

IN THE COMPETITION APPEAL TRIBUNAL  
BETWEEN

JUSTIN LE PATOUREL

Applicant / Proposed Class Representative

and

(1) BT GROUP PLC

(2) BRITISH TELECOMMUNICATIONS PLC

Respondents / Proposed Defendants

---

**AMENDED COLLECTIVE PROCEEDINGS CLAIM FORM**

---

*References to the Claim Form Bundle ("CF **Bundle**") will be in the form [CF Bundle/Tab number/Page number].*

*References to the Bundle containing the witness statement of Justin Le Patourel ("**JLP Bundle**") will be in the form [JLP Bundle/Tab number/Page number]*

*References to the Bundle containing the witness statement of Robert Paul Murray ("**RPM Bundle**") will be in the form [RPM Bundle/Tab number/Page number]*

-

## **TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY	3
PART I: THE REQUIRED INFORMATION AND STATEMENTS UNDER RULE 75(2)	6
PART II: FACTUAL BACKGROUND TO THE 2017 REVIEW AND OFCOM'S FINDINGS	10
PART III: THE PROPOSED CLASS (RULE 75(3)(A)-(C))	30
PART IV: THE INFRINGEMENT AND BASIS OF THE CLAIMS (RULE 75(3)(F)-(H) AND (J))	41
PART V: SUMMARY OF THE BASIS UPON WHICH IT IS CONTENDED THAT THE CRITERIA FOR CERTIFICATION AND APPROVAL IN RULE 79 ARE SATISFIED (RULES 75(3)(E) AND 79)	55
PART VI: SUMMARY OF THE BASIS ON WHICH THE PROPOSED CLASS REPRESENTATIVE SEEKS TO BE AUTHORISED (RULES 75(3)(D) AND 78)	71
PART VII: RELIEF SOUGHT (RULE 75(3)(I))	75

## INTRODUCTION AND SUMMARY

1. This is an application for a collective proceedings order (“**CPO**”) filed pursuant to Rule 75 of the Competition Appeal Tribunal Rules 2015 (SI 1648/2015) (“**the Rules**”) to commence collective proceedings under section 47B of the Competition Act 1998 (“**the Act**”). The Applicant, Justin Le Patourel (“**the Proposed Class Representative**”), makes this application for a CPO permitting him to act as the class representative.
2. The claims which it is proposed to combine in these collective proceedings (the “**Claims**”) are “standalone claims” under section 47A of the Act for damages caused by breaches of statutory duty by the Proposed Defendant<sup>s</sup> (“**BT**”) in charging unfair prices to certain of its customers in breach of s.18 of the Competition Act 1998 (the “**Chapter II Prohibition**”).
3. In summary, BT has throughout the Claim Period charged excessive prices to customers supplied with certain residential landline services. Although the Claims are not “follow on” claims, they arise out of a review, conducted by Ofcom in 2017, of “the market for standalone landline telephone services” (“**the 2017 Review**”). Ofcom conducted the 2017 Review pursuant to its powers under the Communications Act 2003 to review communications markets for the purposes of deciding whether to impose *ex ante* regulation.
4. The 2017 Review addressed the prices paid by consumers for certain residential landline telephone services, where those services are bought by the customer on a standalone basis, rather than as a part of a bundle with non-voice services such as broadband. In summary, Ofcom found that prices for standalone residential landline telephone services were above the competitive level, thereby causing consumer detriment. In February 2017, Ofcom provisionally concluded that a three-year retail price control was necessary to reduce the prices charged by BT for those landline services. Subsequently, in October 2017, Ofcom accepted a set of voluntary commitments from BT which involved, amongst other things, a forward-looking price reduction for a certain segment of customers who buy certain standalone residential landline services and do not buy broadband at all, from

BT or any other provider.<sup>1</sup> As set out below, Ofcom recently launched a consultation to review and consider the renewal of the existing commitments.

5. The Proposed Collective Proceedings are brought on an opt out basis on behalf of a class consisting predominantly of consumers (“**the Proposed Class**”), which it is proposed to divide into two sub-classes (“**the Proposed Sub-classes**”), and seek an aggregate award of damages for the Proposed Class.
6. The Proposed Class and the Proposed Sub-classes are described in detail at §§75 – 101 below. In overview, the Proposed Class comprises consumers who have bought certain residential landline services from BT, on a standalone basis, rather than as part of a bundle, during the Claim Period (as defined below). Those consumers are divided into two Proposed Sub-classes depending on whether or not they also bought broadband (not as part of a bundle but separately).
7. The remainder of this Claim Form is split into the following parts in order to address the requirements in Part 5 of the Rules and Section 6 of the Tribunal’s Guide to Proceedings (“**the Guide**”):<sup>2</sup>
  - (a) **Part I** sets out the information and statements to comply with Rule 75(2);
  - (b) **Part II** sets out the factual background to the 2017 Review and Ofcom’s findings;
  - (c) **Part III** sets out the information and statements concerning the Proposed Class to comply with Rule 75(3)(a)-(c);
  - (d) **Part IV** sets out the information and statements concerning the alleged infringement and the basis of the claims to comply with Rule 75(3)(f)-(h) and (j));
  - (e) **Part V** sets out the summary of the basis upon which it is contended that the criteria for certification and approval in Rule 79 are satisfied to comply with Rule 75(3)(e);

---

<sup>1</sup> As explained later, these are known as “Voice Only Customers”.

<sup>2</sup> §6.11 of the Guide suggests that the Claim Form should be set out in three parts; however, in order to avoid duplication and excessive cross-referencing, the basis of the Claims is set out first, before addressing their suitability for inclusion in collective proceedings and the Proposed Class Representative’s ability to represent the class.

- (f) **Part VI** sets out the summary of the basis on which the Proposed Class Representative seeks to be authorised to comply with Rules 75(3)(d) and 78; and
  - (g) **Part VII** sets out the relief sought to comply with Rule 75(3)(i).
8. Accompanying this Claim Form are the following documents in support of the application for a CPO and the Claims:
- (a) Glossary of definitions used in this Claim Form [**Annex 1**] [**CF Bundle/2/82-86**];
  - (b) Expert economic report by David Parker (Frontier Economics), dated 13 January 2021 (“**the Parker Report**”), which addresses the Infringements, quantification and the class definition and size [**Annex 2**] [**CF Bundle/3/87-255**];
  - (c) Evidence in support of the Claims, which is publicly available, namely: (i) Ofcom’s “Review of the market for standalone landline telephone services; Statement” (26 October 2017) (“**the Statement**”) (non-confidential) [**Annex 3**] [**CF Bundle/4/256-306**]; (ii) Ofcom’s Evidence, “Evidence supporting this statement: Review of the market for standalone landline telephone services”, 26 October 2017 (non-confidential) [**Annex 4**] [**CF Bundle/5/307-368**]; (iii) Ofcom’s Provisional Conclusions, “Review of the market for standalone landline telephone services”, 28 February 2017 (non-confidential) (“**the Provisional Conclusions**”) [**Annex 5**] [**CF Bundle/6/369-486**]; and (iv) Ofcom’s Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/487-607**];
  - (d) Draft Collective Proceedings Order, as required by Rules 75(5)(b) and 80 [**Annex 7**] [**CF Bundle/8/608-611**];
  - (e) Draft Notice to Proposed Class Members of the CPO, as required by Rules 75(5)(c) and 81 [**Annex 8**] [**CF Bundle/9/612-624**];
  - (f) Witness Statement of Justin Le Patourel (Proposed Class Representative), [**JLP Bundle/1/3-32**], addressing the requirements of Rule 78 and including (i) a litigation plan for the Proposed Collective Proceedings as per Rule 78(3)(c) (“**Litigation Plan**”) [**JLP Bundle/2/33-160**]; (ii) a Notice and Administration Plan (“**Notice and Administration Plan**”) [**JLP Bundle/2/60-149**] and (iii) a litigation

funding agreement to demonstrate an ability to pay the proposed Defendants' reasonable costs in accordance with Rule 78(2)(d) ("**Litigation Funding Agreement**") [**JLP Bundle/22/901-933**]; and

- (g) Witness Statement of the Proposed Class Representative's legal representative, Rob Murray (Partner, Mishcon de Reya LLP), addressing the pre-action correspondence and suitability of the legal team [**RPM Bundle/1/3-12**].

## **PART I: THE REQUIRED INFORMATION AND STATEMENTS UNDER RULE 75(2)**

- 9. This part sets out the information and statements to comply with Rule 75(2).

### **The Proposed Class Representative (Rule 75(2)(a)-(c))**

- 10. The Proposed Class Representative is Mr Justin Le Patourel of a private residential address in East Sussex, United Kingdom.<sup>3</sup> Further biographical information concerning the Proposed Class Representative is set out in his Witness Statement [**JLP Bundle/1/3-32**].
- 11. The Proposed Class Representative's legal representatives and address for service in the United Kingdom are: Mishcon de Reya LLP, Africa House, 70 Kingsway, London, WC2B 6AH (Attention: Rob Murray/Natasha Pearman). The Proposed Class Representative's counsel are: Ronit Kreisberger Q.C., Alison Berridge and Jack Williams (all of Monckton Chambers). Further information about the Proposed Class Representative's legal representatives and counsel is set out in the Witness Statement of Rob Murray [**RPM Bundle/1/3-12**] at §§44 – 46.

### **The Proposed Defendants (Rule 75(2)(d) and 75(7))**

- 12. The Proposed Defendants, BT Group PLC and British Telecommunications PLC ("**BT**"), ~~is a~~ are public limited companies~~y~~ with registration numbers 04190816 and 01800000

---

<sup>3</sup> The address for the Proposed Class Representative will be provided to the Tribunal and to the Proposed Defendants, if required. The Applicant requests, in accordance with Rule 101 of the Rules, for the confidential treatment of his private address in any documents filed or served in the proceedings to be treated as confidential by any party to whom it has been or shall be disclosed. The Proposed Class Representative can otherwise be contacted via his legal representatives.

respectively and the same registered office of 81 Newgate Street, London, EC1A 7AJ. BT ~~is a~~are communications providers within the meaning of section 32(4) of the Communications Act 2003 (“CP”).

12A. As for the relationship between the Proposed Defendants and their joint and several liability for the Infringements (as defined below):

- (a) British Telecommunications is a wholly owned subsidiary of BT Group Plc and has been for the entirety of the Claim Period.
  - (b) British Telecommunications PLC is the principal operating subsidiary of BT Group Plc.
  - (c) The BT Group plc Board has ultimate responsibility for the management of the group and until on or around 2 October 2017, the Operating Committee of BT Group plc was the key management committee, which monitored the group’s financial, operational and customer service performance and had cross-business oversight of BT’s lines of business; and reviewed the group’s key risks and considered the potential threats and opportunities to the business. From on or around 2 October 2017, the Operating Committee was replaced by the Executive Committee (the "ExCo").
  - (d) Correspondence between Ofcom and BT relating to the BT Commitments (as defined below) was addressed to Marc Allera of BT Group. Mr Allera is CEO of BT Consumer. As CEO of BT Consumer, he was/is on the ExCo Board of BT Group Plc.
  - (e) In the premises, BT Group Plc had the ability to exercise and/or did in fact exercise decisive influence over the conduct of BT Telecommunications PLC during the Claim Period.
13. The legal representatives of the Proposed Class Representative have been informed that Simmons & Simmons represents the Proposed Defendants and is instructed to accept service of these proceedings on behalf of the Proposed Defendants.

### **Application for a Collective Proceedings Order (Rule 75(2)(e)-(f))**

14. The Proposed Class Representative is making, via this Claim Form, an application for a CPO. The application relates to opt-out proceedings on behalf of consumers.<sup>4</sup>

### **Alternative Dispute Resolution (Rule 75(2)(g))**

15. At the date of filing this Claim Form, the parties have not yet used an alternative dispute resolution procedure. In his letter before action of 14 November 2020 [**RPM Bundle/3/25-30**] and further letters of 27 November 2020 [**RPM Bundle/5/35-39**] and 8 January 2021 [**RPM Bundle/8/46-48**], the Proposed Class Representative made it clear that he is willing to engage in or explore alternative dispute settlement discussions (in accordance with the Rules on Collective Settlements); but he also explained to BT that, in order to do so meaningfully, on an informed basis, and to secure a fair settlement for all Members of the Proposed Class, the Proposed Class Representative must be satisfied that he has received sufficient disclosure from BT concerning the true extent and level of excessive pricing, rather than basing it on estimates from non-confidential versions of the Provisional Conclusions and Statement. See, further, the Witness Statement of the Proposed Class Representative's legal representative, Rob Murray (Partner, Mishcon de Reya LLP) [**RPM Bundle/1/3-12**].

### **Real prospect of success (Rule 75(2)(h))**

16. The Proposed Class Representative believes that the claims which he has sought to combine in the collective proceedings have a real prospect of success (see §§60 - 61 of his Witness Statement [**JLP Bundle/1/19**]).
17. In particular, whilst the Claims are of a standalone nature, they rely heavily on the facts and findings set out in the 2017 Review.
18. Ofcom provisionally found that BT had significant market power, was a price-leader, and charged prices which were above the competitive level so as to give rise to serious

---

<sup>4</sup> As discussed further below, while the services concerned are aimed at residential customers i.e end consumers, a small proportion of customers buying those residential services may in fact have been small businesses. Where the term "consumer" is used in this Claim Form, it is intended to covers both categories of customer unless otherwise stated.

consumer detriment. See the Provisional Conclusions [**Annex 5**] [**CF Bundle/6/369-486**], at §1.16 and §1.17:

“...BT has significant market power (i.e. has a dominant position) in the market for standalone landline telephone services. This allows it to act in setting the terms and conditions of sales in this market without facing significant competitive constraint from other providers. This is particularly true when it comes to setting prices.

BT benefits from a very high market share; over 70%, in a market where many customers are not actively engaged. This in turn has allowed BT to act as a price leader, steadily increasing the price of standalone landline services. Further, given the difficulty in winning new customers from BT, the range of choice from competing providers has declined as prices have increased.”<sup>5</sup>

19. As Ofcom stated that “customers purchasing voice-only services – often elderly people who have remained with the same provider for many years – are getting poor value for money” whereas customers “who buy bundled services are getting more for their money than ever before” (Statement, §1.2) [**CF Bundle/4/260**]. Ofcom stated that the customers affected “have less choice of suppliers and are not benefiting from strong price competition or promotional offers. Their loyalty to their provider is not being rewarded but is instead leading to ever higher prices” (ibid.).<sup>6</sup>
20. Ofcom intended to impose direct price control to reduce monthly line rental prices by £5-7 for both sets of customers (i.e. broadly, the two Proposed Sub-classes): see Provisional Conclusions [**Annex 5**] at §§1.21 – 1.23 and 8.32 – 8.34 [**CF Bundle/6/377**] and [**CF Bundle/6/470**].
21. Ultimately, (and presumably in order to avoid direct price control by Ofcom) BT offered voluntary commitments involving, amongst other things, a 3-year commitment to reduce line rental prices by £7 per month to around a million residential BT Voice Only Customers (i.e. broadly only one of the Proposed Sub-classes), and offered certain engagement remedies for BT Split Purchase Customers (i.e. the other Proposed Sub-

---

<sup>5</sup> See, also, the Statement [**Annex 3**] at §§1.12 (“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”); 2.12, 3.6, 3.34 – 3.48, 3.53 (“BT also accounts for a very high market share, 97% of split-purchase lines”) and 3.54 (“BT’s position in the markets for voice-only access and calls is consistent with the position we set out in the February Consultation for standalone fixed voice services more generally.”)

