Neutral citation [2023] CAT 10

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

<u>20 February 2023</u>

Before:

SIR MARCUS SMITH
(President of the Competition Appeal Tribunal)
DEREK RIDYARD
TIMOTHY SAWYER, CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

DR LIZA LOVDAHL GORMSEN

<u>Applicant and Proposed Class Representative</u>

- and –

META PLATFORMS, INC.
META PLATFORMS IRELAND LIMITED
FACEBOOK UK LIMITED

<u>Respondents and Proposed Defendants</u>

Heard at Salisbury Square House on 30 and 31 January and 1 February 2023

JUDGMENT

APPEARANCES

Ms Ronit Kreisberger, KC, Mr Nikolaus Grubeck, Mr Greg Adey and Mr Benjamin Smiley (instructed by Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Applicant.

Ms Marie Demetriou, KC and Mr David Bailey (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Respondents.

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A. THE APPLICATION BEFORE THE TRIBUNAL

1. By a collective proceedings claim form dated 11 February 2022, Dr Liza Lovdahl Gormsen applies to commence opt-out collective proceedings under section 47B of the Competition Act 1998 against the three above-named Respondents. The Respondents are all members of the "Meta" corporate group which, amongst other things, owns and operates "Facebook", an on-line personal social network. We shall refer to the social network itself as Facebook, and to the Respondents as Meta. We shall refer to Dr Gormsen as the "Proposed Class Representative" or "PCR".

2. A collective proceedings claim may only be commenced with the sanction of the Tribunal. The rules and considerations that inform whether an application to commence such proceedings should be granted were set out in the Tribunal's judgment in *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc* ("O'Higgins").[1] This application concerns only a question of certification.[2] Two conditions need to be satisfied before the Tribunal may make a collective proceedings order, referred to in *O'Higgins* as the "Eligibility Condition" and the "Authorisation Condition".[3] These conditions, themselves, have a number of sub-conditions and/or factors to take into account, in what is (at the end of the day) a structured discretion vesting in the Tribunal.

3. Many aspects of certification do not need to be considered in this Judgment. In part, that is because Meta did not raise any issues in relation to them. Where issues are raised in the course of a collective proceedings application, the Tribunal must resolve them. The converse, however, does not hold good: an absence of objection does not make certification automatic. The Tribunal will, of its own motion, consider whether it is appropriate to make a collective proceedings order. The Tribunal cannot abdicate that responsibility by determining only those matters raised by a party opposing the making of a collective proceedings order.[4]

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[1] [2022] CAT 16.
[2] What was referred to in *O'Higgins* at the "Certification Issue" (at [10]).
[3] *O'Higgins* at [17].
[4] The Tribunal's practice is thus not dissimilar from the High Court's practice when reviewing schemes of arrangement.

4. In this case, we consider that the only matters that we need address are those raised by Meta in oral argument in objection to the Proposed Class Representative's application. These matters were two-fold:

(1) Whether the test in *Pro-Sys Consultants v. Microsoft* was met. We shall refer to this as the "*Pro-Sys* test". The *Pro-Sys* test derives from a decision of the Canadian Supreme Court, where Rothstein J stated:[5]

> "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 (i.e. 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."

Transplanting a test from a foreign jurisdiction – even where that jurisdiction is a common law one, and where the collective action regime is one which, in some respects, was used as a model for that which operates in this Tribunal – is never straightforward. There has been a great deal of recent case law directed to the *Pro-Sys* test. It will be necessary to consider the nature and purpose of the *Pro-Sys* test in some detail, since Meta relied upon it as the primary reason as to why the Proposed Class Representative's application should be refused. The Proposed Class Representative (for her part) contended that Meta were misapplying the *Pro-Sys* test so as to import into the certification regime a more stringent test for striking-out a claim which *(i)* was inconsistent with the law, and *(ii)* was in any event illegitimate, because no strike-out application had been made. The bulk of this Judgment is concerned with this attack on the PCR's application. It will be necessary, in order to determine it, to consider the following matters:

(i) First, the nature of the case pleaded by the Proposed Class Representative against Meta. The Tribunal Rules[6] require the

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[5] [2013] SCC 57 at [118].
[6] The Competition Appeal Tribunal Rules 2015, SI 2015/1648, the "Tribunal Rules".

proposed class representative to plead the claim that the representative wishes to bring fully. The claims that the Proposed Class Representative seeks permission to bring are articulated in a Collective Proceedings Claim Form (the "Claim Form"). We proceed on the basis that the facts and matters averred in the Claim Form are true, although we should note for the record that many of these averments are disputed by Meta. We should also note – as the Proposed Class Representative stressed – that there is no application by Meta to strike the Claim Form out and – to be clear – the Tribunal has not raised this question of its own motion, as it could. We therefore proceed on the basis that the claims articulated by the Proposed Class Representative are arguable and ought to proceed to trial. That said, it is necessary to understand with some precision the case that the Proposed Class Representative seeks to make. That is necessary – and we will expand on this – in order to understand the evidence of Mr James Harvey, a director and co-founder of Economic Insight Limited. Mr Harvey submitted two preliminary expert reports – "Harvey 1" dated 11 February 2022, and "Harvey 2" dated 5 December 2022 – which, amongst other things, explained how the Proposed Class Representative was going to demonstrate how the class she wishes to represent had suffered loss and damage as a result of the causes of action pleaded in the Claim Form. The nature of the Proposed Class Representative's pleaded case is considered in <u>Section B</u> below.

(ii) Secondly, in <u>Section C</u> below, we set out Mr Harvey's expert methodology as to how – at trial – the damage resulting from the claims pleaded in the Claim Form will be demonstrated. We seek to do so as neutrally as possible, and although our consideration identifies points where we were troubled by Mr Harvey's approach, this Section does not consider in any detail the criticisms advanced by Meta, although it may to an unavoidable extent foreshadow them.

(iii) Thirdly, in Section D, we articulate the *Pro-Sys* test which we must apply, and which Meta contended was not met.

(iv) Finally, in Section E, we apply the *Pro-Sys* test to the case as pleaded in the Claim Form and to the methodology as articulated by Mr Harvey. For reasons we have suggested – and which we expand on below – we do not consider it is possible to articulate a methodology for the assessment of loss or damage without a clear understanding of the cause of action said to generate or to be causative of that loss or damage.[7]

(2) Secondly, whether, under rule 79(2)(b) of the Tribunal Rules, the continuation of the proceedings could be justified in terms of cost/benefit. The nature of this test was considered in *O'Higgins* at [288(2)] and [372(2)] and we consider it in the case of this application in Section F below.

B. THE NATURE OF THE CASE PLEADED BY THE PROPOSED CLASS REPRESENTATIVE

(1) Our approach to averments made

5. As we have stated, we proceed on the basis that averments made in the Claim Form are true, even though it is clear that many will be contested at trial. Meta did, however, provide us with a Guide to Facebook (the "Guide"), which we have found helpful in elucidating how Facebook works. However, we have used the Guide for elucidation only. If and to the extent that there is an inconsistency between the Claim Form and the Guide, we will rely on the former and disregard the latter.

[7] It will be necessary to consider this aspect in some detail, because there were times when (in oral submissions) the Proposed Class Representative suggested, or at least came close to suggesting, that liability and quantum could in some way be considered separately. In this way, it was suggested that the absence of a strike-out application – with the consequent acceptance that the pleaded claims were "arguable" – had material effects on the extent to which Mr Harvey needed to explain his methodology.

(2) The nature of the cause of action

6. The Claim Form alleges various abuses of a dominant position by Meta contrary to the Chapter II prohibition in section 18 of the Competition Act 1998.[8] Section 18 materially provides

> "(1) …any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in –
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions…
>
> …
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts."

7. The relevant claim period is 11 February 2016 to 31 December 2019 (the "Claim Period").[9]

(3) The class

8. The Proposed Class Representative estimates the class size to be 45 million persons.[10] Essentially, the class comprises those persons using Facebook in the United Kingdom, which means those persons who had a Facebook account and who accessed that account at least once during the Claim Period while in the United Kingdom.[11]

9. The Proposed Class Representative sought permission to bring the claim on an "opt-out" basis. Given the composition of the class, this is obviously sensible, and Meta made no criticism of this.

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[8] Claim Form/paragraph 7. There is a parallel claim arising out of Article 102 TFEU, but that (for present purposes at least) adds nothing.
[9] Claim Form/paragraph 7 – although the PCR has accepted that the claim period will need to be amended to begin on 14 February 2016 for limitation reasons (Reply/paragraph 105).
[10] Claim Form/paragraph 11.
[11] Claim Form/paragraphs 12 and 17 to 21.

