Neutral citation [2026] CAT 4

Case No: 1640/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 January 2026

Before:

THE HONOURABLE MR JUSTICE HILDYARD
(Chair)
PAUL LOMAS
JOHN DAVIES

Sitting as a Tribunal in England and Wales

BETWEEN:

VICKI SHOTBOLT CLASS REPRESENTATIVE LIMITED

Applicant/

Proposed Class Representative

- v -

VALVE CORPORATION

Respondent/

Proposed Defendant

Heard at Salisbury Square House on 14 October 2025

JUDGMENT (CPO APPLICATION) (NON-CONFIDENTIAL)

APPEARANCES

Julian Gregory and Will Perry (instructed by Milberg London LLP) appeared on behalf of Vicki Shotbolt Class Representative Limited, the Proposed Class Representative.

Brian Kennelly KC, Tom Coates and Sean Butler (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Proposed Defendant.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. By a collective proceedings claim form ("CPCF") filed on 5 June 2024, Vicki Shotbolt Class Representative Limited applied to be appointed as the Proposed Class Representative ("PCR") for a collective proceedings order ("CPO"), on an opt-out basis, to combine claims pursuant to section 47B of the Competition Act 1998 (the "Act") (the "CPO Application") against the Proposed Defendant ("Valve"). The claims arise from the pricing and terms of games sold through Valve's Steam platform.

2. The claims that the PCR seeks to combine are stand-alone, under section 47A of the Act, for loss and damage caused by Valve's alleged infringements of Article 102 of the Treaty on the Functioning of the European Union (up to 31 December 2020) and section 18 of the Act. They would be brought on behalf of up to some 14 million UK-based consumers who purchased video games designed to be played on personal computers ("PC Games" or "Games") and/or additional content (including subscriptions) for such Games ("Add-on Content") (collectively, the "Products"), during the Relevant Period[1] whether on the Steam platform or on other platforms. The aggregate damages are provisionally estimated at up to £656 million.

3. Notice was given to potential class members ("PCMs") by publication on a claims website by the PCR of the application for a CPO. No PCM has applied to make submissions objecting to the application: see rule 79(5) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules").[2] However, the CPO Application has been opposed by Valve.

4. The CPO Application was considered at a hearing on 14 October 2025. This is the Tribunal's judgment in relation to the CPO Application.

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[1] "Relevant Period" is the period from the start of the Class Period (see paragraph 13(2) below) to the date of the CPO. The PCR has reserved its right (in the usual way) to apply to the Tribunal to extend this period up to the date of final judgment or earlier settlement of the Claims in due course.
[2] All references to rules in this Judgment are to the Tribunal Rules.

B. THE PROPOSED COLLECTIVE PROCEEDINGS

(1) Overview of the PC Games market

5. Historically, in order to play a PC game, a consumer would purchase a physical disc from a physical shop and then install the game on their PC. However, according to the PCR, today, only 1% of PC Games are distributed through physical media. Instead, the norm is that consumers purchase, and then play, their Games in an entirely digital format.

6. PC Games are marketed and distributed by publishers. Publishers may develop Games themselves or pay a third-party developer to design them. One option for publishers is to release their Game through, and to be compatible with, a third-party digital distribution platform (a "Distribution Platform"). A Distribution Platform is a service that allows consumers to purchase, download, and play Games on their PC. Steam, owned by Valve, is such a Distribution Platform. Others include the Epic Games Store. Some larger publishers have their own direct to consumers distribution channels. This includes Electronic Arts ("EA") who owns the Origin distribution channel whereby consumers can purchase and play EA's Games.

7. For consumers, there are two main ways to purchase and download digitally distributed PC Games. Consumers can either: (i) purchase and download a Game from a Distribution Platform to play on that platform; or (ii) purchase a download code for a Game (e.g. from a retailer or digital storefront such as Amazon or Humble Bundle, or from the publisher directly) and then use that code to download and then play the Game on a Distribution Platform. The download codes for use on Steam are known as Steam Keys.

8. Traditionally, publishers generated revenue from Games by charging an up-front payment from consumers to download their Games. Today, however, sales of Add-on Content have grown to such an extent that up-front payments to download Games now account for less than half of all revenue from PC Games. Add-on Content refers to Game content that is purchased after the initial

acquisition of the Game. This includes Downloadable Content ("DLC"), which is content purchased out-of-game (such as, for example, an expansion pack that provides additional storylines, characters or areas). It also includes content acquired through "Microtransactions" completed in-game during gameplay (which may include cosmetic content, such as additional "skins" or outfits for characters, or content which aids gameplay, such as currency packs, loot boxes or time savers). For Games distributed via Steam, Add-on Content can be purchased within the Game itself, within the Steam Distribution Platform, or redeemed via a Steam Key.

9. According to the PCR, publishers wishing to distribute Games on Steam must become a "Steam(works) Partner". Publishers do this by entering into the Steam Distribution Agreement ("SDA") as well as other contractual documentation with Valve. When a publisher sells a Game or Add-on Content through Steam, Steam charges a commission[3] on this revenue. Before 2018, Valve charged a single commission rate of 30%. Since 2018, Valve has operated a tiered commission rate structure under which its rate of commission varies depending on the value of sales (30% on the first $10m in title revenue, 25% on title sales between $10m and $50m, and 20% on title sales above $50m).

(2) The Claim

10. The PCR alleges that Steam is dominant in the following relevant markets:

    (1) the "Game Market", on which consumers purchase Games;

    (2) the "Game Distribution Market", on which publishers purchase (or self-supply) services for the distribution of Games to consumers;

[3] Valve's commercial payment arrangements with Steam Partners are described by Valve as "revenue shares". The PCR has drafted its claim by reference to the term "commission". For convenience, the Tribunal has used the term "commission" in this judgment. However, there is no finding on the nature or character of those commercial payment arrangements in this judgment (and that issue was, naturally at this stage, not the subject of substantive submissions or detailed argument before us). Accordingly, nothing substantive is implied but the use of that term which is purely for drafting consistency.

(3) the "Add-on Content Market", on which consumers purchase Add-on Content. This market may include Add-on Content for all Games, whether enabled for Steam or other platforms (a "Wider Add-on Content Market"), or may be limited to the acquisition of Add-on Content for (only) Steam-enabled Games (a "Steam Add-on Content Market"); and

(4) the "Add-on Content Distribution Market", on which publishers purchase (or self-supply) services for the distribution of Add-on Content. Like the consumer Add-on Content Market, this market may include the distribution of Add-on Content for all Games, whether enabled for Steam or other platforms (a "Wider Add-on Content Distribution Market"), or it may be limited to the distribution of Add-on Content for Steam-enabled Games (a "Steam Add-on Content Distribution Market").

11. The PCR alleges that Valve has abused this dominant position by:

(1) Imposing Platform Parity Obligations ("PPOs"), that prohibit publishers from selling Products through other distribution channels on better terms than the same Products are available on Steam. The PCR alleges that the PPOs are likely to cause, and have in fact caused, restrictions of competition.

(2) Imposing anti-steering provisions to the effect that, if a publisher wants consumers playing its Games distributed on Steam to be able to make in-game purchases, all such purchases must be made using the Steam application programming interface, and therefore Valve's payment processing service. As a result, the payments are subject to Valve's commission charges. Such anti-steering provisions leverage Valve's dominant position in the Game Markets so as to enable it to secure a larger share of the Add-on Content Markets, by preventing or restricting the ability of other distribution channels to supply (including self-supply) Add-on Content for Games distributed on Steam.

(3) Imposing excessive commission charges which amount to an unfair price which is then passed on to consumers.

12. In the CPCF as originally filed, the PCR sought to bring the proposed collective proceedings on behalf of the proposed class (the "Proposed Class") defined as:

> "All Persons who, during the Class Period, made one or more payments for the purpose of purchasing: (a) PC Games, and/or (b) Add-on Content for PC Games, including subscription payments for PC Games and/or Add-on Content (collectively **"Relevant Purchases"**)."[4]

13. For the purposes of this definition of the Proposed Class ("Class Definition"):

(1) "Persons" means, in respect of Relevant Purchases, the person who was licensed to use the acquired content, typically the account holder.

(2) "Class Period" means the period up to the date of the Collective Proceedings Order in these proceedings: (i) from 4 June 2018, in relation to members of the Class domiciled in England, Wales and Northern Ireland; and (ii) from 1 January 2010 in relation to members of the Class domiciled in Scotland.

(3) The PCR

14. The PCR is a company limited by guarantee without share capital, and its sole director is Ms Shotbolt. Ms Shotbolt has a background in the social welfare of children, particularly in connection with technology. She is the founder and CEO of the social enterprise Parent Zone, which specialises in understanding the impact of online services and digital technologies on families and children. She is supported by an Advisory Panel which currently consists of Dr David Zendle, a behavioural scientist and a member of the Advisory Board for Safer Gambling of the Gambling Commission and Mr Andy Burrows, the former head of child safety online policy at NSPCC.

[4] Paragraph 244 of the CPCF identifies Persons who are excluded from the Proposed Class but for the purpose of this Judgment it is not necessary to set them out.

15. The PCR has entered into a Litigation Funding Agreement ("LFA") with Bench Walk Guernsey PCC Limited (a member of the Association of Litigation Funders) contracting on behalf of the Steam UK Funding Cell (the "Funder"). The PCR has secured funding of up to £18,573,566 from the Funder to enable it to pay all necessary costs, fees or disbursements. In addition, the PCR has obtained after-the-event insurance (the "ATE Policy") with HDI Global Specialty SE, AXA Insurance UK PLC, Accredited Insurance (Europe) Limited, International General Insurance Co (UK) Limited, and Litica Ltd. The ATE Policy includes adverse costs cover up to £15 million. The PCR considers that this level of cover, when combined with the Funder's contractual obligation to pay unlimited adverse costs, is appropriate and adequate to cover the risk of any adverse costs award.

(4) Valve

16. Valve is registered in the State of Washington, United States of America. It did not apply to strike out any part of the CPCF or seek reverse summary judgment pursuant to rule 79(4). However, it has challenged the granting of a CPO on the grounds set out below.

(5) Procedural history

17. Alongside the CPCF, the PCR filed the first Expert Report of Mr Harman and the First Witness Statement of Ms Shotbolt.

18. Following the issuing of the claim, a case management conference ("CMC") took place on 13 May 2025. At the CMC, the Tribunal gave directions to the hearing of the CPO Application: see order dated 13 May 2025 (as amended by order dated 1 July 2025).

19. Valve filed its Response to the CPO Application on 3 July 2025. The Response was supported by: (i) the Expert Report of Dr Adrian Majumdar; (ii) the First Witness Statement of Mr Erik Peterson, an employee of Valve; and (iii) the First Witness Statement of Mr Kristian Miller, another employee of Valve.

20. The PCR filed its Reply on 16 September 2025 which was supported by a Second Expert Report of Mr Harman and the First Witness Statement of Mr Adrian Mark Chopin of Bench Walk Advisors Limited ("Bench Walk").

21. On 8 October 2025, the parties filed their respective skeleton arguments in advance of the hearing to consider the CPO Application.

C. LEGAL FRAMEWORK

22. In order to grant an application for a CPO, the requirements set out in section 47B of the Act and rule 77 of the Tribunal Rules must be fulfilled. The Tribunal must be satisfied that: (i) the PCR can be authorised to act as the class representative in the proceedings pursuant to rule 77(1)(a) (the "Authorisation Condition"); and (ii) the claims are eligible for inclusion in collective proceedings pursuant to rule 77(1)(b) (the "Eligibility Condition").

