IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1582/7/7/23

BETWEEN:

CHARLES MAXWELL ARTHUR

Applicant/Proposed Class Representative

– and –

(1) ALPHABET INC.

(2) GOOGLE LLC

(3) GOOGLE IRELAND LIMITED

(4) GOOGLE UK LIMITED

Respondents/ Proposed Defendants

ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form dated 29 March 2023 (the "Claim Form")

AND UPON reading the Proposed Class Representative's application dated 29 March 2023 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Rules") for permission to serve the Claim Form and supporting documents on the First to Third Proposed Defendants out of the jurisdiction (the "Rule 31 Application")

AND UPON reading the Witness Statement of Luke Streatfeild dated 29 March 2023, made on behalf of the Proposed Class Representative in support of the Rule 31 Application, and the accompanying exhibit

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the Claim Form and supporting documentation on the First to Third Proposed Defendants out of the jurisdiction at the following addresses:

    (a) Alphabet Inc. at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, or elsewhere in the United States.

    (b) Google LLC at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, or elsewhere in the United States.

    (c) Google Ireland Limited at Gordon House, Barrow Street, Dublin 4, Dublin, Ireland, or elsewhere in the Republic of Ireland.

2. This order is without prejudice to the rights of the First, Second and Third Proposed Defendants to apply pursuant to Rule 34 of the Rules to dispute the jurisdiction of the Tribunal. Any such application should take account of the observations set out in *Epic Games, Inc v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background

1. These are collective proceedings brought pursuant to section 47B of the Competition Act 1998 ("the Act"). The claims they seek to combine concern the Proposed Defendants' conduct in markets for services to sell digital advertising, and in particular digital display advertising – ads displayed on webpages or within apps alongside content. The proposed class members are certain categories of "publishers", who are the owners of the websites and apps.

(2) The Claim

2. According to the Claim Form, the sale by publishers of advertising space (referred to individually as "impressions" and collectively as "ad inventory") on websites or apps takes place in two channels, one of which is the open display marketplace. In the open display marketplace, publishers sell their ad inventory either through direct deals or through real time auctions using programmatic technology. This means using computers and complex algorithms to determine the selection, pricing and delivery of ads. It is this structure that is the primary subject of the proposed proceedings.

3. The open display marketplace involves several intermediary levels between the publishers and the advertisers who seek to place ads on those websites or apps. The technology employed in this structure has evolved over time and the Claim Form describes a number of features of the evolutions, all of which are said to confer advantages on the Proposed Defendants.

4. In very summary form, it is alleged that the Proposed Defendants have abused a dominant position in respect of each of three markets within the overall structure, namely:

   (a) the "publisher ad server market", in which advertising services are provided to publishers.

   (b) the "supply-side intermediary market", in which advertisers participate in auctions to place their ads with the publishers.

   (c) the "DSP market", in which DSPs (or "demand side platforms") provide services to advertisers in purchasing ad inventory and delivering ads to publishers.

5. Again in very summary terms, the Proposed Class Representative alleges that the Proposed Defendants have engaged in a variety of exclusionary abuses, including tying, self-preferencing and exclusive dealing, all of which have had the consequence of foreclosing the relevant markets to competition and creating a vertically-integrated,

closed ecosystem within the open display advertising marketplace, in which publishers and advertisers have little incentive to switch to the Proposed Defendants' competitors.

6. The Claim Form alleges that this exclusionary conduct has reduced the revenues which publishers would have received under conditions of normal competition. The proposed claim is for loss and damage caused by the Proposed Defendants' breach of statutory duty by their infringement of section 18 of the Act and Article 102 of the Treaty on the Functioning of the European Union.

(3) The Parties

7. The Proposed Class Representative seeks to bring collective proceedings on behalf of a class which comprises publishers domiciled in the UK, between 1 January 2014 and the date of final judgment or settlement, who sold open display ad impressions using intermediation services. It is estimated by the Proposed Class Representative's market expert, Mr Rosamilia, that the class will include approximately 200,000 publishers.

8. The Proposed Defendants are members of the Google corporate group. They are said to form part of the Google undertaking (a single economic entity), and are all said to be engaged, in one way or another, with activities relating to ad intermediation services.

9. The First Proposed Defendant is Alphabet Inc., a corporation organized and existing under the laws of the State of Delaware, USA (company number 5786925), whose registered address is 251 Little Falls Drive, City of Wilmington, County of New Castle, Delaware 19808. Alphabet Inc. is the holding company of all subsidiaries and businesses within the Google corporate group.

10. The Second Proposed Defendant is Google LLC, a corporation organized and existing under the laws of the State of Delaware, USA (company number 3582691), whose registered address is 251 Little Falls Drive, City of Wilmington, County of New Castle, Delaware 19808. Google LLC is a wholly owned subsidiary of Alphabet Inc and an intermediate parent company of the Third and Fourth Proposed Defendants.

