COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1404/7/7/21

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 10 June 2021 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by David Courtney Boyle and Edward John Vermeer (the "Proposed Joint Class Representative") against (1) Govia Thameslink Railway Limited; (2) The Go-Ahead Group PLC; and (3) Keolis (UK) Limited (the "Respondents/Proposed Defendants"). The Proposed Joint Class Representative is represented by Maitland Walker LLP, 22 The Parks, Minehead, Somerset, TA24 8BT (Reference: Adrian Render / Julian Maitland-Walker).

The Proposed Joint Class Representative makes an application for a collective proceedings order permitting them to act as the class representative bringing opt-out collective proceedings ("the Application").

The purpose of the Application is to enable the continuation of collective proceedings claiming damages for loss suffered by rail passengers travelling on the London-Brighton mainline as a result of pricing and other practices of the First Proposed Defendant (Govia Thameslink Railway Limited or "GTR") that constitute abuse of dominance in breach of Chapter II of the Act (the "Chapter II Prohibition"). The Second and Third Proposed Defendants are the two controlling parent companies of GTR (through Govia Limited) and are therefore said by the Proposed Joint Class Representative to be liable on a joint and several basis.

The proposed collective proceedings would combine "standalone claims" under section 47A of the Act for damages caused by alleged breaches of statutory duty by the Respondents/Proposed Defendants. In summary, the Application states:

1. GTR is an undertaking which, *inter alia*, operates rail services on point-to-point routes on the London-Brighton mainline. Since July 2015, the franchise entrusted to GTR on the London-Brighton mainline has included the train brands Gatwick Express, Southern, and Thameslink.

2. GTR is dominant on the applicable point-to-point routes on which it operates trains on the London-Brighton mainline outside TfL Travelcard Zones 1-6.

3. The regulatory regime (including the conditions of travel with passengers) to which GTR is subject does not entitle GTR to issue fares restricting travel to only one or two of the three train brands it operates on the London-Brighton mainline. Brand-restricted fares unlawfully limit rail passengers' rights that the regulatory regime grants them to travel on any of GTR's trains along permitted routes on the London-Brighton mainline for the flow[1] to which the fare relates. Moreover, GTR, as lead operator for the flows in question, is not permitted to issue fares dedicated to its own trains (except for advance fares limited to a single train and first-class fares), let alone dedicated to individual GTR brands of train.

4. In breach of the regulatory regime, GTR has at all material times issued and issues fares restricting travel on the London-Brighton mainline to only Southern-branded trains ("Southern Only" fares) or Thameslink-branded trains ("Thameslink Only" fares) (together with Southern Only fares, "Single-Brand" fares) or to only Southern-branded and Thameslink-branded trains ("Not Gatwick Express"

[1] A flow is a permitted route or group of permitted routes between the origin and destination stations (or groups of stations) via any other stations or within a particular geographic area or areas (zone).

fares or "Dual-Brand" fares). At the same time, GTR has charged higher prices for fares permitting travel on all three GTR train brands ("Any Permitted" fares) as compared with Single-Brand and/or Dual-Brand fares on the same flows and has charged higher prices for Not Gatwick Express fares as compared with Single-Brand fares on the same flows.

5. The June 2017 Gibb Report to the Department for Transport relating to the GTR Franchise (the "Gibb Report") found that most rail passengers prefer the flexibility of the Any Permitted fares especially when services are unreliable (which the Gibb Report also found to be the case). The Gibb Report further expressed concern that the fare structure was influencing demand in such a way that train capacity was not optimally used, resulting in worse overcrowding and causing delays.

6. Since the fares that enable rail passengers to recover their rights in whole or in part are more expensive than the cheaper more-restricted fares, rail passengers who have purchased Any Permitted or Not Gatwick Express fares have suffered loss and damage by paying higher prices for travel rights they should be afforded in any event. Rail passengers should have been entitled to purchase the cheaper Single-Brand or Dual-Brand fares without the brand restrictions imposed.

7. Further, GTR has at all material times charged rail passengers higher prices when they tap in or out with Oyster Pay-As-You-Go ("PAYG") or other contactless payment cards at platforms 13 and 14 at London Victoria as compared with other platforms at London Victoria. This typically involves Gatwick Express trains, although Southern trains may also use platforms 13 and 14 at London Victoria, while at times Gatwick Express trains may use other platforms at London Victoria. Given that (except in the case of advance fares) the regulatory regime entitles rail passengers to travel on any GTR train brand on any permitted route between London Victoria and Gatwick Airport without paying a price premium for travelling on a particular GTR train brand, such rail passengers have suffered loss and damage through paying those higher prices.

