Neutral citation [2021] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 September 2021

Before:

THE HONOURABLE MR JUSTICE WAKSMAN
(Chairman)
EAMONN DORAN
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN LE PATOUREL

Applicant /
Proposed Class Representative

- and -

(1) BT GROUP PLC
(2) BRITISH TELECOMMUNICATIONS PLC

Respondents /
Proposed Defendants

Heard remotely on 24-25 June 2021

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Ms Ronit Kreisberger QC, Mr Nicholas Bacon QC, Mr Nikolaus Grubeck and Mr Jack Williams (instructed by Mishcon de Reya LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Ms Sarah Ford QC, Mr Benjamin Williams QC, Mr Giles Richardson and Ms Sarah Love (instructed by Simmons & Simmons LLP) appeared on behalf of the Respondents/ Proposed Defendants.

A. INTRODUCTION

1. This case concerns a claim that the proposed Defendants, BT Group Plc and British Telecommunications Plc (collectively "BT") has abused its dominant position in two telecommunications ("telecoms") markets by imposing unfair prices, contrary to section 18 of the Competition Act 1998 ("the Act"). The claim is brought by Mr Justin Le Patourel as the Proposed Class Representative ("the PCR") in respect of approximately 2.3m affected BT customers.

2. Both markets are concerned with the provision of landline telephone services to residential addresses known as Standalone Fixed Voice services ("SFVs"). These are provided in circumstances where the customer contracts with BT for access to the telephone network for voice calls only. The charges consist of a fixed line rental charge and a variable charge for calls made.

3. With the provision of SFV services there are, according to the PCR, two markets. The first is Voice Only ("VO"). A VO customer buys an SFV service and does not buy a broadband service from either the same or any other provider. As at 2019 there were 1.2m such customers, representing about 5% of total residential customers. The second market encompasses Split Purchase Customers ("SPC"). Such customers take a broadband service pursuant to a separate contract, either with BT or with some other provider. What they do not have is a "bundle" i.e. a package of telephone and broadband services provided together by the same supplier under one contract. The market for bundles, which the PCR says is different from the SPC market, is known in the industry as "Dual Play". As at 2019, there were 1.1m SPCs.

4. We have before us for determination, two applications. The first, made by the PCR, is for a Collective Proceedings Order ("CPO") within the meaning of section 47B of the Act. Subject to the question of merits (see below) BT does not resist the making of a CPO on an "opt-in" basis. However, the PCR is seeking a CPO on an "opt-out" basis exclusively, which BT does resist.

5. The second application is made by BT and it is a cross-application (a) to strike out the claim pursuant to Rule 41 (1) (b) of The Competition Appeal Tribunal

Rules 2015 ("the Rules") on the basis that there are no reasonable grounds for making it and/or (b) for summary judgment to dismiss the claim pursuant to Rule 43 (1) (a) thereof on the basis that it has no real prospect of success.

6. It is common ground now that there are two essential issues between the parties:

   (1) Does the claim have a real prospect of success?

   (2) If so, may the putative collective claim be brought on an opt-out basis?

7. If the answer to both questions is in the affirmative, then, subject to any further ruling or direction by this Tribunal, BT does not in principle resist the making of a CPO on the opt-out basis. If, on the other hand, the answer to either question is in the negative then the claim as a whole must be dismissed.

8. We should add that in the course of argument, the PCR clarified that the claim put forward as the subject of the CPO is exclusively in respect of both VO customers and SPCs. There is no alternative case put forward at this stage that if, for example, whether on the basis of merits or otherwise, the Tribunal were to conclude that the claim in respect of SPCs should not go forward, the PCR would be content with a CPO in respect of VO customers only. In that sense, both classes stand or fall together.

B. THE EVIDENCE

9. In support of the CPO application, the PCR has adduced two witness statements from Mr Le Patourel dated 15 January and 26 May 2021, and two economic expert reports from Mr David Parker dated 13 January and 28 May 2021 ("Report 1" and "Report 2" respectively). For its part, in response to the CPO application and in support of its cross-application, BT has adduced a single witness statement from Mr Jonathan Bunt dated 29 April 2021. It has not adduced any expert evidence.

C. BACKGROUND

10. On 28 February 2017, Ofcom set out proposals to address the concerns which it had by that stage about the standalone telephone services market; these were contained in its Provisional Conclusions document of that date which was then open for a consultation period ending on 9 May 2017. There are 10 Annexes to the Provisional Conclusions. Annex 8 consisted of the supporting evidence relied upon by Ofcom ("Annex 8").

11. The executive summary of the Provisional Conclusions included the following:

> "1.5 However, customers that do not take bundled services have not benefited from competition in the same way. We are particularly concerned about people who only buy a landline from a provider – either because they do not want broadband or payTV, or because they take these services separately, usually from different companies.
>
> 1.6 Our concerns are that relative to those who purchase services in a bundle, these consumers have less choice of suppliers, are not benefiting from strong price competition or promotional offers and their loyalty to their suppliers is leading to ever higher prices. Further, while price increases up to 2013 might have been explained by the rebalancing of revenue from calls and the line rental, since then we have observed a more rapid inflation and it is now clear we need to act. Data relates to the proportion of customers self-reporting a bundle of services, and understates the proportion purchasing multiple services from a single provider. We use this to allow for comparability with 2009 data. Revised analysis for 2016 based on the main provider used for each service is reported in Figure A8.1. This analysis also defines those who pay line rental in addition to their broadband service, as a bundle.
>
> 1.7 We have found that these customers – often elderly people who have remained with the same landline provider for many decades – are getting increasingly poor value for money. They are particularly affected by price increases, and, we consider, are in need of additional protection in a market that is not serving them well enough.
>
> 1.8 To address this situation, we are now proposing to cut the price of BT's standard line rental by at least £5 per month for customers with standalone landline contracts. Thereafter BT would only be allowed to increase its average prices for line rental and calls in line with inflation."

12. At this stage, the proposal to cut the line rental price applied to both VO customers and SPCs, which Ofcom then considered were in the same market.

13. Following consideration of the consultation responses and further market research, Ofcom produced its Review of the Market for Standalone Landline Telephone Services" on 26 October 2017 ("the Review"). The Review consisted

of its final conclusions ("the Statement") together with its Provisional Conclusions. The Statement was accompanied by three Annexes. The third Annex described the supporting information for the Statement which included a document itself called "Evidence Supporting the Statement" ("the Evidence"). This served the same function as Appendix 8 to the Provisional Conclusions. In the Statement, Ofcom maintained its earlier view and pointed out that line rental prices had risen by between 23% and 47% in the period from December 2009 to June 2017, while the wholesale cost of providing these services had fallen by 27% in real terms. In the summary, the Statement concluded as follows:

> "1.10 Since the February Consultation, we have been made aware that providers of standalone telephony services on Openreach's network are in fact able to identify which of their customers are voice-only and which are split purchasers.3 Therefore, while providers have not so far set different prices (or other terms and conditions) between these two customer groups, they could do so if they wished. Accordingly, we are no longer of the view that voice-only and split-purchase customers should be considered part of the same market.
>
> 1.11 While we have concerns about the current outcomes for both customer groups, our concerns are more acute for voice-only customers. Voice-only customers generally do not engage with the market: 77% of voice-only customers have never switched provider or considered doing so.4 They tend to be older and less likely to shop around for a better deal. Over 40% of voice-only customers are at least 75 years old, and 40% live in DE socioeconomic group households (for comparison, 5% of dual-play customers are 75 or over, and 20% are in DE group households).5 Moreover there are now relatively few providers of landline only services for these consumers to choose from.
>
> 1.12 Even if measures to promote engagement and competition for voice-only customers are successful, they are likely to take time to have an impact (and there are challenges to them being successful, which requires both that voice-only customers engage more actively and also that this stimulates a growth in the existing, limited competition). BT currently holds a dominant position in the market for voice-only customers and the lack of competition enables it to maintain prices above the competitive level.
>
> 1.13 We therefore consider that a significant price cut is important to alleviate the detriment suffered by voice-only customers. We are also in favour of providing information to consumers, because of the potential benefits in encouraging their engagement in the market and greater competition.
>
> 1.14 Like voice-only customers, split purchasers have suffered increases in line rental charges in recent years without significant offsetting benefits. However, split purchasers are typically younger and more technologically literate, and, by definition, have internet access which allows them to access alternative offers more easily. Unlike voice-only

customers, split purchasers have a wide range of choices available to them, such as dual-play (telephone and broadband) bundles, which should allow them to seek better value for money from providers if they increase their levels of engagement.

