Neutral citation [2025] CAT 6

Case Nos: 1641/7/7/24
1644/7/7/24

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

20 January 2025

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)
CHARLES BANKES
KEITH DERBYSHIRE

Sitting as a Tribunal in England and Wales

BETWEEN:

**BIRA TRADING LIMITED**

Applicant / Proposed Class Representative

- v -

**(1) AMAZON.COM, INC.**
**(2) AMAZON EUROPE CORE S.À.R.L.**
**(3) AMAZON EU S.À.R.L.**
**(4) AMAZON UK SERVICES LTD**
**(5) AMAZON PAYMENTS UK LIMITED**

Respondents / Proposed Defendants

AND BETWEEN:

**PROFESSOR ANDREAS STEPHAN**

Applicant / Proposed Class Representative

- v -

**(1) AMAZON.COM, INC.**
**(2) AMAZON EUROPE CORE S.À.R.L.**
**(3) AMAZON EU S.À.R.L.**
**(4) AMAZON UK SERVICES LTD**
**(5) AMAZON PAYMENTS UK LIMITED**

Respondents / Proposed Defendants

Heard at Salisbury Square House on 11, 12 and 13 November 2024

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**JUDGMENT (CARRIAGE)**

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APPEARANCES

Sarah Ford KC and Nikolaus Grubeck (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of BIRA Trading Limited.

Mark Brealey KC, Daniel Carall-Green and Christopher Monaghan (instructed by Geradin Partners) appeared on behalf of Professor Andreas Stephan.

The Respondents and Proposed Defendants did not appear.

## A. INTRODUCTION

1. BIRA Trading Ltd ("BIRA") and Professor Andreas Stephan (Prof Stephan) have both issued claim forms applying for certification by the Tribunal of opt-out[1] collective proceedings that each seeks to bring as the class representative ("CR"). In each case, the proposed class comprises independent retailers and the proposed defendants are the same five companies in the Amazon group.[2] For the purpose of this judgment, it is unnecessary to distinguish between the proposed defendants and we shall refer to them collectively as "Amazon".

2. Both claim forms seek aggregate damages for the proposed class for alleged abuse by Amazon of a dominant position in the UK, contrary to the Chapter II prohibition under the Competition Act 1998 ("CA") and, until 31 December 2020, Art 102 of the Treaty on the Functioning of the European Union ("TFEU").

3. Amazon operates the well-known electronic commerce platform through which purchasers can buy a very wide range of products. In the UK, the website is Amazon.co.uk. Amazon also operates an app. on which the settings can specify the UK as the region in which the customer is shopping (the "App"). The website and the App together are referred to as the "UK Amazon Marketplace".

4. Amazon itself acts as the retailer selling many products on the UK Amazon Marketplace, and that aspect of its business is referred to as "Amazon Retail." Amazon also hosts multiple third-party retailers ("merchants") on the UK Amazon Marketplace. Therefore, as well as supplying merchants with listing and payment services, Amazon, through Amazon Retail, competes with many of those merchants in the sale of many products.

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[1] BIRA's application is also brought on an opt-in basis for foreign domiciled merchants: see para 42 below.

[2] When issued, the claim forms named six proposed defendants, but one of those, Amazon Services Europe SÀRL subsequently ceased to exist following a corporate reorganisation when its assets and liabilities were assumed by Amazon EU SÀRL. By consent, it was ordered that Amazon Services Europe SÀRL be removed as a proposed defendant in both proceedings, such removal being deemed to have taken place on 1 August 2024.

5. As regards merchants on the UK Amazon Marketplace, Amazon offers them the option to use its logistics centres and delivery network to store, pack and deliver their products to consumers. The supply to customers of products using this service is referred to as "FBA": fulfilment by Amazon. The use of other logistics and delivery arrangements (whether supplied by the merchant directly or through a third party) are referred to as "FBM": fulfilment by merchant.

6. Amazon offers consumers using the UK Amazon Marketplace the option to subscribe to its "Amazon Prime" service ("Prime"). In exchange for a fee paid monthly or annually, Prime customers receive a range of services, including fast delivery on a wide range of Prime products at no additional cost and free returns. Amazon gives merchants the option to fulfil their offers under the "Prime" label, which will then be displayed alongside their offers on the UK Amazon Marketplace and will show Prime customers that these offers will bring the benefits of the Prime programme, such as no additional shipping costs and fast (e.g. next day) delivery. The number of Prime customers in the UK is substantial and such customers are responsible for the great majority of purchases on the UK Amazon Marketplace.

**(1) The CMA Decision**

7. On 3 November 2023, the Competition & Markets Authority ("CMA") issued a decision ("the CMA Decision") to accept binding commitments following an one year investigation into suspected infringement by Amazon of the Chapter II prohibition under the CA. The competition concerns identified by the CMA included, in summary, the following:

   (1) the ability of Amazon Retail to access and use competitors' data which is not publicly available. Under the terms of the agreements which merchants had to enter into with Amazon in order to sell on its UK Amazon Marketplace, merchants had to provide, and permit Amazon to use, certain data in relation to or derived from their commercial activities in connection with any Amazon product or service. The access to such non-public seller data may give Amazon Retail an advantage over competing merchants, and in particular may be able to be used to inform

business decisions such as when to start and stop offering products, to identify and negotiate more effectively with suppliers, and as regards planning inventories of products.

(2) the process of selection of Amazon's featured offer which appears in the "Buy Box". For any given product, the product page displayed to the consumer prominently features the offer of one particular seller in the so-called Buy Box, through which the product can be purchased with a one-click option. Since over 75% of purchases are made via the Buy Box, being selected as this featured offer is a considerable benefit to sellers. The CMA considered that:

(i) when both Amazon Retail and independent merchants offered a product, the process of selection for the Buy Box appeared to favour Amazon Retail; and

(ii) the process of selection may unfairly favour products that are FBA over products that are FBM.

The CMA was concerned that any bias or discrimination in the selection process may reduce competition between sellers on the UK Amazon Marketplace and/or reduce the scale and competitiveness of fulfilment service providers that serve merchants on the UK Amazon Marketplace.

(3) the criteria for qualification of merchants' products under the Prime programme. Products are eligible for the Prime label only where the merchant used either Amazon's FBA service or a logistics/delivery service under Amazon's "Seller Fulfilled Prime" ("SFP") programme, which involves using an approved "SFP Carrier". There are a limited number of such SFP carriers and (except when the carrier is Royal Mail) SFP sellers were unable independently to negotiate terms with the carrier but had to accept rates and terms that were specified in a separate agreement which Amazon had entered into with the relevant carrier. The CMA was concerned that this may:

(i) disadvantage SFP merchants who might otherwise be able to obtain better rates and terms from SFP Carriers;

(ii) reduce SFP Carriers' ability to compete against Amazon's fulfilment services;

(iii) lead to higher prices for consumers by way of the passing on of higher fulfilment costs.

8. The CMA did not take a decision finding any infringement by Amazon of the Chapter II prohibition. Instead, as noted above, the CMA Decision accepted commitments from Amazon pursuant to s. 31A CA, to make a series of specified changes to its conduct and arrangements in relation to the UK market, which the CMA considered addressed the competition concerns which it had identified. Accordingly, there is no finding either that Amazon holds or held a dominant position or that it abused such a position.

**(2) The EC Decision**

9. On 20 December 2022, the European Commission ("the Commission") published a decision under art. 9 of Regulation 1/2003 accepting commitments from Amazon[3] and concluding two investigations it had been conducting: Cases AT.40462 *Amazon Marketplace* and AT.40703 *Amazon Buy Box* ("the EC Decision").

10. The EC Decision concerned the French, German and Spanish markets. It did not cover the UK. The Commission's preliminary view was that Amazon held a dominant position on each of those national markets. The competition concerns identified by the Commission in its investigations were:

(1) the use by Amazon of non-publicly available data regarding merchants' listings and transactions for the purpose of Amazon's own retail operation ("the Data-use conduct");

[3] The Amazon companies that are addressees of the EC Decision are the first three proposed defendants to the present cases.

(2) the conditions and criteria that governed the selection of the offer that features in the 'Buy Box' ("the Buy Box-related Conduct"); and

(3) the conditions and criteria that governed the eligibility of merchants to Prime and of their offers to the Prime label ("the Prime-related Conduct").

