



Neutral citation [2026] CAT 43

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1597/5/7/23

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

7 May 2026

Before:

THE HONOURABLE LORD RICHARDSON  
(Chair)  
PAUL LOMAS  
PROFESSOR ALASDAIR SMITH

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) GLOBAL-365 PLC**  
**(2) GLOBAL PREPAID SOLUTIONS LIMITED**

Claimants

- v -

**(1) PAYPOINT PLC**  
**(2) PAYPOINT COLLECTIONS LIMITED**  
**(3) PAYPOINT NETWORK LIMITED**  
**(4) PAYPOINT RETAIL SOLUTIONS LIMITED**

Defendants

Heard at Salisbury Square House on 10, 11, 12, 13, 17, 18, 19, 24, 25 June and 1, 2, 3, 10 and 11 July 2025

---

**JUDGMENT**

---

## APPEARANCES

Mr Philip Woolfe, KC and Ms Ligia Osepciu (instructed by Addleshaw Goddard LLP) appeared on behalf of the Claimants.

Mr Josh Holmes, KC, Ms Daisy Mackersie and Mr Luke Kelly (instructed by Cooley (UK) LLP) appeared on behalf of the Defendants.

## CONTENTS

<b>A.</b>	<b>INTRODUCTION .....</b>	<b>5</b>
<b>(1)</b>	<b>Summary of Claim .....</b>	<b>8</b>
<b>(2)</b>	<b>Procedural History .....</b>	<b>10</b>
<b>(a)</b>	<i>Factual Evidence .....</i>	<i>11</i>
<b>(b)</b>	<i>Expert Evidence .....</i>	<i>12</i>
<b>B.</b>	<b>FACTUAL BACKGROUND.....</b>	<b>13</b>
<b>(1)</b>	<b>Overview of the Retail Energy Market .....</b>	<b>13</b>
<b>(2)</b>	<b>Payment Service Providers.....</b>	<b>17</b>
<b>(a)</b>	<i>OTC.....</i>	<i>17</i>
<b>(b)</b>	<i>Non-OTC.....</i>	<i>19</i>
<b>(3)</b>	<b>Contractual arrangements .....</b>	<b>19</b>
<b>(4)</b>	<b>GLOBAL-365 .....</b>	<b>22</b>
<b>(a)</b>	<i>Background.....</i>	<i>22</i>
<b>(b)</b>	<i>The development of SMARTprepay.....</i>	<i>26</i>
<b>(c)</b>	<i>SMARTprepay 2GP.....</i>	<i>34</i>
<b>(d)</b>	<i>Epay .....</i>	<i>36</i>
<b>(5)</b>	<b>Complaint to Ofgem.....</b>	<b>38</b>
<b>C.</b>	<b>EXPERT EVIDENCE FROM THE COMPETITION EXPERTS .....</b>	<b>41</b>
<b>(1)</b>	<b>Market definition.....</b>	<b>41</b>
<b>(a)</b>	<i>OTC.....</i>	<i>41</i>
<b>(b)</b>	<i>Non-OTC.....</i>	<i>42</i>
<b>(2)</b>	<b>Dominance.....</b>	<b>43</b>
<b>(a)</b>	<i>Framework and approach.....</i>	<i>43</i>
<b>(b)</b>	<i>PayPoint's dominance from 2007 to 2018.....</i>	<i>44</i>
<b>(c)</b>	<i>OTC post-2018.....</i>	<i>46</i>
<b>(d)</b>	<i>Non-OTC.....</i>	<i>47</i>
<b>(3)</b>	<b>Abuse .....</b>	<b>47</b>
<b>(a)</b>	<i>OTC.....</i>	<i>47</i>
<b>(b)</b>	<i>Non-OTC.....</i>	<i>51</i>
<b>(4)</b>	<b>Counterfactual.....</b>	<b>53</b>
<b>(a)</b>	<i>The date on which GLOBAL-365 would have begun processing OTC and non-OTC prepayment transactions.....</i>	<i>54</i>
<b>(b)</b>	<i>Likelihood of energy suppliers switching from self-supplying non-OTC energy prepayment services to GLOBAL-365's non-OTC service .....</i>	<i>55</i>

	(c)	<i>Whether energy suppliers prefer to procure OTC and non-OTC services from the same provider or separately .....</i>	<i>56</i>
	(d)	<i>The extent to which GLOBAL-365 would likely have won material OTC and non-OTC business in the counterfactual .....</i>	<i>57</i>
<b>D.</b>		<b>EXPERT QUANTUM EVIDENCE.....</b>	<b>64</b>
<b>E.</b>		<b>THE PARTIES' SUBMISSIONS.....</b>	<b>71</b>
	<b>(1)</b>	<b>Introduction .....</b>	<b>71</b>
	<b>(2)</b>	<b>Dominance.....</b>	<b>71</b>
	(a)	<i>GLOBAL-365's submissions .....</i>	<i>72</i>
	(b)	<i>PayPoint's submissions .....</i>	<i>76</i>
	<b>(3)</b>	<b>Abuse .....</b>	<b>80</b>
	(a)	<i>GLOBAL-365's submissions .....</i>	<i>80</i>
	(b)	<i>PayPoint's submissions .....</i>	<i>91</i>
	<b>(4)</b>	<b>Causation.....</b>	<b>101</b>
	(a)	<i>GLOBAL-365's submissions .....</i>	<i>101</i>
	(b)	<i>PayPoint's submissions .....</i>	<i>108</i>
	<b>(5)</b>	<b>Quantum .....</b>	<b>116</b>
	(a)	<i>GLOBAL-365's submissions .....</i>	<i>116</i>
	(b)	<i>PayPoint's submissions .....</i>	<i>118</i>
<b>F.</b>		<b>DECISION .....</b>	<b>124</b>
	<b>(1)</b>	<b>Introduction .....</b>	<b>124</b>
	<b>(2)</b>	<b>Market Definition.....</b>	<b>125</b>
	<b>(3)</b>	<b>Dominance.....</b>	<b>126</b>
	(a)	<i>Before the PO/PZ merger .....</i>	<i>127</i>
	(b)	<i>After the PO/PZ merger .....</i>	<i>131</i>
	<b>(4)</b>	<b>Abuse .....</b>	<b>132</b>
	(a)	<i>The law.....</i>	<i>132</i>
	(b)	<i>The OTC market.....</i>	<i>133</i>
	(c)	<i>The non-OTC market .....</i>	<i>141</i>
	<b>(5)</b>	<b>Causation.....</b>	<b>143</b>
	(a)	<i>Loss of chance.....</i>	<i>143</i>
	(b)	<i>The actions of GLOBAL-365: the development of SMARTprepay.....</i>	<i>144</i>
	(c)	<i>The actions of third parties – energy suppliers .....</i>	<i>146</i>
	<b>(6)</b>	<b>Quantum .....</b>	<b>154</b>
	<b>(7)</b>	<b>Interest.....</b>	<b>156</b>
<b>G.</b>		<b>DISPOSITION .....</b>	<b>158</b>

## A. INTRODUCTION

1. This Judgment concerns a claim for damages by the Claimants (collectively **GLOBAL-365**) for loss allegedly caused by the Defendants (collectively **PayPoint**) through their conduct which, it is claimed, excluded GLOBAL-365 from the market for the supply of over-the-counter (**OTC**) prepayment services to energy suppliers in Great Britain (**OTC energy prepayment market** or the **OTC market**). In addition, it is also alleged that GLOBAL-365 was excluded from or otherwise suffered loss in the related market for the supply of non-OTC prepayment services to energy suppliers (the **non-OTC energy prepayment market** or the **non-OTC market**) either by PayPoint leveraging its dominant position in the OTC market or as a consequence of it. PayPoint is said to have been in breach of s. 18 of the Competition Act 1998 (the **CA98**).
2. At the material time, GLOBAL-365, a start-up company, was a new entrant payment service provider (a **PSP**). It was established to handle energy prepayments made in relation to premises served by smart meters. It proposed to do this through a system it was developing known as SMARTprepay. The SMARTprepay system was intended to enable energy customers to top-up their smart meters by a number of OTC and non-OTC methods.
3. PayPoint was and remains an established group of companies which provides payment services across different sectors. These include providing payment services to energy suppliers in Great Britain in both the OTC and non-OTC markets in respect of gas and electricity customers who pay for energy with a prepayment meter.
4. The background to GLOBAL-365's claim is complicated. By way of introduction, some energy customers in the UK pay in advance through prepayment meters. PSPs provide the technical infrastructure to enable such customers to make payments to their energy suppliers and for their meters to be topped up enabling them to be supplied with the energy they have purchased.

PSPs are generally paid by the energy suppliers by reference to the number of prepayment transactions that the PSP processes.

5. As set out in more detail below, traditionally, the OTC process involves: (i) a consumer making a payment in a local convenience store (**an Agent Retailer**); (ii) the store transmitting funds, less a commission, to the energy supplier; and, (iii) the store providing the authority for the meter to be topped up through a physical key or card. This process uses technology installed by the PSP in the store, with the store staff being trained by the PSP. Retailers often also offer prepayment, and similar, services in other (non-energy) markets such as telephone top-up or parcel collection/delivery.
6. The advent of so-called “smart” meters permitted other additional, non-OTC, direct payment methods, without the need for a customer to visit a store. However, the OTC payment process remained available with the store using a digital process to authorise the top-up for the customer. Payment systems required different technologies for legacy and smart meters.
7. Thus, PSPs operate in a two-sided market, providing services to both retailers and energy suppliers. This market dynamic is critical.
8. Energy suppliers select a PSP for the OTC market based on, among other things, the size and quality of the retailer network the PSP can offer (including such issues as location, proximity to consumers, standard of service). Not only do energy suppliers want to make it easy for consumers to make payments, they also have regulatory obligations to provide a sufficient mechanism for prepayments to those consumers who cannot obtain (or who do not want) their energy on credit. A large, well-located network of retailers offers a competitive advantage to a PSP when negotiating with an energy supplier for OTC services.
9. Conversely, a retailer is primarily interested in the volume of business, both to drive its commission and to attract footfall to its premises. Having contracts with a number of large energy suppliers offers a competitive advantage to a PSP when creating, expanding or enhancing its retailer network.

10. Although the subject of regulatory obligations to make it available, the prepay sector has traditionally not been of great interest commercially to the larger energy suppliers. It has tended to be less profitable (or unprofitable) because of high administrative costs in dealing with prepayments and the impact of price capping. It generally forms a rather small part of their overall business. However, it does carry significant brand risk for them. Were a prepayment system to fail, consumers would be left without energy with obviously serious consequences for them. This risk is heightened because many prepayment consumers are particularly vulnerable. Reliability is therefore important for energy suppliers.
11. Prepayment customers are not evenly distributed across the energy companies. On the best estimates provided at trial, British Gas had about around 30-40% of the smart prepay sector. Some specialist companies have built their business models around focussing on the prepayment sector and have much greater penetration of that market. The best example is Utilita which generally had some 2-4% of the total energy supply market but some 19% (in 2023) of the prepay market and some 40% of the smart prepay market. Utilita has been an early and committed adopter of the smart meter technology. Other larger specialists in prepay included Economy Energy, E and OVO.
12. A new entrant smart meter PSP, like GLOBAL-365, therefore, had to contend with a number of issues. It was required to obtain a network of retailers sufficient to satisfy the requirements of an energy supplier whilst also obtaining sufficient energy supply business to be attractive to retailers. It was required to have a reliable system in which energy suppliers could place confidence. It had to be sufficiently cost competitive, possibly at low start-up volumes, to be attractive to energy suppliers when many of the suppliers would be attentive to factors other than cost. The new entrant also faced the issue that a very large part of the energy supply market is in the hands of established large suppliers which are likely to be conservative in their PSP choices. Both these established suppliers and those which were very focussed on the prepay sector were likely to consider the quality and reliability of the PSP arrangements to be a particularly critical factor. In particular, GLOBAL-365 had to deal with the fact

that some 70-80% of the supply market was in the hands of two players, Utilita and British Gas.

13. As described below, GLOBAL-365 pitched to both these suppliers for their business but was turned down by them. On the evidence before us, this was a matter of free commercial choice for both suppliers having considered GLOBAL-365's proposal.

**(1) Summary of Claim**

14. GLOBAL-365 was seeking to enter both the OTC and non-OTC smart prepay markets through its product SMARTprepay. To deliver its OTC service, GLOBAL-365 entered into a partnership with epay Limited (**Epay**), a provider of other OTC payment services with an existing retailer network. GLOBAL-365 identified a unique "window of opportunity" to enter the OTC and non-OTC markets from early 2018 until late 2021. This coincided with a phase of the roll out of smart meters in the UK. As noted above, this change from legacy meters necessitated the implementation of new technological services for prepayments.
15. GLOBAL-365 contended that PayPoint's strong market position during the period 2009–2018 was founded upon its provision of OTC prepayment services for legacy meters into which it had sunk a great deal of investment in physical infrastructure – in particular, terminals required to "load" energy top-ups onto a key or card that could then be read by a legacy meter. Throughout the period 2009–2019, PayPoint's share of the OTC energy prepayment markets was consistently in excess of 70%, and as high as 88% in 2018.
16. GLOBAL-365 considered that the technological shift to smart meters offered the possibility of a fresh start which would level the playing field between established providers of energy prepayment services and new entrants. Although, smart meters could still be topped up OTC, since they could also be topped up directly by the user an entirely new non-OTC market segment came into being. This required fresh investment and made the non-OTC market contestable in a way that OTC top-ups for legacy meters were not.

17. GLOBAL-365's "tech for good" mission was aimed at bringing down energy costs for prepayment customers, many of which are from vulnerable and disadvantaged groups, by attempting to use technology to reduce the transaction costs and payment risks for energy suppliers. It saw the roll-out of smart meter technology as an opportunity to offer an alternative to PayPoint.
18. GLOBAL-365 argued that it was prevented from entering the market at scale by exclusivity clauses and related provisions in PayPoint's contracts. GLOBAL-365 relied on provisions in PayPoint's OTC contracts with both energy suppliers and its network of Agent Retailers. GLOBAL-365 also pointed to the provisions contained in PayPoint's non-OTC contracts with energy suppliers. These provisions were said to include exclusive purchasing obligations with energy suppliers and retailers, exclusivity rebates for energy suppliers, volume-based pricing, restrictions on terminating contracts and restrictions on energy suppliers promoting rival OTC services.
19. Following a complaint by GLOBAL-365, the sectoral regulator, the Office of Gas and Electricity Markets (**Ofgem**) initiated competition proceedings against PayPoint. On 29 September 2020, Ofgem issued a Statement of Objections (the **SO**) provisionally finding that PayPoint had abused its dominant position in the OTC prepayment market in the period from 2 April 2009 to 19 October 2018 by reason of (i) the direct exclusivity restrictions on energy suppliers; (ii) supporting restrictions including on the termination of contracts and on the promotion of rival providers of payment services; and (iii) "parallel exclusivity requirements in retailers' contracts that prevented rivals from using those same outlets to collect OTC payments". Those proceedings were resolved by a Decision published by Ofgem on 23 November 2021 (the **Commitments Decision**), pursuant to which PayPoint undertook to remove the objectionable terms and to make a payment of £12.5 million into Ofgem's Energy Industry Voluntary Redress Scheme which supports vulnerable energy consumers. The Commitments Decision expressly states (i) that it contains no legal decision on PayPoint's legal liability or otherwise (see §1.11) and (ii) that PayPoint makes no admissions (see Annex 1, §4). This position is consistent with the Commitments Decision being reached during the investigation process, after a

Statement of Objections, but before any other process, including PayPoint filing a Defence to that Statement of Objections.

20. GLOBAL-365 contended that, by the time of the Commitments Decision, the unique “window of opportunity” was closing. This was primarily because, by this point, other smart meter top-up services had been established. These included “in-house” non-OTC platforms created by some energy suppliers. In addition, by late 2021, in the wake of the Russian invasion of Ukraine and wholesale energy price inflation, many smaller energy suppliers exited the market. As a start-up, GLOBAL-365 had targeted these smaller suppliers as part of its market entry strategy.
21. As a result of PayPoint’s alleged abuse of dominance, GLOBAL-365 sought damages on the basis of a business plan it created in 2016 that estimated that, absent the alleged abuse, GLOBAL-365 would be processing some 30% of smart meters top-ups within 5 years of launch.

## (2) Procedural History

22. The claim was issued on 13 July 2023. A first CMC was held on 31 October 2023, jointly with a related case, Case No. 1581/5/7/23 *Utilita Energy Limited & Another v PayPoint plc & Other* (the **Utilita Proceedings**). By Order dated 20 November 2023, the Tribunal directed that both proceedings would be jointly case-managed and would be heard together and that evidence in each case should stand as evidence in the other case. A joint trial was listed to commence on 10 June 2025, with a provisional time estimate of six weeks.
23. A further joint CMC was held on 26 April 2024 to consider expert evidence and further directions in relation to disclosure. By Order dated 5 June 2024, the parties were permitted to rely on evidence from experts in competition economics in relation to particular identified issues. The Tribunal also granted permission in principle for the parties to rely on expert evidence in the fields of: (i) accountancy and/or corporate finance and/or competition economics to give evidence relevant to quantum; and (ii) one industry expert in the energy sector

(including energy prepayment services). By Order dated 2 October 2024, the Tribunal made further directions in relation to expert evidence.

24. By Order dated 14 May 2025, following a confidential agreement between the parties, the Utilita Proceedings were dismissed by consent.
25. A pre-trial review was held on 16 May 2025. During the pre-trial review, the parties confirmed that they were agreed that the evidence in the Utilita Proceedings should remain before the Tribunal in the GLOBAL-365 proceedings as hearsay evidence. In light of the dismissal of the Utilita Proceedings, the trial length was reduced to five weeks.
26. The trial in these proceedings took place between 10 June 2025 and 11 July 2025.

***(a) Factual Evidence***

27. For GLOBAL-365, the Tribunal heard oral evidence from the following factual witnesses Mr Richard Robertson, the present Regional Managing Director for Epay, and Mr William Wilson, the present Chief Executive Officer and founder of GLOBAL-365.
28. Stephen Smith, who was both an investor in and a non-executive director of GLOBAL-365 from October 2016 to February 2020, and Kenneth Greatbatch, the non-executive chairman of GLOBAL-365 from 2014 to 2020 who had also invested in the company, provided statements on behalf of GLOBAL-365. PayPoint had originally intended to cross-examine both witnesses but, in the event, counsel for PayPoint did not do so, electing instead to use the time available to cross-examine Mr Wilson at greater length.
29. For PayPoint, the Tribunal heard oral evidence from the following factual witnesses: Mr Timothy Watkin-Rees, a co-founder of PayPoint; Ms Josephine Toolan, the present Managing Director, Payments; Mr Ian Ranger, the present Head of Business Development; Mr Anthony Sappor, the present Retail Proposition and Partnerships Director; Mr Stephen O'Neill, the present Chief

Marketing and Corporate Affairs Officer; and Mr Simon Coles, the present Chief Technology Officer.

30. In general, we found that the factual witnesses were helpful and doing their best to assist the Tribunal. Whilst, unsurprisingly perhaps, each party's witnesses tended to see matters from the perspective of their side of the dispute, in general, we had no reason to doubt that they were both truthful and broadly accurate in their recollection. However, both parties made submissions as to how we ought to approach Mr Wilson's evidence. In light of this, Mr Wilson's evidence requires particular and careful consideration. We return to this topic below.

***(b) Expert Evidence***

31. The expert witnesses for GLOBAL-365, both of whom gave oral evidence, were as follows:

- (1) Dr Serena Hesmondhalgh, a Principal at The Brattle Group in London, who produced one expert report in relation to the energy sector; and
- (2) Mr Mat Hughes, Partner and Managing Director in the Investigations, Disputes and Risk practice at AlixPartners UK LLP, who produced two expert reports dealing with the issues of competition economics and quantum.

32. There were the following expert witnesses for PayPoint, all of whom gave oral evidence:

- (1) Mr Prashant Kachhala, a Director for Baringa Partners LLP, who produced one expert report in relation to the energy sector;
- (2) Dr Adrian Majumdar, Managing Partner at RBB Economics, who produced two expert reports dealing with issues of competition economics; and

- (3) Mr Alexis Anaman, a Senior Managing Director at FTI Consulting LLP, who produced two expert reports dealing with quantum.
33. The parties' experts of like discipline helpfully produced joint statements setting out where they agreed and disagreed.
34. For completeness, we should mention that the competition economist instructed by the claimant in the Utilita Proceedings, Mr Mark Bosley of Berkeley Research Group, also contributed to the Competition JES. But, in relation to evidence from competition economists, the trial focused, almost entirely, on the evidence of Mr Hughes and Dr Majumdar. Mr Bosley did not give oral evidence.
35. In general, the Tribunal found the evidence of all of the experts to be of assistance. However, we were somewhat surprised by certain aspects of the approach of GLOBAL-365's expert, Mr Hughes. In particular, we were surprised by his adoption, apparently without further significant interrogation of its assumptions or independent consideration of their reasonableness, of GLOBAL-365's 2016 business plan as the basis for his damages model. Although we do not doubt his expertise, on occasion he also seemed to come close to defending his client's position rather explaining than his own opinion. We return to these issues below.

## **B. FACTUAL BACKGROUND**

### **(1) Overview of the Retail Energy Market**

36. In general, there was a broad consensus between the parties' industry experts as to the relevant aspects of the UK energy market. This was apparent both from the joint statement prepared by Dr Hesmondhalgh and Mr Kachhala and the concurrent evidence session in which they participated. As a result, we did not understand there to be any significant dispute between the parties in this respect. Based on that evidence, we are able to make the following findings.

37. The retail supply of energy in Great Britain is a licensed activity under the Electricity Act 1989 and the Gas Act 1986. Licensed energy suppliers are subject to regulation by Ofgem, which also has concurrent jurisdiction with the Competition and Markets Authority (CMA) to enforce the CA98, including the Chapter II prohibition, in matters relating to the energy sector: see s. 54 CA98.
38. Energy customers in Great Britain are either (i) post-pay customers, who pay for their energy after they have consumed it, typically on a monthly basis or (ii) prepayment customers, who use prepayment meters to pay for their energy in advance of consumption. Prepayment customers have often been placed on a prepayment meter by their energy suppliers because of past debt problems.
39. Ofgem licence conditions require both gas and electricity suppliers with over 49,999 customers to provide a wide range of payment methods to customers, including cash and payment by a prepayment meter. Pursuant to Ofgem Standard Licence Condition (SLC) 27 such suppliers are required to offer the customer a wide choice of payment methods including payment by cash “to a person and at a place that is reasonable in all the circumstances of the case” and “fortnightly or more regularly”. A sufficiently effective prepayment network offered by a PSP is, therefore, a regulatory requirement for any larger supplier.

Prepayment: legacy and smart meters

40. Prepayment meters are either legacy meters or smart meters.
41. Before the introduction of smart meters in 2012, all customers had what are now called “legacy” meters, which can only be read at the premises at which the meter is installed. Prepayment of legacy meters happens by “topping up” using a physical key or card, depending on the kind of meter. The top-up process for legacy meters is necessarily OTC. It requires a customer to take their key or card to a retail outlet that provides top-up services and to purchase, whether by cash or other means, additional energy. The retailer will then insert the key or card into a terminal that will load a token onto the card/key effecting the purchase of an amount of energy (i.e. OTC). The customer then takes the topped-up key back to his or her premises, where it is inserted into the

prepayment meter which reads the amount that has been loaded onto the card and permits the supply of the amount of purchased energy accordingly.

42. It has been more costly for energy suppliers to serve prepayment customers than post-pay customers. That higher cost flows from the OTC infrastructure necessary for in-person top-ups and from customer support (including call centres and engineering call outs). In part as a result of these higher costs, prepayment customers with legacy meters have generally paid higher energy prices than post-pay customers. Despite that, prepayment customers have the reputation of being barely profitable (or unprofitable) for suppliers, particularly where energy cost capping has applied to prepayment customers.
43. Smart meters connect to wireless telecommunications networks. Readings from such meters can be taken remotely without the need for a manual reading of the meter display. Where a prepay customer has a smart meter, they are not limited to purchasing top-ups OTC via a physical key (as for legacy meters). Credit can also be added to a smart meter electronically by, for example, telephone, text, online or by an app (non-OTC). However, smart meters can still be topped up using OTC cash or other payment methods in a store. In this case, the technical process for delivering the additional energy purchased by way of the top-up does not involve a physical token. Instead, the relevant data is transmitted to the energy company concerned which, in turn, enables the supply of energy to the consumer by communicating with the smart meter.
44. The roll-out of smart meters in Great Britain began in 2012 with the first generation of meters known as **SMETS1** meters. SMETS1 meters used a variety of proprietary specifications and what was known as “head end” application programming interfaces. This resulted in limited interoperability between different suppliers and a certain degree of complexity. Relevant to a competition analysis, this meant that a new SMETS1 meter might need to be installed when a customer changed energy supplier if the new supplier used a different specification, creating a barrier to switching.
45. The second generation of smart meters (**SMETS2**) were rolled out from 2017. By contrast with SMETS1, SMETS2 is a common specification across the

industry. All communications involving SMETS2 meters are required to pass via a single organisation, the Data Communications Company. This structure allows for interoperability and enables remote customer switching between suppliers.

#### Structure of the energy supply market

46. In the evidence before us, energy suppliers were categorised into three tiers.
- (1) **Tier 1:** this tier comprises the so-called “**Big Six**”: British Gas, EDF Energy, E.On, npower, Scottish Power and SSE. E.On acquired npower in 2019 and OVO, a relatively new entrant, acquired the retail business of SSE. These companies are, or are comprised of, the entities that emerged from the restructuring of the generation and supply activities of the formerly publicly owned energy companies following privatisation of the sector in the late 1980s. Prior to 2014, the Big Six supplied over 90% of the demand for gas and electricity in Great Britain. (This tier is broadly equivalent to Ofgem’s classification of “large” suppliers whose market share exceeds 5%.)
  - (2) **Tier 2:** also referred to as the “challengers” or “the mid-tier”. These companies are smaller than the Big Six, but in many cases are still substantial energy suppliers of long standing. Of particular importance in relation tier 2, is Utilita which maintained a very significant market share in the smart prepayment sector. (This tier is broadly equivalent to Ofgem’s classification of “medium” suppliers whose market share exceeds 1% in at least one fuel but remains below 5% in both gas and electricity.)
  - (3) **Tier 3:** covers smaller, typically new-entry energy suppliers. (This tier is broadly equivalent to Ofgem’s classification of “small” suppliers whose market share is below 1% in both gas and electricity.)
47. Historically, the supply of gas and electricity in Great Britain was dominated by the Big Six. From 2015 to 2018, there was a substantial number of new entrants

to the energy supply market, in part as the result of changes designed to promote competition made following a CMA Energy Market Investigation in 2014–2016. The number of active energy suppliers rose from under 30 at the end of 2014 to a peak of 70 in mid-2018. That number began to decline again in 2018: first gradually, then dramatically in 2021, when 29 suppliers exited the market following large changes in wholesale energy prices.

48. As of 2024, the top six energy suppliers, which included five of the original Big Six (British Gas, EDF, E.On, Scottish Power and OVO, formerly SSE) plus Octopus Energy (a new entrant from 2015/16), still supplied over 90% of energy demand in Great Britain.

## **(2) Payment Service Providers**

49. For present purposes, PSPs act as intermediaries between customers and energy suppliers by providing technical infrastructure for payment. In essence, they provide the operational support for the flows of cash and data to enable customers to top-up their prepayment accounts with energy suppliers. Both GLOBAL-365 and PayPoint are PSPs.

### ***(a) OTC***

50. For OTC transactions, PSPs use a network of locations which are typically retailers at which customers can carry out various transactions, including, but not limited to, energy prepayments. As at 2017/8, PayPoint had an agent retailer network comprising some 28,000 outlets (at which size it has broadly remained).
51. PayPoint’s Agent Retailers include both: (i) “indies” which are unaffiliated independent shops, including those forming part of a small group under common ownership; and (ii) “mults” being stores that are managed by a head office and have multiple locations, including the convenience store formats of certain supermarket brands. Approximately 70% of PayPoint’s retailer network are “indies” and 30% are “mults”.

52. The three other entities that operate substantial retail networks offering OTC energy prepayment services in Great Britain are as follows:
- (1) **The Post Office:** before its 2018 merger with Payzone (see below), had some 11,500 outlets in a range of locations, including: dedicated, standalone Post Office outlets; “Fortress” counters located in third-party owned convenience stores and staffed by Post Office employees located behind a glass screen; and, “Locals” where the Post Office is more integrated into a third-party owned convenience store. In general, the Post Office network had more limited opening hours than the convenience stores in PayPoint’s network but they tended to be in very convenient locations for historical reasons.
  - (2) **Payzone:** before its merger with the Post Office, operated an agent retailer network (in a model similar to PayPoint’s) of 10,000-12,500 locations.
  - (3) **Epay:** operates an agent retailer network of around 32,000 stores. This is larger than PayPoint’s network, but, in contrast to PayPoint, it is concentrated in national retail chains (supermarkets such as Asda, Morrisons, Sainsbury’s, Tesco, petrol forecourt operators such as BP and Shell and others such as Boots, Poundland and WH Smith) rather than “indies”. These locations have been not traditionally used for energy prepayments. Epay’s OTC business in Great Britain largely focused on mobile phone top-ups rather than energy payments.
53. In October 2018, the Post Office and Payzone merged (into an entity which we refer to as **PO/PZ**) resulting in a merged network of similar size to PayPoint’s, but smaller, in total number of outlets, than Epay’s. PO/PZ won exclusive contracts in 2019 to provide OTC prepayment services to British Gas and to Scottish Power.
54. Before the PO/PZ merger, PayPoint provided OTC prepayment services for legacy and/or smart meters to all of the Big Six, as well as OVO and Octopus Energy and a number of smaller tier 2 and tier 3 suppliers, including Utilita.

**(b) Non-OTC**

55. Non-OTC top-up transactions are carried out in a number of different ways (see §43 above).
56. PayPoint developed a non-OTC product called Multipay, originally in collaboration with Utilita. This is an integrated service which allowed a customer to top-up a prepayment smart meter through various channels including an app, a web-page, an automated telephone line or SMS. PayPoint began to market Multipay to the Big Six in around 2015. However, only SSE (later sold to OVO) took up Multipay, which it did in March 2016. A number of smaller energy suppliers also adopted Multipay.
57. In 2018, Octopus began to offer its Kraken software to other energy suppliers. This is described as “an all-in-one, smart operating system automating much of the energy supply chain to allow outstanding service and efficiency as the world transitions to a decentralized, decarbonized energy system”. Within that wide-ranging functionality, the Kraken software includes, or can integrate, the ability to top-up smart meters on a non-OTC basis. Kraken is used by EDF and E.On.
58. Some of the larger energy suppliers chose not to outsource non-OTC prepayment services for smart meters but, rather, to develop this capability in-house. This is the case for British Gas and Scottish Power as well as Octopus (i.e. Kraken) and OVO. Although Utilita initially used the Multipay product (which it had helped to develop) it switched to an in-house service in 2019.

**(3) Contractual arrangements**

59. Supplier contracts could split between legacy and smart meters as well as between OTC and non-OTC (smart only). The extent to which there was a contractual nexus or an economic nexus (say through price incentives) between contracts in one segment and in another was highly relevant to the abuse allegations. Contracts with the Big Six suppliers tended to follow relatively formal procurement processes (not least to comply with public procurement legislation).

60. GLOBAL-365's case was based upon exclusivities in favour of PayPoint contained in PayPoint's contracts. Some contracts feature so-called "convenience exclusivity". This arrangement reflected the particular social, economic and geographical (highly convenient stores) of the Post Office. It meant that an energy supplier would be exclusive to the PSP in question save for arrangements that the supplier reached in parallel with the Post Office (but only the Post Office).
61. At trial, the parties produced an agreed "Contracts Table" that included all of the supplier contracts, the markets to which they related, the period for which they applied and any exclusivities contained in them (together with some other information). Not surprisingly, contracts with smaller suppliers tended to be in relatively standard form whereas those with larger suppliers were more individually negotiated. At a high level of summary, the key points emerging from that table were as follows.
- (1) PayPoint had contracts with all the tier 1 suppliers at some stage during GLOBAL-365's window of opportunity. Some of those contracts contained explicit exclusivities, perhaps for a specific market, such as smart meters, or convenience exclusivity, but the majority did not. PayPoint's contract with British Gas, which seems to have had approaching 40% of the prepayment market, did not contain (with a limited exception) any explicit exclusivity. In general, these contracts tended to cover legacy and smart OTC but less frequently non-OTC (which major suppliers often developed in-house). The contracts tended to be for two to five year periods.
  - (2) PayPoint contracted with all the suppliers that it regarded as tier 2 at some stage during GLOBAL-365's window of opportunity. Contract periods varied from one to five years, with three years being common. These contracts were usually on an exclusive basis (sometimes with carve-outs) and usually covered legacy and both OTC and non-OTC smart meter markets, at least for some of the time. GLOBAL-365 contracted with one supplier which it categorised as tier 2 but which PayPoint considers to be tier 3. (This difference highlights that the

definitions of tier 2 and 3 are not exact. Nothing turns on this particular point.)