23. The Authorisation Condition is met if the Tribunal considers that it is "just and reasonable" for the PCR to act as a representative in the proceedings (rule 78(1)(b)). Rule 78(2) of the Tribunal Rules sets out the factors relevant to determining whether it is just and reasonable for the PCR to act as the class representative. These include whether the PCR: (1) would fairly and adequately act in the interests of the class members; (2) does not have a material interest that is in conflict with the interests of the class; and (3) will be able to pay the defendant's recoverable costs if ordered to do so.

24. The Tribunal is required to take into account all of the circumstances when determining whether the PCR would act fairly and adequately in the interests of the class, including the following matters specified in rule 78(3):

> "(a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
>
> (b) if the proposed class representative is not a member of the class, whether it is a preexisting body and the nature and functions of that body;
>
> (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

25. Drawing on this statutory framework, relevant authorities and guidelines, the Tribunal in *Christine Riefa Class Representative Limited v Apple* [2025] CAT 5; [2025] Bus. L.R. 417 ("*Riefa*") at [31] provided the following guidance regarding the Tribunal's consideration of the Authorisation Condition and its scrutiny of a proposed class representative's funding arrangements, an issue which arises in this case:

"(1) The Tribunal may certify a claim only where it considers that it is just and reasonable for the PCR to act as the class representative.

(2) In making that determination, the Tribunal must consider whether the PCR would fairly and adequately act in the interests of the class members.

(3) That includes consideration of the PCR's ability to pay the defendant's recoverable costs, as well as its ability to fund its own costs, such that the proceedings are conducted effectively.

(4) Class actions almost inevitably require third party funding. The interests of the funders are not the same as the interests of potential class members. This gives rise to inherent risks for the fulfilment of the policy objectives of the collective actions regime.

(5) An important protection for potential class members is that the PCR will properly act in the best interests of the class including when agreeing any funding arrangements, and in managing the proceedings going forward including ongoing interactions with funders. That requires the PCR to be sufficiently independent and robust.

(6) In forming its view as to the ability of the PCR to act fairly and adequately in the interests of potential class members the Tribunal will consider all relevant circumstances, including the question of how the PCR has satisfied itself that the funding arrangements reasonably serve and protect those interests.

(7) A further protection is that the terms of any funding agreement should be open to scrutiny, not only by the court but also by the members of the class on whose behalf the claims are brought.

(8) The Tribunal should nevertheless exercise caution in intervening in relation to the funder's return under the funding arrangements, at the certification stage, bearing in mind the Tribunal's ability to control the return to the funder at the subsequent stage of judgment or settlement. In extreme cases, however, the Tribunal's concerns regarding the funding arrangements may lead to a refusal to certify."

26. As regards the Eligibility Condition, the Tribunal must be satisfied that the requirements in rule 79(1) have been fulfilled, having regard to all the circumstances. Specifically, the Tribunal must be persuaded that the claims: (i) are brought on behalf of an identifiable class; (ii) raise common issues; and (iii) are suitable to be brought in collective proceedings.

27. Rule 79(2) provides:

> "In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—
>
> (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
>
> (d) the size and the nature of the class;
>
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
>
> (f) whether the claims are suitable for an aggregate award of damages; and
>
> (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act(a) or otherwise."

28. In assessing commonality and, particularly, suitability for the purposes of rule 79, the Tribunal must be satisfied that the PCR has put forward a methodology that both identifies the issues to be resolved at trial and enables the Tribunal to properly and fairly determine these issues. This is known as the *Pro-Sys Test* (also referred to as the *Microsoft Test*).

29. That test originates from the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57, where Rothstein J stated, at [118]:

> "In my view, 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."

30. The application of the *Pro-Sys Test* when certifying collective proceedings was introduced by the Tribunal in *Walter Hugh Merricks CBE v Mastercard Inc. & Others* [2017] CAT 16; [2017] 7 WLUK 516 and approved by the Supreme Court in that case: [2020] UKSC 51, [2021] 3 All ER 285 ("*Merricks SC*").

31. The approach in applying the *Pro-Sys Test* was considered by the Court of Appeal in *London & South Eastern Railway Ltd v Justin Gutmann* [2022] EWCA Civ 1077; [2022] 7 WLUK 388 ("*Gutmann CA*"). More recently, the Tribunal applied the test in the joint CPO judgment of *Hammond & Stephan v Amazon.com, Inc. & Others* [2025] CAT 42; [2025] Bus. L.R. 2281 ("*Hammond & Stephan*"*).*

32. The following propositions can be drawn from these cases:

(1) The test is about practical justiciability. The Tribunal is to determine whether the methodology is workable at trial and whether it will advance the resolution of the issues: *Gutmann CA* at [60].

(2) The methodology is based upon a counterfactual model of how the market would have operated absent the abuse. It is therefore not a fair criticism to make of a methodology that it is hypothetical. There will need to be "some" factual basis for the assumptions and models deployed, but this requires only a minimum evidentiary basis and is not an onerous condition: *Gutmann CA* at [54] and *Merricks SC* at [41].

(3) It must be recognised that the methodology is formulated prior to disclosure and is therefore necessarily provisional and might properly identify further refinements and work to be carried out after disclosure: *Gutmann CA* at [55].

(4) The Tribunal is entitled to apply intuition and common sense in its assessment of the methodology: *Gutmann CA* at [57].

(5) The methodology is not required to achieve perfection. The Tribunal should bear in mind that it is armed with a broad axe by which it can fill gaps and plug lacunae in the methodology: *Gutmann CA* at [58].

(6) The Tribunal should avoid conducting a mini-trial. The assessment of the proposed methodology at the certification stage has to be made at a higher level to determine whether the method is plausible, coherent and workable, as opposed to purely hypothetical or unclear or impractical: *Merricks SC* at [113] and *Hammond & Stephan* at [79(1)].

33. As emphasised in *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. & Others* [2024] CAT 11; [2024] 2 WLUK 438 ("*Gormsen*") at [2], in considering whether to make a CPO, the Tribunal must consider whether the requirements of both the Authorisation and Eligibility Conditions are satisfied, irrespective of whether matters are raised by the parties.

34. Furthermore, whilst a CPO application must cover the specific requirements for a CPO as set out in the Tribunal Rules, the Tribunal has an important and ongoing role in ensuring the interests of the class members are protected. Therefore, a Tribunal should have the importance of proper case management in mind both at the CPO hearing and beyond. Likewise, a Tribunal may look at the funding arrangements in more detail at the conclusion of the proceedings whether by way of a settlement or of a judgment. Similarly, a Tribunal may require a methodology to be developed and possibly replaced in appropriate cases if circumstances change, such as following disclosure.

D. THE AUTHORISATION CONDITION

35. In its Response to the CPO Application, Valve raised various concerns regarding the PCR's funding arrangements.

(1) It was unclear what funds the Funder had to ensure it could meet its obligations under the LFA.

(2) Clause 10.2 of the LFA entitled the Funder to withdraw funding when there was a "Material Adverse Change". This was defined to include when the proceedings would no longer reasonably be expected to earn a commercially viable return for the Funder, Solicitor or Class Representative. Valve queried the definition of "a commercially viable return" and why the Solicitors' or Class Representative's return was relevant.

(3) The Funder or the PCR's solicitors would be able to exert control over the proceedings as the PCR would, under the terms of the LFA, be unable to challenge the reasonableness of the legal advice it received, particularly regarding settlement, without voiding the LFA.

(4) Clause 12.1 of the LFA appeared to allow the Funder to transfer its obligations under the LFA to someone who, for example, is not bound by the Association of Litigation Funders Code of Conduct (the "ALF Code") or is otherwise not a suitable funder.

(5) No indemnity is provided for costs which may be incurred by Valve after the cancellation of the ATE Policy but prior to a costs order being made, and no indemnity is provided for Valve's costs of a detailed assessment of those costs. There were also inconsistencies within the ATE Policy which appeared to increase the risk that the PCR would be unable to satisfy an adverse costs award if ordered to do so.

(6) The Litigation Plan did not make provision for a sufficient number of additional days in court such as additional case management conferences or any appeals.

36. Following correspondence between the parties, the PCR took the following actions in response to these concerns. It:

(1) filed a witness statement from Mr Adrian Mark Chopin of Bench Walk explaining the Funder's source of funds and its creditworthiness;

(2) amended the LFA so that:

(i) a Material Adverse Change may only be triggered in circumstances where the Funder, rather than also the solicitors and the PCR, does not receive a commercially viable return; and

(ii) if the PCR unreasonably fails to follow the advice of the solicitors or counsel, this disagreement would be subject to the dispute resolution procedure within the LFA;

(3) confirmed that the PCR would notify Valve and the Tribunal in writing at least 10 business days in advance of any transfer of the Funder's rights and obligations under the LFA and would use reasonable endeavours to confirm that the new funder would comply with the ALF Code; and

(4) amended the ATE Policy including provisions so that cancellation would take effect after a 30-day notice period and that the policy would cover costs incurred prior to and including the date of cancellation but where the legal obligation to pay these costs only arose after cancellation of the policy.

37. Following these changes, Valve did not pursue the points raised in its Response contesting the fulfilment of the Authorisation Condition. Nevertheless, as explained in paragraphs 33 and 34 above, it is for the Tribunal itself to consider whether the criteria for certification are met.

38. As regards the Authorisation Condition, taking account of the criteria set out in rule 78 and having reviewed all the evidence filed, including the two Witness Statements from Ms Shotbolt, the sole director of the PCR, and the wider evidence submitted on its behalf, the Tribunal has concluded that it is just and reasonable for the PCR to act as the class representative in these collective proceedings.

39. As regards the specific criteria in rule 78(2) by which the just and reasonable test is to be assessed:

(1) in the light of the background and standing of Ms Shotbolt, the sole director of the PCR, the experience of the Advisory Committee, their advisers, including in relation to costs, we consider that the PCR would fairly and adequately act in the interests of class members;

(2) we can detect no material conflict of interest;

(3) the PCR would be able to pay the Defendant's anticipated costs if ordered to do so; and

(4) there is only one applicant and no application for an injunction (so the issues in rule 78(2)(c) and (e) do not arise).

40. More specifically, as regards the criteria specified in rule 78(3) (which we must consider in assessing whether the PCR would act fairly and adequately in the interest of class members), we have reached the following conclusions.

(1) As regards rule 78(3)(a), neither the PCR nor Ms Shotbolt is a member of the class.

(2) As regards rule 78(3)(b), the PCR was formed as a special purpose vehicle to fulfil the class representative role. This is a commonly adopted structure and not, by itself, a reason for refusing certification. The suite of arrangements into which it has entered are also commonly

seen and intended to, and do, enable it to meet the criteria for certification.

(3) As regards rule 78(3)(c), the PCR has: (i) prepared a Litigation Plan, a Notice and Administration Plan (which includes communications with the class members), and a Litigation Budget; (ii) formed an Advisory Panel to support Ms Shotbolt and the PCR itself; and (iii) entered into the funding arrangements and commitments described in paragraph 15 above which were then amended in response to challenges from Valve, as set out above, so that they are now in a reasonably common form and in our view, satisfactory. Our assessment at this initial stage of proceedings is that the rates of return to the Funder are not unreasonable in comparison with rates in other recent such agreements supporting CPO applications that have been granted, although we note that the reasonableness of the funder's return is a matter finally to be determined after any recovery is obtained (see *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited & Others* [2023] CAT 73; [2023] 11 WLUK 585 at [171] and *Professor Barry Rodger v Alphabet Inc. & Others* [2025] CAT 45; [2025] 8 WLUK 198 at [53]). The PCR has also retained an experienced claims management specialist (Epiq Systems Limited ("Epiq")), a consumer compensation activist and communications organisation to advise and a professional website designer to support communications and the dissemination of information (which will be heavily weighted toward the website and online communications) using search optimisation and other digital techniques to increase awareness and the distribution of information.