11. The Commission reached "preliminary concerns" that each of these three conducts constituted an abuse of a dominant position within Art 102 TFEU. As regards the Data-use conduct, the Commission's preliminary concern was that this gave Amazon Retail an advantage over merchants as regards its decisions to start listing (i.e. selling) a specific product; in its pricing decisions; in its inventory management and planning decisions; and in its vendor selection decisions (i.e. choice of supplier): recitals (181)-(197) of the EC Decision. The EC Decision states, recital (222):

> "The potential effects that Amazon's Data-use Conduct may generate, and which essentially stem from the impact on the individual data-use cases that feed into Amazon Retail's various retail operation decisions, are independent of the potential effects of Amazon's Buy Box-related Conduct and Prime-related Conduct. Nevertheless, as a result of the three Conducts taking place simultaneously on Amazon's e-commerce platforms, and distorting competition between Amazon Retail and third-party sellers, their potential effects complement each other in so far as such effects are ultimately all capable of marginalising third-party sellers by limiting their ability to grow and/or partially foreclosing them from the sale of highest demand products, thereby depriving them of scale, and thus lessening competitive pressure on Amazon Retail."

12. However, the Commission found that the final commitments offered by Amazon, which took effect from the date of the EC Decision, effectively met its preliminary competition concerns. The Commission therefore did not take a final decision finding an infringement of Art 102 TFEU.

13. It will be evident that the CMA Decision in part reflects similar concerns to the EC Decision.

**(3) The AGCM decision**

14. On 9 December 2021, the Italian national competition authority (the Autorità Garante della Concorrenza e del Mercato) ("AGCM") issued a decision finding that Amazon[4] had abused its dominant position on the Italian market and imposed a €1.3 billion fine ("the AGCM Decision").[5]

15. The abuse found by the AGCM concerned Amazon's favouring of merchants who used FBA for the sales they made on the Amazon marketplace in Italy. FBA sellers were found to have preferred access to the Prime label. The AGCM held that this restricted the development of competing third party providers of logistics and delivery services, to the advantage of Amazon. Secondly, the AGCM found that Amazon's conduct reduced competition from alternative providers of e-commerce platform services since it increased the costs of multi-homing by merchants and therefore discouraged them from also selling on other e-commerce platforms.

16. Accordingly, the AGCM Decision has similarity with some of the concerns identified in the CMA Decision. But the AGCM Decision did not address the use by Amazon of non-publicly available data.

**(4) US Proceedings**

17. On 26 September 2023, the US Federal Trade Commission ("FTC") started proceedings against Amazon in the US District Court for the Western District of Washington, alleging that Amazon[6] "is a monopolist" that deploys an "interconnected strategy to block off every major avenue of competition".

18. As amended on 14 March 2024, one of the allegations in the complaint brought by the FTC together with 19 State Attorneys General ("the FTC Complaint") is that, when Amazon detects that a seller is offering a product elsewhere online at a price cheaper than that charged on the Amazon platform, "Amazon punishes

[4] The Amazon companies that are the addressees of the AGCM decision are the second and third proposed defendants to the present cases and two Italian subsidiaries in the Amazon group.
[5] The AGCM decision is under appeal to the Regional Administrative Court for Lazio but the appeal has been stayed pending the outcome of a reference to the Court of Justice of the EU in another case from Italy concerning the time limit for the AGCM to initiate an investigation.
[6] The lawsuit is against only the first proposed defendant to the present cases.

that seller. It does so to prevent rivals from gaining business by offering shoppers or sellers lower prices" (para 13). Acknowledging that Amazon had removed a contractual requirement barring sellers from offering lower prices anywhere else, first in Europe and then in 2019 in the US, the complaint alleges that Amazon continues to use "other anti-discounting tactics to discipline sellers who offer lower-priced goods elsewhere". Those include the exclusion of such sellers from the Buy Box; and the complaint further alleges (at para 16):

> "For especially important sellers, Amazon keeps in place a targeted version of the contractual requirement it supposedly stopped using in 2019. If caught offering lower prices elsewhere online, these sellers face the ultimate threat: not just banishment from the Buy Box, but total exile from Amazon's Marketplace."

19. In addition to what the complaint describes as Amazon's "anti-discounting tactics", the FTC Complaint alleges that Amazon makes eligibility for products to have "Prime" status, with all the benefits that brings in terms of increased sales, dependent upon the merchant using Amazon's FBA service. That is alleged to foreclose rival online marketplaces from achieving the scale to compete effectively with Amazon, since merchants are deterred from using third-party logistics and delivery providers on Amazon and accordingly would have to use different providers if they were to sell on other marketplaces, which makes multi-homing[7] less attractive. This allegation is accordingly very similar to the abuse found in the AGCM Decision: para 15 above.

20. The FTC Complaint concerns only the US market. We should make clear that these are allegations and that the US Proceedings are continuing.

## B. THE PRESENT APPLICATIONS

### (1) BIRA

21. BIRA issued its claim form and application for a CPO on 6 June 2024. The claim form defines the proposed class, at para 109, as:

[7] i.e. offering the product for sale on more than one e-commerce platform.

> "Third-Party merchants who, during the Relevant Period, sold new products on the Amazon UK Online Marketplace"

The Relevant Period is defined as being 1 October 2015 to 6 June 2024 (i.e. the date of the claim form): *ibid*, para 6. In response to questions from the Tribunal, BIRA clarified that "new" products means any product which is not second-hand.

22. BIRA's claim alleges two kinds of abuse, summarised at paras 14-15 of the claim form:

(1) "Data Abuse Conduct". This refers to the use by Amazon of non-public data supplied by merchants, and essentially reflects an aspect of the first competition concern identified in the CMA Decision, as described at para 7(1) above, and of the first potential abuse identified in the EC Decision: para 10(1), above.

(2) "Other Anti-Competitive Behaviour", expressed as follows:

> "Amazon's unlawful product entry strategy also included Amazon self-preferencing these Amazon Retail products via the "Buy Box" feature, a function of Amazon's website which prominently features a single 'Featured Offer' on the given page or listing for a product."

23. The essence of BIRA's claim is expressed in the final sentence of para 15 of the claim form:

> "In employing a product entry strategy consisting of the the [*sic*] Data Abuse Conduct and the Other Anti-Competitive Behaviour, Amazon has engaged in conduct that amounts to the abuse of its dominant position in the market for the provision of e-commerce marketplace services in the UK…. (the "**Unlawful Product Entry Strategy**" or "**the Infringement**").

24. The overall description of the abuse alleged by BIRA as an "Unlawful Product Entry Strategy" is appropriate. BIRA's claim focuses on Amazon's decisions to launch a product for sale through Amazon Retail. Hence BIRA pleads as regards causation of loss (at para 92):

> "As a consequence of the Infringement, Amazon was able to (i) identify products that could be sold by Amazon Retail that would either (i) not otherwise have been sold by Amazon Retail or (ii) were sold by Amazon Retail at an earlier point in time than would have been the case. Amazon Retail's

> sales of those products were more successful than would have been the case absent the Infringement, in part because Amazon Retail was able to secure more sales and Amazon Retail avoided selling less successful products."

The consequence of the "Other Anti-Competitive Behaviour" is also assessed in terms of making Amazon Retail's entry more successful: para 94.

**(2) Prof Stephan**

25. Prof Stephan issued his claim form and application just a few weeks after BIRA, on 26 June 2024. The claim form defines the class, at para 18, as:

> "All UK-domiciled sellers that used Amazon's e-commerce marketplace services to reach customers in the UK within the Relevant Period."

The Relevant Period is defined as being 26 June 2018 to the date of issue of the claim form, i.e. a period going back six years in accordance with the limitation period.[8] However, Prof Stephan expressly reserves the right to amend and seek to go back to an earlier start date depending on the outcome of the appeal in the *Umbrella Interchange Fee* case concerning the application of the EU principle of effectiveness.[9]

26. Prof Stephan alleges five distinct forms of abuse, as set out in detail at paras 136-164 of the claim form:

(1) Amazon's use of non-public seller data. This encompasses the first form of abuse alleged by BIRA, but is framed in a more extensive way, reflecting the CMA and EC Decisions (see para 73(1)(i) below);

(2) "Self-preferencing of Amazon Retail". This refers to the selection of offers that feature in the Buy Box. Prof Stephan alleges that in this selection Amazon favours offers sold by Amazon Retail as compared to offers sold by merchants. It reflects the second competition concern

[8] Insofar as any claims within the proceedings are governed by Scots law, Prof Stephan asserts a period of five years.
[9] On 19 December 2024, the Court of Appeal issued its judgment dismissing the appeal, but it is unclear whether there might be a further appeal to the Supreme Court.

identified in the CMA Decision and the Buy Box-related Conduct identified in the EC Decision.

