Neutral citation [2025] CAT 19

Case No: 1639/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 March 2025

Before:

HODGE MALEK KC
(Chair)
TIMOTHY SAWYER
ANDREW TAYLOR

Sitting as a Tribunal in England and Wales

BETWEEN:

BULK MAIL CLAIM LIMITED

Applicant/Proposed Class Representative

\- v -

**INTERNATIONAL DISTRIBUTION SERVICES PLC
(FORMERLY ROYAL MAIL PLC)**

Respondent/Proposed Defendant

Heard at Salisbury Square House on 3 and 4 March 2025

JUDGMENT (COLLECTIVE PROCEEDINGS ORDER APPLICATION)

APPEARANCES

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

Kenneth MacLean KC, Edmund Nourse KC and Andew McIntyre (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of Proposed Defendant

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A. INTRODUCTION

1. The Proposed Class Representative ("PCR") seeks to bring collective proceedings, on an opt-out basis, against the Proposed Defendant ("Royal Mail"). The claim "follows on" from Ofcom's 14 August 2018 decision entitled "Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK" (the "Ofcom Decision").[1]

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

3. At the time the CCNs were issued, Whistl was a major access operator for bulk mail and had started to roll out its own delivery operations to the final recipients in specific areas. It had been planning to extend its end-to-end delivery service across the UK, thus eroding Royal Mail's market share. The CCNs, had they become operative, would have made using Royal Mail's delivery service more expensive for firms like Whistl that had their own end-to-end collection and delivery service, whilst also using Royal Mail's delivery service for those parts of the country not covered by their in-house delivery services. It is the PCR's

[1] Royal Mail appealed against the Ofcom Decision to the Tribunal on 12 October 2018 on various grounds, all of which were dismissed in the Tribunal's judgment dated 12 November 2019 ([2019] CAT 27) (the "CAT Judgment"). Royal Mail subsequently appealed against the CAT Judgment to the Court of Appeal. This second appeal was dismissed by a judgment of the Court of Appeal dated 7 May 2021 (the "CA Judgment"). Royal Mail thereafter sought permission to appeal to the Supreme Court. Permission was refused on 7 June 2022.

case that as a result of the announcement of the CCNs, and prior to the Ofcom Decision, the funders for Whistl's planned expanded operation withdrew their funding.

4. The PCR intends to rely upon certain passages of the Ofcom Decision, including paragraphs 1.24 and 7.167-7.171 which are extracted below:

> "1.24 By way of summary only:
>
> a) Having assessed the conditions of competition on the bulk mail delivery market as at early January 2014, we have found, in particular, that competition in the bulk mail delivery market was already very limited. Royal Mail was overwhelmingly dominant, enjoying unique structural advantages in a market for which there were high barriers to entry. Royal Mail was also an unavoidable trading partner for access operators, including those rolling out their own delivery network. The bulk mail delivery market was therefore vulnerable to exclusionary conduct on the part of Royal Mail.
>
> b) We have found that the price differential amounted to discrimination against access operators that sought to compete with Royal Mail in the bulk mail delivery market. Due to the rules and restrictions Royal Mail applied to the different price plans, an access operator that sought to enter the bulk mail delivery market beyond a limited scale would have to move to, or remain on, APP2/ZPP3, and therefore pay the higher prices applicable under those price plans.
>
> c) We have concluded that Royal Mail did not have a legitimate justification for discriminating in this way against its access customers which chose to compete with it in bulk mail delivery. Specifically, we have found that the difference in treatment applied by Royal Mail cannot, as Royal Mail has submitted, be explained or justified on the basis of: (i) differences between APP2/ZPP3 customers by comparison with NPP1 customers based on their geographic profile, total volumes or variability of volumes in a geographic area; or (ii) costs savings that are alleged to result from Royal Mail's introduction of a requirement for NPP1 customers alone to provide more detailed volume forecasts.
>
> d) As part of our investigation, we obtained, using our statutory information gathering powers, Royal Mail's contemporaneous internal documents which were generated during its governance process leading to the CCNs. Having reviewed those documents in detail, we have concluded that Royal Mail's conduct reflected a deliberate strategy to limit delivery competition from its first and only significant competitor, Whistl. The documents show that Royal Mail identified this nascent competition as a threat to its position. It then developed and introduced the price differential, alongside other measures in the CCNs, as a direct response to the threat of competition from Whistl. Section 4 sets out the documents as part of a chronology of events leading up to and following the issue of the CCNs.
>
> e) Based on our analysis of profitability, prices and costs, the price differential would have had a material impact on the profitability of an

end-to-end entrant, both in absolute terms and also relative to its profits. The material effect of the price differential was particularly evident in the case of Whistl, which was the target of Royal Mail's pricing strategy and for whom the price differential was calibrated to deter further expansion of its end-to-end activities.

f) In the context of the prevailing features and conditions of the bulk mail delivery market and the associated retail market for bulk mail markets at the time, such a material impact on profitability was likely to make entry or expansion in bulk mail delivery significantly more difficult. The introduction of the price differential increased the already high barriers to entry and expansion in the bulk mail delivery market, thereby reducing the incentives on an access operator to risk entry.

g) By introducing the price differential in the CCNs, Royal Mail used its position as an unavoidable trading partner for access operators effectively to penalise those of its access customers who also sought to compete with it by undertaking end-to-end delivery activities. As a result, we conclude that the introduction of the price differential was reasonably likely to have a foreclosing effect because it made entry less likely to occur. This, in turn, would preserve and potentially enhance Royal Mail's dominant position in the bulk mail delivery market. Therefore, the introduction of the price differential was reasonably likely to give rise to a competitive disadvantage / lead to a restriction of competition from the point at which the CCNs were issued.

h) To the extent that it is relevant that the price differential was suspended (on 21 February 2014) as a result of Ofcom opening this investigation, we have found that the suspension did not prevent the price differential from having continuing effects in the bulk mail delivery market. On the particular facts of this case, we have found that the introduction of the price differential was reasonably likely to distort competition from the point at which the CCNs were issued by Royal Mail.

i) Our analysis of the restrictive effect of the price differential is supported by evidence of the immediate developments observed in the market following the introduction of the price differential in January 2014. We have concluded that the evidence shows that the introduction of the price differential materially contributed to: (i) LDC's decision not to complete its investment in Whistl in January 2014, and (ii) Whistl's decision to reduce and then suspend its roll out plans. This evidence also supports our conclusions on the continuing effects of the introduction of the price differential despite its suspension.

j) We have not found it necessary in this case to determine whether the price differential was a material factor or not in Whistl's ultimate exit from the bulk mail delivery market in mid-2015.