(4) In the round, we consider that these arrangements are sufficient to satisfy sub-rules (i)-(iii) of rule 78(3)(c).

41. The Tribunal has identified no other factors outside those set out in rule 78(3) that contradict these conclusions. We note that many of these features remain subject to continuing supervision and control by the Tribunal as the case develops.

42. As regards rule 78(4), at this stage in the proceedings, there is no indication that there are any subclasses.

43. This conclusion on the Authorisation Condition and the application of rule 78 is subject to satisfactory resolution of a number of limited and specific matters on which the Tribunal sought further information or clarification at the hearing: see Sections E(4) and F below. The PCR indicated at the hearing that these would be accommodated.

E. THE ELIGIBILITY CONDITION

44. In the CPO hearing, Valve opposed the CPO Application on three grounds, all of which relate to the Eligibility Condition, put here in the order in which they were argued before us:

(1) the PCR had not put forward an adequate methodology for determining the effective commission charge, or as Valve referred to it the effective revenue share, received by Valve on sales of Products (the "Effective Commission Charge Issue") which related to the excessive pricing allegation;

(2) the PCR had not put forward an adequate empirical method for determining the effect of the alleged PPOs (the "PPO Issue") which related to a wider abuse allegation; and

(3) the PCR's proposed Class Definition was inadequate as there was no workable methodology whereby PCMs, including a high proportion of minors, can identify themselves as being class members (the "Class Certainty Issue").

45. Rather than the sequence in which these matters were addressed in the CPO Application, we address the Effective Commission Charge Issue (the third allegation of abuse in the CPO Application) first because it was the most fully argued before us. We then address the PPO Issue, because it also relates to methodologies and raises some similar legal issues. Finally, we address the

Class Certainty Issue. We note that the second alleged abuse in the CPO Application relates to the imposition by Valve of restrictions on Steam Partners to the effect that Add-on Content for Games sold through Steam must be purchased from Steam. This has not been the subject of any challenge to the grant of a CPO; but it is relevant to note that the PCR has relied on these restrictions as having exacerbated the effect of: (i) the PPO and (ii) Valve's excessive commission, rather than as an independent and self-standing abuse.

(1) The Effective Commission Charge Issue

46. The third abuse alleged by the PCR is that Valve's commission charge amounts to an unfair price which imposes an illegal cost on Steam Partners which is passed on to consumers in higher prices.

47. The PCR intends to apply the classic two-limbed framework set out in Case 27/76 *United Brands v European Commission* [1978] 1 C.M.L.R. 429; [1978] ECR 207 ("*United Brands*") to assess whether the commission is: (i) excessive and (ii) unfair (unfairness can be assessed either in reference to the price itself or when compared to comparators).

48. To establish that Valve's commission has been excessive, Mr Harman proposed to compare Steam's revenues with the full economic costs of its Game and Add-on Content distribution activities. In establishing whether the commission is unfair, Mr Harman proposed to assess the economic value offered by Steam and compare Steam's commission charge with the commission charged by competitors in the relevant and analogous markets. This includes the commission charged by the Epic Game Store, which is 12% and by the Microsoft Store, which since 2021, is also 12%. In comparison, Mr Harman calculated that Steam's average commission charge range is around 27%. We note (with the caveat that Apple have announced their intention to seek the Court of Appeal's permission to appeal) that this approach is consistent with the Tribunal's approach in *Dr Rachael Kent v Apple Inc. & Another* [2025] CAT 67; [2025] 10 WLUK 406, where the comparators adopted included Steam, as well as other PC marketplaces (such as the Microsoft Store).

(a) Valve's submissions

49. Valve challenges Mr Harman's methodology for establishing that Steam's commission charge amounts to an unfair price on the basis that he has failed to consider the effect of Steam Keys. Without a credible plan for taking Steam Keys into account, the PCR cannot establish Steam's actual effective commission charge, and without this, the PCR cannot establish whether the commission charge amounts to an unfair price.

50. Valve provides Steam Keys free to Steam Partners. A Steam Partner can distribute its Steam Keys itself or through other distribution channels. A consumer can then purchase a Steam Key which can be redeemed on the Steam platform (for which Valve charges no commission). Valve submitted that Steam Partners can receive a considerable number of Steam Keys.

51. Accordingly, Valve contended that the PCR cannot properly calculate Valve's effective commission charge because the use of Steam Keys reduces that commission, as a fraction of a Steam Partner's total revenue, because the Steam Partners are receiving other revenue, from the use of the Steam platform, which, in effect, reduces the commission but to an extent that is unknown and unknowable. This is because Valve has no visibility of the price at which Steam Keys are sold or, indeed, the volume that are sold. Valve alleged that Mr Harman has not shown how he would credibly estimate the impact of Steam Keys on Valve's commission.

52. Although Valve admitted that it did hold data on Steam Keys issued and redeemed, it submitted that these were inexact proxies for volume: a significant proportion of Steam Keys issued are not redeemed; redemption figures were not a good proxy as a significant number of Steam Keys are sold in bundles whereby a consumer may purchase a bundle of Steam Keys for different Games without redeeming all the keys (so that a Steam Partner earned sales revenue from a Steam Key that was not used). Valve also submitted that, since Steam Keys do not have an expiry date, there could be Steam Keys sold before the Relevant Period but redeemed during it and, conversely, Steam Keys issued during the

Relevant Period but only sold and redeemed after it, further complicating the analysis in a way that Mr Harman's methodology did not address.

53. As to the price of Steam Keys, Valve submitted that it was not safe to assume that a Steam Key would be sold for the same price as the Game as offered on Steam. Valve submitted that Steam Partners can distribute Steam Keys in different ways, across different retailers, and at prices that change regularly. Both the pricing and the volume of Steam Keys issued and redeemed would vary between Steam Partners. It was therefore not possible to gain an accurate figure for Steam Key revenue at the game or Steam Partner level.

54. Valve submitted that, for collective proceedings, while *Gutmann CA* stands for the proposition that, where an aggregate award of damages is to be made, it is not necessary to prove on a class member by class member basis that the defendant's breach of duty has caused loss to every one of those class members, *Gutmann CA* had not decided that the logically prior question of whether there has been a breach of duty can be decided on an aggregate basis. Still less, Valve submitted, did *Gutmann CA* decide that an aggregate approach could be taken to a question as foundational to an unfair pricing case as the price itself.

55. Mr Kennelly KC submitted that this information gap related to the prices and volume of Steam Keys could not be fixed using the broad axe. In response to Mr Gregory's submissions that in *Justin Le Patourel v BT Group Plc & Others* [2024] CAT 76; [2025] Bus. L.R. 808 ("*Le Patourel*") the Tribunal used averages and estimates when faced with a lack of data, Mr Kennelly KC submitted that the data gaps in *Le Patourel* concerned issues in identifying the relevant comparators and costs rather than the price itself. Mr Kennelly KC submitted that there is no previous excessive pricing case where the impugned price could not be identified with precision, even in aggregate or by average.

56. To demonstrate this, Valve's expert, Dr Majumdar produced two approximations, depending on whether issuance or redemption was used as a proxy for volume, and using the Steam platform price (a simplifying

assumption) which showed that actual commission charges varied over time and in 2018 are materially lower than Mr Harman's estimated commission charge.

57. Valve submitted that the PCR's Reply and Mr Harman's Second Expert Report offered no solution to the issues above. Valve, in particular, disagreed that the required information could be gathered by the PCR as Mr Harman had suggested. First, public information on the price of Steam Keys would not provide a reliable picture on historical prices. Secondly, price comparison sites would not be a feasible means of filling the information gap as they do not generally provide data about prices on a publisher's own website. Furthermore, this information would not identify the price of those Steam Keys that actually were sold. Public information gathered through web-scraping is not necessarily reliable with even the sample cited by Mr Harman containing errors. Likewise, for Steam Keys sold in bundles, it would not be possible to determine the price of individual Steam Keys within such a bundle. In response to Mr Harman's suggestion that information could be gathered using a survey from publishers and/or digital store fronts, Valve responded that such a proposal was not properly explained and would be unlikely to be representative given the variety both of sale channels available and how Steam Partners used Steam Keys. Similarly, Mr Harman gave no consideration to the practicalities of obtaining this information particularly given most of these entities are based outside this jurisdiction. Third, to the suggestion that data aggregators could provide the relevant information, Valve noted that this proposal was again unsubstantiated and something that Mr Harman had earlier dismissed in the context of getting information to determine the relevant markets.

58. Valve also submitted that the PCR had also failed to show a plan to determine which Steam Partners actually paid these allegedly unfair prices. Mr Kennelly KC referred to *Gutmann CA* which stated at [38] that:

> "It is common ground that quantum should be calculated so that an award of damages does not overcompensate. Section 47C(2) does not rewrite the constituents of the tort to remove liability issues; it merely permits those ingredients to be established deploying different - top down - evidence. In determining quantum, the CAT therefore necessarily ensures that it excludes from the calculation those who fail at the liability stage and the methodology

> must, at some point, include a device for winnowing out no-loss members of the class.".

59. As the PCR had not put forward a credible methodology for establishing which Steam Partners ultimately bore the allegedly unfair commission charge, Valve submitted that the PCR had also failed to provide a plan for "winnowing out" the PCMs who had not actually suffered a loss.

60. Valve denied that these submissions would, if accepted, make it effectively immune to an unfair pricing case, because Steam Partners possess this data and could bring a case against Valve, or the Competition and Markets Authority ("CMA") could open an investigation.

61. Accordingly, Valve submitted that the PCR failed the *Pro-Sys Test* on the basis that its proposed methodologies were inadequate and did not demonstrate a sufficiently clear route to an effective trial.

(b) The PCR's submissions

62. The PCR submitted that Mr Harman and the PCR's methodology had expressly acknowledged that Steam Keys would need to be taken into account when calculating the effective commission charge. However, it was only from Valve's Response and Mr Peterson's Witness Statement that the PCR learnt that Valve does not earn any commission on Steam Key sales. It was then provided with relevant transaction data, following which Mr Harman had concluded that his methodology was capable of appropriately accounting for Steam Keys.

63. The PCR resisted the notion that it needs accurately to calculate Valve's effective commission charge at the level of each game or Steam Partner, submitting that this would entail a bottom-up approach to determining both liability and quantum. The PCR submitted that it was claiming aggregate damages on behalf of the Proposed Class. This was allowed for by the Act, with section 47C(2) stating that:

> "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

64. As to the basis on which aggregate damages are estimated in such claims, the PCR quoted the following observation made in *Merricks SC* at [58]:

> "…the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable.".

65. The PCR then submitted that determining whether there has been a breach of statutory duty in an unfair pricing claim through an aggregate approach does not create problems regarding causation, because in collective proceedings claims, causation can also be assessed on an aggregate basis. Relying on *Gutmann CA* [38] and [39], the PCR submitted that any requirement to prove a case separately in respect of each individual class member would make it excessively difficult for these members to vindicate their rights, which would be contrary both to the principle of effectiveness and the purpose of the opt-out collective proceedings regime.

