Amended pursuant to Rule 114(3) of the Competition Appeal Tribunal Rules 2015

Neutral citation [2026] CAT 34

Case No: 1696/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 April 2026

Before:

THE HONOURABLE MR JUSTICE ADAM JOHNSON
(Chair)
JOHN DAVIES
LESLEY FARRELL

Sitting as a Tribunal in England and Wales

BETWEEN:

DR MARIA LUISA STASI

Applicant/Proposed Class Representative

- v -

(1) MICROSOFT CORPORATON
(2) MICROSOFT LIMITED
(3) MICROSOFT IRELAND OPERATIONS LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 11 and 12 December 2025

JUDGMENT (CPO APPLICATION)

APPEARANCES

Sarah Ford KC, Robert Marven KC and Ben Lewy (instructed by Scott + Scott UK LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Brian Kennelly KC and Aislinn Kelly-Lyth (instructed by Linklaters LLP) appeared on behalf of the Respondents/Proposed Defendants.

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A. INTRODUCTION

1. In a collective proceedings claim form (**CPCF**) filed on 3 December 2024, Dr Maria Luisa Stasi applied to be appointed as the Proposed Class Representative (**PCR**) for a collective proceedings order (**CPO**) to combine claims pursuant to section 47B of the Competition Act 1998 (the **1998 Act**) (the **CPO Application**) as against the Proposed Defendants (collectively **Microsoft**).

2. The CPO Application seeks to combine "standalone" claims under section 47A of the 1998 Act, alleging that Microsoft has abused its dominant position in breach of the Chapter II prohibition in section 18 of the 1998 Act and/or Article 102 of the Treaty on the Functioning of the European Union (**EU**) (**Article 102**), by way of certain of its licensing practices in respect of the operating system (**OS**) software known as **Windows Server** as well as in respect of its cloud computing services, particularly its platform **Azure** (the **Claim**). The Proposed Claim is brought on behalf of a **Proposed Class** of organisations which obtained a licence to use Windows Server, and a **Proposed Sub-Class** consisting of members who are alleged to have suffered additional losses, and seeks to recover damages for the alleged overcharge paid by them as a result of the alleged infringements. The PCR seeks certification of the Proposed Claim on an opt-out basis, with aggregate damages estimated to be in excess of £1.7 billion.

3. Microsoft's position is that the CPO Application should be dismissed in whole or in part, or alternatively, that it should be stayed unless and until the PCR sets out an adequate blueprint to trial and addresses other failings in the Proposed Claim and/or it should proceed only on an opt-in or partially opt-in basis. In its Response to the CPO Application (the **Response**), filed on 25 July 2025, Microsoft's position was set out as follows (in summary): (1) the Proposed Claim does not meet the certification threshold because there is no adequate blueprint to trial; (2) there are serious issues in relation to the PCR's "funding and governance arrangements"; and (3) that the Proposed Claim if it is to proceed should be certified on an opt-in rather than an opt-out basis, or alternatively on a hybrid opt-in and opt-out basis. By the time of the hearing of the CPO Application (the **Hearing**), Mr Kennelly KC appeared to state that Microsoft's position in respect of (3) had moved on such that only its alternative

position was being advanced, i.e. that the Proposed Claim should be certified on a hybrid opt-in and opt-out basis (Day 2, page 70, lines 7–10).

4. A few days following the Hearing, on 18 December 2025, the Supreme Court delivered its judgment in *Evans v Barclays Bank Plc and Others* [2025] UKSC 48 (***Evans***). On 29 December 2025, the parties jointly requested permission from the Tribunal to file short written submissions on the implications of *Evans*; permission was granted by way of an Order made on 6 January 2026 for the filing by both parties of submissions of no more than ten pages in length by 23 January 2026. The Tribunal has had the benefit of those submissions in the preparation of this Judgment.

B. BACKGROUND TO THE PROPOSED CLAIM

5. Microsoft's alleged abusive practices relate to cloud computing and specifically how Windows Server is licensed for use on Azure and other (rival) cloud computing services, which include Amazon Web Services (**AWS**), Google Cloud Platform (**Google**) and Alibaba Cloud (**Alibaba**), referred to collectively by the PCR as the **Listed Providers**.

(1) Cloud computing

6. Cloud computing is now the system by which most businesses access technology and store their data, following a gradual development away from the previous system of on-premises storage. Cloud computing essentially refers to, as succinctly put in the CPCF at §151, "the delivery of computing services…over the internet." Cloud computing functions on an individual basis by way of virtual machines, referred to by Microsoft on its website as "virtual computers within computers". Virtual machines allow one computer's hardware to divide into several computers, each of which will function like a stand-alone computer. This allows for cloud computing to mimic for a user the experience of using one computer's hardware and software.

7. As noted by the CPCF (§152), businesses have gradually migrated their information technology needs from on-premises infrastructure to cloud computing services, as more businesses have entered the market. Many

organisations, the CPCF states (again at §152), now adopt "cloud-first" strategies such that the vast majority of their information technology storage is done on the cloud.

(2) Azure and Windows Server

8. Azure was launched by Microsoft in 2010 and is now one of the world's largest providers of cloud computing services. As pointed out in the CPCF at §156, it has a global presence with over 60 server regions, has relationships with key artificial intelligence developers, and offers "a broad ecosystem of products" which it sells alongside Azure.

9. Windows Server is a term used by the PCR to refer collectively to a number of Microsoft's proprietary OS which run on servers. Server OS are distinct from OS which run on desktop computers, such that they are "designed to run central services to support multiple users" and are "not a useable or affordable substitute for" OS which are run on desktops (CPCF §158). A relevant example of an alternative server OS is Linux Server OS (**Linux**), which is described as a popular open-source OS. The relevant OS which are encompassed by Windows Server are (CPCF at §159):

> "Windows Server 2008, Windows Server 2008 R2, Windows Server 2012, Windows Server 2012 R2, Windows Server 2016, Windows Server 2019, Windows Server 2022 and any forthcoming releases of Windows Server (including Windows Server 2025), including their specialised Editions."

(3) The licensing of Windows Server

10. As noted in the CPCF at §160, the ways in which Microsoft licenses Windows Server are complicated and not straightforward. Of note for our purposes is that Microsoft licenses Windows Server for use on both Azure and rival cloud services including the Listed Providers. Certain licences granted by Microsoft are **On-Premises Licences**: these include, as defined in the CPCF at §65 "any licence for Windows Server obtained through: (i) a Microsoft Enterprise Agreement, (ii) a Microsoft Products and Services Agreement […], or (iii) Microsoft's Cloud Solution Provider programme."

(4) The CMA's market investigation

11. On 31 July 2025, the Competition and Markets Authority (**CMA**) published its **Final Report** upon the conclusion of its market investigation into "cloud infrastructure services". The PCR in her skeleton argument pointed to a number of the CMA's conclusions as relevant to the Proposed Claim as follows:

    (1) "We have considered whether Microsoft's licensing practices have the effect of reducing competition in cloud services markets by materially disadvantaging AWS and Google, who consequently compete less effectively" (§7.766).

    (2) "AWS and Google are being materially disadvantaged by Microsoft's licensing practices in relation to Windows Server and SQL Server. They pass through at least some of the input costs of Microsoft software, and customers generally perceive them to be more expensive than Microsoft…" (§7.767).

    (3) "Windows Server and SQL Server are used disproportionally on Azure compared to on AWS and Google. We consider that the very large difference is at least partly because some customers' choice of cloud is influenced by Microsoft's licensing practices" (§7.769).

    (4) "In summary, Microsoft's licensing practices have the effect of reducing competition in cloud services markets by materially disadvantaging AWS and Google, who consequently compete less effectively" (§7.775).

12. As the PCR points out, the CMA concluded that Microsoft's licensing practices have an adverse effect on competition in the cloud services market, but considered that there were material risks to the effectiveness of the remedies which it had the power to implement under the Enterprise Act 2002 (the **2002 Act**). Instead, it recommended that it prioritise commencing an investigation into Microsoft under the Digital Markets, Competition and Consumers Act 2024 to determine whether it has strategic market status so that more appropriate interventions can be considered given the digital nature of the cloud services market.

13. Of further note for the purposes of section F below in respect of the particular arguments made by Microsoft as to the use (or non-use) of a price-cost test in the PCR's methodology, Ms Ford KC at the Hearing (Day 1, page 13, line 14 to page 15, line 18) pointed the Tribunal to §7.615 onwards of the Final Report, and particularly to the CMA's response at §7.620 onwards. The CMA stated:

> "7.621 Rivals' margins can be relevant evidence of partial foreclosure. However, they do not provide determinative evidence and should be interpreted in the round with other evidence.
>
> […]
>
> 7.625 More generally, we do not consider it necessary or appropriate to define a threshold or a benchmark in relation to each feature of the market (as it is unreasonable to consider them in isolation), let alone define them for particular elements of each feature. We have set out the benchmark of a well-functioning market elsewhere in this report.
>
> 7.626 For the reasons above, we consider margins to be relevant but not determinative as an indicator of partial foreclosure. We have instead focused our assessment on the extent to which the evidence on margins is consistent or inconsistent with partial foreclosure."

14. Ms Ford KC argued that the CMA "expressly rejected" the use of a price-cost test at §7.633, fn 2440 (Day 1, page 15, lines 16–18).

15. Mr Kennelly KC made the argument on behalf of Microsoft that although the "CMA did not find a price-cost test to be determinative", it did include one in its work (Day 2, page 24, lines 15–16).

C. THE PROPOSED COLLECTIVE PROCEEDINGS

16. The PCR alleges that during the period from 3 December 2018 up to the date of judgment (the **Claim Period**), Microsoft has held a dominant position in the relevant market for "Paid Server OS". This relevant market is defined as being a market for paid versions of server OS running on server class hardware and including professional support.

17. The PCR alleges that Microsoft has abused this dominant position by way of two forms of licensing practices, referred to as **Licensing Abuses**. These are set out in the CPCF at §5 and, in summary, refer to the following practices:

(1) The Service Provider License Agreement pricing abuse (**SPLA Pricing Abuse**), which involves Microsoft charging wholesale prices for Windows Server under SPLAs which are higher than those for equivalent licences charged to Azure users.

(2) The **Re-Licensing Abuse**, involving Microsoft allowing the holder of an On-Premises Licence to use Windows Server to operate on Azure, but not on other Listed Providers, without the need to pay re-licensing fees. The Re-Licensing Abuse operates by way of the Azure Hybrid Benefit (**AHB**) which is granted to the holder of an On-Premises Licence.