- (3) PayPoint's contracts with tier 3 suppliers were for periods between one and five years (with the occasional shorter period) but were generally of a three year period or longer. As the tier 3 suppliers tended to be new entrants and focussed on smart meters, the contracts frequently covered both smart OTC and non-OTC but not legacy. The contracts almost uniformly contained exclusivity clauses (although this was occasionally limited to convenience exclusivity).
  - (4) Of some 80 tier 3 suppliers of varying size (with varying degrees of survival in the market), PayPoint contracted with some 22 tier 3 suppliers during GLOBAL-365's window of opportunity. Some of those contracts expired during the window of opportunity and were, at least in theory, open to GLOBAL-365 to compete for. GLOBAL-365 contracted with some 16 suppliers at some stage (sometimes replacing PayPoint). Some 47 suppliers either had no PSP provider or the provider was not identified.
62. GLOBAL-365's contracts were non-exclusive. After the Commitments Decision, and in accordance with it, PayPoint did not enforce the exclusivities.
  63. Agent Retailer contracts with PSPs tended to be for 5 years. Typically, they would contain exclusivities in terms of which the Agent Retailer in question could not deal with any other PSP in relation to energy supply during that period. PayPoint said that it was difficult to enforce these exclusivities both with large groups like supermarket "mults", and, for different reasons, with independent storers, but we were presented with uncontested evidence that PayPoint had sought to enforce those exclusivities to protect their retail network.

**(4) GLOBAL-365**

**(a) Background**

64. The principal evidence in respect of GLOBAL-365 came from Mr Wilson.
65. GLOBAL-365 was founded by Mr Wilson as a “tech for good” business. Mr Wilson considered that the advent of smart meters presented an important opportunity for energy suppliers to lower their costs to serve prepayment customers. He anticipated being able to lower costs by implementing less costly (particularly non-OTC) services and by minimising faults and errors in the top-up process. This would have the effect of reducing customer complaints and resulting cost pressures on energy suppliers’ call centres. Mr Wilson’s aim was to deliver these costs savings to energy suppliers so that they could be passed on to prepay customers. This, in turn, could potentially reduce the tariff differential between prepayment and post-pay customers and, thereby, help to address the issues of fuel poverty.
66. The “tech for good” aspect of GLOBAL-365’s foundation, was clearly important to Mr Wilson. In his evidence, Mr Wilson explained that his intention was to develop SMARTprepay as a brand which would have similarities in the prepayment services sector to the “Fairtrade” brand and values. This had the consequence that GLOBAL-365 were not interested, at least at the outset, in developing a “white label” application that could be used by energy suppliers without the SMARTprepay branding. Mr Wilson seemed wedded to this principle, irrespective of the fact that energy suppliers might not have wanted the impact on their own brand of using a separately branded payment mechanism. However, later in his evidence, Mr Wilson said that, although he did not recall being told by many suppliers that they wanted a white label product, he would have considered a white label product if requested. His position seems to have evolved: he did not want to prejudice the branded nature of SMARTprepay but became more open to a white label product given the rate of progress with signing up suppliers. In a similar way, he was initially very reluctant to put SMARTprepay in an app format (preferring access through a

browser) but became more open to the idea if it were necessary to secure suppliers (although it appears that no app was ever developed).

67. A positive feature of SMARTprepay (according to Mr Wilson) was a funds splitting feature which would enable consumers to allocate their payments to different aspects of their contractual relationships with suppliers. There was no evidence before us that established that this was something that was of particular value to consumers or energy suppliers. There was also some evidence that, if such a facility would have been of value, suppliers would have found a way to make it available whatever GLOBAL-365 might have done. It seemed that GLOBAL-365 encountered difficulties operationalising this facility.
68. Between early 2015 and late 2019, Mr Wilson invested £320,000 in GLOBAL-365 in his personal capacity and through his company, Directlogic. During this period, he also dedicated his time and efforts to developing and marketing the SMARTprepay concept. GLOBAL-365's other shareholders and investors were as follows.
  - (1) Mr Steve Smith, a former senior executive at Ofgem and current Interim Chief of Strategy and Regulation Officer at National Grid, who invested a total of £140,000 in two tranches between 2016 and 2017. Mr Smith was a Non-Executive Director from October 2016 to February 2020 and was actively involved in GLOBAL-365 during the early days of the business. In addition to other roles, Mr Smith used his contacts in the energy industry to facilitate introductions for Mr Wilson to relevant personnel at (i) energy suppliers such as British Gas and Utilita and (ii) the Post Office, which GLOBAL-365 initially considered as a potential OTC partner.
  - (2) Mr Kenneth Greatbatch, a former CFO and CEO of various businesses in the chemicals and advanced materials sectors, who invested a total of £70,120 into GLOBAL-365 between 2015 and late 2019. Mr Greatbatch acted as GLOBAL-365's Non-Executive Chairman from 2014–2020.

- (3) Ms Fiona Atkinson, an investor and entrepreneur, who invested £25,000 in the business in 2015.
  - (4) Mr Iyangan Muniandy, a Senior Vice President at Macquarie Group, who invested £25,000 in March 2018.
69. In addition to this fundraising, GLOBAL-365 made a number of efforts to raise additional external funds in the market between April 2016 and September 2020. These efforts were ultimately unsuccessful.

#### The Business Plan

70. Around 2016, Mr Wilson produced what he referred to as a five-year business plan to assist in discussions with potential investors and commercial partners (the **Business Plan**). For reasons that are discussed below, the Business Plan came to be an extremely significant part of GLOBAL-365's case as it formed the basis for its counterfactual model and, specifically, its damages claim. Mr Wilson was clear in his evidence that the Business Plan consisted only of an Excel spreadsheet and a marketing PowerPoint presentation. Mr Wilson could not recall whether he had ever updated the plan but, in any event, it was the original version which played a role in the case before us. This Excel spreadsheet was founded upon a series of projections of market penetration and revenue (detailing, among other things, set up revenues, monthly charges, revenue per transaction, numbers of transactions). It also contained cost modelling and projected profit and loss and other such information such as salaries.
71. The PowerPoint presentation was a high-level description of the SMARTprepay concept, for the purpose of marketing GLOBAL-365. It was not a detailed strategy or growth plan for the business. Neither document contained sensitivity analyses or risk assessments.
72. The key assumptions which Mr Wilson made in formulating the Business Plan included: (i) the number of smart meters operating in prepayment mode, and thus able to be served by SMARTprepay, over time (the total addressable

market), (ii) the distribution of these meters both between the tiers of energy suppliers and among the suppliers in each tier; (iii) the average number of monthly top-ups per prepayment customer (the potential revenue available from that market) and (iv) the number of energy suppliers that GLOBAL-365 would contract with over time (GLOBAL-365's market penetration).

73. Mr Wilson assumed in preparing the Business Plan that GLOBAL-365 would begin by contracting with multiple tier 3 suppliers, to build volume, experience and credibility, then secure contracts with tier 2 suppliers and ultimately, contract with one tier 1 (Big Six) supplier in month 13 of the Business Plan and a second Big Six supplier some 6 months later. GLOBAL-365 referred to this as the process of "credentialisation". In order to build up the credentials and market reputation needed to secure a contract with one or more of the Big Six (and achieve scale), a new entrant like GLOBAL-365 needed first to deliver a stable and reliable service under contracts with a material number of tier 3, and especially tier 2, suppliers. In his statement, Mr Smith considered that, having secured one initial Big Six customer, GLOBAL-365's uptake amongst the other Big Six could be expected to "snowball".
74. It was notable that beyond the evidence contained in Mr Wilson's witness statement which sets out the assumptions which he made in formulating the Business Plan, the Tribunal neither heard nor were shown anything to vouch for the reasonableness or otherwise of those assumptions. As we note further below, the expert evidence at trial on behalf of GLOBAL-365 from Mr Hughes relied on the Business Plan to describe the alleged counter-factual. On the evidence before us, no attempt was made by GLOBAL-365 to establish that the assumptions underlying the Business Plan were reasonable.
75. In particular, it was striking that the Tribunal heard no evidence from either Mr Wilson or anyone else to support the implicit assumptions which he had made that a new and untested platform (which was not then operational), would have the technical capability to meet the increasing demand detailed in the Business Plan on a stable and reliable basis. This omission is all the more surprising when one considers the technology risks associated with all such start-ups. The Tribunal was left without any evidential basis to support Mr Wilson's

contention that it was reasonable to assume that GLOBAL-365 would have the capacity, in terms of technology and resources (including staff), to demonstrate to energy suppliers that it could provide a reliable service to them at the scale envisaged in the Business Plan.

***(b) The development of SMARTprepay***

Introduction

76. There were no witness statements submitted by GLOBAL-365 from those involved at a technical level in the design and development of SMARTprepay. Nor did GLOBAL-365 seek to lead any independent expert evidence as to the technical capabilities of the product. Instead, this part of GLOBAL-365's case depended upon Mr Wilson's oral evidence and his recollection of various contemporaneous documents which were put to him. In this regard, it is also important to emphasise that Mr Wilson was, self-avowedly, not a person with technical expertise. His background was in sales.

The initial development

77. GLOBAL-365 initially worked with Mr Kinsley Ransom, the founder of RedRansom Software Ltd, to develop SMARTprepay. Mr Ransom was contracted to GLOBAL-365 from June 2015 on a part-time basis and had overall responsibility for the development of SMARTprepay. Mr Ransom subsequently became GLOBAL-365's Chief Technology Officer in March 2018. It did not appear that he ever became an employee of GLOBAL-365. His initial task was to create a software development plan for SMARTprepay which would involve integrations with the following systems:

- (1) Barclay's Pingit, a mobile payments application that would facilitate the transfer of funds from prepayment customers to GLOBAL-365. At this stage, this was an important integration for GLOBAL-365 as Pingit represented an important means by which the customers of energy suppliers using SMARTprepay could effect payment; and

- (2) The Post Office through Vocalink, the company which provides the infrastructure in the UK for Faster Payments, BACS and the ATM network. Vocalink had quoted GLOBAL-365 £150,000 to integrate SMARTprepay with the Post Office's systems to facilitate OTC top-ups at Post Office outlets and via a network of ATMs. GLOBAL-365 ultimately decided not to pursue the Vocalink integration with the Post Office or any ATMs for commercial reasons.
78. From the evidence, it appeared that GLOBAL-365 experienced a certain lack of continuity in the personnel used to develop the software. In 2016, it was envisaged that some of the software development of SMARTprepay would be outsourced to Joshika Technologies Ltd, a software development company based in India. However, later in 2016, GLOBAL-365 parted company with Joshika Technologies and appointed Ms Helen Clemson as an in-house developer to assist Mr Ransom. Ms Clemson left after four months (albeit returning in a different role sometime later).
79. In March 2017, in place of Ms Clemson, GLOBAL-365 appointed Mr Andrew Munt who became GLOBAL-365's Chief Software Engineer and a member of GLOBAL-365's executive management team. Mr Munt was not employed by GLOBAL-365 directly but by Ajeo Ltd and did work for GLOBAL-365 alongside other clients. Mr Munt's involvement with GLOBAL-365 appears to have ended around the start of 2018.
80. In his evidence, Mr Wilson was keen to highlight the involvement of the Science and Technologies Facilities Council (STFC), based at Daresbury, in the development of SMARTprepay. Mr Wilson estimated that the STFC contributed some £2 million of value in kind based on time devoted to the project by STFC's employees and access to STFC's high performance computing facilities. However, in his oral evidence, Mr. Wilson explained that the STFC did not actually write any code for the platform. Its involvement was limited to hosting the first-generation of SMARTprepay platform and "providing advice to everybody on the formats and the languages that the code should be written in". In June 2018, the STFC informed GLOBAL-365 that it could no longer host SMARTprepay on its servers as its software licenses with

Microsoft and IBM were supplied on the basis that it was a research establishment and did not offer any commercial products. As a result, GLOBAL-365 switched to hosting SMARTprepay with a company based in Manchester called Awareness Software Limited.

81. A further technical issue was that GLOBAL-365 was not able to integrate with Secure Meters equipment. Secure Meters manufactured a type of SMETS1 meter which was used by a significant number of tier 3 energy suppliers. That technical issue did limit some of GLOBAL-365's marketing opportunities.

The Marketing of SMARTprepay

82. PayPoint produced an analysis of GLOBAL-365's marketing of SMARTprepay which was not directly challenged by GLOBAL-365. In essence, as regards tier 3, this showed as follows.

- (1) Mr Wilson approached 59 tier 3 suppliers of which PayPoint had contracted with 17, of which seven were for non-OTC services. Accordingly, many suppliers that were approached by GLOBAL-365 could not have been constrained by any PayPoint exclusivity clauses.
- (2) Although Mr Wilson identified 10 suppliers whom he understood could not contract with GLOBAL-365 because of exclusivity clauses, an analysis showed that four never contracted with PayPoint, one did so after the approach from GLOBAL-365 and the remaining five contracted before GLOBAL-365 had a viable product and those contracts came up for renewal during GLOBAL-365's window of opportunity.
- (3) As regards some seven suppliers that were approached by GLOBAL-365 which could be regarded as large tier 3 or small tier 2, a considerable majority had contracts with PayPoint (not all of which covered non-OTC) with exclusivity clauses. All had, however, the opportunity to contract with GLOBAL-365 at some stage during GLOBAL-365's window of opportunity but only one, Toto, actually did so. Toto having

previously contracted with PayPoint. Moreover, in respect of only one, Robin Hood, was there objective evidence of a clear statement that the refusal to proceed with GLOBAL-365 was due to a PayPoint exclusivity clause. The reasons for the others not contacting with GLOBAL-365 were not always clear but, at least in some cases, appeared to reflect concerns around the risk associated with a new product.

### Minibems

83. GLOBAL-365 began to market SMARTprepay to energy suppliers as early as 2015 and was contracted to “go live” with its first customer Minibems in January 2018. Minibems is a supplier of heating equipment and meters to residential housing developments. GLOBAL-365 was contracted as the prepayment service provider for heating meters installed and operated by Minibems in a housing project in Glasgow consisting of 350 flats.
84. Before its launch with Minibems, internal GLOBAL-365 email correspondence indicated that difficulties were being experienced in relation to SMARTprepay’s development. On 24 November 2017, a meeting was held between Mr Wilson, Mr Ransom, Mr Munt and GLOBAL-365’s Chief Operating Officer, Mr Daron Davidson. Mr Davidson recorded the following in emails sent following the meeting:
- “Clearly we have some way to go in terms of being able to offer a “working” solution to a client. My main concern here is that I don’t believe that we are all up to speed in terms of what is required to have a fully working solution. I am hopeful that the meeting on Thursday will produce an outcome that will ensure that we are all aware of what is required and can then priorities accordingly.”
- “As discussed on Friday – my perception was that we have a “working” system and we don’t more importantly we don’t know when we will have one – I’m not looking to assign blame or justification as to why we haven’t – we can have a drains up if you think it beneficial at a later date.”
85. On 17 December 2017, Mr Wilson sought clarity “about what exactly will be available” from 1 January 2018, when GLOBAL-265 was due to launch with Minibems. An internal review was held. Among the main findings of the review that were reported in an email that was sent by Mr Wilson on 29 December 2017 were:

- “• release dates have been repeatedly missed
- the original design concept seems to have been a simple web application with little thought given to scalability, resilience or system monitoring”
- at the beginning of their involvement Mobetrics and SMSJuice did well to pick up the Joshika codebase quickly in the absence of adequate design documentation

...

As a result of these findings I have decided that going forward and **with immediate effect** there will be significant changes to how our software is developed.”

86. Mr Wilson accordingly directed that work should start immediately in relation to developing a new “second generation” platform (**2GP**) with “minimal further expenditure” to be incurred on the existing “first generation” platform (**1GP**).
87. A result of minimising further expenditure on 1GP was that the limitations remained in respect of its functionality. For example, in serving Minibems, GLOBAL-365 had to prepare reconciliations and reports manually.
88. As a result of the difficulties that emerged with 1GP, the Minibems launch was delayed until 4 February 2018 notwithstanding the fact that only very low transaction volumes were to be involved.
89. Even after the launch, it was apparent that numerous issues existed in relation to 1GP. In an email to Mr Ransom dated 7 February 2018, Mr Davidson considered that GLOBAL-365 was “in a difficult place at the moment as the platform has issues”, and that Mr. Ransom had to focus on “priorities” given that there were “a lot of things that need fixing”. An example was that Minibems was unable to use SMARTprepay to locate a customer account number on the system so the only way to locate the account number was manually to find the customer name using an exported list of SMARTprepay customers.
90. On 4 March 2018, Mr Davidson sent an email to Mr Ransom, copying Mr Alan Allman (who had been appointed as GLOBAL-365’s Chief Compliance Officer), giving his assessment as to GLOBAL-365’s situation at the time:

“Within a couple of weeks of me starting full time it became very apparent to me that the platform was not ready for “public access” in terms of the usability and some of the core functions that were required (funds splitting). The release to Minibems was testimony to that, as this highlighted further issues when the client highlighted we had a lack of basic functionality to perform such tasks as searching, reporting to name a few. The solution has been to have work arounds and plasters while further development has been done.

...

We have spent circa £190k on the development of the platform so far (over the last 15 months or so) .. pause and reflect on that .. we can no longer continue to pump further unspecified costs into “software” product development when we are seeing such poor quality in terms of the product and delivery.

...

While I appreciate your comment yesterday about you needing to spend circa 3.5 days per week on Global work and this impacting RRs revenue - I suggest that this is reflected on as to why, how much of this time is fire fighting or maintaining plasters due to the lack of functional development and providing inaccurate or incomplete information.

We need to have more control of expenditure, we cannot put to market a product in the same way that we did for Minibems - I trust that version released on Tuesday will resolve this and will be “the platform is ready” that we anticipated on the 1st November.”

91. It appeared that one result of the difficulties which GLOBAL-365 had had with the Minibems launch was that overall responsibility for the development of SMARTprepay was taken away from Mr Ransom and passed to Mr Allman. These difficulties with SMARTprepay appear to have persisted beyond March 2018 and included Mr Davidson continuing to manually process invoices for Minibems and encountering errors in the reconciliation of transactions.
92. Stepping back from detail of the evidence we have considered, it is clear that during this period GLOBAL-365 was experiencing a variety of technical issues in getting the SMARTprepay platform ready and appeared to lack the resources and technical expertise to deal with them.

#### The evidence of Mr Wilson

93. When confronted in cross-examination with the contemporaneous documentary evidence concerning the difficulties which GLOBAL-365 had apparently

encountered in late 2017 and early 2018, Mr Wilson's position is best summarised as being one of denial.

94. Mr Wilson's view of the email from Mr Davidson in late November 2017 (quoted to in §84 above) is illustrative. When asked about this email, Mr Wilson's position was that, contrary to the plain meaning of the email, Mr Davidson did think that GLOBAL-365 had a working system and that the issues they were experiencing related only to the user interface. Mr Wilson then ascribed the obvious difficulties with the remainder of the email which arose his interpretation to the fact that Mr Davidson was dyslexic. Despite being questioned on his interpretation of this email for some time, Mr Wilson entrenched his position. Whether considering just this email or when considered in the broader context of the contemporaneous documentation, we find Mr Wilson's evidence in respect of this email not to be credible.
95. When taken to his own email dated 29 December 2017 (quoted in §85 above), Mr Wilson refused to accept that, at the time, he had concluded that the development of SMARTprepay had gone wrong. He was only prepared to accept that things had not gone as well as they should have done. Mr Wilson maintained that he was dissatisfied with how the software was developed, not what was being developed. This distinction did not sit comfortably with the facts disclosed by the evidence.
96. More generally, Mr Wilson's evidence in respect of these emails highlights many of the difficulties which the Tribunal had with his evidence particularly on the technical aspects of SMARTprepay. Mr Wilson adopted an almost uniformly positive outlook when shown documents which, on their face, made clear that GLOBAL-365 were experiencing difficulties in developing SMARTprepay and developing it to the point when it could reliably be used by energy suppliers at scale. At points, Mr Wilson would seek refuge in the fact that he was a salesman, did not understand the technology and likened receiving technical emails to receiving emails in Russian: all of which would rather undermine his ability to form a mature and balanced view on the nature and extent of the technical issues.

97. Having carefully considered his evidence in the round, we conclude that Mr Wilson's evidence was strongly affected by his personal closeness to the issues and his general mindset. He was undoubtedly strongly influenced by his genuinely held belief in both GLOBAL-365 and the SMARTprepay product. However, he lacked a detailed or coherent recollection of the events which underlay the contemporaneous documentation which was put to him in the course of lengthy two-and-a-half-day cross-examination. He certainly was not capable of addressing technical issues before us. Moreover, Mr Wilson candidly admitted, on a number of occasions, to having no independent memory of what was being put to him. Unsurprisingly perhaps in these circumstances, his answers often digressed and were somewhat wandering. On occasion, he appeared to struggle to answer straightforward questions.
98. Against this background, it was both striking and surprising that, from time to time during the course of his evidence, Mr Wilson also produced points of detail which were unsupported by any contemporaneous evidence. One notable example of this concerned the processing limits which GLOBAL-365 encountered with 1GP. As noted above, following the difficulties which were encountered with 1GP both before and after the Minibems launch, it was necessary for GLOBAL-365 to carry out certain tasks on behalf of its client manually (see §91 above). When it was suggested to Mr Wilson, in cross-examination, that this would necessarily impose a limit on how many transactions and customers GLOBAL-365 could deal with, he volunteered that this limitation would only have been a problem if they had been dealing with more than 10,000 transactions a day. Later in his evidence this became 10,000 transactions per client per day. It was entirely unclear from where, or on what basis Mr Wilson had derived this detail.
99. In light of our assessment of Mr Wilson as a witness, the Tribunal finds itself unable to attach any weight to his evidence where it is not corroborated by contemporaneous documentation.

(c) *SMARTprepay 2GP*

100. GLOBAL-365's second-generation product went live from 2019, after development throughout 2018. From the evidence, it appeared that:
- (1) it was only in December 2018, following the transfer of transaction processing from 1GP to 2GP, that GLOBAL-365 was in a position to begin processing for new clients (leaving aside issues as to the capacity of the system); and
  - (2) this delay was caused in part by difficulties which GLOBAL-365 experienced in relation to integrating with a Barclays payment system, Pingit, during the course of 2018. (Pingit was one of the payment mechanisms used by SMARTprepay. It continued to cause problems for GLOBAL-365 and was discontinued by Barclays in 2021.)
101. During the course of 2018, the only additional customer for whom GLOBAL-365 processed transactions was another "secondary market" energy supplier, Meterix. Meterix operates an energy payment scheme which resells and meters energy for landlords of multiple occupancy buildings and housing associations. Meterix operated at an even smaller scale than Minibems. GLOBAL-365 processed the transactions generated by Meterix customers using 1GP. Thus, by the end of 2018, GLOBAL-365 had processed no transactions for any of its target tier 3 energy suppliers and only a very modest number of transactions for these two secondary energy suppliers. We did not have data for GLOBAL-365's 2018 revenue but, for comparison, its 2019 transaction fee revenue from Minibems was £1,371.10 and Meterix was £279.75, indicating the very low number of transactions being processed.
102. GLOBAL-365 did run a pilot scheme for Opus Energy between September 2018 and November 2018. It appeared from Mr Wilson's evidence that this was a very limited trial involving five Opus Energy employees, and at the conclusion of the pilot scheme Opus Energy apparently opted not to pursue the installation of any smart meters and thus had no need for a non-OTC service.

103. GLOBAL-365 subsequently concluded contracts for SMARTprepay with 16 energy suppliers. 15 of those suppliers fell within tier 3: Ecotricity; Future Energy; GnERGY; Go Effortless Energy; HUB Energy; Logicor; Opus; PFP Energy; Pure Planet; Rebel Energy; Solarplicity; Symbio Energy; Toto Energy; Yu Energy; and Zog Energy. One, People’s Energy, fell within GLOBAL-365’s definition of tier 2 (although not PayPoint’s – the dividing line is not precise). Notably, Toto Energy had previously been in a contract with PayPoint. Of these 16 suppliers, 11 had gone out of business by 2021.<sup>1</sup>
104. To date, GLOBAL-365 has only processed transactions for the following energy suppliers commercially (as opposed to system tests, either with the supplier’s own staff, or otherwise):
- (1) **Solarplicity:** from February 2019. SMARTprepay processed very low volumes of top-ups for approximately 28 customers until October 2019. Solarplicity ceased trading in March 2020
  - (2) **Pure Planet:** from 2019 until it ceased trading in December 2021. Pure Planet began testing in May 2019 but accounts show GLOBAL-365 only received transaction fee revenue from Pure Planet for a single month in May 2021, which may have represented test transactions.
  - (3) **Yu Energy:** from 2019 until 2024 when Yu Energy switched to PayPoint. Yu Energy began testing SMARTprepay in 2019 but GLOBAL-365 did not begin processing transactions with Yu Energy until 2021 with very low volumes. In 2022 its volumes increased modestly before roughly trebling in 2023.
105. GLOBAL-365’s accounts for 2019, 2020 and 2021 show revenue from transaction processing at levels below £2000 a year. GLOBAL-365 did also derive a small amount of revenue from account opening, account management and set up. GLOBAL-365's level of transaction income suggests that transaction

---

<sup>1</sup> Future Energy (2018); Toto Energy (2019); Solarplicity (2020); GnEnergy (2020); Go Effortless Energy (2020); HUB Energy (2021); People’s Energy (2021); PFP Energy (2021); Pure Planet (2021); Symbio Energy (2021); and Zog Energy (2021).

volumes were very low from those tier 3 suppliers with whom GLOBAL-365 did actually both contract and also enter into an operational relationship in the first three years. Volumes did increase a little in 2022 as a result of the Yu Energy contract, which saw some growth.

106. However, in relation to Yu Energy, it appeared from contemporaneous documents that the increase in transactions caused operational problems for the SMARTprepay system. In particular, the increase in the volume of data which the platform was being required to handle caused such failures as: pages not loading; report failures; and, perhaps most importantly, failed top-up requests. This problem appears to have come to a head in June 2023, during which month SMARTprepay handled approximately 3,300 transactions. When this issue was raised with him, at the time, Mr Wilson described the situation as:

“The volume requirement is known to everyone and hasn’t changed from day 1 so the system not being able to cope with the relatively miniscule amounts of data generated by Yu Energy is very worrying when we should be able to take on British Gas’s 1m prepay customers without any problem.”

Again, from contemporaneous documents, it appeared that the advice Mr Wilson had received from those working on the development of SMARTprepay was that, in an ideal world, each module of the system would be re-built with the volume requirement in mind. However, the reality was, without time and resource, it would be necessary to patch and repair as best they could.

*(d) Epay*

107. GLOBAL-365 partnered with Epay, to provide an OTC retailer network for SMARTprepay. Epay bore the cost of integration with GLOBAL-365’s systems.
108. Epay was an international, leading, full-service provider of prepayment and payment processing services, well-resourced with good experience and skills in the prepayment area. Epay had a network of 32,000 outlets across Great Britain. That network was driven by its other prepay products, particularly mobile phone top-up services. That network consisted of independent retailers (i.e.

convenience stores) and, as to the vast majority, major national supermarket and retail chains (such as Asda, Tesco, Boots, Currys, Poundland and WH Smiths).

109. Epay had a 2014 (non-exclusive) contract with E.On to offer smart meter top-up services. This was its only energy prepayment offering.
110. Epay's independent retailer numbers were in decline (some 3,700 stores in 2014 to some 1,000 today). Epay attributed this, in part to the lack of a wider energy top-up offering which it had not been able to deliver. Epay decided strategically to focus its business on the national retailer chains. Some of those retailers already hosted PayPoint services. Epay considered it had a competitive advantage over PayPoint because energy prepayment capability could easily be loaded on the existing prepayment hardware that Epay had installed in its stores, whereas PayPoint required a separate, and additional, terminal to be added. The smart meter technology was closely related to mobile phone top-ups. Epay was, therefore, interested in expanding its prepayment services to include more energy suppliers to provide a stronger proposition to the national chains. Epay hoped that GLOBAL-365's SMARTprepay product would attract those energy suppliers to the Epay OTC offering for that purpose.
111. In partnering with Epay, GLOBAL-365 expected to have access to its full OTC network of 32,000 outlets across Great Britain. GLOBAL-365 could, thereby, offer an OTC service to energy suppliers together with its non-OTC product.
112. However, in practice, the national retailers that made up a large part of Epay's network were reluctant to become involved in energy top-ups. The reasons appeared to include the newness of smart meters, Epay not having a sufficiently good energy supply base and the available commission structures not being sufficiently attractive.
113. Accordingly, despite the (then) promise of GLOBAL-365's additional energy suppliers, the national retailers were not generally interested in energy top-up business. SMARTprepay was ultimately only available through approximately 2,000 independent retailers in the Epay network. This did not leave a GLOBAL-

365/Epay combination looking competitive to suppliers as regards the OTC market in comparison with PayPoint, Payzone or the Post Office.

114. Epay's conclusion, after the event, was that PayPoint's exclusivity clauses with retail chains inhibited their interest in adopting Epay's energy offering. However, GLOBAL-365 presented no specific evidence of that being the reason for not including an energy prepayment capability. It did present evidence of PayPoint seeking to enforce its retailer exclusivities against retailers considering the Epay option, albeit that the extent and effect of that enforcement activity was contested.

**(5) Complaint to Ofgem**

115. In the period 2015–2018, GLOBAL-365 made efforts to market the prospective SMARTprepay product to larger suppliers including both the Big Six and tier 2 suppliers. However, GLOBAL-365 did not succeed in securing contracts with any of these larger suppliers.
116. During the course of such marketing discussions with a number of energy suppliers, GLOBAL-365 gained the impression that at least some energy suppliers were, or were claiming that they were, unable to contract with it owing to exclusive purchase arrangements with PayPoint. This prompted GLOBAL-365 to raise a complaint to Ofgem in January 2017.
117. That complaint covered PayPoint's energy supplier exclusivity obligations, retail non-compete obligations and bundled pricing arrangements. Ofgem opened an investigation into PayPoint's conduct in August 2017, following which PayPoint offered commitments to Ofgem to seek to resolve the investigation.
118. As noted above at §19, Ofgem issued an SO on 29 September 2020 outlining its provisional findings. On August 2021, Ofgem published a notice of intention to accept PayPoint's most recently offered set of commitments which included:

- (1) within 30 days of Ofgem's decision to accept the relevant commitments; to seek to amend the terms of its contracts with energy suppliers concerning OTC prepayment services to remove any exclusivity obligations (without any knock-on effect on pricing); and, pending such removal, to notify those companies that PayPoint would not enforce the said obligations;
- (2) for the next five years, not to enter into agreements with energy suppliers in relation to OTC prepayment services for energy containing any such exclusivity terms;
- (3) within 30 days of Ofgem's decision, to seek to amend the terms of its contracts with energy suppliers concerning non-OTC energy prepayment services to remove any exclusivity obligations (without any knock-on effect on pricing); and, pending such removal, to notify those companies that PayPoint would not enforce the said obligations;
- (4) where both OTC and non-OTC prepayment services were provided under the same contract, to seek to agree with the counterparty energy suppliers to amend the contracts to include early termination rights in relation to non-OTC prepayment services;
- (5) for the next five years, not to enter into agreements with energy suppliers (i) in relation to non-OTC payments containing any exclusivity terms or (ii) governing both OTC and non-OTC prepayments;
- (6) within 30 days of Ofgem's decision, to seek to amend the terms of its contracts with retailers in relation to OTC energy prepayment services to remove any retail non-compete obligations (without any knock-on effect on pricing); and, pending such removal, to notify the retailers that PayPoint would not enforce the said obligations; and
- (7) for the next five years, not to enter into new contracts with retailers containing any such non-compete obligations.

