Neutral citation [2025] CAT 64

Case Nos: 1304/7/7/19
1305/7/7/19
1425/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 October 2025

Before:

SIR PETER ROTH
(Chair)
PROFESSOR SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

FIRST MTR SOUTH WESTERN TRAINS LIMITED

Defendant

SECRETARY OF STATE FOR TRANSPORT

Intervener

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) LONDON & SOUTH EASTERN RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP PLC

(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Intervener

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP PLC

(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Intervener

Heard at Salisbury Square House on 18, 19, 20, 28 June and 3, 4, 5, 8, 11, and 12 July 2024

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Philip Moser KC, Mr Stefan Kuppen, and Ms Alexandra Littlewood (instructed by Hausfeld & Co. LLP and Charles Lyndon Ltd) appeared on behalf of Mr Gutmann.

Mr Tim Ward KC, Mr James Bourke, and Mr Hugh Whelan (instructed by Slaughter and May) appeared on behalf of First MTR South Western Trains Limited.

Mr Paul Harris KC, Ms Anneliese Blackwood, Mr Michael Armitage and Ms Clíodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of London & South Eastern Railway Limited and Govia Thameslink Railway Limited and others.

Ms Anneli Howard KC, Mr Brendan McGurk, and Ms Khatija Hafesji, (instructed by Linklaters LLP) on behalf of the Secretary of State for Transport (written submissions only).

Note: Excisions in this Judgment (marked "[✂]") relate to confidential information.

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A. INTRODUCTION

1. Mr Justin Gutmann is the class representative ("the CR") in three parallel collective proceedings brought pursuant to s. 47B of the Competition Act 1998 ("CA"). Each of the three proceedings raises broadly the same allegations of abuse of dominance contrary to the Chapter II prohibition in s. 18 CA, with regard to the practice and arrangements by train operating companies ("TOCs") regarding the sale of a particular kind of rail ticket known as a Boundary Fare. In essence, the CR alleges that the relevant TOC in each case failed to make Boundary Fares sufficiently available and/or to take reasonable steps to make customers purchasing tickets aware of Boundary Fares, with the consequence that class members effectively paid twice for part of their journeys. The proceedings are brought on an opt-out basis and seek aggregate damages for the respective classes.

2. The first proceedings concern the South-Western rail franchise ("the SW franchise"). The proceedings as commenced comprised claims for the period starting on 1 October 2015 (when the collective proceedings regime came into force) and asserted that the infringement of competition law was continuing, although the claims were then limited to end on 9 May 2024, the day before service of the Re-Re-Amended Claim Form. The SW franchise was operated by Stagecoach South Western Trains Ltd ("Stagecoach") between 4 February 1996 and 20 August 2017, and was then operated by First MTR South Western Trains Ltd, trading as "South Western Railway" ("SWR") until 21 May 2025, when the services were transferred into public ownership. Both Stagecoach and SWR were respondents to the application for a collective proceedings order ("CPO").

3. The second proceedings concern the South-Eastern rail franchise ("the SE franchise"). The proceedings were commenced against London & South Eastern Railway Ltd ("LSER") which was first awarded the SE franchise in 2006. The claims cover the period from 1 October 2015 to 17 October 2021 when the Government's Operator of Last Resort took over the operation of the services previously run by LSER.

4. The applications by the CR for a CPO in the proceedings concerning the SW and SE franchises were heard together. In support of his applications, the CR relied on an extensive economist's expert report from Mr Derek Holt and a 'mystery shopper' survey from a consumer research company, Decidedly (now Yonder). The respondents to those applications, as well as arguing that certification should be refused, applied to strike out the claims or for reverse summary judgment. On 19 October 2021 the Tribunal issued its judgment granting the applications for a CPO (subject to a qualification in the definition of the respective classes) and dismissing the applications to strike out or for summary judgment: [2021] CAT 31 (the "CPO Judgment"). Following further submissions, a CPO was made in both proceedings on 18 January 2022. Stagecoach, First MTR and LSER all appealed that decision and on 28 July 2022 the Court of Appeal handed down judgment dismissing the appeal: [2022] EWCA Civ 1077 ("*Gutmann CA*"). By a further ruling on 10 November 2022, the Tribunal granted the CR permission to amend the class definition to include season tickets within the scope of journeys that were covered: [2022] CAT 49.

5. The proceedings against LSER were further amended to add as additional defendants LSER's parent company, Govia Ltd ("Govia") and the two partners to the joint venture which owns Govia. These additional defendants were alleged to be liable with LSER on the basis that they form part of the same economic unit for the purpose of competition law. If LSER is not liable, it is not suggested that these additional defendants would be liable, and for present purposes we say no more about them and consider the case as against LSER.

6. The third proceedings concern the Thameslink, Southern and Great Northern franchise (the "TSGN franchise"). Govia Thameslink Railway Ltd ("GTR"), which is also a subsidiary of Govia, was awarded the franchise in May 2014. The application for a CPO was made after the judgment in *Gutmann CA* and was not contested. On 22 March 2023, the Tribunal made a CPO in this further set of proceedings, for reasons set out in a brief written judgment: [2023] CAT 18. In addition to GTR, the action is brought against the same three defendants as the action brought against LSER, on the same basis that they are part of a single economic entity.

7. On 5 April 2023, the Tribunal ordered that all three proceedings shall be jointly case managed and tried together, with evidence in one to stand in the others so far as relevant. It also granted permission to the Secretary of State for Transport ("the SoS") to intervene, limited to "neutral written submissions regarding the statutory and regulatory framework in which fare setting was and is carried out, and the arrangements made thereunder."[1]

8. The CR reached agreement with Stagecoach to settle the proceedings between them, and on 27 March 2024 they jointly applied pursuant to s. 49A CA for a collective settlement approval order ("CSAO"). Following a hearing, a differently constituted panel of the Tribunal determined on 10 May 2024 that a CSAO should be granted: [2024] CAT 32; and a CSAO was duly made. Accordingly, the proceedings as regards the SW franchise have continued only as against SWR and cover the period from 20 August 2017 until 9 May 2024.

9. The claims against the 2nd-4th Defendants in the proceedings concerning the SE franchise and the TSGN franchise rest on the liability of, respectively, LSER and GTR. It is not suggested that these other Defendants would be liable in the event that LSER or GTR are not liable. All the evidence and submissions accordingly concerned the allegations against SWR, LSER and GTR. For convenience, we shall therefore use the term "Defendants" to refer to these three TOC Defendants.

10. The Tribunal directed that the trial of the issues arising in the proceedings should be split, with a first trial of the issues relating to abuse, on the assumption that the Defendants were dominant. The issues for determination at the first trial were specified in the Tribunal's order of 22 November 2023, to include the questions whether the steps required by the CR of the Defendants would have obstructed their operation of services of general economic interest ("SGEI"), within the scope of the exclusion of the Chapter II prohibition in para 4 of Sch 3 CA, and whether, if abusive conduct was found, it affected or was capable of

[1] Following the Tribunal's ruling that parts of the SoS's written Statement of Intervention exceeded this limitation and were therefore inadmissible ([2024] CAT 34), an Amended Statement of Intervention was filed.

affecting trade within the UK. Issues relating to causation of loss and quantification of damage were reserved for a subsequent trial.

11. This judgment is given following the first trial. A glossary of abbreviations used is at the end of the judgment.

B. TICKETS AND BOUNDARY FARES

12. Point-to-point fares on the rail network are fares for journeys between a specific origin station and a specific destination station. There is at least one point-to-point fare available for the journey between every origin and destination station in Great Britain. There is a variety of ticket types (and fares) for such point-to-point travel. Those include off-peak fares, child fares, student fares, and Advance fares offered by many TOCs for purchase up to 12 weeks ahead of travel on certain routes whereby the customer gets a discounted price in return for reduced flexibility.

13. Since 1 October 2016, where one fare covers travel to a particular station and the other fare covers travel from that station, the two fares may be used in combination even if the train does not stop at that station.

14. Transport for London ("TfL") Travelcards which we will simply refer to as "Travelcards" are zonal tickets which allow unlimited travel on the public transport network in London. Significantly for the present cases, that includes not only TfL's own bus and underground services but also National Rail services within the zone of validity of the Travelcard (excluding the Heathrow Express and LSER's high-speed HS1 line). They can be issued for variable time periods and for a range of zonal combinations. Although there are a total of nine TfL travel zones, some 99% of all Travelcards are not valid beyond zone 6; therefore, in practice the relevant zones are 1-6. Travelcards are available for different combinations of travel and time periods within those main zones, as follows:

(1) Peak Travelcards are valid for travel at any time of day and available in two combinations: either for zones 1-4 or for zones 1-6;

(2) Off-peak Travelcards are valid for travel at any time after 9.30 am on weekdays and at any time on weekends and public holidays; they are available for zones 1-6 only;

(3) 7-day or longer Travelcards are valid for travel at any time and are available in any combination of two or more adjoining zones.

15. The validity of Travelcards for travel on rail services is governed by the Travelcard Agreement entered into between a subsidiary of TfL and all TOCs, including therefore SWR, LSER and GTR. Under the Travelcard Agreement, the TOCs receive a share of the revenue generated from the sale of Travelcards.

16. Boundary Fares are a form of extension or add-on ticket sold for use with a Travelcard. On the basis that a valid Travelcard will cover travel on part of the journey which the customer wishes to take, the Boundary Fare covers the balance of the journey from the outer edge of the zone to which the Travelcard applies to the customer's destination. All three Defendants sell (or have sold) such Boundary Fares for almost all journeys originating in each TfL zone to destinations on their network. Given that customers holding a Travelcard have already paid for the part of their journey which the Travelcard covers, they need only purchase such a Boundary Fare, whereas if they purchase a full, origin-destination fare they will be paying unnecessarily for the first part of their journey. However, Boundary Fares are not available for certain tickets, of which by far the most significant are Advance fares and Season ticket fares.

17. Tickets for travel on the TOCs' networks are sold through a number of channels. The customer can purchase a ticket from the TOC itself, and each TOC sells or sold tickets by a number of different means: e.g. at station ticket offices ("TOs"), at station ticket vending machines ("TVMs"), over the telephone, on-line, and on the train, although telephone sales became insignificant in this period and were generally discontinued. Each TOC also sells tickets for travel on the services of another TOC. TfL used to sell tickets for travel on the rail network from certain ticket offices, but since most TfL TOs have closed such sales have become insignificant. There are also third-party ticket retailers ("TPRs")

authorised to sell rail tickets, of which the most significant is the online seller, Trainline.com ("Trainline").

18. The Defendants sold and continue to sell Boundary Fares at station TOs, and if a staff vendor was on the train they could also sell Boundary Fares. None of the Defendants sold Boundary Fares online (i.e. through their website or app). As regards TVMs, there was variation as between the different Defendants, as follows:

SWR: outbound Boundary Fares (i.e. where the origin is a zone boundary) were available from many but not all of its TVMs. See further para 121 below.

LSER: Boundary Fares were not available at its TVMs.

GTR: When GTR took on the TSGN franchise in late 2014, certain TVMs did not have the functionality to sell Boundary Fares, and from 2015-2018 GTR was engaged in replacing its TVMs with machines from a new supplier. Since late 2018, Boundary Fares have been available from all GTR TVMs.

19. TPRs did not generally sell Boundary Fares. In particular, Trainline does not offer them on its customer-facing website.[2]

C. THE CLAIMS

20. The claim forms, as amended, state the basic allegation of abuse at para 3:

> "By failing to make Boundary Fares sufficiently available for sale and/or failing to use their best endeavours to ensure that there was a general awareness among their customers of the existence of Boundary Fares, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey, the Defendants have abused and continue to abuse their position of dominance on the relevant markets in breach of the prohibition in section 18 [CA]."

The alleged abuse is further pleaded at para 42, as follows:[3]

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[2] Trainline apparently makes very limited sales of Boundary Fares under separate arrangements with business customers.

[3] The pleadings in the three proceedings are identical in this respect, save that the quoted passage is at para 47 of the claim form in the GTR action.

> "The abuse, which is continuing, consists in the Defendants' neglecting of their special responsibility as dominant undertakings through failing to take any or sufficient steps to prevent Class Members from being double-charged for part of the service provided to them. In practice, the abuse consists in failing to make Boundary Fares sufficiently available for sale, and/or failing to use their best endeavours, for example in the form of better staff training, amended sales procedures, or increased customer-facing information, to ensure that there is a general awareness among their customers of Boundary Fares so as to enable customers to buy an appropriate fare which avoids them being charged twice for part of their journeys."

21. The alleged abuse therefore effectively comprises two distinct elements: (a) lack of availability of Boundary Fares, and (b) insufficient awareness among customers of Boundary Fares. The first element in turn involves both the channels through which Boundary Fares could be purchased and those types of tickets, in particular Advance fares and Season tickets, for which no Boundary Fare existed.

22. A further aspect of the claims concerns TPRs. As refined in the course of the trial, the CR's case concerning sales by TPRs is that the Defendants should have required TPRs to sell Boundary Fares, and/or that if there was greater awareness and availability of Boundary Fares, that would have led TPRs to offer Boundary Fares to avoid losing business. On that basis, the CR contends that loss resulting from the conduct of the TPRs was caused by the conduct of the Defendants.

23. The Defendants all denied that the various matters relied on by the CR, properly understood, amount to a failure to discharge their 'special responsibility' as (presumed) dominant undertakings and any abuse of dominance as a matter of competition law. In the alternative, if those matters could otherwise amount to abuse, they submitted that their conduct was objectively justified.

24. As regards the SGEI "exemption" in para 4 of Sch 3 CA, the CR accepted that the Defendants are entrusted with the operation of services of general economic interest or having the scope of a revenue-producing monopoly, but denied that any of the matters complained of would obstruct the performance of the tasks assigned to them so as to fall within the scope of the narrow conditions for that exemption to apply.

25. The class is defined as all persons who in the claim period (which varies as between the three sets of proceedings):

> "purchased or paid for a rail fare for themselves and/or another person, which was not a Boundary Fare *or a fare for the portion of their journey from the last station covered by their Travelcard to their destination*, where:
>
> a. the person for whom the fare was purchased held a Travelcard (or Travelcards) valid for travel within one or several of TfL's fare zones (the "Zones") at the time of their journey or, where the fare was a season ticket fare, for at least the period of validity of that season ticket fare; and
>
> b. the rail fare (including a fare for a return journey and a season ticket fare) was for travel in whole or in part on the services of the Defendants from a station within (but not on the outer boundary of) those Zones to a destination beyond the outer boundary of those Zones." [emphasis added]

26. Therefore, the claims are only in respect of *outward* Boundary Fares, i.e. where the journeys originated in a TfL zone (but covering also return fares). Although the theory underlying the alleged loss would cover also inward Boundary Fares, Mr Moser KC explained at the hearing of the CPO application that this limitation was made for practical convenience and on the basis that the majority of relevant cases would be journeys originating in London. The emphasised wording was inserted as a result of the CPO Judgment, to reflect the fact that a Travelcard holder who did not purchase a Boundary Fare but purchased a point-to-point fare to their destination from the last station in the zone covered by their Travelcard, for use in combination with the Travelcard, would have suffered no (or at most minimal) loss. As will be seen, the availability of such point-to-point fares featured prominently in the Defendants' arguments.

D. THE TRIAL

27. As noted above, the trial concerned limited issues, and in particular the question of abuse. Causation and quantum were reserved for a further trial in the event that abuse was established.

28. Evidence from a large number of factual witnesses was adduced by the various Defendants, as follows (their relevant positions, are stated as at the time of trial):

SWR

Mr Peter Williams: Customer and Commercial Director since November 2022. Previously, from June 2018 he was the Commercial Director.

Mr Alex Cameron: Interim Head of Revenue & Commercial Strategy (as maternity leave cover) for various fixed periods since February 2019 (and excluding April 2020-January 2021).