18. The PCR states that the effect of the SPLA Pricing Abuse is to inflate the prices of Windows Server which the Listed Providers charge their customers for using Microsoft software, thereby making it cheaper for users of Microsoft software to operate it on Azure than on the Listed Providers.

19. The effect of the Re-Licensing Abuse, according to the PCR, is that a holder of an On-Premises Licence to use Windows Server must pay a (substantial) re-licensing fee if it operates Windows Server on a Listed Provider, but not if it operates Windows Server on Azure.

20. The CPCF also refers to certain **Quality Abuses** which the PCR relies on "as evidence of Microsoft's anti-competitive intent", but as to which she will not seek to "quantify the impact" or bring any claim. The Quality Abuses are said to involve Microsoft (CPCF at §7–8):

> "(1) Refusing to supply certain of its products via SPLAs to other cloud providers, including Microsoft 365, Windows Desktop 10/11 and Visual Studio.
>
> (2) Reserving newer features of SQL Server, Windows Server OS and Windows Desktop OS for Microsoft Azure customers.
>
> (3) Limiting security updates and additional features for Microsoft products that are being run in other clouds."

21. The PCR defines the Proposed Class as "[a]ll Organisations (other than Excluded Organisations) which, during the Claim Period, obtained a licence to use Windows Server from a Listed Provider" (CPCF at §50). The PCR contends

that the Re-Licensing Abuse has caused additional loss to a sub-set of the Proposed Class. This is the Proposed Sub-Class, which is defined as "[a]ny Class Member who held an On-Premises Licence with Software Assurance to use Windows Server during the Sub-Class Claim Period" (CPCF at §51).

22. The PCR estimates that the Proposed Class has approximately 59,000 proposed class members (**PCMs**), but, pending disclosure, she has been unable to estimate the number of members of the Proposed Sub-Class. The PCR seeks to bring the Proposed Claim on an opt-out basis.

23. The CPO Application is supported by two expert reports by the PCR's expert economist, Professor Abraham Wickelgren of the University of Texas at Austin (supported by Fideres Partners LLP) (**AW1** and **AW2** respectively).[1] The Response was accompanied by an expert report from Microsoft's expert economist, Professor Fiona Scott Morton of Charles River Associates (**FSM1**).

D. LEGAL FRAMEWORK

(1) The authorisation and eligibility conditions

24. The requirements to be fulfilled in order for the Tribunal to grant a CPO are set out in section 47B of the 1998 Act and in Rules 77, 78 and 79 of the Competition Appeal Tribunal Rules 2015 (the **Rules**). Specifically, the Tribunal must be satisfied that a PCR is a person who the Tribunal could authorise to act as class representative in accordance with r. 78 (the **Authorisation Condition**) and that the claims are eligible for inclusion in collective proceedings in accordance with r. 79 (the **Eligibility Condition**).

25. The Authorisation and Eligibility Conditions are well-established in the Tribunal's jurisprudence and were set out clearly in the Tribunal's recent judgment in *Spottiswoode v Airwave* [2025] CAT 60 (§§27–33):

> "27. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the PCR (the authorisation condition): s. 47B(5)(a) and r. 77(1)(a). The authorisation condition is met if the Tribunal

[1] The CPO Application is also supported by expert reports from Mr Geoffrey William Hooper of Oareborough Consulting Limited and Mr Richard Gibbons of Synyega Limited. These are non-economic expert reports which did not have a bearing on the matters discussed at the Hearing.

considers that it is 'just and reasonable' for the PCR to act as a representative in the proceedings: s. 47B(8)(b) and r. 78(1)(b).

28. The factors relevant to the determination of whether it is just and reasonable for the PCR to act as the class representative are set out in r. 78(2). These include whether the PCR 'would fairly and adequately act in the interests of the class members' and whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so.

29. Under r. 78(3), in determining whether the PCR would act fairly and adequately in the interests of the class members, the Tribunal must take into account all the circumstances, including:

> (1) If the PCR is not a member of the class (as in the present case), whether it is a pre-existing body and the nature and functions of that body: r. 78(3)(b); and
>
> (2) Whether the PCR has prepared a plan for the collective proceedings which satisfactorily includes a method for bringing the proceedings on behalf of the class; a procedure for governance and consultation taking into account the size and nature of the class; and any estimate of and details of arrangements as to costs, fees or disbursements which the PCR may be ordered to provide: r. 78(3)(c).

30. Second, the claims must be eligible for inclusion in collective proceedings (the eligibility condition): s. 47B(5)(b) and r. 77(1)(b). The eligibility condition comprises three cumulative requirements, set out in s. 47B(6) and r. 79:

> (1) The proposed claims must be brought on behalf of an identifiable class of persons: r. 79(1)(a).
>
> (2) The proposed claims must raise common issues, or, in other words, the same, similar or related issues of fact or law: s. 47B(6) and r. 79(1)(b).
>
> (3) The proposed claims must be suitable to be brought in collective proceedings: s. 47B(6) and r. 79(1)(c).

31. As to whether a claim is brought on behalf of an identifiable class of persons, the Tribunal's Guide to Proceedings 2015 notes the following at §6.37:

> 'It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class. The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings. And it has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt in or out of the proceedings.'

32. Rule 79(2)(e) also requires the Tribunal to consider, in the context of suitability of the claims to be brought in collective proceedings, whether it is possible to determine in respect of any person whether that person is or is not a member of the class.

> 33. As the Tribunal emphasised at §2 of *Gormsen v Meta* [2024] CAT 11, in considering whether to make a CPO, the Tribunal must consider whether the requirements of both the authorisation and eligibility conditions are satisfied, whether or not these are raised by the parties."

(2) The *Pro-Sys* Test

26. Part of the assessment of whether proceedings are suitable to be brought in collective proceedings involves asking whether the relevant claims are suitable for an aggregate award of damages (see r. 79(2)(f)).

27. Guidance on this issue was given in the decision of the Supreme Court in *Mastercard Inc v Merricks* [2020] UKSC 51, [2021] 3 All ER 285 (***Merricks***). It does not, as such, involve an assessment of the merits of the claims. It does however involve forming a value judgment about the plausibility of the expert evidence relied upon as establishing loss on a class-wide basis. This point developed real significance in the parties' arguments in the present case, and in effect was the main point of substance relied on by Microsoft in arguing against certification. Microsoft's main submission was that the evidence of Professor Wickelgren was not sufficiently credible or plausible, and identified no effective blueprint for trial.

28. As to the standard to be applied, the Supreme Court in *Merricks* was split as to the outcome in that case on the facts, but they were agreed as to the relevant test. This was taken from a leading Canadian decision: *Pro-Sys Consultants Ltd v Microsoft Corpn* [201] SCC 57 (***Pro-Sys***).

29. The Supreme Court cited §118 of *Pro-Sys* at §40 of *Merricks*. The test set out is often known as the ***Pro-Sys* Test** and was articulated by Rothstein J as follows:

> "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 *Pro-Sys* Test has subsequently been considered in several cases before the Tribunal (and on appeal). In *London & South Eastern Railway v Gutmann* [2022] EWCA Civ 1077, [2022] WLUK 388 (***Gutmann***), the Court of Appeal said that the *Pro-Sys* Test sets out a "common sense approach" and confers on the court or tribunal a "broad discretion" to approve the methodology to be used at trial (§53). In a later case, *UK Trucks Claim Ltd v Stellantis* [2023] EWCA Civ 875, [2024] 1 All ER (Comm) 543 (***Trucks***), the Court of Appeal stated that the *Pro-Sys* Test sets a "fairly low threshold" and emphasised that a proposed class representative's methodology is not required to address every issue or defence that a defendant might raise. To require the proposed class representative to do so would be to encourage a "plethora of expert evidence" and lead to lengthy, expensive certification proceedings as in the US (§102).

31. More recently, the Tribunal granted a CPO in *Ad Tech v Google* [2024] CAT 38 (***Ad Tech***), and in doing so observed:

    (1) The *Pro-Sys* Test obliges the Tribunal to envisage how it proposes to bring complex proceedings to trial. It is a continuing test which is regularly tested against actual progress (§29(2)).

    (2) The *Pro-Sys* Test looks not to the provision of answers but at whether the proposed class representative has asked the right questions as to how the case might be tried and has some idea (if not a final idea) as to how these questions might be answered (§29(3)).

    (3) Where there is an asymmetry of information between claimants and defendants, the methodology may need to be formulated at a high degree of generality. To require a methodology at a higher standard than that required of a pleading introduces a merits test by the back door (§35(3)).

    (4) The *Pro-Sys* Test is about the "management to trial of a properly pleaded claim" and it is only when the Tribunal can see no clear way of trying the case that the *Pro-Sys* Test should act as a bar to certification (§39).

(3) Opt-in/opt-out

32. When considering whether or not to grant a CPO, the Tribunal must consider whether, if certified, the proceedings should be granted on an opt-in or opt-out basis. Sections 47B(10) and (11) of the 1998 Act define opt-in and opt-out collective proceedings as follows:

> "(10) 'Opt-in collective proceedings' are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.
>
> (11) 'Opt-out collective proceedings' are collective proceedings which are brought on behalf of each class member except—
>
> > (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
> >
> > (b) any class member who—
> >
> > > (i) is not domiciled in the United Kingdom at a time specified, and
> > >
> > > (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

33. The approach the Tribunal should adopt when assessing whether to certify proceedings on an opt-in or opt-out basis is set out in r. 79(3) of the Rules (**r. 79(3)**):

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

34. The Supreme Court's judgment in *Evans* has recently clarified elements of the assessment set out in r. 79(3). In *Evans*, the Supreme Court heard an appeal against a Tribunal order to stay CPO applications pending the submission of revised applications for certification and that, if they were to proceed, they would be on an opt-in basis. The Tribunal considered that the pleaded claim was weak because the proposed class representative would be unable to show a

causal link between the infringement and the losses alleged. The appeal before the Supreme Court focused on the factors relevant to the choice between opt-out/opt-in proceedings.

35. The Supreme Court noted the "broad discretion" of the Tribunal under r. 79(3) to take into account all matters it thinks fit in making a decision on whether to grant a CPO on an opt-out or opt-in basis, including the factors expressly referred to in r. 79(3): namely the strength of the claim and the practicability of the proceedings being brought on an opt-in basis (§4).