119. In addition to the above commitments concerning its future conduct, PayPoint offered to make a voluntary payment of £12.5 million into a Voluntary Redress Scheme.
120. By the Commitments Decision on 23 November 2021, Ofgem announced that it had accepted PayPoint’s commitments (both in relation to its conduct and in relation to the voluntary payment), and as a result, had ended its investigation.
121. GLOBAL-365, submitted that Ofgem’s analysis was correct and that the Tribunal ought to reach the same conclusions. PayPoint, on the other hand, submitted that it cannot be inferred that, had Ofgem concluded its investigation, it would have found an infringement and very little weight could be attributed to its analysis. Ofgem had only carried out a preliminary analysis; the process had not reached the point at which PayPoint would have submitted its defence and the adversarial process had not been concluded. Rather, it was submitted that PayPoint had agreed to a pragmatic resolution of the process in order to avoid the distraction, cost and wider consequences of dealing with an ongoing Ofgem investigation. Further, as set out in §19, PayPoint entered into the commitments without making any admissions, and the Commitments Decision did not contain any finding on liability.
122. As a result, there has, as yet, been no finding of infringement by any competition authority. Accordingly, we do not even enter into the territory covered by the Supreme Court in *Evans v Barclays Bank* [2025] UKSC 48; [2026] Bus LR 328 on 18 December 2025 or in *Consumer Association v Qualcomm Inc* [2023] CAT 9 in relation to the rule in *Hollington v Hewthorn*. In any event, neither the SO nor the Commitments Decision are matters that we have relied upon in this judgment.
123. It is notable, however, that both parties have, to some extent, relied on the evidence which Ofgem gathered during the course of its investigations. Furthermore, neither party sought to object to any evidence led from the Ofgem investigation on any ground. Nevertheless, PayPoint did submit that we ought to treat this evidence with a degree of care where it was solely untested hearsay. In oral closings, leading counsel for PayPoint also emphasised that it was

important for the Tribunal to have regard to the context in which evidence had been submitted to Ofgem by energy suppliers. Ofgem had been conducting an investigation in terms of the CA98 into exclusivity arrangements to which a number of those suppliers were party. On this basis, the implication, which was unsupported by any evidence or further specification, seemed to be that any evidence submitted might be in some way self-serving.

124. In these circumstances and as is further developed below, we have considered the evidence gathered during the Ofgem investigation on which each of the parties has relied. Clearly, that material was not tested before us and is, formally, nothing more than hearsay. Whilst considering this material, we have given it relatively little weight in our consideration of the issues before us.

### **C. EXPERT EVIDENCE FROM THE COMPETITION EXPERTS**

#### **(1) Market definition**

##### ***(a) OTC***

125. There was significant common ground in the expert evidence between Mr Hughes, for GLOBAL-365, and Dr Majumdar, for PayPoint, on market definition:

- (1) the relevant OTC market was the market for the supply of OTC prepayment services to energy suppliers in Great Britain;
- (2) the OTC market is a two-sided market with the energy supplier on one side of the market and the retailers on the other;
- (3) there are network effects in the relevant OTC market which mean that the value of the services offered to an energy supplier by a PSP is affected by the extent of the coverage of that PSP's network of retailers;
- (4) that the conduct on the retailer side of the OTC market is relevant to the assessment of foreclosure on the energy supplier market; and

- (5) the relevant market on the retail side comprises the supply of commission (and footfall) generating OTC transactions.
126. Dr Majumdar considered that the extent to which PayPoint, and its competitors, could offer retailers other footfall generating services as a substitute for energy prepayment transactions was relevant to the question of whether the terms of PayPoint's contracts with energy suppliers prevented its competitors from maintaining or expanding their retail networks. For his part, Mr Hughes did not consider that it was necessary to define the retailer side of the market in order properly to assess PayPoint's conduct. In his view, it was sufficient to consider the extent to which indirect network effects arising from the retailer side of the market affected competition in the market for OTC energy prepayment services.
- (b) Non-OTC*
127. The parties' experts agreed that the relevant non-OTC market was the market for non-OTC energy prepayment services to energy suppliers in Great Britain .
128. However, the parties' experts did not agree in one respect. Dr Majumdar suggested the relevant non-OTC market should include self-supply of non-OTC services by energy retailers. Self-supply of non-OTC services had become a major feature of the market. Mr Hughes, on the other hand, considered that in-house services should not be included within the relevant non-OTC market. Mr Hughes recognised that the evidence was mixed as a result of some energy suppliers clearly using in-house supply. However, he contended that those suppliers that did not switch would face costs in doing so including the fact that PayPoint's conduct had restricted the ability for third parties to enter the market.
129. In the event, this would not appear to be a dispute of much significance. In closing submissions, GLOBAL-365 confirmed its case was not based on PayPoint's dominance in the non-OTC market but on its ability to leverage its dominance from the OTC market onto the non-OTC market. Accordingly, the Tribunal is not required to determine whether PayPoint held a dominant position in the non-OTC market.

## (2) Dominance

### (a) Framework and approach

130. Based on the case being advanced at trial by GLOBAL-365, a critical question was whether PayPoint was dominant on the OTC market taking account of its position both with energy suppliers and the size and relevance to, or convenience for, OTC energy prepayment transactions of its retailer network. It was common ground that this required analysis of the strength of (a) existing competition; (b) potential competition; and (c) countervailing buyer power.
131. The experts agreed that the question of dominance could usefully be considered in two periods: before and after the PO/PZ merger (which was cleared by the CMA in October 2018).
132. The experts also agreed that PayPoint's market share represented the starting point for the assessment of dominance but, thereafter, had slightly different views. Mr Hughes considered that PayPoint's high market shares, consistently above 50%, resulted in a presumption of a dominant position on the relevant market. However, he did not conclude that PayPoint was dominant solely on this basis. He had considered all market characteristics, in line with the Office of Fair Trading's Guidance on Market Definition.
133. Dr Majumdar, on the other hand, did not accept this presumption as a matter of economics. Dr Majumdar considered that whilst representing the starting point for the assessment of dominance, market shares are not determinative, in particular, where, as here, market shares may disguise effective competition at the bidding stage in a tender market which prevent dominance.
134. In this regard, the experts agreed that, to the extent OTC services are procured through periodic tenders, an important issue when assessing market power is whether a PSP faced sufficient competitive constraints at the tendering or negotiation stage of contracting (including retendering and renegotiating).

135. Dr Majumdar noted that the OTC market was characterised by: (i) the Big Six accounting for the majority of transactions; (ii) long term contracts; and (iii) contracts awarded by formal or informal tender processes. The result of these factors was that winning a contract with a Big Six energy supplier could result in a substantial gain in (or retention of) market share for the successful PSP which would then persist for the duration of the contract. He considered that price competition takes place at the bidding stage. A PSP with a high market share still faces competitive pressure from other bidders, and the energy companies have countervailing buyer power. In such circumstances, a firm with a persistently high market share may have obtained and maintained that share by offering competitive terms at tender stage.
136. Mr Hughes agreed that a bargaining framework analysis may be used to assess the competitive constraints on energy suppliers' tendering and/or renegotiations for the provision of payment services. However, he disagreed with both Mr Majumdar's use of this analysis and his conclusions in this case. In particular, the mere existence of tenders and negotiations conducted by suppliers offering large volumes of transactions did not mean that energy suppliers had countervailing buyer power as that, in practice, depended on their ability to switch to credible alternatives. Mr Hughes considered that suppliers could not easily switch, not least because of their commercial and regulatory need for a good convenience coverage at the retail unit level which only PayPoint (in isolation) had. This was underpinned by the fact that PayPoint had maintained its high market share for a significant period before the PO/PZ merger.

***(b) PayPoint's dominance from 2007 to 2018***

137. There was no dispute that, from 2009 until 2018, PayPoint's share of the OTC energy prepayment market was consistently higher than 77%, peaking around 88% in 2018.
138. Mr Hughes was of the view that PayPoint was dominant in the OTC market during this period prior to the PO/PZ merger. To support this opinion, Mr Hughes relied on three related points to suggest that, during this period, there

was no credible alternative to PayPoint. In essence, there were three reasons why Payzone could not be regarded as a credible alternative:

- (1) Payzone bid for but did not win any tenders from Big Six energy suppliers between 2012 and 2017.
- (2) Payzone's network declined between 2009 and 2018 from over 15,000 locations to around 10,000.
- (3) Although Payzone was appointed alongside the Post Office and PayPoint on a non-exclusive basis, when this occurred, Payzone's actual share of transactions processed was small by comparison with PayPoint's share.

139. Dr Majumdar's view was that the evidence as to whether PayPoint had substantial market power in the first period was mixed and not conclusive. He contended that none of the points raised by Mr Hughes addressed the competitive constraint which existed at the tender stage. This was because energy suppliers had, or at least, critically (and he placed some weight on this), were perceived by PayPoint to have, the credible threat of contracting with Payzone on an exclusive basis. In Dr Majumdar's view, the Big Six used the credible threat of contracting with Payzone on the basis of "convenience exclusivity" to put competitive pressure on PayPoint.

140. In addition, even before the PO/PZ merger, Payzone's retailer network in combination with the Post Office did provide sufficient coverage to make it a suitable alternative. Moreover, Payzone had opportunities to add more retailers to that network should it so wish. Dr Majumdar was of the view that the fact that the subsequent PO/PZ merger created a stronger competitor did not mean that PayPoint was dominant before the merger. Rather, it merely showed what a powerful combination the two organisations formed when cooperating on a contractual basis. This militated against the conclusion that PayPoint was dominant in this earlier period.

141. Dr Majumdar relied further on a pricing analysis which did not reveal an upward trend on PayPoint's prices for the Big Six as a whole across the period 2009 to 2018, even in nominal terms. Dr Majumdar considered that this was of significance given that the quality of PayPoint's offer was increasing during this period. In his view, this evidence was consistent with the conclusion that there was no decline in competitive pressure from the Big Six across the period notwithstanding both the actual decline in the size of Payzone's network and the fact that it did not win any contracts on a convenience exclusivity basis until 2019 after the PO/PZ merger.

*(c) OTC post-2018*

142. The experts agreed that PayPoint's share of the OTC energy prepayment market fell in 2020 as a result of the loss of two major contracts. First, PO/PZ was awarded the Scottish Power contract for smart OTC services in March 2019. Second, British Gas awarded its OTC contract to PO/PZ in June 2019.

143. However, there remained a dispute between the experts both as to how rapidly PayPoint's market share fell following the PO/PZ merger and whether PayPoint was dominant in this second period. Dr Majumdar's view was that PayPoint's market share fell "significantly and quickly" in and after 2019. He was also of the view that during this period PayPoint did not have a sufficiently high degree of market power to be considered to be dominant. By contrast, Mr Hughes considered that PayPoint was likely to have remained dominant at least until the Commitments Decision in November 2021. Further, at that point, there was a possibility, in Mr Hughes' opinion, that PayPoint was jointly dominant with the PO/PZ merged entity.

144. We do not need to consider this issue of joint dominance any further as GLOBAL-365 counsel did not rely upon it in final submissions. Suffice it to say that Dr Majumdar did not agree. He pointed out that this notion rests on an allegation of anti-competitive coordination between the two firms which, as Mr Hughes accepted, was not supported by any evidence.

**(d) Non-OTC**

145. As we have noted above, Mr Hughes and Dr Majumdar did not agree on whether the relevant non-OTC market included the self-supply of non-OTC services by energy suppliers. As a consequence, the two experts did not agree as to PayPoint's position in that market. However, neither expert actually contended that PayPoint held a dominant position on the non-OTC market.
146. Mr Hughes identified a number of factors consistent with PayPoint being dominant on the non-OTC prepayment market but he did not reach a conclusion on this point. For his part, Dr Majumdar's view was that the evidence suggested that PayPoint did not have any particular market power in the non-OTC market either when it entered the market in 2015 by supplying Utilita or at any point thereafter.
147. In any event, in light of the parties' positions in submissions, we need not consider this further. GLOBAL-365's case was based not on PayPoint's dominance in the non-OTC energy prepayment market, but on its ability to leverage its dominance from the OTC market onto the non-OTC market.

**(3) Abuse**

148. As a starting point, the experts were agreed that the assessment of whether PayPoint's abusive conduct entailed an assessment of whether that conduct foreclosed actual and/or potential competitors. However, they disagreed on the criteria required to determine anti-competitive foreclosure and placed emphasis on different factors.

**(a) OTC**

149. Mr Hughes' view was that PayPoint conceived and successfully implemented an exclusionary strategy that foreclosed new entry onto the OTC and non-OTC energy prepayment markets. That exclusionary strategy relied in particular on:

- (1) exclusive purchase obligations (including convenience exclusivity) in PayPoint's contracts for OTC prepayment services;
- (2) exclusivity-based pricing in PayPoint's contracts for OTC prepayment services;
- (3) exclusivity provisions in PayPoint's contracts with agent retailers; and
- (4) exclusive purchase obligations in PayPoint's non-OTC contracts with energy suppliers (see §160 below).

150. In Mr Hughes' view, exclusive purchasing obligations were, as a matter of principle, always liable to produce exclusionary effects. However, in the present case, PayPoint's exclusive purchasing obligations for OTC prepayment services were not merely capable, in principle, of having exclusionary effect but actually had had such effects. PayPoint's exclusive purchasing obligations covered the vast majority of energy suppliers (by number of suppliers). Mr Hughes also relied on a number of responses by energy suppliers to Ofgem's Requests for Information which stated that they were dissatisfied with PayPoint's exclusivity provisions and would have been interested in multi-sourcing OTC prepayment services from other providers.

151. These exclusivity provisions (and exclusivity-based pricing) were being implemented in relation to the OTC market which, the experts agreed, is a two-sided market, characterised by network effects. In such a two-sided market it was essential to take account of the impact of the exclusivity not only on the side of the market where it is being implemented, but also on the other side of the market. Exclusivity not only denies competitors access on one side of the market, but by doing so, also renders those competitors less attractive to customers on the other side of the market. A significant number of energy suppliers were subject to exclusive purchase obligations to PayPoint. This prevented competing PSPs from winning the business of those energy suppliers and also resulted in them being less attractive to retailers. Similarly, as a result of PayPoint's retailer exclusivity obligations, competing PSPs were denied the

opportunity to construct a strong retail network and were therefore rendered less attractive to energy suppliers.

152. For his part, Dr Majumdar considered that exclusive purchasing was not liable to give rise to foreclosure because winner-takes-all competition between OTC providers could intensify “quality adjusted price competition” and provide better outcomes than multi-sourcing of OTC prepayment services. He argued that the existence of exclusive purchasing agreements in the market has generated pro-competitive outcomes: it has enabled energy suppliers to use highly competitive bidding processes to secure improved terms. In Dr Majumdar’s view, the reasons for this include: (i) exclusivity justifying the payment of lower commission to retailers on the basis that the retailers will obtain greater footfall benefits; (ii) exclusivity enabling the PSP to spread its costs over higher transaction volumes; and (iii) by inviting offers to supply it on an exclusive basis, the energy supplier can exert the greatest amount of buyer power in negotiations.
153. In addition, Dr Majumdar relied on an application of an “as effective competitor test” (AECT). This suggested that an “as effective competitor” could have profitably matched or beaten the prices charged by PayPoint under its convenience exclusivity arrangements with British Gas, Scottish Power, SSE and Utilita. In this regard, Dr Majumdar pointed to the evidence in relation to Payzone. Ultimately, an “as efficient competitor” had emerged in the form of PO/PZ, notwithstanding the terms of PayPoint’s contracts with energy suppliers and retailers. The impugned terms had not prevented an as efficient rival from obtaining access to energy suppliers because such a rival could have won the contract in the first place.
154. Turning to the retailer side of the OTC market, Dr Majumdar maintained that PayPoint’s exclusivity for OTC energy prepayment services with some 28,000 retail outlets cannot have had exclusionary effect because of the number of retailers who were unrelated to PayPoint. Dr Majumdar had calculated that, in 2017, there were approximately 66,000 retailers identified as being suitable for offering OTC energy prepayment services. This number also did not take account of other types of stores which were included in Epay’s network. All in

all, this meant that there were a large number of retailers who had not contracted with PayPoint and were available to a rival PSP. There were also a considerable number of new and evidently suitable outlets that became available each year up to 2016 based on the numbers of outlets PayPoint had been able to add to its network during this period. There was, however, no objective evidence before us as to how to assess the relative quality (in the sense of attractiveness to energy suppliers for OTC transactions) of the networks, beyond the general points that the Post Office, for legacy reasons, had a very convenient network and PayPoint had invested considerable time and money in creating an attractive network.

155. Ultimately, it appeared to us that the key differences in the views of the experts can be summarised as follows:

- (1) whether, in this case, there was sufficiently strong “winner-takes-all” competition that generated outcomes at least as competitive as multi-homing (i.e. where energy suppliers and retailers use multiple OTC PPS providers);
- (2) the relevance of an AECT test (and, if relevant, how it should be formulated and applied) for the assessment of foreclosure in this case;
- (3) the issues of (i) whether PayPoint’s contracts with energy suppliers came up for retender/renegotiation in a way that permitted rivals to make credible bids for energy suppliers; and (ii) whether there were sufficient opportunities for rivals to expand their network coverage by contracting with agent retailers that were unaffected by PayPoint’s contracts; and
- (4) whether PayPoint’s conduct in fact foreclosed any of (i) Payzone; (ii) the Post Office; (iii) Epay; (iv) GLOBAL-365; and (iv) other potential entrants; from the OTC market on either or both the energy supplier side and agent retailer side.

*(b) Non-OTC*

156. As noted above, GLOBAL-365's case was based not on PayPoint's dominance in the non-OTC energy prepayment market, but on its ability to leverage its dominance from the OTC market into the non-OTC market.
157. Against this background, the experts agreed that those energy suppliers that did out-source would be likely to use a single source for their non-OTC payment services (for cost/integration reasons). In addition, the experts agreed the (relatively evident) point that PayPoint was less likely to have been able to leverage any market power it might have in relation to the energy suppliers which self-supplied non-OTC services from inception.
158. However, the experts disagreed on both whether there were, in fact, any mechanisms for PayPoint to obtain leverage in the non-OTC market and also on which types of mechanisms and effects would constitute anticompetitive leveraging from an economic perspective.
159. The experts also disagreed on whether PayPoint foreclosed either energy suppliers from switching to self-provision or other PSPs from contesting the market.
160. Mr Hughes argued that PayPoint's non-compete clauses foreclosed competition in the non-OTC market by preventing energy suppliers from switching to self-supply and substantially harmed competition in the non-OTC market as a result. Similarly, he contended that PayPoint's conduct restricted energy suppliers from switching to other third-party PSPs. Mr Hughes' position was that, unlike the OTC agreements, which typically carved out the Post Office network from exclusivity, the non-OTC agreements typically did not allow energy suppliers to use any other provider.
161. He considered PayPoint leveraged its position in the OTC market to foreclose competition in the non-OTC market by securing exclusionary terms in its agreements, including exclusivity provisions, non-compete clauses and bundled pricing arrangements. Mr Hughes did not consider there was any requirement

for PayPoint to have market power in respect of the non-OTC prepayment services for competition to be distorted in non-OTC services in this way.

162. As noted above, Dr Majumdar did not accept Mr Hughes' starting point. He did not agree that PayPoint had significant market power in the non-OTC market when agreeing contractual terms with an energy supplier. Therefore, in his view, the agreed terms did not reflect the exercise of market power or give rise to anti-competitive foreclosure. In addition, energy suppliers typically contracted with only one PSP for their non-OTC requirements and exclusivity in the non-OTC market was therefore to be expected. It was not a mechanism for anti-competitive foreclosure.
163. The majority of energy suppliers (by transaction volume) self-supply or self-supplied non-OTC at some point. Therefore, PayPoint did not leverage from its OTC position into the non-OTC market to any material degree and the scope to self-supply would remain a constraint on PayPoint even where energy suppliers currently outsource their non-OTC requirements. In this regard, Dr Majumdar noted that Utilita, SSE, OVO and E accounted for a substantial portion of PayPoint's non-OTC energy prepayment service volumes over the period 2015-2023. In his opinion, it was unlikely that these energy providers would have been prevented from switching to self-supply as a result of PayPoint's non-compete clauses. In Utilita's case, it had brought PayPoint into the non-OTC market when it had an incumbent supplier (Eckoh). In these circumstances, it seemed unlikely that the agreed terms reflected the exercise of market power by PayPoint. In relation to SSE, OVO and E, Dr Majumdar considered that, given their size, each would have been able credibly to threaten self-supply.
164. In addition, even where PayPoint's contracts contained exclusivity or cross-market terms, they (i) covered only a small portion of the relevant market; (ii) came up for renewal regularly as the typical contract term was three years; and (iii) did not contain terms that would exclude an "as efficient competitor". Dr Majumdar found no support for the view that bundling, tying or leveraging extended beyond this small share of the relevant market. He did accept that it was for the Tribunal to interpret the contractual terms.

**(4) Counterfactual**

165. There was significant disagreement between the parties' experts about GLOBAL-365's counterfactual. The only real point upon which the experts agreed was that GLOBAL-365 would not have had a "first mover" advantage in the counterfactual scenario in which PayPoint's alleged exclusionary abuse was absent.
166. However, it was also notable to the Tribunal that, in giving evidence on this issue Mr Hughes, in particular, appeared to have trespassed, without proper acknowledgement of the consequences, into areas which did not involve, properly understood, his opinion on questions of competition economics but were rather factual matters, on which his position was very supportive of GLOBAL-365's case.
167. The most striking example of this was Mr Hughes' adoption of GLOBAL-365's Business Plan as both the starting point and the driver of his counterfactual model for the way in which GLOBAL-365 would have performed in a situation in which PayPoint's alleged exclusionary abuse was absent. During questioning from the Tribunal, in the concurrent evidence session, Mr Hughes candidly admitted that he had taken this step without carrying out any investigations of his own to test the reasonableness either of the Business Plan itself or of the assumptions which underlay it. He also accepted that, so far as he was concerned, the reasonableness or otherwise of the Business Plan was fundamentally not a question which engaged his expertise as a competition economist.
168. For reasons to which we will return, given the amount of ink, time and, of course, money, that has been expended in both developing Mr Hughes' counterfactual and responding to it, it is a matter of regret to the Tribunal that this was not recognised sooner.
169. Turning to their evidence, there were four key issues about which the experts disagreed:

- (1) The date on which GLOBAL-365 would have begun processing OTC and non-OTC energy prepayment transactions for energy suppliers.
  - (2) Whether, if an energy supplier self-supplied its non-OTC energy prepayment service requirements, it would be likely to have switched to GLOBAL-365's non-OTC service.
  - (3) Whether energy suppliers prefer to procure OTC and non-OTC energy prepayment services from the same prepayment services provider or separately.
  - (4) The extent to which GLOBAL-365 would have been likely to win material additional OTC and non-OTC business with the Big Six, tier 2 or tier 3 energy suppliers.
- (a) *The date on which GLOBAL-365 would have begun processing OTC and non-OTC prepayment transactions.***

170. Mr Hughes adopted a “market entry” date of January 2018 based on the Business Plan and Mr Wilson’s evidence, the actual energy suppliers that GLOBAL-365 contracted with in (or before) 2018, including Yu Energy, Solarplicity and Future Energy, and because GLOBAL-365 had processed transactions for Minibems from February 2018. In addition, GLOBAL-365’s engagement with energy suppliers commenced in 2015 and GLOBAL-365 had had the ability to integrate with SMETS1 meters through its partnerships with CGI and Trilliant. Although, the smart meter roll out was slower than initially envisaged, Mr Hughes was of the opinion that this would not have prevented GLOBAL-365 from contracting with suppliers for OTC and non-OTC from the start of 2018.

171. Dr Majumdar disputed that GLOBAL-365 would have begun processing OTC and non-OTC energy payment transactions from January 2018 and emphasised the difference between contracting with a customer and processing any material volumes for that customer having regard to contracts entered into by GLOBAL-365 for which it did not process any transactions (e.g. Ecotricity in 2016).

172. In the counterfactual, Dr Majumdar believed that GLOBAL-365 would have started to process transactions around the same time as it did in the factual, having regard to: (i) delays in the smart meter roll-out; (ii) technical issues with the Pingit integration which was important in relation to non-OTC payment at the time, resulting in it being unable to roll out its product to energy suppliers for a number of months following June 2018; (iii) the fact that GLOBAL-365's product still lacked basic functionality in April 2018; and (iv) his understanding that (whether for a period of time, or more generally) GLOBAL-365 could not integrate with Secure Meters, which manufactured a type of SMETS1 meter used by a significant number of tier 3 energy suppliers.

***(b) Likelihood of energy suppliers switching from self-supplying non-OTC energy prepayment services to GLOBAL-365's non-OTC service***

173. Mr Hughes was of the view that there was evidence that supported the proposition that it was likely that energy suppliers would make this kind of switch. Mr Hughes identified examples of energy suppliers switching from in-house non-OTC services to third party products. This included E.ON using an in-house non-OTC service in 2018 before it started to use Kraken, the Octopus product. In addition, OVO had its own in-house product in 2015 prior to switching to PayPoint in 2020 (as a result of its merger with SSE). Finally, EDF had an in-house service in 2017 but subsequently modified it because of technical challenges and now uses Kraken.

174. Dr Majumdar considered it unlikely that an energy supplier would switch from self-supply to GLOBAL-365's non-OTC service for the following reasons.

- (1) Self-supply is likely to have been more cost effective than contracting with GLOBAL-365 for larger energy suppliers.
- (2) Energy suppliers that self-supply, particularly the Big Six, were likely to have valued the technical and brand control that self-supply enable and would be unlikely to give this up to contract with GLOBAL-365.

- (3) Octopus took the decision to self-supply in 2016 and therefore GLOBAL-365 would not have been able to contract with Octopus in the counterfactual.
  - (4) OVO's switch from self-supply to an external provider for non-OTC energy prepayment service requirements was due to its acquisition of SSE and the low price offered by PayPoint to OVO, a price which was substantially lower than that assumed by GLOBAL-365 in its Business Plan. Dr Majumdar suggested that EDF and E.On used Kraken as a wider technology platform; it was unclear what level of non-OTC prepayment services Kraken offered; and EDF and E.On might well still use their own in-house non-OTC energy prepayment services in conjunction with Kraken (although the technical details remained unclear).
  - (5) To the extent that energy suppliers would consider switching from self-supply, they would be expected to have a preference for contracting with an established prepayment provider.
- (c) *Whether energy suppliers prefer to procure OTC and non-OTC services from the same provider or separately*

175. Mr Hughes considered that energy suppliers seemed to prefer to procure OTC and non-OTC energy prepayment services from the same PSP. Having regard to the period considered in Ofgem's SO (between 2 April 2009 and 19 October 2018), he noted that energy suppliers often used the same PSP for both OTC and non-OTC prepayment services. In addition, based on the SO, Mr Hughes noted the associated additional costs that would likely be incurred by an energy supplier if it procured its non-OTC payment services from a different provider to its OTC payment services. The additional costs would include those associated with managing two separate contractual relationships and additional IT costs required to integrate two PSPs with the supplier's system instead of one. However, Mr Hughes accepted that energy suppliers might procure OTC and non-OTC services separately in circumstances where using separate providers was more commercially appealing.

176. Dr Majumdar considered that the evidence suggested that any efficiencies or ancillary benefits associated with using the same supplier for OTC and non-OTC energy prepayment services are not large. The majority of the non-OTC market (in terms of transactions) is accounted for by energy suppliers such as British Gas, EDF, E.On, Scottish Power, Octopus and Utilita who self-supply and, therefore, who use different providers for OTC and non-OTC services. Nevertheless, he also accepted that it is possible that some tier 3 energy suppliers might prefer to procure OTC and non-OTC energy prepayment services from the same prepayment services provider to obtain operational efficiencies.

***(d) The extent to which GLOBAL-365 would likely have won material OTC and non-OTC business in the counterfactual***

177. The two experts adopted fundamentally different approaches to this issue.

178. Mr Hughes adopted a market share-based approach with the intention of estimating what proportion of each tier of suppliers GLOBAL-365 would have been able to secure in the counterfactual. He explained that he had treated particular energy suppliers as “tokens” of certain volumes of prepayment transactions and, therefore, market share. Notably, Mr Hughes had removed Utilita and Octopus on the basis that he considered they would have been unlikely to contract with GLOBAL-365. This was for the following reasons.

- (1) Utilita was excluded on the basis that it wanted an “established player in the market rather than a new entrant”. Mr Hughes considered Utilita’s exclusion to be a conservative adjustment as he was of the view that GLOBAL-365 might actually have been able to secure Utilita if it had first established sufficient credibility by providing services to smaller energy suppliers. He therefore included sensitivities to his model that (i) GLOBAL-365 won only Utilita’s OTC, and, (ii) all of Utilita’s business.
- (2) Octopus was excluded both because it developed its own non-OTC product before GLOBAL-365’s planned entry in 2018 and because other suppliers had adopted its Kraken software. Accordingly, Mr Hughes

thought Octopus was less likely than other energy suppliers to outsource its non-OTC energy prepayments business.

179. Mr Hughes then categorised the remaining suppliers into the three tiers and made assumptions as to the share of each tier that GLOBAL-365 would have contracted with and the number of transactions that would have been involved, based on the number of smart meters in smart prepayment mode (SMSPM). The shares Mr Hughes used were derived directly from the Business Plan. Mr Hughes' model proposed that, absent the alleged abuse, GLOBAL-365 would have had: (a) a 30% chance of winning any given volume of tier 3 business; (b) a 50% chance of winning any given volume of tier 2 business; and (c) a 30% chance of winning any given volume of tier 1 (Big Six) business.
180. Although Mr Hughes' model applies a central estimate of the likelihood of GLOBAL-365 winning market share in each tier based on Mr Wilson's original Business Plan, Mr Hughes emphasised that his model is capable of calculating damages on the basis of any assumed level of market share. Mr Hughes considered that such an approach allowed him to adopt a probabilistic approach whereby the chance of GLOBAL-365 winning any single supplier was between 30% and 50%, depending on the tier being considered. In his opinion, focusing on the position of each individual supplier was unlikely to provide a robust assessment as to what the position would have been in the counterfactual. This was because, in his opinion, the actual conduct of energy suppliers was affected by PayPoint's conduct.
181. According to Mr Hughes, during the "ramp-up" period included in his damages modelling, GLOBAL-365 would have built a track record with suppliers from tiers 3 and 2 before obtaining a contract with a Big Six supplier in January 2019. With the exception of Utilita and Octopus (see §178 above), Mr Hughes considered the remaining energy suppliers would have been contestable by GLOBAL-365. Absent PayPoint's conduct, his opinion was that energy suppliers could have contracted with other PSPs, including GLOBAL-365, during the currency of their contracts with PayPoint on either a multi-homing or a trial basis.

182. As regards the tier 3 suppliers, Mr Hughes considered that it was reasonable that GLOBAL-365 would have contracted with 30% of these suppliers for OTC and non-OTC services. He considered many of these suppliers were dissatisfied with PayPoint, including Robin Hood Energy, Spark and First Utility. These suppliers also had the weakest bargaining position as a result of their low volumes. Self-supply of non-OTC was also less viable for such energy suppliers, thereby increasing their reliance on third-party providers and their willingness to secure the best deal. This suggested that such energy suppliers would have been willing to consider alternatives, such as GLOBAL-365, in the counterfactual.
183. Mr Hughes considered that his approach enabled him to factor in the gradual consolidation of energy suppliers into the modelling, with small energy suppliers being acquired by larger ones between 2018 and 2023. As noted above, Mr Hughes also included a number of sensitivities to account for the uncertainty in relation to the likely share of the market that GLOBAL-365 would have achieved in the counterfactual.
184. In respect of the non-OTC market, Mr Hughes considered that in the counterfactual, suppliers would have been more willing to outsource their non-OTC payments to a third-party having regard to the evidence of Mr Wilson and Mr Smith. He suggested that the evidence indicated PayPoint was unpopular with energy suppliers because of high costs, poor responsiveness and unreliable systems. This was consistent with concerns from Utilita and SSE about PayPoint's failure levels. Such a negative perception, according to Mr Smith, would likely have made energy suppliers hesitant to adopt PayPoint's non-OTC product, whereas a new entrant might have been more appealing. Absent PayPoint's conduct, energy suppliers might have been more open to a third-party service in a competitive market if they believed that the quality of service met their expectations.
185. Some of the largest energy suppliers used third-party services even after developing their own in-house product (see §173 above). Mr Hughes considered that this suggested that some of the largest energy suppliers might have been interested in third-party suppliers and, in some cases, would have been willing

to switch back to third party services despite having a developed in-house product.

