Neutral citation [2024] CAT 38

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1572/7/7/22 and 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 June 2024

Before:

SIR MARCUS SMITH
(President)
JOHN ALTY
DR MARIA MAHER

Sitting as a Tribunal in England and Wales

BETWEEN:

AD TECH COLLECTIVE ACTION LLP

Applicant/Proposed Class Representative

- v -

(1) ALPHABET INC
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE UK LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 8, 9 and 10 May 2024

JUDGMENT (CERTIFICATION)

APPEARANCES

Robert O'Donoghue, KC, Gerry Facenna, KC, Julian Gregory, Nikolaus Grubeck and Greg Adey (instructed by Hausfeld & Co. LLP, Humphries Kerstetter LLP and Geradin Partners Limited) appeared on behalf of the Proposed Class Representative.

Meredith Pickford, KC, Conall Patton, KC, Natasha Simonsen and Warren Fitt (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Proposed Defendants.

A. THE CLAIM FORM AND AD TECH'S APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER

1. By a collective proceedings claim form (the "Claim Form"), the Applicant and Proposed Class Representative seeks the permission of the Tribunal to continue proceedings against the above-named Respondents and Proposed Defendants (i.e. for a Collective Proceedings Order). We shall refer to the Applicant and Proposed Class Representative as "Ad Tech"; and to the Respondents and Proposed Defendants collectively as "Google".

2. The Claim Form articulates a claim of some considerable technical complexity. It concerns an alleged infringement, by Google, of the Chapter II prohibition as contained in the Competition Act 1998 (and, for certain periods, of Article 102 of the Treaty on the Functioning of the European Union). The infringement pleaded alleges abuse of dominance by Google in three of the markets for digital advertising. The essence of the abuses pleaded are that Google has preferred itself over other competitors in these markets. The value at risk – if the pleaded claims are successful – runs to a number of £ billions, and unsurprisingly Google has resisted certification, as is its right.

3. The making of a Collective Proceedings Order was resisted by Google on two grounds:

   (1) First, it was contended that the Claim Form was insufficiently pleaded so as to preclude certification at this stage.

   (2) Secondly, it was contended that the methodology in support of the claims in the Claim Form had been insufficiently articulated by Ad Tech (including Ad Tech's expert, Dr Latham) such that the test – colloquially referred to as the *Microsoft* test – was unsatisfied.

4. Additionally, certain questions of limitation arose, as well as issues regarding the structure of Ad Tech's legal team. These points could not be advanced as objections to certification *per se*, but are relevant to the case management of

these proceedings, should we be inclined to make a Collective Proceedings Order.

5. The hearing initially listed for this application was adjourned. Ad Tech criticised Google for opposing certification on grounds that were too granular; Google stated it could not properly be ready for the hearing in light of the voluminous materials filed by Ad Tech. Clearly, a respondent to an application for a collective proceedings order is entitled to resist such an order on whatever (proper) grounds it sees fit; and the applicant for the order must not only explain to the Tribunal why the making of a collective proceedings order is justified, but also respond to such other points as the respondent makes. Nevertheless, the volume of material that has been produced for the purposes of this application is troubling, both in terms of cost to the parties, and in the amount of Tribunal time that has been taken up. Hearings of applications for Collective Proceedings Orders are not intended to be trials of the proceedings, but seek to ensure that the collective proceedings are properly constituted in the interests of the represented class. It is this consideration which is paramount. The interests of the represented class are not served by the litigation of issues best left to trial. This Judgment seeks to tread the fine line between appropriately considering the factors that go to certification, whilst leaving to trial those matters that must be resolved on the evidence. It is as short as we can (properly) make it.

6. We should also say that this Judgment is confined to the issues that were still in dispute between the parties at the hearing of the application. Ad Tech have traversed, in their Claim Form, each of the criteria relevant to certification; we are satisfied that it is only necessary to address in this Judgment those contested issues raised by the parties. Had the Tribunal held concerns on any of the matters relevant to certification, we would have ensured that we were addressed on the point by the parties.

B. MARKETS FOR DIGITAL ADVERTISING

7. The markets for digital advertising with which the Claim Form is concerned are described (generally) in the following terms:

"4. The Claims concern Google's conduct in markets for the services used to sell digital advertising, in particular display advertising – ads displayed on webpages or within apps alongside content. Different users may be shown different ads when viewing the same webpage, and advertisers bid for the opportunity to display an ad in the light of information about the relevant user (such as their browsing and purchase history). The sale of display ads – referred to as "impressions" – typically takes place in the fraction of a second between when a user clicks to open a webpage and the webpage content opens. The technology used to facilitate such sales and to manage and supply display ads is known as "ad tech".

5. Several intermediaries provide services in the ad tech "stack" that runs from online publishers (that operate websites or apps) on one side of the transaction, to advertisers (which buy the right to have their ads displayed) on the other. Publishers contract with publisher ad servers that manage their inventory and determine which ad to serve each time an ad impression is sold. When impressions are available for sale, publisher ad servers send a "bid request" to supply side platforms (or "exchanges") that run real time auctions. Auctions bids are submitted by demand side platforms on behalf of advertisers, which use advertiser ad servers to store their ads, deliver them to publishers and track ad campaign metrics. The detailed operation of ad tech services is technical, and often opaque not only to outsiders but to many of the publisher and advertiser clients that use them.

6. The different layers of the ad tech stack are highly interconnected, with services at one end of the stack needing to integrate with services at other levels. Economies of scale and scope can be reaped not only by having a larger presence at one level of the stack, but also from being present with a substantial share of transactions at multiple levels…"

8. The Claim Form contends that Google occupies a dominant position in each of (i) the market for publisher ad servers; (ii) the market for SSPs; and (iii) the market for DSPs, and that it has abused its dominant position on those markets.

