COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1626/7/7/23

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 30 November 2023 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Mr Justin Gutmann ("Mr Gutmann" or the "Applicant/Proposed Class Representative") against Hutchison 3G UK Limited ("Three") (together the "Respondents/Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Charles Lyndon Limited of 22 Eastcheap, London EC3M 1EU (Reference: Rodger Burnett and Rob Wilson).

The Applicant/Proposed Class Representative makes the application on behalf of a proposed class of UK claimants who allegedly suffered harm as a result of the Respondents'/Proposed Defendants' alleged abusive conduct in relation to the practice of overcharging customers for mobile telephony services after the expiry of the customer's contractual minimum term by continuing to require them to pay amounts in respect of mobile telephone handsets or devices for which the customers had already paid in full by the end of the minimum term. Such an overcharge is known as a "Loyalty Penalty", and multiple periodic payments of a Loyalty Penalty by a customer are referred to as "Loyalty Penalties".

Mr Gutmann has also applied to commence collective proceedings against: Vodafone Limited and Vodafone Group PLC ("Vodafone") (Case 1624/7/7/23), EE Limited and BT Group PLC ("EE") (Case 1625/7/7/23), and Telefonica UK Limited ("O2") (Case 1627/7/7/23). Together, the four proposed collective proceedings are referred to as the "Four Related Applications".

More particularly, each of the Four Related Applications is intended to be brought on behalf of natural persons (including sole traders, but excluding a natural person in a business partnership) who, as customers of the mobile network operators ("MNOs"), wishing to purchase mobile telephony services, entered into at least one contract with one of the Respondents/Proposed Defendants in each of the Four Related Applications (and/or with another company within the same corporate group as one of the Respondents/Proposed Defendants) under specified brands. The relevant brands, each an "Included Brand", are as follows: (i) in the claim against Vodafone, the "Vodafone" brand; (ii) in the claim against EE, the "EE", "Orange" or "T-Mobile" brands; (iii) in the claim against Three, the "Three" brand; and (iv) in the claim against O2, the "O2" brand.

Pursuant to the contract(s) - which are referred to in the Four Related Applications as "Combined Handset and Airtime Contracts" or "CHA Contracts" - the customer:

(1) agreed to make regular payments over a minimum contractual term ("Minimum Term") to pay for: (i) a mobile telephone handset or device ("Handset"); and, as part of the same contract, (ii) other mobile telephony services (in particular, services that enable the customer to make telephone calls, send text messages and/or use mobile data) ("Airtime Services"); and

(2) continued, even after the Minimum Term had expired, to be required to pay, and to pay, an amount in excess of the sum payable in respect of the supply of Airtime Services, i.e., a charge

that was not reduced to reflect the fact that the customer had, by the end of the Minimum Term, already paid for the Handset.

In essence, the Four Related Applications each claim that customers who did not immediately terminate their CHA Contracts with an MNO at the end of their Minimum Term were required on an ongoing basis to overpay, and have overpaid, for Airtime Services that they continued to receive since their periodic charges were not reduced at the end of the Minimum Term to the relevant SIM-only price. Instead, the customers were charged a Loyalty Penalty. Such Loyalty Penalties can broadly be characterised as the difference between (i) the payments actually made under a CHA Contract after the expiry of the Minimum Term (i.e. payments of the full charge(s) purportedly due under the CHA Contract, despite the fact that, by the end of the Minimum Term, the Handset had already been paid for); and (ii) the lesser amount that would have been paid had the relevant customer been charged for the services that the relevant customer actually received after expiry of the Minimum Term (i.e., Airtime Services only).

According to and across all the Four Related Applications, the cumulative effect of the practice engaged in by the MNOs has been to confer a very substantial and unjustified benefit on the Respondents/Proposed Defendants over a period of years, to the detriment of their 'loyal' customers. Based on currently available public information and data (which dates back to 1 January 2007), the provisional estimate of harm caused is in respect of up to 28.2 million customer contracts. It is anticipated that at least some proposed class members will have claims arising against one or more of the Respondents/Proposed Defendants arising from different CHA Contracts. On a preliminary estimate, the aggregate losses suffered by the proposed class members are around £3.285 billion (including interest).

The Four Related Applications contend that they meet the requirements for certification on an opt-out basis because:

1. The proceedings are brought on behalf of an identifiable class of persons in that it is possible to establish by reference to documentary evidence that (i) the proposed class members entered into one or more CHA Contracts under an Included Brand with one or more MNO; (ii) the relevant CHA Contract continued beyond the Minimum Term; and (iii) the proposed class members made at least one payment under the relevant CHA Contract after the Minimum Term had expired.

2. The proceedings raise the same, similar or related issues of fact or law. Without limitation, these include:

    a. the definition of the relevant product and geographic markets;

    b. the MNOs each held a dominant position, whether individually or collectively with the other MNOs, on a relevant market(s);

    c. whether, if the MNOs held such a dominant position in a relevant market(s), they abused that dominant position;

    d. whether any abuse(s) of a dominant position caused and and/or continues to cause proposed class members loss in the form of a Loyalty Penalty or Loyalty Penalties;

    e. how much loss in the form of a Loyalty Penalty or Loyalty Penalties the abuse(s) caused and/or continue to cause proposed class members; and

    f. the rate and duration of the proposed class members' entitlement to pre-judgment interest.

3. Collective proceedings are highly likely to be the only realistic and economically viable means for proposed class members to obtain compensation. Although the costs of bringing and administering the claims are substantial, the costs of bringing the claims collectively are proportionate in the context of the claims. Furthermore, the benefits of bringing the claims collectively considerably outweigh the costs of doing so.

4. It would not be practicable or cost-effective for proceedings to be brought on an opt-in basis. Having regard to the likely relatively modest value of claims of individual proposed class members, there is a material risk that few such persons would pro-actively opt-in to collective proceedings should certification be granted on an opt-in basis.

5. Mr Gutmann is not aware of any separate similar proceedings that have already been commenced.

6. The provisional estimates that harm was caused in respect of a very large class size (up to 28.2 million customer contracts across the Four Related Proceedings) is indicative of the relative suitability of collective proceedings over individual proceedings, as is the relatively modest value of individual class member's likely claims.

7. A plausible and credible methodology for estimating aggregate loss has been developed.

8. It would be just and reasonable for Mr Gutmann to be appointed as the class representative in each claim in that:

    a. Mr Gutmann will act fairly and adequately in the interests of the proposed class members;

    b. Mr Gutmann is supported by a consultative group, comprised of certain individuals with specific expertise and experience in industry-specific and consumer rights matter;

    c. Mr Gutmann does not have a material interest that is in conflict with the interests of the class members;

    d. Mr Gutmann is not aware of any other person seeking approval to act as the class representative in respect of the same claims;

    e. Mr Gutmann has developed comprehensive plans for the proposed collective proceedings;

    f. Mr Gutmann has entered into a third-party litigation funding agreement in order obtain funding for the litigation; and

    g. Mr Gutmann will be able to pay the Respondents'/Proposed Defendants' recoverable costs if ordered to do so and has taken out adverse costs insurance cover in the form of an after the event insurance policy.

In any event, Mr Gutmann is well equipped to manage the proposed collective proceedings. He has instructed specialist competition litigation solicitors and counsel, specialist costs counsel, expert competition economists and experienced claims administrators in order to assist and advise it in connection with the proposed collective proceedings.

The relief sought in these proceedings is:

(1) Damages on behalf of the proposed classes, to be assessed on an aggregate basis; and
(2) Simple interest, at such rates the Tribunal considers appropriate;

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, KC (Hon)
Registrar
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