186. Dr Majumdar's primary conclusion was that GLOBAL-365 would not have secured any greater volumes of transactions in the counterfactual.
187. In his view, it was more appropriate, in relation to the Big Six and tier 2 energy suppliers, for the Tribunal to approach the likelihood of GLOBAL-365 contracting with any particular energy supplier on a supplier-by-supplier basis. Such an approach would necessarily take the specific circumstances of each supplier into account. This was more accurate than a share-based approach. This approach ought to include a consideration of the following factors:
  - (1) whether the energy supplier was self-supplying in respect of non-OTC transactions before GLOBAL-365 would have been able to provide these services;
  - (2) the evidence from the communications between GLOBAL-365 and energy suppliers; and
  - (3) the timing of renewal of contracts with energy suppliers and the likelihood of those suppliers switching away from their incumbent provider to GLOBAL-365, as opposed to threatening to switch to gain a lower price and remaining with the incumbent.
188. In relation to tier 3 energy suppliers, Dr Majumdar considered a share-based approach to be reasonable to estimate the proportion of energy suppliers that GLOBAL-365 would have been able to contract with in the counterfactual. There was less information in relation to tier 3 energy suppliers, and, in his view, it would not be practical to assess these energy suppliers on a case-by-case basis.
189. It was not clear to Dr Majumdar why energy suppliers that chose to self-supply would have been more willing to outsource to a third party in the counterfactual. In his view, energy suppliers that self-supplied in the factual would not have been any more likely to out-source in the counterfactual.

190. In Dr Majumdar's view, it was unlikely that GLOBAL-365 would have secured a contract with any of the Big Six for the provision of OTC and/or non-OTC energy prepayment services in the counterfactual.
191. In relation to non-OTC, Dr Majumdar considered that GLOBAL-365 would not have been in a position to supply any of the Big Six. It would not have been possible to contract with any of British Gas, E.On, EDF or Scottish Power before these energy suppliers had begun, or, at least, made their decision, to self-supply their non-OTC prepayment requirements. npower contracted with Payzone for non-OTC services in 2016 and, when E.On and npower merged, its customer base was presumably transitioned to E.On's pre-existing in-house service. SSE commenced procuring non-OTC services from PayPoint in September 2016, with its contract renewing in September 2019. Dr Majumdar's view was that SSE would not have considered GLOBAL-365 as a credible alternative for non-OTC services when it renewed its contract. The terms agreed between SSE and PayPoint were lower prices than those Mr Wilson planned to offer.
192. In relation to OTC energy prepayment services, Dr Majumdar's view was again that it was unlikely that GLOBAL-365 would have contracted with the Big Six in the counterfactual. As GLOBAL-365 planned to provide OTC energy prepayment services alongside non-OTC services, Dr Majumdar's view was that, insofar as GLOBAL-365 would not have secured a non-OTC contract with any Big Six provider, it would also not have secured any OTC business either. In addition, Epay's network contained substantially fewer retail outlets in which bill-payers were able to make energy OTC prepayments compared to each of PayPoint, the Post Office, and Payzone.
193. While Dr Majumdar did not consider that PayPoint's contracts were the cause of Epay's inferior network for OTC energy prepayment services, his understanding was that between 2016 and 2018 GLOBAL-365 marketed Epay to a number of energy suppliers as having 40,000 retailers. (We note that, in the circumstances, this was a bold claim.) Nevertheless, GLOBAL-365 failed to gain any traction with them. This suggested to Dr Majumdar that, even if Epay's

network had been larger, GLOBAL-365 would not have gained any material volumes above those it processed in the factual.

194. As regards the tier 2 suppliers, Dr Majumdar's view was that GLOBAL-365 would also not have contracted to provide either OTC or non-OTC energy prepayment services to any of the following suppliers: E, Economy, Octopus, Opus Energy, OVO, Shell, Utilita and Utility Warehouse.

(1) E procured OTC and non-OTC energy prepayment services from PayPoint on an exclusive basis from June 2016 (before GLOBAL-365 would have had a live product in the counterfactual). E's 2021 contract with PayPoint was non-exclusive, so PayPoint's contractual provisions with E could not have been the cause of E not contracting with GLOBAL-365 at that stage.

(2) From March 2016, Economy Energy procured non-OTC energy prepayment services from PayPoint. Economy Energy ceased trading in January 2019 and its customers were transferred to OVO.

(3) Octopus developed its own in-house product.

(4) Opus Energy did not contract with PayPoint and therefore PayPoint's contracts could not have prevented Opus Energy from contracting with GLOBAL-365 in the factual. Opus Energy decided not to proceed with GLOBAL-365 following a trial of its pilot scheme. This suggests that Opus Energy would not have contracted with GLOBAL-365 in the counterfactual.

(5) OVO launched its in-house non-OTC service in 2015 and therefore would not have switched to GLOBAL-365 for non-OTC.

(6) Shell procured non-OTC energy prepayment services from Payzone from December 2016, before GLOBAL-365 had a live product. Shell purchased non-OTC services exclusively from PayPoint in 2019. It is not obvious that, in the counterfactual, GLOBAL-365 would have won

a contract to supply Shell in competition with PayPoint and, incumbent, Payzone. Further, he understood that when Shell was acquired by Octopus in 2023, its customers were moved to Octopus' in-house service reducing the long-term value of this contract.

(7) For reasons discussed elsewhere, Utilita were not likely to contract with GLOBAL-365 given their development, at first jointly with PayPoint and then independently, of a non-OTC product and their lack of interest in the GLOBAL-365 OTC offering.

(8) Utility Warehouse was approached by GLOBAL-365 in October 2017 but he understood that this did not lead to Utility Warehouse contracting with GLOBAL-365. Ultimately, Utility Warehouse procured its OTC and non-OTC energy prepayment service requirements from PayPoint in June 2019, under an exclusive contract.

195. In any event, in the counterfactual (as in the factual) Dr Majumdar expected the tier 2 energy suppliers considered above would have been large enough to self-supply as an alternative to out-sourcing.

196. In relation to tier 3 suppliers, Dr Majumdar's view was that GLOBAL-365 would have not secured a materially larger number of contracts with the remaining small energy suppliers in the counterfactual than it did in the actual. It is unlikely that GLOBAL-365 would have been in a materially different position in the counterfactual as it would not have benefited from (i) a first-mover advantage; (ii) a leading supply position; or (iii) any reputation effects that might have arisen from winning supply with Big Six or tier 2 suppliers.

197. In respect of tier 3 however, Dr Majumdar had also modelled an alternative "conservative" scenario in which GLOBAL-365 would, in the counterfactual, have been able to contract with one third of tier 3 suppliers for both OTC and non-OTC markets (the **Conservative Alternative Scenario**). This was simply based on a prudent assumption that PayPoint, Payzone and GLOBAL-365 would have split the market equally between them. This scenario, of course,

falls well short of the GLOBAL-365 Business Plan objectives from which it is not derived.

#### **D. EXPERT QUANTUM EVIDENCE**

198. The experts were agreed on the general approach to quantum that: (i) the estimation of damages should be based on a comparison between the profits GLOBAL-365 would have made in a non-abusive counterfactual and its actual profits; and (ii) that counterfactual financials and forecasts adopted for the purposes of performing a net present value analysis should represent a reasonable central case expectation.
199. Mr Hughes' estimate of GLOBAL-365's loss was comprised of (i) estimated loss of profits in GLOBAL-365's first ten years of trading of £39.6 million, relative to the counterfactual absent PayPoint's alleged abuse; and (ii) an estimated "Terminal Value" for GLOBAL-365 at the end of the 10 year period of £73.6 million, based on future discounted cash flows. PayPoint disputed both of these figures.
200. Mr Hughes' starting point in respect of his quantification of damages was, again, the Business Plan. He extended the plan forward from 5 years to 10 years but also made certain adjustments based on the data now available to him that were not available to Mr Wilson when the plan was prepared. These included:
- (1) the number of smart meters actually installed over time and the number of smart meters operating in prepayment mode (as opposed to as forecast by Mr Wilson);
  - (2) the proportion of smart meters operating in prepayment mode that, in his opinion, were actually contestable by GLOBAL-365, including the assumptions he had made that GLOBAL-365 would not have contracted with Utilita or Octopus in the counterfactual (see §178 above);
  - (3) the actual frequency of top-ups in the period 2018–2024;

- (4) the volume of OTC and non-OTC top-ups that GLOBAL-365 would have processed in the counterfactual with those adjustments using Mr Wilson's assumptions about the number of energy suppliers that GLOBAL-365 would have been able to contract with in the counterfactual;
- (5) PayPoint's average fees for OTC and non-OTC top-ups in the period 2018–2023, on which basis Mr Hughes adjusted the 2016 Business Plan assumption of a uniform fee of 15p per OTC or non-OTC transactions to a differentiated price of 14p per OTC transaction for the Big Six suppliers, 15p per OTC transactions for suppliers other than the Big Six and 11.81p per non-OTC transaction; and
- (6) certain adjustments to the cost projections in the 2016 Business Plan.

201. PayPoint's position on quantum was addressed primarily by Mr Anaman relying on the conclusions reached by Dr Majumdar. On this basis, Mr Anaman's primary conclusion was that the revenue under the counterfactual and the actual are the same and the damages are nil. However, Mr Anaman also modelled Dr Majumdar's Conservative Alternative Scenario (see above at §197). His estimate of the loss on this basis was between £422k and £426k (including interest on variously simple and compound basis). This calculation assumed zero losses for a Terminal Value because Mr Anaman did not consider GLOBAL-365 would have been viable long term in the circumstances of the Conservative Alternative Scenario.

202. In relation to net present value and the cost of capital, the experts were also agreed on a number of methodological points, including that the capital asset pricing model is appropriate to estimate GLOBAL-365 cost of capital and that damages should be estimated on a pre-tax basis. In addition, in relation to net present value revenue and costs, the experts agreed that a tax adjustment should be applied to damages incurred before April 2023 and that it was reasonable to include a specific cost per transaction in relation to OTC transactions.

203. The experts disagreed in relation to the best approach to estimating GLOBAL-365's exposure to systematic risk. Mr Hughes considered it appropriate to consider GLOBAL-365's risk profile as similar to that of utility companies rather than that of generic software companies. Mr Anaman's view was that GLOBAL-365's risk profile reflected elements of both utility companies and start-up software companies.
204. In addition, the experts disagreed as to whether a small company premium should be included when estimating the cost of capital for GLOBAL-365: Mr Hughes considered that a small company premium should not be included whereas Mr Anaman considered it should.
205. A further disagreement as between the experts related to how certain costs should be modelled.
- (1) Mr Hughes adjusted GLOBAL-365's fee per transaction to reflect PayPoint's average revenues per transaction whereas Mr Anaman assumed that GLOBAL-365 would have tendered pricing in line with prices assumed in the Business Plan.
  - (2) Mr Anaman also considered it reasonable to include a £0.1 cost per transaction in relation to non-OTC transactions, as included in the Business Plan. Mr Hughes did not, on the basis that this amount would have only been paid to Epay for processing OTC transactions and the charge did not apply to non-OTC transactions according to Mr Wilson.
  - (3) In relation to estimating counterfactual costs, Mr Hughes considered it reasonable to include salary assumptions as set out in the Business Plan which he adjusted upwards to reflect changes to minimum wages and in relation to tax calculations between 2018 and 2024. Mr Hughes also considered the estimate of employer contributions to employee pensions in the Business Plan to be reasonable. In Mr Anaman's modelling of the Conservative Alternative Scenario, he had regard to the salary assumptions in the Business Plan. In this scenario, GLOBAL-365 would remain a sub-scale business and the incremental personnel costs he

derived using the salary assumptions of the Business Plan far exceeded this gross profit (before considering other costs). Therefore, Mr Anaman did not consider it necessary to derive a refined estimate of personnel expenses to fit his alternative counterfactual.

- (4) When estimating counterfactual financials, Mr Hughes included the overhead costs assumptions set out in the Business Plan but made adjustments to overhead costs to reflect the number of suppliers assumed in the Business Plan and Mr Wilson’s assumptions of the magnitude of certain costs. Mr Anaman did adopt overhead cost assumptions from the Business Plan in his analysis (IT costs from year 2, and all other items from year 1), however he considered it was ultimately not necessary to derive a refined view on a sustainable level of operating expenses given the sub-scale nature of GLOBAL-365 under the alternative counterfactual. In short, as GLOBAL-365 would, in his view, be loss making in this scenario, the refinements to the costs projections were not material as there had been no loss.

206. The most material point of disagreement between the quantum experts was about the relevance of the internal and external fundraising efforts and whether they represented reasonable benchmarks for assessing the value of the business and, hence, the quantum of damages.

207. Mr Hughes considered that the internal support and shareholder investment that GLOBAL-365 received was indicative of its financial strengths and views of its likely success at the time, absent PayPoint’s conduct. The fact that GLOBAL-365 received such internal funding from Mr Greatbatch, Mr Smith, Mr Muniandy and Mr Wilson who were willing to put their own money, time and effort into GLOBAL-365’s business suggested that GLOBAL-365’s business opportunity was credible. However, Mr Hughes placed limited weight on the “pre-money” valuations of August 2017 (i.e. before GLOBAL-365 had processed any transactions, which first occurred in February 2018) that any internal fundraising implied for two reasons:

- (1) Mr Anaman's implied valuations could not be divorced from PayPoint's conduct, and specifically the difficulties that GLOBAL-365 faced in attracting larger energy suppliers as customers.
  - (2) The core investors were not merely providing money but would have provided important management and market expertise and added value to the company.
208. Mr Anaman considered the internal fundraising to be useful benchmarks but believed them to be considerably weaker than the evidence from the external fundraising considering:
  - (1) The investments made by Mr Wilson and the other individual investors benefited from generous tax relief (up to 75% of the invested amount can be offset against personal income tax if the company fails and no capitals gains tax applies if the company is successful).
  - (2) Mr Wilson's investment accounted for more than 50% of the total invested capital. Mr Wilson acknowledged he had no prior experience in this sector and it is common for founders to overestimate the potential of their business.
209. Mr Hughes did not consider the external fundraising efforts provided any indication of GLOBAL-365's profitability in the counterfactual, absent the alleged infringements. Mr Hughes' view was that while potential investors might not have been explicitly aware of PayPoint's conduct, which was generally not disclosed in the marketing material, it would still have affected their investment decisions because:
  - (1) When assessing investment opportunities, investors will consider a number of market characteristics, some of which would have been directly affected by PayPoint's conduct. This includes the competitive landscapes, barriers to entry, scalability, sustainability and the go-to-market strategy. Marketing material from 2018 specifically referenced PayPoint's 90% share of the market for topping up legacy meters. Whilst

presented positively in the materials it was not seen as such in feedback from investors. It is not surprising that investors were wary of a business that had failed to get traction with energy suppliers.

- (2) The decision to seek external funding was made around the same time that GLOBAL-365's board became aware of PayPoint's exclusivity terms. This suggested that the anti-competitive effects of PayPoint's conduct had already materialised in the market, specifically that GLOBAL-365 was foreclosed from competing. PayPoint's conduct affected GLOBAL-365's ability to obtain external funding as a result.

210. Mr Anaman considered the external fundraising efforts and their results were important as GLOBAL-365 was subject to an extensive marketing process between April 2016 and September 2020. His view was that GLOBAL-365's external fundraising and marketing were a reasonable benchmark for GLOBAL-365's damages. He also considered it to be a strong cross-check to the reasonableness of Dr Majumdar's primary conclusion that GLOBAL-365 would have been unlikely to have achieved greater transaction volumes in the counterfactual than the factual.

211. Mr Anaman stated that the marketing materials presented to potential investors made no reference to PayPoint's alleged conduct and routinely presented an outlook for GLOBAL-365 largely consistent with the Business Plan (i.e. that GLOBAL-365 would achieve a 35% market share). The marketing materials presented to investors throughout the period of the external fundraising (both before and after Mr Wilson became aware of PayPoint's alleged conduct in July 2016) anticipated GLOBAL-365 would be successful in capturing a large share (35%) of the market consistent with the share assumed by GLOBAL-365 in its counterfactual.

212. The high market share that GLOBAL-365 explained that PayPoint held was not conceived of by GLOBAL-365 as a barrier to its potential success but as a potential opportunity. For example, in 2018, GLOBAL-365 characterised the market as having two parties, PayPoint with 90% market share and Payzone with 10% market share in the legacy prepayment market. GLOBAL-365

suggested that the duopoly was ripe for disruption. In the counterfactual, there would be more parties in the legacy prepayment market and the additional number of providers would make GLOBAL-365 less likely to succeed than in the actual as a result of the increased number of providers.

213. Despite extensive marketing and low values being sought there was no interest in investing in GLOBAL-365. According to Mr Anaman, this gave rise to the inference that investors who were experienced at evaluating business models did not reasonably consider that GLOBAL-365 would be profitable. It appeared from the evidence that a wide range of reasons had been given by investors to explain why they did not want to invest in GLOBAL-365. The reasons did not relate to the alleged conduct of PayPoint. They included (i) the sales and technical hurdles associated with winning a Big Six client, especially given GLOBAL-365 was a start-up with no track record (as noted in an email from Mr Nigel Evans to Mr Wilson dated 12 February 2018); (ii) concerns about the size of the actual market opportunity; and (iii) the significant marketing investment that would be required.

#### The Conservative Alternative Scenario

214. Finally, as regards Dr Majumdar's Conservative Alternative Scenario, Mr Anaman applied Dr Majumdar's 30% fraction to actual SMSPPM numbers. He then estimated GLOBAL-365 resulting revenue and costs using similar criteria to those in the Business Plan (which he considered to be conservative, not least as to costs in the sense of leading to a larger damages claim because he considered that the costs were, in fact, too low in the Business Plan). He also made some other assumptions on such matters as when those contracts would have incepted. This produced a loss to GLOBAL-365, from the alleged breaches, of some £381k for the period 2019–2023.
215. Mr Anaman then rolled his calculations forward to look for future losses, based on similar assumptions but allowing for some increases in cost structure (but not revenue levels). His calculations showed that GLOBAL-365 became unprofitable once those increases in the cost structure were taken into account, reflecting its position as a sub-scale business. There is a tension in these

calculations between holding the cost structure constant for the historical costs (albeit conservative) and allowing cost increases for the future assessment. However, Mr Anaman's conclusion was that there should be no recovery for the future value of GLOBAL-365 on the Conservative Alternative Scenario.

## **E. THE PARTIES' SUBMISSIONS**

### **(1) Introduction**

216. The parties did not structure their submissions in the same way. GLOBAL-365's submissions followed a more traditional structure addressing, in turn, the issues of dominance, abuse, causation and quantum. On the other hand, PayPoint structured their submissions to focus on what they described as the five main "planks" of GLOBAL-365's case in respect of each of which PayPoint contended GLOBAL-365 failed. As such, it was notable that PayPoint's submissions focused heavily on questions of causation (planks 1, 2, 3 and parts of 5).

217. For the purpose of setting out the parties' respective positions on the each of the critical parts of the case as pleaded, we have adopted the more traditional structure.

### **(2) Dominance**

218. Both parties took, as their starting point, the measure of agreement between Mr Hughes and Dr Majumdar in relation both to the definition of the relevant market and dominance (see above at Sections C(1) and C(2)). As such, the parties submitted that the key issue is whether PayPoint held significant market power in the OTC market and whether this resulted in PayPoint being able to act to an appreciable extent independently of its customers and competitors. This issue should be considered in two periods: being before and then after the PO/PZ merger (which was cleared in October 2018).

219. GLOBAL-365 made clear that the alleged dominance by PayPoint of the OTC market was by reference to its position on the energy supplier side of the OTC

energy prepayment market. GLOBAL-365 made no allegation of dominance by PayPoint on the retailer side of the OTC market. However, the parties were agreed that conduct on the retailer side of the market is relevant to the assessment of foreclosure on the energy supplier side. Therefore, although there was some disagreement about the appropriate market definition on the retailer side, this was not a matter that the Tribunal needed to resolve.

220. Similarly, GLOBAL-365 also made no allegation of dominance on the non-OTC market for energy prepayment services.

*(a) GLOBAL-365's submissions*

221. GLOBAL-365's position was relatively straight forward. It relied primarily on PayPoint's market shares for the period 2009–2018 (set out above): such persistently high market shares gave rise to a presumption of dominance.
222. There was no evidential basis to rebut that presumption. In fact, the evidence supported it and undermined PayPoint's case to the contrary. PayPoint relied on the contention that a combination of Payzone and the Post Office provided a credible threat to it. However, as Dr Majumdar accepted, neither the Post Office on its own nor Payzone on its own could meet all of an energy supplier's needs for OTC services during the period 2009–2018. Dr Majumdar was also unable to point to a single instance of an energy supplier taking OTC services from a combination of the Post Office and Payzone prior to the PO/PZ merger.
223. By contrast, in the period 2009–2018, all of the ten energy suppliers with the highest volumes of prepayment transactions were supplied by PayPoint, whether exclusively (Utilita, OVO, Economy Energy, E), in conjunction with Post Office on a "convenience exclusivity" basis (British Gas, SSE, Scottish Power) or as part of a three network service also including Payzone (EDF from 2013, E.On and npower).
224. GLOBAL-365 relied on Mr Hughes' view that, prior to the PO/PZ merger, there were no credible substitutes for PayPoint for the provision of OTC energy

prepayment services, including the combination of the Post Office and Payzone, for the following reasons.

- (1) A number of energy suppliers had told Ofgem that PayPoint was a “must have” provider of OTC prepayment services (for example, OVO).
- (2) The evidence gathered by Ofgem was that the Post Office was typically not viewed as a substitute for PayPoint, having regard to its limited coverage in urban areas and more restricted business hours.
- (3) In the period 2010–2018, PayPoint was processing the vast majority of OTC transactions for the 10 energy suppliers with the largest prepayment volumes. Notably, PayPoint was processing over 80% of OTC prepayment transactions even for suppliers with convenience exclusivity (such as British Gas and Scottish Power) or three network services (such as E.On).
- (4) Payzone’s share of OTC energy prepayment transactions fell from just under 20% in 2008/9 to approximately 2% in 2018. Payzone’s network was also shrinking during this period from around 16,000 outlets with active terminals in 2009 to around 10,000 outlets in 2018.
- (5) Between 2012 and 2017, Payzone only succeeded in winning new (legacy) OTC business on one contract, from EDF in 2013, on a non-exclusive basis, with PayPoint and the Post Office also having been appointed as payment service providers. This was despite Payzone tendering for new OTC business from four of the Big Six: British Gas (in 2013), EDF (in 2012), Scottish Power (in 2015–2017) and SSE (in 2015). However, Payzone was later excluded from providing smart OTC services to EDF, when PayPoint’s contract with EDF was varied in 2017 to include smart OTC services on a convenience exclusivity basis.
- (6) Scottish Power’s 2017 tender for smart OTC services also resulted in an award to the PO/PZ entity in 2019. However, this was on the basis of a

“revised offer submitted by the new combined business” and not on the basis of the offer initially submitted by Payzone in its own right.

225. Where Payzone did provide legacy OTC prepayment services alongside PayPoint and the Post Office (i.e. to EDF and E.On) a minority of OTC transactions took place on the Payzone network (approximately one tenth of the volumes for those energy suppliers processed on the PayPoint network).
226. For the period following the PO/PZ merger, GLOBAL-365 did accept that the merged entity became more of a credible threat to PayPoint. GLOBAL-365 relied on Mr Hughes’ opinion that it was unclear whether PayPoint’s dominance ended immediately upon completion of the PO/PZ merger or persisted for a period of time thereafter. However, regardless of the precise point at which dominance was extinguished, GLOBAL-365 submitted that this point was of limited significance because (i) the vast majority of supplier contracts containing exclusivity provisions were signed during the period prior to the PO/PZ merger; and (ii) those signed after the PO/PZ merger were in almost all cases continuations or slight variations of exclusive arrangements entered into prior to the merger.
227. In relation to the loss of the British Gas contract to PO/PZ, GLOBAL-365 submitted that the Tribunal could not rely on market outcomes following a major structural change to draw inferences about the competitive position of the market prior to that change. The post-merger offering was a coordinated joint offering of the combined Post Office and Payzone networks: whereas the Post Office and Payzone had not previously made joint bids. The PO/PZ merger also enabled Post Office and Payzone to integrate their IT and served to assuage concerns regarding Payzone’s finances. A particularly important consideration was Mr Watkin-Rees’ evidence that the Post Office tendered for the British Gas 2019 contract on the basis that “supply by the Post Office [was linked] with a requirement to take services from Payzone at the same time”. Therefore, in contrast to the position up to 2018, during which British Gas had no option but to procure from a combination of the Post Office and PayPoint. Its choice was between (i) PayPoint only, (ii) Post Office and Payzone or (iii) a combination

of all three. This clearly illustrated the shift in the competitive dynamics post-PO/PZ merger in comparison to the period prior to the merger.

228. GLOBAL-365 argued that Dr Majumdar's pricing and margins analyses did not show that the Post Office and/or Payzone provided a credible competitive constraint on PayPoint prior to 2019, for the following reasons:

(1) Dr Majumdar accepted that, at best, his analysis went to show whether the competitive constraint on PayPoint from Payzone changed over the period considered.

(2) Dr Majumdar also acknowledged that, in relation to the beginning of the period analysed, if prices were already at a level above the cost benchmark chosen, the fact they did not fall did not allow an inference that the prices were competitive. One could only draw inference as to whether or not the competitive constraints had changed. He also acknowledged that his analysis also did not address the counterfactual price in the absence of exclusivity.

(3) GLOBAL-365 noted that PayPoint's average prices per transaction in 2017 were materially higher than those of the Post Office and Payzone for the suppliers that they both served (EDF, E.On and npower). It was also significant that the market shares of challenger energy suppliers grew over this period, and those suppliers had faced materially higher per transaction prices from PayPoint than the Big Six.

(4) Dr Majumdar sought to rely, at least to some extent, on an analysis of PayPoint's margins across all OTC services which indicated declining margins across this period, albeit he indicated in oral evidence that he did not "place much weight" on it. GLOBAL-365 pointed to Mr Hughes' evidence which demonstrated that Dr Majumdar's margin analysis was flawed in that the decline in margins was likely to be driven by an overall decline in volumes in OTC as PayPoint's business shifted towards non-OTC channels, such that fixed costs were spread across a

declining number of transactions. As such, it was not indicative of the state of competition.

**(b) *PayPoint's submissions***

229. In relation to both periods, PayPoint's argument on dominance related to there being a bidding market. Therefore, the key question for the Tribunal was whether there was effective competition at the bidding stage. PayPoint considered that when bidding for contracts it was constrained to an appreciable extent by Payzone. When considering whether there was effective competition at the bidding stage, it was important for the Tribunal to have regard to the evidence as to PayPoint's perception of the threat that, if PayPoint did not make a sufficiently attractive offer, the supplier could contract exclusively with Payzone (and the Post Office) and exclude PayPoint.
230. In relation to the pre-merger period, GLOBAL-365 raised arguments in relation to Payzone's failure to win a number of tenders between 2012–2017; the decline of Payzone's network between 2009 and 2018; and that Payzone's share of transactions where it was appointed alongside the Post Office was small compared to PayPoint's share. However, none of these points went directly to the question as to whether there was a competitive constraint at the tender stage because suppliers had, or were perceived by PayPoint to have, the credible threat of contracting with Payzone on a convenience exclusivity basis.
231. PayPoint's position was that the evidence supported the conclusion that there was effective competition at the bidding stage for three reasons.
232. First, PayPoint perceived that energy suppliers had a credible threat to switch to Payzone. Mr Watkin-Rees, who was closely involved in negotiations with the Big Six between 2009 and 2018, had explained his perception that there was a real and substantial risk that PayPoint would lose business to Payzone and that the Big Six "held almost all the cards" in the negotiations. Based on his experience of procurements, Mr Watkin-Rees did not agree with the proposition that PayPoint was a "must have" network for suppliers. His view was that PayPoint was "under constant threat of being removed in every major tender".

His belief was that the convenience exclusivity structure allowed suppliers “to deliver maximum jeopardy in the procurement process so that people would be fearful of the threat of losing the business”.

233. There was contemporaneous evidence that the Big Six did use the threat of contracting with Payzone on a convenience exclusivity basis to put competitive pressure on PayPoint in the way described by Mr Watkin-Rees; and evidence that it responded to that pressure by improving the terms of its offer.

(1) In March 2015, SSE responded to PayPoint’s proposal for the supply of legacy and smart OTC services asking for a price of 10p “all in” (i.e., including commission) based on its “benchmarking”. The perception of Mr Watkin-Rees was that this was likely to have been the price bid by Payzone. This would have represented a £1.75 million saving per year to SSE: the prices offered by PayPoint already represented approximately £700,000 of savings per year. In the latter stages of the negotiation, SSE told PayPoint that if PayPoint did not make an acceptable offer, it would not progress PayPoint’s offer for smart OTC services and would consider going to the market for legacy OTC services. As a result, SSE obtained the lowest price of any of the Big Six in 2016.

(2) In November 2015, E.On told PayPoint during negotiations for a new contract that the price of using Payzone and the Post Office was approximately £2 million lower than (i) the price of using PayPoint and the Post Office, and (ii) the price for a three-network service, i.e. Payzone, Post Office and PayPoint. PayPoint did not believe that E.On would stop using Payzone and so reduced its offer for a three network service.

(3) In 2019, EDF conducted a mini procurement with the purpose of securing better prices for OTC prepayment services. Following EDF’s response to PayPoint’s first proposal, Ms Toolan explained that PayPoint offered (i) lower transaction fees; (ii) reduced prices for issuing legacy meter keys and cards; (iii) the ability for EDF to introduce

a second supplier for smart OTC services on 6 months' notice; and (iv) a significant one-off rebate.

(4) During the British Gas procurement in 2013, the contemporaneous documents recorded that, even at an early stage, PayPoint was proposing to offer British Gas £10 million of savings over the course of a 5-year contract. As Mr Watkin-Rees stated: "the only logical basis" on which PayPoint would offer multi-million pound reductions in price to British Gas was "the threat that we might lost the business". British Gas told Ofgem that PayPoint's commercial proposal was "strong" and that it successfully secured a discount on PayPoint's initial proposals in the course of negotiations. It is also apparent from the information given by British Gas to Ofgem that it did give serious consideration to the possibility of switching from PayPoint to Payzone, consistent with PayPoint's perception that it was a real and credible possibility. Ultimately, British Gas decided not to switch on the basis that the price differential between PayPoint and Payzone was negated to a material extent by switching costs. That also suggests that if PayPoint had not made significant reductions to its prices, British Gas's commercial assessment might well have been different.

234. In addition, Dr Majumdar's analysis of PayPoint's prices did not reveal an upward trend for the Big Six as a whole across the period 2009 to 2018, even in nominal terms and despite the fact that the quality of PayPoint's offering was increasing during this period. This evidence was consistent with the conclusion that there was no decline in competitive pressure from the Big Six after 2009 (the start of the period of alleged dominance) notwithstanding the decline in the size of Payzone's network and the fact that it did not win any contracts on a convenience exclusivity basis until 2019.

235. Second, Payzone's network in combination with the Post Office did provide sufficient coverage to make it a credible alternative to PayPoint. The evidence suggested that Payzone's network, in combination with the Post Office, would have provided sufficient coverage for all energy suppliers to conclude a contract, albeit that the contract might have included some provision for

Payzone to fill any gaps. Given that PayPoint's perception of the risk of switching was central to the assessment of dominance, it did not matter in this context whether energy suppliers would actually have been willing at that time to switch to a combination of Payzone and Post Office. Payzone's network was, at all times, of sufficient scale for PayPoint to have regarded it as a viable alternative.

236. Third, the fact that the merger made PO/PZ a stronger competitor did not mean that PayPoint was dominant before the merger. There was no dispute that the merger increased the competitive threat to PayPoint. It was also broadly agreed that the merger enabled PO/PZ to present combined or coordinated bids; gave Payzone the benefit of any technical development on the part of the Post Office; and alleviated concerns about Payzone's financial resilience. There was, however, nothing in this to undermine the conclusion that PayPoint also perceived a serious competitive threat from Payzone before the merger.
237. In relation to the post-merger period, PO/PZ was awarded the Scottish Power contract for smart OTC services in March 2019; and British Gas had taken its decision to award its OTC contract to PO/PZ by June 2019. Therefore, it could not sensibly be suggested that PayPoint continued to hold a dominant position after the PO/PZ merger. Competition was demonstrably effective at the bidding stage, including for the single most significant OTC contract in the market; and Payzone, in combination with the Post Office, was demonstrably a credible alternative to PayPoint.
238. During the concurrent evidence, Mr Hughes did not seriously pursue an argument that PayPoint's alleged dominance persisted for any meaningful period of time after the merger, although he considered that dominance would not have ended immediately after the merger. On Mr Hughes' own view, the competitive strength of the merged entity comprised the ability to submit a single coordinated bid, an improved IT offering and financial robustness. Although the integration of IT systems might have taken a period of time to realise, the other two factors would apply very soon after (if not immediately upon) the completion of the merger, including the coordination, which Mr Hughes identified as the most important factor.

239. The fact that PO/PZ had a smaller network in comparison to PayPoint was not relevant to the assessment of dominance given that its network was obviously sufficient to meet the needs of British Gas and Scottish Power. The contemporaneous evidence suggested that PO/PZ offered coverage that exceeded the regulatory requirements by some distance and was better than the coverage of PayPoint's larger network.