1.15 To address the detriment faced by split purchasers we have decided that it is more appropriate to allow time for split purchasers to become more actively engaged and potentially switch to dual-play bundles where that is a better option for them, than to include them in a price control at this stage. Split purchasers may benefit from being informed that, in many cases, they are not obtaining good value for money and can find themselves a better deal."

14. We should point out that the actual text of paragraph 1.11 said that 55% of dual play customers were over 75 rather than 5%. The reference to 55% is clearly an error - see the underlying evidence referred to and relied upon at page 35 of the Evidence.

15. Other findings in the Statement were as follows:

(1) VO and SPC Customers were in separate markets within the provision of SFV services. This conclusion arises from Ofcom's observation in paragraph 1.10 cited above, notably the ability of BT to identify and to sustain different prices to the two classes of customer;

(2) SFV access and SFV calls comprised different markets even though consumers typically bought SFV access and SFV calls together; but whether or not such access and calls did form part of the same market did not alter Ofcom's competitive assessment;

(3) Dual Play services were not in the same market as SFV VO services;

(4) The geographical scope of the relevant markets was the UK excluding Hull; as with the ambit of the claim itself, Hull was excluded because telecoms services there are provided by a separate entity pursuant to a licence;

(5) In relation to VO customers overall, BT enjoyed a significant market share (over 70%) within this market which had become "significantly more static." Competitors faced significant barriers to expansion within

the market and BT had been able to increase and sustain prices above the competitive level. BT did not face any significant constraints on its ability to act independently within that market;

(6) In relation to SPCs, they were paying materially more for standalone voice and standalone broadband services than they would pay for equivalent Dual Play services, and SFV Services bought by SPCs were not in the same market as Dual Play services;

(7) BT had a very high market share of SPC services, somewhere around 97%; the declining and relatively small size of this market could make it difficult for other providers of SFV services to target SPCs to encourage them to switch;

(8) However, in relation to SPCs, Ofcom decided that, although these customers also suffered detriment arising from high prices, on balance that it was more appropriate to allow time for such customers to become more engaged and potentially to switch to Dual Play where that was a better option, rather than including them in price control at that stage.

16. On 24 October 2017 BT put forward a voluntary proposal to Ofcom. This included, for VO customers but not SPCs, a line rental reduction of £7 per month as from 1 April 2018 and thereafter raising the price of calls and line rental by no more than inflation each year. It also proposed an improvement in the information made available to such customers to make them more aware of potential savings. For SPCs, BT proposed to stimulate engagement by issuing an annual statement showing their total spend which should help them consider what alternatives were available for voice-only services in conjunction with broadband services. We refer to the above proposals as "the BT Commitment." Ofcom accepted the BT Commitment in place of any binding decision of its own.

17. Following a consultation launched in 2020, aimed at reviewing the performance of the BT Commitment to date, Ofcom published its 2021 Statement on 25 March 2021. In it, Ofcom accepted a renewed BT Commitment with price

increases for VO customers limited to inflation and in any event within a safeguard cap of 2.5% of the price of line rental. This commitment would last 5 years. The existing commitment in respect of SPCs continues as before.

D. THE CLAIM

18. The PCR's detailed claim form was issued on 15 January 2021 and amended on 4 March 2021. It has since been re-amended with the consent of BT. In it, the PCR seeks damages from BT for its alleged abuse of a dominant position. The period for which damages are sought in respect of residential VO customers is 1 October 2015 to 1 April 2018, at which point the price cut contained in the BT Commitment came into effect. The earlier date is the earliest date from which the PCR can claim damages by reason of the relevant limitation period. For business VO customers (a small percentage of the total) the claim period runs from 1 October 2015 until final determination of the claim by this Tribunal. This is because such customers were not covered by the price cut. £182m is presently claimed in respect of all VO customers. For SPCs, the claim period, again, runs from 1 October 2015 but, since these customers have not benefited from any voluntary price reductions by BT, it runs until final determination of the claim by this Tribunal. The amount presently claimed in respect of these customers is £287m. The total claimed is therefore £469m which is inclusive of VAT but exclusive of interest which is claimed on a compound basis, by way of further damages, or alternatively on a simple basis.

19. BT served its detailed Response on 30 April 2021 and the PCR served its Reply on 28 May 2021. Both of these documents contain information which it were agreed to be treated as confidential to BT at that stage. However, the Tribunal does not consider that there are any parts of this judgment which require redaction on the grounds of confidentiality.

E. THE LAW

(1) Legal Framework For The Grant Of A CPO

20. Section 47B of the Act provides for the bringing of collective proceedings. This can only be done if the Tribunal makes a CPO. The section also provides as follows:

> "(10) "Opt-in collective proceedings" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.
>
> (11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except— (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and (b) any class member who— (i) is not domiciled in the United Kingdom at a time specified, and (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.
>
> (12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified."

21. References in this judgment to the opt-out or opt-in basis should be construed accordingly.

22. Rule 79 of the Rules provides as follows:

> "**Certification of the claims as eligible for inclusion in collective proceedings**
>
> (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings— (a) are brought on behalf of an identifiable class of persons; (b) raise common issues; and (c) are suitable to be brought in collective proceedings.
>
> (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including— (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; (b) the costs and the benefits of continuing the collective proceedings; (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class; (d) the size and the nature of the class; (e) whether it is possible to determine in respect of any

person whether that person is or is not a member of the class; (f) whether the claims are suitable for an aggregate award of damages; and (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA [Competition and Markets Authority] under section 49C of the 1998 Act(a) or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)— (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover. (4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant— (a) under rule 41(1), to strike out in whole or part any or all of the claims sought to be included in the collective proceedings; or (b) under rule 43(1), for summary judgment. (5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order."

23. In addition, Rule 93 provides as follows:

"**Distribution of award…**

(1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to— (a) the class representative; or (b) such person other than a represented person as the Tribunal thinks fit….

(3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify— (a) the date by which represented persons shall claim their entitlement to a share of that aggregate award;"

24. The CAT's Guide to Proceedings 2015 ("the Guide") contains the following paragraphs:

"**Whether proceedings should be opt-in or opt-out**

6.38 As mentioned above, a judgment in opt-out proceedings binds all persons within the class, save for those who have opted out (or foreign class members who have not opted in), whereas a judgment in opt-in proceedings binds only those class members who have opted in to the proceedings. Where the class representative seeks approval to bring opt-out proceedings, it will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings.

6.39 The Tribunal will consider all matters it thinks fit in determining whether proceedings should be opt-in or opt-out. Rule 79(3) lists two specific factors the Tribunal will consider:

- *Strength of the claims (Rule 79(3)(a))*

> Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.
>
> - *Whether it is practicable for the proceedings to be brought as opt-in proceedings (Rule 79(3)(b))*
>
> The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

(2) Summary Judgment/Strike-out Principles

25. Both sides agree, as is the law in this area, that there is no material difference in the approach to be taken in this case in deciding an application to strike out a claim and one for summary judgment against it. To avoid being struck out or dismissed, the claim must have a real prospect of success. It must not be merely "fanciful". The Tribunal does not have to take every assertion at face value but on the other hand, it should not seek to conduct a "mini-trial". This is reflected in the merits assessment which forms part of the opt-in/opt-out suitability consideration referred to in paragraph 6.39 of the Guide quoted in paragraph 24 above. The Court can take account of evidence not presently available but which may reasonably be expected to be produced at trial. In this regard there is likely to be significant amounts of disclosure from BT. However, as will be clear hereafter, our assessment of the prospects of success of the claim at this stage does not depend on the future availability of such disclosure.

