COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1696/7/7/24

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 3 December 2024 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 (the "Act"), by Dr Maria Luisa Stasi (the "Proposed Class Representative" or "PCR") against: (1) Microsoft Corporation; (2) Microsoft Limited; and (3) Microsoft Ireland Operations Limited (together, "Microsoft"). The PCR is represented by Scott + Scott (UK) LLP, 1 Chancery Lane, London, WC2A 1LF (Reference: James Hain-Cole/Alice Bernstein/Adi Marciano/Darío Martínez Jove/Mitti Varajarvi).

The Collective Proceedings Claim Form ("CPCF") states that the claims it is proposed to combine (the "Claims") in the proposed collective proceedings are for damages resulting from Microsoft's alleged breaches of the Chapter II prohibition under section 18 of the Act and/or Article 102 of the Treaty on the Functioning of the European Union.

According to the CPCF, the PCR's case is that certain of Microsoft's licensing practices relating to the software known as "Windows Server" and cloud computing services are unlawful. The PCR alleges the purpose and effect of the licensing practices ("Licensing Abuses") are: (i) to make it more expensive to operate Windows Server on cloud computing platforms operated by rivals of Microsoft; and thereby (ii) to incentivise users of Microsoft software to use Microsoft's cloud computing platform ("Microsoft Azure") rather than a rival cloud.

The Claims relate to two forms of alleged Licensing Abuse, namely: (i) a practice whereby Microsoft charges wholesale prices for Windows Server under its Service Provider License Agreements ("SPLAs") that are higher than the prices for equivalent licences charged to users of Microsoft Azure (the "SPLA Pricing Abuse"), the effect of which is said to inflate the prices of Windows Server which certain rival clouds (namely Amazon Web Services, Google Cloud Platform and Alibaba Cloud (the "Listed Providers")) charge their customers for using Microsoft software, thereby making it cheaper for users of Microsoft software to operate that software on Microsoft Azure rather than on Listed Providers; and (ii) a practice whereby Microsoft allows the holder of an on-premises licence to use Windows Server to operate that software on Microsoft Azure – but not on a Listed Provider – without the need to pay re-licensing fees (the "Re-Licensing Abuse"), the effect of which is allegedly 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 Microsoft Azure.

The CPCF alleges that the Licensing Abuses are carried out pursuant to a coherent strategy to leverage Microsoft's position in the market for server operating systems (in which Microsoft enjoys dominance, and which comprise part of its established and extensive software "ecosystem") into the market for cloud computing (in which Microsoft faces competition from rival clouds).

The CPCF states that Microsoft's alleged Licensing Abuses have been highly successful in encouraging businesses which are contracting for cloud computing services for the first time to choose Microsoft Azure over rival providers, and that publicly available information from 2022 indicates that Microsoft has won 60-70% of revenues from these new users of cloud computing services. The PCR alleges that,

by contrast, Microsoft has been less successful in encouraging existing users of Rival Clouds to "switch" to Microsoft Azure. It is alleged it is these users – i.e. businesses which have chosen not to switch, but instead continue to operate Windows Server on Listed Providers – which have been harmed by Microsoft's conduct, and which comprise the Proposed Class.

The PCR alleges that the SPLA Pricing Abuse has caused loss to an identifiable group of persons (the "Proposed Class" or "Proposed Class Members"), and that the Re-Licensing Abuse has caused an additional loss to a sub-set of the Proposed Class (the "Proposed Sub-Class"). The PCR seeks to bring these proceedings on an opt-out basis on behalf of all UK domiciled organisations which fall into the Proposed Class.

As such, the PCR's Proposed Class and Proposed Sub-Class definitions are as follows:

1. The Proposed Class as "All Organisations (other than Excluded Organisations) which, during the Claim Period, obtained a licence to use Windows Server from a Listed Provider".

2. The Proposed Sub-Class as "Any Class Member who held an On-Premises Licence with Software Assurance to use Windows Server during the Sub-Class Claim Period."

The "Claim Period" is defined as starting on 3 December 2018 and running until "the date of judgment".

The PCR seeks to recover an aggregate award of damages currently estimated as worth between c. £1.7 billion and £2.1 billion. Based on publicly available information and list prices, the PCR estimates the SPLA Pricing Abuse has caused members of the Proposed Class to suffer a loss of c. £1.7 billion over the past six years, and that the Re-Licensing Abuse has caused members of the Proposed Sub-Class to suffer a loss of up to £2.1 billion.

