COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1572/7/7/22

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 30 November 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Mr Claudio Pollack ("Mr Pollack/the Applicant/Proposed Class Representative/PCR") against (1) Alphabet Inc; (2) Google LLC; (3) Google Ireland limited; and (4) Google UK Limited (together, "Google/the Respondents/Proposed Defendants/PDs"). The PCR is represented by Humphries Kerstetter LLP, St Bartholomew House, 92 Fleet Street, London EC4Y 1DH (Reference: Toby Starr and Sinead O'Brien).

The claims that Mr Pollack seeks to combine (the "Claims") are for loss and damage caused by the Proposed Defendants' breach of statutory duty by their infringement of section 18 of the Act (the Chapter II prohibition) and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). In particular, the PCR seeks to recover damages to compensate (1) UK-domiciled Publishers and (2) Publisher Partners for harm in the form of reduced revenues caused by Google's anticompetitive conduct in the ad tech sector in the period since 1 January 2014. The proceedings are brought on an opt-out basis in respect of Publishers (that are UK domiciled) and on an opt-in basis in respect of Publisher Partners.

The Claims concern Google's conduct in markets for the services used to sell digital advertising, in particular display advertising – ads displayed on webpages or within apps alongside content. Different users may be shown different ads when viewing the same webpage, and advertisers bid for the opportunity to display an ad in the light of information about the relevant user (such as their browsing and purchase history). 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".

According to the Collective Proceedings Claim Form ("CPCF"), several intermediaries provide services in the ad tech "stack" that runs from online publishers (that operate websites or apps) on one side of the transaction, to advertisers (which buy the right to have their ads displayed) on the other. Publishers contract with publisher ad servers that manage their inventory and determine which ad to serve each time an ad impression is sold. When impressions are available for sale, publisher ad servers send a 'bid request' to supply side platforms (or 'exchanges') that run real-time auctions. Auctions bids are submitted by demand side platforms on behalf of advertisers, which use advertiser ad servers to store their ads, deliver them to publishers and track ad campaign metrics.

The PCR contends that Google occupies a dominant position in each of: (i) the market for publisher ad servers; and (ii) the market for supply side platforms.

The PCR further contends that Google has abused its dominant position through two self-preferencing courses of conduct. First, Google's publisher ad server, DFP, has treated Google's supply side platform, AdX, more favourably than rival Supply Side Publishers ("SSPs"). Second, AdX has treated DFP more

favourably than rival publisher ad servers. Each abuse is said to include a number of different conducts, which it is contended are abusive whether considered individually or collectively.

The PCR alleges that the existence of these two abuses is supported by the preliminary assessment of Dr Latham, as set out in his report (the "Latham Report"). However, while the Claims are 'standalone', they are supported by the findings of several competition authorities that have investigated the ad tech sector and Google's conduct within it.

In particular, in a decision of 7 June 2021, the French competition authority (the "FCA"), Autorité de la Concurrence, found that Google's conduct in the ad tech sector breached Article 102 TFEU (the "FCA Decision"). Specifically, the FCA found that Google had committed two self-preferencing abuses that overlap very substantially with the abuses alleged in the Claims. The allegations in the Claims are also said to be supported by numerous findings made by the UK's Competition and Markets Authority (the "CMA") and the Australian Competition & Consumer Commission (the "ACCC") in their reports into digital advertising. None of the findings in the FCA Decision or in the CMA or ACCC reports were challenged by Google. The Claims are further supported by internal Google documentation referred to in the complaint into Google's ad tech conduct that has been filed in the US on behalf of 17 State Attorneys General.

The PCR says that various other investigations and legal proceedings concerned with Google's ad tech conduct are ongoing.

The Claims state that the proposed class members ("PCMs") have suffered loss and damage as a result of Google's anti-competitive conduct. They have received less revenue from the sale of their advertising inventory than they would have done under circumstances of normal and effective competition. On a preliminary estimate, aggregate losses suffered by the approximately 100,000-130,000 PCMs over 2014-2026 are £1.9bn-£7.0bn, excluding interest if one focuses only on ads sold through SSPs. These losses amount to £4.8bn-£13.2bn once one incorporates umbrella effects (again, excluding interest). Of the 100,000-130,000 PCMs, around 20,000 are estimated to make use of SSPs.

The Class is comprised of all Publishers (UK-domiciled natural or legal persons that publish content on a website or mobile app containing ad units) and Publisher Partners (natural or legal persons that sell Online Display Ads i.e., ads displayed on a Publisher's website or mobile app alongside content, excluding (i) ads on owned and operated platforms and (ii) search advertising) on behalf of Publishers, other than Publisher Ad Servers (an ad server which manages Publishers' advertising inventory and provides the decision logic underlying the final choice of which ad to serve), Ad Exchanges (electronic marketplaces that automate the sale of Online Display Ads, including through real-time auctions) and Ad Networks (intermediaries that operate on their own account aggregating advertising inventory from publishers and matching it with demand from their own demand sources) that received revenue from the sale of Online Display Ads during the Relevant Period (the period between 1 January 2014 and the date of the making of a collective proceedings order in the present proceedings).

