Neutral citation [2025] CAT 56

Case No: 1639/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 September 2025

Before:

HODGE MALEK KC
(Chair)
TIMOTHY SAWYER
ANDREW TAYLOR

Sitting as a Tribunal in England and Wales

BETWEEN:

BULK MAIL CLAIM LIMITED

Class Representative

- v -

INTERNATIONAL DISTRIBUTION SERVICES PLC
(FORMERLY ROYAL MAIL PLC)

Defendant

Heard at Salisbury Square House on 23 September 2025

NON-CONFIDENTIAL RULING

APPEARANCES

Paul Harris KC, Ben Rayment, Hannah Bernstein and Reuben Andrews (instructed by Lewis Silkin LLP) appeared on behalf of the Class Representative

Kenneth MacLean KC, Edmund Nourse KC and Andew McIntyre (instructed by Hogan Lovells International LLP) appeared on behalf the Defendant

Note: Excisions in this Ruling (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. This is the second case management conference (the "Second CMC") in these collective proceedings brought by the Class Representative ("CR") against the Defendant ("Royal Mail"). The Collective Proceedings Claim Form was issued on 29 May 2024. For the reasons set out in the Tribunal's Judgment ([2025] CAT 19) following the Collective Proceedings Order Application hearing ("the CPO Judgment"), by Order made on 6 March 2025 ("the CPO") Bulk Mail Claim Limited was authorised to act as the class representative and to continue the proceedings on an opt-out basis. Bulk Mail Claim Limited is a body specifically incorporated to bring these proceedings and is a private company limited by guarantee. Its sole member and director is Mr Robin Aaronson, an economist specialising in competition policy, including in postal markets.

2. The claim "follows on" from Ofcom's 14 August 2018 decision entitled "Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK" ("the Ofcom Decision").

3. The Ofcom Decision concluded that Royal Mail unlawfully abused its dominant position in the market for bulk mail delivery services (the "Bulk Mail Delivery Services Market") by attempting to introduce discriminatory prices via "Contract Change Notices" ("the CCNs") on 10 January 2014 ("the Infringement"). The term "bulk mail" is used to refer to high volume mailings of similar or identical items being sent to addresses anywhere in the UK, or a substantial part of it, by a company or other organisation, such as a public body or charity. These retail customers purchase bulk mail retail services from Royal Mail and "access operators" in the "bulk mail retail services market". Access operators typically collect bulk mail and carry out an initial sortation, before passing that mail on to Royal Mail for physical delivery. Royal Mail is required by law to provide these bulk mail delivery services and is overwhelmingly dominant in the Bulk Mail Delivery Services Market.

4. At the time the CCNs were issued, Whistl was a major access operator for bulk mail and had started to roll out its own delivery operations to final recipients in specific areas. It had been planning to extend its end-to-end delivery service

across the UK, thus eroding Royal Mail's market share. The CCNs, had they become operative, would have made using Royal Mail's delivery service more expensive for firms like Whistl that had their own end-to-end collection and delivery service, whilst also using Royal Mail's delivery service for those parts of the country not covered by their in-house delivery services. It is the CR's case that as a result of the announcement of the CCNs, and prior to the Ofcom Decision, the funders for Whistl's planned expanded operation withdrew their funding.

5. Royal Mail appealed the Ofcom Decision to the Tribunal. This appeal was dismissed on 12 November 2019 ([2019] CAT 27) ("the Ofcom Tribunal Judgment"). A further appeal to the Court of Appeal was dismissed on 7 May 2021 ([2021] EWCA Civ 669; [2021] 5 WLUK 57). A petition seeking permission for a further appeal was dismissed by the Supreme Court on 7 June 2022.

6. In a nutshell, it is the CR's case that:

   (1) as a result of the Infringement, Whistl withdrew from the relevant market, never to return;

   (2) purchasers of bulk mail services paid higher prices than they would have otherwise, creating an overcharge (the "Overcharge");

   (3) on a provisional basis, the CR estimates the total value of the claim in terms of the Overcharge is in the region of £1 billion, and the number of class members exceeds 290,000.

7. Whistl brought its own claim against Royal Mail primarily based on the Ofcom Decision ("the Whistl Proceedings"). This claim was settled between the parties in early 2025, but not before disclosure had been undertaken, which included not only documents from Whistl, but also from its former Dutch parent, PostNL (formerly TNT), and Whistl's potential funders, LDC. Also available in those proceedings was material from the Ofcom investigation in the Ofcom case file and the evidence and submissions from the appeals to the Tribunal and the Court

of Appeal. This should substantially reduce Royal Mail's costs for disclosure in these proceedings and at this stage disclosure from this resource has been, and is being, provided to the CR.

8. Whilst this is the first case management conference following certification, case management was considered at the CPO hearing and the Tribunal gave guidance on the case moving forward as reflected in the CPO Judgment at [82] and the CPO.

9. Before dealing with the specific matters on the agenda in the Second CMC, the Tribunal makes the following observations pertinent to these proceedings:

(1) Like most collective proceedings before the Tribunal, these proceedings raise issues of both evidence and case management. The aim is to have a trial which can be conducted in an efficient manner, without overly complex and convoluted arguments, and with both factual and expert evidence in a form that can be absorbed and is comprehensible.

(2) It is appreciated that the proceedings are and will be expensive for both sides. On the part of the CR, this requires the support of funders and ATE insurers. This requires costs budgeting as between the CR, its lawyers and the funders, as well as between the parties. The Tribunal is keen to avoid a cost dispute between those on the CR's side, including the stakeholders in terms of lawyers, funders and ATE insurers, which may have an impact on the proceedings, both at this stage, as well as at the conclusion of the proceedings. Sometimes such disputes are unavoidable.

(3) Costs need to be kept under control and be reviewed by the parties as well as by the Tribunal. The CR has the benefit of an independent costs specialist (Practico) to enable it to consider bills in the proceedings, especially from its own legal team. This is a matter which was directed by the Tribunal as reflected in the CPO Judgment at [40]. Further, at [39] of the CPO Judgment the Tribunal requested that the CR submit budget updates at each case management conference indicating the extent to

which the budget has changed and confirming the amount that has been drawn from the funder.

