

IN THE COMPETITION APPEAL TRIBUNAL

Case number: []

BETWEEN:

VICKI SHOTBOLT CLASS REPRESENTATIVE LIMITED

Applicant/Proposed Class Representative

- and -

VALVE CORPORATION

Respondent/Proposed Defendant

COLLECTIVE PROCEEDINGS CLAIM FORM

Applicant / Proposed Class Representative: Vicki Shotbolt Class Representative Limited with address for service c/o Milberg London LLP, Third Floor, Sutton Yard, 65 Goswell Road, London, EC1V 7EN.

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Applicant's counsel: Robert Palmer KC, Julian Gregory and Will Perry of Monckton Chambers, 1-2 Raymond Buildings, Gray's Inn, London, WC1R 5NR, Tel: 0207 405 7211.

Respondent / Proposed Defendant: Valve Corporation, 10900 NE 4th Street, Suite 500, Bellevue, Washington 98004, United States.

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I. INTRODUCTION AND SUMMARY

1. This application, filed under Rule 75 of the Competition Appeal Tribunal Rules 2015 (the “**Rules**”), is for a collective proceedings order (“**CPO**”) to commence opt-out collective proceedings under section 47B of the Competition Act 1998 (the “**Act**”), and for the Applicant – Vicki Shotbolt Class Representative Limited, an English company limited by guarantee – (the “**Proposed Class Representative**” or “**PCR**”), to be authorised as the class representative.¹
2. The claims that the PCR seeks to combine in these collective proceedings (the “**Claims**”) are standalone claims under section 47A of the Act on behalf of around 14 million UK-based consumers who purchased video games designed to be played on personal computers (“**PC Games**”, or “**Games**”)² and/or additional content (including subscriptions) for such Games such as extra storylines, characters, features or in-game currency (“**Add-on Content**”), (collectively the “**Products**”), during the Relevant Period “**Relevant Period**” (the period from the start of the Class Period, defined at §243(b) below, to the date of final judgment or earlier settlement of the Claims).
3. The PCR contends that the Proposed Defendant, Valve Corporation (“**Valve**”), which operates Steam, the leading PC Game distribution platform, has committed, and continues to commit, an abuse of a dominant position, in breach of s. 18 of the Act (the “**Chapter II Prohibition**”) and (for the period prior to 31 December 2020) Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) (“**Article 102**”). Specifically, the PCR contends that Valve has abused its dominant position by: (a) imposing Platform Parity Obligations (“**PPOs**”) that prohibit publishers, which market PC Games, from selling Products through other distribution channels on better terms than the same Products are available on Steam; (b) restricting the ability of users to purchase Add-on Content for games purchased on Steam through other distribution channels (a ‘tying’ or ‘anti-steering’ infringement); and/or (c) charging publishers unfair and excessive commission rates for distributing the Products (collectively the “**Infringing Conduct**”).

¹ Ms Shotbolt’s private address can be provided confidentially to the Tribunal on the Tribunal’s request.

² In this Claim Form, the term “PCs” includes personal computers manufactured by Apple and/or which use the Mac Operating System.

4. The PCR contends that the Infringing Conduct has increased the prices paid by class members for the Products over the Relevant Period by an aggregate total of £656m, including interest. The PCR's expert estimates that average losses per class member are likely to be in the region of £22 to £44.³
5. The following paragraphs provide a high-level summary of the Claims, described in more detail in Section II.
6. The video game industry is the largest entertainment industry in the UK, ahead of the TV, video and music industries: in the UK, 60% of adults, and 93% of 10 to 16-year olds, regularly play video games.⁴ Different devices are used to play video games, including PCs, consoles (such as PlayStation or Xbox) and mobile phones. These Claims are focused on video games played on PCs ("**PC Games**" or "**Games**"). Consistent with the approach taken by the European Commission ("**Commission**")⁵, the PCR's expert considers that PC Games and related services are in different markets to those for consoles and mobiles.
7. PC Games are marketed and distributed by publishers, which either develop them in-house or pay third party developers to design them. Historically, Games were distributed through physical media, e.g. CDs that consumers would buy from bricks-and-mortar stores such as HMV or Game. Today, however, virtually all Games are distributed digitally (only around 1% of Games are still distributed physically).⁶ For digitally distributed Games, historically publishers generated revenue by charging users an up-front payment to download a Game ("**Pay-to-Download**"). While a considerable proportion of Games are still distributed on a Pay-to-Download basis, the majority of PC Game revenue is now generated through sales of Add-on Content for Games⁷ (a significant number of which Games are "**Free-to-Download**"), such as additional storylines, characters, outfits etc.

³ The damages estimates that have been calculated by the PCR's expert remain provisional at this stage of the Claim and are subject to final determination.

⁴ See, https://www.ofcom.org.uk/_data/assets/pdf_file/0023/238361/online-nation-2022-report.pdf . [CF/39/2420-2547]

⁵ See Harman 1 §4.3.12. [CF/4/176]

⁶ See Harman 1 §4.3.11. [CF/4/176]

⁷ See Harman 1 §5.7.2 and Appendix E. [CF/4/208, 337-340]

8. Steam, owned by Valve, is the leading digital distribution platform for PC Games (“**Distribution Platform**”). Steam’s two main Distribution Platform rivals are the Microsoft Store (which also sells games for Microsoft’s Xbox console) and the Epic Games Store, launched in 2018. Other Distribution Platforms have very low market shares and niche offerings. Distribution Platforms provide services in two-sided markets, as they offer distribution services to publishers and retail services to consumers. The other way in which consumers can digitally download Games (and Add-on Content for them) is through direct distribution channels, operated by publishers, such as publisher websites or platforms.
9. Valve started out as a PC Game publisher. It initially launched Steam in 2003 primarily to provide patches and updates for its own games. In 2005, however, Steam began distributing the Games of third-party publishers in exchange for a percentage of sales revenues, i.e. a commission charge. From then to 2018, Valve charged all publishers a commission rate of 30%.⁸ In November 2018, Valve introduced a stepped commission rate structure involving lower rates for Games with high sales volumes, but its average commission rate remains at around [REDACTED].⁹
10. Since its launch, Steam has been the leading Distribution Platform, and remains so today. Steam hosts at least 93% of all Games.¹⁰ It has several times more users than its rivals. Gamers spend around six times more time playing Games on Steam than on the Epic Game Store, which holds the second largest library (at just 2,900 Games, compared to the circa 74,000 games available on Steam). Steam has been described by a commentator as “*by far the biggest*” Distribution Platform.¹¹ For these and the other reasons detailed below, the PCR contends that Valve has a dominant position on relevant consumer (retail) and publisher (distribution) markets.
11. As detailed at §82 below, several large companies have sought to compete with Steam, with limited success. A number of rival Distribution Platforms have been launched, only

⁸ Harman 1 §3.8.2. [CF/4/158]

⁹ Subject to Steam Keys sales, as discussed at §45 and §60-66 below. Harman 1 §5.6.4 and Table 5-6. [CF/4/206]

¹⁰ As of 2023: Harman 1 §5.3.5 and Table 5-1 [CF/4/197-198]

¹¹ See Exhibit GH-192 to Harman 1.

subsequently to close down.¹² Two leading publishers have removed their Games from Steam, in order to distribute them exclusively through direct distribution channels and/or the Epic Games Store, only subsequently to return.¹³ The Epic Games Store has incurred large losses at least in part as a result of paying publishers hundreds of millions of pounds to distribute their Games exclusively through Epic. The CEO of Epic Games has stated that Steam “*can only be challenged through exclusives*”, as “*Steam has veto power over prices*”.¹⁴

12. This appears to be a reference to the **First Abuse** alleged by the PCR in these Claims, namely that Valve has entered into PPOs under which publishers are prevented from selling Products through other distribution channels more cheaply or earlier than they are available on Steam, or in differentiated form. Valve’s PPOs constitute ‘wide’ (rather than ‘narrow’) parity obligations, as they impose restrictions on how publishers sell their Products through direct distribution channels as well as on rival Distribution Platforms and through online or bricks-and-mortar retailers (collectively “**Other Distribution Channels**”). Wide parity obligations are generally regarded as unlawful. Indeed, under the Competition Act 1998 (Vertical Agreements Block Exemption Order) 2022, wide PPOs are treated as ‘hardcore restrictions’, which the Competition and Markets Authority has stated in guidance is a category of restriction “*for which it is presumed that they generally result in harm to competition*”.¹⁵
13. The **Second Abuse** is that, for Games purchased on Steam, Valve imposes restrictions on the relevant publishers that mean that Add-on Content for those Games must also be purchased from Steam, e.g. rather than through Other Distribution Channels. These restrictions, imposed through tying and/or ‘anti-steering’ obligations, foreclose competition in the markets for the sale and distribution of Add-on Content for such Games, reserving those markets for Valve.
14. The **Third Abuse** is that Valve’s commission charges to publishers (for both Games and Add-on Content) are unfair and excessive. Valve’s 30% commission (which remains the rate paid in respect of the overwhelming majority of sales) has been in place since Steam

¹² See Harman 1 §3.10.2. [CF/4/162-164]

¹³ See Harman 1 §§3.10.4 and 5.3.7. [CF/4/165, 198]

¹⁴ See Exhibits GH-219 and GH-232 to Harman 1.

¹⁵ See Exhibit GH-250 to Harman 1.

started selling third-party Games in 2005, at a time when it was competing mainly against bricks-and-mortar stores, and has been retained notwithstanding the dramatic increase in PC Games sales that has taken place since then, and the fact that Valve should now be benefitting from very significant economies of scale and scope. Other operators, including Epic, have publicly stated that the costs of operating a Distribution Platform are equivalent to only around 5 to 7% of revenue.¹⁶ The lawfulness of 30% commission charges in adjacent markets is currently being considered in the ongoing *Kent* and *Coll* claims currently before the Tribunal.¹⁷

15. The PCR contends that the three abuses constitute a single and continuous infringement, including because Valve's PPOs and tying/anti-steering restrictions are designed to reduce the competitive pressure to which Steam is subject, so as to enable it to continue charging high commission charges. Those commission charges are hugely profitable for Valve: in 2011 its CEO asserted that it was more profitable per employee than Apple or Google.¹⁸ Despite Valve's extremely high levels of profitability, the relevant markets have not experienced the sort of sustained, successful competitor entry or expansion that might have been expected, and which would likely have competed down Valve's high commission rates, in large part because of the restrictions imposed by Valve under the first two abuses.
16. The PCR contends that, absent (a) the PPO and/or (b) Valve's excessive commission charges, both commission rates and Product prices would have been lower across the relevant markets, including because publishers would have been free to sell Products through Other Distribution Channels more cheaply than on Steam, and reductions in commission rates would have been passed-on to consumers through lower prices. The tying/anti-steering restrictions have exacerbated the effects of these two abuses.
17. While the Claims are standalone, very similar PPO allegations are being advanced against Valve in the US in the *In re Valve* litigation, summarised at §§84-85 below. Amended complaints have survived motions to dismiss in two sets of proceedings that

¹⁶ See Harman 1 §§ 7.6.14-7.6.16 [CF/4/256].

¹⁷ *Kent v Apple*, Case No 1403/7/7/21; *Coll v Alphabet*, Case No 1408/7/7/21.

¹⁸ See, <https://www.gamesradar.com/internal-valve-study-found-the-house-of-steam-was-making-more-money-per-employee-than-facebook-apple-and-microsoft-over-dollar780000-per-head-a-year/> [CF/55/2699].

have since been consolidated, and it is apparent from the plaintiffs' motion for certification that many of the allegations advanced in those proceedings are supported by documentary evidence.¹⁹ Also, on 13 May 2024, the Polish competition authority launched a preliminary investigation into competition concerns which the press release stated related to "*the actions of providers of platforms such as ... Steam*".²⁰ The concerns being investigated appear to overlap with the PPO allegations in these Claims as they were specifically stated to include "*applying restrictions on the sale of games and ancillary content on competing platforms or online stores, interfering with the pricing and discount policies of game developers and publishers, or restricting market access to competing platforms and other digital service providers*".

18. The PCR's Litigation Plan envisages that relevant materials from the US proceedings and Polish investigation could be provided following certification as an initial tranche of disclosure.²¹ Other aspects of the PCR's proposed methodology, including 'blueprint to trial' considerations, are addressed in Section III(E) below.
19. On 24 January 2024, the PCR sent a pre-action letter before claim to the Proposed Defendant setting out initial details relating to the Claims and requesting certain disclosure. **[CF/24/667-681]** On 29 February 2024, the Proposed Defendant responded, enclosing the Steam Subscriber Agreements from 2013 to the current date. **[CF/26/683-684, 699-1423]** The Proposed Defendant failed to provide the Steam Subscriber Agreements from 2003-2012 and the Steam Developer Agreements from 2003-2023, as had been requested; nor did the Proposed Defendant provide requested information relating to its accounts. At the time of filing, the Proposed Defendant had not provided any substantive response to the allegations in the claim.
20. The PCR does not, at this early stage and prior to disclosure and factual and expert evidence, have all of the information and/or documentation that will ultimately be relevant to the determination of the Claims. Accordingly, the PCR reserves its right to

¹⁹ Document 204-4 – Motion to Certify **[CF/33/2165-2170]**.

²⁰ See Press Release, <https://uokik.gov.pl/en/video-game-market-preliminary-investigation> **[CF/40/2548-2550]**.

²¹ See PCR's Litigation Plan at §6.6. **[CF/14/556]**.

amend this Claim Form in due course including in the light of disclosure, witness evidence and/or explanation.

21. The remainder of this Claim Form is structured as follows:²²
 - (a) Section II sets out the basis of the Claims – i.e. the information and statements required under Rule 75(3)(f)-(j).
 - (b) Section III addresses the authorisation and eligibility requirements – i.e. the information and statements required under Rule 75(3)(a)-(e).

22. The following documents are appended to this Claim Form:
 - (a) A draft Collective Proceedings Order as required by Rules 75(5)(b) and 80 [CF/2/114-117];
 - (b) A draft Notice of the CPO to Proposed Class Members as required by Rules 75(5)(c) and 81 [CF/3/118-125];
 - (c) A first witness statement of Ms Vicki Shotbolt (“**Shotbolt 1**”), the sole director of the PCR, which addresses inter alia the requirements of Rule 78 [CF/6/393-416]. Exhibited to Shotbolt 1 are:
 - (i) the PCR’s curriculum vitae [CF/7/417-418];
 - (ii) the Litigation Funding Agreement and the Priorities **Agreement** [CF/8/419-446] & [CF/12/520-532];
 - (iii) the Funder’s after-the-event insurance policy [CF/11/485-519];
 - (iv) the Litigation Plan [CF/14/542-561] which also contains the Notice of Administration Plan [CF/15/562-592], the Litigation Timetable [CF/16/593-597]; and the Litigation Budget [CF/17/598].

²² The information and statements required under Rule 75(2) are primarily set out on the first page of this Claim Form.

- (d) An expert report by Mr Greg Harman of Berkeley Research Group (“**BRG**”), dated 3 June 2024 (“**Harman 1**”) [CF/4/128-380].
 - (e) An application to serve the Defendant out of the jurisdiction, comprising: (i) an application document, setting out why the PCR considers the requirements for service out to be satisfied; (ii) a supporting witness statement from the PCR’s solicitor (“**Pearman 1**”); (iii) a draft of the Order sought; and (iv) accompanying documents.
23. Unless otherwise indicated, the defined terms used in this Claim Form and the documents appended to it should be taken to align with those used in Harman 1, as summarised in the Glossary to that report at Appendix C. [CF/4/317-320]

II. THE BASIS OF THE CLAIMS (RULE 75(3)(F)-(J)).

24. The Claims are brought on a standalone basis and not in respect of any infringement decision (Rule 75(3)(f)).²³
25. The remainder of this part of the Claim Form sets out the information and statements required by Rule 75(3)(g)-(j) and in particular:
- (a) The factual context for the Infringing Conduct, including the relevant regulatory framework (Rule 75(3)(g));
 - (b) The nature of the Infringing Conduct, including the facts and contentions of law relied upon (Rule 75(3)(g)-(h));
 - (c) The relief sought in the proceedings (Rule 75(3)(i)); and
 - (d) The PCR’s observations on which part of the UK the proceedings are to be treated as taking place under Rule 18 (Rule 75(3)(j)).
26. These issues are addressed below under the following headings.

²³ See, however, §17 above and §§84-85 below relating to the *In re Valve litigation* in the US and the investigation launched by the Polish competition authority.

A	Factual background
B	Market definition and Dominance
C	Abuse
D	Causation and Loss
E	Proposed methodology
F	Jurisdiction and applicable law
G	Relief
H	Relevant part of the UK

A FACTUAL BACKGROUND

The video game industry

27. The video game industry is the largest entertainment industry in the UK, ahead of the TV, video and music industries, with 60% of adults regularly playing video games across consoles or mobiles phones²⁴, and 93% of 10 to 16-year-olds playing video games online regularly.²⁵
28. Game “**developers**” create video games (i.e. design the game, and write the software to bring it into existence), while “**publishers**” market and distribute video games and often also provide funding to developers. However, there is no clear-cut distinction between publishers and developers, including because publishers sometimes contribute to video game design (as they are concerned with its marketability), and some larger companies such as Blizzard Entertainment and Epic Games operate as hybrid publishers/developers (i.e. a publisher may have an in-house development team that it uses to create video games in addition to, or instead of, commissioning games from third party developers).²⁶

²⁴ See, [Online Nation 2022 Report \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/online-nation-2022/online-nation-2022.pdf), Figure 3.4 at page 84. [CF/39/2420-2547]

²⁵ The Rip Off Games, How the new business model of online gaming exploits children, A Parent Zone Report, 29 August 2019, [PZ The Rip-off Games 2019.pdf \(parentzone.org.uk\)](https://parentzone.org.uk/wp-content/uploads/2019/08/PZ-The-Rip-off-Games-2019.pdf). [CF/41/2551-2572]

²⁶ References in this Claim Form to “publishers” includes such hybrid publishers/developers.

29. Video games are played on different devices, including PCs, games consoles (e.g. PlayStation or Xbox) and mobile devices (e.g. smartphones or tablets). A video game developed for a particular device will generally only work on that device – e.g. a video game developed for PCs will not ordinarily be playable on a PlayStation console or on an iPhone.²⁷ This claim is concerned with PC Games. As detailed below, different versions of PC Games may be created for different PC Game distribution platforms.

PC Game Distribution Platforms

30. Historically, consumers purchased physical media (such as compact disks or “CDs”) from bricks-and-mortar shops, such as HMV or GAME, which contained Games that could then be downloaded to the PC. However, the market for the distribution of video games is now dominated by digital purchase and distribution methods, and only 1% of PC Games are now distributed through physical media. see Harman 1 §4.3.11. [CF/4/176]
31. Steam is the leading digital Distribution Platform for PC Games. Such Distribution Platforms sell, and allow gamers to launch and play, Games produced by a variety of third-party publishers, as well as Games produced by the publisher that owns the platform. For example, the Steam platform sells Games from thousands of third-party publishers, as well as Games developed by Valve itself. Today, Steam’s main Distribution Platform rivals are the Epic Games Store and Microsoft Store.²⁸ As well as Distribution Platforms, certain larger publishers have their own direct to consumer distribution channels or storefronts where they distribute their own Games directly to consumers over the internet. In particular, Electronic Arts (“EA”) has its own distribution channel called Origin, on which consumers can purchase and play EA’s Games. Similarly, Ubisoft owns the Ubisoft Connect distribution channel, on which consumers can purchase and play Games produced by Ubisoft.

²⁷ Different versions of the same game may allow cross-platform functionality, or “cross-play”, allowing a player to continue their progress in a game on different devices. Such functionality does not in itself mean that the software itself is fully interoperable across different devices. However, some games may be fully interoperable: for example, a subset of Microsoft’s game library is interoperable between the Xbox console and PCs.

²⁸ See Harman 1 §§5.3.5 – 5.3.10 and Table 5-1 [CF/4/197-199].

32. There are two main ways that consumers can purchase and download digitally distributed PC Games. Consumers can either: (a) purchase and download a Game from the same store or platform (such as from Steam); or (b) purchase a download code for a Game from one location (e.g. from a digital retailer such as Amazon or eBay), and then use the code to download the Game from another platform or store (such as from Steam).
33. Traditionally, publishers generated revenue from Games by charging an up-front payment for consumers to download such Games (known as the ‘Pay-to-Download’ model). Over time, however, other monetisation models have emerged. In particular, consumers now frequently pay to purchase Add-on Content for PC Games - after the initial acquisition of the Game. This Add-on Content may be Downloadable Content (“DLC”), which is content purchased out-of-game (such as, for example, an expansion pack that provides additional storylines, characters or areas), or it may be content acquired through “Microtransactions” completed in-game during gameplay (which may be cosmetic, such as additional ‘skins’ or outfits for characters, or may aid gameplay, such as currency packs, loot boxes or time savers). Some Games, including some of the most popular Games, are based on a ‘freemium’ model under which the core Game can be downloaded for free, and all revenue is generated from Add-on Content. Certain publishers also offer subscription models, for example which grant consumers ongoing access to a PC Game in exchange for periodic payments. Sales of Add-on Content have grown to such an extent that they now account for the majority of spending on Games – i.e. up-front payments to download Games now account for less than half of all PC Game revenue: Harman 1, Appendix E, § E.3.1. [CF/4/338]
34. A “platform-enabled” version of a PC Game refers to a version of a Game designed to run on a specific PC gaming platform, such as Steam. In order to play video games, gamers typically launch the relevant PC gaming platform application, and then enter their login details. Once logged in, gamers can select the relevant Games from a game library, launch and then play the Games all within the PC gaming platform application.
35. Two copies of the same Game title enabled for different platforms are in essence the same Game, in the sense that they will have identical content and video gameplay, including the same levels, story, and features. However, platform-enabled Games are typically not interoperable (fully or at all) across different platforms. While it is sometimes possible for gamers to launch and play a PC Game enabled for one platform

on another platform, known as cross-platform play, the full game functionality will not normally be available.²⁹ In particular, it is not generally possible to port platform-specific functionality – such as social networks, or game saves, which may be important to the user experience – to another platform.³⁰

The evolution of Valve and the Steam platform

36. Before it set up Steam, Valve was a video game developer. In 1998, it released its first Game, “Half-Life”,³¹ to critical and commercial success. Valve subsequently developed other successful video games, most notably the multi-player Game³² “Counter-Strike” (first released in 2000).³³
37. A significant shift in Valve’s business model occurred in 2003 when it launched Steam. Steam was initially designed primarily to provide patches and updates for Valve-developed Games,³⁴ which were much easier to distribute digitally than on physical media such as CDs.
38. Steam was updated in two major ways in 2004 to coincide with the release of “Half-Life 2”.
 - (a) First, Valve allowed users to purchase Half-Life 2 digitally from Steam itself, in addition to the option of purchasing a physical copy.
 - (b) Second, Valve required that, irrespective of where Half-Life 2 had been purchased from, it had to be played via Steam. Valve therefore required all customers who

²⁹ See Harman 1 §§3.6.11-3.6.12 [CF/4/150-151].

³⁰ See Harman 1 § 3.6.12 [CF/4/151].

³¹ Half-Life is a first-person shooter game centred on gun fighting and other weapon-based combat, which the player experiences directly through the eyes of the main character – a scientist who must escape a research facility after it is invaded by aliens following a scientific experiment that went wrong.

³² In a multiplayer video game, more than one person can play in the same game environment at the same time, either from the same location (e.g. using the same PC), or remotely – such as over the internet. As multi-player games allow gamers to interact with one another, they provide an element of social communication absent from single player games.

³³ Counter-Strike is a multiplayer game in which teams of terrorists battle to perpetrate an act of terror while counter-terrorists try to prevent it. Counter-Strike was originally released as a modification to Half-Life. Valve subsequently acquired the intellectual property rights and turned it into a separate retail product.

³⁴ “Patches” fix flaws, or “bugs,” in a game’s software after initial release, while updates often incorporate new functionality or content into the game.

wanted to play Half-Life 2 to create a Steam account and install Steam on their PCs. Consumers that purchased the PC version of Half-Life 2 other than on Steam were provided with codes they could submit to Steam to add Half-Life 2 to their Steam game library. This approach was thereafter adopted in respect of other popular PC Games developed and published by Valve, such as Counter-Strike.

39. In 2005, Valve began to contract with third-party publishers to distribute their PC Games digitally through Steam in exchange for a percentage of sale revenues, i.e. a commission charge: see further §§53-55 below.

The Steam platform today

40. Today, Steam is the leading Distribution Platform by both revenue and volume. Steam offers over 74,000 Games, totalling 93% of all available PC Games, while the Epic Games Store and the Microsoft Store, Steam’s largest Distribution Platform rivals, each offer fewer than 3,000.³⁵ In 2021, Steam had 120 million monthly active players with 62.6 million active daily, as well as up to 24.8 million concurrent players.³⁶
41. Distribution Platforms, including Steam, operate in two-sided markets, as they offer services to both consumers and publishers.³⁷ In particular, Distribution Platforms offer services that allow consumers to purchase both PC Games and Add-on Content for those games, and provide publishers with distribution services for Games.³⁸ The following subsections discuss how consumers experience the Steam platform, and Valve’s arrangements with publishers.

User experience of the Steam platform

42. To use Steam, customers must create a user account using an email address and agree to the terms of the Steam Subscriber Agreement. Once an account has been set up, users are able to access the “**Steam Desktop App**”, that is made available for the major PC

³⁵ Harman 1 §5.3.5 and Table 5-1 [CF/4/197-198].

