



Case Number: 1381/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

JUSTIN LE PATOUREL

Class Representative

and

(1) BT GROUP PLC

(2) BRITISH TELECOMMUNICATIONS PLC

Defendants

and

COMPETITION AND MARKETS AUTHORITY

Interested Party

**EXECUTIVE SUMMARY OF JUDGMENT
HANDED-DOWN ON 19 DECEMBER 2024**

INTRODUCTION

1. This is a short précis of the lengthy written unanimous judgment handed-down today, after a trial which took place between January and March 2024. It does not form part of, nor is it a substitute for, the actual judgment to which reference should be made for our detailed findings and reasons.
2. This case concerns a claim against two Defendants, BT Group Plc and British Telecommunications Plc (collectively, “BT”). The claim is that BT has abused its dominant position in a telecommunications (“telecoms”) market by imposing unfair prices, contrary to section 18 of the Competition Act 1998 (“the Act”). The claim is brought by Mr Justin Le Patourel as the Class Representative (“the CR”) in respect of approximately 3.7m affected BT customers. He was appointed pursuant to a Collective Proceedings Order made on an “opt-out” basis on 19 October 2021.

3. The market is concerned with the provision of landline telephone services to residential addresses, known as Standalone Fixed Voice services (“SFV Services”). In such cases, the customer contracts with BT for access to the telephone network for voice calls only. The charges consist of a fixed line rental charge and a variable charge for calls made. There are two customer groups for the provision of SFV Services and the Class is made up of members of both (“Class Members”). The first consists of Voice Only Customers (“VOCs”). A VOC buys an SFV service and does not buy a broadband service from either the same or any other provider. The second group encompasses Split Purchase Customers (“SPCs”). These customers have broadband as well but under a separate contract to that which provides them with voice services. What neither group has are, “bundles” i.e. a package of telephone and broadband services provided together by the same supplier under one contract.
4. Damages are claimed here on an aggregated basis, and by reference to the difference between the prices charged by BT and what is referred to as the “competitive benchmark” for the provision of the SFV Services. The damages are claimed in respect of the following periods:
 - (1) for residential VOCs, between 1 October 2015 and 1 April 2018 inclusive;
 - (2) for SPCs, and also for business VOCs, between 1 October 2015 and the date of the Tribunal’s final determination of their claims or their earlier settlement.
5. The reason why the claim in respect of the VOCs ends on 1 April 2018 is that, following a review into BT’s Pricing for SFV Services by Ofcom, which published its Provisional Conclusions on 28 February 2017 (“the 2017 Provisional Conclusions”), BT voluntarily agreed with Ofcom to reduce its telephone line rental price for VOCs by £7 a month as from 1 April 2018. Thereafter, call and rental prices would increase only by an inflation index. No similar offer was made in respect of SPCs, although BT did agree to issue an annual statement showing their total spend to help them consider what alternatives were available for voice-only services in conjunction with broadband services. Ofcom accepted these proposals, referred to as “the Commitments”. They were renewed in 2021. While it issued a Statement on 26 October 2017, Ofcom never proceeded to make any final findings against BT for the purpose of regulating its prices pursuant to its powers.

THE TRIAL

6. This was a full trial on liability and quantum. At trial, there was a very extensive and complex body of expert evidence, principally from economic experts, but also from experts in behavioural economics and actuarial experts, There were also some factual witnesses called by BT. Much of the economic evidence was taken concurrently, that is to say by experts from both sides addressing a series of questions from the Tribunal. This process is known colloquially as a “hot tub” discussion. There was, however, cross-examination as well. There was also a large body of documents which the Tribunal had to consider.

THE ISSUES

7. On liability, there were the following main issues:
 - (1) Market Definition: is there a distinct market consisting of the supply of SFV Services only, as opposed to some wider market which included bundles?
 - (2) Dominance: if so, is BT dominant in that market?
 - (3) Excessive pricing (Limb 1): if so, did BT charge prices for its SFV Services to the VOCs and SPCs over the claim period which were excessive?
 - (4) Unfairness (Limb 2): if so, were such excessive prices unfair and thereby abusive?
8. The issues on quantum (i.e. if we found that BT was liable for unfair pricing) were as follows:
 - (1) Failure to Mitigate: did the Class fail to mitigate its loss by failing to switch to alternative providers or other suitable BT tariffs, including bundles?
 - (2) Basis of Overcharge: the approach to the amount of overcharge, as a matter of principle;
 - (3) The size of the Class:
 - (a) Business customers who purchased SFV Services: should they be excluded from the Class?
 - (b) Class Members who were gifted broadband: should they be included?
 - (c) Class Members who are deceased without personal representation: it is agreed that they should be excluded from the Class, and the question is how many there are;
 - (4) Interest and inflation:
 - (a) Inflation: should damages be uprated to take inflation into account?
 - (b) Compound Interest: should compound interest be awarded as damages for loss of use of monies?
 - (c) Simple Interest: how much should be awarded by way of simple interest?