10. Members of the class are referred to in the Claim Form as "Users", and is a term we will adopt.

(4) Pleaded factual background

11. The Claim Form provides as follows:

> "38. Throughout the Claim Period, access to Facebook's personal social network service was offered "free" to consumers. When signing up for Facebook, however, Users had to agree to various far-reaching, and complex, terms of business imposed by Facebook. As explained in more detail below, amongst others, 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 networks platform.
>
> 39. Facebook did not pay its Users for access to, or its use of, their personal data. Such data is extremely valuable and Facebook used it to generate vast amounts of revenue, as set out below.
>
> 40. In addition to using such data to provide Users with its social network service, Facebook charged advertisers to show highly targeted adverts to Users based on their personal data – i.e. advertisers paid Facebook to place their advertisements with particular types of Users. In essence, Users "paid" for Facebook's service with their data and by receiving targeted adverts.
>
> 41. Reflecting this, Facebook's terms of service state:
>
> > "[We] don't charge you to use Facebook or the other products and services covered by these Terms. Instead, businesses and organisations pay us to show you ads for their products and services. By using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you."

12. It is helpful to refer to the Guide's description of how User data links with the services provided by Facebook. The Guide describes the data used by Facebook in the following terms:[12]

> "Broadly speaking, there are three categories of data used by Facebook to provide personalised services:
>
> (a) user provided data, namely information about a user provided directly by that user to Facebook, such as a user's name, contact details (email address and/or phone number), age or gender. A user can also choose

[12] Guide/paragraph 32.

to share information on (*inter alia*) their interests, hobbies, or the city they live in;

(b) "on-site" data, i.e. data gathered as a result of a user's activity on Facebook; and

(c) "off-site" data, i.e. data Facebook receives from third parties (such as advertisers), regarding, e.g. how users interact with third-party websites and apps (e.g. visits, purchases, and ads seen/interacted with)."

13. The mechanics of how Meta receives, and Facebook uses, off-site data does not matter for present purposes.[13] The point of the process is not to sell data to advertisers directly, but to offer advertisers the ability to display their ads to a relevant audience – without sharing information that personally identifies any of the Users.[14] We do not consider the process by which Facebook monetises its Users matters: that monetisation could be <u>direct</u> (by the sale of data to advertisers) or could be <u>indirect</u> (by the connection of advertisements of interest to Users with those Users). Nor do we say anything about the value of this service to Users, although it seems to us clear that Meta will be contending that Facebook is a product valued by its Users, and that an assessment of that value may have to be incorporated into the methodology by which loss is assessed. The value to advertisers is clearer – given that they pay for the service provided by Meta – but again this may be a matter for the loss methodology to which we will come. For the present, we would only note that there is a link between the User experience and the service paid for by advertisers, most clearly evidenced by the fact that whilst Users can, no doubt, <u>shape</u> the sorts of advertisements they see through manipulating the data that Facebook can analyse,[15] the one thing they cannot do is opt to have no advertisements at all.

14. The Claim Form pleads that the personal data collected by Facebook is "extensive".[16]

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[13] But is described in Guide/paragraphs 33 to 36.
[14] Guide/paragraph 38.
[15] There are methods of direct control, as described in Guide/paragraph 31, but also no doubt methods of indirect control through means not directly provided by Meta.
[16] Claim Form/paragraph 53; also paragraph 55.

(5) Breach of statutory duty; questions of liability; and questions of quantification

15. In English law, competition law infringements – like an infringement of the Chapter II prohibition – are vindicated as statutory torts.[17] A fundamental requirement for liability to be established is that the claimant must show actionable damage, which forms the "gist" of the action. Recovery is not limited to this threshold "gist damage", but without it there is no cause of action.[18] There is, thus, a delicate interrelationship between proof of actionable damage (which must, at trial, be shown on the balance of probabilities) and the assessment of the damage that is actually recoverable. That assessment forms a part of the process of quantification, is done on a "loss of chance" basis, and involves an assessment of what would have happened in a hypothetical or counterfactual case, in which the tort was not committed.[19] The objective – in the case of competition law infringements as in the case of any other tort, and irrespective of whether the claim is individual or collective – is to place the claimant(s) in the position they would have been in had the wrong alleged (i.e. the tort) never been committed. In carrying out this process of quantification, the court wields a "broad axe"; and a claim that is otherwise sound in law will not fail simply because the assessment process is difficult, involves "gaps" in the court's knowledge or requires the making of assumptions or estimates.

16. Thus, although liability and quantum involve very different questions, there is a close nexus between them. The assessment of quantum is, in the most fundamental way possible, constrained by the wrong that is alleged. For a claimant is only entitled to be put in the position as if the wrong alleged had never been committed.

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[17] See *BritNed Development Ltd v. ABB AB*, [2018] EWHC 2616 (Ch) at [10], affirmed in all respects where the first instance judgment is cited by the Court of Appeal in [2019] EWCA Civ 1840. The one respect in which the judgment was overruled is of significance in this case, and is considered further below.

[18] *BritNed* at [10].

[19] For an expansion of these, admittedly trite, points, see *BritNed* at [12]. We should stress that we are not, in any specific way, seeking to restrict the counterfactual case to be advanced by the Proposed Class Representative. As we describe further below, this is liable to be complex in the present case. What we are saying is that it needs to be articulated and linked to the infringement of competition law alleged.

17. We turn to consider the competition law infringements alleged by the Proposed Class Representative in the Claim Form.

(6) The alleged infringements of the Chapter II prohibition

18. A number of paragraphs in the Claim Form seek to inform the reader that the Chapter II prohibition is concerned with unfair trading terms. Since that is, more or less, what section 18(2)(a) of the Competition Act 1998 says – we have quoted it in paragraph 6 above – we are unsure what these paragraphs in the Claim Form are directed to.[20] The general proposition we of course accept: but, as is well recognised, there is no exhaustive list of abusive conduct,[21] and what constitutes an "abuse" is tricky to nail down, particularly in the new or marginal case. As Whish and Bailey say, "[i]t is not controversial to say that the meaning of abuse of dominance is controversial".[22] Simply to assert that conduct involves "unfair" trading terms, when section 18(2)(a) proscribes "unfair trading conditions" is very close to being a circular proposition, and correspondingly unhelpful.[23]

19. We turn to the more specific articulations of the case that the Proposed Class Representative seeks permission to advance. There are three claims:

(1) Abuse by way of an "Unfair Data Requirement";

(2) Abuse by way of an "Unfair Price"; and

(3) Abuse by "Other unfair trading conditions".

20. Although it is said that these allegations "individually and/or together" infringe the Chapter II prohibition, we will consider them separately. We are not considering a question of strike out, and there is no need for us to consider

[20] Specifically, Claim Form/paragraphs 102*ff*.
[21] Whish and Bailey, *Competition Law*, Oxford University Press, 10th ed (2021) at 198.
[22] At 194.
[23] Claim Form/paragraph 121 – which seeks to elevate these generalisations into a claim of abuse of the Chapter II prohibition – is only saved by the reference to three specific allegations of abuse, identified at the end of that paragraph. Without these more specific allegations, the averments in the Claim Form would be embarrassing for a want of particularity.

whether the claims individually are so weak that they can be saved only by the mutual support they lend each other. The reason we are unpacking the specific allegations is not to assess their strength, but to understand the nature of the harm those abuses are said to have caused the class.

(7) Abuse by way of an Unfair Data Requirement

21. It is appropriate to set out the allegation as pleaded in full:

> "123. At all material times during the Claim Period (or any part thereof), Facebook exploited its dominance by imposing on its Users, as a condition of access to its network, T&Cs which gave rise to the Unfair Data Requirement.
>
> 124. By reason of the facts and matters pleaded above, the Unfair Data Requirement was disproportionate and/or not necessary for the attainment of the commercial objective of providing a Personal Social Network and/or Social Media Network because:
>
> a. The nature, extent and/or scope of personal data which Facebook obtained from Users, summarised at paragraphs 53 – 56 above, extended far beyond the type of data required to offer a social networking and/or social media service; and
>
> b. Such personal data of Users was taken for the purposes of Facebook's activities on the advertising market which generated vast revenues for Facebook and were not shared with Users.
>
> 125. In the premises, the Unfair Data Requirement harmed Users, including for the following reasons:
>
> a. It was imposed on Users on a "take it or leave it" basis: Users who wished to access Facebook had no choice but to give Facebook access to their personal data, including types of personal data which are highly sensitive, and were thereby required to accept insufficient privacy protections from the platform…
>
> b. Throughout the Claim Period, Users had no available alternatives given:
>
> i. Facebook's unique position as a personal social network and/or social media platform and the absence of genuine substitutes which fulfilled the same user needs;
>
> ii. The inability to opt out, adequately or at all, of personalised advertising in exchange for not giving up their data, or conversely to opt into personalised advertising in return for their personal data.

> 126. By making access to Facebook contingent on the provision of personal data, and safe in the knowledge that Users had no real alternative, Facebook exploited Users in order to advance its own commercial interests and objectives in the relevant advertising markets."

