



IN THE COMPETITION

Case No: 1644/7/7/24

APPEAL TRIBUNAL

BETWEEN :

PROFESSOR ANDREAS STEPHAN

Applicant /

Proposed Class Representative

- v -

- (1) **AMAZON.COM INC**
- (2) **AMAZON EUROPE CORE SARL**
- (3) **AMAZON SERVICES EUROPE SARL**
- (4) **AMAZON EU SARL**
- (5) **AMAZON UK SERVICE LTD**
- (6) **AMAZON PAYMENTS UK LIMITED**

(together “Amazon”)

Respondents /

Proposed Defendants

REASONED ORDER (SERVICE OUT OF THE JURISDICTION)

UPON considering the Proposed Class Representative’s collective proceedings claim form dated 26 June 2024 and accompanying documents

UPON considering the Proposed Class Representative’s application dated 27 June 2024 and supporting exhibits pursuant to Rule 31(2) of the Tribunal Rules seeking permission to serve the collective proceedings claim form and accompanying documents on the First, Second, Third and Fourth Proposed Defendant out of the jurisdiction (the “Rule 31(2) Application”)

AND UPON reading the Witness Statement of David Gallagher dated 27 June 2024 in respect of the Rule 31(2) Application

IT IS ORDERED THAT:

1. The Proposed Class Representative is permitted to serve out of the jurisdiction the Collective Proceedings Claim Form dated 26 June 2024 and accompanying documents on the First, Second, Third and Fourth Proposed Defendants.
2. This Order is without prejudice to the rights of the First, Second, Third and Fourth Proposed Defendants to apply pursuant to Rule 34 of the Tribunal Rules to dispute jurisdiction. Any such application should take account of the observations in *Epic Games, Inc & Ors vs Apple Inc. & Ors* [2021] CAT 4 at [3].
3. Pursuant to Rule 76(5) of the Tribunal Rules:
 - a. the First Proposed Defendant shall file an acknowledgement of service within 22 days after service of the Collective Proceedings Claim Form; and
 - b. the Second, Third and Fourth Proposed Defendants shall file an acknowledgement of service within 21 days after the service of the Collective Proceedings Claim Form.
4. Costs in the case.

REASONS

(1) The Proposed Defendants

1. The Proposed Defendants are entities within the Amazon corporate group. The First

Proposed Defendant, Amazon.com, Inc., is a US corporation registered under the laws of the State of Delaware, United States of America, with registration number 2620453 and registered office at 410 Terry Avenue North, Seattle, WA 98709-5210, United States of America. It is the ultimate parent company of all subsidiaries and businesses within the Amazon corporate group, including the Second, Third and Fourth Proposed Defendants.

2. The Second Proposed Defendant is Amazon Europe Core S.À.R.L, a company incorporated under the laws of Luxembourg, with registration number B-180022 and having its principal address at 38 Avenue John F. Kennedy, L-1855 Luxembourg. It is a wholly owned subsidiary of the First Proposed Defendant.
3. The Third Proposed Defendant is Amazon Services Europe S.À.R.L, a company incorporated under the laws of Luxembourg, with registration number B-93815 and having its principal address at 38 Avenue John F. Kennedy, L-1855 Luxembourg. It is a wholly owned subsidiary of the First Proposed Defendant.
4. The Fourth Proposed Defendant, Amazon EU S.À.R.L, is a company incorporated under the laws of Luxembourg, with registration number B-101818. The Fourth Proposed Defendant has a registered UK establishment number BR01727 at 1 Principal Place, Worship Street, London EC2A 2FA. It is a wholly owned subsidiary of the First Proposed Defendant. Permission to serve the Fourth Proposed Defendant out of the jurisdiction is sought on a protective basis in the event that the Fourth Proposed Defendant objects to service within the United Kingdom.
5. The Fifth and Sixth Proposed Defendants are companies incorporated under the laws of England and Wales and permission to serve them out of the jurisdiction is not sought.

(2) Service outside the jurisdiction

6. The Proposed Class Representative submits that the proposed collective proceedings should be treated for the purpose of Rule 18 of the Rules as proceedings in England and Wales, on the bases that (a) the Proposed Class Representative and two of the Proposed Defendants are based in England, with a further having a registered establishment in England, and (b) that most of the proposed class members are likely to be based in England and Wales, and therefore to have suffered the effect of the alleged infringement

and consequent loss and damage there. I am prepared to accept for present purposes that that is correct and I therefore approach the question of service of out of the jurisdiction on the same basis as the High Court of England and Wales and in accordance with the Tribunal's guidance given in *Epic Games, Inc & Ors vs Apple Inc. & Ors* [2021] CAT 4.

