COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1689/7/7/24

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 8 November 2024 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 (the "Act"), by the Consumers' Association, also known as Which? (the "Proposed Class Representative" or "PCR") against: (1) Apple Inc; (2) Apple Distribution International Limited; (3) Apple Europe Limited; and (4) Apple Retail UK Limited (together, "Apple"). The PCR is represented by Willkie Farr & Gallagher (UK) LLP, Citypoint, 1 Ropemaker Street, London EC2Y 9AW (Reference: Boris Bronfentrinker/Elaine Whiteford).

This application for a collective proceedings order ("CPO") concerns alleged specific anti-competitive conduct which, it is further alleged, Apple has implemented in respect of its cloud storage solution, iCloud. The Collective Proceedings Claim Form (the "CPCF") states that the application is made on behalf of a proposed class of natural persons (the "Proposed Class" or "Proposed Class Members") both to compensate them for losses suffered as a result of Apple's alleged abusive conduct (in particular by paying higher prices for cloud storage than they would have paid under competitive conditions), and for injunctive relief to prevent Apple continuing that alleged abusive conduct to the detriment of consumers in the future.

The claims which it is proposed to combine in the collective proceedings are standalone claims for loss and damage caused by alleged breaches of statutory duty by Apple of section 18 of the Act (from 1 October 2015 to date, and ongoing) and/or Article 102 of the Treaty on the Functioning of the European Union from 1 October 2015 to 31 December 2020 (the "Claims").

According to the CPCF, users ("iOS Users") of Apple's mobile devices ("iOS Devices") rely on cloud storage on remote servers to host and/or backup their files and data, both to overcome the limited storage capacity of those devices, and in order seamlessly to access the same files and data across multiple devices, in multiple locations. Given the ever-increasing volume of data being generated by mobile devices through higher-resolution cameras, more data intensive software applications for mobile devices ("apps") and services, and the increasing use of apps and digital services for all aspects of daily life, this reliance on cloud storage has likewise increased and is continuing to increase in scale and importance. Cloud storage is thus a vital part of everyday modern life for many consumers and has become a multi-billion pound industry.

Apple develops and markets smart mobile devices, most notably its iPhone and iPad devices. The CPCF refers to it as the monopolist developer of iOS, the operating system running exclusively on those devices through which it has foreclosed and dominated the market for cloud storage services to iOS Users. The PCR alleges that Apple has not done so by competing on the merits. Instead, it has leveraged its control of iOS to grant itself preferential treatment to iCloud, to the exclusion of rivals or would-be rivals and the exclusion of effective choice in respect of cloud storage of iOS Users. In particular, the PCR contends that Apple has designed and operated both technical restrictions and a choice architecture in respect of iOS and cloud storage for iOS Users which allegedly unlawfully favour iCloud over the many competing and potentially competing cloud storage services. It has thus leveraged its dominant

position in respect of iOS to exclude or limit competition in the markets for cloud storage services to iOS Users (the "Preferential Treatment Abuse"). The CPCF states that the preferential treatment consists in particular of: (i) a set of technical restrictions and practices that prevent users of iOS from storing certain key file types on any cloud storage service other than its own iCloud, and thus ensuring that users have no choice but to use iCloud if they wish to meet all their cloud storage and/or backup needs, in particular in order to conduct a complete backup of the device; and/or (ii) an unfair choice architecture involving the following elements, which individually and cumulatively steer iOS Users towards using and purchasing iCloud rather than other cloud storage services, and/or limit their effective choice, and/or exclude or disadvantage rivals or would-be rivals: (a) the exclusive integration of iCloud into iOS; steering iOS Users on initial set-up of an iOS Device (in particular through exclusively integrating sign up to iCloud with the creation of an Apple ID and the enabling of iCloud by default, plus the exclusion of alternative cloud storage services); (b) steering during everyday usage of an iOS Device by the design and operation of the iOS interface (which exclusively integrates and/or treats preferentially iCloud compared to other cloud storage services); (c) steering on moving from one iOS Device to another iOS Device; and (d) making transferring data from an iOS Device to an Android device a laborious and manual process.

The PCR contends that the effects of the Preferential Treatment Abuse are: (a) entirely to exclude would-be competitors against Apple in the market for providing a comprehensive storage or backup capability on iOS Devices; and (b) to restrict competition against Apple by actual or potential competitors in the market for other cloud storage services for use on iOS Devices. The Preferential Treatment Abuse allegedly constitutes an abuse of a dominant position as: (a) anti-competitive self-preferencing; and/or (b) anti-competitive tying.

According to the PCR, there is no plausible technological or security justification for Apple favouring its own iCloud to the exclusion of actual and/or would-be competitors and the resulting exploitation of its users by inhibiting their effective choices and steering them towards Apple's own service and away from others. The CPCF states that Apple's conduct can be explained only as an attempt to exclude or stifle competition, shield itself from any remaining competition, and reap trading benefits that it would not achieve in conditions of fair and effective competition. The PCR contends that Apple's profit margins for iCloud services substantially exceed its already-high company-wide gross margins, notwithstanding that cloud storage is (in essence) a relatively commoditised service, in contrast to developing and marketing mobile devices and computers which constitutes much of Apple's business.