22. As to this allegation:

    (1) We anticipate – given the manner in which Facebook uses User provided data, "on-site" data and "off-site" data – that the distinction between data that falls within the Unfair Data Requirement and data that falls outside the Unfair Data Requirement will be a very hard one to draw. That, however, is a point that may render the claim weak. The merits of the claim do not arise for consideration: but it is necessary to understand the sort of points that will arise at trial (even if their ultimate success is emphatically not a matter we consider).

    (2) What constitutes data that falls within the Unfair Data Requirement is defined by reference to that which is required for the attainment of the commercial objective of providing a Personal Social Network and/or Social Media Network. Again, we anticipate that Meta will contend that all of the data obtained from Users was so required; and Meta may also contend that the provision of personalised advertising is an <u>attribute</u> of a Personal Social Network or a Social Media Network (and that the sale of advertising is the sole source of funds available to Meta to provide the service to Users). Again, we anticipate that this will be a difficult issue at trial: we articulate the point in order to understand the nature of the case being made, and not to assess its strength.

    (3) The articulation of the Unfair Data Requirement in the Claim Form is vague as to the exact nature of the wrong being alleged against Meta. That is deliberate, if disingenuous:

        (i) The natural – indeed, inevitable – reading of the averment is that Meta unlawfully extracted data from its Users, which it should neither have extracted nor used. We appreciate that there are

considerable difficulties in defining this unlawfully obtained data, but that is the essence of the Unfair Data Requirement.

(ii) It follows from this that the loss to the class must be calculated by reference to the counterfactual situation of what would have been the case, had the tort not been committed. The only possible counterfactual situation in the case of this averment is what would have been the case had the data not been unlawfully extracted. In short, the loss that must be quantified is the loss to the class of their personal data having unlawfully been used.

(iii) The reason the Claim Form is coy about the nature of the loss to the class is because the Proposed Class Representative seeks to recover from Meta not the loss to the class, but the gain accruing to Meta through its unlawful conduct. That can be the only relevance of the repeated references to the profits made by Meta, as opposed to the legally relevant loss, namely the harm to the class.

(iv) The significance of this point will emerge with greater clarity and force once we have articulated the manner in which Mr Harvey proposes to calculate the loss to the class. But we should make clear now that we do not consider that the Claim Form can properly assert a claim to Meta's gains, as opposed to the class' loss.[24] We do not go so far as to say this is a deficiency that renders the claim unarguable. It clearly does not, because we consider that an averment of actionable loss sufficiently emerges

[24] The point can be tested by considering whether the class would have obtained an injunction against Meta at the beginning of the Claim Period, and what the terms of that injunction might have been. The injunction could only have been to enjoin Meta from using the improperly obtained data. Even if the effect of such an injunction (let us assume, for sake of argument, a final injunction) would have been to force Meta to change its terms, so as to pay Users for the data unlawfully extracted, no injunction would be framed in these terms. Courts, for obvious reasons, tend to use injunctions to enjoin rather than mandate. In this case, a mandatory injunction would have to articulate the price that Users and Meta would agree was the proper price for the data. No court would go so far. Rather, Meta's conduct would be enjoined, and the rest left to the market.

from the pleading. But the point is very relevant to the *Pro-Sys* test that we are coming to.

(8) Abuse by way of an Unfair Price

23. Again, it is appropriate to quote from the Claim Form:

> "127. By making access to its platform contingent on Users giving up access to their valuable personal data, Facebook demanded an unfairly high "price" or "payment in kind" for the provision of social networking services. Conversely, by taking that 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' valuable personal data. In particular:
>
> a. The incremental cost to Facebook of offering Personal Social Network and/or Social Media Services to each additional User is very low.
>
> b. The revenues generated by Facebook's advertising activities by virtue of Users' personal data were very high. These revenues indicate that the economic value of that data is high.
>
> c. By virtue of its commercialisation of Users' personal data, Facebook earned substantial excess profits, which are profits earned over and above those profits which a firm would make in a competitive market.
>
> d. In the circumstances, there is no reasonable or proportionate relation between, on the one hand, the economic value of Users' personal data and, on the other, the economic value of the personal social network and/or social media services provided in return by Facebook. Nor is there any reasonable relation between Facebook's costs of providing the social networking service and the revenues which it generated from its commercialisation of personal User data.
>
> e. Users had no option but to accept Facebook's Unfair Prices…
>
> 128. In a competitive market:
>
> a. Users would have received recompense for giving up their personal data in amounts which were proportionate to the commercial value of that data…
>
> b. For example, rival service providers might have offered Users (i) a share of the profits derived from monetising their personal data with advertisers; and/or (ii) the ability to transfer their data to other providers for monetisation; and/or (iii) equivalent services that did not require Users to provide their data (or as much data) for advertising purposes.

> 129. In the premises, Facebook's "prices" were unfair because they enabled Facebook to reap trading benefits, including supra-competitive profits, which it could not have obtained in conditions of workable competition."

24. We found the PCR's submissions as to the nature of this averment difficult. In her submissions before us, Ms Kreisberger, KC, for the PCR, veered from suggesting that this was <u>not</u> a *United Brands* abuse by excessive pricing case <u>at all</u>, to contending that this <u>was</u> a *United Brands* case, but that the test for an excessive price in this case would need to factor in the fact that Facebook was "free" to Users. Pausing there, just to consider in greater detail the nature of the Facebook service, the truth of the matter is that Facebook is <u>not</u> free to Users at all. This is captured very clearly in the Claim Form, where it is asserted that "by taking that 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' valuable personal data".[25]

25. This, if we may respectfully say so, puts the matter very well:

    (1) The situation is really one of barter (as Ms Kreisberger, KC accepted[26]). The User offers up personal data in exchange for the Facebook service; and Meta provides Facebook in exchange for that data. There is no monetary consideration, but there is consideration.

    (2) In these circumstances, depending on how the personal data and Facebook service are valued, there are three possible outcomes:

        (i) There is no abusive price: the exchange of personal data for the Facebook service is not abusive in competition law terms.

        (ii) The price is abusive, in that Meta is charging too much for the Facebook service, and should be making some kind of balancing payment to Users to make up for the fact that the Users' data is

[25] Claim Form/paragraph 127.
[26] Day 1/48/23-49/7; Day 3/38/15-16.

so valuable. This, of course, is the Claim articulated in the Claim Form.

(iii) The price is too low, in that Users are "free-riding", and should, in fact, be paying Meta for the Facebook service, in addition to permitting Meta to use the Users' personal data.

26. We cannot possibly determine which of these outcomes is the case, and it is not our function to do so. However, as we shall come to describe, the *Pro-Sys* test requires that the methodology by way of which this difficult question is to be resolved is laid out now.

27. It will be necessary to consider this aspect of the claim further, but we do so after the *Pro-Sys* test has been articulated and after Mr Harvey's methodology has been described.

28. Returning to the point we were making at paragraph 24 above regarding the Unfair Price abuse, we say this regarding the PCR's submissions. We regard the proposition that there is an approach to excessive pricing recognised in English law other than that laid down in *United Brands* as extremely difficult because it is contrary to authority that is binding on us.[27] On the other hand, we are entirely sympathetic to the point that *United Brands* is a broad and flexible test,[28] which may well need to be adjusted to cope with two special factors that arise in this case:

(1) First, that this is a case of "barter", with no monetary consideration.

(2) Secondly, and relatedly, that this is a case where there is a "two-sided" market. We will explain in due course what we mean by this, and why it matters.

[27] Given that the Court of Appeal has spent many paragraphs elucidating the *United Brands* test in *Competition and Markets Authority v. Flynn Pharma Ltd*, [2020] EWCA Civ 339, without articulating an alternative approach, the submission that there is an alternative approach is a remarkably bold one, that we do not accept.

[28] Again, this is a point that emerges very clearly from the Court of Appeal's decision in *Flynn Pharma*.

(9) Abuse by way of Unfair Trading Conditions

29. The Claim Form pleads as follows:

> "130. The means by which Facebook imposed its T&Cs on Users (which gave rise to the Unfair Data Requirement and Unfair Prices) and/or by which it collected, used and/or monetised Users' personal data were unfair and anti-competitive and/or entailed recourse to methods different from those governing normal competition and/or competition on the merits.
>
> 131. Without prejudice to the generality of the aforesaid, at all material times:
>
> a. Users wishing to use the dominant social network were unable to avoid signing up to the T&Cs…
>
> b. The T&Cs were (i) excessively long and/or complex and/or hard to understand and (ii) changed frequently, with changes not adequately explained to Users…
>
> c. Facebook failed to explain, adequately or at all, the nature, extent and/or scope of User's personal data it collected and/or the way it utilised Users' personal data;
>
> d. Facebook's conduct changed as it obtained market power, degrading privacy protections (which had initially served to attract Users and hence market power) after Users had been "locked in"…In a competitive market, such conduct would not be rational;
>
> e. Facebook's conduct entailed misleading representations in relation to its T&Cs…Facebook thereby concealed that its product was inferior in terms of privacy protection, and/or that several elements of the T&Cs and the data processing they purported to authorise may also have breached data protection law, rendering them abusive in any event.
>
> 132. In the premises, the unfair way in which Facebook engaged with Users and presented and/or imposed its T&Cs created the conditions for, and/or reinforced and exacerbated, the consumer harm which resulted from Facebook's exploitation of its monopoly/market power over Users, through its imposition of unfair terms, prices and/or other trading conditions, in pursuit of its supra-competitive profits for its own gain."