66. Mr Gregory, on behalf of the PCR in the hearing, also referred to *CMA v Flynn Pharma Limited & Others* [2020] EWCA Civ 339; [2020] 4 All E.R. 934 ("*Flynn*") at [97(1)(iii)] to show that there was no single method in which an unfair pricing abuse can be established. The method that should be used to determine whether a price was excessive and unfair would "depend upon the availability of evidence and data" (at [107]). As the PCR was not required to adopt a particular method, it was certainly not required to adopt a practically unworkable one as suggested by Valve.

67. Mr Gregory further submitted that it was common for courts not to have the actual data needed to identify a price or a cost with precision. It was therefore consistent with the broad axe principle that such matters could be estimated and liability thereby established by extrapolating or making assumptions from the

data that was available. Mr Gregory referred to the following passages from *Merricks SC*:

> "50. This unavoidable requirement for quantification in order to do justice is not limited to damages. There are occasions where the court has to quantify or value some right or species of property and does not allow itself to be put off by forensic difficulties, however severe… In none of these cases does the court throw up its hands and bring the proceedings to an end before trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability."
>
> […]
>
> 74. The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily basis. The likely cost and burden of disclosure may well require skilled case-management. But neither justifies the denial of practicable access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive. The present case may well present difficulties of those kinds on a grand scale, but they are difficulties which the CAT is probably uniquely qualified to surmount. It may be that gaps in the data will in some instances be able to be bridged by techniques of extrapolation or interpolation, and that some gaps will be unbridgeable, so that nothing is recovered in relation to particular market sectors or for parts of the Infringement Period. Nonetheless it is a task which the CAT owes a duty to the represented class to carry out, as best it can with the evidence that eventually proves to be available. Nor can it be ignored that ADR may help, either in relation to narrowing the issues, or towards an overall settlement.".

68. Mr Gregory cited *Le Patourel* where, due to the different uptake of packages and changes over time, there was a "complex factual background to the analysis of market prices and price changes, under which it is not simple to identify a definitive 'price per unit' charged by BT or its rivals for the SFV products in question" (at [126]). When assessing BT's costs, the Tribunal noted that both parties' methodologies contained a number of problems. When going about assessing costs, what was needed was not, as the Tribunal put at [902] a "scientific calculation" but a figure based on the totality of evidence which represented the most appropriate outcome.

69. Mr Gregory also noted that *Le Patourel* at [926] indicated that an excess would be significant, under the first limb of the United Brands test, if it was 20% or more above the competitive benchmark. Applying that to this case, using an

illustrative and conveniently round example, if the Tribunal concluded that the relevant competitive benchmark was a 10% commission charge and, due to the uncertainties surrounding Steam Keys, it was only possible to estimate Valve's effective commission charge as being somewhere in the range of 20 to 25%, even without being able to precisely set the effective commission charge, the Tribunal could still be confident that the price was excessive compared to the benchmark.

70. Regarding gaps in the available data, for example in relation to the volume of Steam Keys, either issuance, redemption or an adjustment applied to one of these figures could be used to assess the effect of Steam Keys, with the most appropriate approach being a matter for trial.

71. In relation to the timing of sales, the PCR noted that due to the length of the Relevant Period, Valve's own expert admitted that there is no material timing issue. Further, the PCR submitted that using the data Valve had disclosed, it should be possible to use reasonably robust assumptions on how quickly Steam Keys were redeemed.

72. As to the price at which Steam Keys are sold, Valve's expert had shown it was possible to calculate an effective commission charge based on an assumption that Steam Keys were sold at the same price as the respective Product is sold on Steam, with such an assumption being consistent with the alleged PPOs. Mr Harman noted that while it would be possible to proceed with this assumption (which was favourable to Valve), it seemed likely that some Steam Keys were sold at prices below the Steam price. Some information could be gathered to test and, if appropriate, moderate this assumption. Mr Gregory submitted that Valve's criticisms of these data sources were premised on the incorrect basis that it would be necessary to calculate accurately an effective commission charge for individual sales or Steam Partners. In any event, if the PCR was unsuccessful in satisfying the Tribunal as to the appropriateness of these sources of data, the Tribunal would be able to assume, in Valve's favour, that the sales price was the same as that on Steam.

73. Finally, the PCR referred to *Mark McLaren Class Representative Limited v MOL (Europe Africa) & Others* [2022] EWCA Civ 1701; [2023] Bus. L.R. 318 at [41] to [48] that if a proposed class representative establishes a *prima facie* case, but there are some remaining uncertainties about the availability of data, the appropriate course is for the Tribunal to address these issues through its ongoing case management powers, rather than by refusing certification. This case management could include ordering specific disclosure from Valve which would, according to the PCR, allow Mr Harman to identify the most suitable methodology to account for Steam Keys and determine whether Valve held any internal assessment as to the effect of issuing Steam Keys.

(c) The Tribunal's analysis

74. The law on abuse through excessive pricing has been developing since the seminal case of *United Brands*, not least in the consideration by this Tribunal and the Court of Appeal in *Flynn* and subsequent cases. For the purpose of this CPO Application, it suffices to set out that a case for breach can, amongst other methods, be made out if *United Brands'* Limb 1 (excessive pricing) and Limb 2 (unfairness) are satisfied with Limb 2 having two possibilities (unfair by reference to comparators or unfair in itself). There is a considerable margin of appreciation given to a competition authority or a claimant as to how they satisfy that test and there is no single methodology that is required to satisfy either limb.

75. The *Pro-Sys Test* is considered above at paragraph 28 (et seq). This does not require the Tribunal, at the certification stage, to conduct a "mini-trial" or to have the actual evidence before it to be able to validate that a specific analysis can be done. Rather, what is required, in essence, is for the Tribunal to conclude that there is a sufficiently well considered and feasible: (i) theory as to how a case can be proved; and (ii) route to producing the evidence required so that a trial can be expected to be effective in fairly determining the issues the case raises.

76. Although Mr Kennelly KC did not accept that the PCR satisfied Limb 1 either, the essence of Valve's challenge is that the PCR's case is predicated on applying

the "unfairness limb", to the differential between the commission taken by Valve for sales on Steam and comparators in similar markets. Valve's point is that the existence of Steam Keys, with uncertainties around the revenue that they raise, prevents that comparison being done to a sufficient degree of precision with the consequence that there cannot be a proper evaluation of whether any differential is abusive.

77. This is because the commission notionally charged by Valve needs to be reduced to take account of the free issuance by Valve of Steam Keys to Steam Partners. The difficulty is that although Valve knows the number of Steam Keys issued to Steam Partners (because Valve is the issuer) and the number of those issued that are redeemed (because they are redeemed through the Steam platform), the number of Steam Keys sold and the price at which they are sold is not information that is (or can, practically, be) available to the PCR, (and Valve does not have it) and the volumes to which those prices are to be applied to generate the total Steam Key revenue are inherently uncertain. This means that the true share of the revenue from the distribution of a game on Steam that is taken by Valve cannot be calculated because, although Valve's direct take is clear, there is an unresolvable uncertainty as to the total revenue generated, and hence the fraction that Valve retains, because the Steam Key element is unknown and unknowable. Accordingly, Valve argued: (i) it is not possible to determine whether Valve's commission was abusive and (ii) it would not be possible to calculate any damages due if it were.

78. To support this, Valve relies on the diverse nature of the Steam Key distribution arrangements, including that Steam Keys can be sold as part of a bundled package with other Games making it even more difficult to calculate the Steam Key associated revenue and the variable pricing strategies deployed.

79. We accept that there are non-trivial evidential issues for the PCR to resolve in relation to accounting for Steam Keys. However, we do not consider that the application for a CPO fails on this ground. We have concluded that the PCR has done enough for present purposes to demonstrate an understanding of the legal test that is required to be met, the theoretical approach to meeting that test

and a variety of possible routes by which sufficient evidence can be obtained to properly apply the relevant test. Our reasons for this conclusion are as follows.

80. Steam Keys (i) issued and (ii) redeemed represent respectively [✂] and [✂] of sales of Products world-wide and [✂] (based on those redeemed) in the UK across, roughly, the Class Period. The effect of Steam Keys is therefore limited.

81. In practice, the relative impact of this issue and the uncertainty that it creates, is likely to be reduced by the following factors which operate to reduce the (calculation distorting) revenue that Steam Partners receive from Steam Keys.

(1) Despite the PPOs (considered below), there are suggestions that Steam Keys were sold at a discount to the Steam price (it is difficult to see how they could be sold at a premium on a sustained basis).

(2) In many of the distribution channels, the distributor will also take a fee (the equivalent of the Valve Commission).

(3) It is rather more likely that the number of Steam Keys sold is closer to the (smaller) number redeemed than those issued; it is not likely that there are widespread and material payments for Steam Keys that are not used (redeemed).

(4) We understand that Steam Keys may be bundled with packages of other Products and not redeemed (because the purchaser was primarily interested in other Products in the package and never bothered to redeem the Steam Key); but it is not credible that a party bundling Products would have been paying the Steam Partner a price close to the Steam price for only one element of a bundled package that it recognised consumers might not want.

82. Further, the CPCF, the evidence of Mr Harman and the submissions at the hearing made it clear the PCR proposes to demonstrate that Limb 1 of the United Brands test (that the pricing is excessive) is satisfied by using a cost plus analysis (of Valve's total costs in operating the Steam platform, including its

cost of capital) compared with revenue Steam generates to demonstrate that the pricing is excessive. This critical initial calculation is independent of the Steam Key issue.

83. The Steam Key issue could be relevant to Limb 2 (unfairness). However, that Limb has two variants (unfair by reference to "comparators" and unfair "in itself"). The PCR would only need to succeed on one variant. The Steam Key issue is clearly relevant to the "comparator" test, and might, depending on how matters developed at trial, be relevant to the "in itself" test. However, for the reasons set out above, the Steam Key issue only distorts the calculation of commissions; it does not render it impossible. The PCR may be able to establish unfairness using reasonable assumptions, or, particularly, assumptions favourable to Valve as discussed below. More generally, the unfairness assessment is inherently a judgement taken in the round rather than one subject to a precise numerical assessment. There are, therefore, limits to the weight that can be given to the challenges, however valid analytically, that are predicated on a degree of precision that is not presently required in the wider assessment that the Tribunal has to make.

84. It would have assisted us had Mr Harman been more specific in his evidence as to what relevant market evidence would be obtained and how, Valve having fairly raised questions as to the amount and quality of data that would be available. However, the pricing of Products on Steam, the volumes of Steam Keys issued and redeemed are hard numbers that should be available from Valve. Moreover, evidence, to some degree, should be available from a variety of sources, including web-scraping and other aggregated sources of information, Valve's own internal assessments of how Steam Partners were, in fact, using the Steam Keys that Valve issued to them (a topic about which Valve would have views because it was taking individual commercial decisions on what number of Steam Keys to issue to which Steam Partners) and, possibly, experts on the distribution of Products through Steam Keys and, also possibly, some third party information. This should enable, with the benefit of reasonable and prudent assumptions, a sufficient estimate to be made of the, likely relatively limited, impact of Steam Keys on Valve's share of the income that a Steam

Partner receives from the distribution of a Product for the purpose of applying the rather general assessments required by Limb 2 of the *United Brands* test.

