COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1468/7/7/22

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 17 June 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Mr Justin Gutmann ("Mr Gutmann" or the "Applicant/Proposed Class Representative") against (1) Apple Inc., (2) Apple Distribution International Limited, and (3) Apple Retail UK Limited (together, "Apple" or "the Respondents/Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Charles Lyndon Limited of 22 Eastcheap, London EC3M 1EU (Reference: Dorothea Antzoulatos and Rodger Burnett).

The Applicant/Proposed Class Representative makes an application for a collective proceedings order ("CPO"), brought on behalf of a proposed class of UK claimants (both consumers and business entities) who have allegedly suffered harm as a result of Apple's alleged abusive conduct in relation to certain models of Apple iPhones, pursuant to section 47B of the Act and Rule 75 of the Tribunal Rules (the "Application").

According to the Application, the proposed class is likely to include at least 26.1 million iPhone users in the UK, who have suffered harm and substantial aggregate losses from Apple's concealment of battery issues and its decision to slow down the processors in approximately 44.2 million iPhones. The substantial aggregate losses for one head of loss relating to the substandard performance and reduced functionality of some Affected iPhones are provisionally estimated to be at least £853 million (excluding interest).

The Applicant/Proposed Class Representative is Mr Justin Gutmann. Mr Gutmann has extensive experience of consumer welfare issues, most recently as the Head of Research at Consumer Focus, a statutory consumer rights body now part of Citizens Advice, from 2009 to 2016. During his time at Consumer Focus, Mr Gutmann was involved in research projects on mobile phone networks and market power in both the handsets market and network provider's market. Mr Gutmann also has particular experience of the CPO regime as the authorised class representative in the Trains *Boundary Fares* proceedings, which were certified by the Tribunal on 19 October 2021 ([2021] CAT 31), and the proposed class representative in in Case 1425/7/7/21, both relating to the use of TfL travelcards. He is supported by a consultative group, comprised of certain individuals with specific expertise and experience in industry-specific and consumer rights matters.

The Application states that the Proposed Defendants design, market and sell iPhone smartphones, either on a wholesale basis to mobile network operators ("MNOs") or direct to users via the Apple Store or its website. Apple also owns the operating software, "iOS", for iPhones, which is a closed proprietary system that can only be used on iPhones. Apple licenses the iOS to iPhone users on its standard contractual terms, which are not negotiable.

The claims which it is proposed to combine in the proposed collective proceedings (the "Claims") are 'standalone' claims under section 47A of the Act. They are claims for damages caused by Apple's breaches of statutory duty in infringing: (i) the Chapter II prohibition on abuse of dominance in s.18(1)

of the Act, and in particular the first and second limbs at section 18(2)(a) and (b) of the Act; and (ii) until 31 December 2020, the EU law prohibition on abuse of dominance in Article 102(a) and (b) of the Treaty on the Functioning of the European Union ("TFEU").

Mr Gutmann contends that Apple has leveraged and abused its position of dominance on related hardware and software markets by engaging in a series of exploitative and unfair commercial practices that have caused widespread harm to its customers in the UK. In summary, over a number of years, starting from at least September 2016 with the release of iOS version 10, to the determination of these proceedings (either by way of settlement or judgment) (the "relevant period"), Apple leveraged its dominant positions between the hardware market and the software market in the UK through an unfair and abusive course of conduct, which included the imposition of unfair and misleading commercial practices, unfair trading conditions, unfair prices and/or and limited technical development to the prejudice of users, contrary to s.18(1) and (2) (a) and (b) of the Act and/or Article 102(a) and (b) TFEU.

In particular:

1. Apple was aware, from 2015 onwards, that certain models of iPhones (the "Affected iPhones") contained lithium-ion batteries that were defective in that they were unable to deliver the necessary peak power required by the iPhone central processing unit ("CPU") the graphics processing unit ("GPU") and operating system and which caused the smartphones to stall or shut down without warning (the "battery issues").

