



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1529/7/7/22

BETWEEN:

ELISABETTA SCIALIS

Applicant/
Proposed Class Representative

- v -

(1) KORG (UK) LIMITED
(2) KORG INC.

Respondents/
Proposed Defendants

ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form filed on 26 August 2022 and the Proposed Class Representative's application dated 26 August 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 Second Proposed Defendant out of the jurisdiction (the "Rule 31(2) Application")

AND UPON reading the first witness statement of Matthew Newbould dated 26 August 2022 in respect of the Rule 31(2) Application

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the Second Proposed Defendant outside the jurisdiction.
2. This Order is without prejudice to the rights of the Second Proposed Defendant to apply pursuant to Rule 34 of the Tribunal Rules to dispute the 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

(A) Background to the claim

1. The Proposed Class Representative (“PCR”) has applied for a Collective Proceedings Order (“CPO”) pursuant to section 47B of the Competition Act 1998 (“Competition Act”) so as to enable the continuation of collective proceedings on an opt out basis claiming aggregated damages for loss suffered by purchasers of certain musical products (“Proposed Class Members”).
2. The claims which the PCR proposes to pursue are a mix of follow on and standalone claims under section 47A of the Competition Act, and are claims for breach of statutory duty by infringing the Chapter I prohibition contained in section 2 of the Competition Act and/ or Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) (“the Claim”).
3. On 29 June 2020, the Competition and Markets Authority (“CMA”) issued a settlement decision in Case 50565-4 addressed to the First Proposed Defendant (“Korg UK”) and its ultimate parent company, the Second Proposed Defendant (“Korg Inc”) (“the Decision”). The Decision related to what was referred to as “the Korg Pricing Policy”. In summary, the CMA found that the Korg Pricing Policy was an agreement and/ or concerted practice that applied to online advertising and sales of musical instruments and equipment, specifically synthesizers and hi-tech equipment (“the Relevant Products”) manufactured on behalf of the Proposed Defendants (“the Korg Relevant Products”) and supplied in the United Kingdom.
4. I am told that the Decision in this case is one of a number of RPM infringement settlement decisions issued by the CMA in the period 1 August 2019 and 17 July 2020, regarding musical instrument products and suppliers’ pricing policies. The PCR in this case has applied for a CPO in a number of other cases based on those CMA decisions. Those other cases also raise the issue of whether or not permission should be granted to serve proposed defendants out of the jurisdiction. The essential nature of the claim,

and structure of the claim form is similar in each case, and similar issues arise when it comes to jurisdiction. The terms of the Reasoned Order on permission to serve out of the jurisdiction are also similar in each case..

5. The Decision relates specifically to the Korg Pricing Policy as it applied between Korg UK and one of its resellers, identified as “Reseller 1”, during the period 9 June 2015 to 17 April 2018 (“the Relevant Period”) whereby Reseller 1 would not advertise or sell the Korg Relevant Products below a price specified by Korg UK (“the Agreement”). The Agreement was found to infringe the Chapter I prohibition and Article 101 (“the Infringement”). The Decision is final as none of the addressees sought to appeal it.
6. Although the CMA considered that it had reasonable grounds for suspecting that more than 20 Korg UK resellers were subject to the Korg Pricing Policy and that they had generally complied with it, for reasons of administrative efficiency, the CMA chose to focus on the Korg Pricing Policy as it applied to Reseller 1. The CMA also concluded that the Infringement involving Reseller 1 was likely to have had a wider effect in the market, by reducing downward pressure on the retail price of the Korg Relevant Products through other resellers (including what are referred to as “mass resellers”). Although the CMA focused its decision on Korg Relevant Products, the PCR maintains that the evidence suggests that the Korg Pricing Policy was not limited to Korg Relevant Products, and extended to other musical products (“Relevant Musical Products”) manufactured and supplied by Korg UK (“Korg Relevant Musical Products”), and that it was applied by at least some resellers to both online and instore sales.
7. The PCR intends to rely on the Decision in order to establish the Infringement in respect of Reseller 1 during the Relevant Period, including the understanding that the Korg Pricing Policy applied to Korg resellers in the UK more generally, and that the Agreement had a broader impact as identified by the CMA.
8. The PCR also intends to rely on findings in the Decision, evidence cited in the Decision, and other evidence to be obtained by way of disclosure (should a CPO be granted) to establish that from 1 October 2015 until at least 17 April 2018 (the “post 30 September 2015 Infringements”), the terms of the Korg Pricing Policy applied to (1) all Korg UK resellers (rather than just Reseller 1); and (2) to the wider range of Korg Relevant

