Neutral citation [2025] CAT 70

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 October 2025

Before:

ANDREW LENON K.C.

Sitting as a Tribunal in England and Wales

BETWEEN:

DR SEAN ENNIS

Class Representative

- v -

(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) LIMITED
(8) APPLE EUROPE LIMITED

Defendants

Heard at Salisbury Square House on 14 April 2025

RULING (PRELIMINARY ISSUES TRIAL)

APPEARANCES

Robert O'Donoghue KC, Daniel Carall-Green and Victoria Green (instructed by Geradin Partners Limited) appeared on behalf of Dr Sean Ennis

Daniel Piccinin KC, Tim Parker and Grant Kynaston (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of Apple Inc. & Others

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A. INTRODUCTION

1. This ruling is in respect of Apple's application under Tribunal Rule 53(2)(o) for a trial of preliminary issues concerning: (i) the law applicable to the Class Representative's claims; and (ii) whether or not the conduct complained of by the Class Representative is within the territorial scope of UK or EU competition law ("the Application").

2. Apple's rationale for an early trial of those issues is that, if successful on either of them, the early determination would dispose of the majority of the value of the claim and reduce the scope of the remaining trial.

3. The Class Representative opposes the Application on the grounds, in summary, that it is impossible to achieve a clean split between issues of applicable law and territorial scope, and issues going to liability. The Class Representative also submits that determination of the preliminary issues will not dispose of the whole claim, even if Apple is successful, will increase costs, and will lead to delay and increased procedural complexity.

B. BACKGROUND

4. The Class Representative's claim is for damages arising out of allegedly excessive or unfair pricing charged by Apple to UK-domiciled App developers by way of commission on transactions taking place through the App Store.[1] In the context of the Application, a significant feature of the claim is that it is not limited to revenues derived from transaction through the UK storefront of the App Store, but extends to transactions carried out through different countries' storefronts worldwide.

5. Prior to the grant of the Collective Proceedings Order dated 29 November 2024, Apple applied for an order to strike out the proceedings, in so far as they concerned commissions charged on transactions carried out via storefronts outside the UK ("Non-UK Storefronts") or via storefronts outside the EU

[1] The operation of the App Store is described at paragraphs [1] to [3] of the Tribunal's ruling on Apple's strike out application [2024] CAT 23.

("Non-EU Storefronts"). The application was made on the grounds that: (i) the law applicable to such conduct was said to be the law of the country in which the relevant storefront operates and was therefore outside the jurisdiction of the Tribunal; and (ii) the charging of commissions on transactions taking place through the Non-EU Storefronts and the Non-UK Storefronts is conduct which falls outside of the territorial scope of section 18 CA98 and/or Article 102 TFEU.

6. In its ruling on Apple's applications ([2024] CAT 23), the Tribunal dismissed Apple's strike out application on the basis that the Class Representative had a realistic prospect of establishing that the applicable law was UK Law that the infringement complained of was within the territorial scope of section 18 of the Competition Act 1998 ("CA98") and Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

7. Apple's position is that, although the Tribunal found that the issue as to the applicable law ("the Applicable Law Issue") and the issue as to territorial scope ("the Territorial Scope Issue") were not apt for final resolution in the context of an application for striking out, they raise narrow, self-contained issues of fact and law which are ripe for determination as preliminary issues. Apple suggests that these issues can be formulated as follows:

> "In so far as the claims relate to the charging of the Commission on transactions taking place through non-UK Storefronts:
>
> (a) Are those claims governed by (i) English law (including, prior to IP Completion Day, EU competition law) (as the Class Representative contends); or (ii) the law of the country of the Storefront (as Apple contends)?
>
> (b) Is the conduct complained of implemented in the UK or (prior to IP Completion Day) the EU by reason of the Represented Persons paying the Commission being domiciled in the UK (as the Class Representative contends and Apple denies)?
>
> (c) Is it foreseeable that the conduct complained of will have an immediate and substantial effect in the UK or (prior to IP Completion Day) the EU by reason of the Represented Persons paying the Commission being domiciled in the UK (as the Class Representative contends and Apple denies)?"

C. THE APPLICABLE PRINCIPLES

8. Tribunal Rule 53(2)(o) provides that the Tribunal may give directions for the hearing of any issues as preliminary issues prior to the main substantive hearing. In deciding whether to make such a direction, the Tribunal is guided by the governing principle in Rule 4(1) of seeking to ensure that the case is dealt with justly and at proportionate cost. The case law of the Tribunal and the High Court makes clear that the decision whether to direct a trial of preliminary issues is essentially a pragmatic, fact-sensitive balancing exercise.