<sup>6</sup> See also Statement §§3.5 and 4.24 in relation to a category of customers known as Split Purchase Customers, addressed below.

class). The BT Commitments [**Annex 3**] [**CF Bundle/4/284-300**] are described in detail at §§58 - 62 below.

22. On the basis of his own analysis of the publicly available data arising out of the 2017 Review, the Parker Report has concluded that, during the applicable Claim Period, BT holds/held a dominant position on relevant markets for standalone residential landline services, and that it abused its position in those markets by charging excessive prices, thereby infringing the Chapter II Prohibition.
23. The Proposed Class Representative therefore believes that (i) the prices for standalone residential landline services which form the subject-matter of the Claims infringe the Chapter II Prohibition and (ii) the infringing prices caused Members of the Proposed Class to sustain losses. Whilst the precise magnitude and effects of the unlawful overcharges will be the subject of detailed disclosure, expert reports and factual evidence (and will be tested at trial, including by cross-examination), the Proposed Class Representative believes on the basis of Ofcom's findings and the Parker Report that the Members of the Proposed Class have a real prospect of recovering damages in the Claims.

## **PART II: FACTUAL BACKGROUND TO THE 2017 REVIEW AND OFCOM'S FINDINGS**

### **Regulatory framework**

24. Ofcom is the independent regulator responsible for regulating communication services in the UK. Under the Communications Act 2003, Ofcom is responsible for implementing the market review process established under European law. The following is a summary of the regulatory framework under which Ofcom's 2009 and 2017 reviews (discussed below) were conducted.
25. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services requires national regulatory authorities to carry out reviews of competition in communications markets to ensure that regulation remains appropriate and proportionate in the light of changing market conditions.
26. Each market review normally has three stages, namely:

- (a) identification and definition of the relevant markets (Communications Act 2003, s.79);
  - (b) assessment of competition within in each relevant market, in particular whether any undertakings have significant market power (“SMP”) (Communications Act 2003, s.79). SMP is defined as a position which amounts to or is equivalent to dominance of the market (Communications Act 2003, s.78); and
  - (c) where there is a finding of SMP, imposition of appropriate regulatory obligations (Communications Act 2003, ss.87-93).
27. In doing so, Ofcom is required to take utmost account of the Commission’s 2002 guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.<sup>7</sup>

### **Regulatory action by Ofcom pre-2017**

28. BT has been subject to a variety of regulation since privatisation in 1984. In 2003, Oftel (the predecessor regulator to Ofcom) carried out the first review of *retail* landline services (i.e. services provided to end customers), including residential and business services, under the above regulatory framework and imposed certain *ex ante* regulation including (i) no undue discrimination requirements; (ii) certain price publication and notification requirements and (iii) cost accounting and accounting separation requirements.<sup>8</sup> At the stage, Ofcom also confirmed the regime of direct retail price controls which had been in place since 2002,<sup>9</sup> but they were not renewed on their expiry in 2006.<sup>10</sup>

---

<sup>7</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03). Framework Directive 2002/21/EC Recital 28, Arts 15(3) and 16(1).

<sup>8</sup> Ofcom, “Fixed Narrowband Retail Services Markets: Identification and analysis of markets, making of market power determinations and setting of SMP conditions, Final Explanatory Statement and Notification”, 28 November 2003.

<sup>9</sup> Oftel, “Protecting consumers by promoting competition: Oftel’s conclusions”, 20 June 2002.

<sup>10</sup> Ofcom, “Retail Price Controls: Explanatory Statement”, 19 July 2006.

29. In 2009, Ofcom conducted a review of “Fixed Narrowband Retail Services Markets”<sup>11</sup> under s.79 Communications Act 2003 (“**the 2009 Review**”) [Annex 11] [CF Bundle/12/664-767]. As part of that review, Ofcom concluded that, following the adoption of various measures which Ofcom had taken to enhance competition in retail markets,<sup>12</sup> BT no longer had SMP in landline telephone services. See §§66-70 of the Parker Report [Annex 2] [CF Bundle/3/113-114].

### **Ofcom’s 2017 Review**

30. On 1 December 2016, Ofcom announced<sup>13</sup> a review under s.79 of the Communications Act 2003 of “the market for standalone landline telephone services” (“**the 2017 Review**”<sup>14</sup>). In the announcement, Ofcom explained that the review was prompted by a concern that people who bought landline services on a standalone basis were not being served well by the market. Ofcom published its Provisional Conclusions on 28 February 2017, and sought responses by 9 May 2017.
31. The 2017 Review concerned the provision of **Standalone Fixed Voice Services (“SFV Services”)** which, Ofcom explains, comprise residential landline telephone services which are not sold as part of a bundle with non-voice services,<sup>15</sup> as addressed in more detail below.
32. The Proposed Class Representative reserves his right to rely on all Ofcom documents pertaining to the 2017 Review at trial for their full meaning and effects. The following paragraphs contain a summary of the main facts and findings made by Ofcom in the 2017 Review from the public, non-confidential versions of the documents.

---

<sup>11</sup> Ofcom, “Fixed Narrowband Retail Services Markets: Identification of markets and determination of market power”, 15 September 2009. This covered analogue and digital (ISDN) telephone lines, and calls for consumers and businesses.

<sup>12</sup> See Ofcom’s 2009 Review, §1.7 [CF Bundle/12/668].

<sup>13</sup> [Annex 9] [CF Bundle/10/625-631].

<sup>14</sup> Ofcom’s 2017 Review encompasses the Provisional Conclusions [Annex 5] [CF Bundle/6/369/486] and the Statement [Annex 3] [CF Bundle/4/256-306], which are key documents in relation to the Claims.

<sup>15</sup> Provisional Conclusions, §1.15 [Annex 5] [CF Bundle/6/376-377] and see Glossary [Annex 6] [CF Bundle/7/603-695].

## Provisional Conclusions

### *Relevant markets: products, geography and customer groups*

33. Ofcom defined two distinct product markets in relation to the provision of SFV Services:
- (a) the market for the provision of access *i.e.* line rental (“**the SFV access market**”);  
and
  - (b) the market for the provision of calls (“**the SFV calls market**”).<sup>16</sup>
34. In defining the material scope of each of the SFV access market and SFV calls market, Ofcom excluded “landline telephone services when they are provided as part of a bundle (landline telephone and broadband or landline telephone, broadband and pay-TV)”.<sup>17</sup>
35. Ofcom refers to three types of bundles: multi-play, triple play and dual play, as follows:
- “CPs offer fixed voice services bundled with other communications services e.g. broadband, pay TV or mobile. These multi-play bundles are usually sold at a discount compared to the price of purchasing the individual components separately from different providers (or the same provider). ... dual-play (voice and broadband) and triple-play (voice, broadband and pay TV) bundles are particularly common. ...”<sup>18</sup>
36. This Claim Form uses the term “Dual Play” to refer to a bundle comprising voice and broadband services.
37. Further, as regards the material scope of each of the SFV access market and SFV calls market, Ofcom provisionally excluded:
- (a) BT Basic, a product available only to customers on specific low income government benefits;<sup>19</sup>

---

<sup>16</sup> Provisional Conclusions, §§1.15 and 3.3 [Annex 5] [CF Bundle/6/376-377] and [CF Bundle/6/386].

<sup>17</sup> Provisional Conclusions, §1.15 [Annex 5] [CF Bundle/6/376-377]

<sup>18</sup> Provisional Conclusions, §3.30 [Annex 5] [CF Bundle/6/392]

<sup>19</sup> Provisional Conclusions, §§3.50 to 3.53 [Annex 5] [CF Bundle/6/398]. See §88 below for an explanation of BT Basic.

- (b) services available only to businesses;<sup>20</sup> and
  - (c) mobile services on the basis that they “remain at most a complementary service for most consumers.”<sup>21</sup>
38. Ofcom defined the relevant geographic area as the UK excluding the Hull area.
39. Ofcom went on to identify the following two distinct groups of customers taking SFV Services as follows:
- (a) **“Voice Only Customers”**: SFV Customers who do not also buy a fixed broadband service (whether from the same provider or different providers); and
  - (b) **“Split Purchase Customers”**: SFV Customers who buy fixed broadband but not as part of a bundle with SFV services. As set out above, customers buying dual play, triple play or multi play bundles are excluded from the scope of each of the SFV access market and SFV calls market.
40. Ofcom further distinguished between two groups of Split Purchase Customers<sup>22</sup> as follows:
- (a) Split Service Customers: SFV Customers “who buy fixed broadband from the same provider as their SFV service (but not as part of a bundle)” (emphasis added); and
  - (b) Split Supplier Customers: SFV Customers “who buy fixed broadband from a different provider than their SFV service” (emphasis added).
41. The various customers groups are represented in Ofcom’s Figure 3.1 which, for convenience, is reproduced below.

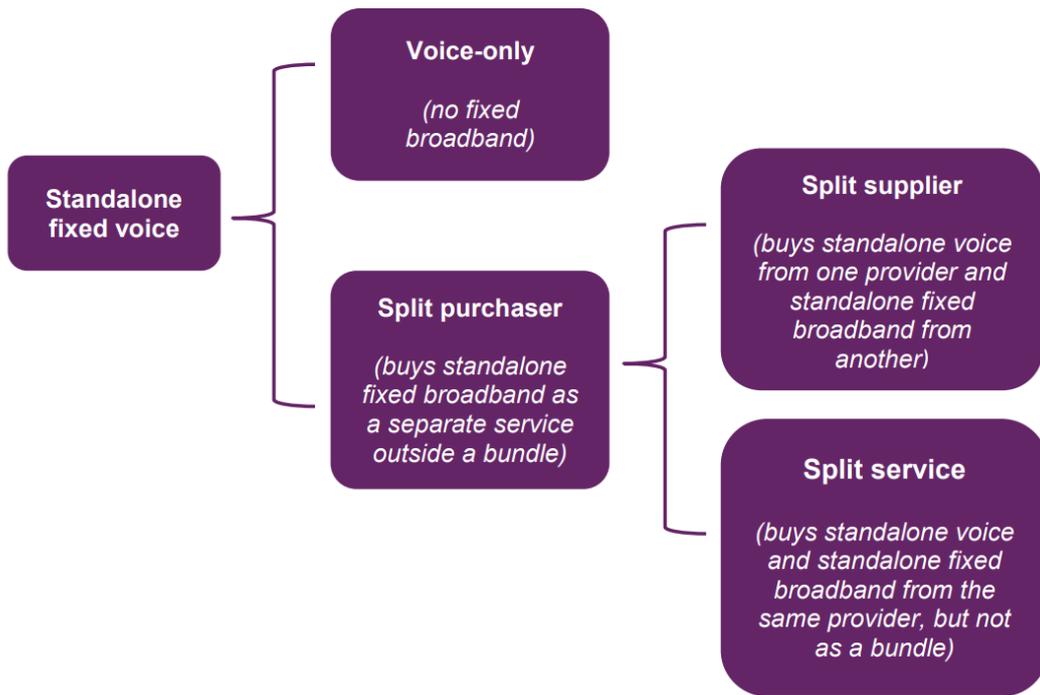
---

<sup>20</sup> Provisional Conclusions, §§3.54 to 3.56 and 3.106 [Annex 5] [CF Bundle/6/398-399] and [CF Bundle/6/407].

<sup>21</sup> Provisional Conclusions, §§3.57-3.62, 3.86-3.100 [Annex 5] [CF Bundle/6/399-400] and [CF Bundle/6/404-406].

<sup>22</sup> Provisional Conclusions, §3.21.2. [Annex 5] [CF Bundle/6/389].

**Figure 3.1: Customer groups within SFV<sup>30,31</sup>**



42. Ofcom estimated that, at the time of the Provisional Conclusions, there were around 2.9 million SFV Customers, which accounted for 11% of total residential landline customers. Of those, around 1.7 million were Voice Only Customers and 1.2 million were Split Purchase Customers.<sup>23</sup>
43. Ofcom provisionally concluded that it was not necessary to distinguish between Voice Only and Split Purchase Customers for the purposes of defining the SFV access market, given that the two customer groups “purchase identical products under identical terms.”<sup>24</sup> Ofcom went on to consider whether there was scope for BT and other CPs to price discriminate between the two customer groups, which might suggest that they are in different markets. At that stage, Ofcom treated both groups as in the same market as they had so far been charged the same prices for SFV Services.
44. In relation to the nature and characteristics of Voice Only and Split Purchase Customers (together, SFV customers or standalone landline customers), Ofcom provisionally found:

<sup>23</sup> Provisional Conclusions, §1.12 [Annex 5] [CF Bundle/6/376].

<sup>24</sup> Provisional Conclusions, §§3.44 to 3.49 [Annex 5] [CF Bundle/397].