2. Rather than inform its customers of the battery issues in a transparent and timely manner and/or instigate a voluntary product recall, Apple concealed the battery issues and continued to market and sell the Affected iPhones. It proceeded to push automatic software updates via its exclusive iOS operating system, which increased the Affected iPhones' power demands further beyond the capabilities of their batteries.

3. The contractual terms and conditions in Apple's iOS licences with users at the relevant time (which were drafted by Apple in standard form issue and were non-negotiable) provide that Apple, at its discretion, could make available future iOS Software Updates for the user's iOS device. Pursuant to the iOS licences, iOS software may be pre-installed on a device or a user may choose to allow, or be deemed to consent to, automatic software updates, in which case the update will automatically download and install onto the device. Users were, and are, strongly encouraged by Apple to permit automatic updates and few disactivate them in practice. The proposed class members were subjected to unfair trading conditions and/or commercial practices as iOS updates were pre-installed or downloaded and installed automatically to the Affected iPhones without sufficient transparency and/or a meaningful opportunity for users to make an informed choice whether or not to accept the download and/or to remove it subsequently.

4. In leveraging its market power over its iOS ecosystem, Apple exacerbated the information asymmetry and inequality in bargaining position between it and its customers by issuing subsequent iOS 10.2.1, 11.2 and 12.1 updates (the "relevant iOS updates") in a misleading and non-transparent manner, which portrayed those updates as beneficial features and/or omitted essential information about their purpose and effects. Unbeknownst to the Proposed Class Members, the relevant iOS updates included a "power management feature", which sought to manage the battery issues but which actually slowed down, or "throttled", the processor, thereby adversely affecting the performance, functionality and technical capabilities of the Affected iPhones (the "throttling issues").

5. Apple has leveraged its market power in the iOS market with detrimental effects on users in the relevant hardware markets, by issuing the relevant iOS updates in an abusive way that took advantage of its customers' trust and brand loyalty and the network effects and significant barriers to switching resulting from users' iOS platform-dependence. Contrary to the prohibition in s.18(1) and (2)(b), Apple surreptitiously slowed down the Affected iPhones processors, limiting and compromising the performance, technical capabilities and functionality of the Affected iPhones and/or their batteries in a way that prejudiced users. That conduct served to protect Apple's profitability, reputation and market position at the expense of its customers' best interests.

6. Apple's lack of candour and transparency about the battery and throttling issues and failure to afford prompt and effective reparation to all of its customers in the UK (such as through a voluntary product recall, free battery replacement, refund and/or wider compensation) deterred or prevented the proposed class members from exercising their legal rights, whether under their warranty protection or pursuant to their statutory rights, thereby depriving them of obtaining fair timely and effective redress.

7. The proposed class members suffered user detriment as they suffered prolonged substandard performance of their premium handset which did not provide the superior functionality, technical capabilities and performance which users were led to believe they would experience and/or were significantly less valuable than initially thought. They paid, or continued to pay instalments towards, an unfair price of over £300 for a premium handset, whose high price did not reflect the reduced technical capabilities and actual lower value of the Affected iPhones.

According to the Application, there has been a number of regulatory investigations (culminating in extensive fines), class actions and collective settlement proceedings relating to Apple's unfair conduct in a number of countries, including but not limited to Italy, France, Belgium, Spain, Canada and the United States (the "Relevant Proceedings"). In particular, Apple has agreed settlements of approx. US$113m and between US$300-500m in two sets of US proceedings and has paid administrative fines of €10m and €25m in Italy and France respectively as well as offering forward-looking undertakings to the CMA in connection with its misleading and unfair commercial practices.3 Whilst the Relevant Proceedings are all concerned with consumer protection law, they are highly relevant to the allegations of leveraging and exploitative abuse and theory of harm in this claim and will be relied on by Mr Gutmann as relevant evidence in support of the antitrust allegations in the Claims.

The proposed collective proceedings are intended to be brought, on an opt-out basis, on behalf of a workable class of consumers and business entities, who are identifiable and can make use of Apple's Account ID information to demonstrate their eligibility and facilitate the distribution of the aggregate damages award. In essence, the "Proposed Class" comprises Apple's customers who acquired brand-new Affected iPhones in the United Kingdom.

