by those customers. Again, we are talking about the final column. They point to the figure -- the proportion of Azure revenue deriving from customers spending more than 20 million per annum. All that shows in our submission is that there are a relatively small number of members of this class who can be expected to have suffered higher losses.

As the Tribunal pointed out, both in McLaren and in the Amazon case, within any class, sub-groups of that type are likely to be found to exist and indeed they do in this class. As the Tribunal has said on those two previous occasions, the mere fact that they exist can't mean that it is the right approach to sub divide a class.

The third factor we ask the Tribunal to take into account -- Mr Lewy is right to remind me that this is data that's been provided by Microsoft in respect of Azure, and that the class is obviously made up of non-Azure customers essentially, customers of the Listed Providers.

In adducing this data Microsoft is essentially inviting the Tribunal to infer that the same would apply in relation to the customers of the Listed Providers and that's essentially an untested proposition.

MR DAVIES: There is another question, which probably is not actually for you. That is whether the distribution of Microsoft Windows Server licence fees is proportional to

the value of client spend?

MS FORD: Yes, that must be right.

MR DAVIES: I just leave that out there.

MS FORD: Indeed. I suspect my learned friend will be in a better position to address that.

I was moving on to identify our third factor, which is, there is no proposal about how Microsoft suggests the Tribunal should go about bifurcating this class. The proposed defendants in McLaren did at least come up with what they said was a threshold above which they suggested the class should be expected to opt in. Microsoft has not done that. In my submission the reason why it hasn't, is because it must recognise that exactly the same problems arise. Any proposed threshold that it puts forward is going to be arbitrary and whatever metric is proposed is likely to give rise to practical difficulties for individual class members in trying to ascertain whether they fall inside the proposed opt-out class or the opt-in class.

Fourthly, there are no positive benefits advanced of bifurcation. I showed the Tribunal in McLaren the proposed defendants did at least attempt to suggest that opt-in proceedings might have benefits, and they referred to disclosure, although the Tribunal ultimately wasn't particularly persuaded by it.

The Tribunal rightly recognised in that case that advocating opt-in proceedings was potentially self-serving for a defendant. So, what they said was it is necessary to scrutinise whether an opt-in formulation actually brings positive benefits. In this case, Microsoft has not identified any positive benefits that it contends would arise from bifurcating the class in the way it suggests.

In our submission, there is absolutely nothing to commend it as a cause of action.

The final point we make concerns the risk of retaliation and this is the point that I made earlier today in relation to the second sentiment.

All members of the proposed class are users of Windows Server and so they are dependent on a continuing business relationship with Microsoft. All of them will be substantially smaller than Microsoft and if they were to be required to opt in, they expose themselves to retaliation by Microsoft. I have shown the Tribunal that this is not a fanciful concern, because preserving the anonymity of end customers was a key concern expressed by the CISPE parties in reaching a settlement with Microsoft, and CISPE submitted to the CMA that they were concerned about retaliation from Microsoft.

In our submission, that is a further factor which points strongly in favour of opt-out proceedings.

Mr Lewy helpfully reminds me that that was a factor which was also taken into account by the Tribunal in the Stephan v Amazon case, paragraph 153(4), it says:

"Professor Stephan submitted that since many PCMs need to continue to sell on the UK Amazon Marketplace, they may be intimidated to take active steps to identify themselves in litigation against an essential trading partner. We are in no position to evaluate this concern, but we accept that it is not fanciful."

If anything, in our submission, the situation is stronger, because an independent party, the CISPE settlement parties, have expressed that concern to the CMA. So, it is not something we are raising in the abstract; it is a concern which has been addressed.

For all those reasons, we ask the Tribunal to certify these proceedings on an opt-out basis.

Unless I can assist the Tribunal further on that point, I am going to hand over to Mr Marven.

MR JUSTICE ADAM JOHNSON: Thank you.

I am just looking at the time. Would it be appropriate to have a short break now.

I think we will, Mr Marven, come back to you after our break.

Thank you very much.

(3.08 pm)

(Short break)

(3.20 pm)

MR JUSTICE ADAM JOHNSON: Yes.

Thank you, Mr Marven.

MR MARVEN: Sir, yes. I am going to deal with funding. I am going to deal with the actual documents, subject to anything the Tribunal wants to say to me, relatively briefly, because as I am sure the Tribunal will have appreciated, the core of the attack on the funding is not actually on its terms but on the identity of the funder.

Just for completeness, there is a funding agreement. The Tribunal has that in its final form. I don't propose to turn it up, but just for the Tribunal's reference at tab 31, page 2669, and the funder is LCM Funding UK limited. I will come back to its parentage momentarily.

There is also an after-the-event insurance policy.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: The insured is actually the funder, but there is an anti-avoidance enforcement clause, which in summary means that Microsoft can claim on it directly, and in the event that there was a narrowly defined reason for terminating the policy, that would be prospective only, and Microsoft would be given notice of that.

The policy is in the confidential bundle, tab 32, page 1769. The insurer, I should say, is Litica, a well-known insurer.

The anti-avoidance endorsement, which is probably the most important thing for Microsoft, is at page 35 in the non-confidential bundle, page 2702.

I don't propose to say much more than that save to emphasise that, as I understand it, Microsoft does not suggest that there is anything other than adequate capacity to

pay its costs. Its challenge is to the proposed class representative's capacity through her funder to fund her own costs.

I stress that for this reason. The Tribunal will appreciate the context in which this question arises is not -- I will submit here that Microsoft have overreached in their concerns -- to conduct some kind of audit of the funding, because it feeds into the ultimate question with which, of course, the Tribunal will be very familiar: whether it is just and reasonable to appoint the proposed class representative as the class representative.

One of the specific factors that is mentioned in the rules in that regard is the ability to pay the defendants' costs and I have dealt with that. I don't understand there is any challenge in that regard.

