IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1433/7/7/22

BETWEEN:

DR LIZA LOVDAHL GORMSEN

Applicant/
Proposed Class Representative

- v -

(1) META PLATFORMS, INC.
(2) META PLATFORMS IRELAND LIMITED
(3) FACEBOOK UK LIMITED

Respondents/
Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form treated as filed on 14 February 2022 and the Proposed Class Representative's application treated as made on 14 February 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") for permission to serve the collective proceedings claim form on the First Proposed Defendant ("Meta") and, in so far as it is required, on the Second Proposed Defendant ("Facebook Ireland"), out of the jurisdiction (the "Rule 31 Application")

AND UPON reading the first witness statement of Katharine Alice Vernon made on 11 February 2022 in support of the Rule 31 Application

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve Meta (at the address of Meta's registered agent) and, to the extent that permission is required, Facebook Ireland outside the jurisdiction.

2. This Order is made without prejudice to the rights of Meta and Facebook Ireland to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4 at [3].

REASONS

3. It is likely, as the Proposed Class Representative contends, that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. The task of the Tribunal is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. The Tribunal therefore approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7 at [17]-[18].

4. Meta is based in the United States ("US") and Facebook Ireland is based in Ireland. The Proposed Class Representative has served the collective proceedings claim form (and supporting documents) on the Third Proposed Defendant ("Facebook UK") in the UK. The Second and Third Proposed Defendants are all direct or indirect subsidiaries of Meta, which is the ultimate parent company of Facebook. The Rule 31 Application states that Meta was responsible for developing, overseeing and/or implementing Facebook's terms of business and trading conditions, and its strategy of monetising access to its customers' personal data through advertising. It is pleaded in the claim form that Meta is directly liable for the alleged competition infringements. The Rule 31 Application states that Facebook Ireland was the contracting entity for the terms of service which UK users had to accept to join Facebook's social network (the "Terms of Service") and the data controller, with respect to the collection and use of personal data of UK users. Thus, it is alleged that Facebook Ireland is jointly and severally liable for the alleged competition infringements.

(1) Service on the Second Proposed Defendant

5. In relation to Facebook Ireland, the Proposed Class Representative's primary position in the Rule 31 Application is that permission is not required to serve the claim form on Facebook Ireland out of the jurisdiction pursuant to rule 6.33(2) CPR in conjunction with section 15B of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act")[1] and that the Tribunal has jurisdiction concerning consumer claims in the UK. This is based on the domicile of the consumer. In the alternative, the Proposed Class Representative seeks permission pursuant to rule 31(2) of the Tribunal Rules.

6. Rule 6.33(2) CPR provides:

> "(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under sections 15A to 15E of the 1982 Act and—
>
> (a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and […]
>
> (b)(ii) the defendant is not a consumer, but is a party to a consumer contract within section 15B(1) of the 1982 Act".

7. The Proposed Class Representative relies on section 15B of the 1982 Act which, in relevant part, provides as follows:

> "(1) This section applies in relation to proceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom.
>
> (2) The consumer may bring proceedings against the other party to the consumer contract—
>
> (a) […], or
>
> (b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract)."

8. A "consumer" is defined in section 15E(1) as "*a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession*". The definition of "*consumer contract*" relied upon by the Proposed Class

[1] Sections 15A to 15E inclusive of that Act were inserted, with effect from 31 December 2020 (known as IP completion day), by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

Representative, contained in section 15E(1)(c), is a contract which has been concluded with a person who "*(i) pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled, or (ii) by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and which falls within the scope of such activities"*.

9. The Rule 31 Application contends that a proposed class member is a "consumer" and the Terms of Service constitute a "consumer contract" within the meaning of the 1982 Act because at all material times, Facebook pursued and/or directed commercial or professional activities in the UK.

10. Expressly without prejudice to the rights of Meta and Facebook Ireland to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction, I have concluded (on the basis of the materials before me) that a proposed class member is a "consumer" and that the Terms of Service properly constitute a "consumer contract" for the purposes of the 1982 Act. If this is right, permission is not required to serve the Second Proposed Defendant out of the jurisdiction and it not strictly necessary to consider the position of the Second Proposed Defendant under rule 31(2). However, I do so given that I have not been fully addressed on the point, and to provide all parties with greater certainty as regards the jurisdictional position.