(4) Class members and the potential size of each class member's losses vary considerably. A particular feature of this case is that whilst many class members may have small claims, there are other class members who have potentially large claims: CPO Judgment at [30]. For this reason there is a customer user group in addition to a consultative panel for Mr Aaronson to work with. Class members may have differing potential rates of pass-on (if at all).

(5) The amount of case management any particular collective action requires varies considerably. With parties and their solicitors acting in a pragmatic, sensible and constructive manner, proceedings can be managed in an efficient way. This can avoid unnecessary disputes, reduce costs and be of real assistance to the Tribunal throughout the proceedings. Many things can be agreed so interlocutory hearings, including case management conferences may be shorter, avoided or reduced in number.

B. EVENTS SINCE THE CPO JUDGMENT

10. Since the CPO and the CPO Judgment, the proceedings have been managed well by the parties and considerable progress has been achieved. In particular:

(1) The parties have exchanged pleadings. An amended claim form was served on 17 April 2025. The Defence was served on 20 May 2025. Both pleadings are of proportionate length. A short Reply was served on 15 July 2025 crystallising the issues between the parties, at least in terms of pleading.

(2) A Confidentiality Ring Order was made by consent on 17 March 2025 (the "CRO"). Royal Mail has disclosed various documents into the ring from the Whistl Proceedings, including all relevant witness statements and the material documents from the Ofcom case file. The parties must

keep in mind what documents need to remain subject to the CRO as the proceedings progress.

(3) On 15 July 2025, the CR filed a list of the findings in the Ofcom Decision and the Ofcom Tribunal Judgment which it considers binding on Royal Mail. Royal Mail filed its response shortly before the Second CMC on 10 September 2025.

(4) The CR has filed a third report from its economic expert, Dr Chris Williams. This was pursuant to a direction made in the CPO Judgment that he set out his proposed methodology in greater detail than he provided in his first two reports to the Tribunal at the CPO hearing. In turn, Royal Mail's economic expert, Mr Matt Hunt of Alix Partners, has provided a report in reply dated 18 September 2025.

(5) The CR has filed an updated Litigation Plan and costs budget.

11. The pleadings have an important role in providing the framework for the case, setting out the issues and points of disagreement as well as what is admitted. They are the key reference point for disclosure and the list of issues. Ideally they should be kept to a sensible length and avoid getting into the detail of the evidence. From the Defence, the key battle lines centre on causation and the existence or level of any Overcharge. As set out in paragraphs 4 and 5 of the Defence, Royal Mail's case may be summarised as follows:

> "4. It is denied that the Infringing Conduct caused any loss to the Class Members. In particular:
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> 4.1 The Infringing Conduct was not the effective cause of the termination of Whistl's end-to-end ("E2E") bulk mail delivery business. Rather, such termination was caused, in particular, by (i) the voluntary decision of LDC not to proceed with its investment and to exercise its discretion to withdraw from the share purchase; and/or (ii) the voluntary decision of Whistl to abandon, and not to proceed any further with, its delivery business. Those decisions were driven not by the Infringing Conduct but rather by Whistl's own conduct and the inherent problems with the business (including, by way of example only, declining mail volumes; serious operational problems, some of which attracted widespread media attention; an adverse judgment from the High Court on Whistl's challenge to Royal Mail's VAT exemption; and the possibility, publicly stated by Ofcom itself, of regulatory intervention to protect Royal Mail's universal service obligation).

> 4.2 The CCNs proposed the introduction of a number of changes to the terms of the Access Letters Service other than the price differential, including e.g. in relation to the zonal tilt, the surcharges payable in respect of NPPI, the tolerances for meeting targets, the requirement to display zonal indicia and the provision of volume forecasts. None of these proposed changes was found by Ofcom to give rise to any infringement of competition law. Insofar as the CCNS were a factor in LDC's decision not to proceed with its investment and/or Whistl's decision not to proceed with its bulk mail delivery business, it is denied that it was the Infringing Conduct that was the primary or effective cause of such decision, as opposed to the non-infringing aspects of the CCNs.
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> 4.3 Further and in any event, even had LDC decided to proceed with its investment and/or even had Whistl decided to proceed with the expansion of its bulk mail delivery business, that business would not have been successful. In this regard, it is significant that at no point since the withdrawal of the CCNs and the dismissal of Royal Mail's appeals has Whistl itself or any other Access Operator or market entrant ever sought to pursue its own bulk mail delivery business.
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> 5. Moreover, even if, contrary to the above, Whistl would have succeeded in building an E2E bulk mail delivery business in the counterfactual, it is denied that this would have led to lower prices for Class Members."

12. In the CPO Judgment, the Tribunal summarised Dr Williams' proposed methodology (at [58] to [65]), and directed that at the Second CMC, the Tribunal would wish to review a further report from him as to the development of that methodology (at [81]). Dr Williams' third report develops upon the material before the Tribunal at the CPO hearing. The executive summary of his third report is worth reproducing in full given the importance of expert evidence in these proceedings:

> "1.1.2 Having certified the CR's claim, the CAT directed at paragraph 8 of the "Directions Order" that I produce this third report ("Williams 3"), covering the following issues:
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> a) My detailed methodology ("Question 1");
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> b) The proposed qualitative evidence on which I intend to rely ("Question 2");
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> c) The interrelationship between the detailed methodology and qualitative evidence ("Question 3"); and
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> d) My approach to calculating overcharge ("Question 4").
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> 1.1.3 Williams 3 has been informed by the off-the-shelf disclosure provided from Royal Mail pursuant to paragraph 1 of the Directions Order (the "OTS Disclosure").

1.1.4 My detailed methodology was set out previously in Williams 1 (Question 1). I propose to calculate aggregate damages suffered by Bulk Mail Retail Customers, arising from the Infringement via econometric modelling. In particular, I will rely on estimates of the VoC, the Retail Customer Overcharge (which incorporates the degree of "Pass-through"), the degree of market contestability, the rate of "Pass-on", and the interest rate which applies to aggregate damages.