(3) "Self-preferencing of offers usings FBA". This also refers to the selection of offers that feature in the Buy Box. Prof Stephan alleges that Amazon favours merchants' offers that use FBA over offers that use FBM. Although related to (2) above in that it concerns selection for the Buy Box, the harm alleged to result is different: this conduct is alleged to affect competition in logistics and delivery services for merchants as between Amazon and third parties, artificially stimulating demand for FBA and preventing FBM providers from achieving scale. This reflects an aspect of the second competition concern identified in the CMA Decision and part of the Buy Box Conduct identified in the EC Decision.

(4) Conditioning access to Prime on the use of FBA. Prof Stephan alleges that Amazon effectively makes access for a product to the Prime label conditional on the merchant's use of FBA. This corresponds to the abuse found in the AGCM Decision (and reflected also in the FTC Complaint).

(5) Anti-discounting practice. Prof Stephan alleges that in practice Amazon places sanctions on merchants who sell their products elsewhere at lower prices than they charge on the Amazon UK Marketplace, or at least that merchants are aware of the risk that Amazon may do so. This allegation is effectively the same as that pursued in the US Proceedings by the FTC Complaint.

27. The effects of each head of abuse and the loss thereby caused is pleaded separately under each head although, as Prof Stephan emphasises, those effects overlap. In summary, loss is alleged to have been caused in broadly three ways:

(1) Amazon's use of non-publicly available data and the favouring of Amazon Retail in the Buy Box caused merchants to lose sales for their competing products.

(2) The favouring of FBA sellers in the Buy Box and for Prime led to higher prices for FBA services (due to increased demand) and for FBM services (since third-party logistics providers were prevented from achieving lower costs through economies of scale).

(3) The fees for e-commerce marketplaces were higher due to the reduction in competition (as a result of the disincentives for merchants to engage in multi-homing by reason of the anti-discounting practice and the higher cost of FBM services.).

## C. THE HAMMOND PROCEEDINGS

28. Alongside the present applications, there is pending before the Tribunal an application for a CPO for proceedings against Amazon brought by Mr Robert Hammond as the PCR for all consumers who purchased products via the Amazon UK Marketplace. The abuse alleged by Mr Hammond concerns the way Amazon promotes both its own products (i.e. Amazon Retail) and the products of merchants using FBA, which is alleged to lead to higher prices for consumers.

29. An application for a CPO for collective proceedings against Amazon on behalf of consumers was also made by Ms Julie Hunter. Accordingly, the Tribunal was there also faced with two rival applications and resolved that 'carriage dispute' in favour of Mr Hammond: [2024] CAT 8. Mr Hammond's application will therefore proceed to a hearing to determine whether a CPO should be granted. The Tribunal has indicated that it is sensible for that application on behalf of a class of consumers to be heard alongside the application for a CPO on behalf of a class of merchants.

## D. CARRIAGE DISPUTES

30. As with the *Hunter/Hammond* applications, when there are two competing applications for a CPO on behalf of the same or overlapping classes, making the same or overlapping allegations against the same or overlapping proposed defendants, this gives rise to what is often called a 'carriage dispute' and the

Tribunal has to determine which should be preferred. The Competition Appeal Tribunal Rules 2015 ("CAT Rules")[10] provide accordingly at rule 78(2)(c):

> "(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> […]
>
> (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable; …"

31. In addition to the *Hunter/Hammond* applications, there have been two other carriage disputes determined by the Tribunal: *UK Trucks Claim Ltd v Stellantis NV and ors, Road Haulage Association Ltd v Man SE and ors* [2022] CAT 25 ("*Trucks*"); and *Evans v Barclays Bank PLC and ors, Michael O'Higgins FX Class Representative Ltd v Barclays Bank PLC and ors* [2022] CAT 16 ("*FX*"). In both those cases, the carriage dispute was heard as part of the substantive CPO application, involving therefore all the proposed defendants and an extensive hearing at very substantial cost. The experience of those first two cases indicated that it would generally be more efficient and fairer to all the parties if the carriage dispute was resolved in advance of the full certification hearing. This was therefore the approach adopted, with the consent of the two rival PCRs, in the *Hunter/Hammond* cases and, without any objection from BIRA or Prof Stephan, it is the course which has been followed here.

32. Accordingly, the present judgment is not determining whether the BIRA application or Prof Stephan's application should be certified, but only which of the two should proceed to a full certification hearing. This is a relative assessment, and it will be open to Amazon to argue at the certification hearing that the PCR that was successful in the carriage dispute should not be granted a CPO. At this stage, if one of the two applications manifestly fails to meet the criteria under the CA and the CAT Rules for a CPO, it can be dismissed. But if not, the appropriate course is for the unsuccessful application to be stayed, pending the certification hearing of the other application; it can then be revived

[10] All references to rules in this judgment are to the CAT Rules.

if the 'winner' of the carriage dispute is there denied certification: cp. the ruling in *Hunter/Hammond* at [38].

33. Although more proportionate than hearing the carriage dispute as part of the full certification hearing, such disputes are nonetheless expensive and cause delay to the substantive proceedings. It is generally much better for the potential class members if such disputes are resolved without a contested hearing, by the two PCRs agreeing to consolidate their actions on appropriate terms: see the observations in the *Hunter/Hammond Ruling (Costs)* [2024] CAT 68 at [21]. Such an accommodation was reached in what would have been a further carriage dispute involving parallel claims against Google: *Pollack v Alphabet Inc and ors*; *Arthur v Alphabet Inc and ors*: see the Tribunal's reasoned order approving consolidation, [2023] CAT 65. Unfortunately, it is not always possible to achieve such agreement.

34. As is clear from the above, carriage disputes are a relatively new phenomenon in the UK, reflecting the nascent nature of our collective proceedings regime. Accordingly, we think it is helpful and instructive to note how such disputes are handled in some jurisdictions with long-established regimes for collective or class proceedings.

35. In Australia, such a dispute is referred to as a "multiplicity contest" and, in the absence of a certification procedure, is resolved under the court's power to order a stay of proceedings. In *Wigmans v AMP Ltd* (2021) 270 CLR 623, the majority judgment of the High Court of Australia stated (at para 52):

> "In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case."

36. The judgment effectively approved the multifactorial approach derived from the judgments of the Federal Court of Australia in *Perera v Get Swift Ltd* (2018) 263 FCR 92. The Federal Court there identified as potentially relevant factors (as summarised in *Wigmans* at [6]):

(1) the competing funding proposals, costs estimates and net hypothetical return to group members;

(2) the proposals for security for the defendant's costs;

(3) the nature and scope of the causes of action advanced;

(4) the size of the respective classes;

(5) the extent of any bookbuild;

(6) the experience of the legal practitioners (and funders) and availability of resources;

(7) the state of progress of the proceedings; and

(8) the conduct of the representative applicant to date.

See also the subsequent summary by Lee J in *CJMcG Pty Ltd v Boral Ltd (no 2)* [2021] FCA 350 at [13].

37. In *Get Swift*, the Federal Court in turn drew on the experience of Canadian cases, as has the Tribunal in adopting the *Microsoft* test for the assessment of expert evidence at the certification stage, endorsed by the Supreme Court in *Merricks v Mastercard Inc* [2020] UKSC 51. In Canada, each province has its own class action legislation. We note that the Ontario Class Proceedings Act 1992, as amended in 2020, provides in s. 13.1(4):

> "On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,
>
> (a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;
>
> (b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;
>
> (c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and
>
> (d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances."

38. Of course, the approach in other jurisdictions is not binding, and each regime has its own particular context and features. In the UK, unlike Ontario, there is

no statutory prescription of the relevant factors to be applied in resolving a carriage dispute. In the UK, unlike Australia, there is a discrete certification stage, and the CAT Rules supplement the CA in setting out a series of factors to be taken into account in determining whether to authorise a class representative and whether the claims are suitable to be brought in collective proceedings: see rules 78(3) and 79(3). The merits of the case play little role in the certification process: *Merricks* at [60]. Nonetheless, we consider that one can learn from other jurisdictions with much longer experience of collective or class actions, as well as from the three carriage disputes resolved to date in this jurisdiction. We find the overall prescription of the Ontario statute, that the court should determine "which proceeding would best advance the claims of the class members in an efficient and cost-effective manner", a helpful guide to the approach of deciding under rule 78(2)(c) which would be "the most suitable".

