



COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1568/7/7/22

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 15 November 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 (“the Act”), by Julie Hunter (“the Applicant/Proposed Class Representative”) against (1) Amazon.com, Inc. (2) Amazon Europe Core S.À.R.L. and (3) Amazon Services Europe S.À.R.L. and (4) Amazon EU S.À.R.L. (together “the Proposed Defendants”)(“the Application”). The Applicant/Proposed Class Representative is represented by Hausfeld & Co LLP, 12 Gough Square, London EC4A 3DW (Reference: Lesley Hannah / Aqeel Kadri).

The Applicant/Proposed Class Representative makes an application for a collective proceedings order permitting her to act as the class representative bringing opt-out collective proceedings on behalf of UK domiciled members of the proposed class (“the Application”). The proposed class is more fully described below. The proposed collective proceedings would combine standalone claims for damages under section 47A of the Act in respect of the Proposed Defendants’ alleged breaches of statutory duty by infringing Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) (prior to 31 December 2020) and section 18 of the Act (the “Chapter II Prohibition”), which prohibit the abuse of a dominant position in a market, (“the Claims”). The Claims cover the period from 14 November 2016 to present (“the Relevant Period”).

The Proposed Defendants

The Application states that the Proposed Defendants are all entities within the Amazon Group (hereinafter referred to collectively as “Amazon”). Amazon is a major digital services business which operates across many national markets. Its business offering includes *inter alia* online marketplace services, order fulfilment services, cloud computing services and various digital subscription services.

According to the Application, the First Proposed Defendant is a US corporation which is the ultimate parent company of the Amazon Group, and all of the other Proposed Defendants. The Second, Third and Fourth Proposed Defendants are each registered in Luxembourg.

Background

The Claims concern Amazon Marketplace - a platform hosting a market for purchase and sale of goods. The Applicant/Proposed Class Representative alleges that Amazon occupies a dominant position in relation to Amazon Marketplace.

The Application describes Amazon Marketplace as operating as a two-sided market. One side of the market is business-to-business, through which Amazon (i) provides third-party retailers (“Third Party Retailers”) a platform on which they can sell products to end-consumers and (ii) offers associated services to those Third Party Retailers, including payment systems, delivery, and logistics services. The other side of the market is business-to-consumer: Amazon provides consumers with, *inter alia*, (i) a platform on which to shop for goods, either products sold by Third Party Retailers, or by Amazon itself as part of its retail business (“Amazon Retail”), (ii) subscription to its Prime membership; and (iii) a dedicated customer service.

The Application sets out that there are three types of retailers on Amazon Marketplace:

- (a) Amazon Retail: Amazon Retail sells goods on Amazon Marketplace. It is therefore at once both the operator of the platform and a direct competitor to Third-Party Retailers.

(b) Third-Party Retailers that compete with Amazon Retail. There are two types of Third-Party Retailers:

- a. FBA Retailers: The majority of Third-Party Retailers have delegated their delivery and logistics services, in whole or in part, to Amazon by entering into a contract with Amazon for the provision of Amazon's delivery and logistics services to those Third-Party Retailers, known as "Fulfilment by Amazon" or "FBA".
- b. FBM Retailers: Some Third-Party Retailers do not purchase Amazon's delivery and logistics services. They are in charge of their own delivery and logistics, of delivery of goods to consumers. This is known as "Fulfilment by Merchant" or "FBM".

Abuse of Dominance

The Applicant/Proposed Class Representative alleges that throughout the Relevant Period, the majority of purchases on Amazon's website have been made through its "Buy Box", which features prominently on the given page/listing for a product (the "Product Detail Page"). The Buy Box presents a single "Featured Offer" that is significantly more visible and accessible than any other offers for the same product, and as a result the Featured Offer is the only offer for the product in question that is considered and selected by the vast majority of consumers. Amazon selects the retailer whose offer is designated as the Featured Offer in the Buy Box. To determine which retailer (a term that includes Amazon Retail and Third-Party Retailers) 'wins' the Buy Box and consequently appears as the Featured Offer, Amazon applies the "Featured Merchant Algorithm" ("FMA").

The Applicant/Proposed Class Representative further alleges, in response to a product search, that the FMA almost invariably selects an offer from Amazon Retail or Third-Party Retailers who purchase FBA as the Featured Offer. In other words, Amazon's own retail offering and those of Third-Party Retailers who purchase Amazon's delivery and logistics services are (in all or almost all cases) the only offers that are selected by the FMA as the Featured Offer (colloquially known as 'winning' the Buy Box). As a result, the Applicant/Proposed Class Representative alleges that the Featured Offer is not always the cheapest offer but is the product of a selection bias which unjustifiably favours (i) Amazon Retail and (ii) Third Party Retailers using FBA.

The Applicant/Proposed Class Representative further alleges that this systematic bias is compounded by the fact that the Buy Box feature makes it more difficult for customers to locate and select alternative purchasing offers for the same product. The Applicant/ Proposed Class Representative alleges that the above conduct constitutes an abuse of Amazon's alleged dominant position in respect of Amazon Marketplace.

The Applicant/Proposed Class Representative contends that as a result of the alleged abuse, the proposed class has collectively suffered significant losses in the form, *inter alia*, of overcharges on goods purchased on the Amazon Marketplace during the Relevant Period, which loss the Applicant/Proposed Class Representative estimates to be between £539.6 - £875.8 million before interest.

