



**THE HIGH COURT
COMMERCIAL**

Record No.: 2025/3009P

225 No. 48 COM

**IN THE MATTER OF THE REPRESENTATIVE ACTIONS FOR THE
PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS ACT 2023**

AND IN THE MATTER OF A REPRESENTATIVE ACTION

**AND IN THE MATTER OF REGULATION (EU) 2016/679 (“THE GENERAL
DATA PROTECTION REGULATION”)**

Between:

**IRISH COUNCIL FOR CIVIL LIBERTIES COMPANY LIMITED BY
GUARANTEE**

Plaintiff

-and-

MICROSOFT IRELAND OPERATIONS LIMITED

Defendant

JUDGMENT of Mr Justice Rory Mulcahy delivered on 25 September 2026

Introduction

1. The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (“**the 2023 Act**”) is an Act which enables consumers to seek collective redress for infringement of their rights pursuant to a range of EU law measures. It allows a body designated as a qualified entity to take an action on behalf of a group of consumers concerning breaches of their rights.

2. The 2023 Act gives effect to Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers (“**the Representative Actions Directive**” or “**RAD**”). Article 2(1) of the Directive provides that it applies to representative actions brought against infringements of the EU measures listed in the annex to the Directive. One of the measures listed is Regulation (EU) 2016/679 (“**the General Data Protection Regulation**” or “**GDPR**”).

3. In this representative action, the plaintiff (“**ICCL**”), a qualified entity, alleges that the defendant (“**Microsoft**”) has infringed the GDPR in its processing of data subjects’ personal data on Microsoft’s Xandr platform, a platform which allows for the sale of online advertising space by real time bidding (“**RTB**”).

4. On 26 May 2025, ICCL brought an *ex parte* application before the High Court (O’Donnell J) seeking to have these proceedings declared an admissible representative action and leave to issue a plenary summons. The application purported to provide the information required by section 19(10) of the 2023 Act concerning (a) sources of funding, (b) the nature of the claim and the nature of the alleged infringement, and (c) the class or classes of consumers affected by the infringement.

5. By Order of that date, the court deemed the proceedings an admissible representative action and granted leave to issue the proceedings (“**the Leave Order**”).

6. The parties have exchanged pleadings, but each party has taken issue with the manner in which the other has pleaded its case. In simple terms, Microsoft complains that ICCL has inadequately particularised its complaint in its statement of claim. ICCL objects to Microsoft’s reliance on bare denials or non-admissions in its defence.

7. Microsoft raised particulars on ICCL’s claim on 8 September 2025, and ICCL replied on 22 September 2025. ICCL noted that the details of Microsoft’s processing of data were within the peculiar knowledge of Microsoft, that its claim was based on Microsoft’s publicly available documentation and that, accordingly, Microsoft had sufficient information to enable it to plead its defence. Despite delivering a defence on 14 October 2025, Microsoft requested further detailed particulars on 18 November 2025. It subsequently issued a motion

seeking to compel replies to those particulars. It also sought an order pursuant to section 19(10) and 19(11) of the 2023 Act directing the plaintiff to provide “*full and proper information*” concerning the matters set out in section 19(10) of the Act.

8. ICCL furnished a notice for particulars of Microsoft’s defence on 28 October 2025. Microsoft replied on 24 November 2025. Notably, Microsoft characterised many of ICCL’s requests for particulars as impermissible attempts to go behind non-admissions or denials.

9. In the exchanges between the parties regarding the dispute about the adequacy of each other’s pleading, a question arose as to what, if any, effect the provisions of the GDPR and/or the fact that this is a representative action pursuant to the 2023 Act had on the rules of pleading and/or the burden of proof applicable to this case.

10. In the circumstances, the parties ultimately agreed to a preliminary trial of four questions (some in more than one part) based on agreed facts. During the course of the hearing of that trial, however, I suggested that the questions proposed for determination did not, in fact, reflect the dispute on those issues between the parties. In particular, Issues 1 and 3 as originally framed queried whether the national law rules of evidence and pleading would have to be adapted in light of the 2023 Act and/or the GDPR. In fact, as became clear from the parties’ written and oral submissions, the parties agreed that the existing rules of evidence and pleading were sufficiently flexible as to be consistent with the arguments which they wished to advance, *i.e.* the rules did not need to be adapted. This agreement did not, however, resolve their dispute about the pleadings.

11. In those circumstances, I invited the parties to consider whether a revised formulation of the issues may better capture what was in dispute between them. Following the hearing, the parties proposed revised questions which they contended could be addressed by reference to the arguments which had already been advanced. The issues as framed by ICCL are as follows:

ISSUE 1

1. *In a representative action seeking injunctive relief pursuant to the 2023 Act, interpreted in the light of the RAD, in circumstances where the plaintiff's claim includes allegations that the defendant has infringed the GDPR:*
 - (a) *What effect, if any, does Article 5(2) GDPR and/or Article 24(1) GDPR have on the legal or evidential burden of proof on the parties?*
 - (b) *What effect, if any, does Article 5(2) GDPR and/or Article 24(1) GDPR have on the application of the rules of pleading in Order 19, rule 3, 5, and 7 of the Rules, as interpreted by case law, in relation to either the plaintiff or the defendant?*
 - (c) *In particular, to what extent, if at all, is the plaintiff relieved of the obligation to particularise the factual and legal matters it relies on in support of its claim in this representative action?*
 - (d) *In circumstances where the Defendant denies/does not admit that it is the data controller, but pleads in the alternative that, if it is determined to be the data controller, it has complied with the obligations of a data controller, to what extent must the Defendant positively plead to the facts on which it may later seek to rely in proving it complies with the data controller's obligations?*
 - (e) *If the Defendant is permitted to and/or elects not to positively plead to the facts that it believes prove it complied with the data controller's obligations under the GDPR, and the Plaintiff establishes to the Court's satisfaction that the Defendant is the data controller, what effect does this have on the Defendant's entitlement to present facts at trial regarding its compliance with the GDPR?*

ISSUE 2

2. *In a representative action seeking injunctive relief pursuant to the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023, interpreted in the light of the RAD, and, in particular, Articles 7, 8, and 16 thereof, in circumstances where the plaintiff's claim includes allegations that the defendant has infringed the GDPR, is the defendant entitled to seek information and/or raise concerns regarding the information that must be provided by the plaintiff pursuant to section 19(10) and (11) of the 2023 Act concerning: (a) the source of funding of the representative action; (b) the nature of the claim and, in particular, the nature of the alleged infringement(s) of the GDPR; and (c) the class or classes of consumers affected by the alleged infringement(s) of the GDPR?*

ISSUE 3

3. *In a representative action seeking injunctive relief pursuant to section 23 of the 2023 Act in respect of alleged infringements of the GDPR, does the “peculiar knowledge principle” reverse the legal or evidential burden of proof?*

12. The defendant contends that Issue 1(e) is outside the scope of the issues which were before the court during the preliminary trial and objects to its inclusion. The defendant also suggests an alternative formulation of Issue 1(a) as follows:

- (a) Does Article 5(2) GDPR and/or Article 24(1) GDPR reverse the legal or evidential burden of proof on the parties?*

13. Issue 1 encompasses two related issues. ICCL accepts that the GDPR imposes no obligations on Microsoft if it is not, as it claims, the relevant data controller. ICCL accepts that it, therefore, bears the burden of proof in respect of that issue. However, if it discharges that burden, ICCL's first contention, rejected by Microsoft, is that the GDPR ‘reverses’ the burden of proving non-compliance with the GDPR in these proceedings, or at least that Microsoft bears the burden of demonstrating that it has complied with the GDPR and that, as a corollary, ICCL is not obliged to demonstrate non-compliance.

14. If correct in its first contention, ICCL argues that this has a bearing on the manner in which each party must plead its claim. In particular, and relatedly, ICCL's second contention is that because the burden of showing compliance rests on Microsoft, it must, in accordance with the rules of pleading, plead the facts it will rely on to demonstrate compliance.

The agreed facts

15. It is simplest to set out the agreed facts as framed by the parties. They are as follows:

1. The Plaintiff is a company limited by guarantee registered in Ireland which operates as an Irish non-profit organisation engaged in the promotion and defence of civil and human rights in Ireland and internationally and has its registered address at Castleriver House, 14-15 Parliament Street, Dublin 2.

2. The Defendant is a limited liability company registered in Ireland and has its registered address at 70 Sir John Rogerson's Quay, Dublin 2.

3. On the ex parte application of the Plaintiff (High Court Record No 2025/95 IA), the High Court (Barry O'Donnell J) made an Order dated 26 May 2025 deeming these proceedings to be an admissible representative action seeking injunctive relief, pursuant to section 19(2) of the 2023 Act, and granting leave to the Plaintiff to commence these proceedings by plenary summons.

4. These proceedings seeking injunctive relief pursuant to section 23 of the 2023 Act were issued by the Plaintiff by plenary summons issued 29 May 2025 (High Court Record No H.P 2025/3009).

5. The parties have to date exchanged the following pleadings:

(a) On 29 May 2025, the Plaintiff delivered a Statement of Claim.

(b) On 8 September 2025, the Defendant delivered a Notice for Particulars on the Statement of Claim.

(c) On 22 September 2025, the Plaintiff delivered Replies to Particulars on the Statement of Claim.

(d) On 14 October 2025, the Defendant delivered a Defence.

(e) On 28 October 2025, the Plaintiff delivered a Notice for Particulars on the Defence.

(f) On 18 November 2025, the Defendant delivered a Notice for Further and Better Particulars on the Statement of Claim. (g) On 24 November 2025, the Defendant delivered Replies to Particulars on the Defence.

6. Arising from the pleadings exchanged, a dispute has arisen between the parties concerning the application of the rules of pleading and the rules of evidence, including the allocation of the burden of proof, for the claim for injunctive relief which the Plaintiff has raised in the present proceedings.