The rules do not themselves mention capacity to fund own costs, but the guidance -- and again the guide, I don't propose to turn this up, just for Tribunal's reference, is paragraph 6.33, it says by extension capacity to fund own costs is relevant. It is simply a factor.

It is not a question, in my respectful submission, of the Tribunal saying that there is some kind of binary decision, certainty of funding means certification, without means no certification. That's not, in my respectful submission, the appropriate approach.

There was at one point, I don't think it is pursued, because it is not in the skeleton, but there was a narrow challenge to provisions in respect of discontinuance. The Tribunal has seen that. I will come to that in due course, if needs be, but in terms of the relevance of terms of funding, I will just ask the Tribunal to turn this up. The relevant authority is cited at paragraphs 93 and 94 of our reply, which is tab 5, page 175.

Essentially -- I paraphrase -- in terms of the approach at this stage to the terms of funding it is only -- I quote from the relevant authorities at paragraph 94, It is only where funding provisions are "sufficiently extreme" that they warrant calling out at this

stage that the Tribunal does so. The general position, and I quote from the Gormsen case at paragraph 93 of the reply:

"Matters such as the appropriateness of the terms of funding are left to the Tribunal's supervision at the end."

Where, as the Tribunal will appreciate, it has very significant powers supervisory to disturb any contractual arrangements that are made.

That's all I am going to say about the terms of funding, subject to any concerns the Tribunal wishes to raise with me. If there are not any, I am going to move on to what is the challenge that's made by Microsoft, it is rather reduced in its skeleton argument from --

MR JUSTICE ADAM JOHNSON: Before you move on, can we raise a couple of points that had occurred to us, which you may be able to assist on?

MR MARVEN: Of course.

MR JUSTICE ADAM JOHNSON: I am looking at the amended funding agreement, tab 31. First of all, clause 9.5, page 2683, which is dealing with the claimant's position to withdraw or discontinue. The structure adopted there is to impose a restriction on the claimant's ability to withdraw or discontinue, etc, against the reasonable written legal advice of the solicitors.

So, I think we thought that was satisfactory. Presumably if there is any disagreement about the reasonableness or otherwise of any advice given, that's a matter that could be referred to arbitration under clause 16?

MR MARVEN: Yes, it would be.

MR JUSTICE ADAM JOHNSON: Is it clause 16? Yes, clause 16.

MR MARVEN: I think that's right, yes.

MR JUSTICE ADAM JOHNSON: Then clause 17.1 is dealing with the funder's position. We did have a question about that. That says:

"If the funder reasonably considers, based on independent advice, that the merits of any claim are no longer satisfactory or that any claim is no longer economically viable ..."

What does that mean and are you able to assist us at all in identifying how economic viability would be assessed? In some other cases we have seen examples of wording which pegs the assessment of economic viability to the position as it stands when the claim is initiated, so that if there is, as it were, a material adverse change in the position later on which requires the economic assessment to be revisited, then it becomes permissible to do so, but at the moment economic viability seems to be an open-ended concept.

MR MARVEN: Sir, you are right. It is not a defined term in the agreement. So, what I say is not based on an express term of the agreement. It is based on my submission as to what the construction would be. I accept that it's a general phrase that isn't narrowed to any specific definition, but I would suggest it would mean that it financially simply wasn't worth continuing with the claim, but it would mean in my submission that it was no longer economically viable from the class's point of view, because that's the test of the -- that's the claim, the class's claim.

This aspect of it is subject to an expert determination clause, which is clause 15, that you see two pages back on page 2688, where essentially a KC expert would determine it.

So, there are safeguards there.

Firstly, that the funder has to reasonably consider that to be the position and there is an explicit expert resolution clause, which would be a relatively summary procedure.

Sir, you have seen -- I have not come armed with examples, because although, of course, you are fully entitled to raise it, it was not a point that Microsoft had raised. There are funding agreements that have very similar wording that have passed muster

before, but you are also right to say that there are other forms of wording that have been used in other cases.

MR JUSTICE ADAM JOHNSON: Yes, I see. I mean, one possible amendment which we might derive some reassurance from would be one that reflected the limitation you have just expressed, i.e. an amendment that makes it clear that economic viability has to be looked at from the point of view of the class rather than the funder. We might say that is especially significant in this case, given that some concerns have been expressed about the economic position of the funder. I know we are going to address those separately.

MR MARVEN: I have heard what you have said and no doubt we can consult the funder on that. I don't speak for the funder, so I can't give you an answer as to whether we are able to make that revision.

MR JUSTICE ADAM JOHNSON: I don't expect a response immediately. You can reflect on it overnight and we can come back to it tomorrow.

MR MARVEN: In terms of economic viability, that again is referring to the economic viability of the claim. I would suggest that -- if I can put it this way -- any internal issues that the funder had could not bear on that question.

MR JUSTICE ADAM JOHNSON: I hear what you say, and I see the argument on the construction of that language which you advance. On the other hand, long experience suggests to me that alternative interpretations are always available of language which is not exactly clear. So, you might give some thought overnight to whether some amendment might be possible.

MR MARVEN: I will certainly do that.

MR JUSTICE ADAM JOHNSON: While we are on it, can we raise another point, which is that we understand that in some other cases the claimant has been encouraged to appoint a specialist costs adviser to provide advice as the proceedings

unfold on an ongoing basis about the reasonableness of costs incurred in managing the action. I don't know whether you are familiar with that structure.

MR MARVEN: I am aware it has been suggested in other cases. It is not something and it has not to my knowledge been canvassed in this case. It is something that is possible. Speaking personally as someone who does this kind of thing, I have no personal complaint about this, but it does itself increase the cost. There is certainly debate --it is not in every case that the Tribunal considers that necessary or even appropriate. There are issues about how frequently the review or the reviewing of invoices should take place, but I can certainly take an instruction on that, if you like.

MR JUSTICE ADAM JOHNSON: Yes, give consideration to that overnight as well, if you wouldn't mind.

