COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1408/7/7/21

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 29 July 2021 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Elizabeth Helen Coll ("the Applicant/Proposed Class Representative") against (1) Alphabet Inc., (2) Google LLC, (3) Google Ireland Limited, (4) Google Commerce Limited and (5) Google Payment Limited ("the Respondents/Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Hausfeld & Co LLP, 12 Gough Square, London, EC4A 3DW (Reference: Lesley Hannah / Luke Streatfeild).

The Applicant/Proposed Class Representative makes an application for a collective proceedings order permitting it to act as the class representative bringing opt-out collective proceedings on behalf of UK domiciled members of the proposed class and on an opt-in basis for non-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 caused by the Respondents'/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, which prohibit the abuse of a dominant position in a market ("the Claims").

The Application states that the Respondents/Proposed Defendants are members of the Google corporate group and comprise a single undertaking ("Google"). The First Proposed Defendant is the holding company for the Google group of companies and is responsible for setting global policies in relation to products and services developed by its subsidiaries. The Second Proposed Defendant is the primary operating subsidiary of the First Proposed Defendant, and the Third to Fifth Proposed Defendants are subsidiaries of the Second Proposed Defendant. The Application alleges that the Third to Fifth Proposed Defendants were implementing policies in the UK determined by the First and Second Proposed Defendants in the US.

According to the Application, Google's ecosystem consists of Google's own and third-party hardware, its proprietary operating system ("Android") and its proprietary apps (such as Google Search, Google Chrome, Google Maps, Gmail, YouTube and the Play Store) and services. The Android operating system that controls the basic functions of Android devices is owned by Google, which does not only deploy Android in the production of its own branded smart mobile devices. Smart mobile device manufacturers ("OEMs") can avail themselves of a basic version of Android for free under an open-source licence, and Google requires OEMs to enter into a Mobile Application Distribution Agreement ("MADA") with the Second Proposed Defendant in order to obtain the right to pre-install and distribute Google's key proprietary apps.

The Application states that, in respect of smart mobile devices which run on the Android operating system and on which the bundle of Google's proprietary Android apps and services has been pre-installed ("GMS Devices"), any Android app developer who wishes to create Android apps for distribution through the Play Store to GMS Device users needs to enter into a non-negotiable Developer Distribution Agreement ("DDA") with the Second, Third and Fourth Proposed Defendants. The DDA requires Android app developers to use only Google's Play Store payment processing system ("PSPPS") for processing payments by GMS Device users for purchases of Android apps in the UK version of the Play Store or purchases within Android apps downloaded from the UK version of the Play Store ("Relevant Purchases"). The Fourth Proposed Defendant fixes the level of commission charged by Google on developers for Relevant Purchases using the PSPPS. The Fourth Proposed Defendant also contracts with GMS Device users under the Google Play Terms of Service ("the Google Play Ts & Cs") for the purposes of downloading, viewing, using or purchasing content on the Play Store. The Second Defendant is a counterparty to the Google Play Ts & Cs for GMS Device

users in the UK, and, under the Google Play Ts & Cs, a commission is payable by each GMS Device user in the UK when making Relevant Purchases. The Fifth Proposed Defendant is responsible for processing payment transactions in the UK on behalf of Google group companies and receives payments in respect of Relevant Purchases.

The Applicant/Proposed Class Representative alleges that Google occupies a dominant position in each of: (i) the market for the licensing of smart mobile operating systems and (ii) the market for the distribution of Android apps to Android device users, and that Google holds a monopoly in (iii) the market for the provision of payment processing services for Relevant Purchases. The Applicant/Proposed Class Representative further alleges that Google has abused its dominant positions by engaging in the following mutually reinforcing exclusionary practices, which do not constitute competition on the merits: (i) bundling the Play Store with other important proprietary apps, with the consequence that OEMs who wish to pre-install such apps on their devices have no choice but to install and prominently display, the Play Store; (ii) imposing a series of contractual and technical restrictions which restrict the ability of Android app developers to distribute Android apps to GMS Device users via distribution channels other than the Play Store; (iii) requiring that payments for Relevant Purchases be made exclusively through Google's PSPPS, thus preventing Android App developers from utilising other payment processing service providers in respect of Relevant Purchasers; and (iv) charging excessive and unfair commission in respect of all Relevant Purchases.

The Application states that the infringements may appreciably affect trade between Member States of the European Union or within the UK or a part of it. In particular, the infringements affect the ability of Android app developers or providers of payment processing services to offer cross-border services (or services within the UK).

According to the Application, the Respondents'/Proposed Defendants' conduct is unlawful pursuant to s.18 of the Act and Article 102 TFEU, and each of the five Respondents/Proposed Defendants is jointly and severally liable for any loss caused as a result of the infringements. The Applicant/Proposed Class Representative contends that the loss and damage to the proposed class during the relevant period is the difference between the commission in fact paid by them and the commission which they would have paid in the absence of the infringements.

The proposed class consists of all GMS Device users who, between 1 October 2015 and the date of final judgment or earlier settlement of the collective proceedings, used the UK version of the Play Store and made one or more Relevant Purchases. The definition of "GMS Device users" excludes certain individuals such as officers, directors or employees of the Respondents/Proposed Defendants, their subsidiaries and any entity in which they have a controlling interest, any deceased person and any registered corporate entity that has ceased to trade. The definition of "Relevant Purchases" excludes in-app payments that are: (i) primarily for the purchase or rental of physical goods or services that will be consumed outside of the Android app; (ii) primarily remittances in respect of credit card bills or utility bills; (iii) for peer-to-peer services, online auctions, tax exempt donations or content or services that facilitate online gambling; and (iv) in respect of any product category deemed unacceptable under Google's Payments Center Content Policies from time to time. The Application proposes that all persons who fall within the class definition and who are domiciled in the UK be included in the proposed class, and all persons who fall within the class definition and who are not domiciled in the UK be permitted to opt into the proceedings.