7. Arising from the pleadings and correspondence exchanged, a dispute has arisen between the parties as to whether the defendant is a data controller in respect of the personal data processed in the manner raised in the proceedings.

16. As is apparent from the foregoing, the agreed facts are not terribly enlightening and are little more than a history of the litigation. None of the facts relevant to the underlying proceedings are agreed. Indeed, as appears from the issues identified, Microsoft does not accept that it is the “*data controller*” for the personal data the subject of the proceedings for the purposes of the GDPR, and accordingly, does not accept that it is amenable to the provisions of the GDPR at all in these proceedings.

17. When submitting the revised questions, the parties also submitted points of agreement on the legal issues between the parties. They are as follows:

1. The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (“the 2023 Act”), interpreted in the light of Directive (EU) 2020/1828 (the “RAD”) and the principle of national procedural autonomy, does not harmonise the rules of pleading in representative actions.

2. Article 5(2) and/or Article 24(1) GDPR do not harmonise the rules of pleading in representative actions.

3. The rules of pleading that apply in representative actions are governed by national law, subject to the principles of equivalence and effectiveness.

4. In a representative action seeking injunctive relief pursuant to section 23 of the 2023 Act in respect of alleged infringements of the GDPR, the rules of pleading applicable to ICCL as the Plaintiff and to [Microsoft] as the Defendant are those set out in Order 19, rule 3, 5 and 7 of the Rules of the Superior Court (the “Rules”), as interpreted by case law; however, the application of those rules may fall to be considered in light of the relevant provisions of the GDPR, the 2023 Act and the RAD.

5. The rules of pleading set out in Order 19, rules 3, 5 and 7 of the Rules, which apply in a representative action seeking injunctive relief pursuant to section 23 of the 2023 Act in respect of alleged infringements of the GDPR, are not affected by Article 5(2) and/or 24(1) GDPR; however, the application of those rules may fall to be considered in light of the relevant provisions of the GDPR, the 2023 Act and the RAD.

6. The rules of pleading set out in Order 19, rules 3, 5 and 7 of the Rules which apply to a representative action seeking injunctive relief pursuant to section 23 of the 2023 Act in respect of alleged infringements of the GDPR are not contrary to the principles of equivalence and effectiveness.

7. The legal and evidential burden of proof are on ICCL to establish that [Microsoft] is a controller in respect of the processing of personal data that is the subject matter of the proceedings.

The 2023 Act

18. Section 8 of the 2023 Act provides that an organisation may apply to the Minister for Enterprise, Tourism and Employment to be designated as a qualified entity for the purpose of taking domestic or cross-border representative actions. To be designated, the organisation must meet the requirements of section 8(1)(a) – (f) of the 2023 Act. The organisation must establish that:

- (a) it is a legal person and can demonstrate in the application 12 months of actual public activity in the protection of consumer interests prior to the application,*
- (b) its main purpose is one that demonstrates that it has a legitimate interest in protecting consumer interests provided for in a relevant enactment,*
- (c) it has a non-profit-making character,*
- (d) it is not the subject of insolvency proceedings and has not been declared insolvent,*
- (e) it is independent and is not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, it has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers, and*
- (f) it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that it complies with the matters referred to in paragraphs (a) to (e) and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose (if any) and its activities.*

19. Section 8, therefore, contains continuing obligations on a qualified entity once designated as such. The 2023 Act provides mechanisms for review of designations made. It is common case that the ICCL has been designated by the Minister as a qualified entity.

20. Section 19 of the 2023 Act addresses the capacity of qualified entities to take representative actions:

- (1) A representative action may only be brought before the Court by a qualified entity.*
- (2) Where it considers it appropriate to do so, the Court may deem a representative action admissible under this section where satisfied that the applicant in the action is a qualified entity.*
- (3) Subject to subsection (4), in the case of a cross-border representative action brought by a qualified entity referred to in paragraph (b) of the definition of that term in section*

2, the Court shall accept the inclusion of the name of the qualified entity in the list of designated qualified entities maintained by the Commission in accordance with Article 5(1) of the Directive as sufficient evidence that such qualified entity is entitled to bring a cross-border representative action before it.

(4) Subsection (3) shall not prevent the Court from examining whether the main purpose of the qualified entity referred to in section 8(1)(b) justifies the qualified entity concerned taking a representative action in a particular case.

(5) A defendant trader in a representative action shall have the right to raise justified concerns to the Court regarding whether a qualified entity complies with the designation criteria.

(6) A qualified entity may within a single representative action seek either or both of the following reliefs: (a) an injunction in accordance with section 23; (b) redress measures in accordance with section 26.

(7) Where a qualified entity seeks both reliefs referred to in paragraphs (a) and (b) of subsection (6) within a single representative action the Court may, where it grants both of the reliefs sought, provide that both of those reliefs may be contained in a single judgment.

(8) In any representative action brought in accordance with this Act, a qualified entity shall be the plaintiff in the representative action, and shall have all of the rights and obligations of a plaintiff in the proceedings.

(9) The consumers represented in a representative action shall be entitled to benefit from the outcome of the granting of any reliefs referred to in subsection (6).

(10) A qualified entity shall provide the Court with the following information:

(a) the sources of funding of the representative action;

(b) the nature of the claim and, in particular, the nature of an alleged infringement;

(c) the class or classes of consumers affected by the alleged infringement

(11) A qualified entity shall provide the Court with sufficient information regarding the consumers referred to in subsection (10)(c) in order that the Court may assess the admissibility of the representative action concerned in accordance with this section.

(12) The Court may, on the application of a party to a representative action, or of its own motion dismiss a representative action which appears to the Court to be manifestly unfounded as soon as the Court has received the necessary information in order to make such a decision.

(13) The power conferred by subsection (12) to dismiss a representative action is without prejudice to any other discretionary power to dismiss an action which the Court may exercise at any time during the course of proceedings.

21. Thus, only a qualified entity may take a representative action. It must first obtain a determination from the High Court that the action is admissible. To do so, it must satisfy the court that it is a qualified entity and provide it with the information prescribed in subsection 10. An action can be dismissed on the grounds that it is manifestly unfounded. Though not stated in terms, it would appear that a court may refuse to deem a representative action admissible if satisfied, based on the information provided, that it is manifestly unfounded.

22. In addition, a defendant has a right to raise “*justified concerns*” regarding whether a qualified entity meets the designation criteria. Though this entitlement relates to designation by the Minister pursuant to section 8 of the 2023 Act, as a matter of logic it is an entitlement which can only arise once proceedings have been deemed to be admissible in accordance with section 19: until that point, there is no ‘action’ and, therefore, no “*defendant... in a representative action*” within the meaning of sub-section 5.

23. Section 23 of the Act entitles a qualified entity to seek injunctive relief:

(1) A qualified entity may, in a representative action brought in accordance with section 19, apply to the Court for an injunction and the Court may, on such application make an order granting one of the following:

(a) an interim injunction to cease a practice or, where appropriate, to prohibit a practice where that practice has been deemed by the Court to constitute an infringement;

(b) an injunction to cease a practice or, where appropriate, to prohibit a practice, where that practice has been found by the Court to constitute an infringement.

...

(7) A qualified entity in making an application under this section shall not be required to prove—

(a) actual loss or damage on the part of an individual consumer affected by the alleged infringement, or

(b) intent or negligence on the part of the trader, the subject of the application concerned.

24. Accordingly, a plaintiff in a representative action is relieved of the obligation to prove actual damage to a consumer *and* of the obligation to prove intent or negligence, *i.e.* fault on the part of a defendant when seeking injunctive relief. It is not that the burden of proof is reversed in relation to these matters, rather they are not *necessary* proofs at all. This does not, of course, mean that proof of damage or fault may not be relevant considerations in determining what, if any, relief may be appropriate.

25. A plaintiff may also seek redress measures pursuant to section 26 of the 2023 Act, but there is no provision corresponding to section 23(7) in relation to that remedy. ICCL does not seek any redress measures in this action.

26. Section 34 of the Act creates an entitlement to disclosure of documents in certain circumstances:

(1) Where a qualified entity—

(a) has submitted sufficient evidence to the Court for a representative action to be deemed admissible, and

(b) submits to the Court that additional evidence is in the possession or control of the defendant in the representative action or a third party, the Court may, upon an application in that behalf by the qualified entity, order that such evidence referred to in paragraph (b) be disclosed by the defendant or third party, as the case may be, to the qualified entity in accordance with rules of court.

(2) Where, in a representative action brought by a qualified entity, the defendant in the action submits to the Court that certain evidence is in the possession or control of the qualified entity or a third party, the Court may, upon an application in that behalf by the defendant, order the qualified entity or third party, as the case may be, to disclose the evidence concerned to the defendant in accordance with rules of court.

The General Data Protection Regulation (GDPR)

27. The only articles of the GDPR referenced in the preliminary issues are Articles 5(2) and 24(1) of the GDPR, though ICCL also relies on other provisions of the GDPR in the proceedings. As appears below, these have been the subject of consideration in a number of decisions of the Court of Justice of the European Union (“CJEU”) and at domestic level within the EU.

28. Article 5(1) of the GDPR provides that:

1. Personal data shall be:

1. processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

2. collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

3. adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

4. accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

5. kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

6. processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

29. Article 5(2) then provides:

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

30. Thus, Article 5(2) imposes an express obligation on data controllers to be able to show that personal data processed by it is processed in accordance with each of the requirements set out in Article 5(1).

31. Article 24(1) imposes a similar obligation to that contained in Article 5(2):

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural

persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

32. This imposes an obligation to put in place appropriate measures to ensure that processing is carried out in accordance with the GDPR *and* to be able to demonstrate that it has been. The question of whether Articles 5(2) and 24(1) impose *different* obligations in relation to the requirement to be able to demonstrate compliance does not need to be addressed for the purpose of this application.