Ms Kirstie Angell: Customer Experience Training Manager (previously called Customer Service Training Manager) from 2012 at Stagecoach and subsequently on its acquisition of the SW franchise at SWR, until her retirement in March 2024.

Mr Liam Ludlow: Head of Retail since September 2019.

Mr Ian Humphreys: Senior Marketing Manager since August 2022, and previously Campaigns Manager focusing on commuters from August 2021.

Mr Jeremy Walt: Senior Digital Manager since 2021, and previously Digital Manager since December 2017. (Mr Walt stated that this promotion did not significantly change his responsibilities.)

Mr Nicholas Wilcox: Pricing Manager (responsible for managing the database of fares and products), at Stagecoach since 2014 and from 2017 at SWR.

Ms Verity Hinde: Head of Revenue & Commercial Strategy since February 2018, and previously Senior Commercial Manager. While Ms Hinde was on maternity leave her role was filled by Mr Cameron (see above).

LSER

Mr John Backway: Head of Retail from August 2018 to October 2021.

Ms Daisy Hutchinson: Revenue Analysis Manager (previously called Market Intelligence Manager) from 2006 to 2021.

Mr Andrew Spring: Pricing Manager from 2015-October 2021.

Mr Mark Anderson: Head of Marketing from November 2014-August 2017, and Head of Customer Experience March 2020-June 2021.

GTR

Mr Adam Phayer: Head of Revenue Development and Retail since 2019, and previously Retail Programme Manager since 2012.

Mr Matthew Short: Head of Franchise Management since August 2019.

Mr Dominic Morrow: Head of Marketing since April 2022.

Mr Barry Edwards: Pricing Manager since 2015.

Ms Niki Hill: Revenue Analysis Manager (responsible for reporting fare sales and passenger income) since July 2015.

29. In addition, the Defendants jointly submitted evidence from Mr Paul Bowden, who since June 2021 has been Commercial Director at the Rail Delivery Group: see para 45 below.

30. The CR did not call any factual witnesses, as is not uncommon in opt-out collective proceedings. In support of the CPO applications, the CR adduced extensive expert evidence from Mr Derek Holt, an experienced competition economist. Mr Holt was not called for the purpose of the present trial but the CR was given permission to call an expert in the field of ticketing practices. He duly submitted an expert report from Mr Timothy Bellenger, dated 9 April 2024. Mr Bellenger is currently a Transport Strategy Manager at Nottingham City Council but between March 2004 and April 2021, he was Director, Policy and Investigation at London TravelWatch ("LTW"). LTW is the name adopted in 2006 by the London Transport Users' Committee established under s. 247 of the Greater London Authority Act 1999 ("GLAA"). Section 252A GLAA is titled "Committee to keep railways matters under review" and provides, inter alia:

> "(1) It shall be the duty of the Committee, so far as it appears to it expedient from time to time to do so—
>
> (a) to keep under review matters affecting the interests of the public in relation to railway passenger services provided wholly or partly within the London railway area;
>
> (b) to keep under review matters affecting the provision of station services within that area;
>
> (c) to make representations to, and to consult, such persons as it thinks appropriate about the matters mentioned in paragraphs (a) and (b); …"

Mr Bellenger filed a second, shorter report in reply, after he was provided with the Defendants' further factual witness statements served in April 2024.

31. Of the factual witnesses, the CR did not seek to cross-examine Mr Williams or Ms Hinde. The extent of cross-examination of the other factual witnesses varied significantly. However, relatively little that we have to decide following this trial depends upon contested oral evidence of the factual witnesses and we do not think it is necessary to comment on the quality of each individual factual witness. Where the evidence of particular witnesses is relevant, we shall comment as appropriate in the course of our analysis.

32. We have to say that Mr Bellenger was not a very satisfactory expert witness. Much of his evidence amounted to generalised assertions and was not related to the practice or conduct of the particular TOCs that are defendants in these proceedings. Under cross-examination it became clear that, at times, his evidence was based on assumption rather than actual knowledge, e.g. as regards the feasibility and cost of selling Boundary Fares on TVMs and online. We note that the closing submissions of the CR do not seek to rely on his evidence. Nonetheless, we consider he was an honest witness, and we have no doubt that he is keen to enhance the passenger experience on the railways. On some points, we found his answers illuminating and helpful, although they did not assist the CR's case.

E. THE REGULATORY FRAMEWORK

33. As the SoS said in the statement of intervention, the rail industry in the UK is an intensely regulated and subsidised sector. The Railways Act 1993 ("RA 1993") introduced a regime of franchising whereby TOCs bid for contracts to operate passenger rail services on specific routes or in designated regions, and the SoS, through the Department for Transport ("DfT"), awarded rail franchises through a competitive procurement process. The powers of the SoS under RA 1993 are to be read with the EU Railway Regulation, Reg (EC) 1370/2007 (as amended), which continues to apply as "retained EU law" (now "assimilated law") following Brexit.[4]

[4] Subject to amendments made by the Regulation (EC) No 1370/2007 (Public Services Obligations in Transport) (Amendment) (EU Exit) Regulations 2020.

34. The rail regulator, the Office of Rail and Road ("ORR"), has various powers and duties under the RA 1993 and the Railways Act 2005, and a number of regulations. Those include a duty to contribute to the development of an integrated system for passenger transport and the facilitation of passenger journeys which involve the use of services of two or more TOCs. The ORR further has a role in protecting passenger interests through enforcing consumer law within the rail sector.[5] When the SoS awarded a franchise to a TOC, the ORR granted the TOC a licence allowing it to operate passenger rail services. By virtue of the general authority granted by the SoS pursuant to s. 8(1)(b) RA 1993, he has ultimate oversight of the conditions of such licences granted by the ORR. The current general authority provides that fare setting and regulation for passenger services are the preserve of the SoS and that they are not to be the subject of licence conditions.

35. The TOC franchise agreements, as one might expect, are very substantial documents. Each comprises some 800 pages, containing a multitude of particular obligations and requirements placed on the franchisee. Those obligations include overall performance standards (including service requirements) alongside specific improvements required regarding fares and ticketing, station operation and rolling stock. These are referred to as 'committed obligations'. The DfT can regulate certain fares by price caps or tariff 'baskets': those fares include commuter fares and so-called 'protected fares' which are certain off-peak fares and weekly season tickets. The TOC may also be required to create child fares. Hence, there is an obligation on the TOCs to participate in the Young Person's Railcard Scheme and the Senior Railcard Scheme. However, Advance fares, first class fares and other peak and off-peak fares are not regulated fares. Boundary Fares are also not regulated fares.

36. The extent of the DfT's granular involvement in the TOCs' operation of their services, implemented either by committed obligations or less formal instruction, can be demonstrated by various examples. LSER was required to

[5] The ORR also has concurrent powers with the Competition and Markets Authority ("CMA") to enforce the CA in relation to services relating to railways.

make new types of Railcard and FlexiSeason tickets available; and to make clear which products were available on its TVMs. Over the period covered by these claims there was a general push from DfT to promote "channel shift", i.e. to encourage a move of ticket selling from TOs to sale by TVM or on-line. GTR was required (by cl 3.5 of Sch 6.2 of its franchise agreement) to instal TVMs at 13 specified stations.

37. The franchise agreements contained obligations regarding marketing. For example, the SW franchise agreement with SWR specified at cl. 57 the minimum amount which SWR must spend each year on marketing by way of brand promotion and the targeting of potential customers making leisure related journeys, and further, at cl. 57.2, stated:

> "The Franchisee shall from the Start Date and thereafter throughout the Franchise Term undertake sales and marketing campaign activities with the purpose of encouraging the purchase of Advance Purchase Train-specific Fares by passengers."

And by cl. 70, SWR was obliged by the end of the franchise term to ensure that at least 89% of customer journeys made on its passenger services were made using smart tickets. The franchise agreement with GTR, by cl 3.7 of Schedule 6.2, required it to introduce "a series of marketing campaigns" to publicise the risks of fare evasion and publish the results of high-profile "revenue protection activities", including details of convictions for fare evasion.

38. The DfT monitored the ongoing compliance by each TOC with its franchise agreement, in particular as regards the committed obligations. It had the power to revisit or change those agreements through an "in-franchise change" mechanism.

39. However, significant changes were made to the regulatory position in the wake of the Covid-19 pandemic, which had a drastic effect on the operation of passenger railways: e.g., the revenues of SWR dropped to 5% of pre-pandemic levels. There have been further changes since. In summary:

(1) in late March 2020, the SoS entered into a series of Emergency Measures Agreements ("EMAs"), whereby some of the TOCs' obligations under

their franchise agreements were suspended and new requirements were imposed. In particular, the DfT took over the revenue and costs risks of the TOC operations and accordingly assumed much greater control over their operations. The DfT monitored expenditure closely and any 'discretionary spend' that had not previously been incurred by the TOC required express DfT approval. The TOCs were also required to suspend all conventional marketing operations and to focus instead on dissemination of information about safety and social distancing;

(2) in September 2020, the EMAs were replaced by Emergency Recovery Measures Agreements ("ERMAs"). Under the ERMA, the emphasis switched to recovery and future planning: the DfT required the TOCs to forecast future revenue and how that would be achieved following the pandemic;

(3) from around mid-2021, the process began to replace the ERMAs with a National Rail Contract ("NRC"), a new agreement between the SoS and the respective TOC. The NRC introduced a fundamentally different model from the franchise regime. Each TOC receives a fixed fee for running its services and has the possibility of earning additional performance-related fees bonuses. Ticket revenue is essentially generated for the benefit of the DfT. Since October 2023, performance is benchmarked against revenue targets and the TOC can earn a share of the revenue achieved in excess of those targets. Under the NRC regime, each TOC is required to submit an annual draft business plan to the DfT, with a proposed budget focused on specified objectives, and attaching also an annual marketing plan. Following discussion, the DfT may approve, postpone or reject the plan and proposals for capital expenditure: the DfT is in particular concerned to reduce the overall subsidy provided to the rail industry, by specific measures to reduce costs and promote revenue recovery. Once approved, the activities proposed in the plan give rise to formal commitments ("Business Plan Commitments") and key performance indicators against which the TOC's performance is assessed.

40. Mr Peter Williams of First MTR commented on the position under the NRC as follows:

> "In practice, the NRC is more restrictive and proscriptive than the original Franchise Agreement. Monitoring by the DfT is now more intensive, and deliverables (and associated budgets) are agreed annually through the intensive Annual Business Plan process in response to DfT requirements, as opposed to being agreed as part of the Franchise Agreement for the entire Franchise Period."

41. While we have summarised the overall regulatory framework, it is important to note that the position varies between the three TOCs that are, respectively, defendants to the three actions.

SWR

42. SWR, as noted above, took over the SW franchise from Stagecoach as from 20 August 2017. The franchise agreement which it entered into was intended to apply for seven years and included details obligations as explained above. SWR found that the revenue generated from the service was less than the running costs, so that its parent group had to make up the franchise premium payable to DfT. On 31 March 2020, SWR entered into an EMA, and then, successively, an ERMA and the NRC.

LSER

43. LSER was appointed to operate the SE franchise from 1 April 2006. However, its franchise agreement expired prior to the start of the relevant claim period. Thereafter, its position was as follows:

(a) From October 2014, instead of seeking tenders for a new franchise period, the DfT negotiated a series of short-term extensions or "Direct Award Contracts", ranging in length from three months to three years and eight months, for LSER to continue to operate the franchise. The DfT had the option to extend the arrangements for periods of three to five months and at any stage could revisit or change LSER's obligations under the relevant agreement to require LSER to adopt particular ticketing or advertising strategies. Moreover, under the terms of the Direct Award Contracts, from

mid-2017 LSER was treated as being in the final year of its franchise period, and to ensure the integrity of the anticipated future tender process the DfT's oversight of the operation of the franchise increased: e.g. the DfT had to approve all proposed fare changes and any kind of capital investment in relation to 'franchise owned' assets.

(b) At the end of March 2020, LSER moved to an EMA, under which the revenue, risk and costs of running the SE franchise were no longer borne by LSER but by the Government. Under the EMA, the DfT had to approve almost all decisions and changes proposed by LSER. The EMA continued until LSER was deprived of the SE franchise on 17 October 2021. Accordingly, LSER never entered into an ERMA or the NRC.

GTR

44. GTR was granted a franchise in June 2014: that was a new franchise created by the amalgamation of what had previously been separate franchises.[6] Because of the need for extensive infrastructure investment and consequent service disruptions, GTR's position under its franchise was slightly different from that of the other TOCs in that the DfT took all revenue risk. GTR was paid a management fee to operate the franchise and was only on cost risk, i.e. it was liable for additional costs incurred above its approved budget. The DfT required GTR to present for approval at the start of each year its marketing plans and any proposed changes to fares policy. In March 2020, as with the other TOCs, GTR entered into an EMA, under which the DfT took on cost risk in addition to the revenue risk which (unlike for other TOCs) it had borne from the outset of the franchise. The EMA was followed by an ERMA in September 2020 and in April 2022 GTR entered into the NRC.

45. The licences held by the TOCs require that they are members of the Rail Delivery Group ("RDG") an association of all passenger and freight operators in Great Britain and Network Rail (which owns and operates all rail

[6] Although GTR took over operations from September 2014, the Southern and Gatwick Express brands were only joined to the existing Thameslink and Great Northern brands to form the full franchise in July 2015.

infrastructure). The RDG is responsible for proposing and coordinating cross-industry initiatives, including those intended to ensure that TOCs' and industry ticketing systems are integrated so that passengers can travel from any station to another across the National Rail network. RDG is also responsible for licencing TPRs. RDG sets the standards for the ticket issuing systems ("TIS") used by all TOCs and TPRs and monitors compliance with those standards.

46. Under the terms of their franchise agreements, the TOCs were required to become parties to the Ticketing and Settlement Agreement ("TSA"). The TSA is an agreement between all the TOCs and Rail Settlement Plan Ltd, a company controlled by the RDG. The TSA sets out various arrangements between the TOCs relating to the carriage of passengers and the retailing of tickets. Under the TSA, the lead TOC for each flow (i.e. station to station journey) sets the fares for that flow, and each TOC is entitled to sell fares for journeys on the services of another TOC. The TSA provides for the way revenues from those sales are cleared and settled. There are no provisions in the TSA specifically regarding Boundary Fares.

47. We have set out the regulatory background in some detail not only because it was strongly emphasised by all the Defendants but because we consider that it is relevant context. The fact that neither the SoS nor the ORR ever told TOCs to promote Boundary Fares more actively or to sell them through particular channels is not an answer to the claims, and the Defendants did not seek to go that far in their submissions. The Defendants did many things which the DfT did not require them to do, including as regards the introduction of particular kinds of fare, and there is certainly no suggestion that that they were under any restriction on selling, promoting or marketing Boundary Fares. However, we do regard it as relevant that the SoS imposed a wide range of onerous obligations, including as regards the introduction of particular fares or boosting forms of tickets or as regards capital expenditure, which legitimately influenced the priorities which the TOCs had to adopt in the management of their businesses, and their commercial strategies were heavily guided by the objectives set by the DfT. As Mr Ward KC, appearing for SWR, said, these Defendants were not like an ordinary private sector business in terms of their degree of commercial freedom. The intense focus in this case on Boundary

Fares should not obscure the wider picture and the reality in which TOCs operated.

F. THE LAW ON ABUSE

48. Section 18 CA prohibits conduct which amounts to the abuse by an undertaking of a dominant position in a market within the UK, if it may affect trade within the UK. Pursuant to s. 60A CA, the Tribunal has an obligation to ensure consistency between UK competition law and the case law of the EU Courts pre-dating the end of the implementation period following the UK withdrawal from the EU (subject to certain exceptions). The Tribunal is also required to "have regard" to any decision or statement of the European Commission (the "Commission") made before that date. It was common ground that the EU case law and decisions referred to below concerning the equivalent Art 102 of the Treaty on the Functioning of the European Union ("Art 102" and "TFEU") can be relied on in this case in applying s. 18 CA.

