COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPLICATION TO COMMENCE COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998

CASE NO. 1433/7/7/22

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 14 February 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Dr Liza Lovdahl Gormsen ("the Applicant/Proposed Class Representative") against (1) Meta Platforms, Inc. (2) Meta Platforms Ireland Limited and (3) Facebook UK Limited (together "the Respondents/Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Quinn Emanuel Urquhart & Sullivan, 90 High Holborn, London, WC1V 6LJ (Reference: Kate Vernon).

The Applicant/Proposed Class Representative makes an application for a collective proceedings order permitting her to act as the class representative bringing opt-out collective proceedings on behalf of UK domiciled members of the proposed class ("the Application"). The proposed class is more fully described below. The proposed collective proceedings would combine standalone claims for damages under section 47A of the Act in respect of the Respondents'/Proposed Defendants' alleged breaches of statutory duty by infringing Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and section 18 of the Act (the "Chapter II Prohibition"), which prohibit the abuse of a dominant position in a market, ("the Claims"). The Claims cover the period from 11 February 2016 to 31 December 2019 ("the Claim Period").

The Respondents/Proposed Defendants

The Application states that the Respondents/Proposed Defendants are members of the Meta corporate group and comprise a single undertaking ("Facebook") for the purposes of the Claims. Facebook owns and operates the social network service, Facebook, as well as the photo sharing and messaging services, Instagram and WhatsApp.

According to the Application, the First Proposed Defendant is the headquarters and ultimate parent company of the Facebook corporate group, including the Second and Third Proposed Defendants. The First Proposed Defendant was responsible for developing, overseeing and/or implementing Facebook's terms of business and trading conditions, and its strategy of monetising access to its customers' personal data via advertising. The Second Proposed Defendant is the European headquarters and central administration for Facebook in the EU and UK. The Application alleges that the Second Proposed Defendant was the data controller, with respect to the collection and use of personal data, and the contracting entity for Facebook's terms of service in relation to its social network. The Third Proposed Defendant is Facebook's UK subsidiary. The Third Proposed Defendant obtains access to, and/or otherwise possesses, user data from the Second Proposed Defendant pursuant to a data processing agreement, before selling this user data to UK advertisers for the purposes of targeted advertising. According to the Application, each of the three Respondents/Proposed Defendants is jointly and severally liable for any loss caused as a result of the infringements.

According to the Application, in exchange for 'free' access to Facebook's social networking platform, a user had to agree to Facebook's Terms of Service, or would in any event be deemed to have accepted them. The Terms of Service, which were previously known as the Statement of Rights and Responsibilities, incorporated Facebook's Data Policy and Cookie Policy (collectively, the "T&Cs"). These included giving Facebook permission to collect, share, and otherwise process users' personal data, both on- and off-platform (the "Unfair Data Requirement"), and to view targeted advertising alongside other content on the social network platform. Facebook did not pay its users for access to, or its use of, their valuable personal data. Such personal data included, but was not limited to: (i) personal data provided by users explicitly (such as name and contact details), (ii) personal data provided implicitly (such as contacts, browsing history, private messages, behavioural patterns), (iii) personal data obtained by or via third party websites and application shared with or obtained by Facebook (such as browsing history, internet usage, census data, health data),

and/or (iv) sensitive data (such as individuals' racial or ethnic origin, political opinions, religious beliefs, sex life and health).

Dominant position

The Applicant/Proposed Class Representative alleges that Facebook occupies a dominant position in:

(i) the Personal Social Network Market: comprising Facebook only is defined in the Application as "*the supply of an integrated range of functions that were used by people to maintain personal relationships and share personal experiences in a shared social space with a focus on friends, family and other social connections*"; or

(ii) the Social Media Market: should the market be defined more broadly than the Personal Social Network Market, the Application states that the relevant product market is no wider than the Social Media Market. The Social Media Market is provisionally defined by the Applicant/Proposed Class Representative as the provision of social media services which facilitate "*interaction between their users, allowing them to communicate with each other, and share and discover engaging content*". The Applicant/Proposed Class Representative reserves her position as to the precise formulation of such a market, but notes that the widest formulation of this market would include Facebook, Instagram (part of the Facebook group), WhatsApp (part of the Facebook group), Snapchat, Pinterest, Reddit, Tumblr, Twitter, TikTok, and LinkedIn.

The relevant geographic market is stated in the Application to be as wide as the UK, or alternatively, global.