…

7.167 As a general principle, competition typically puts downward pressure on prices, encourages quality improvements, efficiency and incentivises investment in the development of new products and processes.

7.168 In the relevant context of this case, increased competition in the bulk mail delivery market would, for example, tend to increase the pressure on

Royal Mail and potential rivals to reduce their costs and to pass the benefits of these cost reductions onto customers through: cost reductions for consumers of retail bulk mail services, such as banks or government bodies; and / or cost reductions for access operators in the form of lower access costs. For example:

a) The report presented by Royal Mail from its external advisors, FTI Consulting, refers to the discounts Whistl offered when it competed in delivery. Whistl planned to offer, on average, a 5% discount to its usual retail price when customers chose to partly use Whistl's own delivery. FTI Consulting said that in practice Whistl offered larger average discounts of 7% to non-VAT exempt customers and 19% to VAT exempt customers compared to Royal Mail access charges.

b) Competition in the delivery market could act as a constraint on the prices offered by Royal Mail at the wholesale level. Although the provision of collection and initial sortation services is competitive, this element constitutes a relatively small proportion of the value chain (approximately 10%). The major part resides in delivery services, where Royal Mail faced very limited competition (see Figure 2.4, above). As a competitor such as Whistl expanded in the market, Royal Mail could have been incentivised to respond with lower access prices for access operators, achieved through costs savings or other efficiencies. However, as noted at paragraph 7.124 above, on the facts at issue in this case, Royal Mail dismissed this option.

7.169 Similarly, any benefits from greater innovation could also be expected to flow through to consumers of retail bulk mail services. For example, in this case we note there were potential benefits and innovations in Whistl's service, including:

a) Full tracking of letters, including scanning on delivery, enabling much greater information to be shared to mail producers. This would be an improvement on Royal Mail's access services which did not, and do not today, offer any tracking.

b) A delivery cycle in which Whistl would deliver to each address three days per week (compared to Royal Mail's six-day delivery schedule) to reduce costs and hence prices. This may have been beneficial to bulk mail producers who, in using D+2 or later services, do not require urgent delivery.

c) Delivery products that would expand Whistl's offering beyond the confines of Royal Mail's D+2 Access services and offer greater choice to mail products. For example, Whistl developed a 'local sort' product that would offer a lower rate to letters that were to be delivered close to the point of collection (a service not offered by Royal Mail).

7.170 Thus, by raising the already high barriers to entry in the bulk mail delivery market, and by making it less likely that the nascent competition in the bulk mail delivery market would continue to grow, Royal Mail's introduction of the price differential was reasonably likely to give rise to consumer harm. Using a dominant position to raise barriers to entry or expansion, and so limit nascent competition, is likely to harm the interests of consumers at both the wholesale and retail level.

> 7.171 As we explain in sub-section F below, it is not now possible to establish for sure what would have happened if the price differential had not been introduced, i.e. whether Whistl would have successfully expanded its delivery operations or would have ultimately exited the market at some point in the future in any event. However, we have concluded that, by introducing the price differential, Royal Mail pre-empted the outcome of the competitive process, leveraging its overwhelming dominance in the bulk mail delivery market, and its consequent status as an unavoidable trading partner for access operators, to penalise entry with the effect that it was less likely to occur." (footnotes omitted).

5. The PCR's theory of harm is that as a result of the infringement, Royal Mail's competitor Whistl exited the market for bulk mail delivery services. As a result of Whistl's exit, purchasers of bulk mail retail services (the proposed class members, or "PCMs") paid higher prices than they otherwise would have paid (the "alleged overcharge"). This is based on the assumption that Whistl's entry into the bulk mail delivery services market would have led to increased competition and that, in turn, would have manifested in lower prices. Royal Mail disputes any such effect and does not accept that there would have been an overcharge either to the access operators or, through pass on, to their customers, on behalf of whom the PCR seeks to bring collective proceedings.

6. The PCR proposes to rely on the methodology set out by its economic expert, Dr Chris Williams, in order to establish and quantify that purchasers of bulk mail delivery services paid higher prices than they would have paid "but for" the Infringement. Dr Williams' proposed methodology relies on both quantitative and qualitative analysis which are summarised in section F below. At a high level, Dr Williams' quantitative analysis relies on an econometric difference-in-difference model ("DiD") to estimate retail customer overcharge by utilising a comparison between the UK, and Germany and Sweden, all of which have liberalised postal markets. The comparator markets of Germany and Sweden are used to estimate a counterfactual Royal Mail price for bulk mail delivery services in the period after Whistl exited the UK market.

7. The proposed class are all persons who purchased bulk mail retail services between 10 January 2014 and the date of the collective proceedings order ("CPO"). The proposed class is provisionally estimated to consist of 290,477 entities, and the value of the claim is provisionally estimated to be in the region of £1 billion. The Ofcom Decision identifies at paragraph 1.5 that the main types

of bulk mail customers are utility companies, banks, government departments and advertisers. These large customers' share of the claimed damages may individually be worth several million pounds or more. However, there is significant variation within bulk mail customer segments. This is demonstrated by Freedom of Information Requests to NHS Trusts, revealing that they spent £0.5 million on average on post in 2023, with the highest spending NHS Trust spending around £9.3 million. This is not a case where all proposed class members only have relatively small claims, albeit many of the proposed class members will probably fall into this category.