OUR JUDGMENT ON LIABILITY

Introduction

9. On the issues referred to above we found as follows below.
10. First, we found that the relevant market was that for SFV Services only, and not any wider market.
11. Second, we then found that BT was dominant in that market.
12. Third, on the question of whether the prices were excessive, we had to consider:
 - (1) What was a reasonable profit margin for BT to earn in addition to the actual cost of providing SFV Services?

- (2) In respect of the underlying costs, what proportion of the common costs of BT Consumer (which included broadband, TV and other BT consumer services as well as the SFV Services) should be recovered from SFV Services?
- (3) What was the “competitive benchmark” by which BT’s prices should be judged?
- (4) If its prices exceeded the benchmark, did they do so significantly and persistently?
13. We should add here that the experts for both sides took quite different approaches to the calculation of the benchmark, except in relation to reasonable margin, and they reached very different benchmarks.
14. To illustrate the differences between the experts, the table below shows the benchmark price arrived at by the CR’s experts on an annual basis. When the proposed benchmark is subtracted from the actual price (here denominated by “ARPU” – the average revenue earned by BT per user), the excess is very large, for all years except for the last being between 82% and 96% over the benchmark.

Weighted Average (WA) of three product-specific benchmarks:

	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
WA SFV Services benchmark (£ per line)	144.45	148.33	150.16	151.81	149.96	148.92	157.06
WA ARPU (£ per line)	262.38	285.58	295.03	278.72	279.44	272.08	263.44
Difference, above benchmark	82%	93%	96%	84%	86%	83%	68%

15. On the other hand, the figures produced by BT’s expert, done on a monthly basis were as follows:

	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
<u>Using SAC Combi, 25% margin, and baseline common costs:</u>							
<u>SFV Services ARPU:</u>	23.32	26.13	28.47	28.64	33.11	35.24	35.61
	21.86	23.80	24.59	23.23	23.29	22.67	21.95

16. On that basis, BT’s prices were actually less than the benchmark so, by definition, there could not be any excess at all.

Were the prices excessive?

Reasonable Margin

17. The CR said that BT’s reasonable margin should be no more than 10%. BT said it should be 25%, or as an alternative, not less than 20%. We found the reasonable margin to be 13.5%.

Common Costs of BT Consumer

18. BT’s expert said that out of BT Consumer’s total indirect costs of £983m, and taking the year 2015/16 as an example, its common costs were £390m, in other words about 40%. On the expert’s alternative “low scenario”, common costs were £262m, being around 27%. The balance would form BT Consumer’s incremental costs.

19. Because of how the CR's experts approached the question of the benchmark, they did not produce alternative sets of figures to those advanced by BT. But they said the common costs would have been very much less.
20. We considered that the appropriate common costs figure for BT Consumer was £250m.

Extent to which such common costs should be reasonably recovered from SFV Services

21. BTs' primary position was that 62% of such costs should be recovered from SFV Services, which would amount to some £242m. Although not directly stated, the CR's position was likely to have meant that a much smaller proportion, around 9%, of any common costs could reasonably be recovered from SFV revenues.
22. In our view, and allowing for a reasonable degree of flexibility in how a multi-product firm should be entitled to recover its common costs, BT should be allowed to recover from SFV Services, 40% of the total common costs figure of £250m which we had determined. We then made an upwards adjustment to BT's incremental costs because with any reduction in the allowable common costs, the incremental cost would rise to an extent.