30. As to this allegation:

(1) This is an allegation that is extraordinarily difficult to pigeonhole as an abuse of a dominant position. It seems to turn on an allegation that Users were misled by the T&Cs and/or by other statements made or not made

by Meta. The substance of the claim appears to be one of misleading or misrepresenting consumers, and seems to us to be maintainable independent of any finding of dominance. As is well-known, dominance (which we assume here, because it is alleged in the Claim Form) brings with it special responsibilities which are not incurred by non-dominant undertakings. These allegations seem to us not to be competition law infringements at all, but rather some other – possibly consumer protection based – claim.

(2) We say this not because we have a concern about arguability (as we have repeatedly said, we are not considering questions of strike-out), but because of two other concerns.

(3) First, if this is not an infringement of the Chapter II prohibition, then there is no jurisdiction to try this claim before the Tribunal. This is not a matter that was raised with the parties at the hearing, but is a matter that we would want to be satisfied on. We say nothing more on this point in this Judgment.

(4) Secondly, if we are right and this claim turns on an allegation that Users were misled by the T&Cs and/or by other statements made or not made by Meta, then a number of difficulties arise:

(i) If Users were misled, then (presumably) their contract with Meta falls to be set aside (i.e., rescinded) and some form of restitution for benefits conferred made; or there might be a claim for misrepresentation sounding in damages (if the misrepresentation was made negligently or fraudulently).

(ii) Of course, misrepresentation is not pleaded, as such, and no case of rescission or damages for negligent or fraudulent misrepresentation is advanced. (Naturally, had this been pleaded, the jurisdictional question we have adverted to would have been evident for all to see.)

(iii) We remain at something of a loss to understand precisely what is being alleged in this, third, claim. Whatever the position, however, it seems to us that the Unfair Trading Conditions allegation turns on the extent to which individual class members were misled. That, in turn, strongly points against this claim being susceptible of collective proceedings.

(5) Having identified a significant concern in relation to this part of the Claim Form, we propose to consider it further in the light of Harvey 1 and Harvey 2. It may be that these reports will shed light on how the damage to the class will be established; which will, in turn, elucidate the cause of action that has been pleaded.

C. AN OVERVIEW OF MR HARVEY'S METHODOLOGY FOR ASSESSING QUANTUM

(1) Mr Harvey's "conceptual framework"

31. Harvey 1 contains – in paragraphs 3.7*ff* – a section where he seeks to define the loss to the class:

> "Defining the loss
>
> 3.7 The claim, as detailed in the Claim Form, is that due to Facebook's abusive conduct, the Proposed Class Members suffered loss and damage, including in that they were not adequately compensated for the commercial value of their personal data monetised by Facebook.
>
> 3.8 In that respect, the economic loss suffered in aggregate by class members is the difference between **(i)** and **(ii)**, where:
>
> **(i)** is the economic value that users *would have* received in the counterfactual scenario (i.e. in a scenario where Facebook had not held a dominant position and/or had not abused its dominant position); and
>
> **(ii)** is the economic value that users *actually* received (i.e. in the actual scenario that Facebook abused its dominant position).
>
> 3.9 I consider that there are a variety of possible competitive counterfactuals, including ones in which users are paid for the data that they provide to the social network and Facebook continues to monetise the data through selling advertising. More specifically, possible competitive counterfactuals include the following.

- There could be competing networks that do not interconnect, and they compete on the basis of: (a) payments to users for their data/to join and use the network; and (b) the quality of the service provided, including levels of data privacy.

- There could be competing social networks that are interoperable. Interoperability could be "behind the scenes", such as with emails and mobile phones in which data flows from one rival to another. Interoperability could also be "over the top", allowing users to easily and simultaneously post to and access information from multiple social networks. Again, competition between networks could be on the basis of: (a) payments to users for their data/to join and use the network; and (b) the quality of the service provided, including levels of data privacy.

3.10 More broadly, in the CMA's market study, the CMA stated that: "Although many online services are currently provided free of charge, in a well-functioning market, consumers might be offered a reward for their engagement online, or offered a choice over the amount of data they provide or adverts they receive."

3.11 In the actual scenario, users received access to the Facebook social network and in exchange have to provide their data to Facebook. In effect, they received value from their use of the Facebook social network platform, but gave away value in terms of their personal data.

3.12 Therefore, as users gave away their data in the factual and would have received something more in return in the counterfactual, what matters is what more they would have received in the counterfactual. That is, the loss can be defined as the difference between **(a)** and **(b)**, where:

(a) is the market price of personal data (of the type collected and monetised by Facebook) in a competitive market i.e. the "commercial value" of the data; and

(b) is the market price that users would have been charged by Facebook for delivering the social networking platform in a competitive market.

3.13 I note that the above is not dependent on the specific competitive counterfactual. That is, the definition of the loss set out in paragraph 3.12 is applicable to all of the potential competitive counterfactuals. This is because, if the market was competitive, the users would receive greater benefits – whether through a monetary payment, payment in kind (e.g. other products or services), or improved quality of service. The definition in paragraph 3.12 is simply a measure of the additional value that users would have received if Facebook had not abused its position.

3.14 Furthermore, aggregate damages can be assessed based on the definition in paragraph 3.12 because it is equally applicable to each individual user as it is to users as a whole."

(2) Problems with this conceptual framework

32. As we have described, the counterfactual in the case of each of the three causes of action pleaded in the Claim Form – being means for assessing the compensation necessary to put the class in the position they would have been in, had the wrong not been committed – varies significantly from claim to claim. Thus:

    (1) In the case of the Unfair Data Requirement abuse, the counterfactual by reference to which loss is calculated is the loss to the class caused by the abuse, by Meta, of data "belonging" to the class.[29] However, gains by Meta, even obtained through its tort, do not necessarily or automatically correlate to losses sustained by the class. Competition law does not operate a form of compensation based upon the recoupment or clawing back of unlawful gains: it compensates for loss.[30]

    (2) In the case of the Unfair Trading Conditions Abuse, in addition to the concern we have that this is not (jurisdictionally speaking) an abuse of dominance claim at all, there is the related problem that the effect of the misleading statements by Meta is one that is going to be specific to each claimant in the class: hence our concern that this is not, absent greater particularity, really a matter for collective proceedings at all. It seems to us that in the case of each class member it is necessary to ask, "If the misstatements/misrepresentations had not been made, what would the class member have done?" The answer, we suspect, is that <u>either</u> the class member would not have subscribed to Facebook (a "no transaction" case) or else the class member would have subscribed on the terms anyway (a "no reliance" case). We doubt very much whether

[29] We do not propose to venture into the difficult area of ownership of data, but recognise that these issues exist. That is why "belonging" is in quotation marks. For the remainder of this Judgment, however, we shall use the language of ownership to describe the class' relationship with its data because this is the clearest way of describing matters.

[30] See *BritNed v. ABB* at [223]*ff*. This case concerned "cartel savings", where the participants in the cartel saved significantly on costs <u>because of the wrong</u>. It was held (overruling the decision at first instance) that such savings could not equate to damages recoverable by the claimant. Precisely the same is true of gains made because of the wrong. Although it may well be appropriate to revisit this area, the law is clear and binding from the Court of Appeal down.

there would have been any kind of re-negotiation between class member and Meta.

(3) Only in the case of the Unfair Price abuse is it relevant to consider the extent to which Meta overcharged the class and we accept that the difference between the price actually charged and the price that should have been charged represents the class' measure of loss. But that measure needs to be considered and articulated through the prism of *United Brands*; and we will come, in due course, to the problems that arise out of Mr Harvey's methodology in this regard.

33. Mr Harvey draws no distinction between these three cases: he regards Meta's tort as a single, monolithic, abuse, and accordingly provides only a single methodology in his reports (albeit one that changes according to the points taken against it).[31] The methodology is most clearly directed to the quantification of loss in the case of the Unfair Price abuse, since it seeks to compute the difference between what Users actually received with what Users would have received in the counterfactual case.[32] Mr Harvey's methodology is not directed at all to the other cases.

34. Meta raised a series of concerns about Mr Harvey's methodology, even in the case of the Unfair Price abuse. We will consider these in due course.

35. For the present, we would only note that Ms Demetriou, KC, who appeared for Meta, was right in focussing on the appropriate methodology for calculating the loss arising out of the Unfair Price abuse, and in critiquing Mr Harvey's methodology in this regard only. Ms Demetriou, KC, quite rightly, said she could not address the other claims, because no methodology <u>at all</u> had been framed by the Proposed Class Representative.[33] We consider that Ms Demetriou, KC was entirely correct in this submission.