33. In these proceedings, ICCL pleads that Microsoft has not complied with its obligations under the GDPR. It is ICCL's case that since the GDPR requires a data controller to demonstrate compliance with the GDPR, that obligation translates into a requirement to demonstrate compliance in these proceedings, *i.e.* that Microsoft bears the burden of proving its compliance. Microsoft refers to the obligations under Articles 5(2) and 24(1) of the GDPR as "*substantive obligations*" (Transcript Day 2, p. 92) and argues that those substantive obligations have nothing to do with the rules of pleading or onus of proof in civil proceedings.

ICCL's claim

34. Although ICCL sues in a representative capacity, as permitted by the 2023 Act, it accepts that this capacity cannot put it in a better position than were the proceedings to have been commenced by an individual or individuals with standing so to do, save to the extent expressly provided in the Act. ICCL further accepts that the only material difference which the 2023 Act makes to the manner in which these proceedings are to be conducted is by section 34 of the 2023 Act which provides for the making of disclosure by a defendant in different circumstances to those when discovery might ordinarily be available (Transcript Day 1, p. 79). Section 23 will, in addition, have a bearing on those matters which must be proved in order for injunctive relief to be available.

35. ICCL’s complaint is set out in its statement of claim. It is also explained in the affidavit of Johnny Ryan, Senior Fellow of the ICCL, and director of its privacy and data protection program, “Enforce”, which grounded ICCL’s application to have these proceedings deemed admissible.

36. ICCL pleads that Microsoft purchased Xandr, a real time bidding platform, in or around November 2021, through which Microsoft now operates a number of its products, Microsoft Invest, Microsoft Monetize and Microsoft Curate.

37. The statement of claim explains how real time bidding works. ICCL contends that “*what data subjects read, watch and listen to online, and where they go in the real world is recorded, collated and shared widely by a system that operates behind the scenes on almost every website and app.*” It says that the information is used to show highly-personalised individually targeted ads. When a person loads a website or app, the webpage or app will likely contain various spaces where an advertisement can be displayed. As the webpage or app is loaded, these spaces are auctioned to advertisers. The auction and bidding take place almost instantaneously, hence ‘real time’.

38. The crux of ICCL’s complaint is its contention that the data broadcast in RTB auctions to solicit bids, and in particular the data broadcast by the Xandr platform, can include “*highly personal information*”. ICCL is concerned about the manner in which this personal information is processed. ICCL cites the defendant’s documentation which refers to bid requests including “*data points about the user*” and that bidders are passed “*all relevant information about the user.*” The statement of claim seeks to identify fields of personal data which may be broadcast by Xandr as part of an auction.

39. ICCL pleads that Microsoft is the data controller for the purpose of the GDPR in relation to this personal data.

40. ICCL wrote to Microsoft on 6 January 2025 setting out 16 questions relating to the processing of personal data, answers to which, it pleads, “*would enable [the defendant] to examine the lawfulness (or unlawfulness) of the processing in question.*” It is unclear if ICCL intended to refer to the plaintiff rather than defendant in this plea. In any event, it pleads that Microsoft ultimately refused to answer the questions.

41. ICCL pleads that Articles 5(2) and 24(1) of the GDPR place responsibility for proving compliance with the GDPR on data controllers. It pleads that by failing to respond to the questions posed, or otherwise provide information which establishes that all personal data is processed in accordance with the GDPR, Microsoft has failed to prove compliance with the GDPR and that it is “*deemed to be infringing*” until it proves otherwise.

42. ICCL also pleads that Microsoft has infringed its transparency obligations by not providing sufficient, specific information regarding the personal data it is processing, and that it is breaching its obligations to minimise the data which it processes to that which is necessary. It claims that Microsoft has failed to ensure adequate security of the personal data it processes, including by causing the general or total loss of control over the personal data which is broadcast.

43. Finally, it pleads that Microsoft has not obtained proper consent to the processing of the personal data, because it has not identified (or been able to identify) what happens to that personal data once it is broadcast in an auction.

44. ICCL alleges that the foregoing is in breach of various provisions of the GDPR. It says that it will rely on expert evidence at the hearing of the action. It seeks orders pursuant to section 23 of the 2023 Act requiring Microsoft to cease processing personal data or to amend or restrict the manner in which personal data is processed.

Microsoft’s defence

45. Microsoft’s defence contains a number of preliminary objections. It contends, *inter alia*, that ICCL has failed to comply with the provisions of section 19(10) of the 2023 Act by failing to put sufficient information before the court when seeking the Leave Order.

46. It also objects to the manner in which ICCL has pleaded its claim, contending that the statement of claim does not comply with the Rules of the Superior Courts and that it is replete with pleas that are “*vague, general, speculative and lacking in clarity.*” The general

plea is repeated throughout the defence in response to each allegation contained within the statement of claim, each of which is met by either a denial or non-admission.

47. As noted, in relation to the plea in the statement of claim that Microsoft is the data controller in respect of the personal data processed on the Xandr platform, Microsoft pleads that the allegation “*lacks clarity and is inadequately particularised*”. It makes “*no admissions*” in respect of this plea.

Rules of pleading

48. When providing the revised issues for preliminary ruling, the parties identified the relevant rules of pleading as Order 19, rules 3, 5 and 7 of the Rules of the Superior Courts (“**the Rules**”):

3. Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person.

...

5. (1) In every personal injuries action (within the meaning of the Civil Liability and Courts Act 2004) pleadings shall conform to the requirements of section 13 of the Civil Liability and Courts Act 2004. In all other cases alleging a wrong within the meaning of the Civil Liability Acts 1961 and 1964 particulars of such wrong, any personal injuries suffered and any items of special damage shall be set out in the statement of claim, defence or counterclaim (as the case may be) and particulars of any contributory negligence shall be set out in the defence.

(2) In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.

(3) In any case where the particulars, being of debt, expenses or damages, exceed three folios that fact must be so stated with a reference to full particulars already delivered or to be delivered with the pleadings.

...

7. (1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

(2) Before applying under this rule to the Court a party may apply for particulars by notice or letter. Subject to the provisions of Order 1A, rule 10A, the costs of each such notice or letter and of any particulars delivered pursuant thereto shall be allowable on adjudication of costs. In dealing with the costs of any application for particulars, the provisions of Order 1A, rule 10A and of this rule shall be taken into consideration by the Court.

(3) Particulars shall not be ordered under this rule to be delivered before defence or reply, as the case may be, unless the Court shall be of opinion that they are necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be so delivered.

49. During oral submissions, reference was also made to Order 19, rules 17 and 19:

17. It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

...

19. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

Case law on pleading

50. The provisions of Order 19, and pleading requirements generally, were considered in detail in *AIB plc v AIG Europe Limited and Ors* [2019] 3 IR 650, [2018] IEHC 677. That judgment concerned an application for further and better particulars of the defendants' defence. The defendants contended that their defence was simply a denial of the plaintiff's claim and that it was, accordingly, not appropriate to require further particulars. At §38 of the reported judgment, the court (McDonald J) set out the general principles which applied to pleading:

“(a) Under O. 19, r. 7(1), the court has power to direct any party to furnish further and better particulars of any matter stated in any pleading or similar document.

(b) Under O. 19, r. 7(3), further particulars will not be ordered before defence or reply (as the case may be) unless the court is of opinion that they are “necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be ... delivered”.

(c) While O. 19, r. 7(1) does not identify the criteria to be applied by the court in considering an application of this kind, the principles to be applied are now well established. The fundamental principle is that a party should know in advance, in broad outline, the case which that party will have to meet at the trial. This was made clear by Fitzgerald J. in the Supreme Court in Mahon v. Celbridge Spinning Co. Ltd. [1967] I.R. 1 at p. 3.

(d) Thus, as Henchy J. noted in the Supreme Court in Cooney v. Browne [1985] I.R. 185 at p. 191, where a pleading is so general or so imprecise that the other side cannot know what case he or she will have to meet at trial, further particulars will be ordered.

(e) However, Henchy J. stressed in the same case, at p. 191, that a party will only be entitled to “such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial”. Accordingly, particulars cannot be used as a mechanism to extract details as to the evidence to be given by the opposing party. This was reiterated more recently by Hogan J. in Armstrong v. Moffatt [2013] IEHC 148, [2013] 1 I.R. 417 at p. 426.

(f) Particulars will not be ordered unless they are genuinely required to enable a party to know the case to be made by the opposing party at trial. As Costello J. made clear in James Elliott Construction Limited v. Lagan [2014] IEHC 547, (Unreported, High Court, Costello J., 20 November 2014) at para. 18, the court will not entertain an application for further and better particulars which are oppressive or unreasonable.

(g) It is also well established that the court will not direct a party to provide particulars of a denial in a pleading. This is confirmed by the authors of Delany and McGrath on Civil Procedure (4th Ed., Round Hall, 2018) at paragraph 5-128. Delany and McGrath on Civil Procedure cites as authority for this proposition the decision of the Court of Appeal of England and Wales in Pinson v. Lloyds and National Provincial Foreign Bank, Ltd. [1941] 2 K.B. 72. Logically, the same principle must apply to a non-admission. In Warner v. Sampson [1959] 1 Q.B. 297, Ormerod L.J. made clear that a denial and a non-admission have a similar effect in that both pleas have the effect of putting the opposing party on proof of its case. At this point, it should be noted that there is a dispute between the parties as to whether the principle that one cannot obtain particulars of a denial can be said to be applicable in the Commercial Court. This is an issue which is addressed further below.

(h) Particulars of a denial will, however, be ordered where the denial amounts in substance to a positive allegation. This principle is succinctly stated in Delany and McGrath on Civil Procedure (4th Ed., Round Hall, 2018) at p. 264 as follows:-

“5-129 However, the position [is] different where the traverse [is] of a negative allegation ... in which case, the question whether or not [there] defendant can be ordered to give particulars depends on whether the traverse is a mere traverse or whether, though negative in form, the negative is pregnant with an affirmative, in which case particulars of that affirmative must be given.”

(i) It is also clear that a party is not entitled to hide behind a traverse in those cases governed by O. 19, r. 15, which provides as follows:-

“The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply ... as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations ... release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.”

