



## COMPETITION APPEAL TRIBUNAL

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

**CASE NO. 1437/7/7/22**

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 21 March 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 (“the Act”), by Elisabetta Sciallis (the “Applicant/Proposed Class Representative”) against (1) Fender Musical Instruments Europe Limited (“Fender Europe”), and (2) Fender Musical Instruments Corporation (“Fender US”), (together, “Fender” or “the Respondents/Proposed Defendants”). The Applicant/Proposed Class Representative is represented by PGMBM Law Ltd, 70 Mark Lane, London EC3R 7NQ (Reference: Jeremy Evans/Matthew Newbould).

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 persons who fall within the proposed class definition, and opt-in collective proceedings for non-UK domiciled persons who fall within the proposed class definition (“the Application”). The proposed class is more fully described below.

The proposed collective proceedings would combine principally follow-on claims for damages under section 47A of the Act caused by the Respondents’/Proposed Defendants’ breach of statutory duty in infringing section 2(1) of the Act (the “Chapter I Prohibition”), and Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”), as determined by the Competition and Markets Authority (“CMA”) in a settlement decision addressed to the Respondents/Proposed Defendants on 22 January 2020, in Case 50565-3 regarding online resale price maintenance (“RPM”) in the guitar sector (“the Settlement Decision”). The Application also seeks to include a number of ‘standalone’ claims for damages based on infringements of the Chapter I Prohibition and Article 101 TFEU.

#### The Respondents/Proposed Defendants

Fender Europe is incorporated in England and is active in the supply in the United Kingdom and Republic of Ireland of musical instruments and musical instrument products manufactured by or on behalf of Fender US. Fender US is the indirect controlling parent company of Fender Europe. The musical instruments and products sold by Fender Europe include electric guitars; electric bass guitars; acoustic guitars and basses; amplifiers and effects pedals; and accessories (including amp covers, cables, capos & slides, care & cleaning, cases, digital tuners, gig bags, harmonicas, mini amps, picks, pickups, stands, straps and strings). The CMA concluded in its Settlement Decision that Fender Europe and Fender US formed a single economic unit for the purposes of the infringements of the Chapter I Prohibitions and/or Article 101 TFEU.

#### The Settlement Decision and Claims

According to the Application, the Settlement Decision is final as against both Respondents/Proposed Defendants as neither sought to appeal it. The Settlement Decision found that Fender Europe infringed the Chapter I Prohibition and/or Article 101 TFEU by entering in to an agreement and/or concerted practice with one of its most important UK resellers (“Reseller 1”) (“the Agreement”) to the effect that

Reseller 1 would not advertise or sell online electric guitars, electric bass guitars, acoustic guitars, and acoustic bass guitars (“Relevant Products”) supplied to it by Fender Europe (“Fender Relevant Products”) below prices specified from time to time by Fender Europe, (the “Minimum Price”) (“the Fender Pricing Policy”). The CMA found that the Agreement lasted from 12 January 2013 until at the latest 17 April 2018 (“the Relevant Period”). The CMA fined Fender Europe £4,531,185, holding Fender US jointly and severally liable.

The Application contends that according to findings and/or evidence cited in the Settlement Decision: (a) Fender Europe holds a 35-40% market share in respect of the Relevant Products in the United Kingdom; (b) Fender Europe committed the infringement intentionally; (c) Fender Europe intended and expected the Fender Pricing Policy to apply to the UK sales of its entire musical instrument network of resellers (except Mass Resellers); (d) it was an implied condition of being part of Fender Europe’s network of musical instrument resellers that they should “respect the brand” by adhering to Fender Pricing Policy; (e) adherence to the Fender Pricing Policy was high; (f) resellers proactively and systematically monitored each other’s resale pricing and periodically used the information gathered to report non-compliance to Fender Europe; (g) Fender Europe sought to enforce the Fender Pricing Policy through contacting resellers selling below the Minimum Price and/or threatening sanctions; (h) some resellers adhered to the Fender Pricing Policy both online and in store; (i) the Fender Pricing Policy was not limited to the Fender Relevant Products (as defined in the Settlement Decision) but also applied to electric guitars, electric basses, acoustic guitars, acoustic basses, amps, and effects pedals, and accessories for these products (collectively referred to as “Relevant Musical Instrument Products”); and (j) Fender’s rationale for introducing the Fender Pricing Policy was to enable resellers to obtain attractive margins and to help Fender Europe maintain and improve its UK market position. The Application contends that the CMA found that the infringement would likely have had a broader effect in the market, reducing downward pressure on the retail price of Fender Relevant Products more widely, including through the musical instrument reseller and Fender Europe direct-to-consumer channels.