Musical Products, and that this was also an infringement of the Chapter I prohibition and Article 101 TFEU.

9. Further, the PCR alleges that as a consequence, the prices paid by the Proposed Class Members for (1) Relevant Products (whether manufactured or supplied by Korg UK or a third party) in the period 9 June 2015 to 30 September 2015 (the “First Infringement Period”); and (2) Relevant Musical Products (again, whether or not they were manufactured or supplied by Korg UK) in the period 1 October 2015 to 17 April 2018 (the “Second Infringement Period”) were materially higher than they would otherwise have been. The PCR maintains that the anti-competitive effects were such that other manufactures or suppliers, and other reseller channels were not subject to real price competition and their prices would also have been artificially inflated by virtue of “umbrella pricing”.
10. Further, the PCR contends that the prices did not return to competitive levels immediately following the Relevant Period, and that there is a “Run-Off period” of 12 months during which time the prices were inflated. The PCR also claims damages on behalf of Proposed Class Members who paid for Relevant Musical Products on finance in relation to the additional financing costs of the inflated prices.
11. The “Proposed Class” therefore, comprises¹ any person (including any deceased person through the personal or authorised representative of his or her estate) who:
 - (a) Purchased in the UK, in the First Infringement Period (between 9 June 2015 and 30 September 2015), a new Korg Relevant Product and/ or a new Relevant Product manufactured or supplied by another manufacturer; and
 - (b) Purchased in the UK, in the Second Infringement Period (between 1 October 2015 and 17 April 2019), a new Korg Relevant Musical Product and/ or a new Relevant Musical Product of another manufacturer or supplier.

¹ Subject to certain specified exclusions.

12. The reason for the different date ranges and product groups is to reflect the requirement that claims arising prior to 1 October 2015 must be based on a relevant decision (such as the Decision in this case). For claims arising on or after 1 October 2015, that is not required, and it is possible to bring “standalone” claims.

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

13. The PCR contends that the majority of the Proposed Class Members are likely to be domiciled in England and Wales, the damage in question occurred in the jurisdiction each and every time the Proposed Class Member(s) purchased the products the subject of the proposed claim, and Korg UK has a registered office in England. I think it is likely, for the purposes of Rule 31(2) of the Tribunal Rules that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 (“CPR”) (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

(a) *Serious Issue to be Tried*

14. For the purposes of Rule 31(2)(b) of the Tribunal Rules, I am satisfied that there is a serious issue to be tried on the merits of the claim, and that there is a real, as opposed to fanciful prospect of success.
15. As regards the follow-on claims, the PCR intends to rely as against the Proposed Defendants on the Decision, which found the Infringement at least as regards Reseller 1, and at least as regards Korg Relevant Products, and further the CMA identified that the conduct would have had a wider impact on the market. The Decision is binding on the Tribunal and the Proposed Defendants pursuant to s. 58A(2) of the Competition Act. The CMA found that Korg Inc. is jointly and severally liable with Korg UK for the Infringement.
16. As regards the stand alone claims, I also note that the CMA recorded that on the basis of the evidence it had seen (1) it had reasonable grounds for suspecting that more than 20 Korg UK resellers were subject to the Korg Pricing Policy; and (2) that it was not

confined to Korg Relevant Products but also applied to Korg Relevant Musical Products more generally. I note that in addition to the evidence available to the CMA, if a CPO is made, the PCR will seek further disclosure. In the circumstances I am satisfied that there is a real prospect of establishing infringement in relation to Korg Relevant Musical Products, and that it extended to other Korg UK Resellers. I am also satisfied that there is a real prospect of Korg Inc. being found to be jointly and severally liable with Korg UK.