C. THE NATURE OF PLEADINGS

9. Before we proceed to the infringement of competition law pleaded by Ad Tech in the Claim Form, it is necessary to make the following preliminary, but important, points:

(1) The Claim Form is an articulation of every fact which it would be necessary for a claimant to prove in order to support the right to the judgment of the court: *Coburn v. Colledge*, [1897] 1 QB 702. The mere enumeration of these relevant facts and matters creates a thing of property – a cause of action – capable of being dealt with by the claimant

or (in this case) the class representative. The mere fact that a claim has been articulated says nothing about the merits of the claim pleaded.

(2) It is clear from the decision in the Supreme Court in *Merricks* that there is no "merits test" that collective proceedings must pass in order to be certified, beyond the minimal requirement that the claim must not be capable of being struck out: *MasterCard Inc v. Merricks*, [2020] UKSC 51; [2021] 3 All ER 285, [2021] Bus LR 25 at [45], [59] to [62]. This is a very low standard – similar, if not identical, to that applicable in individual claims – which facilitates access to justice by the class representative on behalf of the class.

(3) It is not necessary to reproduce the averments pleaded in the Claim Form, except to the extent that their arguability is in question. The pleadings need only satisfy a very low threshold at this stage. In setting out the averments made by Ad Tech, the Tribunal should not be taken to have adjudicated upon any of the matters therein.

(4) We therefore content ourselves in noting that the technically layered and complex market environment pleaded by Ad Tech is one where it is arguable that Google, present in all layers of the ad-tech stack and alleged to be holding over 50% market share in each of the markets in which abuse of dominance is alleged, could discriminate against non-Google entities and favour itself, as pleaded.

D. MARKETS AND DOMINANCE

10. The relevant markets and Google's dominance in those markets are pleaded in Part III of the Claim Form. Specifically, the background facts and matters are set out in Claim Form/[79] to [136]; market definition is pleaded in Claim Form/[137] to [140]; and dominance in Claim Form/[141] to [152]. It was not contended by Google that these averments were not arguable, and we do not propose to set them out for this reason.

E. THE THREE ABUSES

11. Instead, we turn to the abuses of dominance pleaded by Ad Tech. There are three, together said to constitute a single and continuous infringement, and they are set out in Claim Form/[8] as follows:

> "(1) Google's publisher ad server DFP has treated its SSP AdX more favourably than rival SSPs (**First Abuse**).
>
> (2) AdX has treated DFP more favourably than rival publisher ad servers (**Second Abuse**).
>
> (3) Google's DSPs (Google Ads and DV360) have treated AdX more favourably than rival SSPs (**Third Abuse**)."

12. **SSP** stands for "supply-side platform" and **DSP** for "demand-side platform" (Claim Form/[7]). The other acronyms or names ("DFP", "AdX", "Google Ads" and "DV360") are Google-owned entities operating within the markets described at [7] above. We do not propose to expand upon the technical aspects of the abuses any further. Their essence is one of unlawful preferencing by Google of itself or entities related to it over other, non-Google, entities. It is as a result of these alleged abuses that the class, as defined in the Claim Form, is said to have suffered loss and damage.

13. These three abuses are pleaded more specifically in later parts of the Claim Form:

(1) The First Abuse is pleaded at Claim Form/[163]*ff*, and concludes (our emphasis in <u>underline</u>) with the following averments of abuse:

> "203. The Google practices pleaded at §§163 to 202 taken together constitute abusive self-preferencing because they constitute conduct that: (a) favours Google's own AdX service relative to rival SSPs; (b) represents a departure from normal competition on the merits; (c) has produced or is capable of producing anti-competitive effects; and (d) is not objectively justified.
>
> 204. Further or alternatively, <u>each of the practices</u> pleaded at §§163 to 202 constitutes abusive self-preferencing in its own right because it constitutes conduct that: (a) favours Google's own AdX service relative to rival SSPs; (b) represents a departure from normal competition on the merits; (c) has produced or is capable of producing anti-competitive effects; and (d) is not objectively justified.

205. Google's decisions to configure DFP in these ways did not constitute normal competition on the merits…"

(2) The Second Abuse is pleaded at Claim Form/[211]*ff*. Again, even the concluding averments are lengthy and we quote them only in part (our emphasis in underline):

"225. The Google practices pleaded at §§211 to 224 taken together constitute abusive self-preferencing because they constitute conduct that: (a) favours Google's own DFP service relative to rival publisher ad servers; (b) represents a departure from normal competition on the merits; (c) has produced or is capable of producing anti-competitive effects; and (d) is not objectively justified.

226. [Ad Tech] contends that it is legitimate to consider these various conducts on a collective (as well as an individual) basis as they constitute a single and continuous infringement. [Ad Tech] will be able to plead further following disclosure, but these conducts:

(1) pursued a single economic aim, namely to prevent rival publisher ad servers from accessing AdX demand satisfactorily, thereby creating a strong disincentive for publishers to use rival ad servers so as to strengthen DFP's dominant position in the Publisher Ad Server Market; and

(2) complemented each other by producing effects that interacted with, and reinforced, one another, so as to promote this objective.

227. Further or alternatively, each of the practices pleaded at §§211 to 224 constitutes abusive self-preferencing in its own right because it constitutes conduct that: (a) favours Google's own DFP service relative to rival publisher ad services; (b) represents a departure from normal competition on the merits; (c) has produced or is capable of producing anti-competitive effects; and (d) is not objectively justified.