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[31] See the passages quoted in paragraph 31 above, and in particular Harvey 1/paragraph 3.7.
[32] See Harvey 1/paragraph 3.8, quoted in paragraph 31 above.
[33] Day 2/59/20 – 60/5; 91/6 – 9.

D. THE *PRO-SYS* TEST

(1) The genesis of the test and its purpose

36. We describe the genesis of the test in paragraph 4(1) above. The decision concerned the extent to which collective proceedings needed to be buttressed by sufficiently plausible or credible expert methodology. Although the actual *Pro-Sys* test was concerned with the satisfaction of the Canadian commonality requirement, the test ranges far more widely than this. Transplanted into the United Kingdom collective proceedings regime, the *Pro-Sys* test serves as a requirement – both for the parties and for the Tribunal – to ensure that before a claim is certified so as to proceed to trial, the parties[34] satisfy the Tribunal as to the steps that need to be undertaken in the future so as to ensure that the claim, if certified to proceed, can be heard in an efficient manner, consistent with the Tribunal's governing principles.[35] Put another way, the purpose of the *Pro-Sys* test is to minimise the related risks of the *(i)* parties throwing away unnecessary costs; *(ii)* the Tribunal's time being wasted; and *(iii)* a matter coming to trial in an unmanageable form.

37. Pleadings are the traditional way in which courts have exerted control over the issues they try and the evidence that is needed in order properly to try those issues. Pleadings are of critical importance in competition cases, because the issues that arise tend to be rather more wide-ranging and less easy to nail down than in conventional litigation; the evidence needed to determine such issues is similarly difficult to identify.[36]

38. Properly articulated pleadings have nothing to do with the merits of a case: they simply enable an arguable case to be properly tried. That is also the purpose of the *Pro-Sys* test. Why, it might be asked, have a specific test – over-and-above a patrolling of the pleadings – that is specific to collective actions. There are three answers to this:

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[34] In particular the proposed class representative: but, as will be described, the proposed defendants have a role to play also.
[35] See Rule 4 for an articulation of these.
[36] See *O'Higgins* at [197]*ff*, and in particular [214]*ff*.

(1) The *Pro-Sys* test serves as an excellent articulation of what the Tribunal ought to be doing in every case, collective or otherwise. The Tribunal has extensive case management powers, and those powers should (and will) be exercised to ensure that the Tribunal's governing principles are upheld. It is simply that collective proceedings – because of the specific need for the proceedings to be certified – have a specific stage in the certification process devoted to these questions. But the questions themselves are not so very different from the questions the Tribunal ought to be asking of itself and of the parties at early case management conferences in every case.

(2) Collective proceedings have the special requirement for certification because *(i)* there is less "claimant control" and *(ii)* damages are or can be assessed at the level of the class rather than individually. These two reasons for certification constitute, in themselves, the reasons why the *Pro-Sys* test exists as a specific test in collective proceedings. In individual actions, the claimant chooses to bring the proceedings, and "calls the shots". One can expect a high degree of control from the claimant, and claimants will (typically) wish to minimise costs and costs exposure and maximise recovery. That implies a level of control of the litigation that will trend to the proportionate, and which will align to the claimant's interests in accessing justice to vindicate their rights. Of course, this is always subject to the court's control. The point is that in collective proceedings, opt-in as well as opt-out (although the problem is starker in opt-out proceedings), claimant control is far less, and the conduct of the litigation vests in the class representative. It is entirely right and proper that the class representative's intentions as to the future conduct of the litigation (including how the claim will be made good) receive a scrutiny that is higher than that facing the individual claimant.

(3) Assessing damages at the class level involves a degree of uncertainty that cannot usually be unpicked or crystallised in conventional pleadings. Given that the merits are not in issue, it would be entirely inappropriate to require the class representative to justify, in any merit-based way, the likely quantum that will be recovered. Not only is this an

impossible task, quantification being a matter for trial, it is also an improper demand. A proper cause of action should not be killed off unless liable to be struck out, as the Supreme Court in *Mastercard Incorporated and others v Walter Hugh Merricks CBE* has made very clear.[37] However, it is entirely right and proper that the Tribunal be satisfied that the proposed class representative knows how it is proposed to make the claim good or – to put the same point another way – what directions the Tribunal will, either immediately or in due course, have to make, so as to ensure an effective trial at some point in the future. Although quantification will usually be the area of most doubt and concern, issues may arise in relation to other aspects of the claim, and the *Pro-Sys* test should not be regarded as limited to issues of quantum.[38]

(2) The recent case-law

39. There has been a great deal of recent law dealing with the *Pro-Sys* test, reflecting the fact that it has become (at the moment at least) the objection of choice for respondents seeking to prevent certification of a claim.

40. As to this, and without seeking to go over old ground clearly expressed in the decisions of other courts, the following points emerge:

(1) The merits are not for review at any stage prior to trial, unless the claim pleaded warrants striking out.[39] We have already stressed this, but the point bears repeating.

(2) The Tribunal bears a heavy responsibility as the gatekeeper in collective proceedings. As we have described, this role reflects the Tribunal's management responsibilities in all cases that come before it, but in

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[37] [2020] UKSC 51; see, also, *MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd* ("*McLaren*"), [2022] EWCA Civ 1701 at [41].

[38] *O'Higgins* itself is a case in point. There, the Tribunal (whilst understanding the theoretical basis for the claim) had no sense of how that claim could be made good at trial. The outcome, in that case, was not to strike out the claim but to refuse to certify on the basis sought by the two proposed class representatives. However, although the respondents' objections were never framed in this way, this was very much a case where the *Pro-Sys* test was not satisfied.

[39] *McLaren* at [41] and the authorities there cited.

collective proceedings – for the reasons given in paragraph 38 above – the gatekeeper function is of particular importance. The duty is a proactive as well as a reactive one,[40] and the essential object is to ensure that there is in place a blueprint for the parties and for the Tribunal of the way ahead to trial.[41]

(3) This point can be shortly stated, but ought to be unpacked. There are, we consider, at least two misapprehensions on the part of proposed class representatives which need to be laid bare:

(i) *The "St Augustine" fallacy.* St Augustine is reputed to have prayed, "Lord, make me good…but not yet". So, too, in many applications for the certification of collective proceedings, the proposed class representative can be heard to say: "The answer to this particular problem will emerge on disclosure."[42] An excellent example is the litigation plan of the Proposed Class Representative in this case.[43] Paragraphs 61 to 70 set out the PCR's proposals in relation to disclosure and it is evident (from paragraph 64) that the PCR sees disclosure as a somewhat opened ended and uncertain process. Whilst, of course, some degree of uncertainty and open-endedness is to be expected, to the extent that the expert methodology for (e.g.) the assessment of quantum is dependent upon disclosure from the proposed defendants, we would expect the disclosure that will be required to be articulated (ideally by the expert). That is a very important aspect of demonstrating to the Tribunal how a particular assertion will be made good at trial. We stress, again, that the Tribunal has no particular interest in this stage in the strength of the methodology: even weak and (in terms of outcome) uncertain

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[40] *McLaren* at [45] to [46] and the authorities there cited.

[41] *McLaren* at [47].

[42] See, for example: Day 1/46/25 – 47/2; 64/22 – 65/3; 66/20 – 67/17; 88/10 – 24; Day 2/28/8 – 12; Day 3/58/21 – 22; 61/22 – 25; 62/4 – 7.

[43] Contained in Exhibit LLG1-1 to the first statement of Dr Lovdahl Gormsen.

methodologies will not be killed off.[44] But the parties and the Tribunal need a blueprint and (absent very good reason) collective proceedings will not be permitted to progress unless and until that blueprint has been provided.

(ii) *The "not my problem" fallacy.* Often, a proposed class representative will assert that it is not for them to make good – even in terms of "blueprint" – points that will be part of the defence of the respondents, should the case proceed.[45] We stress that such a contention will rarely be satisfactory. Of course, we appreciate that there will be points on which the proposed defendants will bear the burden of proof. But where – at the certification stage – a proposed defendant makes clear that a certain point will be taken, then, whilst the proposed class representative does not have to have an answer to the point, it is incumbent on the proposed class representative to show how – methodologically speaking – the point can be addressed. The two-sided nature of the market in this case[46] presents an excellent example. As we shall come to describe, Meta contended that the outcome of the Unfair Price abuse allegation would be significantly affected by the fact that the Facebook service was provided in the context of a two-sided market. That may, or may not, be the case, we cannot say: but the methodology for the assessment of quantum needs to be sufficiently robust to deal with the point. Otherwise, one is left with a PCR unable to explain at certification how a claim to damages can withstand a defence that is going to be articulated by the proposed defendants, if the action proceeds. (It is worth pointing out that this involves a certain degree of "cards on the table" from the

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[44] Indeed, were it to be the case that a PCR's expert expected a defendant to have information necessary to making good the claim which the defendant actually did not have, rather than strike-out the claim, the debate would pivot to how – given the absence of this information from the defendant – the claim could be established.

