Neutral citation [2025] CAT 60

Case No: 1698/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 October 2025

Before:

THE HONOURABLE MRS JUSTICE BACON
(President)
ROBERT HERGA
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Applicant/
Proposed Class Representative

- v -

(1) AIRWAVE SOLUTIONS LIMITED
(2) MOTOROLA SOLUTIONS UK LIMITED
(3) MOTOROLA SOLUTIONS, INC

Respondents/
Proposed Defendants

Heard at Salisbury Square House on 12 September 2025

JUDGMENT (CPO APPLICATION)

APPEARANCES

Rhodri Thompson KC, Anneli Howard KC and Suzanne Rab (instructed by Ashurst LLP and White & Case LLP) appeared on behalf of the Proposed Class Representative.

Brian Kennelly KC and Tom Coates (instructed by Herbert Smith Freehills Kramer LLP) appeared on behalf of the Proposed Defendants.

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A. INTRODUCTION

1. In a collective proceedings claim form filed on 5 December 2024, Ms Clare Spottiswoode CBE applied to be appointed as the Proposed Class Representative (**PCR**) for a collective proceedings order (**CPO**) to combine claims pursuant to s. 47B of the Competition Act 1998 (the **1998 Act**) (the **CPO Application**) as against the Proposed Defendants (collectively **Motorola**).

2. The CPO Application seeks to combine "standalone" claims under s. 47A of the 1998 Act, alleging that Motorola has abused its dominant position in breach of the Chapter II prohibition in s. 18 of the 1998 Act, through the charging of excessive and unfair prices for the use of Land Mobile Radio (**LMR**) network services, which serve as the emergency radio communication network in Great Britain (**Airwave Services**). The PCR's claim is brought on behalf of the purchasers of the Airwave Services, and seeks to recover damages for the alleged overcharge paid by them as a result of the infringement. The PCR seeks certification of the claim on an opt-out basis, with aggregate damages on that basis estimated to be in the region of £600–650m.

3. Motorola's position is that the claim is entirely without merit as a matter of substance. In its Response to the CPO Application, filed on 13 June 2025, Motorola also contended that the PCR had not set out a satisfactory economic methodology for advancing the claims in collective proceedings. By the time of the hearing, Motorola did not pursue its arguments as to the economic methodology. Motorola did, however, maintain that the application should not be granted in its current form, contending that: (1) the proposed class definition is unclear, and should be more narrowly drawn; (2) the claim should (if it proceeds) be brought on an opt-in basis; (3) the claim for the first nine months of the claim period should be struck out; and (4) the exclusions in the PCR's funding arrangements are excessive and should be corrected.

4. Following the hearing, and in light of the discussion at the hearing, the parties were able to reach agreement on the funding arrangements. The disputed issues

are therefore now limited to the class definition, the opt-in/out point, and the strike out point.

B. BACKGROUND TO THE CLAIM

(1) The Airwave Network and Airwave Services

5. Airwave Services are provided using a bespoke, closed, secure, proprietary, terrestrial trunked radio LMR network (the **Airwave Network**). The Airwave Network is used by the police, ambulance services, and fire and rescue services in Great Britain. It is also used by certain government departments, and smaller organisations such as the coastguard, local authorities, charitable organisations as well as some private companies. The Airwave Network is critical for national security, enabling emergency personnel to communicate securely.

6. The Airwave Network is owned and operated by Motorola through the First Proposed Defendant (**ASL**). The Airwave Network was commissioned in 2000 under the Private Finance Initiative Framework Agreement (the **PFI Framework Agreement**). The original parties to the PFI Framework Agreement were British Telecommunications Plc and the Police and Information Technology Organisation.

7. In 2016, Motorola acquired ASL. The current counterparty to the PFI Framework Agreement is the Home Office.

8. ASL provides Airwave Services to its users through a series of contracts:

   (1) For police forces, Airwave Services are provided pursuant to the PFI Framework Agreement and call-off contracts between ASL and relevant police forces, based on a model contract annexed to the PFI Framework Agreement.

   (2) For fire and rescue services, Airwave Services are provided pursuant to an agreement between the Home Office and ASL (the **Firelink Agreement**), as well as call-off contracts between ASL and relevant fire

and rescue services based on a model contract annexed to the Firelink Agreement.

(3) For ambulance services, there is a contract for the provision of Airwave Services in England and Wales between the Department of Health, the Welsh Ambulance Services NHS Trust, and ASL. There is also a separate contract on similar terms with the Scottish Ambulance Service Board (**SASB**) for the provision of Airwave Services in Scotland.

9. These contracts are referred to as the **Blue Light Agreements**. Other bodies, including other government departments and charities can also access the Airwave Network, either through a bespoke agreement or using ASL's standard terms, or by contracting with a direct purchaser of Airwave Services.

10. In addition to providing access to the Airwave Network (**Core Services**), Airwave Services also include other goods and services including radio terminals, training, and additional network coverage (**Menu Services**).

(2) Motorola's acquisition of ASL and negotiations with the Home Office

11. The PFI Framework Agreement initially anticipated that the Airwave Network would be operational until late 2019. Between April 2014 and September 2015, in order to replace the Airwave Network, the Home Office ran a procurement process for the establishment of an Emergency Services Network (**ESN**). On 8 December 2015, the mobile network operator EE was awarded the contract to establish the network infrastructure for the ESN, and Motorola was awarded a contract for the provision of "User Services".

12. It was initially agreed that the ESN would be in place by May 2017, with the transition of Airwave Services users from the Airwave Network to the ESN to be completed by the end of 2019. In 2016, to arrange for this transition, and to facilitate Motorola's acquisition of ASL, the Home Office (with the Department of Health and SASB) and Motorola entered into a number of agreements regarding the Airwave Network. The effect of these was that:

(1) The Home Office acquired the right to issue a **National Shut Down Notice**, which would specify the **National Shut Down Target Date** for the Airwave Network as being either 31 December 2019 or such later date as the Home Office specified. At that point, Motorola would cease providing Airwave Services.

(2) The Blue Light Agreements were aligned so that they would all end on the National Shut Down Target Date. The Home Office also obtained a discount from Motorola on certain prices for the remaining duration of the Airwave Network, and a further discount if the Airwave Network was required after 31 December 2019.

13. Unfortunately the timetable for the rollout of the ESN fell behind schedule. In 2017, to cover for a potential delay, Motorola agreed (if required) to provide Airwave Services from 1 January 2020 to 30 September 2020 at a further discounted rate. As further delays occurred, in 2018 Motorola and the Home Office agreed that the National Shut Down Target Date would be extended to 31 December 2022 with a further discount applied.