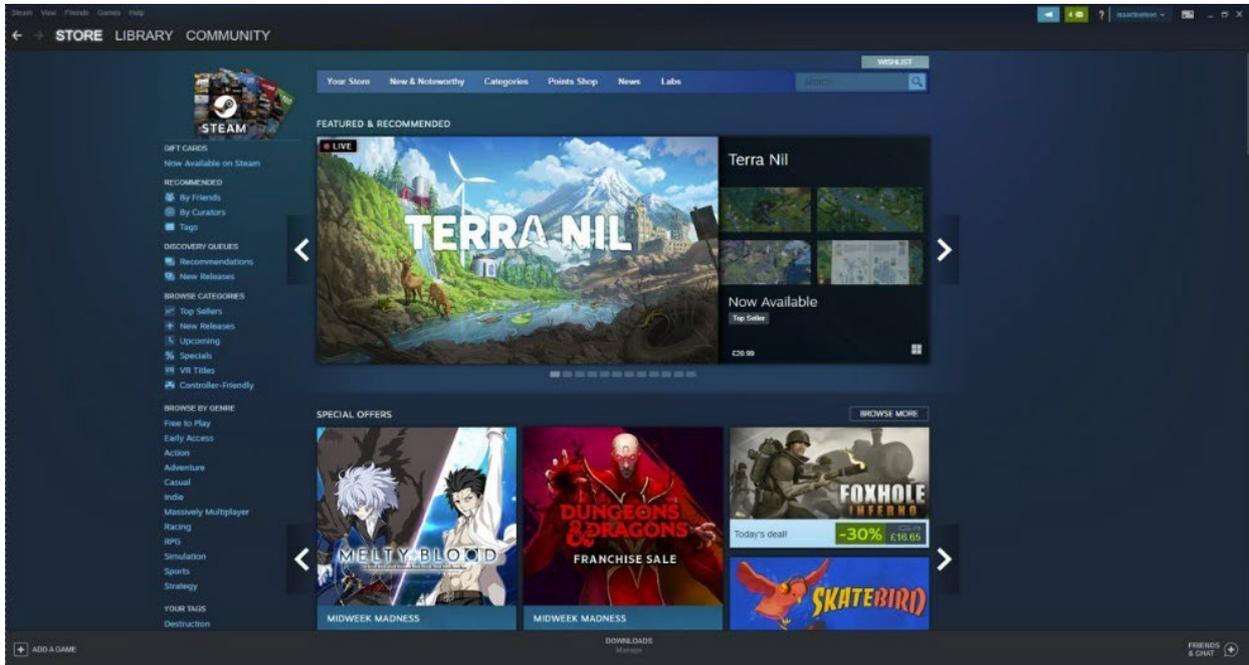
³⁶ See, [Steam :: Steamworks Development :: Steam - 2020 Year in Review \(steamcommunity.com\)](https://steamcommunity.com) [CF/42/2573-2580].

³⁷ See Harman 1 §4.2.10 [CF/4/170].

³⁸ See Harman 1 §§3.7.9 – 3.7.15 [CF/4/153-157].

operating systems (Windows, Mac OS and Linux).³⁹ Users are also able to access certain functionalities via the Steam website, <https://store.steampowered.com/> (“the Website”).

43. A screenshot of the Steam Desktop App landing page is shown below:



44. The Steam Desktop App offers,⁴⁰ *inter alia*, the following user features (listed in the top left corner of the above screenshot from left to right):

- (a) The “**Steam Store**”, from which users can purchase PC Games, DLC and related content.
- (b) The “**Steam Library**”, which stores Games that users have purchased from the Steam Store, as well as Games enabled for the Steam platform originally purchased through other sales channels (e.g. via Amazon.co.uk) but which can be downloaded into the Steam Library.
- (c) The “**Community Market**”, a virtual trading platform designed by Valve that allows users to trade game-specific items, trading cards, backgrounds and emoticons.

³⁹ Valve provides Steam mobile apps on Apple iOS and Google Android which offer similar functionalities. These apps sit in a different product market and are not the subject of this claim.

⁴⁰ The Website allows users to access the Steam Store and Community Market, but not the Steam Library.

45. Consumers may also purchase download codes for Steam-enabled Games from other sales channels, such as digital retailers like Amazon. (Games enabled for other Distribution Platforms can often be purchased using download codes in the same way). In addition, consumers may be provided with download codes for free as part of a promotion, which they can then use to download the relevant Game into the Steam Library. Download codes for Steam-enabled Games are known as “Steam Keys”. See further §§60-66 below.
46. Steam provides a functionality called the “**Steam Wallet**”, a digital tool that allows users to add funds to their accounts, which can then be used to make purchases on Steam, e.g. of Games or Add-on Content (including DLC and to complete microtransactions during gameplay). The current version of the Steam Subscriber Agreement states at clause 3(C) that “*Steam may make available an account balance associated with your Account (the “Steam Wallet”). The Steam Wallet is neither a bank account nor any kind of payment instrument. It functions as a prepaid balance to order Content and Services*”. The Steam Wallet must be used for: (a) any purchases of DLC from the Community Market; and (b) any purchases of Add-On Content within Games (i.e. Microtransactions) that have been accessed via the Steam Library. The Steam Wallet may also be used to purchase Games, though users may also use other payment methods such as their credit or debit card to purchase Games from the Steam Store. Whether users are adding funds to their Steam Wallet or purchasing items using other payment methods, Valve (via its wholly owned subsidiary Valve GmbH) acts as the payment processor.

Valve’s contractual arrangements with publishers

47. Publishers wishing to sell Games on Steam (whether by listing Games for sale on the Steam Store and/or by selling download codes through other channels which can be used to download PC Games on Steam) must become a “**Steamworks Partner**” with Valve by entering into the Steam Distribution Agreement (“**SDA**”).
48. The PCR has obtained a version of the SDA disclosed in the context of litigation in the US between Epic Games and Apple.⁴¹ As this version of the SDA refers to Valve having commission charges of 30%, the PCR infers that it predates November 2018 when Valve

⁴¹ Case No. 4:20-cv-05640-YGR.

introduced its tiered commission structure. It appears from the pleadings in the *In re Valve* litigation that this version of the SDA has subsequently been updated, including to take into account Valve’s revised commission charges.⁴² However, pending further disclosure, the PCR provisionally assumes that, save in relation to Valve’s commission charges, the same terms that are present in this version of the SDA (alternatively substantively equivalent terms) applied throughout the Relevant Period.

49. Pursuant to clause 2.2 of the SDA, the publisher (referred to as the “Company”) must ensure that its Games are “*compatible with Steam and any Steamworks services*” they may choose to use.⁴³ “Steamworks” is defined at clause 1.14 as “*those Steam services and features described on the Steamworks partner website found at <https://partner.steamgames.com/> and any other features and services that Valve decides, in its sole discretion, to make available to Steam Account Owners and/or Company as part of Steamworks*”. In practice clauses 1.1.4 and 2.2 have the effect that publishers must comply with a number of rules contained within “**Steamworks Documentation**” posted on the Steam website. Where this Claim Form refers to Steamworks Documentation, it relies on the current rules accessible via the Steam website and/or previous iterations of the rules referred to in the pleadings from the *In re Valve* litigation.
50. The SDA refers to “Applications”, defined to encompass, in particular, “games” and “Application Updates”, the latter of which is in turn defined, in particular, as “*any updates, corrections and enhancements*” including “*any DLC*”. DLC is defined, at clause 1.8, as “*any online content, features or software ... made available by Company for purchase, download or online access separately from the Application, whether through in-application purchase transactions or otherwise*”. DLC is further stated to include any services provided in exchange for a subscription payment.⁴⁴ Within the SDA, therefore, the term “Application Updates” encompasses the three categories of Add-on Content as defined in this Claim Form (i.e. DLC, Microtransactions and

⁴² E.g. see Consolidated Second Amended US Complaint (defined at §66 below), §89 and fn.29 [CF/35/2177-2291].

⁴³ See also SDA, clause 11. “Steamworks” is defined at clause 1.14 as “*those Steam services and features described on the Steamworks partner website found at <https://partner.steamgames.com/> and any other features and services that Valve decides, in its sole discretion, to make available to Steam Account Owners and/or Company as part of Steamworks.*” [CF/27/685-698]

⁴⁴ SDA, clause 1.8 [CF/27/685]

subscription payments), and the term “Applications” encompasses PC Games and Add-on Content.

51. Under the SDA, among other things:

- (a) The publisher is granted a licence to use the Steamworks Software Development Kit (“**SDK**”),⁴⁵ which contains “*all the scripts and templates for building and uploading your product to Steam.*”⁴⁶
- (b) Either party to the SDA may terminate the agreement “*immediately upon written notice at any time if the other Party is in material breach of any warranty, term ... and has failed to cure that breach within thirty (30) days after written notice thereof...*”.⁴⁷
- (c) The publisher grants Valve licences to reproduce, use, modify, transmit, sell and otherwise distribute the “Applications” via Steam.⁴⁸
- (d) Pursuant to those licences, Games and Add-on Content are sold to consumers by Valve, rather than by the relevant publishers, and Valve receives the revenues from such sales.⁴⁹

52. As for the payment of commission charges by publishers to Valve:

⁴⁵ SDA, clause 11.2. “Steamworks SDK” is defined at clause 1.18 of the SDA as “*the software development toolkit for Steamworks, the Steam Installer, and any other Valve software that is delivered to or made available to [the publisher] for its user pursuant to this Agreement*”. Use of the SDK is mandatory to ensure a game is Steam-enabled [CF/27/686].

⁴⁶ See, Getting Started (Steamworks Documentation). [CF/31/1446-1448]

⁴⁷ SDA, clause 7.2 [CF/27/688].

⁴⁸ SDA, clauses 3.1 and 3.2 [CF/27/686].

⁴⁹ SDA, clause 6.1. See also clause 1(D) of the Steam Subscriber Agreement, which provides that “*Your order through Steam is an offer to Valve to agree on the delivery of the ordered Subscriptions, Content and Services and/or Hardware (the “Product(s)”) in exchange for the listed price. ... In the case of Content and Services, we accept your offer, and conclude the agreement with you, by confirming the transaction and making the Content and Services available to you or, in the case of pre-orders, only by confirming the transaction to you and deducting the applicable price from your payment method.*” [CF/27/687] & [CF/28/1411].

- (a) As set out at clause 6.1, on a monthly basis, Valve provides the relevant publisher with various revenue reports, including a report of the “Adjusted Gross Revenue” used to calculate the amount payable to the publisher.
- (b) “Adjusted Gross Revenue” is defined at clause 1.1 as *“the gross revenue actually received by Valve from Valve’s exploitation of the Applications ... (including, for the sake of clarity, gross revenue generated from subscription fees paid with respect to one or more Company Applications or from distribution of any DLC”,* less certain specified adjustments (including from returns and refunds). “Adjusted Gross Revenue” therefore includes revenue from Games and all types of Add-on Content.⁵⁰
- (c) Valve uses the figures contained in these reports to make monthly payments to publishers of a percentage (reflecting its commission rates) of the relevant “Adjusted Gross Revenue” figure, again pursuant to clause 6.1 of the SDA.⁵¹ In the version of the SDA seen by the PCR, the relevant commission rate is 30% for all publishers. However, as set out below, Valve updated its commission structure in 2018.

Valve’s commission charges

53. As to Valve’s commissions on revenue associated with the sale of their PC Games and the sale of Add-on Content (the “**Commission Charges**”):
- (a) From 2005 to November 2018, Valve charged publishers a fee of 30%.⁵² For example, for a Game sold for £50.00 on Steam, the publisher would receive £35 (i.e. 70% of the sale price), while Steam would receive £15 (i.e. 30% of the sale price). Similarly, if DLC were sold within a Game for £5, the publisher would receive £3.50 and Steam £1.50.

⁵⁰ See, further, the Steamworks news item titled *“Revenue Share Tiers and other updates to the Steam Distribution Agreement”* [CF/57/2723-2724] (1 December 2018; available at <https://steamcommunity.com/groups/steamworks/announcements/detail/1697191267930157838>).

⁵¹ SDA, clause 6.1. [CF/27/687]

⁵² See Harman 1 §3.8.2. [CF/4/158]

- (b) From November 2018 onwards, Valve has applied a stepped commission rate structure of:
- (i) 30% for all revenue⁵³ below aggregate sales of USD 10 million; and
 - (ii) 25% for all revenue between aggregate sales of USD 10 million and USD 50 million; and
 - (iii) 20% for all revenue between aggregate sales above USD 50 million.⁵⁴

54. As discussed further at §§159-160 below, Valve’s Commission Charges are significantly higher than those charged by other Distribution Platforms: in particular, the Epic Games Store and Microsoft Store, Steam’s two closest rivals, both have commission charges of 12% for Games and Add-On Content.
55. For DLC purchased via the Community Market, Valve charges users a “Steam Fee” of 5% of the item sell value, with some purchases attracting an additional 10% commission.⁵⁵

Valve’s pricing terms

56. While publishers are in principle free to set the prices at which their Games and/or Add-on Content are sold on Steam, both initial prices and pricing changes are only implemented on Steam once they have been approved by Valve. The ‘Pricing’ section of the Steamworks Documentation states that “[i]nitial pricing as well as proposed pricing adjustments will be reviewed by Valve and are usually processed within one or two business days”. It further states:

“Q: Can I schedule my price updates to happen automatically? ”

A: No, pricing changes cannot be scheduled to happen automatically, but you have the option to publish prices changes on your own schedule after Valve reviews them, or have Valve publish them immediately after review.

⁵³ The PCR understands that such revenue includes Add-On Content. See the article “*New Revenue Share Tiers and other updates to the Steam Distribution Agreement*”, posted on Steam’s website on 1 December 2018, which explains that “*Revenue includes game packages, DLC, in-game sales, and Community Marketplace game fees.*” [CF/57/2723-2724] Available at <https://steamcommunity.com/groups/steamworks/announcements/detail/1697191267930157838>.

⁵⁴ See Harman 1 §3.8.3 [CF/4/158-159].

⁵⁵ See Harman 1 at Table 3-2 (internal p.31) [CF/4/161].

If you choose to publish price changes yourself, after the price changes have been reviewed by Valve, you will be notified via email. You'll be then given an option to publish your future price change at a time that is convenient for you. Once you publish the changes, they'll immediate be live for customers” (underlining added).

57. This review and approval process effectively gives Valve the ability to veto prices proposed by publishers. As detailed further at §§60-64 below, there is evidence that Valve refuses to approve prices proposed by publishers unless they comply with its PPO terms, i.e. unless a publisher proposes a price for Games and/or Add-on Content that is the same or lower than the price at which the same content is sold through Other Distribution Channels.

Valve's PPOs

58. Valve's contractual documentation contains PPOs relating to the terms on which publishers must sell Products that are sold on Steam and through Other Distribution Channels (“**Multichannel Products**”) that cover (at least):
- (a) the price of Games sold on Steam and through Other Distribution Channels (“**Multichannel Games**”) using Steam Keys. In practice, Valve applies this PPO more widely so as to encompass the price of Multichannel Games sold on Steam and through Other Distribution Channels regardless of whether or not they are distributed through those other channels using Steam Keys;
 - (b) the price of Add-on Content sold on Steam and through Other Distribution Channels (“**Multichannel Add-on Content**”), specifically DLC as defined in the SDA (which includes Microtransactions and subscriptions); and
 - (c) the nature and timing of the Multichannel Products delivered to Steam, relative to how they are delivered to Other Distribution Channels.
59. These PPOs, discussed further at §§60-74 and §§116-131 below, are referred to as the “**Valve PPOs**”. The precise meaning and scope of the Valve PPOs, including which way in which they are applied, communicated to publishers and/or enforced, will be a matter for evidence in due course.

The Game PPO

60. As stated at §45 above, Steam Keys are download codes for Steam-enabled Games. Steam Keys are product authorisation codes (consisting of 15 characters)⁵⁶ that can be used to download a licensed copy of a Steam-enabled Game on Steam. A publisher must request Steam Keys from Valve, and Valve has sole discretion to approve the requests. The Steam Keys section of the Steamworks Documentation states: “*Valve reserves the right to reject Steam Key requests*”.
61. Subject to the requirements of the Game PPO, discussed below, publishers provided with Steam Keys may: (a) sell them to retailers (e.g. for onward sale in bricks and mortar stores or on online digital stores) or through their own direct distribution channels – and, in respect of such sales, the publisher does not pay Steam’s commission charges; and/or (b) give away Steam Keys for free, e.g. for marketing purposes.
62. However, Steam limits the number of Steam Keys that it provides to publishers. The Steam Keys section of the Steamworks Documentation indicates that Valve will ordinarily only approve up to a few thousand Steam Keys for each Game sold on Steam.⁵⁷

“Q: How many Steam Keys can I get for my game?”

A: Games and applications launching on Steam may receive up to 5,000 Default Release Steam Keys to support retail activities and distribution on other stores. After that, all Steam Key requests are reviewed on a case-by-case basis.”

63. Given that leading Games have sales volumes in the millions, it appears that potentially only a tiny proportion of overall sales of such Games are made using Steam Keys.⁵⁸
64. Valve applies an express contractual PPO in respect of Multichannel Games sold using Steam Keys, which requires and/or is applied so as to require publishers selling Games through Other Distribution Channels using Steam Keys to sell the same or equivalent Steam-enabled Game on Steam for the same (or lower) price as they are selling it elsewhere using Steam Keys.

⁵⁶ For example, “8YYIO-GJ6YR-4XRYH”.

⁵⁷ See, Steam Keys (Steamworks Documentation). [CF/30/1435-1445]

⁵⁸ It is possible that the number of Steam Keys given away by Valve has changed over time: Harman 1 §3.7.19 and 8.3.6. [CF/4/158, 269] This will be a matter for disclosure and/or other evidence in due course.

- (a) The “Steam Keys” section of the Steamworks Documentation (which the PCR believes was introduced in February 2023, potentially in the light of the *In re Valve* litigation) currently provides (emphasis in the original):⁵⁹

“You should use Steam Keys to sell your game on other stores in a similar way to how you sell your game on Steam. It is important that you don’t give Steam customers a worse deal than Steam Key purchasers.”

“It’s OK to run a discount for Steam Keys on different stores at different times as long as you plan to give a comparable offer to Steam customers within a reasonable amount of time.”

“If you request an extreme number of keys and you are not offering Steam customers a comparable deal, or if your sole business is selling Steam Keys and not offering value to Steam customers, your request may be denied and you may lose the privilege to request keys.”

“When reviewing Steam Key requests, some of the things we typically look at include the level of customer interest on Steam, the total number of keys that have been issued and activated for the game and the additional number that are being requested. A request will usually be rejected if there’s an imbalance that suggests the developer is not making an offer to Steam customers that is comparable to what Steam Key purchasers are offered. For instance, a game with a few hundred units of lifetime sales requesting tens of thousands of keys, or more.”

...

Q: Why was my key request denied?

A: When reviewing Steam Key requests, we typically look at the level of customer interest on Steam, the total number of keys that have been issued and activated for the game and the additional number that are being requested. A request will usually get rejected if there’s an imbalance that suggests the developer is not making an offer to Steam customers that is comparable to what Steam Key purchasers are offered.”

- (b) Until 17 December 2021, the “Steam Keys” section of the Steamworks Documentation provided (emphasis in the original):⁶⁰

“We ask you to treat Steam customers no worse than customers buying Steam keys outside of Steam.”

⁵⁹ See, Steam Keys (Steamworks Documentation). [CF/30/1435-1445]

⁶⁰ See: [Steam Keys \(Steamworks Documentation\) \(archive.org\)](#) [CF/30/1435-1445]; Page 43 of Document 99 - Consolidated Amended Class Action Complaint, In Re Valve Antitrust Litigation, Case 2:21 cv 000563-JCC, at §166 [CF/36/2334].

“You should use keys to sell your game on other stores in a similar way to how you sell your game on Steam. It is important that you don’t give Steam customers a worse deal.”

“Keep in mind that the perceived price in the bundle/subscription should be a price you are willing to run the game at a standalone price or discount on Steam ... We want to avoid a situation where customers get a worse offer on the Steam store, so feel free to reach out to us via the Developer Support tool if you want to talk through a specific scenario.”

“We reserve the right to deny requests for keys or revoke key requesting privileges for partners that are abusing them or disadvantaging Steam customers.”

“We reserve the right to remove key requesting privileges from any partner whose sole business is selling Steam keys and not providing value or a fair deal to Steam customers.”

- (c) In the same vein, an earlier version in operation until 1 September 2017 of the “Pricing” section of the Steamworks Documentation provided that:⁶¹

“You are welcome to generate keys for resale with other retailers, including your own website. However, your product must also be available for sale on Steam. If you are hoping to receive exposure to Steam customers, the price on Steam will have to match prices elsewhere.”

65. Whilst these contractual obligations are ostensibly concerned with Steam Keys, Valve also applies them more broadly to Multichannel Games offered for sale through all Other Distribution Channels (both online and bricks-and-mortar retail stores), regardless of whether or not the Multichannel Games distributed through those other channels are distributed using Steam Keys (or are Steam-enabled). Consequently, where a Multichannel Game is sold on Steam, Valve requires the relevant publisher to sell it on Steam for the same (or lower) price as it is sold through Other Distribution Channels, including in particular (a) on other Distribution Platforms and (b) through direct distribution channels (the “**Game PPO**”). Valve communicates to publishers that it will delist (i.e. stop selling) any Multichannel Games that are being sold at a higher price on Steam, in breach of the Game PPO.
66. In support of this allegation – before disclosure and evidence has been produced by Valve – the PCR relies on a number of publicly available examples of instances where Valve has explained and enforced its contractual restrictions to Multichannel Games distributed *without* using Steam Keys, despite the fact that, on their face, the contractual restrictions

⁶¹ Ibid., at §168.

only apply to Multichannel Games distributed using Steam Keys. In particular, the “**Consolidated Second Amended US Complaint**”⁶² in the *In re Valve* litigation cites a number of statements made by Valve employees to publishers, including in online Steam forums, as well as examples of Valve’s conduct, examples of which are set out in Annex 1.

The DLC PPO

67. Clause 2.4 of the SDA provides:

“If Company distributes the Application through any other (non-Steam) distribution channel, and if Company distributes any material DLC for the Application through that other channel, it will deliver the DLC to Valve at the same time such that Steam Account Owners will receive comparable DLC with customers acquiring the Application through other channels.

Company is free to offer special and unique promotional content through other distribution channels, provided that material parity is maintained between Steam Account Owners and users of other distribution channels who make a comparable investment in the Application and the associated DLC.”⁶³

68. The operation of the first paragraph of clause 2.4, in conjunction with clause 2.1, concerns “the Content PPO” and is discussed at §§73-74 below.
69. In relation to the second paragraph of clause 2.4, at this stage of proceedings, prior to disclosure and evidence, the PCR adopts the understanding of this term pleaded in the Consolidated Second Amended US Complaint at §175: “*Valve’s requirement of “material parity” is enforced by Valve to mean the publisher must provide the DLC at the same price on the other storefront as it is priced on Steam*”. [CF/35/2224] As noted at §50 above, and given the way in which it is defined in the SDA, DLC for these purposes includes all Add-on Content.
70. Consequently, where Multichannel Add-on Content is sold on Steam, Valve requires the relevant publisher to sell it on Steam for the same (or lower) price as it is sold through Other Distribution Channels, including in particular (a) on other Distribution Platforms and (b) through direct distribution channels.

⁶² Document 99 in Case 2:21-cv-00563-JCC. [CF/36/2292-2406]

⁶³ SDA, Clause 2.4. [CF/27/686]

71. In support of this understanding, the PCR relies on the explanation given by Valve as to how this provision operates in response to a question asked by a publisher in 2017 about the “*rules regarding distributing/selling a game outside of steam*”. A Valve employee explained in response that “*The biggest takeaway is, don’t disadvantage Steam customers. For instance, it wouldn’t be fair to sell your DLC for \$10 on Steam if you’re selling it for \$5 or giving it as a reward for \$5 donations. We would ask that Steam customers get that lower \$5 price as well.*”⁶⁴
72. The PCR refers to the restrictions set out at §§69-71 concerning the price at which publishers must sell Add-on Content as the “**DLC PPO**”.

The Content PPO

73. For Multichannel Products distributed on Steam, Valve’s contractual terms prohibit publishers from providing those Products for distribution through Other Distribution Channels: (a) with differentiated content; and/or; (b) earlier than they are provided to Steam (the “**Content PPO**”).
74. These prohibitions arise from the following provisions of the SDA:
- (a) Clause 2.1 requires publishers to submit Applications to Steam for release no later than the first commercial release⁶⁵ and any localised versions and Application Updates (which, as noted at §50 above, is defined, in particular, as “*any updates, corrections and enhancements*” including “*any DLC*”) “when available, but in no event later than they are provided to any other third party for commercial release”.⁶⁶
- (b) The first paragraph of Clause 2.3 of the SDA, set out at §67 above.

Tying/Anti-Steering Arrangements

75. Valve’s contractual documentation imposes the following restrictions on publishers, which limits their ability to use third party services (or self-supply such services).

⁶⁴ Document 99 in Case 2:21-cv-00563-JCC. [CF/36/2292-2406]

⁶⁵ Or, if already commercially released as of the Effective Date of the SDA with the relevant publisher, within 30 days of the Effective Date.

⁶⁶ SDA, Clause 2.1. [CF/27/686]

76. First, clause 2.5 of the SDA states: *“The parties agree that Applications distributed via Steam will not include functionality from or links or references to any store other than Steam, or any other facility for making purchases or payments”*. This is referred to as the **“Clause 2.5 Restriction”**.⁶⁷
77. Presently, consumers typically purchase Add-on Content for Games purchased on Steam either from: (a) within the Game application, e.g. using the Game menu or in-game store; or (b) the Steam Store. In these cases, including where the Add-on Content is provided by the publishers, the relevant payment is made to Valve and is subject to Valve’s Commission Charges.
78. It would be technically possible, however, for in-application purchases of Add-on Content for Games purchased on Steam to be made from entities other than Valve, e.g. for the payment to be made to the relevant publisher or a rival Distribution Platform. However, the Clause 2.5 Restriction prevents this.
79. Second, the “Microtransactions (in-game purchases)” section of the Steamworks Documentation states: *“For any in-game purchases, you’ll need to use the microtransaction API so Steam customers can only make purchases from the Steam Wallet”*. Similarly, the “Microtransactions implementation guide” section of the Steamworks Documentation states: ***“In-game purchasing This is for games that have an integrated store and the user experience will stay in-game • Step 1 Your game needs to ship with the Steamworks API”*** (emphasis in original).⁶⁸
80. The effect of these provisions is that, if a publisher wants consumers playing its Games distributed on Steam to be able to make in-game purchases, all such purchases must be made using the Steam API, and therefore Valve’s payment processing service – as a result of which the payments are subject to Valve’s Commission Charges. The possibility of the publisher using an alternative third-party payment processing service to process in-game purchases for such Games, and thereby to avoid being subject to Valve’s Commission Charges, is precluded. This is referred to as the **“Steamworks API Restriction”**.