8. The Proposed Defendant ("Royal Mail") opposes certification of the proposed collective proceedings:

   (1) in their entirety, on the basis that the PCR has failed to put forward a sufficiently credible or plausible expert methodology for assessing the alleged overcharge; and

   (2) alternatively, in respect of class members who were exempt from VAT, on the basis that the PCR has failed to put forward a sufficiently credible or plausible expert methodology for assessing the overcharge allegedly suffered by such customers.

9. Royal Mail further contends that, if the claim is certified, the class definition will have to be amended to specify an end date no later than the date on which the collective proceedings order ("CPO") application was issued (29 May 2024). The PCR contends that the end date should be the date of any CPO.

B. LEGAL FRAMEWORK

10. Section 47B of the Competition Act 1998 (the "1998 Act") and Rule 77 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") set out the requirements that must be fulfilled in order for the Tribunal to make a CPO.

11. The Tribunal must be satisfied that:

(1) It is "just and reasonable" for the entity bringing the proceedings to be authorised as the class representative (the "authorisation condition"): section 47B(5)(a) of the 1998 Act and Rule 77(1)(a) of the Tribunal Rules.

(2) The claims are eligible for inclusion in collective proceedings (the "eligibility condition"): section 47B(5)(b) of the 1998 Act and Rule 77(1)(b).

12. In considering whether to make a CPO the Tribunal must consider whether the requirements of both the authorisation and eligibility conditions are satisfied, whether or not these are raised by the parties (see *Gormsen v Meta* [2024] CAT 11 at [2]).

13. Also relevant to the Tribunal's decision to certify collective proceedings is whether the PCR's proposed methodology to assess damages satisfies the test articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp [2013] SCC 57* ("*Microsoft*") as interpreted and applied by the Court of Appeal in *London v South Eastern Railway Limited v Gutmann* [2022] EWCA Civ 1077 ("*Gutmann CA*").

14. In *Microsoft*, Rothstein J stated at paragraph [118]:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a classwide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

15. Green LJ made the following observations on the *Microsoft* test in *Gutmann CA* (from [53]-[58]):

(1) The test is not a statutory test; it articulates a common sense approach, and confers on the court or tribunal a broad discretion to approve of the methodology to be used at trial.

(2) The methodology is based on a counterfactual model of how the market would have operated absent the abuse.

(3) The methodology is provisional; information asymmetries between claimants and defendants may mean that at the certification stage, a class representative can only advance a methodology identifying what might be done following disclosure.

(4) The methodology must identify the issues, not the answers. The tribunal will wish to assess whether the methodology is capable of being adjusted to reflect only partial victory by the class, in the event the defendants win on some issues at trial.

(5) Judges are expected to use their intuition and common sense.

(6) In forming its judgment at certification, the tribunal will bear in mind that it is armed with a "broad axe" at trial "by which it can fill gaps and plug lacunae in the methodology".

16. In addition, on a practical level, the following should be borne in mind:

(1) A CPO application should not be converted into a mini trial.

(2) The Tribunal is not expected to overcomplicate matters and provide lengthy decisions on such applications. Follow on claims often deal with events quite a number of years ago and it is not desirable for there to be a long delay between applications for a CPO and the final determination of such applications.

(3) Whilst a CPO application must cover the specific requirements for a CPO set out in the Tribunal Rules, the Tribunal should have in mind proper case management both at the hearing and any subsequent CMC. The CPO application hearing can be a useful opportunity to place any proceedings on a sound footing and to identify where the battle lines between the parties are likely to fall.

(4) Collective proceedings are brought for the benefit of class members and the Tribunal has an important role in ensuring that their interests are protected.

(5) The Tribunal will wish to ensure that arrangements are made which are suitable in terms of funding, ATE and legal costs, even though these matters may end up being looked at in more detail at the conclusion of the proceedings, whether by way of settlement or judgment.

(6) Circumstances vary considerably so what may be appropriate in one case, may not necessarily be so in others.

(7) Whilst the Tribunal needs to be satisfied on certification that the PCR and its experts have a plausible methodology for assessing damages, it is recognised that following disclosure, methodologies may need to develop and indeed be replaced in appropriate cases.

C. CPO APPLICATION

17. The CPO application complies with Rule 75 of the Tribunal Rules, which sets out the procedural requirements for a collective proceedings claim form.

D. AUTHORISATION CONDITION

18. The factors relevant to determining whether it is "just and reasonable" for an applicant to act as a class representative are set out in Rule 78.

19. The Tribunal must consider whether a PCR "would fairly and adequately act in the interests of the class members" (Rule 78(2)(a)). Circumstances relevant to this determination are set out in Rule 78(3), and include:

(1) Whether the PCR is a member of the class, or if not, whether the PCR is a pre-existing body and the nature and functions of that body; and

(2) Whether the PCR has prepared a plan for the collective proceedings that includes a method for bringing the proceedings on behalf of represented

persons and notifying represented persons of the progress of the proceedings, a procedure for governance and consultation which takes into account the size and nature of the class, and any estimate and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

20. The Tribunal must also consider whether the PCR has a material conflict of interest with the interests of class members, and whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so.

21. The Tribunal will scrutinise the PCR's funding arrangements in considering the authorisation condition. As the Tribunal noted in *Christine Riefa Class Representative Limited v Apple Inc and Others* [2025] CAT 5 at [31], while class actions invariably require third party funding, the interests of funders are not the same as the interests of potential class members, which gives rise to inherent risks for the fulfilment of the policy objectives of the collective actions regime. The Tribunal will need to consider how the PCR has satisfied itself that the funding arrangements reasonably serve and protect the interests of class members.

