IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1602/7/7/23

BETWEEN:

CHRISTINE RIEFA CLASS REPRESENTATIVE LIMITED

Applicant/ Proposed Class Representative

– and –

(1) APPLE INC.

(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED

(3) AMAZON.COM, INC

(4) AMAZON EUROPE CORE S.À.R.L

(5) AMAZON SERVICES EUROPE S.À.R.L

(6) AMAZON EU S.À.R.L

(7) AMAZON.COM SERVICES LLC

Respondents/ Proposed Defendants

REASONED ORDER

UPON the Proposed Class Representative's application dated 25 July 2023 pursuant to Rule 31(3) of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**") for permission to serve the Collective Proceedings Claim Form and supporting documents on the First to Fifth,

and Seventh Proposed Defendants (together, the "**Service Out Proposed Defendants**") out of the jurisdiction (the **"Rule 31 Application"**)

AND UPON reading the Collective Proceedings Claim Form, the first Witness Statement of Christine Riefa in support of a Collective Proceedings Order and the first Expert Report of Dr Chris Pike

IT IS ORDERED AS FOLLOWS:

1. The Proposed Class Representative (the "**PCR**") has permission to serve the Collective Proceedings Claim Form and supporting documentation on the Service Out Proposed Defendants out of the jurisdiction at the following addresses:

    (a) Apple Inc. at 28 Liberty Street, New York, 10005, United States of America.

    (b) Apple Distribution International Limited ("**Apple DI**") at Hollyhill Industrial Estate, Hollyhill, T23 YK84, Cork, Ireland.

    (c) Amazon.com, Inc at 410 Terry Ave N, Seattle, WA, 98109-5210, United States of America.

    (d) Amazon Europe Core S.à.r.l. ("**Amazon EC**") at Avenue John F. Kennedy 38, L-1855 Luxembourg.

    (e) Amazon Services Europe S.à.r.l. ("**Amazon SE**") at Avenue John F. Kennedy 38, L-1855 Luxembourg.

    (f) Amazon.com Services LLC ("**Amazon Services**") at 410 Terry Ave N, Seattle, WA, 98109-5210, United States of America.

2. The Service Out Proposed Defendants, pursuant to Rule 76(5), have 21 days after the service of the Collective Proceedings Claim Form to file an acknowledgment of service in the form provided by the Registrar to the PCR.

3. The Service Out Proposed Defendants may apply to have this order set aside or varied but must make any such application no later than the period for disputing the Tribunal's jurisdiction under Rule 34. If any Service Out Proposed Defendant makes any application to have this order set aside or varied, any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc*. [2021] CAT 4, at [3].

4. The costs of the application are reserved.

REASONS

1. The PCR seeks permission to bring claims for damages under section 47B of the Competition Act 1998 (the "**Act**") as a class representative on behalf of all purchasers of new Apple-branded and Beats-branded electronics products ("**Apple Products**") sold in the United Kingdom at retail level (other than as part of mobile network operator or mobile virtual network operator contracts) between 31 October 2018 and the date of final judgment or earlier settlement of the claim (the "**Relevant Period**") ("the **Proposed Class**").

2. It is likely that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. The Tribunal therefore approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

3. On an application for permission to serve proceedings outside the jurisdiction, the claimant must satisfy the court that:

   (a) There is a serious issue to be tried on the merits of the claim.

   (b) There is a good arguable case that the claim falls within one of the classes of cases set out in PD 6B.3.1.

   (c) England is clearly the appropriate forum for the trial of the action.

See *Dicey, Morris & Collins on the Conflict of Laws* 16th Ed. Para. 11-100 and Rule 31(2) of the Tribunal Rules.

Serious issue to be tried

5. I am satisfied on the basis of the material set out in the Collective Proceedings Claim Form, the first witness statement of Christine Riefa and the first expert report of Dr Chris Pike that there is a serious issue to be tried on the merits of the claim.

6. The PCR's case is that that Amazon and Apple entered into agreements which were in breach of the Chapter 1 prohibition contained in Section 2 of the Act and/or until 31 December 2020 the EU prohibition contained in Article 101 of the Treaty on the Functioning of the European Union ("**Art 101 TFEU**") and Section 18 of the Act.

