IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

BETWEEN:

ELIZABETH HELEN COLL

Applicant /
Proposed Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Respondents /
Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form treated as filed on 29 July 2021 and the Proposed Class Representative's application treated as made on 29 July 2021 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules") for permission to serve the collective proceedings claim form on the First Proposed Defendant ("Alphabet"), the Second Proposed Defendant and the Third Proposed Defendant ("Google Ireland") out of the jurisdiction ("the Rule 31(2) Application")

AND UPON reading the first witness statement of Luke Valentine Streatfeild made on 28 July 2021 in support of the Rule 31(2) Application

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve Alphabet, Google LLC and Google Ireland outside the jurisdiction.

2. This Order is made without prejudice to the rights of Alphabet, Google LLC and Google Ireland to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4, at [3].

REASONS

3. I think it is likely, as the Proposed Class Representative contends, that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. The Tribunal therefore approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

4. Alphabet and Google LLC are based in the US and Google Ireland is based in Ireland. The Proposed Class Representative will be serving the collective proceedings claim form (and supporting documents) on the Fourth and Fifth Proposed Defendants (respectively, "Google Commerce" and "Google Payments") in the UK. The Second to Fifth Proposed Defendants are all direct or indirect subsidiaries of Alphabet. The Rule 31(2) Application states that Alphabet is responsible for setting global policies in relation to products and services developed by its subsidiaries.

5. The claim form seeks damages for abuse of a dominant position in breach of s.18 of the Competition Act 1998 and (as regards conduct prior to 31 December 2020) Article 102 of the Treaty on the Functioning of the European Union. The Proposed Defendants are all members of the same corporate group and I am satisfied that they would probably be regarded as part of the same economic entity ("Google") for the purpose of competition law. I consider that the relevant markets which are put forward in the collective proceedings claim form

and supported by a preliminary expert's report from Mr Holt are well arguable. As regards dominance, the preliminary analysis of Mr Holt is said to be supported by the reasoning set out by the European Commission in its decision of 18 July 2018 in Case AT.40099 – *Google Android*, which relied on a narrower market than that defined by Mr Holt. Accordingly, I am satisfied that there is a seriously arguable case that the Proposed Defendants are dominant in those markets.

6. Abuse is alleged essentially on two alternative bases, as summarised in Mr Streatfeild's evidence: (a) the contractual and technical restrictions imposed (i) on manufacturers of Android smartphones and tablets ("GMS devices") and (ii) on developers of Apps that are to be available on GMS devices, including the requirement that all payments to download such Apps or make in-App purchases are made using Google's Play Store payment processing system; and (b) the charging of unfair and excessive prices in the form of commission on such purchases. I consider that insofar as this conduct may have taken place either in the US or partly in the US and partly in Ireland, it is well arguable that it was foreseeable in each case that it would have an immediate and substantial effect in the EU and the UK (among other places). On that basis, it will satisfy the 'qualified effects' test for substantive jurisdiction. I think it is seriously arguable that the matters relied on and alleged constitute abusive conduct and, given the prominence of GMS devices in the EU and the UK, I think it is clear that alleged anti-competitive conduct will have an appreciable effect on trade between Member States of the EU (before 31 December 2020) and within the UK: see *Epic Games* at [88]. Accordingly, I think there is a serious issue to be tried on the merits of the case against Alphabet, Google LLC and Google Ireland.

7. In that regard, I note that Google's conduct in connection with the Android operating system and Google ecosystem has formed the subject matter of a number of regulatory investigations and private claims in several jurisdictions, including by the UK Competition and Markets Authority.

8. As regards the 'gateways' under CPR PD6B, I think that there is a good arguable case that the claim falls within gateway 3.1(9)(the tort gateway) on the basis

that damage is sustained within the UK (and accordingly within the EU for the purpose of application of Article 102 prior to 31 December 2020). The damage alleged is in the form of higher prices paid by consumers purchasing Apps and in-App content on their GMS devices using the UK version of the Google Play Store and will in most cases therefore be sustained in the UK: see *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 119 (Pat) cited in *Epic Games* at [119].

9. On that basis it is unnecessary to consider the alternative gateway relied on, i.e. gateway 3.1(3) (necessary or proper party). However, for completeness, I briefly consider that provision. According to the claim form, Google LLC, Google Ireland and Google Commerce are parties to the agreement with App developers concerning the UK; and Google LLC and Google Commerce are the entities with which, under the Google Play Terms of Service, users of GMS devices in the UK contract for the purpose of using the Google Play Store and downloading or purchasing content through it. On that basis, I think that there is a serious issue to be tried as against Google Commerce concerning both the restrictions imposed on App developers and the commission charged for making relevant purchases, which it is reasonable for the Tribunal to try. In view of the direct involvement of Google LLC in these arrangements, and the fact that Google Commerce is alleged to be implementing policies or decisions determined by Alphabet and Google LLC, I consider that Alphabet, Google LLC and probably also Google Ireland, are proper parties to the claim. If they were in England, I have little doubt that Alphabet, Google LLC and Google Ireland would have been properly sued on these claims. Accordingly, it is unnecessary to consider the position of Google Payments.

10. By contrast, insofar as the claim alleges abuse on the basis of the restrictions imposed on OEM manufacturers of GMS devices (allegation (a)(i) at para 6 above), referred to in the claim form as the "bundling" abuse, I am not satisfied that there is an issue to be tried as against either Google Commerce or Google Payments: cp *Epic Games* at [112] and [115]. Therefore gateway 3.1(3) is not satisfied as regards that claim.

11. Finally, I am satisfied that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The class comprises an estimated 19.5 million GMS device users. The claim is based on UK and EU competition law. Google's Terms of Service, which are incorporated into the contract with GMS users of the Google Play Store, expressly provide that the user can file legal disputes concerning their relationship with Google under that contract in the English courts. Although there are a number of claims in the US which seeks redress against Google on behalf of consumers, the US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK consumers: see *Hoffmann-La Roche Ltd v Empagran S.A.* 542 US 155 (2004). Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this action.

The Hon Mr Justice Roth	Made: 29 September 2021
President of the Competition Appeal Tribunal	Drawn: 29 September 2021