39. It is clear that in the UK, like these other common law jurisdictions, resolving a carriage dispute involves a multi-factorial assessment: see *Trucks* per the Chancellor at [100]; *FX* per Green LJ at [139] ("broad and multifaceted"). Having regard to the structure of the UK regime (including the control exercised by the Tribunal at the subsequent stage of settlement or judgment), we think that for an initial carriage dispute the potentially relevant features include: the scope of the proposed class; the nature and approach of the PCR; the experience and quality of the legal representatives; the funding arrangements and degree of cover to meet the defendants' costs should the claim fail; the quality of the litigation plan; the scope of the claims pursued; whether the proceedings are proposed as opt-in or opt-out; and the nature and quality of the experts and their methodologies, both on matters relating to liability and matters relating to quantum. We emphasise that this is not an exhaustive list, and self-evidently some factors will be much more significant in some cases than in others.

40. However, the timing of the rival applications is generally not relevant. There is certainly no presumption in favour of the 'first to file'. As Green LJ stated in *FX* at [153]:

> "If it were systemically accorded weight, it would risk encouraging premature and ill-thought out claims simply upon the basis that being first in time conferred a forensic advantage. It could penalise the more measured class

> representative that wished to road test a claim thoroughly before lodging or (as we were told is the case here) await publication or availability of a Commission decision. It is hard to see what, in policy terms, is to be gained from encouraging a race to file."

Timing might perhaps become relevant if one application was filed significantly later, such that it would cause material delay in progressing the claims, and as Green LJ noted in *FX*, the Tribunal might at some point impose a cut-off. But that has no application to the present case, where the two applications were filed only a few weeks apart.

## E. RELATIVE ASSESSMENT

41. The hearing of the carriage dispute involved extensive submissions on behalf of the two rival applicants. Amazon chose not to participate in the dispute. We proceed to consider the various factors that we regard as relevant to the present applications.

### (1) The Scope of the Class

42. The scope of the proposed class is similar in the two applications. BIRA's does not include merchants selling second-hand goods, but that is a very minor part of the offering on the UK Amazon Marketplace, and Prof Stephan did not suggest that this distinction was of much weight. Prof Stephan, for his part, limits the proposed class to merchants domiciled in the UK, whereas BIRA's class definition includes foreign based merchants who sell on the UK Amazon Marketplace. However, such merchants would have to opt-in to the proceedings: see s. 47B(11)(b) CA. While the number of overseas merchants may not be insignificant, inclusion of their claims may give rise to disputes about the governing law for their claims. However, if this was a real complication, BIRA's class definition could be amended at the certification hearing: cp. an analogous approach by the Tribunal to the claims for foreign trucks in *Trucks*: [2022] CAT 25 at [180].

43. We were initially concerned about the widely different figures provided as to the class size. BIRA's application estimated that the number of UK merchants in the class was 35,000, whereas Prof Stephan's expert estimated the class size

at over 200,000. It would count in Prof Stephan's favour if his proceedings would benefit many more merchants, but we cannot infer that from the data so far provided. Since BIRA's estimate excludes overseas merchants and BIRA's claim period extends back several years earlier than the start of Prof Stephan's claim period, there is no justification for this discrepancy. It appears that it can be explained on the basis of the lack of accurate information and the use of different sources from which the estimates were prepared. We expect this will be resolved once data is provided by Amazon, and we conclude that there is no ground for assuming that BIRA's proposed class is smaller than that of Prof Stephan.

44. Although BIRA's proposed class encompasses merchants who sold on the UK Amazon Marketplace over a longer period, as already noted Prof Stephan has reserved the right to amend his application depending on the outcome of a current appeal concerning the approach to English limitation periods in the light of recent EU jurisprudence: see para 25 above.

45. Altogether, therefore, we regard these differences in the class definitions as relatively minor and a neutral factor in the relative assessment.

**(2) The Class Representative**

46. BIRA is a non-profit trade association whose members are independent retailers. It was established in its present form in 2009, bringing together two organisations whose origins go back much earlier. BIRA has been active over the years in promoting the interests of its members on a number of fronts, e.g. by lobbying government on potential legislation or policy. BIRA has over 4,300 full members, of widely varying size, and as a class representative would have the benefit of ready access to its retailer members in seeking relevant information. However, its membership comprises essentially bricks-and-mortar retailers. Many of the BIRA members sell also online, but a significant number do not. And there are a significant number of merchants who have no stores but sell solely online, who would not be BIRA members. Therefore, as Ms Ford KC for BIRA acknowledged, many BIRA members would fall outside the class and a substantial number of class members would not be members of BIRA.

47. Prof Stephan is a full-time academic and since 2013 has been professor of competition law at the University of East Anglia Law School. From 2017-2022 and again since 2023 he has been Head of the Law School, responsible for all aspects of running the department, including management of the budget.

48. Although Prof Stephan has financial management experience in the university context, given a choice, we would in general consider a long-established trade association representing many members of the class to be preferable as the class representative. However, although he has less relevant experience, Prof Stephan has appointed a high-powered consultative panel to provide him with advice and guidance on the conduct of the case, comprising Lord Neuberger, the former President of the UK Supreme Court; Ms Sue Prevezer KC, who has extensive experience of commercial litigation; and Mr Stephen Robertson, who is a former director general of the British Retail Consortium, a trade association which campaigns on behalf of the retail industry, and who was previously directly involved in the business of some major retailers. We have seen the terms of reference of this panel and we note that Prof Stephan's litigation budget provides for substantial payments to the panel members for their assistance, so it is clearly envisaged that they will provide active assistance. Prof Stephan also says in his witness statement that he would seek to engage with any UK trade or retail organisation which may have members falling within his proposed class.

49. We were somewhat concerned by the fact that Prof Stephan had approved a litigation funding agreement ("LFA") in a form which the Tribunal considered ceded too much control to the funder: see further para 65 below. But it appears that Prof Stephan did seek independent advice from a specialist KC on the LFA and we think that this shows that he took reasonable steps to satisfy himself that the terms of the LFA were acceptable. Since the deficiency in the LFA is now remedied, we think this is of limited relevance in our evaluation.

50. Having regard to all these matters, we consider that BIRA here is the more suitable class representative, but Prof Stephan, assisted by his consultative panel, is certainly not unsuitable and would be able to conduct the litigation

competently and effectively on behalf of the class. This factor therefore points in favour of BIRA.

**(3) The Lawyers**

51. Both PCRs are represented by highly experienced solicitors and Counsel teams specialised in competition law. We see nothing to choose between them. Accordingly, this factor is neutral.

**(4) Funding and adverse costs cover**

52. As is almost invariable for collective proceedings, both PCRs rely on litigation funding. Prof Stephan has entered into an LFA that commits the funder to a maximum amount of £32.9 million for Prof Stephan's costs and expenses. BIRA has entered into an LFA providing for up to £28.15 million for BIRA's costs and expenses. Both these LFAs therefore provide for very substantial funding. The higher funding for Prof Stephan would appear to reflect the wider scope of the allegations he seeks to make, so it may be that his funding is more cost-effective. However, overall we regard the relative scale of funding as a neutral factor.

53. For both PCRs, arrangements to cover a potential adverse costs order are dealt with under the LFA rather than by a discrete ATE policy. BIRA's cover for adverse costs is provided under the scope of the LFA, in the amount of £15 million (and the funder in turn has ATE cover). Prof Stephan's funder is committed to pay adverse costs of £5 million until the grant or refusal of a CPO and of £20 million thereafter; and the funder's potential liability in that regard has a third party guarantee.[11] Neither PCR sought to criticise the other's level of costs cover as inadequate and we regard this factor as neutral.

54. The levels of return to the two funders are significantly different. Following the Supreme Court's *PACCAR* judgment, the remuneration of funders under LFAs

[11] Although the LFA entered into by Prof Stephan contains various references to "ATE insurers", Prof Stephan's witness statement indicates that the funder's liability is backed by a guarantee not an insurance policy.

have been quite elaborately structured, usually based on a multiple of funds committed or expended and the potential duration of the proceedings. BIRA's LFA provides for a funder's return of a total multiple rising, by stages, from 4 up to 6.5 (if the time to recovery exceeds 5 years). Prof Stephan's LFA, as recently amended, provides for a total multiple rising from 4 up to 10 (if the recovery is after the commencement of the substantive trial). Accordingly, the funder's return is potentially substantially higher if the proceedings are brought by Prof Stephan than if they are brought by BIRA.

55. Although we find the maximum return under Prof Stephan's LFA remarkably high, we note that under the amendment to the LFA the funder expressly agreed that any entitlement to such fees will be payable out of undistributed damages "unless otherwise agreed at the relevant time as a term of a Settlement agreed between all parties (to the extent permissible at law) and approved by the CAT"; and the funder further stated:

> "As set out in the LFA (Clause 8.3), we wish to reiterate that the sums provided for in respect of our Commission are subject to such approvals and orders as may be made by the CAT."