[45] See, for example: Day 1/43/16 – 45/1; 54/13 – 22; 62/19 – 64/3; 64/15 – 65/4; 98/11 – 24; 113/10 – 17; 116/12 – 16; 118/1 – 10; Day 2/25/26 – 26/14; 34/14 – 37/7; Day 3/36/11; 4/16 – 42/6; 54/20 – 55/10; 61/10 – 15.

[46] See paragraph 28(2) above.

proposed defendants: if there are methodological problems, they need to be articulated at certification, and not to arise as unwelcome surprises post-certification.)

(4) A failure, on the part of the Tribunal, to engage in this process is an error of law. It is worth quoting from *McLaren*:

> "50. In its Judgment, the CAT identified the battle lines, but said that the battle along those lines was for trial. In our judgment this was an error in approach. Once it had decided to grant certification, the CAT should have gone on to address the ramifications of the challenges to the Class Representative's methodology. At the CPO stage it was clear that this represented *the* pivotal dispute in the case.
>
> 51. In this regard, if the CAT was of the view that it lacked sufficient information to perform this elucidatory role it could, exercising its broad case management powers, have directed the Class Representative to set out more fully its response to the overall pricing case, as presented by the appellants. If, however, it considered that the appellants had not sufficiently particularised or evidenced their overall pricing case, it could have directed them to provide further detail and then directed the Class Representative to respond. Either approach would have enabled the CAT fully to exercise its gatekeeper role and at the outset lay down a more developed judicially approved trial preparation pathway. Instead, we consider that the CAT did err in simply stopping in its tracks when confronted with two starkly opposing price theories and holding that they were for trial."

(5) The Court of Appeal, in *McLaren*, was confronted with collective proceedings that had already been certified by the Tribunal – a conclusion which the Court of Appeal upheld. It was in its failure to apply the *Pro-Sys* test that the Court of Appeal held that the Tribunal's error of law arose. When such matters arise before the Tribunal – as they do here – it is, of course, a case management question whether the proceedings are certified and the satisfaction of the *Pro-Sys* test left for later, or whether certification is delayed until a satisfactory "blueprint" is provided. Generally speaking, however, the latter course will be the preferable: it makes no sense to certify proceedings whose triability is in doubt. In the case of *McLaren*, had the error of law not been made by the Tribunal, then we have little doubt that the right course would have been to put off the order certifying the proceedings until the issues identified by the Court of Appeal had been resolved.

(6) Clearly, the application of the *Pro-Sys* test is fact and context sensitive. Valuable observations on the test were provided by Green LJ in *London & South Eastern Railway Ltd v. Gutmann* at [52]*ff*.[47] It would be duplicative to set them out here: the fact that we do not do so, does not mean that we have not conscientiously sought to apply them in the present case. It is to the application of the *Pro-Sys* test that we now turn.

E. APPLICATION OF THE *PRO-SYS* TEST IN THIS CASE

(1) The Unfair Data Requirement abuse and the Unfair Trading Conditions abuse

41. We can deal with these causes of action very briefly. It is obvious that the *Pro-Sys* test is not met in either case. For the reasons we have given – see paragraphs 21 to 22, 29 to 30 and 32 to 33 above – there can be no doubt that the *Pro-Sys* test has not even been addressed – let alone any kind of "blueprint" to trial provided – in the case of either the Unfair Data requirement abuse or the Unfair Trading Conditions abuse.

(2) The Unfair Price abuse

(a) ***United Brands*** **and an impressionistic overview of the law**

42. As we have stated, this is an excessive price claim as articulated in *United Brands*.[48] It would be both pointless and inappropriate to set out the law regarding breach of the Chapter II prohibition by way of excessive pricing in any detail. We are not trying a case of excessive pricing, but attempting to see whether the methodology for assessing an excessive price and so a potential breach of the Chapter II prohibition has been sufficiently set out to enable the claim to be tried. Nor do we wish to fetter, even inadvertently, how such claims are articulated in the future.

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[47] [2022] EWCA Civ 1077.
[48] See paragraph 28 above.

43. The law in this regard was considered by the Court of Appeal in *Competition and Markets Authority v. Flynn Pharma Limited*.[49] It is clear that claims regarding excessive pricing involve extremely difficult combinations of law, fact and economics. We simply propose – in order to show the difficulties that will have to be surmounted in trying such a claim and so in framing a blueprint – to quote two important passages from the case-law, cited with approval in *Flynn Pharma*. We are making no effort to state the law comprehensively, but rather to provide some kind of canvas on which a blueprint to try the issues arising this this case can be painted.

44. In *United Brands v. Commission*, Case No 27/76, the European Court of Justice, as it then was, stated:[50]

> "248. The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under article 86 of the Treaty.
>
> 249. It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
>
> 250. In this case, charging a price which is excessive because it had no reasonable relation to the economic value of the product supplied would be such an abuse.
>
> 251. This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however, the Commission has not done this since it has not analysed UBC's costs structure.
>
> 252. The questions, therefore, to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.
>
> 253. Other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair."

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[49] [2020] EWCA Civ 339.

[50] [1978] ECR 207. Cited in *Flynn Pharma* at [56]*ff*, and described (rightly) by the parties in that case as "seminal".

45. Later case law has expanded and explained this decision, in the following respects:

(1) The *United Brands* test is not intended as a "brightline" test for determining excessive prices or an abuse of dominance by excessive pricing. There is no fixed, definitive methodology, and it would be wrong to read *United Brands* in this way.[51]

(2) But there is a helpful articulation of general principle:

(i) The basic test for abusive pricing is fairness.[52]

(ii) In *Flynn Pharma*, Green LJ unpacked this concept in the following way:[53]

> "Then (in [249] and [250]) the court describes two central economic features of an abuse of unfairness. These are (i) that the undertaking has reaped "trading benefits" which could not have been obtained in "normal and sufficient competitive" conditions; and (ii) that a selling price that is "excessive" in that it bears no reasonable relation to the economic value of the product or service in question is an example of an abuse…"

(3) There is no single method for ascertaining whether a price is unlawful in terms of its excess or not, and any given method will have some inherent weaknesses.[54] In particular, an appropriate method is likely to be informed by that which is being valued: identifying costs and linking them to a particular product is a problem in almost every case, but particularly so where intangible property is concerned. The following methods or approaches are discernible:

(i) Comparators are of particular importance, even where they may not be clear or compelling.

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[51] *Flynn Pharma* at [63] to [67].
[52] *United Brands*, [248]; *Flynn Pharma*, [60].
[53] At [61].
[54] *Autortiesibu un komunicesanas konsultaciju agentura / Latvijas Autoru apvieniba*, Case C-177/16, EU:C:2017:286 at [36] to [48]; *Flynn Pharma*, [63].

(ii) The inter-relationship between price and cost is obviously significant. Bearing in mind always that cost can be extraordinarily difficult to relate to a product's price, if (nevertheless) cost can reliably be derived, a price well in excess of cost will be an <u>indicator</u> of unfairness.

(iii) Of course, excessive prices are not *ipso facto* unfair. Unfairness may arise in itself – "you know it when you see it" – or by reference to comparables.

(iv) It is important to emphasise the fact specific nature of the exercise. Excessive prices in the short run may be defensible. In *Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading*,[55] the Tribunal cited with approval the following statement regarding what was or might be an excessive price:

> "…if it is above that which would exist in a competitive market and where it is clear that high profits will not stimulate new entry within a reasonable period. Therefore, to show that prices are excessive, it must be demonstrated that (i) prices are higher than would be expected in a competitive market, and (ii) there is no effective competitive pressure to bring them down to competitive levels, nor is there likely to be."

(v) In *Napp* itself, the Tribunal identified as "among the approaches that may reasonably be used to establish excessive prices: *(i)* comparing price charged with cost incurred; *(ii)* comparing price charged with the costs of the next most profitable competitor; *(iii)* comparing the prices charged by the undertaking in question with those of its competitors; and *(iv)* comparing the prices charged by the undertaking across different markets."[56] Other methods will also no doubt exist, in particular analyses of price changes over time, where there is no corresponding change in the operation of the market itself.

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[55] [2002] CAT 1 at [390].
[56] At [392].

(b) Some difficulties that need to be reckoned with

46. Framing an unfair prices case is not straightforward, even when one is "simply" trying to frame a methodology or a "blueprint" to trial. The facts and matters of this case render the task even more difficult than in a "vanilla" case.

47. Here we simply set out some of the points that will have to be addressed in some way in order to try this case. We stress that we are not even attempting to be exhaustive:

    (1) *This is a "two-sided" market case.* Two-sided[57] markets present enormous analytical problems to both economists and competition lawyers. Two-sided markets – and the issues of market definition they give rise to – were considered by the Tribunal in *BGL (Holdings) Limited v. Competition and Markets Authority*.[58] The present case concerns a two-sided market (as all before us accepted) in that Meta is participating in two markets as the vendor of different services:

        (i) Meta is "selling" social media services – that is, Facebook – in what might be called the market for social media services, and we are assuming (because that is what the Proposed Class Representative alleges) that Meta is dominant in this market.