Lesley, was there anything else on the agreement? That's all we have I think on the terms of the agreement itself. So, let's come on to the --

MR MARVEN: I am very grateful for that. We will take that away and come back tomorrow.

MR JUSTICE ADAM JOHNSON: Thank you very much.

MR MARVEN: The criticism or the attack that is made, it is said that it is -- my paraphrasing -- that the funder's reliability is open to question. The Tribunal appreciates that the funder is a UK subsidiary of a company called Litigation Capital Management Limited, which is listed on the London Stock Exchange Alternative Investments Market, and prior to that was listed on the Australian Securities Exchange. So, it is a company that has been subject to significant public scrutiny for a significant period of time.

In terms of how the funding -- what I propose to do now is just go through how the funding in this case would operate and also to make the submission that actually what the defendant is doing here is attempting to relitigate points which another Tribunal

has rejected in a case called Gutmann v Vodafone and others.

Let me, if I may, start with the evidence in this case.

The first statement I want to go to is the first statement from Mr Moloney, who is the Chief Executive Officer of the LCM group, which is a group that includes the parent company. The Tribunal has that at tab 7, page 332. That sets the scene. The impetus, the Tribunal will appreciate, for the express concerns of Microsoft is a statement that was published later, in I think October 2025, dealing with the position of the parent company to June 2025 and its annual results. I will come on to that.

You will see that referenced at paragraph 5 of Mr Moloney's statement at page 333. I don't propose to read it all out. He makes reference to paragraph 102 of the reply and says at paragraph 108 that the funding will be -- I will come back to this -- what this statement says is up to 62 per cent. That's an error. It is not up to, as I will seek to explain in a moment, it is at least 62 per cent of the funding commitment that -- I will explain why I say that -- comes from managed funds, in other words, from third-party investors and 38% from LCM's own funds.

In terms of LCM's own funds, further comfort is given at page 335 and paragraph 12 onwards. First of all, he makes the point at paragraph 12:

"The points made by the proposed defendants' letter related to LCM Ltd's financial position, including its debt covenants, are irrelevant to the funds managed by LCM as described above ..."

They are irrelevant to the 62 per cent because that's funding from third parties:

"The proposed defendants' concerns could therefore only be relevant to the contribution of the funding commitment that is derived from LCM Ltd's own balance sheet resources."

He then goes on to deal with that, and he says that LCM's position is supported by a capital facility provided by Northleaf with a facility that was renewed December 2024

for US$75 million with an upside of a further 75 million. He then goes on to explain at paragraph 14 the provenance of Northleaf, that it is a:

"Canadian global private markets investment firm focused on mid-market private equity, private credit, and infrastructure investments in developed markets."

Then goes on to give its history and record the fact that it has 29.6 billion worth of assets under its control.

Before I go to Mr Moloney's second statement, can I just go back to our reply, paragraphs 100 to 102, tab 5, page 176.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: Just a little on from what I showed the Tribunal in terms of the principle. Paragraph 100 sets out that its business model -- the figures are different in this case, as you will have seen -- is it is of an asset manager with cases funded typically 25 per cent from own balance and 75 per cent from third parties:

"In the case of Dr Stasi's claim (and due to the size of the budget passing an agreed threshold level) this allocation is 62/38, with 62 per cent of the funding coming from one of the personally managed funds, 'Fund II'. Although LCM achieved its target of raising US$291 million for Fund II, as explained in LCM's 1 October 2025 annual report, the fund closed to new businesses at around 65 per cent committed (i.e., 189 million) which covers commitments relating to 37 individual investments of varying sizes."

Then paragraph 101:

"Although the identities of the individual subscribers to Fund II are confidential, LCM can disclose that they are a mixture of Ivy League endowments, leading US investment banks and a number of European wealth managers and family offices. These investors have committed to fund the amounts in Fund II through the life of the claims within the fund with capital designated solely for the cases covered thereby,

including the proposed class representatives claim. 62 per cent of the financing for the PCR's claim is therefore covered by sources external to LCM."

Paragraph 102.

"As indicated above, the remaining 38 per cent of the funding for the PCR's claim is derived from, and covered by, LCM's own balance sheet. To the extent there is any shortfall in LCM's ability to cover its share of funding, LCM has access to a credit facility from Northleaf Capital Partners, which was refinanced on 2 December 2024 for an initial amount of 75 million (the facility) with a potential to upsize for another 75 million."

I will not read the rest out. It essentially says much the same as I have shown you in Mr Moloney's first statement.

There is a correction to be made to Mr Moloney's first statement, because the word "up to" which the Tribunal may have seen were seized on at paragraph 58 of Microsoft's skeleton were, in fact, and I apologise for this, a mistake, but that's corrected in Mr Moloney's second statement. If I can invite the Tribunal to turn this up. It is at tab 74, page 2914.

MR DAVIES: Mine stops at 2912.

MR MARVEN: I am sorry. There are a few tabs you don't have. I see you shaking your head.

MR JUSTICE ADAM JOHNSON: I am the same.

MR MARVEN: We will need to fix that by tomorrow morning.

MR JUSTICE ADAM JOHNSON: Just tell us.

MR MARVEN: I am going to tell you what it says. I am going to have another problem with tab 73 in just a minute. What paragraph 2 says is -- I am reading from paragraph 1 now for the sake of absolute clarity:

"Paragraph 8 of my first witness statement should read as follows:

"As explained in paragraph 102 of the reply, the funding provided by LCM Funding UK Ltd in relation to the proceedings is sourced as follows. Capital derived from funds managed under the management in proportion of no less than 62 per cent of the funding commitment."

In other words, "up to" is a solecism, it should read "no less than". To the extent that Microsoft are saying that the bit that comes from LCM's own funds is questionable and we don't have a cap on that, because it might be more than 30 per cent, because the third-party funding is only up to 62 per cent, that is a non-party point. The third-party funding is no less than 62 per cent.