⁶⁷ SDA, Clause 2.5. [CF/27/686]

⁶⁸ Microtransactions Implementation Guide, Steamworks Documentation. [CF/29/1424-1434]

81. The Clause 2.5 Restriction and the Steamworks API Restriction are collectively referred to as the “**In-game Purchasing Restrictions**”. As detailed at §§134-136 below, both In-game Purchasing Restrictions tie the distribution of Add-on Content to the distribution of Games.

Market developments

82. Various companies have attempted – with little success - to compete with Steam since its launch. Competition was limited in the first decade of the 2000s. In the 2010s, various undertakings have sought to compete with Steam, but most have failed to gain a significant foothold in the market.⁶⁹ By way of example:
- (a) Electronic Arts Inc. (“**EA**”): EA is one of the largest video game developers and publishers in the world and is responsible for best-selling titles within the Sims, FIFA and Battlefield franchises. In 2011, it launched a distribution channel for its own games called Origin. Although Origin originally offered only EA-developed games, EA later began to offer releases from other major publishers such as Warner Bros. EA did not publish Games on Steam until 2019.⁷⁰ In 2022, it ceased to offer Origin entirely, and at this point transferred all content to a Distribution Platform called “the EA app”, which connects to Steam.
 - (b) Ubisoft Entertainment SA (“**Ubisoft**”): Ubisoft is also one of the world’s largest video game developers and publishers, and is responsible for best-selling titles within the Assassin’s Creed and Tom Clancy’s series of games. In 2012, it launched its own distribution channel, Uplay, which was subsequently renamed Ubisoft Connect. In 2019, Ubisoft stopped publishing on Steam because of its unrealistically high commission rates,⁷¹ in order to focus on distribution through Ubisoft Connect and the Epic Games Store (considered below). However, in 2022, Ubisoft returned to distributing its Games via Steam, a move that one technology

⁶⁹ For a more detailed list of alternative digital distribution services, see Harman 1, Section 3.10 (internal p.32). [CF/4/162-166]

⁷⁰ “EA games are returning to Steam along with the EA Access subscription service”, The Verge (29 October 2019), available at <https://www.theverge.com/2019/10/29/20937055/ea-games-steam-access-subscription-service-pc-storefront-jedi-fallen-order-sales>. [CF/44/2591-2596]

⁷¹ Ubisoft’s Vice President for Partnerships and Revenue, Chris Early, told The New York Times in August 2019 that Steam’s business model and commission rates were “unrealistic” and did not “*reflect where the world is today in terms of game distribution*”. [CF/35/2267]

news outlet stated “*suggests the size of Valve’s userbase may outweigh the value of sharing a smaller portion of sales with a partner like Epic*”.⁷²

- (c) Discord: Discord is an online communication platform that is popular in the gaming world. Discord Inc. initially launched a Discord Store in 2018. The Discord Store sought to capitalise on millions of existing users⁷³ and a 10% commission rate that was intended to undercut Steam.⁷⁴ Discord also provided users with novel features, subsequently adopted by Steam. For example, a 2018 Business Inside Report suggested that Valve’s Steam Chat function took “*many cues from Discord, including a suspiciously similar user interface*” that looks “*almost exactly the same*”.⁷⁵ The Discord Store was not able to compete effectively with Steam. In December 2021, Discord ceased selling licenses for PC games, whilst in March 2022, it shut down the Discord Store entirely.
- (d) Kartridge: similarly, the publisher Kongregate launched the Kartridge Distribution Platform in 2018, but it stopped taking new games in 2020 and was shut down in September 2023.⁷⁶
83. The Microsoft Store and the Epic Games Store are both still in operation. However, as highlighted at below and in Section 5 of Harman 1, their market shares are still well below Valve’s, and they offer a very small percentage of the total number of available

⁷² Ubisoft is bringing ‘Far Cry 6’ and three other recent games to Steam, Engadget (22 April 2023), available at <https://www.engadget.com/ubisoft-is-bringing-far-cry-6-and-three-other-recent-games-to-steam>. [CF/45/2597-2603]

⁷³ Namely 8.9 million daily users in 2017 and 100 million daily users in 2020. See “Everything you need to know about Discord, the app that over 250 million gamers around the world are using to talk to each other”, Business Insider (12 October 2020), available at <https://www.businessinsider.com/how-to-use-discord-the-messaging-app-for-gamers-2018-5>. [CF/46/2604-2628]

⁷⁴ In a blogpost at the time of the Discord Store launch, Discord stated “*Turns out, it does not cost 30% to distribute games in 2018. After doing some research, we discovered that we can build amazing developer tools, run them, and give developers the majority of the revenue share.*” See “Why not 90/10?”, Discord (14 December 2018), available at <https://blog.discord.com/why-not-90-10-3761ebef4eab>. [CF/47/2629-2631]

⁷⁵ “The new and improved Steam Chat is here to take on Discord — here’s how the two apps compare”, Business Insider (28 July 2018), available at <https://www.businessinsider.com/steam-chat-update-vs-discord-2018-7>. [CF/48/2632-2659]

⁷⁶ Harman 1 § 3.10.2(IX) and Table 3-3. [CF/4/34, 36]

exclusive and non-exclusive PC Games (see in particular at §101 below and the accompanying table)

- (a) Microsoft: the Microsoft Store was launched in October 2012, at which point it was known as the Windows Store. The Windows Store is a Distribution Platform for Windows-compatible games. Microsoft distributes some of its own Games on an exclusive basis. Microsoft has nonetheless been unable to capture significant market share from Steam. In 2019, Microsoft began selling PC Games on Steam. In response to this development, it was reported that Microsoft had “*given up entirely*” on its attempts to “*dethrone Steam*”, and was “*instead embracing a much more open model*”.⁷⁷
- (b) Epic Games Inc. (“**Epic Games**”): Epic Games is one of the world’s largest game developers and publishers and is particularly well-known for its blockbuster title Fortnite. In 2018, it launched the Epic Games Store, which has since become Steam’s largest competitor. Epic has sought to grow its market share through a combination of lower commission rates (set at 12% for Games sold on its platform⁷⁸), exclusive contracts for large titles, the provision of free Games, and by waving a 5% royalty fee⁷⁹ on sales for the use of Epic’s proprietary game development engine, Unreal Engine. In relation to exclusive titles, Epic Games’ CEO, Tim Sweeney has explained that “*the lock-in effect of having a large library of games on a dominant storefront is more powerful than features, and hence a dominant store can only be challenged through exclusives*”.⁸⁰ Epic’s expenditure on exclusivity agreements has been considerable. For example, in 2020 alone it spent at least \$444m on exclusive titles and incurred losses of \$273m.⁸¹ As a result of Valve’s PPOs, Epic has not been able to offer lower prices for Games that are also available on Steam. As explained by Mr Sweeney: “*Steam has veto power over prices, so if a multi-store developer wishes to sell their game for a lower price*

⁷⁷ “Microsoft will distribute more Xbox titles through Steam and finally support Win32 games”, The Verge (30 May 2019), available at <https://www.theverge.com/2019/5/30/18645250/microsoft-xbox-game-studios-publishing-valve-steam-32-bit-windows>. [CF/49/2660-2665]

⁷⁸ Harman 1 §3.10.2(VII). [CF/4/164]

⁷⁹ Ibid.

⁸⁰ Harman 1, Exhibit GH-219.

⁸¹ “Epic will lose over \$300M on Epic Games Store exclusive, is fine with that”, Pc Gamer (10 April 2021), available at <https://www.pcgamer.com/epic-games-store-exclusivesapple-lawsuit/>.

on the Epic Games store than Steam, then ... Valve can simply say ‘no’”.⁸² The pricing history analysis conducted in Harman 1 – that compares Epic Games Store and Steam prices for a leading title, Red Dead Redemption 2 – is consistent with Mr Sweeney’s explanation: Harman 1, Figure 6.1.

The *In re Valve litigation*

84. The PCR’s allegations regarding the Game and DLC PPOs overlap considerably with allegations made against Valve in the *In re Valve* litigation in the US: see, in particular, the Consolidated Second Amended US Complaint at §§9-12 and 156-184.⁸³ In broad summary, the Consolidated Second Amended US Complaint alleges that Valve has unlawfully restrained trade and monopolised the relevant market on the following bases.
- (a) Valve requires publishers to agree to PPOs (referred to in the Complaint as “Platform Most Favoured Nation” or “PMFN” clauses) in respect of all game publishers that list games and Add-on Content in the Steam store: §§156-159. The Complaint refers to these PPOs as “the Valve PMFN”. The Valve PMFNs mirror the three PPOs alleged by the PCR.
 - (b) The Valve PMFN allows Valve to prevent publishers from offering lower pricing or other marketing tactics to compete to attract customers to other distribution channels, thereby sustaining its supra-competitive commission rates: §§160-163.
 - (c) Publishers are required to comply with the Valve PMFN, which consists of written and unwritten rules: §§164-184.
 - (d) The Valve PMFN suppresses price competition, as demonstrated by various pieces of pricing data: §§185-194.
 - (e) Valve actively enforces the Valve PMFN to suppress competition (both in terms of price but also in terms of exclusive content), as can be seen from various examples including the experiences of both Wolfire and Dark Catt: §§195-211.

⁸² Harman 1, Exhibit GH-232.

⁸³ Document 127 – in Case 2:21-cv-00563-JCC [CF/35/2177-2291]

- (f) Valve uses its Steam Keys in a way that allows it to monitor publishers' sales on other distribution channel and enforce the Valve PMFN: §§212-235.
- (g) Valve encourages and/or allows its users to improperly attack publishers using Steam reviews and community discussions, and does not timely remove inappropriate reviews, if at all: §§236-257.

85. By way of brief background to the *In re Valve* litigation:

- (a) The litigation consists of two consolidated sets of class action proceedings: *Wolfire Games, LLC v. Valve Corporation*⁸⁴ and *Dark Catt Studios et al. v Valve Corporation*, brought in the District Court for the Western District of Washington.⁸⁵ The lead claimants are Wolfire Games LLC (“**Wolfire**”), an independent PC Games developer, and two companies in the Dark Catt corporate group (collectively “**Dark Catt**”), which inter alia develop PC Games and other interactive content.
- (b) In both sets of proceedings, the plaintiffs were permitted to file amended complaints after the District Court identified failings in their original complaints. In response to the plaintiffs respective amended complaints, Valve applied to have the claims summarily dismissed. Those applications failed in respect of Wolfire and Dark Catt’s PPO allegations: see the District Court’s two Opinions of 6 May 2022.⁸⁶ For example, in the Wolfire proceedings, the District Court rejected Valve’s argument that the PPO allegations did not “*amount to plausible antitrust conduct ... because the CAC’s supporting allegations were anecdotal and threadbare*”,⁸⁷ concluding that those allegations were “*sufficient to plausibly allege unlawful conduct*”.⁸⁸

⁸⁴ Case No. 2:21-cv-00563-JCC. These proceedings were themselves consolidated on 20 May 2021 with another claim: *Sean Colvin et al. v. Valve Corporation* (Case No. 2:21-cv-00650-JCC).

⁸⁵ Case No. 2:21-cv-00872-JCC.

⁸⁶ Document 80 in Case 2:21-cv-00563-JCC (Wolfire) [CF/37/2407-2414]; Document 70 in Case 2:21-cv-00872-JCC (Dark Catt). [CF/X/X]

⁸⁷ Document 80 in Case 2:21-cv-00563-JCC (Wolfire), p.6. [CF/38/2415-2419]

⁸⁸ The District Court’s Order observed at p.3 that “[t]o survive such a motion, the complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face”. [CF/37/2408]

- (c) The two sets of proceedings were consolidated on 22 July 2022. The plaintiffs thereafter filed the first consolidated complaint on 26 August 2022. This pleading did not add any new substantive allegations to those that had already been pleaded and survived Valve’s various motions to dismiss. This complaint was amended and the Consolidated Second Amended US Complaint was filed on 23 March 2023. Valve responded to this pleading on 6 April 2023.
- (d) Significant documentary discovery has taken place in the litigation, and depositions have been given. These documents are not publicly available (with the exception of certain redacted extracts exhibited to the motion to certify).
- (e) Following discovery and the giving of depositions, the plaintiffs have filed a motion to certify the class.⁸⁹ It is evident from the motion for certification, which mirror those in the Consolidated Second Amended US Complaint, that many of the plaintiffs’ allegations are supported by documentary evidence (though the publicly available versions of these documents are heavily redacted). At the time of filing this Claim Form, Valve has responded to the motion, but its response and the supporting exhibits remain sealed.

B MARKET DEFINITION AND DOMINANCE

86. The PCR’s preliminary case on market definition and dominance is set out at Harman 1 Sections 4 and 5, on which the PCR relies in full. The following paragraphs merely provide a brief summary of Mr Harman’s conclusions and some of the more significant elements of his preliminary analysis.

Market definition

87. Mr Harman has applied the standard approach to market definition in competition cases, as recently summarised by the Commission in its updated *Market Definition Notice*.⁹⁰ Steam and other Distribution Platforms provide services to both consumers and publishers, and therefore compete on ‘two-sided’ markets. Mr Harman has had regard to the Tribunal’s explanation as to how two-sided markets should be defined in its

⁸⁹ Document 204 – in Case 2:21-cv-00563-JCC. [CF/32/1449-2164]

⁹⁰ *Commission Notice on the definition of the relevant market for the purposes of Union competition law*, 8 February 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645.

judgment in *BGL (Holdings) Limited & Others v Competition and Markets Authority*) [2022] CAT 36 (“*Compare the Market*”), and to the *Support study accompanying the evaluation of the Commission Notice* to which the Tribunal referred. Accordingly, Mr Harman has defined markets for consumers and publishers separately. See Harman 1 Section 4.2. [CF/4/168-173]

88. Mr Harman finds that PC Games (and Add-on Content for them) are in different markets to games (and related content) for consoles and mobiles, as they have different functionality, pricing policies, production costs, characteristics and distribution channels and both consumers and publishers view them (and their parallel distribution channels) differently. This is consistent with the approach adopted by the Commission in its decision on the merger between Activision Blizzard and King:⁹¹ Harman 1 §4.3.12. [CF/4/176]
89. In respect of Games, Steam, like other Distribution Platforms, provides services that allow consumers to purchase: (a) Games; and (b) Add-on Content. Similarly, on the publisher side, Steam, like other Distribution Platforms, provides services under which it distributes on behalf of publishers: (a) Games; and (b) Add-on Content. The provision of services relating to Games, on the one hand, and Add-on Content, on the other hand, are distinct for the reasons set out at Harman 1 §§4.5.2-4.5.5. [CF/4/181-182] In particular: (a) in order to purchase Add-on Content, a consumer must already own and have installed a base Game; (b) the distribution of Games requires a digital store including for browsing Games, whereas Add-on Content can be (and often is) purchased from within the Game and distributed through the publisher’s own infrastructure; (c) Games and Add-on Content are therefore marketed differently, with different audiences being targeted; and (d) in respect of Games purchased and installed on their platforms, both Steam (see §§75-81 above) and other Distribution Platforms limit the ability of consumers to purchase Add-on Content for such Games through alternative distribution channels. As a result of such differences, conditions of demand and supply, and therefore competitive conditions, are very different for Games, as compared with Add-on Content. Accordingly, Mr Harman’s preliminary approach to market definition starts with separate

⁹¹ Harman 1, Exhibit GH-160, §26.

focal services offered by Steam, on both the consumer and publisher sides of the market, relating to: (a) Games; and (b) Add-on Content.

90. Consistent with standard practice, Mr Harman considers the extent to which consumers and publishers would switch away from these focal services in response to a small but significant non-transitory increase in price (“SSNIP”). As is commonly the case at this stage of the proceedings, Mr Harman lacks the data that would be required to perform an empirical application of the SSNIP test, but he applies the test conceptually. He also considers the extent to which the relevant markets should be broadened on account of supply side substitution, i.e. the likelihood of new competitors being able to enter the market quickly and easily in response to the SSNIP.
91. In relation to the provision of Games by Steam to **consumers**, Mr Harman concludes on a preliminary basis that, in response to a SSNIP in the price of all Games on Steam, consumers would in principle be able to switch to buying games from other Distribution Platforms and/or via **existing** direct distribution channels (e.g. from publisher websites), and that these should therefore be included in the relevant market. He does not consider that digital retailers (such as Amazon, eBay etc) or physical retailers (i.e. brick and mortar stores) should be included in the relevant market, essentially because such stores have a predominantly vertical (rather than horizontal) relationship with Distribution Platforms, as they simply sell digital product keys⁹² that consumers can use to download games from Steam and other Distribution Platforms. See Harman 1 §§4.3.6-4.3.13. [CF/4/174-177]
92. As a result, digital and physical retailers do not compete with the services offered by Steam and other Digital Platforms, but simply provide an alternative route through which consumers can access their services. In relation to the potential for supply substitution, Mr Harman concludes that the creation of a new Distribution Platform or direct distribution channel would entail substantial time and cost, such that the market should not be expanded to include publishers who do not have an existing direct distribution channel on account of this possibility. See Harman 1 §§4.3.14-4.3.15. [CF/4/177]

⁹² Digital licences that allow consumers to access the game and downstream content (see Harman 1 §3.6.7). [CF/4/149-150]

93. In relation to the supply by Steam of Game distribution services **to publishers**, Mr Harman concludes that the relevant market should (a) include distribution services offered by rival Distribution Platforms and existing direct distribution channels, but (b) exclude distribution through digital and physical retailers, and (c) not be expanded to include other publishers who do not have an existing direct distribution channel on account of potential supply side substitution, for broadly equivalent reasons. See Harman 1 §4.4.13. [CF/4/181]
94. Again, for broadly equivalent reasons, Mr Harman considers that the same parameters apply to the consumer and publisher markets for the purchase and distribution (respectively) of Add-on Content. Mr Harman notes that the relevant markets could either be limited to Add-on Content for (only) Steam-enabled Games, or extend to Add-on Content for all Games, whether enabled for Steam or for other Distribution Platforms: Harman 1 §§4.5.21-4.5.22. [CF/4/186] This depends in part on: (a) whether or not the relevant markets should be defined taking into account the existence of the alleged infringing conduct, including in particular the restrictive tying provision in Clause 2.5 of the SDA (Mr Harman undertakes his analysis on both alternative bases: Harman 1 §§4.5.11-4.5.12) [CF/4/183]; and/or (b) the extent that consumers would consider the prices of Add-on Content when choosing the distribution channel through which to obtain the relevant (base) Game (Harman 1 §4.5.19). [CF/4/186]
95. Mr Harman finds that the geographic scope of these markets is limited to the UK, for the reasons set out at Harman 1 Section 4.7 (internal p.58). In particular, Steam (and other Distribution Platforms) have digital stores dedicated to particular countries (and, among other things, set different pricing for different countries), and only allow consumers to make purchases from the digital store for their country of domicile.
96. On the basis of these and the other considerations set out in Harman 1 Section 4, Mr Harman provisionally concludes that the following four markets (collectively the “**Relevant Markets**”) are relevant to the assessment of Steam’s dominance and the abuses alleged in these proceedings: Harman 1 §4.9. [CF/4/191] All four markets encompass Distribution Platforms and direct distribution by publishers, exclude digital and physical retailers, and are geographically limited to the UK.
- (a) the **Game Market**, on which consumers purchase Games;

- (b) the **Game Distribution Market**, on which publishers purchase (or self-supply) services for the distribution of Games to consumers;
 - (c) the **Add-on Content Market**, on which consumers purchase Add-on Content. This market may include Add-on Content for all Games, whether enabled for Steam or other platforms (a **Wider Add-on Content Market**), or may be limited to the acquisition of Add-on Content for (only) Steam-enabled games (a **Steam Add-on Content Market**); and
 - (d) the **Add-on Content Distribution Market**, on which publishers purchase (or self-supply) services for the distribution of Add-on Content. Like the consumer Add-on Content Market, this market may include the distribution of Add-on Content for all Games, whether enabled for Steam or other platforms (a **Wider Add-on Content Distribution Market**), or it may be limited to the distribution of Add-on Content for Steam-enabled games (a **Steam Add-on Content Distribution Market**).
97. The Game Market and the Game Distribution Market are collectively referred to as the **Game Markets** (plural), and the Add-on Content Market and the Add-on Content Distribution Market are collectively referred to as the **Add-on Content Markets** (plural). Similarly, the two markets on the consumer side, namely the Game Market and the Add-on Content Market, are collectively referred to as the **Consumer Markets** (plural), and the two markets on the publisher side, namely the Game Distribution Market and the Add-on Content Distribution Market, are collectively referred to as the **Distribution Markets** (plural).

Dominance

98. In Section 5 of his report (internal p.63), Mr Harman explains the basis for his preliminary view that Valve is likely to hold a dominant position (and to have held a dominant position over the Relevant Period) on: (a) both Game Markets and (b) both the Add-on Content Markets, if these are limited to Steam-enabled games. He also considers that Valve could hold a dominant position in one or both Add-on Content Markets even if they were not limited to Steam-enabled games, i.e. in the Wider Add-on Content Market and/or the Wider Add-on Content Distribution Markets. While Valve's market shares are likely to be lower in these Wider Add-on Content Markets than in some of the

other Relevant Markets, Mr Haman notes that Valve's practices allow it to leverage its dominance into the wider Add-on Content Markets, such that Valve's market shares are not a true reflection of the limited extent of competitive constraints in those markets. However, further evidence (including Valve's own internal data) is required to assess this on a more informed basis.

99. As Mr Harman notes (Harman §2.4.1) [CF/4/136], Steam is a privately held company and there is limited publicly available information on its operations or financial performance, which limits the information available to estimate its market share at this stage of the proceedings. In his report, Mr Harman sets out how he will be able to refine his assessment of Steam's dominance post-certification with the benefit of additional information and/or disclosure (Harman 1 §5.10) [CF/4/221-223]. In addition, however, he explains why he considers it likely that Valve holds dominant positions on all, or at least some of, the four Relevant Markets based on publicly available information, as briefly summarised in the following paragraphs.
100. First, Steam is routinely referred to by specialist trade press and commentators on the PC game market as being, for example, "*by far the biggest*" Distribution Platform: Harman 1 §5.3.3. [CF/4/197]
101. Second, Steam has a very large share of certain Distribution Platform 'volume' metrics that are indicative of it having large shares in the Relevant Markets: Harman 1 §§5.3.4-5.3.7. [CF/4/197-198]. In particular:
 - (a) Steam hosts 93% of all Games. In comparison, the Epic Games Store and the Microsoft Store, Steam's two biggest rivals, combined only host only around 6% of all Games. This is illustrated in Table 5-1 (internal p.68) in Harman 1, reproduced below. [CF/4/198]

Table 5-1 PC game availability

Distribution Channel	Games available	
	2023	Proxy 2017
Steam	74,197	17,113
Epic	2,900	190
Microsoft Store	1,995	1,995
Ubisoft Store	212	212
EA	199	199
Blizzard	26	26
Total	79,529	19,735
Games not on Steam	5,332	2,622
Steam-Only games	74,197	17,113
Proportion of all games that are Steam-Only	93.3%	86.7%

- (b) In terms of the length of time that consumers spend playing Games on the different Distribution Platforms, gamers spend around six times more time playing Games on Steam than Games on the Epic Game Store, widely regarded as Steam’s most significant rival: Harman 1 §5.3.9 and fn. 308. [CF/4/199]
- (c) Similarly, Steam has several times more accounts and users than the Epic Games Store: Harman 1 §5.3.9. [CF/4/199]
102. As for Steam’s share of the Relevant Markets by value (i.e. its share of revenue), given the fact that Valve does not itself publish relevant revenue data, Mr Harman has undertaken his preliminary analysis using various public data sources, including data published by the Association for UK Interactive Entertainment, ERA (a trade organisation), and a presentation by Microsoft on games markets. Based on various conservative assumptions, Mr Harman preliminary estimates Steam’s market shares in the Relevant Markets to be as set out in Table 5-2 internal p.71, reproduced below. [CF/4/201]

Table 5-2 Steam's market shares, April 2018 – March 2024, %

Market	2018	2019	2020	2021	2022	2023	2024
Game	59%	50%	69%	71%	82%	88%	83%
Game Distribution	76%	68%	83%	84%	91%	94%	91%
Steam Downstream Content	100%	100%	100%	100%	100%	100%	100%
Steam Downstream Content Distribution	100%	100%	100%	100%	100%	100%	100%
Wider Downstream Content							
Lower bound	29%	24%	31%	31%	34%	33%	33%
Upper bound	50%	44%	52%	53%	54%	56%	54%
Wider Downstream Content Distribution							
Lower bound	48%	41%	49%	49%	53%	51%	51%
Upper bound	69%	62%	69%	70%	71%	72%	71%

103. These market shares support findings of dominance in the various Relevant Markets as follows.

- (a) On the Game Markets, Steam has had market shares above 50% throughout the whole of the Relevant Period, which is indicative of it being dominant in both Game markets.
- (b) If the Add-on Content Markets are limited to Steam-enabled Games, Steam will obviously be dominant because it has a 100% monopoly in those markets.
- (c) If the Add-on Content Markets are not limited to Steam-enabled Games, based on Mr Harman's preliminary market share estimates it is not clear from market shares alone that Steam would hold a dominant position on the consumer or publisher sides of the market: Mr Harman's lower end estimates suggests market shares of between 24% and 33% on the Wider Add-on Content Market and 41% to 53% on the Wider Add-on Content Distribution Market (by contrast, Mr Harman's higher end estimates does suggest dominance). First, however, Mr Harman will be able to undertake an assessment of market shares in any such markets on a more informed basis in due course once he has access to Valve's own revenue data and internal market share assessments. Second, Valve's market shares in the Wider Add-on Content markets will not truly reflect the limited competitive constraints that it faces in those markets, as Valve's abusive practices allow it to leverage its

dominance from other Relevant Markets. Third, the considerations set out in §104 below suggest that Valve would be dominant in any Wider Add-on Content Markets notwithstanding that its market shares have not been consistently above 50%.

