Neutral citation [2025] CAT 66

Case Nos: 1595/7/7/23
1644/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 October 2025

Before:

SIR PETER ROTH (CHAIR)
CHARLES BANKES
KEITH DERBYSHIRE

Sitting as a Tribunal in England and Wales

BETWEEN:

ROBERT HAMMOND

Class Representative

- v -

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

Defendants

AND BETWEEN:

PROFESSOR ANDREAS STEPHAN

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 LTD

Defendants

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. By its judgment of 24 July 2025, [2025] CAT 42 (the "Judgment"), the Tribunal granted applications for a collective proceedings order under s. 47B of the Competition Act 1998, in separate proceedings brought by Mr Robert Hammond and by Professor Andreas Stephan as proposed class representatives against, respectively, four and five companies in the Amazon group. In this ruling we use the same abbreviations as in the Judgment. All paragraph references in this ruling are to the Judgment unless otherwise stated.

2. The Hammond Application was on behalf of a class of consumers and the Stephan Application was on behalf of a class of merchants. However, as explained in the Judgment, the heads of abuse alleged in the two proceedings overlap and, in particular, the heads of abuse alleged in the Hammond Action are also alleged in the Stephan Action. For that reason, the two applications were heard together.

3. On 14 August 2025, Amazon applied for permission to appeal the Judgment (the "PTA Application") in relation to certification of both the Hammond Action and the Stephan Action. On 19 September 2025, short written submissions in response were served on behalf of Mr Hammond and Prof Stephan. An appeal to the Court of Appeal lies only on a point of law: CA s. 49(1A).

4. The other development of note since the Judgment is that, on 2 September 2025, the Regional Administrative Court of Lazio dismissed Amazon's appeal against the finding of infringement in the AGCM Decision, but reduced the penalty: see at [17]-[18]. Amazon has a right of further appeal to the Italian Council of State.

B. HAMMOND GROUNDS OF APPEAL

5. Amazon's PTA Application puts forward two independent grounds.

Hammond Ground 1

6. Mr Hammond's claim raised two allegations of abuse, which he termed "exploitative abuse" and "exclusionary abuse", although both arise from Amazon's preferencing of products sold by Amazon Retail or FBA: [116]-[117]. In reality, therefore, these should more appropriately be regarded as two different forms of effect (and damage) alleged to result from the same conduct: i.e. exploitative effect and exclusionary effect. The Tribunal found that the method put forward by Mr Hammond's economic expert for assessing the "exploitative abuse" met the standard for certification: [118]-[125]; but not his method for assessment of the "exclusionary abuse": [126]-[131].

7. However, the Stephan Action also alleged the same consequences (among others) as resulting from the same conduct by Amazon, and the different methodology put forward by Prof Stephan's economic expert was found to meet the standard for certification. Accordingly, on the basis that the two actions would be tried together, and to the extent that the two actions alleged the same abuse and causation, the two class representatives would be expected to use a joint expert, the Tribunal held that the certification of the Hammond Action could include the "exclusionary abuse" on the basis that Mr Hammond will use the methodology of Prof Stephan's expert: [133]-[134].

8. Amazon contends that this was impermissible and that the Tribunal should have refused to certify the Hammond Action as regards the exclusionary abuse. It relies in particular on the contention that the methodology of Mr Hammond's expert was "positively inconsistent" with that of Prof Stephan's expert and that Mr Hammond's pleading would require amendment.

9. Even if this can be said to be a point of law, we consider that it has no real prospect of success. Not only is it within the Tribunal's case management powers, but it is also sensible, to direct that these two actions be tried together, and that insofar as they allege the same abuse causing the same damage, the class representatives should use a single joint expert: see *Stellantis Auto SAS v Autoliv AV* [2024] EWCA Civ 609, [2024] 1 WLR 4728. Once that course is followed, the fact that in his report prepared for the purpose of certification at the outset of the proceedings Mr Hammond's expert (Dr Pike) expressed an opinion inconsistent with that of Prof Stephan's expert (Dr Houpis) is irrelevant,

unless Mr Hammond took the position that he is not willing to proceed on the basis of Dr Houpis' methodology. Unsurprisingly, the submissions for Mr Hammond in response to the PTA Application make clear that this is not the case and that Mr Hammond is content to proceed on that basis.

10. Of course, Amazon can seek to refer to the contrary opinion of Dr Pike, if it wishes, when cross-examining Dr Houpis at trial. The PTA Application is therefore not correct to assert that Dr Pike's reports are being "struck from the record".

11. As for the need to amend the pleading, even if that were correct, the proceedings are at their outset. No defence has yet been served. Amazon rightly does not suggest that an application to amend would be refused.