7. I am satisfied that the facts alleged in the Collective Proceedings Claim Form and the first expert report of Dr Chris Pike establish a reasonably arguable case that the Global Tenets Agreement ("**the GTA**") entered into on 31 October 2018 by Amazon.com, Inc., Amazon EU, Amazon Services, Apple Inc. and Apple DI and the agreement referred to as the EU Amendment Agreement entered into on the same date between the Proposed Sixth Defendant, Amazon EU S.à.r.l. ("**Amazon EU**"), Apple Inc. and Apple DI, (together with the GTA the "**Restrictive Agreements**") had the object and/or effect of restricting competition within a number of online and retail markets in the United Kingdom contrary to the Chapter I prohibition and/or Article 101 TFEU.

8. The PCR's case is that the Restrictive Agreements foreclosed all resellers other than certain authorised resellers on a geographical and discriminatory basis from access to the intermediation services provided by Amazon through its electronic commerce platforms and online shops operated through websites such as amazon.com and amazon.co.uk and that this significantly reduced the number of resellers present in a sales channel of considerable importance without any selection system based on quality and non-discriminatory criteria. The PCR alleges that this had the effect of increasing the prices of Apple Products – not only those sold on through Amazon but also those sold by Apple and other online and offline retailers and that many members of the

Proposed Class will also have suffered losses from increased financing costs incurred when purchasing Apple Products at inflated prices on finance at point of sale.

9. I am satisfied that there is a reasonable prospect of establishing that the Restrictive Agreements appreciably affected trade within the United Kingdom or a substantial part of it, having regard to the prominence of the Amazon platforms and online shops and Apple Products in the United Kingdom and that up to 31 December 2020 that they had an appreciable intra-Community effect.

10. The PCR's case is that each of the Proposed Defendants is jointly and severally liable for the alleged infringements either on the basis that they were parties to the Restrictive Agreements or that they form part of the same undertaking as other Defendants who were parties, or that they were directly involved in the offending conduct.

11. I note that the Restrictive Agreements have been the subject of investigations by competition authorities in other jurisdictions. The Italian competition authority, the Autorità Garante della Concurrenza e del Mercato ("AGCM"), in a decision dated 16 November 2021 (the "AGCM Decision"), found that the Restrictive Agreements breached Article 101 TFEU by object and that they had appreciable anti-competitive effects. The AGCM Decision was overturned on appeal on procedural grounds but the substantive grounds of the decision were not criticised. The Spanish competition authority, the Comisión Nacional de los Mercados y la Competencia ("CNMC") has fined Apple and Amazon a total of €194 million after finding that the same Restrictive Agreements infringed Article 101 TFEU and Spanish competition rules. Apple and Amazon have said that they intend to appeal the decision. The German competition authority, the Bundeskartellamt ("BKartA"), is also currently investigating the Restrictive Agreements.

Good arguable case

12. The PCR relies on Gateways (3), (9)(a) and (9)(b) in Practice Direction 6B of the CPR.

Gateway (3)

13. I am satisfied that there is a good arguable case that the proceedings fall within Gateway (3).

14. Gateway 3 applies where "[a] claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

15. There are therefore three requirements: (i) There must be at least one anchor defendant served otherwise than via Gateway 3; (ii) There must be "a real issue which it is reasonable for the court to try" between the claimant and the anchor defendant(s); and (iii) The other defendants must be "necessary or proper" parties to the claim.

(i) Service on anchor defendant

16. As to the first requirement, the anchor defendant for the purposes of this gateway is the Amazon EU, the Proposed Sixth Defendant, which has an establishment in the United Kingdom and can be served without permission. The PCR intends to serve the Collective Proceedings Claim Form on Amazon EU.

(ii) Real issue to be tried

17. As to the second requirement, the basis of the claim against Amazon EU, a wholly owned subsidiary of the Amazon.com, Inc. is as follows:

    (a) Amazon EU entered into the GTA and the EU Amendment Agreement.

    (b) Amazon EU is engaged in the direct sale to customers on Amazon's European marketplaces of the tangible goods that Amazon purchases from third-party suppliers.

    (c) Amazon EU is accordingly liable for the alleged infringements either as a result of its direct involvement in the offending conduct or by implementing it, and it is jointly and severally liable with the other Proposed Defendants for the alleged

infringements on the basis that it forms part of the same undertaking as the other Amazon Proposed Defendants and/or entered into one or both of the Restrictive Agreements and/or implemented the alleged infringements and/or was aware of them.