104. As well as having large market shares, various other considerations suggest that Steam faces only limited competitive constraints, and therefore holds a dominant position, on all of the Relevant Markets: Harman 1 §5.9. [CF/4/215-221]

- (a) As it is by some distance the largest provider of Games, Steam benefits from significant within-group network effects, as consumers value Distribution Platforms that allow them to play multi-player games on the same platform with a large number of other users.
- (b) Steam also benefits from significant across-group network effects, as consumers value Distribution Platforms that are able to offer Games from a large number of publishers; and, as noted above, Steam hosts 93% of all Games. Similarly, publishers value Distribution Platforms that provide them with access to a large number of consumers; and, as noted above, Steam has by some distance the largest number of user accounts (and gameplay hours).
- (c) As it has significantly more users than any other Distribution Platform, Steam has a significant advantage over both actual and potential competitors through its ability to do more sophisticated analyses that allow it to develop targeted services for both publishers and consumers, which in turn incentives publishers and consumers to use Steam.⁹³
- (d) There are substantial barriers and/or costs to consumers switching away from Steam, in particular as many Steam users have a large library of Games, achievements, and social connections built up within the platform.⁹⁴ Switching to a different Distribution Platform would mean losing access to these features, as well as records of in-game progress. To obtain the same library on an alternative

⁹³ Harman 1 §5.9.19. [CF/4/220]

⁹⁴ Harman 1 §§4.5.16 and 5.9.14. [CF/4/184, 219]

Distribution Platform, consumers would also need to purchase the Games again, as Games are not portable between Distribution Platforms.

- (e) There are substantial barriers to entry as creating a distribution service for Games entails substantial time and cost.⁹⁵ Consistent with this, rates of entry have been low historically, predominantly only the largest publishers have attempted to establish such services, and several new distribution services have failed within relatively short periods of time: Harman 1 §4.3.15, and §82 above. [CF/4/177]
- (f) Individual consumers in the Consumer Markets obviously lack buyer power, and the evidence suggests that not even large publishers have significant buyer power vis-à-vis Steam in the Publisher Markets. Among other things, and as noted at §82 above, a number of large publishers have attempted to remove their Games from Steam, only subsequently to return.

C ABUSE

105. The PCR contends that the Defendant has abused its dominant position in breach of the Chapter II prohibition and (for the period prior to 31 December 2020) Article 102 TFEU in the following three ways, namely by imposing: (a) the Valve PPOs; (b) the In-Game Purchasing Restrictions; (c) Commission Charges that constitute unfair and excessive prices.

106. The PCR contends that these three abuses (detailed in this section): (a) are abusive when considered both individually and collectively; and (b) collectively constitute an overall anti-competitive strategy and a single and continuous infringement.

Applicable legal principles: general

107. The Chapter II prohibition prohibits “*any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market*” if it may affect trade within the UK. Article 102 TFEU likewise prohibits such conduct if it may affect trade between Member States.

⁹⁵ Harman 1 §4.3.15. [CF/4/177]

108. Notwithstanding that the proposed collective proceedings will be brought after 31 December 2020 (“**IP completion day**” for Brexit), in assessing abuse of dominance the Tribunal must seek to ensure consistency with pre-existing EU jurisprudence pursuant to s.60A(1)-(3) (subject to s.60A(4)-(7) of the Act). That jurisprudence includes extensive case law in respect of the interpretation and application of Article 102 on which the PCR relies for the purpose of this Claim Form.
109. The PCR relies among others on the following legal principles and authorities in relation to the general concept of an abuse.
- (a) A dominant undertaking commits an abuse where, through conduct different from that which governs normal competition on the merits, it hinders the maintenance of the degree of competition that exists on the market or the growth of that competition.⁹⁶
 - (b) A dominant undertaking has “*a special responsibility not to allow its conduct to impair undistorted competition*”.⁹⁷
 - (c) Abusive conduct is that which represents a departure from ‘normal competition’ or ‘competition on the merits’. Whether conduct represents such a departure is a question of appreciation to be assessed by reference to the specific facts of the case.⁹⁸
 - (d) Conduct can be abusive even if it is commonplace in the market,⁹⁹ and even if such conduct may lawfully be entered into by non-dominant undertakings.¹⁰⁰ There is no requirement that the abusive conduct can only be indulged in by virtue of dominance.¹⁰¹

⁹⁶ Case C-209/10 *Post Danmark* EU:C:2012:172, §24.

⁹⁷ Case 322/81 *Michelin v Commission* EU:C:1983:313, §57.

⁹⁸ *Gutmann v South Western Trains* [2021] CAT 31, §41.

⁹⁹ Cases T-191/98 etc *Atlantic Container Line v Commission* EU:T:2003:245, §1124.

¹⁰⁰ *AstraZeneca EC*, at (325).

¹⁰¹ *National Grid v GEMA* [2010] EWCA Civ 114, §39; Case C-457/10 P *AstraZeneca* EU:C:2012:770, §354.

- (e) The categories of abuse are not closed, such that it is impossible to set out any exhaustive list of conduct that violates section 18 of the Act.¹⁰² Further, there is no need to pigeon-hole an allegation of abuse into a particular category.¹⁰³ Among other things, while abuses are sometimes categorised as ‘exclusionary’ or ‘exploitative’, there is no clear-cut or absolute distinction between the two.¹⁰⁴
- (f) “[T]he same practice may give rise to an infringement of both Article 101 TFEU and Article 102 TFEU, even if the two provisions pursue different objectives”.¹⁰⁵ Further, substantively Article 101/the Chapter I prohibition must be interpreted consistently with Article 102/the Chapter II prohibition.¹⁰⁶
- (g) Exclusionary effects arise where the effective access of actual or potential competitors to markets or their components is hampered or eliminated as a result of the conduct of the dominant undertaking.¹⁰⁷
- (h) The following factors in particular make foreclosure effects more likely: (i) a strong dominant position; (ii) if the undertaking benefits from economies of scale and/or scope and network effects; (iii) the conduct affects a high percentage of total sales in the relevant market; and/or (iv) the conduct has been in place for a long time.¹⁰⁸
- (i) The special responsibility of dominant undertakings includes an obligation not to engage in exploitative abuses that harm customers.¹⁰⁹
- (j) “Although abuse is an objective concept ... intention may be taken into account in determining abuse”.¹¹⁰ In other words, while an abuse may be established by reference to objective evidence such that it is not necessary to prove any anti-

¹⁰² C-52/09 *TeliaSonera* [2011] ECR I-527, §26.

¹⁰³ *Streetmap v Google* [2016] EWHC 253 (Ch), §58.

¹⁰⁴ T-612/17 *Google Shopping* §153; Bellamy & Child, *EU Competition Law*, 8th edition, §10.072.

¹⁰⁵ C-307/18 *Generics (UK) v CMA*, EU:C:2020:52.

¹⁰⁶ Case C-333/21 *European Superleague v FIFA & UEFA*, §186. This does not include the application of block exemptions, which can exempt an agreement from Article 101/the Chapter I prohibition but cannot exempt it from the operation of Article 102/the Chapter II prohibition: see *Generics v CMA* [2018] CAT 4, §427-432.

¹⁰⁷ T-604/18 *Google Android* §281.

¹⁰⁸ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, §20.

¹⁰⁹ *Gutmann v South Western Trains* [2021] CAT 31, at [65].

¹¹⁰ *Streetmap.EU v Google* [2016] EWHC 253 (Ch), §66.

competitive intent, harmful intentions on the part of the dominant undertaking can support a finding of abuse.

- (k) An abuse may be formed of a pattern of conduct comprising different elements and it is not necessary for the dominant undertaking to have engaged in all forms of the abusive conduct during the entirety of the period, provided that at least some elements of the pattern are conducted throughout the period of the infringement.¹¹¹
- (l) In circumstances where a dominant undertaking takes a series of actions forming part of an overall plan to distort competition, and those actions interact to contribute to the realisation of that plan, those actions can be regarded as a single and continuous infringement, even if each of the infringements in question also separately constitute an abuse.¹¹²

First Abuse: the Valve PPOs

Applicable legal principles

- 110. The PCR relies among others on the following legal principles and authorities in relation to Steam’s imposition of unlawful PPOs.
- 111. Under a parity obligation (also known as a “Most Favoured Nation” or “MFN” clause), a buyer/seller requires a seller/buyer to offer it terms that are no worse than those offered to other buyers/sellers. Parity obligations can refer to non-price or price terms, the latter of which are sometimes referred to as ‘price parity obligations’. Parity obligations can exist at any level of the supply chain. Parity obligations that apply to online platforms, such as Steam, which offer intermediation services (i.e. the online platform brings together and ‘matches’ buyers and sellers of the relevant good or service – in this context PC Games) may be referred to as “platform parity obligations”, defined above as PPOs.
- 112. The entering into of retail parity obligations, including PPOs, by a dominant undertaking may have such restrictive effects that it constitutes an abuse under the Chapter II

¹¹¹ *AB Inbev Beer Trade Restrictions* (AT.40134) [2020] 4 C.M.L.R. 12 §§202-205.

¹¹² Case T-286/09 *Intel v Commission* EU:T:2014:547, §§1562-3. See also Case T-604/18 *Google v Commission* EU:T:2022:54, §§1015-1031, upholding the Commission’s finding that four separate abuses comprised a single and continuous infringement (see Case COMP/AT.40099, *Google Android*, Commission Decision of 18 July 2018, §§479-482).

Prohibition / Article 102. Historically, such PPOs have more commonly been analysed under the Chapter 1 prohibition / Article 101 TFEU, where in several cases courts and regulators have found their effects to be sufficiently anti-competitive as to render them unlawful even where they were entered into by undertakings that were not dominant. However, the restrictive effects on competition of PPOs – in particular wide PPOs - are even more egregious where, as here, they are imposed by a dominant undertaking. Indeed, as stated by the Commission: “[t]he restrictive effects of across-platform retail parity obligations are generally more severe where they are used by one or more leading providers of online intermediation services”.¹¹³

113. Thus, in 2017, following an investigation into PPOs and similar provisions in agreements between Amazon and e-book suppliers, the Commission accepted commitments from Amazon which had been offered to meet the Commission’s concerns relating to clauses that, among other things, required e-book suppliers to make available to Amazon e-books, prices, promotions and commissions that they had offered to other e-book retailers. The Article 9 commitment decision stated that, on a preliminary basis, the Commission had concluded that Amazon held a dominant position in markets for the distribution of English language and German language e-books, and that the relevant MFN or parity clauses constituted an abuse of that dominant position – including because they were “*capable of deterring, or likely to deter, entry and/or expansion by E-Book Retailers competing with Amazon. This can result in a weakening of competition at the e-book distribution level and a strengthening of Amazon's already-dominant position vis-à-vis competing E-book Retailers*”.¹¹⁴

114. The potential for such anti-competitive effects emerges clearly from the legislation, guidance and decisional practice on the status of parity obligations, including PPOs, under the Chapter I prohibition and Article 101. It applies *a fortiori* in the context of Article 102: see paragraph 109(f) above. In particular:

¹¹³ Commission Guidelines on vertical restraints §362.

¹¹⁴ [CASE AT.40153 E-book MFNs and related matters \(Amazon\)](#), 4 May 2017.

- (a) Relevant legislation and guidance includes in particular: (i) the EU Vertical Block Exemption Regulation (“**VBER**”)¹¹⁵ and the Commission’s *Guidelines on vertical restraints* (“**Commission Guidelines**”);¹¹⁶ and (ii) the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (“**VABEO**”)¹¹⁷ and the CMA’s guidance on the VABEO (“**CMA Guidance**”).¹¹⁸
- (b) The Article 101 case law and guidance distinguishes between ‘narrow’ and ‘wide’ retail parity obligations. **Narrow** retail parity obligations are limited to the terms on which goods and services are sold through **direct** channels, such as a manufacturer’s website. **Wide** retail parity obligations extend to the terms on which goods and services are sold through **indirect** (as well as direct) channels, such as where a platform requires a manufacturer to sell its good or service on its platform at a price no higher than it is sold on other third-party platforms.¹¹⁹
- (c) Wide PPOs are not capable of benefiting from exemptions under the VBER or VABEO. Under Article 5 VBER, wide PPOs are ‘excluded’ restrictions that cannot benefit from the general exemption for vertical agreements under Article 2.
- (d) Wide PPOs (like other wide retail parity obligations) are treated even less favourably under the VABEO, as they are deemed to be a ‘hardcore’ restriction under Article 8. As a result, if an agreement contains a wide PPO, the agreement as a whole (and not simply the parity clause) is incapable of benefiting from an exemption. The CMA Guidance states that “*hardcore restrictions correspond to a category of restrictions under the VABEO for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the VABEO*”.¹²⁰

¹¹⁵ Commission regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

¹¹⁶ Guidelines on vertical restraints (2022/C 248/01).

¹¹⁷ Statutory Instrument 2022 No.516.

¹¹⁸ [CMA 166 Vertical Agreements Block Exemption Order: CMA Guidance](#), 12 July 2022.

¹¹⁹ For example, see the CMA Guidance, §§8.79ff and 10.161ff.

¹²⁰ CMA Guidance §8.5.

- (e) The Explanatory Notes for the VABEO explain that the UK Government took a deliberate decision to treat wide retail parity obligations less favourably in the UK than they are treated in the EU under the VBER. The UK Government is stated to have taken into account “*specific UK market conditions and the interests of UK customers and UK businesses*”, in particular that the UK had seen an “*exponential growth of online sales and services, increased price transparency and monitoring ... a rise in the number of online platforms acting as intermediaries*”, as well as “*the CMA’s experience of scrutinising parity obligations in its casework*”. The Explanatory Notes state that, as a result, “*the Government is concerned that wide retail parity obligations soften competition between horizontal competitors and reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate, or to enter markets and expand*”.¹²¹
- (f) The CMA Guidance (as well as the Commission Guidelines)¹²² identifies the anti-competitive effects that the CMA considers are likely to result from wide retail parity obligations, which it states “*are more likely than other types of parity obligation to produce anti-competitive effects and are therefore hardcore restrictions under the VABEO*”. In particular the CMA states that:¹²³
- “Wide retail parity obligations prevent product suppliers from offering lower prices or better terms on other intermediaries. Accordingly, other intermediaries cannot gain a competitive advantage if they improve the terms of the intermediation service they supply to a product supplier (eg through lowering the commissions charged) ... Similarly, the intermediary benefitting from the wide retail parity obligation is protected from competition from other intermediaries, and therefore has less incentive to improve the terms of its own intermediation service ... The overall effect is that wide retail parity obligations reduce the competitive pressure on the commission rates and other terms offered by intermediaries to product suppliers. In addition to softening competition between intermediaries, wide retail parity obligations reduce the ability and incentive of intermediaries to enter and expand ... Finally, wide retail parity obligations are also likely to soften competition between product suppliers competing on intermediaries, particularly online where there is greater price transparency.”
- (g) For the purpose of assessing the effects of a PPO, the Commission Guidelines state that relevant factors will include the market position of the platform that imposes the PPO – a point of key importance in the present context, where Valve is

¹²¹ Explanatory Notes §§7.19, 7.20 and 7.36.

¹²² Commission Guidelines §360.

¹²³ CMA Guidance §§8.84-8.88.

dominant – as well as the market share of the buyers of intermediation services covered by the obligation, the ‘homing behaviour’ of those buyers and end users (i.e. how many intermediation platforms they use), the existence of barriers to entry, the significance of direct sales channels and the ability of buyers to de-list their products from intermediation platforms.¹²⁴ All of those considerations are acutely raised in the present case, given the high market share enjoyed by Valve, and the weakness of its rivals’ attempts to enter or expand, whether by direct sales or otherwise.

- (h) If a parity obligation is found to restrict competition, in principle it may satisfy the requirements for individual exemption under section 9 of the Act and/or Article 101(3). The Commission Guidelines state that wide retail parity obligations are less likely than narrow parity obligations to fulfil the conditions of Article 101(3), as their restrictive effects are generally more severe.¹²⁵ The CMA Guidance states that it can be presumed that wide retail parity obligations are “*unlikely to fulfil the conditions for exemption*”, and record that (as is also the case under Article 101(3)) “[t]he burden is on the parties to substantiate any efficiencies resulting from the inclusion of wide retail parity obligations in their agreement and to demonstrate that all the conditions for individual exemption under section 9(1) are fulfilled”.¹²⁶
- (i) While the VBER, VABEO and their accompanying guidance are relatively recent, the position adopted in them in relation to parity obligations is consistent with earlier decisional practice.
- (j) In 2004, the Commission closed an investigation into MFN clauses in the contracts of the major Hollywood film studios with a number of pay television companies after the studios agreed to withdraw or waive the clauses. The Commission press release stated:¹²⁷

“The MFN clause gives the studios the right to enjoy the most favourable terms agreed between a pay-TV company and any one of them. According to the Commission’s preliminary assessment, the cumulative effect of the clauses is an alignment of the

¹²⁴ Commission Guidelines §361.

¹²⁵ Commission Guidelines §374.

¹²⁶ CMA Guidance §8.90.

¹²⁷ [IP/04/1314 Commission closes investigation into contracts of six Hollywood studios with European pay-TV's](#), 26 October 2004. [CF/50/2666-2667]

prices paid to the Majors. This is particularly because any increase agreed with a Major triggers a right to parallel increases in the prices of the other studios. The Commission considers that under these circumstances of cumulative effect such anomalous way of setting prices is at odds with the basic principle of price competition.”

- (k) In 2013, the Office of Fair Trading (“OFT”) closed on administrative priority grounds an investigation into suspected anti-competitive arrangements by Amazon after Amazon decided to end its price parity policy, which restricted its sellers from offering lower prices on other online sales channels. The OFT press release stated:¹²⁸

“Following numerous complaints, the OFT opened a formal investigation into Amazon’s price parity policy in October 2012. It was concerned that the policy was potentially anti-competitive. In particular, such policies may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers. In light of Amazon’s decision, the OFT is currently minded to close its investigation on grounds of administrative priority.”

- (l) In 2014 and 2017, the CMA expressed concerns about the anti-competitive effects of wide MFNs in its final reports following market investigations into the private motor insurance and digital comparison tool markets. In 2020, the CMA issued an infringement decision that Compare the Market’s wide MFN clauses infringed Chapter I and Article 101.¹²⁹

115. It bears emphasis that the above analysis applies even in the absence of dominance, and the special responsibilities that it brings. In the present case, for the reasons set out below, the imposition of the Valve PPOs by a dominant undertaking amounts to an abuse, given

¹²⁸ [60/13 OFT welcomes Amazon’s decision to end price parity policy](#), 29 August 2013. See also [CE/9692/12 Amazon online retailer: investigation into anti-competitive practices](#), 1 October 2013. [CF/51/2668-2669]

¹²⁹ The CMA’s decision was overturned on appeal: *BRG (Compare the Market)* [2022] CAT 36. However, the Tribunal’s judgment was based on various case-specific factors, in particular the CMA’s flawed approach to market definition (the Tribunal concluded the CMA should have defined the market as a two-sided market) and the CMA’s failure to identify anticompetitive effects. This second error arose, *inter alia*, from the CMA’s decision to rely exclusively on qualitative evidence which the Tribunal considered was “*anecdotal*”, “*lack[ed] depth ... and consistency with the CMA’s theory of harm*” and was “*untestable by both Compare The Market and the Tribunal*” (§262(2)). Also, the Tribunal did “*not consider there to be any scope for contending that Compare The Market had sufficient market power to impose [MFNs]. The Decision contains no such finding (which would be akin to an abuse of dominance case)...*” (§262(2)).

the clear restrictions on competition which they impose, which serve only to entrench Valve's market position.

The Valve PPOs

116. The three Valve PPOs, namely the Game PPO, DLC PPO and Content PPO: (a) are abusive both individually and collectively; and (b) together with the second and third abuses collectively constitute an overall anti-competitive strategy. On either basis, they constitute a single and continuous infringement.
117. The Valve PPOs restrict whether, and the terms on which, publishers can provide Multichannel Products in both Consumer Markets. The Valve PPOs are abusive individually and collectively in particular because they: (a) do not constitute competition on the merits; (b) are presumed to restrict competition; and/or (c) produce anti-competitive effects.
118. The Valve PPOs do not constitute competition on the merits because, instead of seeking to enhance Steam's services on the Distribution Markets, for example by improving the quality of the distribution services provided by Steam to publishers, or by reducing its Commission Charges, the Valve PPOs prevent rival distribution channels from offering, or reduce their incentives to offer, improved distribution services and/or lower commission charges, including by preventing them from offering to consumers Games and/or Add-on Content in a differentiated form, earlier and/or at lower prices than they are offered on Steam. See further paragraphs §§124, 129, 131-132 and 133 below. In short, instead of improving Steam's own offering to publishers, increasing competitive intensity in the market, the Valve PPOs restrict the ability of rival distribution channels to improve their offering, relative to Steam's offering, thereby reducing competitive intensity in the market.
119. The Valve PPOs should be presumed to restrict competition for the purpose of the Chapter II prohibition, and therefore effectively constitute abusive conduct 'by object', given their treatment under the Chapter I prohibition, as summarised at paragraph 112(d) to (f) above. The same approach should be adopted in relation to Article 102, insofar as the Tribunal is applying that provision to the UK market. In particular:

- (a) The Valve PPOs are all wide retail parity obligations, as they constrain how publishers can distribute Games and/or Add-on Content to consumers via rival Distribution Platforms, as well as through their own direct distribution channels.
 - (b) Under UK legislation, namely the VABEO, wide retail parity obligations are treated as ‘hardcore’ restrictions because they are presumed to restrict competition. In the relevant Explanatory Notes, the UK Government explained that it had taken a deliberate decision to adopt this approach in the light of “*specific UK market conditions*” and “*the CMA’s experience of scrutinising parity obligations in its casework*”.¹³⁰
 - (c) Substantively Article 101 / the Chapter I Prohibition should be interpreted consistently with Article 102 / the Chapter II Prohibition.¹³¹
120. The individual and cumulative effects of the Valve PPOs are summarised at paragraphs §§124, 129, 131-132 and 133 below. These anti-competitive effects, which hinder the ability of actual and potential rival distribution channels to compete effectively with Steam and/or to enter and/or expand, produce significant anti-competitive effects in particular as a result of the fact that: (a) the PPOs are all wide (§§114(d)-(f) and 119 above are repeated); (b) Valve has a strong position on the Relevant Markets, including relative to its nearest rivals (§§100-104 above are repeated); (b) Steam benefits from, among other things, significant network effects (paragraphs 98-104 above are repeated), which make it difficult for actual or potential rival distribution channels to enter, expand and/or compete effectively against Steam (even absent the Valve PPOs); (c) publishers can avoid being bound by the Valve PPOs only by not selling their Multichannel Games and/or Multichannel Add-on Content on Steam, which typically results in, or at least risks, a significant loss of revenue (Harman 1 §4.4.6); (d) by restricting the ability of actual and potential rivals to compete effectively with Steam, Valve is able to charge unfair and excessive commission charges, which result in higher prices being charged to consumers (see paragraphs §§148-161 and 169-184 below); and (e) the alignment of

¹³⁰ Explanatory Notes §§7.19, 7.20 and 7.36.

¹³¹ Case C-333/21 *European Superleague v FIFA & UEFA*, §186. This does not include the application of block exemptions, which can exempt an agreement from Article 101/the Chapter I prohibition but cannot exempt it from the operation of Article 102/the Chapter II prohibition: see *Generics v CMA* [2018] CAT 4, §427-432.

prices and softening of price competition in the Consumer Markets that result from the Game PPO and the DLC PPO takes place in online markets where there is high price transparency.

The Game PPO

121. As detailed at paragraphs 58-66 above, Valve enforces the Game PPO, which arises from:
 - (a) express contractual provisions in the SDA and/or Steamworks Documentation; (b) the way in which those provisions are enforced by Valve; (c) communications between Valve and publishers; and/or (d) Valve's practices in relation to the delisting of Games on the Steam platform.

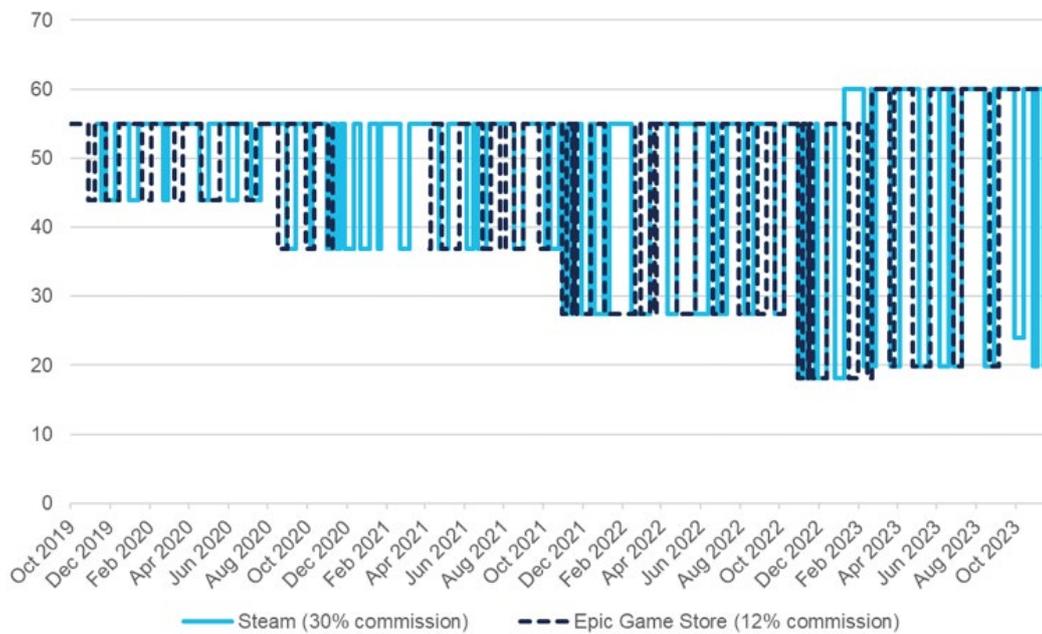
122. Under the Game PPO, in respect of Multilateral Games sold on Steam, Valve requires the relevant publisher to sell the relevant Multichannel Game on Steam for the same (or lower) price as it is sold through Other Distribution Channels. Valve enforces the Game PPO at least in part by delisting, and/or threatening to delist, Multichannel Games that are sold at a higher price on Steam, in breach of the Game PPO.