49. It is well established by the jurisprudence of Court of Justice of the European Union ("CJEU") that:

    (1) "abuse" is an objective concept relating to the behaviour of an undertaking in a dominant position, which amounts to "*methods different from those which condition normal competition in products or services*": Case 85/76 *Hoffman-La Roche v Commission* ECLI:EU:C:1979:36, at para 91. This has often been described as the use of methods other than "*competition on the merits*": e.g. Case C-280/08P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603, at para 177.

    (2) the abuse does not have to arise by virtue of the economic power bestowed by the dominant position: *Hoffman-La Roche.*

50. Following Art 102, s. 18 CA sets out certain categories of conduct that may constitute an abuse. The CR relies particularly on s. 18(2)(a):

> "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

However, it is established that these categories are not exhaustive and that conduct may constitute an abuse even if it does not come within one of the enumerated categories: *Deutsche Telekom* at para 173. In *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch), Mann J emphasised (at [79]) that the statutory examples and those developed by subsequent case law, are simply "*ways in which the basic wrong can be committed, but at all times an eye must be kept on the basic wrong itself.*"

51. In Case 322/81 *Michelin* ECLI:EU:C:1983:313, the CJEU stated at para 57 that a dominant undertaking by virtue of its position in the market in which it operates is subject to a "*special responsibility* not to allow its conduct to impair genuine undistorted competition on the …market." As has been remarked, this is to some extent a statement of the obvious, since a dominant undertaking is subject to the prohibition under Art 102/s. 18 which does not apply to a non-dominant enterprise: see Whish & Bailey, *Competition Law* (11th edn, 2024), p. 203.

52. It is common to distinguish various forms of abuse set out in the statute or developed by the case-law as between exclusionary abuses (which primarily affect competitors) and exploitative abuses: Whish & Bailey at p. 217. Imposing unfair prices or unfair trading conditions is therefore termed an exploitative abuse. It is common ground that the present cases are concerned with exploitative not exclusionary abuse. The rationale for proscribing exploitative abuse was succinctly expressed by the Court of Appeal in *Gutmann CA* at [93]:

> "The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit."

53. In support of his claims, the CR relied strongly on Joined Cases C-147 & 148/97 *Deutsche Post v GZS & Citicorp* ECLI:EU:C:2000:74, and Case C-385/07P *Duales System Deutschland* ("*DSD*"), EU:C:2009:456.

54. *Deutsche Post* is a ruling on a reference from the German court concerning charges levelled by the German postal operator, Deutsche Post. Pursuant to an international agreement, where mail was posted in another European country for delivery in Germany, Deutsche Post would recover from the operator in the country of posting so-called "terminal dues". However, those dues did not cover the full cost of delivery of mail. An international bank, whose billing operation was based in Germany, arranged to send its regular communications to customers in Germany (as well as other European countries) from Holland, paying the Dutch international postal charges. Deutsche Post claimed postage charges from the international bank at the full internal rate for domestic postage, on the basis that the communications, although posted in Holland, originated in Germany.

55. The CJEU held that this infringed what is now Art 106 TFEU (then Art 90 of the EC Treaty), as an abuse of dominance contrary to what is now Art 102 (then Art 86 of the EC Treaty). The CJEU stated (emphasis added):

> "54. Article 90(2) of the Treaty … justifies, in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail, the grant by a Member State to its postal services of the statutory right to charge internal postage on items of mail where senders resident in that State post items, or cause them to be posted, in large quantities with the postal services of another Member State in order to send them to the first Member State.
>
> …
>
> 56. On the other hand, in so far as part of the forwarding and delivery costs is offset by terminal dues paid by the postal services of other Member States, it is not necessary, in order for a body such as Deutsche Post to fulfil the obligations flowing from the UPC [Universal Postal Convention], that postage be charged at the full internal rate on items posted in large quantities with those services.
>
> 57. It is to be remembered that a body such as Deutsche Post which has a statutory monopoly over a substantial part of the common market may be regarded as holding a dominant position within the meaning of Article 86 of the Treaty.
>
> 58. Thus, the exercise by such a body of the right to demand the full amount of the internal postage, where the costs relating to the forwarding and delivery of mail posted in large quantities with the postal services of a Member State other than the State in which both the senders and the addressees of that mail are resident are not offset by the terminal dues paid by those services, may be

> regarded as an abuse of a dominant position within the meaning of Article 86 of the Treaty.
>
> 59. In order to prevent a body such as Deutsche Post from exercising its right, provided for by Article 25(3) of the UPC, to return items of mail to origin, the senders of those items have no choice but to pay the full amount of the internal postage. …
>
> 61. It follows from all the foregoing considerations that, in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail, it is not contrary to Article 90 of the Treaty, read in conjunction with Articles 86 and 59 thereof, for a body such as Deutsche Post to exercise the right provided for by Article 25(3) of the UPC, in the version adopted on 14 December 1989, to charge, in the cases referred to in the second sentence of Article 25(1) and Article 25(2) thereof, internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which that body belongs. *On the other hand, the exercise of such a right is contrary to Article 90(1) of the Treaty, read in conjunction with Article 86 thereof, in so far as the result is that such a body may demand the entire internal postage applicable in the Member State to which it belongs without deducting the terminal dues corresponding to those items of mail paid by the abovementioned postal services.*" [our emphasis]

56. Two points are notable in *Deutsche Post*:

(1) when it posted the mail in Holland to its German customers, there was no way the bank could avoid paying the postal charges demanded by Deutsche Post; and

(2) Deutsche Post would recover the terminal dues for this mail from the Dutch operator, which formed part of the mailing cost paid by the bank in Holland, but was nonetheless demanding the *entire* internal postal rate from the bank: i.e. it was not crediting against the amount demanded the terminal dues which it also received, and in that regard was being paid twice.

57. *DSD* is a judgment of the Grand Chamber of the CJEU, upholding a decision of the Court of First Instance (now the General Court), which had dismissed an application to annul the Commission's decision holding that DSD had abused its dominant position by reason of its charging arrangements. Under German environmental protection legislation, manufacturers and distributors of packaged goods are required to have arrangements for taking back the sales packaging from final consumers free of charge, but they are exempt from that

obligation if they participate in a third party system which guarantees the regular collection throughout their sales territory of used sales packaging. DSD operated such a system on behalf of manufacturers and distributors and was the only operator of such a system throughout Germany, although there were alternative operators at more regional levels. Subscribers to DSD's system would affix its "DGP" (Green Dot) logo to their packaging, and DSD would ensure that such packaging was collected. However, the fees charged by DSD were based on *all* packaging bearing the DGP logo, irrespective of whether that packaging was actually collected by DSD as opposed to the manufacturer collecting it themselves or using another third party. The Commission rejected DSD's argument that manufacturers could choose not to affix the logo to packaging which was not to be collected by DSD. That was not economically realistic or practical since it would require selective labelling of packages and require manufacturers and distributors using mixed systems to ensure that packages bearing the logo were disposed of at different outlets from packages without the logo that were to be collected by another system (judgment at para 31).

58. Noting that an abuse of dominance under Art 102 (then Art 82 of the EC Treaty) may be constituted by directly or indirectly imposing unfair prices or other unfair trading conditions, the CJEU stated:

> "141. As the Court of First Instance stated at paragraph 121 of the judgment under appeal, it is apparent from point (a) of the second paragraph of Article 82 EC that the abuse of a dominant position may consist, inter alia, in directly or indirectly imposing unfair prices or other unfair trading conditions.
>
> 142. In the same paragraph of the judgment under appeal, the Court of First Instance noted the settled case-law, according to which an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided (see, inter alia, Case 226/84 *British Leyland v Commission* [1986] ECR 3263, paragraph 27, and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 46).
>
> 143. As the Court of First Instance held at paragraph 164 of the judgment under appeal, …, the conduct of DSD which is objected to in Article 1 of the decision at issue and which consists in requiring payment of a fee for all packaging bearing the DGP logo and put into circulation in Germany, even where customers of the company show that they do not use the DGP system for some or all of that packaging, must be considered to constitute an abuse of a dominant position within the meaning of the provision and the case-law referred to above. …"

59. Accordingly:

(1) customers of DSD had no practical alternative to fixing the DGP logo to all their waste packaging; and

(2) DSD would get paid by those customers for collection of packaging which DSD did not in fact collect at all.

60. In his opening submissions for the CR, Mr Moser stated that the CR's case "hinges on the lack of transparency and the fact that people did not know that they were paying over the odds or that they could save." On the question of transparency, the Defendants drew attention to the approach of the CJEU in *Michelin.* The alleged abuse in that case comprised a system of selective discounts granted on an individual basis to purchasers of Michelin's tyres who exceeded certain 'targets'. Dismissing the challenge to the Commission's finding of abuse, the CJEU stated:

> "81. The discount system in question was based on an annual reference period. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In this case the variations in the rate of discount over a year as a result of one last order, even a small one, affected the dealer's margin of profit on the whole year's sales of Michelin heavyvehicle tyres. In such circumstances, even quite slight variations might put dealers under appreciable pressure.
>
> 82. That effect was accentuated still further by the wide divergence between Michelin NV's market share and those of its main competitors. If a competitor wished to offer a dealer a competitive inducement for placing an order, especially at the end of the year, it had to take into account the absolute value of Michelin NV's annual target discount and fix its own discount at a percentage which, when related to the dealer's lesser quantity of purchases from that competitor, was very high. Despite the apparently low percentage of Michelin NV's discount, it was therefore very difficult for its competitors to offset the benefits or losses resulting for dealers from attaining or failing to attain Michelin NV's targets, as the case might be.
>
> 83 Furthermore, the lack of transparency of Michelin NV's entire discount system, whose rules moreover changed on several occasions during the relevant period, together with the fact that neither the scale of discounts nor the sales targets or discounts relating to them were communicated in writing to dealers meant that they were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do so."

61. *Michelin* was accordingly a case of exclusionary abuse, where the discount system placed pressure on purchasers to buy their tyres from Michelin and not its competitors. Although the lack of transparency in the discount system was a factor, we agree with Mr Ward KC that it was relied on as an aggravating factor of the effect of a system which was inherently exclusionary. We were not referred to any case where the lack of transparency of an otherwise innocuous system could in itself constitute an abuse.

62. The CR further relied on the recent decision of the French national competition authority ("NCA") of 29 December 2023 in *Bisphenol A*, which Professor Holmes drew to the parties' attention at the hearing.[7] There, the French NCA held that three canning trade associations and 11 canning manufacturers had infringed Art 101 TFEU by agreeing to limit the information provided to consumers about the BPA-content of their cans. This had the effect that consumers were unable to choose BPA-free products, at a time when such products were available, and BPA was considered dangerous to health. The addressees of the decision had also agreed not to deliver BPA-free containers before a certain date.

63. The CR sought to draw an analogy with the present cases on the basis that the Defendants were failing to provide information to consumers about the availability of a product which may affect their purchasing decisions. However, that case involved a collective strategy to prevent manufacturers from competing on the presence or absence of BPA in their products: i.e. it was an agreement between competitors "not to compete on a competition parameter, the absence of BPA" (para 1054). The NCA unsurprisingly found that this manifestly involved a 'by object' restriction of competition. It was therefore clearly different from the present cases.

64. At the time of the CPO applications, the CR had relied also on the judgment of the German Federal Supreme Court in *Facebook* (Decision KVR 69/19 of 23 June 2020). That was in effect a provisional decision, setting aside the

[7] Décision no 23-D-15 du 29 décembre 2023 relative à des pratiques dans le secteur de la fabrication et la vente de denrées alimentaires en contact avec des matériaux pouvant ou ayant pu contenir du bisphénol A.

suspension by the lower court of an infringement decision of the German competition authority (the BKA), pending a full appeal. By the time of this trial, the CJEU had issued its judgment in Case C-252/21 *Meta Platforms v BKA*, ECLI:EU:C:2023:537, [2023] 5 CMLR 22, a reference from Germany in the full appeal proceedings. In its decision, the BKA had found that Meta had violated the German domestic equivalent to Art 102 by effectively imposing on German users of Facebook.com general terms of service whereby they consented to Facebook collecting, storing and using personal data generated from their use of other group products or services outside the Facebook social network, such as WhatsApp and Instagram, and from their visits to the web pages of companies that use Facebook Business Tools ("off-Facebook data"). The BKA found that this data processing by Meta was contrary to the General Data Protection Regulation, Reg (EU) 2016/679 ("the GDPR"), and relied on that finding in concluding that Meta had abused its dominant position.

65. In its reference to the CJEU, the German appeal court sought clarification as to whether the BKA, which was not the German supervisory authority for the purpose of the GDPR, was entitled to find a breach of the GDPR or whether that role was reserved under the GDPR to the specified supervisory authority. The court further asked a series of questions as to whether Meta's conduct in fact did contravene the GDPR. In ruling on the first point, the Grand Chamber of the CJEU referred to the statement that abusive conduct involves resort to methods other than those governing normal competition (see para 49 above) and continued, at paras 47-48:

> "… In that respect, the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers.
>
> 48 It follows that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR."

In response to the other questions, the CJEU clarified the interpretation of the relevant provisions of the GDPR; their application to the actual facts of the case was then a matter for the national court to determine.

66. The judgment in *Meta* was considered by the CJEU last year in Case C-21/23 *ND v DR*. That was a reference for a preliminary ruling in a private action between competitors brought under the domestic German law of unfair competition. The claimant sought an injunction to restrain the defendant's actions on the basis that they constituted unfair competition because they infringed the GDPR. The German court referred two questions to the CJEU: the first question asked whether, given the system of remedies prescribed in the GDPR, a private claimant was precluded from alleging infringement of the GDPR within the scope of distinct national law prohibiting unfair commercial practices; the second question asked about the correct interpretation of the particular provision of the GDPR, on the basis of which the facts were alleged to constitute an infringement.

67. The CR drew attention to the observations on the first question by Szpunar AG in his Opinion: ECLI:EU:2024:354. He said, at para 90:

> "As regards … the possibility for undertakings to rely on the provisions of the GDPR, I note that they are able to do so in actions based on national law, such as the action at issue in the main proceedings, only incidentally. More precisely, the undertaking brings an action on the basis of national law, namely the prohibition of acts of unfair competition. The unfairness of the act in question is therefore the consequence of an infringement of the GDPR. In other words, the action is not based on an infringement of the provisions of the GDPR, but takes such an infringement into account in an incidental manner."

The Advocate General then referred to the *Meta* judgment and observed:

> "In other words, the Court accepts that an infringement of the provisions of the GDPR may constitute an infringement of competition law."

He continued:

> "92. Although that was said not in the context of a dispute between individuals but in the context of the examination of an anticompetitive practice by a national competition authority, I see no reason why the possibility of an infringement of the provisions of the GDPR being taken into account in an incidental manner should be limited to that situation.

> 93. First, as regards competition law, since it is accepted that an infringement of the provisions of the GDPR may be taken into account in a public enforcement matter, in my view it should also be possible for such an infringement to be taken into account in private enforcement and, therefore, in disputes between individuals which are not primarily based on an infringement of a right conferred by the GDPR, unless it is accepted that individuals cannot obtain compensation for the harm caused by an infringement of competition law which has nonetheless been established by a competition authority.
>
> 94. Second, as Advocate General Richard de la Tour has observed, the protection of personal data may have 'ramifications … in other areas relating, in particular, to employment law, competition law or even consumer law'. To my mind, the influence which the GDPR thus has in other areas must mean that its provisions may be taken into account in actions which are primarily based on provisions having no connection with that regulation."

68. The CJEU has now given judgment in *ND v DR*: ECLI:EU:C:2024:846. The Court broadly followed the approach of the Advocate General. The judgment referred to *Meta* and stated at para 62:

> "The possibility for a competitor of an undertaking to bring an action before the civil courts on the basis of the prohibition of unfair commercial practices in order to put an end to an infringement of the substantive provisions of the GDPR, allegedly committed by that undertaking, not only does not undermine those objectives but it is, in fact, such as to enhance the effectiveness of those provisions and thus the high level of protection of data subjects with regard to the processing of their personal data, pursued by that regulation."