85. This conclusion is supported by the submission made on behalf of the PCR at the hearing to the effect that the PCR was content for the impact of the Steam Key issue to be assessed at trial with the benefit of any reasonable doubt being given to Valve on such issues – i.e. the PCR's position would be that Valve's commission charge was abusive even with the maximum reasonable reductions in the net commission resulting from the uncertainties in any assumptions on Steam Key revenues. We note, however, that this submission is, in effect, broadly consistent with the burden of proof that the PCR inevitably carries.

86. As Mr Gregory submitted at the hearing:

> "… even if it was only possible to estimate effective commission rates in a range, it is still plainly possible that it would demonstrate that Valve's rate is excessive, even based on the lower end of the range."

87. We were not persuaded by Valve's attempt to position the Steam Keys issue by reference to individual Steam Partners (or Games). That would render any such abusive pricing claim next to impossible to bring. Moreover, as is clear from the authorities, there is no single way to establish such an abuse. If the PCR wishes to try to prove a case of abusive pricing on a top down, in the round, basis, as regards liability and loss, it is entitled to do so. The Tribunal does not consider that this case falls outside of the scope of *Gutmann CA* on these issues, nor that there could not be appropriate prospects for the "winnowing out" of any non-qualifying claims if necessary in due course.

88. Valve raised a further issue in relation to Steam Keys: that Steam Keys do not have an expiry date and, hence some redeemed in the Relevant Period would have been sold before hand; and some sold in the Relevant Period would not feature in redemptions until after the end of the Relevant Period. This, it was submitted, further rendered the calculation of the true Valve commission rate impossible. Dr Majumdar identified one example where the apparent explanation for a perverse calculation of Valve's commission level was this timing effect.

89. Whilst there is a valid analytical issue in relation to this timing point, Dr Majumdar was reluctant to give it much weight particularly over a data period as long as six years (as is the case here). The purpose of the CPO hearing, applying the *Pro-Sys Test*, is not to establish the detailed methodology for resolving each challenge to the PCR's case. No persuasive evidence was submitted to us that this potential effect was sufficiently large in the round that, by making prudent assumptions, this feature could not reasonably be taken into account at trial, particularly for the purpose of the Limb 2 test which, as discussed above, has inherent limits as to the mathematical precision with which it can be applied. This is particularly so given that this timing effect is an adjustment to the size of something which is itself an adjustment (the impact of Steam Keys). Furthermore, one would expect that, to an extent, those Steam Keys issued during the Relevant Period but redeemed afterwards would tend to compensate those issued before but redeemed during the Relevant Period. We consider that this is something that can be addressed by reasonable assumptions based on the data that is available and, on this basis, is not a factor that is likely to be determinative in applying the Limb 2 test.

90. Accordingly, whilst the Tribunal accepts that it is a slightly unusual feature of this case that this issue could result in uncertainty in the price alleged to be unfair rather than the prices of comparators, and that the PCR will have an evidential burden to discharge at trial, it considers that the *Pro-Sys Test* is met and that the collective proceedings can be effectively tried as regards this issue.

91. Insofar as the Steam Keys issue impacts on the calculation of damages, if the claim is successful, the Tribunal sees no reason why the "broad axe principle" should not be available to assist in what will clearly, in any event, be an aggregated damages assessment.

(2) The PPO Issue

92. The first abuse alleged in the CPCF is that Valve has entered into the PPOs. By virtue of the PPOs, Steam Partners are allegedly prevented from selling Products: (i) through other distribution channels more cheaply, or earlier, than

on Steam; or (ii) in a differentiated form. The PCR alleges that the PPOs are likely to cause and have in fact caused a restriction of competition. For this, the PCR relied on the Expert Reports of Mr Harman. Under the heading of "Approach to Assessing the PPOs" Mr Harman's First Expert Report stated the following:

> "7.4.29 In the merits phase, subject to the claim being certified, to assess the effects of the PPOs on competition and consumers, I will need evidence on the precise nature and scope of the PPOs in force throughout the Relevant Period.
>
> 7.4.30 **First**, I will assess the terms of the PPOs by reference to documentary evidence, such as: (i) contracts or agreements between Valve and game developers/publishers that include PPO clauses, particularly those affecting multichannel games; and (ii) correspondence or other documents in which Valve explains to publishers (or other parties), the interpretation and application of the relevant contractual terms which give effect to the PPOs.
>
> 7.4.31 **Second**, I will review evidence on the implementation and enforcement of the PPOs, which may include: (i) correspondence between Valve and publishers relating to the enforcement of the PPOs, the intention to enforce the PPOs, or the consequences of failing to comply with the PPOs; and (ii) documents produced by Valve that monitor compliance with the PPOs.
>
> 7.4.32 **Third**, I will assess the likely effects of the PPOs on prices and other outcomes in the Relevant Markets. Given that Steam is likely to have been dominant in the Relevant Markets throughout the Relevant Period, and the PPOs appear to have been in force throughout the Relevant Period, there may be limited direct evidence on outcomes absent the PPOs. In Section 8, I set out in more detail my approach to assessing market outcomes for the purpose of assessing aggregate damages. In summary, my approach comprises:
>
> (I) performing a further literature review to assess the empirical effects of removing PPO-like clauses in other markets;
>
> (II) assessing the effects of the PPOs on the prices of Steam Only Products and Multichannel Products (e.g., the likely commission rates that may have prevailed absent the PPOs and the likely rate of pass-on of any lower commission rates; and
>
> (III) assessing the indirect effects of the PPOs on the prices of other Products, including Products not sold on Steam and Valve's own games. I will review the role of benchmarking in the market to set and update prices.
>
> (IV) information prepared by Valve in the normal course of business showing: (i) Valve's view on showrooming; (ii) planned investments to innovate and to improve the platform; and (iii)

> discussion of the likely costs and actual costs of undertaking these innovations."

93. When quantifying the loss caused by the PPOs, the PCR stated that the premise would be that, in the counterfactual without the PPOs, economic theory suggests that incentives and competitive forces would increase competition in the market and push prices, and Valve's commission, down. In calculating the counterfactual commission charge, Mr Harman explained that his methodology for calculating this charge will overlap heavily with his excessive pricing methodology. For the indirect effect of the PPOs on Products not also sold on Steam (and hence not subject to the PPOs) or Valve's own Products, Mr Harman would gather evidence regarding the level of substitution between Products. This could come from Valve, including Valve's internal analysis and its communication with publishers, from academic studies on the video game market and from an industry expert.

(a) Valve's submissions

94. Valve criticised Mr Harman's methodology for assessing the effect of the alleged PPOs on the grounds that it was based on: (i) economic theory; (ii) the effects of PPOs in other markets according to a literature review; and did not provide a proper basis for a likely counterfactual commission rate.

95. Valve submitted this was insufficient for the *Pro-Sys Test* (as discussed above) as Mr Harman had not set out a methodology for empirically assessing the effect of the alleged PPOs.

96. Valve submitted that reliance on economic theory alone could not sustain a breach of competition law. Mr Kennelly KC referred to *BGL (Holdings) Limited v Competition and Markets Authority* [2022] CAT 36; [2022] 8 WLUK 71 ("*BGL*"). In *BGL*, the Tribunal found that the CMA had failed to show the relevant 'most favoured nation clauses' restricted competition and criticised the CMA's analysis in attempting to show anti-competitive effects. The Tribunal stated that:

> "224(2). A great deal of the analysis operates at the level of theory or (less helpfully) bare assertion. Thus, Decision/§9.8 states:
>
> > "The CMA finds that during the Relevant Period, by preventing the relevant providers from offering lower prices on [Compare The Market's] rival [price comparison websites], [Compare The Market's] network of [wMFNs] restricted the ability of and reduced the incentives on providers subject to [Compare The Market's] [wMFNs] to compete on price by differentiating their prices across [price comparison websites]…"
>
> With great respect, statements like this are not only once again repetitive of the findings in Section 7, but also either bare assertion or statements operating at the level of theory. This is not, as we have discussed, a "by object" infringement case – and rightly so.
>
> […]
>
> 243. Conversely, however, the mere fact that these clauses were effective – in the sense that they were complied with – is not sufficient to demonstrate an anti-competitive effect. The CMA must show – and the burden is on it – that there was such an effect…"
>
> (Emphasis in the original)

97. Valve submitted that it was not sufficient to show a particular PPO was in force or that it was complied with. Rather, the PCR had to show prices would actually have fallen if the relevant clauses had been removed.

98. Valve further submitted that Mr Harman's reliance on economic theory and the absence of a robust empirical methodology for establishing the effects of the alleged PPOs was all the more acute in circumstances where: (i) there is no consensus that all PPOs inevitably produce harmful effects, as pointed out by Dr Majumdar; and (ii) on the PCR's own case, the PPOs are not universally enforced.

99. Valve contended that Mr Harman's proposal to undertake a comparison with other markets where PPOs have been banned or restricted was inadequate. The other markets referred to by Mr Harman included digital comparison tools, online travel agencies, goods sold on Amazon, and e-books. Valve submitted that these comparisons as to the effect of PPOs would be valid only to the extent that the markets were relevantly similar. Valve submitted that these markets were similar to Steam only at the entirely superficial level of being online platforms operating in two-sided markets. They were not similar in respect of:

(i) the services they provide; (ii) their demand characteristics; and/or (iii) their costs. That the empirical evidence gathered from such other markets was, in any event, mixed, only underlined the need for a robust empirical assessment of effects in the market relevant to these proceedings. While Mr Harman's Second Expert Report stated that these comparisons would be used just as a "cross check", this left the question of what the cross-check was checking in the first place.

100. On Valve's submissions, this left Mr Harman's estimation of the counterfactual commission charge as the only means advanced of conducting an empirical assessment of the effect of the PPOs. However, this would assume what would need to be shown: that the alleged PPOs do in fact have an impact on Valve's commission charge, and that removing them would produce a lower commission charge in the counterfactual. In any event, Mr Harman's methodology for establishing the effective commission charge was also flawed due to the Steam Key issue discussed above.

101. Finally, the PCR had not explained how disclosure would solve this problem. Although the PCR stated that it would seek disclosure as to the terms and enforcement of the PPOs, referring to *BGL*, evidence as to the compliance with the PPOs would not show what would happen if the PPOs were lifted. It was perfectly possible, Mr Kennelly KC submitted, that even if the PPOs were lifted, assuming they existed, that publishers would not react as Mr Harman predicted. As the PCR had offered no methodology as to how it would explore that question, the PCR had failed to satisfy the *Pro-Sys Test.*

(b) The PCR's submissions

102. The PCR submitted that Valve's challenges were based on a misunderstanding of Mr Harman's methodology. In assessing the effects of the PPOs, Mr Harman provisionally planned to take into account, among other things: (i) evidence about the terms of the Valve PPOs and how they are enforced; (ii) likely direct and indirect effects; (iii) the level of cost-reflective commission rates; (iv) considerations of economic theory, including the likely incentives of different

parties; (v) factual evidence relating to how prices are set in the market (e.g. the extent to which benchmarking is used); (vi) Valve's disclosure, as well as empirical market data and industry expert input; (vii) the impacts of PPOs in comparator markets; and (viii) likely pass-on rates (themselves assessed through a combination of economic theory and empirical analysis).

103. This approach, the PCR submitted, comfortably satisfies the low bar of the *Pro-Sys Test* not least when one has regard to two key obstacles that Mr Harman faces, especially at this stage.

104. First, there is likely to be limited direct evidence on what the market position would have been absent the PPOs if Valve were dominant throughout the Relevant Period and had imposed the PPOs to suppress competition. As a result, there is no choice but to rely more heavily on the predictions of (entirely orthodox) economic theory when assessing the effects of the PPOs.