8. Further, GTR has at all material times subjected rail passengers to penalty and excess fares in circumstances where rail passengers are caught by ticket inspectors travelling on train brands of GTR which are unlawfully excluded by the lower-priced fares purchased by those passengers. Since the lower-priced fares should have entitled such rail passengers to travel on any of GTR's train brands on the London-Brighton mainline, those passengers have suffered loss and damage through the imposition of penalty fares and excess fares.

9. GTR has at all material times misinformed and misinforms rail passengers that it is entitled to issue brand-restricted fares and charge a premium for Any Permitted and Not Gatwick Express fares on the basis – *quod non* – that Gatwick Express, Southern, and/or Thameslink are distinct train operating companies or different trading entities for ticketing purposes. Moreover, the Gibb Report found that the self-service nature of Oyster and contactless card payments may mean that rail passengers were paying more for journeys when tapping in and out at London Victoria and that they were not taking advice from booking office clerks or seeing a range of fares available offered on ticket vending machines.

10. These practices constitute abuse of dominance contrary to Chapter II of the Act on the part of GTR on the relevant markets on which it is dominant and affect trade within the United Kingdom by: (a) directly or indirectly imposing unfair purchase or selling prices; (b) directly or indirectly imposing unfair trading conditions; and/or (c) applying dissimilar conditions to equivalent transactions.

11. Rail passengers purchasing the more expensive Any Permitted fares should have been entitled to purchase the cheaper Single-Brand or Dual-Brand fares without the brand restrictions imposed and have therefore suffered loss and damage. Rail passengers purchasing the more expensive Not Gatwick Express fares should equally have been entitled to purchase cheaper Single-Brand fares and have therefore suffered loss and damage. Rail passengers tapping in or out at London Victoria platforms 13 and 14 have suffered loss and damage through having higher charges imposed as compared with tapping in or out at other platforms at London Victoria. Rail passengers required to pay for penalty and excess fares have suffered loss and damage as they should not have been required to pay such fares.

Accordingly, the proposed class comprises any person who between 1 October 2015 and the date of final judgment or earlier settlement of the claims purchased or paid for:

(a) Any Permitted fares (tickets) issued by GTR for travel in either direction between stations on the London-Brighton mainline (including fares covering travel on London Underground) but excluding fares for travel exclusively within the Travelcard Zones;

(b) Not Gatwick Express fares issued by GTR for travel in either direction between stations on the London-Brighton mainline (including fares covering travel on London Underground) but excluding fares for travel exclusively within the Travelcard Zones;

(c) Train travel where a passenger taps in or out at platforms 13 and 14 at London Victoria with Oyster PAYG or other contactless payment cards when travelling to or from another station on the GTR train network (including stations north of London); and/or

(d) Penalty fares or excess fares when travelling on the London-Brighton mainline on a GTR train brand excluded by the relevant fares originally purchased by the person.

The proposed collective proceedings are brought on an opt-out basis and seek an aggregate award of damages.

The Proposed Joint Class Representative submits that it would be just and reasonable for them to act as class representative because:

1. They will act fairly and adequately in the interests of the class members:

    (a) Mr Vermeer, an IT expert and rail passenger campaigner, and Mr Boyle, a journalist, author and rail passenger campaigner, each have considerable knowledge of the GTR Franchise not least through engaging in various "passenger interest" matters over a considerable number of years. They are both experienced rail passenger campaigners and spokespersons for rail passengers' interests;

    (b) Mr Vermeer and Mr Boyle are acting in the proposed class's interest and have agreed to waive their entitlement to their own individual compensation out of class damages.

    (c) Mr Vermeer and Mr Boyle have the organisational and representational skills required for these proposed collective proceedings, as well as being able to give appropriate instructions to the lawyers instructed on behalf of the class.

        i. Mr Vermeer and Mr Boyle are well-suited to manage the proposed collective proceedings.

        ii. Mr Vermeer and Mr Boyle have engaged leading competition experts in both counsel and solicitors to pursue the proposed collective proceedings on behalf of the class members.

        iii. Mr Vermeer and Mr Boyle have entered into a litigation funding agreement with a leading third-party litigation funder which has agreed a sufficient budget to cover the costs associated with bringing these proposed collective proceedings.

    (d) Mr Vermeer and Mr Boyle were consulted on and have approved a Litigation Plan for the proposed collective proceedings that satisfies the criteria laid down in Rule 78(3)(c).