26. BT accepts, in paragraph 5 of its skeleton argument, that simply because this is a standalone claim based on "pure" excessive pricing, this does not mean that the PCR has to discharge some higher burden in showing that there is a real prospect of success. In fact, of course, strictly, the burden is actually upon BT as the applicant to show that there is no such prospect although we should make clear that the result in this case is not dictated by which party bears the burden. We accept, as paragraph 5 goes on to suggest, that (as in every case), the nature of the claim in question should be taken into account when assessing its prospects of success. For example, there may be more putative defences or answers to some claims, than to others. Or some claims may need to satisfy demanding formal requirements. Or (as in the case of claims for rectification) the court may, as a matter of substantive law at trial need to be satisfied very fully on the basis of convincing evidence, before the claim could be said to have been established on the balance of probabilities.

27. Here, we take into account that standalone excessive pricing claims have been rare in this jurisdiction. In paragraph 1 of its Skeleton Argument, BT points to parts of paragraph 3 of the judgment of this Tribunal in *Flynn Pharma v CMA* [2018] CAT 11. However, it is worth citing that paragraph in full:

> "Cases of pure unfair pricing are rare in competition law. Authorities find them difficult to bring and are, rightly, wary of casting themselves in the role of price regulators. Generally, price control is better left to sectoral regulators, where they exist, and operated prospectively; ex post price regulation through the medium of competition law presents many problems. However, the law prohibits unfair pricing in certain circumstances and in such cases there is no reason in principle why competition law cannot be applied, provided this is done on the correct legal basis and the analysis of evidence is sound."

28. In addition, BT, in its Response to the claim, referred to the observations of the minority in the well-known recent decision of the Supreme Court in *Mastercard v Merricks* [2020] UKSC 51. The context there, of course, was a "follow-on" claim and the issue was the adequacy or otherwise of the claim for damages. In any event, we must follow the majority view, and its discussion of the principles of summary judgment in this context does not materially assist BT here.

29. BT also points to the need for claims like this to be properly pleaded and particularised. Of course that is so. But in truth, BT has had no real difficulty in

responding to this claim at this early stage. The six objections it makes to the PCR's case on the merits ("the 6 Objections") are highly specific and targeted. In truth, BT's position is not that it does not understand the PCR's case; rather it is that the claim is so bad that it should be summarily rejected.

(3) Unfair Pricing as an Abuse of Dominant Position

30. Section 18 of the Act provides that:

> "**Abuse of dominant position…**
>
> (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in— (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;…."

31. At paragraph 56 of the judgment in *Flynn* in the Court of Appeal ([2020] Bus LR 803), Green LJ (with whom Sir Geoffrey Vos C (as he then was) and Sir Stephen Richards agreed) said that the starting point is the judgment of the CJEU in *Case C-27/76 United Brands v Commission EU:C:1978:22* [1978], which all parties described as "seminal". Paragraphs 248–253 thereof read as follows:

> "248 The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.
>
> 249 It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
>
> 250 In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.
>
> 251 This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.

> 252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.
>
> 253 Other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair."

32. There has been, perhaps inevitably, extended discussion before us of the "test" for abusive pricing set out in *United Brands* and its recent analysis by the Court of Appeal in *Flynn*. We do not consider that it is necessary to rehearse much of that discussion here and this is for two reasons. First, the PCR accepts, at least for present purposes, that it will at trial need to satisfy both "limbs" of paragraph 252 of the judgment in *United Brands*. That is to say that the pricing at issue is both excessive and that it is unfair. This assists us when we come to consider BT's Objection 4, below. That said, precisely how those limbs are to be satisfied is a different matter. For present purposes we do not consider it necessary to do more than recite what Green LJ stated at paragraph 97 of his judgment in *Flynn* in respect of the conclusions to be drawn from the case-law:

> "…
>
> (i) The basic test for abuse, which is set out in the Chapter II prohibition and in Article 102, is whether the price is *"unfair"*. In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of "*normal and sufficiently effective competition*", i.e. "*workable*" competition.
>
> (ii) A price which is "*excessive*" because it bears no "*reasonable*" relation to the economic value of the good or service is an example of such an unfair price.
>
> (iii) There is no single method or "*way*" in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon.
>
> (iv) Depending upon the facts and circumstances of the case a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases.
>
> (v) If a Cost-Plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is "*excessive*". This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales (ROS) or to some other appropriate benchmark such as return on capital employed (ROCE). When that is performed, and *if* the price exceeds the selected benchmark, the authority

should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive.

(vi) In analysing whether the end price is unfair a competition authority may look at a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness.

(vii) If a competition authority chooses one method (e.g. Cost-Plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone.

(viii) If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it."

33. A key point in *Flynn* of course was the extent to which the CMA, in determining that there had been abusive pricing, was bound to consider methods of assessing abuse (or not) other than the one it chose to employ. The answer was that (if and when) the relevant undertakings raised such alternative methods (with different results) the CMA was required to give them proper attention. See paragraphs 116, 259 and 260 of the judgment along with paragraph 97 (viii) referred to above. That issue does not really arise here at this stage since BT will not have to set out its full defence until and unless the CPO sought by the PCR is made. However, to the extent that BT has sought here to deliver a knockout-blow based upon a methodological matter, we consider it in the context of its 6 Objections below.

34. Second, matters such as the true reach of the "economic value" concept, as used in *United Brands* and as commented upon in *Flynn* (see paragraphs 171-173) are best dealt with in context below.

F. MR PARKER'S REPORTS

35. In support of its claim, PCR has (at this stage) adduced Reports 1 and 2. Mr Parker is a professional economist and is a Director of the competition practice of Frontier Economics Limited, a consultancy specialising in microeconomic analysis. He has had over 20 years' experience as a professional economist and

specialises in the use of economics - both economic theory and empirical analysis - in competition law cases.

36. Materials provided to him for the purpose of making Report 1 included the Review, together with numerous other relevant Ofcom documents, price guides and statements from BT, as well as a selection of legal materials including the Act, the Communications Act 2003 ("the Communications Act"), the judgments in *United Brands* and *Flynn* as well as the judgment of the CJEU and the Opinion of Advocate-General Wahl dated 6 April 2017 in *Lavijas Autoru apvieniba v Konkurences padome* C-177/16 (the "*Latvian Copyright*" case).

(1) Market Definition

37. After stating extensively the relevant background, including key elements of Ofcom's Review, Report 1 dealt with market definition in Section 6. After detailed consideration of the markets and the evidence Mr Parker concluded that:

(1) Because the access and calls components are almost always jointly supplied and purchased, they form a single market; in this respect he differed from Ofcom;

(2) Even if it were otherwise, it would not alter his later conclusion that BT held a dominant position in the supply of SFV services throughout the claim period;

(3) VO customers and SPCs each formed a separate market in the provision of SFV services;

(4) Dual Play services should not be considered as being in the same market as VO customers receiving SFV services; nor were they in the same market as SPC;

(5) The relevant geographical scope for each of the relevant markets was the UK, excluding Hull.

38. All of the above conclusions came after detailed analysis of the markets, or alleged markets, by reference to supply and demand side, over some 26 pages.

(2) Dominance

39. In his Section 7, Mr Parker then assessed BT's position in the relevant markets and concluded, unsurprisingly, that it was dominant. If the market share is more than 50% as it clearly was here, there is a rebuttable presumption of dominance. BT does not suggest otherwise for present purposes. The issue of dominance was considered in detail across 22 pages in which possible countervailing factors to dominance were considered and rejected.

(3) Abuse

40. In his Section 8, Mr Parker considered the question of abuse of a dominant position. At sub-paragraph (1) thereof he dealt with the law as stated in *United Brands* and beyond. At paragraph 280 he referred, among other paragraphs, to paragraphs 252 of *United Brands* and paragraph 97 of *Flynn*, as referred to above. His analysis focused on the prices charged for line rental.

41. Mr Parker then went on to identify a competitive benchmark for the exercise of discerning abuse which was most suitable here. He decided that the benchmark was BT's own line rental price from 2009, which Ofcom, as regulator, had itself judged to be competitive at the time, as adjusted for changes in its most important cost component namely wholesale line rental cost ("WLR") ("the 2009 Price"). He also noted that as at 2009, BT did not have "significant market power" ("SMP") in providing residential access to landline telephone services. He noted that Ofcom had effectively treated BT's 2009 prices as the upper limit on a competitive price - see his paragraph 291.