(2) Application under Rule 31(2) of the Tribunal Rules

11. The claim form seeks damages for abuse of a dominant position in breach of s.18 of the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union. The Proposed Defendants are all members of the same corporate group and I am satisfied that they would probably be regarded as part of the same economic entity ("Facebook") for the purpose of competition law. I consider that the relevant markets which are put forward in the collective proceedings claim form and supported by a preliminary expert report of Mr James Harvey are well arguable. As regards dominance, the preliminary analysis of Mr Harvey is said to be supported by several competition authorities' assessments of Facebook's market power around the world (including the UK's Competition and Markets Authority assessment in its market study on *Online*

Platforms and Digital Advertising[2] and in its *Facebook/Giphy* merger decision (currently on appeal in the Tribunal)). Accordingly, I am satisfied that there is a seriously arguable case that the Proposed Defendants are dominant in those markets.

12. Abuse is alleged essentially on three bases, as summarised in Ms Vernon's evidence:

    (a) the Unfair Data Requirement, which relates to the requirements imposed on users of Facebook contained in Facebook's Terms of Service which give Facebook permission to collect, share, and otherwise process users' personal data, both on- and off-platform;

    (b) the Unfair Price, which relates to the charging of an unfairly high "price" or "payment in kind" in the form of extensive personal data for the provision of social networking services; and

    (c) Other unfair trading conditions, which relate to the the means by which Facebook imposed its Terms of Service on users (which gave rise to the Unfair Data Requirement and the Unfair Price) and/or by which Facebook collected, used and/or monetised users' personal data.

13. I consider it to be seriously arguable that the matters relied on and alleged constitute abusive conduct. Further, given the prominence of Facebook in the EU and the UK, it is likely the alleged anti-competitive conduct had an appreciable effect on trade between Member States of the EU and within the UK: see *Epic Games* at [88]. Accordingly, I conclude there is a serious issue to be tried on the merits of the case against Meta, and Facebook Ireland.

14. In that regard, I note that Facebook's conduct in connection with the provision of its personal social networking/media services, including its use of personal data, forms the subject matter of a number of regulatory and legal proceedings in several jurisdictions, including the UK's Competition and Markets Authority who recently announced it has

[2] CMA, *Online Platforms and Digital Advertising: Market study final report* (1 July 2020): https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

opened an investigation into "*whether Facebook might be abusing a dominant position in the social media or digital advertising market through its collection and use of advertising data*".[3]

15. As regards the "gateways" under CPR PD6B, I consider there to be a good arguable case that the claim falls within gateway 3.1(9) (the tort gateway) on the basis that damage is sustained within the UK (and accordingly within the EU for the purpose of application of Article 102). The damage alleged by the Proposed Class Representative is in the form of "excess profit" which Mr Harvey proposes can be assessed by reference to the commercial value of users' personal data monetised by Facebook, discounting the (minimal) value of access to the social network. Mr Harvey puts forward a plausible methodology for establishing loss suffered by the proposed class in the aggregate which can be, at a high-level, understood as calculating the difference between the economic value that users would have received (in the counterfactual scenario had Facebook not held a dominant position and/or not abused its dominant position) and the economic value users actually received. Accordingly, damage is likely to be sustained in the UK: see *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 119 (Pat) cited in *Epic Games* at [119]. I have taken into account the existence of the exclusive jurisdiction clause in the Terms of Service, as well as the decision of the Court of Appeal in *Ryanair Ltd v Esso Italiana SrL* [2013] EWCA Civ 1450.

16. On that basis it is unnecessary to consider the alternative gateway relied on, i.e. gateway 3.1(3) (necessary or proper party). However, for completeness, I briefly consider that provision. According to the claim form, Meta is the ultimate parent company of Facebook UK, and such has significant influence or control, and was responsible for developing, overseeing and/or implementing the Terms of Service; and Facebook Ireland was at all material times the contracting entity for the terms of service which UK users had to accept to join Facebook's social network. On that basis, I consider there to be a serious issue to be tried as against Meta concerning both the Terms of Service imposed on UK users and the revenue generated from the personal data obtained from those users, which it is reasonable for the Tribunal to try. In view of the

[3] CMA Press Release, *CMA investigates Facebook's use of ad data* (4 June 2021): https://www.gov.uk/government/news/cma-investigates-facebook-s-use-of-ad-data.

direct involvement of Facebook Ireland, as the contracting entity, and the fact that Facebook Ireland is alleged to be implementing policies or terms and conditions determined by Meta, I consider that Meta and Facebook Ireland are proper parties to the claim. If they were in England, I have little doubt that Meta and Facebook Ireland would have been properly sued on these claims.

17. Finally, I am satisfied that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The class comprises an estimated 45 million users. The claim is based on UK and EU competition law and Facebook's Terms of Service, which are incorporated into the contract with UK users of Facebook. Further, although there is a similar class action in the US which seeks redress against Meta on behalf of consumers, the US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK consumers: see *Hoffmann-La Roche Ltd v Empagran S.A*. 542 US 4 155 (2004) and it appears that the US action is limited to "*persons in the United States*".

18. Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this action.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 15 March 2022
Drawn: 15 March 2022