        (ii) Meta is selling advertising services to persons selling other products who wish to gain access to specific Users of Facebook, namely those Users who might be interested in buying the products of those third party sellers. Put crudely, Meta is selling access to "eyeballs", and the specific service that Meta provides is that the advertisements of sellers are directed to very specific eyeballs, namely the eyeballs of persons more likely to buy a product as a result of being shown a particular advertisement. We were not presented with any submissions as to Meta's

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[57] Or "multi-sided" markets to use the formulation that Meta prefers. The critical point is that the market cannot be understood solely by reference to the "one-sided" interface between Users and Meta.
[58] [2022] CAT 16.

dominance in this market: Meta, for understandable reasons, denies its dominance generally; and the Proposed Class Representative sees the question as irrelevant. Because of the interaction between the two markets – which we will come to – we do not consider the question to be irrelevant at all.

The essence of a two-sided market is the interaction – through the same platform, here Facebook – of two very different sets of buyers. The seller is common – here, Meta. The products supplied are different: social media services on the one hand, advertising on the other. But there is an interaction between the two markets whereby one affects the other.[59] Quite how those effects work depends on circumstance, but they are an inherent feature of two-sided markets. Here, third party sellers buying advertising services will only be interested in paying for those services if they are assured that their advertisements are reaching the "right eyeballs". Eyeballs – in sufficient number and diversity – are critical to the advertising market. We strongly suspect – but this would be a matter for trial – that no matter how Meta dress this up, Users of Facebook would rather have the social media service <u>without</u> the advertising than with it. If that is right, then this will affect Meta's pricing in the social media services market. Meta has clearly decided that the optimal price is to sell the social media services for nothing, but different scenarios could easily pertain. It might be the case that more eyeballs could be attracted if Users were <u>paid</u> to use Facebook, and that this additional cost to Facebook could be justified in the additional advertising revenue produced. Conversely, it might be the case that Users of Facebook actually <u>like</u> targeted advertising, and are prepared to pay for that (rather different) service. If so, then Facebook might be able to charge existing advertisers what it already charges <u>and</u> extract a "real" price from Users. We have no idea what the answer is to these questions, but there is an obvious (albeit uncharted) relationship between the Users of Facebook and the data they provide and advertiser interest. Cut back the data available to enable targeted advertising, and the advertising revenue may

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[59] See *BGL*, [117].

plummet. On this basis, it may well be worth offering to pay Users to use Facebook, but that is only one of many possible scenarios.

(2) *Consumer surplus is individual.* Consumer surplus varies between buyers, dependent on the particular buyer in question. Consumer surplus, to be clear, is an economic measurement of consumer benefits resulting from market competition. A consumer surplus happens when the price that consumers pay for a product or service is <u>less</u> than the price they are willing to pay. It is, in short, a measure of the additional benefit that consumers receive because they are paying less for something that what they were willing to pay. Thus:

(i) Take the case of "buyers" of social media services, as we will call Facebook's Users for the sake of this point. There will be some Users who would be willing to pay £*X* for Facebook's services and for whom £*X* is the consumer surplus because Facebook is provided for "free". As the price for Facebook's services diminishes, so too <u>more</u> users will be willing pay the lesser amount. The "equilibrium" point, in this particular market, is a price of zero, but there can be little doubt but that the User base could be expanded still further were Meta to elect to <u>pay</u> Users to subscribe to Facebook (a so-called negative price). This is why the "demand curve" for the sale of social media services generally, and Facebook in particular, will slope downwards from left-to-right: demand will be higher at the lower price.

(ii) What makes zero the "equilibrium" price? In a "normal" market – that is to say, not a two-sided market – the key driver will be the service provider's costs (here, Meta's costs of providing Facebook) and competition between Meta and other providers of similar services. Producer surplus is the difference between how much a supplier would be willing to accept for a product versus how much they can receive by selling the product at the market price. The difference or surplus amount is the benefit the producer receives for selling the good in the market. Normally,

the price will not be zero, because (even in a perfectly competitive market) producing the product will involve some cost, which must be recouped. In a market where Facebook is said to be a dominant product, one would expect Meta's producer surplus to be unconstrained by competition, and so higher than it ought to be in a competitive market.

(iii) Yet, we know that Facebook is provided to Users at zero monetary cost, which is not the price that would pertain in a normal market. The reason a zero monetary price is economically explicable is because of the advertiser market. Obtaining the volume of User's eyeballs (and their data) that is produced by a "zero" price maximises Meta's advertising revenue such that – inferentially, and treating Meta as a profit-maximiser – it would cost more to Meta in lost advertising revenue than Meta would gain in increasing the price of social media services to Users.

(iv) The extent to which Meta's advertising revenues are affected depends on the consumer surplus of the purchasers of advertising services. (It might appear a little odd to speak of "consumer surplus", because the purchasers of advertising services are themselves sellers not buyers, but when it comes to advertising services they are consumers.) The consumer surplus of purchasers of advertising services will be measured by reference to a fairly straightforward monetary analysis. Advertising services will be bought until they cost more (in the judgement of the purchaser of those services) than the benefit of the increases in sales achieved by the advertising services. In these terms, the value of advertising services will also vary from purchaser to purchasers, according to their consumer surplus. Once again, the demand curve slopes downwards from left-to-right – there will be more demand, the lower the price.

(v) The point is that both demand curves are relevant to Meta, and it is their interaction that will affect the prices that Meta charges for its "platform" – Facebook – which is both the vehicle for providing social media services to Users and the vehicle for providing advertising services to third party sellers.

(3) *"Cost" is very difficult to compute.* At points in the PCR's case (and certainly in the Claim Form) much was made of the low marginal cost to Meta of providing Facebook to the next (the marginal) User. That is, almost certainly, correct, and the same can be said of the marginal cost of supplying the marginal user of a telecommunications network. But that might be said to miss the point. The provider of the telecommunications network will have spent, upfront, a great deal of money in setting up the network before providing a service to anyone. Put another way, the marginal cost of supplying the first user is immense. We have no intention of framing the appropriate approach to the assessment of cost: but this is something that a methodology based upon an excess of price over "cost" will have to grapple with.

(4) *Excess of price over cost is very difficult to define. United Brands* makes clear that something is to be derived from prices that are in excess of cost, but that even prices well in excess of cost need not necessarily be abusive within the meaning of the Chapter II prohibition.[60] This, in a very real sense, is why the test for "unfair" pricing in the case of the Chapter II prohibition is so fluid: even in a competitive market, prices may significantly be in excess of cost, and not just in the short-run.

48. Having set out some of the difficulties, we turn to the methodology advanced by the Proposed Class Representative.

[60] One instance of this is the case articulated in *Napp* (see paragraph 45 above). In the "short run", whatever that means, excessive prices can be the signal for others to enter the market. As a result of such entry, encouraged by high prices, the prices fall.

(c) The methodology of the Proposed Class Representative

49. We should say, at the outset, that in any event the methodology which the Proposed Class Representative puts forward will need to be clarified before this claim can proceed. There are sufficient mismatches, inconsistencies and deficiencies between Harvey 1 and Harvey 2 (Harvey 2, we should say, sought to respond to a report submitted by a Mr David Parker, of Frontier Economics, on behalf of Meta ("Parker 1")) and the manner in which the methodology was described during the oral hearing to require this.

50. But we have concluded that far more is required than a mere clarification of approach. The purpose of this section is not so much to describe Mr Harvey's approach – for it does not emerge clearly enough from the material before us, including the oral submissions over a three-day hearing – as to identify the significant methodological difficulties that we have identified in the approach as we understand it. These need to be rectified if this matter is to proceed. We would stress that this list is not intended to be – indeed, cannot be, given our inability to understand fully what the PCR intends – comprehensive.

51. Paragraph 3.8 of Harvey 1 – set out in paragraph 31 above – sets out a measure of "economic loss" for computing an overcharge that seems to be at least defensible. However, paragraph 3.9 (and the remainder of the analysis, if we may respectfully say so) goes very badly wrong in trying to articulate "a variety of possible competitive counterfactuals". That is to pre-suppose the very outcome that we are searching for: it assumes that which needs to be established, namely that there is an abuse of a dominant position. Now, for purposes of strike-out, that is an assumption we are prepared – indeed, obliged – to make. But for purposes of assessing whether there is an overcharge and, if so, how great it is, one cannot have a methodology that assumes that which it is supposed to demonstrate. What paragraph 3.9 does is assert that the situation that presently pertains (an equilibrium price in the social media market where Facebook is priced at zero) is infringing competition law, and needs to be replaced by a different system, comprising one of the various options set out in paragraph 3.9.