69. Although both *Meta* and *ND v DR* were judgments of the CJEU delivered post-Brexit, it was not suggested by the Defendants that they should be disregarded.

70. The present cases do not of course involve the GDPR. But Mr Moser relied on *Meta* and the Opinion of Szpunar AG in support of his submission that "a vital clue" as to whether conduct was an abuse could be found, in a consumer case, in whether it contravened relevant legislation governing consumers. In that regard, Mr Moser referred to Directive 2005/29 concerning unfair business-to-consumer commercial practices, which was transposed in the UK by the Consumer Protection from Unfair Trading Regulations 2008 ("the CPUTR"). Reg 3 of the CPUTR prohibits "unfair commercial practices" and reg. 3(4)(a) specifies that a commercial practice is unfair if it is a misleading omission under the provisions of reg. 6. Reg. 6 includes the following:

> "(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

> (a) the commercial practice omits material information,
>
> (b) the commercial practice hides material information,
>
> (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
>
> (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,
>
> and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
>
> (2) The matters referred to in paragraph (1) are—
>
> (a) all the features and circumstances of the commercial practice;
>
> (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
>
> (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.
>
> (3) In paragraph (1) "material information" means—
>
> (a) the information which the average consumer needs, according to the context, to take an informed transactional decision; …"

71. Mr Moser submitted that the position here as regards the CPUTR was analogous to that in *Meta* as regards the GDPR. In his opening submissions, he said:

> "Here is a vital clue to what is abusive in our case: a commercial practice that hides material information or provides it in an ambiguous or unclear way, leading the consumer to take a transactional decision – i.e. to buy a full fare – that he would not have taken otherwise."

In response to questioning from the Tribunal, Mr Moser acknowledged that following the approach of the CJEU, it would be necessary for the Tribunal to examine whether the Defendants' conduct complies with the CPUTR, and he submitted that it was not in compliance with reg. 6. But he said that he was not seeking to enforce the CPUTR in this Tribunal or for a remedy thereunder. However, in the CR's closing submissions the point was put slightly differently. It was there stated:

> "… the CR submits, by analogy with regs. 3 and/or 6, that the Defendants conduct is either unfair within the meaning of the CPUTRs, or may be seen as unfair by analogy, and that this should be taken into account in an incidental manner in the present case in the manner explained by Advocate General Spuznar in [*ND v DR*]. For this purpose, it is not necessary (nor possible given

> the jurisdiction of this Tribunal) to find a breach of the CPUTRs. Instead, the degree to which the Defendants conduct complied with the CPUTRs provides a further piece of evidence in the wholistic assessment of whether the Defendants' overall conduct was abusive."

72. We note that the relevant provisions of the CPUTR have now been replaced, with effect from 6 April 2025, by ss. 225 and 227 of the Digital Markets, Competition and Consumers Act 2024, but those provisions are not retrospective and in any event are to similar effect, so nothing turns on this change. The allegation regarding compliance with the CPUTR is clearly a significant one. In our view, there is no scope for some elusive analysis of the "degree" to which the TOCs complied with the CPUTR. We think the CPUTR are relevant only if it can be shown that the Defendants did not comply with their obligations under those regulations. That was the approach of the BKA in *Facebook*, and then of the German court and the CJEU in the two cases discussed above. Indeed, it was the purpose of the various questions on the interpretation of the GDPR addressed in the preliminary rulings. As Szpunar AG explained, the GDPR was taken into account in an "incidental" manner only in the sense that those cases were not brought under the remedies provisions of the GDPR. The abuse in *Meta* and the unfair competition in *ND v DR* was alleged on the basis of *infringement* of the GDPR.

73. However, here the CR did not allege any breach of the CPUTR in his pleadings, and the Defendants strongly objected to this point being raised at trial. It is a serious allegation: a trader who engages in a commercial practice which violates reg. 6 is guilty of an offence: reg. 10 (subject to limited defences in reg. 17). The CJEU judgment in *Meta* was handed down on 4 July 2023, well before the finalisation of the list of issues for the present trial on 22 November 2023. The assertion that it is relevant to examine whether the Defendants' conduct complies with Directive 2005/29 was introduced briefly in the CR's skeleton argument for the trial, and then developed only on the first day of the trial in counsel's opening.

74. Moreover, as the Defendants pointed out, the question of whether they had complied with reg. 6 CPUTR is far from straightforward. It requires assessment

of the likely effect on the "average consumer". Reg 2 includes the following interpretive provisions:

> "(2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.
>
> …
>
> (4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group."

75. In *Secretary of State v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76, Briggs LJ (as he then was), with the concurrence of Richards and Ryder LJJ, said at [30] that the requirement to make this assumption:

> "reflects the common sense proposition that the UCPD exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer."

The Court of Appeal there held that it was clearly erroneous of the judge to have proceeded on the principle that a supplier of a service for which it is proposing to charge "will always be obliged to inform the consumer (if it be the case) that the same service is available free from an alternative supplier": see at [38]-[39]. Briggs LJ added:

> "The proposition must in my judgment be *a fortiori* erroneous if it is only part of the service which the trader is offering that can be obtained free from an alternative supplier."

76. The likely reaction of the average consumer has been described by the High Court as "a fairly typical example of an issue of mixed fact and law"; accordingly, where it was disputed, that required a trial on evidence: *CMA v Care UK Health & Social Care Holdings Ltd* [2019] EWHC 2828 (Ch). Although in this regard the courts have been very cautious about placing weight on the evidence of individual consumers, they will have regard to survey evidence: see the judgment following trial in that case where reliance was placed on a survey of a sample of the relevant consumers, *CMA v Care UK Health & Social Care Holdings Ltd* [2021] EWHC 2088 (Ch) at [72]. In the present

proceedings, the relevant group of consumers comprises purchasers of Travelcards who take rail journeys out of London. The CR, unlike the CMA in the *Care UK* case, did not rely on any survey evidence of such consumers (or indeed direct the Tribunal to the relevant authorities on the application of the CPUTR[8]). The Defendants say that if they had been faced with a specific allegation of breach of reg. 6 CPUTR, they may well have sought to adduce such evidence.

77. In all the circumstances, we do not think it is open to the CR to ask the Tribunal to find non-compliance with reg. 6 CPUTR. And, as stated above, unless the Defendants infringed the CPUTR, we do not regard those regulations as relevant. We would add that if it were open to us to consider the issue, we would have found that there is insufficient evidence to establish non-compliance with the CPUTR.

78. At the time of the CPO applications, when the Defendants were seeking to contest part of the claims as unarguable, the CR relied on the *Facebook* judgment of the German Federal Supreme Court as an illustration of the breadth of the concept of abuse of dominance in competition law. The CPO Judgment followed that approach, and the Court of Appeal noted that it was an example of abuse constituted by "an unfair intrusion into consumer rights": *Gutmann CA* at [100].

79. We have no doubt that abuse is a broad concept, and that the concept of exploitative abuse by "unfair" conduct should develop to reflect new patterns of commerce. However, that concept is not unlimited. Competition law is not a general law of consumer protection. And where the allegations concern systemic conduct, the fact that the dominant company could have carried out a particular aspect of its business better, or in a different way that would have benefited consumers, does not mean that this conduct crosses the line to constitute abuse. The law provides other means to investigate and potentially control the conduct of enterprises: the regulatory framework summarised above

[8] The CR referred only to Case C-310/15 *Deroo-Blanquart v Sony Europe* ECLI:EU:C:2016:633, where the CJEU addressed a different aspect of Dir. 2005/29.

gives the SoS extensive power to direct the TOCs' conduct as regards fares, ticketing and marketing. Questions as to how a fair market ought to be organised may be relevant to a market investigation, which the CMA and ORR can instigate, but that is distinct from the question whether specific conduct of certain participants in the market constitutes an abuse: see the Tribunal's observations in *Churchill Gowns Ltd v Ede & Ravenscroft Ltd* [2022] CAT 34 at [112].

80. It must be emphasised that abuse of dominance is prohibited and therefore unlawful. Such conduct renders a dominant company liable to potentially very significant fines, and is classified as quasi-criminal for the purpose of Art 6 of the European Convention on Human Rights. That is why the Tribunal has held that "strong and compelling evidence" is required to establish abuse: *Napp Pharmaceutical Holdings Ltd v DGFT* [2002] CAT 1 at [109]. The competition law prohibition of abuse does not create an obligation on the dominant company to organise or conduct its business so as to achieve the best outcome for its customers, or *a fortiori* for a sub-group of its customers. In the present case, the concern is with a sub-group of the Defendants' customers: those who hold Travelcards while taking journeys out of London beyond the outer limit of their Travelcard.

81. The CR further relied on the discussion of the law on abusive and unfair terms in O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*" (3rd edn, 2020) at pp. 1031-1045, to which the Court of Appeal also referred in *Gutmann CA*. His closing submissions cited the passage at p. 1040:

> "The Commission's detailed treatment of abusive contract terms in *DSD* usefully clarified the scope of Article 102(a) in such cases. The Commission maintained the test set out in earlier cases: is the clause central to the object of the contract? But, as a second stage, it considered whether it was proportionate, bearing in mind the parties' respective interests. Although proportionality is more art than science, its meaning is reasonably well-established in EU competition law. In basic terms, it requires a balancing between the object of the contract, the terms of the contract, and the contractor's justification for those terms. Thus, the clause should: (1) have a legitimate objective other than consumer exploitation; (2) be "effective," that is to say, capable of achieving the legitimate goal; (3) be "necessary" in the sense that there is no alternative that is equally effective in achieving the legitimate goal but with a less restrictive or less exploitative effect; and (4) be "proportionate," in the sense

> that the legitimate objective pursued by the dominant firm should not be outweighed by its exploitative effect on the trading party in question."

82. However, that passage is expressly an analysis of the Commission's decision in *DSD*. In the immediately following passage, the authors notably state:

> "More recent decisions and judgments illustrate perhaps a more circumspect view of the role of Art 102(a) in assessing the fairness of contractual terms."

And the summary at the end of the discussion of all the cases states:

> "… it is also recognised that the alternative methods posited must be realistic and should not themselves involve a material increase in costs. Otherwise they would necessarily be less effective than the chosen methods. Proportionality necessarily involves questions of judgment and policy rather than precision, but the use of proportionality in EU competition law is well established."

83. More fundamentally, this discussion in O'Donoghue and Padilla's valuable book is premised entirely on an unfair contractual "term" which has been *imposed* on the 'victim' of the exploitative abuse. That is of course consistent with the language of Art 102(a)/ s. 18(2)(a): see para 50 above. As we have noted, in both *Deutsche Telekom* and *DSD* the customer wishing to use the service had no practical alternative to paying the impugned charge. In *Meta*, the courts stressed the BKA's finding that consumers wishing to use the Facebook social network had no alternative but to "consent" to the terms entitling Meta to broad access and use of their data. In the recent Commission decision in *Apple – App Store Practices (music streaming)*, 4 March 2024, in setting out the legal test for abuse by unfair trading conditions, the Commission states, at recital (529):

> "It can be inferred from the case law that, in essence, to be qualified as unfair under Article 102(a) of the Treaty and thus abusive, trading conditions must be: (i) imposed by a dominant undertaking on its trading partners, (ii) unfavourable or detrimental to the interests of that undertaking's trading partners or of third parties, including consumers, that are affected by the trading conditions imposed by the dominant undertaking, and (iii) not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose, in that they go beyond what is strictly necessary to achieve it."

84. We consider, as Mr Ward accepted in argument, that "imposition" for the purpose of the legal proscription can be *de facto*: e.g. if a business selling largely online was alleged to charge unfair and excessive prices, it would be no answer

for it to say that it also operated a brick-and-mortar store in one part of the country where consumers could go in person and buy the same product at cheaper prices. The Court of Appeal accordingly summarised what is necessarily the basis of the CR's case on abuse in *Gutmann CA* at [115]:

> "The essential premise in the present case is that the defendants have double-charged consumers for travel and have been enabled to do this by use of a system that is said to be opaque and inaccessible."

85. For the great majority of journeys, both single and return, Boundary Fares exist and have been available for purchase. Therefore the relevant questions are whether (a) on the evidence, it is established that each Defendant's system for sale of Boundary Fares was so opaque and inaccessible that in practical terms a double charge was imposed on the relevant consumers for part of their journeys; and (b) whether the absence of any Boundary Fare for use with certain particular kinds of ticket amounts to an abuse.

86. Where conduct would prima facie constitute an abuse, it is open to the dominant undertaking to establish that its conduct was objectively justified. It is well-established that the burden of establishing the 'defence' of objective justification rests on the dominant undertaking.

87. The CJEU addressed the requirements for objective justification in Case C-209/10 *Post Danmark v Konkurrencerådet* EU:C:2012:172. That was a case where the abuse at issue involved exclusionary conduct, and the Court stated (citations omitted):

> "41…an undertaking may demonstrate … either that its conduct is objectively necessary … or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.
>
> 42 In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition."

88. Objective justification therefore has a number of different aspects, which are helpfully identified as follows by O'Donoghue and Padilla (at p. 344):

> "(1) situations in which the dominant firm's conduct is objectively necessary because of factors external to the dominant firm's conduct; (2) situations in which the dominant firm takes defensive measures to protect its commercial interests; and (3) situations in which the dominant firm's conduct is justified by efficiencies."

As regards the first aspect, the law imposes a high standard for necessity: *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch) at [134]. And for all aspects, it has been stressed on many occasions that the conduct must be proportionate to the goal pursued: e.g., *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (Ch) at [143]-[146].

G. LACK OF BENEFIT TO THE DEFENDANTS

89. The Court of Appeal stated in *Gutmann CA* at [115]:

> "If a dominant undertaking charges a consumer for a service they do not use or need or want or imposes terms which give the dominant undertaking an advantage to which it is not entitled – for example by failing to deduct pre-payments – then this might be unfair and there might be an abuse of dominance."

90. As noted above, under the Travelcard Agreement revenue from sales of Travelcards is allocated as between TfL and the TOCs. In the claim forms, the CR alleged that if a Travelcard holder purchased a full journey fare (i.e. from station of origin to the destination) instead of a Boundary Fare (or equivalent point-to-point fare), the relevant Defendant would be paid twice for part of the passenger's journey. This was based on the contention that the Defendants would receive compensation in the form of their revenue share under the Travelcard Agreement "for providing the service to the customer in relation to that element of the journey covered by the Travelcard." That was the basis on which the CPO applications were considered by the Tribunal, and then the Court of Appeal. However, in the light of the evidence from the Defendants for this trial, the CR accepts that this is not case. The revenue allocation model under the successive Travelcard Agreements used for the apportionment tracks, as accurately as possible, the actual use of Travelcards on the services of each

operator (TfL or the relevant TOC), and a TOC does not receive payment in relation to Travelcards that are not actually used on its services.

91. No doubt for this reason, in his closing submissions the CR emphasised that it is not necessary for a dominant company to derive a commercial benefit from its conduct in order for that conduct to be condemned as abusive, referring to *Arriva The Shires.* This proposition is not in dispute. But it is notable that in that judgment (in a case of exclusionary abuse akin to a refusal to supply), Rose J (as she then was) went on to say, at [99]:

> "The complete absence of any commercial gain on the part of the dominant undertaking may well be highly relevant in a particular case, for example on the issue of objective justification. If a dominant undertaking can show that it has nothing to gain from refusing to supply a customer, that would support its contention that, as a matter of fact, the refusal was based on an entirely legitimate objective justification – why else would it forego the sale?"

92. The fact that the Defendants were not in fact being 'paid twice' when their customers who held Travelcards bought full journey fares accordingly distinguishes the present cases from *Deutsche Post;* nor were they being paid for a service that was not provided, in distinction with *DSD*. In our view, this is an important context in which the allegations of abuse fall to be considered.