(j) Thus, in cases coming within the principles at (h) and (i), the court must be in a position to direct a party to furnish particulars notwithstanding that the relevant pleading of that party may take the form of a traverse. Furthermore, it is clear that if the matter has not been appropriately pleaded in accordance with O. 19, r. 15, the court may refuse to allow the party responsible to subsequently make a positive case (within the ambit of application of these rules) at the trial. (See the decision of the Supreme Court in Duffy v. Ridley Properties Ltd. [2008] IESC 23, [2008] 4 I.R. 282 at p. 305).

(k) It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request. As Clarke J. observed in Moorview Developments Limited v. First Active plc [2005] IEHC 329, (Unreported, High Court, Clarke J., 20 October 2005) at p. 14:-

“7.2 It should be noted that the facts that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore, an assertion that the other

party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges.”

(l) The requirement in the Commercial Court that, prior to trial, the parties must exchange witness statements, can be relevant in the context of an application for further particulars. This is clear from the decision of Clarke J. in Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010) at para. 4.1. This principle was succinctly summarised by Costello J. in Quinn Insurance Limited v. PriceWaterhouseCoopers [2015] IEHC 303, (Unreported, High Court, Costello J., 19 May 2015), at p. 18 where she said:-

“39. ... the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements.”

(m) There may be circumstances where it is appropriate to direct that particulars should only be furnished after discovery. This follows from the decision of Clarke J. in Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010) at paras. 4.6 and 4.7. There is a dispute between the parties in this case as to the extent to which this principle is of application here and this is an issue that I may need to examine in more detail in due course.

(n) Finally, it is important to bear in mind that the purpose of pleadings and of particulars is to ensure that the issues in the case are sufficiently identified in advance of the trial. It has, therefore, been observed that in more complex cases, particulars may have a more expansive role than in the case of more routine cases. This was made clear by Baker J. in Playboy Enterprises International Incorporated v. Entertainment Media Networks Limited [2015] IEHC 102, (Unreported, High Court, Baker J., 19 February 2015), which was subsequently approved by the Court of Appeal in Quinn

Insurance Limited v. PriceWaterhouseCoopers [2017] IECA 94, (Unreported, Court of Appeal, 21 March 2017) at para. 16.”

51. McDonald J considered the basis for the principle that a court will not order particulars of a denial. In so doing, he preferred the explanation offered by Astbury J in *Weinberger v Inglis* [1918] 1 Ch 133 to the suggestion by Stable J in *Pinson v Lloyds and National Provincial Foreign Bank, Ltd* [1941] 2 KB 72 that particulars will not be ordered of a denial because there is, in effect, nothing to particularise. In Astbury J’s view, the pleading requirements reflected the burden of proof. As McDonald J explained (at §43 of the reported judgment):

“It seems to me that the observations of Astbury J. in that case provide an entirely rational explanation for the principle that a court will not order a party to provide particulars of a denial. On the face of it, that principle cuts directly across the basic proposition described in para. 38(c) above that a party should know in advance, in broad outline, the case which that party will have to meet at the trial. At a superficial level that principle does not sit comfortably with the principle that particulars will not be ordered of a denial. However, applying the logic of Astbury J. in Weinberger v. Inglis [1918] 1 Ch. 133, both principles are, in fact, entirely reconcilable. If the onus of proof is on one party in relation to some aspect of the case, then it must follow that a denial by the opposing party of the allegations made in support of that case could not properly give rise to an obligation on that party to provide particulars of the denial or an explanation for the denial. If the onus of proof rests solely on one party, the opposing party must be entitled to put that party on proof and the classic way in which to achieve this is to deny (or not to admit) the allegations in question. This does not offend against the principle set out in para. 38(c) above because the party, on whom the onus of proof lies, knows that it will have to establish the relevant issue at the trial. That party will itself know what it has to prove at trial. Given that the onus of proof in relation to the relevant issue rests on that party, it is for it to make its case and it cannot force the opposing party to narrow the scope of the work which it must undertake in order to prove its own case.”

52. The analysis in *Mount Salus Residents v An Bord Pleanála* [2023] IEHC 691 is to similar effect.

53. As appears from the points of agreement on the legal issues, the parties accept that the above, as interpreted in the case law, are the rules of pleading applicable to these proceedings and that these rules satisfy the principles of efficiency and equivalence. In the circumstances, the true issue between the parties regarding the pleadings concerns the allocation of the burden of proof in proceedings claiming infringement of the GDPR.

Burden of proof in civil cases

54. *McGrath on Evidence* (Round Hall, 3rd ed., 2020) discusses the allocation of the burden of proof as follows:

2-136 The general principle applied in civil cases is that he who asserts must prove (Ei incumbit probatio qui dicit, non qui negat). Thus, whichever party contends for the existence of a particular fact will bear the burden of proving its existence. A party cannot circumvent this requirement by pleading his or her case by way of negative allegations, and a party will have to prove a negative where it is an essential part of his or her claim.

2-137 As a rule of thumb, this will generally mean that proof of the facts necessary to establish a cause of action will rest on the party bringing the proceedings, while proof of a defence to the action will lie on the party raising the defence. Thus, in a negligence action, the burden of proving the existence of a duty of care, a breach of that duty, and that damage was suffered by the plaintiff as a result of that breach will rest on the plaintiff, while the burden of establishing the defence of contributory Negligence rests on the defendant. If a defendant raises a counterclaim, then the defendant will bear the burden of proof in respect of that counterclaim.

...

2-161 The general rule in civil cases is that the party that bears the legal burden in respect of an issue will also bear the evidential burden in respect of that issue. The standard which has to be met is to make out a prima facie case. A party will have made out a prima facie case when, on the evidence given, it would be open to the tribunal of

fact, if no other evidence were given, or if it accepted that evidence even though contradicted in its material facts, to enter a verdict for that party. If a plaintiff has failed to discharge the evidential burden upon him or her with regard to the constituent elements of his or her cause of action then, as discussed below, the case will be dismissed. However, a case should only be withdrawn from a jury in circumstances where a jury could not reasonably conclude that it is more likely than not that the plaintiff's version of events is true or correct.

2-162 It is sometimes suggested that the discharge by a plaintiff of its evidential burden may lead to the evidential burden shifting to the defendant, but, as noted by Clarke J in Koger Inc v O'Donnell, this simply reflects the common-sense proposition that, if a plaintiff has made out a prima facie case and the defendant does not adduce any evidence to rebut it, the plaintiff will be found to have discharged its legal burden of proof. Moreover, an evidential burden of proof will not shift simply because a plaintiff has adduced evidence from a number of witnesses in relation to a matter.

55. During oral submissions, counsel for Microsoft offered the following helpful summary (Transcript Day 2, pp. 76 - 78):

“The legal burden is generally on the Plaintiff and it has to satisfy the Court on the balance of probabilities. And what that means is, is that if the Plaintiff does not satisfy the Court to 51% on any particular ingredient of a cause of action, the Plaintiff fails. The effect of the allocation of the burden of proof is the allocation of the risk of failure. The reason it's placed on the Plaintiff as a matter of general principle is because the Plaintiff is bringing the case, the Plaintiff is bringing the Defendant into court, and, therefore, as a matter of fairness and in order to ensure the rights of the defence, the burden is on the Plaintiff to bring home their case, not on the Defendant to disprove the case.

That's the general starting position. The evidential burden is the burden to bring forward evidence to satisfy the legal burden. In the vast majority of instances, the evidential burden follows the legal burden. You don't have to worry about the distinction between the two, because once you decide who has the legal burden, the evidential burden follows. Sometimes they are allocated to different parties. The most

obvious are in criminal proceedings, where the evidential burden of raising a defence, such as self-defence, provocation or something like that, is on the Defendant. It has to put forward sufficient evidence to raise the defence, the legal burden then shifts to the prosecution to disprove the defence in order to prove their case beyond a reasonable doubt....

So sometimes when Courts or academic commentators are talking about a shifting of the burden of proof, what they mean is, is that there's a shift of the legal burden. But a lot of the time it's sometimes used, or a lot of the time it's used in the sense of there is, in practical terms, during the course of a trial, a shifting of an evidential burden, and what that means is that if I'm a Plaintiff and I bear the burden of proof in respect of an issue, I also bear the evidential burden, and if I make out a case, and a prima facie case is really one that could be found by the tribunal of fact to satisfy the legal burden, it's a case that will survive an application for a nonsuit. Once I've done that, in practical terms a burden may shift to a Defendant, that if they don't bring forward some evidence to disprove the Plaintiff's case, the Court may go -- may find for the Plaintiff."

56. This characterisation of what a ‘*shifting*’ burden of proof involves reflects the observations of the Supreme Court in *Koger v O'Donnell* [2013] IESC 28, a case involving a breach of copyright claim. The Supreme Court (Clarke J as he then was) noted as follows (at §6.5):

“In many cases, and a case such as this is one, to say that the evidential burden shifts is no more than to express the common sense proposition that the party on whom the initial legal burden of proof rests has produced sufficient evidence so that, in the absence of any, or any further, evidence on the part of its opponent, it will succeed. The opponent then has, in practice, a burden, for if no further evidence is adduced that party will lose. The position in copyright reflects that common sense proposition.”

57. There are a number of statutory exceptions to the general rule that a plaintiff bears the burden of proof in civil proceedings. By way of example, there are a number of statutory defences available under the Defamation Act 2009. Where a defendant pleads one of those defences, it will be required to plead the material facts on which it relies in support of that

defence. A further potential common law example, discussed below in relation to Issue 3, is the so-called ‘peculiar knowledge principle’.

Burden of proof and the GDPR

58. The position in EU law is similar to that in national law: the burden of proof will typically, though not always, rest on a claimant. Microsoft refers to the opinion of the Advocate General in Case C-136/24 P, *Hamoudi v Frontex (European Border and Coast Guard Agency)*, a case concerning a claim for damages by a person who contended that he was one of a number of parties who had been unlawfully “pushed back” from the EU border by the respondent, having landed in Greece. The General Court concluded that the applicant’s evidence was insufficient to prove that he was present at the pushback incident. He appealed on the grounds that the General Court had misapplied the burden of proof.