228. Google's course of conduct does not constitute competition on the merits. It is in the interests of DSPs and their advertiser clients to be able to access as wide a pool of ad inventory as possible. Under normal competitive conditions, AdX would have an incentive to respond to these interests of its (direct and indirect) clients by ensuring they can easily access inventory sold through rival publisher ad servers…"

(3) The Third Abuse is pleaded at Claim Form/[237]*ff*. The abuse is (in part) articulated as follows at [240]:

"…Google Ads treats rival SSPs differently from AdX, with the result that the vast majority of Google Ads demand is channelled to AdX:

(1) Google Ads only submits bids to rival SSPs on behalf of advertisers for specific targeting purposes and certain types of advertising campaigns – whereas its submission of bids to AdX is not limited in this way ([Ad Tech] understands that even this limited bidding with rival SSPs only commenced in 2015).

(2) Google Ads charges advertisers a higher "take rate" when they buy impressions from rival SSPs compared to when they buy impressions from AdX. This: (a) disincentivises advertisers from submitting bids to rival SSPs; and (b) when they do submit such bids, reduces the level of their net bids (relative to the net bid that would have been submitted to AdX) such that they are less likely to win impressions."

The result, according to Claim Form/[241], is that "[t]hese practices have resulted in a situation where virtually all of the advertiser demand that goes through Google Ads is directed at AdX…". The same point is made in regard to Google's other DSP, DV360 (Claim Form/[244]). The plea concludes (quoting in part, and adding emphasis in underline):

"247. Google has chosen to limit the extent to which its DSPs submit bids to rival SSPs, instead channelling their demand predominantly to AdX, contrary to what one would expect in conditions of normal competition, in order artificially to boost the competitive position of AdX in the SSP market…

248. The foregoing self-preferencing practices are each individually and/or collectively capable of having, and/or are likely to have had, anti-competitive effects, in particular by preventing rival SSPs from competing on a level playing field with AdX…"

14. It is to be noted that not only does each abuse pleaded contain multiple "sub-abuses", but that it is Ad Tech's pleaded claim that the three abuses themselves are interrelated in terms of causation of damage. Thus, Claim Form/[9] pleads:

"Each abuse encompasses a range of conduct or practices which are abusive, whether considered individually or collectively. Further, while [Ad Tech] considers it helpful to delineate the three abuses for analytical purposes, the abuses collectively constitute a single and continuous infringement, in particular because all three abuses form part of an overarching strategy by Google to entrench its dominance throughout the ad tech stack. The abuses have had mutually re-enforcing effects, given both the nature of the conduct (for example the fact that Google has operated both DFP and its DSPs to undermine the ability of rival SSPs to compete with AdX) and the interconnected nature of the different levels of the ad tech stack."

15. Claim Form/[267] cites Dr Oliver Latham's second report ("Latham 2") in support of this argument. Dr Latham is Ad Tech's expert economist. We make

reference to Dr Latham's work (whether as set out in his reports or summarised in the Claim Form), as necessary, in this Judgment.

16. Claim Form/[265] pleads the counterfactual case in terms:

> "The counterfactual requires removing the infringing conduct and assessing how the relevant markets would likely have operated without it, relying on assumptions and approximations as appropriate. It will be a matter for expert evidence to establish the position the [proposed class members] would have been in the absence of the abusive conduct."

17. Claim Form/[266] identifies the relevant parts of Latham 2 in the supporting expert evidence.

F. AN ARGUABLE CLAIM

18. Google does not contend that any of the three abuses set out above cannot arguably be pleaded. Rather, Google contends that Ad Tech's case is defective because no sustainable "counterfactual case" is pleaded. Thus, Google Skeleton/[1] asserts that:

> "[Ad Tech's] approach to the application for a Collective Proceedings Order…is misconceived. Its claim is exceptionally diffuse, with 10 different approaches to quantification of four different effects all said to arise from each of 15 different pleaded abuses".

19. Google's point is that for every form of conduct alleged to amount to an abuse, Ad Tech should plead the "counterfactual case" and set out what would have happened absent that conduct. In fact, Google goes further than this, and suggests that Ad Tech needs to plead what Google should have done in order to avoid the alleged abuse altogether. Thus, Google Skeleton/[20] takes one particular averment in the Claim Form, and says this:

> "Take for example the complaint…about the imposition of a 5-10% fee that Google is said to have charged to rival SSPs who wished to take part in Google's Open Bidding auction. To maintain this, the Claim Form would need to set out clearly:
>
> a. Whether it is alleged that, in the counterfactual world, Google would have developed (at cost to itself) and provided to others a service (the bringing together of SSPs in the Open Bidding auction) at no charge, and if so why that would be a realistic business model consistent with normal competition; or whether it is alleged that, in the counterfactual world, Google would have provided such services for a smaller fee

than the 5-10% take rate, and if so why, and how the PCR proposes to identify a non-abusive fee.

b. Why the charging of a 5-10% fee for participating in Open Bidding (as compared to any fee in the counterfactual world in subparagraph a. above) would be liable to: (i) lead to a 20-40% drop in gross revenues for publishers…(gross price effect); (ii) foreclose as-efficient rival SSPs with the alleged knock-on effect on market take-rates (take-rate effect); (iii) reduce the revenues available to publishers when concluding direct deals and sales through ad networks (umbrella effect); and (iv) have enduring effects in respect of each of the gross price effect, take rate effect and umbrella effect, even once removed or reduced to a lawful level (overhang effect)."

20. The case law contains considerable discussion in regard to the pleading of counterfactuals. Thus, without seeking to be comprehensive, in *National Grid plc v. Gas & Electricity Markets Authority*, [2010] EWCA Civ 114 at [57], Richards LJ stated that:

> "What is appropriate by way of counterfactual, however, is a matter of judgment for the decision-maker. There is no rule of law that the counterfactual has to take a particular form…The purpose of the counterfactual is simply to cast light on the effect of the conduct in issue. It is for the decision-maker to determine whether a counterfactual is sufficiently realistic to be useful, and to decide how much weight to place on it. This is an area of appreciation, not of legal rules."