1.1.5 As addressed further in Section 4 below, in relation to the qualitative evidence (Question 2), I propose as follows:

a) *Review of business plans, financial information, and Ofcom regulation*: I propose to review Whistl's and Royal Mail's business plans, financial models and other contemporaneous documents, in order to test the viability of the core assumption that I make in my econometric model. I intend to make my econometric model reflective of factual patterns over the Relevant Period. Furthermore, I will consider the impact of my estimates of the Retail Customer Overcharge on key financial metrics within the business plans and financial models. I also propose to collect information on Royal Mail's cost-allocation methodology and profits, to construct *'bottom up'* estimates in order to either verify and/or provide an alternative basis on which Retail Customer Overcharge can be estimated. Finally, to the extent relevant, I propose that this information can be used to assess the likelihood of regulatory responses by Ofcom, under different assumptions about Whistl's entry and expansion. If the CR is granted permission to adduce forensic accounting expert evidence, I consider that this would be of particular assistance in relation to this analysis.

b) *Survey of Bulk Mail Retail Customers:* I propose a survey be conducted, to test actual or potential Retail Customer responses to increased competition in Bulk Mail Delivery Services. The OTS Disclosure provides useful information for the purpose of planning, delivering and interpreting the results of the survey.

c) *Approach to estimating the Retail Customer Overcharge for VAT-exempt customers:* Royal Mail's Bulk Mail Retail Services are VAT-exempt, which gives Royal Mail a price advantage, but also increases its input costs since it cannot reclaim VAT it pays on these inputs. I propose to estimate Royal Mail's costs, margins and prices for its Bulk Mail Retail Services, in order to assess the cost and price implications of VAT-exemption for Royal Mail. I can then use these estimates to (i) should information be available, assess whether my quantitative estimate of the Retail Customer Overcharge for VAT-exempt customers is robust, and (ii) produce a qualitative estimate of the Retail Customer Overcharge.

d) *Review of other postal markets:* my DiD model and quantitative results rely on the identification of appropriately competitive Comparator Countries. Via a literature review and a review of the relevant disclosure, I propose to consider the impact of competition in Bulk Mail in European postal markets, where entry by providers of Bulk Mail Delivery Services has led to increased competition of equivalent services to Bulk Mail Retail Services. I intend to use this review to assess the key characteristics of Bulk Mail Retail Services in the UK and the Comparator Countries,

ensuring that the selection process for the list of Comparator Countries is robust.

e) *Review of economic literature on Pass-through and Elasticities:* I will conduct a further review of the economic literature and the evidence obtained through disclosure, and anticipate using this to test (and, if necessary, refine) my estimates of Pass-through and elasticities.

1.16 In relation to Question 3, the qualitative evidence will act as both a complement to my quantitative methodology, and, should it prove necessary, provide an alternative basis on which I can estimate the Retail Customer Overcharge. The relevant interrelationships are addressed more fully in Section 5 below, however in summary:

a) *Review of business plans, financial information and Ofcom regulation:* As described further in Section 5.2 below, this analysis will be complementary to my econometric modelling in that it will inform my choice of Comparator Countries, the degree of market contestability, and act as a verification and validation of the quantitative estimates of the Retail Customer Overcharge. This analysis will also provide an alternative basis for estimating a viable range for the Retail Customer Overcharge.

b) *Survey of Bulk Mail Retail Customers*: My proposed survey has the potential to be used as a complement, and/or an alternative to, the quantitative evidence. In particular, the survey is capable of complementing the quantitative analysis of the Retail Customer Overcharge as it will provide a basis against which I can test the output of my econometric model in terms of Pass-through; and the input in terms of market contestability. It will also provide direct evidence (and therefore an alternative basis for calculation) of Pass-through and to the extent necessary, Pass-on.

c) *Approach to estimating the Retail Customer Overcharge for VAT-exempt customers:* The proposed qualitative evidence on the Retail Customer Overcharge for VAT-exempt customers will complement my quantitative estimates of the Retail Customer Overcharge, in that it will inform my assessment of the net price advantage Royal Mail enjoyed in relation to VAT-exempt Retail Customers, which in turn I intend to use to calculate Retail Customer Overcharge for VAT-exempt Retail Customers. I anticipate this analysis will also be used in producing qualitative estimates of the Retail Customer Overcharge, by estimating Counterfactual costs, profits and prices, primarily using information from Royal Mail, which I will then compare against prices charged by Royal Mail for its Bulk Mail Retail Services, as well as additional contemporaneous information.

d) *Review of other postal markets:* The review of postal markets will complement my quantitative analysis, by providing a transparent and robust approach to the selection of Comparator Countries.

e) *Review of economic literature on Pass-through and elasticities:* The proposed review can either complement my quantitative estimates of Pass-through in that it will provide a basis against which I can test (and if necessary, refine) my estimates, or alternatively, provide the basis for such estimates.

1.1.7 My approach to calculating the Retail Customer Overcharge (Question 4) is closely linked to my theory of harm, which I set out in Williams 1. My approach sets the basis for estimating the Retail Customer Overcharge as the difference between the prevailing prices in the Actual Scenario versus the Counterfactual. In order to reach a damages estimate, I will also consider the rates of Pass-through and, to the extent relevant, Pass-on. I will obtain estimates of these inputs, and others, using the quantitative methodologies and qualitative evidence. I will rely on a combination of the OTS Disclosure, additional disclosure, publicly available information and my proposed survey.

1.1.8 Based on my methodology, I propose to provide the Tribunal with a flexible quantum model (addressed in Section 6 below), prepared in an Excel format, which will allow the Tribunal, as well as the Royal Mail's experts, to interrogate the model and the assumptions it is based on."