- (a) “Standalone landline customers generally do not engage with the market: 70% of standalone landline customers have never switched provider or considered doing so”: §1.13, Provisional Conclusions [**Annex 5**] [**CF Bundle/6/376**];
- (b) “SFV customers have lower levels of engagement (9%) and lower annual switching rates (3%), compared to dual-play customers (20% and 12%, respectively). Further, a higher proportion of SFV customers reported that they have never switched their landline supplier (70%) compared to dual-play customers (45%)”: A8.147 in Ofcom’s Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/576**];
- (c) “BT SFV and BT voice-only customers are less engaged compared to customers of other CPs. Only 5% of BT SFV customers are classified as engaged, compared to 19% of other CP SFV customers.”: A8.156 in Ofcom’s Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/578**];
- (d) Standalone landline customers “tend to be older and less likely to shop around for a better deal. Approximately 43% of standalone landline customers are at least 75 years old, and 35% live in DE socio-economic group households (for comparison, 4% of dual-play customers are 75 or over, and 20% are in DE group households)”: §1.13, Provisional Conclusions [**Annex 5**] [**CF Bundle/6/376**]. See also §A8.143 in Ofcom’s Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/572-573**],<sup>25</sup>
- (e) “35% of SFV customers live in DE socioeconomic group households, which is substantially higher than the equivalent proportion for dual-play customers (20%). In terms of customer segments, the proportion of voice-only customers who live in DE socioeconomic group households (41%) is materially higher than the

---

<sup>25</sup> “S135 responses indicate that 43% of SFV customers are aged 75 years old or over (12% are aged between 75 and 79, 15% are aged between 80 and 84, and 16% are aged 85 or over). This is substantially higher than the equivalent proportion for dual-play customers (4% according to the Ofcom Technology Tracker, 2016 H2) and for the UK population over 15 years old (10% according to the ONS)”; and “The Ofcom Technology Tracker (2016 H2) study suggests that: 34% of SFV customers are aged 75 years old or over. This is lower than the 43% figure based on S135 responses. We rely on the 43% figure as it is based on actual customer information held by CPs, rather than on survey responses. The Technology Tracker also suggests that voice-only customers tend to be older (47% are aged 75 or over) than split-supplier customers (4% are aged 75 or over, as is the case for dual-play customers)”.

equivalent proportion of split-supplier customers (21%). The high proportion of DE is partially explained by the fact that pensioners are automatically classified as living in E socioeconomic group households under the National Readership Survey's classification system.” §A8.143 in Ofcom's Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/572-573**]; and

- (f) “71% of SFV customers indicated they are not working, which is materially higher than the equivalent proportion for dual-play customers (35%). In terms of customer segments, 81% of voice-only customers indicated they are not working which is markedly higher than the equivalent proportion for split supplier customers (45%).” §A8.143 in Ofcom's Provisional Conclusions Annexes, 28 February 2017 (non-confidential) [**Annex 6**] [**CF Bundle/7/572-573**].

*Provisional findings on SMP*

45. Ofcom provisionally concluded that:

- (a) BT had SMP in the SFV access market in the UK (excluding the Hull Area) based amongst other things on: BT's market share of at or above 79% (Provisional Conclusions, §4.27); the high cost of acquiring customers; evidence that BT acted as a price leader; BT's profitability; and the lack of countervailing buyer power (section 4) [**CF Bundle/6/413-430**].
- (b) BT had SMP in the SFV calls market in the UK (excluding the Hull Area) based amongst other things on: BT's market share; the high cost of acquiring customers; and BT's profitability (section 5) [**CF Bundle/6/431-437**].

*Provisional findings on consumer detriment*

46. While Ofcom considered that consumers buying bundled products had benefitted from competition, it was concerned that:

“... competition is not benefiting standalone voice customers (i.e. those that do not purchase bundled products) to the same extent. There are currently 2.9 million households which take voice services outside a bundle,

representing 11% of all residential landline users (i.e. including those that purchase landline services in a bundle). Whilst the number of such customers is declining over time, it is nevertheless likely to remain significant for the foreseeable future.

... these customers have been progressively exposed to increasing line rental prices since 2010. This has been occurring despite wholesale charges for products used to provide line rental falling by up to 26% in real terms...

While some of the price increases may be due to rebalancing prices as fixed voice call revenue falls, declining wholesale costs suggest that CPs serving this market have been increasing their profitability.

We are particularly concerned that this trend affects a significant number of consumers who are elderly... over half of these consumers are over 70... Moreover, this group of consumers is generally more disengaged; Ofcom research has shown that 71% of consumers who use standalone landline services have never switched providers or considered doing so. We are concerned that these customers are receiving poor value for money given the rising line rental charges which they face.”<sup>26</sup>

47. Ofcom identified two types of consumer detriment: (i) direct effects and (ii) indirect effects.
48. In relation to direct effects, Ofcom considered the extent to which BT’s SFV services were above the competitive level, taking into account its assessment of BT’s profitability in the SFV access and calls markets and the profit margins which it identified. The relevant data on BT’s profitability is redacted and the Proposed Class Representative reserves his right to amend this section of the Claim Form following disclosure of the redacted material. In the light of that assessment, Ofcom provisionally concluded that BT’s prices were approximately £8-10 per line per month above the level of its costs and £5 to £7 per line per month above a level defined using competitive benchmarks.<sup>27</sup>
49. In relation to indirect effects, Ofcom stated:

“Competition can deliver a number of consumer benefits such as lower prices, more choice, better quality and innovation. Competition in the provision of SFV services could, for example, deliver benefits in the form of

---

<sup>26</sup> See §§2.2 – 2.7 in the Provisional Conclusions [Annex 5] [CF Bundle/6/379-380]. The Proposed Class Representative relies on those passages in full.

<sup>27</sup> Provisional Conclusions, §6.4 [Annex 5] [CF Bundle/6/438], referencing the analysis at Section 8 and Annex 5.

product differentiation by reference to service features (e.g. reliability of the connection), customer and add-on services. Consumers could also benefit from competition in the provision of different call packages and inclusive call allowances. As a result of the lack of competition in the market, reflected in BT's SMP, consumers are deprived of the benefits that such competition would bring."<sup>28</sup>

*Ofcom's proposed remedy*

50. Ofcom provisionally decided to impose a price control remedy in the form of a price reduction to BT's charges for SFV Services "in order to protect consumers from prices which are above the competitive level".<sup>29</sup> Ofcom proposed "that both sets of consumers purchasing SFV services [i.e. broadly, the two Proposed Sub-classes] would be included in a price control": Provisional Conclusions, §8.34. Specifically, Ofcom (provisionally) considered that a reduction to the prices paid by customers to BT each month for line rental was necessary.
51. Ofcom considered a number of options in order to determine the size of the monthly line reduction. One such option was to reduce BT's line rental prices to a cost-based level, which would result in a reduction of between £8 and £10 (including VAT) per line per month (§8.17). But Ofcom considered that such a reduction would be highly likely to make it uneconomic for other providers to compete in offering SFV Services, due to the substantial customer acquisition costs that they face (§8.18).
52. Accordingly, in order to understand how much it could reduce prices by and still expect competition to emerge, Ofcom took account of a number of different measures in order to estimate a competitive benchmark (§8.19) set out below:
  - (a) BT's 2009 profitability for its SFV Services (§§8.20 to 8.28);
  - (b) BT's profitability, at the time of the Provisional Conclusions, in the dual play market (§§8.22 to 8.23);

---

<sup>28</sup> Provisional Conclusions §6.7 [Annex 5] [CF Bundle/6/439].

<sup>29</sup> Provisional Conclusions, §8.30 [Annex 5] [CF Bundle/6/469].

- (c) The profitability of other CPs offering retail voice services (although Ofcom had some concerns about the robustness of its estimates and therefore treated the results of its analysis with caution (§§8.24 and 8.25); and
  - (d) A discounted cash flow analysis designed to establish what level of price cut could be imposed but retain the incentive for rivals to compete for providers (§§8.26 to 8.28).<sup>30</sup>
53. Ofcom provisionally concluded that a price cut of between £5 and £7 (including VAT) per line per month would allow profitability at a level that would be consistent with competition developing (§8.30); and would significantly reduce the direct customer detriment attributable to BT’s pricing behaviour (§9.6).
54. Ofcom proposed a three-year term for the price control which would give consumers and CPs “certainty over BT’s charges over the medium term” (§8.31).
55. Ofcom considered whether there was any reason to exclude Split Purchase Customers from the proposed price control (notwithstanding its finding on market definition at §43 above), as follows:

“Both sets of consumers purchase the same SFV products and therefore, as we noted in Section 3, they both face the same detriment from the prices of SFV services being above the competitive level. Our provisional conclusion in Section 3 is that both of these sets of consumers are included in the same SFV markets. These provide reasons to include both sets of consumers in any price control.

Nevertheless, we have also considered whether there is a reason to exclude split purchasers from any price control. One possible reason is the potential for engagement remedies to be more effective in promoting competition for split purchasers than for voice-only consumers. Compared to voice-only customers, split purchasers have the added benefit of using the internet to compare and switch between products and CPs. In addition, there are many CPs offering competitive dual-play packages which split purchasers could adopt. However, even if, assisted by these circumstances, engagement remedies proved to be effective, in the absence of a price control, consumers who remain split purchasers are likely to continue to suffer detriment from

---

<sup>30</sup> Ofcom also noted that BT used its Home Phone Saver product as a retention tool where it may lose customers to competitors. The product therefore provided an indication of the price cut which BT was willing to offer commercially where it perceived the threat of competition (§8.29).

BT's prices for SFV services being above cost in the significant period of time before the implementation of such remedies. Therefore, we propose that both sets of consumers purchasing SFV services would be included in a price control." (§§8.33 – 8.34)

56. In the light of the above, Ofcom proposed a price control in the following terms:<sup>31</sup>

"Specifically, we propose to set a three-year retail price control on BT's standalone fixed voice services of the following form:

An initial one-off price reduction of the line rental by between £5 and £7 per month and controls on line rental in years 2 and 3 of between CPI-0 and CPI+2.5%;

A CPI-0 basket control on all other core existent standalone fixed voice services available to residential customers' charges in each year (the basket will also include the line rental in years 2 and 3 though subject to a sub-cap to avoid significant rebalancing between call charges and the line rental, which might harm consumers who make fewer calls)."

57. Ofcom also proposed to impose obligations on BT: (i) to cooperate with Ofcom in the testing or trialling of different measures to provide information to its customers, and - if justified in the light of that evidence - (ii) to implement measures in the manner and form as Ofcom may direct.<sup>32</sup>

#### BT's proposed Commitments

58. On 24 October 2017, BT put forward a voluntary proposal in relation to the 2017 Review, presumably in order to avoid *ex ante* regulation involving mandatory price control by Ofcom ("**the BT Commitments**").<sup>33</sup> The BT Commitments were submitted following "discussions between BT and Ofcom": see BT letter to Ofcom of 24 October 2017 [Annex A to the Statement] [**Annex 3**] [**CF Bundle/4/285**]. The Proposed Class Representative has not had access to records of those discussions and reserves the right to amend this Claim Form following their disclosure.

---

<sup>31</sup> §9.3.

<sup>32</sup> Provisional Conclusions, §9.5 [**Annex 5**] [**CF Bundle/6/479**].

<sup>33</sup> Published as part of the Statement [**Annex 3**] [**CF Bundle/4/284-300**].

59. The BT Commitments are at [**Annex 3**] [**CF Bundle/4/284-300**]. The Proposed Class Representative will rely on them at trial for their full meaning and effects. A summary of the key provisions is set out below.
60. BT offered a set of price commitments (referred to below as “**the Price Commitments**”) [**Annex 3**] [**CF Bundle/4/287-288**] comprising:
- (a) a forward-looking price reduction from 1 April 2018 of £7 (including VAT) per line per month on “Line Rental Services” for only its “Fixed Voice-Only Customers” where:
    - (i) Line Rental Services was defined as standard line rental and line rental plus.; and<sup>34</sup>
    - (ii) Fixed Voice-Only Customers was defined as “residential customers who purchase a Line Rental service under the BT brand and who do not also have a fixed broadband service provided to them, whether by BT or another Communications Provider”;
  - (b) an analogous reduction to prices for Line Rental Saver; and
  - (c) a commitment to cap increases across a basket of access and calls charges in line with the Consumer Prices Index for three years (i.e. until 31 March 2021).
61. The following categories of BT’s customers were excluded from the Price Commitments:
- (a) BT Basic and Home Phone Saver customers;<sup>35</sup>
  - (b) Split Purchase Customers;<sup>36</sup>

---

<sup>34</sup> See §87 below for a description of line rental products offered by BT.

<sup>35</sup> See §88 below for a description of these products.

<sup>36</sup> BT Commitments, §2.2.2 [**Annex 3**] [**CF Bundle/4/288**]: BT undertook to exclude customers it believed to be Split Purchase Customers from the price reduction but to give such customers an opportunity to opt back in if BT’s information is incorrect.

- (c) Business customers;<sup>37</sup> and
- (d) Customers not supplied by BT’s “Consumer Business Unit”. This category includes, for example, customers of Plusnet plc and EE Limited.<sup>38</sup>

62. BT also offered:

- (a) “**Reporting Commitments**” according to which BT would, amongst other things, provide annual compliance statements to Ofcom until the end of BT’s financial year in 2021; and
- (b) “**Commitments to increase engagement**” whereby BT offered:
  - (i) to work with Ofcom to identify the form of communication with the best prospect of success in increasing engagement for BT Voice Only Customers; and
  - (ii) to send an annual statement to BT Split Purchase Customers detailing, amongst other things their total spend, potential cost savings and information on switching to another CP. No other commitments were offered in relation to BT Split Purchase Customers.

### The Statement

63. On 26 October 2017, Ofcom published the Statement [**Annex 3**] [**CF Bundle/4/256-306**]. The Proposed Class Representative relies on the Statement for its full meaning and effects. The key facts and findings are summarised below.

64. Ofcom reiterated its concerns regarding the detriment suffered by SFV Services customers including that:

---

<sup>37</sup> BT Commitments, §2.2.3 [**Annex 3**] [**CF Bundle/4/288**]: BT undertook to “exclude any standalone voice customers from the price reduction that it has reason to believe are business customers. Such customers will be provided with an opportunity to opt back in if BT’s information is incorrect.”

<sup>38</sup> See BT Commitments, Recital C, footnote 2 and Annex A, §§ 2.5, 2.8 and 2.9 [**Annex 3**] [**CF Bundle/4/287-290**].

- (a) Customers purchasing voice-only services – often elderly people who have remained with the same provider for many years – are getting poor value for money (§1.2).
- (b) Line rental prices have increased significantly since 2009 (§1.3).
- (c) Competition is not benefiting customers purchasing landline telephone services on a standalone basis to the same extent as those purchasing in a bundle (2.5). In particular:
  - (i) “these customers have been progressively exposed to increasing line rental prices since 2009. This has been occurring despite wholesale charges for products used to provide line rental falling by up to 27% in real terms.” (§2.6)
  - (ii) Those increases have “a particular impact on elderly customers... over 40% of voice-only customers are over 75. Moreover, this group of consumers is generally more disengaged. Ofcom research has shown that 77% of voice only customers have never switched providers or considered doing so. These customers are receiving poor value for money given the rising line rental charges which they face” (§2.8)
  - (iii) “Split-purchase customers pay materially more...than they would pay for functionally equivalent dual-play services ...” (§3.51).
  - (iv) “Voice-only customers... have a very limited set of competitive choices, are highly disengaged from the market and have a more limited range of tools, in any event, through which to compare service options (as they generally have less access to the internet” (§4.6); and “low consumer engagement is one of the factors that has contributed to cementing BT’s position in the market” (§4.18).<sup>39</sup> See also §1.11 and §2.8 of the Statement on lack of

---

<sup>39</sup> The Statement cites Ofcom, 2016, The Consumer Experience 2015, Research Annex, which states at 3.4.2: “The proportion of consumers purchasing a fixed line as a stand-alone product was unchanged in 2015 (31%, the same as in 2014), following a continued decline over several years as consumers moved to bundled offers. At an overall level, the proportion of consumers classified as ‘engaged’ in the fixed-line market is also unchanged since 2014, at 14%. However, half as many consumers in the standalone fixed-line market remain ‘engaged’ (8%) compared to those who bundle this service (17%). Lower engagement among stand-alone purchasers may be linked to the older age profile of this group of fixed-line customers;

customer engagement [Annex 3] [CF Bundle/4/262] and [CF Bundle/4/267].<sup>40</sup>

- (v) Only 8% of SFV Services customers are classified as “engaged” according to Ofcom’s Switching Tracker 2017 (see Figure 9 of Ofcom’s Consultation on end-of-contract and out-of-contract notifications dated 31 July 2018 [Annex 12] [CF Bundle/13/802]).