14. In December 2021, as delays with the ESN continued, the Home Office served a National Shut Down Notice extending the National Shut Down Target Date to 31 December 2026 at the prevailing price. In 2024, the Home Office extended the National Shut Down Target Date again, to 31 December 2029.

(3) The CMA's market investigation

15. In April 2021 the Home Office wrote to the Competition and Markets Authority (**CMA**) regarding the Airwave Network and the ESN. In October 2021, the CMA made a reference for a market investigation under s. 131 of the Enterprise Act 2002 into the supply of LMR network services for public safety in Great Britain. Motorola's application for judicial review of the reference decision was refused by the Tribunal: *Airwave Solutions v CMA* [2022] CAT 4.

16. On 5 April 2023 the CMA issued the final report in its market investigation entitled "Mobile radio network services" (the **Market Investigation Decision**), determining that there were features of the relevant market which caused an adverse effect on competition (**AEC**) within the meaning of s. 134 of the Enterprise Act 2002. Those included the importance of the Airwave Network; the fact that it had to be provided by a monopolist pursuant to a long-term contract; the fact that the Home Office had not exercised its right under the PFI Framework Agreement to take over the Airwave Network's assets and that retendering was not a credible option; the fact that the ESN was taking far longer than anticipated to deliver; the consequence that the Home Office was "locked-in" with Motorola and had very weak bargaining power; and the lack of effective constraints provided by the terms of the PFI Framework Agreement on the price of the provision of the network after 2019. The CMA considered that those features enabled Motorola to make supernormal profits in respect of the Airwave Network.

17. To remedy the AEC, the CMA imposed a charge control, limiting the price for Airwave Services to a price the CMA considered would apply in a competitive market (the **Charge Control Order**). The Charge Control Order came into effect on 1 August 2023. It is subject to review in 2026 and is due to run until the end of 2029. Importantly, the Charge Control Order did not apply retrospectively, nor did it give a right to damages for those who paid for Airwave Services before the Charge Control Order's imposition.

18. Motorola's application for judicial review of the CMA's Market Investigation Decision was refused by the Tribunal: *Airwave Solutions v CMA* [2023] CAT 76. Motorola then unsuccessfully sought permission to appeal to the Court of Appeal: [2025] EWCA Civ 54.

C. THE PROPOSED COLLECTIVE PROCEEDINGS

19. The PCR claims that during the period from 1 January 2020 to 31 July 2023 (the **claim period**), Motorola held a dominant position in the relevant market for the supply of radio communications network services for public safety and ancillary

services in Great Britain. The PCR alleges that Motorola abused this dominant position by charging unfair prices for the provision of Airwave Services.

20. The PCR defines the proposed class as "all Purchasers of Airwave Services during the Claim Period", with "Purchaser" being defined as "any natural or legal person … which makes or made a specific Financial Contribution for the use of Airwave Services, whether by that person or entity, or by another person or entity." "Financial Contribution" is defined as "the transfer or allocation of funds or other monetary consideration".

21. The PCR says that the proposed class definition is intended to cover all those persons or entities that have paid for Airwave Services, whether on their own behalf or on behalf of others, including as part of public sector cost-sharing or contribution arrangements. The PCR estimates the likely size of the proposed class as between 400 and 2,000 proposed class members (**PCMs**). The PCR seeks to bring the claim on an opt-out basis.

22. Various parts of the claim form mirror and refer to the findings of the CMA. The claim is nevertheless brought on a standalone basis, since the CMA's Market Investigation Decision and Charge Control Order do not amount to infringement decisions as defined in s. 47A(6) of the 1998 Act.

23. Unlike other collective proceedings previously brought before the Tribunal, the present proposed proceedings are not funded by a private commercial funder. Instead, the PCR has entered into a litigation funding agreement (the **LFA**) with the Secretary of State for the Home Department. The Home Office is also the largest member of the proposed class.

24. In support of the CPO Application, the PCR relies on two reports by Mr Joseph Bell of Oxera Consulting LLP, which cover market definition, dominance, abuse and a preliminary methodology for estimating aggregate damages. In assessing whether Motorola charged an unfair price, Mr Bell proposes to compare Motorola's overall revenues generated by the provision of Airwave Services, on an aggregate basis, with the overall costs that Motorola incurred,

leading to a calculation of Motorola's internal rate of return (**IRR**) within the claim period. Mr Bell will then assess whether that IRR is materially higher than Motorola's cost of capital, to determine whether the price charged was excessive. Mr Bell proposes to consider various further factors in relation to the question of whether the price was unfair in itself or when compared against other benchmarks.

25. To determine the loss suffered by the proposed class, Mr Bell proposes to compare the aggregate affected value of commerce with a counterfactual revenue estimated on the basis of a fair and non-excessive price level. Once Mr Bell has calculated any overcharge, he will then apply an appropriate interest rate and then consider any appropriate adjustment for pass-on to entities (if any) that are not part of the proposed class. Mr Bell notes that a range of approaches might be adopted for the distribution of any damages, but that one possible approach might be to apportion damages in proportion to the level of net financial contributions that each class member made to the charges during the claim period.

D. LEGAL FRAMEWORK

(1) The authorisation and eligibility conditions

26. Section 47B of the 1998 Act and Rules 77–79 of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**) set out the requirements that must be fulfilled in order for the Tribunal to make a CPO. (The references to rules in the remainder of this judgment are to the Tribunal Rules.)

27. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the PCR (the **authorisation condition**): s. 47B(5)(a) and r. 77(1)(a). The authorisation condition is met if the Tribunal considers that it is "just and reasonable" for the PCR to act as a representative in the proceedings: s. 47B(8)(b) and r. 78(1)(b).

28. The factors relevant to the determination of whether it is just and reasonable for the PCR to act as the class representative are set out in r. 78(2). These include whether the PCR "would fairly and adequately act in the interests of the class members" and whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so.

29. Under r. 78(3), in determining whether the PCR would act fairly and adequately in the interests of the class members, the Tribunal must take into account all the circumstances, including:

    (1) If the PCR is not a member of the class (as in the present case), whether it is a pre-existing body and the nature and functions of that body: r. 78(3)(b); and

    (2) Whether the PCR has prepared a plan for the collective proceedings which satisfactorily includes a method for bringing the proceedings on behalf of the class; a procedure for governance and consultation taking into account the size and nature of the class; and any estimate of and details of arrangements as to costs, fees or disbursements which the PCR may be ordered to provide: r. 78(3)(c).