MR JUSTICE ADAM JOHNSON: Thank you.

MR MARVEN: That is the funding and there is one other document I want to show the Tribunal, which is tab 64 -- which I think is within the range that the Tribunal has -- at page 2830. It is a letter, because it just sets out what I am going to say on this. It is a letter from my instructing solicitors in response to various challenges on the funding position.

In particular -- I don't need to show you the Linklaters letter it replies to, but it is challenging the reliability of the funding, but I just want to show paragraph 2.2 to the Tribunal.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: "... unlike the majority of funders in the collective action space, LCM" [to be clear that is the parent company] "is a publicly listed company and is therefore subject to significant transparency requirements including continuous disclosure obligations. These obligations require that any material change in LCM's circumstances must be conveyed to the public. This is important for at least two reasons that are directly relevant to your requests."

"(a) First, LCM cannot provide information to any one party that is not equally available

to the public, in particular, its shareholders. This is relevant to the request you make at paragraph 7.2 of your 15 October letter and paragraph 5 of your 31 October letter. The details of the agreement between LCM and Northleaf are not in the public domain and nor is it necessary for information sought about the functioning of the facility agreement to be shared with your clients (for the reasons we explain below)."

"(b) Second, should there be any material development, whether in relation to LCM's general financial position or specifically in relation to the Northleaf facility, then LCM is required pursuant, inter alia, to the Listing Rules to publish an RNS announcement with that information. As such, both Dr Stasi and your clients will be aware as soon as possible following any such material change should it occur."

I make those points because I say the combination of the evidence and the correspondence I have just shown the Tribunal together with -- I will come on to develop this point -- the fact that this is not a test of the Tribunal being satisfied beyond peradventure of the funding, it is simply a factor, and also the Tribunal's continuing supervisory role in respect of the funding means that the concerns Microsoft raise are overstated, if not inappropriate, at this stage.

MR JUSTICE ADAM JOHNSON: In the letter, the LCM referred to is the AIM-listed company?

MR MARVEN: It is the AIM-listed company. That's why it is subject to those obligations, because it is publicly listed.

MR JUSTICE ADAM JOHNSON: I see. There is an agreement between that company and Northleaf, which is what paragraph 2.2(a) is telling us?

MR MARVEN: With that facility with the 75 million and 75 million upside.

MR JUSTICE ADAM JOHNSON: Thank you.

MR MARVEN: I am sorry, just on the document you couldn't find, I am told you ought to have the hard copy. Is it convenient just to see?

It should be at the very end of the non-confidential bundle.

MR JUSTICE ADAM JOHNSON: Yes. Tab 74, end of volume 5.

MR MARVEN: Do you have that?

MR JUSTICE ADAM JOHNSON: Yes. Thank you.

MR MARVEN: I am grateful. I have read out the punchline from tab 74, but you have it at page 2914.

While we are there, did you want to just take a minute on that? I have read it out.

MR JUSTICE ADAM JOHNSON: No, I think that's clear. Thank you very much.

MR MARVEN: While you are there, because this is also a statement that I will refer to, there is a statement from Mr Hain-Cole, who is a partner at my instructing solicitors, who is in court today. That is at tab 75. The relevance of that statement is by way of further reassurance that in particular paragraphs 8 and 9 -- the Tribunal has that at page 2918 -- one of the points Microsoft raised in its skeleton argument is in contrast to the Gutmann case which I have referenced and I am going to come to, there was no evidence in this case that if the worst came to the worst and LCM ceased to have capacity to fund, that there is the potential for other funding.

The importance of this evidence at paragraph 9, is that Mr Hain-Cole says that he has discussed the matter with John Astill of Exton Advisors and Mr Astill's view, based on current conditions of the litigation funding market was:

"... should the claim be certified and LCM subsequently ceased to be in a position to fund, alternative funding would in principle be available, albeit a period of time would be required to permit a thorough due diligence propose to be completed by any expected subsequent funder."

I am just going to read on:

"Mr Astill considered that the opportunity to fund a certified claim would likely to be viewed favourably by the market relative to the usual pre-certification funding

applications. Insofar as certain risks associated with the certification process could be viewed as having been mitigated."

In other words, if the certification is given, it would be an improved position in terms of taking this to the funding market if it did come to it.

That's really all I have to say on the evidence, I am glad we found it in hard copy.

I wanted to go to the evidence first, because, of course, I appreciate that this Tribunal will reach its own decision based on the evidence before it and its consideration of the legal principles, but I do say, with respect, that Microsoft's challenge has already been litigated and decided in the Gutmann case, and really what they are, with the greatest of respect, doing in their skeleton argument is they have trawled this case and they have attempted to find points of distinction. They have purported to identify two points. The first is the "up to" point. The figures are different in this case. I have already addressed "up to" being an error, but in any event, as we will see from the report, in the Gutmann case the third-party funding was said to be up to 35 per cent and the up to didn't concern the Tribunal there.

The second point of distinction that they sought to elucidate was that, unlike Gutmann, there was no evidence in this case that alternative funding could be expected to be available if the worst happened.

I would respectfully query whether that's something on which one would need evidence as opposed to it just being a matter for inference and common sense, but in any event in response to that point being raised in the skeleton, we put in the statement of Mr Hain-Cole, who, as you have seen, has spoken to Exton Advisors and has given the evidence he has.

I should also say that the "up to" point, the first point, that they did not challenge that until after the Gutmann decision came out. It wasn't in any of the correspondence post Mr Moloney's first statement. It does very much, with respect, look like they have

simply done a trawl and tried to find points of distinction with the decision in Gutmann. To which, if I may, I will now turn.

The Tribunal does have that in the authorities bundle, tab 41. The report starts at page 2721, but I am going to pick it up at page 2798.

MR JUSTICE ADAM JOHNSON: Yes. Thank you.