22. The Tribunal will need to be satisfied that the fees being incurred on behalf of the class members are subject to proper scrutiny. Unlike normal litigation where a client goes to a lawyer and if necessary to a funder as well, in collective proceedings, it is the other way round. In collective proceedings, it may be the lawyers who identify the possibility of a class action claim, they go to a funder, and then a PCR is identified to bring the claim. The PCR may be a person with little or no experience in dealing with litigation costs and fees. Measures may need to be put in place to ensure that the PCR gets specialist and independent advice on any litigation funding agreement as well as costs specialist advice on legal fees to provide assistance in approving any costs arrangements and fees.

(1) The PCR

23. The PCR is Bulk Mail Claim Limited, which was incorporated for the purpose of this litigation. The PCR is a private company limited by guarantee and its

sole member and director is Mr Robin Aaronson, an economist specialising in competition policy, including in postal markets.

24. Mr Aaronson has held senior roles in various public and private bodies related to competitive markets and postal services. In 2000, Mr Aaronson was appointed by the Secretary of State for Trade and Industry as a member of the Postal Services Commission (Postcomm, the regulator of the postal industry at that time), initially for a term of five years. In 2005, his term was extended by a further 18 months. From 2009 to 2017, Mr Aaronson served as a Member of the Competition Commission (later the CMA).

25. The PCR has instructed Lewis Silkin LLP, a law firm with significant experience in litigation in addition to an experienced team of specialist competition law barristers at Monckton Chambers.

26. On request, the PCR provided details of the origination of this matter. Andrew Wanambwa of Lewis Silkin was aware of the Infringement Decision in mid-2019.[2] Mr Wanambwa approached a litigation funding broker to source funding for a "group claim" based on the issues raised in the Infringement Decision, and the broker approached Asertis, which expressed an interest in funding the potential claim. In February 2023, Mr Wanambwa approached Mr Aaronson to act as the PCR in this matter, and on 27 July 2023, the PCR (Bulk Mail Claim Limited) was incorporated.

27. We are satisfied that Mr Aaronson is suitable to act as the director of the PCR entity, given his credentials and experience. Neither the PCR nor Mr Aaronson is a member of the proposed class, nor has any material interest in conflict with that of class members.

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[2] The version of this judgment published on 14 April 2025 has been amended to correct the date by which Mr Wanambwa was aware of the Infringement Decision.

(2) Governance and consultation

28. The PCR must prepare a plan for the collective proceedings that satisfactorily includes a procedure for governance and consultation which takes into account the size and nature of the class (Rule 78(3)(c)(ii)).

29. Mr Aaronson is assisted by a consultative panel established in June 2024 comprised of Roger Witcomb and Lesley Ainsworth.

    (1) Roger Witcomb is an economist who has worked at the Bank of England and lectured in economics at Cambridge University. He was a panel member at the Competition and Markets Authority ("CMA") from 2009 to 2017, and chair of the Competition Commission and a panel chair of the CMA from 2011 to 2016.

    (2) Lesley Ainsworth is a competition lawyer and former partner at Hogan Lovells where she specialised in EU and UK competition law and led the firm's London competition practice. She was also a member of the CMA from 2013 to 2018, and since 2019 has advised the Financial Conduct Authority and Payment Systems Regulator on competition decisions.

30. As already noted above, the class members in the proposed collective proceedings will include large corporate and other entities that are likely to have claims for significant sums of money, a feature not usually found in other collective proceedings before the Tribunal. It may therefore be appropriate for those class members to be more actively involved in decisions about these proceedings, and we consider it is important for class members to have the opportunity to participate as part of the consultative panel or by way of membership of a customer user group. At the request of the Tribunal, the PCR provided the terms of reference for a Class Members Customer Group, which we are satisfied will assist it in acting in the interests of the class.

31. We were informed that class members can request a copy of the Amended LFA, but that some terms would be redacted for confidentiality, such as deferred fees

for solicitors and the total cost of insurance premiums incurred. There is a question as to whether the PCR can assert privilege or confidentiality against the entities they are representing in these proceedings. In line with the Tribunal's comments in *Riefa* at paragraph [112], there is no justification for withholding the terms of the LFA from the scrutiny of the public, and in particular, potential class members. We expect class members to be able to inspect the Amended LFA with minimum redactions upon giving appropriate confidentiality undertakings when considered necessary.

(3) Funding arrangements

32. The Tribunal is to consider whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)). The plan for proceedings should include any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal may order that the PCR shall provide (Rule 78(3)(c)(iii)).

33. The costs of bringing the claim are being funded by a third-party funder, Asertis Limited ("Asertis") which is a member of the Association of Litigation Funders of England and Wales and abides by its Code of Conduct. On 23 November 2023, the PCR entered into a Litigation Funding Agreement (the "initial LFA") with Asertis to enable it to pay both its own costs of the Proceedings and, if ordered to do so, Royal Mail's recoverable costs. Royal Mail set out in correspondence various features of the initial LFA which it considered were unsatisfactory. This correspondence and the decision in *Riefa* prompted the PCR and Asertis to enter into an "Amended LFA" on 21 February 2025, on which the PCR received independent advice from Benjamin Williams KC and Forensic Risk Accountants. The Tribunal carefully considered the terms of the Amended LFA and considers that they do not appear to be unreasonable, at least for certification purposes. The amounts claimed under it at any distribution stage will of course be carefully reviewed. The parties and the funder should not assume that because a particular level of return has been agreed by way of LFA, that will be the amount the Tribunal ultimately permits to come out of any settlement or judgment sums. That will depend on a number of factors, including the level of success and the sums recovered.

34. The return for funders (the "success fee") is dealt with at Schedule 1 of the Amended LFA. In the event of success, the drawn funds will be repaid, plus a multiplier comprising two elements: a priority multiplier of 1.5x of the drawn funds and a balancing multiplier of 0.5x for the first 12 months. There is also an increase in the balancing multiplier of 0.1875 per every quarter. There is a cap of 5.75 overall, which applies to the aggregate of the priority multiplier and the balancing multiplier.