30. Second, the claims must be eligible for inclusion in collective proceedings (the **eligibility condition**): s. 47B(5)(b) and r. 77(1)(b). The eligibility condition comprises three cumulative requirements, set out in s. 47B(6) and r. 79:

    (1) The proposed claims must be brought on behalf of an identifiable class of persons: r. 79(1)(a).

    (2) The proposed claims must raise common issues, or, in other words, the same, similar or related issues of fact or law: s. 47B(6) and r. 79(1)(b).

    (3) The proposed claims must be suitable to be brought in collective proceedings: s. 47B(6) and r. 79(1)(c).

31. As to whether a claim is brought on behalf of an identifiable class of persons, the Tribunal's Guide to Proceedings 2015 notes the following at §6.37:

> "It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class. The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings. And it has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt in or out of the proceedings."

32. Rule 79(2)(e) also requires the Tribunal to consider, in the context of suitability of the claims to be brought in collective proceedings, whether it is possible to determine in respect of any person whether that person is or is not a member of the class.

33. As the Tribunal emphasised at §2 of *Gormsen v Meta* [2024] CAT 11, in considering whether to make a CPO, the Tribunal must consider whether the requirements of both the authorisation and eligibility conditions are satisfied, whether or not these are raised by the parties.

(2) Opt-in/opt-out

34. If the Tribunal makes a CPO, the order must specify whether the collective proceedings will be opt-in or opt-out. In making that decision the Tribunal may take into account all matters it thinks fit, including in particular whether it is practicable for the proceedings to be brought on an opt-in basis: r. 79(3).

35. Further relevant factors may include which option is better able to vindicate the claim, which affords better access to justice, and which enables the case to be best case managed from the point of view of judicial efficiency: *Evans v Barclays Bank* [2023] EWCA Civ 876, [2024] 1 All ER (Comm) 573, §93. In that regard, access to justice includes consideration of whether it would be proportionate or practicable for the class members (whatever their size and degree of sophistication) to commence proceedings to recover their loss, having

regard to the sums at stake and the likely costs of participation on an opt-in basis: *Evans* §123.

36. There is no presumption in favour of opt-in or opt-out proceedings: *Le Patourel v BT* [2022] EWCA Civ 593, [2023] 1 All ER (Comm) 667, §§60–68. In *Evans*, the Court of Appeal stated that the merits of the claim will in most cases be a neutral factor in the consideration of whether the proceedings should be opt-in or opt-out; but that the merits may come into play where there is a relevant connection with the choice of opt-in/opt-out (§§93 and 134). (We note that the Court of Appeal's judgment in *Evans* is on appeal before the Supreme Court, with judgment currently pending.)

(3) Strike out

37. Rule 41(1)(b) sets out the Tribunal's power to strike out in whole or in part a claim at any stage of the proceedings, if it considers that there are no reasonable grounds for making the claim. As the Tribunal noted in *Alex Neill Class Representative v Sony* [2023] CAT 73, §32 and *BSV v Bittylicious* [2024] CAT 48, §§35–37, the test for strike out or summary judgment in relation to proceedings in the Tribunal is approached on the same basis as applications for strike out or summary judgment in the High Court under the Civil Procedure Rules, applying the principles set out by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch), §15.

38. In summary, the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success, with "realistic" meaning a claim that carries "some degree of conviction". That requires the claim to be more than merely arguable. The court must not conduct a mini-trial, but may reject factual assertions made if it determines them to have no real substance. The court should, however, take into account not only the evidence before it, but also the evidence that can reasonably be expected to be available at trial. The court should therefore consider whether there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available and so affect the outcome of the case.

E. ISSUES

39. As already noted, the issues remaining in dispute are as follows:

(1) Whether the proposed class definition is unclear and unworkable, and should be replaced with a narrower definition of the proposed class. Motorola's submission was that the class should be confined to those who directly purchased Airwave Services from Motorola during the claim period.

(2) Whether the claim should proceed on an opt-in basis (Motorola's submission) rather than an opt-out basis (the PCR's submission).

(3) Whether the claim in relation to the first nine months of the claim period should be struck out, as contended for by Motorola, on the basis that the prices for Airwave Services charged during that period were agreed in 2017, a time when the PCR does not allege that Motorola was dominant.

40. The Tribunal has, as it is bound to do, considered whether any other obstacles to certification might arise in relation to the claim, even if not specifically raised by the parties. We have not identified any such concerns. In particular, we note that it is common ground that the PCR is, in principle, a suitable class representative. Ms Spottiswoode has, in particular, a background of senior positions in the public sector (including serving as Director General at the Office of Gas Supply from 1993–1998), and considerable experience of contentious litigation. She has already been certified as the class representative in Case 1440/7/7/22 *Spottiswoode v Nexans France*, concerning a claim for damages arising from the European Commission's infringement decision in the *Power Cables* case (AT.39610).

41. Ms Spottiswoode is supported in these proceedings by an advisory panel whose members comprise Sir Gerald Barling, a retired High Court judge and former President of the Tribunal; Roberto Troiolo, the Deputy Commercial Director of the Emergency Services Mobile Communications Programme at the Home

Office; Chris Lucas, the Ambulance Senior User and Head of Products for the NHS Ambulance Radio Programme; Mark Nottage, the National Police ESN Coordinator, who leads the National Police Chiefs Council's ESN and Airwave Team; Peter Brown, the Telecoms and Emergency Services Mobile Communications Team Lead in the Scottish Government; and James Taylor, a former Chief Executive for three Greater Manchester local authorities.

42. There is also no dispute that the proposed claims of the PCMs raise common issues, for the purposes of s. 47B(6) and r. 79(1)(b). Nor, other than the class definition issue, is any objection taken to the suitability of the proposed claims to be brought in collective proceedings.

F. THE CLASS DEFINITION

(1) The PCR's submissions

43. As set out above, the PCR's proposed class definition hinges on whether a person has made a "specific Financial Contribution" for the use of Airwave Services whether by that person or entity, or by another person or entity. The PCR submitted that this definition is intended to encompass the wide range of persons who paid, through various mechanisms, for Airwave Services. In particular, it is intended to capture three categories of purchasers.