36. The Supreme Court concluded that it was legitimate for the Tribunal to consider the weakness of the claim as a factor militating against opt-out proceedings: "the merits of the claim are not a neutral factor" (§168).

37. The Supreme Court noted that there may be cases where the Tribunal is unable to assess the merits of the claim at certification stage and is therefore unable to place any weight on the strength of the claim in the choice of certifying on an opt-out or opt-in basis (§§101–106).

(4) Funding

38. The scrutiny of the PCR's funding arrangements falls under the Authorisation Condition: r. 78(2)(d) of the Rules requires the Tribunal to consider whether the PCR would be able to pay the defendant's recoverable costs. A helpful summary of the Authorisation Condition as it relates to funding is set out in §31 of *Riefa v Apple* [2025] CAT 5:

> "(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."

E. ISSUES

39. As noted above at §3, Microsoft's primary position in respect of the CPO Application is that it should be refused. Aside from this, the specific issues in dispute are:

(1) Whether the PCR has provided an adequate blueprint to trial which can be said to pass the *Pro-Sys* Test.

(2) Whether the Proposed Claim should proceed on an opt-out basis, as contended for by the PCR, or whether there should be separate opt-in and opt-out classes, as contended for by Microsoft.

(3) Whether the PCR's funding arrangements are sufficiently adequate such that she can be considered to fulfil the Authorisation Condition.

F. BLUEPRINT TO TRIAL

40. This issue was the main battleground between the parties. The submissions made on behalf of Microsoft were heavily critical of Professor Wickelgren's methodology, as set out in AW1 and AW2, and argued that it failed to provide

any plausible blueprint to trial likely to enable losses to be established on a class-wide basis.

41. In order to understand this issue, it is most convenient to start with a description of Professor Wickelgren's methodology, and of the main criticisms of it developed by Microsoft's expert, Professor Scott Morton. We will then go on to summarise the parties' main submissions on the topic of blueprint to trial, and then express our conclusions.

(1) The expert evidence

(a) Market definition and dominance

42. Professor Wickelgren proposed defining two markets, one upstream for paid server OS ("paid" excludes free Linux), and a downstream market for cloud computing services in which cloud service providers compete to offer services such as "Infrastructure as a Service" and "Platform as a Service" (but not "Software as a Service") to customers, who are mainly businesses and other organisations. Microsoft is alleged to be abusing its dominance in the paid server OS market to harm competition in the cloud computing services market.

43. Later, in explaining theories of harm, Professor Wickelgren refers to the Windows Server and non-Windows Server "segments" of the cloud computing market. By this is meant those portions of the cloud computing services market in which the customers use Windows Server or other OS, respectively.

(b) Abuse of dominance (theories of harm)

44. Professor Wickelgren advances three elements of conduct that he considers could be anti-competitive. First, higher pricing of Windows Server to Azure's rivals and second, its restriction of the use of existing Windows OS licences only to customers using Azure (the Re-Licensing Abuse) have the effect of imposing higher prices on customers for cloud computing services using Windows Server on Azure's rivals than those customers would pay if they used Azure (AW1 at §274). He provides examples of price differences and differential price increases, and also notes that AHB is only available to Azure

customers (AW1 at §275). Third, he further raises four examples of methods by which Microsoft degrades Windows Server quality to customers of cloud services not using Azure (AW1 at §276). In AW2, he makes clear that he considers these three mechanisms should be assessed together, as a multifaceted strategy to make Microsoft's rivals less effective competitors in the cloud computing market, for customers requiring Windows Server.

45. Professor Wickelgren then considers whether this differential treatment amounts to applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" per s. 2(2)(d) of the 1998 Act. At this stage, the operative part of this sentence is the latter part, as differential treatment (at least as regards pricing) was undisputed. The question is therefore whether the conduct creates a competitive disadvantage for the rivals that harms consumers through weaker competition.

46. Professor Wickelgren identifies three distinct mechanisms through which the pricing and quality conduct above (including the Re-Licensing Abuse by way of the AHB) could harm competition. This is most clearly set out in AW2 at §28 and subsequent paragraphs:

(1) Increase in Microsoft's share of the cloud computing market, through exclusion of rivals, including Google and AWS, from the Windows Server segment of the market.

(2) Exclusion or denial of economies of scale to smaller (existing or potential entrant) cloud computing rivals from the cloud computing services market. This would reduce competition across the market.

(3) Segmentation of the cloud computing services market between Microsoft and its larger rivals, resulting in the larger "designated" cloud computing rivals being less effective competitors for customers requiring Windows Server, allowing Microsoft to increase cloud computing prices to such customers above what it would otherwise have been able to charge. This affects only the Windows Server "segment" of the cloud computing market. It could also result in less incentive for

Microsoft to compete for non-Windows customers in the cloud computing market.

47. These mechanisms differ in the degree to which they involve exclusion. In the first, it is not clear to us whether Professor Wickelgren suggests that large rivals are *unable* to compete in the Windows Server segment of the cloud computing services market but they are in any event not excluded from the market as a whole, as defined. The second mechanism does involve "traditional", direct exclusionary effects (sometimes termed foreclosure), as smaller rivals are denied scale either forcing their exit or making them less efficient and thus less effective competitors. Professor Wickelgren does not develop either of these at length, but in a few places discusses the exclusion of smaller cloud computing competitors, for example as a way in which the non-Windows segment of the cloud computing market may be harmed (AW1 at §§300, 313 and 316).

48. Professor Wickelgren describes the third mechanism as the most significant of his three (AW2 at §38). As a result of the differential treatment, rival cloud service providers either have to offer higher prices for cloud services (by passing on some or all of the OS licence fee) to customers wanting to use Windows Server, or accept lower margins for selling cloud services to such customers (or some combination of the two).

49. To the extent rival cloud service providers offer more expensive or lower quality cloud services to customers using Windows Server, they will be less effective competitors to Azure for such customers. Microsoft could then either gain customers from those rivals, or raise its own cloud services prices to such customers to benefit from this reduced competitive constraint.

50. To the extent they accept lower margins for selling cloud services to customers using Windows Server, Google and AWS will find such customers less attractive than customers using other OS (forms of Linux) and will redirect their efforts to winning and retaining these more profitable non-Windows Server customers.

51. Professor Wickelgren anticipates an objection that these rivals are mostly very large companies which could afford to "cross-subsidise" to remove their pricing

disadvantage for cloud services customers using Windows, suggesting that they do not do so because they would expect Microsoft to further increase Windows licence fees in response, possibly without limit (AW1 at §299 and elsewhere). He also suggests that such price reductions would not be in rivals' interests since they would also have to reduce cloud services prices to non-Windows Server customers (AW1 at §309).

52. Somewhat more tentatively, Professor Wickelgren suggests that, because Microsoft will not wish to make Windows Server unattractive by pricing its cloud services for that OS higher than its prices for Linux-based cloud services, it will have an incentive to keep cloud service prices for Linux users high too, to some extent conceding that segment of the market to its rivals (AW1 at §315). Again, this implies non-Windows users might be harmed.

53. We note that the three mechanisms by which competition may be harmed do not map onto the three forms of conduct Professor Wickelgren identifies: price discrimination, quality discrimination and the AHB conduct. Instead, the three types of conduct constitute "a multi-faceted conduct in which the SPLA Pricing Abuse, the [Re-licensing] Abuse and quality discrimination are all elements that work together to cause an anticompetitive effect" (AW2 at §116).

54. The end result is therefore a form of market segmentation in the cloud services market, in which Microsoft gains an increased share of Windows OS users, while its rivals gain an increased share of Linux users. Microsoft and its rivals therefore compete less closely than before: competition between them is weakened.

55. We note that Professor Wickelgren does not suggest that AWS and Google are excluded from any market (recalling that he considers Windows Server and paid Linux users to be in a single market for cloud computing services) (AW1 at §316). These large rivals are not excluded from the Linux segment of the market at all – indeed, they gain share there, in Professor Wickelgren's theory, and they need not be fully excluded from the Microsoft segment for the logic of his third mechanism to hold. In that element of the theory of harm, Microsoft does not face a reduced competitive threat in the cloud computing services market because it has excluded rivals or rendered them unable to compete in that

market; instead, the harm to competition arises because Microsoft faces "softer" competition from its rivals which are less attractive to some customers and therefore have less incentive to compete for some customers.

(c) Professor Scott Morton's criticisms

56. Microsoft's expert, Professor Scott Morton, critically assesses this framework, as it was set out in AW1. Her main criticism is that Professor Wickelgren provides no "limiting principle" to distinguish pro-competitive from anti-competitive behaviour (see, for example, FSM1 at §101), nor (relatedly) any balancing of pro-competitive effects against anti-competitive effects. She cites economic literature on the economics of vertical integration, in which a firm supplying an upstream input to its own downstream production (as Microsoft does providing Windows Server to Azure) creates efficiencies, which may benefit consumers. She further notes that as a practical matter, the price such a firm charges "to itself" for its own product is meaningless, so simply comparing that to the price at which the input is supplied to an external rival cannot establish an abuse. On the basis of the economic literature and competition authority guidelines, she suggests that a price-cost test is a necessary limiting principle when considering the effect of conduct raising the external price of an input (which she characterises as a "margin squeeze") (FSM1 at §14(b)). This would serve as a limiting principle, by establishing whether an as-efficient competitor cannot earn positive margins as a result of the conduct. She further suggests other limiting principles, such as assessing the scale of the conduct and its effects (FSM1 at §14(c)).

(d) Quantification

57. Finally in this section, we note that both Professor Wickelgren and Professor Scott Morton provide their views on how to estimate counterfactual prices for Windows Server, both to establish liability and to assess the quantum of damages, if required. The nub of their disagreement here is that Professor Wickelgren in AW1 assumed that, absent abuse, the 'external' price to rival cloud computing providers would be lowered to the price charged to Azure and thus the overcharge is the full extent of this difference. Professor Scott Morton, in contrast, argued that Professor Wickelgren should consider that the price to

Azure might also be higher, reducing any overcharge. Professor Wickelgren accepted in AW2 that he should consider both prices, although he advanced reasons to believe that the change in the external price would be larger.

(e) Approach of the experts

58. Before leaving this section, we feel we should make some more general points about the approach of the experts in this case.