35. Settlement is covered in clause 10 of the Amended LFA. We are satisfied that under the Amended LFA, it is ultimately a matter for Mr Aaronson, upon provision of written advice from Lewis Silkin, to decide whether to approve a settlement. The PCR provided the Tribunal with a calculation of the success fee that would be payable to the funder under the Amended LFA depending on the settlement amount obtained and stage of the case at which the proceedings settle. As noted above, settlements in collective proceedings will ultimately be subject to the oversight of the Tribunal.

36. We are satisfied that the Amended LFA is appropriate in the circumstances of this case, noting that "success" can have a number of different meanings to different stakeholders. It is only on drawn down funds that multipliers are imposed. As noted in *Mark McLaren Class Representative Limited v MOL (Europe) Africa Ltd* [2025] CAT 4 at [83], the Tribunal appreciates funders need to have a reasonable opportunity to make a reasonable return on their investments, otherwise they will not be available to fund these types of cases. At the hearing, the Tribunal raised with the PCR that the LFA did not expressly specify that prior to any settlement there should be a written legal opinion or memorandum on the proposed settlement, addressing its rationale and terms, and including an analysis of the advantages and disadvantages. The PCR and Asertis have agreed an addendum to the LFA to address this. This reflects good practice. Since the hearing the Tribunal has issued its judgment in the "Water CPO Cases" *(Professor Carolyn Roberts v Severn Trent Water Limited and others)* [2025] CAT 17, which at paragraphs [89] to [95] deals with some concerns regarding the wording of the LFA in that case. The PCR should consider these with Asertis and make any changes to the Amended LFA that

they consider reasonable to deal with those points. The matter will be considered further at the next CMC.

37. Concerns were raised by Counsel for Royal Mail about the financial position of the funders. They referred to a recent High Court decision in *Asertis Ltd v Lewis Barry Bloch* [2024] EWHC 2393 (Ch) where it was found that there was reason to believe that Asertis would not be able to meet an adverse costs order. In correspondence, Lewis Silkin on behalf of the PCR has provided confirmation by way of a letter dated 31 January 2025 as to the financial position of Asertis and the results of a corporate restructure which was implemented on 1 January 2025. Asertis also offered to take practical measures to maintain security of funds, which if implemented would have costs implications, as funds would be drawn down early. The rate of return for Asertis under the LFA is by reference to funds drawn down over time. Asertis is now funded by its new holding company, Legatus Holdings Ltd, with whom it has a revolving credit facility. Legatus itself is funded by funds managed by two large institutional credit funds. The Tribunal indicated that it would not require Asertis at this stage to take the steps offered for maintaining the security of funds in the event that Lewis Silkin itself reviewed the relevant documents and agreements to satisfy itself of the matters it represented in its letter dated 31 January 2025. Lewis Silkin provided this confirmation. In the event that the PCR has any concerns about the financial position of Asertis and its ability to continue funding the proceedings, which are not resolved within 14 days, it has now undertaken that it will inform the Tribunal and Royal Mail in writing.

38. The PCR has also obtained an Adverse Costs Indemnity Insurance Policy to cover potential adverse costs. We are satisfied that adequate After the Event ("ATE") insurance is in place and that the terms of the coverage are appropriate. There is a limit of indemnity of £15 million post-CPO, split into a sub-limit of £3 million for opponent's costs in respect of the period up to the granting of the CPO. There are anti-avoidance provisions in favour of the PCR, and the policy indemnifies all costs incurred up to the point of cancellation of the policy. The three insurance companies providing the ATE cover each have an A or A- rating from AM Best, which is satisfactory.

39. As regards the budget, we are satisfied that the hourly rates that have been agreed for solicitors, counsel and the PCR fall within a reasonable range, and that the budget realistically accommodates the projected progress of the case through to trial. Under the Amended LFA, if the budget has been exceeded, the PCR may request further funds, which the funder has the option of providing. Counsel for the PCR indicated that the budget was consistent with other budgets for claimant entities proceeding toward what could be reasonably assumed to be a six-week trial. In line with the Tribunal's duty to actively manage cases, we requested that the PCR submit updates on the budget at each case management conference indicating the extent to which the budget has changed and confirming the amount that has been drawn from the funder. If the budget has been exceeded, we will be able to review whether the funder has agreed to that, and whether a realistic revised budget has been prepared.

40. Bills issued in the course of proceedings will be interim bills, and in practice are subject to review and approval both by the funder and the PCR. Under clause 8.5.1 of the Amended LFA, the funder is to review invoices as to whether they are reasonable or not. It may be said that whilst one would ordinarily expect the funder to carefully review invoices, its own return is set by reference to the sums drawn down, which are mainly the legal and experts costs, so the higher the fees paid the greater potential return under the LFA. As regards the PCR, it is the client and hence any bill must be approved by the PCR, which in practice means Mr Aaronson. We considered that it would be desirable if Mr Aaronson were to retain a costs specialist independent of both the funders and Lewis Silkin to assist him in reviewing and approving any bills. We stated that we expected something more than what would be carried out by the court on a summary assessment of costs, but not as detailed as a full taxation of costs. The PCR agreed to this cross-check and proposal.

41. As regards the fees for Mr Aaronson, these are being paid by the funder at a rate of £3,000 per month. Given the substantial responsibility that has been taken on and the likely amount of time Mr Aaronson is likely to spend, this sum seems fair and reasonable. The fees agreed for the two members of the consultation panel appear reasonable and should be added to the costs budget. The customer user group will also entail a cost. However, this is worth incurring as it will

enable the PCR to have feedback and input from class members, including amongst those with a large stake in the proceedings.

(4) Litigation plan

42. The litigation plan includes the timetable. The timetable submitted with the application in May 2024 required some amendment to take account of the fact that the proceedings brought by Whistl against Royal Mail recently settled. The PCR intended to have some participation in the trial of that action which was fixed to be heard in the last quarter of 2025. It also required amendment to make it more detailed and to take account of the directions made at the hearing. At any CMC a revised timetable should be prepared and submitted alongside the updated costs budget.