44. The first category consists of contractual users who made payments to Motorola for access to and use of Airwave Services during the claim period. This includes the Home Office, which pays Motorola for the Core Services used by the police and fire and rescue services in England, Wales, and Scotland. Some individual police forces and fire and rescue services also have a direct contractual relationship with Motorola in respect of the purchase of additional Menu Services. Other contractual users include some local authorities (e.g. Norfolk County Council), infrastructure and utility providers (e.g. UK Power Networks and First MTR/Southwestern Trains) and charities and NGOs (e.g. the RSPCA, and various maritime and coastguard organisations such as the Loch Lomond

Rescue Boat Service). Motorola states there are around 397 entities that purchase Airwave Services directly from it.

45. The second category is that of non-contractual purchasers, who pay for access to and use of Airwave Services via another PCM. This includes a variety of intra-government sharing and recharging arrangements, where the costs are split between different entities. For example, English and Welsh fire and rescue services are invoiced by the Home Office for the cost of the Core Services the Home Office pays on their behalf. There are also instances where local authorities pay for access to Airwave Services pursuant to arrangements with other local authorities who are contractual users: e.g. Breckland Council which is invoiced by Norfolk County Council for Breckland Council's share of the Airwave Services charges. Other entities do not themselves make use of the Airwave Network, but contribute to the costs of Airwave Services provided to them by a user of the Airwave Network. This includes situations where the police provide enhanced police services or special support to an entity such as the Emirates Stadium or Heathrow Airport, and then invoice that entity for the costs incurred including the costs for Airwave Services.

46. The third category is that of financial contributors, who do not make use of Airwave Services themselves but pay for Airwave Services on behalf of another. One example is the Scottish Government, which makes a "specific Financial Contribution" to the Home Office towards the costs of Core Services provided to police and fire and rescue services in Scotland.

47. The PCR contended that the proposed class definition is both clear and objective, on the basis that PCMs will be identifiable based on the payments they have made as evidenced by invoices, receipts, purchase orders, payment records, accounting records or delivery notes. The PCR proposed that any damages obtained in the proceedings should be distributed among the PCMs in proportion to each PCM's net financial contributions for Airwave Services. The question of how an individual PCM might at that stage evidence its entitlement to damages should, the PCR submitted, ultimately be regarded as a matter for distribution, not certification.

48. Ms Howard KC, for the PCR, pointed out that narrowing the class to those who directly purchased Airwave Services from Motorola would or at least could lead to a denial of access to justice for the indirect purchasers of Airwave Services (i.e. those in the second and third categories above) whose claims would potentially be excluded from the aggregate damages claim by the contractual users, as being losses not suffered by those users.

(2) Motorola's submissions

49. Motorola submitted that a workable class definition requires that the PCMs are able to identify whether or not they fall within the class as defined. Mr Kennelly KC, on behalf of Motorola, contended that the proposed class definition is unworkable by that standard, because it would be unclear to at least some PCMs whether they had made Financial Contributions to Airwave that were sufficiently "specific" to bring them within the proposed class. He said, for example, that it might be unclear whether a contribution in respect of a local police force's services would be sufficient to include someone within the proposed class, particularly since it appears that the police do not always specifically invoice third parties for Airwave Services. He also claimed that an indirect purchaser might not have suffered any loss where a cost-sharing arrangement or financial contribution did not vary in line with charges for Airwave Services.

50. Mr Kennelly also submitted that the proposed class definition would give rise to a conflict of interest between the PCMs, if they included both direct and indirect purchasers of Airwave Services, since the loss suffered by the indirect recipients would reduce the loss suffered by the direct purchasers. Mr Kennelly submitted that this meant there would not only be a conflict of interests at distribution, but also earlier in proceedings as to whether a possible PCM was actually in the proposed class, leading to a question as to whether the PCR could properly represent both the direct and indirect purchasers.

51. Mr Kennelly argued that these issues could be cured if the proposed class definition was limited to those who have directly purchased Airwave Services

from Motorola. To address the concern that this would lead to a denial of access to justice for the indirect purchasers, he said that Motorola would be willing to undertake not to plead any pass-on defence, but *only* if the proceedings were certified on an opt-in basis. Mr Kennelly claimed that the direct purchasers could then claim on behalf of the indirect purchasers, and allocate the damages to those indirect purchasers as necessary at the distribution stage. Alternatively, as detailed in written submissions submitted after the hearing, Motorola stated that the Tribunal could distribute damages to the indirect purchasers as appropriate under r. 93(1)(b) and (3)(c).

(3) Discussion

52. As the Tribunal explained in *Commercial and Interregional Card Claims v Mastercard* [2023] CAT 38 (***CICC***), §§59–63, there is a distinction between the requirement in r. 79(1)(a) that the proposed claims be brought on behalf of an identifiable class, and the requirement in r. 79(2)(e) that (in the context of an assessment of suitability pursuant to s. 47B(6) and r. 79(1)(c)) the Tribunal should take into account whether it is possible to determine whether a person is or is not a member of the defined class. At §62 the Tribunal made the following points, in particular, about the relationship between the two provisions:

> "We make the following observations about the interplay of rules 79(1)(a) and 79(2)(e):
>
> (1) In our view, these rules, while overlapping, perform distinct functions. As is clear from *Merricks SC* [*Mastercard* v *Merricks* [2020] UKSC 51, [2021] 3 All ER 285] (by analogy with the test for common issues), *Trucks CPO* [*UK Trucks v Stellantis* [2022] CAT 25] and *FX* [*O'Higgins v Barclays* [2022] CAT 16], rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is a factor to consider among other factors when considering suitability.
>
> (2) Rule 79(1)(a) asks whether an objective and clear class definition has been proposed (see *Trucks CPO* at [188]). It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. This underpins important features of the collective proceedings regime, such as the assessment of common issues and the ability to identify those who are bound by the result of those proceedings.
>
> (3) While rule 79(1)(a) is identified as a hurdle, we note the importance, as summarised in *Le Patourel CA* at [29], of collective actions facilitating access to justice. It should not easily be assumed that the existence of a hurdle, in the form of rule 79(1) generally, requires an overly prescriptive

> approach. There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to 'have regard to all the circumstances'.
>
> (4) Rule 79(2)(e) is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and seems important in relation to issues such as registration of class members and the distribution of any award of damages.
>
> (5) Rule 79(2)(e) is one of a number of factors relating to suitability under rule 79(2) (in order to meet the requirement in rule 79(1)(c)). Each factor is to be weighed along with the others and an overall judgment reached about suitability (see *Merricks SC* at [61] and [62]).
>
> (6) Despite having distinct functions, rules 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person's membership of the class."