The PCR's Proposed Class definition is as follows:

> *All iOS Users who, at any time during the Claim Period, obtained iCloud Services for use on an iOS Device on which the United Kingdom was selected as the "Country / Region" in the Apple ID account settings (or Personal Representatives of such persons), save that any iOS Users who first obtained iCloud Services after [date of certification of the Claim] are not Class Members.*

As to the estimate of the amount claimed in damages, aggregate damages are currently estimated, as at 30 September 2024, as follows: (a) in respect of damage suffered by Proposed Class Members who paid for iCloud Services at between £1,382 million and £1,987 million (excluding interest) and at between £1,782 million and £2,583 million (including simple interest at the Bank of England base rate + 5%); and (b) in respect of damage suffered by Proposed Class Members who never paid at £224 million (excluding interest), and £300 million (including simple interest at the Bank of England base rate + 5%).

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. The PCR is a pre-existing body established to represent the interests of UK consumers, and it has considerable experience representing the interests of, and engaging with, such consumers

in a variety of ways (including experience of acting as a class representative in collective proceedings). It is well-resourced internally and advised by an experienced external team of competition lawyers and economists.

2. The PCR has prepared plans for the proposed collective proceedings – the Litigation Plan, and Notice and Administration Plan – which include:

    (a) a method for bringing the proceedings on behalf of the Class;

    (b) notification proposals at pre-CPO, CPO and distribution stages;

    (c) initial proposals for distribution;

    (d) a procedure for governance and consultation, which takes into account the size and nature of the Proposed Class;

    (e) consideration of matters in relation to disclosure, evidence and witnesses;

    (f) consideration of the litigation timetable; and

    (g) a cost budget for the proposed collective proceedings, which includes the estimate of and details of arrangements as to costs, fees and disbursements.

3. The PCR has also instructed an experienced claims administration company and a public relations agency to assist with the administration and notification processes in addition to the PCR's resources. Further, the PCR has established a claims website, www.CloudClaim.co.uk, which will serve various functions at each stage of the proceedings, including enabling Proposed Class Members to register to receive updates, and providing additional information and relevant notices as the proceedings progress.

4. There is no conflict of interest which prevents the PCR from acting as the class representative for the Proposed Class. The PCR is not a member of the Proposed Class.

5. The PCR is unaware of any other applicant seeking approval to act as a class representative in respect of the same Claims.

6. The PCR has entered into a Litigation Funding Agreement with a third-party funder to enable it to pay the costs of the proceedings. The funder will also indemnify the PCR for any adverse costs that the PCR is ordered to or agrees to pay to Apple. After-the-event insurance has been obtained by the funder against the risk of having to pay out under the indemnity, and a comprehensive budget has been agreed in connection with the funding arrangements.

The CPCF states that the Claims are eligible to be brought in collective proceedings because:

1. The Claims are brought on behalf of an objectively identifiable class of persons, and it is possible to identify whether any person falls within the Proposed Class based on objective and straightforward factual enquiries.

2. The Claims manifestly raise common issues because each and every individual claim under section 47A of the Act, which the PCR seeks to combine in these collective proceedings, concerns the same service namely iCloud, supplied by the same undertaking, Apple, to UK

consumers. Specifically, the Claims raise the following common issues: the definition of the relevant markets; whether Apple was and is dominant on those relevant markets (and the duration of those dominant positions); whether Apple has abused and is abusing its dominant position on those markets by any or all of the conduct forming part of the alleged Preferential Treatment Abuse (and the duration of the abusive conduct); whether the Preferential Treatment Abuse is objectively justified; the effects of any and all of Apple's conduct forming part of the alleged Preferential Treatment Abuse; the conditions of the competitive and lawful counterfactual; whether any abuses of dominance, individually or together, have caused Proposed Class Members to suffer loss and damage; the quantum of aggregate damages; the basis, rate and amount of aggregate interest on damages; whether the proposed defendants are jointly and severally liable; and the limitation period applicable to the Claims.

3. The Claims are suitable to be brought in collective proceedings because:

    (a) The Claims are individually modest in value, and the common issues are of mixed law, fact and expert evidence, which would be extremely difficult, prohibitively costly, and highly inefficient for individual Proposed Class Members to address on an individual basis.

    (b) Whilst there are inevitably costs associated with bringing the collective proceedings, these costs are fair and proportionate in light of: the size of the loss as a result of the Preferential Treatment Abuse which would otherwise go un-redressed; the size of the Class; the aggregate value of the Claims; and the benefits obtained by preventing and deterring Apple's abusive conduct.

    (c) The individual Claims of the Proposed Class Members are suitable for an award of aggregate damages.

Further, the proposed collective proceedings should proceed on an opt-out basis (although it will be possible for Proposed Class Members domiciled out of the UK to opt-in) because:

1. The Claims are strong, they are supported by expert reports, facts and materials cited, other similar proceedings, and other similar regulatory decisions and investigations. In any event, there is no alternative option which is better able to vindicate the Claims and/or affords better access to justice and/or enables the case to be best case managed.

2. In particular, given: (i) the modest individual sums at stake; (ii) the complexity and costs involved (even assuming some level of engagement); (iii) the large size of the Proposed Class; (iv) the nature of the Proposed Class as natural individuals; and (v) the lack of awareness of the relevant issues amongst the Proposed Class, it would not be feasible to bring this consumer claim on an opt-in basis for all Proposed Class Members.

The relief sought in these proceedings is:

1. Damages on behalf of the Class to be assessed on an aggregate basis pursuant to section 47C(2) of the Act;

2. Simple interest under section 35A of the Senior Courts Act 1981 and/or Rule 105 at the rate of Bank of England + 5% per annum (or such other rate as the Tribunal may consider appropriate);

3. An injunction requiring that Apple cease the Preferential Treatment Abuse (or any aspect thereof);

4. The PCR's Costs; and/or

5. Any such further or 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 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
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