123. The existence of the Game PPO, its scope and terms and/or the way in which it is enforced by Valve – and also its effectiveness, in terms of its impact on pricing - will be a matter for evidence in due course, including disclosure from Valve. Evidence of these matters at this early stage of the proceedings includes the following:
 - (a) The Game PPO arises in part from express contractual provisions that require publishers not to sell Multichannel Games distributed using Steam Keys more cheaply through other distribution channels than they are sold on Steam: see §§64-65 above.
 - (b) Evidence cited in the Consolidated Second Amended US Complaint in the *In re Valve* litigation, examples of which are set out in Annex A, shows that Valve has applied these contractual obligations, which are ostensibly concerned with Multichannel Games distributed using Steam Keys, more broadly to Multichannel Games offered for sale on Steam and distributed through Other Distribution Channels, regardless of whether or not they are distributed through those other channels using Steam Keys.

- (c) Tim Sweeney, the founder and CEO of Epic Games, has explained that Valve's power to review prices is far-reaching: "*Steam has veto power over prices, so if a multi-store developer wishes to sell their game for a lower price on the Epic Games store than Steam, then ... Valve can simply say 'no.'*"¹³²
- (d) The existence and effectiveness of the Game PPO is supported by preliminary analysis conducted by Mr Harman and summarised in Section 6 of Harman 1 (in particular §§6.4.4-6.4.15). [CF/4/226-232] Specifically, Mr Harman has analysed the prices on which 33 Multichannel Games were sold over a number of years (a) on Steam and (b) through other distribution channels, including in particular where those Multichannel Games were distributed without the use of Steam Keys (i) on other Distribution Platforms and/or (ii) through direct distribution channels. For these Games (and particularly high selling Games), Mr Harman has observed a similar, distinctive pattern of pricing parallelism that is consistent over time, and is illustrated in Figure 6-1 in Harman 1 (internal p.98) [CF/4/228], reproduced below, which shows the price at which the Game Red Dead Redemption 2 was sold on both Steam and the Epic Games Store (a rival Distribution Platform) between October 2019 and October 2023. See further Harman 1 Appendix G (internal p.200), summarised at Harman 1 §§6.4.9-6.4.10. [CF/4/229]

¹³² Harman 1, Exhibit GH-232.

Figure 7-1: Pricing history of Red Dead Redemption 2, sold through Steam and Epic, October 2019 to December 2023, GE



- (e) On both Steam and the other distribution channel, the price of the Game bounced around between a full price level and a discounted price level, reflecting the fact that sale periods during which Games are sold at a significant discount are common in the industry. Mr Harman identifies a common pattern of pricing parallelism with a number of distinctive features. In particular, on both Steam and the other distribution channel: (a) the level of the discounts and subsequent price increases (when the price rebounds to the full price level) are the same, and consistent over a long period of time; and (b) the discounts and subsequent price increases generally occur within a short time period, and are sometimes simultaneous (such that the periods of discounted prices often overlap, or quickly follow one another): Harman 1 §§6.4.7-6.4.8. [CF/4/229] Mr Harman concludes that he would not expect to see this pattern of pricing behaviour absent the Game PPO, given material differences in distributions costs that publishers face when using alternative distribution channels, and therefore infers that the existence of this distinctive pattern of price parallelism supports the existence and effective enforcement of the Game PPO: Harman 1 §6.4.9. [CF/4/229]
- (f) Notwithstanding that the relevant express contractual provisions refer to Games distributed using Steam Keys, Mr Harman’s preliminary pricing analysis has not

found clear evidence that Valve effectively enforces the Game PPO in respect of Multichannel Games distributed through digital retail stores (such as Amazon, e-Bay etc) using Steam Keys: Harman 1 §6.4.13. [CF/4/231] The extent to which this is in fact the case, and the reasons why (if this is indeed the case) Valve enforces the Game PPO less strictly in respect of Games distributed using Steam Keys, will be a matter of evidence in due course. Possible explanations for a lack of effective enforcement of the Game PPO in respect of Games distributed using Steam Keys include: (a) the lack of a direct contractual relationship between Steam and digital retail stores, which may limit Steam's ability to enforce the restriction effectively; and/or (b) the possibility that Steam may consider it less important effectively to enforce the Game PPO in this context, given that: (i) digital retail stores are not direct competitors of Steam (see §91 above); (ii) Steam limits the number of Games distributed using Steam Keys (see §62 above); and/or (iii) that Steam Key sales result in consumers playing the relevant Game on the Steam platform, thereby enabling Valve to charge commission on subsequent Add-on Content purchases (given the tying/anti-steering abuse set out above) and to obtain data on the relevant consumer.

124. The Game PPO is likely to cause, and has in fact caused, restrictions of competition in particular as follows.

- (a) The Game PPO prevents Other Distribution Channels from gaining a competitive advantage (relative to Steam) by offering Multichannel Games more cheaply than they are available on Steam. This reduces the ability and incentive of: (i) existing rival distribution channels to expand; and (ii) potential rival distribution channels to enter the market (and subsequently expand). These effects arise on all four Relevant Markets.
- (b) By limiting the ability of rival distribution channels to compete against Steam in these ways, the Game PPO reduces the competitive pressure faced by Steam, and thereby its incentive to improve the quality, or reduce the price, of its own; (i) distribution services offered to publishers in the Game Distribution Market; and (ii) retail services offered to consumers in the Game Market.

- (c) Among other things, this reduction in competitive pressure on Steam allows Steam to charge higher commission rates in the Game Distribution Market than it would otherwise be able to charge, which in turn results in higher prices being charged in the Game Market. As Steam is the leading Distribution Platform with large market shares in both Game Markets, this reduces the intensity of price competition across both Game Markets, leading to higher average commission charges in the Game Distribution Market, and higher prices in the Game Market.
- (d) The Content PPO results in an alignment in the prices of Multichannel Games on offer in the Game Market, thereby restricting price competition in that market.

The DLC PPO

- 125. As detailed at paragraphs 67-72 above, Valve enforces the DLC PPO, which arises from:
 - (a) express contractual provisions in the SDA; (b) the way in which those provisions are enforced by Valve; (c) communications between Valve and publishers; and/or (d) Valve's practices in relation to the delisting of Games on the Steam platform.
- 126. Under the DLC PPO, in respect of Multichannel Games sold on Steam, Valve requires the relevant publisher to sell the relevant Add-on Content on Steam for the same (or lower) price as it is sold through other distribution channels. Valve enforces the Game PPO at least in part by delisting, and/or threatening to delist, Multichannel Games the Add-on Content for which is sold at a higher price on Steam, in breach of the DLC PPO.
- 127. The existence of the DLC PPO, its scope and terms and/or the way in which it is enforced by Valve – and also its effectiveness, in terms of its impact on pricing - will be a matter for evidence in due course, including disclosure from Valve.
- 128. In addition to the matters identified at §§67-72 above, the existence and effectiveness of the DLC PPO is supported by preliminary analysis conducted by Mr Harman and summarised in Section 6 of Harman 1 (in particular §§6.4.16-6.4.18).**[CF/X/X]** Specifically, Mr Harman has analysed the prices at which Add-on Content for leading Multichannel Games has been sold over a number of years (a) on Steam and (b) through other distribution channels, including in particular where Add-on Content for Multichannel Games was sold both (i) on other Distribution Platforms and/or (ii) through direct distribution channels. For such DLC, Mr Harman has found evidence of the same

distinctive pattern of pricing parallelism that he found for Multichannel Games, as summarised in paragraph 123(e) above, which he would not expect to see absent the DLC PPO.

129. The DLC PPO is likely to cause, and has in fact caused, restrictions of competition in particular as follows.
- (a) The DLC PPO prevents rival distribution channels from gaining a competitive advantage (relative to Steam) by offering Add-on Content for Multichannel Games more cheaply than they are available on Steam. This reduces the ability and incentive of: (i) existing rival distribution channels to expand; and (ii) potential rival distribution channels to enter the market (and subsequently expand). These effects arise on all four Relevant Markets.
 - (b) By limiting the ability of rival distribution channels to compete against Steam in these ways, the DLC PPO reduces the competitive pressure faced by Steam, and thereby its incentive to improve the quality, or reduce the price, of its own; (i) distribution services offered to publishers in the Add-on Content Distribution Market; and (ii) retail services offered to consumers in the Add-on Content Market.
 - (c) Among other things, this reduction in competitive pressure on Steam allows Steam to charge higher commission rates in the Add-on Content Distribution Market than it would otherwise be able to charge, which in turn results in higher prices being charged in the Add-on Content Market. As Steam is the leading Distribution Platform with large market shares in both Add-on Content Markets, this reduces the intensity of price competition across both Add-on Content Markets, leading to higher average commission charges in the Add-on Content Distribution Market, and higher prices in the Add-on Content Market.
 - (d) The DLC PPO results in an alignment in the prices of Add-on Content for Multichannel Games on offer in the Add-on Content Market, thereby restricting price competition in that market.

The Content PPO

130. As detailed at paragraphs 73-74 above, Valve's contractual terms impose the Content PPO which prohibits publishers from providing Multichannel Products for distribution

through Other Distribution Channels: (a) with differentiated content; and/or; (b) earlier (alternatively materially earlier) than they are provided to Steam.

131. The Content PPO is likely to cause, and has in fact caused, restrictions of competition in particular as follows.

- (a) The Content PPO limits the ability of rival distribution channels to gain a competitive advantage (relative to Steam) by offering Multichannel Products earlier (alternatively materially earlier) than they are available on Steam, or in a differentiated form. This reduces the ability and incentive of: (i) existing rival distribution channels to expand; and (ii) potential rival distribution channels to enter the market (and subsequently expand). These effects arise on both the consumer and publisher sides of the market, i.e. on all four Relevant Markets.
- (b) By limiting the ability of rival distribution channels to compete against Steam in these ways, the Content PPO reduces the competitive pressure faced by Steam, and thereby its incentive to improve the quality, or reduce the price, of its own; (i) distribution services offered to publishers in the Distribution Markets; and (ii) retail services offered to consumers in the Consumer Markets.
- (c) Among other things, this reduction in competitive pressure on Steam allows Steam to charge higher commission rates in the Distribution Markets than it would otherwise be able to charge, which in turn results in higher prices being charged in the Consumer Markets. As Steam is the leading Distribution Platform with large market shares in the Relevant Markets, this reduces the intensity of price competition across all four Relevant Markets, leading to higher average commission charges in the Distribution Markets, and higher prices in the Consumer Markets.
- (d) The Content PPO results in an alignment in the content and release dates of Multichannel Products on offer in the Consumer Markets, thereby reducing the variety of services on offer to consumers and restricting non-price competition on those markets.

Collective effects of the Valve PPOs

132. The Valve PPOs are collectively likely to cause, and have in fact caused, restrictions of competition in particular as follows.
- (a) The Valve PPOs prevents rival distribution channels from gaining a competitive advantage (relative to Steam) by offering Multichannel Products more cheaply or earlier than they are available on Steam, or in a differentiated form. This reduces the ability and incentive of: (i) existing rival distribution channels to expand; and (ii) potential rival distribution channels to enter the market (and subsequently expand). These effects arise on all four Relevant Markets.
 - (b) By limiting the ability of rival distribution channels to compete against Steam in these ways, the Valve PPOs reduces the competitive pressure faced by Steam, and thereby its incentive to improve the quality, or reduce the price, of its own; (i) distribution services offered to publishers in the Distribution Markets; and (ii) retail services offered to consumers in the Consumer Markets.
 - (c) Among other things, this reduction in competitive pressure on Steam allows Steam to charge higher commission rates in the Distribution Markets than it would otherwise be able to charge, which in turn results in higher prices being charged in the Consumer Markets. As Steam is the leading Distribution Platform with large shares in all of the Relevant Markets, this reduces the intensity of price and non-price competition in those markets, leading to higher average commission charges in the Distribution Markets, and higher prices in the Consumer Markets.
 - (d) The Valve PPOs results in an alignment in the prices, content and release dates of Multichannel Products on offer in the Consumer Markets, thereby restricting price and non-price competition in those markets.
133. Absent the Valve PPOs, the Relevant Markets would have developed differently. Among other things:
- (a) Steam and rival distribution channels could have competed by offering differentiated prices, content and release dates for Multichannel Products in the Consumer Markets.

- (b) More Products could have been released on a Multichannel basis and/or exclusively through distribution channels other than Steam.
- (c) As more Games would likely have been available through additional channels, including at lower prices, more consumers would likely have “multi-homed”, i.e. used Other Distribution Channels in addition to Steam, including rival Distribution Platforms.
- (d) Steam’s exposure to greater competitive pressure across the Relevant Markets would have resulted in it reducing its Commission Charges to publishers, and downward competitive pressure on commission charges would have been greater across both Distribution Markets.
- (e) Lower publisher commission charges, in combination with greater competitive intensity in the Consumer Markets, would have resulted in Games and Add-on Content being sold for lower prices.

Second abuse: the In-game Purchasing Restrictions

134. As detailed at §§75-81 above, through its contractual arrangements with publishers, in respect of Games distributed through Steam Valve imposes: (a) the Clause 2.5 Restriction, which prevents publishers from including any links or references within Games (including from pages accessed via the game menu outside of gameplay) enabling users to purchase Add-on Content from distribution channels other than Steam; and (b) the Steamworks API Restriction, which requires any in-game purchases (i.e. Microtransactions completed during gameplay) to be made using the Steamworks API – such that the relevant payment is made to Valve and is subject to Valve’s Commission Charges. These two restrictions, collectively referred to as the In-game Purchasing Restrictions, ensure that all, alternatively the overwhelming majority, of purchases of Add-on Content made by users from within Games distributed on Steam are made from Steam (and not through other distribution channels).
135. The In-game Purchasing Restrictions leverage Valve’s dominant position in the Game Markets so as to enable it to secure a larger share of the Add-on Content markets, by preventing or restricting the ability of other distribution channels to supply (including self-supply) Add-on Content for Games distributed on Steam. Accordingly, both the

Clause 2.5 Restriction, and the Steamworks API Restriction, are abusive whether considered individually or collectively.

136. As stated at paragraph 109(e) above, the categories of abuse are not closed, and there is no need to pigeon-hole an allegation of abuse into a particular category. As a result, the abusive nature of Valve’s In-game Purchasing Restrictions ultimately falls to be determined by reference to all the facts of the case. However, they may usefully be considered by reference to two existing categories of abuse, namely tying and the imposition of anti-steering provisions.

Applicable legal principles

137. ‘Tying’ usually refers to situations where customers that purchase one product (the tying product – here, Games and/or Game distribution services) are required also to purchase another product from the dominant undertaking (the tied product – here, Add-on Content and/or Add-on Content distribution services).¹³³
138. The PCR relies among others on the following legal principles and authorities in relation to the abuse of tying.
- (a) The Chapter II prohibition and Article 102 state that conduct may, in particular, constitute an abuse of a dominant position if it consists in “*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 such contracts*”. However, UK and EU courts have found that the abuse of tying is not limited to that situation, and held that it may be an abuse to tie two products even when that is consistent with commercial usage or there is a natural link between them.¹³⁴
- (b) Tying constitutes an abuse where the following factors are present: (i) the undertaking concerned is dominant in the market for the tying product; (ii) the tying and tied products are two separate products; (iii) the undertaking concerned does

¹³³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (“**Commission Article 102 Guidance**”), §51.

¹³⁴ T-201/04 Microsoft v Commission (“**Microsoft**”) EU:T:2007:289, §942; *Socrates v Law Society* [2017] CAT 10, §141.

not give customers a choice to obtain the tying product without the tied product; (iv) the practice in question ‘forecloses competition’; and (v) that practice is not objectively justified.¹³⁵

- (c) As to the second condition, whether the two products are separate products depends on customer demand.¹³⁶ The Commission has stated that “[t]wo products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product”.¹³⁷
- (d) As to the third condition, compulsion or coercion can in particular: (i) be contractual and/or technical (i.e. where the tying product only works properly with the tied product); and (ii) still exist where the party accepting the tied product is not charged a separate price for it.¹³⁸
- (e) In relation to the fourth condition, tying only constitutes an abuse if it may have an anti-competitive effect, but it is not necessary to demonstrate direct harm to customers or consumers or actual anti-competitive effects. It is sufficient to show that the conduct is reasonably likely to harm the competitive structure of the market.¹³⁹
- (f) Specifically in relation to the tying of payment processing services, on 10 June 2022, the CMA published its final report in its *Mobile ecosystems* market study. Appendix H considered the requirements imposed by Apple and Google on developers to use their proprietary payment systems to process in-app purchases made by users, including in particular within mobile games (i.e. the tying of their payment systems).¹⁴⁰ The CMA identified various potential anti-competitive effects, including that app developers could not choose alternative payment

¹³⁵ *Microsoft*, §§859, 862, 864, 869; Case T-604/18 *Google Android* EU:T:2022:541, §284.

¹³⁶ *Microsoft*, §917.

¹³⁷ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, §51.

¹³⁸ Case AT.40099 *Google Android* (“*Google Android Decision*”), §§746-748, citing *Microsoft*, §§ 963 and 967-970.

¹³⁹ *Socrates v Law Society* [2017] CAT 10, §§147-148.

¹⁴⁰ [Appendix H: Apple’s and Google’s in-app purchase rules](#). [CF/53/2673-2692]

processing services that better met their needs and were ‘disintermediated’ from their users in certain respects, and the potential distortion of competition between Apple’s and Google’s own apps and rival apps. The CMA rejected Apple’s and Google’s attempt to justify the requirements on the basis that they were necessary for it to collect commission on the payments, finding that alternative methods (which were not prohibitively costly or difficult to implement) could be used which did not give rise to the potential anti-competitive effects that it had identified.

139. In relation to the abuse of imposing anti-steering obligations, on 4 March 2024 the European Commission took an infringement decision finding Apple more than €1.8 billion for abusing its dominant position in the market for the distribution of music streaming apps to iOS users. The Commission found that Apple had abused its dominant position in particular by imposing unfair trading conditions contrary to Article 102(a) TFEU, in the form of anti-steering provisions that required app developers to use in-app purchases to unlock features or functionality within their app, including for “*subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version*”; further, they banned app developers from including in their apps any buttons, external links or others calls to action that directed customers to purchasing mechanisms other than in-app purchase, notwithstanding that such alternative purchasing mechanisms outside the app, offering subscriptions at cheaper prices, would have been available. The Commission found that these anti-steering provisions were (i) unilaterally imposed by Apple, (ii) were detrimental to the interests of iOS users of music streaming services (as they prevented music streaming service providers from duly informing OS users about the available options to purchase music streaming subscriptions outside of the app and from enabling them to effectively exercise those options), and (iii) were not necessary for the achievement of a legitimate objective and in any event not proportionate for that purpose. As such, they amounted to an abuse of dominance.”¹⁴¹

Abusive conduct in this case

¹⁴¹ Commission Decision C (2024) 1307 final, Case AT.40437 – Apple – App Store Practices (music streaming), 4 March 2024, provisional non-confidential version: see Recitals (163)-(165) for the wording of the Anti-Steering Provisions, and Recitals (825-826) for the Commission’s conclusions on the abusive nature of those provisions.

140. Both elements of the In-game Purchasing Restrictions satisfy the four conditions for abusive tying.
141. First, Valve is dominant in the market for the tying product. Both of the In-game Purchasing Restrictions tie the distribution of Add-on Content/Add-on Content distribution services to the distribution of Games/Game distribution services. For the reasons given at §§98-104 above, Valve has a dominant position in the Game Market and the Game Distribution Market.
142. Second, the tying and tied products are two separate products. In particular, Add-on Content and Add-on Content distribution are separate products/services from Games and Game distribution services: see §89 above, and Harman 1 §7.5.14. **[CF/4/250]**
143. Third, Valve does not give customers (users or publishers) a choice to obtain the tying product without the tied product.
- (a) The Clause 2.5 Restriction means that, within each Game purchased on Steam, users are not provided with any choice to purchase Add-on Content from a distribution channel other than Steam.
 - (b) For Microtransactions completed during gameplay, users necessarily have to use Valve's payment processing service, as Valve requires that Games sold on Steam use the Steamworks API for such transactions.
 - (c) Publishers have no choice but to comply with these contractual requirements if they wish to distribute their Games on Steam.
144. Fourth, the In-game Purchasing Restrictions have harmed, or are reasonably likely to harm, the competitive structure of the market. In particular, absent the In-game Purchasing Restrictions, publishers would, or would reasonably likely, have included links or references so as to enable users to purchase Add-on Content for Games (including in-game purchases) sold on Steam from other distribution channels, such as the relevant publisher's website and/or other Distribution Platforms (which would have supplied such Add-on Content). The fact that Valve imposes the In-game Purchasing Restrictions is itself evidence that such an outcome is plausible, as if it were not these provisions would be otiose. Paragraphs 78-80 above are repeated.

145. Further or alternatively, the In-game Purchasing Restrictions are anti-steering provisions which amount to the imposition of abusive and unfair trading conditions contrary to Article 102(a) TFEU: (i) they are unilaterally imposed by Valve (as the relevant terms are drafted by Valve, and publishers have no realistic choice but to agree with them if they want their Games distributed on Steam); (ii) they are detrimental to the interests of publishers and consumers (as they as they mean that consumers cannot make informed and effective choices as to where to purchase Add-on Content for Games distributed on Steam, and publishers cannot make informed and effective choices as to where to distribute such content); and (iii) they are not necessary for the achievement of a legitimate objective and in any event not proportionate for that purpose.
146. Individually and collectively, the In-game Purchasing Restrictions restrict competition in particular by restricting the ability of Other Distribution Channels to compete with Steam (on both Add-on Content Markets) for the distribution and sale of Add-on Content for Games distributed on Steam. Absent the In-game Purchasing Restrictions, Valve and its Commission Charges would be subject to greater competitive pressure in the Distribution Markets.¹⁴²
147. The In-game Purchasing Restrictions also exacerbate the effects of the First Abuse, and facilitate Valve's unfair Commission Charges, for the reasons given at §§16**Error! Reference source not found.**-162 below and Harman 1 section 7.7 (internal p.133). **[CF/4/263-264]**

Third Abuse: unfair pricing

148. The PCR contends that Valve's Commission Charges are unfair and abusive.

Applicable legal principles

149. The PCR relies among others on the following legal principles and authorities in relation to the abuse of unfair pricing.

¹⁴² Harman 1 §8.2.4. **[CF/4/266]**

150. The Chapter II Prohibition and Article 102 prohibit “*directly or indirectly imposing unfair purchase or selling prices*”. In relation to unfair pricing, the PCR relies among others on the following legal principles and authorities.
151. In its *United Brands* judgment, the CJEU stated, among other things, that one method of determining whether a price is abusive is to compare the selling price with the cost of production, to determine whether the difference is excessive (the so-called ‘excessive limb’), and, if so, whether the price is unfair either in itself or when compared to competing products (the so-called ‘unfair limb’).¹⁴³
152. In *Flynn / Pfizer*, the Court of Appeal reviewed the case law relating to unfair pricing (including the *United Brands* judgment) and drew the following conclusions:¹⁴⁴
- “(i) The basic test for abuse, which is set out in the Chapter II prohibition and in Article 102, is whether the price is “unfair”. In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of “normal and sufficiently effective competition”, i.e. “workable” competition.
 - (ii) A price which is “excessive” because it bears no “reasonable” relation to the economic value of the good or service is an example of such an unfair price.
 - (iii) There is no single method or “way” in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon.
 - (iv) Depending upon the facts and circumstances of the case a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases.
 - (v) If a Cost-Plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is “excessive”. This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales (ROS) or to some other appropriate benchmark such as return on capital employed (ROCE). When that is performed, and if the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive.
 - (vi) In analysing whether the end price is unfair a competition authority may look at a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness.

¹⁴³ Case 27/76 *United Brands* [1978] ECR 207, §§252.

¹⁴⁴ *CMA v Flynn & Pfizer* [2020] EWCA Civ 339, §97.

(vii) If a competition authority chooses one method (e.g. Cost-Plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone.

(viii) If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it.”

153. The Court of Appeal cited with approval the statement, endorsed by the Tribunal in *Napp*, that in principle a price was excessive:

“...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 (i) that 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.”¹⁴⁵

154. In its *Hydrocortisone I* judgment, the Tribunal considered the CMA’s application of the ‘bears no reasonable relation to the economic value’ test – one of the ways in which it might be established that a price is excessive. The Tribunal rejected as unarguable the contention of the Appellants that prices must bear some relation to the economic value because customers valued the products highly and were willing to pay the prices demanded, stating that this amounted “*to an unacceptable, and wrong, elision of the case for legitimate consumer surplus ... and the case of an illegitimate exercise of market power*”. Further, even “[i]f the explanation for the producer surplus excess is consistent with a competitive market, then it may be that it must be asked whether the excess is too great to be justified”. The Tribunal explained that a price above cost may be legitimate in particular where, for example through product differentiation, the seller has created a product that “*that adds value to the Buyer, in the sense that this aspect represents something that Buyers wish to purchase from that Seller in contradistinction to the offerings of other Sellers; and for which the Buyer will pay a premium*”. In this scenario, the seller is rewarded for its efforts with some producer surplus, but consumer surplus is also maximised – in contrast to a situation where prices above cost result from the seller having market power (e.g. due to barriers to market contestability), where consumer surplus is reduced.¹⁴⁶

¹⁴⁵ Ibid, at [91], discussing *Napp Pharmaceutical Holdings v DGFT* [2002] CAT 1 (“Napp”).

¹⁴⁶ *Hydrocortisone I* [2023] CAT 56, §§332, 339, 341.

155. In relation to the use of comparators, the Tribunal stated:¹⁴⁷

“Comparators are of particular importance, even where they may not be clear or compelling. Comparators can include: (i) comparators on different markets; (ii) comparators on the same market at the same time; and (iii) comparators separated by time. In all cases, the critical question for the court is whether anything probative can be derived from the comparator in question. ...

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. As the Tribunal noted, other methods will also no doubt exist, in particular analyses of price changes overtime, where there is no corresponding change in the operation of the market itself.”