21. In *Dune Group Limited v. Visa Europe Limited*, [2022] EWCA Civ 1278, in considering the appropriate counterfactuals to be used when determining whether certain measures were restrictive of competition, the Court of Appeal noted (at [41]):

> "Ms Smith submitted that, under the *Cartes Bancaires* test, it is imperative that a counterfactual removes the "anticompetitive vice" identified. To my mind, however, *Cartes Bancaires* does not support that proposition, and Ms Smith did not cite any other case in which it has been held that a counterfactual can be appropriate only if it would remove the competitive "concern", "problem" or "vice". More than that, it seems to me that it could make no sense for there to be such a requirement. As Mr Rabinowitz and Mr Cook said, counterfactuals are used to test whether a measure restricts competition. If it were the case that any counterfactual resulting in a continuing competitive "concern", "problem" or "vice" was to be ignored, the exercise would fail in its purpose. If a competitive "concern", "problem" or "vice" arose with the measure in operation, it would inevitably be found to be restrictive of competition since any counterfactual which allowed the issue to continue would be discarded."

22. We endorse all that has been said about the importance of "counterfactuals", which are an important tool in competition cases for the reasons given above,

and more generally in analysing the effects on a market of what are alleged to be anticompetitive practices. They must be pleaded with sufficient specificity. What constitutes sufficient specificity is a matter that turns on the case that has been pleaded. Thus, where (for example) an allegation is pleaded that a term in an agreement is anti-competitive, it is necessary to say something about what would have happened in a likely and realistic "counterfactual" world, in the absence of this infringing term. It is a necessary averment to say that in this "counterfactual world", the competitive situation would have been different on the relevant market. We accept that a counterfactual analysis is necessary in the context of an allegation regarding abuse of a dominant position (see e.g., *Socrates Training Limited v. Law Society of England and Wales*, [2017] CAT 10 at [161]).

23. As stated above, the Claim Form pleads a single and continuous infringement comprising three abuses, each of which are said to comprise individual measures amounting to "sub-abuses". It states (at [265]) "[t]he counterfactual requires removing the infringing conduct and assessing how the relevant markets would likely have operated without it". For each allegation of discrimination or preference, therefore, the pleaded counterfactual world is a world where the discrimination or preference did not take place, where all similarly placed participants were treated alike, and the market operated (in a good sense) indiscriminately. In a sense, the difference between the "real world" (where there is discrimination and preference) and the "counterfactual world" (where the discrimination or preference is obviated) is contained in the description of the abuse.

24. We accept the Claim Form could have more explicitly explained the relevant counterfactual(s), which are expanded upon in Dr Latham's reports. However, having regard to our comments in the paragraph above, we consider the PCR's counterfactual to have been sufficiently pleaded for Google to know the case it has to meet.

25. Google's suggestion – made in Google Skeleton/[20] – that it is necessary for Ad Tech to specify <u>how</u> the non-discrimination could have been avoided by Google is not, in our judgement, something that needs to be pleaded by Ad Tech.

In our view, the authorities above support the contention that there is no requirement for a counterfactual to take a particular form.

26. Accordingly, we conclude that the Claim Form is properly pleaded, and sets out a case that is arguable within the *Merricks* test. We reject Google's contentions to the contrary.

G. THE *MICROSOFT* TEST

27. The purpose of the test was helpfully articulated in *London & South Eastern Railway Ltd v. Gutmann* [2022] EWCA Civ 1077 at [24]:

> "To enable the CAT to form a judgment on commonality and suitability the class representative is required to put forward a "methodology" setting out how the issues that they have identified will be determined or answered at trial. In practice the methodology is prepared by an expert economist instructed by the proposed class representative. The methodology advanced will be counterfactual and therefore hypothetical in nature. It posits how the market would operate absent the alleged unlawful conduct and provides a benchmark against which to measure a defendant's actual conduct. It constitutes a critical document that the CAT will examine when determining commonality and suitability. The test to be applied to a proposed methodology to determine whether it is up to standard was articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v. Microsoft Corp* [2013] SCC 57 ("*Microsoft*") and was endorsed by the Supreme Court in this jurisdiction in *Merricks*."

28. The test was expanded upon in *Gutmann* at [52]*ff*, and has been referenced in almost all of the applications for Collective Proceedings Orders in this Tribunal and on appeal. We take this case-law as read, and instead turn to consider Google's point that this test had not been met. We will, as a convenient shorthand, refer to the *Microsoft* test as requiring a "blueprint to trial".

29. Latham 2 sets out the PCR's proposed methodology for determining damages in this case. We note:

    (1) A vast amount of detail will have to be marshalled by the experts to try this claim. Much of that detail is presently unknown to Ad Tech: some may be in Google's possession; some in the hands of third parties; some may not be available at all.

(2) It is the task of this Tribunal to manage cases between certification and trial to ensure that extremely complex issues of fact, economics, technology and law are resolved at a trial that takes place promptly and proportionately in accordance with Rule 4 of the Tribunal's Rules. The phrase "blueprint to trial" is particularly apposite because it obliges the Tribunal to envisage how it proposes to bring complex proceedings to trial. The Tribunal's role in case management is particularly evident in collective proceedings, beginning with certification, but not ending with it. The *Microsoft* test, properly understood, is a continuing test, at which the "blueprint to trial" is regularly tested against actual progress, so that trial dates are held, and orderly trials take place.

(3) In these circumstances, the *Microsoft* test looks not to a provision of answers, but rather to whether the proposed class representative has asked the right questions as to how the case might be tried, and has some idea (if not a final idea) as to how those questions might be answered.