59. We found the reports by both economist experts to be clear and very helpful. However, we note that we found them to be highly partisan in their support for each expert's client's case, particularly the two reply reports (FSM1 and AW2), each of which was devoted to rebuttal of the other expert's analysis. Each expert appeared to consider the other completely wrong about almost everything of relevance to the case. This is not a helpful approach and although it did not cause us problems at this stage, we expect to see a more constructive spirit and process from the experts in future. They should be mindful (guided by their instructing solicitors) of their overriding duty to the Tribunal, as set out in CPR PD 35 and elaborated in the Tribunal's Practice Direction 3/2025 Expert Evidence (we recognise of course that the expert reports in this case were produced without the benefit of this recently-published practice direction).

60. In particular, we found it troubling that Professor Wickelgren seemed to believe that he was required to consider some analytical questions that might not favour his client only after the point had been raised by 'the other side'. Obviously, not every point can or should be anticipated (and nor can an expert assess evidence before obtaining access to it), but he should have considered basic or obvious economic principles such as the possible benefits of vertical integration, or the possibility that Microsoft's external licence fees might not come down all the way to its internal charge in the counterfactual, without having been prompted to do so. For both of these topics, Professor Wickelgren's initial report took a position to the maximum benefit of his client, only conceding the need to examine them when challenged by Professor Scott Morton. It is the duty of the expert to come to a considered view rather than to advocate for their own side. We hope these well-known principles will be observed in the future stages of this case, and in other cases.

(2) The parties' submissions

(a) Microsoft

61. Microsoft's submissions reflected closely the logic of Professor Scott Morton's evidence, and in particular the point that Professor Wickelgren's methodology suggests no limiting principle enabling a proper assessment to be made of the difference between behaviour which is abusive and therefore unlawful on the one hand, versus competition on the merits on the other which would be lawful. In developing this main theme, Microsoft made a number of points, among which were the following.

62. To begin with, while it may be true that Microsoft treats customers who licence Windows Server via Listed Providers differently to the way it treats its own Azure customers, mere difference in treatment is not an abuse. There are pro-competitive reasons why Microsoft might impose such different treatment. Thus, a first problem is that Professor Wickelgren makes no effort to account for the possible pro-competitive effects of Microsoft's behaviour, and to distinguish such effects from that part of the pricing structure which is abusive. If Professor Wickelgren's complaint is that the pricing is too high, he fails to specify a proper benchmark against which the pricing should be compared. He relies only on the inferred price charged to customers using Azure, but that is not a reliable reference point from which to determine whether there is an abuse. However, Professor Wickelgren's methodology treats the entire price differential between the two as the product of an abuse. That is altogether too crude. It is not enough for Professor Wickelgren to say (as he does in AW2) that he will wait for Microsoft to identify any pro-competitive effects before allowing for them: it is the PCR's case, and she has to show a sound methodology.

63. A second (related) problem is that Professor Wickelgren seems to assume that Listed Providers make no effort to compete at all in the affected market – he says they are incentivised not to do so, by thinking there is no practical point: they could try and subsidise pricing to the end-users to make it more competitive, but Microsoft is big and powerful enough to respond by raising its prices even higher. The theory is that the Listed Providers are instead

incentivised to focus on customers who use Linux. However, Microsoft submits it is quite unrealistic to think that AWS and Google cannot effectively compete in the relevant market, by subsidising the licence fee and reducing the prices to their end-users if they wanted to. If they can compete but simply choose not to, that is not really abuse. It would only be an abuse if they could not in fact compete – that is why Professor Scott Morton is correct to say that you need the price-cost test from which the PCR shies away, because she knows it would result in showing no abuse.

64. A third problem is that Professor Wickelgren assumes that, in a counterfactual world in which there was no abuse, Microsoft would reduce its licence fees to customers who licence via the Listed Providers; but it cannot be assumed that that *would* be the approach (or the only approach), because another rational response would be to raise prices to Azure customers – that would be another way of equalising the (abusive) difference in treatment. Microsoft says that one gets no real assurance from the settlement reached with the Cloud Infrastructure Service Providers in Europe (**CISPE**), which Professor Wickelgren says he will treat as a natural experiment, because the terms reached there with a number of small cloud providers are not indicative of how Microsoft would respond in a counterfactual world involving treatment of AWS and Google customers.

(b) The PCR

65. The PCR argued that it is too simplistic to criticise Professor Wickelgren for failing to adopt the price-cost test as a limiting principle.

66. For one thing, she argued that such criticism ignores the nature of the abuse alleged. This is not in the nature of complete foreclosure arising from a margin squeeze. It is a more subtle form of abuse. It arises from Microsoft deliberately setting up the market in a way which incentivises the Listed Providers not to compete (or not to compete as aggressively), even if they still can. Such conduct on the part of Microsoft is capable of amounting to an abuse in law provided it arises from a dominant position and leads to consumer detriment. On this theory, proving the abuse does not depend on showing whether the Listed Providers can actually compete, which would be the point of a price-cost test, an as-efficient competitor test (**AEC test**), or some similar test.

67. In developing this line of argument, the PCR argued that the alleged abuse relied on a "multi-factorial analysis" of the kind set out in the European Commission's draft Guidelines on the application of Article 102, as well as used by the CMA in the context of the Final Report, and which will consider a number of factors including (the PCR's skeleton argument at §§53–54):

> "(i) the extent of Microsoft's dominance in the market for server operating systems, (ii) the conditions in the relevant markets, such as economies of scale, network effects, and switching costs, (iii) how much of the market for cloud computing services is affected by the conduct, (iv) whether the practices influence user behaviour, irrespective of the intrinsic qualities of the underlying product, and (v) whether the discriminatory treatment raises rivals' costs or limits access to consumers."

68. The PCR argued that the courts have expressly recognised that the price-cost test, although certainly relevant in some contexts, is not essential to demonstrating abuse of dominant position. In *Royal Mail v Ofcom* [2021] EWCA Civ 669, [2021] Bus LR 1045, the Court of Appeal stated (at §38):

> "the case law does not establish that an AEC test which is relied upon by the undertaking under investigation must be treated as highly relevant to, let alone determinative of, the question of whether a pricing practice is anti-competitive. On the contrary … the AEC test is one tool among others for the purposes of assessing whether there is an abuse of a dominant position … there may be circumstances in which carrying out an AEC test is either impracticable or inappropriate".

69. The PCR emphasised in particular the findings made by the CMA in its Final Report. While accepting that these findings will not be binding at trial, and that the CMA was looking at a different question, they nonetheless indicate that evidence is likely to be available to show that Microsoft's licensing practices have an adverse effect on the cloud services market, in a manner which has potentially detrimental effects on consumers (see the Final Report, for example at §9.74 and §10.94). That should be enough for present purposes to give an assurance that Professor Wickelgren's methodology is sufficiently plausible: it is consistent with findings as to market effects which the CMA has already made.

(3) Discussion

70. We start by acknowledging the nature of the inquiry at this stage. This is not about the merits of the claims as such. Instead, it is about the suitability of the

claims for resolution in collective proceedings. As described by Rothstein J in the *Pro-Sys* case, the inquiry is as to the commonality requirement – i.e., is there a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at trial, there is a means to demonstrate that it is common to the class (see the extract from *Pro-Sys* at §29 above).

71. Although not directly concerned with the merits, this certainly requires engagement with the PCR's proposed theory of harm. That is necessary in order to assess whether the theory of harm reveals a prospective class-wide loss. This is what we understand is meant by the idea of a "*blueprint to trial*".

72. The harm here arises from an alleged abuse of dominant position. This is not a follow-on case, and so no abuse is established. Nonetheless, we take the view that the PCR was correct to emphasise the significance in this context of the conclusions expressed by the CMA in its Final Report.

73. Caution is obviously required. The CMA's findings are not binding (see *Evans* at §§158–159). Nonetheless, they can be relied on for the purpose of identifying evidence which might reasonably be expected to be available at trial (*ibid*.).

74. We of course accept that the CMA in its Final Report was addressing a different question to that which arises in these proceedings. The CMA's function in conducting a market investigation was to assess whether any relevant feature, or combination of features, prevents, restricts or distorts competition, in connection with the supply or acquisition of goods or services in the UK or a part of the UK pursuant to the 2002 Act.

75. Nonetheless, it seems to us that the findings made in a CMA market investigation may in some cases include matters that are highly relevant to the question of abuse of dominance. For example, conduct by a single firm with sufficient market power can qualify as a feature causing or contributing to an adverse effect on competition (**AEC**), which would be relevant to (though not determinative of) an abuse of dominance allegation.

76. We have set out above at §11 the conclusions expressed by the CMA which the PCR emphasised in her skeleton argument. We would also note the following:

(1) Final Report §7.46, where the CMA says expressly that it has investigated "whether Microsoft's licensing practices, as described above, partially foreclose AWS and Google, its two principal downstream competitors, in the supply of cloud services, particularly in competing for customers that purchase cloud services which use certain upstream Microsoft software as an input".

(2) Final Report §7.133, where the CMA concludes that Microsoft has "a significant degree of market power in relation to Windows Server because Microsoft has a high share of the server OS market and many customers we heard from would be unlikely to switch away from Windows Server in response to a small but significant price increase".

(3) Final Report at §7.604, where the CMA concludes: "There is a significant difference between Microsoft's customer facing prices on Azure and the prices it charges AWS and Google on their SPLAs. This, together with the difference in other price and non-price factors is likely to harm competition."

(4) Final Report at §§7.759 and 7.765, where the CMA concludes, "[i]n summary, Microsoft has the ability to partially foreclose AWS and Google through its software licensing practices", and "[i]n summary, Microsoft has the incentive to partially foreclose AWS and Google through its software licensing practices and these licensing practices reflect that incentive."

(5) Final Report at §§9.70 and 9.74, where on the question of detriment to customers, the CMA concluded, "[t]he AECs that we have found may be expected to result in substantial customer detriment in cloud services in the UK", and "[w]e expect that prices are higher than they would be in the absence of the harms to competition that we have identified".

77. Taken together, these conclusions seem to us relevant to the question whether the PCR has advanced a plausible blueprint to trial.

78. Put shortly, the CMA has determined that Microsoft has a significant degree of market power in a server OS market that is wider than that defined by the PCR; that its conduct in licensing Windows Server (and specifically the price and non-price differential faced by Google and Amazon) has harmed competition in the cloud services market; that it has the ability and incentive partially to foreclose Google and Amazon; and that its conduct has had that effect. Moreover, it has found that the AECs it identified, which include one at §36(c) of the Final Report which results from Microsoft's licensing practices, may be expected to result in substantial customer detriment.