105. Second, Mr Harman's methodology has been developed in the absence of any disclosure from Valve (or relevant third parties) about the terms and enforcement of the PPOs. The PCR submitted that the terms of the PPOs and the way they have been enforced will, obviously, be the starting point for any analysis of their effects. As to disclosure requests, Mr Harman's First Expert Report had set out the evidence the PCR would request, including the terms of the PPOs, Valve's internal assessments of the effects of the PPOs, and Valve's enforcement of the PPOs. In the hearing, Mr Gregory also referred to the CPCF, which noted evidence disclosed in similar US proceedings against Valve where Valve had threatened to delist publishers if they did not increase their prices on other distribution channels.

106. Mr Gregory also noted that Mr Harman had already analysed the pricing patterns of 37 Games which found empirical evidence that the PPOs were affecting prices, and showed pricing consistency across platforms for most titles with sales exceeding 100,000 units. To the extent that the analysis was to show some variation on the impact on prices across Games, this would actually

evidence the effect of the PPOs as the different pricing patterns could be explained by the extent to which the PPOs were actively enforced.

107. In response to Valve's criticisms regarding Mr Harman's reliance on comparator markets, the PCR stated that Mr Harman had not proceeded on a simple assumption that PPOs in different markets are directly comparable. Mr Harman's Second Expert Report had given further clarification that, in principle, it is necessary to consider differences in market features when comparing the effects of PPOs across different markets. However, the PCR submitted that Mr Harman's approach in using comparators was entirely orthodox in competition law and to the extent Dr Majumdar disagreed with Mr Harman's choice of comparators, this would be a matter for trial rather than certification.

108. Mr Gregory further submitted that if the PCR established that the PPOs had some effect on prices, then the Tribunal would be in "broad axe territory" for assessing the level of prices in the counterfactual for the purposes of aggregate damages. Within this analysis, the PCR accepted that Mr Harman would be relying on economic theory more heavily than in other cases for the reasons given above. However, such an approach is common in competition law proceedings as discussed in the European Commission's *Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* at [16] and [17], as referred to and endorsed in *Merricks SC* at [52].

(c) The Tribunal's analysis

109. The PPOs alleged by the PCR are of a wide nature, affecting not only direct sales by Steam Partners themselves but also sales through non-Steam distribution channels.

110. Such wide PPOs, if operated by a dominant undertaking, are widely accepted in competition law as likely to have adverse competition effects (although the size of those effects will depend on the specific circumstances). This is seen in the

treatment of such clauses in the European Commission's Vertical Block Exemption Regulation (EU) 2022/270 and in the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 in the UK.

111. It is against this background that Valve's submission that the *Pro-Sys Test* is not met in relation to the PPO allegations needs to be considered. Valve is over simplifying the PCR's case in its attack on the CPCF when it asserts that "a claim for breach of competition law cannot be proven by reference to economic theory alone". That is not what the PCR seeks to do. However, wide clauses of this nature are recognised by competition law to raise competition issues; it is not simply a matter of abstract (or novel) economic theory. Moreover, in this case, Mr Harman does not seek to rely only on theory but also on evidence.

112. Valve placed some reliance on the *BGL* (Compare the Market) case. Although an important case, the circumstances were a little different there. The case was on the basis that: whatever the market power of Compare the Market, it was a Chapter I (effects) assessment; it was an appeal of a CMA Decision, the CMA having based its assessment very heavily on economic theory and evidence described as anecdotal (and seemingly exonerating in some cases); the CMA did not take into account evidence that Compare the Market's wide MFN clauses had not affected commissions in fact; and the CMA did not present a case that Compare the Market was able to test (because it was too based on theory). Although a useful reference point, it is therefore not directly comparable with this case where there would be a rather different factual matrix, adversarial procedure and specific process for testing the evidential material against the background of economic theory and competition law expectations in the context of an (alleged) dominant party.

113. Valve's argument that the PPOs are not (perhaps effectively) enforced and therefore did not constitute an abuse (and the resulting inherent tension with the PCR's case on the price of Steam Keys) is clearly rather one for trial, and not for certification where the issue that is being considered is, rather, the *Pro-Sys* criterion of a workable methodology and availability of evidence to enable a fair trial.

114. Although raised as a criticism by Dr Majumdar (on instructions), in effect, it is common ground between Valve and the PCR that PPO effects in other markets are only relevant to the extent that there are sufficient similarities in the market concerned. Mr Harman's position is that these markets would be used as a cross-check on the estimates of the effect that he proposed, rather than simply reading across effects in one market as a basis for effects in another. This would only be one part of the evidential picture and does not seem an unreasonable approach. Indeed, if Mr Harman's assessment of the impact of the PPOs were to be wildly higher than the impact on other markets, it is likely that Valve would refer to that comparison when criticising his conclusion.

115. Valve is correct in its challenge that the PCR cannot simply calculate, on a cost-plus basis, what a cost reflective counterfactual commission charge would be and assume that the difference between that and the actual rate is a result of the PPOs. It will be necessary to demonstrate a sufficient causal link through a range of evidence consistent with accepted economic theories. However, the details of establishing that causation are for trial.

116. Moreover, we note that, although not the subject of comment by Dr Majumdar, in Section 6 and Appendix G of Mr Harman's First Expert Report, Mr Harman presents an illustrative analysis of the pricing and timing of price moves on some 37 Games to support an empirical assessment that PPOs are having an impact on competition. Disclosure might enable the PCR to tie the correlation in price moves on different platforms to Valve's PPOs or their operation. We make no evaluation of the cogency of that evidence (including whether it is, rather, reflective of an efficient market) nor of whether it would help in establishing the counterfactual PPO-free price. Rather the point is that Mr Harman is actually proposing to produce empirical evidence, to be tested at trial, in support of the PCR's case and not simply to rely on theory.

117. Valve also raises, in essence, the Steam Key data argument discussed above to challenge Mr Harman's proposed approach to calculating the PPO-free counterfactual. We have considered that argument already. For similar reasons, we consider, for certification purposes, that it is sufficiently likely that, with

reasonable approximations, based on the data that is available, it will be possible to obtain a sufficiently good assessment of prices in the counterfactual for an effective trial to take place. That remains a burden of proof that the PCR will need to discharge at trial.

118. We do not underestimate the challenge of demonstrating, at trial, that the PPOs had an effect on the competitive structure of the market such as to constitute an abuse of a dominant position or of attributing a price impact to that effect, even with a broad axe, to estimate the damages due. However, we are at the certification stage. Wide PPOs of this nature are treated by competition law generally as raising issues of considerable competition concern when adopted by dominant undertakings. Whilst more detail would always be welcome at a certification stage, we do not consider that the PCR has failed to meet the *Pro-Sys Test*. It has identified the legal approach that it would take to establishing an abuse, the elements of the arguments that it intends to develop and the sources of evidence for those arguments (which one would reasonably expect to be available); the approach does not simply rely on nebulous economic theory but rather on a mixture of evidence to support and evaluate a harm that competition law conventionally considers to occur. In particular, Mr Harman has undertaken some preliminary analysis on some 37 Games which, in his opinion, suggests that there is some empirical support for prices being affected as a consequence of the PPOs. If substantiated at trial, this would be precisely the kind of detailed and specific evidence that would support the claim.

119. As mentioned in paragraph 45, Valve does not object to certification in relation to the second head of challenge (tying/steering clauses, though as noted above, this appears to us to be relied on by the PCR as exacerbating the other abuses rather than as an independent or self-standing abuse). We have concluded that certification should be granted to the third head, excessive pricing in relation to commissions. In practice, at trial, we can anticipate that the impact of the PPOs on the price of Products and whether they were part of the commercial structure that supported the alleged excessive commissions will almost certainly arise in the consideration of heads 2 and 3. We are, therefore, concerned, that to allow the case to proceed on heads 2 and 3, but not head 1, would, in practice lead to

very considerable practical difficulties which would not be in the interest of an effective and fair trial (the prospects of which are at the heart of the *Pro-Sys* Test).

120. For the above reasons, we conclude that the *Pro-Sys Test* is met and that the collective proceedings can be effectively tried as regards the PPO Issue.

(3) Class identification

121. Rule 79(1)(a) provides that the Tribunal may certify claims as eligible for inclusion in collective proceedings provided it is satisfied that such claims "are brought on behalf of an identifiable class of persons", having regard to all the circumstances.

122. Rule 79(2) provides, so far as is relevant to class identification:

> "In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—
>
> [...]
>
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class...".

123. The Tribunal considered the interplay of rules 79(1)(a) and 79(2)(e) in its judgment in *Commercial and Interregional Card Claims I Limited v Mastercard Incorporated* [2023] CAT 38; [2023] Bus. L.R. 1218 ("*CICC I*"), at [62]:

> "We make the following observations about the interplay of rules 79(1)(a) and 79(2)(e):
>
> (1) In our view, these rules, while overlapping, perform distinct functions. As is clear from *Merricks SC* (by analogy with the test for common issues), *Trucks CPO* and *FX*, rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is a factor to consider among other factors when considering suitability.
>
> (2) Rule 79(1)(a) asks whether an objective and clear class definition has been proposed (see *Trucks CPO* at [188]). It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. This underpins important features of the collective proceedings regime, such as the assessment of common

issues and the ability to identify those who are bound by the result of those proceedings.

(3) While rule 79(1)(a) is identified as a hurdle, we note the importance, as summarised in *Le Patourel CA* at [29], of collective actions facilitating access to justice. It should not easily be assumed that the existence of a hurdle, in the form of rule 79(1) generally, requires an overly prescriptive approach. There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to "have regard to all the circumstances".

(4) Rule 79(2)(e) is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and seems important in relation to issues such as registration of class members and the distribution of any award of damages.

(5) Rule 79(2)(e) is one of a number of factors relating to suitability under rule 79(2) (in order to meet the requirement in rule 79(1)(c)). Each factor is to be weighed along with the others and an overall judgment reached about suitability (see *Merricks SC* at [61] and [62]).

(6) Despite having distinct functions, rules 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person's membership of the class."

124. In *Commercial and Interregional Card Claims I Limited v Mastercard Incorporated* [2024] CAT 39; [2024] 6 WLUK 181 ("*CICC 2*") the Tribunal further stated at [72]:

> "When one comes to consider rule 79(2), the question becomes much more about practicality, and the Tribunal will exercise its judgment in broad terms at the CPO stage, provided it is satisfied that there is going to be a workable methodology (or, possibly, methodologies) which will allow the mechanics of registration, distribution and the like to be given effect. That requires, in practice, at least a credible suggestion about how merchants might be able to identify themselves."

(a) Valve's submissions

125. The PCR's Class Definition (as at the hearing) is set out at paragraph 12 above. The Class Definition includes both purchasers on Steam itself and purchasers of Games and Add-on Content through other channels. Valve alleged that the PCR's original proposals as to how PCMs could identify themselves relied heavily on disclosure of "transaction data" from Valve with a view to

minimising the burden on PCMs. Following confirmation from Valve that it does not hold data on purchases made through channels other than its own, Valve alleged that the PCR pivoted to relying primarily or exclusively on PCMs identifying themselves through their own records, such as bank statements or emails.

126. Valve considered that the PCR's proposals remained inadequate considering the PCR stated that the PCMs include a "high number of minors". Such minors will be class members where they are account holders even though they may use a parent or guardian's card for purchases. These PCMs are unlikely to hold the key financial records and, as minors, are unlikely to have had effective document retention for emails and the like. Account transaction histories are themselves unlikely to provide the answer because little or no personal information is required to set up accounts (on Steam at least) such that accounts cannot be obviously linked to natural persons.