30. Latham 2 identifies four ways in which he states that Google's conduct is likely to have harmed the class. These are summarised at [264] of the Claim Form:

> "(1) Gross price effect: Google's conduct depressed the prices at which programmatic ads were sold by publishers, in particular by limiting the extent to which AdX competed in real-time auctions against rival SSPs. In simple terms, Google's conduct made these auctions less competitive, to the detriment of publishers. Dr Latham further explains that the mechanism differed as between publishers that used DFP and publishers that used other ad servers…
>
> (2) Take rate effect: Google's conduct resulted in higher SSP commission charges, i.e. "take rates", by weakening competition in the SSP market. The basic mechanism is that by undermining the ability of rival SSPs to compete with AdX on a level playing field, Google's conduct: (a) increased AdX's share of the SSP market; and (b) reduced the competitiveness of the SSP market.
>
> (3) Umbrella effects on other ad sales: by reducing the revenue received for ad sales through SSPs (through the two effects identified above), Google's conduct potentially also reduced the level of revenue from: (a) direct sales (as lower programmatic revenue weakened the bargaining position of publishers vis-à-vis advertisers, by making the alternative to direct sales less lucrative); and (b) sales through ad networks (as ad networks could charge higher take-rates as a result of facing less competitive pressure from sales through SSPs).

(4) Overhang damages: even if the leveraging abuses were removed, it would take time for rivals to then build up scale and scope and expand in competition with DFP/AdX. Indeed, as Dr Latham explains, there is a risk that Google's accumulated advantages are such that rivals will never recover (or recover fully) and harms will persist for the long term. Accordingly, it is necessary to include an overhang period to take account of this retarding and enduring adverse effect on competition."

31. Dr Latham's steps to compiling a preliminary estimate of damage are set out (in very much a bird's eye view) at Latham 2/[460]. These steps comprise: (i) estimating the total value of affected commerce in the UK; (ii) estimating the gross price effect; (iii) estimating the take rate effect; (iv) accounting for umbrella effects; (v) accounting for overhang damages; and (vi) incorporating interest. From [463]*ff*, Dr Latham proposes a data-led approach to conducting this analysis involving regression and statistical analysis, as well as financial analysis and (potentially) more sophisticated auction modelling.

32. Dr Latham proposes three methodologies to estimate the gross price effect [at Latham 2/[51(2)] and in detail at Latham 2/[Section 5.2]]:

> "51.2. […] I present three methods to estimate this effect. The first method is inspired from the FCA's [French Competition Authority's] methodology to assess the impact on auction outcomes of Google not having access to certain advantages such as "last look". The second is based on standard econometric techniques to measure in a regression framework the impact of number of auction participants on winning bids. The third relies on auction modelling based on impression and bid-level auction data…"

33. Dr Latham also proposes three methodologies to estimating the take rate effect [at Latham 2/[51.3] and in detail at Latham 2/[Section 5.3]]:

> "51.3. I present three methodologies for estimating this effect. My first methodology relies on a "cost plus" approach whereby I will compare the gross margin that AdX earns with an appropriate comparator defined as these services' costs plus a reasonable rate of return. I note that such cost-plus approach is often used by the CMA to estimate what a reasonable price (in this case take rate) would have been in a more competitive market. The second approach relies on a comparison of AdX's gross margin before and after the conduct started. The third relies on comparator-based approaches whereby I will consider the levels of take rate that are seen in more well-functioning markets (e.g. financial exchanges) as relevant reference points of what AdX would have charged in the counterfactual, while accounting for possible other differences unrelated to Google's conduct."

34. Dr Latham's methodology for estimating umbrella effects is set out at Latham 2/[51.4.] and in detail at Latham 2/[Section 5.5] and for estimating overhang damages is set out at Latham 2/[51.5] and in detail at Latham 2/[Section 5.6]:

> "51.4. The rationale for this [umbrella] effect is that by supressing programmatic revenues, Google worsened publishers' bargaining position in the direct sales channel. Moreover, it may have limited competition and permitted other advertising sources like ad networks to raise their take rates or otherwise decrease yields for publishers. I would thus estimate umbrella damages by first identifying the total revenue that publishers earned from direct sales and ad networks respectively, which would form the base of the affected commerce. I would then run an econometric analysis to assess the change in direct sale and ad network revenues absent Google's conduct by quantifying the relationship between (i) direct and ad network yields and (ii) SSP programmatic yields.
>
> 51.5. Google's conduct has not only changed market prices, as one would typically see in a cartel case. It has also caused structural and permanent shifts in the ad tech industry. Even if effective remedies were introduced immediately, it is unlikely that competition would be restored instantaneously and, given inter alia the strength of the network effects at play and the importance of gathering data, it may never be completely restored. This means that an analysis based purely on harms accrued to date is likely to understate the harm incurred by publishers. It is therefore appropriate to augment damages with a measure of "overhang damages", whereby the harms identified would persist and only gradually dissipate. I explain how I would approach this issue by allowing for the impact of Google's conduct to dissipate over a reasonable time period starting from the present day. I explain how this period could be chosen in a conservative manner to avoid the risk of over or under compensation."