79. It is true that these findings do not map directly onto the PCR's case theory that there has been an abuse of dominance. There are important points of difference. For example, the CMA defines the server OS market more broadly than the PCR, and includes unpaid Linux OS (see at §7.120) (the PCR's case is focused only on the "Paid Server OS market"). Likewise, "a significant degree of market power" is not necessarily equivalent to dominance; and on the issue of customer detriment, the CMA's conclusion rests on the combined effects of the AECs it identified, not solely the effects of Microsoft's licensing practices.

80. Nonetheless, even allowing for these limitations, we consider that the CMA's conclusions tell us something about the likelihood of evidence being available at trial to substantiate the claim that there has been an abuse of dominant position by means of exclusionary conduct, resulting in loss on a class-wide basis. The fact is that an expert body has taken the view that Microsoft's power, in markets defined very similarly to those in the present Claim, has enabled it to act in a way that reduces competition in downstream markets; that it has the incentive to do so; and that competition has been reduced in those markets in a manner which may be expected to result in substantial customer detriment.

81. Although certainly the Tribunal will in due course have to take its own view, and although certainly it will be open to Microsoft to contextualise the CMA's findings in whatever way it wishes, neither fact devalues the relevance of those findings for present purposes.

82. That is because the issue for now is a limited and straightforward one. It is whether there is a sufficiently plausible basis for thinking that a case of a class-

wide loss arising from abuse of dominant position will be capable of being advanced at trial. Given the degree of overlap between the CMA's findings and the PCR's case, it seems to us entirely reasonable to infer that we *can* expect evidence to be available at trial which carries with it a realistic prospect of such a case being made out. The evidence available to the CMA persuaded it to make findings which are at least consistent with the idea that there has been an abuse of dominance resulting in a detrimental impact on customers. It is reasonable to expect the same (or substantially the same) evidence to be available at any trial before the Tribunal, and to think that it will support a plausible submission that there has been a pattern of abusive conduct resulting in losses on a class-wide basis.

83. Professor Wickelgren's methodology seeks to address how such loss arises.

84. We acknowledge there are some present shortcomings with that methodology. For example, it seems to us there is a lack of clarity about the precise extent to which Professor Wickelgren relies on the first two of the three mechanisms of harm he identifies at §28 of AW2 (referenced above at §46), both of which appear to include the submission that cloud computing rivals are excluded from the market or denied economies of scale. Likewise, in some parts of his evidence the theory of harm he advances in respect of the AHB conduct (i.e. the Re-Licensing Abuse) is characterised as a "multi-product rebate". All these forms of alleged abuse of dominance might well be most appropriately assessed by means of a price-cost test.

85. All the same, such shortcomings are not sufficient to dissuade us from the conclusion that there is at least a realistic prospect of Professor Wickelgren's approach establishing loss on a class-wide basis, without application of any price-cost test.

86. That is because it is clear that the "most significant" mechanism of harm relied on by Professor Wickelgren is the third of those identified at §28 of AW2, namely his theory of market segmentation.

87. This relies on the proposition that Microsoft's conduct segments the market, thus softening competition between Microsoft and the larger cloud computing

service rivals. By reducing their ability and incentive to compete for Windows Server customers, Microsoft, it is alleged, induces those rivals to focus on the Linux segment of the cloud computing market. This segmentation may also weaken Microsoft's own incentive to offer lower prices in the Linux segment of the market.

88. As we see it, this is a rather different theory of harm from a "traditional" concern about exclusion, such as predatory pricing, in which a dominant firm provides impossibly tough competition, to drive rivals out of the market or at least to reduce their scale so as to make them uncompetitive; most likely sacrificing profit in the short term, to reap the benefits later in a market with fewer effective competitors. It is more akin to the "raising rivals' costs" theories advanced by the economists Salop and Scheffman, as Professor Wickelgren notes (AW2 at §121).

89. In AW2, Professor Wickelgren further explains that his case in respect of the AHB conduct/Re-Licensing Abuse is also put on the same basis – i.e., it forms part of an overall pattern of "multi-faceted conduct" by which Microsoft raises rivals' costs, which does not depend on showing exclusion from the relevant market, any more than does the SPLA Pricing Abuse.

90. Professor Wickelgren concedes that his theory of harm is "novel" (AW2 at §45). We agree; but we do not see why it is not at least arguable as a matter of law. It proceeds by the following steps:

(1) The alleged conduct is only feasible (and only harms competition) because Microsoft is dominant in the paid server OS market.

(2) The conduct harms competition in the cloud computing services market, albeit mainly not by complete foreclosure (i.e., not by excluding rivals from the market as a whole).

(3) End users are harmed as a result of this weakened competition, mainly through higher prices in some or all of the cloud services market.

91. In principle, it seems to us that those three steps are at least capable of constituting an abuse of dominance, and the findings made by the CMA (see above) suggest that evidence is likely to be available at trial supporting the argument that the steps can be made out.

92. We accept that, in order to determine the extent of the alleged abuse, some kind of assessment will be needed of the anti-competitive effects of the conduct complained of. But given the theory of harm in play, we cannot accept Microsoft's basic submission that the dividing line between what is unlawful and what is not can only be drawn by means of a price-cost test. That is because of the nature of the harm alleged, which does not depend on Microsoft's conduct making it unprofitable for an as-efficient competitor to compete. Under the theory the PCR advances, there can still be harm even if there is a degree of competition.

93. We therefore think the PCR has a credible case for saying that a price-cost test is the wrong tool of measurement: it is too inflexible a measure with which to test a theory of harm which is necessarily somewhat more nuanced.

94. Professor Wickelgren's position is that something different is required. He engages more directly with this question in AW2, particularly in section 5. The analysis is likely to be more complex than would be an application of a price-cost test, but that is inevitable since what is being alleged is not simple "exclusion". What will be needed is a more nuanced balancing of all the pro- and anti-competitive effects of the conduct complained of.

95. We do not consider it unrealistic to think that such an exercise can be carried out. Courts and tribunals are well used to conducting evaluations which are incapable of being carried out with hard-edged precision. In such cases, an exercise of judgment is called for. As we understand it, Professor Wickelgren's position is that an exercise of that kind is likely to be required here. Expressed in broad terms, it will involve nothing more complicated than seeking to assess the impact on customers of an environment in the market for cloud computing services which is said to be materially less competitive than it should be, and would be if the licensing practices the PCR complains of did not exist.

96. We accept that the evaluation may in practice be a difficult and perhaps demanding one. Microsoft may be able to argue successfully at trial that the margins of error in it are so broad that it cannot be carried out safely, and therefore the claim should fail. That point will remain open for argument. But Microsoft's position is not so obviously correct that it can lead to the conclusion at this stage that the PCR has no realistic prospect of demonstrating harm on a class-wide basis without resort to a price-cost test as the relevant yardstick.

97. Indeed, however novel the PCR's theory of harm may be, there is no doubt at all that it posits losses on a class-wide basis, which arise straightforwardly from the members of the Proposed Class having faced an overcharge as a result of Microsoft's licensing practices. As we see it, that is the real nub of the inquiry at this stage of our assessment, since we are concerned with the suitability of the claims for resolution in collective proceedings. That is the true nature of the *Pro-Sys* test. To go further would be to trespass into an inquiry as to the merits, which is not directly a matter of concern at this stage (see *Merricks* at §§59–60), although it will be at the later stage of considering whether certification (if otherwise justified) should be on an opt-in or opt-out basis.

G. OPT-IN/OPT-OUT

(1) The PCR's submissions

98. The PCR's position is that these proceedings should be certified on an opt-out basis. Drawing upon r. 79(3), the PCR argues that the constituent claims she seeks to combine are sufficiently strong, and opt-in proceedings sufficiently impracticable, to justify certification on an opt-out basis.

99. As to the strength of the constituent claims, the PCR points to the various regulatory investigations across the globe in respect of conduct from Microsoft relevant to these proceedings, in particular the Final Report (see above at section B(4)). It suggests that, whilst the Proposed Claim is not strictly follow-on such that it may benefit from the presumption of strength articulated in paragraph 6.39 of the Tribunal's Guide to Proceedings 2015, these regulatory investigations demonstrate that the Proposed Claim is strong enough to justify certification on an opt-out basis. The PCR also draws support for her position

from Microsoft's own admission that certain of its licensing practices have been abusive.

100. As to practicability, the PCR submits that the anticipated: (i) class size of approximately 59,000 members; (ii) diversity amongst PCMs, who are spread across a large number of industries and sectors without any common representative industry organisation or trade association; and (iii) average claim size of tens of thousands of pounds, all militate in favour of certification on an opt-out basis. The PCR also highlights that the PCMs will be dependent on a continuing business relationship with Microsoft and may risk being exposed to retaliation from Microsoft if required to opt-in to the Proposed Claim.

101. In response to Microsoft's proposal that the Tribunal bifurcates the Proposed Class to create separate opt-in and opt-out classes, the PCR submits that Microsoft has not advanced any firm proposals as to how the Tribunal should approach bifurcation, and argues that there are no positive benefits to be gained from doing so. The PCR draws support for this position from the Tribunal's decision in *McLaren v MOL* [2022] CAT 10, where the Tribunal similarly rejected the Defendants' proposals for a bifurcated class (at §161 onwards).

(2) Microsoft's submissions

102. Microsoft's original position, as expressed in the Response, was that if certified, the Proposed Claim should continue on an opt-in basis. In the alternative, should the Tribunal consider that opt-in proceedings are not practicable for the Proposed Class in its entirety, separate opt-in and opt-out classes should be designated. At the Hearing, Microsoft advanced only its alternative position, proposing that the Tribunal designates two separate classes:

(1) an opt-in class of larger customers who have an annual spend on cloud services with Listed Providers of between $100,000 and $5,000,000 (which Microsoft expects to comprise the vast majority of the Proposed Claim value); and

(2) a narrower opt-out class of smaller customers who have an annual spend on cloud services with Listed Providers of less than $100,000 (which

Microsoft expects to account for a smaller proportion of the Proposed Claim value).

103. It is proposed that a third portion of the Proposed Class, comprising very large commercial entities with an annual spend on cloud services with the Listed Providers in excess of $5,000,000, should not be afforded the benefits of the collective regime at all.