Abuse of a dominant position

The Applicant/Proposed Class Representative alleges that Facebook abused its dominant position, through the imposition of its T&Cs, by imposing unfair terms, prices and/or other trading conditions on its users. Further or alternatively, it is alleged that Facebook engaged in the following unfair conduct (which individually and/or collectively infringed Article 102 TFEU/the Chapter II Prohibition) amounting to an abuse:

(i) the Unfair Data Requirement: By making users' access to Facebook contingent on the provision of personal data, Facebook abused its dominant position in order to advance its own commercial interests and objectives in the market(s). The nature, extent and/or scope of personal data obtained by Facebook pursuant to its T&Cs was disproportionate and/or not necessary for the attainment of the commercial objective of providing a Personal Social Network and/or Social Media Network. The Unfair Data Requirement harmed users because (a) if they wished to access Facebook, they had no choice but to give Facebook access to their personal data, and (b) users had no available alternatives to Facebook during the Claim Period.

(ii) the Unfair Price: Facebook demanded an unfairly high 'price' or 'payment in kind' for the provision of social networking services. By taking valuable personal data without paying for it (i.e. by offering a zero monetary price) and offering only social networking services in return, Facebook offered an unfairly low purchase price for users' personal data. In particular, the incremental cost to Facebook of offering Personal Social Network and/or Social Media Services to each additional user is very low, the revenues generated by Facebook's advertising activities by virtue of the personal data were very high and Facebook earned substantial excess profits above those expected in a competitive market. Facebook's 'prices' were unfair because they enabled it to reap trading benefits, including supra-competitive profits, which it could not have obtained in conditions of workable competition.

(iii) other unfair trading conditions: The means by which Facebook imposed its T&Cs on users (which gave rise to the Unfair Data Requirement and the Unfair Price) and/or by which Facebook collected, used and/or monetised users' personal data were unfair and anti-competitive. For example, (i) users wishing to use Facebook's platform were unable to avoid signing up to the T&Cs, (ii) the T&Cs were excessively long and/or complex, and (iii) Facebook failed to explain, adequately or at all, the nature, extent and/or scope of the personal data it collected and/or the way it utilised the personal data.

The Applicant/Proposed Class Representative contends that the loss and damage to the proposed class during the Claim Period can be assessed by reference to the commercial value of users' personal data monetised by Facebook, discounting the (minimal) value of access to the social network. The economic loss suffered by

proposed class members can be understood as the difference between the economic value that users would have received (in the counterfactual scenario – where Facebook had not held a dominant position and/or had not abused its dominant position) and the economic value users actually received. The Applicant/Proposed Class Representative reserves the right to introduce other heads of loss following disclosure and evidence, including (without limitation) damages for non-pecuniary harm suffered by virtue of proposed class members loss of control arising out of degraded privacy caused by the alleged infringements.

The Application states that the infringements may appreciably affect trade between Member States of the European Union and/or within the UK or a part of it.

Proposed class members

In the Application, the proposed class is defined as "all Users who had a Facebook account at any time during the Claim Period and accessed their account at least once during the Claim Period while in the UK". For the purposes of the class definition:

- "Claim Period" means the period between 11 February 2016 and 31 December 2019 inclusive.
- "Users" means individual consumers who are natural persons (including children) and excludes businesses and bodies of persons corporate or unincorporate. Where any UK User has died since the beginning of the Claim Period, the personal representative of their estate becomes the class member.
- "Facebook" means the personal social network service Facebook.com, owned/operated by the Respondents/Proposed Defendants.
- "Facebook account" means an individual's personal account on the Facebook personal social network service.

The Application proposes that all persons who fall within the class definition (and are not excluded) and who are domiciled in the UK on the domicile date to be determined by the Tribunal are to be included in the proposed class. The Claim does not provide for persons who fall within the class definition and who are not domiciled in the UK on the domicile date to "opt-in", so as to avoid disproportionate administrative difficulties and costs.

Certification of the proposed collective proceedings

According to the Application, the Claims raise common issues, specifically the same, similar or related issues of fact or law which comprise: (a) the definition of the relevant market; (b) whether Facebook held a dominant position in that market during the Claim Period; (c) the nature and unfairness of Facebook's T&Cs and/or other trading terms and/or other tradition conditions; (d) the unfair way in which those trading terms were presented, changed, and/or imposed; (e) how the Facebook obtained personal data from the proposed class members and the nature of such data; (f) the use made by the Facebook of the personal data of its users; (g) the unfairness of Facebook's prices; (h) whether in all the circumstances, Facebook abused a dominant position; (i) whether any such abuse of a dominant position caused loss and damage to the proposed class members; (j) the nature of such loss and damage; (k) the quantification of any aggregate award of damages; and/or (l) the rate and duration of any interest to be awarded to proposed class members.

The Applicant/Proposed Class Representative submits that it is just and reasonable for her to act as class representative because:

1. The Applicant/Proposed Class Representative would act fairly and adequately in the interests of the class members. The Applicant/Proposed Class Representative has a PhD in competition law and has worked as a lawyer and an academic in that field for over two decades, with a particular focus on issues relating to abuse of a dominant position. She has extensive experience in private practice, representing businesses and consumers at both a national and international level. She has also held a number of senior roles in competition enforcement, including at the Financial Conduct Authority and the Office of Fair Trading. Throughout her career she has advocated for stronger enforcement of competition and consumer protection rules.