35. Bearing in mind that this is only a summary, based on a preliminary analysis, we note the following:

(1) Dr Latham states that his damages assessment is performed relative to a counterfactual without the three leveraging abuses whereby DFP favours AdX, AdX favours DFP and Google's DSPs favour AdX. Dr Latham considers (see the reference in Latham 2/[457] to his paragraphs in Latham 2/[54] and [461(d)]) that his approach will be able to quantify the damages flowing to the class from the specific abuses within the three main abuses pleaded. Thus, Latham 2 states:

> "53. My analysis above considers a counterfactual where all three leveraging abuses are removed. I believe this to be the correct approach at this stage for two reasons.
>
> 54. First, because the different layers of the ad tech stack are very closely inter-connected the conducts are likely to have all contributed to a weakening of competition not only through their individual effects, but as a result of how they interacted and re-enforced one another. The consequence of this is that it would be contrived at this stage to allocate the overall effects of the conduct to specific practices. However, if the Tribunal considered this

> appropriate, I could potentially amend my methodology to estimate the damages stemming from the individual abuses identified. Amending my methodology in this way is likely to be easier following disclosure, including because I expect that Google undertook internal analyses of the likely effects of different courses of conduct that it was considering adopting (and there is evidence that it did this in relation to at least some of the relevant conducts).
>
> 55. Second, if some categories of abuse are identified and therefore removed from the counterfactual, then Google's incentives to engage in other categories of potentially abusive conduct will be reduced, or even removed, regardless of whether these other conducts are abusive or not. On this basis it would still be correct to base damages on the combined effect of the various conducts."

(2) Given the manner in which Ad Tech's claim has been pleaded – namely that the abuses are all inter-connected – we consider that it is necessary only for us to assure ourselves that the consequences of a narrower set of abuses could, if necessary, be ascertained. The Tribunal could, at trial, conclude that only some of the abuses were made out, and it would be necessary to have a methodology robust enough to deal with that outcome. We are satisfied that this has been considered by Ad Tech and Dr Latham; we do not consider that each and every combination of failure or success at trial needs to be stated, either in the pleading or in the expert report. If that was Google's contention – and at times it appeared to be – then we reject it as both contrary to law and oppressive to the class' access to justice.

(3) The expert report necessarily must be formulated at a fairly high degree of generality, because Ad Tech is not currently in possession of the data required to support its claims. To oblige Dr Latham to put forward a methodology that is to a higher standard than that required of a pleading does no more than introduce, by the back door, the sort of merits test repudiated in *Merricks*.

36. We consider that Ad Tech has, through the expert evidence of Dr Latham, demonstrated that the averments in the Claim Form are triable and that – should the matter proceed to trial – the harm to the class and the loss and damage suffered by it can be quantified.

37. Google, in our judgement, came very close to suggesting that a claim should only proceed if a *prima facie* articulation of loss could be produced. We refer, by way of example, to this exchange that the Tribunal had with Google's leading counsel, Mr Pickford, KC (at Transcript/Day 2/pp.87*ff*):

The President	Let's say the Tribunal, as a condition of certification, says: we are going down this route. I'm not saying for a moment that that is what we are going to do, but let's suppose that is the way in which we want damages to be assessed. Now what, given the *Microsoft Pro-Sys* test, what should we be demanding of Mr Latham? I take it, it is not a fully working model?
Mr Pickford, KC	No, it is obviously not a fully working model.
The President	Because that is not possible, no.
Mr Pickford, KC	No, you're right, sir, that is not our case. Our case is that there are issues that are going to need to be grappled with, where we would expect to see more detail from Dr Latham than he has given. And that, inherently, those issues, we suggest, are going to cause difficulties for his modelling. I can explain what those key issues are.
The President	I mean, are you expecting a fully fleshed out model, based upon the data that is presently in the possession of the class representative? Is that what Dr Latham should produce?
Mr Pickford	No. I think what we are saying is that he needs to explain how he is going to meet the kinds of challenges that his model is going to meet, in more detail than he has done. That doesn't mean setting out a fully-blown model but it does mean grappling with the sort of points that Mr Matthews raises, in which I'm happy to explain.
The President	But is not the proof always in the evolution of these cases? You can, of course, have a theoretical debate of "can you/can't you", but does that take us any further? I mean, isn't what you are saying, in order to be satisfied that this is do-able, we should be telling Dr Latham: you know that the information is incomplete in your hands; we know that data will, as the matter is certified, be receivable from Google going forwards. We know, therefore, that the model that you produce will have to be comprehensively re-written and binned. But, nevertheless, in order to satisfy ourselves that it can be done, please produce a prototype on the information that you have. Is that what we ought to be directing the class representative to do?
Mr Pickford, KC	Well, I think what we need to see as a minimum is whether the way it is specified -- the way the model is going to be specified -- appears to represent a plausible representation

of the market that it is seeking to model. We don't have any of that kind of engagement from Dr Latham at all yet.

The President Do you say that Dr Latham knows enough about the market in order to be able to do that?

Mr Pickford, KC Yes, I think he should. I mean, after all, he is, he was the economist who has been involved in assisting the Publishers in relation to this issue for many, many years.

The President I have no doubt about his involvement on the class representatives' side. But doesn't the informational mismatch, which Mr O'Donoghue referred to yesterday, come into play at this point? The Tribunal is pretty unsympathetic to informational mismatches when it comes to pleading a case. It has to be pleaded…

And away from pleading arguability and into methodology, what I'm really trying to get a feel for is: bearing *Microsoft Pro-Sys* firmly in mind, is the way that we satisfy ourselves that it can be done, to tell the class representative: we know it is a pretty pointless exercise given that you don't have all the data, nevertheless, so that we the Tribunal can be satisfied matters are triable, do your best – we will see what there is. And allow Google to kick the tyres and work out whether, when data is provided from Google, the model can be improved still more. But at least we have a workable model at the beginning.

Is that how we ought to be proceeding?

Mr Pickford, KC I think it may be…

…So, yes, sir, to answer your question: yes, I think that would be sensible and appropriate…

38. The *Microsoft* test is <u>not</u> a barrier to access to justice. If it were, it would be clearly contrary to the decision of the Supreme Court in *Merricks*. The general rule – in collective proceedings as in the case of individual claims – is that arguable claims ought to proceed to trial. Of course, in the case of collective proceedings there are a number of additional requirements (safeguards for the protection of both class and defendants) that need to be satisfied. These are set out in rules 78 and 79 of the Competition Appeal Tribunal Rules 2015. Clearly, where these requirements are not satisfied, an application for a Collective Proceedings Order should fail.