The Proposed Class

In the Application, the "Proposed Class" is defined as "all Relevant Purchasers who, during the Relevant Period, made one or more purchases on the Amazon Marketplace for the United Kingdom". For the purposes of the class definition:

- "Relevant Purchasers" means any legal or natural person domiciled in the UK who has made a purchase on the Amazon Marketplace for the UK (or the UK-domiciled personal representative of such a person), excluding various categories of individuals with connections to the Proposed Defendants, Proposed Class Representative, the Competition Appeal Tribunal or other relevant court, or any corporate entity which has been struck off or dissolved pursuant to the Companies Act 2006 or equivalent legislation, as set out in the class definition.
- "Amazon Marketplace for the United Kingdom" comprises the desktop and mobile-optimised versions of the website with the Amazon homepage and the iOS and Android versions of the Amazon app available for mobile devices where the app's settings specify the UK as the region in which the purchaser has chosen to shop.

- “Relevant Period” means the period between 14 November 2016 and the date of final judgment or earlier settlement of these collective proceedings.

The Application proposes that all persons who fall within the class definition (and are not excluded) and who are domiciled in the UK on the domicile date to be determined by the Tribunal are to be included in the Proposed Class. The Application provides for persons who fall within the class definition but who are not domiciled in the UK on the domicile date to be determined by the Tribunal are proposed to be permitted opt into the proceedings.

Certification of the proposed collective proceedings

According to the Application, the Claims are suitable for resolution in collective proceedings because, (i) the Claims are brought on behalf of an identifiable class of persons, (ii) the Claims raise common issues, namely (a) the definition of the relevant economic markets; (b) whether the Proposed Defendants were dominant in those markets, (c) whether the Proposed Defendants abused and/or continue to abuse their dominant positions, (d) whether any such abuse has caused Proposed Class Members to pay a higher price when making a purchase of goods on the Amazon Marketplace for the United Kingdom during the Relevant Period than they would have done absent the infringements and if so, the aggregate loss suffered by the Proposed Class Members.

The Applicant/Proposed Class Representative submits that she would act fairly and adequately in the interests of the Class Members because:

1. The Applicant/Proposed Class Representative has worked with leading consumer interest organisations in the UK and internationally, and currently holds several senior advisory positions in consumer protection bodies. The Applicant/Proposed Class Representative states that she has in-depth knowledge of the consumer issues associated with digital platforms, contends that she has demonstrated integrity, professionalism, and dedication to consumer welfare throughout her career, and is driven to act as Proposed Class Representative by a desire to empower and protect consumers.
2. The Applicant/Proposed Class Representative is not aware of any material interest that conflicts with the interests of the proposed class members.
3. The Applicant/Proposed Class Representative is not aware of any other person seeking approval to act as the class representative in respect of the same claims.
4. The Applicant/Proposed Class Representative has adequate funding for the Claims and will be able to pay the Proposed Defendants’ recoverable costs if ordered to do so. The Applicant/Proposed Class Representative has entered into a funding agreement and has obtained after the event insurance.
5. The Applicant/Proposed Class Representative has prepared a litigation plan for the proceedings, which includes:
 - (a) proposals for communicating with the Proposed Class and reporting the progress of the Claims to them;
 - (b) an outline of the process by which requests to opt in and opt out of the Claims;
 - (c) a procedure for governance of the Claims and consultation with the Proposed Class which takes into account the size and nature of the Proposed Class;
 - (d) consideration of the litigation timetable and proposals in respect of evidence;
 - (e) provisional proposals on how sums might be distributed to members of the Proposed Class should the Tribunal grant an aggregate damages award or following a collective settlement;
 - (f) the estimated costs that the Proposed Class Representative may incur throughout the Claims, and how those costs will be funded.

The Applicant/Proposed Class Representative submits that these Claims are suitable for resolution through collective proceedings because:

1. The Application states that the Claims are likely to be relatively low in value on an individual basis but very substantial in aggregate.
2. The Application states that the benefits of continuing the collective proceedings outweigh any costs to the parties, given that it would likely not be practically possible to bring the Claims on an individual basis. To the extent that the Applicant/Proposed Class Representative is not successful, the costs of the litigation will be covered by the funder on the basis of the litigation funding agreement.
3. The Proposed Class Representative is not aware of any separate proceedings making claims of the same or a similar nature on behalf of the proposed class members.
4. The Proposed Class is estimated to comprise between 51.6 and 53.1 million members. A group of individuals of this number could only bring their claims by way of collective proceedings. Though large, it is nonetheless possible to determine whether an individual is part of the Proposed Class or not.
5. The Applicant / Proposed Class Representative submits that the Claims are suitable for an aggregate award of damages as a practical and proportionate means of assessing damages in collective proceedings and has included a provisional methodology in this regard.
6. As to alternative methods of dispute resolution, the Applicant/Proposed Class Representative states that she has invited the Proposed Defendants to engage in settlement discussions, but the Proposed Defendants have indicated that they are not currently prepared to engage in any such dialogue.

According to the Application, the proposed collective proceedings should proceed on an opt-out basis because:

1. The Claims are strong and have a real prospect of success. The underlying facts on which the Claims are based are, to a significant extent, a matter of public record and unlikely to be in dispute. The infringements alleged involve well established categories of abuse of dominance. Competition authorities in multiple jurisdictions, including the European Commission, have investigated and/or are currently investigating Amazon in respect of conduct regarding the Buy Box.
2. It is not practicable for the proceedings to be brought on an opt-in basis given (i) the relatively modest amounts that each proposed class member could recover, (ii) the costs and complexity of the issues involved, and (iii) fact that individual proposed class members are primarily consumers.

The relief sought in these proceedings is:

- (1) Damages to be assessed on an aggregate basis;
- (2) Simple interest calculated from the date each individual claim arose;
- (3) The costs of the Proposed Class Representative; and
- (4) Any such further and 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 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

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