H. ALLEGED LACK OF AWARENESS

93. There is no suggestion in the present cases that any of the Defendants adopted a policy to keep Boundary Fares obscure or to leave customers unaware of their existence. The position is therefore very different from the deliberately uncertain and changing volume discounts that applied in *Michelin*, calculated to deter customers from making purchases from Michelin's competitors. On the contrary, all the Defendants sold Boundary Fares from all their TOs, and Boundary Fares were mentioned in the training of TO staff. The staff had access to the TOCs' internal "Knowledge Base", which had a three page section on "Travelcard Excess Fares", stating that for holders of Travelcards, "Tickets should be issued from the outermost Boundary Zone of the Travelcard held and must not be valid for travel after the date of expiry of the Travelcard held", followed by more detailed explanation and worked examples.

94. The Defendants stressed that Boundary Fares were only one category among over 1000 types of fare they sold, and described them as a "niche product". Mr Moser commented that Boundary Fares were only 'niche' because they were given so little visibility that they remained obscure. However, the Defendants made clear that Boundary Fares were regarded as "niche" because they had only limited application. As Mr Ward put it:

> "… they are only relevant to Travelcard holders who want to occasionally travel to a destination outside the zones. But they do not want to do it often enough to buy a periodic ticket that covers both, whether a wider travelcard or a season ticket."

That is why the TOCs did not regard Boundary Fares as one of their core fare types.

95. Whether or not Boundary Fares should be labelled as "niche" seems to us largely a matter of semantics. We think that they are clearly of much less relevance than other types of fare, such as off-peak fares. The fact that many of the Defendants' customers may have Travelcards does not in itself mean that a Boundary Fare is a significant product. A Boundary Fare is relevant for such customers only if and when they wish to take an outbound journey beyond the boundary of their Travelcard. As Mr Bellenger said in re-examination, those are "a very specific sub-set of passengers in the generality." We agree with the observation of Mr Cameron of SWR that a Boundary Fare did not represent "your typical travel pattern as a customer." That is important when considering the allegation that in failing to take greater steps to raise awareness of Boundary Fares the Defendants were imposing an unfair selling system that amounted to an abuse.

96. Although it was central to the CR's case that there was insufficient awareness of Boundary Fares among rail passengers, the evidence relied on in support of this allegation was, in our view, wholly unsatisfactory. We think there was considerable force in Mr Ward's criticism that there was an "evidential vacuum." In particular, there was no survey of Travelcard holders using any of the three Defendants that might indicate a lack of awareness of Boundary Fares. This cannot be explained on the basis of lack of time or funding: the CR, through litigation funding, has ample resources: see the CPO Judgment at [48]. Indeed,

in support of the CPO applications he had relied on a survey (dealing there with the responses to inquiries at TOs): para 4 above. But that survey was not put in evidence at this trial and, in any event, addressed a different point. There was evidence of a very small pilot survey conducted in January 2024 in preparation for the envisaged stage 2 trial on causation, but there was only one question in that survey relevant to the issue of awareness and the way that was addressed is ambiguous; the result therefore cannot provide any support for the CR's case that there was a low level of awareness.[9]

97. The CR placed heavy emphasis on "the numbers": i.e. the actual number of Boundary Fare tickets sold over the relevant periods by each of the three Defendants. In particular, the CR pointed out that in the claim periods falling within the years 2015/16 to late January 2019, the total number of outbound Boundary Fare tickets sold for travel on the Defendants' services was a little over 2.3 million. The claim periods differ as between the three Defendants and the breakdown is as follows:

SWR	20.8.17 - 9.5.24	451,207
LSER	1.10.15 - 17.10 21	378,950
GTR	24.11.15 - 9.5.24	1,514,778

98. By contrast, over 77 million Travelcards[10] were sold over the three years 2015/16-2017/18. But of course (leaving aside the distinction in the time periods), that is not the relevant comparison. The correct comparator is the number of journeys starting within the Travelcard zones and ending somewhere beyond (i.e. what were referred to as '"in-scope" journeys) taken by Travelcard holders. Although Mr Holt had attempted to estimate those in his reports for the CPO applications, his estimates were not agreed and he was not put forward as an expert for this trial, such that he could be cross-examined.[11] Moreover,

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[9] It is unclear whether the response rate to the question whether the passenger intends to purchase a Boundary Fare was recorded before or after the passenger was given a prompt as to what a Boundary Fare is, so the result is of no assistance. Moreover, this was just a pilot on a sample of 73 customers holding Travelcards.

[10] Excluding 1-day Travelcards since it is accepted that those were not relevant to the potential sale of Boundary Fares.

[11] Mr Holt had expressly made his estimates prior to any disclosure; he was not asked to reconsider them or take them forward beyond January 2019 with the benefit of disclosure that could be obtained from the

the number of Travelcard holders who took in-scope journeys will include those who loaded their Travelcard onto their Oyster card or a TOC smartcard,[12] and who therefore would not need to purchase a Boundary Fare ticket since they would automatically be charged only the extension fare price when 'tapping in and out' their Oyster or TOC smartcard.[13] In addition, there was evidence that TOs sometimes sold customers who said they hold a Travelcard a point-to-point ticket from the outermost station covered by their Travelcard instead of a specific Boundary Fare ticket when those were the same price, since that served the same purpose. The extent to which this happened is unclear. Mr Cameron of SWR produced in his evidence a table showing a detailed breakdown of tickets sold for outbound travel from Surbiton in the period August 2017-March 2024: this was intensively analysed in cross-examination but we consider that in the end it did not enable any clear conclusion to be drawn. Accordingly, we find that the numbers do not establish the propensity or extent to which Travelcard holders made in-scope journeys, let alone the extent to which they purchased a full fare instead of a Boundary Fare or equivalent point-to-point ticket.

99. Furthermore, the fact that passengers did not buy a Boundary Fare does not establish that they were unaware of this option. Mr Bellenger gave a specific example of a walking group that he had organised in 2015, when he gave the participants specific instructions about how to buy a Boundary Fare to the station where the walk began; nonetheless, of the five who held a Travelcard (or Freedom Pass), almost all chose to buy a different ticket. And there will always be some travellers who simply forget to bring their Travelcard when making an out-of-London journey and so have to pay the full fare.

Defendants prior to trial. Each of the three TOC Defendants set out in their evidence figures for annual sales of Boundary Fares for later years.

[12] GTR introduced a PAYG feature on its "Key" smartcard in 2014 and since then has been expanding the services on which this can be used. LSER launched its "Key" smartcard in 2016. SWR introduced its "Touch" smartcard in 2018 but prior to 2 January 2020 only some Travelcards could be loaded onto those smartcards.

[13] The CR recognises that such passengers therefore fall outside the class definition.

100. Moreover, we note that the ORR's report on *Fares and ticketing – information and complexity* (June 2012), in a passage on which the CR relied for a different purpose, stated:

> "… in some cases, popular tickets have not previously been offered on TVMs if they do not commence from the station at which the TVM is located – boundary zone fares are the most requested category."

That finding was based on ORR's passenger survey and is directly contrary to the assertion that passengers had little awareness of Boundary Fares.

101. There was much evidence, both documentary and oral, of the training given to TO staff regarding Boundary Fares. However, in the absence of a sustainable case that there was lack of awareness among customers about Boundary Fares, the question of how comprehensive or intensive or frequent was the staff training about Boundary Fares falls away. Boundary Fares were referred to in the training materials given to staff, along with much other information; and the prominence which this was given varied as between the Defendants. But there was no evidence that when a customer seeking to purchase a rail ticket at a TO says that he or she has a Travelcard, the TO staff fail to suggest that the customer can get Boundary Fare. In contrast to the position on the CPO applications, when the CR did adduce evidence of a 'mystery shopper' survey of the experience of customers at TOs (see para 4 above), which in the nature of a CPO application the Defendants were not then able to challenge, neither that survey nor any other was adduced in evidence at the trial.

102. It is clear that TO staff at London stations did not routinely ask customers seeking to buy a ticket if they held a Travelcard. However, in our judgment, this in itself could not amount to an unfair selling practice constituting an abuse. A dominant company has no duty under competition law actively to assist all its customers to pay the lowest price or to buy the optimal product for their needs. Nothing in the jurisprudence on Art 102/s 18 CA gives any support for such a proposition, which would have very broad implications.

103. What the sales figures for Boundary Fares do show, along with the evidence of TO staff training, is that this was certainly not a concealed product. And all three Defendants publicised sources of information where passengers could

make inquiries: e.g. SWR's "Passenger's Charter" included a customer service centre telephone number and the National Rail Enquiries number which a customer could call for information.

104. We can accept that, looked at in isolation, the numbers of Boundary Fares sold appears to be on the low side, as Mr Phayer of GTR very frankly acknowledged in cross-examination. However, we reject the allegation in the claim forms that the Defendants "must have been well aware … that only an unrealistically low number of Boundary Fares was being sold for travel on their services". It is clear to us, on the evidence from each of the three Defendants, that they did not particularly focus on Boundary Fares prior to the launch of the present proceedings. None of them monitored the numbers of Boundary Fares sold. Indeed, Mr Williams, who has been the Customer and Commercial Director at SWR, only became aware of Boundary Fares at all as a result of these proceedings. And Mr Wilcox, who is responsible for managing the database of fares and products at SWR, said that "it is just one of those products that has always just kind of sat in the background". We did not discern any greater attention to Boundary Fares among the other two Defendants. And as Ms Hill of GTR pointed out, even if she had identified sales or earnings figures for Boundary Fares as one of the categories in her regular Earnings and Fares reports (which she did not), in order to assess whether the figures were unreasonably low it would have been necessary to determine the number of in-scope journeys made by Travelcard holders, and what fares those passengers had purchased (e.g. whether they had purchased a point-to-point fare from the last station covered by their Travelcard), which was not possible on the available data.

105. We further reject the CR's contention that that the Defendants should have taken active steps to promote the existence of Boundary Fares in order to generate customer awareness. In the first place, as set out above, we do not consider that the CR established that the level of awareness was low. But even if it was, if a dominant firm makes a product sufficiently available to customers (a question which we address further below), and does not seek to conceal its existence, we cannot accept that the "special responsibility" of the dominant firm to avoid the imposition of unfair trading terms requires it to promote or advertise a product

that will benefit some of its customers so as to increase their awareness of that product. To repeat what we have said above, nothing in the jurisprudence on abuse of dominance supports such a proposition.

106. In the light of this, it is unnecessary to consider whether the Defendants could reasonably have raised awareness or demand for Boundary Fares if they had wished to do so. We will only say that we were not impressed by the evidence of Mr Anderson, the head of marketing at LSER until May 2024, whom we found to be a very partisan witness keen to suggest difficulties in devising a promotional campaign for Boundary Fares. And we were wholly unpersuaded by the evidence of Mr Morrow, the head of marketing at GTR, who insisted that a marketing campaign would have been extremely difficult and complicated because it could not be suggested that a Boundary Fare could save consumers money since any messaging would have to include the cost of a Travelcard.

107. As the CR pointed out, the TOCs had various forms of marketing channels available, including their own social media and poster space at stations in addition to paid third party advertising channels. The closing submissions for the CR put forward various ways in which a marketing or promotional campaign could have been conducted. It is not for the Tribunal to get into the granularity of what a campaign would involve. But any campaign would have clearly had a cost. In that regard, we accept the evidence of Mr Humphreys, the senior marketing manager at SWR, whom we found to be a much more balanced and impressive witness and who acknowledged that they could have come up with a promotional campaign for Boundary Fares had that been requested. Unlike the other marketing witnesses, Mr Humphreys had for his evidence set out what a campaign would cost, with alternative options. A 'medium weight' campaign of four weeks, expected to reach 71.4% of adults, would have cost £420,000, reduced to £270,000 if advertising on key radio stations was omitted (resulting in a less effective campaign), plus in either case £95,000 for the creative, production and management time involved. And Mr Humphreys explained that with such a rail product, they have found that to maintain awareness one has to repeat the promotion to remind customers of the benefit.

108. In his closing submissions, the CR asserted:

> "… the claim periods lasted between 6 and 9 years for each Defendant. Each Defendant had thousands of poster spaces, and a range of other owned channels, through which it could communicate marketing messages. It is remarkable to suggest that, over a period of that length, and with that many channels available to them, a message about the availability of a good value fare could never have been prioritised among the various different messages."

No doubt that is correct, but it misses the point. A marketing campaign is of no value if it is not effective. The CR did not adduce any evidence as to how a marketing campaign which would significantly increase customer awareness could have been carried out more cost-effectively than Mr Humphreys indicated.

109. We accept that each TOC Defendant could have carried out a campaign of the kind outlined by Mr Humphreys, save during the period of the Covid pandemic and the EMAs, when the DfT required the suspension of all promotion other than the conveying of messages about safety and social distancing. We consider that each TOC could also have included information about Boundary Fares on its website, explaining where such tickets could be purchased, as SWR finally did as from 1 May 2024. But the question of marketing Boundary Fares has to be seen in a wider context. This was just one type of fare among many. Each Defendant had a multitude of obligations in running its services and had to choose its priorities, both in terms of expenditure generally and as the subject of its marketing campaigns. In addition to the direct cost of a marketing campaign, account has to be taken of the opportunity cost: insofar as poster spaces or digital advertising was used for Boundary Fares, they could not be used for other messages or promotions. Any business has to choose where to concentrate its marketing and resources: e.g. what stickers to put up in the windows of TOs or what is the most important information to include on its website. As described above, each franchise and then the successive agreements with the SoS set out very full and detailed obligations, and we consider that it was reasonable and justifiable that the Defendants focussed their marketing plans (which generally had to be submitted to the DfT) on meeting their relevant 'committed obligations'.

110. Moreover, LTW, having regard to its duty to make representations regarding matters affecting the interests of the public (see para 30 above) never raised a

complaint with any of the Defendants that more information or publicity should be given for Boundary Fares. In 2013, LTW published a report, *Value for money on London's transport services: what consumers think*, based on research it had commissioned on passenger perceptions. Under the heading, "Improve awareness of what is on offer", the report sets out specific matters and products on which the operators should give consumers more information, but Boundary Fares are not included. Mr Bellenger accepted in cross-examination that LTW regarded other things as more significant to deal with than Boundary Fares.

111. Altogether, therefore, we conclude that even if (contrary to our finding above) the CR had been able to establish that there was insufficient customer awareness of Boundary Fares, there was no unfair trading amounting to an abuse on the basis that none of the Defendants actively promoted or advertised Boundary Fares. However, that is not sufficient to dispose of these cases. If Boundary Fares were not reasonably available for customers to buy, we recognise that this could amount to an abuse. We turn to address that issue.

I. ALLEGED LACK OF AVAILABILITY

112. Boundary Fares were available in place of all 'regular' peak and off-peak tickets. The CR's case on lack of availability concerned (1) the channels through which existing Boundary Fares could be purchased, and (2) special fares for which no Boundary Fare equivalent existed. We address these in turn.

(1) Existing Boundary Fares

113. As set out above, there were three principal channels through which the TOCs sold rail tickets: (a) TOs; (b) TVMs; (c) on-line (website or app). Previously, they had also sold on the telephone from call centres but the volume of such 'telesales' declined sharply and that channel was discontinued either before or early in the claim periods: therefore no reference was made by the CR to that channel. Tickets could also be purchased from handheld devices used by staff on platforms or on trains, but that was not a significant sales channel (presumably because it was not often available). Much more important were the sales of rail tickets by TPRs, in particular Trainline.

114. Before considering the availability of Boundary Fares from each Defendant, we address the Defendants' general argument that a point-to-point fare from the outermost station covered by the customer's Travelcard was effectively equivalent to a Boundary Fare since it could similarly be used in conjunction with the Travelcard. Such a point-to-point fare would usually cost the same as a Boundary Fare, which is why the class definition excludes claims in respect of journeys where such a point-to-point fare was purchased. Since point-to-point fares were available from all these channels (save in the case of TVMs for LSER, as discussed further below), the Defendants submitted that there could not be any unfairness if the availability of Boundary Fares was more restricted.