52. That is not the purpose of the inquiry at trial at all. The purpose of the inquiry at trial is to work out the extent to which the price actually charged by Meta is abusive. That involves not working out what price would pertain if the market were differently structured, but working out whether Meta's price is too high.

53. Mr Harvey's "option 1" – considered in Harvey 1/paragraphs 3.18 to 3.20 – explicitly tries to find "suitably "close" comparator markets" to be "used to infer the price that users would receive in the competitive counterfactual".[61] That is not the relevant counterfactual. The relevant counterfactual for Mr Harvey to compute is what price would Users pay if the abuse (the excess price) was removed, which involves an altogether different approach.

54. Mr Harvey's "option 2" is no better.[62] This option – which, as we understand it, has undergone some evolution – involves:

(1) Computing Meta's "excess profits". In and of itself, this is not an unhelpful metric to have, and Mr Harvey approaches it in a variety of ways, one of which is the difference between Meta's actual return on capital employed ("ROCE") and the return Meta would make in a "competitive" market, that return being measured by the weighted average cost of capital ("WACC"). On its own, this metric is no more than a mathematical means of calculating one potential outcome of option 1.

(2) Option 3, however, involves assessing a user's valuation of the value received from Facebook.[63] Thus, Harvey 1/paragraph 3.32 says:

> "…in a competitive market for user data, users would only provide their data for a price commensurate with the value they place on this data. In other words, the value users place on their data reflects the price at which they would be willing to give up their data in a competitive market."

[61] To quote from Harvey 1/paragraph 3.18.
[62] See Harvey 1/paragraphs 3.21*ff*. Option 2 needs to be understood with "option 3". On its own, it is no more than a variant of or crystallisation of option 1.
[63] See Harvey 1/paragraphs 3.31*ff*.

This is tendentiously put, because it again assumes that which needs to be established. But an assessment of what value Users derive from Facebook – bearing in mind that consumer surplus is a subjective, individual, measure – would be a helpful metric to have. Again, the present equilibrium payment to Users is zero, but it would be helpful to know what would happen to demand if *(i)* Meta charged for Facebook and *(ii)* if Meta paid Users to use Facebook.

(3) In submissions and – we think, in Harvey 2[64] – Mr Harvey suggested that the price that would be agreed in a "competitive" market would lie somewhere between the maximum that Meta could afford to pay its Users (represented by the excess of ROCE over WACC[65]) and the minimum that Users would accept (being a rate above their value of the data they were providing to Meta[66]).[67] As to this:

(i) There are a number of unspoken assumptions here, which would need to be unpacked.

(ii) The price so obtained is not – or is not axiomatically – what the *United Brands* test would take as unfair and so an infringement of the Chapter II prohibition.

(iii) There is a failure to consider the operation of the two-sided market in this case. Let us assume – in the PCR's favour – that Meta is dominant in both markets, and so can to an extent price independently of market forces. We cannot say what the effect of Meta having to pay for data would entail. It may be that the profit maximising course would be for Meta to absorb the cost, and keep its prices in the advertising market the same. But it may be that Meta could successfully maintain its rates in the

[64] See, for instance, Harvey 2/paragraph 3.27.
[65] Or whatever other way Mr Harvey might choose to calculate that excess.
[66] The Proposed Class Representative and Mr Harvey assume that, in a competitive market, Users would charge for their data. That may or may not be right: but it cannot be assumed.
[67] Day 1/89/16 – 25; Day 2/14/16 – 15/18; 34/24 – 35/1; 44/9 – 13; Day 3/67/17 – 24.

advertising market whilst selling a less targeted (because of less User data) service. We do not know.

55. We have not spent very much space deconstructing Harvey 2. Re-reading his supplemental report, one gets a sense of an unstated, but comprehensive, change of approach, rather than a defence of the existing methodology articulated in Harvey 1, in light of criticisms made by Meta's expert Mr Parker in Parker 1. We consider that if the PCR's methodology has changed, then it was incumbent on the PCR to articulate this change specifically and unequivocally. It is not our function to seek to second-guess the methodology put forward by a proposed class representative. To the extent we have misunderstood or misstated Mr Harvey's approach, this is not for a want of trying on our part.

56. It is not for us to attempt an articulation of a positive case on behalf of the PCR. That is not our function. We operate in an adversarial system, where it is the function of the Tribunal to decide cases that are articulated before us. With this general point well in mind, we venture two suggestions, one general and one specific to this case:

(1) The general suggestion is this: we doubt very much whether any expert can articulate a methodology for assessment of loss to the class without clearly understanding – and setting out or referencing in their report – the legal basis for contending that a particular loss is caused by the infringement that has been pleaded. In short, there is a nexus between *(i)* the exact breach of duty alleged, *(ii)* the framing of the counterfactual needed to put the claimant class in the position they would have been in had the tort not been committed, and *(iii)* the method of quantifying the damage sustained as a result. This needs to be clearly set out, and obviously involves both a legal and an economic or accounting expertise.

(2) Turning to the specific, we appreciate that Meta's "excess" profits (and, we stress, we are assuming these, given the case that has been pleaded by the PCR) are highly relevant to any case alleging unfair prices. But the claim that there has been abusive pricing requires more than this

assertion, and needs to be framed within the flexible framework of the *United Brands* test. In this case, because there is a two-sided market, as we continue to call it, the potentiality for the same excess profits to be the result of unfair prices in two markets cannot be forgotten. In other words, there is the possibility – to put it no higher than that – that there has been an unlawful overcharge not just to Users, but to the advertisers (who, after all, are how Meta monetises Facebook) also. We fully appreciate the Meta will likely deny this, and that a loss to advertisers is not something that the PCR has any responsibility to recover, acting (as the PCR intends to do) only for the User class. But the Tribunal must be astute to avoid over- as well as under-compensation, and this is a point that needs at least to be addressed in any methodology advanced in this case.

(3) Conclusion

57. We have sought to be as helpful as we can be to articulate our issues with the methodology advanced by the Proposed Class Representative. That is because we do not wish to say, without a degree of specificity, that the *Pro-Sys* test is comprehensively not met in this case. But that, ultimately, is our conclusion. Without significantly more articulation, there is no blueprint to trial, and the PCR has unequivocally failed the *Pro-Sys* test.

58. It follows that there can be no question of acceding to the application at this stage. Meta invited us – if this was our conclusion – to put the application "out of its misery", and to refuse it. We decline to do so, unless that is an order that the Proposed Class Representative asks us to make. Our preference – consistent with the importance of access to justice articulated by the Supreme Court in *Merricks* – is that the Proposed Class Representative have another go. But we wish there to be no misunderstanding: the methodology so far advanced by the PCR will need a root-and-branch re-evaluation, and mere tinkering with the methodology will not do. If the PCR is minded to simply "tinker", then it is probably better for the application to be refused, and for the PCR to seek a review of our decision in the Court of Appeal. (To be clear: this should not be

taken as a hint that we would be minded to give permission to appeal: that will have to be applied for, in the usual way.)

F. A COST/BENEFIT ANALYSIS

59. In *O'Higgins* at [288(2)], the Tribunal said thus:

> "…we consider that rule 79(b) obliges us to consider the benefits and disbenefits of continuing the proceedings in an altogether more open-textured and broader framework. In short, we consider that, in a very broad-brush way, we must consider whether there are adverse effects ("costs") in allowing these proceedings to continue. In short, "costs" does not refer to the financial costs being incurred by the funders and by their contingently instructed lawyers. It refers to disbenefits in an altogether broader framework…"

60. Given our conclusions in relation to the *Pro-Sys* test, we do not consider that it is appropriate to consider this objection any further at this stage. The methodological problems identified wholly obscure the cost/benefit analysis we would have to conduct, and this ground of objection – given these methodological problems – essentially duplicates Meta's contention that the *Pro-Sys* test is not met (as, indeed, it is not). We do not think it is pointful to consider this second line of attack. Whether it has substance in light of a new methodology is not something on which it would be appropriate to speculate.

61. If <u>obliged</u> to make a ruling, then (for the reasons we have given) rule 79(b) is not met: we can see no point in permitting an untriable case to proceed to trial, and a number of very good reasons to stop it from so proceeding, namely wasted costs, wasted time and the public interest in this Tribunal hearing and disposing of matters that cannot, whatever their merits, be properly tried.

G. DISPOSITION

62. Unless the Proposed Class Representative invites a different order, we will stay this application for a period of six months so as to enable the PCR to file additional evidence setting out a new and better blueprint leading to an effective trial of these proceedings. If the PCR requires more time than this, then an application (with reasons) will have to be made. If no such application is made, then, absent a new and better blueprint we will lift the stay and reject the

application. If a new and better blueprint is produced, then we will give appropriate directions to enable the renewed application to be determined.

Sir Marcus Smith President	Derek Ridyard	Timothy Sawyer, CBE

Charles Dhanowa, OBE, KC (Hon) Registrar	Date: 20 February 2023