The CPCF states that it would be just and reasonable for the PCR to act as the class representative in the proposed collective proceedings. In summary:

1. It is said the PCR will act fairly and reasonably in the interests of all Proposed Class Members because:

    a) The PCR is not a member of the Proposed Class and would be able to act impartially in the interests of all its members.

    b) The PCR is an experienced competition lawyer who has worked as a policy researcher, academic, and practitioner at a leading law firm.

    c) The PCR has: significant experience in overseeing and liaising with multidisciplinary teams; in working collectively to achieve complex goals; in managing costs, and in taking decisions in which complex interests must be balanced and fairly determined; as well as legal and economic knowledge required to assess the advice she will receive, and to make decisions that are in the best interests of the Proposed Class.

    d) The PCR is highly motivated by a longstanding interest in matters of competition law and digital regulation and concern that absent a collective action, Microsoft will not be held to account for its conduct.

    e) The PCR has the time and capacity to take on the responsibilities associated with the role.

    f) The PCR has also instructed a team of legal and expert advisers who, between them, have a wealth of experience in these matters.

    g) The PCR has developed a comprehensive litigation plan and has entered into a litigation funding agreement which is backed by an ATE insurance policy.

2. The PCR does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of Proposed Class Members.

3. At the time of filing the CPCF, the PCR is not aware of any other applicant seeking approval to act as class representative in respect of the Claims.

4. The PCR would be able to pay Microsoft's recoverable costs if ordered to do so.

The PCR submits that:

1. The Proposed Class is identifiable because it has been defined in a clear, objective manner such that organisations will be able to identify whether or not they fall within the Proposed Class and Sub-Class, because:

    a. members of the Proposed Class will know whether they obtained a licence to use Windows Server from a Listed Provider during the Claim Period; and

    b. members of the sub-class will know whether they held a licence to use Windows Server on-premises during the Claim Period.

2. The following issues are said to be "common issues" (i.e. issues that are the "same, similar or related" from Claim to Claim): jurisdiction; governing law; market definition; dominance; abuse; causation and loss; quantum; and interest.

The PCR further submits that the proposed collective proceedings are an appropriate means for the fair and efficient resolution of the issues common to the Claims, because they are the most procedurally efficient and viable way for members of the Proposed Class and Sub-Class to obtain compensation for their losses. In summary:

1. The Proposed Class is numerically large and includes approximately 59,000 members, each of which will have a material claim against Microsoft.

2. Whilst Microsoft's licensing practices have been the subject of a market study by OFCOM, and are currently being investigated by the Competition and Markets Authority, neither of these regulators have yet conclusively determined Microsoft's liability, and determining it in relation to each member of the Proposed Class would be commercially unviable.

3. Some members of the Proposed Class may fear retaliation from Microsoft through onerous audits (used to verify compliance), were they to complain about the Licensing Abuses.

The PCR submits that the benefits of the proposed collective proceedings strongly outweigh the costs.

The CPCF states that the Claims are suitable for an aggregate damages because, in summary: there is a credible methodology that offers a realistic prospect of establishing loss on a class-wide basis; any forensic difficulties faced by the Proposed Class Representative in obtaining data from Microsoft and the Listed Providers would also be experienced by individual class members which seek to bring claims (and therefore do not undermine the relative suitability of collective proceedings vis-à-vis individual proceedings); and, to assess the loss by each Proposed Class Member on an individual basis would be impracticable and disproportionate.

Further, the CPCF states the proposed collective proceedings should proceed on an opt-out basis because:

1. The Claims have (at the very least) a real prospect of success. The CPCF states that the Licensing Abuses are currently being investigated by the Competition and Markets Authority and other competition authorities.

2. It would be impracticable, disproportionate, and uneconomic for the proceedings to be brought on an individual basis, or on an opt-in basis. Further, opt-in proceedings would not be suitable as the class is large and spread across a range of different industries and sectors.

3. The Proposed Class Members continue to be reliant on Microsoft for provision of the Microsoft Operating Systems, and it is alleged there is potential that Microsoft might, if these proceedings are continued on an opt-in basis, threaten retaliation against members of the Proposed Class so as to prevent them from opting-in to proceedings and "putting their head above the parapet".

The relief sought in these proceedings is:

1. Damages;

2. Interest pursuant to Rule 105(3) of the Rules at such rate and for such period as the Tribunal thinks fit;

3. Costs;

4. Such further or other relief as the Tribunal sees 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 post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)
Registrar
Published 2 January 2025