59. In his opinion, the Advocate General stated (at §25):

“In accordance with the legal maxim onus probandi incumbit ei qui dicit, non ei qui negat, the onus or burden of proof in civil cases lies on the claimant and not on the respondent. This long-standing or settled rule is universally accepted by Member States as the general rule on the burden of proof in such cases and is, in any event, the rule applicable, in principle, in the present action for damages.”

60. This is described by Microsoft as “*the starting point for any analysis*” (Transcript Day 2, page 91). The default position, says Microsoft, is that the party who asserts must prove and that any reversal of that position must be expressly provided for.

61. ICCL does not dispute what the Advocate General identifies as the general rule, but refers to the *Court’s* decision in *Hamoudi*, in which it found that, in that case, the burden of proof had to be adapted:

“104 In the light of the specific features of an action for non-contractual liability against the European Union on the basis of alleged unlawful conduct by Frontex in

relation to an operation involving pushback to a third country of which persons, such as the appellant, claim to have been victims, those persons cannot be requested to adduce conclusive proof that that operation occurred and that they were present during it.

105 As the Advocate General also noted, in essence, in point 52 of his Opinion, failure to adapt the burden of proof imposed on those persons might hinder all legal action by victims of a pushback operation against Frontex on the basis of alleged unlawful conduct by that agency, granting the latter de facto immunity and thus jeopardising the effective protection of the fundamental rights of those victims as enshrined, in particular, in Articles 18, 19 and 47 of the Charter.

106 Accordingly, where persons claim to have been victims of a pushback operation, full respect for the right to an effective remedy, as guaranteed by Article 47 of the Charter, requires that it be sufficient for those persons to present prima facie evidence that that operation, in which Frontex participated, occurred and that they were present during it.”

62. The parties refer to a number of cases of the CJEU which address the burden of proof in proceedings relating to the GDPR. Case C-175/20, *SS v Valsts ieņēmumu dienests* concerned a request by the Latvian tax authorities for certain information from an internet service provider, SS. It was accepted that the information included personal data and that the tax authority had the requisite statutory power to request the information. SS nonetheless challenged the request on the basis that it was not consistent with the GDPR. In addressing the questions referred by the national court regarding how it should determine the lawfulness of the request, the CJEU observed as follows:

“77 In that context, it should be emphasised that, in accordance with the principle of accountability set out in Article 5(2) of Regulation 2016/679, the controller must be able to demonstrate its compliance with the principles relating to the processing of personal data set out in Article 5(1) thereof.

78 Therefore, it is the duty of the Latvian tax authority to establish that, in accordance with Article 25(2) of that regulation, it has sought to minimise as far as possible the amount of personal data to be collected.

79 As regards the circumstance that the disclosure request sent by the Latvian tax authority does not make provision, in the event of failure by the advertisement services provider concerned to restore access to the advertisements published in the period targeted in the request, for any limit in time, it should be recalled that, taking into account the principle of data minimisation, the controller is also obliged to limit to what is strictly necessary, in the light of the objective of the processing envisaged, the period of collection of the personal data at issue.

80 Therefore, the period to which the collection relates cannot exceed the period strictly necessary to achieve the objective of general interest sought.

81 As is apparent from paragraph 77 of the present judgment, the burden of proof in that regard lies with the Latvian tax authority.”

63. Case C-252/21, *Meta Platforms* involved proceedings by Meta against the Federal Cartel Office in Germany in which it sought to challenge a decision of the Cartel Office prohibiting Meta from processing certain personal data. In the course of addressing questions regarding how to determine whether the processing was “*necessary*” within the meaning of Article 6 of the GDPR, the CJEU observed as follows:

“95 It should finally be noted that, in accordance with Article 5 of the GDPR, the controller bears the burden of proving that those data are collected, inter alia, for specified, explicit and legitimate purposes and that they are processed lawfully, fairly and in a transparent manner in relation to the data subject. In addition, according to Article 13(1)(c) of that regulation, where personal data are collected from the data subject, the controller must inform the data subject of the purposes of the processing for which those data are intended as well as the legal basis for the processing.”

64. And in Case C-60/22, *UZ v Bundesrepublik Deutschland*, a case concerning the processing of personal data in the course of assessment of an application for international

protection, the court was asked to consider whether a data controller's failure to discharge its accountability obligations pursuant to Article 5 of the GDPR, due to the absence of a complete record of processing activities, rendered the processing unlawful. The CJEU observed:

“53 Under Article 5(2) of the GDPR, the controller, in accordance with the principle of ‘accountability’ laid down in that provision, is responsible for compliance with paragraph 1 of that article and must be able to demonstrate its compliance with each of the principles set out in paragraph 1 of that article, the burden of such proof thus being placed on it (see, to that effect, judgment of 24 February 2022, Valsts ieņēmumu dienests (Processing of personal data for tax purposes), C-175/20, EU:C:2022:124, paragraphs 77, 78 and 81).”

65. The above cases concerned the application of the GDPR generally, and the CJEU made observations regarding the burden of proof in the context of discussing the obligations imposed by the GDPR. In Case C-340/21, *VB v Natsionalna agentsia za prihodite (NAP)*, the court was directly asked to consider the application of the burden of proof in proceedings in which the claimant sought damages pursuant to Article 82 of the GDPR, following a cyberattack on the defendant which led to personal data held by the defendant being published on the internet. Article 32 of the GDPR imposes an express obligation on data controllers to put in place appropriate measures to protect the security of personal data which it processes.

66. In relevant part, Article 82 provides as follows:

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. *A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.*

67. The claim had been rejected at first instance because the claimant had not proved that the NAP, a body attached to the Bulgarian Ministry of Finance, had failed to adopt appropriate security measures to prevent improper access to her personal data, *i.e.* she had not proved that the NAP failed to comply with Article 32. The appeal court referred questions to the CJEU regarding, *inter alia*, whether this represented a correct application of the burden of proof. The CJEU paraphrased the relevant question referred as follows:

“48 By the first part of its third question, the referring court asks, in essence, whether the principle of accountability of the controller, set out in Article 5(2) of the GDPR and given expression in Article 24 thereof, must be interpreted as meaning that, in an action for damages under Article 82 of that regulation, the controller in question bears the burden of proving that the security measures implemented by it are appropriate under Article 32 of that regulation.”

68. The court concluded (at §57) that the controller *did* bear the burden of so proving:

“52 It is clear from the wording of Article 5(2), Article 24(1) and Article 32(1) of the GDPR that the controller concerned bears the burden of proving that the personal data are processed in such a way as to ensure appropriate security of those data, within the meaning of Article 5(1)(f) and Article 32 of that regulation...

53 Those three articles thus set out a rule of general application, which, in the absence of any indication to the contrary in the GDPR, must also be applied in the context of an action for damages based on Article 82 of that regulation.”

69. Microsoft contends that *VB* must be read together with Case C-667/21, *ZQ*, another case seeking damages pursuant to Article 82, in this instance on the basis of the contention that the claimant’s employer had unlawfully processed his personal data. As Microsoft points out, the decision was delivered by the same panel of the CJEU as in *VB*, during the same week (though there were different Advocates General). No question regarding the burden

of proof was referred to the CJEU in *ZQ*, but a question regarding the extent to which the employer's "fault" was a relevant consideration was raised. The question was characterised in the following way in the judgment:

"88 It is apparent from the information provided by the referring court, in response to a request for clarification addressed to it in accordance with Article 101 of the Rules of Procedure of the Court of Justice, that the fifth question seeks to determine, first, whether the existence and/or proof of a fault are necessary conditions for the liability of the controller or processor to be incurred and, secondly, what effect the degree of fault on the part of the controller or processor is likely to have on the actual assessment of the damages to be paid as compensation for the non-material damage suffered."

70. The CJEU identified the ingredients of a cause of action under Article 82 at §90:

"90 As regards the first part of that question, it should be noted that, as recalled in paragraph 82 of this judgment, Article 82(1) of the GDPR makes the right to compensation contingent on the presence of three factors, namely the existence of an infringement of that regulation, the existence of damage suffered and the existence of a causal link between that infringement and that damage."

71. It then discussed the burden of proof:

"93 Article 82(3) of the GDPR specifies, from that perspective, that a controller is exempt from liability under Article 82(2) of that regulation if it proves that it is not in any way responsible for the event giving rise to the damage."

94 It therefore follows from a combined analysis of those various provisions of Article 82 of the GDPR that that article provides for fault-based liability in which the burden of proof rests not on the person who has suffered damage, but on the controller."

72. In other words, under Article 82, a controller may escape liability by proving that it is not at fault, but a claimant does not have to establish fault in order for liability to be imposed. But this (and, argues Microsoft, *VB*) must be read in light of the following observation at §99 of *ZQ*:

“First, as the Advocate General observes, in essence, in point 93 of his Opinion, it would not be consistent with the objective of such a high level of protection to opt for an interpretation according to which data subjects who have suffered damage as a result of an infringement of the GDPR should, in an action for damages under Article 82 of that regulation, bear the burden of proving not only the existence of that infringement and the damage resulting therefrom for them, but also the existence of a fault on the part of the controller, deliberately or through negligence, or even the degree of seriousness of that fault, even though Article 82 does not lay down such requirements (see, by analogy, judgment of 14 December 2023, Natsionalna agentsia za prihodite, C-340/21, EU:C:2023:986, paragraph 56).”

73. Thus, argues Microsoft, these two cases concern the burden of proving *fault*, not the burden of proving *an infringement*. The burden of proving an infringement (and damage) rests on the claimant, per Article 82, but a claimant is expressly relieved of the obligation of proving fault, since a respondent may escape liability by proving that it is not at fault.