According to the Application, the Claims raise common issues as the same, similar or related issues of fact or law as follows: (a) the definition of the relevant economic markets; (b) whether the Respondents/Proposed Defendants hold a dominant position on those relevant markets; (c) whether the Respondents/Proposed Defendants have abused and/or continue to abuse their dominant positions; (d) whether any abuse(s) of dominance by the Respondents/Proposed Defendants has caused the proposed class members to pay a higher price when making Relevant Purchases than they would have done absent the infringements and, if so, the aggregate loss suffered by the proposed class members; and (e) the rate and duration of the proposed class members' entitlement to pre-judgment interest.

The Applicant/Proposed Class Representative submits that it is just and reasonable for her to act as class representative because:

1. The Applicant/Proposed Class Representative would act fairly and adequately in the interests of the class members. In her professional career, the Applicant/Proposed Class Representative has particular experience of consumer issues in digital markets. Her motivation to act as the class representative in these proceedings stems from her personal and professional commitment to create digital markets and systems that work for consumers and meet their needs for access, choice, protection and fair treatment. In the light of her experience, her capacity and commitment, she would act fairly and adequately in the interests of the proposed class.

2. The Applicant/Proposed Class Representative is a member of the proposed class and her interests are aligned with those of other members of the proposed class. She has no material interest that is in conflict 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 claim and will be able to pay the Proposed Respondents'/Proposed Defendants' recoverable costs if ordered to do so. The Applicant/Proposed Class Representative has entered into a funding agreement and has obtained an after-the-event insurance policy ("the ATE Policy") with an adequate and appropriate level of cover.

5. The Applicant/Proposed Class Representative has prepared a litigation plan for the proceedings, which includes:

   (a) A method for bringing the proceedings on behalf of the proposed class members and for notifying proposed class members of the progress of the proceedings;

   (b) A procedure for governance and consultation which takes into account the size and nature of the proposed class;

   (c) Estimates of and details of arrangements as to costs, fees or disbursements; and

   (d) The Applicant/Proposed Class Representative has engaged a very experienced consultative group of advisers with expertise and experience in group claims management, banking and payment systems, competition law, consumer law and consumer rights matters. She also has assistance, along with her experienced legal team, from a global provider of legal support services and technology to manage the data, logistics and communication for claims administration and payment and from a communications consultancy to manage the public relations aspect of the proposed collective proceedings.

The Application states that the Claims are suitable to be brought in collective proceedings because:

1. The principal issues are common issues and are therefore suitable for determination in collective proceedings.

2. The proposed collective proceedings present an appropriate means for the fair and efficient resolution of the common issues. Collective proceedings in all likelihood represent the only economically viable method for individual members of the proposed class to obtain compensation for losses suffered as a result of the infringements in question. The Claims are likely to be relatively low in value on an individual basis but very substantial in aggregate. Thus, they are a prime example of the type of claims for which the collective proceedings provisions contained in the Act were designed.

3. The benefits of the collective proceedings outweigh any costs to the parties. The costs associated with bringing the proceedings and administering the Claims on behalf of a class of a substantial size remain fair and proportionate in view of the aggregate value of the Claims and are outweighed by the benefits to the proposed class members from being able to pursue compensation for losses suffered due to the infringements, which would otherwise not be practically possible. 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 and ATE Policy.

4. The Applicant/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.

5. The proposed class currently consists of approximately 19.5 million members. A group of individuals of this number, each with substantially the same claims, could only bring their claims by way of collective proceedings of this nature. Any other mechanism for grouping together claims would simply not present a viable method of resolving the claims.

6. While the proposed class is large, there is a simple mechanism for determining whether a person is part of the proposed class.

7. The Claims are suitable for an aggregate award of damages. It is unnecessary to consider individual purchases to arrive at a single global award and, as to distribution, at this stage, the Applicant/Proposed Class Representative considers that each proposed class member will easily be able to provide appropriate evidence of the Relevant Purchases they have made during the relevant period, allowing the proportion of the overall award attributable to them to be determined.

8. At this stage of the proceedings, the Applicant/Proposed Class Representative does not envisage that alternative dispute resolution or any other means of resolving the Claims is likely to be possible.

According to the Application, the proposed collective proceedings should proceed on an opt-out basis (although it will be possible for members of the proposed class domiciled out of the UK to opt-in) because:

1. The Claims are strong and have a real prospect of success. The underlying facts on which the Claims are based are a matter of public record and not in dispute. The infringements alleged involve well established categories of abuse of dominance.

2. It is not practicable for the proceedings to be bought on an opt-in basis given the relatively modest amounts that each proposed class member could recover, the complexity and costs involved, the size of the proposed class and the fact that proposed class members are individual consumers.

The relief sought in these proceedings is:

(1) Damages on behalf of the proposed class, to be assessed on an aggregate basis;

(2) Simple interest at the rate of 8% per annum or such other rate as the Tribunal may consider appropriate;

(3) Costs; and

(4) Such further and other relief as the Tribunal may think 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, QC (Hon)
Registrar
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