**(3) Abuse**

*(a) GLOBAL-365's submissions*

240. Although GLOBAL-365 identified separate theories of harm arising out of exclusivity on both the energy supplier side and the retailer side, its principal submission was that the restrictive effect of PayPoint's abuse had to be understood in terms of the interaction of the two sides of the market and of both the energy supplier and retailer contracts.

241. In relation to the energy supplier side of the market, GLOBAL-365 submitted that exclusivity had two relevant exclusionary effects:

- (1) Exclusivity in a supplier contract would prevent rivals from accessing the demand of that specific energy supplier during the currency of the contract. To the extent that exclusivity covered a significant proportion of the market, this might directly give rise to a foreclosure effect in the ordinary way that would be applicable to a single-sided market.
- (2) In addition, by preventing multi-homing, exclusivity in energy supplier contracts affected the ability of rival OTC payment service providers to build a sufficiently attractive portfolio of suppliers to attract retailers. Critically, given the two-sided nature of the market this also thereby affected the terms on which those payment service providers were able supply OTC services to other energy suppliers. GLOBAL-365 noted that this was also Ofgem's central theory of harm as to the impact of PayPoint's exclusivity terms. This was described as the **Supplier Portfolio Effect**.

242. Similarly, GLOBAL-365 contended the exclusionary effects on the retailer side were as follows.

(1) Exclusivity in a retailer contract would prevent a rival OTC payment services provider from accessing the supply by that retailer of the key services necessary to run an OTC service for its energy supplier clients. In other words, the exclusivity prevents multi-homing by retailers. To the extent that exclusivity covers a significant proportion of the available retail outlets suitable for energy top-ups, or of the outlets most attractive to consumers, this might directly give rise to a foreclosure effect in the same way as any exclusive supply obligation in a single-sided market.

(2) In addition, by preventing multi-homing, exclusivity in retailer contracts affected the ability of rival OTC payments providers to build a portfolio of retailers which was sufficiently attractive in number, coverage and quality to win the business of the suppliers. This was described as the **Retailer Portfolio Effect**.

243. GLOBAL-365 submitted that a network of exclusive arrangements on one side of the market, in combination with a large market share, was likely to give an OTC payment services provider market power with respect to pricing on the other side of the market. This was acknowledged by Mr Watkin-Rees, who considered that PayPoint's exclusive agreements with suppliers enabled PayPoint to negotiate much lower prices with retailers compared with the prices that would be paid absent supplier exclusivity.

244. In addition, the evidence also indicated that PayPoint considered that the growth of its exclusive retail network weakened its rival OTC payments providers and that it was able to charge suppliers a premium over the price offered by Payzone in return for access to its stronger retail network.

245. Considering the operation of these effects collectively, and in the context of a two-sided market characterised by strong network effects, GLOBAL-365 submitted that the exclusivity terms in PayPoint's contracts with retailers, by preventing multi-homing, were likely to heighten the Supplier Portfolio Effect

created by PayPoint's exclusive contracts with suppliers. If required to choose between OTC payments providers on a single-homing basis, retailers would rationally opt for the OTC payment service provider which offered the most benefit to them (in footfall as well as commission), even if they would otherwise also want to take services from a second OTC payments provider.

246. Similarly, the evidence indicated that energy suppliers would, all other things being equal, prefer not to sign exclusive deals and many would want to multi-home for OTC services, in order to take account of complementary retail networks. However, PayPoint was willing to offer suppliers a substantial discount in order to obtain exclusivity precisely because it would weaken rivals.
247. Further, to the extent that exclusivity allowed PayPoint artificially both to drive down commissions paid to retailers and to charge suppliers a premium over its competitors, it will have undermined the ability of rival and new entrant OTC payments providers to undercut PayPoint.
248. GLOBAL-365 submitted that it was striking that Dr Majumdar's evidence did not seem to address the portfolio effects directly. Dr Majumdar's assertion that Payzone was not foreclosed because it retained the possibility of developing its retailer network through offering non-energy OTC services did not engage directly with the question of whether portfolio effects in fact arose from the exclusivity terms. At best, this argument focussed on whether the impact of the portfolio effects was outweighed by the hypothetical and unevidenced possibility that Payzone could nonetheless compete effectively to attract energy retailers using other parts of its OTC services. In any event, this hypothesis was contradicted by the observed decline in Payzone's energy retailer network following the loss of the British Gas contract in 2009, and its small and declining share of OTC energy prepayments from 2009 to 2018. It was also notably not a point made by Dr Majumdar in respect of Epay which built its network entirely on non-energy OTC services.

#### The portfolio effects

249. GLOBAL-365 contended that the evidence amply demonstrated the existence of portfolio effects. PayPoint’s internal strategy documents showed the significance of exclusivity and its likely impact on both sides of the market were well understood as Mr Watkins-Rees had noted in a PayPoint Strategy Review for 2014–15: “a larger network also... weakens competitors”.
250. In November 2015, Mr Alcraft of PayPoint considered offering E.On a price for an exclusive contract which was lower than would be justified on “a straightforward financial measure” specifically in order to obtain “the indirect benefit of knocking PZ out, which will be harder to quantify – but material”.
251. A PayPoint presentation from January 2017 referred to the need to “[c]ontinue to throttle their [Payzone’s] product offering by securing exclusive client contracts”. In relation to the independent energy sector (i.e. non-Big Six suppliers), the same presentation noted that PayPoint was “well placed to deliver c.90%+ of all Smart prepay transactions for indy energy over the coming years”. The explanation given for this specifically included the statements that “OTC contracts [were] almost all exclusive” and that PayPoint’s contract exposure was limited due to many suppliers being in exclusive long-term deals or expected to sign new deals imminently.
252. PayPoint also sought to enforce its exclusivity arrangements with retailers which emphasised its awareness of the competitive impact of retailer exclusivities on the supplier side of the market. GLOBAL-365 submitted that this evidence showed the following.
- (1) In July 2014, following notification of the award of the E.On smart OTC contract to Epay, PayPoint formed and implemented a strategy not only of writing to those supermarkets with whom it held exclusivities, but also writing directly to E.On drawing this to their attention. The strategy was implemented by PayPoint’s letter to E.On dated 23 July 2014. At the time, Mr Alcraft of PayPoint expressed the view that he was “optimistic it’s recoverable” through this strategy.

- (2) PayPoint repeatedly threatened the Post Office and Payzone with legal action based on the tort of interference with contractual relations where they attempted to co-site their terminals with PayPoint retailers.
  - (3) PayPoint enforced its exclusivity against retailers and required the removal of rival terminals even where Payzone was able to offer services that PayPoint could not.
253. GLOBAL-365 submitted that PayPoint’s cumulative effect on the market could be seen from the following evidence in respect of Payzone.
- (1) By 2017, Payzone’s network had shrunk to 10,873 retailers, down from around 16,000 in 2008/09.
  - (2) For those Big Six providers who contracted on a non-exclusive basis with PayPoint and who made use of PayPoint, Payzone and the Post Office, Payzone was processing only a very small proportion of transactions: around 8% across EDF and E.On.
  - (3) Moreover, the attractiveness of Payzone’s retailer base for energy OTC top-up as measured by the average number of transactions per retailer was telling: across EDF and E.On, Payzone retailers, on average, processed only around a quarter of the number of transactions that PayPoint retailers did.

Opportunities to contract with energy suppliers or retailers

254. PayPoint asserted that rivals to PayPoint had “opportunities” to contract with suppliers and retailers but, while such an analysis would be relevant to direct foreclosure in a single-sided market, it failed to engage with the harm arising from the Supplier Portfolio Effect and the Retailer Portfolio Effect. The central point was not that exclusivity in respect of a supplier prevents rivals from accessing the demand of that supplier. Rather it was that exclusivity in respect of suppliers cumulatively weakened the ability of a rival to contract with retailers, and thus to obtain the supply of services needed to compete effectively

for suppliers. The obverse was true in respect of exclusivity in respect of retailers. In short, energy payment service providers needed to be attractive simultaneously to both energy suppliers and retailers: this was referred to as the “chicken and egg” problem during the hearing.

255. In relation to retailers, GLOBAL-365 criticised Dr Majumdar’s analysis for failing to engage with questions of coverage or quality. His analysis referred to an overall number of retail premises in the UK without conducting any analysis to demonstrate which of these would be either potentially suitable for OTC energy prepayment transactions or would be suitable in terms of locations to expand the coverage of rival PSPs’ energy retailer networks. In addition, his analysis failed to focus on whether PayPoint’s exclusivities degraded Payzone’s ability to compete more generally based on the appeal of Payzone’s network to prepayment energy end-consumers. Dr Majumdar’s “churn” analysis of available retailers overestimated the number available to be won by Payzone to the extent he did not take account of whether any of them had previously been Payzone retailers. In any event, in view of the vastly different number of energy OTC transactions per retailer being offered by the PayPoint and Payzone networks, it cannot be assumed that a retailer that was willing to sign up to PayPoint would also have been willing to sign up to Payzone or a new entrant OTC payments provider.

Dr Majumdar’s AECT and pricing analysis

256. GLOBAL-365 submitted that Dr Majumdar’s AECT was irrelevant. This analysis simply tested whether PayPoint was providing OTC (or non-OTC services) at above a notional cost price. It failed to engage with the portfolio effects.
257. Dr Majumdar had also accepted in cross-examination that his price-cost test did not seek to test whether the terms of PayPoint’s contracts were such as to prevent an as-efficient competitor from emerging. His analysis failed to compare the evolution of PayPoint’s prices against that which would have applied in the counterfactual. Therefore, they did not isolate, in any way, the competitive effects of the exclusivity terms from other factors affecting the

market and could not be taken as evidence that those terms did not have an exclusionary impact on the market as a whole or new entrants, such as GLOBAL-365.

Exclusivity not used to intensify bidding competition on OTC prepayment market

258. GLOBAL-365 submitted that the evidence clearly indicated that the impetus for exclusivity came from PayPoint rather than the suppliers. For example:

- (1) the email from Ms Toolan to SSE dated 30 June 2015 which described exclusivity as a “redline point” for PayPoint;
- (2) PayPoint’s exchange in May 2016 with Bristol Energy, in which Bristol Energy raised concerns about agreeing exclusivity for 4 years which was “a very long time in the fast-moving world of smart energy”, but PayPoint described exclusivity as “a pretty fundamental piece in our agreements”;
- (3) PayPoint’s email exchange with Robin Hood Energy in March 2016, in which Robin Hood Energy was reluctant to agree exclusivity in respect of SMETS 2 meters, given that PayPoint did not yet have a SMETS 2 service, but PayPoint made clear that “[i]n short, we expect exclusivity for SMETS 1 and SMETS 2 transactions”;
- (4) Mr Ranger’s email exchange with Bulb Energy in January 2020, in which Bulb indicated that the “best offer that we can reach” was a non-exclusive deal, but Mr Ranger proceeded to offer a non-exclusive deal only at a substantial premium over an exclusive deal;
- (5) Utilita’s email of February 2012 indicated that “the 5 year exclusivity that you would require for the reduced payments would place too much of a constraint on us as a business that is constantly changing”;

- (6) the section 26 responses prepared by energy suppliers to Ofgem also generally indicated that they were dissatisfied with exclusivity. GLOBAL-365 highlighted the responses of Scottish Power, British Gas and Robin Hood Energy; and
  - (7) finally, the evidence indicated that following the PO/PZ merger and PayPoint's commitments, many energy suppliers now multi-home to a greater degree.
259. GLOBAL-365 emphasised that this was not to deny that suppliers did ultimately opt for exclusive deals, given the substantial price difference offered by PayPoint for exclusive and non-exclusive deals together with PayPoint's insistence. Rather there was no evidence that suppliers deliberately engaged in offering exclusivity simply as a strategy to drive price competition. GLOBAL-365 submitted that all the evidence pointed to the contrary.
260. Any decision by a supplier accepting exclusivity in return for a discount would only take into the account of the costs and benefits to itself. However, the critical aspect of the Supplier Portfolio Effect is that a supplier's acceptance of exclusivity will have consequences for other market participants which the supplier will not take into account. Thus, the fact that that supplier chooses to accept the obligation cannot be taken as an indication that it is welfare-enhancing or pro-competitive.

PayPoint's targeting of key independent energy suppliers

261. GLOBAL-365 submitted that an important aspect of PayPoint's conduct concerned the targeting and tracking of independent energy suppliers outside the Big Six that were actively seeking prepayment customers. For example:
- (1) in PayPoint's UK & Ireland 2015/16 Plan Review dated 24 March 2015 PayPoint specifically identified both Utilita and Economy on this basis;
  - (2) PayPoint presentation titled "Cash and Energy" dated 20 September 2017, in which PayPoint classified the energy supplier market by the

percentage of prepayment customers each supplier had. PayPoint noted that “Utilita has essentially created a new market, which Economy Energy and E are now imitating...all 3 are exclusive to PayPoint across cash and Multipay”; and

- (3) in fact, of the independent suppliers identified by PayPoint in September 2017 as then having more than negligible proportions of prepayment customers, namely Utilita, E, Economy, OVO, Spark, Ecotricity and Utility Warehouse, all were in exclusive deals with PayPoint covering at least smart OTC.

Whether foreclosure should be assessed as a generality or on an undertaking by undertaking basis

262. During the hearing, the Tribunal raised whether foreclosure should be assessed as a generality seeking to determine whether the market is foreclosed in general terms, or whether, alternatively, it should be approached on an undertaking specific basis – in other words asking whether the market is foreclosed to a particular undertaking.
263. GLOBAL-365 submitted that, as a general principle, it is commonly said that competition law serves to protect the competitive process, not specific competitors: see Guidelines on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) at §6. Thus, having regard to *Hoffmann-La Roche v European Commission* EU:C:1979:36; [1979] E.C.R. 461 at §91, the fundamental test is not whether specific competitors are eliminated by conduct that is otherwise unobjectionable but whether the conduct itself is abusive in the sense that it involves:

“...behaviour ...which is such as to influence the structure of a market... and which through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

264. However, conduct which serves to exclude a single competitor can also be an abuse: see C-413/14P *Intel Corporation Inc. v European Commission* EU:C:2017:632; [2017] 5 CMLR 18 at §11.
265. The CJEU held in Case C-48/22 *Google LLC and Alphabet Inc. v European Commission* EU:C:2024:726; [2024] 5 CMLR 20 (**Google Shopping**) at §167, that conduct which is liable specifically to foreclose new entry can be abusive even if it is not effective to exclude an existing, as efficient, competitor (see §422 below).

Leveraging and impacts in the non-OTC market

266. GLOBAL-365 submitted that the evidence demonstrated that PayPoint’s conduct in establishing and enforcing exclusivity obligations on suppliers and retailers in the OTC energy prepayments market was both intended to and likely to also affect the non-OTC energy prepayments market.
267. It was clear that PayPoint considered that it could use its position in the OTC market to promote its position into the non-OTC market.
- (1) In a presentation titled “Clients” dated 5 January 2017, PayPoint identified its Energy Focus as including the following:

“Treat legacy OTC as cash cow and MultiPay as rising star – focus and resource accordingly

...

Continue to push hard into indy energy, leveraging cash aggressively”  
(emphasis added)

- (2) PayPoint identified these “indy energy” suppliers as being of key significance in the process of credentialization to provide non-OTC services to the Big Six. PayPoint’s 2015/16 Plan Review dated 24 March 2015 (which pre-dated the launch of PayPoint’s Multipay product) noted that “[w]e are actively working with the “big little six”...all are aware of PayPoint group offerings and capabilities” and set an intention to “[c]ontinue to target the “big little six” with SmartPay offerings...to

enhance credentials for big six sales” and to “[c]ontinue to secure exclusivities as market share moves from the big six to Independents”.

(3) In oral evidence, Mr Watkin Rees stated (see Day 6/158:17-25):

“...we would probably see our gateway product as being the cash OTC product, not least because, if someone was trying to tick off their SLC 27 condition, they needed to provide cash and prepayment and cash ticked that box, and then, having got that, if the company turned out to be serious about prepayment, we would have a platform, a relationship in which to be able to sell our non-OTC products, should that also be attractive.”

268. In addition, the structural links between the OTC and non-OTC markets were such that there are likely to be efficiencies in having a non-OTC payments provider who is also one of the energy supplier’s OTC payments providers, arising from the overlapping costs structure of OTC and non-OTC services.

(1) Mr Ranger’s evidence was that there were costs incurred by PayPoint in respect of each energy supplier that were shared between OTC and non-OTC services. For that reason, PayPoint would price for smaller energy suppliers so as to achieve a minimum revenue per annum across the relationship as a whole including both OTC and non-OTC services. However, the point goes wider than merely smaller suppliers: even for larger suppliers where meeting minimum revenue is not in issue, where a payments service provider is pitching to provide non-OTC as well as smart OTC services to an energy supplier, it would be rational for it to price its offering taking account of common costs between the two.

(2) Mr Kachhala's evidence was also that if an OTC provider began providing non-OTC services, there would be no additional costs to the supplier of integrating at a technical level.

269. Finally, PayPoint entered into contracts with suppliers which (a) provided for exclusivity across both OTC and non-OTC and (b) minimum volume commitments and pricing that applied across both OTC and non-OTC. Such volume-based pricing across OTC and non-OTC would provide an incentive for suppliers to take non-OTC services from PayPoint in addition to OTC services. Although this was not true across the board, this type of conduct applied in

particular to a number of suppliers who were the most significant potential sources of non-OTC volumes. GLOBAL-365's primary case was that this conduct was abusive in itself in that it represented a use of PayPoint's dominant position in the OTC market to obtain an advantage in respect of the non-OTC market. However, irrespective of whether it independently constituted an abuse, it represented a further mechanism by which exclusionary effects on the OTC market were transmitted to the non-OTC market.

270. In this regard, GLOBAL-365 relied on Mr Hughes' evidence to the effect that PayPoint's contracts with bundled pricing and exclusivity with Utilita, E and SSE covered 92% of its non-OTC volumes in 2018. Given that PayPoint was the only undertaking providing outsourced non-OTC services to Ofgem registered energy suppliers at this stage, this also suggested that these contracts accounted for the same proportion of outsourced non-OTC volumes. In addition, as noted above, PayPoint deliberately targeted obtaining exclusive deals (across both OTC and non-OTC) with those independent energy suppliers with higher proportions of prepayment business, and did so with a strategy of "leveraging cash" (i.e. OTC).

***(b) PayPoint's submissions***

271. PayPoint's starting point was that the Chapter II prohibition is concerned with the protection of efficient competition, not inefficient competitors. PayPoint referred to this as the "as efficient competition principle". This principle was distinct from the AECT, which simply provided one methodology for assessing whether a dominant firm's conduct would eliminate as efficient competitors. PayPoint submitted that it followed that evidence that an actual competitor has left the market or lost market share is not by itself proof of an abuse. The probative value of that evidence will depend on the reasons for the exit or decline.
272. On this basis, PayPoint raised the following three issues for the Tribunal in relation to the circumstances of the present proceedings.

273. First, the exercise for the Tribunal is to consider whether the time-limited exclusivity provisions in PayPoint's contracts with energy suppliers and retailers were reasonably likely, in all of the circumstances of the market, to prevent an as efficient rival from competing in the OTC market.
274. Second, that exercise should be based on an objective assessment of the likely consequences of the impugned terms for competition in the OTC market generally having regard to:
- (1) the features of the market, including that it is a two-sided market; that, on the energy supplier side, the market is characterised by a small number of large players who carry out periodic procurement processes; and, on the retailer side, that there are other commission and footfall generating services that can be used to attract retailers and that the national supermarket chains were largely uninterested in energy prepayment;
  - (2) the terms themselves: the scope and duration of the exclusivity provisions, the frequency and scale of opportunities for competitors of PayPoint to win the business of energy suppliers and to secure retailers to their own networks, and whether the discount offered for exclusivity precluded as efficient rivals from profitably competing with PayPoint on price (the AECT); and
  - (3) the likely position in the OTC market absent the impugned terms, including consideration of whether more energy suppliers would have multi-homed for OTC services in the counterfactual (as is contended for by GLOBAL-365) notwithstanding the likelihood that this would have led to higher prices.
275. Third, the Tribunal ought to consider the evidence about the position of PayPoint's actual competitors in the OTC market to inform its assessment of the effect of the impugned exclusivity provisions on the OTC market. PayPoint submitted that the evidence showed that:

- (1) the merged PO/PZ was clearly in a position successfully to compete with PayPoint in 2019, notwithstanding the impugned exclusivity provisions. This was a strong factor militating against a finding that the impugned terms were likely to lead to the foreclosure of an as efficient competitor: an efficient and effective competitor in fact was able to win business, and grow to become the largest operator, in the OTC market notwithstanding those terms; and
- (2) the fact that Epay was not able to grow a share of the smart OTC market was not a consequence of the impugned terms. It was a consequence of a combination of factors including that Epay could not serve legacy meters; the smart OTC segment was still nascent in the period in which it attempted to enter the market; and Epay's target retailers (the supermarkets) were largely uninterested in offering energy prepayment services.

#### The two-sided market

276. The two-sided nature of the OTC market and the network effects were common ground. This explained why time-limited exclusivity provisions led to lower prices for energy suppliers. However, the existence of network effects were insufficient, in and of itself, to prove an abuse.
277. In considering the two-sided nature of the market, PayPoint submitted that it was important to note that there was an imbalance between the two sides. Although energy suppliers required a PSP to offer a sufficient retail network, the evidence did not support the conclusion that PSPs must offer any, let alone significant volumes of, energy prepayment transactions to build a retail network. This reduced the strength of the network effects.
278. Network effects are a natural barrier to entry in the OTC market that would arise irrespective of the impugned terms. Absent the impugned terms, a new entrant would need to find a way to sell itself to retailers without energy suppliers in order to build a network sufficient to offer an attractive proposition for energy suppliers. The "chicken and egg" problem was always going to exist. The issue

for the Tribunal was whether the exclusivity provisions at issue made it materially more likely that a new entrant would fail to overcome the natural barriers to entry presented by the two-sided nature of the market. PayPoint contended that there were numerous and frequent opportunities to contract on both sides of the market notwithstanding those provisions.

279. PayPoint argued that this is not a case in which a concern arises that the popularity of one product/service amongst consumers combined with indirect network effect will “tip” the market to a monopoly for one firm. There were multiple established retail networks throughout the period including the Post Office which was effectively immune from indirect network effects as its network was determined and paid for by the government. Payzone also had an established network throughout the period, although its network did decrease over time. Payzone’s network was sufficient to win the British Gas and Scottish Power contracts, when combined with the Post Office in 2019. Indirect network effects did not cause Payzone’s network to shrink below the minimum viable scale required to compete effectively with PayPoint.

#### The retailer side

280. PayPoint analysed the retailer side of the market in two parts: independent retailers and supermarkets.

#### *Independent retailers*

281. In respect of independent retailers, PayPoint’s principal submission was that there were a huge number of opportunities for PayPoint’s competitors to sign up independent retailers. PayPoint pointed to the evidence of the significant number of additional retailers which PayPoint was able to add to its network each year in the period from 2007 to 2023. These amounted to 39,500 new locations: an addition to its retail network each year of between 5% and 18%. PayPoint submitted, on the basis of the unchallenged evidence of Mr O’Neill, that 90% of the retailers that joined its network had no prior relationship with PayPoint and, therefore, could have been signed up by a competitor such as Payzone or Epay.

282. PayPoint submitted further that there was also evidence to show that competitors could have grown a network of retailers by developing a portfolio of footfall and commission generating services. PayPoint also pointed to the evidence of PayPoint witnesses, including Mr Watkin-Rees and Mr O'Neill, to the effect that PayPoint itself had offered retailers a range of different ways to obtain commission and footfall. In this regard, PayPoint relied on the evidence concerning Epay: it had been able to build a large retail network through offering mobile top-ups. The fact that it appeared that significant parts of that network had not been attracted to energy prepayments did not alter that fact.
283. PayPoint argued that, in considering PayPoint's independent retailer network, it was also necessary for the Tribunal to have regard to evidence from, in particular, Mr Watkin-Rees, in relation to the extensive investment which PayPoint had made in its network. This included investment in marketing and in "field teams" to visit new stores and carry out installation and training. It also involved PayPoint investing in developing the technological offer to the retailers. In contrast, the Tribunal had heard no evidence in relation to what steps, if any, Payzone had taken. In these circumstances, PayPoint submitted that it ought to be difficult for the Tribunal to infer that the decline in Payzone's network was, in fact, driven by a lack of energy suppliers in its portfolio.
284. PayPoint's investment in its retail network also gave context to the exclusivity which PayPoint sought in its contracts with retailers. As Mr Watkin-Rees had explained, this was a way of PayPoint recouping the benefit of its investment in building the network. The fact that there had been evidence that PayPoint, on occasion, sought to enforce the exclusivity terms in its retailer contracts was nothing to the point. If the terms were lawful, there was nothing wrong with enforcing them.
285. Finally, PayPoint suggested that there was little actual evidence that independent retailers did want to multi-home. That was not Mr Watkin-Rees' experience. Moreover, it wasn't clear what the overall benefit of retailer multihoming was said to be. If there was competition among PSPs leading to increases in commission paid to retailers, this would result in an increase in prices for energy suppliers and other customers. Mr Watkin-Rees considered

that this would not benefit anyone. It would unbalance PayPoint's relationship with consumers, suppliers and retailers which Mr Watkin-Rees likened to a three-legged stool.

### *Supermarkets*

286. PayPoint submitted that the evidence demonstrated that supermarkets were generally not interested in offering energy prepayment top-ups. In this regard, PayPoint relied on the evidence of its own witnesses: Mr Watkin-Rees and Mr Sappor. PayPoint, despite repeated efforts and the promise of significant volumes of prepayments, had been unable to generate significant or long-lasting interest from supermarkets. This evidence was consistent with Mr Robertson's experience at Epay.
287. PayPoint submitted that the evidence indicated that its presence in supermarkets was limited. In 2014, at the time when Epay entered the market for energy prepayments services, PayPoint had exclusivity in relation to ASDA's stores (then 331 in number), 235 out of 1,203 Sainsbury's stores, and 134 out of 3,378 Tesco stores. As to Morrisons, despite being pressed on the point, Mr Sappor had been categorical that PayPoint had never had an agreement.
288. On this basis, PayPoint argued that it was open to Epay to have offered energy prepayment in those parts of the supermarket where PayPoint had no or only limited presence. Properly construed, PayPoint's exclusivity in relation to Sainsbury's and Tesco did not cover their entire estates, were limited in their duration, and those subject to exclusivity were not (as GLOBAL-365 sought to suggest) in the "best" locations – as was clear from Mr Sappor's evidence. In Mr Sappor's opinion, the more successful the store the less likely that PayPoint would have been able to gain access to it.
289. In any event, PayPoint submitted that, in Mr Sappor's experience, the supermarkets with which it had had dealings had significant bargaining power. If the supermarkets had wished to offer Epay energy prepayment services, PayPoint would have been likely to have had to accommodate them. Mr Sappor gave evidence about the "carve-outs" in favour of a particular supplier which

supermarkets would require. For example, he referred to mobile phone top-ups. On the basis of both Mr Watkin-Rees' and Mr Sappor's evidence, PayPoint submitted that it was simply unrealistic to suggest that PayPoint had been able to use its exclusivity provisions in its supermarket contracts to restrict competition.

290. Finally, PayPoint submitted that any suggestion that Epay had been foreclosed by PayPoint's conduct would also require the Tribunal to ignore the evidence that Epay had an extensive network of national retail chains with which PayPoint had no relationship. On the basis of Mr Robertson's evidence these included: Poundland, Wilko, WH Smith, Boots, and petrol forecourt operators BP and Shell. There had been no challenge to Mr O'Neill's evidence that PayPoint had no relationship with any of these retailers.

#### The energy supplier side

291. PayPoint submitted that it was necessary, as a starting point, first, to appreciate that the energy supplier side of the market is characterised by a small number of big players: throughout the period, the largest six energy suppliers accounted for more than 90% of supply in the retail gas and electricity markets. In relation to prepayment, the Big Six and Utilita accounted for 85% of all customers in 2018 and in relation to smart prepayment, the evidence suggests that British Gas and Utilita alone accounted for up to 80% of all transactions.
292. Second, it was also common ground that these large energy suppliers carried out frequent procurement processes. In this regard, PayPoint submitted that nothing particularly turned on whether those processes were formal tendering processes or more informal market testing exercises.
293. From this starting point, PayPoint submitted that there was considerable evidence that, during the course of these procurement exercises energy suppliers of all sizes had exerted pressure on PayPoint to improve its terms. PayPoint pointed to examples of E.On, EDF and SSE using this tactic. PayPoint also relied on the evidence of its negotiations with British Gas in 2014 in which

British Gas used the threat of switching to Payzone in to secure a 20% reduction in price.

294. This evidence was consistent with the fact that the two competition economists agreed that competition *can* be intensified if a customer chooses to procure on a “winner takes all” basis. Mr Hughes put forward two reasons for his opinion that this had not happened in this case: (i) that energy suppliers did not have a sufficiently good outside option; and (ii) it was apparent from the evidence that the suppliers themselves did not want exclusivity. PayPoint submitted that neither of these reasons was borne out by the evidence.
295. In relation to the first reason, PayPoint noted that Mr Hughes had relied, to a material extent, on evidence from suppliers that had been obtained by Ofgem. These responses were mixed and, importantly, untested. As a result, PayPoint submitted that the evidence to Ofgem ought to be treated with caution especially when compared with the following factors:
- (1) Payzone’s network was at its lowest point in 2018, just before the merger with the Post Office, at around 10,000 retailers. Nonetheless, that scale of network, in combination with the Post Office network of 11,500 sites, was judged by both British Gas and Scottish Power to provide sufficient coverage in 2019.
  - (2) PayPoint pointed to the evidence which suggested that it would have been possible for a supplier to require a provider to add retail sites to its network, after the merger. In this regard, PayPoint noted PZ/PO had added retail sites to its network following the merger. There was no reason to think that this could have happened at an earlier point.
296. As to the second reason put forward by Mr Hughes, PayPoint again noted Mr Hughes’ reliance on the evidence obtained by Ofgem from suppliers. However, in any event, PayPoint submitted that the evidence indicated that PayPoint had presented suppliers with a choice: PayPoint had offered both exclusive and non-exclusive prices. Exclusivity allowed PayPoint to offer a lower per transaction fee and many energy suppliers therefore made the commercial choice to contract

on an exclusive basis to obtain that lower fee in exchange for the freedom to multi-home.

297. Against this background, the fact that some energy suppliers told Ofgem that they would have liked to use additional providers did not show that exclusivity was imposed by PayPoint or that energy suppliers were somehow unwilling participants in exclusivity. At most, it showed that some energy suppliers would have preferred a world in which they both paid a lower per transaction fee and had the freedom to multi-home. PayPoint argued that that ignored the economic reality.

298. Despite the fact that Mr Hughes had relied on the views of British Gas following a market assessment in 2013, PayPoint submitted that, properly understood, this example demonstrated that PayPoint's exclusivity produced the best price. British Gas had the option to contract on a non-exclusive basis: exclusivity was not imposed. The situation was as follows.

(1) British Gas considered the Post Office, Payzone and PayPoint (having excluded Epay on the basis that it had insufficient confidence in their ability to serve prepayment customers). Its options were: convenience exclusivity with PayPoint; convenience exclusivity with Payzone; or multi-homing with all three networks.

(2) A convenience exclusive arrangement with Payzone was cheaper than a convenience exclusive arrangement with PayPoint. The costs of customer migration would, however, have "eroded the majority of Payzone's offer" (on a worst-case scenario); and there were other advantages to staying with PayPoint (including that it could offer "more favourable customer services offerings in the new smart pay channels")

(3) A three network service would have cost more than convenience exclusivity because of an increase in PayPoint's commission charge from 0.5% to 1%.