Unfair pricing in this case

156. At present, the PCR does not have access to Valve’s data relating to its costs and revenues associated with the Steam platform. As a result, at §§7.6.10-7.6.35 of his report Mr Harman sets out his proposed methodology for determining whether Valve’s Commission Charges are excessive and unfair: see §204 below. [CF/4/255-263] However, notwithstanding the absence of cost and revenue data at this stage, Mr Harman identifies a number of considerations which indicate that Valve’s Commission Charges are likely to be abusive.

157. The PCR contends that the Commission Charges are unfair and abusive given: (a) Valve has had higher levels of profit over an extended period of time than one would expect in a sufficiently competitive market; (b) these high levels of profitability have not triggered material competitive entry or expansion; rather, the evidence indicates that it has been, and remains, very difficult for actual and potential rivals to enter the market and/or expand; and/or (c) the Commission Charges are significantly higher than several relevant comparator benchmarks.

158. Mr Harman proposes to assess whether Valve’s Commission Charges are abusive by applying the framework set out in the *United Brands* judgment, which includes an assessment of whether prices are: (a) excessive; and (b) unfair. Given that Steam

¹⁴⁷ *Ibid*, §331.

provides services in two-sided markets, Mr Harman will assess the overall costs incurred and revenue earned by Steam from both sides of the platform.

159. As to whether the Commission Charges are excessive, Mr Harman proposes to compare Steam’s revenues with the full economic costs of its Game and Add-on Content distribution activities: Harman 1 §§7.6.12-7.6.13.[CF/4/255] However, various public information suggests that Valve’s Commission Charges are likely to be excessive:

- (a) In 2011, Valve’s CEO called Valve “*tremendously profitable*” and asserted that it was more profitable per employee than Google or Apple.¹⁴⁸ In 2018, a Valve employee undertook analysis which showed that Valve was more profitable on a net income per employee basis than numerous other Big Tech companies including Facebook, Apple, Netflix, Alphabet, Microsoft, Intel and Amazon, implying that Valve was making more than \$780,000 per employee each year.¹⁴⁹
- (b) Mr Tim Sweeney, CEO of Epic Games, has estimated that the operating costs of operating a Distribution Platform amount to around 5 to 7% of revenue.¹⁵⁰ Based on this rough estimate, and the level of the Valve Commission Charges, Mr Harman estimates on a preliminary basis that Valve has been earning revenues of tens of millions of pounds each year in excess of costs, including between £98 million and £107 million in excess of cost in the 2023 financial year alone: Harman 1 §7.6.17 and Table 7-2. [CF/4/257]

160. As to whether the Commission Charges are unfair, a common and recognised approach is to compare the relevant prices with the prices of comparable products. Mr Harman’s preliminary assessment of comparators is set out at Harman 1 §7.6.22 and Table 7-3. [CF/4/259] This assessment shows, in particular, that Valve’s Commission Charges, which amount to an average commission of [REDACTED], are dramatically higher than the

¹⁴⁸ Oliver Chiang, [The Master of Online Mayhem \(forbes.com\)](https://www.forbes.com/2011/02/28/valve-ceo-profitable/) , FORBES (Feb. 28, 2011) [CF/54/2693-2698].

¹⁴⁹ See, <https://www.gamesradar.com/internal-valve-study-found-the-house-of-steam-was-making-more-money-per-employee-than-facebook-apple-and-microsoft-over-dollar780000-per-head-a-year/> and Document 200-6 in *In re Valve Antitrust Litigation* [CF/34/2171-2176].

¹⁵⁰ Harman 1, Exhibit GH-275.

commission charges of Steam's two main rival Distribution Platforms, namely the Epic Games Store and the Microsoft Store, which both charge 12%.

161. As summarised at paragraphs §§82-83 above, the fact that Valve has had high Commission Charges and profitability over an extended period of time has not triggered successful competitor entry or expansion. Indeed, several rival distribution channels have existed the market, and a number of major publishers attempted to remove their Games from Steam only to return at a later date. In short, there appears to have been, and continues to be, no effective competitive pressure to bring Valve's Commission Charges down to competitive levels. This is likely, at least in part, to be the due to Valve's abusive conduct in imposing the Valve PPOs and In-game Payment Restrictions: see paragraphs 116-136; 140-147.

Single and continuous infringement

162. The various conducts falling within the scope of the three abuses described above in this Part II C all form part of an overall strategy by Valve which together form a single and continuous infringement of Chapter II/Article 102 TFEU. In particular, Valve's imposition of the Valve PPOs and In-game Purchasing Restrictions are elements of an overall strategy designed to limit the competitive pressure to which Steam is subject so as to enable it to charge its high commission charges. See further Harman 1 §§7.7.1-7.7.3. [CF/4/263-264]

Objective justification

163. The burden is on Valve to make any case for objective justification. The PCR will respond to any Valve arguments on objective justification in due course.

Effect on trade

164. The Infringing Conduct may appreciably affect trade between Member States of the European Union and/or within the UK or a part of it. The Infringing Conduct has reinforced Valve's dominant position and/or appreciably distorted the structure of competition on the Relevant Markets, in particular in the way summarised at §§94-97 above. Among other things, the Infringing Conduct has (a) restricted the ability of actual and/or potential rival distributors to compete effectively with Steam, including by restricting their ability to enter the market and/or expand, has (b) restricted the ways in

which publishers can sell Products to consumers, and (c) has increased price levels across all four Relevant Markets – thereby preventing and/or affecting the ability of distributors and publishers to offer services within the UK and between Member States (for the period prior to 31 December 2020).

165. By way of non-exhaustive example in relation to the impact on trade between Member States, Ubisoft – which has sought to compete on the Relevant Markets through its Uplay digital distribution channel, and which has developed/published a number of leading games – is incorporated and headquartered in France.

D CAUSATION AND LOSS

166. The relief sought in these proceedings is damages, to be assessed on an aggregate basis pursuant to section 47C(2) of CA98. The Infringing Conduct has caused loss and damage to the Proposed Class Members (“PCMs”) as it has resulted in them paying higher prices for Relevant Purchases during the Relevant Period.
167. The loss and damage suffered by the PCMs is the difference during the Relevant Period between the amounts that the PCMs: (i) in fact paid for Relevant Purchases; and (ii) would have paid if Valve had not engaged in the Infringing Conduct.

Applicable legal principles

168. In relation to causation of loss, the PCR relies among others on the following legal principles and authorities.
- (a) In order to prove their case, competition claimants “*must establish: (a) a breach of competition law; and (b) actionable harm or damage caused by that breach ... [t]hat means that the Claimants must prove that some damage was caused by the Infringement and the test for causation is on a “but for” basis. Their recovery is not limited to the “gist damage” but they must satisfy the test for causation before there can be consideration of the quantification of their actual loss*”.¹⁵¹

¹⁵¹ *Royal Mail v DAF* [2023] CAT 6, §168.

- (b) “[O]ne cannot give a commonsense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule”.¹⁵²
- (c) As to the purpose served by the claims: (a) the ultimate purpose of the law on abuse of dominance is to prevent consumers from being treated unfairly;¹⁵³ and (b) the rationale for collective proceedings claims is to allow the vindication of claimants’ rights (in particular in circumstances where the level of individual loss would have rendered individual claims unviable) and to ensure that defendants pay damages to reflect their wrongdoing, which acts as a disincentive for future unlawful conduct.¹⁵⁴
- (d) The principle of effectiveness applies to domestic (as well as EU) competition law claims such that “*the rules should not be applied in such a way that the very right sought to be enforced is undermined*”.¹⁵⁵
- (e) The principle of effectiveness applies not only to the application of principles of liability but also “*to the procedural and evidential rules by which the court determines whether and to what extent the claimant has suffered loss*”.¹⁵⁶
- (f) “[A] level of imperfection and simplifying assumptions are unavoidable in every competition damages estimation. To require perfection or every permutation to be accounted for would be contrary to the principle of effectiveness for such damages claims”.¹⁵⁷

Causation and loss in this case

169. At trial, the PCR will satisfy the requirements for legal causation if, having proven an infringement, it can establish that it is more likely than not that the infringement caused

¹⁵² *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22, per Lord Hoffman at §31.

¹⁵³ *South Eastern Railway v Gutmann* [2022] EWCA Civ 1077, §93.

¹⁵⁴ *Merricks v MasterCard* [2020] UKSC 51 at §45; *South Eastern Railway v Gutmann* [2022] EWCA Civ 1077 at §§53 and 63.

¹⁵⁵ *NTN Corp v Stellantis* [2022] EWCA Civ 16, §29.

¹⁵⁶ *Sainsbury’s v Mastercard* [2020] UKSC 24, §189.

¹⁵⁷ *UK Trucks Claim v Stellantis* [2022] CAT 25, §138.

some (‘gist’) damage to the Proposed Class. That would be the case, for example, if the PCR proved: (a) the Third Abuse relating to excessive Commission Charges, and that it was more likely than not that in the counterfactual some publishers would have passed-on some of the savings from reduced distribution costs to consumers through lower prices; and/or (b) the First Abuse relating to the Valve PPOs, and that it was more likely than not that absent the Valve PPOs some publishers would have priced some Games (e.g. some Multichannel Games) more cheaply. In short, to prove legal causation, it will not be necessary for the PCR to succeed on all aspects of its counterfactual case. Nonetheless, in the following paragraphs the PCR summarises its preliminary case on the counterfactual, given this is linked to its preliminary methodology for estimating aggregate damages. The PCR reserves the right to amend its counterfactual case, and its preliminary methodology, in due course in the light of disclosure. the appropriate counterfactual is one purged of all unlawful conduct. That is, one in which Valve did not have any PPOs in place, there were no In-Game Purchasing restrictions, and Valve did not charge excessive commissions. Nor would there be any other potential violations of competition law.¹⁵⁸

170. At a high-level, the PCR considers that, in a counterfactual without any PPOs,¹⁵⁹ the In-game Purchasing Restrictions or the excessive commissions (the “**Primary Counterfactual**”), publishers would have sold Products at lower prices both through Other Distribution Channels and on Steam, for the reasons summarised below. In short:

¹⁵⁸ *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6 §61; *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* [2009] CAT 36 §90; *Achilles Information Limited v Network Rail Infrastructure Limited* [2022] CAT 9 §5(7).

¹⁵⁹ Were Valve to contend in due course that in the counterfactual it would have entered into narrow PPOs, the PCR will consider and respond to any such argument (including in the light of disclosure): the Tribunal has stated that PCR’s should not in their claim forms anticipate points that may be run by proposed defendants (*Gormsen (CPO 2)* [2024] CAT 11, §7(2)(ii)), and that even subsequently a PCR’s methodology is not required to address “every conceivable issue or defence which the defendants say they will or may run” (*UK Trucks Claim Ltd v Stellantis NV* [2023] EWCA Civ 875, §102). Nonetheless, in the circumstances of this case, the PCR considers it highly unlikely that it would have been lawful for Valve to enter into narrow PPOs (i.e. which restricted the terms on which Multichannel Products could be sold through direct distribution channels, but not through rival Distribution Platforms) on terms that were otherwise the same as the Valve PPOs. First, Valve has had high market shares in the Relevant Markets over a sustained period of time, and various other competitive advantages over rivals: see 104 above. Second, many Multichannel Products are only sold through Steam and direct distribution channels (i.e. they are not also sold through rival Distribution Platforms). As a result, in a context in which Valve has very considerable market power in the Relevant Markets, narrow PPOs would have eliminated a significant source of competitive pressure. See also Harman 1 §8.2.5. [CF/4/266]

- (a) Steam Commission Charges would have been set at a lower (non-excessive) level, thereby reducing the distribution costs for publishers from selling Products on Steam. As a result of these lower distribution costs, publishers would have sold Products on Steam at lower prices.
- (b) Publishers would have sold Multichannel Products through Other Distribution Channels at lower prices (both because those products would have been sold at lower prices on Steam, and because absent the Valve PPOs publishers would not have been required to sell those products at or above the prices on which they were sold on Steam, and would have had an economic incentive to sell them at lower prices).
- (c) Other Products – in particular Valve’s own Products and Products sold through Other Distribution Channels but not on Steam - would also have been sold at lower prices, as publishers set prices in part in the light of the level of prices of similar Products, and Multichannel Products and Products sold on Steam (which would have been sold at lower prices) comprise a large proportion of all Products.

171. The PCR’s primary case is that Valve committed all three pleaded abuses, which constitute a single and continuous infringement, and that the counterfactual should therefore be stripped of all the conduct alleged to be abusive. The PCR does not consider that it is obliged to plead separate counterfactuals in which only some of Valve’s allegedly abusive conduct is stripped out (e.g. anticipating a scenario in which the PCR succeeded on some of its abuse claims, but failed on others). That is in particular for the following reasons: (a) the PCR has pleaded that the three abuses collectively constitute a single and continuous infringement (see paragraph 106 above); (b) the case law requires the counterfactual to be stripped of all unlawful conduct, not only some of it (see the cases cited at footnote 159); (c) a PCR is not required to plead counterfactuals for each and every possible combination of its success or failure on different issues at trial, as the Tribunal may certify a methodology even where it has not “*considered what sorts of adjustments might need to be made should the [defendants] prevail on some issues*”;¹⁶⁰ and (d) it is unrealistic to expect the PCR to plead its counterfactual case in great detail

¹⁶⁰ *MOL (Europe Africa) Ltd v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701, §§48-49.

at this early stage of the proceedings given the current information asymmetries that exist as between the parties, in particular prior to disclosure.

172. Nonetheless, in the following paragraphs, the PCR summarises its case (at this early stage subject to disclosure) as to the counterfactual worlds that would have existed if one removed only: (a) the Valve PPOs (but not Valve’s excessive Commission Charges) (the “**PPO Counterfactual**”); and (b) Valve’s excessive Commission Charges (but not the Valve PPOs) (the “**Excessive Pricing Counterfactual**”). The PCR has adopted this approach to illustrate that, even if only some of Valve’s abusive conduct were to be removed from the counterfactual: (a) prices would still have been lower across the whole of the market (albeit through different mechanisms); and (b) the PCMs would still have paid less for their Products in the counterfactual than they actually did. The PCR’s articulation of these alternative counterfactuals also illustrates that its proposed methodology for estimating aggregate damages will be appropriate, or alternatively could be adapted, so as to ensure that the Claims remain triable in the event that it did not establish each and every head of abuse at trial.
173. For the avoidance of doubt, at this preliminary stage, the PCR does not contend that the PCMs would have suffered losses caused by the In-Game Purchasing Restrictions considered in isolation. Specifically, in a counterfactual without the In-game Purchasing Restrictions but in which the Valve PPOs and Valve’s excessive Commission Charges were still present, it is not at this stage contended that the PCMs would have paid lower prices for their Products. Rather, the PCR contends that the In-game Purchasing Restrictions exacerbated the anti-competitive effects of the Valve PPOs, which together caused losses. However, the PCR reserves its right to amend its pleading in respect of this issue in due course, in particular in the light of disclosure.

The PPO Counterfactual

174. The Valve PPOs constrain the terms on which publishers can sell Multichannel Products through Other Distribution Channels. Their effects are summarised in particular at §§132-133 above. In summary:
- (a) the Game PPO prevents or restricts publishers from selling Multichannel Games through Other Distribution Channels more cheaply than on Steam;

- (b) the DLC PPO prevents or restricts publishers from selling Add-on Content for Multichannel Games through Other Distribution Channels more cheaply than on Steam; and
 - (c) the Content PPO restricts publishers from providing Multichannel Products through Other Distribution Channels: (i) with differentiated content; and/or (ii) earlier than they are provided to Steam.
175. The position in the PPO Counterfactual (in which there are no Valve PPOs but Valve’s excessive Commission Charges are not removed automatically as a result of having been found to be abusive,) can usefully be analysed by reference to (i) Multichannel Products; (ii) third party Products (i.e. Games not published by Valve, and their associated Add-on Content) sold only on Steam (“**Steam-only Products**”); (ii) Games published by Valve sold only on Steam, and their associated Add-on Content (“**Valve Products**”); and (iii) Products not sold on Steam but sold through one or more Other Distribution Channels (“**Other Distribution Channel-only Products**”).

Multi-channel Products and Steam-only Products

176. In the PPO Counterfactual - in which, in particular, the Game PPO and DLC PPO were not present - publishers would have offered Multichannel Products for sale through Other Distribution Channels more cheaply than on Steam. This is to be expected in particular because publishers have an economic incentive to do so given that their distribution costs are lower when selling through Other Distribution Channels compared to on Steam, as a result of Steam’s high commission charges.¹⁶¹
177. To the extent that Multichannel Products were offered for sale more cheaply through Other Distribution Channels than on Steam, consumers would have made more purchases through such channels and fewer purchases on Steam, i.e. because consumers typically prefer to purchase products for lower prices.
178. In addition, absent the Valve PPOs publishers would have had a greater incentive to sell more Products through Other Distribution Channels, whether in addition to, or instead of, on Steam.

¹⁶¹ Harman 1 §8.2.3. [CF/4/265-266]

179. Absent a competitive response from Steam, this would have resulted in Valve having reduced market shares, revenues and profits. Faced with this increased competitive pressure, Valve would have reduced the level of its Commission Charges in response, which would have led publishers to reduce the prices of Products sold on Steam (both Multichannel Products sold on Steam, and Steam-only Products) (as publishers should have had an incentive to pass-on these distribution cost savings): see Harman 1 8.2.1-8.2.5. [CF/4/265-266]
180. The level of competitive pressure on Steam to reduce its Commission Charges (i.e. so as to limit the loss of business to Other Distribution Channels now able to sell Multichannel Products at prices lower than those on Steam) would have been further increased as a result of the following.
- (a) Absent the Content PPO, publishers would have had an incentive to offer some Multichannel Products through Other Distribution Channels earlier than on Steam and/or in differentiated form (one of the ways in which distribution channels compete) to a greater extent than permitted under the Content PPO.
 - (b) If the In-game Purchasing Restrictions were also absent from the PPO Counterfactual, publishers would have had an incentive to provide some links or references to enable users to purchase Add-on Content for Multichannel Games downloaded from Steam from Other Distribution Channels, enabling Other Distribution Channels to compete with Steam in respect of such content (including on price)
181. As a result, in the PPO Counterfactual publishers would have sold Multichannel Products (both on Steam and through Other Distribution Channels) and Steam-only Products at lower prices than in the actual world.

Valve Products and Games sold only through Other Distribution Channel

182. Valve does not pay Steam's commission charges for the distribution of Valve Products, i.e. Valve's own first-party Games (and associated Add-on Content) that it produces itself and distributes on Steam. However, publishers (including Valve) set prices for Products in part in the light of the level of prices for similar Products and the intensity of price competition in the market: Harman 1 §8.5.6. [CF/4/278]

183. As a result, because in the PPO Counterfactual other categories of product would have been sold at lower prices, Valve Products would also have been sold at lower prices. Given that Valve's own Games are predominantly Free-to-Play, these lower prices would predominantly have taken the form of lower prices for Add-on Content for Valve produced Games.
184. Further, Other Distribution Channel Products would also have been sold at lower prices (notwithstanding that the Valve PPOs do not constrain the terms on which publishers sell Products when they are sold only through Other Distribution Channels) for similar reasons, i.e. given that publishers set prices for Products, including Other Distribution Channel Products, in part in the light of the level of prices for similar Products and the intensity of price competition in the market: Harman 1 §8.5.2. [CF/4/277]

The Excessive Pricing Counterfactual

185. In the Excessive Pricing Counterfactual: (a) Valve's Commission Charges would be at a competitive level; but (b) the Valve PPOs and the In-game Purchasing Restrictions would remain in place.
186. In this counterfactual, all Products would have been sold at lower prices, in particular for the following reasons.
- (a) All third-party Products sold on Steam would have been sold by publishers at lower prices as their distribution costs would have been lower, i.e. as publishers would have had an incentive to pass-on their distribution cost savings arising from Steam's lower Commission Charges: Harman 1 §8.2.7. [CF/4/137] This includes Multichannel Products, as well as Steam-only Products.
 - (b) As Multichannel Products would have been sold on Steam at lower prices, publishers would also have sold Multichannel Products through Other Distribution Channels at lower prices, reflecting the fact that, under the Games PPO and DLC PPO, they would be able to reduce their prices on Other Distribution Channels to the same (lower) level as the same products were sold on Steam, and they would have had an economic incentive to do so given the level of their distribution costs when selling through those Other Distribution Channels.

- (c) As all Steam-only Products, and all Multichannel Products (on both Steam and Other Distribution Channels) – which together constitute a large proportion of the Relevant Markets - would have been sold at lower prices, other Products, namely Valve Products and Other Distribution Channel Products, would also have been sold at lower prices given that publishers set prices for Products in part in the light of the level of prices for similar Products and the intensity of price competition in the market: Harman 1 §§8.5.2-8.5.6. [CF/4/277-278]

187. As a result, in the Excessive Pricing Counterfactual, all categories of product would have been sold at lower prices than in the actual world.

E PROPOSED METHODOLOGY AND CERTIFICATION

Applicable legal principles

188. In respect of the relevance of the PCR’s proposed methodology to its application for certification, the PCR relies among others on the following legal principles and authorities.

189. Under s.47B(6) of the Act, claims are eligible to be included in collective proceedings “*only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings*”. In order to enable the Tribunal to assess whether the commonality and suitability requirements are met for the purpose of certification, PCRs are required to put forward a methodology setting out how the issues they have identified will be determined or answered at trial.¹⁶² If a claim is certified, the methodology “*will provide an initial blueprint for the parties and the CAT of the way ahead to trial*”.¹⁶³ The Court of Appeal has stated that the methodology “*will be relevant to a range of issues including breach of duty, causation, proof of loss and quantum*”.¹⁶⁴

190. When assessing the methodology at the certification stage, the Tribunal’s assessment should be sensitive to the facts of the case and take into account the information

¹⁶² *Gutmann v LSER* [2022] EWCA Civ 1077, at [24].

¹⁶³ *MOL v McLaren* [2022] EWCA Civ 1701, at [47].

¹⁶⁴ *LSER v Gutmann* [2022] EWCA Civ 1077, at §44.

asymmetries that often exist as between claimants and defendants prior to disclosure, and the fact the methodology can be revised prior to trial.

- (a) *“The level of detail of a methodology required by the CAT will always be fact and context sensitive and will turn upon such matters as the availability of evidence”*.¹⁶⁵
- (b) *“The methodology is subject to a certification assessment prior to disclosure and is thereby necessarily provisional and might, properly, identify refinements and further work to be carried out after disclosure. In many competition cases there will be a distinct informational asymmetry between a claimant and a defendant which might be exacerbated in aggregate damages, top down, cases where the relevant information might predominantly be in the possession of the defendant. At the certification stage all that might be possible is for the class representative to advance a methodology identifying what might be done following disclosure. This is why in Microsoft the Court referred, in prospective terms, to there being ‘some evidence of the availability of the data to which the methodology is to be applied’”*;¹⁶⁶
- (c) Where a defendant has indicated that a point will be taken, the PCR should generally address how – methodologically speaking – the issue will be addressed (which requires a ‘cards on the table’ approach from the proposed defendants).¹⁶⁷ However, points should not be anticipated in the Claim Form.¹⁶⁸ Further, *“it is not for the [class representative] to produce an expert methodology which addresses every conceivable issue or defence which the defendants say they will or may run. To go down that route would be to encourage a plethora of expert evidence addressing every conceivable argument that might be raised, and a long drawn out and expensive certification process”*.¹⁶⁹
- (d) The *“test is about practical justiciability”* and whether the methodology will *“advance the resolution”* of the issues at trial, such that the workability of

¹⁶⁵ *MOL v McLaren* [2022] EWCA Civ 1701, at [47].

¹⁶⁶ *LSER v Gutmann* [2022] EWCA Civ 1077At §55.

¹⁶⁷ *Gormsen v Meta (CPO)* [2023] CAT 10, at §40(3)(ii).

¹⁶⁸ *Gormsen v Meta (CPO 2)* [2024] CAT 11 §7(2).

¹⁶⁹ *Boyle v Govia* [2023] CAT 63, §8(2).

methodology at trial is a central consideration. However, the issue must be considered bearing in mind that the methodology is not fixed in stone at certification and can be revisited prior to trial.¹⁷⁰

191. For the purpose of determining whether the criteria for certification are satisfied, the Tribunal assesses the PCR’s methodology by reference to the ‘Pro-Sys’ or ‘Microsoft’ test that originated in Canadian jurisprudence and was endorsed by the Supreme Court in its Merricks judgment for use in the context of collective proceedings claims under the Act. The Microsoft test asks whether the PCR’s methodology provides “some basis in fact” for the conclusion that the certification criteria are met.¹⁷¹
192. As to how the Microsoft test should be applied, the courts have provided the following guidance.
- (a) At the certification stage, the Tribunal is not concerned with the merits of the claim or the methodology.¹⁷²
 - (b) *“The threshold for certification was not onerous, not least because [the methodology] had to be formulated in advance of disclosure”.*¹⁷³
 - (c) *“In forming its judgment at the certification stage the CAT will bear in mind that at trial it is armed with a broad axe by which it can fill gaps and plug lacunae in the methodology”.*¹⁷⁴
 - (d) *“[I]f collective proceedings are (i) arguable and (ii) triable they should proceed to trial ... No case should be untriable, if it is arguable. Triability is all about case management and not about killing off proceedings”.*¹⁷⁵

¹⁷⁰ *LSER v Gutmann* [2022] EWCA Civ 1077 at §§47 and 60.

¹⁷¹ *Merricks v MasterCard* [2020] UKSC 51, [2021] Bus. L.R. 25 at §56(1).

¹⁷² *Merricks v MasterCard* [2020] UKSC 51, [2021] Bus. L.R. 25 at §59; *Gormsen v Meta (CPO)* [2023] CAT 10, at §40(3)(i).

¹⁷³ *Gutmann v LSER* [2022] EWCA Civ 1077, at [61], referring to the majority judgment of Lord Briggs in *Merricks*.

¹⁷⁴ *LSER v Gutmann* [2022] EWCA Civ 1077, at §58.

¹⁷⁵ *Boyle v Govia* [2023] CAT 63, §§6-7.