74. The question of the burden of proof under the GDPR was also addressed in my judgment in *TikTok v DPC* [2026] IEHC 37. I note that the judgment is the subject of a pending appeal. The proceedings were a statutory appeal against a decision of the regulator, following an inquiry, that TikTok had infringed the GDPR because it had failed to demonstrate compliance with the requirements of Article 46 (concerning transfers of personal data outside the EU), as required by Articles 5(2) and 24 of the GDPR. Article 46 prohibits transfers of personal data from within the EU to third countries unless it can be shown that there would be effectively equivalent protection for the personal data in the third country to that guaranteed by the GDPR. This requires a prior assessment by the data controller of the level of protection available in the third country. The DPC concluded that TikTok’s prior assessments did not establish that there was effectively equivalent protection and that it had therefore infringed Article 46.

75. TikTok argued that the regulator had misinterpreted the GDPR by concluding that it imposed an obligation on data controllers to demonstrate compliance with its requirements and, relatedly, that the regulator had impermissibly reversed the burden of proof in its

inquiry because the DPC had required TikTok to prove its compliance, rather than the DPC proving TikTok's non-compliance.

76. I concluded that there *was* an obligation on TikTok to demonstrate that its transfers of data outside the EU were in compliance with the GDPR (at §243) and that the DPC was entitled to conclude that there was an infringement if TikTok's assessments of the level of protection were inadequate. As a consequence, I concluded that there was no impermissible reversing of the burden of proof in requiring TikTok to demonstrate such compliance (at §256).

77. I also concluded that, in any event, the legal and evidential burden had remained on the regulator to prove an infringement by TikTok of Article 46, but that it could discharge this burden by showing that TikTok's assessments were inadequate, *i.e.* that TikTok had failed to demonstrate compliance was, in fact, an infringement. As set out in the judgment (at §263), a number of the elements necessary to show an infringement were not in dispute. The DPC was not obliged to demonstrate that there was inadequate protection afforded to personal data in the third countries to which data was being transferred, *i.e.* to prove that the transferred data was being processed in a manner which was not in compliance with the GDPR.

Applicable principles – trial of a preliminary issue

78. The principles by which the question of whether it is appropriate to direct a preliminary trial should be decided are as set out by the Supreme Court in *Campion v South Tipperary County Council* [2015] 1 IR 716, [2015] IESC 79:

“[35] The following therefore is a summary of the legal position before O. 25 of the Rules of the Superior Courts can be successfully invoked:-

- there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application;*

- *there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented;*
- *there must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient;*
- *the greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case, the stronger will be the argument for making the requested order;*
- *conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order;*
- *exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense;*
- *as an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate;*
- *it must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful to retain the traditional separation of such matters;*
- *'convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation;*
- *the making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties;*

- *the court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*
- *subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do.”*

79. It is clear that even where the trial of a preliminary issue is directed, the court retains a discretion to refuse to determine the issues raised, as identified in *LM v Commissioner of An Garda Síochána* [2015] 2 IR 45, [2015] IESC 81 (see also *Craughwell v Government of Ireland* [2025] IECA 63).

80. In this case, the trial of a preliminary issue was by agreement of the parties rather than directed by the court following an assessment of the merits of such a mode of trial. I have some reservations about whether this was an appropriate case in which to seek to try preliminary issues. The issues in dispute arise in the context of complaints by each party about the other’s pleadings. It would have been preferable, in my view, that the relevant legal issues were teased out in the context of specific complaints about specific pleadings rather than, as here, divorced from the particular factual pattern underlying these proceedings, as occurred in *AIB v AIG*. That this would have been the better course is apparent from the need to re-state the issues as originally framed in circumstances where those issues did not capture the fundamental dispute between the parties. Even as re-framed, the answers to the questions posed are unlikely to advance matters as far as would contested applications for further particulars and/or for discovery.

81. Be that as it may, the parties have expended considerable time, effort and expense in progressing this application, and have made detailed and skilful submissions on complex legal issues. In the circumstances, I propose to address the questions posed and provide answers insofar as it is possible and appropriate so to do.

Issue 1

82. The issues identified under Issue 1 were the main focus of the parties in their written and oral submissions. As noted above, these issues were initially framed in terms of the rules of pleading, but the focus, in fact, was on the question of the burden of proof and, in particular, whether the terms of the GDPR impose the burden of proof on Microsoft in respect of any aspect of these proceedings.

Arguments of the parties

83. ICCL contends that the case law makes clear that the burden of proving compliance with the GDPR is on the data controller. It accepts that it has the burden of proving that Microsoft is the data controller in this case, and that it has to mount a *prima facie* case that there has been processing which infringes the GDPR. But it says that once it meets this threshold, the burden then shifts to the defendant.

84. Microsoft's position is that at all times both the legal and evidential burden rests on the plaintiff and that there is no general reversal of the burden of proof. Insofar as the authorities identify specific circumstances where the burden of proof is on the data controller, those authorities do not deal with a civil claim. Insofar as there is any reversal or shift in civil claims, it is expressly provided for in Article 82 of the GDPR. This is not a claim within Article 82. Any information asymmetries are addressed by section 23(7) of the 2023 Act which relieves a plaintiff of the burden of proving actual damage and of fault when seeking injunctive relief, and section 34 which facilitates applications for disclosure. There is, therefore, no requirement for any further adaptation to the rules of pleading or the allocation of the burden of proof.

Discussion

85. As observed above, ICCL accepts that it bears the burden of proving that Microsoft is the data controller of personal data processed on the Xandr platform. Absent that proof, the obligations of the GDPR are not engaged at all. Though the focus of this acknowledgement was on the question of whether Microsoft, rather than some other entity, was the data

controller, it seems to follow that ICCL also bears the burden of proving that there is personal data being processed on the Xandr platform, in order that the GDPR provisions be engaged.

86. What this highlights is that there is clearly no *general* reversal of the burden of proof in proceedings alleging infringement of the GDPR such that a defendant bears the legal and evidential burden in relation to all matters. This much is obvious. A plaintiff cannot simply issue proceedings against a defendant claiming it has breached the GDPR and require that defendant to prove that it has not. The plaintiff must establish that the obligations of the GDPR are engaged in respect of that defendant.

87. What is clear from the authorities, however, is that the GDPR imposes a positive obligation on data controllers to demonstrate compliance with the GDPR and that, where that issue requires to be determined in proceedings, this translates into the imposition of the burden of proof on that issue on the data controller. Though Microsoft seeks to distinguish the type of proceedings here from those authorities, what is consistent between the authorities is the courts' conclusions on where the burden of proof lies where the question arises whether particular processing by a particular controller complied with the GDPR.

88. *Valsts* provides an excellent example. In that case, the subject of a data request brought proceedings claiming that the request was not consistent with the requirement in the GDPR to minimise the amount of personal data collected. Absent the obligation in the GDPR that the controller demonstrate compliance, it would have been for the subject of the data request to show that the request was too broad. In light, however, of Articles 5(2) and 24(1) of the GDPR, it was for the tax authority to show that it was sufficiently narrow. That is, the defendant bore the burden of proof on that issue.

89. Similarly, in *Meta*, the Cartel Office prohibited the processing of certain personal data. Meta argued that the processing was “*necessary*” within the meaning of Article 6 of the GDPR and that the Cartel Office was, accordingly, wrong to have prohibited it. The CJEU concluded that if Meta wished to rely on necessity to justify the processing of the data, then it was for Meta to prove that this was so, not for the Cartel Office to prove that it was not. This has obvious echoes of the approach to the defences under the Defamation Act 2009,

referred to by way of example above. It also reflects the approach taken by the DPC and endorsed in my judgment in *TikTok*.

90. *VB* provides a stark example of this imposition of a burden of proof on a defendant. In that action for damages pursuant to Article 82 of the GDPR, the defendant bore the obligation of proving that it had taken the steps required by Article 32.

91. Microsoft suggests that this decision should be “*read down*” in some way in light of the contemporaneous decision on another Article 82 case, *ZQ* and that the allocation of the burden of proof discussed in those cases is confined to the question of proving fault in an action pursuant to Article 82. The decision in *ZQ* does indeed suggest that a data controller does not bear the burden of proof in relation to all matters in an action for breach of the GDPR. But that is consistent with all the other cases. Rather, what the authorities establish is that where a data controller relies on compliance with its obligations under the GDPR by way of defence to an allegation that it has not complied, it will be for the data controller to prove that compliance, not for the other party to prove that it has not. Notably, in *VB*, the CJEU described the imposition of the burden of proof on a controller as a rule of “*general application*”, and therefore applicable to claims under Article 82 in the absence of any expression to the contrary, rather than a rule peculiar to Article 82 claims.

92. How then does this answer the issues raised at Issue 1? The first question asked is what effect, if any, does Article 5(2) GDPR and/or Article 24(1) GDPR have on the legal or evidential burden of proof on the parties, or, on Microsoft’s formulation, do Articles 5(2) and/or 24(1) of the GDPR reverse the legal or evidential burden of proof on the parties?

93. In light of the analysis above, the answer to Issue 1(a) (on either party’s formulation of the issue) is that there is no general reversal of the legal or evidential burden. However, if the court is required to determine whether there has, in fact, been compliance with specific obligations in the GDPR – because ICCL establishes to the requisite standard the matters on which it bears the onus of proof – Microsoft will bear the onus of proving that it has complied with any relevant obligation imposed on it by Article 5(1) of the GDPR and/or that any relevant processing by it of personal data is in accordance with the GDPR within the meaning of Article 24(1). Though ICCL refers to having to make out a *prima facie* case

of *infringement*, it is clear that it will not bear any onus to prove *non-compliance* where the question of compliance is in issue.