39. The *Microsoft* test does not fall within this class of rule – a pre-condition to certification. The *Microsoft* test concerns the management to trial of a properly pleaded claim: it is only when the Tribunal can see no clear way of trying the

case that the *Microsoft* test should act as a bar to certification. Even then, the proposed class representative will be given the opportunity to re-visit the claim, so as to render it triable. That occurred in *Gormsen v. Meta Platforms Inc*, [2023] CAT 10 and [2024] CAT 11, which was certified "second time round".

40. In our view, the approach encouraged by Google in the exchange above would go further than the *Microsoft* test and act as a barrier to justice by requiring a claimant to meet an unrealistically high threshold for the articulation of their methodology.

41. We conclude that Dr Latham has demonstrated that he has a methodology to assess the value of the claims of the class that Ad Tech seeks to represent in these proceedings. We consider that the loss flowing from the difference between the abuses alleged and the counterfactual case can, at trial, be determined.

H. A "BLUEPRINT TO TRIAL"

42. We have concluded that neither the arguability test nor the *Microsoft* test acts as a barrier to certification in this case, and we are going to grant Ad Tech's application for a Collective Proceedings Order.

43. However, the *Microsoft* test obliges us to consider the "blueprint to trial" and there are a number of matters relevant to case management, none of which are preclusive of certification, that require specific consideration.

(1) Questions of limitation

44. Google has identified two limitation issues which it says render portions of the claims pleaded in the Claim Form liable to be struck out. First, Google contends that any claim for damage suffered between 1 January 2014 and 30 September 2015 is time-barred and should be struck out, based on application of the limitation rule found in rule 31 of the Competition Appeal Tribunal Rules 2003. Second, Google contends that a claim was only brought in respect of the "Third

Abuse" by the filing of the Arthur Claim Form on 29 March 2023, which would affect the start date for that claim.[1]

45. Because these points are not preclusive of the making of a Collective Proceedings Order (at the highest, only some claim periods would be struck out) the Tribunal was not asked to determine these matters at the certification hearing. However, the question as to when these matters should be tried did arise for consideration and is relevant to the blueprint to trial.

46. Rule 53 gives the Tribunal broad case management powers. Rule 53(1) allows the Tribunal, at any time and on its own initiative or on the request of a party, to give such directions as are provided for in Rule 53(2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost. Dealing with a case justly and at proportionate cost includes (as set out in Rule 4) saving expense, dealing with the case in ways that are proportionate to the complexity of the issues, and ensuring that it is dealt with expeditiously and fairly. Rule 53(2)(o) provides that the Tribunal may give directions for the hearing of any issues as preliminary issues prior to the main substantive hearing.

47. In this case, we consider it is preferable for these limitation points to be considered as part of the main trial of these proceedings, rather than as a preliminary issue. We have taken the following matters into account:

    (1) The law involved in considering these points is less straightforward than suggested by Google, requiring the interpretation and application of EU law, with a high likelihood of an appeal by the losing party. The Tribunal has considered such questions in *Merchant Interchange Fee Umbrella Proceedings (Volvo Limitation Judgment)*, [2023] CAT 49, [2023] Bus L.R. 1879, which is currently awaiting appeal before the Court of Appeal. Although the limitation issues turn substantially on questions of law, not fact, that is not exclusively the case; the Tribunal may be

[1] These proceedings represent a consolidation of the applications by Mr Claudio Pollack, filed on 30 November 2022, and Mr Charles Arthur, filed on 29 March 2023, to bring collective proceedings under section 47B of the Competition Act 1998.

required to determine questions as to when the claimants had, or can be deemed to have had, knowledge of the alleged abuses.

(2) The monetary significance of these points is sufficiently substantial as to justify the losing party to seek permission to appeal. Given the novel questions of law involved, it is on the cards that permission to appeal would be granted. An interlocutory appeal runs the risk of interrupting the timetable to trial, and may jeopardise the Tribunal's aim of dealing with the proceedings expeditiously. Essentially, the Tribunal is faced with the choice of staying proceedings pending the outcome of any appeal or proceeding regardless of the appeal. If the latter course is chosen, all other things being equal, it makes far more sense to deal with all issues, including questions of limitation, at a single trial. On the other hand, if there is a significant effect on the trial of the limitation issues being determined early, then (i) they should be determined early and (ii) the trial should await the outcome of any appeal.

(3) Given the limitation issues affect only the time periods for the pleaded abuses, rather than having the potential to strike out any of the claimed abuses altogether, we do not consider that trying the limitation issues as a preliminary issue would narrow the issues for the main trial such as would allow significant time or cost savings.

(4) In light of the above, we do not consider there is any real advantage in trying these limitation points early, and no real disadvantage in leaving them over to trial. The fact is that any regression or model used at trial will have to be sufficiently flexible to deal with multiple outcomes (e.g. where some abuses are found to exist, and some not). The time period of the claims is but one such variable, and we see no good reason for needing to determine limitation in advance of trial.

48. Accordingly, as part of the blueprint to trial, we consider that these questions of limitation should be dealt with not as questions of strike out but as part of the main trial itself. Any other course would involve, for no good reason, disrupting the process to trial.