2. The Applicant/Proposed Class Representative is specifically excluded from the proposed class. She has no material interest that is in conflict with the interests of the proposed class members.

3. The Applicant/Proposed Class Representative is not aware of any other person seeking approval to act as the class representative in respect of the same claims.

4. The Applicant/Proposed Class Representative has adequate funding for the claim and will be able to pay the Proposed Respondents'/Proposed Defendants' recoverable costs if ordered to do so. The Applicant/Proposed Class Representative has entered into a funding agreement and has obtained adverse costs cover with an adequate and appropriate level of cover.

5. The Applicant/Proposed Class Representative has prepared a litigation plan for the proceedings, which includes:

   (a) A method for bringing the proceedings on behalf of the proposed class members and for notifying proposed class members of the progress of the proceedings;

   (b) A procedure for governance and consultation which takes into account the size and nature of the proposed class;

   (c) Estimates and details of arrangements as to costs, fees or disbursements; and

   (d) The Applicant/Proposed Class Representative has appointed a committee of eminent advisers with expertise and experience in competition law, economics, consumer rights, and data and technology. She also has assistance, along with her experienced legal team, from a claims administration company to assist with administering the proceedings, and notifying and communicating with the proposed class members. To assist with public relations aspect of the proposed collective proceedings, she has instructed a public relations agency and a digital marketing agency.

The Application states that the Claims are suitable to be brought in collective proceedings because:

1. The proposed collective proceedings present an appropriate means for the fair and efficient resolution of the common issues. Collective proceedings in reality represent the only practically and economically viable method for individual members of the proposed class to obtain compensation for losses suffered as a result of the infringements in question. The Claims are likely to be relatively modest in value on an individual basis but very significant in aggregate. Thus, they are a paradigm example of the type of claims for which are suitable for inclusion in collective proceedings.

2. The benefits of the collective proceedings outweigh any costs to the parties. The costs associated with bringing the proceedings and administering the Claims on behalf of a class of a substantial size remain fair and proportionate in view of the aggregate value of the Claims and the benefits to the proposed class members from being able to pursue compensation for losses suffered due to the infringements, which would not otherwise be practicable. To the extent that the Applicant/Proposed Class Representative is not successful, the costs of the litigation will be covered by the funder on the basis of the litigation funding agreement.

3. The Applicant/Proposed Class Representative is not aware of any separate proceedings making claims of the same or a similar nature on behalf of the proposed class members.

4. The proposed class is estimated to comprise approximately 45 million members. A group of individuals of this number could only bring their claims by way of collective proceedings. Any other mechanism for grouping together claims would simply not present a viable method of resolving the claims. Moreover, the nature of the proposed class, which is not limited to any particular demographic, means that the individual claims are suitable to be brought in collective proceedings.

5. It is possible to determine whether any person falls within the proposed class using objective criteria.

6. The Claims are suitable for an aggregate award of damages for the following reasons: (a) there are a large number of individual claims, each of relatively modest value; (b) the losses suffered by the proposed class arise out of the same unfair T&Cs and/or trading conditions, therefore the individual claims are largely identical; (c) while the exact nature of the personal data will differs between individual class members, the number of individuals affected and the amount of personal data extracted means that quantification of loss by any other means is unrealistic and disproportionate; and (d) there is a plausible

and credible method for calculating an aggregate damages.

7. As to alternative methods of dispute resolution, the Application states that voluntary redress does not apply to the Claims. However, the Applicant/Proposed Class Representative is prepared to enter into constructive discussions with the Respondent/Proposed Defendants to explore a timely resolution of the Claims. However, this must be done on an informed and fair basis, likely following, at least, initial disclosure.

According to the Application, the proposed collective proceedings should proceed on an opt-out basis because:

1. The Claims are strong and have a real prospect of success. The underlying facts on which the Claims are based are, to a significant extent, a matter of public record and unlikely to be in dispute. The infringements alleged involve well established categories of abuse of dominance.

2. It is not practicable for the proceedings to be bought on an opt-in basis given (i) the relatively modest amounts that each proposed class member could recover, (ii) the lack of awareness of the relevant issues among the proposed class, (iii) the complexity of the issues involved, and (iv) fact that individual proposed class members are unlikely to take proactive steps to opt-in; and/or may be deterred from participating in an opt-in action due to the personal information that Facebook holds about them and the importance that the Facebook social network plays in their lives.

The relief sought in these proceedings is:

(1) Damages on behalf of the proposed class, to be assessed on an aggregate basis;

(2) Simple interest at the rate of 8% per annum or such other rate as the Tribunal may consider appropriate;

(3) Costs; and

(4) Such further and other relief as the Tribunal may see fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar
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