65. Ofcom’s detailed findings on market definition are addressed in the Parker Report [Annex 2] at §§85-88 [CF Bundle/3/117-119]. In summary:

- (a) Ofcom found, contrary to its original approach in the Provisional Conclusions, that Voice Only Customers and Split Purchase Customers are in separate markets for the purchase of SFV Services (§§1.10, 3.13 – 3.22 of the Statement [Annex 3] [CF Bundle/4/262] and [CF Bundle/4/271-273]) given, in particular, that:

- (i) “providers of standalone telephone services on Openreach’s network are in fact able to distinguish which of their customers take voice-only and which are split purchasers”;
- (ii) therefore, providers could in theory price discriminate between the two groups even though they had not done so in the past; and
- (iii) by offering the Price Commitments, BT had shown that in future it could and was willing to identify Voice Only Customers and charge them different prices from Split Purchase Customers.

- (b) As regards the supply of SFV Services to Voice Only Customers, Ofcom found that:

- (i) SFV access and SFV calls comprise different markets, even though consumers typically buy SFV access and SFV calls together. But whether or

---

four in ten (40%) are aged 65+, and consumers in this age group are more likely than other age groups to be classified as inactive.”

<sup>40</sup> Voice Only Customers “generally do not engage with the market”, “tend to be older” and are “less likely to shop around for a better deal”.

not access and calls were treated as part of the same market did not fundamentally affect Ofcom’s competition assessment (§3.30-3.32 of the Statement);

- (ii) Dual play services are not in the same market as SFV access services bought by Voice Only Customers. In particular, Ofcom found that “BT did not provide any evidence to contradict our assessment that the presence of dual-play offers had not constrained standalone fixed voice prices to competitive levels. We have updated our analysis of price trends for standalone fixed voice and ADSL<sup>41</sup> services and the updated figures continue to support our position.” (§§3.23 to 3.29 of the Statement);
- (iii) the geographic scope of the relevant market was the UK excluding the Hull Area (§3.33 of the Statement); and
- (iv) the following products were not within the relevant market:
  - (i) BT Basic;
  - (ii) Business SFV access services; and
  - (iii) Mobile services.<sup>42</sup>

66. Ofcom found that BT had SMP in each of the markets for SFV access and SFV calls by Voice Only Customers (§3.34 to 3.48 of the Statement), concluding as follows:

“Overall, BT enjoys a significant market share within the markets for voice-only access and calls which have persisted over time. While competition was more intense in the early part of the century[, w]ith the movement of the focus of the market to bundles the market has become significantly more static. Competitors face significant barriers to expansion within the market and BT has been able to increase prices above the competitive level. In these circumstances, we do not consider that BT faces any significant constraints

---

<sup>41</sup> ASDL stands for Asymmetric Digital Subscriber Line and is the most commonly available type of broadband, delivered through BT’s copper network.

<sup>42</sup> Statement, §3.5 [Annex 3] [CF Bundle/4/270].

on its ability to act independently within the markets for the purchase of voice-only access and calls.”<sup>43</sup>

67. Ofcom concluded 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. We therefore consider that a significant price cut is important to alleviate the detriment suffered by voice-only customers... Like voice-only customers, split purchasers have suffered increases in line rental charges in recent years without significant offsetting benefits”.<sup>44</sup>
68. In relation to Split Purchase Customers, Ofcom:
- (a) reiterated its concerns that “Split-purchase customers pay materially more, for standalone voice and standalone broadband services, than they would pay for functionally equivalent dual-play services” (§3.51. See also §1.11,
  - (b) did not consider it necessary to proceed with a more formal market definition (or market assessment) exercise (§3.49);
  - (c) noted its findings in the Provisional Conclusions that SFV Services bought by Split Purchase Customers were not in the same market as Dual Play services, and that consultation responses had not provided evidence or arguments to lead it to change its view (§§3.50-3.52);
  - (d) noted that BT had a very high market share at 97% of Split Purchase lines, and that the declining and relatively small size of the market could make it difficult for providers of SFV Services to target Split Purchase Customers to encourage them to switch provider (§3.53);
  - (e) carried out some qualitative research, based on “a small and non-representative sample”, which suggested that “a more effective trigger for split purchase customers to increase their engagement could be through their broadband and/or TV package, rather than the landline” (§4.25); and

---

<sup>43</sup> Statement, §3.48 [Annex 3] [CF Bundle/4/277].

<sup>44</sup> Statement, §§1.12 – 1.14 [Annex 3] [CF Bundle/4/262-263].

- (f) decided on balance that it was “more appropriate to allow time for Split Purchasers to become more engaged, and potentially to switch to dual play where that is a better option for them, rather than including them in a price control at this stage” (§4.26).

69. Ofcom accordingly accepted the BT Commitments [**Annex 3**] [**CF Bundle/4/284-300**] would monitor their impact and consider further intervention if the consumer detriment on the part of Voice Only Customers remained unaddressed (§4.23 of the Statement).

### **Ofcom’s 2020 Review**

70. On 10 December 2020, Ofcom announced a consultation entitled “Protecting voice-only landline telephone customers” regarding the BT Commitments (due to expire on 31 March 2021) and BT’s offer of further voluntary commitments (“**the 2020 Review**”) [**Annex 10**] [**CF Bundle/11/632-663**]. The 2020 Review contains the following relevant statements:

- (a) in 2019, there were still 1.2 million Voice Only Customers, representing approximately 5% of total residential customers and the “overwhelming majority of voice-only landline customers take their service from BT, which has a share of over 75% of such customers” (§2.1), which share had increased from 69% in 2017;<sup>45</sup>
- (b) the providers reported that “the largest source of ceased voice-only services relates to the death of the bill payer” (§3.3);
- (c) “concerns arising from the 2017 review...remain relevant” (§2.3) and Ofcom “continue[s] to believe that price protection for voice-only customers remains necessary to address [its] previous concerns from our last review in 2017, which included lack of competition in the market and poor value for money for this group of customers” (pg. 2, and see also §§2.27 – 2.30);
- (d) levels of switching among Voice Only Customers “are low, particularly for BT customers. Voice-only customers also tend to be older, from lower socio-economic

---

<sup>45</sup> 2020 Review, §3.4.

grades, not working, and more financially vulnerable” (pg. 2 and see also §§3.9 – 3.13);

- (e) BT did not meet its voluntary commitments in 2018/19 as a result of a “modelling error” and BT made a charitable donation of £142k to recognise the impact of this error (§2.20); and
- (f) while the majority of Voice Only Customers benefited from the implementation of the line rental price reduction, there is little competition in the market for this group of consumers (§3.6).

71. Ofcom proposed to accept BT’s offer of new voluntary commitments for a period of five years in respect of all products and services for Voice Only Customers (including any new products or services for Voice Only Customers introduced during the 5-year period) made up of:

- (i) an inflation-based control (CPI+0%) on the basket of line rental and call charges for voice-only products (excluding EE, Plusnet and BT’s business products and/or services);
- (ii) an annual CPI+0% limit on prices for its Home Phone Saver product and a safeguard cap of CPI+2.5% for its line rental product; and
- (iii) a commitment to provide information to Ofcom on its compliance with the new commitments on an annual basis.

72. Ofcom also found that “an indicative range for the estimated benefit for customers [of the new voluntary commitments by BT] would be around £6m to £14m in the first year and benefits would increase each year of the commitment period. On average over the five year period [of the new commitments], customer benefits in these scenarios could be between £17m to £34m on an annualised basis” (§4.8).

73. The 2020 Review does not address or contain any assessment of SFV prices charged to Split Purchase Customers.

### **PART III: THE PROPOSED CLASS (RULE 75(3)(A)-(C))**

74. This part sets out the information and statements required to comply with Rule 75(3)(a)-(c), providing a description of the Proposed Class and Proposed Sub-classes and an estimate of their sizes.

#### **Description of the Proposed Class and Proposed Sub-classes (Rule 75(3)(a) and 75(3)(b))**

##### Overview of the Proposed Class and Proposed Sub-classes

75. The Proposed Class is defined as:

“all persons domiciled in the United Kingdom (except in the **Hull Area**) who, during the **Claim Period**, bought a **BT Standalone Fixed Voice Service** except for the **Excluded Services**” (referred to below as “**the Proposed Class**” or “**Proposed Class Members**” as appropriate).<sup>46</sup>

76. For these purposes:

- (a) **BT Standalone Fixed Voice Service** (referred to below as a “**BT SFV Service**”) means any residential landline calling plan service provided by BT, except for the Excluded Services, which (i) includes landline line rental and (ii) has not been sold as part of a bundle with broadband. For these purposes, a bundle refers to a contract, or two or more closely related, linked or interdependent contracts which, individually or together, include and require the purchase of broadband as well as the landline calling plan service.
- (b) **Excluded Services** means BT Basic and BT Home Phone Saver.
- (c) **Hull Area** means the area defined as the Licence Area in the licence granted on 30 November 1987 by the Secretary of State under Section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc.

---

<sup>46</sup> For the avoidance of doubt, all defined terms used in the remainder of this Claim Form are the defined terms set out in the Class Definition and explanation of those terms herein, unless otherwise stated.

77. The Proposed Class is split into two Proposed Sub-classes, namely:
- (a) **BT Voice Only Customers:** Members of the Proposed Class who, during the applicable Claim Period as defined below, bought a BT SFV Service but did not, at the same time, buy a broadband service, either from BT or any other provider.
  - (b) **BT Split Purchase Customers:** Members of the Proposed Class who, during the applicable Claim Period as defined below, have bought at the same time both (i) a BT SFV Service; and (ii) a broadband service, either from BT or any other provider.
78. The **Claim Period** means:
- (a) for residential BT Voice Only Customers, between 1 October 2015 and 1 April 2018 inclusive;
  - (b) for business BT Voice Only Customers, between 1 October 2015 and the date of the Tribunal's final determination of the Claims made by the Proposed Sub-class of BT Voice Only Customers or their earlier settlement (or settlement of any part thereof); and
  - (c) for BT Split Purchase Customers, between 1 October 2015 and the date of the Tribunal's final determination of the Claims made by the Proposed Sub-class of BT Split Purchase Customers or their earlier settlement (or settlement of any part thereof).
79. Defined terms used in the definition of the Proposed Class and the Proposed Sub-classes (i.e. those in bold font above) are set out in the Glossary to this Claim Form [**Annex 1**] [**CF Bundle/2/82-85**], and further explanation of relevant terms is given below. All definitions are the same as or consistent with those used by Ofcom<sup>47</sup> and BT.<sup>48</sup>

---

<sup>47</sup> See, for example, §1.12 and Figure 3.1 of the Provisional Conclusions [**Annex 5**] [**CF Bundle/6/376**] and [**CF Bundle/6/390**] and Annex A3 to the Statement [**Annex 3**] [**CF Bundle/4/303-305**].

<sup>48</sup> see, for example, §2.2 and Annex A to the BT Commitments [**Annex 3**] [**CF Bundle/4/288**] and [**CF Bundle/4/290-291**]

### Nature of the Proposed Class

80. Members of the Proposed Class have characteristics which suggest that many of them are in groups that are considered to be vulnerable.<sup>49</sup> As Ofcom noted, SFV Customers tended to be:
- (a) **elderly / older**: see §§44(d), 64(a) and (c), and 70(b) and (d) above. See also the Litigation Plan at §§3.10 – 3.15 [**JLP Bundle/2/42-43**], and the Notice and Administration Plan at §§27 – 29 [**JLP Bundle/2/69**];
  - (b) **in lower socio-economic groups**: see §§44(e) and (f), and §70(d) above. See also the Litigation Plan at §§3.16 – 3.19 [**JLP Bundle/2/43-44**] and the Notice and Administration Plan at §§24– 25 [**JLP Bundle/2/68**]; and
  - (c) **disengaged**: see §§44(a) – (c), 64(c) and 70(d) and above. See also the Litigation Plan at §3.9 [**JLP Bundle/2/42**].
81. Based on Ofcom’s estimates (see Annex 8 to the Provisional Conclusions at §A8.2 [**Annex 6**] [**CF Bundle/7/530**]), 60% of SFV Customers are Voice Only Customers, with the remaining 40% being Split Purchase Customers.

### Explanation of the Proposed Class

82. The following paragraphs explain the parameters of the Proposed Class and Proposed Sub-classes.<sup>50</sup> In defining their scope, the Proposed Class Representative has considered the guidance on class definition contained in §6.37 of the Guide, as follows:
- (a) “[T]he class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim”

---

<sup>49</sup> Ofcom considers customers’ age, disability, income and geographical location to be factors that impact their vulnerability. See <https://www.ofcom.org.uk/about-ofcom/what-is-ofcom/consumer-vulnerability> [**JLP Bundle/4/166-171**].

<sup>50</sup> For the avoidance of doubt, the defined terms are consistent with, if not identical to, those used by Ofcom (see, for example, §1.12 and Figure 3.1 of the Provisional Conclusions [**Annex 5**] [**CF Bundle/6/376**] and [**CF Bundle/6/390**] and Annex A3 to the Statement [**Annex 3**] [**CF Bundle/4/303-305**]), and by BT (see, for example, §2.2 and Annex A to the BT Commitments [**Annex 3**] [**CF Bundle/4/288**] and [**CF Bundle/4/290-291**])

(b) “If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile.”

83. For the reasons given below, the Proposed Class has been defined in such a way to ensure that all consumers<sup>51</sup> harmed by BT’s excessive prices for SFV Services are within its scope, and that any exclusions are based on an objective and clear rationale. In particular, and as explained below, the Proposed Class encompasses the different categories of customer which bought SFV Services from BT and which, Ofcom found, had suffered detriment as a result of BT’s pricing.