43. The Tribunal is satisfied that the arrangements for bringing the proceedings on behalf of the represented persons and for notifying them of the progress of the proceedings are suitable (Rule 78(3)(c)). There is a claim website which will contain information about the proceedings and provide updates for class members. Epiq has prepared a Notice and Administration Plan dated 29 May 2024 which covers the required steps, but may require some updating in the light of developments since then. It is not necessary to incur the cost now of preparing a further plan, as some aspects such as distribution are much better left to be developed at a later stage. At the hearing the Tribunal suggested that some amendments be made to the draft CPO Notice to provide more detail as to the nature of the claim and to make clear that the class does not include dissolved companies.

E. ELIGIBILITY

44. Rule 79 sets out the factors relevant to the Tribunal's consideration of whether claims are eligible for inclusion in collective proceedings. The proposed claims must be brought on behalf of an identifiable class of persons, raise common issues (similar or related issues of fact or law), and be suitable to be brought in collective proceedings.

45. In determining whether the claims are suitable to be brought in collective proceedings, the Tribunal will take into account the following relevant matters:

(1) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(2) the costs and the benefits of continuing the collective proceedings;

(3) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(4) the size and the nature of the class;

(5) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(6) whether the claims are suitable for an aggregate award of damages; and

(7) the availability of alternative dispute resolution and any other means of resolving the dispute.

46. The Tribunal will consider whether collective proceedings should be opt-in or opt-out proceedings, having regard to the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in collective proceedings.

(1) The proposed class

47. We are satisfied that the claim has been brought on behalf of an identifiable class of persons. An issue arose at the Certification Hearing as to the status of dissolved companies. While we did not consider the class definition in the CPO itself needed to specifically exclude dissolved companies, we note that dissolved companies are not part of the claim. It should be made clear in the CPO Notice and on the claim website that dissolved companies do not fall within the class.

48. There is an issue between the parties as to the proposed end date for the purpose of the class definition.

49. The PCR's position was that persons who purchased bulk mail retail services until the date of the CPO should be included, submitting that where (as is alleged here) a defendant has committed an infringement with continuing effects, it would be open to the claimant to amend the claim to reflect the end date of the infringement.

50. Royal Mail submitted the proposed end date should be no later than the date of the claim form. In support of that proposition, Royal Mail relies on the following authorities:

(1) In *Merricks v Mastercard Inc* [2022] CAT 13 the Tribunal held that, on a proper reading of ss. 47B(1) and (4) of the 1998 Act and the CAT Rules, it is "fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made"; and that it would therefore be "inconsistent with the statutory structure for collective proceedings" for the class to be defined by reference to a date after "the issue of the claim form" (at [26]-[28], and [33]).

(2) In *Neill v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73 at [67]-[71], the Tribunal endorsed the reasoning in *Merricks*, rejected an attempt by the PCR to define the class by reference to a date post-dating the CPO application, and directed the PCR to "amend the class definition so that the Relevant Period terminates as at the date of filing of the Claim Form".

51. There is an open question as to how long the effects of the infringement may have operated. The end date for the class definition should be the date of the claim form (29 May 2024). The Tribunal will only determine any application later in the proceedings to extend that date on the basis of full argument by the parties.

(2) Collective proceedings are an appropriate means of resolving the common issues

52. The claim clearly raises common issues which are suitable to be brought in collective proceedings. There is a large number of persons within the class, and it would be wholly impracticable for each member to bring their own claim, many of which would be relatively small. This is an effective way of bringing claims of a large number of people in one proceeding.

53. No class member has brought any claim against Royal Mail arising out of the infringement. The only claim that has been brought was by Whistl which claimed it suffered loss of profit as a result of the infringement, which it claimed led it to abandon its plans for end-to-end delivery of bulk mail. In those proceedings the claim was in the region of £600 million and those have been recently settled on confidential terms.

54. These are unusual for collective proceedings before the Tribunal in that the class includes some members with potentially large damages claims and so the loss per class member may range from millions of pounds to relatively small amounts. Often individual class members have little to no input in the proceedings and everything is left to the class representative and its lawyers in the pursuit of the claim. In a case like the present with some individual class members having potentially large stakes, they may take a more active interest in the proceedings. The customer user group is intended to take account of such a large range of potential damages for individual class members.

(3) Strength of the claims

55. The Claim Form sets out the reasons the PCR considers the claims have a real prospect of success. It notes that the proposed claim is a follow-on claim based on the binding effect of findings of fact and about the Infringement in the Ofcom Decision, and that the Infringement was motivated by, and had the effect of, excluding Whistl from the market. The Ofcom decision itself was upheld by the Tribunal and a further appeal to the Court of Appeal was dismissed.

56. Given the Ofcom Decision and in particular the sections set out above at [4], the PCR clearly has a good arguable case that the Infringement hindered Whistl's plans for expansion. However, in order to show that Whistl's planned expansion would have resulted in lower prices for class members, it will be necessary to look at internal documents for Royal Mail and Whistl in order to ascertain their intentions and earning capacity within the market for end-to-end delivery of bulk mail. Whistl intended to gain market share by offering discounts, but once it had established a foothold it is a matter of evidence as to what it would have done in terms of pricing, expansion and staying in that segment of the market. It will also be a matter of looking at qualitative evidence as to how Royal Mail would have reacted. It should not simply be assumed that Royal Mail would have certainly taken the step of reducing prices in order to counter Whistl's plans, nor that Whistl would have continued discounts or sought to maintain lower prices in the medium to long term.

57. Qualitative evidence from Royal Mail, Whistl and others will no doubt play an important role in these proceedings. At the moment the PCR has had no disclosure from these sources. Disclosure is likely to inform how the overcharge is to be proved or rebutted, as well as the extent (if any) of the overcharge.

F. CRITICISMS OF THE PCR'S METHODOLOGY

(1) PCR's methodology

58. In order to establish and quantify that purchasers of bulk mail delivery services paid higher prices than they would have paid "but for" the Infringement, the PCR proposes to rely on the methodology set out by its economic expert, Dr Chris Williams. Dr Williams' proposed methodology has three components.