9. A non-exhaustive list of factors which are likely to be relevant to an application for a split trial was given by Hildyard J in *Electrical Waste Recycling v Philips Electronics UK Limited* [2012] EWHC 38 (Ch):

> "5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations seem to me to include whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
>
> 6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time and costs might actually increase costs."

10. In *Euronet 360 Finance Limited v Mastercard Incorporated* [2022] CAT 15, at [10] Butcher J held that, in considering the various factors involved, an important starting point is to ask whether there are difficulties in defining an appropriate split "*because if there are difficulties in defining an appropriate split or a clean split is not possible, that is likely to count significantly against there being a split trial*". The purpose of ordering a preliminary issue trial is generally to

clarify or narrow the issues remaining for determination at the trial. If there is no clean split, there is a risk that the preliminary determination will have the opposite effect.

11. In *Kent v Apple* [2022] CAT 45 Apple's application for a preliminary issue trial on market definition/dominance was rejected essentially because separating market definition/dominance from the other issues was not a clean split, would lead to duplication across trials and could adversely affect trial preparation and case management. The Tribunal held as follows:

> "We consider there to be a material risk, even on the pleadings as they currently stand, that problems will arise between a first trial, where facts are determined for the purposes of market definition/dominance purposes, and a second trial, where those facts are also relevant to issues of abuse. These might include:
>
> (1) Complexity in determining which factual matters should be determined in the first trial, as opposed to the second, and how that is to be done in practice (for example, what evidence should be called in which trial).
>
> (2) Concern about the consequences of deciding factual (and indeed expert) matters in the first trial in isolation from the issues to which they are relevant in the second trial. By way of example, further material might arise in the second trial which called into question findings already made in the first trial.
>
> (3) Disputes about the existence, nature or extent of factual findings in the trial, which could be time consuming, confusing for witnesses, and potentially difficult to resolve when attempting to apply them in the second trial."

12. In *Westover and others v Mastercard and others* [2021] CMLR 14 the Tribunal determined as a preliminary issue the question of the law applicable to follow-on claims for damages brought by Italian companies caused by an infringement of Article101(1) TFEU, but in that case the parties were in agreement that a preliminary issue was the way forward; it was not argued that there was any overlap between the preliminary issue and the issues to be determined at the main trial.

13. Another factor to consider, where preliminary issues of law are to be determined by reference to a set of agreed or assumed facts, is whether the facts can be identified without dispute. If the formulation of the agreed or assumed facts becomes in itself a source of dispute between the parties, this is likely to weigh against ordering the proposed preliminary issues trial. In *Steele*

v Steele [2001] C.P. 106 Neuberger J (as he then was), declined to determine preliminary issues which had previously been directed by a different court, holding as follows:

> "Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue. In the present case there are 11 pages of agreed facts running to 46 paragraphs with 30 separate footnotes identifying disputes of one sort or another between the parties. The cost and effort in agreeing such a document must to my mind be highly questionable, particularly if there is bound to be a trial relating to a great majority of the issues of law and fact whichever way the preliminary issue is decided."

14. In *Rossetti Marketing Ltd v Diamond Sofa Company L*td [2013] 1 AER 208 Lord Neuberger MR (as he by then was) held that the case represented yet another cautionary tale about the dangers of preliminary issues. He highlighted the following principles:

> "(i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are nonetheless to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated and (iii) once formulated, the issues should be answered in a clear and precise way."

D. THE "CLEAN SPLIT" FACTOR

15. The "clean split" factor was the main focus of the parties' submissions. Is there a sufficiently bright line between the proposed preliminary issues and the issues to be determined at the main trial, or is there an overlap, potentially undermining the benefits of early determination of the preliminary issues?

16. Apple contended that a clean split was possible. It referred to the Tribunal's ruling on Apple's strike-out application ([2024] CAT 23), in which the Tribunal noted that there is a distinction between, on the one hand, the task of establishing the location of an "affected market" for the purpose of establishing the applicable law, and, on the other, the task of defining a market for the purposes of competition law:

> "65. There is no clear guidance in Rome II as to what is meant by an "affected" market or how the location of an affected market is to be ascertained. The PCR relies on the market definition exercise carried out by Mr Perkins in his reports.