104. Microsoft's position is underpinned by its assessment of the Proposed Claim against the matters set out in r. 79(3). Firstly, Microsoft suggests that the PCR's allegations of abuse are on their face "diffuse and nebulous, and supported by a range of unorthodox and imprecise methodologies" (Microsoft's skeleton argument at §51), and therefore the Proposed Claim should not be considered a strong one. Microsoft also highlights that despite the existence of various regulatory investigations against it for conduct with potential relevance to the Proposed Claim, it is brought on a standalone basis and therefore should not benefit from the general presumption of strength which may be afforded to follow-on claims.

105. Secondly, Microsoft's position is that it is entirely practicable for the Proposed Claim brought by large customers to proceed on an opt-in basis, given that these customers will be sophisticated undertakings for whom it is commercially viable to bring proceedings without the benefit of the opt-out mechanism. Microsoft assumes that these large customers will account for the vast majority of the Proposed Claim value. Witness evidence from Ms Kristin Boyd Chester, a corporate vice president and chief financial officer of cloud and artificial intelligence at Microsoft, is provided in support of this assumption, which shows that the vast majority of Microsoft's revenue from Azure is attributable to its largest customers; it is submitted that the distribution of AWS's and Google's revenue by customer spend (as two of the Listed Providers) is likely to be broadly similar to that of Azure.

106. Additionally, Microsoft suggests that proceeding on an opt-in basis is likely to yield case management benefits by ensuring that relevant evidence is disclosed in the proceedings. Finally, the PCR's assertion that some PCMs may fear

retaliation is rejected by Microsoft as "wholly speculative and unevidenced" (Microsoft's skeleton argument at §53).

(3) The parties' further submissions

107. Both parties contend that *Evans* offers support for their own position.

108. The PCR submits that the clarifications provided in *Evans* support the case for certification on an "opt-out" basis. When discussing the strength of the constituent claims, the PCR distinguishes the circumstances of the Proposed Claim from those in *Evans*: the existence of multiple regulatory proceedings around the globe investigating Microsoft's conduct in respect of cloud computing, and the absence of difficulties in causation arguments, mean that the Tribunal's doubts as to the strength of the claims in *Evans* (which the Supreme Court found the Tribunal to be "well within its discretion" to consider as a factor weighing against certification on an opt-out basis; see *Evans* at §110) do not arise in these proceedings.

109. As to practicability, the PCR again distinguishes the Proposed Claim from *Evans* by arguing that the Tribunal does not have sufficient evidence before it to reach any factual findings on whether PCMs would be in a position to bring claims on an opt-in basis. This is distinct from *Evans,* where the Tribunal had sufficient information to conclude that proceedings could practicably be brought on an opt-in basis, but that the class had no appetite to do so. Comparing the Proposed Class to the class in *Evans*, the PCR highlights the anticipated greater class diversity and smaller average Proposed Claim value as factors pointing in favour of certification on an opt-out basis. The perceived risk of retaliation by Microsoft is again emphasised by the PCR as an important additional factor pointing in favour of opt-out proceedings, although her submissions on this point do not appear to hinge on *Evans*. The PCR notes that the possibility of bifurcating the Proposed Class, as Microsoft proposes, is not something with which the Supreme Court engaged in *Evans.*

110. In contrast, Microsoft argues that *Evans* supports bifurcation of the class, on the basis that certifying the Proposed Claim on an entirely opt-out basis cannot be justified. As to the strength of the constituent claims, Microsoft emphasises that

(unlike in *Evans*), these are standalone rather than follow-on claims. Microsoft points to the Supreme Court's reminder in *Evans* of the inadmissibility of findings by another decision-maker as evidence of facts, to cast doubt over whether the mere existence of related regulatory investigations against Microsoft can fairly be given weight by the Tribunal.

111. As to practicability, in support of its bifurcated approach to certification, Microsoft draws support from the Supreme Court's view that "where the Tribunal identifies groups of claimants with distinct profiles relevant to the assessment to be made, it should consider the practicability of bringing an opt-in claim for each group separately" (*Evans* at §120). Microsoft argues that the PCMs, who are all businesses and organisations and include some of the largest companies in the world, fall squarely within the description of the Supreme Court in *Evans* for whom "it may not be appropriate for collective proceedings to be brought at all; and if collective proceedings are considered appropriate, it is likely to be only on an opt-in basis" (*Evans* at §117). *Evans* is therefore understood by Microsoft to support its position that any opt-out class should be limited to customers with an annual spend with Listed Providers of less than $100,000. Microsoft also reiterates its view that having an opt-in class would yield real practical advantages for the disclosure of evidence, and rejects as purely speculative the PCR's suggestion that some class members may fear retaliation; neither of these submissions appear to hinge upon particular developments in *Evans.*

112. Together with its submissions, Microsoft provided a further (Second) Witness Statement of Kristin Chester, a Corporate Vice-President and Chief Financial Officer of Cloud and AI at Microsoft (**Chester 2**). Ms Chester attached as an Annex to her Statement a Table showing customer spend on Microsoft's Azure product. Microsoft had attempted to hand in a Table containing the same information at the Hearing, but the PCR objected. Nonetheless, in light of the further submissions filed by the parties, we have had regard to Chester 2 in preparing this Judgment (see further below).

(4) Discussion

113. We have referenced Rule 79(3) of the Rules above at §33. This empowers us, in determining whether proceedings should be certified on an opt-in our opt-out basis, to take account of all such matters we think fit. This includes the matters identified in Rule 79(2), such as whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues, and the size and nature of the class. It also includes two additional factors, namely (a) the strength of the claims and (b) whether it is practicable for the proceedings to be brought as opt-in proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

114. The Supreme Court has made it clear in the *Evans* decision that the question of opt-in versus opt-out is an exercise of evaluation. The Tribunal must strive to achieve an outcome which is fair and proportionate between the parties, consistent with the overall obligation in Rule 4(1) to deal with cases justly and at proportionate cost.

115. There is a balance to be struck between competing objectives. On the one hand, the collective actions regime, and the opt-out structure in particular, are designed to provide access to justice in a new way for certain types of claim and certain types of litigant: "What the regime seeks to provide is a reasonable opportunity, not available previously, for a group of claimants to club together (or, in the case of opt-out proceedings, to be grouped together by a claims entrepreneur) to vindicate their rights in a way which would not be practicable or cost-effective if they had to proceed individually" (*Evans* at §115). On the other side of the equation, however, is the potential for unfairness to Defendants, created by what the Supreme Court in *Evans* referred to as the "significant leveraging advantage associated with opt-out proceedings" (see at §91). By this is meant principally the incentive to settle even weak claims for more than merely nuisance value, if they are consolidated together in a single proceeding with all the practical effects that gives rise to, including the fact that, if the claims proceed to judgment, damages will be awarded in respect of the whole class even though not all class members are likely to come forward to claim their entitlement (*Evans* at §90).

116. The Tribunal must hold these competing factors in balance, as best it can, in order to produce a result which is a just one.

117. As the Supreme Court indicated in *Evans*, some cases will be straightforward. For example, if the claim is obviously a strong one on the merits and is brought on behalf of a large class of consumers who would otherwise have no practical means of achieving redress, that combination of factors will usually – all other things being equal – result in an opt-out structure being approved. On the other hand, if the claim is a weak one and if a large part of its aggregate value is made up of claims by significant commercial entities who are well able to make their own assessment as to whether to sue or not, then the Tribunal is likely to refuse certification on an opt-out basis. That was the result in *Evans* itself, where the claim was a weak one because it suffered from fundamental causation problems (see at §84), and where although the overall class included many individuals and small investors, the vast majority of the aggregate claim value was in the hands of large entities who were well able to look after their own interests. The presence of the individuals and small investors did not make a difference to the opt-in/opt-out question looked at in the round, because their claims represented only a "tiny fraction of the aggregate claim" by value, and to allow their interests to prevail would be to allow "the tail to wag the dog" (see at §123).

118. The question is how to conduct this form of evaluation in the present case.

119. To begin with, we do not at this stage feel able to agree with the PCR's submission that the present case is a strong one.

120. We certainly conclude that the case has a reasonable prospect of success. In fact, we would say that the claim comfortably passes that hurdle. We say that for the reasons already developed above (see at §90-91). The findings made by the CMA give reassurance that evidence is likely to be available at the trial to make good the proposition that Microsoft has been able to take advantage of its dominant position in the paid OS server market in a manner which has distorted competition in the related market for cloud computing services, with the effect that end-users have suffered losses. There is a legal question whether the softening of competition (as opposed to complete exclusion) relied on by

Professor Wickelgren can amount to an unlawful abuse in law, but we see no reason in principle why not.

121. All the same, there are some uncertainties to take account of. We will mention three by way of example.

122. For one thing, the theory of harm relied on is a novel one, and that in itself brings with it an element of risk.

123. For another, there will be difficulties of definition given the nature of the theory of harm, which does not lend itself to the sort of hard-edged assessment which would be available from application of a price-cost test. A boundary will somehow need to be drawn between conduct which is abusive and conduct which is pro-competitive, because at trial the essential question will be: by how much would licence prices to Listed Providers be lower in a counterfactual world in which Microsoft did not engage in any abusive conduct? We have already said we are confident that evaluation is one which the Tribunal should in principle be capable of conducting. However, we also consider that Professor Wickelgren's present approach to the question may be rather too simplistic. His position is that prices in a counterfactual world would be lower by the whole of the present difference between (i) the inferred price charged to Azure customers, and (ii) the prices charged to Listed Providers. That assumes that the whole of the differential will ultimately be proven to be a function of abusive and unlawful conduct. In our view, that approach is likely to overestimate rather than underestimate the recoverable loss, and so that is a further source of weakness in the claim. The points relied on by Professor Wickelgren in response can only be taken so far. For example, the settlement reached with CISPE (mentioned above at §64) will be a relevant reference point, but there is a good case for saying that the terms reached with a group of smaller cloud service providers cannot (without adjustment) provide a reliable yardstick for assessing how Microsoft is likely to have behaved in providing non-discriminatory prices to Azure's two main rivals, namely AWS and Google.