13. Mr Hunt, in his second report, sets out why he considers that Dr Williams' proposed approach to estimating the Overcharge (which he abbreviates as the RCO) is not viable. In particular, he summarises his position on that central issue as follows:

"Dr Williams' "quantitative" methodology

6. Dr Williams has only made minor adjustments to his so-called "quantitative" methodology, which is an econometric DiD modelling methodology. Dr Williams maintains that this will be his primary approach for estimating the RCO, in line with his first expert report ("Williams 1"). I explained in Section 5 of Hunt 1 why I do not consider that Dr Williams' proposed DiD modelling approach is viable. Dr Williams has not provided any material amendments or additions to that approach that address my concerns regarding the significant challenges with implementing a DiD model in this case, including: controlling for important differences between comparator countries and the UK; and providing evidence to show that the comparators satisfy key assumptions necessary for a DiD modelling approach to be valid. Dr Williams has not explained how he will overcome these challenges and I still do not see how Dr Williams can address certain serious problems with his proposed approach, such as providing evidence of parallel trends.

Dr Williams' "qualitative" methodologies

7. Dr Williams has set out what he calls "qualitative" methodologies. In my view, none of the approaches that Dr Williams set out provide a viable methodology for estimating the RCO. In many places, Dr Williams' proposed approach is unclear and difficult to follow, and he has not presented the rationale for his approach. In addition, it is evident that there are serious challenges with implementing some of the approaches.

8. For example, Dr Williams has suggested that he could use survey evidence as another alternative (or complementary) approach to his DiD model for estimating the RCO. Dr Williams has not provided additional detail regarding the design and implementation of his survey beyond what he has already set out in Williams 1 (Appendix 7). As there are serious problems with using a survey methodology to estimate RCO that Dr Williams has not

addressed, I do not believe that Dr Williams' survey approach provides a viable methodology to estimate the RCO.

a) First, Dr Williams appears to claim that observing how bulk mail retail customers prices have evolved over time will provide him with an alternative to his DiD model. This is incorrect. Gathering information about prices actually charged to such customers and observing their evolution over time will not allow him to estimate prices in the counterfactual and thereby to calculate the RCO.

b) Second, while Dr Williams could in principle gather some information on customer switching behaviour using his proposed survey, such a survey has a host of practical issues that Dr Williams would need to address for it to provide reliable evidence for bulk mail retail customers' purchasing behaviour, for example:

   i) Dr Williams would need to target the survey at the specific individuals who were decision makers at bulk mail retail customers in relation to the purchase of bulk mail services many years ago.

   ii) Dr Williams would need to frame questions about a counterfactual scenario of entry by Whistl that would be sufficiently clear and precise to get meaningful responses to those questions. Survey evidence is well known for being prone to having material biases and asking questions about a counterfactual scenario from many years ago that would have changed over time (as Whistl rolled out a mail delivery network) and that customers never experienced would be particularly fraught with difficulties.

c) Third, information about possible customer switching behaviour alone will not allow Dr Williams to estimate what prices would have been in the counterfactual and arrive at an estimate of RCO. Customer switching information will not tell Dr Williams whether Whistl or Royal Mail would have offered services at lower prices in the counterfactual."

14. In addition, Mr Hunt does not consider that Dr Williams has set out a viable qualitative methodology for estimating the RCO specifically for VAT exempt customers. Mr Hunt does not express his views on what is the correct methodology or how he intends (if at all) to ascertain the Overcharge (if any) or pass-on.

15. It is evident that the experts remain far apart on how the Overcharge is to be estimated, what methodologies are viable, and suitable comparators for any difference in differences ("DiD") model.

C. SECOND CMC AGENDA ITEMS

16. The main agenda points for consideration at the Second CMC were as follows:

(1) Expert evidence;

(2) Binding findings;

(3) Class Member Customer Group;

(4) Disclosure;

(5) LFA and Practico;

(6) Costs budgets;

(7) Confidentiality; and

(8) Directions to trial.

(1) Expert evidence

17. The parties seek permission pursuant to Rule 55(1)(d) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") to adduce written and oral evidence as follows:

(1) Economic expert evidence from Dr Williams (for the CR) and Mr Hunt (for Royal Mail).

(2) Forensic accounting expert evidence from Mr Gary Davies on behalf of the CR and Mr Andrew Grantham on behalf of Royal Mail. The focus of this will be a qualitative analysis relating to whether Whistl could have sustained operations or expanded in the Bulk Mail Delivery Services Market.

(a) Economic expert evidence

18. The Tribunal is satisfied for the reasons given in the CPO Judgment, including as stated at [83], that expert economic evidence is required. The Tribunal is also satisfied that Dr Williams and Mr Hunt are suitably qualified to give that evidence.

(b) Forensic accounting evidence

19. As to the proposed forensic accounting evidence, the Tribunal is satisfied that such evidence is desirable and proportionate. It should provide a useful qualitative analysis on the plausibility of Whistl remaining in the relevant market and then expanding to provide a competitive restraint on Royal Mail, leading to lower prices. This is not necessarily a simple exercise. It involves a number of variables and assumptions as to the direction of Whistl's position and market share and its pricing over time.

(c) Further points

20. That said, there are certain observations that the Tribunal would like to make at this stage on expert evidence.

21. First, it is directed that there be a meeting of experts to discuss the relevant issues and to prepare for the Tribunal a list of issues to be covered by expert evidence. The list of issues will specify the issues which are being covered and which expert is covering it. The list of issues for now can cross refer back to Dr Williams's first three reports, and Mr Hunt's reports as and when necessary. The list should also cross refer to the relevant paragraphs in the pleadings. This list of issues is to be filed before the next hearing in these proceedings and is subject to the Tribunal's approval.

22. The Tribunal of course appreciates that whilst this is to be a meeting of experts, this is a meeting that solicitors should also attend as they can assist in the process of drafting the list of issues for expert evidence. The list of issues will be useful because it is by reference to it, that the Tribunal is granting permission

to provide expert evidence. This Tribunal generally does not like having an open ended permission to adduce expert evidence without it being specified on what topics expert evidence is to be given and the approach that is going to be taken by each expert.