18. I am satisfied that these allegations give rise to a real issue to be tried as between the PCR and Amazon EU.

(iii) ***Necessary or proper parties***

19. I am satisfied that the PCR has a good arguable case that the Service Out Proposed Defendants are necessary or proper parties to the claim on the basis that all the Proposed Defendants are jointly and severally liable for the infringements arising from the Restrictive Agreements which were in the nature of a tortious joint enterprise. The factual and legal allegations against each of the Proposed Defendants are essentially the same. The Service Out Proposed Defendants which are alleged to have entered into and/or implemented the Restrictive Agreements are necessary or proper parties to the proposed proceedings against Amazon EU.

Gateway (9)(a)

20. Gateway 9(a) applies where "A claim is made in tort [and] damage was sustained, or will be sustained, within the jurisdiction".

21. The PCR is claiming on behalf of purchasers of Apple Products in the United Kingdom who the PCR alleges were subject to an overcharge when buying such products. I consider that the PCR has a good arguable case that the Proposed Class suffered loss in the jurisdiction on the basis that "if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought": *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat) [99]. The PCR's case is that the Apple Products will have been bought from the Amazon UK online marketplace and Apple's UK website, in Apple's physical stores in the United Kingdom, and through other online and offline retail channels in the United Kingdom and that the vast majority of purchased Apple Products were likely delivered to UK addresses (where not

purchased in a store or purchased online for collection in a store), and in all probability paid for with a UK debit or credit card or using a UK bank account.

Gateway 9(c)

22. I consider that the PCR also has a good arguable case that the Tribunal has jurisdiction over the Service Out Proposed Defendants pursuant to Gateway 9(c). Gateway 9(c) applies where "A claim is made in tort [and] the claim is governed by the law of England and Wales".

23. The PCR's case is that English law will be applicable in such circumstances by dint of Article 6.3(a) of the Rome II Regulation (No 864/2007), as continued in force with Brexit amendments (made by Part 4 Article 11 of the Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019). Article 6.3(a) provides that the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected. The market or markets affected by this conduct in the relevant retail channels in the United Kingdom is the United Kingdom, making English law applicable to the claim.

Forum Conveniens

24. I am satisfied that England and Wales is clearly or distinctly the forum in which the case can suitably be tried for the interests of all the parties and for the ends of justice. Through the Proposed Claim, the PCR seeks redress for alleged competition infringements on behalf of a large class of purchasers of Apple Products in the United Kingdom. The PCR seeks to do so under UK and EU competition law by means of the Tribunal's bespoke opt-out collective proceedings regime which enables individuals domiciled in the United Kingdom, for whom there would otherwise be no prospect of viably pursuing claims on an individual basis, automatically to have their claims for damages included in the opt-out proceedings.

25. As far as the PCR is aware, there is no similar action being brought on behalf of other individuals in any other jurisdiction brought on behalf of other individuals which would

render England and Wales anything other than clearly and distinctly the proper forum. Whilst I understand that there is a class action claim for damages against Amazon and Apple pending in the United States in respect of their conduct relating to the GTA and which seeks redress on behalf of US consumers, I am satisfied on the basis of the material referred to in the Application that the United States is not a suitable forum for vindicating the collective rights of the members of the Proposed Class. In particular, it appears that the Sherman Act does not apply extra-territorially.

26. The PCR submits that any jurisdiction clauses in contracts entered into by members of the Proposed Class are not relevant to jurisdiction because they do not extend to non-contractual claims and/or because they are unlawful/unenforceable in the case of consumer contracts as "unfair" (see s. 63 and Schedule 2 paragraph 20 of the Consumer Rights Act 2015, as read with Part 2 of that Act). In any event, as the Tribunal noted at [148]-[149] in *Epic* (referring to the observations of Rix LJ in the case of *Konkola Copper Mines plc v Coromin* [2006] EWCA Civ 5), it is for the Proposed Defendants to establish the validity, application, and scope of a jurisdiction clause if they seek to set aside permission to serve outside the jurisdiction.

27. I am satisfied that, even if a material amount of the evidence were located outside of England and Wales, this factor would be insufficient to displace the Tribunal as clearly and distinctly the appropriate forum for the trial of the case, having regard to the factors connecting the claim to this jurisdiction.

Andrew Lenon KC Made: 3 November 2023

Chair of the Competition Appeal Tribunal Drawn: 3 November2023