MR MARVEN: Sorry. I may go back to page 2797, just above paragraph 223:

"Authorisation condition issues."

It is the same funder as in this case.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: I just flag that at paragraph 223.

Challenges are made on the next page, 2798. At paragraph 227 the first complaint that you see there is:

"... the absence of a legally binding guarantee from the ... parent company."

The second challenge, at 228, is that the funder is not a member of the Association of Litigation Funders. Those two challenges are squarely made there.

There is another challenge in the Gutmann case, which I don't need to deal with, about the adequacy of ATE, because that is not raised here. That begins at 229.

I do just want to show the Tribunal the submissions that were made by proposed class representative at paragraphs 234 to 237 on pages 2799 to 2800, because they do apply equally here.

Paragraph 234, in relation to the PCR's ability to fund his own cost, the funder is a UK subsidiary with a long-established global litigation funding business. Mr Thompson stressed the funder was a UK company, it was not based off-shore. I don't need to read the rest of that. Again, it makes reference to the parent, as I have indicated, being on the AIM market.

Paragraph 235 sets out in general terms the funding.

At 236, the submission which I would make is:

"... it is wholly implausible that a very large group of international funders would default on its obligations."

That goes to the guarantee point. I am not saying it is an answer to the reliability of funds point in and of itself.

237, neither evidence nor reasoning to support the demand that there should be a guarantee.

238, I don't need to go to that, that's to do with the ATE point.

The Tribunal's decision on those points is at paragraphs 244 to 246.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: The Tribunal rejects those points, and at 245 says:

"... it is notable that no general challenge is made in respect of the funding arrangements ... Further, at the hearing, the proposed defendants did not seek to impugn the reputation of either the Funder or the LCM Group ..."

I understand that to be true here as well, I interpose to say:

"In this regard, we note that this Tribunal has previously certified collective proceedings funded by the funder without the additional guarantee sought by the ... defendants ..."

Then summarising the submission at the top of the next page, 2803:

"... the proposed defendants sought to argue the funding arrangements put in place ... are materially deficient ..."

Then at 246:

"The principal difficulty we have with the argument advanced by the proposed defendants is that, while they had not identified any reasonable basis for inferring that the funder will, at some point, no longer be able to access funding from the LCM Group, they sought to suggest that this represents a fundamental problem with the

funding arrangements put in place by the PCR. Indeed, it was contended by the proposed defendants that, in some unexplained way, the absence of a guarantee is of such significance that it will impact on the PCR's ability to act fairly and adequately in the interests of the class members."

I just pause to say that's ultimately the test at this stage:

"In short, we are entirely unpersuaded by the proposed defendants' argument."

That's how they deal with that point. I will not read the next paragraph, which is to do with the ATE.

Then just in terms of -- this is dealt with in two bits, because what has been called the 2025 statement, that's said to give rise to material uncertainty postdated the hearing, so there were written submissions on it.

We now have to look at the next bit of the judgment to see how the Tribunal in that case dealt with it. That begins at section E, on page 2804.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: Just to give you the context, paragraph 251:

"In October 2025, at a point when the Tribunal was on the point of issuing its judgment in respect of the applications addressed above, the Tribunal received correspondence on behalf of all of the proposed defendants which raised concerns arising from the content of the annual statement for the year ended 30 June 2025 issued by the funder's ultimate parent, LCM Ltd ..."

I am showing you this here -- I don't actually think the statement itself has found its way into the bundle, but it is very much what Microsoft relies on. I am happy to read it out, but I probably can't do better than simply invite the Tribunal to read the extensive quotations at paragraph 252 and 253. If I may, I will just pause while you do that.

MR JUSTICE ADAM JOHNSON: Yes. **(Pause)**

The LCM lender referred to, is that Northleaf?

MR MARVEN: Yes, yes.

MR JUSTICE ADAM JOHNSON: I see.

There are debt covenants relating to -- well maybe you can't say, but relating to the balance sheet position or -- there must be --

MR MARVEN: Yes, I can't give any more information than is there.

MR JUSTICE ADAM JOHNSON: Yes, I see.

MR MARVEN: Two countervailing points.

One, that there is material uncertainty as to whether the parent can continue as a going concern.

But countervailing that, the directors having a reasonable expectation that it will continue to receive the necessary support to allow it to continue.

So, two countervailing points there.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: The Tribunal, first of all, when it comes to dealing with it, at 256, makes the point no doubt better than I have, that the context in which this issue arises:

"The first of these issues arose as an extension of the factor raised expressly in rule 78(2)(d) of the 2015 Rules, namely, that the Tribunal consider the PCR's ability to pay the defendant's recoverable costs if ordered to do so (see the Guide at paragraph 6.33). The second issue arose in the context of the Tribunal's consideration of the factor identified in rule 78(2)(a), namely that the PCR would act fairly and adequately in the interests of the class members."

Then, importantly:

"Consideration of the funding arrangements which the PCR had in place for his own costs arose in this context because the Tribunal is required to be satisfied that appropriate arrangements had been put in place which would enable the potential class members to have the benefit of effectively conducted proceedings ... As noted

below, the proposed defendants also directly called in question the PCR's ability to act fairly and adequately in the interests of the class as a result of what were perceived by the proposed defendants to be inadequacies in the PCR's response to the LCM 2025 statement ..."

I just show you that to outline the defendants' submissions. As I understand it here, the first of those points is taken, but the second isn't. I mean, it is in the evidence and I can go to it if needs be, but I don't understand that apart from what they say is the inherent doubt over the funder's position, I don't understand them to be making the second of those two criticisms, namely there was something inadequate in the proposed class representative's response to that.

The submission -- I will not go to this in detail tab -- at paragraph 259, is that the Tribunal couldn't be satisfied that the proposed class representative could fund her own costs, but the Tribunal's answer to that at paragraphs 262 to 263 and also 264 is that in summary that the approach -- the points being made go well beyond the requirement for suitability as a class representative, which is the issue at this stage, and also the fact that the Tribunal has an ongoing supervisory role means that it is not appropriate simply to proceed at the certification stage on a worst-case scenario.