23. As regards the position of Dr Williams, as considered at certification, there is a reference to two comparators for the DiD model. However, there are now indications that Dr Williams would like to explore other jurisdictions as comparators. That is perfectly permissible. However, he does need to specify what those jurisdictions are and why he considers they are comparable. The Tribunal understands that there is further disclosure that is coming from Royal Mail, which may impact what are the appropriate comparators. The Tribunal requires to be informed, certainly by the time of the next hearing, what the comparators are and the reasons for this. If Dr Williams seeks to add another comparator after the list of issues has been finalised, this would have to be explained to Royal Mail and the Tribunal.

24. As regards Mr Hunt, the Tribunal directs that he (along with Mr Grantham if so desired) produce a report, no longer than ten pages, setting out his methods for a positive case, if he has one, on how the Overcharge and any pass-on should be calculated. The Tribunal suggests that this may be conveniently done after the meeting of experts, because the meeting itself may inform his own analysis. The Tribunal directs that this be filed before the next hearing.

25. As regards the order of the experts' reports for trial, whether they be concurrent or sequential, the Tribunal defers that issue to the next hearing. This is because one of the factors in determining which is the most appropriate approach is whether or not Mr Hunt is going to advance a positive case.

26. The experts should endeavour, as far as possible, to avoid producing overly long, convoluted and complicated reports. It is critical that whatever they produce is in a form that can be absorbed easily by the Tribunal. The Tribunal will be imposing page limits for expert reports when it comes to trial. The Tribunal would not expect first round expert reports to be longer than 75 pages, with one and a half line spacing. In the main text, the minimum font size should

be 12pt for Times New Roman, 11pt for Arial, or an equivalent size for other fonts. For citations and footnotes, the font size may be one point smaller. If there are to be two rounds of expert reports, the second-round reports should be materially shorter than the first.

27. There have been cases where that has not been done, with this leading to more complicated cases, longer hearings and much longer time frames for any judgment. The Tribunal directs the parties' attention to the Tribunal President, Bacon J's recent judgment in the High Court in *Cabo Concepts Ltd v MGA Entertainment* [2025] EWHC 1451 (Ch) at [42] to [57] as an example where parties did not use expert evidence in a satisfactory manner. The Tribunal notes the following in particular:

> "49. Thirdly, and related to the second point, expert evidence at a trial is not and cannot be seen as a negotiation process, where the experts start from extremely polarised and partisan positions, only to edge incrementally towards the centre ground as the trial progresses. That would make the trial unworkable, for the parties as well as the court. The proper course is for each opposing expert to start from a position that is objective and defensible. Any differences in opinion between the experts should be discussed fully at the stage of a joint meeting of experts (if there is one). The experts should revise their opinions as appropriate following that meeting, with the joint statement reflecting their revised opinions. Any residual differences can then properly be tested through the experts' oral evidence at the trial.
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> 50. That process requires a willingness by the experts to engage with the evidence of the other side in a manner that reflects objective consideration as to the strengths and (importantly) weaknesses of their position. Where an expert fails to do so, and maintains instead an entrenched and polarised position right up to trial, that may again indicate a lack of objectivity in their approach, thereby undermining the credibility and reliability of their evidence."

28. It is in no one's interests not to have objective experts and expert evidence. First, it does not assist the Tribunal. Secondly, the experts could be criticised, which will have an impact on their future prospects as experts. It is an important message that the Tribunal wishes to convey: extreme positions do not help.

29. The Tribunal does not expect experts to quantify the Overcharge to the last farthing. Sometimes people are looking for precision where it does not exist. This Tribunal is going to have to determine some of these issues on a broad axe, rather than a completely precise basis.

30. It is also important that the experts address the same issues. Time and time again, the Tribunal has had before it at trial experts producing reports where neither engages with the other nor make it clear what the party's case is. Further down the line, when it comes to detailed directions as to expert evidence, the Tribunal will be directing a meeting of experts after the expert reports for trial have been exchanged. As a result of that, the Tribunal will expect to have a detailed list of issues on which they agree and disagree, so it can see the points on which the experts agree and that can be cross referred to the relevant paragraphs of the expert reports. On those items where they disagree, the experts should provide short explanations, on both sides, as to why they disagree. This should be more detailed than one line and should help form an effective agenda for when the expert evidence is called. The Tribunal is not now determining whether there will be hot tubbing at trial, however that clearly will be a possibility, at least in relation to some issues.

31. Finally, when it comes to the list of issues, it needs to be clear which expert is going to cover what. The Tribunal can envisage there will be some overlap on certain issues between what the forensic accountancy experts are going to cover and what the economic experts are going to cover. Therefore, the Tribunal requests that there be a clear understanding of which issues relate to each expert and how this is to operate.

(2) Binding findings

32. It is evident from the CR's list of binding findings and Royal Mail's response, that the parties have so far been unable to agree on all those findings said to be binding. Furthermore, Royal Mail's position is that the Tribunal should disapply the binding effect of certain findings.

33. A similar disagreement arose in the Whistl Proceedings in which the Tribunal directed that there would be a one-day preliminary issues hearing to determine the issue. Prior to the hearing, the parties reached an agreement. That agreement was put before the Tribunal which considered it to be a appropriate in all the circumstances. On certain issues the parties agreed they were binding; other

issues, the parties agreed, effectively, to leave it for trial or they left open some ambiguity.

34. The first issue for the Tribunal to determine on this aspect is whether the agreement from the Whistl Proceedings should be produced to the CR. It is said on behalf of Royal Mail that this is a private agreement and in effect, what was agreed there is neither here nor there, and that the CR should take its own position on what findings it wishes to contend are binding and what its responses are to those findings that are at issue.

35. The Tribunal considers that the proportionate way forward is for Royal Mail to disclose that agreement, which has been read and considered by the Tribunal in any event in the Whistl Proceedings, to the CR within the next two days.

36. As regards where the Tribunal goes from here, it was initially proposed by Royal Mail that this is a matter that should be determined by way of a preliminary issue. This was, in effect, opposed by Mr Harris KC on behalf of the CR. There was some suggestion in correspondence that they agreed that this should be determined by preliminary issue. Mr Harris KC is perfectly entitled to take the view that to have a preliminary issue determined at this stage would be an inappropriate use of resources. All too often, preliminary issues are seen as a shortcut, but they end up increasing costs. As to the possibility that preliminary issues lead to an "enormous size of costs claimed", the parties are referred to *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2023] CAT 53 at [11] and [12]. Where, for example, Royal Mail wishes to have a particular finding disapplied and no longer binding, this submission may be founded on evidence which would have to be proved at trial. This would clearly be a matter that should be determined at trial itself, rather than in advance of trial, unless a very clear position can be adopted by the Tribunal in light of submissions by the parties.

