COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1403/7/7/21

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 11 May 2021 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Dr. Rachael Kent ("the Applicant/Proposed Class Representative") against (1) Apple Inc. and (2) Apple Distribution International Ltd ("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 ("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 Apple corporate group ("Apple") and Apple is the maker and distributor of devices, including iPhones and iPads ("iOS Devices"). Apple's proprietary mobile operating system, iOS, is the only operating system permitted for use on iOS Devices, and iOS apps developed by a third-party developer ("iOS Apps") for use on iOS Devices can only be downloaded from Apple's proprietary app store ("App Store") as pre-installed on all iOS Devices. The Application also states that payments for purchases of an iOS App in the App Store or payments for purchases by iOS Device users within an iOS App ("Relevant Purchases") can only be made using the App Store Payment Processing System ("ASPPS") and Apple charges a commission on all Relevant Purchases ("Commission").

According to the Application, the First Respondent/Proposed Defendant is responsible for determining the terms upon which iOS App developers distribute iOS Apps on the App Store to iOS Device users, in particular, by requiring iOS App developers to enter into the Apple Developer Program Licence Agreement ("DPLA"). Under the DPLA, the Second Respondent/Proposed Defendant is appointed as the agent on behalf of the iOS App developer to collect the Commission from the iOS Device user in the UK.

The Applicant/Proposed Class Representative alleges that, due to restrictive terms and conditions and technical restraints imposed by Apple regarding iOS, the Respondents/Proposed Defendants (collectively or individually) occupy a position of dominance in each of: (i) the market for the distribution of iOS Apps to iOS Device users; and (ii) the market for the provision of payment processing services for Relevant Purchases. The Applicant/Proposed Class Representative further alleges that the Respondents/Proposed Defendants have abused their dominant position by: (i) imposing restrictive terms which require iOS App developers to distribute iOS Apps exclusively via the App Store and require that all Relevant Purchases are made using the ASPPS; and (ii) by charging excessive and unfair prices in the form of the Commission. 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 app developers or payment processors 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 the First and Second Respondents/Proposed Defendants are jointly and severally liable for the infringements. The Applicant/Proposed Class Representative contends that users of iOS Devices have lost out due to the Respondents'/Proposed Defendants' unlawful anticompetitive conduct. They have paid more Commission for Relevant Purchases than they would have done under circumstances of normal and effective competition.

The proposed class consists of all iOS 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 App Store and made one or more Relevant Purchases. The definition of "iOS 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. The definition of "Relevant Purchases" excludes: (i) the in-app purchase of real-time person-to-person services between two individuals; and (ii) the in-app purchase of physical goods or services that will be consumed outside of the iOS App. 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: (i) the definition of the relevant economic markets; (ii) whether the Respondents/Proposed Defendants hold a dominant position on those relevant markets; (iii) whether the Respondents/Proposed Defendants have abused and/or continue to abuse their dominant positions; (iv) whether any abuse(s) of dominance by the Respondents/Proposed Defendants has caused the proposed class members to pay a higher Commission when making Relevant Purchases than they would have done absent the infringements and, if so, the magnitude of that overcharge; and (v) 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 role, as a lecturer in Digital Economy and Society, the Applicant/Proposed Class Representative has particular experience relating to the impact of digital platforms on consumers. Her motivation to act as the class representative in these proceedings stems from her personal and professional commitment to supporting consumer rights and welfare, to promoting positive outcomes for consumers of digital technology, and preventing abuses by technology companies. 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' 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; and

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

6. The Applicant/Proposed Class Representative has engaged a very experienced consultative group of advisers with expertise and experience in group claims management, digital markets and consumer rights matters. She has also instructed an experienced legal team.

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

1. 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.

2. 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 with 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.

3. 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.

4. The proposed class currently consists of approximately 19.6 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.

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

6. 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.

7. At this stage of the proceedings, the Applicant/Proposed Class Representative does not envision that any alternative dispute resolution or alternative 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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