42. Having looked at other possible benchmarks including "cost-plus" he noted in paragraph 315 that the 2009 Price was itself in substance a cost-plus approach. In that paragraph he said as follows:

> "In principle, one could develop a competitive benchmark by building a bottom-up cost-plus model, which involves reflecting all costs of production

> and an appropriate profit margin. However, my approach of relying on the 2009 benchmark and adjusting for subsequent cost changes is in substance a cost-plus approach. This is because in 2009, assuming that the market was then competitive, BT would have set its price so as to account for relevant costs and include an appropriate margin reflecting the relevant allocation of common costs and a return on capital employed."

43. In his assessment as to whether BT's prices were excessive, he said that the relevant test was whether the relevant prices were "significantly" and "persistently" above the competitive benchmark. He considered that they were. He went on to reject the presence of any countervailing factors, such as "competitive rebalancing" with other services provided by BT.

44. It is true that his conclusions are framed in terms of "excessive" rather than "unfair" prices. (In fact, even in *Flynn* itself, the word "excessive" is sometimes used contextually in the sense of "unfair"). However, it is clear to us that Mr Parker had in mind the need to address both limbs of the *United* Brands test at paragraph 252, rather than focusing solely on the first limb notion of an excessive price. In particular, in his paragraph 284 he noted paragraph 155 of *Flynn* which stated that the prices consumers are prepared to pay in an effectively competitive market are a useful proxy for a price that bears a reasonable relationship to economic value. Having regard to paragraph 97(v) of *Flynn*, he also considered, when assessing the arguments about competitive rebalancing, whether there were other factors which might affect the appropriateness of his chosen benchmark and therefore justify the particular prices charged as not abusive.

45. On any fair reading, it is clear that Mr Parker was concluding that BT's prices fell foul of both the first and second limbs of the *United Brands* test.

46. Report 2 is important here because in it, Mr Parker addresses the 6 Objections raised by BT against his findings in Report 1. We will refer to Report 2 in more detail below when we consider the validity or otherwise of those objections which form the basis of BT's argument that the instant claim is baseless. However it is worth noting here what Mr Parker stated explicitly in paragraph 3.50-3.53 of Report 2:

> "3.50 As the BT Response states, Limb 2 relates to "whether [the relevant price] is unfair, either in itself or when compared to competing products".
>
> 3.51 In relation to Limb 2 – whether the prices are unfair relative to competing products – I explored a large number of potentially competitive benchmarks in Parker 1. The potential benchmarks I explored related to the prices of comparator products – and more specifically, the competitive benchmarks that I find to be most relevant are those of the same products at different (earlier) periods in time.
>
> 3.52 I did also consider whether line rental prices charged by other providers of SFV services should serve as competitive benchmarks but rejected them. Competitor prices are only useful benchmarks in this context if those prices were set at the competitive level. As I discussed in Parker 1, this did not appear to be the case. Rather, in the present case prices of competitor products also appeared to be set at above the competitive level. This was for the following reasons: a. prices had trended upwards throughout the Claim Period while costs (as measured by WLR and Metallic Path Facility, "MPF", the key wholesale inputs) had declined over the whole period. This is not consistent with the behaviour of prices in a competitive market; and b. In almost all cases, BT had acted as price leader, making price changes first, with rivals following in order to maintain price differentials at broadly the same level. If so, rivals are not setting prices at the competitive level, given the changes in costs referred to above, but rather are setting prices above the competitive level by 'sheltering under BT's pricing umbrella'. I noted that my conclusions on this point were consistent with those of Ofcom.
>
> 3.53 I do not think that it would be sensible from an economic perspective to reach the conclusion that BT's prices are not excessive, on the basis that BT's prices are similar to those of rivals in the market, but where those rival prices are themselves above the competitive level (and where such prices are buoyed up by the existence of the high prices of the dominant incumbent). Such an approach would also conflict with the Court of Appeal's view [see paragraph 97 (i) of Flynn) that "a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of 'normal and sufficiently effective competition', i.e. 'workable competition'." A dominant firm could reap such trading benefits if rivals price up to its level, rather than down to the competitive level."

47. In our judgment, and subject to our evaluation of the 6 Objections discussed below, Mr Parker's evidence as a whole is clear in its support for at least a prime facie case of abuse as against BT in respect of both VO customers and SPCs.

G. MERITS ANALYSIS: THE 6 OBJECTIONS

(1) Introduction

48. BT's case on the merits is, as it has to be, that the PCR's proposed claim has no real prospect of success. Put another way, it is fanciful. It contends that notwithstanding the service of the two reports from Mr Parker and none from

BT, there are 6 particular objections to the PCR's case which, whether individually or collectively, render it incapable of getting off the ground.

49. The 6 Objections were set out in Sections A1 to A6 of the Response. They are, in summary, as follows:

(1) The Review was made pursuant to the *ex ante* regulatory regime under the Communications Act. That is a very different context from the *ex post* powers to be found within the Act. In particular, the findings of the Review cannot simply be "read across" to this case for the purposes of finding an abuse within section 18 of the Act ("the Context Point");

(2) The Review did not, in any event, reach any final determinations about BT's pricing ("the Provisional Point");

(3) Mr Parker evidently failed to deal adequately or at all with the wider competitive dynamics which did or may have influenced BT's pricing for SFV services ("the Wider Competitive Dynamics Point");

(4) Mr Parker's findings or analysis of abuse are wholly inadequate ("the Abuse Point");

(5) The Review does not, in any event, support a case of abuse in respect of the SPCs ("the SPC Point");

(6) BT's customers are guilty of a failure to mitigate their loss ("the Mitigation Point").

50. We deal with each objection in turn.

(2) The Context Point

51. It is correct that there is a contextual difference between the role of Ofcom, *qua* price regulator, and an analysis of abusive pricing for the purpose of section 18. In particular, Ofcom must exercise its functions in accordance with the six objectives set out in section 4 (3)-(9) of the Communications Act. These go

beyond the promotion of competition which itself is expressly required by section 4 (3) and (8) (a). Thus, for example, section 4 (5) stipulates the promotion of the interests of all the members of the public in the UK, and section 8 (b) refers to the purpose of securing the "maximum benefit for… customers of communications providers."

52. However, that hardly renders the Review invalid without more, for present purposes. It is plainly focused on the excessive pricing of BT as a direct result of its market power. It also needs to be remembered that the PCR's case is not that there is some automatic "read-across" of the Review so as to found the claim. Rather, the PCR relies upon the Review as a piece of evidence. Given that the object of Ofcom here was to consider the question of excessive pricing it would, in our judgment, have been very odd if, for present purposes, the PCR did not consider the Review as being highly relevant. It is, as the PCR submits, the most up-to-date and comprehensive body of evidence relating to the subject-matter in issue which is in the public domain; or, it is at least plainly realistic so to contend for present purposes.

53. It is also true that the Communications Act employs the concept of SMP as a threshold requirement rather than using the term "dominance" in the relevant market. However, section 78 (1) thereof provides that a person is taken to have SMP if "he enjoys a position which amounts to or is equal to dominance of the market". See also the statement of equivalence between these two concepts at paragraph 3 of the judgment of Lloyd LJ in *Hutchison 3G v BT* [2009] EWCA 683. Consistent with that approach Ofcom expressly stated in paragraph 1.12 of the Review that "BT currently holds a dominant position in the market for voice-only customers and the lack of competition enables it to maintain prices above the competitive level." Accordingly, the difference in terminology is of no significance, certainly, not in this case and at this stage.

54. BT relies upon the decision of the General Court of the CJEU in *Deutsche Telekom v EC Commission* [2008] 5 CMLR 9. Here, the Commission found that Deutsche Telekom had abused its dominant position in (among other things) the wholesale market for telecoms access, by charging its competitors who required such access excessive prices which amounted to an unfair "margin squeeze".

On appeal (which was unsuccessful), one of the arguments raised by Deutsche Telekom was that such pricing had actually been approved by the relevant regulator. As to this, the Court observed at paragraph 113 of the judgment:

> "In that respect it must be stated, first, that even though RegTP is obliged, like all organs of the State, to respect the provisions of the EC Treaty (see, to that effect, *CIF* [2003] 5 C.M.L.R. 16, cited at [86] above at [49]), it was, at the material time, the German body responsible for regulating the telecommunications sector, rather than the competition authority of the Member State concerned. However, the national regulatory authorities operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition policy (see the Commission's Notice of August 22, 1998 on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets and principles [1998] OJ C265/2 at para.13)."