59. *First*, Dr Williams' methodology relies on an econometric DiD model to estimate the retail customer overcharge by utilising a comparison between the UK, and Germany and Sweden, all of which have liberalised postal markets. The comparator markets of Germany and Sweden are used to estimate a counterfactual Royal Mail price for bulk mail delivery services in the period after Whistl exited the UK market.

60. This estimation of the counterfactual Royal Mail price is based on an assumption that, aside from the differences controlled for in the model, prices in the UK bulk mail delivery services market would have evolved in the same way as in Germany and Sweden. The retail customer overcharge is then estimated by calculating the average difference between the observed Royal Mail price after Whistl exited the market, and the counterfactual Royal Mail price. Dr Williams intends to further refine his DiD model and its estimate of the retail customer overcharge using additional information and data obtained from Royal Mail and elsewhere through disclosure, post-certification.

61. *Second*, Dr Williams proposes to estimate the retail customer overcharge separately for VAT-rated and VAT-exempt customers. Dr Williams has suggested that these two groups each account for approximately half of bulk mail delivery services revenue. Dr Williams considers that separate estimates of the retail customer overcharge are necessary due to the differential VAT treatment of these two customer groups combined with the differential requirement on Royal Mail and Whistl to charge VAT on bulk mail delivery services. This differential treatment is likely to have created a disparity in competitive conditions and the price of bulk mail delivery services for these two groups of customers.

62. To estimate separately the retail customer overcharge for VAT-exempt customers, Dr Williams plans to refine or recalibrate his DiD model using additional information and data obtained from Royal Mail post-disclosure.

63. *Third*, Dr Williams proposes several pieces of additional analysis that will inform his view of the retail customer overcharge. This additional analysis will, in some cases, result in refinements to his DiD model for estimating the overcharge and, in other cases, may well lead to alternative estimates of the overcharge.

64. This additional analysis includes:

(1) *First*, a review of evidence from other liberalised postal markets where competitors have entered the market. Such evidence is said to include market shares, geographic market coverage and changes in prices.

(2) *Second*, a review of Royal Mail and Whistl's business plans and internal analyses, and any independent assessments of those business plans.

(3) *Third*, a survey from a sample of bulk mail retail customers aimed at testing the degree to which the increased competition in the counterfactual could have led to lower prices, by reference to market participants.

(4) *Fourth*, the collection of additional financial information which Dr Williams will use to refine and test the estimates of his overcharge, such as Royal Mail's cost inputs which would allow Dr Williams to produce a bottom-up estimate of the bulk mail delivery prices that Royal Mail would have charged.

(5) *Fifth*, for VAT-exempt customers information regarding the VAT rate, the proportion of VAT-exempt customers within the market, the magnitude of non-deductible or "hidden" VAT and supply and demand elasticities.

(6) *Sixth*, a review of relevant economic literature focusing on the question of pass through and inputs.

65. Counsel for the PCR submitted that Dr Williams would take both the econometric and additional analysis into account in forming his overall expert opinion as to the size of the retail customer overcharge.

(2) Royal Mail's critique of the PCR's proposed methodology

66. Based on the expert report of its expert Mr Hunt, Royal Mail argues that the PCR's proposed methodology for assessing the retail customer overcharge lacks credibility and plausibility for two reasons.

67. *First*, Royal Mail considers that: (i) the PCR is simply assuming that the Infringement led to an overcharge, which Royal Mail does not accept was the case, and that the DiD model which the PCR plans to use is not capable of demonstrating that the Infringement led to an overcharge; and (ii) selection bias in the choice of comparator markets renders the DiD model fundamentally flawed.

68. Royal Mail also has concerns about the model's assumption of parallel trends between the UK, German and Swedish markets, but was content not to pursue this issue at the certification stage of the proceedings. Therefore, it is unnecessary to examine the parallel trends issue any further at this stage.

69. In relation to point (i) above, Royal Mail submits that any demonstration that the Infringement led to an overcharge needs to be grounded in an analysis of the UK market and, in particular, what could have been expected in the counterfactual. At the hearing, Counsel for Royal Mail suggested that this analysis would need to include, for example, (a) an assessment of the scale of Whistl's likely entry and expansion in the UK market and the period of time over which any such entry and expansion was likely to have happened, (b) whether Whistl's entry would have been temporary or permanent, and (c) the extent to which competition between Royal Mail and Whistl was likely to have led to lower prices for their customers.

70. In relation to point (ii) above, Royal Mail submits that the model presupposes a certain level of competition in the counterfactual and uses comparator markets that meet or exceed that assumed level of competition. Royal Mail further notes that Dr Williams, in choosing Germany and Sweden as comparator markets, does not explain why other EU member states (and non-EU members) with liberalised postal markets have been rejected.

71. *Second*, Royal Mail considers that the DiD model is not capable of estimating the retail customer overcharge for VAT-exempt customers as there was no similar VAT exemption for bulk mail delivery services in the chosen comparator countries (i.e. German and Sweden). That is, the necessary prices for the purposes of the comparison-based DiD model cannot be obtained

because they do not exist. Royal Mail goes on to say that the lack of a VAT exemption for bulk mail customers in Germany and Sweden means that there was not a market for VAT-exempt customers that could have evolved in a similar way to the UK.

72. Royal Mail also has concerns that a lack of VAT-exempt retail prices for the UK, or a means of reliably estimating such prices, means that the DiD model will not be able to estimate the retail customer overcharge for VAT-exempt customers. It was, however, content to accept, for certification purposes, that Dr Williams had advanced a theoretical methodology for estimating such prices. As a result, this issue is not discussed further.

(3) The PCR's response to Royal Mail's criticisms

73. The PCR's overarching response to Royal Mail's criticisms of its proposed methodology are that these are granular matters that do not go to the plausibility and credibility of the PCR's proposed approach, and it is the plausibility and credibility of the PCR's approach which is relevant to whether certification should be granted.