In the event of a judgment, the distribution of damages is subject to the control of the Tribunal pursuant to s. 47C CA. Our principal concern is as to the effect of the LFA on the interests of the class members. The higher return agreed for Prof Stephan's funder may well reflect different assessments of the litigation risk, given the wider claims made, and the higher amounts (than in the BIRA LFA) committed for both Prof Stephan's costs and adverse costs cover. Therefore, despite this sharp contrast between the funders' potential returns, given the protection for class members we do not here find this a significant factor favouring BIRA's application.

56. A further aspect of the LFAs requiring scrutiny by the Tribunal, given the potential for conflicting incentives as between the CR and the funder, is the need to ensure that the CR can conduct the proceedings in the interests of the class members, while fairly protecting the interest of the funder. In that regard, the Tribunal has previously highlighted the importance of the terms of an LFA

concerning (a) settlement of the proceedings, and (b) termination of the funding agreement: *Merricks v Mastercard* [2021] CAT 28 at [24].

57. We had some concerns about the wording of the termination provision at clause 17.1 of the BIRA LFA, and how that interacted with the dispute resolution provision in clause 15. However, in response to the Tribunal's questions Ms Ford KC confirmed that if a dispute over the Funder's notice to terminate is resolved in favour of BIRA, the intention was that the termination notice given by the funder shall cease to have effect, and that the agreement would in any event continue until the expert determination procedure concluded. This would require some minor amendment to the wording of the LFA, which we were told would be forthcoming. Subject to that, we are satisfied that the terms of the BIRA LFA reasonably protect the interests of the class members.

58. Prof Stephan's LFA deals with settlement at clause 7, which is as follows ("the Claimant" is Prof Stephan and "the Manager" is an associated company of the funder which appears to provide it with advisory services):

> "7.1 The Claimant shall not enter into any agreement to settle the Claim and/or the proceedings without the prior written consent of the Funder (not to be unreasonably withheld or delayed.)
>
> 7.2 The Claimant shall immediately inform the Manager (or cause the Lawyers to inform the Manager) of any proposed settlement offers or proposals made by or on behalf of the Defendant(s). The Claimant shall consult (and cause the Lawyers to consult) the Manager and provide such assistance as may be requested by the Manager to evaluate the proposed offer of Settlement.
>
> 7.3 The Claimant shall not, nor cause the Lawyers to, communicate or make any settlement offers or proposals to the Defendant(s) without the prior written consent of the Funder (not to be unreasonably withheld or delayed). The Claimant will actively consider and seek to initiate offers of Settlement where appropriate to do so. If the Claimant wishes to make a settlement offer or proposal of any kind in respect of the Claims and/or the Proceedings in whole or in part, it shall notify the Funder in advance in writing together with written reasons.
>
> 7.4 Notwithstanding the foregoing and subject always to clause 4.1, the Funder or the Manager may propose to the Claimant that it explore or pursue a settlement; and may at any time request that the Lawyers provide a written report on Settlement strategy (which the Claimant shall ensure is provided within fourteen (14) days of such request.)
>
> 7.5 In the event of any dispute between the Claimant and the Funder in respect of a proposed Settlement, the matter shall be determined in accordance with clause 18.4."

Clause 18.4 provides for the reference of a dispute between the funder and the class representative to a KC, whose opinion will be binding.

59. Ms Ford KC attacked this provision as inappropriate, on the basis that it would fetter the CR's independence in seeking to settle the proceedings in the interests of the class. She pointed out that in some other cases the Tribunal in considering the LFA had noted the importance of a CR having the final decision as regards settlement: e.g. although the agreement may require the CR to take the advice of an independent KC, in those cases, that advice is not binding.

60. In our view, the terms of clause 7, considered as a whole, do not give cause for concern. Under cl.7.1 and 7.3, the funder's consent to a settlement which the CR wishes to reach cannot be "unreasonably withheld". It is of course correct that if Prof Stephan considered that terms of settlement were attractive but the funder objected, that dispute would be referred to an independent KC. But any settlement would in any event require the approval of the Tribunal as "just and reasonable" pursuant to CA s. 49A(5). The possibility that an independent KC would consider the terms of settlement were inappropriate but that the Tribunal would nonetheless approve them as just and reasonable appears to us not just wholly speculative but, in practice, unrealistic.

61. Furthermore, we note that a "binding KC opinion" clause applicable to such a potential settlement dispute was recently considered and approved by the Tribunal when expressly addressing a challenge to the terms of the revised LFA in the *Trucks* proceedings: see [2024] CAT 51 at [80].

62. By letter dated 13 December 2024, the solicitors to BIRA drew attention to the public dispute that has apparently arisen in *Merricks* as between the CR who has agreed terms of settlement with the defendants and the funder who is objecting to those terms. It was suggested that this indicates the potential for such disputes and underlines the importance of protecting the CR's independence. We note that the solicitors to BIRA are also the solicitors for Mr Merricks and that the funder in that case, Innsworth Capital, is also the funder of Prof Stephan. However, we have no information about the basis of the

dispute in that other case and consider that it would be inappropriate to draw any wider conclusion from what may be very particular circumstances.

63. We note, moreover, that the form of settlement clause in Prof Stephan's LFA follows the requirements set out in the Code of Conduct for Litigation Funders prepared by the Civil Justice Council ("the LF Code") at para 13.2, and serves to prevent the funder forcing the CR to accept settlement terms which the CR does not consider appropriate. Moreover, as Prof Stephan's solicitors pointed out in their letter of response of 16 December 2024, this form of settlement provision is expressly recognised as giving appropriate protection to the funded party in section 25 of the comprehensive report, *A Review of Litigation Funding in England and Wales* (28 March 2024) provided to the Legal Services Board by Prof Rachael Mulheron KC (Hon), an academic with particular expertise regarding litigation funding.

64. As regards termination, the LFA signed by Prof Stephan, as amended, included the following provisions regarding the funder's right to terminate:

> "12.1 The Funder is entitled to terminate its funding obligations under clause 3.1 and/or this Agreement (in whole or in part) with respect to all or some of the Claims:
>
> > (a) upon giving not less than twenty- one (21) days' written notice to the Claimant if the Funder reasonably ceases to be satisfied about the merits of the Claims (or the relevant part of the Claims) and/or the Proceedings, such a view to be reached based on the independent legal and expert advice that has been provided to the Funder; or
> >
> > (b) upon giving not less than twenty-one (21) days' written notice to the Claimant if the Funder reasonably believes that the Claims (or relevant part of the Claims) and/or the Proceedings are no longer commercially viable for the Funder to fund because the Funder is unlikely to obtain at least a sum equivalent to the anticipated Project Costs for the Proceedings (as set out in the Approved Budget), multiplied by [4] as a return on its funding of the Proceedings, such a view to be reached based on independent legal and expert advice that has been provided to the Funder; …"

65. We did not regard this provision as satisfactory and consider that it gives disproportionate power over the proceedings to the funder. Although the funder could exercise these rights only on the basis of independent legal advice, it is not clear who was to provide that advice nor to what extent it would be binding. More particularly, there was no provision for the CR to have any input into the

provider of the advice to present a contrary view. It was striking that the express provision in cl. 18.4 of the LFA for a dispute between the CR and the funder to be referred to a KC for a binding opinion, which applied to settlement, was not applicable to a decision by the funder to terminate under cl. 12.1. A termination provision in this form is also contrary to the LF Code, para 13.2.

66. In the face of strong indication from the Tribunal, Mr Brealey KC for Prof Stephan said that his client would reconsider this provision with the funder, and the Tribunal then received confirmation that they had agreed to amend cl. 12.1 to provide that in the event of a dispute by the CR, the provisions of cl. 18.4 would apply to a termination decision as they do to a settlement decision. As so amended, we find that Prof Stephan's LFA is unobjectionable for the purposes of this carriage dispute.

67. Accordingly, in the end, the funding arrangements of the two applications are a neutral factor in choosing between them.

**(5) Litigation Plan**

68. Both PCRs included with their applications detailed litigation plans, pursuant to rule 78(3)(c). Neither PCR sought to criticise the litigation plan of the other. We have reviewed the plans and agree that this is a neutral factor in this case.