Just going through that in a little more detail at 262:

"The PCR submitted that the arguments advanced by the proposed defendants were speculative, opportunistic and ought to be rejected. The approach of the proposed defendants was not consistent with the guidance provided by Lord Briggs in Merricks ..."

That's then set out in the rest of 262.

Then 263 and 264 as I have summarised.

The Tribunal's decision is at paragraphs 271 onwards on page 2810.

Then identified at 272:

"... we consider that by far the most serious aspect of the challenges made in the proposed defendants' submissions is the suggestion that the PCR's response to the LCM ... statement in some way casts doubt ..."

That's a challenge that I understand is not made here. So that was their principal concern there.

They then go on to say -- they reject that, but they do then look at paragraph 276 onwards at the proposed class representative's ability to fund their own costs.

They say at 276:

"In light of this, the question which remains is -- does the content of the LCM 2025 statement raise any basis for considering that it would not be just and reasonable for the PCR to act as class representative."

I just pause there to flag, they take it back to that test, which is the test on certification:

"In this regard, the two particular factors that are highlighted in the proposed defendants' submissions are, first, the PCR's ability ... to fund his own costs; and second, his ability to pay the proposed defendants' recoverable costs if ordered to do so."

As I have said before, as I understand it, it is only the first of those factors that's relied on here, so I will not read 277, which is the second factor.

At 278, which is important because it goes to the first factor, the Tribunal say this:

"In respect of the first factor, we accept that the content of the LCM 2025 statement does highlight issues in respect of LCM Ltd's financial position which both merited careful consideration by the PCR and will require to be kept under review both by him and by the Tribunal. However, overall, we are not persuaded that, at this stage, there is any reason to consider that, in light of the LCM 2025 statement, the PCR would be unable to act fairly and adequately in the interests of the class members. We have reached this conclusion for a number of reasons."

Then I am going to go through them:

"First, we consider that it is important to bear in mind that the Tribunal does not require, at the stage of certification, to determine the PCR's likely costs to the end of trial and be satisfied that the PCR has secured sufficient funding to cover those costs (see Trucks CPO ...). To impose such a requirement at the stage of certification would fall foul of Lord Briggs's approach to the collective proceedings regime in Merricks. Rather, the Tribunal requires to consider the estimates and arrangements which the PCR has made and then to consider whether those arrangements will enable the PCR to act fairly and adequately in the interests of the class members."

"Second, although within the LCM 2025 Statement, the directors of LCM Ltd set out their concerns as to its ongoing financial position, they nonetheless explain that ..."

I will paraphrase that the directors have a reasonable expectation they will be able to continue:

"We see no reason to doubt this statement.

"Third, we consider that, contrary to what was submitted by the proposed defendants, the way in which the PCR's funding is structured is a relevant factor. In our view, the fact that up to 75 per cent of the funding has been committed by third party investors and would remain available irrespective of whether LCM's funding ceased is of significance in this regard."

Pausing there, I recognise that things are different here, it is 62:38, but I say the same principle applies and the other point I make is that although Microsoft in their submissions seized on the words "up to", which they said was carefully chosen wording. As I say, it was simply a mistake, but, in fact the Tribunal -- it is clear from that paragraph that the evidence before the Tribunal in that case wasn't 75 per cent, it was actually up to 75 per cent, and that did not cause them an anxiety.

MR JUSTICE ADAM JOHNSON: 62 per cent is fully committed. Provision of that is

not contingent on the 38 per cent being available?

MR MARVEN: No, it is third-party funding. It doesn't relate to -- so concerns about LCM's position is irrelevant.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: On that 38 per cent there is the Northleaf facility.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: Yes.

MR JUSTICE ADAM JOHNSON: Yes. I follow.

I am taking the figures from Microsoft's skeleton at paragraph 56, and I just wanted to get my head around the issues and what's involved in practical terms. We are told that the cost budget is 14 million.

MR MARVEN: Yes, that's right. You have that in the bundle. Would you like me to give you --

MR JUSTICE ADAM JOHNSON: I am just interested in the headline figures and the issues of principle that arise. We have 14 million as the top-line figure. 62 per cent of that is committed already.

MR MARVEN: That's third-party funding.

MR JUSTICE ADAM JOHNSON: Third party funding. So that's about 8.7 million?

MR MARVEN: Yes.

MR JUSTICE ADAM JOHNSON: What we are really concerned about is the rump, which is, what, 5.3 million.

MR MARVEN: Yes.

MR JUSTICE ADAM JOHNSON: 5.3 roughly.

The proposition there is that LCM Funding UK Ltd has, according to its latest set of accounts, total assets of 41. Again, I am looking at Microsoft's skeleton.

MR MARVEN: That figure is correct. It comes from the accounts.

MR JUSTICE ADAM JOHNSON: That figure is correct.

MR MARVEN: I accept that figure.

MR JUSTICE ADAM JOHNSON: The logic of the argument being made against you is that there will be other claims on that 41 million presumably and that it can't -- it may or may not materialise. LCM has not signed up to the ALF Code of Conduct and so it is not subject to specific capital adequacy requirements.

Let me just finish the structure.

Your response to that is to say a number of things.

First of all, LCM Funding UK Ltd is a subsidiary company of the AIM-listed business.

MR MARVEN: Yes.

MR JUSTICE ADAM JOHNSON: The AIM-listed business has the benefit of the Northleaf credit facility. Moreover, as a listed entity it is required to make public announcements if --

MR MARVEN: There is any material change.

MR JUSTICE ADAM JOHNSON: -- there is any material change.

Moreover, if the class were to be certified, then the likelihood of another funder emerging would be increased and, in any event, they would only need to make up the 38 per cent, because 62 is already committed.