55. By itself, those observations hardly mean that the Review in this case must be regarded as simply irrelevant. In fact, the reasoning behind paragraph 113 (as the Court's subsequent findings show) was that the mere fact that the regulator had approved the prices did not mean that Article 82 (as it then was) could not be infringed. They went on to find that it had been.

56. BT also referred to *Telefonica v EC Commission* [2012] 5 CMLR 20. This was another case where the Commission found a telecoms provider, which had been the previous holder of the state telecoms monopoly, guilty of infringing Article 82 by reason of an abusive market squeeze. One point taken by Telefonica in its appeal was that (contrary to the findings of the Commission) the state regulator had found that regional and national wholesale products were not within the same market - see paragraph 135 of the judgment. In paragraph 142 thereof, the Court rejected that particular argument. BT relies upon the single sentence within that paragraph:

> "In that regard, unlike the contested decision, the decision of the CMT of June 1, 2006 falls within a framework of a prospective analysis."

57. This observation is certainly pointing to a difference between the two regimes. But it is noteworthy that a further two substantive reasons for rejecting this argument were also given by the Court in this paragraph. And again, none of this has the effect of ousting the relevance of the Review from the word go, as it were.

58. Finally, BT relied upon *Hutchison 3G* where the substantive issue was the exercise or otherwise of SMP on the part of Hutchison 3G in the context of Ofcom's decision to impose price controls upon it pursuant to its powers under the Communications Act. Hutchison 3G argued, among other things, that although the CAT had found SMP, it was necessary for section 88 of the Communications Act to be satisfied, as well as section 87. Section 88 (1) provides that:

> "OFCOM are not to set an SMP condition falling within section 87(9) except where— (a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and (b) it also appears to them that the setting of the condition is appropriate for the purposes of— (i) promoting efficiency; (ii) promoting sustainable competition; and (iii) conferring the greatest possible benefits on the end-users of public electronic communications services."

59. As to this, Lloyd LJ observed at paragraph 74 of his judgment that:

> "The debate under sections 87 and 88 proceeds on the footing that there has already been a finding of SMP on the relevant market. It can fairly be said that the structure of the sections shows that it does not follow, merely because there has been a finding of SMP, that price controls can be imposed. Otherwise it would not have been necessary to prescribe the additional requirement that section 88 be satisfied. The provisions of section 88 derive from article 13 of the Access Directive, quoted above at paragraph [24]. Reading the provisions as to price control in their context in the Access Directive, while it is a legitimate point that the imposition of price controls is not necessarily to be possible in every case where there has been a finding of SMP, it seems to me that article 13 does not suggest that it will necessarily be unusual or exceptional that price controls are imposed. "Situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level … to the detriment of end users" (to quote from article 13) would not be uncommon when a finding of SMP has been made."

60. We follow that, but yet again, we fail to see how it necessarily deprives the Review of its utility to the exercise here, especially at this stage. The PCR does not suggest that the mere fact (or threat) of price control in any given case equates to a finding of abuse.

61. For all those reasons, there is nothing in the Context Point as an argument fatal to the claim at this stage.

(3) The Provisional Point

62. It is of course correct that Ofcom did not make a formal determination, because it was satisfied with the BT Commitment. Ofcom also recognised, for example, that it would be incorrect to see VO customers as being in the same market as SPCs, contrary to its earlier Provisional Conclusions. Further, in the light of the elements of the BT Commitments, which differed as between the two groups of customers, Ofcom did not consider it necessary to proceed with a more formal market definition exercise in respect of SPCs.

63. BT contends that this affects the weight to be attached to the Review. Perhaps, although there is clearly much detailed and careful analysis of the evidence and materials before Ofcom in the Review, cited above. But a debate about the weight to be attached to the findings which Ofcom did make hardly amounts to a fatal undermining of the PCR's case unless it can be said that no real weight could be attached to the Review at all; but that, in our view, is a hopeless submission.

64. Otherwise, BT makes a number of submissions to the effect that Mr Parker's own analysis was too dependent on Ofcom's and added comparatively little; further, such analysis as he did add (for example on abuse) was superficial and basic. However, Mr Parker was, as an expert, entitled to consider and approbate (or not) the contents of the Review as support for his position. The real question is whether, taken in the round, there was any part of his analysis that was so wanting that it was fatal to any realistic conclusion that there was abuse. That point is best dealt with in context below, in particular within Objections 3-5.

65. Accordingly, there is nothing in Objection 2 which assists BT at this stage.

(4) Objection 3: the Wider Competitive Dynamics Point

66. There are several component parts to the Wider Competitive Dynamics which BT says have been ignored by Mr Parker or inadequately addressed by him and which undermines all aspects of his analysis. We consider each in turn.

(a) Steep decline in the number of landline call volumes

67. Ofcom figures show that there was a steady decline in the number of fixed voice (i.e. landline) calls, from 103bn in 2012 down to 54bn in 2017. There was an increase in mobile phone subscribers from 88.1m in 2012 to 150.4m (including 4G) in 2017, along with increased average numbers of calls by subscribers per month. See Ofcom's Communications Market Report dated 2 August 2018 at section 4.1.

68. It is then said that as landline call volumes fell, at least part of the line rental increases made by BT over the claim period might be due to it compensating for the reduction in the opportunity to recover fixed costs from the prices charged for the variable (calls) element of voice services. Ofcom referred to this possibility at paragraph 2.7 of the Review, in this way:

> "Some of the price increases may be due to a rebalancing of prices between line rental and calls as fixed voice call revenues fall due to people making fewer calls, using instead texts, email etc. However, the declining wholesale costs suggest that the price increases are generally not justified by cost increases and communications providers serving this market have been increasing their profitability."

69. At paragraph 3.47, Ofcom added:

> "Our analysis for the February Consultation indicated that BT's profitability per standalone fixed voice line was high and had increased over the period 2007/08 to 2015/16. We estimated that BT's net margin per standalone fixed voice line increased from £[✂] per month to £[✂] in real terms over the period (based on December 2016 prices). Using the same methodology, we estimate that BT's net margin per standalone fixed voice line in 2016/17 was £[✂] per month."
>
> (footnotes omitted)

70. Those observations do not assist BT on this point.

71. Perhaps unsurprisingly, Mr Parker takes the same view. He accepts that this kind of "competitive rebalancing" could be justified if necessary in order to continue to cover BT's total fixed costs. However, as he stated at paragraph 3.31(b) of Report 2:

> "Ofcom's analysis of BT's data shows that BT's gross margins on both access and calls, as well as its net margins across SFV services as a whole, have increased significantly since 2009/10. This is inconsistent with competitive rebalancing between access and calls for SFV services".

72. Furthermore, there is little or no real evidence adduced by BT (a course which was open to it) to show that its line rental prices and margins were increased from 2009 due to a commercial need to recover common fixed costs.

73. Accordingly, this element of Objection 3 is wholly speculative and should be discounted for present purposes.

(b) Rationality of offering a bundled price for voice and broadband

74. As originally formulated in paragraph 68 of the Response, BT's point here was that it was "economically rational for such providers to incentivise the take-up of bundles by setting line rental prices with a relatively significant mark-up above costs compared with the incremental broadband (or other services') prices." Such a structure would then make bundles attractive, compared to standalone services.

75. In Report 2, Mr Parker rebuts this suggestion in the detailed analysis contained in paragraphs 3.15 to 3.24. In summary he considered that:

(1) It does not follow that it is economically more rational to sell Dual Play bundles rather than SFV services. There may be some common fixed costs between voice and broadband provision, but profitability of the two services depends on variable costs as well. It is not clear that it would be more profitable to have Dual Play customers rather than SFV customers since in the former sector, BT (as with other telecoms suppliers) operates in a very competitive market;

(2) The most effective means of incentivising customers to switch to bundles would be to lower the bundle price, as opposed to increasing SFV prices; it can hardly be assumed that if, because of the higher prices, SFV customers switch to bundles they would necessarily take the bundle from BT as opposed to any other provider;

(3) In fact, there is no positive evidence that incentivisation towards bundles was BT's motive for the prices it was charging for SFV services and indeed such internal pricing documents as were disclosed to Ofcom suggest otherwise;

(4) Even if BT had this intention, it is hard to see why this indicates that such prices were not abusive, if otherwise they would be so regarded. In reality, BT has in fact been able to increase its profits on SFV services over the claim period.