*Services within the Proposed Class*

84. The Proposed Class is made up of BT customers who bought a (standalone) BT SFV Service. As explained above, the term “standalone” connotes an SFV service which is not sold as part of a bundle with non-voice services such as broadband (and therefore excludes dual play and other multi play bundles).

85. A SFV Service is comprised of two distinct components:

(a) The access component (“**SFV access**”) is the provision of a fixed telephone line connection (*i.e.* a landline) with the ability, once the call component is added, to make calls. The access component is a pre-requisite for the purchase of outgoing calls and the vast majority of customers will make some calls. The access component is usually paid for by a periodic fixed line rental charge for access to the network.

(b) The calls component (“**SFV calls**”) allows the consumer to make outgoing call over the telephone line. This is often paid for by a variable payment for calls made under a calling plan.

86. Access services are typically offered by providers as part of a “calling plan package” which encompasses both line rental and a call allowance; indeed BT does not offer “standalone” line-rental services (*i.e.* line rental without a call allowance): see

---

<sup>51</sup> Though please see further detail in relation to Home Phone Saver customers below.

Provisional Conclusions, §§3.23 – 3.24 [**Annex 5**] [**CF Bundle/6/390-391**]. BT SFV Services therefore encompass all BT’s calling plan packages (except BT Basic and Home Phone Saver, as explained below), which include landline rental.<sup>52</sup>

87. At all material times during the Claim Period, BT offered three line rental products and three calling plan services, each of which are within the scope of BT SFV Services, as set out below:

(a) The relevant line rental services are:<sup>53</sup>

- (i) **Standard Line Rental**, the standard product available to those paying on direct debit;
- (ii) **Line Rental Saver**, offering a discount for up-front payment by credit or debit card at the start of the year; and
- (iii) **Line Rental Plus**, a product allowing for payment by means such as cash or cheque.

(b) The relevant calling plans are:

- (i) **Unlimited Weekend Calls** which covers weekend calls to fixed numbers only, and was offered free of charge with all line rental services until October 2019.<sup>54</sup>
- (ii) **Unlimited Evening and Weekend Calls** which is charged as an addition to line rental.
- (iii) **Unlimited Anytime Calls** which is charged as an addition to line rental and covers daytime, evening, and weekend calls.<sup>55</sup>

---

<sup>52</sup> Such as Standard Line Rental, Line Rental Saver and Line Rental Plus.

<sup>53</sup> For more detail on these products please see the Parker Report [**Annex 2**], §§60 – 61 [**CF Bundle/3/109**].

<sup>54</sup> See the Parker Report [**Annex 2**], §59 [**CF Bundle/3/109**].

<sup>55</sup> See Provisional Conclusions, §3.24 [**Annex 5**] [**CF Bundle/6/390-391**] and Annex 9, page 113 [**Annex 6**] [**CF Bundle/7/601**].

*Excluded Services*

88. The following services provided by BT have been excluded for the reasons given below:

(a) **BT Basic**, which:

- (i) is a service provided to customers who are recipients of specific means-tested Government benefits. To qualify for BT Basic a customer has and had to receive one of the following benefits: income support, income-based job seekers allowance, pension credit (guarantee credit), employment and support allowance (income related), and universal credit (and are on zero earnings);
- (ii) was excluded from the scope of the relevant affected market(s) as provisionally defined by Ofcom and (consequently) Ofcom's proposed price control and the BT Commitments;<sup>56</sup> and
- (iii) is offered at prices well below prices for other line rental products: see Parker Report at §64.<sup>57</sup>

(b) **BT Home Phone Saver**, which:<sup>58</sup>

- (i) is a tariff which packages together line rental, calls and a number of additional features;<sup>59</sup>

---

<sup>56</sup> Provisional Conclusions, §§3.26, 3.50 – 3.53 [Annex 5] [CF Bundle/6/391] and [CF Bundle/6/398] and at Annex 8 at §A8.111-A8.113 [Annex 6] [CF Bundle/7/563-564].

<sup>57</sup> And Provisional Conclusions, Annex 8 §A8.112 [Annex 6] [CF Bundle/7/564].

<sup>58</sup> The term “BT Home Phone Saver” covers each and any year's version in the Claim Period e.g. BT Home Phone Saver 2019 for the year 2019.

<sup>59</sup> Provisional Conclusions, Annex 8, Figure A8.38 [Annex 6] [CF Bundle/7/565].

- (ii) provides a substantial discount compared with purchasing all of the individual features separately, but is more expensive than buying a line rental product with weekend calls;<sup>60</sup>
  - (iii) was excluded from the scope of Ofcom’s proposed price control;<sup>61</sup> and
  - (iv) in respect of which there is insufficient publicly available evidence to determine whether prices were excessive (see the Parker Report, §§308-311 [Annex 2] [CF Bundle/3/180]).
- (c) **Business services offered by BT**, which were excluded from Ofcom’s proposed price control and the BT Commitments. In particular, Ofcom found that business services are in a separate market from residential SFV Services. As Ofcom noted, “there is limited scope for demand-side substitution from residential to business services because in order to purchase a business access line from BT a customer is required to submit a company registration number, which would prevent a residential user from acquiring a business line”.<sup>62</sup> See also Parker Report, §§107-118 [Annex 2] [CF Bundle/3/123-128].

89. For the avoidance of doubt, as set out in the Draft Collective Proceedings Order [Annex 7] [CF Bundle/8/608-611], various categories of individuals (such as lawyers and Tribunal panel members) are also excluded on the conventional approach in collective proceedings.

---

<sup>60</sup> Provisional Conclusions, Annex 8 §8.116 and Figure A8.38 [Annex 6] [CF Bundle/7/564-565]. See also Parker Report, §64 [Annex 2] [CF Bundle/3/111-112].

<sup>61</sup> Provisional Conclusions Annex 9, Schedule, §2.8(vi)(c) [Annex 6] [CF Bundle/7/599-600].

<sup>62</sup> Provisional Conclusions, §3.55: “there is limited scope for demand-side substitution from residential to business services because in order to purchase a business access line from BT a customer is required to submit a company registration number, which would prevent a residential user from acquiring a business line” [Annex 5] [CF Bundle/6/399]. Note this is not to be confused with residential SFV services bought by business customers.

90. As regards the geographic market, the Hull Area is excluded because BT does not offer SFV Services in that area; the incumbent network provider in Hull is KCOM (formerly Kingston Communications).<sup>63</sup>

*The Claim Period*

91. The Claim Period differs between the Proposed Sub-classes for the sole reason that the price control aspects of the BT Commitments did not cover either BT Split Purchase Customers or BT Voice Only Customers who, despite buying residential services, were business users.

*Reasons for defining a single class*

92. The Proposed Class Representative seeks the Tribunal's permission to bring collective proceedings on behalf of a single class of persons comprising customers of BT (the majority of which were/are consumers purchasing in a personal capacity)<sup>64</sup> who paid excessive prices to BT for SFV Services during the Claim Period. For the reasons given above, that class of persons is made up of two broad customer groups: BT Voice Only Customers and BT Split Purchase Customers.
93. The BT SFV Services purchased by BT Voice Only and BT Split Purchase Customers are identical; as the Parker Report explains, from a "functional characteristics" perspective there is no reason to separate the two customer groups.<sup>65</sup> The distinguishing feature is that, in addition to the excessively priced service, BT Split Purchase Customers separately buy an additional service, namely, broadband, whereas BT Voice Only Customers do not.
94. For the reasons given at §§152 - 155 below and as explained by the Parker Report,<sup>66</sup> the economic methodology for determining: (i) the level of the unlawful overcharge paid by

---

<sup>63</sup> Ofcom estimated that around 17% of SFV Customers were small and medium sized enterprises (Provisional Conclusions, §3.11) [Annex 5] [CF Bundle/6/387-388].

<sup>64</sup> Ofcom estimated that around 17% of SFV Customers were small and medium sized enterprises (Provisional Conclusions, §3.11) [Annex 5] [CF Bundle/6/387-388].

<sup>65</sup> Parker Report, §133 [Annex 2] [CF Bundle/3/132].

<sup>66</sup> Parker Report, §132 and subsequent sections [Annex 2] [CF Bundle/3/131-255].

consumers to BT for SFV Services and (ii) the losses thereby suffered by those consumers, is common to the two customer groups.

95. In the premises, it is appropriate to define a single class in respect of both customer groups.

Explanation of the Proposed Sub-classes and how it is proposed that their interests will be represented

96. Although a single class is proposed, the Proposed Class Representative suggests defining each customer group as comprising a discrete sub-class, in the interests of clarity, given that:

(a) each customer group comprises a discrete economic market: see the Parker Report, §§131-141 [**Annex 2**] [**CF Bundle/3/131-134**].

(b) the BT Commitments reduced prices solely to the Voice Only Customer group (save that businesses buying residential SFV services were carved out and so denied the price reduction: see §§61 and 80(c) above and §101 below.) As such, the claim period for Voice Only Customers ends on 1 April 2018, the date on which the BT Commitments became effective (save for Voice Only Customers who are businesses for whom the claim period is the same as that applicable to Split Purchase Customers).<sup>67</sup>

97. For the avoidance of doubt, there is no conflict of interest between the Proposed Sub-classes, and accordingly the Class Representative can properly represent the interests of all Proposed Class Members. The two Proposed Sub-classes only differ in respect of whether they purchased a fixed broadband service (separately) or not. BT Voice Only Customers bought only a telephone service and not broadband, whereas BT Split Purchase Customers bought a telephone service and a broadband service (but, crucially, not as a bundle).

98. Nor does the Proposed Class Representative anticipate that the Proposed Sub-classes will require separate case management. As described in more detail below at §§152 - 155, the

---

<sup>67</sup> See §§2.2 and 2.2.2 of the BT Commitments [**Annex 3**] [**CF Bundle/4/288**].

analysis of the relevant market and dominance for each Proposed Sub-class are similar and draw on related evidence. The methodology for assessing overcharge and calculating damages do not differ between the Proposed Sub-classes, save to reflect the different time periods for which excessive prices were charged.

#### Other potential sub-classes

99. Other sub-classes (or sub-sub-classes) are unnecessary.
100. First, Split Purchase Customers are divided by Ofcom into two further sub-categories: Split Service and Split Supplier Customers. See §§39 - 43 above. However, whether a BT Split Purchase Customer buys their separate broadband service from BT (a Split Service Customer) or from another provider (a Split Supplier Customer) does not affect the services provided or the prices paid to BT for SFV Services.<sup>68</sup> As such, it is not a material distinction for the purposes of the assessment of infringement or quantum.<sup>69</sup>
101. Second, there is no need for business purchasers of BT SFV Services to be defined as a separate sub-class. The Proposed Class Representative does not currently know the size of this group although Ofcom gives a very broad-brush estimate of around 17% of SFV Customers.<sup>70</sup> Although the assessment of damages in respect of such purchasers may raise issues such as amounts of VAT which have been reclaimed and/or pass on if raised by BT, all other aspects of the assessment of liability and quantum are common with other Proposed Class Members: see §§152 - 155 below. In the premises, there is no need to define this group as a separate sub-class or sub-sub class. The Proposed Class Representative will also, of course, keep such matters under review, but it is anticipated

---

<sup>68</sup> See also Ofcom's finding that "survey evidence from split-supplier customers is a reasonable proxy for Split Purchasers as it estimates that split-supplier customers account for around 80% of Split Purchasers, with the remaining 20% being split-service customers": Ofcom's Evidence at §§1.103 – 1.107) [**Annex 4** **CF Bundle/5/342**].

<sup>69</sup> The distinction between split-supplier and split-service sub-groups of Split Purchase Customers only appears in some evidence relied upon by Ofcom where it relies on some data from only Split Supplier customers. In any event, Ofcom states "survey evidence from split-supplier customers is reasonable proxy for Split Purchasers as it estimates that split-supplier customers account for around 80% of Split Purchasers, with the remaining 20% being split-service customers": Ofcom's Evidence at §§1.103 – 1.107) [**Annex 4**] [**CF Bundle/5/342**].

<sup>70</sup> Ofcom stated that: "In total, 9% of SMEs purchase a (residential) SFV service. With 5.4 million SMEs in the UK, this would suggest around 490,000 out of 2.9 million SFV customers are SMEs – around 17%." Provisional Conclusions, §.3.11 [**Annex 5**] [**CF Bundle/6/387-388**].

that it will be possible to manage these additional steps, if necessary, in the context of the wider Proposed Class and after liability is established.

### **Estimate of the size of the Proposed Class and Proposed Sub-classes (Rule 75(3)(c))**

102. Rule 75(3)(c) of the Rules requires the provision of “an estimate of the number of class and sub-class members and the basis for that estimate”. The Guide at §6.37 states that “although the claim form must give an evidence based estimate of the size of the class, it is not necessary to identify each class member (in an opt-out claim) or specify exactly how many persons are within the class”.
103. It is estimated that the size of the Proposed Class (i.e. those who purchased BT SFV Services in the Claim Period) is around 2.31 million individuals (Parker Report, §418); with the BT Voice Only Customer Sub-class estimated at around 1.23 million and the BT Split Purchase Customer Sub-class is estimated at around 1.08 million members (Parker Report, §418). For the avoidance of doubt, these estimates reflect the total number of individual Members of the Proposed Class across the Claim Period, rather than the number of Members of the Proposed Class purchasing BT’s SFV Services at any given time.<sup>71</sup>
104. The above Class size estimate is based on publicly available information and calculated by estimating the number of BT SFV Customers at the beginning of the Claim Period (by, for example, removing customers who had the Excluded Services) and adjusting that number to reflect the estimated number of consumers who joined the Class over the Claim Period by applying an average monthly switching rate (Parker Report, §§420-426 [Annex 2] [CF Bundle/3/214-216]).
105. In the light of the BT Commitments - according to which BT undertook to grant the discount to BT Voice Only Customers and to send annual statements to BT Split Purchase Customers - BT assumedly has records of the precise number of customers that belong to the Proposed Class and Proposed Sub-classes. As such, the Proposed Class

---

<sup>71</sup> In 2017, for example, Ofcom stated that there were 2.9 million SFV Customers, which accounted for 11% of total residential landline customers (Provisional Conclusions, §1.12). Of these, approximately 1.7 million were Voice Only Customers and 1.2 million were Split Purchasers. (These numbers include Home Phone Saver customers, which are excluded from the Class and hence Parker’s Class size estimates.)

Representative anticipates that this estimate will be replaced with an exact Class size following disclosure by BT.

**PART IV: THE INFRINGEMENT AND BASIS OF THE CLAIMS (RULE 75(3)(F)-(H) AND (J))**

106. This part sets out the information and statements required by Rule 75(3)(f)-(h) and (j), in particular a concise statement of the relevant facts; a concise statement of the contentions of law which are relied on; and the Proposed Class Representative's observations on which part of the UK the proceedings are to be treated as taking place under Rule 18.