53. The first question is, therefore, whether there is an objective and clear class definition for the purposes of r. 79(1)(a), bearing in mind that this does not require absolute precision, but should be approached with a degree of common sense and pragmatism.

54. In our judgment, the proposed class definition meets that test. In essence, the class comprises all those who have paid specifically for the use of Airwave Services, whether that use is by the purchaser or another entity. That, as the PCR has explained, requires there to have been a Financial Contribution which can be attributed specifically to the use of Airwave Services.

55. That is a clear and objective definition. Beyond the direct contractual users of Airwave Services, the definition brings within the scope of the class the indirect purchasers who pay specifically for Airwave Services, irrespective of whether the Airwave Services are being provided directly to them, or to another entity. The requirement of a "specific" Financial Contribution means that the definition will cover both those who make a payment solely for the provision of Airwave Services, and those whose payment is encompassed within a payment for a package of services that include Airwave Services, provided (in the latter case) that a part of that payment is specifically attributable to Airwave Services.

56. The fact that evidence will be required to demonstrate the existence of such a specific Financial Contribution does not mean that the class definition is lacking in clarity. We agree with the PCR that the question of whether and how an individual PCM can evidence its entitlement to damages is ultimately a matter for distribution. That raises, however, the second question as to the extent to which it can be determined whether or not a particular person is a member of the class, for the purposes of considering the suitability of the claims to be brought in collective proceedings, for the purposes of r. 79(2)(e).

57. In that regard, we consider Motorola's concerns to be exaggerated. We do not see any inherent difficulty in the determination of whether a particular person or entity is a purchaser of Airwave Services pursuant to the proposed class definition. As the PCR notes, there are various obvious ways in which such evidence of a Financial Contribution specifically attributable to Airwave Services could be provided, such as by invoices or account statements. It is, moreover, entirely usual for there to be an expectation that evidence will be provided, at the distribution stage, of the class members' entitlement to an appropriate share of the aggregate damages award, and there may be a variety of sources from which that evidence may be drawn.

58. We do not accept Motorola's contention that the proposed class definition would give rise to a conflict of interests that would call into question the ability of the PCR to represent both the direct and indirect purchasers. Mr Kennelly referred to *UK Trucks v Stellantis* (***Trucks CPO***) [2023] EWCA Civ 875, [2024] 1 All ER (Comm) 543 where the Court of Appeal considered (at §94) that the inclusion of purchasers of both new and used trucks within the class gave rise to a conflict associated with pass-on issues, which needed to be addressed at the start of the proceedings. We do not, however, consider that the situation discussed in *Trucks CPO* assists Motorola.

59. In the first place, unlike the submissions of Motorola in the present case, the Court of Appeal in *Trucks CPO* notably did *not* suggest that the conflict of interests between purchasers of new and used trucks prevented both sets of

purchasers from being included within the class definition. Rather, the solution lay in the two groups having separate representation in the proceedings.

60. Secondly and importantly, the conflict in *Trucks CPO* did not merely concern the question of how to allocate the aggregate award of damages, but arose from the outset in the calculation of the overcharge. The Tribunal had explained ([2022] CAT 25, §127) that the expert for the RHA, which was the preferred class representative, proposed to conduct separate regression analyses to calculate the overcharge for the different subclasses of class members, differentiating between purchasers of new and used trucks. The total damages for each proposed class member would then be calculated on a "bottom up" approach. The Court of Appeal noted (at §§56 and 60) the submission by MAN and DAF that this gave rise to a conflict between the purchasers of new and used trucks, since the purchasers of new trucks would have an incentive to argue for a lower overcharge in relation to used trucks, so as to minimise the extent to which their damages were reduced by pass-on. At §§96–97 the Court agreed that the RHA's expert could not, in those circumstances, properly represent both groups, given the element of subjectivity in the selection of data and assumptions made for the regression analysis.

61. In the present case, however, the methodology for the calculation of damages proposed by the PCR (and her expert, Mr Bell) does not distinguish between the different groups of purchasers of Airwave Services. Rather, as summarised in §25 above, Mr Bell proposes a "top down" approach based on the difference between the total value of affected commerce and an estimate of the counterfactual value of commerce consistent with a price level that was neither excessive nor unfair. There is no suggestion from Motorola that the quantification of damages by Mr Bell, on the basis of this methodology, would or might differ if carried out on behalf of the direct purchasers as opposed to the various types of indirect purchasers. On the contrary, it is apparent that all of the categories of PCMs encompassed by the proposed class definition (as set out at §§44–46 above) would have the same interest in maximising the aggregate damages available, on the basis of one and the same economic analysis.

62. The only remaining issue would then be the distribution of the aggregate damages as between the class members. The PCR acknowledges that at that point there might be some difference of view as to how to allocate and distribute the award as between the individual class members. If such a difference of view were to emerge, that could be addressed appropriately by the Tribunal at that stage. It certainly would not require separate representation of the different groups of purchasers throughout the proceedings.

63. Finally, while we note that although both the PCR and Motorola relied on access to justice considerations in relation to the class definition issue, the focus of the provisions concerning class definition is not on ensuring the widest possible access to justice. Rather, those provisions are designed to ensure that the class is clearly delineated and can be properly determined, so as to ensure the practical workability of the collective proceedings. The issue of access to justice is, however, a relevant consideration in the consideration of whether the proceedings should be brought as opt-in or opt-out proceedings, and we therefore address it below in that context.

64. We therefore accept the PCR's proposed class definition.

G. OPT-IN OR OPT-OUT?

(1) The PCR's submissions

65. The PCR submitted that the proposed collective proceedings should be certified on an opt-out basis, on the grounds that there were concerns as to the practicability of opt-in proceedings. In particular, Ms Howard said that there was a very real likelihood that a number of the PCMs, many being public sector bodies, would not find it practicable or feasible to opt-in.

66. The PCR relied on evidence that the PCMs would face practical problems opting-in due to budgetary constraints, a lack of qualified legal personnel to advise on and oversee active participation in the proceedings, and a general lack of resources to make decisions on complex litigation in circumstances where

the PCMs are otherwise engaged in fulfilling their public sector or charitable duties. The PCR said that this would be particularly true for smaller PCMs. As an example of the potential lack of engagement by the PCMs, the PCR noted that a user survey conducted by the Home Office seeking details of the contractual basis on which organisations contracted with ASL for Airwave Services, and the prices paid, had an overall response rate of 35%. The response rate was even lower for local authorities (17%) and healthcare bodies (6%).