124. The final point to make is that the claim will obviously face evidential challenges, notwithstanding the points we have made already about the evidence the CMA's findings suggest will be available. An obvious issue concerns

Professor Wickelgren's assumption as to why AWS and Google do not use their considerable financial resources to match Azure prices to end-users, even when facing higher licence costs for Windows Server (see above at §63). Professor Wickelgren's argument, as we have explained, is that it would not be rational for them to try and compensate their customers through lower margins, because Microsoft could then simply increase the licence fees further, to restore its competitive advantage, essentially without limit. We find this argument plausible, but it is not on its own so logically compelling that we feel we could accept it at trial without evidence that it is correct.

125. Taken together, these factors make us cautious in our evaluation of the merits of the case at this early stage. As noted, we feel that the claim comfortably crosses the hurdle of having a real prospect of success, and so we would not describe it as weak; but neither do we think we can characterise it as obviously strong. We would describe it as an apparently viable claim with a good prospect of success.

126. Having considered the merits, the next question we address is whether it would be practicable for the claim to be brought on an opt-in basis. That is the question posed by Rule 79(3)(b). In the *Evans* case at §112, the Supreme Court said the implication of Rule 79(3)(b) is that if it is practicable for the proceedings to be brought as opt-in proceedings, then generally speaking they should be.

127. In this case, not even Microsoft argues that it is practicable for the Claim as constituted, comprising all members of the Proposed Class, to proceed on an opt-in basis. Its argument is that the Proposed Class should instead be broken up. The logic is that it should be practicable for claims by a sub-group of the Proposed Class to be brought on an opt-in basis (because the relevant claimants are large entities capable of looking after their own interests), and so they should be hived off. The remaining claims (by smaller entities) can then be certified on an opt-out basis. The implication is that it *would* be impracticable for those claims to be brought on an opt-in basis.

128. It will not be unusual for a proposed class to comprise a range of claimant types. The Supreme Court in *Evans* gave some guidance as to how to approach such

cases. That guidance did not involve fragmenting the intended class. Instead the Supreme Court said as follows at §120:

> "In our view, where the Tribunal identifies groups of claimants with different profiles relevant to the assessment to be made, it should consider the practicability of bringing an opt-in claim for each group separately; and if this yields a different conclusion for each group, it should then stand back and make an overall assessment of the balance of justice having regard to the underlying assessments."

129. Applying that guidance here, we would start by agreeing with the PCR's submission that the limited data available in this case makes it difficult to have confidence that a reliable distinction can be drawn between claimant sub-groups having different profiles.

130. The limitations in the available data are accepted on both sides. Members of the Proposed Class are customers of the Listed Providers who are users of Microsoft's product Windows Server. Microsoft's position at the Hearing before us, however, was that it does not have data from the Listed Providers showing the profile or expenditures of their customers.

131. Although there was some debate about what information Microsoft should or should not have been able to produce, we are content for present purposes to accept Microsoft's stated position. The upshot even so is that the only data we have available is not data concerning customers of the Listed Providers (i.e., the members of the Proposed Class), but instead data from Microsoft about the profile of customers for its own Azure product. That in and of itself makes us very cautious about our ability to draw reliable conclusions as to the constitution of the Proposed Class.

132. There are other problems as well, even if we engage with the data Microsoft has made available. As noted, this is broken down by reference to customer spend. In the Annex to Chester 2, customers are grouped into "spend buckets" as follows:

Spend bucket ($)
>0-1K
1K-10K

10K-50K
50K-100K
100K-250K
250K-500K
500K-1M
1M-5M
5M-10M
10M-20M
20M+

133. Microsoft's argument, in summary, proceeded by the following steps: (i) the breakdown of customer spend across Azure customers shows that a material proportion of the expenditure is concentrated in the hands of customers who spend over US$100k per annum, and we can assume the same will be true of the Proposed Class; (ii) since they spend more, members of the Proposed Class spending over US$100k per annum will also necessarily have the larger claims and will therefore make up a high percentage of the overall aggregate value of the Proposed Claim; (iii) entities spending more than US$100k per annum can be expected to be of a such a size that they can take their own legal advice and form their own judgment as to whether to opt-in or not, and they should be left to make that choice for themselves and so should be excluded from any opt-out class; and (iv) very large spenders incurring more than US$5m per annum should not benefit from being party to any form of collective proceeding, and should be left to bring stand-alone claims if they wish to.

134. We do not accept these submissions. In our view, they proceed on the false premise that the position of claimants spending over US$100k per annum is sufficiently different from those spending less that the resultant sub-groups can safely be separated out for the purpose of determining practicability.

135. We do not agree. If there is any line to be drawn at all, it is not at all clear to us why it should be drawn by reference to a figure for customer spend of only US$100k.

136. The Proposed Class comprises relevant Organisations (see above at §2 and §21), i.e. businesses. We accept the PCR's submission that overall the Proposed Class

is a diverse one. We think it a fair assumption that it will include small and medium sized enterprises (**SMEs**) involved in many areas of business and having different profiles. Given that, we do not consider that we can safely infer anything on a general basis about the practicability of such entities bringing opt-in proceedings, based only a single data point concerned with their annual spend on incidental IT costs in purchasing cloud computing services. It is difficult to see why businesses spending more than US$100k per annum on such services will obviously be in any better position as regards practicability than those spending below that figure. Practicability would depend on a range of other factors including their stage of development, their overall profitability, their available financial reserves and their individual claim size. The latter point is an important one: the PCR estimates an average claim value of circa. £29,000 per class member (CPCF at §136), which implies relatively low claim values towards the lower end of the expenditure range, likely to make it impractical in cost/benefit terms for many claimants to bring claims of their own. To put it shortly, we think that single metric based on annual spend is rather too crude a measure from which to derive a reliable conclusion about practicability between different groups at this level of expenditure, even allowing for a generous margin of error. Quite apart from other matters, we would say the figure is too low to warrant such a conclusion. We therefore reject Microsoft's basic submission.

137. Even if a cut-off point could be identified at some higher level of expenditure, that would not be the end of the matter. The question then would not be about dividing up the Proposed Class into possible alternative classes, as Microsoft has suggested. Instead it would involve (see *Evans* at §120) standing back and "mak[ing] an overall assessment of the balance of justice having regard to those underlying assessments" (i.e., having regard to the fact that there are distinct groups standing in a different position as regards the practicability of their claiming on an opt-in basis).

138. In *Evans*, the critical point was a clear imbalance between the interests of (i) the first sub-group (financial institutions and large commercial entities), whose claims represented all but a tiny fraction of the overall aggregate claim, and (ii) the second sub-group (a very large number of individuals and smaller entities), whose claims made up that remaining tiny fraction. The result was a risk of

serious unfairness to the Defendant, arising from the involuntary grouping together of claims which were inherently weak on the merits, without requiring the entities holding the vast majority of the overall claim value to make a decision for themselves about whether to bring proceedings or not. That risked exposing the Defendant to undue and unfair pressure to reach a settlement, at a price going beyond any obvious nuisance value, in order to limit its ongoing risk arising from the leveraging effect of an opt-out class.

139. Standing back, we do not see any clear parallel with this case. To begin with, we do not consider the Claim to be a weak one. Although we shy away from characterising it as strong, given the novelty of the PCR's theory of harm and the resultant limitations we have identified above, we do consider that it comfortably passes the hurdle of having a reasonable prospect of success. It thus seems to us to be a claim having tangible value, which is properly brought in the form of a collective proceeding given the common issues and its suitability for an aggregate award of damages. We therefore do not regard the present as a case where the leveraging effect of an opt-out certification would generate an unfair degree of pressure to settle a weak claim. We see this as a more routine situation in which a claim is being advanced which, although promising, is still in its early stages and is not without difficulty. In such circumstances we see no good reason why settlement discussions, if the parties choose to engage in them, should not be grounded in an analysis of the claim and a hard-headed assessment of its merits, free from the distortions the Supreme Court was understandably concerned about in the *Evans* case. In any event, one would expect a company like Microsoft to have a high degree of resilience and to be unlikely to be pressured into agreeing terms which it did not itself regard as fair.

140. On the other side of the equation stand the claimants – the members of the Proposed Class. It seems to us that the leveraging effect of the opt-out mechanism is a two-sided equation. It certainly brings risks on the defendant's side; but on the claimants' side, it brings the benefit of access to funding arrangements which in part at least will depend for their economic viability on the scale afforded by the grouping together of claims in a single collective proceeding.

141. If we were to refuse certification on an opt-out basis in the present case, it seems to us that at the very least the present funding arrangements put forward on behalf of the Proposed Class would need to be revised, and depending on how the Proposed Class was reconstituted, that would carry with it the risk that the funding arrangements would collapse entirely. Certainly, we apprehend the risk of that happening would be high if the Proposed Class were reconstituted along the lines suggested by Microsoft in its submissions. In the circumstances, it seems to us that a refusal to certify would therefore produce its own risk of injustice. That would arise from the likelihood that many thousands of claimants with apparently valid claims would be denied the opportunity of seeking redress afforded to them by being able to aggregate their claims together with other (larger) claims in a manner which makes it viable to obtain finance in the litigation funding market.

142. We think this reasoning is consistent with the comments made by the Supreme Court in *Evans* at §110: the possible collapse of the claim if certified on an opt-in basis is plainly a relevant factor, to be considered in light of the Tribunal's evaluation of the merits of the claim. It is not a trump card, but clearly if the claim has value, the risk of that value being lost is a matter the Tribunal must take into account in assessing the justice of the situation overall.

143. Finally, we should say we attach little weight to the other points made by Microsoft in advancing this part of its case. One was that there would be procedural benefits in a bifurcation of the Proposed Class, principally the relative ease of obtaining disclosure from members of an opt-in (as opposed to opt-out) class. However, whatever the potential benefits of bifurcation in procedural terms, they would need to be weighed against the disadvantages; and if we are correct in our supposition that Microsoft's suggested bifurcation would risk the viability of the claim, those disadvantages would be considerable.

144. A further point made was a criticism that the PCR could have helped herself by conducting a more aggressive "book building" exercise – i.e., she could have sought to engage in direct contact with potential claimants, which would have provided more reliable data about the make-up of the Proposed Class, which in turn would have enabled the Tribunal to make a more informed assessment as to whether an opt-in structure was viable for some discernible sub-group or

groups. Again, we see little in this criticism. The PCR's response was again to point to the diversity of the Proposed Class, which comprises entities across a large number of industries and sectors, linked only by the fact that they have incurred incidental IT costs in purchasing cloud computing services in a particular way. The PCR submitted that in those circumstances, it would have been highly impracticable and disproportionately costly at this stage to identify and approach potential class members in order to "book build". Given the range of entities involved across different areas of business, there is no trade association or other body to act as an obvious point of contact. We agree, and indeed would say that the obvious diversity of the class underscores the point already made above, about the difficulty in this case of seeking to isolate sub-groups having sufficiently different characteristics to allow them to be fairly separated one from the other in terms of the practicability requirement.

