



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1572/7/7/22

BETWEEN:

CLAUDIO POLLACK

Applicant/Proposed Class Representative

– and –

(1) ALPHABET INC.

(2) GOOGLE LLC

(3) GOOGLE IRELAND LIMITED

(4) GOOGLE UK LIMITED

Respondents/ Proposed Defendants

ORDER

UPON reading the Proposed Class Representative’s collective proceedings claim form dated 30 November 2022 (the “Claim Form”)

AND UPON reading the Proposed Class Representative’s application dated 30 November 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the “Rules”) for permission to serve the Claim Form and supporting documents on the First to Third Proposed Defendants out of the jurisdiction (the “Rule 31 Application”)

AND UPON reading the Witness Statement of Toby Starr dated 30 November 2022, made on behalf of the Proposed Class Representative in support of the Rule 31 Application, and the accompanying exhibit

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the Claim Form and supporting documentation on the First to Third Defendants out of jurisdiction at the following addresses:
 - (a) Alphabet Inc. at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, and 251 Little Falls Drive, Wilmington, New Castle, Delaware 19808, United States, and/or elsewhere in the United States.
 - (b) Google LLC at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, and 251 Little Falls Drive, Wilmington, New Castle, Delaware 19808, and/or elsewhere in the United States.
 - (c) Google Ireland Limited at Gordon House, Barrow Street, Dublin 4, Dublin, D404E5W5, Ireland, or elsewhere in the Republic of Ireland.
2. This order is without prejudice to the rights of the First, Second and Third Proposed Defendants to apply pursuant to Rule 34 of the Rules to dispute the jurisdiction of the Tribunal. Any such application should take account of the observations set out in *Epic Games, Inc v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background

1. These are collective proceedings brought pursuant to section 47B of the Competition Act 1998 (“the Act”). The claims they seek to combine concern the Proposed Defendants’ conduct in markets for services to sell digital advertising, and in particular display advertising – ads displayed on webpages or within apps alongside content.

2. According to the Claim Form, the sale of display ads – referred to as ‘impressions’ – typically takes place in the fraction of a second between when a user clicks to open a webpage and the webpage content opens. The technology used to facilitate such sales and to manage and supply display ads is known as “ad tech”.
3. The ad tech market involves several intermediary levels between the publishers, who operate the websites or apps, and the advertisers who seek to place ads on those websites or apps. In very summary form, it is alleged that the Proposed Defendants have abused a dominant position in respect of two intermediary roles which they play, namely as a “publisher ad server”, which manages advertising services for publishers, and as a “supply side platform”, which runs auctions for publisher ad servers in which advertisers participate in auctions to place their ads with the publishers. The Proposed Defendants are said to have a market share in excess of 90% in the publisher ad server market and a market share in excess of 50% in the supply side platform market.
4. Again, in very summary terms, the Proposed Class Representative alleges that the Proposed Defendants have engaged in self-preferencing conduct between these two intermediary roles, which has had the consequence of reducing the revenue which publishers would have received under conditions of normal competition.
5. The proposed claim is for loss and damage caused by the Proposed Defendants’ breach of statutory duty by their infringement of section 18 of the Act and Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).

(2) The Parties

6. The Proposed Class Representative seeks to bring collective proceedings on behalf of a class which comprises (1) publishers domiciled in the UK between 1 January 2014 and the making of a collective proceedings order and (2) intermediaries known as “publisher partners”, who act on behalf of publishers in dealings with publisher ad servers. It is anticipated that the subclass of publishers will include between 100,000 to 130,000 UK publishers, while the publishing partner subclass is expected by the Proposed Class Representative’s expert, Dr Oliver Latham, to be “*most likely in the dozens*”. Some of the publishing partners may be domiciled outside the UK, so this

subclass is proposed to be an “opt in” class, while the publisher subclass is proposed to be “opt out”.