**(6) Scope of the Claims**

69. There is a major and significant difference between the scope of the claims which the two proposed collective proceedings seek to pursue. As set out above, the BIRA proceedings are confined to two related heads of alleged abuse: the use of non-publicly available data and the self-preferencing of Amazon Retail in the Buy Box: paras 22-24 above. Prof Stephan's proceedings include those heads, but both the allegations are framed on a broader basis than by BIRA: see para 26 above. He also advances three further allegations, covering the preferencing of FBA merchants over FBM merchants both in the Buy Box and in the eligibility for Amazon Prime, and the anti-discounting policy which is

alleged to reduce competition with other e-commerce platforms and thereby increase platform fees for all merchants.

70. Ms Ford KC emphasised that a broader claim is not of itself a better claim. She referred to the observations of Green LJ in his judgment (with which the Chancellor and Snowden LJ agreed) in *FX* at [148]:

> "The mere fact that one putative class representative crafts a broader claim is not an indication that the claim is preferable. Were it otherwise all class representatives would be falsely incentivised to draft claims as widely as possible to obviate the risk that in a carriage competition having a narrower claim might tell against them. There may be many good reasons why a better articulated and thought-through claim will be narrower and not wider. There might be sensible trade-offs to be made between pursuing the more questionable outer limits of a claim (which might significantly add to costs) and focusing upon a narrower and stronger core claim (which might be more efficient to litigate)."

71. Ms Ford KC referred to the judgment of the Ontario Superior Court in the case of *Kennedy v Akumen Inc* [2022] OJ No 2109, which the Tribunal drew to the parties' attention. That was a carriage dispute between two representatives (Mr Kennedy and Mr Longair) seeking to bring class actions for holders of securities in the defendant company which had issued incorrect financial statements. Referring to the requirement in s. 13.1(4) of the Ontario statute (see para 37 above), J.T. Akbarali J stated (adopting the view of Perell J) that the court has to consider:

> "what is precisely necessary for access to justice to the class members and their particular circumstances and to discourage case theories or the parts of case theories that may be a waste of resources or that may be a drag on the proceeding or that are not worth the trouble or effort needed to achieve accesses to justice."

After analysing the allegations advanced in the rival proceedings, the judge concluded (at para 46):

> "In my view, it cannot be said that the additional aspects of the Longair claim against Akumin and the individual defendants, or the Longair theory of correction, are based on a flawed or toxic theory, nor that advancing that theory would unduly delay or complicate the proceeding. Rather, the broader theory advanced in Longair is more consistent with the goals of access to justice by capturing more viable claims. Moreover, because the Longair action subsumes the Kennedy action, it is likely to be at least as successful as the Kennedy action."

72. Ms Ford KC submitted that the Canadian authority reinforces the view that there is no general rule and that the Tribunal has to weigh up the breadth of the case theory against other factors.

73. We readily acknowledge that in some cases a more narrowly focused approach that can lead to a shorter trial and a more efficient outcome for class members may have distinct advantages. But everything depends on the particular circumstances. A broader approach, advancing more claims, might be more cost-effective if it can be done at proportionate cost. Here, we have two distinct concerns about BIRA's approach.

(1) First, the two allegations of abuse in the BIRA claim are narrowly framed.

(i) The "Data Abuse Conduct" is alleged in terms of the use of non-public data for the purpose of Amazon Retail's strategy and decisions regarding *product entry*. Although that was indeed one aspect of concern regarding the use of such data set out in the CMA Decision, it expressed other concerns as well: e.g. that Amazon Retail is able to use non-public data to approach suppliers of third-party sellers and negotiate terms of supply; that it could be used for Amazon Retail's decisions on stocking and planning inventories, and on setting product prices: see the CMA Decision at para 4.5, and also para 4.6(b)-(c). Such use of non-public data could obviously arise long after Amazon Retail had started selling a product. The EC Decision similarly sets out concerns regarding use by Amazon Retail of non-public data for decisions regarding pricing, inventory planning and management, and on approaches to the merchants' suppliers: see at recitals (116)-(120). However, the claims as framed in BIRA's proceedings do not seek to capture these distinct aspects of data use: see para 26(1) above. By contrast, Prof Stephan's claim form expressly advances these further aspects.

(ii) The "Other Anti-Competitive Behaviour" allegation concerning self-preferencing in the Buy Box is also narrowly framed in terms of more successful product entry, tied to the "Data Abuse Conduct." As Ms Ford KC stated:

> "we do not pursue a standalone allegation of self-preferencing absent the data abuse."

She justified this on the basis that a scenario where Amazon was self-preferencing Amazon Retail products in the Buy Box absent a data abuse "are in practice incredibly narrow." Again, this approach contrasts with that of Prof Stephan, which does not contain any such limitation.

(2) The BIRA claim excludes any allegations of abuse by favouring FBA merchants, whether in selection for the Buy Box or for Prime, and therefore the effect that such conduct could have on the supply of delivery and logistics services. That was a significant part of the competition concerns articulated in the CMA and EC Decisions and the sole basis of the AGCM Decision. By contrast, these allegations are pursued in Prof Stephan's proceedings: see para 26(3)-(4) above. Further, the anti-discounting abuse alleged by Prof Stephan (see para 26(5) above) is also not raised by BIRA. That is a main part of the allegations in the FTC Claim, and while that claim concerns only the US market, the policy of Amazon on which the FTC Claim relies is expressed in the same terms towards merchants in the UK through what Amazon calls its "Amazon Marketplace Fair Pricing Policy".

74. As regards (1), we are not persuaded by the reasons advanced on behalf of BIRA for limiting the two abuse allegations on which it does rely to the effect on Amazon Retail decisions on product entry. It was not the approach of the CMA Decision, reached after a one year investigation, where the bias in favour of Amazon Retail in the selection of offers for the Buy Box is set out as a wholly distinct competition concern: paras 4.8-4.10. The EC Decision also made clear that it regarded the Buy Box conduct as independent of the Data Abuse Conduct: see recital (222) quoted at para 11 above. Moreover, this seems to us logical.

Self-preferencing of Amazon Retail products in the Buy Box could prejudice a merchant who began to sell a competing (or the same) product on the UK Amazon Marketplace long after such a product began to be sold by Amazon Retail.

75. BIRA's theory of harm would not capture consequences unrelated to product entry, and it would therefore not seek damages on that account. On the contrary, its proceedings seek to pursue claims entirely focused on product entry by Amazon Retail. That is accordingly the basis on which its expert economist, Dr Nitsche, has sought to calculate damages, as recognised in BIRA's claim form at para 18:

> "… the Unlawful Product Entry Strategy combined the Data Abuse Conduct with the Other Anti-Competitive Behaviour. That is materially relevant in two ways:
>
> 18.1. More successful entry: The Other Anti-Competitive Behaviour made Amazon Retail entry more successful and therefore more harmful to third-party merchants:
>
> 18.2. Increased likelihood of entry: The increased likelihood of successful entry due to the Other Anti-Competitive Behaviour would be factored into Amazon Retail's entry decisions, increasing the likelihood of entry."

And Dr Nitsche frankly acknowledged in his summary of his expert report:

> "The effects of the Other Anti-Competitive Behaviour will not have been confined to products that experienced Amazon Retail Entry due to the Data Abuse, but these additional effects are not part of my analysis, *as they do not form part of BIRA's Claim*" [emphasis added].

76. As regards 73(2), Ms Ford KC did not seek to suggest that the three further abuse allegations included in Prof Stephan's proceedings are unarguable. That is unsurprising, given that they reflect decisions and actions of various competition authorities. Accordingly, excluding those allegations would deny the class members the potential for compensation for what may prove significant sources of additional harm.

77. The justification advanced by BIRA as to why those additional allegations should not be pursued is summarised as follows in BIRA's skeleton argument (para 14):

> "BIRA does not seek to pursue these matters because they give rise to a conflict between class members and/or are not suitable to be combined in collective proceedings as further explained below. Further, increased fulfilment/logistics fees may well have been passed on to consumers."

78. The proposition that Prof Stephan's allegations gave rise to a fundamental conflict within the class featured prominently in the argument before the Tribunal. BIRA submitted that advancing claims that Amazon's selection of products for either the Buy Box or Prime favoured FBA merchants meant that FBA merchants were the beneficiaries and FBM merchants the victims of the alleged abuse. BIRA focussed on those sales which were made by FBA merchants as a result of the unlawful preferment of those merchants. BIRA submitted that the conflict arose in relation to the proportion of those sales that would transfer from FBA merchants to FBM merchants in the counterfactual, because it was in FBM merchants' interests to maximise this proportion, whereas it was in FBA merchants' interests to minimise it. Since in the counterfactual, where they did not have the benefit of preferential selection, FBA merchants would make lower sales, the difference in the value of sales in those two scenarios, represents the "gain" to FBA merchants as a result of Amazon's unlawful conduct, which would therefore have to be deducted from the damages, relying on the principle set out in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain (The New Flamenco)* [2017] UKSC 43, [2018] 1 All ER 45.