299. This was linked to PayPoint's argument that the fact that it charged lower prices for exclusivity reflected the dynamics of the two-sided market. There was an objective economic reason why an exclusive (or convenience exclusive) arrangement allowed PayPoint to offer lower prices: namely, it meant that PayPoint could justify paying a lower commission to its retailers. Mr Watkin-Rees' evidence was that with exclusivity, PayPoint was able to offer greater footfall to retailers and, as a result, pay a lower commission fee. This was the relationship Mr Watkin-Rees likened to a three-legged stool. On this basis, PayPoint argued that not only did the jeopardy of energy suppliers contracting (or even potentially contracting) on an exclusive basis increase the incentive to offer the best prices, but it also ensured that PayPoint could continue to justify low commission rates on the basis of the differentiated footfall argument.
300. In this regard, PayPoint also highlighted that in a multi-homing scenario, the energy supplier has no control over which PSP is used to process transactions so the incentive to offer lower contract prices when there is no certainty about the number of transactions which will be gained is much weaker than when a lower price offered in bidding for an exclusive contract may capture all the supplier's transactions.
301. Based on the evidence of Dr Majumdar, PayPoint submitted that there were frequent opportunities for its competitors to contract with energy suppliers. Dr Majumdar's calculation was that, on average, 20% of OTC energy prepayment transactions were retendered or renegotiated each year between 2007 and 2021. On this basis, whatever the position of Payzone, PayPoint's position was that an as efficient competitor would not be foreclosed in circumstances where, on average, 20% of volumes were available to be contested notwithstanding PayPoint's exclusivity terms.
302. PayPoint's position in respect of the as efficient competitor principle was supported by Dr Majumdar's evidence in respect of the AECT. As explained in Dr Majumdar's reports, and established with him in cross-examination, the purpose of the AECT was to show that an as efficient competitor could profitably undercut PayPoint's price. In his opinion, it confirmed that the pricing

terms – specifically, in the OTC market, the discount for exclusivity – would not foreclose an as efficient competitor.

303. In respect of the non-OTC market, PayPoint understood GLOBAL-365's primary case to be that the alleged abuse on the OTC market had the effect of making it more difficult for GLOBAL-365 to win non-OTC contracts. PayPoint's position is that there is no evidence to support such effects in circumstances (i) larger energy suppliers could and often did contract separately for OTC and non-OTC services and there is no evidence to suggest material efficiencies for energy suppliers in contracting for both services together; and (ii) any such efficiencies are most likely to have been meaningful for tier 3 suppliers, the significant majority of which did not contract with PayPoint for OTC (or non-OTC) services.
304. In conclusion on this part of the case, PayPoint submitted that there was no evidence of anti-competitive foreclosure in respect of either Payzone or Epay.

**(4) Causation**

**(a) GLOBAL-365's submissions**

Basis of claim

305. During the course of oral submissions, following questions from the Tribunal, GLOBAL-365 clarified that, notwithstanding its written pleadings, it was pursuing its claim solely on a loss of a chance basis. GLOBAL-365 accepted that the loss claimed depended upon the actions of various third parties in the counterfactual including: energy suppliers; retailers; and customers. As a result, there was inherent uncertainty about the actions of these third parties in the counterfactual, and a loss of a chance assessment was required: see *Perry v Raleys Solicitors* [2020] UKSC 5; [2020] 1W.L.R. 1033 at §20 (*Perry*).
306. GLOBAL-365 submitted that Mr Hughes' damages model, upon which it relied, incorporated the loss of a chance assessment. The model was not based upon GLOBAL-365 winning the business of any particular energy supplier. Rather,

Mr Hughes' model was based on an estimate of the likelihood of GLOBAL-365 winning market share in each tier based on Mr Wilson's original Business Plan. GLOBAL-365's case was that it would, absent the abuse, have had: (a) a 30% chance of winning any given volume of tier 3 business; (b) a 50% chance of winning any given volume of tier 2 business; and (c) a 30% chance of winning any given volume of tier 1 business. GLOBAL-365 also stressed that Mr Hughes' model was also capable of calculating damages based on any assumed level of probability.

#### Multi-homing of OTC services in the counterfactual

307. The basis of GLOBAL-365's claim was that, in the counterfactual, absent PayPoint's exclusive contracts, large energy suppliers and those focussed on prepayment would have been likely to either multi-home for OTC services or to elect to procure OTC services solely from Epay. In these circumstances, GLOBAL-365 had a real and substantial chance of winning that business.
308. GLOBAL-365 submitted that the evidence showed that there were no technical obstacles to multi-homing for OTC services. As shown in the Ofgem SO, during the period 2008 to 2018, EDF, E.On and npower had all multi-homed for OTC services with PayPoint, Payzone and the Post Office, for at least certain periods. Further, GLOBAL-365 noted that many energy suppliers including npower, SSE, Scottish Power, E and Utilita, had expressed their dissatisfaction to Ofgem about PayPoint's exclusive contractual arrangements. This evidence supported GLOBAL-365's case.

#### Epay

309. GLOBAL-365's case on causation was based on Epay being its chosen partner for OTC energy prepayment services. In the counterfactual, GLOBAL-365 submitted that Epay's network would have looked quite different because, in the absence of PayPoint's store exclusivity terms, Epay would not have been prevented from attracting and retaining PayPoint's independent convenience outlets into its network. Whereas, in reality, the number of "indies" in the Epay network had declined over time – from around 3,700 stores in December 2014

to around 1,000 stores in October 2024. In the counterfactual, the number of independent outlets on the Epay network would have been much higher.

310. GLOBAL-365 also argued that in the counterfactual, Epay's attempt to enter the smart OTC sector would not have been affected by PayPoint's exclusivity arrangements. When Epay had won a contract from E.On to provide smart OTC services, GLOBAL-365 submitted that the evidence showed that PayPoint had reacted by seeking to harness the exclusivity provisions in its contracts with Asda, Sainsbury's and Tesco to prevent them from offering Epay's service. In the event, Epay's smart OTC product for E.On was only offered by the Post Office and Poundland (roughly 12,000 outlets).
311. In a counterfactual, without PayPoint's exclusivity arrangements, GLOBAL-365 submitted that Epay was likely to have been more successful in securing additional retailers to deliver its voucher-based smart OTC top-up service. On this basis, it would have been an established provider in the smart segment of the OTC market by 2018 when it partnered with GLOBAL-365 to deliver the SMARTprepay product.

#### Non-OTC

312. GLOBAL-365 submitted that the parties appeared to be agreed that winning a contract to provide OTC prepayment services was likely to help a PSP win a contract to provide non-OTC services to the same supplier. Secondly, although GLOBAL-365 accepted that energy suppliers were unlikely to reverse a procurement decision shortly after it had been made, it also submitted that it would be wrong for the Tribunal to conclude that the non-OTC volumes of all energy suppliers that had adopted an in-house or outsourced OTC service before GLOBAL-365 had a working product would be forever lost to it. Even if GLOBAL-365 would not have been able to win non-OTC volumes immediately upon market entry (because of a recently developed in-house service or a contract with PayPoint), in a counterfactual with multi-homing of OTC services, GLOBAL-365 would have been able to establish itself as a provider of OTC services and this would have given it a substantial chance of winning non-OTC volumes later down the line.

### Credentialisation and the requirements of larger suppliers

313. GLOBAL-365's plan was to win contracts with smaller suppliers first in order to "credentialise" for larger suppliers. This was a realistic approach and similar to the approach which PayPoint had adopted in seeking to sell its Multipay non-OTC product.
314. The industry experts were agreed that Big Six suppliers would want to see four types of testing before going live with a PSP: penetration testing, load testing, integration testing and backup testing. Dr Hesmondhalgh pointed out that only integration testing is customer-specific. In respect of the other three types of testing, an energy supplier could gain confidence where a PSP was already providing the relevant services to other energy suppliers at scale.
315. GLOBAL-365 also submitted that, in the counterfactual, in which energy suppliers would be able to multi-home their OTC services, the risks of appointing an OTC provider on a non-exclusive basis were obviously lower than making such an appointment on an exclusive basis. This meant that, in the counterfactual, a non-exclusive contract with a larger supplier was a more promising route to credentialisation. In this regard, GLOBAL-365 noted that there were a number of smaller suppliers in the market before 2021 which focussed on the prepayment sector. Dr Hesmondhalgh had included Utilita, E, Boost (part of OVO), Economy Energy, Spark, Robin Hood Energy, Nabuh and Our Power in this category. Of these, Utilita, OVO and E all had prepayment market shares of 4% or more.

### GLOBAL-365's window of opportunity

316. In submissions, GLOBAL-365 based its case on a "window of opportunity" which opened in 2017 with the roll-out of the SMETS2 meters. That roll-out only gained momentum during 2019. According to GLOBAL-365, the window closed by the end of 2021 by which point a large number of smaller, challenger suppliers, had exited the market.

317. GLOBAL-365 noted that the fact that it did not have a live, working product at the beginning of this period did not prevent it from successfully concluding contracts with energy suppliers. In this regard, it was in no different position than PayPoint which was, until mid-2019, selling a product which was not yet live with SMETS2 meters.

When did GLOBAL-365 have a working product?

318. Based on the evidence of Mr Wilson, GLOBAL-365 submitted that its first generation SMARTprepay product went live in February 2018 – that was the commencement of the Minibem’s contract. This date was consistent with the assumptions underlying Mr Hughes’ damages model – namely that GLOBAL-365 had started to process transactions from early 2018. GLOBAL-365 relied on the evidence of Mr Wilson to downplay the significance of any technical issues with the SMARTprepay product at this time.

319. Relying again on the evidence of Mr Wilson, GLOBAL-365 submitted that its second generation product went live from 2019. GLOBAL-365 accepted that the volumes processed by it in 2019 were low in comparison with either PayPoint or the Business Plan. However, it rejected the criticisms of the product which had been advanced by PayPoint on the basis of the cross-examination of Mr Wilson for three reasons.

(1) First, GLOBAL-365 took a pleading point: that PayPoint had not offered to prove that its product was fundamentally technically flawed.

(2) Second, PayPoint was effectively asking the Tribunal to infer from the fact that the SMARTprepay product encountered technical challenges that it was fundamentally flawed. Such an inference did not necessarily follow as PayPoint’s own experiences in relation to outages in the service it provided to Utilita demonstrated.

(3) Finally, the documents put to Mr Wilson dated from a long period – from 2018 to 2023. Certainly, by the end of that period, Mr Wilson accepted that SMARTprepay might have fallen behind the market but that was in

part, at least, because it had been starved of investment as a consequence of the foreclosure and resulting lack of volume of trade.

SMARTprepay was an attractive product

320. Fundamentally, SMARTprepay was an attractive product. GLOBAL-365 had successfully signed up 16 tier 3 suppliers: Ecotricity, Future Energy, GnERGY, Go Effortless Energy, HUB Energy, Logicor Energy, Opus Energy, People's Energy, PRP Energy, Pure Planet, Rebel Energy, Solarplicity, Symbio Energy, Toto Energy, Yu Energy and Zog Energy. GLOBAL-365 pointed to the following attractive features of its product.

(1) GLOBAL-365's starting price point of 15p per transaction was attractive to smaller suppliers when compared with PayPoint's average fee per OTC transaction in 2018 of in excess of 20p for challenger suppliers like E, Economy Energy, OVO and Utilita as well as for EDF.

(2) "Funds splitting" gave prepayment customers a greater degree of transparency over the proportion of their prepayment going towards topping up their meter as opposed to paying down outstanding debt.

(3) SMARTprepay automatically provided prepayment customers with a Unique Transaction Reference Number (UTRN) via multiple media whereas PayPoint's product Multipay only provided a UTRN on the printed receipt.

321. GLOBAL-365 submitted that the evidence showed that it had adopted a pragmatic approach to market demand. Although, at the outset, it had intended not to develop a "white label" product because it had been keen to develop brand identification, the evidence showed that it would have been prepared to compromise and to consider developing "co-branding" with British Gas.

322. In the same way, GLOBAL-365 submitted that it would have been prepared to reduce its 15p price point in order to win business. This was the clear and unchallenged evidence from Mr Smith.

Energy suppliers prevented from trialling and/or contracting with GLOBAL-365 during window of opportunity

323. By 2018–2019, when GLOBAL-365 had a working SMARTprepay product, all of the tier 2 and larger tier 3 suppliers with a material prepayment focus – E, Economy Energy, OVO, Spark, Utilita and Utility Warehouse – were contracted with PayPoint to provide OTC services on an exclusive basis. In 2019, all of these suppliers, except OVO, also took non-OTC services from PayPoint on an exclusive basis.
324. In essence, GLOBAL-365’s case was that in a counterfactual without PayPoint’s exclusivity terms, it would have had a chance of providing smart OTC prepayment services to the above suppliers from 2018/2019. In respect of non-OTC services, even if GLOBAL-365 could not have contracted immediately for non-OTC services with those suppliers that had Multipay contracts, it could have won those non-OTC volumes on expiry of their contracts with PayPoint. GLOBAL-365 would have had a higher chance of winning such contracts if it was already providing those suppliers with OTC services.
325. On this basis, had GLOBAL-365 not been prevented from supplying OTC (and later non-OTC) services to these tier 2 and larger tier 3 suppliers focused on prepayment, it would have been better able to credentialise its offering and, thus, had a much better chance of securing Big Six business (both OTC and non-OTC) than it did in actuality.
326. For completeness, GLOBAL-365 also submitted that little, if any weight, should be given to Mr Anaman’s opinion that GLOBAL-365’s attempts to raise external funding were of relevance to the counterfactual. The short point is that the fundraising exercise took place in the real world which was affected by PayPoint’s alleged conduct. Despite Mr Anaman’s best efforts to downplay potential investors awareness of PayPoint’s conduct, there could be no doubt that they were aware of its results: PayPoint’s entrenched incumbency in the prepayment market. This, in itself, would have been sufficient to distort investment decisions when compared to the counterfactual.

**(b) PayPoint's submissions**

327. As noted above, PayPoint's submissions focussed heavily on the issue of causation. PayPoint identified five key "planks" of GLOBAL-365's case and submitted that GLOBAL-365 had failed to prove its case in respect of each. Four of those "planks" concerned causation. They were as follows, and will be considered in turn:

- (1) GLOBAL-365 had a best-in-class product developed by 2018;
- (2) The window of opportunity;
- (3) GLOBAL-365 had been blocked from contracting with energy suppliers by PayPoint's contractual terms; and
- (4) GLOBAL-365 would have achieved incumbency status in the counterfactual – under this heading PayPoint made submissions about the quantification of GLOBAL-365's claim and, in particular, its reliance upon Mr Hughes' model.

GLOBAL-365 had a best-in-class product developed by 2018

328. PayPoint submitted that the evidence before the Tribunal made it clear that GLOBAL-365 had failed to prove the starting point on which Mr Hughes' model depended – it did not have a best-in-class product developed by 2018.

329. In summary, SMARTprepay was not ready to roll out to customers in January 2018, as demonstrated by the difficulties GLOBAL-365 had experienced with the Minibems contract. SMARTprepay itself was fundamentally flawed from the outset. The evidence of its development highlighted a shifting cast of developers and a lack of a proper specification. It also showed that Mr Wilson had been repeatedly urged by developers to consider a complete rewrite. The flaws in the software resulted in significant difficulties each time it was rolled out to a new client. In particular, the platform had only ever dealt with miniscule transaction volumes and was prone to failure when subject to stress.

SMARTPrepay was neither lower cost nor higher quality than other products. The 15p per transaction price point for OTC transactions was not competitive – it was materially above PayPoint’s pricing for OTC transactions for larger clients. The product itself did not have any differentiating features.

*Energy suppliers’ requirements*

330. The industry experts had given evidence as to the kinds of factors that were relevant to energy suppliers’ procurement decisions when it came to appointing a PSP for energy prepayment services. Both experts had stressed the need for reliability and for a robust technology platform. Both experts also agreed on the need for testing of the systems being offered by the prospective PSP. In particular, PayPoint highlighted that Mr Kachhala had explained that energy suppliers, particularly the larger ones, were typically risk averse when it came to procuring outsourced payment services. This was because service failures could have significant negative brand and regulatory implications for energy suppliers.
331. PayPoint submitted that the views of the experts were consistent with evidence before the Tribunal of how the larger energy suppliers had procured prepayment services. These procurement processes had involved significant due diligence and the completion of detailed technical questionnaires.
332. This evidence, both expert and factual, formed the backdrop against which SMARTprepay required to be assessed.

*The design and development of SMARTprepay*

333. At the outset, PayPoint highlighted the fact that GLOBAL-365 had provided no evidence from anyone who was involved in the development of SMARTprepay at a technical level. GLOBAL-365’s case depended on the evidence of Mr Wilson together with what could be taken from the documents.
334. In respect of 1GP, the first generation of SMARTprepay, PayPoint submitted that the state of SMARTprepay in early 2018 could be tested by reference to the

roll out of the platform to Minibems, GLOBAL-365's first client, which was scheduled to take place then. It was apparent from the contemporaneous documents surrounding the run-up to the Minibems launch that GLOBAL-365 did not have a working product in late 2017. This was a watershed moment for GLOBAL-365 because, as a result of the problems it experienced, the decision was taken to start work on 2GP, the second-generation platform, with only minimal further expenditure being incurred on the existing platform.

335. PayPoint noted that Mr Wilson, during cross examination, had sought to minimise the difficulties apparently disclosed by email exchanges at the time. However, PayPoint submitted that little weight should be given to Mr Wilson's evidence on technical matters. Mr Wilson did not have a technical background. He seemed to have surprisingly little recall of matters referred to in the documents. His evidence was also inconsistent and unsubstantiated. In any event, even Mr Wilson had been compelled to agree with a contemporaneous assessment of the 1GP as "lacking basic functionality, containing work of poor quality, and as being unsuitable for use with any other supplier than Minibems".
336. In respect of the development of 2GP, PayPoint submitted that the evidence showed that the process of building the platform took the entirety of 2018. Part of the reason for the delay seemed to arise from problems that GLOBAL-365 had had integrating SMARTprepay with the Barclays Pingit app. In cross examination, Mr Wilson had explained that the reason no new clients were added to 1GP pending the development of 2GP was his desire to avoid the risk of the platform not working.

*The roll-out of SMARTprepay 2GP*

337. Following 2GP becoming operational in 2019 until the end of 2022, PayPoint submitted that the evidence showed that GLOBAL-365 actually processed very few transactions and then for only three energy companies – Solarplicity, Pure Planet and Yu Energy.
338. In particular, PayPoint highlighted the evidence which related to the processing by GLOBAL-365 of transactions for Yu Energy. During the course of 2023, the

monthly transaction volumes being processed by GLOBAL-365 increased from around 2,000 in April to 3,417 in June. PayPoint submitted that internal GLOBAL-365 emails from around that time showed that this modest increase in volume led to serious problems for the SMARTprepay 2GP platform because it apparently could not handle that volume.

339. This evidence was fatal to GLOBAL-365's case. As had been put to Mr Wilson in cross-examination, if SMARTprepay couldn't manage the very modest level of transactions which arose from Yu Energy, there was no prospect of it demonstrating that it could cope with the very much greater level of demand which would arise from, for example, British Gas.

*Alleged competitive advantages*

340. PayPoint submitted further that it was clear from the evidence that SMARTprepay was neither sufficiently differentiated nor cost-effective to be attractive to energy suppliers.
341. First, contrary to GLOBAL-365's submissions, the fact that SMARTprepay generated a UTRN was unremarkable. Mr Cole's unchallenged evidence was that this was standard industry practice and that PayPoint's system had the same functionality.
342. Second, in relation to "funds splitting", PayPoint relied on the evidence of the industry expert Mr Kachhala who did not consider the feature to be attractive as well as the evidence of Mr Cole who noted that PayPoint had never been asked by energy suppliers to provide anything like this.
343. Third, SMARTprepay lacked certain basic features that many suppliers appeared to regard as attractive and, indeed, necessary. SMARTprepay was not available as a mobile app. GLOBAL-365 had also not offered SMARTprepay as a "white label" app which could be used with an energy supplier's branding. This was because Mr Wilson had been keen on developing the SMARTprepay branding.

344. Finally, PayPoint argued that there was evidence that GLOBAL-365 would not have been prepared to reduce its price point below 15p. There was clear evidence from Mr Hughes that such a price would not have been competitive.

The window of opportunity

345. GLOBAL-365's claim was based on there being a narrow window of opportunity which, but for PayPoint's conduct, it would have been able to exploit. PayPoint's submission was, in short, that the evidence showed that GLOBAL-365 missed any window which might have existed.
346. On the basis of the evidence of Mr Wilson and Mr Smith, it appeared that this window opened with the roll-out of smart meters and that it closed once most energy suppliers had smart prepayment services in place. The logic underlying the closure of the window was that once suppliers had made arrangements in respect of smart prepayments they were unlikely either to want to change these arrangements or to multi-home. PayPoint submitted that this would be the case whether or not there were any contractual obstacles to them doing so for a number of reasons.
347. First, once suppliers have incurred the upfront costs of building their own non-OTC service, they will have only modest operating costs and are unlikely to switch. The only example of a supplier switching away from its own system was OVO following the SSE merger, but that is explained by the very specific context of OVO having acquired several other suppliers that used PayPoint and having to choose between two already installed solutions, one in-house and one external. In a similar way, a supplier which has set up the provision of third-party non-OTC services will also have reduced incentives to switch given the upfront integration and development costs and the need to migrate customers, for example, by requiring them to download a new app. For these reasons, there was no scope to multi-home non-OTC services.
348. Second, in respect of OTC services, PayPoint submitted that a PSP would struggle to persuade any but the very largest suppliers to add to any pre-existing OTC provision which the supplier had put in place. Energy suppliers would face

integration and contracting costs with each PSP they contracted with and it could be assumed that they would not duplicate these costs without good reason. By contrast, transaction fees would be relatively of less significance. Furthermore, for most suppliers, prepayment was not a priority and, in any event, smart OTC was a declining proportion of transactions.

349. In relation to GLOBAL-365 in particular, PayPoint pointed to Epay. The logic of GLOBAL-365's case was that in the counterfactual Epay would have been a tried and tested supplier of OTC services. On this basis, it was difficult to see why any energy supplier would want to contract with GLOBAL-365 as opposed to contracting with Epay.
350. Against this background, PayPoint submitted that the evidence showed that, on the logic of its own position, GLOBAL-365 could not have succeeded in exploiting the narrow window of opportunity.
351. First, for the reasons set out above in respect of the first "plank", GLOBAL-365 did not have an operational platform before 2019 at the earliest and, even then, it was deeply flawed.
352. Second, by 2019, larger energy suppliers were already self-supplying non-OTC services or had put in place plans to do so. By mid-2018, four of the Big Six had already developed their own non-OTC provision: British Gas (2015); E.On (2017); EDF (2017) and Scottish Power (2018). In relation to the remaining two, SSE had begun to procure non-OTC services from PayPoint in September 2016 and npower appeared to have contracted with Payzone in 2016.
353. The position was broadly similar for tier 2 suppliers. OVO (2015), Octopus (2016) and Utilita (2019) all launched their own in-house non-OTC services. Utilita had previously contracted with Eckoh (2012) and PayPoint (2015). Economy Energy and E both contracted with PayPoint for non-OTC services as early as 2016. Shell appeared to have contracted with Payzone for non-OTC services before 2019 and then switched to PayPoint. The remaining two tier 2 suppliers, Opus Energy and Utility Warehouse, came to deal with the non-OTC issue later. Opus ran a small pilot scheme with GLOBAL-365 in late 2018 but,

ultimately decided not to proceed with non-OTC. Utility Warehouse concluded a contract with PayPoint for non-OTC services in June 2019 but only after GLOBAL-365 had pitched to its representatives.

354. Finally, by 2019, there were several well-established prepayment offerings in the market including PayPoint and Payzone.
355. As a result, GLOBAL-365 missed the opportunity to win the non-OTC business of all of the suppliers who had opted to develop self-supply and its late entry to the market created an obstacle to contracting with suppliers who had already established third-party non-OTC and smart OTC arrangements. Furthermore, GLOBAL-365's late entry to the market meant that it had less time to "credentialise" with tier 3 suppliers before they began to exit the market. Of the 16 tier 3 suppliers with which GLOBAL-365 contracted, 11 went out of business, namely: Future Energy (2018); Solarplicity (2019); Toto Energy (2019); GnEnergy (2020); Go Effortless Energy (2020); HUB Energy (2021); People's Energy (2021); PFP Energy (2021); Pure Planet (2021); Symbio Energy (2021); and Zog Energy (2021).

GLOBAL-365 had been blocked from contracting with energy suppliers by PayPoint's contractual terms

356. As a preliminary point, PayPoint submitted that, in order to address GLOBAL-365's case in respect of the counterfactual and, in particular, the allegation that GLOBAL-365 was prevented from contracting with energy suppliers, it was necessary to consider what had actually happened and the reasons for that.
357. In considering GLOBAL-365's case, PayPoint focussed on the allegation that GLOBAL-365 had been prevented from contracting with larger energy suppliers – those in tiers 1 and 2. PayPoint noted that, consistent with what had actually happened, there appeared no dispute that GLOBAL-365 had managed to contract with a number of the smaller, tier 3, suppliers. PayPoint also proceeded on the assumption, which reflected the reality of in-house non-OTC provision, that these larger suppliers would be prepared to contract separately for OTC and non-OTC services.

358. Against that background, PayPoint submitted that GLOBAL-365 had numerous opportunities to secure contracts with energy suppliers between 2017 and 2021. This was because the suppliers fell into one or more of the following categories: (1) they did not have a contract with PayPoint for either or both OTC or non-OTC services; (2) they contracted with PayPoint but on a non-exclusive basis; and (3) they were free to switch PSP during the period. In particular, PayPoint submitted that GLOBAL-365 had had an opportunity to contract with every tier 1 and tier 2 energy supplier. In this regard, PayPoint relied on the information contained in an agreed table of contracts which the parties helpfully provided to the Tribunal.
359. In relation to tier 3 suppliers, PayPoint noted that of the 59 suppliers contacted by GLOBAL-365, PayPoint only had contracts with 17 in total and, in respect of non-OTC services, only seven. Moreover, of that 17, five contracted with PayPoint only after they had been contacted by GLOBAL-365 and, in respect of 10, their contracts had either started or ended in the period between 2018 and 2021 meaning that they were available to be won by GLOBAL-365 at some point.
360. During the course of the evidence, some attention was focussed on one tier 3 supplier, Robin Hood Energy, as a result of exchanges between that company and both GLOBAL-365 and PayPoint. Mr Hughes had identified Robin Hood Energy as an example of a supplier which had been unable even to have a trial with GLOBAL-365 when it had been contacted in 2016. However, PayPoint submitted that it was very difficult to understand on what basis it could be suggested that GLOBAL-365 would have been in a position to supply Robin Hood Energy. GLOBAL-365 did not have a developed platform in 2016. Moreover, at the time of GLOBAL-365's contact, the view of Robin Hood Energy's representative had been that it was not the correct time to launch a new payment channel only 2 months into the roll-out which had commenced with PayPoint.
361. PayPoint submitted further that, in any event, any failure by GLOBAL-365 to win contracts did not arise from the exclusivity provisions in PayPoint's contracts. This was for two principal reasons.

362. First, GLOBAL-365 had made a commercial choice to contract with Epay to provide its OTC network instead of using a tried and tested provider – like the Post Office or Payzone. PayPoint could not be blamed for the consequences of this choice. Mr Wilson had confirmed in his evidence that this was a commercial choice: he was not prepared to pay for integration to either of these networks. PayPoint submitted that this choice had consequences. Had GLOBAL-365 taken this choice, it would have undoubtedly facilitated GLOBAL-365’s entry to the OTC market. Furthermore, whatever the cause of the deficiencies in Epay’s network, if those deficiencies caused GLOBAL-365 to fail to win contracts that flowed from GLOBAL-365’s own decision.
363. Second, there were numerous other reasons why energy suppliers decided not to contract with GLOBAL-365 which had nothing to do with either Epay’s network or PayPoint’s conduct. In this regard, PayPoint referred to the fact that GLOBAL-365 did not offer an integrated app and that, at least initially, GLOBAL-365 had been reluctant to offer its product in a white label format. More fundamentally, GLOBAL-365 was a new entrant and not well established. The Tribunal had evidence from Mr Bullen of Utilita that this was the reason he had not been interested in what GLOBAL-365 was offering.

**(5) Quantum**

364. The approach of the parties’ respective experts in relation to the quantification of damages is summarised in Section D above.

**(a) GLOBAL-365’s submissions**

365. GLOBAL-365’s case on quantum relied on Mr Hughes’ model which used the Business Plan as the starting point which he extended from 5 years to 10 years and made some adjustments (see §200 above). GLOBAL-365 submitted that Mr Hughes had constructed a general-purpose model which assessed the quantum of GLOBAL-365’s loss on a probabilistic, market wide basis.
366. As noted above at §178, Mr Hughes adopted a “token” approach in relation to energy suppliers which did not: (i) have regard to prepayment volumes for any

individual suppliers; and (ii) make assumptions about which particular suppliers GLOBAL-365 would have won in the counterfactual. He removed transactions associated with Octopus and Utilita in the central case but allowed for a sensitivity where the Utilita volumes were included. In addition, Mr Hughes' model also adjusted the assumptions made in the Business Model to take account of differences that were unrelated to PayPoint's alleged abusive conduct such as the pace of roll out of smart meters.

367. GLOBAL-365 submitted that Mr Hughes' model was modular and allowed the Tribunal to adjust assumptions as to, amongst other things: (i) the market shares that would have been won by GLOBAL-365 in the counterfactual; (ii) the relative mix of OTC and non-OTC transactions processed by GLOBAL-365; (iii) the yearly top-up frequency; and (iv) the discount rate for future losses.
368. During the trial, the Tribunal queried whether there would be sufficient evidence to make an award of damages should the Tribunal consider it was unable to rely on the evidence of Mr Wilson in these proceedings. Mr Hughes responded stating that it would be "going too far" to not award any damages, should the Tribunal find that it cannot rely on Mr Wilson's evidence. GLOBAL-365's final submissions agreed, for the following reasons:
- (1) Should the Tribunal find that PayPoint caused GLOBAL-365 to lose a substantial chance of entering the OTC and non-OTC prepayment markets at scale, the Tribunal must then approach the quantification of the chance and the loss to GLOBAL-365 on a broad axe basis.
  - (2) In determining quantification on a broad axe basis, the Tribunal could make evaluative judgements based on all of the evidence before it, including: (i) the likelihood of multi-homing on OTC services in the counterfactual; (ii) the position of Epay in the counterfactual; (iii) the links between OTC and non-OTC services; and (iv) the existence of tier 2 suppliers with a focus on prepayment that were signed up to exclusivity with PayPoint in the real world.

(3) On the basis of the evidence before the Tribunal, it would need to form a view in relation to GLOBAL-365's: (i) market share in the counterfactual; and (ii) mix of OTC and non-OTC transactions in the counterfactual.

369. GLOBAL-365 submitted that the Tribunal was not required to adopt Mr Hughes' assumptions in relation to the Business Plan. Mr Hughes' model was flexible, and could be adjusted to account for uncertainty, to assess loss in accordance with the Tribunal's judgment on the key issues.

370. In relation to the small company premium, GLOBAL-365 submitted that Mr Anaman ultimately agreed with Mr Hughes that it is not to be applied to all small companies as a matter of principle. It is ultimately a tool that the Tribunal can use to account for uncertainties that it may have about projected cash flows. The Tribunal should be careful not to "double count" uncertainties both at the level of sensitising cash flow projections (e.g. reducing market share estimates relative to Mr Hughes' central case) and at the level of discounting for uncertainty.

***(b) PayPoint's submissions***

371. PayPoint submitted that Mr Hughes' damages model did not provide any reliable basis to prove the quantum of GLOBAL-365's alleged loss and is based on an incorrect premise as to the quality and readiness of GLOBAL-365's product as reflected in the Business Plan. The model was dependent on the evidence of Mr Wilson as to the technical capabilities of SMARTprepay being accepted.

372. In fact, PayPoint submitted, the claim was built on a technically deficient product, that was delivered to the market very late and was pitched to energy suppliers, almost all of which were uninterested. Many energy suppliers had established solutions already; others did not like the functionality and others were not prepared to gamble on an unproven product. Energy suppliers, particularly the Big Six and those with a focus on prepayment, risked regulatory scrutiny and reputational harm which made their position very understandable.

373. In relation to the counterfactual, PayPoint submitted that the following were important considerations.

- (1) The timing and pattern of demand would have been the same.
- (2) The same energy suppliers would have had the same commercial focus and would have required smart-OTC and non-OTC services at the same points in time.
- (3) Each of the energy suppliers would have processed the same number of transactions.
- (4) The quality of prepayment services would have been of critical importance for energy suppliers (even if their commercial importance was less) and consumers. This also needed to be taken into consideration when assessing the likelihood of whether those energy suppliers would have contracted with GLOBAL-365 in the counterfactual.
- (5) The standards that energy suppliers would have been required to meet before they were prepared to contract with GLOBAL-365 would also have been the same.
- (6) There would have been the same requirement for providers to be able to prove that they had a reliable and secure product, and that product could operate at scale with the ability to cope with the demands of processing tens of millions of transactions per year.
- (7) There is no evidential basis to consider that key business decisions made by GLOBAL-365 would have been any different in the counterfactual. The software would have been developed at the same time, in the same way and by the same people. The functionality of the product pitched to energy suppliers would have been the same and the pitches to energy suppliers would have been made at the same point in time.