7. The Proposed Defendants are members of the Google corporate group. They are said to form part of the Google undertaking (a single economic entity), and are all said to be engaged, in one way or another, with activities relating to ad tech services.
8. The First Proposed Defendant is Alphabet Inc., a corporation organized and existing under the laws of the State of Delaware, USA (company number 5786925), whose registered address is 251 Little Falls Drive, City of Wilmington, County of New Castle, Delaware 19808. Alphabet Inc. is the ultimate holding company of all subsidiaries and businesses within the Google corporate group (the Google Group).
9. The Second Proposed Defendant is Google LLC, a corporation organized and existing under the laws of the State of Delaware, USA (company number 3582691), whose registered address is 251 Little Falls Drive, City of Wilmington, County of New Castle, Delaware 19808. Google LLC is a wholly owned subsidiary of Alphabet Inc and an intermediate parent company of the Third and Fourth Proposed Defendants.
10. The Third Proposed Defendant is Google Ireland Limited, a company incorporated in Ireland (company number 368047), whose registered address is Gordon House, Barrow Street, Dublin 4, Dublin, D04E5W5, Ireland. It is the contracting entity for all publishers located in the EEA.
11. The Fourth Proposed Defendant is Google UK Limited, a company incorporated in the UK (company number 03977902), whose registered address is Belgrave House, 76 Buckingham Palace Road, London, SW1W 9TQ. According to the Proposed Class representative, Google UK Limited is responsible for employing staff who support publishers and advertisers using Google’s ad tech, particularly in the UK.

(3) Likely forum for the proceedings

12. The Proposed Class Representative invites the Tribunal to find that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Rules. This is because:
- (a) The Proposed Class Representative and one of the Proposed Defendants are based in England.
 - (b) It is expected that most members of the proposed class will be domiciled in England and Wales.
 - (c) The applicable law should be the law of England & Wales, by virtue of the application of Article 6(3)(a) of Regulation (EC) No 864/2007 of 11 July 2007 (Rome II) and, after 11pm on 31 January 2020, the retained elements of Rome II.
13. I think it is likely, as the PCR contends, 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]).

(4) Legal principles for the Rule 31(2) Application

14. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:
- (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.
 - (b) There is a good arguable case that the claim falls within one of the “gateways” set out in CPR Practice Direction 6B (“CPR PD6B”) at paragraph 3.1.

- (c) In all the circumstances, the UK is clearly or distinctly the appropriate forum for the trial of the claim.
15. The burden is on the PCR to satisfy the Tribunal that all three requirements are satisfied.
- (a) *Serious Issue to be Tried*
16. The proposed collective action is brought as a standalone case, but the Claim Form refers to and relies on a variety of regulatory investigations and court proceedings to support the claim. The Claim Form lists the following:
- (a) In July 2020, the UK Competition and Markets Authority (the “CMA”) published its market study report into ‘Online platforms and digital advertising’.
 - (b) On 14 January 2022, a number of State Attorneys General filed a Complaint in the United States District Court (Southern District of New York), alleging that Google committed multiple antitrust infringements in the ad tech sector.
 - (c) In June 2021, L’Autorité de la Concurrence (the French competition authority, or “FCA”) fined Google €220m for two self-preferencing abuses in the ad tech sector. Google did not contest the decision pursuant to a settlement procedure.
 - (d) In June 2021, the European Commission launched an investigation into whether Google has infringed Article 101 and/or 102 TFEU by favouring, through a broad range of practices, its own services in the ad tech supply chain, to the detriment of competing providers, advertisers and online publishers.
 - (e) In August 2021, the Australian Competition and Consumer Commission (the “ACCC”), found in its Digital Advertising Services Inquiry report that Google dominates the ad tech supply chain and that it has engaged in self-preferencing conduct.
 - (f) In March 2022, the CMA announced an investigation into the alleged “Jedi Blue” agreement under which Facebook is said to have agreed to limit the extent to which it competed with certain Google ad tech services.

