COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPLICATION TO COMMENCE COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998

CASE NO. 1425/7/7/21

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 24 November 2021 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Mr Justin Gutmann (the "Applicant/Proposed Class Representative") against (1) Govia Thameslink Railway Limited; (2) Govia Limited; (3) The Go-Ahead Group Plc; and (4) Keolis (UK) Limited (the "Respondents/Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Charles Lyndon Limited, 22 Eastcheap, London, EC3M 1EU (Reference: Rodger Burnett/Zoë Mernick-Levene/Philippa Beckley/Sian Jacob) and Hausfeld & Co LLP, 12 Gough Square, London, EC4A 3DW (Reference: Luke Streatfeild/Laura Davidson/Charles Laporte-Bisquit).

These proceedings (the "Proposed Collective Proceedings") propose to combine the claims for damages (the "Claims") of a large number of rail passengers (the "Class Members") who have suffered loss as a result of the conduct of the Proposed Defendants. In short, the proposed Class Members are holders of Transport for London ("TfL") zonal tickets ("Travelcards") who have been effectively compelled by circumstances in the control of the Proposed Defendants to pay twice for parts of rail journeys which overlapped with the zone of validity of their Travelcards.

Specifically, the Claims relate to so-called 'boundary zone fares' or 'extension tickets' ("Boundary Fares"), which are fares valid for travel to or from the outer boundaries of TfL's fare zones, intended to be combined with a Travelcard whose validity stretches to the relevant zone boundary. According to the Application, by failing to make Boundary Fares sufficiently available for sale and/or failing to use their best endeavours to ensure that there was a general awareness among their customers of Boundary Fares, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey, the Proposed Defendants have abused and continue to abuse their position of dominance on the relevant markets in breach of the prohibition in section 18 of the Act (the "Chapter II Prohibition") (the "Infringement").

In the vast majority of cases, it is expected that the Class Members will be individuals who have purchased a fare for their own travel. However, the group of persons affected by the Infringement, and hence the class of persons on behalf of which the Proposed Collective Proceedings are brought, is wider. In particular, it also includes persons (both individuals and corporate entities) purchasing a fare on behalf of somebody else (such as a child or employee); persons reimbursing a direct purchaser (presumably mostly corporate entities); or persons purchasing a fare indirectly through another person (e.g. one person purchasing all fares on behalf of a group of travellers).

The Proposed Class Representative submits that, as an undertaking in a dominant position, the Proposed Defendants have a responsibility to ensure *inter alia* that their customers are not subjected to unfair prices or unfair trading conditions. This includes a responsibility to avoid, or to remedy, circumstances which effectively compel customers to pay a second time for a part of the service provided to them in respect of which they already hold a valid ticket (a Travelcard); in particular, given that the First Proposed Defendant receives a share of the revenue from the sale of Travelcards under an agreement with TfL. Furthermore, the Infringement occurred against a backdrop where the Proposed Defendants must have been well aware, from data readily available to them, that only an unrealistically low number of Boundary Fares were being sold for travel on their services. Moreover, as explained below, the Second to Fourth Proposed Defendants are also the parent companies of London & South Eastern Railway Limited, one of the Defendants in the SW/SE Proceedings (as defined below), and as such have been aware at least since the beginning of 2019 of the issue surrounding the availability of Boundary Fares, but did nothing to remedy the situation.

The Claims are of a standalone nature and relate to the period from 24 November 2015 to the present (and ultimately to judgment). On a preliminary estimate, aggregate losses suffered by the up to 10.4 million Class Members are around £73.33 million.

The Proposed Class Representative has extensive experience of consumer welfare issues, most recently as the Head of Research at Consumer Focus, a statutory consumer rights body now part of Citizens Advice, from 2009 to 2016, coupled with experience in the transport sector, in particular as market planning manager for London Underground from 1994–2002. Mr Gutmann has also been authorised to act as the class representative in Cases 1304 and 1305/7/7/19, which concern a closely related subject matter to the present application in respect of the South Western and Southeastern franchises ("the SW/SE Proceedings").[1]

The Application states that the Claims pursued in these proceedings are closely related in terms of their legal and factual basis to the claims pursued in the SW/SE Proceedings, and, as with the issues raised in the two separate CPO applications in the SW/SE Proceedings, the issues raised in this application are "almost identical" to the ones in those proceedings.