94. It is not possible to identify comprehensively what a plaintiff must establish in the abstract, but in general terms, in an action for breach of obligations pursuant to the GDPR, a plaintiff bears the burden of proving that a defendant is a controller of personal data and that there is processing of that data which triggers obligations on the controller with which Article 5(2) and 24(1) of the GDPR require the controller to demonstrate compliance. Where the plaintiff discharges *its* burden of showing that the relevant obligation under the GDPR is engaged, the legal and evidential burden of demonstrating compliance then falls to the controller. As Microsoft argued in its submissions, the obligations in Articles 5(2) and 24(1) are substantive obligations. The consequence of those obligations in proceedings alleging non-compliance with the GDPR is to impose the burden of proving compliance (where the issue arises) on the controller. This is not merely a shifting evidential burden arising from ICCL having established a *prima facie* case in the sense discussed in *Koger*. In respect of the discrete issue of compliance with obligations under the GDPR in respect of which Article 5(2) and/or 24(1) require a controller to demonstrate compliance, the controller bears the ultimate legal burden and the associated evidential burden.

95. I note in passing that this appears, from unofficial web-based translations, to be consistent with how other EU jurisdictions have interpreted the same provisions of the GDPR. In *Data Privacy Stichting v Facebook Ireland*, 15 March 2023, ECLI:NL:RBAMS:2023:1407, the Amsterdam District Court was required to determine a claim that Facebook had breached various provisions of the GDPR and Dutch national privacy law. An issue arose as to where the burden of proof lay. The court noted that the general rule under Dutch law is that the party relying on particular facts bears the burden of proving them, *i.e.* it is the same as in Irish law. However, it concluded that the GDPR changed the allocation of the burden where the question of whether a data controller's compliance with the GDPR was properly put in issue. In those circumstances, the controller bore the burden of proving compliance. See to similar effect, the decision of the Schleswig-Holstein Higher Regional Court (5th Civil Senate), 24 April 2025, 5 U 59/23, (ECLI:DE:OLGSH:2025:0424 5:U59.23.00), which concerned a claim for redress pursuant to Article 82 of the GDPR.

96. The second and third questions appear to raise similar issues. The second question is what effect, if any, does Article 5(2) GDPR and/or Article 24(1) GDPR have on the application of the rules of pleading in Order 19, rules 3, 5, and 7 of the Rules, as interpreted by case law, in relation to either the plaintiff or the defendant? The third is to what extent, if at all, is the plaintiff relieved of the obligation to particularise the factual and legal matters it relies on in support of its claim in this representative action?

97. It is not clear why either question is posed in light of the parties' agreement that the rules of pleading contained in Order 19, rules 3, 5 and 7 apply to these proceedings and that those rules satisfy the requirements of equivalence and effectiveness. In the circumstances, the only available answer to Issues 1(b) and 1(c) is that the rules will apply in the ordinary way to *both* parties. Each must plead to the material facts it relies on in order to establish the matters which it must prove in the proceedings.

98. Similarly, the answer to the fourth question posed seems to follow from the matters agreed. The question is the following: In circumstances where the defendant denies/does not admit that it is the data controller, but pleads in the alternative that, if it is determined to be the data controller, it has complied with the obligations of a data controller, to what extent must the defendant positively plead to the facts on which it may later seek to rely in proving it complies with the data controller's obligations?

99. In accordance with the ordinary rules of pleading, where a defendant will, where it arises as an issue, bear the burden of proving that it has complied with obligations under the GDPR, if it wishes to make an affirmative case of compliance by way of defence, it must plead the material facts upon which it will rely for the purpose of that defence.

100. In *AIB v AIG*, the court highlighted (at §38(j) quoted above) the possibility that where a party fails to meet its pleading obligations by pleading the necessary material facts, it may subsequently not be permitted to make a positive case. McDonald J referenced the decision in *Duffy v Ridley Properties* [2008] 4 IR 282, [2008] IESC 23. In that case, the Supreme Court concluded that it was within the trial judge's discretion not to permit a defence to be advanced where it had not been positively pleaded. However, this suggests that there is no absolute rule which determines what a court must do in such a scenario. In circumstances where the issue was not argued in detail before me and may depend on a variety of factors,

it would not be appropriate for me to offer any view on the fifth issue identified under Issue 1. Even assuming that it falls within the scope of the issues as originally framed, it would not be appropriate to answer it in the abstract and without fuller argument. The parties are, in any event, alive to one possible consequence of the failure to plead the necessary material facts required to substantiate a positive plea.

Issue 3

101. Issue 3 is related to Issue 1 and should, accordingly, be dealt with before addressing the unrelated issues regarding the 2023 Act raised in Issue 2. The issue is expressed in the following way:

In a representative action seeking injunctive relief pursuant to section 23 of the 2023 Act in respect of alleged infringements of the GDPR, does the “peculiar knowledge principle” reverse the legal or evidential burden of proof?

102. The peculiar knowledge principle is described as follows in *McGrath on Evidence* (at 2-141):

There is a long-established principle, of uncertain ambition, that the onus of proof can be reversed where a matter is not within the means of knowledge of one party and is peculiarly within the knowledge of the opposing party. In Mahony v Waterford, Limerick and Western Railway Co., 298, a question arose as to whether goods, which had been damaged in transit, had been damaged by the wilful misconduct of the defendant's servants. It was held that the onus of proving that they had not been so damaged rested upon the defendant railway company. Palles CB stated that:

“Although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well-known exception to such a rule in reference to matters which are peculiarly within the knowledge of one defendant. In such a case, the burden of proof is shifted.”

103. The principle was discussed in *Hanrahan v Merck, Sharp and Dohme* [1988] ILRM 629, [1988] IESC 1:

“The ordinary rule is that a person who alleges a particular tort must, in order to succeed, prove ... all the necessary ingredients of that tort and it is not for the defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of tort lies or is deemed to lie, pre-eminently within the defendant’s knowledge, in which case the onus of proof as to that matter passes to the defendant ... The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant’s capacity of proof.”

104. The decision in *Hanrahan* was analysed in *Rothwell v MIBI* [2003] 1 IR 268, [2003] IESC 16 where the Supreme Court (Hardiman J) concluded that mere difficulty of proof is not sufficient to reverse the onus. The Court emphasised the last part of the above passage:

“It appears to me that the judgment in Hanrahan v. Merck Sharp & Dohme [1988] I.L.R.M. 629, requires not merely that a matter in respect of which the onus is to shift is within the exclusive knowledge of the defendant, but also that it is “peculiarly within the range of the defendant’s capacity for proof.”

105. Notably, in neither case did the Court conclude that the peculiar knowledge principle effected a reversal in the onus of proof.

Arguments of the parties

106. ICCL argues that the relevant evidence is within Microsoft’s exclusive knowledge and therefore the principle is engaged. It refers to Recital 68 of the Representative Actions Directive which, it says, anticipates the scenario here:

Evidence is essential to establishing whether a representative action for injunctive measures or redress measures is well founded. However, business-to-consumer relationships are often characterised by information asymmetries and the necessary

evidence can be held exclusively by the trader, making it inaccessible to the qualified entity. Qualified entities should therefore have the right to request the court or administrative authority to order the trader to disclose evidence relevant to their claim. On the other hand, taking into account the principle of equality of arms, the trader should have a similar right to request evidence that is in control of the qualified entity. The need, scope and proportionality of orders to disclose evidence should be carefully assessed by the court or administrative authority before which the representative action is brought, in accordance with national procedural law, having regard to the protection of legitimate interests of third parties and subject to the applicable Union and national rules on confidentiality

107. Microsoft argues that the possibility of information asymmetries is addressed by Article 18 of the Directive to which effect is given in Irish law by section 34 of the 2023 Act. It also refers to Article 82 of the GDPR, and section 23(7) of the 2023 Act, which relieve a claimant of the obligation to prove fault. It rejects the suggestion that the peculiar knowledge principle has any application in this case.

Discussion

108. The fact that information asymmetries are anticipated and addressed by the Representative Actions Directive and the GDPR is not dispositive of the question of whether the peculiar knowledge principle applies here. The decision in *Hamoudi* suggests that the rules of evidence may have to be adjusted where the interests of justice demand it. The peculiar knowledge principle, whatever its scope, is a common law exception to the general rule. The fact that there may be certain statutory exceptions does not necessarily remove any scope for an exception in the interests of justice.

109. What is apparent from the relevant case law, however, is that whether the peculiar knowledge principle could apply in any given case is a question of *fact*. There is no agreement in relation to any facts which would enable the court to determine whether it should apply in this case. Absent a factual matrix against which the potential scope of the peculiar knowledge principle can be addressed, it would be inappropriate to consider the parameters of the principle here. Accordingly, I decline, in accordance with the jurisdiction identified in *LM*, to determine the third issue identified by the parties.

Issue 2

110. In its defence, Microsoft pleads as a preliminary objection, that ICCL failed to provide “*sufficient information*” to the court to satisfy the requirements of section 19(10) of the 2023 Act or to enable the court to determine the admissibility of the proceedings pursuant to section 19(11). It subsequently requested further information from ICCL regarding the information which it had supplied to the court in accordance with its obligations pursuant to section 19(10) of the 2023 Act. ICCL’s position was that it had supplied sufficient information to satisfy the court. Microsoft issued a motion seeking to compel the provision of further information.

111. Issue 2 is expressed as follows:

In a representative action seeking injunctive relief pursuant to the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023, interpreted in the light of the RAD, and, in particular, Articles 7, 8, and 16 thereof, in circumstances where the plaintiff’s claim includes allegations that the defendant has infringed the GDPR, is the defendant entitled to seek information and/or raise concerns regarding the information that must be provided by the plaintiff pursuant to section 19(10) and (11) of the 2023 Act concerning: (a) the source of funding of the representative action; (b) the nature of the claim and, in particular, the nature of the alleged infringement(s) of the GDPR; and (c) the class or classes of consumers affected by the alleged infringement(s) of the GDPR?

112. The further context for this issue is that, as set out above, ICCL sought leave to issue the proceedings and purported to provide the information required by section 19(10). In light of the information provided, the court deemed the proceedings admissible and granted the Leave Order, giving leave to issue the proceedings. The court was, therefore, satisfied that ICCL had provided the information it was required to provide by section 19(10) and that it was in a position to determine that the proceedings are admissible.