115. In our judgment, point-to-point fares were not a complete substitute for Boundary Fares from the customers' perspective, for several reasons:

(1) The customer would need to know what is the last station in the outer zone of their Travelcard on the journey they planned to take. To identify this the customer would often have to consult a combination of the TOC route map and the TfL map, and even then this may not be straightforward. Mr Phayer, the head of revenue development and retail at GTR, who has worked in the rail industry throughout his professional career, struggled when asked by Mr Moser to explain from what station someone holding a zone 1-3 Travelcard wanting to take the Thameslink service to Cambridge should buy a point-to-point ticket. After looking at the GTR map and the TfL map, Mr Phayer first identified the wrong station and then accepted that the customer might need to ask at a TO or telephone the GTR helpline for assistance.

(2) If the train on the journey the customer is taking does not stop at the station from which they should buy an equivalent point-to-point ticket (a not unusual situation with faster out-of-London services), the customer would need to know that such a ticket would still be valid on that service. It is counter-intuitive to buy a ticket starting at a station where the train does not stop, and none of the Defendants' witnesses suggested that the validity of such tickets was generally known.

(3) If the customer wishes to purchase the point-to-point ticket online, the software generally used by the Defendants for online sales incorporates a journey planner. When seeking to purchase the ticket, the customer will be shown the trains and train-times that can be used for that journey and often the customer is asked to select which train they wish to take. But only trains starting at the station of origin will be displayed. Therefore if the point-to-point ticket is for use as an extension to the Travelcard, to cover travel from a station which by definition their train will arrive at after they have started their journey, the customer will have to work out the time when their chosen train will reach the station of origin for the point-to-point ticket in order to make the purchase. And if it is a station where their desired train does not stop at all (see (2) above), that train will not be displayed among the purchasing options. The customer would then have to feel confident that they could buy a ticket for a displayed train which would be accepted as valid for a different train. As Mr Ludlow, the Head of Retail at First MTR, who we found to be a straightforward and frank witness, said:

> "I appreciate that … that is a lot of hoops to jump through for a customer. So what they may more commonly do is contact our customer services team, and so on."

116. Taking account of these potential complications, we nonetheless recognise that there are many cases where they do not apply and the purchase of an equivalent point-to-point fare would be straightforward. Thus, we referred at para 99 above to the example given by Mr Bellenger of his walking group: he said that two of the five people who could have but did not buy a Boundary Fare bought an equivalent point-to-point fare instead. In our view, the fact that a point-to-point fare would often be a suitable alternative is relevant to the question of how far the special responsibility of the Defendant TOCs to make Boundary Fares "reasonably" available goes.

The sales channels

117. The relative significance of the different channels varied as between the Defendants and over the relevant claim periods. The position for each

Defendant, provided at the Tribunal's request in the course of the trial, is set out in the tables below, which provides a breakdown of earnings by sales channels and by rail accounting year (ending 31 March) for the respective claim periods. As noted above, each TOC sells fares for travel on services operated by other TOCs. The figures for TOC channels represent sales by all TOCs and not just LSER, GTR or SWR outlets as the case may be.

LSER

Sales Channel	2016	2017	2018	2019	2020	2021	2022[14]
TOC Ticket Office	53.1%	51.7%	47.8%	43.3%	40.6%	51.7%	28.0%
TOC TVM	19.7%	19.8%	19.3%	19.6%	19.5%	22.0%	24.1%
TOC Digital	1.5%	2.5%	6.1%	7.7%	8.8%	8.5%	9.8%
Third Party Digital	2.4%	2.9%	3.6%	4.2%	5.0%	7.4%	11.2%
TfL/PAYG	17.6%	17.3%	17.4%	18.9%	19.4%	29.6%	23.4%
Other	5.7%	5.8%	5.8%	6.3%	6.7%	-19.2%	3.5%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

GTR

Sales Channel	2016	2017	2018	2019	2020	2021	2022	2023	2024
TOC Ticket Office	44.2%	42.1%	38.4%	34.4%	30.4%	32.2%	20.8%	18.0%	16.2%
TOC TVM	26.3%	27.4%	26.9%	27.4%	27.2%	27.6%	26.8%	24.6%	22.7%
TOC Digital	6.2%	7.3%	9.4%	10.4%	11.2%	8.6%	8.2%	9.3%	9.2%
Third Party Digital	3.6%	4.4%	5.5%	6.4%	7.6%	11.8%	18.5%	21.8%	24.6%
TfL/PAYG	14.2%	13.5%	14.1%	15.3%	17.1%	26.2%	21.1%	20.8%	21.5%
Other	5.5%	5.3%	5.7%	6.1%	6.5%	-6.4%	4.6%	5.5%	5.8%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

SWR

Sales Channel	2018	2019	2020	2021	2022	2023	2024
TOC Ticket Office	32.8%	30.3%	26.2%	29.8%	15.5%	13.9%	12.5%
TOC TVM	28.5%	28.9%	27.2%	26.0%	22.1%	19.2%	16.8%
TOC Digital	5.1%	5.4%	7.5%	7.1%	8.5%	9.5%	10.0%
Third Party Digital	6.8%	7.9%	10.9%	17.4%	24.9%	27.7%	31.5%
Tfl/PAYG	18.7%	19.3%	20.3%	29.5%	24.0%	23.9%	23.2%

[14] Figures for LSER for 2021/22 relate to the period 1 April – 17 October 2021, i.e. a period of just over six months.

Other	8.1%	8.2%	7.9%	-9.8%	5.0%	5.8%	6%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

118. Although TfL/PAYG accounted for a significant share of ticket sales, they can effectively be disregarded for present purposes These are revenue tables and the vast majority of earnings from TfL/PAYG relate to Travelcard journeys and contactless (Oyster) payments, for which the TOCs receive remuneration under the Travelcard Agreement.[15] Sales by TfL of rail tickets is very limited, in particular since TfL closed all of its ticket offices early in the claims period.

(a) TOs

119. In the case of LSER, for which the claim period ends on 17 October 2021, TOs were the channel accounting for the highest share of earnings, and for SWR and GTR they remained a significant outlet throughout. Boundary Fares were available for purchase from all TOs of all TOCs. The CR accordingly concentrated his criticism on sales through TVMs and online.

(b) TVMs

120. This was clearly a significant channel for each Defendant. The availability of Boundary Fares from TVMs differed as between the three Defendants and it is necessary to consider them separately.

SWR

121. When SWR took over the SW franchise from Stagecoach on 20 May 2017, it inherited two types of TVM:

(1) 462 TVMs (i.e. 73% of the total) provided by Scheidt & Bachmann. Customers could use those TVMs to buy outbound Boundary Fares (i.e. where the origin is a boundary zone and the destination a station beyond

[15] i.e. customers who used their Travelcard or contactless Oyster for a journey on the TOC service entirely within the zones covered by the card.

the Travelcard boundary). Those machines have only been able to sell inbound Boundary Fares, which are not part of these claims, since July 2023.

(2) 175 TVMs (i.e. 27% of the total) provided by Flowbird. There were in turn two types of Flowbird machine:

(i) 91 Galexio models which did not sell outbound Boundary Fares;

(ii) 84 ToDler models, which had limited ticket purchase functionality and could not sell Boundary Fares.

All the Flowbird machines were decommissioned in 2021. SWR added a further three Scheidt & Bachmann machines and all stations with a TVM have had at least one Scheidt & Bachmann TVM. Since SWR has TVMs at all except 11 of the 190 stations where it is the lead operator, customers can buy a Boundary Fare from a TVM at all those stations.[16] Moreover, the screen on the Scheidt & Bachmann machines makes clear that Boundary extensions are available for purchase. As at the time of trial, SWR was in the process of enhancing the TVMs' functionality by adding a specific button to the initial screen labelled "Extend your Travelcard".

GTR

122. When GTR was awarded its franchise in 2015, it inherited a large number of TVMs of different types from the previous franchise holders. As best Mr Phayer could recall, the vast majority of those TVMs allowed customers to purchase Boundary Fares. GTR decided to replace all those TVMs with newer machines which had better functionality and Scheidt & Baumann was awarded that contract in April/May 2015. Those machines were specified to have 'anywhere to anywhere' functionality. However, there were significant delays and issues with the roll-out of the new machines, which took from 2016-2018 (according to Mr Phayer, Scheidt & Bachmann appeared to have capacity problems) and

[16] The absence of a TVM from the 11 stations is due to particular individual circumstances. They were explained by Mr Ludlow in his evidence and no criticism was made in that regard by the CR.

then, once installed, the machines had widespread performance issues which it took a long time to resolve, to the evident frustration of GTR. However, 'anywhere-to-anywhere' functionality was finally resolved in late 2018 and since then Boundary Fares can be purchased from all GTR TVMs.

LSER

123. The situation regarding LSER is rather different. It has a higher number of ungated stations than the other two Defendants and operated a higher number of driver-only trains. LSER took a deliberate decision not to sell any form of 'anywhere-to-anywhere' tickets from its TVMs because of the risk of fraud, so its TVMs could not sell tickets originating at a station other than where the TVM was located. Mr Backway explained the two kinds of fraud that were practised, known as "short-ticketing" and "dumbbell fraud". "Short-ticketing" involves buying a ticket which covers only a part of the journey, boarding or exiting at a station which is not gated and so avoiding the need to show a ticket at that station. In "dumbbell fraud" the passenger buys two tickets which cover only the start and end of their journey, and then uses the first to pass through the barriers at the start and the second to exit through the barriers at the end. LSER considered that the revenue risk from fraud outweighed the benefit to its customers of being able to buy anywhere-to-anywhere tickets from its TVMs.[17] Indeed, when it made an exception to that approach in the claim period and allowed customers to purchase via a TVM an Oystercard which originated in another zone (e.g. to purchase a Zone 1-2 Travelcard in a Zone 6 station), it found that the resulting revenue loss was some £2-4 million per year and so in July 2020 it discontinued the sale of Oyster Travelcards with remote origins from its TVMs.

124. It was clearly possible to enable the purchase of Boundary Fares from TVMs as the evidence from SWR showed. As Mr Harris KC observed in his opening submissions, a TVM is a "queue buster"; and many customers are deterred from

[17] Mr Phayer explained that the position was different for online sales, where the customer leaves an identification 'footprint'.

joining what is sometimes a long queue at a TO when they can buy tickets at a TVM.

125. Such is the significance of TVMs in the sale of tickets that we agree that, in general terms, making Boundary Fares sufficiently available should include enabling them to be bought from TVMs. But there are practical issues with obtaining and installing TVMs with the necessary functionality. On the evidence we are entirely satisfied that SWR and GTR conducted themselves entirely reasonably in the steps they took to enhance functionality on their TVMs so as to sell Boundary Fares. The delays involved in upgrading or replacing TVMs, in the circumstances we have outlined, cannot possibly, in our view, amount to the imposition of an unfair selling system or a departure from "normal competition" that constitutes an abuse of dominance

126. The position of LSER is more complex. Mr Moser urged us to reject the evidence of LSER regarding revenue risk when it came to Boundary Fares. However, we found Mr Backway, whose evidence went to this issue, a clear and direct witness, and indeed the CR acknowledged in his closing submissions that Mr Backway was "a largely straightforward" witness although defensive of LSER' s position. We are satisfied that the decision not to permit anywhere-to-anywhere functionality on the LSER TVMs was governed by concerns about fraud; and although it emerged that SWR also had a significant proportion of ungated stations, that does not detract from the fact that this was the rationale for LSER's decision. That decision notably was not directed at Boundary Fares but concerned all forms of ticket which did not originate at the station where the TVM was located (i.e. it covered such point-to-point fares). The issue therefore comes down to the question whether, as Mr Moser contended, LSER was required to enable the sale of Boundary Fares from TVMs in its major London stations which were gated, such that the fraud risk was significantly lower. However, Mr Backway said that it was challenging operationally to have different software settings and configurations on TVMs at different locations. And as we understand the problem, even if the station of origin is gated, that does not remove the risk fraud which clearly concerned LSER, if the destination station is ungated.

127. We do not need to reach a decision as to whether the failure of LSER to enable Boundary Fares to be bought from its TVMs in London stations might otherwise amount to an abuse, because we are satisfied that its conduct was objectively justified. LSER decided that it would not have TVMs which could sell anywhere-to-anywhere fares entirely on the basis of a concern to reduce fraud, which is clearly a legitimate objective. As for proportionality, it is apposite to recall the observation of Rose J in *Arriva The Shires* that the question of commercial intent is relevant to objective justification: para 91 above. LSER's decision was not motivated by any desire to restrict the legitimate purchase of Boundary Fares in order to achieve a commercial benefit by selling a full journey fare, nor was it seeking to make customers 'pay twice' for part of their journey. In those circumstances, we think that the concept of proportionality leaves scope for reasonable commercial judgment as to how a legitimate objective should be achieved, on which different firms may take different views, and it was reasonable for LSER to avoid the complexity of different configurations for TVMs at different stations. The fact that subsequent to LSER's loss of the franchise, South East trains now does enable Boundary Fares to be purchased from its TVMs, is therefore not, in our view, dispositive.

(c) On-line sales

128. None of the Defendants sold Boundary Fares online, although point-to-point fares were available on their websites and apps. Evidence was given of the technical problem of enabling such fares to be sold online because of the API (application programming interface) configuration whereby the fares selector for customers was combined with a journey planner, whereas a boundary zone is not a specific station location, and also the form of data feed into the API. We recognise that enhancement of the online functionality would have to be done by the external suppliers and might involve significant development cost, but observations from the Defendants' witnesses that this would be very time-consuming and expensive was largely speculative since none of the Defendants had asked their software suppliers or developers to quote for such a change.[18]

[18] Mr Walt of SWR said that "I estimate based on less complex work we are currently undertaking with [the website supplier for SWR and its associated group companies] to fix an existing less complex issue", the charge would be between £500,000 and £750,000 with an additional £100,000 of development work

We therefore treat such evidence with caution. We note also that the CR, for his part, did not adduce evidence of what the development and implementation of such a modification or upgrade was likely to cost.

129. At the outset of the trial, some of us were concerned about the lack of availability of Boundary Fares online. However, it emerged that for sales by the Defendants, their digital channel was relatively much less significant than sales from TOs or TVMs during the claim periods: see the tables at para 117 above. Prior to the pandemic, only for GTR did the digital channel account for just over 10% of sales, and that only in 2018/19 and 2019/20. Once the TOCs entered the period of the pandemic, when rail travel declined dramatically, it would not have been reasonable for them to incur expenditure on developing software to enhance ticket sales. And after the pandemic subsided, although digital sales of rail tickets for travel on SWR and GTR began to increase significantly, most of that increase came in sales by TPRs and was largely accounted for by Trainline.[19] (LSER lost its franchise in October 2021 and never came out of the strict expenditure regime of the EMA).

130. Like any business, the Defendants necessarily had to prioritise their capital expenditure, including on software development. As Mr Ludlow of SWR explained in his evidence:

> "I am not suggesting that it is not a good idea to introduce boundary zone fares on the web and app. … But my point is that that was an area that was not - it was not a matter that presented itself as having urgency to address. We were not receiving large volumes of feedback or complaints about that lack of functionality. We were, however, receiving quite a lot of feedback about other things, and therefore we prioritised our team's efforts and available budget and supplier bandwidth on those things."

And Mr Phayer of GTR said that the non-availability of Boundary Fares online was never raised as an issue of concern, either by customers or the DfT. Mr Walt said that SWR's priorities as regards changes to its online booking functionality were, first, fixing pervasive bugs which developed within the

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to implement the change. However, it was unclear whether those figures were consistent with a recent tender document from the same company.

[19] The share of ticket sales by TPRs, particularly in more recent years, may be relevant for the question whether each Defendant was dominant, but that is not an issue for the present trial.

existing functionality and then any functionality development which was required pursuant to the commitments to DfT. Mr Phayer said that the focus of GTR was on improving customers' "overall end-to-end experience", e.g. by making technical improvements to the ticket purchasing process and making flexible season tickets available online.