67. Opt-in proceedings would also require the PCR to locate and contact PCMs. The evidence of Mr Gale, a partner at Ashurst LLP, the PCR's solicitors, was that his team had already spent over 300 hours attempting to contact a sample of PCMs. If the proceedings were certified on an opt-in basis, contacting all of the PCMs would be very time-consuming, expensive, and would inevitably not succeed in enrolling all PCMs. The result would be a smaller class which would be likely to exclude the smallest class members. That outcome, the PCR submitted, would be contrary to the purpose of the collective proceedings regime, namely the facilitation of access to justice and the deterrence of unlawful anti-competitive behaviour.

68. The PCR also submitted that opt-out proceedings would allow for an aggregate award of damages to be calculated on the basis of the methodology proposed by Mr Bell, relying on aggregate market data, rather than having to engage in complex and otherwise unnecessary individual transaction analysis for individual PCMs as would be the case for opt-in proceedings.

(2) Motorola's submissions

69. Motorola submitted that if the collective proceedings were to proceed, they should be on an opt-in basis. Contrary to the position taken by the PCR, Motorola claimed that opt-in proceedings would be practicable, contending that the proposed class would comprise a manageable set of public authorities and other sophisticated organisations who are familiar with litigation and capable of deciding whether to opt-in. Even using the proposed class definition, Motorola submitted that the size of the proposed class would be in the hundreds rather

than in the thousands. That can be contrasted with opt-out collective actions involving millions of consumers. Mr Kennelly also noted that the class size would be smaller than that in the *Trucks CPO*, where around 11,000 claimants have opted in.

70. Mr Kennelly also submitted that proceeding on an opt-in basis would provide PCMs the opportunity to participate on a properly informed basis, and would assist with obtaining disclosure for the analysis of the alleged abuse and the quantification of damages. In addition, Mr Kennelly suggested that opt-in proceedings would make settlement easier, since the parties would in that case not need to seek the Tribunal's approval (by contrast with the case for opt-out proceedings under r. 94).

71. Finally, Motorola reserved its position to revisit the opt-in/out question depending on the outcome of the appeal to the Supreme Court in *Evans*. Motorola did not, however, suggest that this judgment should be delayed pending the judgment of the Supreme Court in that case.

(3) Discussion

72. The determination by the Tribunal of whether collective proceedings should be certified on an opt-in or opt-out basis requires a "multi-factorial assessment": *Hammond and Stephan v Amazon* [2025] CAT 42, §152. There is no single decisive consideration. Rather, the Tribunal is required under r. 79(3) to take into account "all matters it thinks fit". As the Tribunal also noted in that case, one aspect particularly referred to in r. 79(3)(b) is whether it is practicable for the proceedings to be brought as opt-in proceedings, having regard to all the circumstances including the estimated amount of damages that individual class members may recover.

73. The meaning of "practicability" in this context was considered by the Court of Appeal in *Le Patourel v BT* [2022] EWCA Civ 593, [2023] 1 All ER (Comm) 667, with the following comments at §83:

> "[Ms Ford for BT argued] that practicability meant '*doability*'; if it can be done then it is practicable and if it is therefore practicable then it pointed powerfully in favour of an opt-in process. With respect we do not agree. Practicability includes being '*doable*' but go further; it requires the court to ask whether it is not only '*doable*' but also reasonable, proportionate, expedient, sensible, cost effective, efficient etc, to do it. There are many things that might be doable but where to do them would amount to a poor exercise of judgment."

74. Motorola's submissions on practicability, in the present case, are rather similar to those of BT which were rejected by the Court of Appeal in the above passage. In this case we have no doubt that opt-in proceedings would be "doable", in the sense that proceeding on that basis would in principle be feasible. The two largest purchasers of Airwave Services are the Home Office and the Department of Health. Motorola has estimated that those purchasers accounted for around 75% of charges for Airwave Services during the period covered by the proposed claims. The indirect purchasers also include, as the PCR notes, sophisticated commercial organisations such as Tottenham Hotspur and Heathrow Airport.

75. The question of practicability cannot, however, be approached simply by reference to the position of the users with the largest claims, or those with sophisticated legal decision-making capabilities. Rather, the question must be considered by reference to the proposed class as a whole. That question cannot, moreover, be addressed in the abstract, but must be considered in the context of the amounts of damages that the class members might expect to recover. The fact that a public authority might be able to engage with litigation such as judicial review proceedings brought against it, or damages actions involving large claims (such as various local authorities who have brought claims in the *Trucks* litigation), does not mean that the same public authority will be able to devote the resources necessary to participate actively in a far smaller claim.

76. In the present case, there was evidence before us (in particular from Mr Gale, who had contacted numerous PCMs) indicating that while purchasers such as individual police forces would welcome any damages award, the time and resources required to make active decisions on opting in to the proceedings and continuing to participate on an opt-in basis would mean that at least some forces would not ultimately do so, given the other significant demands on their time and resources.

77. Similar problems would be likely to arise for organisations such as fire and rescue services, particularly the smaller services, local authorities, and charitable organisations such as the RSPCA. A particular example given was the Loch Lomond Rescue Boat Service, whose annual charges for Airwave Services during the claim period were in the range of £1,500–2,000. It is easy to see why for this user and similar small users the amount recovered would potentially be outweighed by the costs of opting in to the proceedings (taking appropriate advice as required).

78. As the Supreme Court commented in *Mastercard v Merricks* [2020] UKSC 51, [2021] 3 All ER 285 at §92, the opt-out proceedings regime was "designed to facilitate access to legal redress for those who lack the awareness, capability or resolve required to take the positive step of opting in to legal proceedings." More recently, in *Le Patourel* the Court of Appeal noted at §29 that:

> "… the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

79. It is apparent from the evidence before us that there would be a significant impediment to access to justice to many class members if the proposed claims were to proceed on an opt-in basis. The majority of the PCMs are entities operating in the public or charitable sectors many of whose claims will not be of sufficient scale for them to devote the time and resources to active opt-in participation.

80. Indeed, it was telling that when pressed by the Tribunal as to the rationale for Motorola's submission that the proceedings should be certified as opt-in rather than opt-out, if indeed it was as easy to opt-in as Motorola submitted, Mr Kennelly was forced to concede that it was possible that even some larger entities might choose not to opt in, "because they will have to fight the case almost like a proper [claimant]", and that they might therefore consider that the

merits of the case "did not justify their involvement, which could be significant". If that is Motorola's view of the position of even larger entities, that illustrates the problem that is likely to arise for the many far smaller entities who are potential class members in these proceedings.