374. In light of the above, the key consideration for the Tribunal was whether it is more likely that GLOBAL-365's product would have been better received absent the exclusivity provisions, which PayPoint submitted it would not. The reactions of energy suppliers in the actual provide a very strong basis to infer there was no real and substantial chance that they would have contracted for SMARTprepay in the counterfactual.
375. PayPoint criticised Mr Hughes' model as it was not based on, and did not provide any insight into, the real-world position of any individual supplier with respect to SMSPMs. Each supplier in the model simply represented a share of the volume of SMSPMs that Mr Hughes estimated to have been available in each tier. For example, one Big Six supplier is a "token" that represents one sixth of the total number of Big Six SMSPMs estimated by Mr Hughes. His model estimated a "glidepath" that simply could not occur because the model did not reflect the structure of demand for SMSPM top-ups. In particular, contrary to what Mr Hughes assumed in the model: (i) there was no mass of "small" (tier 3) suppliers holding small but material volumes that GLOBAL-365 could use to credentialise itself for tier 2 suppliers; and/or (ii) there were no "medium" (tier 2) suppliers holding sufficiently large volumes that GLOBAL-365 could use to credentialise itself for the Big Six.
376. The Tribunal did not have data on the number of smart prepayment meters but the evidence suggested that two suppliers, Utilita and British Gas, accounted for the large majority of SMSPMs in 2019. PayPoint stated that Utilita has a share of approximately 41%-43% of SMSPMs in 2019 and the evidence suggested British Gas had a share of SMSPMs of between 30% and 40% in 2018 and 2019.
377. The next largest supplier in relation to SMSPMs in 2019 was OVO, accounting for approximately 9% (190,000 meters and 12.5 million transactions per year). By that time, OVO had acquired Economy Energy and Spark, two suppliers identified as having a focus on prepayment for GLOBAL-365's credentialisation strategy. PayPoint's transaction data suggested that these two suppliers did have material volumes in 2018. By 2019, however, when GLOBAL-365 was ready to launch any product to serve energy suppliers, they

had been acquired by OVO. Therefore, these energy suppliers should be treated as part of OVO.

378. After OVO, the next largest suppliers served by PayPoint in 2019 were E and SSE, each of whom is estimated to account for around 5% of SMSPMs (equating to around 110,000 SMSPMs and 7 million transactions per year). Therefore, OVO, E and SSE were not on any view suppliers with whom GLOBAL-365 could have credentialised itself. They were suppliers with high transaction volumes for whom credentials would be required.
379. After these five suppliers, there was no evidence to suggest that there were suppliers (and certainly not suppliers outside the Big Six) which had any material volumes of SMSPMs for the purpose of credentialisation in 2019.
380. On this basis, it was clear that GLOBAL-365's credentialisation theory was based on an imaginary premise. There was no possibility of GLOBAL-365 obtaining around 31,300 SMSPMs in the first year following its launch through the acquisition of a pool of small and medium suppliers.
381. Mr Hughes' damages model predicted that by month 19 GLOBAL-365 would be serving approximately 405,000 SMSPMs. This suggested that GLOBAL-365 would have been required to obtain the whole of the business of OVO, E and SSE, including OVO's non-OTC business which was supplied in-house at that time. The estimated combined number of meters for those three companies in the middle of 2019 based on PayPoint transaction data was just over 400,000. It was difficult to see any basis on which this could be said to be a credible outcome in the counterfactual.
382. PayPoint submitted further that Mr Hughes had adopted an inconsistent and incomplete approach to the exclusion of specific suppliers. There were a number of reasons that other suppliers would not have used SMARTprepay for reasons unrelated to PayPoint's impugned conduct and they should also have been excluded from the assessment of loss. In addition to Utilita and Octopus, PayPoint submitted that numerous other energy suppliers should be excluded on the basis that their volumes were unattainable, including:

- (1) Suppliers with in-house non-OTC services in place by 2018. This included British Gas, E.On, Scottish Power and OVO. In addition, EDF had also launched its in-house solution by 2017, which was subsequently withdrawn due to technical issues and relaunched in 2019.
  - (2) All larger suppliers who would have required credentialisation and testing as a pre-condition for contracting. This included all of the Big Six and OVO. There was clear evidence that GLOBAL-365 would not have been able to pass the necessary tests.
  - (3) All suppliers who wanted a white-label service. The evidence suggests that suppliers including E, First Utility/Shell Energy and British Gas would all need a white-label service. PayPoint submitted that Mr Wilson had been definite that GLOBAL-365 would not have provided a white-label service.
383. PayPoint submitted that a further flaw in the model was that Mr Hughes adjusted GLOBAL-365's counterfactual pricing downwards to undercut or, for non-OTC transactions, to match PayPoint's pricing. However, given Mr Wilson's oral evidence, there was no clear basis on which the Tribunal could find that GLOBAL-365 would have offered sufficiently competitive prices in the counterfactual to win this business
384. In addition, PayPoint identified two further issues in relation to Mr Hughes' credentialisation glidepath.
- (1) The damages model produced a very steep incline after the end of the first year based on an assumption, without evidence, that processing transactions for around 31,000 meters would be sufficient to prove credentials for a Big Six supplier with four times that volume of transactions. The problem would have been even more stark if it were to be suggested that GLOBAL-365 could have obtained the business of British Gas, which was serving (even on a conservative view) well over ten times (and probably more like 25 times) that volume of meters.

- (2) The glidepath did not in any event provide sufficient time for GLOBAL-365 to have reached those volumes before it submitted a bid to win a Big Six contract. Allowing for a tender process of around six months between the submission of bids and the contract award followed by a transition period of six months before “go live” (which would be a relatively short process according to the evidence), GLOBAL-365 would have needed to submit a bid in month 1 to “go live” in month 13. In month 1, GLOBAL-365 would by definition have had no credentials to show to a Big Six supplier at all.
385. PayPoint submitted that these criticisms of the assumptions made in the model about the volumes of transactions which GLOBAL-365 would have processed were consequential. This was because the model was extremely sensitive to even small reductions in volumes. Mr Hughes had presented a sensitivity in which he adjusted the volumes won by GLOBAL-365 down by 10%. That sensitivity resulted in a very substantial reduction in both ten-year damages and the Terminal Value. In oral evidence, Mr Hughes said that he did not test any other scenarios beyond those presented in his report. As such, he was apparently not aware that reducing counterfactual volumes by 20% resulted in strongly negative results, i.e., the business was unprofitable and had no positive Terminal Value.
386. PayPoint’s position was that the only appropriate basis on which to assess the quantum of GLOBAL-365’s loss would be a “bottom up” assessment identifying the specific suppliers with whom it would have contracted (or would have had a real and substantial chance of contracting with) in the counterfactual. It would be wrong in principle for the Tribunal to adopt a broad axe approach in circumstances where a more granular assessment, by reference to the best available data, would permit a more realistic assessment of any loss suffered by GLOBAL-365 as a result of PayPoint’s exclusivity terms.
387. If any loss were found on the basis of such a granular, “bottom up” assessment, it should in PayPoint’s submission be assessed on a “loss of a chance” basis. The available evidence does not support the view that there were any suppliers

who would, on the balance of probabilities, have contracted with GLOBAL-365.

388. In the alternative, PayPoint maintained its Conservative Alternative Scenario for which Mr Anaman calculated GLOBAL-365's losses, using the methodology described at §214 above as around £381k.

## **F. DECISION**

### **(1) Introduction**

389. At the outset, it is necessary to draw attention to a very significant difficulty for GLOBAL-365's case when it is measured against the evidence we have heard.
390. GLOBAL-365's claim in the present proceedings is based solely upon its development of SMARTprepay. In essence, the claim proceeds on the basis that GLOBAL-365 has suffered loss because the market share of energy suppliers which it was able to capture with SMARTprepay was far smaller as a result of the allegedly anti-competitive conduct of PayPoint. GLOBAL-365 claims £113.2 million from PayPoint as the value of the chance it lost.
391. It follows that, in order to be successful, it is fundamental that GLOBAL-365 proves, on the balance of probabilities, that it had a real and substantial chance of winning business with SMARTprepay.
392. Analysed in this way, against the background of the evidence we have heard, it can be seen that GLOBAL-365's claim depends to a significant degree on the evidence of Mr Wilson. As we have noted above (at §76), Mr Wilson was the only witness put forward by GLOBAL-365 to speak to the development and technical capabilities of SMARTprepay. Furthermore, GLOBAL-365's case on causation and quantum depends on the unquestioning and uncritical adoption by Mr Hughes of Mr Wilson's Business Plan and the assumptions which underlay it.

393. We have set out above our views of Mr Wilson’s evidence (at §§93–99). This finding has a significant consequence for the overall determination of the case particularly in relation to causation. We set out these consequences below at §§464–467. Given the size and scale of the expert evidence which was built upon it, it is regrettable that these foundations were not more fully tested before the claim was brought to trial.
394. However, that notwithstanding, GLOBAL-365 has advanced its case asserting a breach by PayPoint of section 18 of the CA98 and we intend to deal with it in the conventional manner.

## **(2) Market Definition**

395. GLOBAL-365 asserts dominance by PayPoint on the OTC energy prepayment market with particular reference to PayPoint’s relationships with energy suppliers.
396. Having considered the evidence of the experts and the broad consensus between them (see §125 above), we agree that the relevant OTC market is the market for the supply of OTC prepayment services to energy suppliers in Great Britain.
397. We also agree that the OTC market is a two-sided market in which PSPs buy OTC prepayment services from retailers and deliver prepayment services to energy suppliers. It is clear that there are strong commercial relationships between the two interfaces. The nature of these relationships was encapsulated during the trial with the phrase the “chicken and egg” problem. In order to attract a retailer to join its network, a PSP requires a portfolio of energy suppliers, the customers of whom will go to the retailer to make prepayments. Equally, in order to persuade an energy supplier to entrust it with prepayment services, a PSP needs a sufficient network of retailers that can be used by the supplier’s customers to make prepayments and which will meet regulatory requirements. In short, in order to be successful, a PSP requires to be attractive both to retailers and to energy suppliers.

398. GLOBAL-365 does not assert dominance by PayPoint in the non-OTC energy prepayment market. The parties both submitted that, although there was some disagreement between the experts in respect of the precise definition of the non-OTC market, there was no need for the Tribunal to resolve this.

399. Although we recognise, therefore, in light of the way in which GLOBAL-365 advanced its case, that this is not in dispute, having considered the evidence, we are of the view that, properly defined, the non-OTC market does include self-supply of non-OTC services by energy retailers. In our view, the non-OTC market is the market for the supply of prepayment services provided other than on an OTC basis in Great Britain. We are not persuaded by Mr Hughes' attempt to exclude self-supply by energy suppliers from the definition of the non-OTC market. We do not consider that the evidence of the behaviour of energy suppliers supports Mr Hughes' underlying contention that self-supply was a remote substitute. That is not consistent with the evidence of the generally lukewarm reception that PayPoint received when offering its product, Multipay, to the Big Six energy suppliers in 2015. We also find it difficult to square Mr Hughes' argument with the evidence of PayPoint's entry into the non-OTC market. In 2015, PayPoint was brought into the non-OTC market as a new entrant by Utilita to replace its incumbent supplier.

400. On this basis, it respectfully seems to us Mr Hughes' approach represents an attempt to introduce arguments relevant to the substantive analysis by way of the market definition. We find such an approach to be unhelpful.

### **(3) Dominance**

401. The test for dominance is well established (and was not in dispute before us) as that set out in *Case 27/76 United Brands v European Commission* EU:C:1978:22; [1978] 1 CMLR 429 at §65:

“...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”.

402. Applying this test, we agree with the parties that the question of PayPoint's alleged dominance in the OTC market falls to be considered before, and then after, the PO/PZ merger which was cleared by the CMA in October 2018. It is indisputable that this event significantly altered the competitive conditions in the relevant market.

**(a) Before the PO/PZ merger**

403. In our view, the starting point for considering PayPoint's position in the relevant market has to be its persistently high market share during this period. The experts were agreed that, from 2009 until 2018, PayPoint's market share was consistently higher than 77%, peaking around 88% in 2018.

404. GLOBAL-365 submitted that PayPoint's market share during this period gives rise to a presumption of dominance on its part. We accept that a very large market share can set up an evidential (if not a formal legal presumption) of dominance or, alternatively, represents strong *prima facie* evidence of a dominant position (*cf Churchill Gowns v Ede & Ravenscroft* [2022] CAT 34 at §55). We note that PayPoint's very high market shares were sustained for more than 10 years.

405. Accordingly, it is then necessary to consider what other evidence there is which might suggest that PayPoint was, despite its market share, not, in fact, in a dominant position during this period.

406. PayPoint's answer was to argue that any assessment of competition in the relevant market must take into account the nature of the market: that it is a bidding market. PayPoint drew attention to the fact that exclusionary clauses could be cost-reducing and could be a feature of the efficient competitive equilibrium in a bidding market. Dr Majumdar developed this argument in his modelling of bargaining with buyer power and (in relation to abuse) in his AECT. As noted above (at §§229–236), PayPoint submitted that, analysed in this way, the evidence supported the conclusion that there was effective competition at the bidding stage. There were three main strands to this argument.

- (1) There was some contemporaneous evidence that the Big Six used the threat of contracting with Payzone on a convenience exclusivity basis to put competitive pressure on PayPoint.
- (2) Objectively viewed, even before the merger, Payzone's network in combination with the Post Office did provide sufficient coverage to make it a credible alternative to PayPoint. This conclusion was not lessened by the fact that the merger itself made the combined entity a stronger competitor.
- (3) Dr Majumdar's analysis of PayPoint's prices did not reveal any upward trend for the Big Six as a whole across the period. This was consistent with the conclusion that there had been no decline in competitive pressure on PayPoint in this period.

407. We agree with PayPoint that the fact that the relevant market is a bidding market provides important context. However, having considered the evidence relied upon by PayPoint, we are not persuaded that it undermines the conclusion to be drawn from PayPoint's market share.

408. First, in respect of the contemporaneous evidence, it is important to note that PayPoint relied, to a significant extent, on the subjective views of its employees – in particular, Mr Watkin-Rees and Ms Toolan – that there was a real and substantial risk that the Big Six suppliers might switch to Payzone. Despite the apparent thrust of this evidence and the weight attached to it in written closings, leading counsel for PayPoint made clear, during oral closings, that he accepted that the test for dominance was an objective one. That is, of course, correct. It is not possible for an entity to delude itself out of a dominant position in a market based on the subjective beliefs of its employees. Furthermore, we do not find it surprising that, in the course of contractual negotiations with significant customers, PayPoint employees with responsibility for leading the negotiations genuinely felt some competitive pressure. However, that does not amount to evidence that PayPoint was not in a dominant position in the relevant market. As such, in this context, we are not inclined to attach significant weight to the

subjective views of PayPoint's employees as to any given likelihood that any of the Big Six would, in fact, have switched to Payzone.

409. Second, when viewed objectively, the evidence of what the Big Six actually did during the period undermines any suggestion that Payzone represented a credible alternative to PayPoint. As was pointed out by GLOBAL-365 in submissions (at §224(5)), despite repeatedly tendering for business from the Big Six, Payzone only succeeded in winning new OTC business from EDF in 2013 in respect of legacy meters. Notably, that EDF business was won on a non-exclusive basis with both PayPoint and the Post Office also having been appointed. Moreover, Payzone was only able to retain this business until 2017 when PayPoint's contract with EDF was varied to include smart OTC services on a convenience exclusivity basis.
410. Furthermore, the evidence also indicates that neither the energy suppliers' customers nor the retailers appeared to consider that Payzone represented an attractive option for energy prepayment. Payzone's share of OTC energy prepayment transactions fell from just under 20% in 2008/9 to approximately 2% in 2018. Payzone's network of retailers was also shrinking during this period from around 16,000 outlets with active terminals in 2009 to around 10,000 outlets in 2018.
411. This evidence of what energy suppliers actually did is consistent with the responses that a number of energy suppliers made to Ofgem. In this regard, we note that PayPoint submitted that these responses ought to be treated with caution (see §295). However, insofar as the responses are merely corroborating the objective evidence of what the energy suppliers actually did in the market, we consider that this hearsay evidence does have some value. Although it is of course true that these responses were not tested by cross-examination, we see no justifiable basis for concluding that they were either misleading or deceptive.
412. Third, we are unimpressed by PayPoint's argument that because the PO/PZ joint entity was successful in winning business after the merger, one can infer that Payzone represented a credible threat to PayPoint because it could have won business on a convenience exclusivity basis with the Post Office before the

merger. There are a number of problems with this. Most obviously, this argument still runs into the facts set out above of what actually happened in the market during the period. Payzone was not successful in winning business. Furthermore, the argument ignores the evidence that, after the merger, the PO/PZ entity was more than the sum of its parts because the offer it was making was co-ordinated – submitting a single bid aggregating the best of the separate commercial offerings of the two entities and with the financial resources to expand the agent retailer network. Perhaps most notably, it is apparent that, in relation to the British Gas contract, the Post Office stipulated that use of its network was linked to a requirement to accept services from Payzone. The merged entity also addressed any concerns energy suppliers might have had about Payzone’s finances.

413. Insofar as Dr Majumdar argued that the PO/PZ merger showed that the market was not foreclosed and an “as efficient competitor” could emerge, we disagree. That merger occurred, in part, because Payzone was failing in the market. This is not evidence of a new entrant, or a credible threat, but of consolidation in the face of PayPoint’s dominance.
414. Finally, we do not find Dr Majumdar’s analysis of PayPoint’s prices over the period to be particularly helpful. As he acknowledged during the concurrent evidence session, his analysis only really demonstrated that PayPoint’s prices, which incorporated a reasonably generous profit margin, remained pretty steady over the period. Little can be drawn from an analysis of time series prices of this nature without a detailed investigation of what else was happening in the marketplace. At most, the analysis could be said to support the inference that the competitive constraint offered by Payzone did not diminish over the period, which would be true on the basis that Payzone was already a weak competitor at the start of the period. Overall, we do not consider that the analysis either really engages with or in any way diminishes the conclusion to be drawn from PayPoint’s very strong market share during the period.
415. Accordingly, we conclude that PayPoint was in a dominant position in the relevant market in the period before the PO/PZ merger.

*(b) After the PO/PZ merger*

416. There can be no doubt that the merged PO/PZ entity was a significant competitive threat to PayPoint. This much can be deduced from the fact that PO/PZ was successful in winning the business of both Scottish Power and, more significantly, British Gas shortly after the merger.
417. In respect of the post-merger period, GLOBAL-365's submission on dominance was to suggest, on the basis of Mr Hughes' evidence, that it was unclear whether PayPoint's dominance ceased immediately upon the merger or whether it persisted for some time thereafter. However, as we understood the case as it was put to us, GLOBAL-365 did not, ultimately, rely on a finding that PayPoint was dominant after the merger. This was because GLOBAL-365's case was based on what were said to be the continuing effects of PayPoint's conduct during the period before the merger. GLOBAL-365 relied on the fact that the vast majority of energy supplier contracts containing exclusivity provisions were entered into before the merger and those which post-dated it were, for the most part, only continuations or slight variations of pre-existing contracts.
418. In any event, we are satisfied that, after the PO/PZ merger, PayPoint was no longer in a dominant position in the market. Although it is reasonable to consider that markets can, on occasion, take some time to adjust to new circumstances, in the present case it is striking how quickly after the merger the very significant change represented by award of the British Gas contract took place.
419. As GLOBAL-365 did not rely upon it in submission, we need say nothing further about the notion floated by Mr Hughes of joint dominance following the merger. Suffice it to say that we agree with Dr Majumdar that no evidence was presented to us supportive of this.

**(4) Abuse**

**(a) The law**

420. On the issue of abuse, there appeared to be little, if any, dispute between the parties as to the law. The classic formulation of the concept of abuse is set out by the European Court of Justice in *Hoffman La Roche v Commission* [1979] 3 CMLR 211 at §91:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

421. It is also well-recognised that the prohibition against the abuse of a dominant position is intended to protect competition rather than competitors. As the Court of Justice stated in *Intel* from §134:

“134. ...not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation....

135. However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market....

...

137. In that regard, the court has already held that an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position with the meaning of Article 102 TFEU....”

422. In *Google Shopping* the Court of Justice has also recognised that conduct may be abusive where it impedes new entry to the market (see §167):

“In addition, conduct may be categorised as ‘abuse of a dominant position’ not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market

or markets concerned, but also where it has been proven to have the actual or potential effect—or even the object—of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation....”

423. In this regard, it is important to stress that, as outlined in this passage, the test for abuse is whether conduct has the effect, whether actual or potential, or the object (objectively assessed), of foreclosing the market by impeding entry of potential competitors to the market. This test is not dependent on the circumstances that can arise in a two-sided market where indirect network effects combined with exclusivity strategies can exaggerate the tendency of markets to “tip” into a monopoly. In short, conduct by a dominant firm can still be abusive even where it does not tip the market.

***(b) The OTC market***

424. In our view, the starting point for an assessment of PayPoint’s conduct and its exclusive contracts with both energy suppliers and retailers, has to be an appreciation of the two-sided nature of the OTC market and the associated indirect network effects. As we have noted above, these network effects were referred to by the parties during the case as the “chicken and egg” problem.

Retailer networks

425. We were not persuaded by PayPoint’s argument, based on Dr Majumdar’s analysis, that, because there were opportunities for a potential competitor to add retailers to its network, it followed that PayPoint’s exclusivities were not abusive. This argument does not actually address the effect on the retailers’ side of the market of PayPoint’s exclusivities on the supplier side. Simply because there may have been retailers which could have been added to the network of a potential competitor does not mean that any retailers would, in fact, be prepared to join that competitor’s network in the absence of any flow of energy prepayments. As was pointed out on behalf of GLOBAL-365, the decline in Payzone’s retailer network during the relevant period evidenced this point.

426. The failure of PayPoint's argument to address the impact of the supplier exclusivities on the retailers' side of the market is particularly striking in the case of a potential competitor like GLOBAL-365 that was only processing energy prepayments. A potential competitor could have a network of retailers but it did not follow that the retailers would be interested in processing energy prepayments. It would seem clear that this was Epay's experience.
427. A further problem with PayPoint's argument based on the potential opportunity for retailers to be added to a potential competitor's network is that Dr Majumdar's analysis, upon which it is based, did not take into account the coverage or quality of the potential additional retailers concerned. In our view, this omission significantly undermines the value of the analysis. This omission is striking given Dr Majumdar's clear recognition, during the concurrent evidence, of the importance of the quality of the retailers concerned in attracting energy supplier clients. That recognition was also apparent from the internal PayPoint strategy documents which we were shown. It was notable that PayPoint, which was highly experienced in this area, had managed to "lock up" retailers that were particularly valuable, in terms of location and convenience, for energy prepayments on multi-year exclusive contracts. These exclusivities on the retail side, bolstered by the volume of energy payments that PayPoint could guarantee given its position on the supply side, made it materially more difficult for a potential competitor to build a network of stores that would be a strong selling proposition to an energy supplier. This, in turn, hindered an effective market entry.
428. Second, we do not consider that PayPoint's position in respect of the retailers' side of the market is assisted by the contention advanced on its behalf that the quality and exclusive nature of its retailer network arose in the context of the investment which PayPoint had made in that network. We have no reason to doubt the evidence we heard from PayPoint's witnesses and, in particular, Mr Watkin-Rees, in relation to that investment. Although supplier exclusivity can make a PSP more attractive to retailers and give rise to cost-reducing efficiencies, we received no evidence that retailer exclusivity had benefits for suppliers. Therefore, retailer exclusivity protected the investment which PayPoint made in its network during the course of the period only by reinforcing

the dominant position which it exercised in the market through making it harder for competitors to build retailer networks.

429. As we have noted above (at §421), the Court of Justice in *Intel* emphasised that an undertaking, like PayPoint, which is in a dominant position has a special responsibility not to allow its behaviour to impair genuine competition.
430. In the same way, we consider that PayPoint's responsibilities as a dominant undertaking also provide the answer to the argument founded upon Mr Watkin-Rees' three-legged stool metaphor (see above at §299). A dominant undertaking has a responsibility not to act in such a way as abuses its position by impeding potentially competing undertakings from entering the market and, in so doing, preventing the growth of competition to the detriment of consumers, by, among other things, limiting alternative service development.

#### Energy suppliers

431. Turning to the supplier side of the market, we are not persuaded by PayPoint's argument to the effect that the prevalence of exclusivity terms in its contracts with energy suppliers was a result of energy suppliers themselves seeking such terms in order to exert additional negotiating pressure on PayPoint.
432. We are satisfied, on the basis of the evidence that we have considered, that the impetus for exclusivity terms came from PayPoint and not from the energy suppliers. That conclusion is borne out by evidence from a number of sources.
433. First, this is natural reading of the email correspondence between PayPoint and a number of suppliers (see above at §258(1)–(5)). That correspondence indicated a general unwillingness on the part of suppliers to accept the exclusivity terms which PayPoint was seeking. Notably, in contrast, PayPoint provided no examples of a supplier actively seeking exclusivity other than in circumstances in which PayPoint had offered significantly higher prices for the alternative non-exclusive contract. Our impression of the views of energy suppliers is also consistent with the evidence of the responses provided by a number of suppliers, including Robin Hood Energy, to Ofgem (see §258(6))

above). For the reasons we have noted above in our consideration of dominance, we see no reason to discount the evidence of these responses.

434. Second, there was also clear evidence that PayPoint was aware of the competitive advantage to it, particularly in respect of Payzone, of obtaining exclusive supply arrangements with suppliers. That evidence came from internal PayPoint documents (see §§249–251 above).

### AECT

435. We are not persuaded that PayPoint’s reliance on the “as efficient competitor test” or “AECT” analysis carried out by Dr Majumdar is of much assistance on the issue of abuse. PayPoint sought to draw a distinction between the “as efficient competitor principle”, on the one hand, and the “as efficient competitor test” or “AECT” (see §271 above). As we understood it, by using the former, PayPoint was referring to the proposition, vouched in *Intel*, that the exclusion of less efficient competitors from the market is not necessarily abusive. The latter is a test which seeks to determine whether a competitor which is as efficient as the dominant undertaking can continue to compete profitably in the market. The putative competitor is assumed to have the same cost base as the dominant undertaking. The relevance of the AECT to determining whether certain types of conduct are abusive is well established.
436. However, it has also been recognised that the AECT is of less relevance when one is dealing with a case involving exclusive dealing where the dominant undertaking has a very large market share and the structure of the market means that the presence of a less efficient competitor might contribute to intensifying competitive pressure (*Royal Mail v Ofcom* [2021] EWCA Civ 669; [2021] Bus LR 1045 at §§39–41 per Arnold LJ; *Case C-23/14 Post Danmark A/S v Konkurrenceradet* EU:C:2015:651; [2015] 5 CMLR 25 at §§57–61).
437. It was notable that Dr Majumdar himself, during the concurrent evidence described his use of the AECT as merely “confirmatory” of his views. Against the background of the jurisprudence we have set out above, this degree of circumspection seems appropriate. We find the AECT to be of limited relevance

to assessing PayPoint's conduct in a two-sided market of the kind with which we are concerned. In addition, there are obvious difficulties in meaningfully comparing the cost base of a large traditional incumbent, such as PayPoint, with a hypothetical thinly capitalised insurgent.

#### Conclusions on the OTC market

438. The exclusive supply arrangements put in place by PayPoint with energy suppliers undoubtedly had the effect of restricting the opportunities available to a potential competitor to win significant business from energy suppliers, even if they did not exclude them. For example, the effect of the exclusivities was effectively to prevent other PSPs being able to offer energy suppliers short term or localised trials during the currency of PayPoint's contracts. In general terms, these opportunities were thereby restricted to the periodic procurement processes which arose on the expiry of one of PayPoint's exclusive contracts. When those opportunities arose, in a market where PayPoint was dominant, we consider that potential competitors were impeded effectively from competing to win business from energy suppliers. This was because, between the periodic procurement opportunities – it was extremely difficult for those competitors to build up the necessary network of retailers, particularly those of the right quality, without having an adequate portfolio of energy suppliers to generate the flow of energy prepayments which would be attractive to those retailers. In turn, without having a retailer network of the necessary size and quality, the potential competitor was hindered from competing with PayPoint in the periodic procurement opportunities which arose on the energy supplier side of the market.
439. In addition, we consider that it is important to bear in mind that larger energy suppliers (those with 50,000 or more customers) were subject to regulatory obligations requiring them to offer a wide range of payment methods including cash prepayment OTC (see §39 above). Of at least equal importance, it was clear from the evidence we heard that larger energy suppliers were also acutely aware of the potential significant reputational harm which could arise in the event that problems arose with their ability to process prepayments and, in consequence, to supply energy. This was because these problems were likely to

impact on a supplier's most vulnerable customers. For these reasons, we accept Mr Kachhala's evidence that, particularly larger energy suppliers would be risk averse when it came to procuring payment services and would require provably reliable and robust technology (see §330 above). As a result of this attitude of the larger energy suppliers, the need for proven experience at scale was all the more important for potential competitors of PayPoint. This dynamic increased the sensitivity of the market to any abuse by PayPoint.

440. Therefore, as a result of the two-sided nature of the OTC market and the associated network effects, we conclude that PayPoint's exclusive contracts with energy suppliers and retailers did impede the growth of competition at the margins of the market. The effect of PayPoint's conduct was to hinder the growth by a competitor or a potential competitor of either a sufficient network of retailers or a large enough portfolio of energy supply business to generate adequate flows of energy prepayments. This created a "step-function" in the market impeding the development of normal competition. The market did not exhibit competition on the merits and that was as a result of PayPoint's conduct.

441. We reach this conclusion while recognising that the majority of PayPoint's contracts with the Big Six energy suppliers did not contain explicit exclusivity provisions (see §61(1) above). This is for two reasons. First, there was no suggestion either in the evidence or in argument, that there was any opportunity for competing PSPs to win business from these larger suppliers other than during one of the periodic procurement exercises. It appeared clear that, in general, having gone through a procurement exercise the larger suppliers had no inclination to obtain any additional prepayment services notwithstanding the absence of any explicit exclusivity clauses. Secondly, and in any event, PayPoint had contracts with all the tier 2 suppliers and certain larger tier 3 suppliers during GLOBAL-365's window of opportunity. All of those contracts contained exclusivity provisions. These contractual provisions created a barrier to potential competitors, like GLOBAL-365, seeking to enter the market by "credentialising" their product.

442. It follows that we consider that PayPoint's conduct did foreclose its competitors from the relevant market. We have discussed this above in the context of

dominance, but it bears repeating that during the period, despite repeatedly tendering for business from the Big Six energy suppliers during that period, Payzone was unsuccessful (with the limited, and non-exclusive, exception of E.On); and Payzone's network of retailers significantly declined. We also agree with GLOBAL-365's submission that, at the end of the period, the relative unattractiveness of Payzone's network of retailers can be seen when Payzone was directly competing with PayPoint. This was the case with EDF and E.On who both had non-exclusive supply agreements with PayPoint and Payzone. In those cases, Payzone only processed a small proportion of the transactions. The position was well summarised by Payzone's response to Ofgem:

“...the declining number of transactions that Payzone's retailers process has led to a loss of higher quality retailers such as convenience stores. This has led to a further loss of Energy Suppliers and other clients which itself has caused more retailers to switch away from the Payzone network.”

443. However, in the case of GLOBAL-365, for reasons which we deal with below under the heading of causation, we do not consider that GLOBAL-365's failure to achieve the goals set down in Mr Wilson's Business Plan can generally be attributed to the conduct of PayPoint. In particular, we are satisfied that, on the evidence, GLOBAL-365 has not demonstrated that it ever had a real and substantial chance of winning business from energy suppliers with a large volume of prepayment transactions. However, we are, nonetheless, of the view that there is an evidential basis for concluding that PayPoint's imposition of exclusivity terms did impede, to a limited extent, GLOBAL-365's entry into the market. Even with the product that it had, the structure of the market, as largely implemented by PayPoint, impeded its market access. With a better product that was more commercially attractive, the effects of foreclosure would have been more evident.
444. In this regard, we consider Robin Hood Energy to be a particularly useful example for two reasons. First, it shows a clear illustration of PayPoint insisting on exclusivity terms in the teeth of a small supplier not wishing it. This occurred during contractual negotiations between PayPoint and Robin Hood Energy in early 2016. Second, only a matter of months later, Robin Hood Energy was approached by GLOBAL-365 and, despite being apparently interested in the product, declined to undertake even a trial of the SMARTprepay product on the

basis that it considered that to do so would be a breach of those exclusivity terms.