113. Much of the content of both parties' submissions is directed towards the question of whether what was provided was, in fact, sufficient. I note that as originally framed, the issue posed related to the "*extent of the obligation*" imposed by sections 19(10) and 19(11) of the 2023 Act. Whether the information furnished in any given case is sufficient to satisfy the requirements of the 2023 Act and the Directive is clearly a matter of disputed fact to be determined by reference, *inter alia*, to Recitals 34 and 52 of the Directive which explain, respectively, the purpose of the requirements to provide information on the consumers affected, and on source of funding. Such questions are, accordingly, inappropriate for determination in the context of a trial of a preliminary issue.

114. The Leave Order was, of course, made on an *ex parte* basis. In the ordinary course, any *ex parte* order made by a court must be considered provisional in nature in the sense that an affected party should be entitled to revisit it if it believes the order should not have been made (see, in this regard, *Re Custom House Capital Ltd* [2011] 3 IR 323, [2011] IEHC 298). ICCL does not dispute, therefore, that Microsoft is entitled to seek to set aside the Leave Order (though it, of course, disputes that it has grounds to do so).

115. Microsoft has not, however, sought to set aside the Leave Order. Thus far, it has done two things. In its defence, it has "*reserved all of its rights, including the right to seek an order dismissing the Plaintiff's claim, or part of its claim, as inadmissible and / or manifestly unfounded and / or improperly constituted pursuant to section 19(12) of the 2023 Act and / or the Rules and / or the inherent jurisdiction, at or before the trial of the proceedings.*"

116. It has, in addition, pleaded an entitlement to seek further information "*in relation to these matters*" and has issued a motion seeking an order directing ICCL to provide that further information. The motion seeks the order pursuant to sections 19(10) and 19(11) of the 2023 Act.

Arguments of the parties

117. As noted, ICCL's submissions are directed towards the adequacy of the information which it provided. That is a question of disputed fact which cannot be determined on this

application. More generally, it objects to Microsoft's attempt to look behind the Leave Order without challenging same. It asserts that Microsoft has no free-standing right to an order directing the provision of more information than was deemed sufficient by the court when granting the Leave Order.

118. Microsoft argues that the Leave Order must be capable of being revisited and that the information provided is inadequate to enable it to understand the case which it has to meet. It highlights, in particular, purported inadequacy in the information provided in accordance with section 19(10)(c) of the 2023 Act regarding "*the class or classes of consumers affected by the alleged infringement.*" It stresses that inadequate information about the consumers allegedly affected impairs its ability to defend the case.

119. Microsoft's motion invokes sections 19(10) and 19(11) of the 2023 Act. In its oral submissions, it highlights section 19(5) of the 2023 Act which confers an entitlement on a defendant "*to raise justified concerns to the Court regarding whether a qualified entity complies with the designation criteria.*" It also refers to section 19(12) which entitles a court to dismiss an action as "*manifestly unfounded*" as soon as it has received the necessary information to enable it to make such a decision.

Discussion

120. The preliminary issue queries whether Microsoft is entitled to seek further information or "*raise concerns*" regarding the information which must be provided. These are two distinct questions, which must be addressed separately. I propose to consider first the question of whether Microsoft has an entitlement to information. Of course, Microsoft has an entitlement to seek whatever information it wishes, the question is whether ICCL is required to provide it. Properly understood, therefore, the question is whether the court has jurisdiction to direct the provision of such information.

121. Section 19(2) of the 2023 Act provides that a court should only deem a representative action admissible if brought by a qualified entity. Section 19(10) of the 2023 Act obliges a qualified entity who wishes to commence a representative action to furnish certain information to the court. This includes, at section 19(10)(c), information about the consumers affected. Section 19(11) makes clear that the court must be given sufficient

information about the consumers affected to enable it to determine whether the action is admissible.

122. Since the information required under section 19(10)(c) is necessary to enable a court to determine whether an action is admissible, it must, of necessity, be required to be furnished prior to the court deciding the issue of admissibility. Though not stated in terms, it would appear from the structure of section 19 that the information in section 19(10)(a) and (b) must also be provided in advance and is required to be considered by the court when determining the question of admissibility.

123. The 2023 Act only expressly requires a court to consider whether the plaintiff is a qualified entity and the nature of the consumers allegedly affected in assessing whether a claim is admissible. However, Recital 52 of the Representative Actions Directive suggests that where a conflict of interest arises by reason of the source of funding, this could lead a court to conclude that an action was not admissible. Moreover, it seems obvious that a court could deem an action inadmissible where the alleged infringement was of an EU measure not specified in the Directive or Act.

124. For present purposes, it is only necessary to observe that there is nothing in section 19 which suggests a standalone entitlement on the part of a defendant to seek information on the matters specified in section 19(10). Neither section 19(10) nor section 19(11) is directed to a defendant at all, and no basis was identified by Microsoft for suggesting that those sections created any entitlement to seek orders compelling the provision of more information than that accepted as sufficient by the court for the purpose of deeming the proceedings admissible.

125. Insofar as section 19(5) expressly confers an entitlement on a defendant to raise “*justified concerns*” about a qualified entity’s designation, that is addressed to a different decision – the Minister’s decision to designate the qualified entity – than the court’s decision to determine that particular proceedings are admissible, though questions around how a qualified entity is funded may be relevant to both questions. It is worth observing that the use of the term “*justified*” suggests that a defendant would have to identify some proper basis for raising concerns before any inquiry by the court might be triggered.

126. Section 34(2) of the 2023 Act does create an entitlement for a defendant to seek the disclosure of specific evidence which it believes to be in the possession of a qualified entity. As appears from Recital 68 of the Directive, quoted above, this entitlement exists in order to ensure equality of arms. Pursuant to section 34(1), a qualified entity is entitled to seek information relevant to establishing whether its claim is well founded. It would appear, therefore, that any power of a defendant to seek disclosure of evidence pursuant to section 34(2) must be similarly confined, *i.e.* to seeking evidence regarding matters in dispute in the proceedings.

127. In the circumstances, I can see no basis for concluding that sections 19(10) and 19(11) of the 2023 Act confer on a defendant a stand-alone entitlement to seek the disclosure of further information by a plaintiff regarding the information required by section 19(10) outside the normal process of seeking discovery and/or section 34(2) of the 2023 Act.

128. A defendant is not, thereby, precluded or restricted from “*raising concerns*” (as it is expressed in the preliminary issue) regarding the admissibility of proceedings. As noted above, where a leave order is made *ex parte*, it is open to a defendant to seek to have that order set aside. That is not disputed by ICCL.

129. Although an *ex parte* order must be regarded as provisional in that it is *capable* of being revisited, under the scheme of the 2023 Act, a determination on admissibility is not a decision which *requires* to be revisited. In other words, once a decision has been made that proceedings are admissible, that is not a question which requires to be revisited or determined afresh in the proceedings unless a defendant puts their admissibility in issue.

130. A defendant may elect, therefore, if it has a basis for so doing, to challenge the admissibility of proceedings. This may give rise to a basis for raising particulars, or seeking discovery, if a defendant can identify relevant and necessary documents. Needless to say, a general trawl for documents will not be permitted.

131. In this regard, information in relation to the nature of the infringements alleged and the consumers affected may well give rise to issues in dispute in proceedings where the provision of discovery will be both relevant and necessary to enable a fair disposal of the proceedings. More unusually, as contemplated by Recital 54 of the Directive, there may be

circumstances where issues in relation to funding have a bearing on the admissibility of proceedings and it may be possible, in an appropriate case, to identify documents relevant to that issue which can be requested by way of discovery or pursuant to the power identified in section 34(2) of the 2023 Act.

132. In the circumstances, the answer to Issue 2 is that a defendant has no standalone entitlement to seek the information required by section 19(10) of the 2023 Act. A defendant is, however, entitled to put the admissibility of representative proceedings in issue by way of defence and to pursue whatever procedural mechanisms are available to facilitate such a defence.

Conclusion

133. In light of the foregoing, the responses to the issues raised which I consider are appropriate to address are as follows:

Issue 1(a)

There is no general reversal of the legal or evidential burden. However, if the court is required to determine whether there has, in fact, been compliance with specific obligations in the GDPR because a plaintiff has established to the necessary standard those matters on which it bears the burden of proof, the defendant will bear the onus of proving that it has complied with any obligation imposed on it by Article 5(1) of the GDPR and/or that any processing by it of personal data is in accordance with the GDPR within the meaning of Article 24(1).

Issues 1(b) and 1(c)

The rules of pleading apply in the ordinary way to *both* parties. Each must plead to the material facts it relies on in order to establish the matters which it must prove in the proceedings.

Issue 1(d)

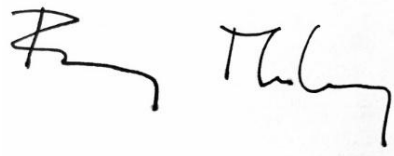
Where a defendant will, where it arises as an issue, bear the burden of proving that it has complied with obligations under the GDPR, if it wishes to make a positive case of compliance by way of defence, it must plead the material facts upon which it will rely for the purpose of that defence.

Issue 2

Sections 19(10) and 19(11) of the 2023 Act do not confer on a defendant a stand-alone entitlement to seek the disclosure of further information by a plaintiff regarding the information required by section 19(10) of the 2023 Act. This does not preclude a defendant from seeking particulars, discovery or disclosure under section 34(2), where the requirements governing those procedures are satisfied, or from seeking to set aside an order deeming proceedings admissible.

134. For the reasons explained above, in the absence of agreed facts, it is not appropriate to determine Issue 1(e) and Issue 3.

135. I will list the proceedings on 9 October 2026 at 10.00 am for the purpose of giving further directions for the progress of these proceedings and making final orders on this application.

A handwritten signature in black ink, appearing to be 'R. Tully', is written on a light blue background.