79. For Prof Stephan, submissions countering the conflict argument were developed at the hearing by Mr Carall-Green. In the first place, he emphasised that there is no clear division between "FBA merchants" and "FBM merchants". As Amazon states in its written response in the *Hammond* proceedings:

> "the position is very mixed. Since FBA is offered on a product-by-product basis, many third-party sellers choose to use the FBA service for some (but not all) of the time, or for certain products (and not others)."

Moreover, in the counterfactual, by definition Amazon would not be favouring merchants who used FBA. Therefore, it cannot be assumed that a merchant who had used FBA would similarly use it in the counterfactual. Since the counterfactual removes this advantage of FBA, the merchant might then be using FBM.

The position was quite unlike the conflict that can arise between the interests of direct and indirect purchasers when it comes to pass-on.

80. Furthermore, and significantly, Mr Carall-Green emphasised that it was not the case that advancing Prof Stephan's abuse (3)[12] was only for the benefit of merchants who offered products (or most of their products) using FBM, at the expense of merchants using FBA. The allegation advanced by Prof Stephan, reflecting the competition authority decisions, is that the preferencing of FBA products in the Buy Box had the effect of increasing the price for FBA services (because of increased demand) *and* of FBM services (because rival logistics suppliers could not achieve scale), in other words that it led to an overcharge on logistics services: see para 27(2) above. Furthermore, by increasing costs of FBM, it also depressed multi-homing and thereby competition between Amazon and other e-commerce platforms, leading to higher market-place related fees. That also affected all merchants. Accordingly, all merchants, whether they supplied products (or most of their products) FBA or FBM, have an interest in pursuing this alleged abuse.

81. That is not affected should merchants using FBA have to give credit for the estimated profit they made through the preferential selection for the Buy Box by reason of the abuse (on the basis that in the counterfactual their products had a lower chance of being in the Buy Box). It is only if that 'lost profit' was so large as to extinguish the logistics overcharge (and indeed the resulting overcharge on market-place fees) that merchants using mostly FBA would have no interest in making this claim and would therefore have a conflict with merchants using mostly FBM. Mr Carall-Green submitted that this could arise only if there was a very substantial diversionary effect of sales to sellers using FBA by reason of this alleged abuse. That would be contrary to the view of Prof Stephan's economic expert, Dr Houpis, who considers it to be a very unlikely scenario, and that is accordingly not Prof Stephan's case. And, Mr Carall-Green said, it seems inherently unlikely that Amazon for its part would seek to argue that any preferential treatment had a large diversionary effect on sales.

[12] See para 26(3) above.

82. We accept that one cannot be clear at this very early stage of the proceedings how large or small the diversionary effect of the preferencing of products sold using FBA might be on the level of sales of such products. We acknowledge that although many merchants use both FBA and FBM, there may well be a significant number of merchants who never use FBA. However, we do not think it is at all likely that the diversionary effect would seriously prejudice the interests of those merchants, largely for the reasons that Mr Carall-Green put forward. In particular, we agree with his argument that it would not reduce the total pot of aggregate damages. Any diversion of sales in the counterfactual from sellers using FBA would be to sellers using FBM, and so would give rise to a claim by those "FBM merchants" for lost sales. The volume of those sales by definition equals the volume of sales which "FBA merchants" would not make in the counterfactual. If the "FBA merchants" had to give credit for the profit they made on those sales, which would be a matter for legal argument and which Prof Stephan does not concede, that would not affect the total sum of damages for this head of abuse.

83. Moreover, any such credit would be as against that part of the damages which amounted to the FBA merchants' loss. We do not see anything in the *Fulton Shipping* case which would require the credit to be set against the loss of other parties who had not received the benefit, i.e. here, the FBM merchants. Such an approach would be wholly inconsistent with the law of mitigation. CA s. 47C(2) allows the Tribunal to calculate damages "without undertaking an assessment of the amount of damages recoverable in respect of each represented person." That is framed in permissive terms. There is no requirement that, when calculating an award of aggregate damages, the Tribunal must do so on a monolithic basis; it may do so by aggregating the damages it determines were suffered by different groups within the class, or ascribed to certain kinds of transactions carried out by some groups and not others. Accordingly, any credit for 'lost sales' by "FBA merchants" would be as against the logistics overcharge by Amazon to those merchants and would not diminish the total damages attributable to "FBM merchants"; and insofar as the latter can show lost profits, they would be entitled to interest on that loss.

84. Furthermore, we do not accept Ms Ford KC's argument that pursuing the logistics abuse (i.e. the favouring of products sold using FBA) is against the interests of "FBA merchants". Dr Houpis' preliminary estimate is that such merchants suffered an overcharge of about 25% on the Amazon logistics fees. Even after assuming a 50% pass-on rate to customers, he estimates that such merchants still suffered a loss of around £1 billion. Allowing that Ms Ford KC may be correct in submitting that Dr Houpis did not, for this purpose, take into account the potential reduction in the volume of sales using FBA in the counterfactual, the FBA merchants' damages from the logistics overcharge appear nonetheless to be very substantial. Ms Ford KC put forward a postulated scenario where the potential proportion of sales diverted away from FBA merchants in the counterfactual had the effect of eliminating the FBA merchants' claim for the logistics overcharge, if the 'lost profits' on those sales were brought into account. It is of course possible to come up with figures and assumptions which have that outcome, which we would add depends also on the rate of pass-through. But for present purposes, we think it is sufficient to say that having regard to Dr Houpis' analysis, to which we were taken in some detail, we do not regard that as very plausible. It is just the sort of "speculative example" in which it is inappropriate to engage at this stage of a collective proceedings: see the observation of the Court of Appeal in *London & South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ 1077 at [73]-[74].

85. Altogether, we consider that the position here is very different from that which arose in *Trucks*. There, reliance on pass-on of the overcharge on new trucks to used trucks (i.e. on the subsequent re-sale of a new truck) was the very foundation of the claims on behalf of purchasers of used trucks. They would necessarily seek to press for a high level of pass-on, whereas purchasers of new trucks would wish for a low level of pass-on since that was a direct credit against their claims. This therefore gave rise to a fundamental conflict of interest.[13]

86. Although Mr Carall-Green suggested that the conflicts point advanced by BIRA applied only to Prof Stephan's abuse (3), we agree with Ms Ford KC that it

[13] Even in those circumstances, the Court of Appeal did not hold that the claims could not be combined in one set of proceedings, but required a separate sub-class representative, with separate legal and economic advice, to be appointed for the purchasers of used trucks.

applies also to abuse (4), concerning eligibility for Prime, albeit with less force since products offered by merchants using Royal Mail and other SPF Carriers for delivery (and therefore not "FBA merchants") would still be eligible for Prime. But for the reasons set out above, we consider that advancing allegations (3) and (4) is in the interests of all merchants, whatever logistics service they chose to use. And in our judgment, there is no overwhelming problem of conflict of interest which hinders Prof Stephan from advancing those allegations effectively on behalf of them all.

87. Ms Ford KC submitted that a conflicts objection also applied to Prof Stephan's abuse (5): i.e. Amazon's alleged anti-discounting conduct. That submission was not put forward with much vigour, and it is misconceived. The argument, as we understood it, was that since one consequence of abuse (5) was alleged to be a reduction in multi-homing and resulting demand for third-party logistics services, and therefore a contributory cause of the higher cost of third-party logistics services, such loss was suffered by FBM merchants and not by FBA merchants. However, that simply means that this aspect of the harm resulting from abuse (5) caused no loss to merchants using FBA. It does not give rise to any conflict of interest. As the Tribunal stated in *Ennis v Apple Inc* [2024] CAT 58 (at [18(3)]: "[t]he existence of differences between the claims of individual members of the class does not mean that there are conflicts of interest between them." Moreover, FBA merchants were of course equally affected by the other alleged consequence of abuse (5): higher prices for the use of e-platform marketplaces.