On the data currently available, Mr Gutmann identifies:

a. A consumer sub-class of approximately 26.1 million Consumers, with, who suffered harm in respect of 39.8 million Affected iPhones over the relevant period; and

b. A business entities sub-class, who have suffered harm in respect of approximately 4.4 million Affected iPhones, with the number of entities to be confirmed following relevant disclosure from Apple.

Mr Gutmann contends that the proposed Collective Proceedings meet the requirements for certification, and it would be just and reasonable for him to be appointed as the class representative. The Claims raise the same, similar or related issues of law and fact. These common issues are appropriately resolved in

collective proceedings, and Mr Gutmann advances a plausible and credible methodology for doing so. Further, opt-out collective proceedings represent the only realistic and cost-efficient method by which customers who have suffered loss as a result of Apple's unfair conduct can achieve effective redress.

In considering certification in this case, Mr Gutmann invites the Tribunal to have regard to the fact that consumer class actions relating to substantially the same conduct by Apple under applicable consumer protection laws have been certified by courts in the United States, which Apple has subsequently settled for between $310million and $500million. It has also agreed to pay $113million in proceedings brought by 33 US States and the District of Columbia. Mr Gutmann understands that consumer law class actions have also been certified in Canada and Spain; and that class actions have been filed (but not yet certified) in Belgium, Italy and Portugal.

Apple's conduct has also been the subject of regulatory enforcement action in a number of jurisdictions around the world, including France and Italy, where it has been fined €25 million and €10 million respectively by the relevant authorities. Mr Gutmann also understands that regulatory investigations have been opened in Canada, Israel and the UK (where, with effect from 22 May 2019, Apple has given forward-looking undertakings to the Competition and Markets Authority to act with greater transparency in its dealings with consumers regarding battery health, unexpected shutdowns and performance management of their iPhones.

The Application states that it would be just and reasonable for Mr Gutmann to act as the class representative in the proposed collective proceedings. In summary:

a. There can be no doubt that Mr Gutmann will act fairly and adequately in the interests of the class members. He has extensive experience of championing consumer interests gained over his professional career. He also has knowledge of the CPO regime and ability to manage a claim such as this from his experience in the *Boundary Fares* litigation.

b. Mr Gutmann does not have, in relation to the common issues (or otherwise), a material interest that is in conflict with the interests of the class members. Whilst this factor would not be determinative, Mr Gutmann does not, and has not, himself use(d) an Affected iPhone.

c. Mr Gutmann is not aware of any other person seeking approval to act as the class representative in respect of the same claims. The question of the relative suitability of competing applications therefore does not arise.

d. In the circumstances, Mr Guttman will be able to pay Apple's recoverable costs if ordered to do so. He has entered into a Litigation Funding Agreement with Balance Legal Capital II G Ltd (the "Funder") managed by Balance Legal Capital LLP.

e. The adverse costs risk is backed by an indemnity given by the Funder which in turn is backed by an after-the-event insurance policy taken out by the Funder.

f. Mr Gutman is not a member of the proposed class. In any event, Mr Gutmann is well-equipped to manage the proposed collective proceedings. He has instructed specialist competition litigation solicitors and counsel, specialist costs counsel, expert competition economists and experienced claims administrators in order to assist and advise it in connection with the proposed collective proceedings.

g. Mr Gutmann has, with the assistance of its legal representatives, experts, and an experienced claims administration company, developed a comprehensive plan for the proposed collective proceedings.

The relief sought in these proceedings is:

(1) An aggregate award of damages on behalf of the proposed class;
(2) Simple interest, at such rates the Tribunal considers appropriate. Mr Gutmann contends that this simple interest rate is appropriate but reserves his position should evidence emerge that the proposed class members have taken out finance to pay for their Affected iPhones.
(3) Costs; and
(4) Such further and other relief as the Tribunal may think fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)
Registrar
Published 14 September 2022