**Contentions of law**

107. In accordance with Rule 75(3)(h), the following section contains a concise statement of contentions of law relied on by the Proposed Class Representative. The contentions of law set out below will be elaborated upon in written and/or oral submissions in due course.

108. Section 18 of the Competition Act 1998 (the "**Chapter II Prohibition**") prohibits "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market if it may affect trade within the United Kingdom".

Market definition

109. According to the Tribunal: "In order to determine whether, in any given case, an undertaking has the necessary degree of economic strength or, to use the more modern term, market power, so as to give rise to dominance, it is self-evidently necessary to define the market in which that market power is said to exist". (*Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4, §88).

110. As to market definition, it is well established that:

"The concept of the relevant market in fact implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned. The interchangeability or substitutability is not assessed solely in relation to the objective

characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration". (Case T-699/14 *Topps Europe v Commission* EU:T:2017:2, §81).

### Dominance

111. A dominant position means: “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers” (*United Brands v Commission*, Case 27/76 EU:C:1978:22 (“*United Brands*”), §65).

112. A market share in excess of 50% gives rise to a presumption of dominance (*AKZO v Commission*, Case C-62/86 EU:C:1991:286, §60).

### Abuse: excessive pricing

113. Excessive pricing is an established head of abuse: see the Chapter II Prohibition which prohibits “*directly or indirectly imposing unfair purchase or selling prices.*”

114. The seminal EU judgment on excessive pricing is *United Brands*, in which the CJEU confirmed that the imposition of unfair selling prices is an abuse, and held that:

- (a) It is advisable to ascertain whether the dominant undertaking has used its dominant position to reap trading benefits which could not have been obtained in normal and sufficiently competitive conditions.<sup>72</sup>
- (b) A price that bears no reasonable relation to the economic value of the product supplied is excessive.<sup>73</sup>
- (c) While noting that other ways could be devised, one approach for identifying excessive prices involves addressing the questions in the following two-stage analysis:

---

<sup>72</sup> *United Brands*, §249. See also the Chancellor in *Flynn CA*, §249 which described this element as “the overarching exercise”.

<sup>73</sup> *Ibid.* §235.

- (i) Is the difference between the costs actually incurred and the price actually charged excessive?
- (ii) If so, is the price (i) unfair in itself or (ii) when compared to competing products?<sup>74</sup>

115. In the subsequent case of *AKKA LAA Case C-177/16 ECLI:EU:C:2017:689*, the CJEU confirmed that the difference between the disputed price and the relevant competitive benchmark must be “significant and persistent”.<sup>75</sup>

116. The Proposed Class Representative will refer in written and oral submissions, insofar as relevant, to the various EU and domestic cases, decided in the wake of *United Brands*, concerning the applicable legal and economic principles for determining whether a price is excessive. The most recent such judgment is that of the Court of Appeal in *CMA v Flynn* [2020] EWCA Civ 339 (“*Flynn CoA*”), which sets out the following (non-exhaustive) principles:<sup>76</sup>

- (a) The basic test for abuse 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.
- (b) One example of an unfair price is a price that is “excessive” because it bears no reasonable relation to the economic value of the good or service.
- (c) 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 on.

---

<sup>74</sup> Ibid., §252.

<sup>75</sup> §§55-56, 61.

<sup>76</sup> *Flynn CoA*, §97.

- (d) A competition authority might use one or more of the alternative economic tests which are available but there is no rule of law requiring them to use more than one test or method in all cases.
- (e) 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 dominant undertaking 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 relevant evidence.

117. For the avoidance of doubt, the Proposed Class Representative will say that the principles summarised at §§116(d) and (e) above apply equally to private claimants seeking redress in respect of unlawful excessive prices.

118. Green LJ also observed that the above propositions are supported by the economic literature and, amongst other things, that: all cases are highly fact and context specific; there are many different tests for determining if a price is excessive and unfair and that it is economically rational that competition authorities should have a margin of appreciation as to the choice of method and evidence that they seek to rely on.<sup>77</sup>

119. The Court of Appeal also emphasised that:

- (a) There is no discrete component of the test which assesses economic value: the reference to “economic value in *United Brands* is part of the overall descriptor of the abuse; it is not the test”.<sup>78</sup>
- (b) When the *United Brands* test is properly applied, it is capable of assessing economic value so that if a price is excessive it bears “no reasonable relationship to economic value”.<sup>79</sup>

---

<sup>77</sup> *Flynn CoA*, §107.

<sup>78</sup> *Green LJ*, §172; *Vos LJ*, §282.

<sup>79</sup> §172.

- (c) The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not an indication that it reflects a reasonable relationship with economic value. Dependency of the user on the impugned product is relevant.<sup>80</sup> A proxy might be what consumers are prepared to pay for the good or service in an effectively competitive market.<sup>81</sup>
- (d) Equally, if there is evidence of the prices being charged in relevant, comparator, markets which were effectively competitive then those prices could be capable of acting as proxy evidence of the economic value of the product in question.

### **The Infringement**

- 120. The Claims are for loss and damage caused by BT's breach of statutory duty on account of its infringement of the Chapter II Prohibition by virtue of its excessive charges for BT SFV Services (or alternatively BT SFV access<sup>82</sup>) during the Claim Period.
- 121. Whilst the Claims are of a standalone nature, because they are not in respect of a final infringement decision within the meaning of section 58A of the Competition Act 1998 (see Rule 75(3)(f)), they rely in large part on the facts and findings by Ofcom set out in the documents pertaining to the 2017 Review, which are summarised at in Part II above.
- 122. The Proposed Class Representative has, thus far, seen non-confidential copies of those documents only. Accordingly, whilst this Claim Form is particularised as far as possible, the Proposed Class Representative reserves his right to amend this Claim Form and/or to provide further particulars following disclosure and/or the preparation of expert reports and/or factual evidence.
- 123. The best particulars of infringement which the Proposed Class Representative can presently provide, based on publicly available material, are set out below. Despite the gap in information currently available to the Proposed Class Representative, the

---

<sup>80</sup> §167. See also Case 395/87 *Ministere Public v Tournier*.

<sup>81</sup> *Flynn CoA*, §155.

<sup>82</sup> For the avoidance of doubt, (i) BT SFV access is a component of BT SFV Services and (ii) any reference to the BT SFV access is a reference to any individual, or all, of the access component options available from BT in the Claim Period, namely BT Standard Line Rental, BT Line Rental Plus and/or BT Line Rental Saver.

threshold of a “triable issue” (*Merricks v Mastercard* [2020] UKSC 51 at §46) as to the excessive and unfair nature of BT’s prices is clearly satisfied.

Market definition

124. While the precise delineation of the affected markets will be a matter for factual and expert evidence at trial, the Proposed Class Representative avers that the relevant product and geographic markets (“**the Relevant Markets**”) are:<sup>83</sup>

- (a) the market for SFV access and SFV calls (together “**SFV Services**”) supplied in the United Kingdom (excluding the Hull Area) to Voice Only Customers, referred to below as “**the market for the supply of SFV Services to UK Voice Only Customers**”; and
- (b) the market for SFV access and SFV calls supplied in the United Kingdom (excluding the Hull Area) to Split Purchase Customers, referred to below as “**the market for the supply of SFV Services to UK Split Purchase Customers**”.

125. Alternatively, if (contrary to the Parker Report):

- (a) there are separate product markets for SFV access and SFV calls, then the Relevant Markets are each or any of the following:
  - (i) the market for SFV access in the United Kingdom (excluding the Hull Area) supplied to Voice Only Customers;
  - (ii) the market for SFV calls in the United Kingdom (excluding the Hull Area) supplied to Voice Only Customers;
  - (iii) the market for SFV access in the United Kingdom (excluding the Hull Area) supplied to Split Purchase Customers; and/or
  - (iv) the market for SFV calls in the United Kingdom (excluding the Hull Area) supplied to Split Purchase Customers.

---

<sup>83</sup> Parker Report, §§30 and 32 [**Annex 2**] [**CF Bundle/3/101-102**].

- (b) Further or alternatively, if, notwithstanding BT's ability to price discriminate between Voice Only and Split Purchase customers, those customers groups form part of the same market, then the Relevant Markets defined at (a)(i) and (a)(iii) above form a single market for SFV access (not segmented by customer group); and the markets at (a)(ii) and (a)(iv) form a single market for SFV calls (not segmented by customer group).

126. For the avoidance of doubt, the Relevant Markets, exclude each of the following services:

- (a) Dual Play services, as they do not sufficiently constrain the prices charged to Voice Only and/or Split Purchase Customers of SFV Services, for the reasons given above §§65, 68 and 84 and by the Parker Report at §§142-170 [**Annex 2**] [**CF Bundle/3/134-143**].
- (b) Business services, because they are not materially substitutable with residential SFV Services, for the reasons given above at §§37, 61, 65 and 88 and/or by the Parker Report at §§107-118 [**Annex 2**] [**CF Bundle/3/123-128**].
- (c) Mobile services because they are not materially substitutable with SFV Services and/or the prices charged for mobile services do not sufficiently constrain SFV prices for the reasons given above at §§35, 37 and 65 and/or by the Parker Report at §§171-179 [**Annex 2**] [**CF Bundle/3/143-144**].
- (d) BT Basic for the reasons given above at §§37, 61, 65 and 88 and/or by the Parker Report at §180 [**Annex 2**] [**CF Bundle/3/144-145**].

### Dominance

127. BT held a dominant position, within the meaning of the Chapter II Prohibition, on each or any of the Relevant Markets during the Claim Period.

### *SFV Services supplied to Voice Only Customers*

128. At all material times within the Claim Period, BT has held and/or holds a dominant position within the meaning of the Chapter II Prohibition in the market(s) for the supply of SFV Services to UK Voice Only Customers and/or the market for SFV access supplied

to UK Voice Only Customers. In particular, and without prejudice to the generality of the foregoing:

- (a) Ofcom provisionally concluded that BT enjoyed a position of SMP in respect of both SFV access and SFV calls (see §§45, 49 and 66 above and Provisional Conclusions, §§4.80 and 5.36 [**Annex 5**] [**CF Bundle/6/429**] and [**CF Bundle/6/437**]).
- (b) BT sustained a share of SFV access to Voice Only Customers, as measured by the number of lines, considerably above 50% (and no less than 68%) over the period 2013 to Q1 2017. It is averred that BT's share is likely to have remained above 61% for the remainder of the Claim Period (Parker Report, §§202-209 [**Annex 2**] [**CF Bundle/3/150-152**]);
- (c) BT's share across both SFV access and SFV calls to Voice Only Customers, on both a volume and revenue basis, is likely to have been materially in excess of 50% throughout the Claim Period (Parker Report, §§210-219) [**Annex 2**] [**CF Bundle/3/152-154**];
- (d) There are significant barriers to entry and expansion resulting from the limited level of customer switching, creating significant challenges for new entrants or existing operators seeking to expand (Parker Report, §§220-224 [**Annex 2**] [**CF Bundle/3/155-156**]);
- (e) The gap between BT's prices for SFV access and its costs (as measured by the charges for key wholesale inputs) increased significantly over time (Parker Report, §§226-227 [**Annex 2**] [**CF Bundle/3/156**]);
- (f) BT acted as a price leader in relation to SFV access, with other CPs following its increases in line rental in terms of both timing and magnitude (Parker Report, §§228-231 [**Annex 2**] [**CF Bundle/3/157-158**]);
- (g) In relation to SFV calls, BT's prices have on average increased since 2009, while prices charged by its competitors have decreased (Parker Report, §§232-239 [**Annex 2**] [**CF Bundle/3/158-160**]);

- (h) While much of the relevant evidence on profitability is redacted from the Provisional Conclusions and Statement, the available evidence suggests that BT's profitability per fixed voice line has been high and increasing over time. For example, Ofcom found that BT's EBIT margins had been increasing and were at 34-42% in 2015/6, and that BT was making higher profits on fixed voice customers than its rivals (Parker Report, §§240-245 [**Annex 2**] [**CF Bundle/3/160-161**]); and/or
- (i) Customers do not have countervailing buyer power (Parker Report, §§246-247 [**Annex 2**] [**CF Bundle/3/161**] and Provisional Conclusions, §4.80 [**Annex 5**] [**CF Bundle/6/429**]).

*SFV Services supplied to Split Purchase Customers*

129. At all material times during the Claim Period, BT has held and/or holds a dominant position within the meaning of the Chapter II Prohibition in the market(s) for SFV Services supplied to UK Split Purchase Customers or, alternatively, the market for SFV access supplied to UK Split Purchase Customers. In particular (and without prejudice to the generality of the foregoing):

- (a) §§128(a), (e), (f), (g), (h) and (i) above are repeated (as they apply equally to UK Split Purchase Customers).
- (b) Although Ofcom did not consider it necessary to make a formal market assessment in respect of Split Purchase Customers in the Statement, it noted that BT had a very high market share at 97%, and that the declining and relatively small size of the market could make it difficult for providers of SFV Services to target Split Purchase Customers to encourage them to switch provider (see §68 above);
- (c) Ofcom estimated that, measured by number of lines, BT's share of SFV access to Split Purchase Customers was close to 100% over the period 2013 to Q1 2017. It is likely to have remained above 97% for the remainder of the Claim Period (Parker Report, §§250-253 [**Annex 2**] [**CF Bundle/3/162-163**]);

- (d) The Parker Report notes that while relevant data is redacted from Ofcom's Provisional Conclusions, based on the information currently available to him, BT's volume and revenue market shares for SFV services to Split Purchase Customers appear to have been persistently above 50%, whether the market is defined to include both the access and calls components, or the access component only (Parker Report, §§254-260) [**Annex 2**] [**CF Bundle/3/163-165**]; and
- (e) There are barriers to entry and expansion resulting from the limited level of customer switching, making it difficult for a new entrant or existing operator to attract new customers (Parker Report, §§261-264) [**Annex 2**] [**CF Bundle/165-166**].

130. Alternatively, to the extent that Voice Only and Split Purchase Customers are in the same market, contrary to the Parker Report, it is averred that BT is dominant in the relevant market(s) for the supply of SFV Services and/or SFV access for those customers combined, for the reasons set out above.

Abuse: excessive pricing

131. In the light of the matters pleaded above and, in particular, the evidence set out in the Parker Report, at all material times during the Claim Period (or, alternatively, any part thereof), BT has imposed excessive prices (on each or any of the Relevant Markets), in breach of the Chapter II Prohibition, for the provision of BT SFV Services, or alternatively for the provision of BT SFV access, to BT Voice Only and/or BT Split Purchase Customers in the UK (excluding Hull).