88. The abuse allegations advanced in the BIRA proceedings are encompassed within the allegations in Prof Stephan's proceedings. The breadth of Prof Stephan's proceedings would no doubt enlarge the scope of a trial and therefore make it more complicated. That can be a concern. However, Prof Stephan's proceedings enable claims to be made collectively for merchants regarding further forms of tenable abuse, potentially causing them substantial loss, for which they will not have the opportunity to recover compensation in the BIRA proceedings. Adopting the language of the judgment in the *Kennedy* case (para 71 above), we find that Prof Stephan's proceedings are "more consistent with

the goals of access to justice by capturing more viable claims" and that this is a powerful factor in their favour.

**(7) Methodology**

89. The applications of both BIRA and Prof Stephan were accompanied in the usual way by detailed reports from an economic expert explaining how they would seek to show the causation of loss and estimate the consequent damages, albeit with the important proviso from the experts that their reports were preliminary and prepared in advance of the material they would expect to receive from Amazon. BIRA's expert is Dr Rainer Nitsche of E.CA Economics. Prof Stephan's expert is Dr George Houpis of Frontier Economics.

90. Both Dr Nitsche and Dr Houpis are well qualified and experienced economic experts. However, they adopted very different approaches to the two abuses which formed part of the two cases, and of course Dr Houpis further explained how he proposed to approach the further abuses alleged only in Prof Stephan's proceedings. In view of the length of their reports, at the Tribunal's request each expert produced a 20-page summary for the purpose of the carriage dispute, which we found very helpful.

91. Dr Nitsche proposed two complementary approaches, which he described as a "broad brush" approach and an "econometric modelling" approach:

(1) The "broad brush" approach combines existing historic data on price and volumes on the UK Amazon Marketplace with "assumptions" and alternative scenarios to produce estimates of the sales and volumes in a counterfactual world (absent the alleged abuse).

(2) In the econometric approach Dr Nitsche begins by estimating the information advantage with a regression model that relates the non-public data to the public data, interpreting the 'residuals' of the model as the Data Delta. This is followed with a two stage estimate of harms via an "Entry Equation" and a "Revenue Equation". The Entry Equation is estimated by a regression model which includes public data and the

Data Delta. Once this is determined, setting the impact of the Data Delta at zero gives an estimate of counterfactual Amazon Retail entry. Separately, Dr Nitsche will estimate empirically how the revenue earned by merchants is determined by a number of factors, including the presence of Amazon Retail. He will then simulate merchants' counterfactual revenue by inserting the counterfactual Amazon Retail entry obtained from the Entry Equation.

92. Dr Houpis also set out two main approaches which he describes as algorithmic ("bottom-up") and econometric ("top-down"):

(1) Dr Houpis' favoured approach entails 're-running the algorithms' absent the alleged abuse(s) to generate the counterfactual. The outcomes with the algorithms prior to modification following commitments to the competition authorities are the factual.

(2) The econometric approach is intended to complement the algorithmic approach, if the latter can be only partially implemented, and be a substitute for it, if it proves unworkable. It varies for each abuse alleged by Prof Stephan and does not rely on access to the algorithms. And in some cases, such as for the dynamic deterrence effect, it will be further informed by before and after regression analysis e.g. assessing whether Amazon Marketplace fees were higher during the infringement period than before.

93. BIRA launched a sustained assault on Dr Houpis' primary method, contending that it was impractical and, in short, that such 'replication' of the algorithms as they were at the relevant time, 'stripping out' those elements which were responsible for the abuse, could not be done. In that regard, with the permission of the Tribunal, BIRA submitted a further expert report from Mr Julian Kervizic, a data scientist and partner at WiseAnalytics. This report emphasised the complexity and evolving nature of the Amazon algorithms. In Mr Kervizic's opinion, "it will not be possible to create a 'pro-competitive' version of [the relevant Amazon algorithms] over the period of [the] alleged abuses", or to

know how consumers would respond to the choice such algorithms would have presented.

94. In response, Prof Stephan submitted a report from Mr David Dorrell, now the head of data science at Frontier Economics and previously the Director of Data Science at the CMA. Mr Dorrell explained from his experience various methods that could be used, e.g. to alter the input data and re-run these algorithms or to use machine learning to construct a comparable algorithm. More specifically, he referred to what the CMA had done to analyse and monitor the modified Amazon algorithms (and their outcome), following their adjustment in accordance with the commitments in the CMA Decision. He also stressed the flexibility of the approach to quantify the effects, focusing on the significant changes which had been made to the algorithms in the relevant period. He recognised that evaluation of Amazon's algorithmic system is challenging, but said that the feasibility of each method cannot be determined before technical investigation of the algorithms through disclosure of technical documentation, data and code. In his opinion, "there is a realistic prospect" that Dr Houpis will be able successfully to implement the approaches he put forward "to re-run and evaluate one or more of the systems underpinning the abusive conducts that he is investigating."

95. BIRA sought to criticise Dr Houpis for having to rely on another expert to support his approach. We reject that criticism. Mr Dorrell is Dr Houpis' colleague who had contributed to Dr Houpis' methodology in the course of its development, and it is entirely appropriate that Dr Houpis should rely on the expertise of a data scientist, which is of course different from that of an economist.

96. Faced with such conflicting expert evidence, we obviously cannot come to any firm conclusion at this point. We can only say that we found Mr Dorrell's evidence reassuring, and we do not see that we can possibly conclude that Dr Houpis' primary approach is not feasible or will not produce sufficiently robust results. Moreover, it has the benefit of more directly tracking the effects of Amazon's alleged abuses which were implemented through the algorithms (i.e. the use of non-public data and the preferencing of Amazon Retail and FBA),

and thus mirrors the approach of the CMA and Commission, which accepted adjustment to the algorithms as meeting their competition concerns. Moreover, insofar as such approaches should not be practicable, we note that Dr Houpis has a back-up, econometric approach. Altogether, we found that Dr Houpis' comprehensive report presented an impressively well-developed and thought through methodology.

97. By contrast, we have some concerns regarding Dr Nitsche's methodology. To help us get a better understanding of what he proposes, at the Tribunal's request he appeared at the hearing to answer some clarificatory questions.[14] While he showed, as one would expect, a good understanding of the legal and economic framework, his broad brush approach appeared to us to be based on very simplistic assumptions of what is likely to have happened in the counterfactual, essentially using the actual entry of independent merchants (in the factual world, where Amazon was committing the two forms of alleged abuse on which BIRA relies) as a proxy for what Amazon Retail itself would have done in the counterfactual world where there was no such abuse. It seems to us that Dr Nitsche's methodology really depends on his econometric approach. The logic of that is sound, but it depends on a number of different specifications at each stage, requiring adequate and reliable data.

98. Moreover, BIRA's case is not confined to the effect of the abuse on Amazon Retail entry following a merchant's entry with the *same* product, or following sudden success of an existing product. BIRA also alleges that Amazon Retail's entry with a *similar* product will have been affected. Dr Nitsche explained that he would use the techniques well developed for merger investigations to identify such similar products. However, a merger investigation involves a limited number of products, and even there such questions of market definition can be data intensive and controversial. Here, Amazon had over 25,000 subcategories of product on its marketplace in 2022. While Dr Nitsche said that techniques of analysing big data are such that this is manageable, we consider that determination of what products are "similar", across almost the entire field of retail sale, for the purpose of giving Amazon Retail an advantage in deciding on

[14] Dr Nitsche did not give sworn evidence, and he was not subject to cross-examination.

entry, is extremely complex, and difficult to do on a robust basis that withstands challenge.

99. We are certainly not saying that Dr Nitsche's econometric methodology is not workable, or that it fails the *Microsoft* test. But when compared to Dr Houpis' alternative, we consider that Dr Houpis' methodology is preferable. We should add that Dr Houpis' approach also has the advantage that it is similar to the approach proposed by the economic expert in the Hammond proceedings. If the collective proceedings on behalf of merchants and the Hammond proceedings on behalf of consumers should both be certified, and then heard together, it is highly desirable that they should use the same basic approach to the quantification of the effects of that aspect of Amazon's conduct on which both proceedings rely.

## F. CONCLUSION

100. In our judgment, the advantage which we find in BIRA as a class representative is clearly outweighed by the factors which favour Prof Stephan: i.e. the scope of the claims and the expert methodology. Accordingly, we consider that Prof Stephan's proceedings are the more suitable to go forward to a certification hearing.

101. The BIRA proceedings will accordingly be stayed with liberty to apply to lift the stay if Prof Stephan's application for certification were to fail or if Prof Stephan were to be granted a CPO which is subsequently revoked.

102. This judgment is unanimous.

The Hon. Mr Justice Roth
Acting President

Charles Bankes

Keith Derbyshire

Charles Dhanowa C.B.E., K.C. (*Hon*)
Registrar

Date: 20 January 2025