The Applicant/Proposed Class Representative intends to rely on findings in the Settlement Decision to establish that from 12 January 2013 to 30 September 2015, Fender Europe entered in to agreements and/or concerted practices not to advertise or sell online Fender Relevant Products below the Minimum Price with: (a) all Fender Europe UK resellers (except large national retailers and catalogue companies not specialising solely in musical instruments and referred to in the Settlement Decision as “Mass Resellers”); (b) alternatively, in addition to Reseller 1, the named Fender Europe UK resellers which the CMA concluded in the Settlement Decision were implementing the Fender Pricing Policy (“the Pre-1 October 2015 Infringements”). The Application also seeks to establish that in breach of the Chapter I prohibition and/or Article 101 TFEU, from October 2015 to at least 17 April 2018, Fender Europe entered into agreements and/or concerted practices with its UK resellers (except Mass Resellers) not to advertise or sell Relevant Musical Instrument Products supplied by Fender Europe below the Minimum Price (the “Post-30 September 2015 Infringements”).

According to the Application, as a consequence of the infringements, the prices paid by Proposed Class Members for Relevant Products and Relevant Musical Instrument Products in the first and second infringement periods were at all times materially higher than they would otherwise have been. It will also be contended that these price effects continued for a run-off period provisionally delineated as one year.

The Applicant/Proposed Class Representative also claims damages on behalf of Proposed Class Members who purchased the Relevant Musical Instrument Products on finance in respect of losses occasioned by the additional cost of financing the inflated Relevant Musical Instrument Product prices.

#### Proposed Class Members

The proposed class comprises any person (including any deceased person through the personal or authorised representative of his or her estate) who:

- (a) Between 12 January 2013 and 30 September 2015 purchased in the United Kingdom a new Relevant Product supplied by Fender Europe and/or a new Relevant Product supplied by a musical instruments manufacturer other than Fender Europe;
- (b) Between 1 October 2015 and 17 April 2019 purchased in the United Kingdom a new Relevant Musical Instrument Product supplied by Fender Europe or a new Relevant Musical Instrument Product supplied by a musical instruments manufacturer other than Fender Europe.

The Applicant/Proposed Class Representative considers that no separate sub-class is required except in respect of Proposed Class Members who purchased Relevant Musical Instrument Products on finance, who are affected on a common basis by an issue relating to compound interest.

#### Certification of the proposed collective proceedings

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

1. The Applicant/Proposed Class Representative will act fairly and adequately in the interests of the Proposed Class Members:
  - (a) The Applicant/Proposed Class Representative has over 18 years' experience as a consumer rights campaigner. She is currently Principal Policy Advisor at the Consumers' Association also referred to as "Which?" and prior to this she was an Executive in consumer cross border affairs for the UK Consumer Centre at the Chartered Trading Standards Institute for over a decade.
  - (b) The Applicant/Proposed Class Representative has the organisational and representational skills required for the proceedings, as well as being able to give appropriate instructions to the lawyers instructed on behalf of the class. She is a qualified solicitor of England and Wales as well as a non-practising advocate in Italy and she has been involved in the management of significant consumer protection projects.
  - (c) The Applicant/Proposed Class Representative has engaged leading competition and group litigation experts in both counsel and solicitors to pursue the Proposed Collective Proceedings on behalf of the class members.
  - (d) The Applicant/Proposed Class Representative plans to enter into a litigation funding agreement with a leading third-party alternative investment fund with a sufficient budget to cover the costs associated with bringing the Proposed Collective Proceedings. The litigation funder has confirmed its agreement to enter into a funding agreement.
  - (e) The Applicant/Proposed Class Representative has developed a comprehensive litigation plan as required by Rule 78(3)(c) of the Rules.
2. The Applicant/Proposed Class Representative, who is not a member of the proposed class, does not have a material interest that is in conflict with the interests of the proposed class members in relation to the common issues.
3. At the time of filing the Application, the Applicant/Proposed Class Representative is not aware of any other applicant seeking approval to act as the class representative in respect of the same claims.
4. The Applicant/Proposed Class Representative has sufficient funding arrangements in place to pay the Respondents'/Proposed Defendants' recoverable costs if ordered to do so.