(2) Ad Tech's post-amalgamation team

49. Originally, there were rival applications for certification as Class Representative, made by Mr Pollack and Mr Arthur, each retaining their own legal teams and advancing their own differently formulated claims: the Tribunal gave directions for the handling of this carriage dispute (see the decision reported under [2023] CAT 34). The carriage dispute was then compromised and a corporate entity – Ad Tech – took over the application, with the involvement of Mr Pollack and Mr Arthur and their respectively instructed legal teams. The arrangements were formalised in an agreement dated 29 September 2023. This agreement provided (in clause 2) as follows in regard to the co-counsel relationship (emphasis added by underline):

> "2.1 Hausfeld, Humphries Kerstetter and Geradin Partners will be the solicitors jointly on the record acting for the Ad Tech PCR in the Ad Tech Proceedings.
>
> 2.2 Each Party shall enter into a New Engagement Letter with the Ad Tech PCR in the same or substantially similar form as their respective Original Engagement Letters. For the avoidance of doubt, such an engagement letter with the Ad Tech PCR may subsequently be amended by agreement between the Ad Tech PCR and the relevant Party.
>
> 2.3 Decisions with regard to the proposed litigation strategy recommended to the Ad Tech PCR shall be taken on a collaborative basis between the Arthur Advisers and the Pollack Advisers along with input from counsel, economists and any other relevant parties were appropriate.
>
> 2.4 The Arthur Advisers shall have joint responsibility with the Pollack Advisers on an equal basis for proposing courses of action and litigation strategy to the Ad Tech PCR and subsequently acting on instructions from the Ad Tech PCR to implement the same.
>
> 2.5 In the event of any disagreement between Hausfeld, Humphries Kerstetter and/or Geradin Partners regarding the proposed litigation strategy or the conduct of the Ad Tech Proceedings, the relevant parties shall present Senior Counsel, in his or her capacity as counsel for the Ad Tech PCR, with the different options and ask Senior Counsel to advise the Ad Tech PCR on the appropriate strategy. The Parties shall recommend that the Ad Tech PCR follow any such advice provided by Senior Counsel.
>
> 2.6 The Litigation Team, or part thereof, shall hold meetings, with such frequency as is necessary, in order to:
>
> 2.6.1 agree the work which needs to be undertaken during the next period; and

2.6.2 agree on a proposed course of action prior to seeking the Ad Tech PCR's approval (where appropriate).

2.7 Work allocation amongst the Litigation Team will be decided on the basis of which member of the Litigation Team is best placed, in terms of experience, availability, available budget and any other relevant factors, including the views of the Ad Tech PCR, to carry out the particular task.

2.8 The overriding concern of all Parties shall be to provide the Ad Tech PCR with the best possible advice in the Ad Tech Proceedings in the best interests of the proposed class members and always in priority over the individual and collective interests of the Parties, the Funder or any other party. As a secondary principle, when deciding upon the provision of work, the Parties shall also have regard to the anticipated fee split that has been agreed between the parties."

50. The triple instruction and retention of Hausfeld, Humphries Kerstetter and Geradin Partners is a result of the compromise of the carriage dispute between Mr Pollack and Mr Arthur. That compromise was in the interests of the class – amongst other things, a carriage dispute would have increased the complexity of the question of certification, would have added to the costs of the certification hearing, and the compromise avoided the risk of delay associated with any appeal of a carriage judgment. The compromise was approved by the Tribunal to the limited extent that the amendments to the Pollack and Arthur claim forms reflected in the Consolidated Claim Form were permitted (subject to any and all questions of prejudice to Google arising from such amendments, such as limitation).

51. Clause 2 shows a potential downside of such compromises. Although Mr Facenna, KC, sought to suggest that the process described in clause 2 was efficient, that is not necessarily the case, and it is unusual to see matters of representation so formally set out. Clause 2 is obviously the outcome of a careful compromise between two aspiring class representatives. The process of dispute resolution between lawyers provided for in clause 2, and the "secondary principle" set out in the last sentence of clause 2.8 are on their face inefficient and the Tribunal would not in the ordinary course look kindly upon three firms of solicitors being "baked into" the collective proceedings from the start. We are grateful, therefore, to Google for raising this, but we will not oblige Ad Tech to change the provisions of this agreement as the "price" for certification. As we have described, this has arisen out of a compromise that was in the interests

of the class: the class incurs the benefit of that compromise but must do so assuming also the burden. The Tribunal is empowered under Rule 53 to give such directions as it thinks fit to secure that proceedings are dealt with justly and at proportionate costs, including (at sub-paragraph 53(2)(m)) for the costs management of proceedings, including for the provision of schedules of incurred and estimated costs. The Tribunal will scrutinise closely any application for costs made on behalf of either of the parties to ensure that only such costs as are reasonably and necessarily incurred are recovered.

(3) Class definition

52. Google raises a number of points (set out in Google Skeleton/[77] to [82]) regarding the definition of the class, including a potential conflict of interest between Publishers (the opt-out sub-class) and Publisher Partners (the opt-in sub-class). This was not raised as a bar to certification, and (having heard submissions) we are very much of the view that what Google described as a conflict of interest was no such thing and certainly did not require the class definition to be amended. The issues that Google raised are more appropriately and effectively dealt with during the course of the proceedings, and in particular when questions of distribution come to be considered.

(4) Controlling the expert evidence and confidentiality

53. Our description of Dr Latham's work, the abuses he has looked at, and his methodology of quantification show that the processes of establishing the abuses and quantifying their harm will be complex and likely involve a good deal of confidential information. As we indicated during the course of the hearing, it will be necessary to closely control this process, so as to ensure that each expert can efficiently and properly articulate their respective approaches; and establish – before trial – what common ground exists, whether in the agreement of granular data or points of principle. We stress that we are in no way departing from the adversarial process that informs the Tribunal's processes: rather, we are seeking to ensure that only genuine points of contention that make a material difference to the outcome are in issue at trial.

54. In the first instance, we are prepared to leave it to the parties to frame an appropriate process; but the Tribunal would want an order framed sooner, rather than later, and will review it with care.

I. DISPOSITION

55. The application for certification is approved. This decision is unanimous.

Sir Marcus Smith
President

John Alty

Dr Maria Maher

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 5 June 2024