- (e) *“too much encouragement has been given in overloading what is intended as a straightforward test of triability, turning the Microsoft Pro-Sys Test into something coming close to a mini-trial. We agree with the Chancellor that such an approach is to be discouraged ... The Microsoft Pro-Sys Test is a low order test for a blueprint to trial: no more, and no less”*.¹⁷⁶
- (f) The CAT’s role is not to *“determine the best methodology available”*, nor to *“conduc[t] a mini-trial”*, nor to *“satisfy itself that the methodology is bound to work”* – it is simply to *“assess the [methodology] put forward by the PCR.”*¹⁷⁷
- (g) *“it is incumbent upon all – lawyers and experts – to ensure that what their work focusses on is that which is necessary to decide certification”*.¹⁷⁸

193. As to quantum, in *Merricks* the Supreme Court laid down the following principles in relation to the estimation of aggregate damages in competition cases.¹⁷⁹

- (a) In collective proceedings seeking an award of aggregate damages under s.47C of the Act, the ordinary requirement requiring each claimant’s loss to be separately assessed is removed.
- (b) If the claim raises a triable issue as to whether the claimants have suffered loss, they should not be deprived of a trial merely because of forensic difficulties in quantifying damages.
- (c) The ‘broad axe’ principle, that the court must do its best to quantify damages upon the basis of the available evidence, is fully applicable in competition cases.
- (d) The need to resort to informed guesswork rather than scientific calculation is of particular importance where the court has to proceed by reference to a hypothetical or counterfactual state of affairs.

¹⁷⁶ *Boyle v Govia* [2023] CAT 63, §§8(3) and 9(6).

¹⁷⁷ *Coll v Alphabet Inc* [2022] CAT 39 §54.

¹⁷⁸ *Gormsen v Meta (CPO 2)* [2024] CAT 11, at §54.

¹⁷⁹ *Merricks v MasterCard* [2020] UKSC 51, §§45-58.

- (e) The Supreme Court cited with approval the following guidance of the European Commission on quantifying harm in actions for damages under the competition rules:

“It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of article 101 or 102 TFEU ... For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single ‘true’ value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations”.¹⁸⁰

- (f) In *Gutmann*, the Court of Appeal confirmed that the ‘broad axe’ principle applied to issues of liability as well as to issues of quantum (noting that *Merricks* itself was potentially concerned with liability): “[t]he duty of the judge to do the best possible with the evidence available applies as equally to issues of causation and loss (liability) as it does to other issues relating to quantum”.¹⁸¹

194. As to the methodology’s explanation of how the PCR intends to demonstrate loss on a class-wide basis:

- (a) “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 ... there is a means by which to demonstrate that it is common to the class”;¹⁸²
- (b) this will generally involve setting out “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”;¹⁸³
- (c) however, “[t]he methodology is based upon a counterfactual model of how the market would have operated absent the abuse. It is quintessentially hypothetical

¹⁸⁰ *Ibid*, §52.

¹⁸¹ *LSEr v Gutmann* [2022] EWCA Civ 1077, at §59.

¹⁸² *LSEr v Gutmann* [2022] EWCA Civ 1077, at §46, noting that this approach of Rothstein J in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 was adopted in this jurisdiction by the Supreme Court in *Merricks*.

¹⁸³ *Gormsen v Meta (CPO)* [2023] CAT 10, at §56(1).

*and, for this reason, will use assumptions and models and, frequently, regression analysis. It is therefore not a fair criticism to make of a methodology that it is hypothetical”.*¹⁸⁴

195. In relation to the **distribution of aggregate damages**, the Supreme Court in *Merricks* explained that it is not necessarily the case that compensation must be on strictly compensatory lines, as: “*the compensatory principle is expressly, and radically, modified. Where aggregate damages are awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant’s loss in the plainest terms ... The only requirement ... is that it should be just, in the sense of being fair and reasonable*”.¹⁸⁵ In addition, the determination of a fair way to distribute an aggregate award of damages will “[in] many cases ... best be left until the size of the class and the amount of the aggregate damages are known”, such that it will generally be premature to consider distribution proposals at the certification stage.¹⁸⁶

Proposed methodology: overview

196. Sections 4 to 8 of Harman 1 summarise Mr Harman’s preliminary proposed methodology. Appendix I of Harman 1 lists various pieces of information and data that Mr Harman will request from Valve in order to refine his assessments of market definition, dominance, abuse and aggregate damages (including class size). The following paragraphs simply summarise at a high level of generality certain elements of Mr Harman’s proposed preliminary approach.
197. As set out at 190(a)-(c) above, it is recognised in collective proceedings cases that there may be significant information asymmetries between the parties at the certification stage, and that the level of detail required of a PCR’s methodology will depend on the extent of the available evidence, and that preliminary methodologies may need to be revised in due course, including in the light of the disclosure (i.e. once it has become clear what evidence is, and is not, available).
198. Those considerations apply with particular force here, given that Valve is not publicly listed and there is relatively little information relating to its operations and financial

¹⁸⁴ *Gutmann v LSER* [2022] EWCA Civ 1077, at §54.

¹⁸⁵ *Merricks v MasterCard* [2020] UKSC 51, §58 (and see also §77).

¹⁸⁶ *Merricks v MasterCard* [2020] UKSC 51, §§77 and 80.

performance in the public domain. As a result, Mr Harman notes that he may well need to revise elements of his methodology in due course, including in the light of disclosure: Harman 1 §2.1.2 and Appendix I. [CF/4/135, 373-378] Mr Harman also notes that, if it were to become apparent that certain pieces of information and/or data that he has requested are not available, his methodology would be adjusted accordingly.¹⁸⁷ If a claim is arguable, it should be triable, and if certain evidence is not available then the Tribunal can have recourse to its ‘broad axe’ to estimate damages as best it can: see §§192-193.

Proposed methodology: establishing an infringement

199. Mr Harman’s proposed preliminary approach to issues of **market definition** is entirely orthodox, being based, among other things, on the standard approach to market definition as set out by the European Commission in its recently revised Market Definition Notice,¹⁸⁸ involving a conceptual application of the hypothetical monopolist test. Given that the Relevant Markets are two-sided, Mr Harman proposes to define markets on both sides separately, consistent with the comments of the Tribunal in its *Compare the Market* judgment: Harman 1 §§4.2.2 and 4.2.10-42.14 [CF/4/168, 170-171]; Harman 1, Section 4. Mr Harman’s proposed approach to **dominance** is also orthodox, being based on an assessment of market shares and the competitive constraints on Steam, taking into account in particular network effects (which are common in platform markets): Harman 1 §§5.1.1-5.2.8. [CF/4/193-196]
200. It is anticipated that Valve will hold a substantial quantity of information and data relevant to these issues, including financial information concerning its Game and Add-on Content sales and its net revenue from publishers, but also data and/or reports relating to the size and boundaries of the Relevant Markets and the share of different distribution channels within those markets: Harman 1, §§4.10, 5.10.3-5.10.5 [CF/4/191-192, 222] and Appendix I. 2-I.3. [CF/4/374] In addition or alternatively, evidence on sales volumes, markets shares and/or other relevant metrics is likely to be available from third party data providers: Harman 1 5.10.1-5.10.2. [CF/4/221-222]

¹⁸⁷ Harman 1 I.1.2. [CF/4/374]

¹⁸⁸ Harman 1 §4.2.2. [CF/4/168]

201. In relation to the **First Abuse** concerning the Valve PPOs, relevant materials are likely to be available from the US *In re Valve* litigation and/or the investigation that has recently been launched by the Polish competition authority: see 17 above and Annex 1 below.
202. In relation to the extent to which Valve enforces the PPOs in respect of different categories of Game and Add-on Content, relevant material is likely to be found in internal Valve documents, and communications between Steam and publishers. Mr Harman also proposes to extend his analysis (examples of which are set out in Harman 1, Section 7) of the extent to which the prices of Products subject to the Valve PPOs move in parallel across Steam and Other Distribution Channels. Internal Valve documents may also cover Valve's rationale for imposing the PPOs, and Valve's internal assessment of their effects, including the extent to which Product prices would be different in their absence.
203. In relation to the **Second Abuse** concerning the In-game Purchasing Restrictions, again internal Valve documents may cover Valve's rationale for imposing those restrictions, and Valve's internal assessment of their effects, including whether and the extent to which, in the absence of the restrictions, publishers would seek to sell Downstream Content for Games sold on Steam through Other Distribution Channels.
204. Mr Harman's proposed preliminary methodology for assessing whether Valve's Commission Charges are excessive and unfair for the purpose of the **Third Abuse** is also entirely orthodox. Mr Harman proposes to take into account, among other things, Valve's profitability, a comparison of Steam's revenues with its full economic costs, and a comparison of Valve's Commission Charges with commission charges for comparable products and services: Harman 1 Section 7.6 (internal p.122). Such an approach is in line with that articulated in the leading authorities in this area (see §§151-155 above), including the judgment of the Court of Appeal in *Flynn / Pfizer*.¹⁸⁹ Broadly similar excessive pricing methodologies have been certified in the ongoing *Kent* and *Coll* claims that are currently before the Tribunal, relating to the 30% commission charges levied by Apple and Google on publishers in respect of app sales in the App Store and Play Store.¹⁹⁰

¹⁸⁹ *CMA v Flynn & Pfizer* [2020] EWCA Civ 339.

¹⁹⁰ *Kent v Apple*, Case No 1403/7/7/21; *Coll v Alphabet*, Case No 1408/7/7/21.

Proposed methodology: aggregate damages

205. The PCR's preliminary methodology for estimating aggregate damages is set out in Section 8 of Harman 1 (internal p.135). [CF/4/265-279]
206. Mr Harman proposes to estimate aggregate damages by identifying the difference in the Relevant Period between the prices that the Class Members: (a) paid for the Products in the actual world; and (b) would have paid in the counterfactual.¹⁹¹
207. As an initial step, Mr Harman will estimate the amounts spent on the Products by the Proposed Class during the Relevant Period. In particular, Mr Harman will estimate the amount spent on Games and Add-on Content (separately) across 5 Product categories, as follows:
- (a) Products sold on Steam, including (i) Multichannel Products sold on Steam, (ii) Steam-only Products and (iii) Valve Products; and
 - (b) Products sold through Other Distribution Channels, including (iv) Multichannel Products sold through such channels and (v) Other Distribution Channel Products.
208. Mr Harman proposes to measure the extent to which prices would have been lower in the counterfactual scenario in two stages. First, by estimating the extent to which publisher distribution costs would have been lower in the counterfactual due to lower commission charges (most obviously for sales through Steam by third-party publishers). Second, Mr Harman will estimate the extent to which consumer prices would have been lower in the counterfactual, taking into account counterfactual distribution costs and also: (a) the extent to which publishers would have passed-on commission charge savings to consumers through lower prices; and (b) the extent to which publishers would have set lower prices as a result of more intense price competition between Games and Add-on Content across the Consumer Markets.
209. It will be necessary for Mr Harman to estimate counterfactual commission rates for Products sold through: (a) Steam; and (b) Other Distribution Channels.

¹⁹¹ Harman 1 §§8.2.1 and 9.2.1-9.2.6. [CF/4/265, 281-282]

210. Mr Harman's estimate of counterfactual commission rates will be informed by the analyses that he will undertake in relation to excessive pricing, which will include in particular comparisons of: (a) Valve's commission revenues with the full economic costs of its Product distribution activities; and (b) Valve's Commission Charges compared to the commission charges of appropriate comparators including in particular Other Distribution Channels. Valve disclosure may also shed light on the factors that influence the operators of PC distribution channels when setting their commission rates, for example the extent to which they take into account the commission rates of rival channels and/or the intensity of competition in the Distribution Markets.
211. Mr Harman proposes next to estimate the extent to which publishers would have set lower Product prices in the counterfactual, including in the light of any savings in distribution costs, i.e. given lower counterfactual commission rates, in particular in the light of two mechanisms: (a) pass-on; and (b) increased price competition.
212. Pass-on is relevant to Products that would have benefitted from lower commission rates in the counterfactual, most obviously Multichannel Products and Steam-Only Products. Increased price competition could have affected the pricing of all Products, but most obviously products that did not benefit from any, or any substantial, reductions in commission rates, such as Valve games and Other Distribution Channel Products.
213. Mr Harman notes that economic theory suggests that pass-on rates are likely to be between 100% (the rate under perfect competition) and 50% (the rate anticipated for a standard profit-maximising monopoly facing a linear demand curve), reflecting a broad rule of thumb that pass-on rates are higher where markets are more competitive. That is the theoretical framework in which Mr Harman's empirical analysis will sit.¹⁹²
214. As to that, Mr Harman proposes to undertake a number of empirical analyses of the extent to which previous changes in commission rates have been passed-on to consumers through adjusted prices. Mr Harman explicitly notes that the precise nature and form of this empirical analysis, including the technical approach that he will deploy, will depend on the available data.

¹⁹² Harman 1 §8.4.5. [CF/4/272]

215. Additional sources of relevant data may become apparent during the proceedings, but even at this preliminary stage Mr Harman has already identified various situations where commission charges paid by one or more relevant publishers have changed.¹⁹³ Analysing the extent to which prices changed in those situations may therefore provide data indicating the extent to which commission rate savings/increases have previously been passed-on to consumers through lower/higher Product prices.
- (a) In November 2018, Steam changed from having a single 30% commission charge to a tiered commission rate structure in which, in respect of each Application, publishers were charged commissions of 30% for all revenue below USD 10 million, 25% for all revenue between aggregate sales of \$10 million and \$25 million, and 20% for all revenue between aggregate sales above \$50 million: see §53 above.
 - (b) There are instances of where publishers have switched from selling their Products on Steam to selling them through Other Distribution Channels with lower commission charges, and *vice versa*. (There are also instances of publishers selling some Games on Steam, but other Games exclusively through Other Distribution Channels, which might also usefully be analysed.)¹⁹⁴
 - (c) There are instances of Other Distribution Channels changing their commission charges, such as when the commission rate on the Microsoft Store fell from 30% to 12% in April 2021.¹⁹⁵
 - (d) There are instances of publishers switching their products between distribution channels with different commission charges in adjacent markets. For example, in July 2020, Epic began offering consumers who played the mobile game Fortnite on Apple iOS and Google Android devices the opportunity to purchase add-on content directly from Epic, rather the App Store or Google Play Store, both of which (at the time) charged commission rates of 30%.¹⁹⁶

¹⁹³ Harman 1 §8.4.19. [CF/4/276]

¹⁹⁴ Harman 1 §8.4.16-8.4.18. [CF/4/275]

¹⁹⁵ Harman 1 §7.6.21. [CF/4/258]

¹⁹⁶ Harman 1 §7.6.28. [CF/4/261]

216. As Mr Harman notes, when undertaking the relevant analyses it may be appropriate to control for other factors that could have affected the prices of the relevant products, such as general market trends, discount periods etc. Undertaking a range of such analysis should provide a number of results that can be used as cross-checks against one another, and can collectively inform Mr Harman's assessment of the extent to which in the counterfactual commission charge savings would have been passed-on to consumers through lower Product prices.
217. The second mechanism likely to have affected Product prices in the counterfactual is increased price competition. First, as summarised at Harman 1 §8.5.2, publishers routinely set the prices of their Products by comparing them to similar Products, a strategy known as price benchmarking. [CF/4/277] This approach highlights the existence and role of price competition in the Consumer Markets, as publishers aim to avoid losing revenue to competitors whose products consumers might choose as alternatives. It is plausible that increased price competition in the counterfactual might have caused publishers to reduce the price of their Products, including after launch, including Products that did not themselves benefit from any, or any substantial, reduction in commission rates.
218. Mr Harman proposes to assess the significance for price levels of price benchmarking, and price competition more generally, in the light of the available evidence. For example, Valve is likely to have considered the relationship between Product prices and volumes for its own internal purposes, e.g. for the purpose of setting the prices of Valve Products, when deciding whether and, if so, how to implement changes to its Commission Charges, and for the purpose of monitoring general market developments. This is also a topic on which an industry expert may be able to give evidence.
219. Having reviewed evidence and analysed data in order to make an informed assessment of the extent to which publishers are likely to have passed-on commission charges savings in the counterfactual and the significance on price setting of price benchmarking and/or the level of price competition in the market, Mr Harman will estimate the extent to which prices would have been lower in the various Product categories identified at §207 above.

220. The two mechanisms are likely to have affected the prices of Products in the different categories to differing extents. For example, if Mr Harman concludes that in the counterfactual Valve's Commission Charges would have been substantially lower, any estimated price reductions in the price of Steam-only Products are likely to be due to a significant extent from publishers passing-on a proportion of the resulting savings to consumers. Conversely, Valve does not have to pay its own Commission Charges in respect of Valve Products, so any estimated price reductions in the price of Valve Products would be due to the estimated impact of price benchmarking and/or more general price competition in the market (i.e. taking into account that, in the counterfactual, the prices of Products similar to Valve Products would have been lower).

Blueprint to trial

221. As noted in the Litigation Plan in Section 6, given the significant information asymmetries that presently exist between the parties it is likely that the disclosure process will need to proceed in steps, with an early step being the filing by Valve of a disclosure report shortly after the Tribunal has made the CPO.

222. In addition, and as noted at §84 above, the PPO allegations in these claims overlap substantially with the allegations being advanced against Valve in the US in the *In re Valve* litigation, and the subject matter of an investigation that has been launched by the Polish competition authority. The PCR therefore intends to seek early disclosure of relevant documents and/or data produced in those two sets of proceedings, which it should be possible for Valve to provide relatively quickly and without great expense. The PCR envisages that these materials are likely to cover, among other things, the operation of the Relevant Markets and the nature, scope and enforcement of the Valve PPOs. Although they will not cover all relevant matters, including given the different scope of the different proceedings, further requests for documentary disclosure can be formulated in part in the light of these materials, as well as Valve's disclosure report. The PCR will also seek disclosure of relevant data, including data relevant to the assessment of market definition and dominance and cost and revenue information for Mr Harman's assessment of whether Valve's Commission Charges are excessive and unfair.

223. As is common in competition cases, as at least some of the disclosed material is likely to be confidential, it will be necessary to put in place appropriate confidentiality arrangements.

224. In terms of witness evidence, the PCR anticipates that Valve may wish to submit factual witness evidence, as well as expert evidence from an expert economist. In addition to Mr Harman, the PCR will consider in due course, in particular following receipt of disclosure and any factual witness evidence served by Valve, whether it wishes to submit any additional expert evidence, such as from a technical and/or industry expert.
225. The PCR's Litigation Timetable envisages that there will be a single trial to determine all issues, including issues of market definition/dominance as well as issues of abuse. That is in part because there is likely to be a substantial overlap in the evidence relevant to different parts of the case. In addition, holding separate trials to determine specific issues is likely to result in increased costs and delay.

Distribution

226. The PCR has set out its (necessarily provisional) initial views on possible methods of distribution in section 8 of the Litigation Plan and section 12 of the Notice and Administration Plan ("NAP"). At this stage, the PCR provisionally considers that the aggregate award could be distributed by the following methods:
- (a) PCMs could be invited to submit application forms (either online or in hard copy) providing the information and evidence necessary to ascertain their eligibility for, and the amount of, any award of damages. Those applications will be processed and checked to avoid duplicative or fraudulent claims. The PCR considers that PCMs will be able to review their transaction histories by logging into relevant Distribution Platforms accounts. Alternatively, PCMs are likely to have email records of purchases or bank statements that may provide evidence of purchases.
 - (b) An alternative approach is to use transaction data held by Valve – and potentially also other Distribution Platforms (e.g. Epic or Microsoft). The PCR considers it likely that Distribution Platforms will hold account data, linked to PCMs, that records all purchases made via that account.

F JURISDICTION AND APPLICABLE LAW

Jurisdiction

227. The proceedings should be treated as taking place in England and Wales for the purpose of Rule 18 of the Rules for the reasons given in Part H below.
228. Where proceedings before the Tribunal are treated as taking place in England and Wales, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc* a [2015] CAT 7, at [17]-[18].
229. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases taking place in England and Wales are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, the Application must satisfy the following requirements:
- (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.
 - (b) There is a good arguable case that the claim falls within one of the paragraphs or “gateways” set out in CPR Practice Direction 6B (“CPR PD6B”) at paragraph 3.1. “Good arguable case” means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon.
 - (c) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.
230. The PCR considers these requirements to be satisfied for the reasons set out in more detail in the accompanying Application to serve out of the jurisdiction (the “**Service Out Application**”).
231. In summary, the PCR considers that:
- (a) there is a serious issue to be tried and that the claim has real prospects of success for the reasons given above, and at Service Out Application §§22-25 [SO/1/11-12] and Shotbolt 1 §48 [CF/6/407-408];
 - (b) there is a good arguable case that the paragraph 3.1(9)(a) gateway is satisfied on the basis that “*damage was sustained, or will be sustained, within the jurisdiction*”.

Where, as here, the loss takes the form of an overcharge (see Section D above), damage is sustained where the goods are bought: *Apple v Qualcomm* [2018] EWHC 1188 (Pat), at [99]. As the PCMs are domiciled and purchased the relevant PC Games and DLC in the UK, damage has been sustained in the jurisdiction;

- (c) there is a good arguable case that the paragraph 3.1(9)(a) gateway is satisfied on the basis that the Claims are governed by UK law for the reasons given at §§232-238 below; and
- (d) England is clearly or distinctly the appropriate forum in particular because it would not be possible for the PCMs to bring their claims, which relate to losses suffered in the UK, in the US because the US Sherman Act does not apply extra-territorially (as has been recognised by the Tribunal in previous cases). In addition, the Claims are governed by UK law, the PCMs, the PCR and the PCR’s legal and economic teams are based in the UK, and the Tribunal is already considering and is set to determine similar unfair pricing allegations relating to 30% commission charges in the ongoing *Kent* and *Coll* cases. See further Service Out Application §§33-34.

Applicable law

232. Losses sustained by PCMs which predate 11pm on 31 January 2020 are governed by Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (“**Rome II**”). Losses which postdate 11pm on 31 January 2020 are governed by the retained version of Rome II (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) (Retained EU Legislation)) (“**Retained Rome II**”), which is in equivalent terms to Rome II. Both Rome II and Retained Rome II apply as between jurisdictions within the United Kingdom pursuant to regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI No. 2986/2008).¹⁹⁷ References below to provisions in Rome II are also to the equivalent provisions in Retained Rome II.

233. Article 4(1) of Rome II sets out the general rule that, unless otherwise provided for:

“the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the

¹⁹⁷ The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008

event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur”.

234. Article 6(3)(a) of Rome II makes specific provision for competition claims, and states that states that “[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected”.¹⁹⁸

235. Recitals (21) and (22) of Rome II explain that Article 6 is a clarification of the general rule in Article 4(1), i.e. Article 6 is intended to state a version of the principle that the applicable law is that of the country where the damage occurs, particularized for competition law.¹⁹⁹ Thus, in *Westover v Mastercard* [2021] CAT 12 at §50, the Tribunal stated:

“The general rule is that the governing law is the law of the country where the damage occurs: Art 4. That is considered to strike a fair balance between the defendant and the claimant: recital (16). Thus Art 6(3)(a) can be seen as a particular application of this approach: where there is a restriction of competition then the market affected is likely to correspond to the place where the anti-competitive damage occurs.”

236. As stated at §231(b) above, the High Court has held that, where (as here) loss takes the form of an overcharge, damage is sustained where the goods are bought. The PCR submits that the same approach should be taken in respect of services.

237. Accordingly, as the Claims are claims for losses incurred by UK-domiciled class members as a result of having been overcharged for goods and/or services provided to them in the UK, the market affected by the alleged infringement is the UK. In this respect, the applicable law, including the applicable rules of limitation or prescription, is (a) English and Welsh law in respect of PCMs domiciled in England and Wales; (b) Northern Irish law in respect of PCMs domiciled in Northern Ireland; and (c) Scottish law in respect of PCMs domiciled in Scotland.

¹⁹⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

¹⁹⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

238. In relation to the Scottish law principles of prescription, section 11(2) of the Prescription and Limitation (Scotland) Act 1973 applies in respect of Valve’s continuing abuse of dominance, whether as part of a single and continuous infringement (see §162 above) or otherwise.²⁰⁰ It follows that the prescriptive period has not yet began to run. In support of this position the PCR relies by way of analogy on the Tribunal’s judgment in *Merricks v Mastercard* [2023] CAT 15, where it concluded that section 11(2) applied in respect of abusive conduct that formed part of an overarching and continuing scheme (c.f. in particular §§65-66 of the CAT’s judgment).²⁰¹

G RELIEF

239. The PCR claims:

- (a) damages on behalf of the Proposed Class, to be assessed on an aggregate basis pursuant to section 47(C) of the Act;
- (b) simple interest thereon, at a rate of 8% per annum (or such other rate as the Tribunal may consider appropriate);
- (c) the PCR’s costs; and
- (d) such further and other relief as the Tribunal may see fit.

H FORUM

240. The PCR invites the Tribunal to order that the proposed collective proceedings be treated as taking place in England and Wales for the purpose of Rule 18 of the CAT Rules, in particular because:

- (a) the PCR and its legal and expert terms are based in England;
- (b) the large majority of the proposed class of up to 14.2 million persons are domiciled and suffered their losses in England and Wales (given that approximately 88% of the UK population is based in England and Wales);²⁰² and

²⁰⁰ Prescription and Limitation (Scotland) Act 1973

²⁰¹ *Merricks v Mastercard* [2023] CAT 15

²⁰² ONS, [Population estimates for the UK: mid-2021](#), 21 December 2022. [CF/56/2703-2721]

- (c) the applicable law in relation to this large majority of the proposed class is the law of England and Wales, for the reasons given at paragraphs 232-238 above.

III. THE PROPOSED CLASS, AUTHORISATION AND ELIGIBILITY (RULE 75(3)(A)-(E))

241. This part addresses the requirements of Rule 75(3)(a) to (e) in three sections, relating to:
(a) the proposed class; (b) authorisation; and (c) eligibility.

A THE PROPOSED CLASS

242. The proposed class of claimants for the purpose of the Claims (the “**Proposed Class**” and “**Proposed Class Members**” or “**PCMs**”) consists of:

“All Persons who, during the Class Period, made one or more payments for the purpose of purchasing: (a) PC Games, and/or (b) Add-on Content for PC Games, including subscription payments for PC Games and/or Add-on Content (collectively “**Relevant Purchases**”).