76. As to all of this, BT's riposte is that these answers are not to the point and that it may be rational to focus on selling bundles even if they are less profitable than the supply of SFV services. This was ascribed to influences acting on both the demand and supply side. On the demand side, Ms Ford QC relied first on figure 1.19 at page 32 of Ofcom's Pricing trends document for March 2017. This showed that 39% of all telecoms users in 2009 had signed up to some form of bundle. By 2016 this had grown to 75%. Thus there was a significant increase in the appetite for bundles. That much we follow.

77. On the supply side, she referred to Table 1.29 at paragraph 1.84 of the Evidence. This shows that the incremental price of switching from SFV services to bundles could be as little as £1 per month for some of BT's competitors, for example Talk Talk and Sky. It was said that its competitors could do this because the costs of wholesale access which they had to incur were the same whether they were supplying SFV services or bundles. BT did not, however, present any specific evidence to show that it faced similar cost constraints. Rather, it was said that BT would have to compete with others in the bundles market and somehow this meant that its own SFV prices were justified. We have to say that we found this part of the argument hard to follow. As put in paragraph 19 (c) of BT's Skeleton Argument:

> ".. Many SFV customers were considering switching to bundles during the Claim Period, so the price differences between bundles and standalone services would have affected their choices. It was thus rational to set bundle prices with a low incremental broadband price relative to the standalone line rental price, with an increase in the headline standalone line rental price ensuring cost

recovery for the overall bundle while making the bundle more attractive to customers."

78. However, the fact that BT competes with others in the bundle market where it is not dominant appears to be of little relevance to the price which it is able to charge in the market where it is dominant. Nor is there any actual evidence from BT that (as this argument suggests) its high prices in the SFV line rental market contained an element of subsidy for its prices in the bundles market. And even if there were, that hardly rules out definitively any question of abuse in the former.

(c) BT's aggregate profitability across voice and broadband services

79. Ms Ford QC's next point was based on Figure A5.14 at paragraph A5.86 of Annex 5 to the Provisional Conclusions, entitled "Profitability of standalone fixed voice services". This showed that a margin of 15% would be achieved on BT's sale of SFV services if there was a reduction of line rental by £8 per month. Such a margin would be similar to BT's margin on bundles and which, by definition, Ofcom would consider competitive. We follow that, but we do not see how this helps BT on its SFV margin which (without any reduction) was very considerably higher, namely 34-42%.

80. Ms Ford QC's overarching point seemed to be that Mr Parker's analysis was too narrow because it failed to consider BT's average profits across the board. We do not regard this as a fatal blow to the PCR's case since the target of this claim is the pricing of the SFV services. This point is addressed in Mr Parker's Report 2 (at paragraph 3.35) where he states that BT's profitability across a wider set of products in not an appropriate indicator of whether prices of SFV services are excessive. The mere fact that BT's profits may be lower in respect of the provision of other services does not seem to us to be relevant - absent specific evidence about cost reallocation etc which has not been submitted.

(d) Digital Inclusion

81. Here, it is said that in setting its high prices for SFV services, BT was responding to policy pressures to encourage digital inclusion i.e. a greater

proportion of the population engaging with and using internet-based services. Paragraph 33-38 of Mr Bunt's witness statement addresses this. But all this amounts to is to explain how BT incentivises customers to switch to bundles consistent with digital inclusion. We follow all of that but we fail to see how or why the charging of high prices and increasingly high margins for SFV services was a necessary part of BT's digital inclusion strategy. Indeed, Mr Bunt does not say that it was. This is again addressed in Mr Parker's Report 2, where he concludes (paragraph 3.39) that charging lower broadband bundle prices would be the most obvious way to encourage digital inclusion, and that this has no necessary connection with charging high prices for SFV services.

(e) Conclusion on Objection 3

82. For all of those reasons, and generally, we fail to see that Mr Parker's analysis is seriously defective because it has not engaged with BT's points on Wider Competitive Dynamics. And to the extent that there is something in some or all of those points, they do not at this stage render his evidence on abuse effectively worthless.

(5) Objection 4: the Abuse Point

83. The first element of this objection is the charge that Mr Parker has not attempted to show how BT's pricing, even if excessive under *United Brands* Limb 1, was also unfair for the purpose of Limb 2. Rather, it is suggested, he has merely collapsed Limb 2 back into Limb 1 without any independent analysis. BT argues that this must be so because the same benchmark ("the 2009 Price") is used in respect of both limbs.

84. As already noted, the PCR agrees (at least for present purposes) that there are two limbs under *United Brands*, both of which must be satisfied. But it contends that it is a non-sequitur to then say that a single benchmark cannot, in the appropriate case, be used in relation to both limbs.

85. Mr Parker has clearly proceeded on the basis that the 2009 Price may be used, first, as an approximation of a "costs-plus" figure. See paragraph 42 above.

However, and as confirmed in paragraph 3.51 to 3.53 of Report 2 (see paragraph 47 above) he also adopted the 2009 Price as the relevant competitive benchmark for the purposes of Limb 2. That is because Ofcom, at least on a *prima facie* basis, had concluded that the 2009 Price was competitive which is why it removed it from regulation, and because other potential price benchmarks were evaluated and explicitly rejected in Mr Parker's analysis.

86. In this case, therefore, the PCR and his expert contend that a suitable competitive benchmark is relatively easy to find because it is an earlier and much lower price charged by the same entity as the one in issue i.e. BT.

87. It is thus clear that Mr Parker has in fact addressed both limbs. On that basis, BT's criticism here is unfounded.

88. Whether, at trial, the benchmark chosen by the PCR remains adequate in the light of submissions made and/or evidence adduced by BT is another question. But it does not render the PCR's present analysis merely fanciful.

89. However, in addition, BT makes the substantive point that non-dominant competitors in the SFV services market charged prices similar to those charged by BT (see, for example, Figure 1.24 at page 19 of the Evidence). They therefore appear not to seek to take business away from BT by charging a lower and more competitive price. There could thus be an argument that the benchmark for Limb 2 should be the price charged by other entities in the same market, an approach which has been adopted in other cases. But that depends on <u>why</u> the competitors are charging a similar price. The answer proffered by the PCR, which is at least plausible, is that the competitors are simply following BT's price leadership and using the BT price as an "umbrella" for their own prices. Put another way, their own prices are or may be as uncompetitive as BT's and they might face no incentive to charge competitive prices for as long as BT continues to charge excessively high prices. The only difference is that they are not dominant in that market. See Mr Parker's evidence on this at paragraphs 318 and 319 of Report 1 and paragraphs 3.52 and 3.53 of Report 2, cited in paragraph 46 above. Ofcom took the same view; see paragraphs 1.16 and 1.17 of the Provisional Conclusions. This is more than sufficient to displace any counter-argument

based on the use of competitors' prices as the appropriate benchmark, at this summary stage.

90. A further objection made by BT is that Mr Parker's analysis is defective because it fails to deal with the fact that, according to BT, its customers have decided to stay with its SFV services even though there were alternatives like bundles which, given the additional broadband service provided, were significantly cheaper. It is argued that this shows that there was an unconstrained decision to remain with BT which is indicative of the "economic value" of the SFV service. Given the existence of that value it is therefore impossible to say that the prices charged are abusive. On the other hand, Ofcom maintained that such customers were relatively disengaged and therefore have not made any conscious or engaged decision to remain with BT at all. And it may take time for such customers to get around to switching. All of this is at least a strongly arguable answer for those customers who have stayed with BT notwithstanding other offers.