37. Royal Mail, having heard what the Tribunal had to say during the Second CMC as well as Mr Harris KC's submissions, has withdrawn its application for a preliminary issue at this stage. That does not mean that there is no longer any need to try and get to the bottom of, so far as it is possible at this stage, which

findings are binding, what the parties' respective positions are, and which findings can be agreed. It is important to have a clear statement from Royal Mail as to each finding it does not accept as binding. In so doing, Royal Mail needs to indicate whether its position is something which can and should be resolved by way of preliminary issue, or whether it should in fact be deferred to trial.

38. The Tribunal directs that after this position statement from Royal Mail has been provided, the parties should correspond with each other with a view to narrow down the issues arising from this process. A further schedule should then be prepared setting out the parties' positions. The CR will provide a list of each finding which the CR contends to be binding by reference to the Ofcom Decision and the Ofcom Tribunal Judgment, giving the relevant paragraphs for each. Royal Mail, in the next column, is to confirm whether it agrees. If it disagrees, Royal Mail will set out the basis for its disagreement, and when it proposes that disagreement should be dealt with by the Tribunal. In the final column, the CR is to provide both its summary response to those items in the previous column it disagrees with and at what stage it considers that the disagreement should be resolved. The parties can, of course, use the schedules already prepared as part of this process, but, ultimately, the Tribunal requests a single, useful and workable schedule.

39. Once that exercise has been undertaken, it is open to Royal Mail to renew its application for a preliminary issue. One would hope that with the benefit of going through this process, and particularly looking at what was agreed in the Whistl Proceedings, the parties will be able to agree matters in a form acceptable to the Tribunal. Preliminary issue hearings can have a range of outcomes. As we have also noted, for disapplying bindingness, the Tribunal's first inclination, though it may be persuaded to the contrary, is that this type of issue in these proceedings is probably a matter best left for trial. There are other issues, such as the meaning of the word "material". It may well be that even if there is a reference to something being "material", the Tribunal will have to decide for itself the extent of this materiality, with this likely being a matter for trial.

40. Finally, there is a cost risk for whoever applies for a preliminary issue because if it is found that the preliminary issue hearing is largely unproductive, and the

issues are deemed to be matters for trial, then there will be an adverse cost order either way.

(3) Class Member Customer Group

41. As regards the Class Member Customer Group ("Customer Group"), this was a matter that the Tribunal considered in the CPO Judgment. The Tribunal considered, given that there are likely to be some major players within the class members, that there should be a group of class members that the CR can consult with. The Tribunal did not intend that the Customer Group would direct how these proceedings are to be conducted. That is the CR's role. But it would be helpful if the CR does consult the Customer Group and keep it apprised of developments in these proceedings.

42. As of now, there are five members of the Customer Group, and they had their first meeting on 8 September 2025. The CR has contacted 71 larger class members to see if they would wish to join the Customer Group.

43. An issue arises as to whether the Tribunal should be told the names of the persons in the Customer Group. Whilst this may not be necessary (at least not as matters currently stand) the Tribunal should be aware of the make up of the Customer Group at least in terms of the sector in which each of these members operates (e.g. local authority or banking) as part of its supervisory role in the conduct of these collective proceedings.

44. The issue then arises as to whether Royal Mail should be provided with the list of Customer Group members. It is the Tribunal's understanding that the CR has informed the Customer Group members that their names will be kept confidential, and part of that is due to a potential fear that those members may be picked on, or there may be repercussions, because they have an ongoing relationship with Royal Mail. We do not consider it is likely at all that Royal Mail will pick on, single out, or do anything to harm any of its customers; it is completely counterproductive to do that. But the fact that a scenario is unlikely does not mean that an individual customer may not have its own concerns, whether they are well founded or not.

45. Mr MacLean KC for Royal Mail suggested that it may wish to get non-party disclosure from individual class members. For that Royal Mail would need to make an application under Rule 63 of the Tribunal Rules. That would be the necessary course, because the individual class members are not party to the action for the purposes of disclosure. Mr MacLean KC also said that this may include seeking disclosure from members of the Customer Group. However, it is unlikely, in deciding which class members it wishes to have disclosure from, that this would be dictated by who is in the Customer Group. One would have thought that if Royal Mail wanted to explore this, it would identify a range of potential class members to look at the extent to which class members would be passing on their postal charges to their customers. Sampling exercises can be controversial and may not necessarily come up with a reliable estimate of the Overcharge and pass-on for the class. There are other well-known methods for determining the level of pass-on across a class.

46. Even if Royal Mail wishes to look at individual member pass-on rates, it does not necessarily follow that it will need to have non-party disclosure. It may be that, for example, if a class member is supplying a service on the internet, it can be seen whether they are offering services which involve using the bulk mail service in issue in this case, and then check whether the class member charges individually for postage and packaging.

47. The Tribunal envisages that, if possible, there should be about ten members in the Customer Group. Once the Customer Group has got to this stage, the Tribunal directs, there should be further consultation with the members of the Customer Group as to whether they would wish their names to be identified. If a list is to be provided to Royal Mail this would be pursuant to the CRO (external lawyers only). Royal Mail may apply to the Tribunal for a list of names. The Tribunal does not envisage that this will be done before the next case management conference. Therefore, the Tribunal will return to the Customer Group at the next case management conference. In saying this, the Tribunal is not encouraging Royal Mail to make an application, particularly as the Tribunal envisages that both the Tribunal and Royal Mail will be informed of the sectors in which each member operates in.