Our Findings on Excessive Prices

23. Our findings as to what the benchmark should be for each of the years in the claim period, and the extent to which there was an excess, were as set out in the table below, using monthly figures

	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
ARPU (£/month)	21.86	23.8	24.59	23.23	23.29	22.67	21.95
Direct costs	8.06	8.73	8.32	8.37	8.2	8.06	8.38
Incremental costs	1.76	1.69	1.77	1.85	1.89	1.94	2.08
Common cost per line plus adjustment	3.93	3.90	4.10	4.28	4.60	4.64	4.73
Total cost excl margin	13.75	14.32	14.19	14.50	14.69	14.64	15.19
Margin (at 13.5%)	2.15	2.23	2.21	2.26	2.29	2.29	2.37
Comp benchmark inc margin	15.90	16.55	16.40	16.77	16.98	16.93	17.56
Excess profit as % comp benchmark	37.5%	43.8%	49.9%	38.6%	37.2%	33.9%	25.0%

24. It will be seen that while we found there was an excess, it was very much less than that claimed for by the CR. Nonetheless, we judged it to be both significant and persistent. We considered that any

excess of 20% or more would be significant, and as there was such an excess for each of the claim years (although dropping to 25% in the last year) it was also persistent.

25. On that basis, we then had to consider whether BT's prices which were excessive to that extent were also unfair.

Were the prices unfair?

26. It is important to stress, as we did in the judgment, that just because a price is excessive does not mean that it was also unfair. There are many factors which are to be considered on the question of unfairness.
27. In our judgment, these prices were not unfair.
28. We took into account, first, that while they were excessive, they were radically less than the excess relied upon by the CR. This meant that the weight of the excess going forward into the unfairness analysis reduced.
29. Further, we considered that BT provided distinctive value to its SFV customers such that its price bore a reasonable relation to value. Value here was found, not just in terms of particular features or "Gives" provided to the customers, but also in BT's brand value as a whole. We found significant loyalty to BT which could not be dismissed as customers simply paying these prices because they had to. Indeed, they did not have to, because they were not captive or generally inert. In fact, over the claim period, there was a very substantial amount of switching by VOCs, either to SFV contracts with other providers but more likely into bundles. There was also significant switching by SPCs into bundles. This suggested an ascription of positive brand value to BT for the period before they switched (as most Class Members did, at some point).
30. Moreover, we took into account the fact of price dispersion in the adjacent market for bundles and, in addition, cost efficiencies dispersion. Here, we considered that they showed that BT's pricing was not unfair. This is in the context of considering the evidence against a standard of workable competition rather than one of perfect competition.
31. On the question of unfairness, the CR also submitted that in general, BT was here exploiting its price insensitive customers, and also that it was guilty of a lack of transparency towards those customers, the press and Ofcom. We rejected those arguments. The CR submitted further, and we accepted, that BT was aware it had much greater flexibility to raise prices for the SFV customers than it did for bundle customers. However, we did not consider that this added materially to the question of unfairness. Equally we disagreed that evidence indicating that some SFV Services' revenue went into investments in other BT products tended to show unfairness.

32. Some points were made about Ofcom. First, we did not see that the fact that BT made some price increases between 2014 and January 2017, during which time Ofcom had expressed some concerns (but without intervening as such), really added to or created unfairness. Second, we did not consider that we should give material weight to Ofcom's findings in its 2017 Provisional Conclusions. This is because we were presented with our own set of primary materials which included a very substantial body of expert evidence based on far more data than had been available to Ofcom. In particular, the issue of common costs was the subject of much more evidence and consideration than under the Ofcom Reports. Further, the landscape had changed materially since 2017. First, while Ofcom focussed on line rental price increases, both parties here accepted that the correct metric was ARPU which had remained flat over the claim period. Second, Ofcom grossly underestimated the level of switching. The actual levels were far greater than the 1% of customers which Ofcom thought had switched in the previous 12 months. This is reflected in the fact that the number of something over 3m customers in 2015 had reduced to around a million by 2022. Further, the average proportion of customers who switched each year between 2014 and 2021 was about 15%. Third, Ofcom saw VOCs having the characteristics of being elderly and vulnerable, and disengaged; but by trial, the CR's case did not rest on any characteristics of this group of customers, as opposed to consumers in general. Further, the overall context for Ofcom was its *ex ante* regulatory powers and duties. It was not making *ex post* findings under Chapter II of the Competition Act 1998.
33. BT made some arguments in favour of fairness by reference to market dynamics. We did not accept those arguments.
34. Overall, we considered that, whether taken by itself or in comparison with other prices, BT's prices were not unfair, and therefore there was no abuse of dominant position. This meant that the CR's claim failed.
35. As the various issues on quantum were argued fully, we also expressed our views on them, although this was not strictly necessary. Those views can be found at paragraphs 1302-1427 of the judgment.