91. Moreover, BT's argument here seems to be a species of the "Willingness To Pay" ("WTP") argument which says that a service is worth whatever customers are willing to pay for it. This is an argument which was rejected by the Court of Appeal in *Flynn*. At paragraphs 154 and 155 of his judgment Green LJ stated as follows:

> "154. The concept of economic value is not defined. In broad terms the economic value of a good or service is what a consumer is willing to pay for it. But this cannot serve as an adequate definition in an abuse case since otherwise true value would be defined as anything that an exploitative and abusive dominant undertaking could get away with. It would equate proper value with an unfair price. This is a well-known conundrum in international competition law. The same point was made by the Court of Appeal in *Attheraces* [2007] Bus LR D77; [2007] UKCLR 309, paragraph 205. The issue was first identified in US antitrust and arose from criticisms of the judgment of the Supreme Court in United States v Du Pont & Co (1956) 351 US 377 when it attracted the soubriquet "*the cellophane fallacy*". To overcome this in United Brands in paragraph 250 the court held that there must be a "*reasonable*" relationship between price and economic value.
>
> 155. The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not therefore an indication it reflects a reasonable relationship with economic value. But a proxy might be what consumers are prepared to pay for the good or service in an

> effectively competitive market, hence the relationship between the two descriptions of abuse in paragraphs 249 and 250 and the fact that the economic value description is said to be an example of the broader description of an abuse in paragraph 249."

92. Ms Ford QC's riposte was to say that BT was not making a WTP point at all. She contended that such points are only fallacious where (unlike here) customers have no alternative products available so that it makes no sense to say that they are "willing" to pay the price charged. However, this riposte cannot be right, or at least not incontrovertibly so, since almost all dominant firms will face at least some competition from some kind of alternative. So there is a sense in which any customer who stays with the dominant entity is, to some extent, choosing not to switch. But that hardly means that it follows that the price charged to them can never be abusive.

93. To the extent that BT argues that this point is at least conclusive against the claim in respect of the SPCs, we return to it when dealing with the next objection.

94. Once more, while all of this may be debated at trial, BT's point here is far from fatal to the claim at this stage.

95. Accordingly, there is in our judgment ample material adduced to give the PCR's case on abuse a real prospect of success.

(6) Objection 5: the SPC Point

96. BT's main point here is that the decision of Ofcom to impose an informational remedy only in respect of SPCs is fundamentally inconsistent with the suggestion that such customers have nonetheless been the victims of abusive pricing. However, this argument confuses Ofcom's findings on SPC pricing by BT with the separate issue of what to do about it. The Review makes plain that Ofcom did regard the pricing as uncompetitive. While Ofcom's evidence states that the SPCs were relatively more engaged than VO customers it remains the case that BT's increased prices for the VO service provided to the SPCs were not later reduced in response, for example, to the outflow of some of those customers to better priced bundles. Indeed, the fact remained that as at 2017,

there were about 1.2m SPCs who have not responded to continuing price increases by BT by switching and their own annual switching rates were (as with VO customers) significantly lower than for Dual Play customers – see generally Ofcom's analysis at paragraphs 3.39-3.43 of the Provisional Conclusions. And it remains the case that there was no competitive restraint upon BT's pricing in the SPC market.

97. An ancillary point made by BT at this stage is that Mr Parker did not deal, or deal fully with the difference in level of engagement between VO customers on the one hand and SPCs on the other, as for example set out by BT in its Response at paragraphs 133-138.

98. However, in Report 2, Mr Parker addresses substantive points made by BT in relation to his findings on market definition, dominance and abuse in the context of pricing for SPCs. At paragraphs 3.55-3.66 he set out a detailed response to those points. In summary:

(1) He maintained that his finding was that SPCs were in a different market from Dual Play customers; although there was some switching it was not sufficient and the fact was that BT had been able to introduce and sustain a price differential, which was greater than a Small but Significant Non-transitory Increase in Price ("SSNIP"), between the price of the SFV service element and separate broadband service for SPCs, on the one hand and the pricing of its Dual Play packages on the other; if Dual Play had really operated as a sufficient competitive constraint on prices paid by the SPCs, the price differential would not have been sustainable; he went on to discount the suggestion that SPCs were paying for more expensive broadband elements including pay-tv and/or mobile phones, since the take-up of such elements in this way was very small; further, the fact that his SSNIP analysis was used to reach a conclusion about the market for the SFV element only was not problematic because that is the target of the investigation; finally, he noted that internal documents provided to Ofcom did not support BT's claim that it feared the threat of switching to Dual Play in the event of price increases for SFV services;

(2) He maintained the position set out in Report 1 (Section 7) that BT was dominant in the SPC market; he stated that BT's suggestion that he had inadequately explored the level of engagement of such customers who in fact felt they were receiving good value for money was not relevant to the question of dominance. The latter was established by BT's market share of close to 100% and its increasing profitability since 2009;

(1) As to points about higher levels of engagement and conscious decisions not to switch on the part of SPCs, made here in the context of abuse, he repeated the point made in the context of VO customers that this involves making an illegitimate WTP argument; while the demographic profile for SPCs may not be as distinct as it was for VO customers the fact remains that it is at least plausible that the SPC market is not the same as the Dual Play market, as shown by the lack of competitive restraint imposed on BT in the former by the operators in the latter and BT's increased profitability; nor did Mr Parker see the need to use different competitive benchmarks for the VO customers on the one hand and the SPCs on the other.

99. For at least the post-2017 period, for which the PCR claims damages also for SPCs (since they did not benefit from any price reduction offered by BT), it could be argued that if the SPCs remained with BT <u>despite</u> the informational remedies, the decision to remain may suggest a real economic value was being attributed by them to BT's service. On the other hand it might suggest that in truth the SPCs are less engaged than Ofcom thought. It might suggest that in truth an informational as opposed to a price cut remedy could now be seen as insufficient for the SPCs, contrary to Ofcom's view.

100. Yet again, some or all of these points may be debated at trial. But they do not, either individually or collectively, dispose of the claim in respect of SPCs at this stage.

101. The only other ways in which a difference in relative engagement between VO customers on the one hand, and SPCs on the other could be relevant would be in relation to the Mitigation Point which forms Objection 6 and/or the opt-

in/opt-out issue discussed below. But these are not relevant to the question of abuse.

102. Accordingly, Objection 5 does not assist BT on the cross-application either.

(7) Objection 6: the Mitigation Point

103. BT alleges that it will have a defence of failure to mitigate loss on the part of the relevant customers. This is because they had at all times, relatively cheaper alternatives by virtue of bundles, if one takes into account the fact that they would obtain broadband access too. BT appears to allege that in this case, such a defence (on which BT bears the burden of proof) would be a complete answer to the claim in the sense that no damages could therefore be awarded at all. If it were otherwise it would only go to quantum.

104. On the other hand, the PCR emphasises the fact that the particular demographic and vulnerability of the customers concerned go to the question of the reasonableness or otherwise of those customers' failure to switch into bundles. The same goes for BT's apparent strategy for limiting the visibility of price increases for SFV services by, for example, notifying the increases during the August bank holiday period so as to minimise press coverage (see paragraph 113 (a) of the Reply).

105. In In relation to SPCs only, BT made the additional point that at paragraph 1.14 of the Review, Ofcom noted that such customers had a wide range of choices available to them such as Dual Play bundles which would give them better value for money. In addition of course, such customers had existing access to the internet which would enable them to search for and see the range of options. We follow this point of distinction but it does not, in our judgment, mean that BT is bound to win on this point so that SPCs will not recover any damages. As with the same point made in the context of liability, it all depends on the true level of engagement, the effect of an apparently continuing lack of competitive restraint and other questions of fact.

106. As for VO customers, there were no cheaper alternatives. It is correct that they could pay somewhat less if they moved to BT's Home Phone Saver tariff - see paragraphs 4.66 and 4.67 of Annex 4 to the Statement. However, Ofcom expressly referred to the fact that only a relatively small proportion of the relevant customers had switched to such a tariff and it suggested that they were generally not sufficiently engaged to seek out this alternative. It also pointed out that the alternative was not a substantial advantage.

107. In oral argument, reference was made by BT to *Secretary of State For Health v Servier Laboratories* [2016] 5 C.M.L.R. 25. Here, the customer was the NHS with its multi-billion pound purchasing power, which had a public duty on behalf of the taxpayer to purchase efficiently. Servier was given permission to plead failure to mitigate in this respect. See paragraph 74 of the judgment. But all that this shows is that on the facts of that particular case the Court held that this plea was sufficiently arguable on the merits to go forward. But that is hardly authority for the proposition that in this case, the PCR has no arguable answer to such a plea. The mere fact that BT might have an arguable case on failure to mitigate, as Ms Ford QC submitted, goes nowhere in the context of the cross-application.