(4) Disclosure

48. Progress is being made on disclosure by the parties, and it is evident from the correspondence that there has been constructive dialogue. There were evidently many documents disclosed in the Whistl Proceedings, with permission to disclose such material from Whistl and non-party sources, as well as documents from Ofcom. There has been an initial disclosure of "off the shelf" ("OTS") material and a further circa 275,000 documents in that category are due to be served, as agreed between the parties, on 10 October 2025 (subject to the Tribunal making orders pursuant to Rule 102(2)(b) disapplying collateral use restrictions that arise under Rule 102 in respect of certain of this material).

49. There has been some disagreement as to the precise wording of that order. One item of disagreement related to "Category 8" documents, which Royal Mail sought to exclude. Category 8 relates to a category of disclosure from the Whistl proceedings which encompassed Royal Mail's:

> "actual unaddressed mail delivery volumes and pricing and most recent forecasts of unaddressed volumes and pricing (including supporting calculations/models) by SSC and postcode sector and zones (ideally by month but otherwise by quarter and both postcode sector and zone if available)".

50. Mr McIntyre, for Royal Mail, made the valid point that whilst he accepted that if this point were pleaded, it could be relevant, the CR had not currently pleaded it. In general, this Tribunal and the High Court proceed on the basis that relevance and disclosure are determined by reference to the issues as set out in the pleadings, and in particular the parties' statements of case: Matthews and Malek, *Disclosure* (6th Edition, 2024) paragraph 5.27. That is generally the touchstone, or at least the starting point, in relation to what documents must be disclosed.

51. This is not necessarily conclusive, but it is an important factor. Hence, if an issue has not been pleaded, it is unlikely that the CR is entitled to seek disclosure in respect of that.

52. Mr Harris KC showed the Tribunal a TNT document from May 2013. [✂]. From this, we are satisfied that unaddressed mail is relevant. However, it has not been specifically pleaded.

53. The CR is given leave to file and serve by 26 September 2025 a Draft Amended Reply, specifically pleading this aspect. During the Second CMC Mr Harris KC confirmed that the CR will be doing so. If Royal Mail has any objection to the wording of the Draft Amended Reply, any objection should be set out in writing by 3 October 2025, providing the basis of the objection. If there is no objection, then the CR will have permission to amend in the terms of that Draft Amended Reply. If there is a dispute, that dispute will be resolved on the papers. In the event the amendment is allowed, the Category 8 documents should be disclosed.

54. As regards the actual wording of the order, there is a further dispute between the parties as to what degree the order should specify what is encompassed within the relevant documents in the class. The Tribunal has indicated what wording is acceptable. The wording is set out in the order giving effect to this Ruling.

55. Another issue in dispute relates to what happens to exhibits to witness statements. The question is, must all the exhibits be provided, even if a particular exhibit is both confidential and irrelevant to the issues in the action? Insofar as an exhibit is both confidential and irrelevant to the issues in the action, it need not be disclosed. Royal Mail may take the view that it is not a particularly constructive use of its time to go through all the exhibits, taking out particular exhibits, especially if they are few in number. It could be an expensive exercise reviewing and redacting individual documents. However, they are fully entitled not to disclose an exhibit which is both confidential and wholly irrelevant to the issues.

56. The Tribunal heard submissions on non-OTS disclosure and approved the proposals at paragraphs 5 to 13 of the draft directions, which envisage, ultimately, a sensible way forward, consistent with other orders that this Tribunal has made in other cases.

57. The precise dates for each stage are reflected in the order giving effect to this Ruling.

58. As is clear from the order that will follow this Ruling, the Tribunal envisages that much of the disclosure by Royal Mail will be based on the disclosure given and received in the Whistl Proceedings. This should be a considerable reduction in expense, at least on Royal Mail's side, in relation to disclosure in these proceedings. That said the scope of disclosure and the need for, mode and extent of any further disclosure exercise are matters to be considered at a further case management conference in due course once a Redfern Schedule process has been progressed.

59. Going forward, there will be remaining issues for disclosure. Resolving these should be by way of requesting specific documents or classes of documents, to be followed by the Redfern schedule process. The Tribunal expects an element of give and take on disclosure and that the parties cooperate. The Tribunal notes that the parties may find it beneficial to consider whether the solicitors should meet to go through disputed areas rather than the method of writing long letters.

60. If items cannot be agreed, then of course, they can go to the Tribunal for determination. When the Redfern schedule is prepared for the Tribunal, it would be helpful if it can be indicated with shading which items are no longer an issue. This will allow the Tribunal to concentrate on those items that are really in issue.

61. The Tribunal can be quite flexible in determining disputes on disclosure. The Tribunal can have a hearing for guidance, or the parties can write in and ask for a ruling in principle on specific areas. The Tribunal can give a ruling on the papers or, if requested by a party, can have an oral hearing. Regarding this process, the parties are directed to *Dawsongroup Plc and Others v DAF Trucks N.V and Others* [2021] CAT 13 at [5] to [11].

(5) Updated LFA and Practico

62. In the CPO Judgment at [37], it was directed that if the CR has any concerns about the financial position of the funder and its ability to continue funding the

proceedings, which are not resolved within 14 days, the CR is to inform the Tribunal and Royal Mail in writing. The CR undertook to do this.

63. As a result of the practical problems that can arise at the settlement and judgment stage in the event there are substantial fees outstanding which ought to have been paid to the lawyers, the Tribunal considers that the undertaking referred to above should be expanded. This is so that in the event that the funder is materially behind in paying the costs, fees and disbursements of the CR and any dispute in relation to this is not resolved within 14 days of the CR notifying the funder of its concerns, the CR will inform the Tribunal and Royal Mail of this in writing. The CR has undertaken to do this.

(6) Costs budgets

64. It was directed that the CR's costs budget that was before the Tribunal at the CPO hearing be updated for the purposes of the Second CMC. The Tribunal has a close interest in the level of costs being incurred in this case, particularly on the CR side, as there may be conflicts of interest further down the line and a squeeze in the event of a settlement or a judgment in favour of the CR. It is evident that the higher the costs, the higher the claim by the funders for their return. If there is a limited pot for distribution to class members or a limited sum for costs, fees and disbursements available, then it may well be that there is a reduction in the amount available to class members. In a way, funders may have an interest in having greater costs if their return is by reference to the level of costs. On the other hand, they have an interest to try and keep costs proportionate, because they, most likely, do not want to incur unnecessary costs in getting the result that they seek. Also, if the proceedings are unsuccessful, then there may be no return at all.