11. The Third Proposed Defendant is Google Ireland Limited, a company incorporated in Ireland (company number 368047), whose registered address is Gordon House, Barrow

Street, Dublin 4, Dublin, Ireland. It is the legal contracting entity for all publishers domiciled in the UK who use Google's intermediation services.

12. The Fourth Proposed Defendant is Google UK Limited, a company incorporated in the UK (company number 03977902), whose registered address is Belgrave House, 76 Buckingham Palace Road, London, SW1W 9TQ. According to the Proposed Class Representative, Google UK Limited implemented policies in the UK which were determined by the First and Second Proposed Defendants in the US.

(4) Likely forum for the proceedings

13. The Proposed Class Representative invites the Tribunal to find that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Rules. This is because:

(a) The majority of the members of the class are likely to be located in England and Wales.

(b) The majority of the loss and damage suffered by the members of the class as a result of the infringements is likely to have been sustained in England and Wales.

(c) The Proposed Class Representative is located in Essex.

(d) The registered office of the Fourth Defendant is in London.

(e) The legal representatives of the Proposed Class Representative and of the Proposed Defendants are located in London.

14. Alternatively, the Proposed Class Representative submits that the Tribunal has the power to treat the proposed proceedings as taking place (concurrently and sequentially) in England and Wales, and in Scotland and in Northern Ireland, and to determine each of those parts of the proposed proceedings in one location, namely London.

15. The Tribunal which hears these proposed proceedings may well have views on the alternative submission from the Proposed Class Representative and it is right that they, and not I, should determine that question. For present purposes, it is sufficient to note that it is likely that the proposed proceedings are, at least in material respects, to be treated as taking place in England and Wales. Accordingly, I will approach service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 ("CPR") (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

(5) Legal principles for the Rule 31(2) Application

16. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:

    (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.

    (b) There is a good arguable case that the claim falls within one of the "gateways" set out in CPR Practice Direction 6B ("CPR PD6B") at paragraph 3.1.

    (c) In all the circumstances, the UK is clearly or distinctly the appropriate forum for the trial of the claim.

17. The burden is on the Proposed Class Representative to satisfy the Tribunal that all three requirements are satisfied.

(6) Serious Issue to be Tried

18. The proposed collective action is brought as a standalone case, but the Claim Form refers to and relies on a variety of regulatory investigations and court proceedings to support the claim. This includes the following matters listed in the Claim Form:

    (a) On 7 June 2021, L'Authorité de la Concurrence (the French competition authority, or "ADLC") fined Google €220m for abusing a dominant position in

the market for ad servers for publishers of websites and mobile apps. Google did not contest the decision.

(b) On 25 May 2022, the Competition and Markets Authority ("CMA") opened an investigation into the First, Second and Fourth Proposed Defendants' ad tech practices, and whether they limited the interoperability of their ad exchange with third-party publisher ad servers and/or contractually tied these services together, as well as whether they may have illegally favoured their own ad exchange services, while taking steps to exclude the services offered by rivals. That investigation is ongoing.

(c) On 22 June 2021, the European Commission announced an investigation into whether Google (without identifying the legal entity or entities involved) has violated EU competition rules by favouring, through a broad range of practices, its own services in the ad tech supply chain, to the detriment of competing providers, advertisers and online publishers. That investigation is ongoing.

(d) In the US, the Department of Justice has (according to the First Proposed Defendant's regulatory filings) been investigating Google for potential antitrust violations. On 24 January 2023, the Department of Justice and various US states filed a civil antitrust suit against the Second Proposed Defendant for monopolising multiple digital advertising technology products in violation of sections 1 and 2 of the US Sherman Act. There are also other civil proceedings underway in the US involving the same or similar allegations of abusive conduct by the Proposed Second Defendant, brought by advertisers, publishers and US states.

19. The allegations in the Claim Form have been raised in general terms in a letter of 10 January 2023 from Hausfeld & Co. LLP, the Proposed Class Representative's legal advisers, to the First Proposed Defendant, which was responded to on 25 January 2023 by Herbert Smith Freehills LLP, the legal advisers to the Proposed Defendants. The 25 January letter contains a rejection of any wrongdoing on the part of the Proposed Defendants and challenges the reliance on the matters referred to in [18] above, noting that there is no binding decision of a competition authority or court that the Proposed

Class Representative can rely on. The decision of the ADLC is said not to be an infringement decision and other proceedings are said to be at a very early stage.

20. Notwithstanding these observations, which are expressed at a high level and in general terms only, I think it is seriously arguable that the matters relied on and alleged constitute abusive conduct and are capable of giving rise to loss which could properly be the subject of collective proceedings[1]. I am satisfied, from the contents of the Claim Form, taken with the regulatory and court proceedings referred to above, that there is a serious issue to be tried in relation to the subject matter of the proposed claim.

(7) The jurisdictional "gateways" under CPR PD6B

21. The Proposed Class Representative relies on two "gateways" under CPR PD6B:

(a) The "tort gateway" under paragraph 3.1(9) of CPR PD6B, which provides as follows:

"3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

...