Given the close factual and legal similarities, in light of the SW/SE Judgment, the Proposed Class Representative submits that (i) he should therefore also be authorised to act as the representative in the Proposed Collective Proceedings under section 47B(8) and Rule 78, and (ii) the claims in these proceedings are also eligible for inclusion in collective proceedings under section 47B(6) and Rule 79. The Proposed Class Representatives further submits that it is clear in light of the SW/SE Judgment that these Claims should be allowed to proceed on an opt-out basis under Rule 79(3).[2]

The Application states that the Claims are eligible to be brought in collective proceedings because:

1. As in the SW/SE Proceedings, the Claims are being brought on behalf of an identifiable class of persons.

2. The Claims raise common issues, which are defined in section 47B(6) of the Act and Rule 73(2) to mean the same, similar or related issues of fact or law. Having regard to the SW/SE Judgment, at least the following common issues arise in these proceedings:

   i. The issue of whether the Proposed Defendants held a dominant position at the relevant time.

   ii. The individual Claims raise the same issues of fact or law in relation to the Proposed Defendants' breach of the Chapter II Prohibition in the form of the Infringement.

   iii. The Claims also raise essentially the same issues of causation (Class Members have overpaid because of the Proposed Defendants' conduct which constitutes the Infringement).

   iv. In an aggregate damages claim, section 47C(2) dispenses with the ordinary requirement to undertake an assessment of the amount of damages recoverable in respect of the claim of each represented person for all purposes antecedent to an award of damages, including for the purpose of quantification of loss.[3]

3. The Claims are suitable to be brought in collective proceedings:

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[1] In a judgment handed down on 19 October 2021, [2021] CAT 31 (the "SW/SE Judgment"), the Tribunal authorised the Applicant to act as the class representative in the SW/SE Proceedings, and certified the claims as eligible for inclusion in collective proceedings. It further held that the claims should be allowed to proceed on an opt-out basis.
[2] In the SW/SE Judgment, the Tribunal found that Mr Gutmann satisfies the authorisation condition in Rule 78 and that it would therefore be just and reasonable for him to act as the class representative. In light of that conclusion, it would plainly also be just and reasonable for him to act as the class representative in these Proposed Collective Proceedings.
[3] SW/SE Judgment at [135(4)].

(a) As in the SW/SE Proceedings, collective proceedings in all likelihood represent the only economically viable method for individual Class Members to obtain compensation for losses suffered as a result of the Infringement.

(b) The costs of bringing the Collective Proceedings are proportionate in view of the aggregate value of the Claims and are outweighed by the benefits to Class Members from being able to pursue compensation for losses suffered due to the Infringement, which would otherwise not be practically possible. Another important benefit is the potential for ensuring that potential wrongdoers modify their behaviour to take full account of the harm they are causing to the public.

(c) The SW/SE Proceedings make claims of a similar nature to the Proposed Collective Proceedings and it is possible that there would be an overlap between members of the class certified in the SW/SE Proceedings and the Proposed Class. However, there is no overlap in the claims being pursued in the different sets of proceedings. The Proposed Class Representative also does not consider there to be any overlap with the claims pursued in Case 1404/7/7/21 Boyle & Vermeer v Govia Thameslink Railway Limited & Others.

(d) The Proposed Class consists of approximately 10.4 million members. A group of mostly individuals of this number, each with substantially the same claims could only bring their claims by way of collective proceedings of this nature. Any other mechanism for grouping together claims would simply not present a viable method of resolving the Claims.

(e) As in the SW/SE Proceedings, opt-out proceedings are the only practical means for bringing the Claims. The Proposed Class is extremely numerous, and the value of each individual Claim is relatively modest.

(f) Finally, as regards the strength of the Claims, by analogy with the SW/SE Proceedings, which are advanced on a materially identical basis to these claims, and in their own right in any event, the Claims have a real prospect of success. Whilst stand-alone in nature, the Infringement as described above avoids much of the complexity and risk typically associated with bringing competition law damages claims.

The relief sought in the Proposed Collective Proceedings is:

1. Damages to be assessed on an aggregate basis pursuant to section 47C(2) of the Act.
2. Interest thereon, calculated from the date each individual claim arose.
3. The Proposed Class Representative's costs.
4. An order for the Proposed Defendants to cease the infringing conduct.
5. Such further or other relief as the Tribunal may see fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar
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