74. Notwithstanding this, the PCR also responded more specifically to each of Royal Mail's individual criticisms, both in its submissions at the hearing and in Dr Williams' second report filed in response to Mr Hunt's report.

75. In relation to the criticism that the PCR is simply assuming the presence of an overcharge, Counsel for the PCR pointed to the relevant passages of the Ofcom Decision extracted above at paragraph 4 of this judgment.

76. Concerning Royal Mail's criticism that the DiD model is unable to demonstrate that the Infringement led to an overcharge, Counsel for the PCR highlighted several strands of its proposed analysis that, separately from the DiD model, would allow its economic expert to assess likely developments in the counterfactual, including the presence of an overcharge. These include a qualitative assessment of Royal Mail and Whistl business plans, and a planned survey of bulk mail retail customers.

77. In relation to selection bias in the choice of comparator markets, the PCR's view is that selecting comparator markets where competition is limited or failed would not shed light on how relevant markets in the UK would have evolved in response to competition. It is far better to use the examples of liberalised markets in Sweden and Germany than certain other countries in the EEA. Moreover, Dr Williams' selection of appropriate comparator markets is also constrained by data availability considerations.

78. In relation to the ability of the DiD model to estimate the retail customer overcharge for VAT-exempt customers, the PCR notes that Dr Williams has explained that the comparator markets do not need to include VAT exemptions as long as the VAT rates remained stable in each of the countries over the period of the assessment: if the effects of VAT are stable, any differences will be "netted out" as part of the final analysis.

(4) The Tribunal's view

79. The Tribunal has been ably assisted by counsel on these matters and has read the relevant expert reports and submissions. The Tribunal can express its conclusions relatively shortly on what may be ultimately issues at trial. The Tribunal considers that the methodology put forward by the PCR to satisfy the *Microsoft* test is sufficiently credible and plausible at this stage of the proceedings not to present an obstacle to certification. The Tribunal is satisfied that there is at least a good arguable case that there has been an overcharge. The effect of the Infringement was to lead to the withdrawal of the funding for Whistl's expansion into the bulk mail delivery services market. This in turn may well have led to Whistl's withdrawal from that market altogether. In the counterfactual, Whilstl would have entered into that market and its internal business plans from 2013 record that it aimed, by 2018, to deliver to around 42% of UK postcodes (see paragraph 2.37 of the Ofcom Decision). Prior to Whistl's entry Royal Mail had a 98% share of the market, as noted in paragraph 1.11 of the Ofcom Decision. It is reasonably foreseeable that such competition may have led to lower prices and indeed Whistl's plans envisaged offering substantial discounts to obtain market share.

80. Looking at comparable markets such as the liberalised markets of Germany and Sweden for the purposes of a DiD analysis is a plausible means of arriving at an estimate of the overcharge. Comparators even if not perfect can still be used and none of the criticisms of the ones currently used can be treated as a knockout blow at this stage. However, Dr Williams intends to supplement and cross check such an analysis by looking at qualitative evidence. DiD analysis using comparators is not an unconventional approach, and these can often adequately deal with differences in comparative markets. Whilst there are differences between the UK and Germany and Sweden, it is certainly arguable that these differences can be adequately accounted for and cross checked against qualitative evidence. At least for certification purposes this seems an appropriate approach, even if it is an approach that is contested. Such a contest will be a matter for trial, if not at earlier case management conferences.

81. Nevertheless, the Tribunal expects the PCR's methodology to develop as it takes account of the additional information and data that it gains through disclosure and carries out the additional analysis that it has identified. The Tribunal notes that this may lead to developments in the PCR's thinking about its approach to the DiD model and the balance of weight accorded to the DiD model and other analyses in the PCR's conclusions.

G. CASE MANAGEMENT

82. As a result of the hearing and the directions given at the hearing, the Tribunal has a basis for mapping out and managing these proceedings going forward. The application and proposals required amendment, but that is not surprising. The Tribunal welcomes engagement with the parties at the CPO certification stage. It enables the PCR to deal with any points of concern and for the Tribunal to deal with the framework of the case as it goes forward. In this present case:

    (1) On funding, the Tribunal was able to review the funding arrangements and understand through scenarios provided how it may translate in returns at particular levels which the funder may claim out of any settlement on judgment sums.

(2) On ATE cover, the PCR was able to demonstrate that there is effective ATE cover in place with A rated insurers.

(3) The methodology for seeking to demonstrate any overcharge has been reviewed. It is evident that this will require development in the light of disclosure. Econometric DiD analysis will need to be supplemented by qualitative evidence and analysis. This will be a matter dealt with at a further CMC in September 2025, by which time:

(i) the PCR will have had disclosure of the witness statements (including relevant exhibits) and lists of documents (with disclosure statements filed in the Whistl proceedings);

(ii) pleadings will have been served including Royal Mail's defence and the PCR's reply;

(iii) the relevant documents from the Ofcom file will have been provided to the PCR;

(iv) the PCR will have identified the precise passages in the Ofcom Decision it relies upon as being binding, and Royal Mail indicating the extent to which it accepts that; and

(v) Dr Williams will have provided his further report on how it is intended to prove the level of the overcharge and develop more fully the details of the qualitative evidence and the interrelationship with his DiD analysis.

(4) Costs will be closely controlled. Mr Aaronson will be assisted by a costs expert and updated costs budgets will be provided for the CMCs in due course.

(5) Mr Aaronson will also have the benefit of the advice of a highly experienced consultative panel as well as the customer user group.

83. Whilst Royal Mail’s objections to certification have been dismissed, it should be appreciated that their engagement on the application and the expert evidence from Mr Hunt has been extremely useful. The evidence of both Dr Williams and Mr Hunt will help inform how the evidence is obtained and developed in the proceeding going forward.

84. This is a unanimous decision of the Tribunal.

Hodge Malek KC Chair	Timothy Sawyer	Andrew Taylor

Charles Dhanowa C.B.E., K.C. (*Hon*) Registrar	Date: 12 March 2025