(9) A claim is made in tort where –

(a) damage was sustained, or will be sustained, within the jurisdiction;

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or

(c) the claim is governed by the law of England and Wales"

(b) The "necessary or proper party gateway" under paragraph 3.1(3) of CPR PD6B, which provides as follows:

"The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

[...]

(3) A claim is made against a defendant on whom the claim has been or will be served [otherwise than in reliance on para 3.1] and –

[1] In doing so, I express no view on whether the claims are suitable for collective proceedings, which is a matter for the Tribunal which hears the collective proceedings application.

(a) there is, between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another party who is a necessary or proper party to that claim."

22. The Proposed Class Representative relies particularly on paragraph 3.1(9)(a), arguing that damage has been suffered in the UK as a result of the overcharge being incurred by publishers in the UK because of the unlawful conduct of the Proposed Defendants. Reference is made to the decision of Morgan J in *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat), where the judge held at [99] that "*if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. If the loss comes from reduced sales then the loss would seem to be in the market where the seller suffers the loss of sales.*"

23. That decision has been applied with approval in a number of Reasoned Orders for service out in the Tribunal – see *Coll v Alphabet* (Case No: 1408/7/7/21, Reasoned Order of the President of 29 September 2021) and *Gormsen v Meta* (Case No: 1433/7/7/22, Reasoned Order of the President of 15 March 2022).

24. I think there is a good arguable case that the claim falls within the "tort gateway" under paragraph 3.1(9)(a) on the basis that damage is sustained within the UK. The alleged damage is the payment of an overcharge by publishers domiciled in the UK and is therefore likely to have been sustained in the UK.

25. On that basis, it is unnecessary to consider the alternative "necessary and proper party gateway" under paragraph 3.1(3). However, for completeness, I will briefly consider that submission.

26. The Proposed Class Representative relies on the presence of an "anchor" defendant in the UK, being the Fourth Proposed Defendant, which is an English company. The application points to the apparent inclusion of the Fourth Proposed Defendant in the CMA's investigation and also a House of Commons Committee on Public Accounts

report of 13 June 2013[2], which suggests that employees of the Fourth Proposed Defendant were involved in sales of advertising services to UK clients.

27. The 25 January 2023 letter from Herbert Smith Freehills states that the Fourth Proposed Defendant does not provide any online services in the UK and that there are no grounds whatsoever for the Proposed Class Representative to bring a claim against that company.

28. The application of the "necessary and proper party gateway" depends on there being a real issue between the Proposed Class Representative and the Fourth Proposed Defendant which it is reasonable for the Tribunal to try. There is plainly a dispute about whether the Fourth Proposed Defendant is an active participant in the alleged abuses. However, the Proposed Class Representative asserts that the Proposed Defendants form a single economic entity for competition law purposes, so being liable on a joint and several basis. There seems therefore to be a good arguable case that the Proposed Defendants will be found to be jointly and severally liable tortfeasors. On that basis, paragraph 3.1(3) is likely to apply.

(8) Appropriate Forum

29. I am also satisfied for the purposes of Rule 31(3) of the Rules that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The proposed class is likely to include a substantial number of publishers based in the UK. The claim is based on UK and EU competition law. It seems likely that the proposed collective proceedings will proceed in this jurisdiction against the Fourth Proposed Defendant in any event.

30. It may be relevant that there is an existing application[3] before the Tribunal for a collective proceedings order in proposed opt in and opt out claims against Google entities, including the Fourth Proposed Defendant. The Claim Form in these proposed proceedings[4] notes the possibility of a "carriage dispute", pursuant to which the

[2] House of Commons Committee of Public Accounts, *Tax Avoidance-Google – Ninth Report of Session 2013-14*, 13 June 2013.
[3] See *Claudio Pollack v Alphabet Inc*. Case No. 1572/7/7/22.
[4] At para 242.

Tribunal would consider which applicant would be the most suitable class representative under rule 78(2)(c) of the Rules. These factors seem to support the selection of the UK as the most appropriate forum.

31. In relation to the First and Second Proposed Defendants, who are registered in the United States, it appears likely that the proposed collective proceedings could not be brought in the United States in the way currently envisaged by the Claim Form. Although there are claims in the US which seek redress against Google on behalf of publishers, the US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK publishers: see *Hoffmann-La Roche Ltd v Empagran* S.A. 542 US 155 (2004).

32. I also note from the witness statement of Mr Streatfeild of 29 March 2023, made in support of this application for service out, that the suite of contracts which publishers in the UK enter into in order to avail themselves of the Proposed Defendants' ad intermediation services are generally subject to English law and made subject to the exclusive jurisdiction of the English Courts. I therefore conclude that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Ben Tidswell Made: 10 May 2023

Chair of the Competition Appeal Tribunal Drawn: 10 May 2023