The PCR seeks an order for opt-out proceedings in respect of the Publishers and opt-in proceedings in respect of the Publisher Partners.

The opt-out sub-class is comprised of all UK-domiciled publishers of online content on websites and in mobile applications that received revenue from the sale of Online Display Ads at any time during the Relevant Period. This sub-class is confined to UK-domiciled Publishers to ensure that the Proposed Class is focused on harm suffered in the UK and to minimise overlap with claims brought elsewhere.

According to the CPCF, the great majority of PCMs are small businesses publishing content online in diverse areas (from news to weather, sport, cookery, entertainment, local interest, science, arts and other content), supported by their revenue from sales of advertising space on their websites. This is not a

consumer claim, but there are likely to be individuals who satisfy the definition and fall within the Class (e.g., individuals who sell advertising on their blogs).

The opt-in sub-class captures another related, sub-group that suffered loss as a result of Google's conduct. The CPCF states that most of the publishers falling within the opt-out class are expected to have a direct contractual relationship with Google or with other publisher ad servers, SSPs and/or ad networks. However, there is a small proportion of publishers that are said to lack the size and scale necessary to contract with publisher ad servers or SSPs directly. Other businesses help them do that by offering ad management services, reselling ad tech tools or aggregating publishers together so as to achieve the scale needed to use ad tech tools like AdX (which has minimum volume requirements).

These businesses are defined in the Class Definition as Publisher Partners. Publisher Partners will also have suffered loss because Google's conduct reduced the revenue achieved from the sale of display ads, thereby reducing the remuneration to which Publisher Partners were entitled. There is an opt-in sub-class proposed to enable those Publisher Partners to join the action in respect of any loss in revenue in respect of their work for and on behalf of their work for UK-domiciled Publishers.

The Claims concern display advertising, ads shown on websites and in mobile applications, and do not include search advertising. As the CMA found, search and display advertising serve different and complementary functions and do not form part of the same product market. Moreover, search advertising is sold in a different auction process and remunerated differently to display advertising, being typically remunerated on a "cost per click" basis.

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

a. The PCR has extensive experience in dealing with competition and regulation in the communications services sector, having previously worked in management positions at Ofcom for over a decade, including Competition Policy Director (2005-2006). His experience includes energy, telecoms and financial services, with some experience in internet businesses.

b. The PCR's previous roles have given him particular experience relating to the abuse of dominance. His work has been concerned with ensuring fair and non-discriminatory access to services provided by suppliers with market power.

c. The PCR's motivation to act as class representative in these proceedings stems from his personal and professional commitment to supporting the rights and welfare of consumers and small businesses, to promoting positive outcomes for users of digital technology, and preventing abuses by technology companies. In light of his experience, his capacity and his commitment, he would act fairly and adequately in the interests of the PCMs.

d. The PCR will be assisted by an experienced team of lawyers and expert economists, with extensive experience of competition law and competition litigation, including experience of competition law class actions in the UK and elsewhere. In addition, several members of the team have been involved over a period of several years with investigations by competition authorities into Google's anti-competitive conduct in the ad tech sector.

e. The PCR is not a member of the Class and does not have any material interest that is in conflict with the interests of class members. He is not aware of any other applicant to be the representative in connection with the same claims.

f. The PCR will be able to pay the Proposed Defendants' recoverable costs if ordered to do so.

g. The PCR has a litigation plan for the proceedings.

h. The claims are eligible for inclusion in collective proceedings and are brought on behalf of an identifiable class of persons. Although the proposed class is a large one, its membership is readily identifiable. Central to the class definition is the requirement to have earned revenue from the sale of online advertising, which Publishers and Publisher Partners will be able to evidence by reference to their own trading records. Moreover, it is highly likely that Google will retain details for all of the PCMs with whom it had a direct contractual relationship, given that (a) the Relevant Period only began in 2014 and (b) most Publishers and Publisher Partners using Google's ad intermediation tools will have had an ongoing relationship with Google over the course of the Relevant Period.

i. The Claims raise common issues as the same, similar or related issues of fact or law. As a minimum, the following common issues arise in respect of the Proposed Class: (i) the definition of the relevant economic markets; (ii) whether Google held a dominant position on the relevant markets; (iii) whether the Proposed Defendants have abused and/or continue to abuse their dominant positions; (iv) whether any abuse(s) of dominance by the Proposed Defendants caused loss or damage to the PCMs (and if so in what amount or amounts); and (v) the rate and duration of the PCMs' entitlement to pre-judgment interest.

The relief sought in these proceedings is:

1. Damages.

2. Interest. The PCR claims interest on the above amounts: (1) Compound interest by way of damages; (2) in the alternative, simple interest pursuant to s.35A of the Senior Courts Act 1981 and/or Rule 105 of the Rules, on such sums and at such a rate as the Tribunal thinks 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 4 April 2023