MR MARVEN: Sir, you have it, yes. 38 per cent is 5.3 million, I have just been told.

MR JUSTICE ADAM JOHNSON: 5.3, yes.

I mean, are you able to educate us about whether there are any specific arrangements in place between LCM Funding UK Ltd and the AIM-listed company.

MR MARVEN: Well, it is the parent company.

MR JUSTICE ADAM JOHNSON: It is the parent. I see.

MR MARVEN: My submission there is -- I mean, this goes to the “would” rather than “could” point. That it is inconceivable that a very well-known international litigation

funder -- I mean, it would be devastating for its reputation in the market -- would simply not honour the obligations of its subsidiary.

MR JUSTICE ADAM JOHNSON: Yes. In any event, your overarching point based on Gutmann, as I understand it, is that these are not matters we should be interrogating at this stage because the enquiry is limited to assessing whether the PCR can act fairly and adequately in the interests of the class members and that enquiry does not engage the sorts of interrogation that's being invited here.

MR MARVEN: You have anticipated the final points. I was going to put the fourth and fifth points at page 2813.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: The invitation effectively to interrogate goes well beyond what is required for rule 58. The fact remains that LCM Limited is a long-established global litigation funding business with an established track record.

Then 2813, the final point:

"We note from Mr Burnett's statement" -- he was the solicitor in that case -- "that even if some issue were to arise to prevent LCM from continuing, it is reasonable to anticipate that alternative funding arrangements could be put in place."

I will not read this out. 284 -- actually, I will read it out. Forgive me:

"In the light of the foregoing, viewing the matter as a whole, we are satisfied at this stage the present arrangements which the PCR has made will enable them to act fairly and adequately in the interests of class members. However, we stress that this is a matter which we will keep under review."

That's the final point perhaps, sir, that the Tribunal has a continuing supervisory role:

"Accordingly, as we set out below, the PCR shall inform the Tribunal and Proposed Defendants of any material developments in respect of his funding arrangements as soon as seem reasonably practical.

"2. In any event the PCR shall find a way of updating the Tribunal and Proposed Defendants of his funding position in regards to the next CMC."

I am not necessarily inviting the Tribunal to do exactly the same, but the Tribunal has a continuing supervisory jurisdiction. So, if a problem does, I say, unexpectedly arise, the defendants will know about it and there are things that the Tribunal can do about it.

MR JUSTICE ADAM JOHNSON: Yes.

I mean, are you able to say whether there is any update of the position since the 2025 statement that you showed us referenced in the Gutmann case?

MR MARVEN: There is nothing in the evidence. I have been reminded of a point. It is a public company, so they can't give an update --

MR JUSTICE ADAM JOHNSON: No, what I meant was there was no other public announcement?

MR MARVEN: No other public announcement.

MR JUSTICE ADAM JOHNSON: This is the latest intelligence we have?

MR MARVEN: Yes, it is.

Sir, if I just turn my back for a moment.

MR JUSTICE ADAM JOHNSON: Of course, yes.

MR MARVEN: Unless there is anything else I can assist on -- I am so sorry.

MR JUSTICE ADAM JOHNSON: It is all right. Yes. I mean, one of the points made is about the fact that LCM has not signed up to the ALF Code of Conduct. I think we have seen examples in other cases where, falling short of actually signing up to it, some form of undertaking has been given that the capital adequacy requirements set out in that code will nonetheless be adhered to. Obviously if that were done, it would be a source of reassurance to everyone. The reply says:

"No reasonable need to do so."

MR MARVEN: It does.

MR JUSTICE ADAM JOHNSON: Are you able to amplify your reasoning on that point?

MR MARVEN: I mean, firstly, the fact that the parent company is a publicly listed company means that it has to give public disclosure of relevant matters.

The case that I think was referred to was a case called BSV, which indicated that it was appropriate -- it wasn't asked for, I think it was volunteered, but the Tribunal blessed it as appropriate. That was a relatively unknown funder. I don't think BSV has been put in the authorities bundle, I think it is apparent from the report that the relevant funder had not funded in this jurisdiction before. I simply say there is no need for it. It is overreach.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: The same point was made in Gutmann.

Sorry. Let me just -- it was there, wasn't it? It is the case we have just looked at.

MR JUSTICE ADAM JOHNSON: Yes. That was Gutmann.

No, it can't be.

MR MARVEN: Yes. The request was made -- I showed you that the submission was made at paragraph 228 at page 2789. That clearly was not accepted by the Tribunal -- I think I showed you the relevant bit. The submission was made in the Gutmann case to which I have just taken you and it wasn't accepted. It was dealt with and rejected in the same breath as the guarantee point.

MR JUSTICE ADAM JOHNSON: Yes. Anyway, the most up-to-date position we have is still effectively that explained in the 2025 statement set out in Gutmann at paragraphs 252 and 253. So plainly some turbulence experienced by the AIM-listed company, because it seems to have been in breach of its debt covenants at least as recently as October. Waivers have been granted, which carry the position through to

the end of the year. So, that's where we are?

MR MARVEN: That's right.

Perhaps I could just go back to Mr Moloney's first statement on page 332.

MR JUSTICE ADAM JOHNSON: Yes.

MR MARVEN: In particular what he says at paragraphs 16 and 17 on page 336, where he says:

"While adverse results are never welcome, they sometimes arise as part of the business of a third-party funder. The statements made in the LCM Ltd's recent accounts reflect the appropriate, and normal, language used by accountants, and directors, in such a situation. As one of the few third-party funders which are publicly listed, LCM Ltd provides transparency in this way on the financial consequences of the successes and setbacks in the litigation it has funded."

Then he refers to the Northleaf facility.

Obviously, as he says, no-one welcomes a bad year, but the concerns based on it expressed by the defendants are greatly overstated. I would add that with many funders that are not publicly listed it could be happening today. We don't know, but it wouldn't be something that's publicly declared.