145. For all those reasons, our assessment is that the Claim should be certified as a collective proceeding on an opt-out basis.

H. FUNDING AND GOVERNANCE

(1) The PCR's submissions

146. The PCR argues that r. 78(2)(d) of the Rules is clearly satisfied due to the fact that she has signed a Litigation Funding Agreement (**LFA**) with LCM Funding UK Ltd (**LCM**), by which the PCR is indemnified against any adverse costs payable to Microsoft. The PCR further notes that LCM has arranged a "back-to-back" after-the-event (**ATE**) litigation insurance policy which contains an anti-avoidance endorsement.

147. In light of Microsoft's arguments as regards the reliability of LCM as a source of funding (see below), the PCR refers to *Gutmann v Hutchison 3G UK Limited* [2025] CAT 77 (***Gutmann Phones***), in which a claim funded by LCM was certified, and wherein the same complaint made by Microsoft was raised and rejected. The PCR notes that she maintains frequent contact with LCM either directly or through her solicitors. The PCR also points to *Gutmann Phones* to make the point that any complaint relating to LCM not being in the Association of Litigation Funders (**ALF**) should be rejected.

148. In respect of Microsoft's arguments as to the process by which LCM was selected, the PCR argues that this complaint goes nowhere. The PCR instructed Exton Advisors as well as an independent costs barrister to advise her on the LFA's terms, and she notes that a similar complaint was rejected as unparticularised in *Gutmann Phones*.

149. The PCR further argues that any complaint made by Microsoft as to clauses 9.3 to 9.5 of the LFA is unfounded, noting that it is unclear what "mischief" could be caused by those provisions. They deal straightforwardly with the circumstances in which the PCR is to be permitted to withdraw or abandon any claim, and provide that this should not happen against the reasonable written legal advice of the PCR's solicitors.

150. Finally, as to Microsoft's complaint that the PCR has not sufficiently consulted with her **Advisory Committee**, whether in respect of her funding arrangements or otherwise, the PCR states this is because the Claim is not yet certified and because the decisions referred to by Microsoft pre-dated the Claim being funded.

(2) Microsoft's submissions

151. First, Microsoft raised concerns broadly about the suitability of LCM as the PCR's funder, in light of market information suggesting vulnerabilities in its financial position.

152. Microsoft also considers that the PCR's "independent consideration of the funding arrangements was limited" (Response §96), pointing to the fact that, because the PCR was selected following the selection of LCM as the funder, she did not have any influence over its selection. Microsoft also notes that the funding arrangements appear not to have had the benefit of any oversight by the Advisory Committee, and that any independent costs advice that the PCR claims to have received failed to identify the "funding arrangements contravened the law" (Response §96.5) in respect of damages-based agreements, ultimately necessitating amendment to the LFA. The advice also, it is said, overlooked the apparent issues with Clauses 9.3 to 9.5 of the LFA.

153. Microsoft raises an issue as to what the role of the Advisory Committee will be in practice. It complains that it is unclear whether the Advisory Committee will play any substantial role as are the circumstances in which the PCR will consider it appropriate to consult with it. Microsoft points in this regard to the fact that the PCR, as at the end of March 2025, had "not yet felt a need to consult with" her Advisory Committee (Response §97).

154. Finally, Microsoft argues that the PCR's governance arrangements have not provided for the fact that the Proposed Class and the Proposed Sub-Class include large corporate entities likely to have claims for significant sums of money, such that those entities could participate in decisions about the proceedings, referring to §30 of *Bulk Mail v International Distribution Services Plc* [2025] CAT 19.

(3) Issues raised by the Tribunal at the Hearing

155. At the Hearing, the Tribunal raised issues with the PCR in respect of: (i) Clause 17.1 of the LFA (which concerns LCM's ability as funder to terminate the LFA where the merits of the Claim are regarded as no longer satisfactory or where the Claim is no longer "economically viable"); and (ii) the appointment of a costs assessor to maintain oversight over the costs incurred by the PCR in the proceedings. The PCR, by letter from her solicitors to the Tribunal dated 19 December 2025, confirmed that the PCR and LCM were content to: (i) amend Clause 17.1; and (ii) appoint a costs assessor.

(4) Discussion

156. As Mr Marven KC correctly reminded us during his submissions, the lens through which to view this set of issues is that stipulated by Rule 78(2). The question is whether it is just and reasonable for the PCR to act as class representative, and in answering that question, the Tribunal is bound to consider whether the PCR would fairly and adequately act in the interests of the class members (Rule 78(2)(a)) and whether they would be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)).

157. The second of these points is easily addressed. The PCR has in place ATE insurance. The insured is the funder, LCM; but as Mr Marven KC explained, the policy contains an anti-avoidance provision which means that Microsoft can claim on it directly. No complaint has been made about this. Thus, Microsoft's position in relation to its own costs, should it succeed in defending the Claim, is protected.

158. The basic criticism raised by Microsoft was really about the PCR's own funding position – i.e., how she proposed to fund her own costs. The nub of the point was said to be a concern about the solvency position of LCM. LCM is a UK subsidiary of an Australian Public Company called Litigation Capital Management Limited, which is listed on AIM (**LCM Ltd**). In October 2025, LCM Ltd released a statement concerning its performance for the year-ended 30 June 2025. In that statement, LCM Ltd drew attention to the fact that a number of adverse case outcomes had led to concerns about cash inflows and increased indebtedness, and gave rise to a risk, in certain scenarios, of a breach of debt covenants. The directors stated that they had come to the conclusion that there was a material uncertainty whether LCM Ltd might be able to continue as a going concern. Notwithstanding that, the directors confirmed they had a reasonable expectation, based on current discussions, that LCM Ltd would continue to receive necessary support from its lender to allow it to continue in operational existence for the foreseeable future. As explained to us, the lender in question is Northleaf Capital Partners (**Northleaf**), a Canadian investment firm. Northleaf has provided a US$75m facility to LCM Ltd, which was renewed in December 2024 with potential to upsize by a further US$75m.

159. These matters led to an objection being taken to the funding proposals in *Gutmann Phones*, although in that case the Tribunal concluded that the position of LCM Ltd did not prevent it concluding that it was just and reasonable for the PCR to be endorsed as class representative.

160. We come to the same conclusion here, for the following reasons.

161. As explained to us by Mr Marven KC, on the basis of the evidence of Mr Moloney of the LCM Group, in fact no less than 62% of the funding sourced by LCM in relation to the Claim is capital derived from funds under management,

as opposed to funds from LCM itself. That percentage of the funding is thus not exposed to any risk arising from the position of LCM Ltd. The overall costs budget for the Claim put forward by the PCR totals some £14m. Thus, roughly £8.7m is to come from third party funders, outside the LCM structure.

162. We accept there is a risk associated with the remaining 38%, or £5.3m, of the overall budgeted figure. However, we do not consider that the level of risk is such as to persuade us at this stage that the appropriate response is to refuse the PCR's application. LCM's latest accounts state that it has assets totalling some £41m. Granted, there will be other claims on that figure; but the evidence of Mr Moloney was that additionally, LCM Ltd has access to the Northleaf facility, and that Northleaf is positioned to provide support to LCM Ltd's balance sheet and the overall portfolio of claims it is funding, including the present Claim. Mr Marven KC submitted that, although it is LCM Ltd and not LCM which has the benefit of the Northleaf facility, LCM Ltd would be bound to support its subsidiary: it would be inconceivable for a well-known international litigation funder like LCM Ltd not to do so. We accept that submission.

163. Taken together these points persuade us that, although a degree of uncertainty surrounds LCM, the level of concern we have is not such as to persuade us that it would not be just and reasonable to appoint the PCR as class representative. Although appointment to that post no doubt carries with it an expectation that funding will be available to carry the proceedings through to trial, that is not the same as saying there must be absolute certainty. We only have to be satisfied that the appointment is just and reasonable, and so we consider that a reasonable expectation of funding should be sufficient; and a reasonable expectation can exist even where there is some doubt. Weighing the evidence here, we are sufficiently reassured there is a reasonable expectation of funding being available under the PCR's proposed arrangements, even as to the 38% share to be provided by LCM itself. Even were that not to be the case, there is the further point made by the PCR's solicitor in evidence, that alternative funding should in any event be available from the litigation funding market if needed, given the present state of the market and the fact that a claim which is already certified would likely be viewed favourably as a funding proposition.

164. As to other matters, we note Microsoft's concerns around the lack of involvement of the PCR and her Advisory Committee in negotiating the initial funding arrangements. However, we understand that the funding arrangements were put in place prior to the PCR coming onboard with the Claim, and that now both the PCR and her Advisory Committee are in place, it is expected that they will be fully involved with any further funding discussions which arise. We do not consider that the apparent lack of involvement at an early stage, for which there is a clear explanation, should pose a barrier to certification.

165. Other concerns raised during the hearing have been addressed in Scott + Scott UK LLP's letter to the Tribunal dated 19 December 2025. In particular, the amendments made to Clause 17.1 of the LFA remove any ambiguity around the basis on which LCM could terminate the LFA on footing that the merits of the Claim are no longer satisfactory or it is no longer considered economically viable. The amendments confirm that this assessment should be made by reference to independent legal and, if appropriate, expert advice obtained by the funder. We are satisfied that this amendment ensures that the funder's powers under this clause are now sufficiently clearly defined. We see nothing in Microsoft's separate concerns as to clauses 9.3 to 9.5 of the LFA to cause us to doubt the appropriateness of the PCR as class representative.

166. In the circumstances, we are satisfied that the proposed funding and governance arrangements put forward by the PCR support the conclusion that it is just and reasonable to confirm her position as class representative.

I. CONCLUSION

167. Our conclusion is that both the Authorisation Condition and the Eligibility Condition are met, and that the Claim is therefore appropriate for certification on an opt-out basis.

J. DISPOSITION

168. We will make a CPO in the terms of the draft submitted by the PCR, subject to such changes as may be necessary to reflect the detail of this Judgment.

The Honourable Mr Justice Johnson
Chair

John Davies

Lesley Farrell

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 21 April 2026