2. Neither Mr Vermeer nor Mr Boyle has a material interest that is in conflict with the interests of the class members in relation to the common issues.

3. Neither Mr Vermeer nor Mr Boyle is aware of any other applicant seeking to be representative in connection with the same claims.

4. Mr Vermeer and Mr Boyle have taken out two significant ATE insurance policies with A-rated insurers that means that they will be able to pay the Proposed Defendants' recoverable costs if ordered to do so.

The Application states that the claims are eligible to be brought in collective proceedings because:

1. The proposed collective proceedings are brought on behalf of an identifiable class of persons. The clear and objective proposed class definition will enable the development of a plan that will ensure that those individuals falling within the proposed class are made aware of the proposed collective proceedings and appropriately targeted with the relevant notices.

2. The claims raise common issues from the perspective of the law, facts, and expert economic evidence. All of the issues to be determined in the proposed collective proceedings constitute common issues and there would be no individual issues requiring determination. The common issues for certification comprise:

   i. The relevant limitation period applicable to the claims;

   ii. Whether GTR is dominant on the relevant markets implicated by the claims;

   iii. Whether the conduct of GTR on the London-Brighton mainline through (a) issuing fares restricted to certain brands, (b) charging higher prices for Any Permitted and Not Gatwick Express fares as compared with fares which are more restrictive from a train brand perspective, (c) charging higher prices for rail passengers tapping in or out at platforms 13 and 14 at London Victoria as compared with rail passengers tapping in or out at other platforms at London Victoria, (d) imposing penalty and excess fares on rail passengers travelling on GTR train brands excluded by their fares, and (e) misinforming rail passengers that GTR is permitted to issue fares restricted to certain brands constitutes abuse of dominance in breach of the Chapter II Prohibition;

   iv. Whether and to what extent the abuse of dominance had an impact on the prices of fares purchased by proposed class members;

   v. The appropriate interest rate at which to adjust damages suffered by proposed class members; and

   vi. Whether interest should be awarded on a simple basis or as damages on a compound basis.

3. The claims are suitable to be brought in collective proceedings:

   (a) All issues to be determined in the proposed collective proceedings are common issues that can fairly, efficiently, and proportionately be dealt with in collective proceedings. There are no individual issues to be determined.

   (b) Individual proceedings on behalf of a proposed class, which it is estimated will to be at least one million individuals and likely to be much higher, are plainly not a relevant alternative to the proposed collective proceedings. The claims are individually low in value and it would be unviable for individuals to bring what would be complex competition law damages actions against the Proposed Defendants. Indeed, bringing such claims would involve substantial and costly exercises that the proposed class members could not reasonably be expected or afford to

undertake individually. Without the Proposed Joint Class Representative's willingness to undertake and publicise the proposed collective proceedings, proposed class members are not likely even to be aware of their potential entitlements.

(c) The impact of the infringement can be assessed on a class-wide basis pursuant to a common methodology applied across the proposed class. The common methodology will assess damages on an aggregate basis pursuant to s.47C(2) of the Act. To assess the overcharge incurred by each member of the proposed class on an individual basis would be impracticable and disproportionate, having regard to the substantial number of proposed class members and affected transactions.

(d) The claims are suitable for an aggregate award of damages pursuant to s.47C(2) of the Act and Rule 73(2) of the Rules.

(e) The benefits of continuing the proposed collective proceedings outweigh any costs for the members of the proposed class, the Proposed Defendants, and the Tribunal. These costs are fair and proportionate in light of the loss suffered as a result of the infringement which would otherwise not be addressed, the size of the class, and the aggregate value of the claims.

(f) The Proposed Joint Class Representative are not aware of any separate proceedings making claims of the same or a similar nature having been commenced.

(g) The size and nature of the proposed class mean that the claims are suitable to be brought by way of (opt-out) collective proceedings.

(h) The proposed class definition is clear and simple and it is possible to determine in respect of any person whether that person is or is not a member of the proposed class.

(i) Finally, as per Rule 79(3) of the Rules, the strength of the claims and the fact that it would not be practicable for them to be brought on an opt-in basis render them appropriate to be brought in opt-out collective proceedings.

The relief sought in the proposed collective proceedings is:

1. Damages to be assessed on an aggregate basis pursuant to section 47C(2) of the Act;
2. simple interest pursuant to s.35A of the Senior Courts Act 1981 and Rule 105 of the Rules, on such sums and at such rate as the Tribunal thinks fit.
3. the Proposed Joint Class Representative's costs; and/or
4. any such further or other relief as the Tribunal may see fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar
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