- (g) In March 2022, the European Commission launched an investigation into the “Jedi Blue” agreement.
 - (h) In May 2022, the CMA announced a wider investigation into Google’s potential abuse of dominance in ad tech.
 - (i) In June 2022, the ACCC opened a formal investigation into Google’s ad tech business.
17. Particular reliance is placed by the Proposed Class Representative on the June 2021 FCA decision. An English translation of that decision is annexed to the Claim Form. It appears that the allegations of infringement by the FCA, which were settled by Google in payment of a substantial fine, were very similar in nature to the allegations made in these proposed collective proceedings.
18. I think it is seriously arguable that the matters relied on and alleged constitute abusive conduct and are capable of giving rise to loss which could properly be the subject of collective proceedings¹. I am satisfied, from the contents of the Claim Form taken with the regulatory and court proceedings referred to above, that there is a serious issue to be tried in relation to the subject matter of the proposed claim.

(b) The jurisdictional “gateways” under CPR PD6B

19. The PCR relies on a number of “gateways” under CPR PD6B:
- (a) Paragraph 3.1(9), which concerns claims in tort where damage was or will be sustained in the jurisdiction.
 - (b) Paragraph 3.1(9)(c), which concerns claims in tort where the claim is governed by the laws of England and Wales.

¹ In doing so, I express no view on whether the claims are suitable for collective proceedings, which is a matter for the Tribunal which hears the collective proceedings application.

- (c) Paragraph 3.1(3)(b), which concerns claims where a person is a necessary and proper party to a claim.
20. Mr Starr has provided information from Google's web support manager for publishers, which suggests that payments for advertising revenue are made directly into publishers' local bank accounts, suggesting that the loss of revenue for UK domiciled publishers (being the larger of the subclasses) will have occurred by way of a reduction in payments to UK bank accounts. This seems likely and I am satisfied that there is a good arguable case that paragraph 3.1(9) of CPR PD6B applies to the proposed claim, given that a significant number of proposed class members are likely to have sustained loss and damage here in the UK.
21. It is not therefore necessary to determine the application of paragraphs CPR PD6B 3.1(9)(c) or 3.1(3)(b), but for completeness, I note that:
- (a) I agree that paragraph 3.1(9)(c) is likely to apply to at least some aspects of the proposed collective action, through the application of Articles 6(3) (a) and (b) of Rome II (including retained law aspects of Rome II, following 11pm on 31 January 2020).
 - (b) It is also likely that paragraph 3.1(3)(b) will apply. This depends on there being a real issue between the Proposed Class Representative and the Proposed Fourth Defendant which it is reasonable for the Tribunal to try. There is some evidence that the Proposed Fourth Defendant provides ad tech services to the Google group, making it an active participant in the alleged abuses. The Proposed Class Representative relies additionally on the Proposed Defendants forming a single economic entity for competition law purposes, so being liable on a joint and several basis. Although the precise role of the Proposed Fourth Defendant in relation to the ad tech business of the Google group, and in particular the intermediary roles which are the subject of these proposed collective proceedings, is unclear, there seems to be a good arguable case that Proposed Defendants will be found to be jointly and severally liable tortfeasors. On that basis, paragraph 3.1(3)(b) is likely to apply.

22. Finally, I note that Mr Starr has raised in his witness statement, by way of full disclosure, the possibility that some publishers, or publishing partners, may be subject to contractual jurisdiction clauses which confer exclusive jurisdiction on the courts of California. It is not at all clear whether and to what extent these contractual provisions might apply. It is only likely to be possible to ascertain that with the assistance of the Proposed Defendants. I therefore proceed for present purposes on the basis that these clauses do not apply. If the Proposed Defendants wish to assert otherwise then they will have an opportunity to do so.

(c) Appropriate Forum

23. I am also satisfied for the purposes of Rule 31(3) of the Rules that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The proposed class is likely to include a substantial number of publishers based in the UK. The claim is based on UK and EU competition law. It seems likely that the proposed collective proceedings will proceed in this jurisdiction against the Proposed Fourth Defendant in any event. In relation to the First and Second Proposed Defendants, who are registered in the United States, it appears likely that the proposed collective proceedings could not be brought in the United States in the way currently envisaged by the Claim Form. Although there are claims in the US which seek redress against Google on behalf of publishers, the US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK publishers: see *Hoffmann-La Roche Ltd v Empagran S.A.* 542 US 155 (2004).

24. I therefore conclude that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Ben Tidswell

Chair of the Competition Appeal Tribunal

Made: 10 January 2023

Drawn: 25 January 2023