81. We do not of course suggest that opt-out proceedings will involve nothing more from PCMs than a decision to collect a share of damages at the distribution phase. Disclosure may be required from at least some of the PCMs on issues arising in relation to the substance of the claim. That will be a matter for the Tribunal to address in due course. It will also be necessary (as discussed above) to consider appropriate evidence of charges borne by the individual PCMs, to determine the distribution of any damages payable. It is undoubtedly the case, however, that the costs and decision-making resources required of individual PCMs, to provide targeted evidence on either of these bases, will be significantly lower than would arise if they were to participate in opt-in proceedings. That is indeed (as Mr Kennelly acknowledged) precisely one of the reasons why Motorola is arguing for any certification of the proceedings to be opt-in rather than opt-out.

82. The other advantage of certification on an opt-out basis, in the present case, is that the calculation of aggregate damages is likely to be easier than if the proceedings are opt-in. We have summarised the PCR's submissions on this point at §68 above, and we agree: an assessment of overcharge on the basis of the aggregate affected value of commerce is likely to be far easier than a methodology which requires the assessment of the overcharge in respect of a more limited opt-in class. In addition, as the Court of Appeal noted in *Evans* at §106, in an opt-out case questions of causation might be simplified on the basis of "generalised findings". Questions of distribution between the class members would remain, but (as the Court of Appeal emphasised in the same paragraph) the Tribunal has considerable flexibility to adopt a suitable method of distribution once the aggregate damages have been quantified.

83. We do not accept Motorola's submission that opt-in proceedings would facilitate a "better balance" between PCMs and the Home Office. While it is the

case that the Home Office is the largest class member and the funder of the proceedings, we note that the Home Office has established two separate teams: one to manage the LFA and the other to represent the Secretary of State's interests as a PCM. The employees assigned to these two teams have signed undertakings to give effect to a series of arrangements to establish and maintain this separation and independence. These include that the teams should work in different offices, and that the funding team will approve invoices for the PCR's legal costs, without the involvement of or communication from the other team.

84. In any event, the PCR has been appointed to represent the interests of all of the PCMs. Ms Spottiswoode's evidence demonstrates that she is well aware of her duties to ensure that all PCMs are treated fairly and equally. She is both well-qualified to do so in light of her past experience, and is supported by an experienced advisory panel (as described above), which includes Mr Taylor who has been selected specifically in order to provide the perspective of smaller users of Airwave Services. We have no reason to believe that there is any risk of the interests of smaller PCMs being discounted in the litigation decisions taken by the PCR.

85. Finally, it is difficult to understand why the Tribunal's role in approving a collective settlement in opt-out proceedings, pursuant to r. 94, should favour opt-in proceedings, given that the provisions in r. 94 apply to *all* opt-out collective proceedings, and are there to ensure that the collective settlement is just and reasonable. If anything, those provisions provide a further safeguard in respect of the interests of the smaller members of the class.

86. Having regard to all of the reasons set out above, we consider it appropriate to certify the proceedings on an opt-out basis.

H. THE CLAIM PERIOD

(1) Motorola's submissions

87. Motorola applied to strike out the PCR's case in respect of the first nine months of the claim period, i.e. 1 January to 30 September 2020, on the basis that the prices applicable during that period were agreed in February 2017, a time at which the PCR does not allege that Motorola was dominant.

88. Mr Kennelly contended that the PCR's allegations of excessive pricing were premised on the proposition that the relevant prices were set by a monopoly provider. In other words, he said that the PCR's case was that the market position pertaining when the prices were agreed was critical to the unfairness of those prices. It is, however, common ground that the prices applicable during the period 1 January to 30 September 2020 were agreed in February 2017 (albeit that further discounts applicable for the 2020–2022 period were subsequently agreed in 2018). The PCR does not plead, nor does Mr Bell argue, that Motorola was dominant in 2017; rather, the pleaded case is that Motorola was dominant during the claim period. Mr Kennelly therefore said that the PCR's failure to allege dominance in 2017 renders the PCR's claim defective in respect of the period up to 30 September 2020.

(2) The PCR's submissions

89. The PCR's pleaded claims for damages are based on the loss caused to the PCMs by Motorola's alleged abuse of its dominant position from 1 January 2020 to 31 July 2023. The claim, as set out in §15 of the claim form, is that the abuse arose from the fact that Motorola *continued* to charge its prevailing prices for Airwave Services beyond 31 December 2019:

> "The PCR contends that Motorola has abused its dominant position during the Claim Period by continuing to charge the prevailing prices for Airwave Services beyond 31 December 2019 and refusing to negotiate sufficient price reductions to reduce prices to a non-excessive and fair level, or otherwise failing to reduce the prices, for the period beyond 2019."

90. Mr Thompson KC confirmed that the PCR does not allege any additional breach of s. 18 of the 1998 Act prior to 1 January 2020. Nor does the claim allege dominance in 2017. It is (he submitted) legally irrelevant to the PCR's case whether Motorola was or was not dominant prior to 1 January 2020.

91. In so far as, contrary to that primary position, it is relevant to consider the market position prevailing in 2017, Mr Thompson submitted that it would be inappropriate to strike out the case in respect of the first nine months of the claim period, given that this is a matter on which further evidence (including expert evidence) will be available at trial. The complex factual matrix relevant to Motorola's assertion cannot therefore be assessed at this stage.

(3) Discussion

92. We can deal with this point shortly. Contrary to Motorola's submissions, it is patently not the PCR's case that the disputed prices were abusive because they were set in a period when Motorola was dominant. Rather, the PCR's case is that the prices were abusive because they were significantly and persistently above efficient costs and above the competitive level, with Motorola continuing to charge the prevailing prices for Airwave Services beyond 31 December 2019, and refusing to negotiate sufficient price reductions to reduce the prices to a non-excessive and fair level. While the PCR does not accept that Motorola was not dominant in 2017, her pleaded case is not determined by any premise as to Motorola's market position when the initial negotiations for the disputed charges took place. Her case is, rather, that the right of action in damages was triggered when the excessive charges were imposed from 1 January 2020 onwards.

93. While it is well-established that dominance and abuse must co-exist temporally, it is also established (and Mr Kennelly accepted) that prices agreed or imposed when dominance did not exist may become abusive on the subsequent acquisition of dominance, with liability crystallising at the point where there is co-existence of dominance and abuse. Examples of European Commission decisions where this arose are Case AT.39816 *Upstream Gas Supplies in*

Central and Eastern Europe (decision of 24 May 2018), §§76–78 and Case COMP/C-3/38 636 Rambus (decision of 15 January 2010), §§29–31.