(a) Reasonable prospect of success

7. In summary, the Proposed Class Representative, a Professor of Competition Law at the University of East Anglia and Head of the UEA Law School, seeks authorisation to bring proceedings combining claims against Amazon on behalf of UK-domiciled sellers that used Amazon's e-commerce marketplace services to reach customers in the UK. The claims are for damages caused by Amazon's breach of the Chapter II prohibition under section 18 of the Competition Act 1998 for the period of six years preceding 26 June 2024 and or, for the period between 26 June 2018 and 31 December 2020, under Article 102 of the Treaty on the Functioning of the European Union.

8. The basis of the Proposed Class Representative's claim is said to be as follows:

8.1 Amazon is a multinational corporate group that operates the electronic commerce platform of the same name. Through the platform third-party sellers can sell their products to customers and multiple third-party sellers can sell the same product. In the UK, Amazon uses the Amazon.co.uk website (the "Website") and the Amazon app (the "App"). Amazon has its own retail arm ("Amazon Retail") that sells products directly via the Website and the App in competition with third-party sellers. By contrast, third-party sellers' goods are made available on the Website and the App via a service called "Amazon Marketplace".

8.2 The Proposed Class Representative alleges that since 2017 at the latest, Amazon has been dominant in the market for the supply of e-commerce marketplace services to third-party sellers to reach customers in the UK.

8.3 The Proposed Class Representative alleges that Amazon has abused its dominant position in five ways:

8.3.1 First, Amazon unfairly uses sellers' data for the purposes of Amazon Retail

without making the data available to non-Amazon sellers.

- 8.3.2 Second, Amazon unfairly prefers offers made by Amazon Retail over sellers' offers when selecting which offers are displayed as the "Featured Offer" in the "Buy Box", i.e., the box prominently displayed on Amazon's product pages where customers are given one-click options to "Buy Now" and "Add to Basket".
- 8.3.3 Third, Amazon unfairly prefers offers using Fulfilment by Amazon ("FBA") over offers using alternative logistics/fulfilment services when selecting which offers are displayed as the Featured Offer in the Buy Box.
- 8.3.4 Fourth, Amazon makes access to the important "Prime" label contingent on the use of FBA.
- 8.3.5 Fifth, Amazon engages in anti-discounting practices which depress sales of goods outside Amazon and divert traffic from other e-commerce platforms to Amazon.

(Together, the "Alleged Abuses").

8.4 It is said therefore that, through the Alleged Abuses, Amazon has engaged in conduct that amounts to an abuse of a dominant position and that this conduct has:

- 8.4.1 caused sellers to lose sales;
- 8.4.2 increased fees for fulfilment/logistics services, and thus decreased sellers' margins, or (insofar as the increased costs were passed on) caused sellers to lose sales; and
- 8.4.3 increased fees for e-commerce marketplace services, and thus decreased sellers' margins or (insofar as the increased costs were passed on) caused sellers to lose sales.

8.5 The proposed collective proceedings are stand alone proceedings, which means that they do not seek to establish liability solely on the basis of any prior finding of infringement by a relevant authority. However, the Proposed Class Representative submits that his approach to the proposed collective proceedings is supported by a

number of decisions and proceedings, including those by: the Autorità Garante della Concorrenza e del Mercato;¹ the Competition and Markets Authority;² the European Commission;³ and the United States Federal Trade Commission.⁴

8.6 Only the decision of the Autorità Garante della Concorrenza e del Mercato records an infringement decision. The CMA and Commission decisions are decisions to accept commitments from Amazon entities which correspond with some of the Proposed Defendants. The decisions and proceedings referred to each contain descriptions of competition concerns which competition authorities have identified. Broadly speaking, the decisions appear to support the approach to market definition and the theories of harm which the Proposed Class Representative puts forward in these proposed proceedings.

9. I am satisfied, from the material before me, including the decisions and proceedings referred to in [8.6], that there is a serious issue to be tried in relation to the standalone claims set out in the Claim Form and that there is a reasonable prospect of the Proposed Class Representative establishing that these claims are suitable for certification in collective proceedings.

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

10. The PCR relies on the following gateways in Practice Direction 6B of the CPR:

10.1 Gateway 9(a): the claim is in tort and damage has been sustained by the Proposed Class within the jurisdiction.

10.2 Gateway 9(b): the claim is in tort and damage has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.

10.3 Gateway 9(c): the claim is in tort and is governed by the law of England and

¹ Autorità Garante della Concorrenza e del Mercato, Decision A5289, December 2021.

² Competition and Markets Authority, “Decision to accept binding commitments under the Competition Act 1998 from Amazon in relation to conduct on its UK online marketplace”, Case number 51184, 3 November 2023.

³ European Commission, Case AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box, 20 December 2022.

⁴ United States Federal Trade Commission, “Amended FTC Complaint” in *Federal Trade Commission v Amazon.com Inc* (2:23-cv-01495), 14 March 2024.

Wales.