127. Valve submitted that the PCR's failure to provide a workable methodology whereby PCMs, including a high proportion of minors, can identify themselves is a factor weighing against certification of the proceedings absent any more realistic proposals by the PCR, pursuant to rule 79(2)(e).

(b) The PCR's submissions

128. The PCR submitted that it has never relied on Valve's data for the purposes of determining class membership and distributing damages. The CPCF, Litigation Plan, and Notice and Administration Plan indicated that (i) other methods of proof would need to be relied on in respect of non-Steam purchases, and (ii) for Steam purchases, it may not be necessary to rely on Valve data at all. In particular, PCMs will be able to provide their own proof of purchases (e.g. account records, bank statements or email receipts). This approach is in line with other collective proceedings: see *Consumers' Association v Qualcomm Incorporated* [2022] CAT 20; [2022] 5 WLUK 318, at [107]. The PCR stated it rightly raised the possibility that the Valve data might be used to validate claims, to reduce the administrative burden on the class members and increase the

likelihood of take-up. However, this has always been proposed as an alternative approach and the claim was not dependent on it.

129. The PCR submitted, that in any event, the point is premature as there is no need for any proof of class membership at the stage where people seek to opt-out of the class. These matters are appropriately left until the distribution stage later in the proceedings, given that the amount of aggregate damages would be known, members of the class may wish to be heard at this point, relevant information may have come to light in the course of disclosure, and the Tribunal would be able to consider the effectiveness of approaches to distribution in other collective claims. It is not appropriate to take final decisions on these matters now: see *Merricks SC* at [77].

(c) Tribunal's analysis

130. Valve's third argument relates to a very specific aspect of the Class Definition.

131. Under rule 79(1)(a), before granting a CPO, the Tribunal has to be satisfied that the claims are brought on behalf of "an identifiable class of persons". Under rule 79(1)(c) the Tribunal needs to be satisfied that the claims are suitable to be brought in collective proceedings. Under rule 79(2), when determining that suitability, the Tribunal has a wide discretion and can take into account "all matters it thinks fit including" (at rule 79(2)(e)) "whether it is possible to determine in respect of any person whether that person is or is not a member of the class". As Valve submitted, rule 79(2)(e) is concerned with the practicality of such matters as registration of PCMs, the organisation of distribution of any damages and whether there can be a viable methodology for the operation of the class.

132. Valve confirmed at the hearing that it was raising no issue as to rule 79(1)(a) and accepted that the class was technically defined clearly enough for that purpose. Its challenge was only as to the Tribunal's exercise of discretion under rule 79(2).

133. Valve submitted that the rule 79(2)(e) criterion is failed and submits that this militates against certification. By the time of the hearing, the remaining concern was that the PCMs are expected by the PCR to contain a high number of minors who may not have the necessary records of transactions to be able to establish class membership, particularly when payments were being made by adults on their behalf (for example on their credit cards) in the circumstances of the market. This, it was submitted, meant that the approach taken by the Tribunal in *CICC 1*, that the methodology had to "*allow the mechanics of registration, distribution and the like to be given effect*.", could not be followed in this case.

134. First, it is worth noting that *CICC 1* involves a subtly different issue. That case concerned the multilateral interchange fee arrangements for Visa and Mastercard with a claim being made, by merchants, for compensation in relation to both commercial card and inter-regional transactions. The relevant problem in that case, was that many (particularly smaller) merchants were not provided with sufficient information by their acquiring banks to ascertain whether they had accepted a transaction the subject of the claim, and therefore fell within the class (and it was not practical for the card companies to provide that data). This was a matter that could not be solved by assumptions, given the differing businesses in the class, creating a fundamental issue, for class identification, of whether membership was technically capable of being established by any workable means. The CPO Application was rejected both under rule 79(1) (the class was not adequately defined) and for the purpose of the discretion under rule 79(2)(e) as to suitability. However, in this case, the question is, rather, one of whether at the time of any distribution of damages, the evidence that would have been available at the time of the alleged cause of action accrued is still available, to the potential class members, to support a distribution of damages (where Valve admits that the Class Definition meets the requirements of rule 79(1)).

135. We do not think that there is anything sufficient in Valve's challenge to this one aspect of the various factors relevant to the discretion that we have to exercise under rule 79(2) to deny a CPO. Proof of class membership and a right to damages will be a matter of evidence. The Litigation Plan proposes a

methodology for establishing a right to damages; it is not dependent on Valve having data about purchases. In essence, if the PCR were successful at trial, if a class member can prove a qualifying purchase using receipts and other records, they would be entitled to damages; and if they could not they would not be able to pursue a claim. This is a matter that can be addressed in more detail after the hearing if the PCR were to succeed.

136. Moreover, the position is strengthened in this respect by a revision to the Class Definition, in the light of issues raised by the Tribunal at the hearing. That revision very substantially diminishes Valve's concerns by tying the class tightly to the party who has suffered the loss, reducing the potential concern of the record keeping of minors. In the light of that development, we have no hesitation in rejecting Valve's challenge in this respect.

(4) Class Definition

137. During the hearing, the Tribunal raised the question of whether there might be an issue in that the Class Definition, as then proposed, seemed to include parties who would not have suffered any loss and would not include parties who had suffered a loss (if an overcharge was made out). This would be because the payment for the Product would have been made by a third party not in the class as defined. For example, a minor might be the account holder (and within the definition) but a parent might be the purchasing party, or the person whose credit card was associated with the account, who actually would suffer the loss from any overcharge that was proved (but who was not within the definition). The PCR had submitted, based on the presumption of advancement, that even if the money is provided by the parents, the loss was suffered by the child.

138. Mr Gregory, on behalf of the PCR, recognised the Tribunal's concern and requested permission to respond in writing, which the Tribunal granted.

139. Following an exchange of correspondence between the parties to the stage where Valve raised no further drafting points which we considered were likely to change materially the position at trial, the Class Definition was amended to:

> "All Persons who, during the Class Period, made one or more payments to purchase ("**Purchasers**"): (a) PC Games, and/or (b) Add-on Content for PC Games, including subscription payments for PC Games and/or Add-on Content (collectively "**Relevant Purchases**").
>
> "Persons" are end-consumers, and do not include resellers or other non-retail customers. Persons include, in particular, people who purchase PC Games and/or Add-on Content for use by themselves or by people they know (such as friends or family members).
>
> "Purchasers" include, for the avoidance of doubt: (a) where the payment was taken from a bank or credit card at the time of purchase (whether through the submission of card details or the use of digital wallet technologies such as Apple Pay, Google Pay or PayPal etc), the person whose account the money was taken from; (b) where the payment was made with pre-loaded funds on a user account (e.g. Steam Wallet, Epic Wallet etc), the user account holder; and (c) where the payment was made using a monetary gift card or voucher, the person who made the payment using that card or voucher."

140. The Tribunal considers that, to the extent that there might have been a problem, these drafting changes address the concerns raised during the hearing. If the PCR is content to proceed on the basis of this definition, it does not present any reason for not granting a CPO.

(5) Conclusions on Eligibility

141. As with the Authorisation criteria under rule 78, irrespective of the arguments of the parties, the Tribunal has to consider for itself whether the requirements of rule 79, relating to Eligibility, are satisfied.

142. The principal requirements of rule 79(1) are set out in paragraphs 26 and 27 above. The Tribunal needs to consider the issue of suitability taking account of all matters that it sees fit but with particular reference to the criteria in rule 79(2).

143. The Tribunal considers that:

(1) the claims are brought on behalf of an identifiable class of persons (particularly, although this criterion was not challenged, with the benefit of the changes to the Class Definition);

(2) the claims do raise common issues; and

(3) having taken account of the factors set out in rule 79(2) and considered the position more widely on the evidence before it, the claims are suitable to be brought in collective proceedings. We have taken account of the *Pro-Sys Test* and discussion above in reaching this conclusion.

(i) These collective proceedings are an appropriate means for the fair and efficient resolution of the common issues.

(ii) The costs and benefits of bringing these proceedings are appropriate for this kind of litigation.

(iii) There are no relevant other proceedings in this jurisdiction.

(iv) The size and nature of the class is such that collective proceedings are the only realistically available process by which these claims are capable of being judicially determined.

(v) As discussed above, and particularly with the benefit of the change in Class Definition, it should be possible, on the evidence available in any given case, to determine whether a given person is, or is not, a member of the class.

(vi) A large number of small claims of this nature is clearly suitable for an award of aggregate damages and we were taken to no evidence that showed that the aggregate damages approach was not appropriate in this case.

(vii) Other than any settlement or mediation discussions that might take place between the parties in this case, as with any other litigation, we are not aware of any alternative dispute resolution procedure that might be available to the parties in this dispute.

F. ISSUES RAISED BY THE TRIBUNAL

144. During the hearing, the Tribunal raised four matters with the PCR, in addition to the proposed Class Definition referred to at paragraph 137 above.

(1) Evidence of funding on competitive terms

145. In *Hammond & Stephan*, the Tribunal considered what information in relation to funding should be provided at the certification stage. The Tribunal said, at [67(1)]:

> "The Tribunal at certification wishes to be satisfied that the PCR has made proper efforts to secure favourable funding terms. Here, we were told that the amended LFA which introduced the current basis for the Funder's Fee was negotiated soon after the PACCAR judgment and that the existence at that time of a competing application for certification (i.e. the Hunter action) made it harder to secure funding. At the request of the Tribunal, Mr Hammond provided during the hearing a further witness statement which gave much more information of the evolution of the final form of the LFA. We consider that it should be standard practice for the PCR to address in their evidence the steps they took to secure an LFA on appropriate terms." (Emphasis added).

146. Having regard to this statement in *Hammond & Stephan*, the Tribunal considered the PCR should provide evidence that recorded the steps taken to secure funding on appropriate and competitive terms.

147. On 24 October 2025, Ms Natasha Pearman (a partner in Milberg London LLP ("Milberg"), solicitors for the PCR) provided her Second Witness Statement in the proceedings addressing the chronology and material facts relating to the origin and the development of the LFA. That evidence covered, reasonably extensively, the origin of the funding and the discussions that had taken place.

148. Valve criticised the PCR's position essentially on the bases that:

(1) the funding arrangements were prepared (but not finalised) before the PCR was involved, although it was admitted that Ms Shotbolt had been briefed on it subsequently by Milberg;

(2) when briefing Ms Shotbolt, Milberg had a conflict of interest given it had put together the LFA;

(3) there was no evidence that Ms Shotbolt had taken steps to satisfy herself independently that the terms were reasonable in market conditions or to improve the terms;

(4) there had been no competitive tender;

(5) the commercial circumstances were such that the PCR could have sought better terms; and

(6) certification should be refused on the basis of the criteria set out in *Riefa*.

149. By a letter dated 31 October 2025, the PCR's solicitors stated that the facts of *Riefa* were highly unusual (leading the Tribunal to refuse certification on the basis that the proposed representative appeared to have fundamentally misunderstood her obligations) and a long way from the circumstances of the present case. The same letter also made the point that any specific requirements articulated in the *Riefa* judgment as to the way in which funding agreements should be negotiated were articulated long after the appointment of Ms Shotbolt and should not be applied retrospectively to the circumstances of this case. They argued:

(1) Valve was attempting to elevate *Riefa* into a further set of independent legal tests or rules (despite the Tribunal itself having made clear that such an approach was not appropriate);

(2) In *Riefa* itself at [101], the Tribunal has stated (also reflected in what was said in *Hammond & Stephan*) that it "agree[d] that the Tribunal should be reluctant to venture into an assessment of the commercial terms of the LFA unless they are sufficiently extreme to warrant calling out".