131. Mr Ludlow said in his oral evidence: "retail systems are a story of continuous development and continuous improvement." As noted above, he said that SWR did not receive many complaints about the inability to purchase Boundary Fares online. Although Mr Moser could identify a few examples of complaints, the evidence from the other two Defendants was effectively the same. Moreover, LTW had not raised the issue of online sale of Boundary Fares in its published research. Mr Bellenger said that LTW had raised this issue at meetings with the TOCs. But the Defendants had no record of such a complaint in the discussions which they had held with LTW.[20] Mr Bellenger could not be more specific and when he had approached LTW for its records in preparing his evidence for this trial, it was not willing to investigate this matter. Even allowing for the fact that LTW is a small organisation, its response to Mr Bellenger indicates to us that the statutory passenger watchdog did not regard this matter as of particular concern; and on the evidence, we are not satisfied that LTW had complained to any of these three Defendants about the non-availability of Boundary Fares online.

132. In the National Rail Contracts concluded with SWR and GTR in 2021, para 2.1 of chapter 5.4 provides:

> "The Operator shall provide a high quality standard of ticket retailing to all customers …. This will include but is not limited to:
>
> (a) providing clear information about fares … and ticketing options, including restrictions and fulfilment methods, ensuring:
>
> (i) these are easy to access and consistent across the different communication channels, points of purchase and on tickets; and

[20] Mr Phayer, who has been Head of Revenue Department and Retail at GTR since 2019, said that if LTW had raised these concerns during that period, he would have been made aware of them.

> (ii) customers can easily identify and choose the cheapest appropriate fare for their journey;
>
> (b) ensuring online, digital and self-service channels are easy to access, clear and user-friendly and incorporate and promote Smart Media functionality…"

The DfT never suggested that either SWR or GTR had failed to comply with this obligation because Boundary Fares could not be purchased online; indeed, Mr Short of GTR said that the DfT in effect "signed off" on this obligation as delivered by GTR to their satisfaction.

133. In addressing the question whether Boundary Fares were inaccessible for customers, it is necessary to consider the overall picture. When Boundary Fares were available for purchase through the Defendants' more significant channels,[21] we do not consider it was unreasonable or other than 'normal' commercial conduct that more effort and expense was not devoted to enable their introduction to their online sales channel. That is particularly the case when point-to-point fares, which could similarly be used by way of extension to a Travelcard, although an imperfect substitute as we record above, were always available online. More specifically, we do not regard this as coming close to an unfair trading practice that could constitute an abuse under competition law.

134. In reaching this conclusion, we recognise that another TOC, Avanti West Coast ("Avanti"), which holds the west coast franchise, has been able to sell Boundary Fares through its website. That was because its online software came from a different supplier and was of a different design (apparently developed to supply the Italian operator, Trenitalia, which owns a half share in Avanti). Mr Moser submitted that this was a clear answer to the Defendants' evidence that there were significant difficulties about such software development. However, the fact that it was possible to have this facility with a completely different software system does not establish that it was straightforward or inexpensive to make the necessary modifications or upgrades to the existing systems used by the three Defendants. All the software suppliers had to be approved and accredited by

[21] Although LSER did not sell Boundary Fares from its TVMs, over 40% of its sales were through TOs except in the final 7 months period, April-October 2021.

RDG. It was not clear when Avanti introduced this system,[22] and in any event, we do not see that the Defendants' conduct is to be impugned because they chose different approved suppliers from the one selected by Avanti.

135. As the degree of online sales from the TOCs' websites and apps grows, and customers resort in ever greater numbers to online purchasing instead of using other channels, we think that there could come a point at which a TOC would risk a finding of abuse if it failed to enable customers to purchase Boundary Fares online. But any such assessment would also have to take account of the decrease in sales of Travelcards. Although apparently popular at the start of the claim periods, the uncontested evidence before the Tribunal was that by the time of the trial they were in major decline because of the increase in use of Oyster and contactless PAYG cards.[23] Ms Hutchinson of LSER said in her evidence:

> "Generally, paper tickets are a dying breed in the industry. It is heavily dominated by Oyster and contactless."

And although we were not given evidence of the actual number of Travelcards sold each year, we note that Mr Holt, in his expert report for the CPO application in the GTR proceedings, estimated that even as between 2015/16 and 2020/21 the proportion of in-scope journeys taken by Travelcard holders had declined from 18.3% to 8.2%. Although Mr Holt's method of assessment was not accepted by the Defendants, the trend is nonetheless clear; and we have little doubt that for the reasons we have given the subsequent years would show a further decline.

136. It is not necessary to decide in those circumstances precisely when the conduct of a TOC in a dominant position and operating out of London stations would require it to sell Boundary Fares online so as to avoid abuse; we are satisfied that this point had not been reached at the time of trial. And we note that at the time of trial, SWR was in the course of introducing a facility whereby a customer could choose to link through from its website to the Avanti website to purchase from Avanti a Boundary Fare on a SWR service; and that as part of

[22] Avanti was awarded the west coast franchise in December 2019.
[23] i.e. debit or credit cards used to 'tap in' and 'tap out' for journeys on TfL services. This decline does not apply to the TfL Freedom Pass, which may also be used with a Boundary Fare, but holders of a Freedom Pass are not within the scope of the claims.

the tender process for a new online TIS which SWR's parent company was conducting on behalf of all its TOC subsidiaries, one of the specifications is that the supplier should provide the functionality to enable sale of Boundary Fares.

137. Although we think it would have been helpful for the Defendants to have included information on their websites as to how Boundary Fares could be purchased (as SWR has done since April 2024), we note that the National Rail Enquiries website, operated by RDG on behalf of all the TOCs, has included such information since at least 2021. However, to say that doing something would have been helpful to consumers is very different from finding that its omission infringes competition law: see paras 79-80 above We do not consider that the absence of equivalent information from the website of an individual TOC could, in itself, possibly amount to abuse.

138. Both as regards TVMs and online sales, none of the Defendants adopted a deliberate strategy to restrict the supply of Boundary Fares, save for LSER's decision that it would not sell any form of ticket from its TVMs that originated other than at the station where the TVM was located (and therefore excluded remote point-to-point fares along with Boundary Fares). None of the Defendants gained extra revenue from customers buying a full journey fare instead of buying a Boundary Fare for use with their Travelcard. The facts of the present cases are far removed from *DSD* or *Deutsche Post*. As Mr Ward put it in his closing argument: "The question is whether the selling system is abusive, not whether it is open to any criticism." We fully accept that the selling systems of each of the Defendants could have been improved. But on the evidence, these are clearly not cases where customers of the respective Defendant were, in practical terms, obliged to "pay twice" for part of their journeys; and we find that none of the three Defendants' selling systems, viewed as a whole, constituted or gave rise to an abuse.

(d) TPRs

139. As noted above, each TOC can sell tickets for travel on the services operated by another TOC, and the figures for sales in the tables at para 117 above include sales for travel on each of the Defendant's networks that were in fact made not

by the respective Defendant but by another TOC. It is not suggested that the Defendants are liable for the conduct of another TOC in deciding by which method to sell such Boundary Fares. In contrast, the allegations as regards TPRs refer to third parties, independent of the Defendants, that are not themselves TOCs. Such sales are almost entirely made online, and much the most significant digital seller is Trainline which now accounts for over 90% of TPR digital sales.

140. As can be seen from the tables, such third party digital sales have been significant since around 2021-2022 and have been increasing since then for both GTR and SWR.

141. In his pleaded Reply, at paras 35(b) and 38, the CR alleged that TPRs act as agents of the Defendants in selling tickets, such that their conduct should be attributed to the respective Defendant whose ticket is being sold since they formed part of the same economic unit. This gave rise to issues 12(a)-(c) in the agreed list of issues. However, in his opening, Mr Moser made clear that the CR was not pursuing any allegation that a TPR should be treated for the purpose of competition law as part of the same economic unit as the relevant Defendant.

142. The CR essentially advanced his case regarding TPRs on two very different and independent bases:

(1) the Defendants should have obliged TPRs to sell Boundary Fares;

(2) if the Defendants had made customers more aware of Boundary Fares and/or themselves sold Boundary Fares online, this would have led TPRs to sell Boundary Fares.

We address these grounds in that order.

(a) Contractual obligation

143. The CR expressed his contention in his closing submissions as follows:

> "… the focus is not on independent abusive conduct of a distributor being attributed to a manufacturer, but on a failure of the Defendants themselves, as principals, to utilise the contractual tools at their disposal to compel third party retailers as their agents to assist in making Boundary Fares more widely available."

144. TPRs sell tickets pursuant to a Third Party Investor Licence ("TPIL"). The contracts with all the TPRs other than Trainline follow a template TPIL, which is at schedule 27 of the TSA, and the contract with each individual TPR is entered into through ATOC Ltd acting as agent on behalf of all of the TOCs. Trainline has a bespoke TPIL which varies in some key respects from the template; and with Trainline the counterparty is the RDG, through its company Rail Settlement Plan Ltd., expressly acting as agent for all the TOCs.

145. All the TPILs take the form of authorising the TPR on a non-exclusive basis to sell "Rail Products". "Rail Products" is defined to mean "the Tickets, Reservations and Discount Cards set out at Schedule 5". The TPIL agreements provide that the TPR cannot sell fares above the prices set by the relevant TOC, but it can charge a booking fee and can sell at a lower price (but then still has to account to the TOC providing the service for the full price of the fare). The TPR receives a commission from the TOC on its fare sales.

146. Schedule 5 of the TPILs is in three parts, and each part specifies various kinds of Rail Products. Part 2 lists those products which the TPR is specifically not authorised to sell, and Part 3 lists those products which the TPR is "not obliged" to sell. In both the standard form TPIL and the Trainline TPIL, Part 3 of Schedule 5 includes (i.e. as Rail Products which the TPR is not obliged to sell) "Excess Fares". The definition of "Excess Fares" is as follows:

> "'Excess Fare' means a variation in the rights and restrictions applicable to a Fare which has the effect of converting that Fare into another Fare."

There is no reference in the TPILs specifically to Boundary Fares.

147. Some of the main differences between the standard TPIL and the Trainline TPIL are not relevant for present purposes. But there is a slight difference between ✂.

148. The CR argued that the definition of Excess Fares in the TPILs did not, on its true construction, cover Boundary Fares and that they fell within one of the categories of tickets in Part 1 of Schedule 5. On that basis, it was alleged that the Defendants could, and should, have compelled the TPRs to sell Boundary Fares. However, it was clear on the evidence that a Boundary Fare was understood by most of those in the industry as a form of Excess Fare, and the CR's expert, Mr Bellenger, acknowledged this. In our view, the correct construction of the definitions is not clear as a matter of language and depends on the technical distinction as between a "ticket" and a "fare"; but in any event, the contract falls to be interpreted against its factual background, which includes the common understanding of those in the industry at the time it was entered into. We do not think that the special responsibility of a dominant company could extend to requiring it to embark on uncertain litigation against a trading partner.

149. ✂. And as regards ✂ TPRs subject to the standard form TPIL, the obligation to sell "all Rail Products" in Part 1 of Schedule 5 is expressly subject to "applicable ATOC Standards". Schedule 7 to the TPIL sets out those standards and para 4.2 of that schedule states:

> "For the avoidance of doubt, the Agent is not obliged to offer for sale … any Rail Product that is incapable of being sold using the Approved TIS."

That is a reference to the obligation under cl. 10.1 of the TPIL only to issue Rail Products using a TIS which has been approved by the RDG. The RDG approved TISs involving journey planning software that would not permit the issue of a Boundary Fare (see paras 45 and 134 above); and if a TPR had such a TIS, we consider that it would have strong grounds to contend that its obligation under cl. 5.2 did not cover the sale of Boundary Fares.

150. An alternative allegation was that the Defendants should have included Boundary Fares within Part 1 of Schedule 5, and have created a contractual obligation on TPRs to offer these fares. However, as far as concerns Trainline, we regard that as unrealistic. Just because this trial proceeded on the assumption that each Defendant was in a dominant position does not mean that the RDG could have successfully imposed this obligation on Trainline. ✂. As the

Defendants pointed out, Trainline is a powerful company ✂. Thus, Mr Bowden gave evidence of a fairly recent attempt by RDG to change the form of TPIL, which Trainline refused to accept. If Trainline as a matter of commercial judgment wished or wishes to sell Boundary Fares, it is able to do so; but there is no basis for finding, on the balance of probabilities, that if the Defendants had sought, through the RDG, to oblige Trainline to offer Boundary Fares for sale that it would have agreed to this.

151. Accordingly, that aspect of the allegation fails as regards Trainline. In the light of that, we place little weight on the position as regards other TPRs. Mr Bellenger said in his evidence that one TPR, Trainsplit.com, has chosen to sell Boundary Fares. But the other digital TPRs have so little market presence that if there is no abuse by failing to make Trainline sell Boundary Fares, we do not consider that a failure to create an obligation on other TPRs to sell Boundary Fares could give rise to an abuse.

152. Although not required to do so, all TPRs were authorised to sell Boundary Fares. There is no evidence that any of the three Defendants sought to discourage TPRs from selling Boundary Fares, or suggested to TPRs that such sales would be contrary to their policy. The decision whether or not to sell Boundary Fares was taken independently by each TPR: thus Trainline decided not to offer them on its consumer-facing interface but did sell them to some business customers, and Trainsplit.com apparently sells them to all customers. The position is therefore very different from that in Case C-680/20 *Unilever Italia Mkt. Operations Srl v AGCM,* EU:C:2023:33. Accordingly, we find that the Defendants' position as regards TPRs does not give rise to any abuse.

153. We should add that although we have rejected the CR's submissions regarding TPRs, we have not done so on the basis of the argument raised by the Defendants that the relevant contracts were not with them individually but with ATOC or the RDG. In our view, if (contrary to our finding) there had been a clear contractual obligation on Trainline to sell Boundary Fares, the Defendants should then have pressed, through the RDG or directly, for enforcement of that obligation; we note that each of the TOCs and therefore each of the Defendants is a party to the Trainline TPIL.

(b) Incentive / competitive impact

154. The CR contended that if the Defendants had taken steps to increase the awareness and/or availability of Boundary Fares, that would have led to greater demand for Boundary Fares and so TPRs would have started to sell them. On that basis, he submitted that the Defendants are liable for loss suffered by CMs as a result of purchases from TPRs. Accordingly, this line of argument is dependent on a finding of abuse by the Defendants, and if there is no abuse then the matter falls away.

155. If abuse were established in this trial, then factual causation would come to be addressed at the second trial in these proceedings. However, the Defendants submitted that the CR's allegation of liability on this basis is not open to him *as a matter of law* even if the Tribunal found that one or more of the Defendants was committing an abuse. As a result, issue 12(d) in the list of issues for the present trial is as follows:

> "Insofar as the Defendants' conduct did infringe section 18 of the Act, are the Defendants liable for any losses flowing from any failure by third parties to make Boundary Fares sufficiently available for sale and/or to use best endeavours to ensure customer awareness of Boundary Fares?
>
> This issue shall include consideration of, inter alia:
>
> …
>
> d. On the assumption that the Defendants' conduct in relation to the sale of Boundary Fares caused the third-party sellers' conduct in relation to their sale of Boundary Fares (which falls to be determined at the Second Trial), does this make the Defendants liable as a matter of law for the relevant third parties' conduct?"

156. The CR relies on the analogy with the position as regards so-called 'umbrella' damages in cartel claims, established by the CJEU in Case C-557/12 *Kone v ÖBB-Infrastrukture*, EU:C:2014:1317, [2014] 5 CMLR 5. That concerned a damages claim against various companies which had participated in a large-scale cartel in numerous EU Member States concerning the installation and maintenance of elevators and escalators, and which was the subject of an infringement decision by the Commission. On the basis that the cartel led to higher prices than would have occurred in a competitive market, the claimant

sought damages from the cartelists although the claimant had purchased its elevators and escalators from third parties which had not participated in the cartel. The claimant contended that it paid higher prices than it would have paid but for the existence of the cartel, on the ground that its suppliers benefited from the existence of the cartel in adjusting their prices to a higher level: see at para 10.