65. One way the Tribunal has tried to deal with these conflicting interests is to have an independent cost expert to advise the CR. At the last hearing, there was a scenario table prepared which considered what would be the recovery to the class minus applicable costs. The table considered recovery of £50 million, £100 million and then in £100 million increments up to £800 million. The schedule was split between four scenarios as to when recovery occurred. One was after

disclosure, the second was after witness statements, the third was after expert reports, the fourth was post-trial. The purpose of that was to see how much was going to be potentially eaten up in funding costs, in percentage terms, out of that recovery in the event that the Tribunal at least was prepared to agree to the funders having their funders' costs.

66. The costs incurred by the CR have been more than originally envisaged, and the budget has increased substantially. The incurred costs, including VAT up until now, are £4.823 million and the budget has been increased from the initial budget of £8.4 million to £15.275 million. Mr Harris KC on behalf of the CR has confirmed that the costs which are being incurred as this case progresses are being met by the funder. Unlike counsel, the CR's solicitors are on a partial conditional fee arrangement ("CFA") with a base element to be charged and payable in any event, a deferral on part of the solicitors' hourly rates, and an uplift to be paid in the event of success in the proceedings. Counsel fees and the solicitors' base costs are not being deferred.

67. The reasons for the budget increases are eightfold, according to Mr Harris KC. It is not necessary for the purpose of this Ruling to go through each of those. However, in respect of one of the items, the legal costs and hourly rates, it is noted that the hourly rates of solicitors and counsel have substantially increased from those placed before the Tribunal at the CPO hearing. The Tribunal pointed out that if it had been the intention at the time of the CPO hearing to substantially increase the hourly rates from those put before the Tribunal at the time of certification, then that ought to have been disclosed, and the Tribunal would take a very dim view if the Tribunal had been misled in that regard. However, Mr Harris KC has confirmed that neither he, including others on the counsel side, nor the solicitors, had the intention at that time to increase rates. We accept that assurance. The revised rates do not look on their face to be excessive, and do not appear to be out of the normal range. Costs will have to be looked at if there is an assessment and of course the ultimate figures and rates will need to be considered at the time that the Tribunal is asked to approve any settlement or distribution of any damages.

68. The particular items within the updated costs budget that have increased substantially include the trial cost estimate which is now £3.5 million. At the time of the CPO hearing that figure was £1.63 million. For the Second CMC, according to the updated budget, nearly £1.3 out of £1.35 million estimated has already been incurred. This is significantly higher than the previous estimated cost allocated for the Second CMC which had been £600,000.

69. Further case management conferences have been factored into the budget, each for £200,000. One can see why that has been factored in, because this case probably does need a number of case management conferences. The cost of disclosure is currently budgeted at £1.26 million, whereas before it was £435,000. The Tribunal and the parties now have a much better grasp of the volume of disclosure then was contemplated at the CPO hearing.

70. At subsequent case management conferences, an updated costs budget should be filed by the CR. It would also be helpful to have a costs budget from Royal Mail so at least the CR can ensure that the level of ATE remains adequate. The costs budget must be in a form that is like for like with the format of the current costs budget. It should also indicate in the budget or in a separate document which items have changed or increased and, if so, by how much. This should note and track changes from the previously filed budget in addition to all previously filed budgets. Budgets should have explanatory notes saying why particular costs have increased or decreased. This should be presented in a manner which is easy to follow rather than break down every single detailed item. At the same time, the scenario document referred to above should be updated to reflect any changes in the CR's budget.

71. While the CR's costs budget has a useful function, the Tribunal in this case is not using it as a handcuff in the sense that no cost will be approved if it is not in the costs budget. The Tribunal is not imposing costs budgeting on the CR for assessment purposes. The Tribunal is not minded to impose that type of cost budgeting in this case, unless it proves necessary. The Tribunal has to rely, to a certain extent, on the good sense of the funders, the lawyers, the class representative, including Mr Aaronson and Practico, to try and keep costs as low as practicable and proportionate.

72. The Tribunal recognises the need to have equality of arms, particularly as Royal Mail, as it is perfectly entitled to do, is running a sophisticated operation, with first rate lawyers and legal teams, who probably do charge higher rates. This likely means increased costs for the CR. We do not expect penny pinching given a case of this size and complexity is likely to be expensive for both sides. However, the Tribunal does not want this litigation to be a war of attrition where every point has to be fought over at great expense. The Tribunal expects the parties' solicitors to cooperate, in the way they have been up until now.

(7) Confidentiality

73. As referred to above, there is a CRO in place, and the parties have been liaising in relation to the continued designation of confidential information. The arrangements that they have proposed seem perfectly sensible.

74. The CR raised a specific point around Royal Mail claiming confidentiality over Royal Mail witness statements disclosed in the Whistl Proceedings. The Tribunal declined to resolve this matter at the Second CMC, however, it may be necessary to resolve this at a later point if this remains an issue.

75. As a general point, the Tribunal would like to stress that by the time it comes to trial, the Tribunal will want to have a closer look at what documents are in the trial bundle, and which ones really do need to remain in the CRO. For that, the Tribunal considers that it is probably best for this to be dealt with at the pre-trial review, unless any party feels it needs to be dealt with earlier. At trial, non-parties may want to be able to have access to documents referred to in open court. If a document does not need to be designated, effort should be taken to try to resolve that before trial rather than at trial.

(8) Directions to trial

76. Given that there is a further case management conference in December 2025 to consider expert evidence in particular (as well as other issues), the order arising from the Second CMC does not include all necessary directions to trial. The

directions being made at this stage shall be set out in an order giving effect to this Ruling.

Hodge Malek KC
Chair

Timothy Sawyer

Andrew Taylor

Charles Dhanowa, CBE., KC (Hon)
Registrar

Date: 23 September 2025