445. The position of Epay is a more complicated one for a number of reasons. To begin with, although we heard evidence from Mr Robertson, as Epay was not a party to this litigation it was not subject to disclosure. Accordingly, we have much less information about its attempts to enter the market other than through its involvement with GLOBAL-365. Furthermore, there was also evidence to suggest that there were other factors which may have contributed to the difficulties that Epay experienced. Epay could not serve legacy meters and, when it entered the market by winning a non-exclusive contract with E.On at the end of 2014, smart meters were still nascent. Epay's retail network was also focussed on supermarkets and large national chains. However, it was apparent from the evidence of PayPoint's witnesses that even with its portfolio of suppliers, PayPoint struggled to interest supermarkets in processing energy prepayments. Finally, there was no evidence to suggest that Epay had even approached either British Gas or Utilita which, between them, represented a very significant proportion of the relevant prepayment market.
446. Notwithstanding these factors, on balance, we conclude that Epay, as a new entrant to the market, was impeded by PayPoint's conduct. We draw this inference principally for two reasons. First, as with Payzone, there is evidence that Epay's network of independent retailers significantly declined over the period (from around 3,700 in December 2014 to 1,000 stores in October 2024). Second, we have had regard to the evidence presented to us of the steps taken by PayPoint, following Epay's appointment by E.On, to utilise its exclusivity provisions with Asda, Sainsbury's and Tesco to prevent them from offering Epay's product.
447. For completeness, we do not consider that the Post Office, alone, represented a competitor to PayPoint. Both of the experts broadly agreed with the proposition that the Post Office was a "must have" PSP, certainly for the bigger suppliers.
448. Consistent with our view, we broadly agree with the way in which in closing, GLOBAL-365 characterised the direct and "portfolio" effects caused by

PayPoint's exclusivities on both the retailer and supplier sides of the OTC market (see §§241–242; and 249–253 above).

449. Therefore, we do not accept the arguments advanced on behalf of PayPoint on the issue of abuse in the OTC market and we conclude that Paypoint did abuse its dominant position in the OTC market.

*(c) The non-OTC market*

450. We can deal with GLOBAL-365's allegations of abuse by PayPoint impacting the non-OTC market more briefly. GLOBAL-365's case is that PayPoint's conduct in the OTC market (in which it was dominant) was both intended to affect, and was likely to have affected, the non-OTC market (in which it was not dominant) and, therefore, either constituted a separate abuse in the related non-OTC market or, as a consequence of the behaviour in the OTC market, caused GLOBAL-365 loss in the non-OTC market.

451. As regards the first limb, we conclude that the non-OTC market is a market that is closely related to the OTC market. The same group of energy consumers need a payment method to prepay their purchases of energy to the same energy suppliers using one of the same service providers (the PSPs). (Albeit, we note both that there was more in-house provision, by larger energy suppliers and that those suppliers did not necessarily use the same PSP as they used for OTC payments.) The only difference in the markets is that in non-OTC, technology permits the physical payment at a retailer to be bypassed. As a result the dynamics of the non-OTC market are different, not least because the issue of the quality of a retail network becomes irrelevant. Accordingly, the pre-conditions for the argument are satisfied.

452. However, for that argument to succeed, GLOBAL-365 needs to prove that PayPoint in some way, leveraged its dominant position in the OTC market to gain an advantage in the non-OTC market that it would not have had in circumstances of normal competition. We do not consider that it has so proved. Where PayPoint provided non-OTC services, it generally provided OTC services. Usually, and certainly with tier 3 suppliers, both were provided on an

exclusive basis. PayPoint admitted that it sought to optimise revenue across both markets where it had contracts in both. PayPoint also clearly had a commercial interest (and strategy) to have a strong position in the non-OTC market which would progressively take over from the OTC market. There are cost efficiencies, particularly relevant for tier 3 suppliers, from buying OTC and non-OTC services from the same supplier. However, each of these factors could be considered an aspect of normal competition on the merits in these markets.

453. PayPoint did contract with some suppliers only in the OTC market and not in the non-OTC market in circumstances where there was no evidence that the supplier was self-supplying. This would suggest that the classic leverage of refusing to supply PSP services in OTC unless the energy supplier also purchased in non-OTC was not deployed and, certainly not uniformly. We were not presented with evidence that those energy suppliers had no need of non-OTC services, despite needing them in OTC. The position in tier 1 and tier 2 is sufficiently mixed as between OTC and non-OTC that there would need to be specific evidence of some leverage being exercised. We were presented with no clear evidence of tiered pricing or volume commitments that would have impacted behaviour. The position in relation to tier 3 raises more potential issues, not least because the pattern of exclusivities is clear and most suppliers who contracted with PayPoint did so for both OTC and non-OTC. Nevertheless, they represent a rather small proportion of tier 3 suppliers and those circumstances were rational in circumstances of normal competition given the cost benefits of single sourcing for such small energy suppliers. We were presented with no specific evidence of leverage (in the sense of economic linkage). Accordingly, we are unable to conclude that there was leverage by PayPoint of its dominant position in the OTC market to abuse the non-OTC market. This limb therefore fails.

454. However, as discussed below, and in relation to the alternative basis upon which GLOBAL-365 put its case that it suffered loss in the non-OTC market, we have concluded that abuse by PayPoint of a dominant position in the OTC market could have caused consequential loss for GLOBAL-365 in the non-OTC market.

**(5) Causation**

455. To recap, for the reasons we have set out above, we find that PayPoint did abuse its dominant position in the OTC market during the period which ended with the clearance of the PO/PZ merger in October 2018. The next question is whether PayPoint's conduct in fact caused GLOBAL-365 any loss.

**(a) Loss of chance**

456. During closings, GLOBAL-365 clarified that it was pursuing its claim solely on the basis that it had, as a result of PayPoint's conduct, lost the chance to win the business of energy suppliers and thereby earn revenue.

457. In our view, this clarification was necessary. In the present case, it is obvious that GLOBAL-365's claim depends on an assessment by the Tribunal of what profits, if any, GLOBAL-365 would have made in a counterfactual world in which PayPoint had not abused its dominant position. Further, it is also clear that the extent of any supposed benefit to GLOBAL-365 is dependent upon the actions of a number of third parties including retailers, consumers and, in particular, energy suppliers.

458. As such, it is necessary, at the outset of considering causation, to draw the distinction made by Lord Briggs in *Perry* at §20 when dealing with an analogous situation in the context of a claim for professional negligence:

“For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.”

459. Applying this distinction to the present case, we have first to consider what GLOBAL-365 has proved, on the balance of probabilities, it would have done in the counterfactual. Thereafter, we are required to evaluate, on a loss of a chance basis, the actions of the third parties concerned.

*(b) The actions of GLOBAL-365: the development of SMARTprepay*

460. GLOBAL-365's claim in the counterfactual is founded on two critical aspects of the development of SMARTprepay: first, that by 2018, SMARTprepay was a fully developed and operative product; and second, that it was attractive to energy suppliers. Notably, GLOBAL-365 did not contend that the development of SMARTprepay was affected by the conduct of PayPoint. In other words, the foundation of GLOBAL-365's claim in the counterfactual was based on the actual development of SMARTprepay.
461. We have set out our findings concerning the development of SMARTprepay above (from §§76–99). In short, we do not consider that GLOBAL-365 has proved either of the aspects upon which its claim is founded to the level necessary to support its claim for damages.
462. First, GLOBAL-365 was only in a position to roll out SMARTprepay to energy suppliers on any material commercial basis at the beginning of 2019. We base this conclusion on the evidence surrounding GLOBAL-365's attempt to launch SMARTprepay with Minibems in February 2018. It was clear from the evidence that the launch was beset with difficulties and also brought to light significant problems with the product. GLOBAL-365 sought to address those problems by moving to develop the 2GP version of SMARTprepay. Thereafter, it was apparent from the contemporaneous documents, that the development of 2GP took until the end of 2018.
463. Second, we do not consider, based on the evidence, that GLOBAL-365 has proved that SMARTprepay was a sufficiently attractive product to energy suppliers. The industry experts were agreed that energy suppliers, particularly larger ones, were, above all, looking for reliability and a robust platform. This evidence was consistent with the view of Utilita that it would not contract with GLOBAL-365 as it wanted an "established player in the market rather than a new entrant". There was no evidence in respect of SMARTprepay that it was either reliable or robust. To begin with, SMARTprepay only processed a very small number of transactions. Up until June 2023, the volume of transactions processed appears to have been minimal (see §105 above). In June 2023, this

volume increased slightly: SMARTprepay processed approximately 3,300 transactions. These transactions were generated by customers of Yu Energy. The contemporaneous internal GLOBAL-365 documents showed that this very modest increase in the number of transactions processed caused significant problems for SMARTprepay. Furthermore, there was no evidence that SMARTprepay could have passed the battery of tests which the industry experts agreed were a prerequisite to being engaged by one of the larger suppliers: penetration testing, load testing, integration testing and backup testing. Mr Wilson was clear in his evidence that GLOBAL-365 had never carried out penetration testing. As we understood his evidence, this seemed to be, in part, because the platform was in a continuous state of development.

464. As we have noted above (at §76), Mr Wilson was the only witness put forward by GLOBAL-365 to speak to the development of SMARTprepay and to give context to the myriad of contemporaneous emails which were put before us. We have commented above on our view of Mr Wilson's evidence on the technical aspects of SMARTprepay and its development (see §§93–99). In our view, he seemed to have an unrealistically low assessment of the degree of confidence that an energy supplier would need in both the technical reliability and functionality of a payment system and the strength of the organisation behind it, when entrusting an element of the revenue stream (and brand) to that system. This would seem especially so where the revenue stream was being generated by customers in respect of whom the supplier had regulatory obligations. At the same time, Mr Wilson seemed to have an unrealistically high assessment of what GLOBAL-365 would be able to deliver. In particular, in relation to the capacity issues which arose in the context of the Yu Energy contract, it appeared that Mr Wilson did not understand the nature of the issue. It was also apparent that GLOBAL-365's technical team had previously neither identified the issue nor recognised what it was. In any event, the incident illustrated that GLOBAL-365 had neither the time nor resource to address the issue before it arose with Yu Energy. Instead, SMARTprepay had been developed and operated on the basis of temporary fixes and work-arounds.

465. We are also unpersuaded by GLOBAL-365's submissions in support of the notion that SMARTprepay was attractive to energy suppliers (see above at

§320). These submissions did not address the central issue of reliability at scale. In our view, the fact that GLOBAL-365 was able to sign up a number of tier 3 suppliers does not bear on this point. The fact is that the great majority of GLOBAL-365's clients did not use the platform for processing transactions. Based on the evidence of the industry experts and, in particular, Mr Kachhala, it is reasonable to infer that the majority of GLOBAL-365's clients were principally interested in ensuring that they had complied with the regulatory requirements of SLC 27 (see above at §39) rather than actually seeking to attract prepayment customers and process their transactions. In this regard, we also note that GLOBAL-365's proposed price of 15p per transaction was competitive for smaller suppliers when compared with PayPoint's approach to such suppliers.

466. As to the particular features of SMARTprepay which GLOBAL-365 relied on, "funds splitting" and the generation of a unique UTRN, we do not consider that these are of material significance when compared with the issue of reliability. In any event, the principal evidence as to their attractiveness came from Mr Wilson. We prefer the contrary evidence relied upon by PayPoint. In relation to UTRNs, this came from Mr Coles, PayPoint's Chief Technology Officer, whose unchallenged evidence was that the generation of these reference numbers was industry standard. In respect of funds splitting, we prefer the evidence of Mr Kachhala who explained that, in his experience as a consultant, he had never come across an energy supplier asking for this functionality.

467. Therefore, we conclude that, in the counterfactual as in actuality, GLOBAL-365 did not have an operational product until the beginning of 2019. Even then, in the counterfactual as in actuality, SMARTprepay was both flawed and untested and would not have been able to service the needs of, certainly, tier 1 and tier 2 suppliers.

***(c) The actions of third parties – energy suppliers***

The correct approach

468. Clearly the most important third parties for the purposes of GLOBAL-365's claim are the energy suppliers. In essence, in order to succeed in its claim, GLOBAL-365 must demonstrate that it had a real and substantial chance to win the business of further energy suppliers but for PayPoint's conduct. The Tribunal must then evaluate its prospect of success (see *Perry* at §34).
469. As a preliminary point, we consider that, certainly so far as the larger suppliers are concerned, this assessment must be carried out on a supplier-by-supplier basis. This follows from the nature of the exercise which is required to be carried out: namely, to assess the likelihood that a particular supplier would, but for the conduct of PayPoint, have contracted with GLOBAL-365. This is not an abstract exercise which can be carried out divorced from the evidence which we have about the particular energy suppliers concerned.
470. In taking this approach, we entirely recognise that when assessing the loss of chance, a court or Tribunal should not require the claimant to prove, on the balance of probabilities, what would have happened in the counterfactual situation in a so-called "trial within a trial" (see *Perry* at §18). However, we do not consider that in assessing GLOBAL-365's chances, for larger suppliers, on a supplier-by-supplier basis we are imposing an undue burden on it. Certainly, so far as the larger suppliers, the Tribunal has had a substantial amount of evidence presented to it on which to make the assessment. That evidence tended to underline the difficulty GLOBAL-365 would have had in obtaining contracts from major suppliers in the counterfactual.
471. In this regard, we note that there was some measure of consensus between the parties and their respective experts that it was relevant and necessary in seeking to assess what would have happened in the counterfactual to take account of the position of energy suppliers in reality. When considering the larger suppliers, Dr Majumdar's approach was to consider the specific circumstances of each supplier. Although Mr Hughes' starting point was rather more abstract, being based primarily on GLOBAL-365's Business Plan, he removed two suppliers, Utilita and Octopus, from his model because he considered, based on his understanding of their position in reality, that they would have been unlikely to contract with GLOBAL-365 in the counterfactual. We agree with this approach

but are surprised that he did not take a similar view in relation to British Gas given the actual evidence that they were not interested in contracting with GLOBAL-365 and the intrinsic unlikelihood of British Gas taking the level of risk which contracting with GLOBAL-365 would have involved.

The larger suppliers

472. We do not consider that GLOBAL-365 has demonstrated that it had a real and substantial chance of winning the business of any larger energy supplier, by which we mean the Big Six, and any supplier which would have required SMARTprepay to process significant volumes of transactions.
473. With respect to the elaborate and ingenious arguments that were advanced in submissions, we have reached this conclusion for three principal reasons.
474. First, as noted above, we have found, based on the evidence, that SMARTprepay was a flawed and untested product, particularly at any material scale. Therefore, we are satisfied that GLOBAL-365 has failed to prove that there was any real and substantial chance that any larger energy supplier would have been prepared to entrust it with that supplier's prepayment business.
475. Second, and in any event, we consider that, in relation to the larger suppliers, GLOBAL-365 has failed to prove a key part of its case on causation. This aspect of GLOBAL-365's case, which is founded on Mr Wilson's Business Plan, depends on the existence of a credible path for it to "credentialise" its product, SMARTprepay. In other words, GLOBAL-365 recognised that, as a new entrant to the market, it would require, first, to establish the credibility of SMARTprepay with smaller suppliers before it would have a chance of winning the business of one of the larger suppliers. It was accepted by the industry experts that such an approach was, in general terms, reasonable. However, in our view, GLOBAL-365 has failed to prove there was ever a credible path open to it.
476. To begin with, we have found that GLOBAL-365 did not have an operational product until 2019. However, by this date, the number of small and medium

sized energy suppliers in the market was already in decline. The evidence of the industry experts was that, having been on the increase since 2011, the number of such suppliers had peaked in mid-2018. The rate of this decline dramatically increased in 2021 when 29 suppliers left the market. Accordingly, the fact that GLOBAL-356 did not have an operational product until 2019 significantly reduced its window of opportunity to prove its product with smaller suppliers. The impact of the departure of suppliers from the market can be seen from the fate of GLOBAL-365's clients: 11 of its 16 clients had exited the market by 2021. Against this background, it is unsurprising that Mr Wilson himself considered that GLOBAL-365's window of opportunity had closed at the end of 2020.

477. Furthermore, we are sceptical that there was, in fact, ever a credible path open to GLOBAL-365 in the prepayment sector. GLOBAL-365's case was based on Mr Wilson's Business Plan which had then been used by Mr Hughes as the basis of his damages model. As we have noted above (at §§70–75), the Business Plan consisted solely of a spreadsheet which charted GLOBAL-365 processing transactions for an increasing number of customers over time. In order to prepare the spreadsheet, it appeared that Mr Wilson had simply divided energy suppliers up into the three tiers and had then estimated how many prepayment customers (or, to be precise, how many smart meters in smart prepayment mode or SMSPMs) a supplier from each tier would have. Accordingly, both Mr Wilson and Mr Hughes assumed that all suppliers within a given tier would have the same number of customers.
478. GLOBAL-365 put forward no evidence, either from the time the Business Plan was prepared or afterwards, to establish that Mr Wilson's estimates of the number of SMSPMs each energy supplier had were either in any way reasonable or corresponded in any way with reality. Based on the incomplete evidence available to us, we are satisfied that GLOBAL-365 has failed to demonstrate that a pathway to "credentialisation" as envisaged in the Business Plan, through small and medium sized suppliers, ever existed in the real world. The Business Plan (and, incidentally, Mr Hughes' damages model) materially misrepresents the reality of how prepayment customers were distributed among energy suppliers. Far from being equally distributed among the tiers of suppliers, it

appears that customers with smart prepayment meters were concentrated in a small group of suppliers.

479. A consideration of figures generated by PayPoint and based primarily upon the transactions which it processed indicates that in 2019 two suppliers, British Gas and Utilita, represented a very significant proportion of the prepayment sector. It appeared that their customers held between 70 to 80% of the SMSPMs. According to PayPoint's figures, the next largest energy supplier to the prepayment sector in 2019 was OVO which had up to 9%. Two other suppliers, E and SSE, accounted for something approaching approximately 5% each. From these figures, it can be seen that the remaining energy suppliers in the market only had very small numbers of SMSPMs.
480. We provided those representing GLOBAL-365 with an opportunity to analyse the figures and respond. Having considered that response, we see no reason to doubt the broad conclusion which can be drawn from the figures generated by PayPoint: namely, that there is simply no evidence of a body of small and medium sized (tiers 2 and 3) suppliers with a sufficiently large volume of prepayment transactions, that GLOBAL-365 could have used to credentialise SMARTprepay as being capable of handling a material volume of transactions. As such, there was no pathway that would have enabled GLOBAL-365 to "break through" as a material player in tier 2 and hence, on its theory, to break into tier 1.
481. Our third reason is that we consider there is force in PayPoint's argument based on the timing of SMARTprepay becoming operational when compared to the timing of arrangements in respect of non-OTC services (at §352) put in place by larger energy suppliers.
482. As a starting point, we agree with the parties' competition experts that energy suppliers were generally unlikely to use more than one supplier for the provision of non-OTC services. We also accept, on the basis of the evidence, that once a supplier has gone to the trouble of either developing its own in-house non-OTC service or, alternatively, integrating with a third party service provider, it was unlikely that the supplier would readily consider switching to an alternative non-

OTC PSP. As we understood his evidence, it was a recognition of this fact that underlay Mr Wilson's own assessment of the timing of the closure of GLOBAL-365's window of opportunity. In this regard, we consider the example of OVO, following its merger with SSE, switching from its in-house supplier to PayPoint to be exceptional and as reflecting its own specific commercial circumstances post-merger.

483. Against this background, we agree with PayPoint's submission that it is significant that, by the time GLOBAL-365 had an operational product, in 2019, a majority of tier 1 and 2 suppliers had non-OTC self-supply arrangements in place. This timing had the effect of further reducing how much of the prepayment sector, by volume, was available to GLOBAL-365 to credentialise SMARTprepay through the non-OTC market.

The smaller suppliers

484. In contrast, having considered the evidence before us, we are satisfied that GLOBAL-365 has proved that, but for PayPoint's conduct, it had a real and substantial chance of winning more of the business of some additional smaller (tier 3) energy suppliers.
485. As a starting point, in reality, GLOBAL-365 was able to secure the business of 16 tier 3 suppliers: Ecotricity, Future Energy, GnERGY, Go Effortless Energy, HUB Energy, Logicor Energy, Opus Energy, People's Energy, PRP Energy, Pure Planet, Rebel Energy, Solarplicity, Symbio Energy, Toto Energy, Yu Energy and Zog Energy. Notably, one of these suppliers, Toto Energy, had previously been a customer of PayPoint. Against this background, it is reasonable to infer that, whatever SMARTprepay's technical problems, GLOBAL-365 was capable of winning the business of smaller suppliers. Given that this was the position in reality, we consider that it is also reasonable to consider that, in the counterfactual, GLOBAL-365 might have been able to gain additional traction by, for example, successfully offering trials to energy suppliers.

486. As we have noted above, we do not consider that there is any tension between this finding and our conclusion that GLOBAL-365 had not demonstrated that SMARTprepay was attractive to larger suppliers. The difference is explained by the risk profile and resources of the respective groups of energy suppliers which actually would have had to rely on SMARTprepay in order to process any significant volume of prepayments from its customers. That would certainly be true of the larger suppliers which explains why such suppliers like Utilita (which focussed on the prepayment market), required a PSP to demonstrate reliability before contracting with it. This would be far less true for smaller suppliers who would be likely to have only comparatively few prepayment customers. However, some of those smaller suppliers were still required to have contracted with a PSP in order to satisfy regulatory requirements or would have wanted such a service for commercial reasons. For such smaller suppliers, we consider that factors such as price would be far more significant. Bearing in mind our finding concerning the effect of PayPoint's conduct on Epay (see above at §446), we also take into account the fact Epay might have been more attractive in the counterfactual as a partner for GLOBAL-365.
487. Against this background, we also attach significance to the evidence in respect of Robin Hood Energy. As we have noted above, there was evidence that this energy supplier, despite being interested in what GLOBAL-365 had to offer, was prevented from even trialling SMARTprepay because of the five-year exclusivity provision which PayPoint had insisted was included in PayPoint's contract with it. We recognise both that when this exchange occurred, in 2016, GLOBAL-365 did not have an operational product and also that Robin Hood Energy had just launched a payment channel and, therefore, may have been reluctant immediately to launch another. However, we remain of the view that the evidence of the attitude of this supplier is illustrative of the fact that, in the counterfactual, GLOBAL-365 had a real and substantial chance of winning the business of at least some smaller energy suppliers. Had Robin Hood Energy been able to multi-home its OTC services, it is not unreasonable to consider that it might have been prepared to use SMARTprepay after 2019 when it became operational.

488. We are not persuaded that our conclusion in respect of the smaller, tier 3, suppliers is undermined by PayPoint's argument that, in fact, GLOBAL-365 had ample opportunity to win this business and, therefore, was unaffected by PayPoint's conduct. PayPoint's argument is based on the fact that of the 59 tier 3 suppliers which GLOBAL-365 approached, PayPoint had contracts with only 17 for OTC services. Of that number GLOBAL-365 successfully contracted with two and had an opportunity, actual or potential, to win the business of 15 of them (see §359 above). This argument misses the point. We do not consider it relevant to a consideration of the counterfactual that, in actuality, GLOBAL-365 was not able to capitalise on the opportunity, such as it was, to win business from the tier 3 suppliers who contracted with PayPoint.
489. The fact remains that in the counterfactual, a number of additional energy suppliers, unconstrained by PayPoint's exclusivity terms, would have been able to enable their customers to process some or all of their prepayments through GLOBAL-365. We consider, for a number of reasons, that, but for PayPoint's abusive conduct, GLOBAL-365 had a real and substantial chance of winning additional business among those suppliers which it was unable to win in actuality. As we have noted above, in the counterfactual, we consider that there was a real chance that GLOBAL-365 might have been able to interest additional suppliers, such as Robin Hood Energy, in undertaking a trial. We also take into account our view that, in the counterfactual, GLOBAL-365's retail network, available through Epay, might also have been more attractive to suppliers as it would have been able to develop its network unhindered by PayPoint's exclusivities. Finally, we consider it reasonable to envisage that, in the counterfactual, had GLOBAL-365 been successful in winning additional business that success would have increased its attractiveness to win yet further business.
490. When it comes to assessing GLOBAL-365's prospect of success of winning additional tier 3 suppliers, we face a difficulty because both parties focussed their cases very heavily on the larger suppliers. As a result, there was less evidence about the larger number of smaller suppliers. However, in this regard, we note an interesting point of near consensus in the evidence. Dr Majumdar's primary view was that GLOBAL-365 would not have secured any additional

business in the counterfactual (see above at §186). However, as mentioned at §197 above, he also modelled an alternative scenario for the counterfactual which he described as “conservative (i.e. favourable to GLOBAL-365)” in which GLOBAL-365 would have been able to secure one third of the transactions being processed by the tier 3 suppliers. Dr Majumdar then modelled the OTC and non-OTC transactions separately. Interestingly, in his Business Plan, on which Mr Hughes’ model is based, Mr Wilson estimated that GLOBAL-365 would win 30% of the tier 3 market (albeit, as we have noted (at §74), it appears that this estimate was based on little more than Mr Wilson’s optimism).

491. Taking into account the difficulties which GLOBAL-365 would have had in the counterfactual arising from the technical problems with SMARTprepay and the timing of its entrance to the market, we consider that 30% represents an over-estimate of GLOBAL-365’s chances of winning additional tier 3 business. Having considered all of the evidence, we assess GLOBAL-365’s chances of winning additional tier 3 business as being 20%.
492. In reaching that finding, we do not distinguish between OTC and non-OTC business. Although we have held that PayPoint’s conduct was abusive only in the OTC market, there appeared no dispute that smaller suppliers were more likely to acquire their OTC and non-OTC services from the same PSP. Accordingly, insofar as GLOBAL-365 was able to win additional OTC business from tier 3 suppliers, we consider it reasonable to conclude that GLOBAL-365 would have also won the equivalent amount of non-OTC business.

**(6) Quantum**

493. The final stage of the analysis is for us to quantify the loss which GLOBAL-365 has sustained, as a result of PayPoint’s conduct, in not winning some additional tier 3 business. The parties were in broad agreement as the correct approach to the assessment of damages: our task is to compare the profits that GLOBAL-365 would have made in the counterfactual based on our findings in respect of causation.

494. However, two competing methods of quantification were put before us: on behalf of GLOBAL-365, we had Mr Hughes' model based on Mr Wilson's Business Plan; and, on behalf of PayPoint, we had Dr Majumdar's Conservative Alternative Scenario which had been quantified by Mr Anaman.
495. We prefer the approach of Dr Majumdar and Mr Anaman for two related reasons.
496. First, as we have noted above, Mr Hughes' model was based upon an uncritical adoption of Mr Wilson's Business Plan. We have commented on the evidence which was presented in relation to the Business Plan above (see §§35 and 167). We are frankly surprised that Mr Hughes considered appropriate to embark on the very significant work involved in developing his model without carrying out a basic investigation into whether the foundations upon which he was building were sound. Had he done so, it is likely that he would have discovered, as we did, that there was no evidence that the assumptions underlying the business model were either reasonable or reflected the realities of the distribution of smart prepayment meters among energy suppliers.
497. Second, at a more granular level, we accept Dr Majumdar's criticisms of Mr Hughes' approach to tier 3. We agree that Mr Hughes' approach overstates the overall size of the tier 3 segment of the market. This overstatement arises because Mr Hughes had included two larger suppliers, E and Opus Energy, in tier 3 in his model. Mr Hughes' acknowledged this overstatement but was of the view that, overall, his approach was reasonable because, based on the Business Plan, he had assumed that in the counterfactual, GLOBAL-365 would only achieve a 30% share of tier 3 but would achieve a 50% share of tier 2. Thus, on his approach, overstating tier 3 reduced the total amount of GLOBAL-365's damages. Given our findings on causation, we do not share Mr Hughes' assessment of his approach.
498. As to the quantification of the profits lost by GLOBAL-365, we are content to adopt the calculations carried out by Mr Anaman subject to one adjustment which we discuss below. We note that, although there was dispute about the assumptions which Mr Anaman had been instructed to make, GLOBAL-365 did

not challenge his quantification of Dr Majumdar's alternative scenario. In this regard, we also accept Mr Anaman's assessment that there was no continuing loss after 2023. That conclusion is consistent with the evidence we heard of the marked reduction in tier 3 suppliers from 2021 onwards.

499. We consider that Mr Anaman's quantification requires to be adjusted to take account of the fact that GLOBAL-365 only approached 59 of the 94 tier 3 suppliers. We see no basis for concluding that GLOBAL-365's conduct in the counterfactual would have been any different. As we have noted above (at §489), we were provided with relatively little, if no, evidence on the transactions processed by particular tier 3 energy suppliers. As a result, we have no evidential basis either to disregard or diminish the significance of the suppliers GLOBAL-365 did not approach. Accordingly, approaching the issue broadly, we consider that Mr Anaman's quantification has to be reduced by one third to take account of the fact that GLOBAL-365 did not approach approximately one third of the suppliers within the tier (59/94). It follows that, taking account of our more pessimistic view of GLOBAL-365's chances within tier 3 (20%), and, starting from two thirds of the figures produced by Mr Anaman, we assess GLOBAL-365's losses for the period 2019 to 2023 as being £169,334 (£94,667 in respect of OTC and £74,667 in respect of non-OTC), excluding interest.

500. For reasons that are obvious, given our findings in respect of causation, it is unnecessary for us to consider the further elaborate arguments developed in respect of quantification.

**(7) Interest**

501. GLOBAL-365 sought compound interest at 2% above the Bank of England's base rate. It did so citing the Tribunal's approach in *Royal Mail v DAF Trucks* [2023] CAT 6 at §768. It argued that:

- (1) as its damages claim was based on a discounted cash flow basis, compound interest fell naturally into that analysis; and

- (2) it would have deployed the profits that it was prevented from earning in other business ventures such as developing a product described as “Automatic Spend Control”.
502. In the alternative, GLOBAL-365 sought simple interest at 2% above the Bank of England’s base rate or such rate or for such periods as the Tribunal sees fit under s. 35A of the Senior Courts Act 1980 or r. 105 of the Competition Appeal Tribunal Rules 2015.
503. PayPoint denied that GLOBAL-365 had sufficiently pleaded a claim for compound interest. Pending further particulars, it did not admit the claim. PayPoint’s experts challenged the theoretical basis for awarding compound interest but did produce some interest computations on both simple and compound bases on the basis of their Conservative Alternative Scenario.
504. GLOBAL-365 did not lead evidence as to the other business ventures to which it referred and did not make detailed submissions on the issue of interest.
505. In *Royal Mail v DAF*, the Tribunal applied the approach set out by the House of Lords in *Sempra Metals v IRC* [2007] UKHL 34, confirming that the Tribunal was very much open to awarding compound interest in appropriate cases. However, it is notable that, in that case, when awarding compound interest, the Tribunal heard arguments on why compound interest represented a fairer compensation for Royal Mail’s loss, including, with the benefit of evidence, as to its funding costs for the shortfall represented by the damages which were on a compound basis.
506. In this case, we had no such evidence or argument. GLOBAL-365 has not proved its “actual interest loss” as provided for in §17 of *Sempra*. Nor have we addressed the level of compensation for GLOBAL-365’s loss on the basis of discounted cash flows as GLOBAL-365 had assumed when applying for compound interest: that was its primary ground. Accordingly, the Tribunal is not in a position to award compound interest and would, in any case, have significant reservations as to whether it was right in these circumstances, however appropriate in might be in other cases.

507. Accordingly, the Tribunal awards simple interest at the rate of 2% above the Bank of England's base rate. There is an inherent lack of certainty as to the time period to which GLOBAL-365's losses relate, given the progressive nature on which it would have won business in the counterfactual. Accordingly, interest will run from 1 January 2020 to allow for a ramp up period from the beginning of 2019 until the date of this Judgment.

## **G. DISPOSITION**

508. For the reasons set out above, the Tribunal concludes:

- (1) The relevant market is the market for the supply of OTC prepayment services to energy suppliers in Great Britain.
- (2) PayPoint was dominant in the relevant market during the period 2009–2018, prior to the PO/PZ merger. However, PayPoint was not dominant in the relevant market following the PO/PZ merger.
- (3) PayPoint abused its dominant position in the relevant market by foreclosing its competitors from the relevant market.
- (4) GLOBAL-365 had a real and substantial chance of winning additional business among the smaller, tier 3, suppliers absent PayPoint's conduct.
- (5) PayPoint shall pay £169,334 to GLOBAL-for the period 2019 to 2023.
- (6) Interest is payable for the period 1 January 2020 until the date of this Judgment at the rate of 2% above the Bank of England's base rate.

509. This judgment is unanimous.

The Honourable Lord Richardson  
Chair

Paul Lomas

Professor Alasdair Smith

Charles Dhanowa, CBE, KC (Hon)  
Registrar

Date: 7 May 2026