12. Moreover, we should state that we do not in any event accept that Dr Pike's evidence is wholly inconsistent with that of Dr Houpis. The PTA Application refers to passages in Dr Pike's reports where he refers to Amazon's FBA prices being reduced by reason of its discrimination in favour of FBA. However, Dr Pike served three reports (an original report, a reply report, and a summary report) and in passages in his original report he referred to the possibility of Amazon *increasing* FBA charges by reason of the abuse. Hence at para 392 of his first report, as updated on 26 March 2024, Dr Pike stated:

> *"… there are three potential effects on FBA.*
>
> *a. First there might be no overcharge, at least not yet….*
>
> *b. Secondly, there might be an overcharge, not relative to the prices of rival fulfilment services in the market, but relative to an even lower price that Amazon might have offered absent the discrimination in order to build its share of fulfilment and obtain the associated economies of scale.*
>
> *c. Thirdly there might have been an overcharge in the sense that Amazon set prices for FBA that were higher than it would have done but-for the conduct, and that are relatively more expensive than rival's prices…"*

The inconsistency in Dr Pike's approach to this question in his subsequent reports was indeed one of the reasons why we found that his evidence on this part of Mr Hammond's case was unclear and deficient.

13. If, as Amazon would wish, the Tribunal were to refuse to certify this part of the Hammond Action, the Tribunal would still be asked in the Stephan Action to find that there was an effect on the prices for fulfilment services and, in consequence, on competition between marketplaces, on the basis of Dr Houpis' evidence, which caused higher prices for marketplace services to merchants. Dr Houpis accepts that to some extent those higher prices would have been passed on to consumers, and such pass-on would fall to be deducted from the merchants' damages. But the consumer class, represented by Mr Hammond, which is claiming in the same trial, would then be unable to recover the damages they suffered as a result of the pass-on being determined by the Tribunal. In the event that Prof Stephan is successful, the inability of the consumer class to recover damages would be a perverse result, constituting a denial of justice to consumers and a pure windfall for Amazon.

Hammond Ground 2

14. The terms of Mr Hammond's LFA, including the level of the funder's remuneration, were the subject of particular attention at the hearing: [49]-[66]. The Tribunal indeed required Mr Hammond to file a further witness statement as to the steps he took to secure funding on favourable terms: [67(1)].

15. Amazon seeks to rely on the fact that, in that witness statement, Mr Hammond said that one difficulty in obtaining funding was the parallel application for certification by Ms Hunter. Since that 'carriage dispute' was resolved in Mr Hammond's favour (by the *Hammond/Hunter* judgment), Amazon contends that the Tribunal should now have required Mr Hammond to go back into the market "to investigate whether better terms for the class were available."

16. That is a course the Tribunal could have taken. It would obviously have caused yet further delay to the Hammond proceedings which were started as long ago as 7 June 2023. Progress was delayed, first, by the need to resolve the carriage dispute with Ms Hunter; then to await resolution of the separate carriage dispute as to who should be the class representative for the merchant class, determined in Prof Stephan's favour by the *Stephan/BIRA* Judgment; and further, by the

applications for permission to appeal against both the *Hammond/Hunter* judgment and the *Stephan/BIRA* Judgment.

17. The Tribunal indeed expressed some concern about the potentially very high level of return for the funder under Mr Hammond's LFA: [67(2)]. Instead of declining to certify unless and until Mr Hammond first investigated whether he could get a LFA with a lower return for the funder, we took the course of making clear that the funder's fee was not approved and that the Tribunal would carefully scrutinise the level of the funder's return following an award of damages or settlement: [66] and [67(2)]. As stated at [64], that approach has been endorsed by the Court of Appeal. We cannot see any real prospect of this decision being held to be irrational so as to give rise to an error of law.

C. STEPHAN GROUNDS OF APPEAL

18. As regards the Stephan Action, the PTA Application also puts forward two independent grounds of appeal.

Stephan Ground 1

19. This in turn incorporates two sub-grounds, both challenging the Tribunal's assessment of the methodology of Prof Stephan's economic expert, Dr Houpis.

20. First, Amazon contends that Dr Houpis' methodology fails to have a method for distinguishing which use by Amazon of NPSD is an abuse and which is not an abuse. However, "abuse" is not an economic concept; it is a legal concept. The question of whether or not conduct is an abuse is a matter of law for the Tribunal to determine. Dr Houpis very properly acknowledges this, and that is not a ground for criticism of his approach. As to whether the use by Amazon of NPSD has anti-competitive effect, Dr Houpis' position is that all such use is anti-competitive, albeit with different degrees of effect. Amazon states that it regards <u>all</u> its use of NPSD as pro-competitive. If that is correct, Prof Stephan's abuse (1) will fail completely. But this is clearly a matter for argument at trial.

21. The Tribunal considered Dr Houpis' detailed and careful reports at some length at [82]-[111]. Should Prof. Stephan succeed as regards only some forms of use of NPSD, then, as Amazon acknowledges, the Tribunal found that Dr Houpis' methodology for analysing the effect of the use of that data could be adjusted to apply in respect of only some forms of use of the data. Amazon does not seek to challenge that assessment.

22. Secondly, Amazon contends that Dr Houpis' methodology in respect of Prof Stephan's abuses (3) and (4) is deficient because of an omitted variable in respect of FBM fees in the proposed regression analysis.