> That exercise was, however, concerned with market definition for the purposes of competition law, not as a means of identifying or locating the affected market for the purposes of Article 6(3). The purpose of market definition for the purposes of competition to law is, as Mr Perkins explained in his Preliminary Report, to identify the main competitive constraints faced by the supplier as a first step towards assessing the supplier's market power. The purpose of defining the market which is or is likely to be affected by a restriction of competition, for the purposes of Article 6(3), is to identify the country or countries with a sufficient connection to the dispute in order to determine the applicable law."

17. Apple argued that the Applicable Law Issue requires determination of the question whether, when Apple charges commission on a transaction between a UK-domiciled developer and, for example, a US consumer buying something from the US storefront of the App Store, that commission affects the market in the UK or the US. It argued that the issue of the location of the affected market would not arise in the main trial. Apple contended likewise that the Territorial Scope Issue requires the Tribunal to determine whether the allegedly excessive commission has effects in the UK, where the developer is domiciled, or in the US where the transaction is taking place, or both. What was required from the Tribunal would be a matter of characterisation of primary facts which would not overlap with issues of liability, causation and loss to be determined at the main trial.

18. The Class Representative opposed the Application on the basis that it was impossible to make a clean split between the Applicable Law Issue, the Territorial Scope Issue and the issues to be determined at the main trial. It was submitted on his behalf that there is an issue on the pleadings as to the scope of services provided by Apple, which is relevant both to liability and to the Applicable Law Issue. Apple's pleaded case, disputed by the Class Representative, is that Apple is providing services including the provision of "*access to Apple's proprietary tools and technology for the purpose of creating iOS apps.*" Apple's case is that the fairness of the Commission has to be assessed in light of this "*wide array of services*" and the "*value of the ecosystem*" that Apple thereby provides. The Class Representative, in contrast, submitted that the Commission is paid in respect of a narrower selection of distribution services as agent or commissionaire. The scope of the services will have a bearing on the profitability that is to be taken into account for the purposes of assessing whether Apple has earned excessive profits. The Class Representative submitted that the

scope of services provided by Apple is also relevant to the Applicable Law Issue since the question as to the location of the affected market may depend on findings as to what services Apple is providing. If Apple is being paid solely for its services as agent or commissionaire, the location of the affected market may be different to what it would be if Apple is also providing proprietary services, tools and technology.

19. It was further submitted on behalf of the Class Representative that, in order to resolve the Territorial Scope Issue, it would be necessary for the Tribunal to make findings as to where the abusive conduct was implemented, or where it was foreseeable that the conduct would have immediate and substantial effects. It was argued that this would involve economic evidence on the effect that the alleged overcharge has on the market, which cannot be cleanly decoupled from the issues of infringement and causation. The Class Representative relied on the observation in *Iiyama (UK) Ltd v Samsung Electronics Co Ltd (Re the LCD Appeals)* [2018] 4 CMLR 23, at [95] that:

> "Whether or not the test [of territoriality] is satisfied will depend on a full examination of the intended and actual operation of the cartel as a whole. Such an examination can only take place in the light of the full facts as they emerge and are assessed at trial. The exercise is not one suitable for summary determination on the basis of the assumed facts."

20. The Class Representative further submitted that there were two other overlapping issues:

    (1) First, an issue as to whether there are alternative methods for the distribution of digital content which provide a meaningful substitute for the services offered by Apple. This was potentially relevant to an understanding of the impact of Apple's conduct on the market, in the context of Applicable Law and Territorial Scope issues, as well as to the competition law issues at the main trial.

    (2) Second, an issue as to whether there are distinct markets for the provision of distribution services depending on the "*genre*" of digital content. Apple argues that it is subject to different constraints according to the "*genre*" of digital content, meaning that there are

multiple markets divided along "*genre*" lines. It was submitted on behalf of the Class Representative that, if that is right, then other questions (e.g., of dominance and effects) in respect of each such market would need to be examined separately.

21. In my judgment, contrary to Apple's case, there is not a clean split between the proposed preliminary issues and the issues to be determined at the trial. As the Class Representative submitted, an analysis of the market and the effects on the market of the Apple's allegedly abusive conduct would be necessary at both stages. At both stages there would have to be factual and expert evidence as to the scope of services provided by Apple, and as to the effects of Apple's conduct on the market. There would inevitably be a significant overlap in the evidence that the Tribunal would need to consider at the two trials. Because of that overlap, I am concerned, as the Tribunal was in *Kent v Apple,* about the consequences of factual findings made by the Tribunal at the preliminary issues stage on the conduct of the main trial. There would be a risk of satellite disputes arising as to the existence, nature and extent of those factual findings, which could well be time-consuming and difficult to resolve at the main trial. There would also be a risk of inconsistency between the Tribunal's findings at each stage.