5. No interim injunction is sought (therefore the question of the Applicant/Proposed Class Representative's ability to satisfy any undertaking in damages does not arise).

According to the Application, the claims raise common issues of law, facts and expert economic evidence and there would be no individual issues requiring determination. Specifically, the following are common to all claims: (i) the relevant limitation period applicable to the claims; (ii) in addition to the infringement involving Reseller 1, whether Fender Europe was engaged in RPM infringements in respect of other resellers during the Relevant Period; (iii) whether and to what extent the infringements had an impact on prices paid by purchasers of Relevant Musical Instrument Products; (iv) whether interest should be awarded on a simple basis or as damages on a compound basis for Proposed Class Members who purchased the Relevant Musical Instrument Products on finance; and (v) what simple interest rate should be applied to Proposed Class Members who did not purchase the Relevant Musical Instrument Products on finance.

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

1. All issues to be determined are common issues that can fairly, efficiently and proportionately be dealt with in collective proceedings. There are no individual issues to be determined.
2. Individual proceedings on behalf of a Proposed Class, which it is estimated will comprise several million claimants, are not a relevant alternative to the Proposed Collective Proceedings. The claims are individually low in value and bringing complex competition law damages actions would involve substantial and costly exercises that the Proposed Class Members could not reasonably be expected or afford to undertake individually.
3. The impact of the infringements can be assessed on a class-wide basis pursuant to a common methodology applied across the Proposed Class, which will assess damages on an aggregate basis. To assess the overcharge incurred by each member of the Proposed Class on an individual basis would be impracticable and disproportionate.
4. The claims are suitable for an aggregate award of damages.
5. The benefits of continuing the Proposed Collective Proceedings outweigh any costs for the members of the Proposed Class, the Proposed Defendants, and the Tribunal. The costs are fair and proportionate in light of the loss suffered as a result of the Infringements which would otherwise not be addressed, the size of the class and the aggregate value of the claims.
6. The Applicant/Proposed Class Representative is not aware of any separate proceedings making claims of the same or similar nature.
7. The size and nature of the Proposed Class is such that the claims are suitable to be brought by way of opt-out collective proceedings.
8. The Proposed Class definition is clear and simple and it is possible to determine in respect of any person whether that person is or is not a member of the Proposed Class.

Finally, the Application contends that the strength of the claims and the fact that it would be impracticable for them to be brought on an opt-in basis, render them appropriate to be brought in opt-out collective proceedings.

The relief sought in these proceedings is:

- (1) An aggregate award of damages on behalf of the Proposed Class;
- (2) Compound interest, by way of damages, from the date that the Relevant Musical Instrument Products were purchased on finance;
- (3) Simple interest pursuant to s.35A of the Senior Courts Act 1981 and Rule 105 of the Tribunal Rules, for Proposed Class Members who did not purchase the Relevant Musical Instrument

Products on finance and in the alternative for those who did purchase the Relevant Musical Instruments on finance;

(4) Costs; and

(5) 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](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email ([registry@catribunal.org.uk](mailto:registry@catribunal.org.uk)). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, QC (Hon)*

Registrar

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