(3) In the present case, the Tribunal should be satisfied for present purposes that the LFA, far from being "sufficiently extreme to warrant calling out", are competitive and neither Milberg nor the PCR should be criticised for not insisting on a competitive tender or a further round of discussions simply for the sake of ticking a "process box". By the time the PCR was appointed, the Supreme Court had handed down its judgment in *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 4 All E.R. 675, which created significant additional risk for funders and created uncertainty in the funding market; the PCR had been fortunate to find funding on terms as good as those in this case.

150. The Tribunal accepts the PCR's points as adumbrated above, and notes that: (i) the multiples of return to the Funder (an important criterion by which to assess the financing) were less than in other CPOs that have been granted; and (ii) no evidence was presented to it that suggested that the LFA in these proceedings was materially "out of the market".

151. However, the Tribunal considered that the suitability of the funding was a matter for which the PCR should take responsibility personally, even if many of the arrangements had been negotiated to Term Sheet level before the PCR came into existence. It therefore suggested that the PCR, rather than its solicitor, should file evidence confirming that it was confident that the current funding arrangements were appropriate in their terms, in the light of market conditions, and in the interests of the PCMs.

152. On 13 November 2025, Ms Shotbolt filed her Second Witness Statement in which she explained that:

(1) although not having conducted the negotiations, she was aware of them prior to the Term Sheet being signed, met the funder subsequently to discuss the funding, was briefed on further discussions and reviewed the LFA and other financial arrangements (including considerations of conflict of interest and her freedom to settle the case) in a page-by-page review before LFA signature;

(2) she was advised at the time by Milberg that the terms were competitive in the marketplace and felt satisfied that was the case when she signed the LFA on 13 October 2023;

(3) she had been personally involved in, and considered, all subsequent amendments to the LFA and had access to an independent costs specialist King's Counsel;

(4) in the light of the further enquiry from the Tribunal, she had reviewed the funding arrangements with the benefit of that King's Counsel and advice from a broker in the litigation funding market; and

(5) with the benefit of that advice, she concluded that the terms and pricing of the LFA were competitive in the litigation funding market, were appropriate and in the best interests of the PCMs.

153. On 19 November 2025, Valve raised various questions on Ms Shotbolt's Second Witness Statement, to the effect that there were some issues that it did not cover (such as the instructions given to the costs counsel and the broker, what information they had about the negotiations and possible linkage to the finance of related proceedings in the USA). The Tribunal does not consider that these questions detract from the clear statement on behalf of the PCR by Ms Shotbolt that, with the benefit of appropriate independent advice, it is satisfied as to the appropriateness of the funding and it is in the best interests of the class. The Tribunal notes, as mentioned above, that there is no evidence before it that suggests that the terms in the LFA are inappropriate in the market conditions in which they were agreed.

154. The Tribunal is, therefore, satisfied that the approach recommended in *Hammond & Stephan* has been satisfied and this is not a ground for refusing the CPO.

(2) Other matters

155. During the hearing, having regard to the likely number of minors within the proposed class, the Tribunal raised whether the addition of a senior lawyer to the Advisory Panel would be appropriate for extra protection given the legal issues that might arise (there otherwise being no independent lawyer on the Advisory Panel). Mr Gregory confirmed the PCR would be prepared to add a lawyer to the Advisory Panel.

156. The Tribunal also suggested that it might be appropriate to receive reports from Epiq in relation to the progress, outcomes and future steps of communications with the relevant stakeholders. This would permit directions as to more active measures to be taken if the notices, communications and online contact arrangements were not effective in practice. Mr Gregory confirmed that the PCR was content for Epiq to provide periodic reports on communications with the class members which summarise the communications sent and the level of engagement with these communications.

157. The Tribunal was concerned about cost control and raised the question of continuing reporting obligations as regards costs budgeting and costs incurred to ensure visibility of expenditure related to the proceedings. Mr Gregory confirmed during the hearing that the PCR would be content to provide costs reporting at future case management conferences, having regard to recent CPO judgments of the Tribunal: for example, see *Bulk Mail Claim Limited v International Distribution Services Plc (formerly Royal Mail Plc)* [2025] CAT 19; [2025] Bus. L.R. 571 ("*Bulk Mail*") at [39]. In the light of *Bulk Mail* and the recommendation made at [45] of *Hammond & Stephan*, the Tribunal considers that: (i) progress of costs against the Litigation Budget should be subject to quarterly reporting to the Tribunal and (ii) the legal team should only submit a request of funding/payment from the funder when that request had been reviewed and approved by an appropriate cost counsel or cost draughtsman.

158. The Tribunal considers that the PCR's agreement to these three points should be recited in the CPO, and the Tribunal will expect to be updated at the next

case management conference about the implementation of what has been agreed.

159. Finally, the Tribunal notes that the Priorities Agreement, which determines how payments, whether as damages following a success at trial or from a settlement, from Valve to the Class Members, provides that the funders, insurers and legal team should be paid in preference to the Class Members and not paid out of unallocated recoveries. This arrangement is expressed to be subject to any order of the Tribunal. Clearly, this issue raises a direct conflict of interest between the class members and others involved, including the legal advisers, although not the PCR. This is particularly sensitive, in this case, given the likely large number of minors in this class. A similar, although slightly less severe, prioritisation was the subject of recent comment by the Tribunal in *Hammond & Stephan* although ultimately accepted in that case. More widely, this kind of arrangement was subject to detailed scrutiny by the Court of Appeal in *Justin Gutmann v Apple Inc. & Others* [2025] EWCA Civ 459; [2025] All E.R. (Comm) 934 ("*Gutmann v Apple CA*") (and then, in practical detail, by the Tribunal in the *Justin Gutmann v Stagecoach South Western Trains Limited* [2025] CAT 72). It was stressed in the judgment of Sir Julian Flaux (with which Lord Justice Green and Lord Justice Birss agreed) that, since the Tribunal has jurisdiction to distribute to funders and lawyers in priority to the distribution to the class, a contractual provision for such prioritisation is unobjectionable, subject always to the Tribunal's overriding supervisory jurisdiction to order otherwise if in the event there is an award of damages in favour of the class (see *Gutmann v Apple CA* at [75] and [97] to [98]). In essence, the financing arrangements set out parameters to which the Tribunal, at the appropriate time, will give appropriate weight when balancing the interests of all stakeholders in a just and fair resolution of the proceedings in the context of the collective proceedings regime.

160. We do not seek to adjust this arrangement, which we anticipate would be delicate commercially for all involved, at the CPO stage. However, we thought it appropriate to emphasise that, depending on the outcome of the proceedings, the Tribunal will be alert to exercise its powers to ensure that the interests of the

class members are properly respected in the distribution of any funds that may be payable by Valve.

G. CONCLUSION ON CERTIFICATION

161. For the reasons set out above, the Tribunal has concluded that it is appropriate to make a CPO in these proceedings and invites the parties to agree and provide an order which also incorporates the recitals which it has described in paragraph 157 above.

(1) Opt-in/Opt-out

162. When the Tribunal makes a CPO, the order must specify whether the collective proceedings will be opt-in or opt-out taking account of all the matters it thinks fit including, in addition to the matters in rule 79(2) the strength of the claims and whether it is practicable for them to be brought as opt-in collective proceedings, having regard to all the circumstances including the estimated amount of damages that the claimants may recover: rule 79(3) of the Tribunal Rules.

163. The question whether a CPO should be granted on an opt-out basis, and the relevance of the strength of the case and the robustness of the methodology suggested for its proof, have been considered very recently by the Supreme Court in *Evans v Barclays Bank and Others* [2025] UKSC 48; [2025] 12 WLUK 363 (*"Evans"*). That decision was handed down on 18 December 2025 (and thus after the conclusion of the CPO Hearing before us); and the Tribunal considered that the parties should be given permission to provide short additional submissions as to its potential relevance to the matters now in issue in this case.

164. In the submissions provided to us accordingly, Valve submits that although *Evans* principally concerned the relevance of the strength of the claim in deciding whether to certify a claim as opt-in or opt out proceedings, the emphasis in the Supreme Court's single judgment on the need to scrutinise the

merits of a claim and the adequacy of any methodology for its proof even at the certification stage, so as to guard against the potential for exploitation of the collective proceedings regime through its guard against the *"enormous leveraging effect"* of collective proceedings to extract a settlement out of defendants even where the claims against them are very weak, fortifies its position that the CPO application should be dismissed. Valve has taken the opportunity to emphasise again its point that it was for the PCR to demonstrate at this stage a plausible theory of harm and how it is to be proved, and that it has not done so *"in particular by reason of the inadequacy of the methodology which the PCR has advanced."*

165. Against this, the PCR submits that *Evans* concerned very different facts and circumstances; but that, especially once the material differences are taken into account, the Supreme Court's reasoning tends to confirm that the present claim should indeed be certified on an opt-out basis. The PCR emphasises that there is no *"fundamental weakness"* in the PCR's pleaded case or theory of harm (including causation) such as the expert evidence revealed there to be in *Evans.* Valve had not submitted that the claim should not be certified because its merits were weak (its objections being based rather on the *Pro-Sys* ground on which we have found against it). Nor has Valve submitted that the claim should only be certified (if at all) on an opt-in rather than an opt-out basis; and the PCR's submissions contrast the claim in these proceedings, brought on behalf of a large class of consumers each of which has suffered small individual losses, such that individual claims would not be economically viable, with the claims in *Evans*, where the proposed class included a group of sophisticated and large financial institutions alleging individual losses large enough to make it financially viable to contemplate bringing proceedings independently.

166. Having carefully considered the Supreme Court decision and the parties' additional written submissions, we consider that there is nothing in the *Evans* case which undermines the analysis we have set out or is such as to cause us to refuse to certify on an opt-out basis. We have not been persuaded by Valve that the decision in *Evans* enunciates principles which fortify its position that the PCR's CPO application should be dismissed or alternatively certified only

as opt-in proceedings. This is not a case where the PCR has resorted to economic theory to plug a hole or gap in its case on causation (contrast paragraphs [106] and [107] in *Evans*). There is nothing evident in the perceived strength of the claims, on the evidence before us and at this very early stage of the proceedings, to cause us to refuse certification. As to the basis of certification, the Tribunal considers that this is the kind of case described in [116] of *Evans* as a "paradigm" of where an opt-out certification is appropriate, as in *Merricks SC*, where there "is a large class of consumers affected by an [alleged] breach of competition law resulting in their having to pay more for goods or services, but involving small sums for each individual which would make each individual case economically unviable". Opt-in collective proceedings would simply not be practicable for a Proposed Class estimated to include up to 14 million individuals, many of them minors, with the average losses estimated to be in the region of £22 to £44 per class member. In short, the Tribunal considers that this is a clear case where the CPO should be on an opt-out basis.

H. DISPOSITION

167. For the reasons set out above, the Tribunal finds that the Authorisation and Eligibility Conditions have been satisfied and grants the CPO on an opt-out basis.

168. This Judgment is unanimous.

The Hon Mr Justice Hildyard
Chair

Paul Lomas

John Davies

Charles Dhanowa, CBE., KC (Hon)
Registrar

Date: 26 January 2026