17. I am also satisfied that there is a real prospect of an expert economist being able to estimate the relevant price effects not just in relation to the Korg products, but also in relation to substitute Relevant Products and Relevant Musical Products provided by third party manufacturers and suppliers, by virtue of “umbrella pricing”. In that regard, I have seen the Expert Report of Iestyn Williams dated 26 August 2022 on the Quantification Methodology, a copy of which was exhibited to the witness statement of Elisabetta Sciallis, the PCR (also dated 26 August 2022). Mr Williams’ report specifically addresses the potential overlap in the effects of various RPM infringements that affected the musical instrument industry sector, which the CMA has investigated, and in relation to which it has issued a number of Decisions.

(b) The jurisdictional gateways under CPR Practice Direction 6B (PD6B)

18. The PCR relies on two of the jurisdictional gateways specified in paragraph 3.1 of PD6B: paragraphs 3.1(3) and 3.1(9). Paragraph 3.1(3) requires there to be a real issue which it is reasonable for the court to try as between the claimant and the defendant on whom the claim form will be served other than in reliance on paragraph 3.1, and that the person in relation to whom permission to serve out of the jurisdiction is sought is a “*necessary or proper party to the claim*”. As to this Korg UK has a UK branch registered at Companies House under number 02355914, and a registered office in Milton Keynes. I am told that the PCR will serve Korg UK in any event. For the reasons I have explained, I am satisfied that there is a serious issue to be tried, as regards Korg UK which it is reasonable for the Tribunal to try.
19. Korg UK was 100% owned by Korg Inc. Korg Inc is a privately held corporation founded in Japan, with its headquarters in Tokyo. The PCR contends that Korg Inc.

exercised decisive influence over Korg UK during the Relevant Period so as to form a single economic unit with Korg UK for the purposes of the Chapter I Prohibition and Article 101 TFEU. Further, Korg Inc. has been found by the CMA to be jointly and severally liable in relation to the Infringement. It is plainly a necessary and proper party to these proceedings.

20. Given my decision in relation to paragraph 3.1(3), I do not strictly speaking need to reach a conclusion on the second gateway: paragraph 3.1(9). The PCR contends that the claim is a tort claim where damage was sustained within the jurisdiction. In my view, there is a good arguable case that this gateway is also met on the basis that the claims arise out of tortious breaches (or alleged breaches) of statutory duty by Korg UK committed in the UK by virtue of its arrangements with UK resellers. Further, damage was allegedly caused in the UK when relevant purchases were made. Again, Korg Inc. is alleged to be jointly and severally liable for all damage proved.

(c) *Appropriate Forum*

21. It seems to me that for the purposes of Rule 31(3) of the Tribunal Rules the UK (and this Tribunal) is the proper place in which to bring the claims. The Proposed Class Members are likely to be largely made up of individuals domiciled in the UK; on the information available, the products which are the subject of these proceedings were marketed and sold in the UK; the proposed First Defendant is a company which has a registered branch and office in England; the claims relate at least in part to the Decision of the CMA based on a breach of UK competition rules, and the applicable law will be English law.
22. In my view, this Tribunal is clearly the appropriate forum for the trial of the Claim.
23. For the reasons give, permission is granted for the service of proceedings outside the jurisdiction.

Bridget Lucas KC

Chair of the Competition Appeal Tribunal

Made: 25 November 2022

Drawn: 25 November 2022