108. It is impossible, in our judgment, to conclude that BT's failure to mitigate argument is putatively so strong that it disposes of the entire claim at this stage.

(8) Conclusions on the 6 Objections

109. Accordingly we conclude that there is a real prospect of success for this claim and the cross-application must be dismissed. Provided that it is appropriate to be brought on an opt-out basis, therefore, it must be determined at a full trial after all the relevant evidence is adduced and considered.

H. THE OPT-OUT BASIS FOR THE CLAIM

110. If (as we have found) there is sufficient merit in the claim so that it should not be dismissed or struck out, there remains the question of the basis on which it should be pursued. It is not in dispute that this claim is in principle suitable to

be brought as collective proceedings *per se*. Rather, the single point now taken by BT is that this claim could and should be brought on an opt-in basis and that the opt-out basis is not more appropriate than the former. We agree that the fact that the PCR does not seek an opt-in basis as an alternative does not absolve it from demonstrating, and the Tribunal from being satisfied, that the opt out basis is more appropriate. See paragraphs 20 and 24 above.

111. BT's overarching point is that in this case, because all the potential claimants are or have been in the recent past, customers of BT, they are easily identifiable and indeed contactable (subject to changes of address etc). See paragraph 14 of the witness statement of Mr Bunt. Therefore, it will be relatively straightforward for such customers (a) to be informed of this action and (b) then to decide whether or not to join it. BT points to the fact that the PCR now relies upon this feature of the claim to explain how simple it would be to distribute any damages or equivalent remedy, since the class to be compensated can be identified.

112. The PCR's core response is that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won. Especially with the demographic of at least most of the potential claimants here, there may well be a reluctance to sign up to a legal action where the risks and complexities will have to be explained to them, and that this scenario differs from that in which they are simply asked to collect a defined amount at the end. Indeed, and as canvassed with counsel during the hearing, the distribution of damages could be achieved without any active participation of the relevant customers at all because their BT accounts could simply be credited with the relevant amount - a method noted albeit in passing by the President during argument in the recent CPO hearing in *Gutmann* v *MTR South West Trains Gutmann* v *First MTR South West Trains and others*:

> "Similarly, if a telecoms operator overcharged subscribers, well they will know who the subscribers are, they can credit them on their phone bills or their account, even if it's only £4.50. One couldn't say, "No you shouldn't bring a collective action because it's only £4.50 and that's trivial", if the mechanism is straightforward."

113. We say more about this feature of the claim below.

114. In In more detail, the PCR contends that there is little prospect that the 2.3m customers who would be within the scope of the action would be sufficiently proactive to opt-in given the demographic of most of them. The claim is a technical one. It is also correct that paragraph 6.39 of the Guide does pre-suppose that individual customers will have conducted their own assessment of the strength of the case before opting in. That seems unlikely here. Of course, legal advice is not mandatory and the proposed Litigation Plan here does set out the nature of the action. Nonetheless, in our judgment, the position at this stage is not at all the same as at the distribution stage, for the reasons already given.

115. Next, the PCR contends that if (as he predicts) too few customers opt in, the required third-party funding will not be attracted and in reality the claim would never get off the ground. It is hard to see an answer to this point, save the one which we have rejected which is that in reality a large number of the relevant customers would opt in.

116. A further, though less persuasive, point made by the PCR is that some customers may still have brand loyalty to BT and would therefore be unlikely to join in an action against it. On the other hand, they may have fewer concerns about collecting at the end of the day. There may be something in this point but we do not attach any real weight to it for present purposes.

117. In the course of argument, a point was taken by BT as to whether, if the PCR won, the Tribunal would actually have jurisdiction to enable the damages to be paid out to each customer via a credit to their account or something similar. It is pointed out that Rule 93 (1), referred to at paragraph 23 above, stipulates that damages can only be paid to the class representative or such other person other than a represented person as the Tribunal thinks fit. Thus this direct method of compensation is simply not available. For our part, we do not accept that the position is as clear as that. The "other person" could be a claims administrator instructed by the PCR who would then, with the assistance of BT's records and technology, be able to effect the relevant credit or something similar. Indeed, on the face of it, the "other person" could be BT itself on a specific direction of the Tribunal.

118. In a case of this kind, it would be extremely odd if Rule 93 (2), interpreted in a common-sense way, would prevent this obvious way of compensating the customers who have won. We appreciate that Rule 93 (3) states that the relevant CPO may specify the date by which represented persons shall claim their entitlement to a share of that aggregate award (see paragraph 23 above). However, that is a discretionary power and we do not accept that this power must entail that in a case like this a customer must positively claim the remedy as opposed to simply collecting it.

119. BT also points out that the PCR's own proposed plan for distribution of damages, if the claim succeeds, involves the filling out of a claim form by each customer who may be contacted (with BT's assistance) online, by post or by telephone - see paragraphs 128 and 129 of the proposed Notice and Administration Plan. We see that but (a) that process may change to the more direct provision of credits, as Ms Kreisberger QC suggested it would and (b) in any event this point does not overcome the difference in principle between a relevant customer engaging at the outset as opposed to the end-stage when informed that they are entitled to compensation.

120. BT did not make any separate point here to the effect that even if there was a case for opt-out in relation to VO customers, there was no such case for the SPCs due to their relatively higher level of engagement and more "savvy" demographic because they would not be discouraged at all from dealing with the administration of opting-in at the outset. But even if it had, we do not take the view that this necessarily follows. A relatively higher level of customer engagement in the context of the service being provided does not by itself translate into a willingness to embark on litigation and the initial administrative process as opposed to simply collecting at the end of it.

121. BT also refers to the fact that, for the proportion of the VO customers who use their residential landlines for business purposes (said to be about 17%), BT may well have a "pass-on" defence. If an opt-in basis is operated then this can be checked with the customers at the outset. But if opt-out is used, BT would not know at the outset which customers were in fact in the potential "pass-on" group and how large that group was. Accordingly, the pass-on-defence could not

properly be run. The aggregate award of damages might be too large at the end of the day if there were (a) unidentified business customers and (b) there would have been a pass-on defence applicable to them which would (in their case) reduce or extinguish the amount of damages.

122. We see this, and we can also see that it is not possible now to say that any partial defence of pass-on, for the relevant customers, would necessarily fail at trial. Absent enquiries being made of customers at the outset, if the claim were made on an opt-out basis, as to whether they were using the landlines for business, it may hereafter be necessary for BT to try and work out which customers are using the landlines for business purposes. Where the customer is a limited company that is relatively straightforward and the incidence of VAT charges may be another indicator. We accept, however, that there may be other business customers who are more difficult to discern. Of course, responses from customers that they did not use the landlines for business might not themselves be reliable and BT might wish to double-check in any event.

123. However, on any view, we do not see that this feature of the claim delivers a fatal blow to the opt-out proposal overall at this stage, and indeed Ms Ford QC does not suggest that it does. She merely suggests that it "goes into the mix". However, since we do not agree that the other matters relied upon in opposing an opt-out basis have any significant weight, the pass-on point cannot possibly make a difference.

124. At this stage, the strength of the claim features again. But that could only assist BT here, in our view, if it could persuade us that this is a very weak claim even if it could surmount the summary judgment/strike-out threshold. For all the reasons given, however, we are not so persuaded.

125. Our conclusion therefore is that the opt-out basis is clearly more appropriate and suitable than the opt-in basis.

I. CONCLUSION

126. It therefore follows that PCR's application for a CPO succeeds and BT's cross-application to strike out and/or summarily dismiss the putative claim must fail. Following the handing down of this judgment we will ask the parties to make any appropriate submissions as to the detailed provisions of the CPO and directions for trial.

127. We should add that BT has consented to an amendment to the claim such that the class of claimants will include deceased customers, provided that they have UK-domiciled personal representatives. The limitation of this sub-class to personal representatives (rather than deceased customers as a whole) means that this agreement does not conflict with the recent decision of the Tribunal in *Merricks v Mastercard* [2021] CAT 28 on the question of the inclusion of deceased persons – see paragraphs 55 and 60 of the judgment.

128. This judgment is unanimous.

129. We are most indebted to all Counsel for their clear and comprehensive written and oral submissions.

The Hon. Mr Justice Waksman
Chairman

Eamonn Doran

Derek Ridyard

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 27 September 2021