



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1641/7/7/23

BETWEEN :

BIRA TRADING LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) **AMAZON.COM INC**
- (2) **AMAZON EUROPE CORE SARL**
- (3) **AMAZON EU SARL**
- (4) **AMAZON SERVICES EUROPE 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 7 June 2024 and accompanying documents

UPON considering the Proposed Class Representative’s application dated 6 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 and Fourth Proposed Defendants out of the jurisdiction (the “Rule 31(2) Application”)

AND UPON reading the Second Witness Statement of Boris Bronfentrinker dated 6 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 7 June 2024 and accompanying documents on the First, Second and Fourth Proposed Defendants.
2. This Order is without prejudice to the rights of the First, Second 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 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 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 Fourth 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 Second Proposed Defendant.
4. The Third Proposed Defendant, Amazon EU S.À.R.L, is a company incorporated in Luxembourg but with a registered UK establishment. Permission to serve it out of the jurisdiction is not therefore sought.
5. The Fifth and Sixth Proposed Defendants are companies incorporated under the laws of England and Wales and, again, permission to serve them out of the jurisdiction is not therefore 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 basis that a significant number (in excess of 60%, according to the Proposed Class Representative's expert economist) 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 trade association for independent retailers, seeks authorisation to bring proceedings combining claims against Amazon on behalf of third-party merchants who have sold goods on Amazon UK's online marketplace. 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 between 1 October 2015 and 7 June 2024 and or, for the period between 1 October 2015 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, whose online marketplace (Amazon.co.uk) is the largest e-commerce retail platform in the UK (the "Amazon UK Online Marketplace"). It operates through the Amazon UK Online Marketplace in two capacities: (i) upstream in supplying e-commerce marketplace services to third-party merchants (the "Upstream Market"); and (ii) downstream, as a merchant, Amazon Retail, selling its own inventory in competition with third-party merchants (the "Downstream Market"). It therefore occupies a dual role, as both the provider of marketplace services and a merchant selling on that marketplace.

8.2 The Proposed Class Representative alleges that since at least October 2015, Amazon has been dominant in the Upstream Market, as the leading provider of e-commerce marketplace services to third-party merchants seeking to sell to customers in the UK, and that Amazon has abused its dominant position in the Upstream Market to gain an advantage on the Downstream Market as a retailer (via "Amazon Retail") on Amazon's UK Online Marketplace. Amazon has abused its dominant position by using the data provided by third-party merchants, or derived from those third-party merchants' use of the Amazon UK Online Marketplace, to inform Amazon Retail's product entry strategy, including: which products Amazon Retail should sell; when to start or end the sale of products (including private label

products); whether and on what terms to negotiate with suppliers and vendors for the sale of products on Amazon’s UK Online Marketplace; and other pricing, inventory management and planning matters (the “Data Abuse Conduct”).

8.3 Amazon’s unlawful product entry strategy also includes Amazon self-preferencing these Amazon Retail products via the “Buy Box” feature, a function of Amazon’s website which prominently features a single ‘Featured Offer’ on the given page or listing for a product (the “Other Anti-Competitive Behaviour”). The offering featured in the Buy Box, being significantly more visible and accessible than any other for the same product, is the one selected by the vast majority of purchasers.

8.4 It is said therefore that, through the Data Abuse Conduct and the Other Anti-Competitive Behaviour, Amazon has engaged in conduct that amounts to an abuse of a dominant position and that third-party merchants have suffered loss through lost sales, reduced margin and reduced innovation and efficiencies.

9. The proposed collective proceedings are standalone proceedings, although the Proposed Class Representative relies on decisions by the Competition and Markets Authority¹ and the European Commission² to accept commitments from some of the Proposed Defendants. These decisions do not amount to infringement decisions, but they contain descriptions of competition concerns which the CMA and EC have identified, leading to the offer of commitments by Amazon. Broadly speaking, the decisions support the approach to market definition and, to a significant extent, the theories of harm which the Proposed Class Representative puts forward in these proposed proceedings.

10. I am satisfied, from the material before me, including in particular the two commitments decisions, that there is a serious issue to be tried in relation to the standalone claims and that it is arguable that these claims suitable for certification in collective proceedings.

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

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

¹ 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.

² European Commission, Case AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box, 20 December 2022.

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

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

11.3 Gateway 3: proceedings will have been properly served on the Third, 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.

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 merchants selling through Amazon’s UK Online Marketplace. 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(c): the claim is governed by UK law

15. The Proposed Class Representative relies on Gateway 9(c) on the basis that this is a claim made in tort governed by English law.

16. 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.
17. Given that a large part of the proposed collective proceedings concern third-party merchants 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

18. 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.
19. 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 Third, 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.
20. It is also clear that the First, Second and Fourth Proposed Defendants are necessary and proper parties to the claims against the Third, 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.

(3) Forum

21. Mr Bronfentrinker has properly pointed out in his Second Witness Statement that there may be an issue about some of the contracts which third-party merchants enter into with

Amazon. These contracts (the “Business Solution Agreements”) contain provisions, differing over time, about Luxembourg law being the governing law of the contract and Luxembourg Courts having (from time to time and depending on the merchant category) exclusive and non-exclusive jurisdiction.

22. Mr Bronfentrinker explains that, having taken advice on Luxembourg law, he is of the view that the provisions do not apply to tort claims such as the proposed collective proceedings.
23. That may or not be the case and is a matter for the Proposed Defendants to explore if they so wish. In the meantime, 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 merchants based in the UK who have transacted on Amazon’s UK Online Marketplace.
24. 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: 9 July 2024
Drawn: 12 July 2024