94. In so far as any reference is, nevertheless, made to Motorola's market position in 2017 (or indeed at any time prior to 1 January 2020), that is likely to involve a complex factual matrix which will require disclosure and evidence in due course, including expert evidence. The Tribunal could not possibly determine the relevant facts at this stage, before any disclosure has taken place, and at a stage where the factual evidence before us is very limited and the expert evidence has been provided on a (necessarily) provisional basis. Indeed, once it is understood that the PCR's case is *not* dependent on the establishment of dominance at the point at which the prices charged from 1 January to 30 September 2020 were agreed, it is not even clear what Motorola's argument is as to the relevance of its market position prior to 2020.

95. Motorola's application for strike out is therefore dismissed.

I. THE FUNDING AGREEMENT

96. In its Response to the CPO Application, Motorola set out various concerns related to the PCR's funding arrangements. After further evidence was filed with the PCR's Reply, Motorola dropped some of its objections. But Motorola said that it remained concerned about the scope of exclusion clauses in the LFA, relating to the Home Office's liability for adverse costs. The relevant provisions in the LFA were as follows:

> "7.1 Unless otherwise agreed by the Funder, the Funder will not pay or be liable under this Agreement for any of the following costs, sums or liabilities incurred by the Class Representative:
>
> 7.1.1 costs and/or other sums incurred as a result of the Class Representative's unreasonable failure (on any one or more occasions) to co-operate with or to follow the advice of Solicitors or Counsel Team;
>
> 7.1.2 costs and/or other sums incurred as a result of any unreasonable act or omission of the Class Representative;
>
> […]

> 7.1.5 costs and/or other sums incurred as a result of any unreasonable failure by the Class Representative to comply with the CAT Rules (if applicable) or an order of the Court during Proceedings;"

97. Motorola said that these provisions placed a significant and unacceptable limitation on the PCR's ability to satisfy any adverse costs order, since they would provide the Home Office with scope for alleging unreasonable behaviour by the PCR in order to avoid adverse costs liability.

98. The PCR's position was that there was no realistic prospect that the exclusion clauses could lead to a position where Motorola would be unable to recover an adverse costs award. Both parties referred to a similar issue that arose at the certification stage of *Consumers' Association v Qualcomm* [2022] CAT 20 §§112–123.

99. In the light of the discussion at the hearing, there were further negotiations between the parties following the hearing, in consequence of which the parties agreed to the insertion of the following additional clauses in the LFA:

> "9.5 The exclusions in clauses 7.1.1, 7.1.2 and 7.1.5 shall not apply in respect of Adverse Costs incurred where and to the extent it is reasonably practicable for the Class Representative to remedy the applicable unreasonable failure, act or omission and where:
>
> 9.5.1 the Solicitors or Counsel Team or any other legal advisor to the Class Representative or the Funder has promptly notified the Class Representative in writing of the Class Representative's unreasonable failure, act or omission and of the potential consequences for the Class Representative of that unreasonable failure, act or omission under this Agreement; and
>
> 9.5.2 the Class Representative has, within 3 working days of any such notice, remedied:
>
> (a) its unreasonable failure to co-operate with or to follow the advice of Solicitors or Counsel Team,
>
> (b) its unreasonable act or omission, and/or
>
> (c) its unreasonable failure to comply with the CAT Rules (if applicable) or an order of the Court during Proceedings,
>
> (as applicable)
>
> such that no further Adverse Costs beyond those covered by this clause 9.5 are incurred.

> 9.6 The Class Representative shall instruct her Solicitors and Counsel Team and any other legal advisors appointed by the Class Representative to urgently notify her in writing if they become aware of any potential and any actual unreasonable failure, act or omission of the Class Representative as described in clauses 7.1.1, 7.1.2 and/or 7.1.5.
>
> 9.7 Where the Class Representative receives any notification pursuant to clause 9.5.1 she shall promptly provide a copy of such notice to the Funder (where the Funder is not the party notifying the Class Representative) and also promptly provide the Funder with subsequent confirmation to demonstrate that the relevant unreasonable failure, act or omissions of the Class Representative has or has not been remedied in accordance with clause 9.5.2. The Class Representative shall also provide any further supporting information (including further advice or opinions from the Solicitors and/or Counsel Team and/or and any other legal or professional advisors appointed by the Class Representative) that the Funder may reasonably require in relation to the relevant failure, act or omission.
>
> 9.8 For the avoidance of doubt, the Class Representative acknowledges and agrees that: (a) any Adverse Costs to be paid by the Funder pursuant to the exception set out in clause 9.5 shall remain subject always to the Adverse Costs Indemnity Limit; and (b) to the extent that the Class Representative does not remedy the relevant unreasonable failure, act or omission as required in accordance with clause 9.5.2 then the exclusions in clauses 7.1.1, 7.1.2 and 7.1.5 shall continue to apply.
>
> 9.9 The Class Representative will notify the Defendants forthwith following (a) the Class Representative becoming aware that the Funder is seeking to rely upon clauses 7.1.1, 7.1.2 or 7.1.5 in a particular scenario and/or (b) where a termination notice is received by the Class Representative from the Funder pursuant to clauses 17.2 or 17.6 or sent by the Class Representative to the Funder pursuant to clause 17.9."

100. The parties agreed that these provisions resolved Motorola's concern in respect of the exclusion provisions in clause 7.1.

101. The Tribunal notes that the mechanism set out above is similar to the amendment made to the after-the-event insurance policy in *Qualcomm*, which was approved by the Tribunal. We likewise consider that it is appropriate for clause 9 of the LFA in the present case to be amended as proposed, in order to clarify and delimit the scope of the exclusion in clause 7.1.

J. CONCLUSION

102. For the reasons set out above, the Tribunal unanimously concludes that:

(1) The PCR meets the authorisation condition.

(2) The proposed collective proceedings meet the eligibility condition. There is an identifiable class, the claims raise common issues, and they are suitable to be brought in collective proceedings.

(3) Clauses 7 and 9 of the LFA should be amended as set out above.

103. We will therefore make a CPO pursuant to s. 47B(4) on an opt-out basis, with the class definition as proposed by the PCR.

The Hon Mrs Justice Bacon President	Robert Herga	Professor Anthony Neuberger

Charles Dhanowa, CBE., KC (Hon) Registrar	Date: 13 October 2025