23. This point was the subject of contention between Amazon's economic expert, Mr Holt, and Dr Houpis, as set out in Mr Holt's reports and Dr Houpis' reply report. It was further argued at the CPO hearing and is addressed at [106]. Bias by reason of an omitted variable is a well-known cause for error in constructing a model for regression analysis. Dr Houpis is of course aware of this, and he has not ignored FBM fees. He said in his report that his specification should pick up both:

> *"a. The direct impact of the potentially-abusive conducts on FBA fees; and*
>
> *b. The indirect impact of the potentially-abusive conducts on FBA fees due to changes in FBM fees (as a result of the potentially-abusive conducts) likely impacting FBA fees."*

We found that Dr Houpis was probably correct in his response as to why his model does not give rise to omitted variable bias as regards the FBM fees: [106, 2nd sentence]. Amazon effectively seeks to re-run this argument, and further contends that the Tribunal should not have accepted that the model could be subject to "various diagnostic tests and sensitivity analysis" without Dr Houpis spelling out the details of such potential tests and analysis.

24. However, this ignores our primary finding, on the contested economic evidence, that Dr Houpis' explanation was probably correct and that his model will not be biased due to an omitted variable. Since we consider that Dr Houpis' approach is robust, the position is very different from *McLaren*, on which the PTA Application seeks to rely (at para 28(c)). There, the Tribunal had found that it

seemed "almost inevitable" that the class representative would have to modify or adapt his methodology in due course. Here, our view is the opposite. The statement in the Judgment that the model can be subject to various diagnostic tests and sensitivity analyses is standard practice when a model is challenged, and the development of econometric models is always an iterative process. We regard it as wholly unnecessary for Dr Houpis to spell that out in detail at this preliminary stage.

25. Moreover, we consider that this is a question of the evaluation of the economic evidence, not a question of law. We think this is the kind of argument on a PTA application which falls within the recent statement of Green LJ (with whom Newey LJ agreed) in his full judgment refusing permission to appeal in *Le Patourel v BT Group PLC* [2025] EWCA Civ 1061 at [12]:

> *"Both the nature of the evidence and the institutional composition of the CAT are factors affecting the breadth of the margin of discretion that must be accorded to the CAT and this impacts upon the sorts of alleged errors that the Court will recognise as amounting to viable grounds of appeal …"*

26. Accordingly, we consider that this ground does not involve points of law; and in any event it does not have a real prospect of success.

Stephan Ground 2

27. Amazon contends that the Tribunal erred in finding that there was no conflict of interest in the proposed class. This ground is a re-argument of the points made at the hearing and addressed at [140]-[147]. Amazon argues that 'FBM sellers' will be disadvantaged if their potential claim for lost sales is not taken into account on distribution of damages. However, as stated at [142], the fact that 'FBM sellers' might have additional potential claims which are not being advanced in the proceedings does not mean that there is a conflict in the conduct of the claims which are being advanced. That is therefore very different from the position in the *Trucks* case: see at [146]. As regards the distinct stage of distribution, it is established that distribution does not have to be compensatory in the sense of distinguishing between the different extent of loss suffered by different class members: *Mastercard Inc v Merricks* [2021] UKSC 51, [2021] 3 All ER 285.

28. As regards Dr Houpis' approach to the measurement of the overcharge on fulfilment and marketplace fees, the issue is not whether Dr Houpis intends to calculate and use the diversion rate as an *input* in his methodology to measure the overcharge, but that as a matter of fact, the greater the degree of diversion from FBM to FBA, the higher will be the overcharge that results from greater demand for FBA services and reduction in scale for other fulfilment providers serving supplying FBM. Therefore sellers using FBA, sellers using FBM, and sellers using both FBA and FBM, all have an interest in contending that there was a high rate of diversion. The position is explained by Dr Houpis in his further report responding to Amazon's expert, Mr Holt: Houpis 3 at paras 280-283a.

29. Moreover, we note that the objection to certification of the Stephan Action on the grounds of conflict between 'FBA sellers' and 'FBM sellers' was first raised by BIRA in the carriage dispute. It was considered and dismissed in the *Stephan/BIRA* Judgment at [78]-[87], and the present Judgment at [144] relies also on what was said at [84] in that earlier judgment: i.e. that considered overall, the inclusion of 'FBA sellers' in the proceedings is clearly in their financial interest. The conflicts argument was further considered and rejected by the Chancellor in his fully reasoned order refusing BIRA permission to appeal on that point: CA-2025-000403, Order of 18 March 2025, paras 3-5. In contrast with BIRA, which sought to represent the class, the position of Amazon is entirely opportunistic. It seeks, in its own commercial interests, to suggest a conflict within the class as an obstacle to the certification of these claims against it, although no such concern has been raised by any of the class members, who include, as Amazon has pointed out,[1] some substantial merchants well able to assess the position.

30. Accordingly, we do not consider that this ground has any real prospect of success.

CONCLUSION

[1] In support of its previous argument that any certification should only be on an opt-in basis.

31. For the reasons set out above, permission to appeal is refused.

32. The parties are asked to prepare a draft order accordingly.

33. This judgment is unanimous.

Sir Peter Roth
(Chair)

Charles Bankes

Keith Derbyshire

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

Date: 21 October 2025