Particulars of breach

132. The prices for BT SFV Services, or alternatively BT SFV access, to BT Voice Only and/or BT Split Purchase Customers in the UK (excluding Hull) during the Claim Period:

- (a) enabled BT to reap trading benefits which could not have been obtained in normal and sufficiently effective conditions; and/or
- (b) are excessive because they bear no reasonable relation to either (i) the economic value of the BT SFV Services and/or the BT SFV access supplied and/or (ii) the

costs of providing BT SFV Services and/or the BT SFV access (for the purposes of the ‘first limb’ of the *United Brands* test at §114(c)(i) above); and/or

- (c) are unfair in themselves and/or when compared to comparable services and/or other relevant proxy/proxies for the prices for BT SFV Services which would obtain in conditions of normal and sufficiently effective competition (for the purposes of the ‘second limb’ of the *United Brands* test at §§114(c)(ii) above).

133. Without prejudice to the generality of the foregoing, the impugned access prices are significantly and persistently above:

- (i) residential landline rental prices charged by BT in 2009, adjusted to reflect changes in the key cost input, which as the Parker Report explains at §§289-322 of his Report, provides a good proxy for the competitive price level for SFV access throughout the Claim Period, and is the best available and most robust competitive benchmark for these purposes (Parker Report, §§323-338 [Annex 2] [CF Bundle/3/184-190]). As Mr Parker explains this benchmark also encapsulates a ‘cost plus’ approach for the purposes of the first limb of the *United Brands* test (Parker Report §315);
- (ii) further or alternatively, each or both of the further potential proxies relied on by the Parker Report, as “sensitivities” only, which are: residential landline rental prices charged by BT in 2009 without any adjustment to reflect changes in costs; and the prices which BT undertook to charge BT Voice Only Customers under the Commitments (Parker Report, §§323-338)

while there is not evidence of any offsetting effect from calls prices (Parker Report, §§339-361).

**(“the Infringement”).**

134. For example, as the Parker Report explains at §326 [Annex 2] [CF Bundle/3/185-186], the price of BT Standard Line Rental exceeded the competitive level by 51% above the competitive level in October 2015 for both BT Voice Only Customers and BT Split Purchase Customers; by 63% above the competitive level in April 2018 for BT Split

Purchase Customers; and by 65% above the competitive level in the latest available period, August 2020 for BT Split Purchase Customers, using Mr Parker's preferred benchmark.

135. It is further averred that the prices for Line Rental Plus and Line Rental Saver were excessive to the same or similar degree as BT Standard Line Rental, on the basis that differences in price between each of those services and BT Standard Line Rental reflect (wholly or in part) cost differences between each of those services and BT Standard Line Rental: the Parker Report, §§327-331 [**Annex 2**] [**CF Bundle/3/186-188**]. This conclusion is further supported by Ofcom's Provisional conclusions [**Annex 5**] [**CF Bundle/6/487-607**]:

- (a) that BT's prices were approximately £5 to £7 per line per month above a level defined using competitive benchmarks;<sup>84</sup> and
- (b) that a price cut of between £5 and £7 (including VAT) per line per month would allow profitability at a level that would be consistent with competition developing and would significantly reduce the direct customer detriment attributable to BT's pricing behaviour.<sup>85</sup>

136. For the avoidance of doubt, the above averments are supported by Ofcom's findings in the 2017 Review and supporting evidence (and the 2020 Review) and the BT Commitments: see, in particular, §§46 – 49; 50 – 57; 58 – 62; 64; and 70 – 71 above. Whilst the Proposed Class Representative reserves the right to plead further particulars of Infringement following disclosure and/or evidence, the threshold of a triable issue as to the excessive charges imposed by BT is clearly met. BT has a case to answer.

### **Causation / Loss and damage**

137. The Proposed Defendant's breach(es) of statutory duty, arising out of the Infringement, has/have caused loss and damage to Proposed Class Members during the Claim Period, consisting in the difference between the prices which they, in fact, paid for the BT SFV

---

<sup>84</sup> See §§20, 48, 54 and 56 above and Provisional Conclusions, §6.4, referencing the analysis at Section 8 and Annex 5 [**Annex 5**] [**CF Bundle/6/438**].

<sup>85</sup> Ibid. and Provisional Conclusions, §§8.30 and 9.6 [**Annex 5**] [**CF Bundle/6/469**] and [**CF Bundle/6/479-480**].

Services (or alternatively BT SFV access services) and the prices which they would have paid for those services in the absence of the unlawful Infringement. But for the Infringement, the Members of the Proposed Class would not have suffered this loss and/or damage.

Particulars of loss and damage

138. The Members of the Proposed Class are entitled to the difference between the prices which they, in fact, paid for the BT SFV Services (or alternatively BT SFV access) and the prices which they would have paid for those services but for the unlawful Infringement.
139. Without prejudice to the Proposed Class Representative's right to provide further particulars of loss and damage following disclosure, expert reports and/or factual evidence, the current best estimate of the loss and damage incurred by the Proposed Class, inclusive of VAT but before interest, is £469 million (Parker Report, §§365-414) **[Annex 2] [CF Bundle/3/198-213]**. This comprises:
- (a) £182 million for the BT Voice Only Customer Sub-class; and
  - (b) £287 million for the BT Split Purchase Customer Sub-class.
140. This estimate is based on the following steps as set out in the Parker Report (§§365-414) **[Annex 2] [CF Bundle/3/198-213]**:
- (a) identifying the Claim Period set out above;
  - (b) an estimate, on a monthly basis, of the number of BT Voice Only and BT Split Purchase Customers of BT SFV Services during the Claim Period, based on data published by Ofcom as part of or with the Provisional Conclusions and/or the Statement;

- (c) an adjustment to those customer numbers to reflect the exclusion of Home Phone Saver services (noting that purchasers of BT Basic services were already excluded in the Ofcom data);
  - (d) an estimate of the level of overcharge in each month, based on comparing the BT Standard Line Rental price over time with the competitive benchmark/level.
141. The Proposed Class Representative also claims interest on the above amounts, either in the form of:
- (a) Compound interest, by way of damages:
    - (i) The Members of the Proposed Class are entitled to full compensation for the loss and damage caused to them by BT's breach of statutory duty. All Members of the Proposed Class have been deprived of money to which they were entitled, and therefore lost the opportunity to earn compound interest and/or they paid compound interest on loans, in respect of those amounts.
    - (ii) The nature of the Claim and the numbers of the Members of the Proposed Class involved means that it is not possible or proportionate to particularise the detail of each such loss on an individual basis. Instead, the Proposed Class Representative will adduce evidence (both expert and factual) in respect of such losses on an aggregate average basis, i.e. compound interest will be treated as any other head of loss in the proposed Claim (as per *Sempra Metals Ltd v Commissioners of Inland Revenue* [2008] 1 AC 561, §94). The Proposed Class Representative reserves the right to provide further particulars on compound interest in due course.
142. In the alternative, simple interest pursuant to s.35A of the Senior Courts Act 1981 and/or Rule 105 of the CAT Rules, on such sums and at such a rate as the Tribunal thinks fit.
143. For illustrative purposes only:
- (a) adding compound interest at 8% gives a best estimate of the loss and damage incurred by the Proposed Class, inclusive of VAT, of £608 million (Parker Report §412 [**Annex 2**] [**CF Bundle/3/212**], comprising:

- (i) £248 million for the BT Voice Only Customer Sub-class; and
  - (ii) £360 million for the BT Split Purchase Customer Sub-class; and
- (b) adding simple interest at 8% gives a best estimate of the loss and damage incurred by the Proposed Class, inclusive of VAT, of £589 million (Parker Report §411[**Annex 2**] [**CF Bundle/3/212**]), comprising:
- (i) £238 million for the BT Voice Only Customer Sub-class; and
  - (ii) £351 million for the BT Split Purchase Customer Sub-class.

144. The relief sought is also set out in part VII below.

**Observations on which part of the UK the proceedings are to be treated as taking place under Rule 18 (Rule 75(3)(j))**

145. Pursuant Rules 18 and 75(3)(j), the proceedings should be treated as proceedings in England and Wales:
- (a) the majority of the Members of the Proposed Class are located in England and Wales (see Parker Report, §§432-434);
  - (b) the majority of loss and damage suffered by the Members of the Proposed Class in consequence of the Defendant's conduct is being sustained in England and Wales (see Parker Report, §§432-434); and
  - (c) the Proposed Defendants is are incorporated under the law of England and Wales and has its head office and principal places of business in England and Wales (see §12 above).

**PART V: SUMMARY OF THE BASIS UPON WHICH IT IS CONTENDED THAT THE CRITERIA FOR CERTIFICATION AND APPROVAL IN RULE 79 ARE SATISFIED (RULES 75(3)(E) AND 79)**

146. This part provides a summary of the basis upon which it is contended that the criteria for certification and approval in Rule 79 are satisfied, as required by Rule 75(3)(e). Rule 79

sets out three criteria (together, “**the Eligibility Criteria**”) which must be satisfied in order for claims to be certified as eligible for inclusion in collective proceedings, namely:

- (a) the Claims must be brought on behalf of an identifiable class of persons (Rule 79(1)(a));
- (b) the Claims must raise common issues (Rule 79(1)(b)); and
- (c) the Claims must be suitable to be brought in collective proceedings (Rule 79(1)(c)).

147. Moreover, Rule 79(3) sets out matters that the Tribunal may take into account in addition to the Eligibility Criteria in determining whether the Proposed Collective Proceedings should be certified as opt-in or out-out proceedings.

148. Each criterion is met in the instant application for the reasons addressed in turn below.

**The Claims are brought on behalf of an identifiable class of persons (Rule 79(1)(a))**

149. The Claims are brought on behalf of an objectively identifiable class of persons (see the definition of the Proposed Class above and the Witness Statement of the Proposed Class Representative at §§21 - 24 [**JLP Bundle/1/7-8**]). In accordance with §6.37 of the Guide, it is possible to identify, using the class definition set out above, whether any person falls within the Proposed Class (and Proposed Sub-classes) based on objective and straightforward factual enquiries, as set out below.

150. First, BT should itself be able readily to identify its current and historic customers which make up the Members of the Proposed Class and those falling in the Proposed Sub-classes based on its billing records. In terms of distinguishing BT Voice Only and BT Split Purchase Customers, the Statement [**Annex 3**] [**CF Bundle/4/256-306**] records at §1.10: “providers of standalone telephony services are in fact able to identify which of their customers are voice-only and which are split purchasers” and “BT has told us that it can seek information from Openreach on a monthly basis to confirm which of their lines are voice-only”. Further, BT itself undertook to identify and distinguish between BT Voice Only and BT Split Purchase Customers in the BT Commitments given that the

prospective price reduction applied to certain Voice Only Customers only: §61 above is repeated.<sup>86</sup>

151. Second, Members of the Proposed Class should be able easily to tell or work out if they fall within its scope. First, all Members of the Proposed Class are UK consumers who have bought or are buying landline telephone services from BT; a matter which will be known or, if not, can be readily ascertained by the individual consumer. The customer will then need to consider whether they also bought broadband (but not as part of a bundle) from BT or another CP during the Claim Period. The Proposed Class Representative considers that BT customers will either already know the answers to these questions or can easily ascertain them, if necessary, by checking their billing history or bank statements.

#### **The Claims raise common issues (Rule 79(1)(b))**

152. Rule 79(1)(b) stipulates that the Tribunal may certify the Claims as eligible for inclusion in collective proceedings where the Claims “raise common issues”. Pursuant to s. 47B(6) of the Act and Rule 73(2), “common issues” are defined as “the same, similar or related issues of fact or law”.<sup>87</sup> Moreover, §6.37 of the Guide states:

“Although the claims must raise common issues to satisfy the criteria for approval, the final resolution of the claims will often require the assessment of individual issues. The existence of such individual issues is not fatal to an application for a CPO. For example, the determination of liability for an infringement may raise common issues of fact and law which justify a CPO, while causation and the quantification of any damages may not be common to the class.

...

Where only certain issues in the claims constitute common issues, there is no requirement that those must predominate over the remaining individual issues in order for it to be suitable for the part of the claims covering the common issues to be brought in collective proceedings. However, the

---

<sup>86</sup> See, for example, 2.1 and 2.2 of the BT Commitments [Annex 3] [CF Bundle/4/287-288]. Moreover, BT’s privacy policy (available at: <https://www.bt.com/privacy-policy/>) states that BT will keep a summary copy of its customers’ bills, contact details and details relating to any dispute for six years.

<sup>87</sup> This mirrors section 47B (6) of the Competition Act 1998.

common issues must be significant such that resolution of those issues will significantly advance the claims of the members of the class.”

153. Ultimately, the Claims manifestly raise common issues because each and every individual claim under s47A, which the Proposed Class Representative seeks to combine in these collective proceedings, concerns: the same service namely, BT SFV Services; supplied by the same undertaking, BT, to UK customers (who are predominantly consumers).

154. Specifically, the Claims raise the following common issues (the “**Common Issues**”):

- (a) Whether BT’s prices for BT SFV services and/or SFV access charged to BT Voice Only Customers and BT Split Purchase Customers are excessive in breach of the Chapter II Prohibition. This in turn requires consideration of:
  - (i) How the markets on which the SFV services are provided to BT customers should be defined, in terms of product, customer group and geographic scope, as pleaded above.
  - (ii) Whether BT occupies a dominant position in the Relevant Markets, as defined, as pleaded above.
  - (iii) What competitive benchmark(s)/level(s) should be selected for the purposes of ascertaining whether BT’s prices for providing BT SFV Services (or BT SFV access) to Members of the Proposed Class were/are excessive.
  - (iv) Whether BT’s prices for providing BT SFV Services (or BT SFV access) were/are excessive when compared to the chosen competitive benchmark(s)/level(s) and what the magnitude of the unlawful overcharge is.
- (b) The amount of damages which should be awarded to compensate Members of the Proposed Class for the unlawful overcharge paid by them to BT.
- (c) The rate of interest to be awarded to Members of the Proposed Class.
- (d) Whether interest should be awarded on a simple basis, or as damages on a compound basis.

155. Each of these issues is capable of being resolved on a common basis, as explained below (and see §25 of the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/8-9**]):

(a) **Market definition:**

- (i) Each claim is in respect of BT SFV Services supplied in the UK excluding the Hull Area. As pleaded above, SFV Services may comprise a single relevant economic market, or be divided into two or more relevant economic markets by reference to material scope (calls / access) and/or customer groups.
- (ii) As is clear from the Parker Report Section 6, whichever approach to market definition is adopted, certain core issues arise relating in particular to the lack of substitutability of SFV Services with: Dual Play services; business services; and mobile services. Further, the approach to geographic scope is common to all relevant markets, however defined.
- (iii) Even if separate economic markets are defined, according to the Parker Report (or otherwise), the Parker Report (Section 6) makes clear that the exercise for defining each respective market raises similar questions and is based on similar principles.