157. It was not disputed that such 'umbrella pricing' is recognised as a possible consequence of a cartel. However, Austrian law excluded compensation in such a situation on the basis that the causal link between the members of the cartel and the autonomous decisions of the undertakings that applied the umbrella pricing was too remote.

158. On a reference from the Austrian court, the CJEU acknowledged that in principle it was for the domestic legal systems of the Member States to determine how the concept of a causal link should be applied. However, the CJEU held that the application of the principle of Austrian law at issue was precluded by the EU principle of effectiveness. The Court said in its ruling:

> "33 The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.
>
> 34 Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied."

159. Although stated as regards the effectiveness of Art 101 TFEU, it is clear that the same principle applies to Art 102 TFEU. Whether the conduct of the Defendants that is alleged to constitute an abuse, in particular in failing to increase awareness of Boundary Fares and/or failing to sell them online, was "liable to have the effect" that TPRs also did not sell them online is a question

of fact, which is not for the present trial. However, as the Defendants themselves pointed out, TPRs and in particular Trainline were their competitors in selling rail fares. In their joint skeleton argument, LSER and GTR said this competition was "fierce". If there were greater demand for Boundary Fares, and customers seeking to purchase online could obtain those fares from the Defendants' websites, it is a reasonable proposition to contend that this would probably have led to a competitive response from TPRs. And we think that it is further well arguable that the Defendants could have reasonably anticipated that Trainline, as their major competitor, would then probably have started to sell Boundary Fares itself.

160. The Defendants sought to stress that Trainline as a sophisticated commercial operator had evidently decided not to offer Boundary Fares on its general website. For example, they relied on Mr Phayer's response in evidence that:

> "I think Trainline, if they saw an opportunity, they would have already developed it and it would be available now."

But that misses the point: the issue is not the opportunity for Trainline in the context of the Defendants' past conduct regarding Boundary Fares, but what, on the balance of probabilities, Trainline would have done in the context of the counter-factual. In that situation, the opportunities for Trainline and, moreover the risk of losing customers to their TOC competitors, would have been very different.

161. The only issue currently before us is whether the CR's contention is to be excluded as a matter of law. In our judgment, it cannot be so excluded. Whether it can be sustained is a matter for factual and potentially economic evidence as to the nature of the competitive dynamic as between Trainline and the TOCs at a subsequent trial. In the light of that, the criticism levelled at the CR in the Defendants' closing submissions regarding the paucity of evidence on this issue at the present trial is misplaced. We would only add that the wording of the issue quoted above is in one respect infelicitous in that we think para 12(d) should read: "liable as a matter of law for *the damage resulting from* the relevant third parties' conduct".

(2) Other fares

162. The CR alleges that insofar as there were types of fare for which no Boundary Fare existed, the failure to offer a Boundary Fare constituted an abuse. Much the most significant categories to which this allegation applies are Advance Fares and Season tickets, and the argument before us on this aspect of the claims understandably concentrated on those two categories.

(a) Advance Fares

163. Advance Fares are a form of cheaper fare that some TOCs offer for sale a period in advance of the date of travel. They are sold for a specific train (i.e. a train departing at a specified time) and a limited number of Advance Fares are available per train (i.e. they are quota controlled). They are also tied to a seat reservation. From the TOCs' perspective, the purpose of Advance Fares is to encourage passenger utilisation for trains which have lower numbers, at off-peak times, whereas from the customers' perspective the benefit is a cheaper fare. Therefore, Advance Fares are not available for all trains or from all stations. By contrast, a Boundary Fare as currently offered is a ticket covering onward travel to the destination station on any train (subject to off-peak restrictions) crossing the specified zone boundary: i.e. it is a very flexible fare and does not specify where the customer must start their journey.

164. In theory, we think it would be possible for the Defendants to introduce a Boundary Fare available only for advance purchase on specific trains for which an Advance Fare is sold, and with similar restricted conditions. We do not accept that this is inherently "illogical", as submitted on behalf of LSER and GTR. Nonetheless, this would be a new and different kind of Boundary Fare, to the extent that Mr Cameron of SWR said in cross-examination that he would not regard such a ticket as a "Boundary Fare" at all.

165. GTR in fact offers Advance Fares only on its Southern services; it has not had Advance Fares on the other parts of its franchise since at least 2009. And on the Southern services, Mr Edwards said that GTR prices Advance Fares on a flat-fare basis, irrespective of the point of origin: e.g. an Advance Fare from

London Victoria to Brighton costs the same as an Advance Fare from East Croydon, on the outer edge of zone 3, to Brighton. On that basis, there would be no saving from a hypothetical Advance Boundary Fare covering the part of the journey from the end of the zone of the Travelcard to the destination. In light of this, we see no ground for any abuse by GTR in failing to provide Advance Boundary Fares.

166. LSER and SWR, as we understood it, offer Advance Fares more widely and price on a different basis. But we think that the restricted conditions inherent in an Advance Fare would make the offer of such an Advance Boundary Fare complex. The present form of Boundary Fare by definition has its origin at "the Boundary": e.g. if there are several routes across the Boundary to the destination (potentially starting at different London stations), it will cover onward travel from any of them, whereas a hypothetical "Advance Boundary Fare", with a seat reservation on a particular train, would cover travel only on one specific route. Moreover, there may be no corresponding simple Advance Fare from the station on the boundary to the destination. For example, an Advance Fare may be available for specific trains from Waterloo to Southampton, but not on the same trains from Surbiton to Southampton. While a customer might be able to use a Zone 1-6 Travelcard to cover the portion of the journey as far as Surbiton, creation of an Advance Boundary Fare for that train from Surbiton to Southampton would involve the introduction of an "Advance Boundary Fare" for travel for which no ordinary Advance Fare was available. This complexity is compounded by the fact that the evidence showed that there are often a range of Advance Fares for the same train, depending on how far in advance the customer books their ticket.[24] We also note that if there is an Advance Fare from the Boundary station to the destination (i.e. Surbiton to Southampton in the above example), the customer could purchase that Advance Fare as a point-to-point ticket. We recognise that this is not an invariable alternative (e.g. the train may not stop at Surbiton[25]), but in many cases it will be.

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[24] E.g for the London Cannon Street to Battle route, the data put to Mr Spring in cross-examination showed that LSER had 10 applicable Advance Fares, depending on time of purchase.

[25] Although an ordinary point-to-point fare is valid on a train which does not stop at the point of origin (and so can be used in combination with a Travelcard), since an Advance Fare is tied to a specific train it would appear that such a fare is not available for a train that does not stop at the point of origin.

167. In all these circumstances, the contention that the absence of such a new kind of "Advance Boundary Fare" gives rise to an abuse would, in our view, go far beyond a requirement for a dominant company to engage in "normal competition" on the merits, or to avoid the imposition of unfair prices or unfair trading conditions. We accordingly reject this allegation.

(b) Season Tickets

168. Season tickets are purchased by customers who regularly travel on a particular route over a period, and cover travel in both directions. They are typically bought by commuters. Although none of the Defendants offered Boundary Fare Season tickets, they pointed to various alternatives:

(1) Out-boundary Travelcard Seasons were sold by each of the three Defendants. Those tickets permitted travel to and from a named destination/origin station (e.g. Brighton) to the edge of TfL zone 6, and unlimited travel within the specified TfL zones before zone 6.[26] They are regarded as a commuter product. Mr Spring of LSER said:

> "This would probably be the right ticket for a customer who held a Travelcard (and so anticipated travel within the Travelcard zones) and also anticipated travelling between the Travelcard zones and a station outside of the Travelcard zones with sufficient regularity to warrant purchasing a season ticket to and from that destination."

(2) A Travelcard holder making regular journeys for a period beyond the outer zone of their Travelcard could purchase a point-to-point Season ticket for the required period covering that additional portion of their journey.

(3) A customer with, say, an annual Travelcard who then found they needed regularly to make extended journeys beyond the Travelcard zones could exchange their Travelcard for a different Season ticket, e.g. a Season ticket for the full journey, or an Out-boundary Travelcard

[26] Mr Backway of LSER said that an Out-boundary Travelcard Season was available to cover any combination of consecutive lower zones which include zone 6; that corresponds to the statement in the TOCs' Internal Knowledgebase.

169. Mr Moser put forward various particular scenarios in cross-examination for which these alternatives might not be appropriate. He said that the Out-boundary Travelcard Season was marketed as a ticket for commuters into London and is "fundamentally an inbound product". Although it can be used 'in reverse', the CR submitted that it was counter-intuitive for a customer whose regular journey originated in London to ask for such a ticket. And he stressed that the option of exchanging a Travelcard was only available for a replacement ticket which ended on the same date (e.g. a holder of a one year zone 1-2 Travelcard who then had to make journeys out of London for a month, could exchange their Travelcard only for an Out-boundary Travelcard Season terminating at the end of the year).

170. There are a multitude of possible variations, and we can accept that there are potential scenarios for which these alternatives are not the most obvious or perfect solution. However, we consider that a customer who makes sufficiently regular or frequent journeys to justify the purchase of a season ticket is inherently more likely to consider carefully their options than a customer who is just making a one-off out-of-Boundary journey; and that there is nothing unfair in expecting such a customer who holds a Travelcard to ask at the TO for advice (e.g. identifying the station from which a point-to-point Season ticket should be purchased; or drawing attention to the Out-boundary Travelcard Season ticket). We find that the great majority of Travelcard holders wanting a Season ticket for out-Boundary journeys would have realistic and practical alternatives to a putative Boundary Season ticket.

171. In our judgment, the prohibition on abuse of dominance is not infringed by a failure to create a product which we consider would be of marginal benefit to only a small portion of what is already a minority of customers (i.e. Travelcard holders who then want a season ticket for outward travel from London for a period that is shorter than the period of validity of their Travelcard). A company which fails to create such a product can hardly be said to be failing to compete "on the merits" or to be exploiting its customers.

(c) Special Fares

172. The Defendants at times offered promotional fares, e.g. reduced fares for travel to a holiday destination in the summer, or "Sunday Out" tickets, or for travel to Castle Cary during the Glastonbury Festival. Each TOC has a different approach or policy regarding such promotional fares, and GTR did not generally offer short-term promotions. Such fares are priced on a particular basis and the CR, in our view rightly, did not press an argument that there should have been a Boundary Fare corresponding to every temporary promotion. As Mr Moser accepted in his opening submissions, this is "a fact sensitive matter". And Mr Harris explained that promotional fares are generally not based on the distance travelled: they are often flat fares to boost travel on a particular route and/or at a particular time. Some promotional fares were offered on a more permanent basis, such as LSER's Weekender and Super-off peak fares. However, these are already heavily discounted fares, as an incentive for customers to travel at particular times, and we do not consider that the prohibition on abusive conduct creates any obligation on the Defendants to offer a multitude of specific discounted Boundary Fares (in each case in a number of configurations to reflect the different zone validities of Travelcards) in conjunction with the various kinds of promotion.

J. SGEI

173. In their respective pleaded Defences, the Defendants asserted that if their conduct regarding Boundary Fares otherwise constituted an abuse (which of course they denied), they benefited from the exemption in Schedule 3, para 4 of the CA for "*services of general economic interest or having the character of a revenue-producing monopoly*" ("the SGEI exemption"). The CR accepted that the Defendants' services as TOCs were services within this category.

174. However, in his opening submissions at trial, Mr Ward made clear that SWR does not seek to rely on the SGEI exemption. LSER and GTR did not formally abandon reliance upon the SGEI exemption, but they advanced no submissions on it. The exemption applies only "*... in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that*

undertaking." The jurisprudence establishes that it is to be construed narrowly, and that the burden of satisfying the exemption rests on the party seeking to benefit from it: Whish & Bailey, p. 254. In the absence of evidence or argument from LSER or GTR that they would be obstructed in carrying out their statutory tasks as railway operators if they had to increase awareness of Boundary Fares or make Boundary Fares more widely available, neither can rely on the SGEI exemption and we need say no more about it.

K. EFFECT ON TRADE

175. The question whether the Defendants' conduct affected or was capable of affecting trade within the UK was included in the list of issues for this trial. However, although denied in the respective Defences, it appears that the denial was on the basis that the conduct did not cause any loss. Causation was not a matter for the present trial, and the Defendants made no submissions on this issue. We consider that it is clear that if there was abusive conduct causing loss, then it would be capable of affecting trade within a part of the UK such that this condition of s. 18(1) CA would be satisfied.

L. CONCLUSION

176. For these reasons, we conclude that:

(1) on the assumption that the three TOC Defendants each holds a dominant position, none of the conduct alleged against them constitutes an abuse of that position;

(2) if, contrary to (1), we had found that their respective conduct was an abuse, then the CR is not precluded as a matter of law from recovering from the Defendants for loss suffered by CMs as a result of the decision of third party retailers not to sell Boundary Fares if the CR can show that, in the counterfactual, such retailers would probably have sold Boundary Fares and that the Defendants should have realised this;

(3) if, contrary to (1), the conduct alleged would otherwise amount to an abuse, it is not exempted from the prohibition in s. 18 CA by Sch 3, para 4 CA; and

(4) on the assumption that the Defendants' conduct caused loss, it was capable of affecting trade in the UK for the purpose of s. 18 CA.

177. We should add this. The allegation of abuse in each of the three proceedings comprises a number of discrete elements. If we were wrong in our rejection of only some elements of the alleged abuse, e.g. as regards the inability to purchase Boundary Fares from LSER's TVMs, or as regards the lack of Advance Boundary Fares, that would nonetheless lead to a significant narrowing of the class and reduction in the potential amount of aggregate damages. In the CPO Judgment, we found that the cost-benefit of the proceedings was a factor that weighed slightly against certification. If the proceedings were much more limited in scope (e.g. in the proceedings against LSER, to cover only Travelcard holders who purchased a full journey fare from a TVM; or to cover only Travelcard holders who purchased Advance Fares for travel out of London), the cost-benefit of the proceedings going forward would clearly be markedly changed. We would then wish to consider whether, in those circumstances, the CPO should be revoked, pursuant to rule 85(2)(a) of the Competition Appeal Tribunal Rules 2015.

178. This judgment is unanimous.

Sir Peter Roth
Chair

Prof. Simon Holmes

Prof. Robin Mason

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 17 October 2025

GLOSSARY

Term	Description
BKA	Bundeskartellamt: the German national competition authority
CA	Competition Act 1998
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
Commission	European Commission
CPO	Collective proceedings order
CPUTR	Consumer Protection from Unfair Trading Regulations 2008
CR	The Class Representative in these proceedings, Mr Justin Gutmann
CSAO	Collective settlement approval order
DfT	Department for Transport
EMA	Emergency Measures Agreement
ERMA	Emergency Recovery Measures Agreement
GDPR	General Data Protection Regulation, Reg (EU) 2016/679
GLAA	Greater London Authority Act 1999
GTR	Govia Thameslink Railway Ltd
LSER	London & South Eastern Railway Ltd
LTW	London TravelWatch
NCA	National competition authority
NRC	National Rail Contract
ORR	Office of Rail and Road
RA 1993	Railways Act 1993
RDG	Rail Delivery Group
SGEI	Services of general economic interest
SoS	Secretary of State for Transport
SWR	South Western Railway
TFEU	Treaty on the Functioning of the European Union
TfL	Transport for London
TIS	Ticket issuing systems
TO	Station ticket office
TOC	Train operating company
TPIL	Third Party Investor Licence
TPR	Third-party ticket retailer
TSA	Ticketing and Settlement Agreement
TSGN franchise	Thameslink, Southern and Great Northern franchise
TVM	Station ticket vending machine