COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1601/7/7/23

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 25 July 2023 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Dr Sean Ennis ("Dr Ennis/the Applicant/Proposed Class Representative/PCR") against (1) Apple Inc; (2) Apple Distribution International Ltd; (3) Apple Canada, Inc; (4) Apple Pty Limited; (5) Apple Services LATAM LLC; (6) iTunes KK; (7) Apple (UK) Ltd; and (8) Apple Europe Ltd (together, "Apple/the Respondents/Proposed Defendants/PDs"). The PCR is represented by Geradin Partners, 37 Warren Street, London W1T 6AD (Reference: Damien Geradin).

The claims that Dr Ennis seeks to combine (the "Claims") are for loss and damage caused by the Proposed Defendants' breaches of statutory duty by their infringements of article 102 of the Treaty on the Functioning of the European Union ("TFEU") (up to 31 December 2020) and section 18 of the Act. In particular, the PCR seeks to recover damages to compensate UK domiciled members of the proposed class, which is more fully described below. The proceedings are brought on an opt-out basis.

The Collective Proceedings Claim Form ("CPCF") states that the Proposed Defendants are members of the Apple corporate group. Apple is the creator of devices such as the iPhone and iPad, and of iOS, the proprietary mobile operating system which also comes pre-installed on those devices. The Claims concern Apple's conduct within the iOS app distribution market (the "App Store"), which comes preinstalled on Apple devices and which functions as the exclusive gateway through which iOS device users may install apps.

Apps allow users to add functionality to devices, or to access certain content or services. They must be programmed to be compatible with a specific operating system, and can be developed by the developer of the operating system or by third parties. A third party that wishes to develop an app for distribution to iOS device users requires access to an application programming interface or "API" provided by Apple; to gain this access, it must enter into a Developer Program Licence Agreement ("DPLA"). The DPLA typically sets a rate of commission payable to Apple by app developers of 30% on purchases of apps or of additional content or subscriptions within those apps.

The PCR alleges that Apple is dominant on the iOS app distribution market, and has abused its dominance by charging prices which are:

a. excessive and unfair in their own right; and/or

b. unfair and abusive as a system of pricing (in that the commission is effectively inescapable, the system does not reflect the true economic value contributed by app developers or of the services that Apple provides, and the burden of the commission falls on only 16% of app developers).

The PCR contends that the commission charged by Apple constitutes a contravention of article 102(a) TFEU and section 18(2)(a) of the Act in particular, which prohibit "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

The proposed class comprises UK-domiciled third-party app developers that sold apps via the App Store, and made sales to iOS device users within third-party apps (a "Relevant Sale"), in the period starting six years before the date of the Collective Proceedings Claim Form (25 July 2023) (the "Relevant Period"), where a commission was charged by Apple on the sale. The PCR estimates that there are between 1,500 and 1,600 such developers.

While the Claims are not in respect of an infringement decision, the PCR contends that Apple's conduct in the iOS app distribution market is already the subject of regulatory and other proceedings in various jurisdictions, including the United Kingdom.

The Claims state that the proposed class members ("PCMs") have suffered loss and damage as a result of Apple's alleged unfair pricing. Apple's conduct has allegedly caused the PCMs to pay a higher commission than they would have in the absence of the conduct (that is, an overcharge), and/or to make fewer sales than they would have made in the absence of the conduct. The PCR claims damages representing the difference between the commission paid by the proposed class and the commission it would have paid in the absence of the alleged overcharge, the loss attributable to lost sales that would have been made in the absence of the alleged overcharge (assuming it was passed on to consumers), and compound interest. Preliminary analysis conducted on behalf of the PCR indicates that an aggregate award of damages would be in the region of £630 million to £785 million.

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

a. The PCR is a highly experienced academic with expertise in competition economics.

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

c. The PCR has access to experienced and knowledgeable advisors.

d. The PCR has adequate arrangements in place to fund the proceedings and to cover the risk of adverse costs.

e. The PCR has no conflict of interest.

The CPCF states that the Claims are suitable to brought in collective proceedings because:

a. Many of the claims are likely to be relatively low in value on an individual basis but substantial in aggregate, so collective proceedings are likely to be the only economically viable, practical and efficient method for many PCMs to seek compensation for losses suffered as a result of the alleged infringements.

b. The benefits of having the claims brought in collective proceedings outweigh any costs to the parties. The costs associated with bringing the proceedings and administering the claims on behalf of a class with a substantial size remain fair and proportionate in view of the aggregate value of the claims.

c. The PCR is not aware of any separate proceedings making claims of the same or a similar nature on behalf of the PCMs although the case of Kent v Apple Inc (Case: 1403/7/7/21). where a collective proceedings order was made on 29 June 2022, is strongly interlinked with the Claims in terms of the factual, legal and economic issues.

d. The claims are brought on behalf of an identifiable class of persons, at an estimated size of 1,500-1,600.

e. The Claims raise the following common issues, being the same, similar or related from claim to claim: (i) the definition of the relevant market; (ii) whether Apple was or is dominant on that market; (iii) whether Apple has abused and is abusing its dominant position on that market by unfair pricing; (iv) whether the Proposed Defendants are liable for any abuse of dominance; (v) whether any abuse of dominance has caused PCMs to pay an overcharge or to make fewer sales; (vi) if that is the case, the value of those effects; (vii) the quantum of damages to which the Proposed Class Members are entitled; and (viii) the rate and duration of any interest to be awarded to the PCMs.

The relief sought in these proceedings is:

1. Damages.

2. Interest. The PCR claims compound interest by way of damages, or alternatively simple interest under section 35A of the Senior Courts Act 1981 and/or Rule 105 on such sums, for such period, and at such a rate as the Tribunal thinks fit.

3. The PCR's costs.

4. Such further or other relief as the Tribunal may see 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 5 September 2023