243. For the purposes of this definition of the Proposed Class (“**Class Definition**”):
- (a) “Persons” means, in respect of Relevant Purchases, the person who was licensed to use the acquired content, typically the account holder.
- (b) “Class Period” means the period up to the date of the Collective Proceedings Order in these proceedings: (i) from 4 June 2018, in relation to members of the Class domiciled in England, Wales and Northern Ireland; and (ii) from 1 January 2010 in relation to members of the Class domiciled in Scotland.
- (c) “PC Games” means video games designed to be played on PCs (i.e. personal computers), as opposed to on other types of hardware such as consoles or mobiles, including PCs built by Apple and/or using a Mac operating system.
- (d) “Add-on Content” means content that can be added-on to PC Games that is purchased after the initial acquisition of the game, sometimes referred to as Downloadable Content (“DLC”), and includes content acquired through Microtransactions completed during gameplay.

244. The following Persons are excluded from the class:
- (a) Any directors of the PCR, their parents, their spouses or civil partners or any persons with whom they cohabit, and their children.
 - (b) Officers, directors or employees of the Proposed Defendant, their subsidiaries and any entity in which they have a controlling interest.
 - (c) All members of the PCR's and Proposed Defendant's respective legal teams and all experts and professional advisors instructed and retained by them and all funders or insurers involved, in connection with these collective proceedings.
 - (d) All members of the Tribunal assigned to these proceedings.
 - (e) Any judge involved in any appeal in the present collective proceedings (whether in respect of the grant of permission to appeal or the hearing of any substantive appeal).
245. All Persons who fall within the definition of the Proposed Class and, on a date of domicile to be determined by the Tribunal, are:
- (a) domiciled in the UK, are proposed to be included in the Proposed Class; and
 - (b) not domiciled in the UK, are proposed to be permitted to opt-in to the proceedings.
246. In respect of any Person who meets the Class Definition but has subsequently died, the Class shall include their lawful representatives, successors or assignees.
247. In respect of the Class Period, in *Neill v Sony* [2023] CAT 73 the Tribunal held that it could only certify collective proceedings which combined claims that were extant as at the date of the Claim Form. However, the PCR contends that the Tribunal has the power to certify collective proceedings so long as the claims being combined are extant by the time of the CPO. Section 47B(1) CA98 provides that collective proceedings may only be brought before the Tribunal that combine two or more claims to which section 47A applies. The requirements of that provision are satisfied so long as the relevant class includes at least two persons with claims that are extant as at the date of the Claim Form. Section 47B(1) does not preclude the bringing of collective proceedings in respect of a class that also includes additional persons whose claims have not become extant by that

stage. Section 47B(5) provides that “[t]he Tribunal may make a collective proceedings order only ... (b) in respect of claims which are eligible for inclusion in collective proceedings”. For the purposes of the present application, the PCR accepts that the effect of that provision is that the Tribunal cannot certify claims that are not extant by the time of the CPO. However, the Tribunal can certify claims which are extant by that stage, even if they were not extant when the Claim Form was filed.

248. PC Games are often played by minors (i.e. persons under 18 years of age). As a result of the definition of “Persons” within the Class Definition, the PCM will be the account holder to whom use of the content was licensed. As a result, where a minor instigated Relevant Purchases while using the account of a parent or guardian, the PCM will be the parent or guardian. Where, however, a minor made Relevant Purchases while using their own account, the PCM will be the account holder notwithstanding that they may have been a minor at the relevant time. That is the case even if the minor made the Relevant Purchases using money or a bank/credit card provided to them by a parent or guardian, as in that scenario the common law presumption of advancement would result in a presumption that the relevant monies used and content acquired were a gift to the minor.
249. As set out below (§§255(e)), the PCR is taking a number of steps to safeguard and tailor the progress of the collective proceedings to the interests of PCMs who are minors.

Rule 75(3)(b): Sub-classes

250. The PCR does not consider that there are conflicting interests or materially different issues arising as between sub-groups of PCMs. As a result, it is not currently considered that it is necessary or appropriate to divide the Class into different sub-classes. The PCR will, however, keep the position under review as the Claims progress.

Rule 75(3)(c): Estimate of number of Class Members

251. The PCR provisionally estimates that there will be approximately 9.3 to 14.2 million Class Members falling within the Proposed Class (Harman 1, §10.3), and that the average claim value²⁰³ for each individual PCM will be between £8 and £23 in respect of the purchase of Games, between £14 and £29 in respect of the purchase of Add-on Content, and between £22 and £44 in total (Harman 1, §§10.3.4-10.3.6). [CF/4/289-290] The

²⁰³ Assuming 14.2 million class members.

PCR anticipates that the Proposed Defendant will be able to provide information that will allow a more precise estimate of the class size in due course (Harman 1 §10.3.3).
[CF/4/289]

B AUTHORISATION

Rule 75(3)(d): summary of the basis on which the PCR seeks to be authorised to act in that capacity in accordance with Rule 78

252. Section 47B(8) of the Act and Rule 78(1)(b) provide that the Tribunal may authorise a person to act as a class representative in collective proceedings only if it considers that it would be just and reasonable for that person to so act. Rule 78(1)(a) provides that the Tribunal may authorise an applicant whether or not they are a class member, and Rule 78(2) and (3) set out various considerations that the Tribunal must consider and take into account when determining whether to authorise an applicant.

253. It would be just and reasonable for Vicki Shotbolt Class Representative Limited to act as the PCR in the Proposed Collective Proceedings for the reasons summarised below and in Shotbolt 1 §§11-69. [CF/6/396-413]

254. Under Rule 78(2)(a), in considering the authorisation condition, the Tribunal must consider whether the PCR “*would fairly and adequately act in the interests of the class members*”, taking into account all relevant circumstances including those listed in Rule 78(3). These issues and factors are addressed in detail in Shotbolt 1 §§31-45 (see also Ms Shotbolt’s reasons for wanting to act as class representative at §§21-30). [CF/6/399-402]
In summary:

- (a) Ms Shotbolt has a longstanding interest in and experience of championing the interests of consumers who play video games, including minors (Shotbolt 1 §§21-27). [CF/6/399-401]
- (b) Ms Shotbolt’s own experience will be complemented by an Advisory Panel which consists of individuals with specific expertise and experience in technology, gaming and children and vulnerable consumer’s rights. Support from the Advisory Panel will provide additional confidence that decisions made by the PCR will be fair and further the best interests of the Proposed Class: Shotbolt 1 §§32-36. [CF/6/402-404] The Advisory Panel currently includes Mr Andy Burrows (a

policy and strategy tech accountability consultant with extensive experience in providing strategic guidance on child-centric design considerations in technology and consumer policy and development), who will be able to support the PCR in ensuring that suitable consideration is given to the high number of minors within the Proposed Class: Shotbolt 1, §§34(b)-36. **[CF/6/402-404]**

- (c) The PCR is supported by a legal team with extensive experience in competition litigation and specifically collective actions: Shotbolt 1 §37. **[CF/6/404]**
- (d) The PCR has prepared a comprehensive Litigation Plan which is intended to ensure that the proposed collective proceedings will be effectively and efficiently pursued in the interests of the Proposed Class (Shotbolt1 §§40-41; Litigation Plan section 3). The Litigation Plan has been developed with the assistance of the PCR’s legal advisors and Epiq Systems Limited, a specialist notice and claims management provider. The Litigation Plan satisfactorily addresses the matters specified at Rule 78(3)(c). It includes, *inter alia*, the way in which the PCR intends to communicate effectively with the Proposed Class, as well as how it will administer an aggregate award of damages. To this end, the Litigation Plan incorporates a Notice and Administration Plan (“**NAP**”), key aspects of which are summarised at Shotbolt 1 §§42-44. In delivering the NAP, the PCR will also be supported by Consumer Voice Limited, which provides public relations services, and the website developer Untold Heroes (Litigation Plan §§3.3-3.4). **[CF/14/547-548]**
- (e) As set out in the Litigation Plan (§4.6) and NAP (§4.5), the PCR will ensure that communications with PCMs will be appropriately tailored to be received/viewed by minors within the Proposed Class – e.g. using language that can be understood by individuals with all education levels. **[CF/14/550] & [CF/15/569]**
- (f) Neither the PCR nor Ms Shotbolt are members of the Proposed Class (Rule 78(3)(a)): Shotbolt 1 §47. Nor is the PCR a pre-existing body (Rule 78(3)(b)): Shotbolt 1 §1. **[CF/6/393]**
- (g) The PCR has adequate funding for the Claim and will be able to pay the Proposed Defendant’s recoverable costs (if ordered to do so) (Rule 78(2)(d) and 78(3)(c)(iii)):

- (i) As explained in more detail in Shotbolt 1 at §§50-59, the PCR has entered into a Litigation Funding Agreement (“LFA”) with Bench Walk Guernsey PCC Limited Contracting on Behalf of the Steam UK Funding Cell (the “Funder”), to enable it to pay all necessary costs, fees or disbursements. The level of funding is adequate and appropriate in all the circumstances, as appears from the detailed litigation budget totalling £18,573,566.00 that is exhibited to Shotbolt 1. A redacted copy of the LFA and Priorities Agreement is exhibited to Shotbolt 1. [CF/8/419-446] & [CF/12/520-532]
- (ii) The PCR has the benefit of an ATE Policy with HDI Global Speciality SE, AXA Insurance UK PLC, Accredited Insurance (Europe) Limited, International General Insurance Co (UK) Limited, and Litica Ltd. The ATE Policy includes adverse costs cover of up to £15m. The PCR considers that this level of cover, when combined with the Funder’s contractual obligation to pay unlimited adverse costs is appropriate and adequate to cover the risk of any adverse costs award in the Parallel Proceedings: Shotbolt 1 §§56-59). [CF/6/409-410]

255. In relation to the remaining considerations and circumstances relevant to authorisation:

- (a) Ms Shotbolt is not aware of any conflict of interest which prevents her from acting as the sole director of the PCR (Shotbolt 1 §§46-47) [CF/6/407] (Rule 78(2)(b);
- (b) Ms Shotbolt is not aware of any other person seeking to act as the class representative in respect of the same claims (Shotbolt 1 §13) [CF/6/397] (Rule 78(2)(c); and
- (c) The PCR is not seeking an interim injunction (Rule 78(2)(d).

C ELIGIBILITY

256. Under s.47B(6) of the Act and Rule 79(1)(a) to (c), the Tribunal may certify claims as eligible for inclusion in collective proceedings only if it considers that they: (a) “*are brought on behalf of an identifiable class of persons*” (b) “*raise the same, similar or related issues of fact or law*” (within the meaning of s.47B(6), referred to in Rule

79(1)(b) as “*common issues*”); and (c) “*are suitable to be brought in collective proceedings*” (taking into account the matters specified in Rule 79(2)).

257. For the reasons set out in this section, the PCR contends that all three requirements are met in the present proceedings, and accordingly that the Claims are eligible for inclusion in collective proceedings.²⁰⁴

Identifiable class of persons (Rule 79(1)(a))

258. In its judgment in *CICC v Mastercard & Visa (CPO applications)* [2023] CAT 38²⁰⁵, the Tribunal provided the following guidance in relation to the question of the identification of the class:

- (a) The requirement in Rule 79(1)(a) is concerned with whether the class definition can sensibly identify a class, e.g. for the purpose of determining whether issues are common and who is bound by the result of the proceedings.
- (b) However, in line with the comments of the Court of Appeal in *Le Patourel*²⁰⁶ regarding the role of collective proceedings in facilitating access to justice, Rule 79(1)(a) does not require an overly prescriptive approach – there may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required.
- (c) The reference in Rule 79(2)(e) to whether it is possible to determine in respect of any person whether they are or are not a member of the class - one of a number of factors relevant to suitability - is concerned with the mechanics of how a particular person verifies whether or not they are included in the class. That is a question of methodology and is important in relation to issues such as registration of class members and the distribution of any award of damages.
- (d) Despite having distinct functions, Rules 79(1)(a) and 79(2)(e) are inherently linked. An unclear or poorly drafted class definition will make it more difficult to reach a

²⁰⁴ This subsection provides a summary of the basis on which it is contended that the criteria for certification and approval in Rule 79 are satisfied, as per Rule 75(3)(e).

²⁰⁵ *CICC v Mastercard & Visa (CPO applications)* [2023] CAT 38

²⁰⁶ [2022] EWCA Civ 593, §29.

reasonably evidenced conclusion about whether a person is a class member, while a well-thought-out one should make such verification easier.

259. A description of the Proposed Class is set out at §§243ff above. The Proposed Class has been defined in such a way that it will be possible objectively to ascertain whether any given person is or is not a Class Member, in accordance with §6.37 of the Guide. In order to tell whether or not they fall within the Proposed Class, individuals will be able to identify whether they made Relevant Purchases by checking email receipts and/or accounts used for the purposes of PC gaming (e.g. their Steam or Epic Games Store account): NAP, §4.3. It will, furthermore, be straightforward for Valve itself to determine and/or verify whether individuals fall within the Proposed Class with reference to Steam account data it holds: NAP, §4.3. This final point is significant as Valve has large market shares (by revenue) in the relevant markets (see §102 above).

Common Issues (Rules 79(1)(b) and 73(2))

260. The Claims raise issues of fact or law which are the same, similar or related (the “**Common Issues**”) as referred to in section 47B(6) of the Act and Rule 73(2).

261. In relation to the common issues requirement, in its judgment in *CICC v Mastercard & Visa (CPO applications)* [2023] CAT 38, the Tribunal stated:

“44. Turning to the common issues test, this should be interpreted purposively, having regard to the objects of the collective proceedings regime. It is not necessary for common issues to predominate over non-common issues. The commonality refers to the question, not the answer, and there can be a significant level of difference between the position of class members. See the decision of the Tribunal in *Gutmann v First MTR South Western Trains Limited*²⁰⁷ at [107], approved on appeal (“*Gutmann CA*”) at [41].”²⁰⁷

262. The present Claims raise at least the following the Common Issues:

- (a) The definition of the relevant product and geographic markets.
- (b) Whether the Proposed Defendant has at all relevant times held, and continues to hold, a dominant position on the relevant markets.

²⁰⁷ *South Eastern Railway v Gutmann* [2022] EWCA Civ 1077

- (c) Whether the Proposed Defendant abused its dominant position on the relevant markets.
- (d) Whether any abuse[s] of dominance by the Proposed Defendant has caused loss or damage to the Proposed Class Members during the Claim Period.
- (e) If the Proposed Defendant's abuse of dominance has caused actionable loss, the aggregate quantum of the losses for which the Proposed Class Members should be compensated.
- (f) The rate at which, and the period over which, the Proposed Class Members are entitled to pre-judgment interest.

263. All of these issues are common to the Proposed Class as they raise the same, similar or related issues of fact or law on behalf of each of the PCMs, and are all capable of being resolved on a common basis across all of the Claims. In particular:

- (a) The issues at §254(a)-(d) above (market definition, dominance, abuse and loss/damage) raise the same questions of law and fact in respect of the whole of the Proposed Class. Each of these issues would be resolved in identical fashion if different persons falling within the Proposed Class Definition were separately to litigate their Claims on an individual basis.
- (b) As to the issues at §254(e)-(f) above (quantum and interest), Mr Harman sets out a plausible and credible methodology for assessing these matters on an aggregate basis if the Claims are certified (see Part II, Section E of this Claim Form, §§189ff above).

Suitability of Claims to be brought in collective proceedings (Rules 79(1)(c) and (2))

264. The Claims are suitable to be brought in collective proceedings for the reasons set out in this section, which considers each of the factors in Rule 79(2) in turn. In summary, the principal issues in the proceedings are Common Issues, there is an identifiable class and the claims could not realistically be brought on an individual or opt-in basis.²⁰⁸

²⁰⁸ In relation to the suitability requirement, in its *Merricks* judgment, at §§56 and 61, the Supreme Court clarified that: (a) in the context of Rules 79(1)(c) and (2), the suitability test is a relative one, i.e.

Appropriate means (Rule 79(2)(a))

265. The proposed collective proceedings present an appropriate means for the fair and efficient resolution of the Common Issues (Rule 79(2)(a)). In particular:²⁰⁹

- (a) All of the main issues in the Claims are Common Issues: see §254 above.²¹⁰
- (b) Collective proceedings are not only a more suitable way of determining the Claims than a host of individual claims, but the only economically viable and practical means for individual PCMs to obtain redress for the losses they have suffered. As set out above (§252), the average PCM's claim value is estimated to be as low as £8 in respect of the purchase of Games, £14 in respect of the purchase of Add-on Content, and £22 in total. In the light of this, and given the complex and costly nature of the litigation (see §275 below), it is inconceivable that any, or any material number of, PCMs (including a large number of minors) would bring individual claims. Nor would a traditional book-building exercise to assemble a group claim be practical or proportionate.
- (c) When considered in aggregate, however, damages are likely to be very substantial. Based on the information currently available, Harman 1 §2.75 provisionally estimates that the claim may be worth as much as £656m including interest. [CF/4/141] The Claims are therefore very good examples of the type of claims that the collective proceedings regime is designed to facilitate, as they offer the only practical means of securing compensation for millions of consumers. who would otherwise be left without effective redress.

Costs and benefits (Rule 79(2)(b))

the question is whether the claims are “*suitable to be brought in collective proceedings rather than individual proceedings*”; and (b) for the purpose of assessing ‘*suitability*’, the various factors which Rule 79(2) lists as being relevant are to be weighed in the balance alongside any other relevant factors – they do not constitute separate hurdles each of which must be surmounted.

²⁰⁹ See, further, the reasons given below (§§275-276) as to why the proposed collective proceedings should be opt-out rather than opt-in proceedings.

²¹⁰ This is precisely the type of claim envisaged to be suitable to be brought in collective proceedings in *Mastercard Incorporated & Ors v Merricks* [2020] UKSC 51, at §62, where all of the principal issues are common issues.

266. The substantial benefits of continuing the Claims in collective proceedings considerably outweigh the anticipated costs to the parties and the Tribunal.
267. First, whilst the costs of the proposed proceedings are substantial, they are fair and proportionate in view of: (i) the aggregate value of the Claims (i.e. as much as £656m, including interest); (ii) the size of the Proposed Class (i.e. between 9.3m and 14.2m individuals); and (iii) the fact that it would be a practical impossibility for claims to be brought on an individual basis.
268. Second, as summarised above (§255(g)), the Proposed Defendant’s costs of the litigation, to the extent that it is not successful, will be covered by the ATE Policy and related provisions in the LFA for adverse costs.
269. Third, the proposed collective proceedings are very unlikely to “*benefit principally the lawyers and the Funder, as opposed to members of the Class*” (per *Consumers’ Association v Qualcomm Inc* [2022] CAT 20 at §105).²¹¹ Uptake of damages by the Proposed Class Members is unlikely to be limited:
- (a) The likely damages per Proposed Class Member is not such a small sum that take-up is inherently likely to be limited. In its *Qualcomm* judgment, taking into account the current economic climate in which many consumers are facing significant cost of living challenges, the Tribunal rejected a submission that take-up was inherently likely to be limited for average claims of £16-£17 – an average claim value that is less than the one in these proceedings (see §251 above). Even relatively low claim values may be significant for PCMs who are minors or young adults and do not have a full income.
 - (b) As set out above, PCMs will be able to identify from their own records whether they made Relevant Purchases and/or Valve can use existing Steam account data in order to establish whether individuals are within the Proposed Class and/or verify claims at the distribution stage.
 - (c) There is likely to be significant publicity around the Claims, including were the proposed collective proceedings to be successful at trial or following a settlement.

²¹¹ *Consumers’ Association v Qualcomm Inc* [2022] CAT 20

The degree of publicity is likely to be significantly bolstered by public relations work undertaken by Consumer Voice (see, for example, NAP §5.3.4, which concerns press coverage).[CF/15/571]

Pre-existing proceedings (Rule 79(2)(c))

270. The PCR is not aware of any separate proceedings making claims of the same or a similar nature having been commenced by or on behalf of the Class Members (or any of them) to date (Shotbolt 1 §13). As noted at §52 of the PCR's Service Out Application, there is no overlap between the Proposed Class in these proceedings and the classes represented in US class actions against Valve (nor could there be, given losses suffered by the PCMs in the UK falls outside the scope of the Sherman Act: see §52(c) of the Service Out Application).[SO/1/27].

Proposed class and identifiability of the class (Rule 79(2)(d)-(e))

271. The large size and nature of the Class are such as to make the Claims suitable to be included in collective proceedings (Rule 79(2)(d)). In addition, the Proposed Class Definition is clear and simple and it is possible to determine, in respect of any person, whether that person is or is not a member of the Proposed Class. See §242 above.

Aggregate award (Rule 79(2)(f))

272. The Claims are suitable for an aggregate award of damages. In Part II, Section E above, the PCR summarises the methodology that Mr Harman proposes for assessing the aggregate losses that the Proposed Class Members have suffered.

273. As regards the method(s) of distributing any aggregate award of damages, it is likely that the most suitable method(s) can only be determined once the class size and aggregate award have been precisely calculated. The PCR's provisional views are set out at §§205-220 above.

Alternative dispute resolution (Rule 79(2)(g))

274. As regards alternative dispute resolution, the PCR is willing to consider any sensible alternative dispute resolution proposals, including collective settlement proposals. However, in circumstances where Valve has not responded substantively to the PCR's

pre-action letter of 24 January 2024 or provided any material disclosure, the PCR cannot currently say whether this course of action may be feasible.

Rule 79(3): the proposed collective proceedings should be opt-out proceedings

275. The Proposed Collective Proceedings are brought on an opt-out basis. It is not practicable for the proceedings to be brought on an opt-in basis (Rule 79(3)(b)). The Proposed Class comprises a very large number of individuals who will individually have lost amounts that are insignificant when compared with the overall costs of litigating their claims. Even assuming that PCMs are relatively engaged, the cost-benefit analysis for individuals would mean that such a level of engagement would not necessarily translate into a willingness to embark on litigation through opt-in proceedings (especially when the “*risks and complexities*” are explained to them). Further, the substantial number of PCMs who are minors (see §249 above) may be particularly unlikely to take the active steps necessary to opt-in to legal proceedings at the outset. Even if they were viable, opt-in proceedings would invariably result in a very significant proportion of potential claimants not opting-in and therefore not receiving any remedy.
276. Finally, notwithstanding the wording of Rule 79(3), the Court of Appeal has indicated that the strength of the Claims will, in general, be a neutral factor when it comes to the question of whether proceedings should be opt-in or opt-out.²¹² However, to the extent it is a relevant factor in these proceedings, it is submitted that for the reasons set out in this Claim Form and its supporting evidence, the Claims are of sufficient strength to justify their certification on an opt-out basis.

²¹² *Evans v Barclays Bank* [2023] EWCA Civ 876, §§93 and 115-117.

STATEMENT OF TRUTH

I believe that the facts stated in this Collective Proceedings Claim Form are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of trust without an honest belief in its truth.

SIGNED: 

NAME: V Shotbolt

DATED: 4-Jun-2024

STATEMENT OF CONSENT

I agree that my electronic signature on this document is the equivalent of my handwritten signature. I further agree that my electronic signature on this document is as valid as my handwritten signature. I hereby confirm that the electronic signature has been produced with my consent.

SIGNED: 

NAME: Victoria Shotbolt

DATED: 4-Jun-2024

ANNEX 1: EVIDENCE FROM *IN RE VALVE*

This annex sets out examples of Valve’s conduct and statements towards developers/publishers that have been referred to in the Consolidated Second Amended US Complaint in the *In re Valve* litigation (see in particular §§84-85 of the Claim Form). [CF/35/2177-2291]

1. §200: *“In late 2018, for example, one publisher had been selling its game on the Steam Store for \$5, but launched its game on the Discord Store (enabled for Discord’s gaming platform) for free. Valve detected that the publisher was charging different prices on the two storefronts, and told the publisher that offering its game for a lower price on Discord violated the Valve PMFN. Valve insisted the publisher renegotiate its deal with Discord and ensure that gamers buying the Discord version pay the same price as gamers buying the Steam version”.*
2. §202: In 2021 a developer/publisher called “The Snarktopus” contacted Steam through its “Developer Support tool”, querying what was meant in Steamworks Documentation where Valve refers to how *“to avoid a situation where customers get a worse offer on the Steam store”*. The developer/publisher asked: *“Regarding the pricing policy, can a non-Steam variant of a game be sold at a different price than on the Steam store page?”* Valve’s response was that *“Selling the game off Steam at a lower price wouldn’t be considered giving Steam users a fair deal”*.
3. §204: In Valve’s “Steamworks Development” online forum, in a thread called “Patreon and steam keys”, in 2017 “TomG” of Valve explained that a publisher should *“[t]hink critically about how your decisions might affect Steam customers, and Valve. If the offer you’re making fundamentally disadvantages someone who bought your game on Steam, it’s probably not a great thing for us or our customers (even if you don’t find a specific rule describing precisely that scenario).”* In the same thread, TomG responded to another question by explaining that: *“we usually choose not to sell games if they’re being sold on our store at a price notably higher than other stores. That is, we’d want to get that lower base price as well, or not sell the game at all.”*
4. §205: In response to another inquiry from a game publisher, Valve explained: *“We basically see any selling of the game on PC, Steam key or not, as a part of the same shared PC market- so even if you weren’t using Steam keys, we’d just choose to stop selling a game if it was always running discounts of 75% off on one store but 50% off on ours ...”.*
5. §207: In response to queries raised by another developer, Valve explained that if they *“brought a particular other game of [theirs] to Steam, it would need to be equivalently priced. This was regardless of whether the non-[S]team version use Steam technology[,] [i.e.], a completely standalone version would have to be the same price as the Steam version.”*
6. §208: the plaintiffs plead that *“Wolfire has been subject to Valve’s threats to enforce its PMFN. On December 3, 2018, for example, a Steam account manager, Tom Giardino, told Wolfire’s owner that it would delist any games available for sale at a lower price elsewhere, whether or not using Steam keys. As a result of Valve’s enforcement of its PMFN, Wolfire has not offered its games for a lower price than what appears on Steam with other sellers.”*
7. §209: the plaintiffs plead that *“Dark Catt has also been subject to Valve’s anticompetitive conduct and PMFN. Dark Catt sold its game on Steam and offered its game for a temporary lower price on Humble Bundle. Shortly thereafter, it was banned from Steam”.*