10.4 Gateway 3: proceedings will have been properly served on the Fourth (though permission is still sought in this application on a protective basis), Fifth and Sixth Proposed Defendants, there is between the Proposed Class and these Proposed Defendants a real issue to be tried, and the Proposed Foreign Defendants are necessary or proper parties to that claim.

10.5 Gateway 4A(c): claims arising out of the same or closely connected facts.

11. As already noted, the Proposed Class Representative seeks permission to serve the Fourth Defendant out of the jurisdiction on a protective basis. It is not clear to me why this is necessary, as no reason is given for the request other than to avoid any argument that the Fourth Defendant cannot be served as of right within the jurisdiction as a registered overseas company under section 1139(2) of the Companies Act 2006. I am prepared to proceed on this basis for the purposes of this application, but in future it would be desirable for clearer reasons to be given in order to justify such an approach.

Gateway 9(a): damage sustained in the jurisdiction

12. Gateway 9(a) applies where damage was sustained, or will be sustained, within the jurisdiction.

13. I am satisfied that there is a good arguable case that the proceedings fall within gateway 9(a) for the following reasons:

13.1 The claims are tort claims within the meaning of the gateway (see *Apple Retail UK Ltd v Qualcomm (UK) Ltd*. [2018] EWHC 118 (Pat) at [92] (“*Apple Retail*”).

13.2 It is alleged that significant damage has been sustained within the jurisdiction, by reason of lost sales, margin or other losses incurred in the UK by sellers selling through the Website. See *Apple Retail* at [97] and [99] and *Epic Games, Inc & Ors vs Apple Inc. & Ors* [2021] CAT 4 at [123] to [125].

14. It is not therefore necessary to consider the other gateways relied on by the Proposed Class Representative, but I will consider them briefly for completeness.

Gateway 9(b): damage sustained from acts committed in the jurisdiction

15. Gateway 9(b) applies where damage has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.
16. I agree that it is likely that the acts alleged to have been taken by Amazon, including implementing actions and policies in relation to UK sellers, selling to UK customers, fulfilment of sales to UK customers, and undertaking actions on a UK based website are likely to have been committed in the jurisdiction.

Gateway 9(c): the claim is governed by UK law

17. The Proposed Class Representative relies on Gateway 9(c) on the basis that this is a claim made in tort governed by English law.
18. I agree that this is likely to be the case in respect of at least part of the proposed collective proceedings, by virtue of Article 6 of Regulation EC No 864/2007 on the law applicable to non-contractual obligations (“Rome II”) and by the retained version of Rome II. I note, however, that some aspects of the proposed collective proceedings may be governed by Scots law or Northern Irish law.
19. Given that a large part of the proposed collective proceedings concern sellers who are likely to be based in England and Wales, I am satisfied that there is a good arguable case that the proceedings fall within Gateway 9(c).

Gateway 3: Necessary or proper parties

20. 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 Gateway) and — (a) there is between the claimant and defendant a real issue which 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.

21. I am satisfied that there is a good arguable case that the proceedings fall within Gateway 3. There are clearly real issues to be tried between the Proposed Class Representative and the “anchor” defendants (the Fourth, Fifth and Sixth Proposed Defendants), who it appears may be properly served within the jurisdiction. That is either because they are said to be parties to the alleged infringements or are part of an undertaking which is alleged to have infringed competition law.
22. It is also clear that the First, Second and Third Proposed Defendants are necessary and proper parties to the claims against the Fourth, Fifth and Sixth Proposed Defendants, as they concern the same allegations of anti-competitive conduct and therefore necessarily involve the trial of substantially the same issues.

Gateway 4A(c): claims arising out of the same or closely connected facts

23. Gateway 4A(c) applies where “A claim is made against the defendant which [...] falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (23), and a further claim is made against the same defendant which arises out of the same or closely connected facts.”
24. I agree that each part of the claim relates to the same pattern of conduct and/or a single course of conduct by Amazon such that the claims arise from the same or closely connected facts.

(3) Forum

25. I find that in all the circumstances England and Wales is the appropriate forum to bring the proposed collective proceedings and that the Tribunal ought to exercise its discretion to permit service out of the jurisdiction. In particular, I rely upon the fact that the proposed class comprises sellers that are by definition UK-domiciled.
26. Mr Gallagher properly points out, by way of full disclosure, that there may some argument about the effect of jurisdiction clauses which apply to aspects of the trading arrangements between sellers and various Amazon entities. His analysis suggests that these are not likely to result in another jurisdiction (most likely Luxembourg) having

exclusive jurisdiction over the claims comprised in the proposed collective proceedings.

27. That is an issue which the Proposed Defendants will be entitled to contest if they take a different view. For present purposes, I am prepared to proceed on the basis that Mr Gallagher's analysis is correct.

28. Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this action.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 12 July 2024
Drawn: 12 July 2024