22. The difficulty of achieving a clean split is, in my view, a significant factor weighing against the proposed trial of preliminary issues in this case.

E. OTHER FACTORS

23. In addition to the absence of a clean split, there are a number of other factors suggesting that the "siren song" of preliminary issues should be resisted.

24. First, there is no agreement as to the assumed facts by reference to which the preliminary issues would be determined. At the hearing of this application, Mr Piccinin KC for Apple initially submitted that the trial of the preliminary issues would involve applying the law to undisputed primary facts. Mr O'Donoghue KC's response, for the Class Representative, was that the facts were not agreed. In order to gauge whether a set of primary facts could be formulated without

protracted argument, the Tribunal directed Apple to set out its proposed assumed facts and for the Class Representative to respond. This exchange resulted in a 28 page document from the Class Representative listing disputed facts, agreed facts and missing facts, to which Apple responded with a 17 page document of its own. Given the extent of the disagreement between the parties, the task of identifying the facts which should form the basis of the preliminary issue determination would be complex and contentious. As in *Steele v Steele* [2001] C.P. 106, the effort, time and costs entailed in identifying a relevant set of facts suggests that an order for preliminary issues is not appropriate.

25. Second, it was common ground that the determination of the proposed preliminary issues would not dispose of the whole case, even if Apple was successful in disposing of the claim in so far as it relates Non-UK Storefronts. The claim in respect of commission on sales effected via EU (including UK) versions of the App Store between 25 July 2017 and 31 December 2020 and via the UK version of the App Store from 1 January 2021 onwards would be unresolved. The Tribunal cannot assume that these would not be economically viable or that a ruling on the preliminary issues would bring the proceedings to an early conclusion through settlement.

26. Third, there is a risk that a trial of preliminary issues would increase costs. Apple submitted that the preliminary issues would have to be determined in any event, so that there would be no material increase in costs overall. Apple also submitted that, if it succeeds on either of the preliminary issues, the scope of the evidence and argument required for the remaining portion of the trial will be greatly reduced since the main trial would be focused exclusively on UK/EU Storefronts, obviating the need for the parties to contest, and the Tribunal to determine, effects on global competition and pass-on a storefront by storefront basis. The Tribunal cannot, however, assume that Apple will succeed on either of the preliminary issues. Moreover, it is not self-evident that, even if Apple did succeed, the scope of the main trial would be reduced to the extent claimed by Apple. It seems questionable that a storefront by storefront analysis would be necessary given that Apple's rate of Commission and practices appear to be largely global in nature, and Apple has not raised a defence of pass-on. More fundamentally, it is inherently likely that two trials would cost more than one,

with two sets of brief fees, the costs of re-reading into a case for the second time and the adducing of expert and factual evidence in two rounds.

27. Fourth, there is some risk that a trial of preliminary issues would delay the outcome of the case. Apple correctly submits that a trial of preliminary issues could take place without necessarily delaying the main trial, which is not fixed to take place until late 2027. A preliminary issues trial could be directed, heard, and decided all before the first deadline for factual witness evidence falls. There would, however, be a risk of a bifurcated appeal process. If permission were granted for appeal against the Tribunal's ruling on the preliminary issues (which is not unlikely, given the novelty of the legal issues raised), it is by no means certain that the appeal would be concluded before the preparation for, and hearing of, the main trial. In these circumstances the main trial might well be adjourned rather than proceeding on a basis that was liable to be set aside by the Court of Appeal.

28. There is force in Apple's argument that jurisdiction is a threshold matter and a challenge to the jurisdiction of the Tribunal should ideally be resolved at an early stage of proceedings, rather than at its conclusion. If Apple's case on the Applicable Law Issue or the Territorial Scope Issue is correct, it would follow that it is not the proper function of this Tribunal to investigate and adjudicate on the competition matters raised by the Claim Representative in relation to non-UK Storefronts. However, as it is not possible to separate out the jurisdictional issues from issues of liability, this factor carries little weight.

29. The Tribunal therefore concludes that a single trial, without preliminary issues, offers the best course to ensure that the whole case is adjudicated as fairly, quickly and efficiently as possible.

F. DISPOSITION

30. Apple's application for a trial of preliminary issues is dismissed.

Andrew Lenon K.C.
Chair

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 31 October 2025