MR JUSTICE ADAM JOHNSON: Yes. Thank you.

Thank you very much indeed. Good.

Mr Kennelly, we come to you. We are obviously now going to run into tomorrow. You can have eight minutes to get us warmed up, if you would like.

Reply by RESPONDENTS

MR KENNELLY: I think I will open.

In terms of the structure, my plan is to take the process arguments first and then go to the background facts and key background facts, then the pleading, the Claim Form

and then the law, the same authorities that my learned friend went to and then Professor Wickelgren's evidence.

MR JUSTICE ADAM JOHNSON: Yes, thank you.

MR KENNELLY: In summary then, just to give our response in a nutshell, the PCR alleges, as you have heard, that Microsoft has charged the Listed Providers as downstream rivals, prices which by self-preferencing and differential pricing, prices which are liable to exclude them from part of the downstream market.

It is common ground that the legal test has two parts.

First, they must show that Microsoft's pricing is not competition on the merits.

Secondly, and separately, that the effect of Microsoft's pricing is to exclude the Listed Providers in the sense that the case law describes.

The question for the Tribunal is whether the PCR has a methodology for proving either of those things.

We understand -- of course we do -- that the bar for challenging a PCR's methodology is high. The Tribunal has an important gatekeeper role, and this is a very large case with an estimated claim value of up to £2 billion.

Before it is allowed to proceed, the Tribunal needs to be sure that the PCR has a credible plan for showing that the alleged conduct was, in fact, abusive within the meaning of the law.

Normally we say in a case like this, a margin squeeze test would be used to check if the pricing is genuinely not competition on the merits, and is liable to have exclusionary effects.

The PCR is adamant, as you have heard, that no such test is appropriate here. The problem is that the PCR does not propose a replacement test which will address both of those parts of the legal test. She has gone to enormous lengths to suggest every possible approach except the obvious one, the one most obviously suited to a situation

where a vertically integrated operator is accused of pricing in such a way as to squeeze the margins of its downstream rivals.

Why is that? The PCR has the obvious problem that, unlike every other exclusionary pricing case, here the alleged victims are two of the largest companies in the world, which are well able to compete for Cloud users who prefer Windows Server, notwithstanding the price that Microsoft charges for Windows Server.

Of the companies allegedly excluded, Amazon is the market leader in the PCR's defined market and Google, as you will see, has enjoyed rapid growth. We are a million miles from a situation where new entrants downstream struggle to enter or stay in the market because they are forced to pay a rival high prices for an indispensable input.

In this case, it is easy to forget the reality, the factual situation. With that in mind, before the bell rings, I would ask the Tribunal to at least look at some key facts and key background facts.

The first is the market share. The market share for all virtual machines, all VMs as we call them.

Could you please go to Professor Wickelgren's first report, first bundle, tab 8, page 362. I think my learned friend showed you this figure in a different place, figure 4. The top of page 362.

MR JUSTICE ADAM JOHNSON: Yes.

MR KENNELLY: You will see this is "Cloud provider market shares in the UK, 2019 to 2022". You can see the colour coding at the bottom of the figure.

From it you can see the market shares of Amazon in orange and Microsoft in dark blue. Microsoft admittedly growing from 25 per cent to 35 per cent. Amazon maintaining its market share, but Google, smaller market share for sure, but it has trebled its market share between 2019 and 2022. Even Professor Wickelgren has to

acknowledge the nature of this market in his report.

If you look at what he says about it at paragraph 84, looking at this report, he says:

"Providers who work on a massive global scale are considered hyperscalers."

He includes among the hyperscalers, Amazon, Microsoft and Google, the three with the highest market share in the UK.

If you go to page 364, here he is describing Amazon Web Services. Professor Wickelgren for the PCR says at paragraph 91:

"AWS has become a central part of the commercial strategy of Amazon. The importance of AWS is reflected in the role it has played in Amazon's profit-generation ..."

This is important in a case where it is said that they are being squeezed out because of lower margins:

"... AWS has a much higher operating margin than any other division of Amazon's business and its revenues increased by eight times between 2014 and 2019.

"What started as an infrastructure service has developed into a business where Amazon operates in all the layers of the cloud market. AWS is the biggest player in the IaaS market and has presence in 254 countries."

The second point I want to draw to your attention is the position of Windows Server in this market, because Windows Server is a minority operating system for virtual machines, for VMs. You get that from the report -- I don't think the figure is contested in Professor Scott Morton's report. That's in the confidential bundle at page 17. It is a single sentence I want to show you at the top of page 17 in the confidential bundle.

MR JUSTICE ADAM JOHNSON: Yes.

MR KENNELLY: At the top you can see:

"75 per cent global use the Linux Operating System while 25 per cent use ..."

MR JUSTICE ADAM JOHNSON: Sorry, did you say page 17?

MR KENNELLY: Yes, confidential bundle, page 17.

MR JUSTICE ADAM JOHNSON: Yes. I see. For some reason the numbering on the pdf does not correspond with the numbering I have typed in. Anyway, I have found it. So, page 17, top of the page.

MR KENNELLY: What page number are you on?

MR JUSTICE ADAM JOHNSON: I am looking at page 15.

MR KENNELLY: Yes, that will help me tomorrow.

You will see 75 per cent of the VMs use Linux and 25 per cent use Windows Server. Of course, they are all in the same market according to the PCR. Those are two of the three basic facts I wanted to bring to your attention. I can deal with the rest in the morning.

MR JUSTICE ADAM JOHNSON: Very good, excellent.

MR DAVIES: (inaudible) all paid?

MR KENNELLY: No.

MR DAVIES: That's okay. Thank you.

MR JUSTICE ADAM JOHNSON: Thank you all very much for your help so far.

We will break there and see you tomorrow at 10.30 am.

Thank you very much.

(4.31 pm)

(Court adjourned until 10.30 am

on Friday, 12th December 2025)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?