(b) **Dominance:** Whilst dominance is assessed separately on each Relevant Market, the Parker Report makes clear that the *approach* to assessing whether BT is dominant is the same or similar as regards each Relevant Market: see Parker Report, Section 7.

(c) **Competitive benchmark:** As set out in the Parker Report Section 8, the proposed approach to establishing a competitive benchmark is identical for each of the Claims. This approach will lead to individual benchmarks for each of the three line rental products, in each month of the Claim Period, but the methodology is identical in each case.

- (d) **Excessive pricing:** As set out in the Parker Report Section 8, the amount of the monthly overcharge per line which is abusive and therefore unlawful, will be established by a comparison of the prices actually paid for each BT SFV access service in each month of the Claim Period, with the competitive benchmark for that product for that month. This approach is identical across each and every Claim.
- (e) **Damages:** As set out in the Parker Report Section 9, in order to establish the damages payable, it is necessary to apply the overcharge established in the above step to the circumstances of the Proposed Class Members. The Parker Report [Annex 2] has explained the steps that will be taken in order to calculate the amount of aggregate damages to which the Proposed Class Members is entitled at Section 9 [CF Bundle/3/198-212] (see also below). Had the Claims had been pursued separately, the same methodology would apply to the calculation of individual loss, as follows:
- (i) identifying the relevant overcharge for each individual Proposed Class Member's specific subscription (which BT SFV access service they purchased and for which months). While this calculation would be tailored to the individual, it would follow a methodology identical for each and every Proposed Class Member.
  - (ii) establishing an appropriate basis for awarding interest for each Proposed Class Member. This step would follow common legal principles and a common methodology.
  - (iii) for any Proposed Class Members who were businesses customers during the Claim Period, considering potential deductions for any VAT which has been reclaimed and any arguments relating pass on,<sup>88</sup> but their assessment would depend on a common methodology.

---

<sup>88</sup> It is for BT in the first place to plead and prove that pass-on of a sufficiently specific nature would have occurred (see *Sainsbury's v MasterCard* [2018] EWCA Civ 1536),

**The Claims are suitable to be brought in collective proceedings (Rule 79(1)(c) and 79(2))**

156. In determining whether the claims are suitable to be brought in collective proceedings, Rule 79(2) states that the Tribunal shall take into account all matters that it thinks fit, including seven expressly identified considerations (together, the “**Suitability Considerations**”).

157. In *Merricks v Mastercard* [2020] UKSC 51, the Supreme Court held that:

- (a) “the certification process is not about, and does not involve, a merits test... There is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application”: see also rule 89(4) and (§59);
- (b) “The listed factors [in Rule 79(2)] are not separate suitability hurdles, each of which the applicant for a CPO must surmount. The hurdles (ie preconditions to eligibility under section 47B(5)(b) and (6)) are only that the claims are brought on behalf of an identifiable class, that they raise common issues and that they are suitable to be brought in collective proceedings”: see also rule 79(1) and (§61); and
- (c) the phrase “suitable” in section 47B of the Competition Act and under rule 79(2)(f) means “suitable in a relative sense: ie suitable to be brought in collective proceedings rather than individual proceedings” (§56).

158. Each consideration is met in the instant application for the reasons addressed in turn below (and see §§30 - 32 of the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/10-12**]).

Collective proceedings are an appropriate means for the fair and efficient resolution of the Common Issues (Rule 79(2)(a))

159. The proposed collective proceedings for the Claims are an appropriate means for the fair and efficient resolution of the Common Issues (see also, the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/3-32**] at §25 and the Litigation Plan generally [**JLP Bundle/2/33-160**]).

160. The principal reason why the Proposed Class Representative considers that the Claims can only be brought by way of collective proceedings is that they are individually low in value: the Parker Report estimates individual loss as between £148 and £333 per person (Parker Report, §413 [**Annex 2**] [**CF Bundle/3/213**]). It would therefore be unviable for individual consumers to pursue such claims separately considering their relative complexity and the corresponding costs and time which would be required to bring such a claim (especially bearing in mind the characteristics of the Members of the Proposed Class, as addressed above at §80 and references therein). Indeed, this is borne out by the total absence of such individual claims to date despite the Statement in 2017. The low value of each s47A claim is therefore a complete bar to bringing individual claims and the Infringements by BT will go unredressed unless the Claims are made collectively.

161. Other relevant considerations are that:

- (a) The particular characteristics of the Members of the Proposed Class means that they would in practice be unable or unlikely to bring their own claims: §80 above is repeated. See, also, the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/3-32**] at §§49 – 59 and 89, and the Litigation Plan [**JLP Bundle/2/33-160**] at §§3.8 – 3.19.
- (b) The Common Issues are ones of mixed law, fact and expert evidence, which would be extremely difficult and likely costly exercises for individual Members of the Proposed Class (and the Tribunal) to undertake on an individual basis. It would be inefficient and unfair to expect individual Members of the Proposed Class to each bring a claim, which would in any event have to be case managed together. This would introduce a significant burden on the Tribunal's (or County Court's) time if individual claims were pursued.
- (c) There is unlikely to be any need for Members of the Proposed Class to produce any evidence in order to establish the Infringement or quantum. For example, issues relating to dominance and infringement are highly technical ones requiring expert legal argument and economic evidence, thus avoiding duplication of costs for Members of the Proposed Class.

(d) The principal issues are Common Issues and each is ideal for determination in collective proceedings: this is “a potential plus factor in the balance” (*Merricks*, §62). The resolution of these Common Issues will significantly advance the claims of the Members of the Proposed Class.

162. For these reasons, collective proceedings are not only an “*appropriate*” means for the fair and efficient resolution of the Common Issues, but the only viable means for the individual Members of the Proposed Class to vindicate their rights and obtain redress for the loss and damage caused by the Infringement.

The benefits of continuing the collective proceedings outweigh any costs (Rule 79(2)(b))

163. In the light of the factors set out above, the benefits of continuing the collective proceedings outweigh any costs for the Members of the Proposed Class, the Proposed Defendants and the Tribunal. Whilst there are inevitably costs associated with bringing the collective proceedings (as set out in the costs budget in the Litigation Plan, section 8 and at Annex 2 to that Plan [**JLP Bundle/2/150**]), these costs are fair and proportionate in light of: (i) the loss suffered as a result of the Infringement which would otherwise go un-redressed; (ii) the size of the Class; and (iii) the aggregate value of the Claims.

164. Moreover, as explained in in Part VI below and §§96 – 115 in the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/27-31**]), to the extent that the Proposed Class Representative is unsuccessful, the costs of this litigation will be covered by the Proposed Class Representative’s Litigation Funding Agreement [**JLP Bundle/22/901-933**].

There are no separate proceedings making claims of the same or similar nature which have already been commenced by members of the class (Rule 79(2)(c))

165. The Proposed Class Representative is not aware of any separate proceedings making claims of the same or a similar nature having been commenced whether by the Members of the Proposed Class or an alternative proposed class representative (whether on an opt-in or opt-out basis).

The size and nature of the Proposed Class (Rule 79(2)(d))

166. Both the size and nature of the Proposed Class mean that the Claims are suitable to be brought by way of (opt-out) collective proceedings. As to the size of the Proposed Class, §§102 - 105 above are repeated and relied upon. As to the nature of the Proposed Class, §80 above is repeated. The Guide at §6.37 states that “it may be where the class is small, but each individual member’s loss is significant, redress would be more effectively obtained by an ordinary individual action”. Neither is the case here. The Class is estimated to be 2.31 million unique individuals, each having suffered relatively small individual amounts (Parker Report, §§418 and 413 [**Annex 2**] [**CF Bundle/3/214**] and [**CF Bundle/3/213**]). Moreover, as explained fully at §80 (and references therein) above, the characteristics of the Members of the Proposed Class (in particular, age, socio-economic group and lack of engagement) means that, by their very nature, their Claims are well-suited to being advanced on their behalf in collective proceedings.

It is possible to determine in respect of any person whether that person is or is not a member of the Proposed Class (Rule 79(2)(e))

167. For the reasons given at §§75 – 79 and 149 – 151 above, it is possible to determine in respect of any person whether that person is or is not a Member of the Proposed Class (and which Proposed Sub-class they fall within).

The Claims are suitable for an aggregate award of damages (Rule 79(2)(f))

168. The Guide at §6.78 states that:

“In awarding damages in collective proceedings, the Tribunal is not required to assess how much each represented person may recover in respect of their claim. Rather the Tribunal may make an “aggregate” award of damages as defined in Rule 73(2). An aggregate award determines the amount the class as a whole is entitled to and is designed to be a practical and proportionate method of assessing damages in collective proceedings. For example, the Tribunal may calculate the damages on a class-wide basis; this could be way of a lump sum award against the defendant, or by using a formula to determine each represented person’s claim without requiring individual proof. This type of award is likely to be more suitable where its calculation can be made without information from the class members, such as where the defendant’s records are sufficient, or where there is a large class with largely identical individual claims.”

169. In relation to aggregate damages, in *Merricks v Mastercard* [2020] UKSC 51, the Supreme Court held that:

- (a) “it is not a condition that the claims are suitable for an award of aggregate damages. That is only one of many relevant factors in the suitability assessment under rule 79(2)” (§§61 and 64(b)) and “[s]uitability of a case for aggregate damages is plainly not a hurdle. It is just one of many factors relevant to suitability of the claims for collective proceedings under rule 79(2)” (§68);
- (b) “in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant’s loss in the plainest terms.” (§58);
- (c) [i]n the context of suitability for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on, and insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large.” (§73)
- (d) aggregate damages “provides just compensation for the loss suffered by the claimant class as a whole, but the amount need not be computed by reference to an assessment of the amount of damages recoverable by each member of the class individually” (§3);

170. In relation to the distribution of any damages, the Supreme Court added that “generally” any consideration of distribution proposals “at, and for the purposes of the certification stage” is “premature...not least because issues about distribution mainly engage the interests of the represented class inter se, rather than those of the proposed defendant... [Any] inappropriate element in the distribution proposals would normally be better dealt with at a later stage” (§80 and see, also, §§58, 64(g) and 77 of that case);

171. The individual claims of the Proposed Class Members are suitable for an award of aggregate damages including for the following reasons:

- (a) There is a large number of individual Claims (estimated by the Parker Report at 2.31 million: see above and Parker Report, §418), each of relatively small value (Parker Report, §413 [**Annex 2**] [**CF Bundle/3/213**]);
- (b) Each of the Claims is very similar, arising out of the pricing of a single service (available in three variants) by a single provider (BT) over a defined period (the Claim Period) and so the Claims are largely, if not entirely, identical (see §§152 – 155 above);
- (c) The Proposed Class Representative anticipates that the total damages are capable of being calculated without information from the Proposed Class Members (see the Litigation Plan at section 6 [**JLP Bundle/2/50-54**]);
- (d) Certain aspects of the calculation of damages, namely the appropriate rates for compound interest calculation, and any pass-on, cannot practicably be undertaken on an individual basis;
- (e) The Parker Report [**Annex 2**] sets out a simple methodology for calculating aggregate damages at §§368 – 387) [**CF Bundle/3/198-203**], namely, in summary, on a monthly basis, based on (i) the duration of the period over which damages arise for BT Voice Only Customers and BT Split Purchase Customers; (ii) the number of BT Voice Only Customers and BT Split Purchase Customers purchasing BT SFV Services; and (iii) a comparison of the price for each BT SFV Service against its competitive benchmark; and
- (f) BT is likely to retain sufficient evidence and data in order to make these calculations and the unredacted, confidential versions of the Ofcom materials are likely to greatly assist (see Annex E to the Parker Report for the disclosure Mr Parker deems appropriate [**Annex 2**] [**CF Bundle/3/247-254**]).

172. In the premises, an award of aggregate damages is a practical and proportionate method of assessing damage on behalf of the Proposed Class.

173. The Proposed Class Representative however notes that it will in theory be possible to calculate the precise unlawful overcharge borne by each individual consumer (subject to any adjustments which may need to be made for business customers) which may be relevant at the distribution stage. See the Litigation Plan (section 8) [**JLP Bundle/2/54-56**] and the Parker Report (§388) [**Annex 2**] [**CF Bundle/3/203-204**], which set out a provisional and initial methodology for achieving an individually-tailored (and compensatory) distribution (Parker Report, §§375 – 384) [**Annex 2**] [**CF Bundle/3/200-202**]. The Proposed Class Representative will keep this matter under review and will, in due course, provide a detailed methodology and process for how individual Proposed Class Members can claim their share of any award of damages and how their claims will be processed.
174. The Proposed Class Representative has made appropriate plans for notifying Proposed Class Members (see the Notice and Administration Plan (sections 7 – 9) [**JLP Bundle/2/89-95**] and Litigation Plan [**JLP Bundle/2/33-160**]).

The availability of alternative dispute resolution (Rule 79(2)(g))

175. Section 49C of the Act on voluntary redress schemes does not apply in the instant case (there being no relevant decision). Nevertheless, as set out above at §15, and in correspondence on his behalf with BT (see the Witness Statement of Rob Murray [**RPM Bundle/1/3-12**]), the Proposed Class Representative is prepared to enter into constructive discussions with BT to explore a timely resolution of the Claims so that Members of the Proposed Class are fairly compensated as soon as possible. In order to fulfil his functions as a Proposed Class Representative and meet the criteria set out in the Rules for the approval of any Collective Settlement, this must, however, be done on an informed and fair basis.

**The collective proceedings should be opt-out proceedings (Rule 79(3))**

176. The Proposed Class Representative seeks permission to bring the Claims by way of opt-out proceedings. The Guidance indicates that the Tribunal can consider whether the Claims should be brought on an opt-in or an opt-out basis, taking into account all matters

it thinks fit, including (i) the strength of the Claims<sup>89</sup> and (ii) whether it is practicable for the proceedings to be brought as opt-in proceedings. Each of these considerations, dealt with in turn below, support the Proposed Class Representative’s application for a CPO on an opt-out basis.

### Background to the introduction of the opt-out regime

177. One of the principal reasons for introducing a wider regime for collective proceedings, and the ability for representatives to bring opt-out proceedings, was the ineffectiveness of the previous scheme of representative proceedings brought by a specified body in securing redress for consumers. The travaux documents for the 2015 Act observed that the previous regime had resulted in only a single case being brought in over 10 years (a claim by The Consumers’ Association (more commonly referred to as Which?) against JJB in respect of replica football shirts) and that the claim only recovered a “small fraction of the consumer losses involved due to the low level of participation” (estimated to be approximately £20 on average per consumer who opted-in).<sup>90</sup> Following this sole outing, Which? had stated that it would not bring another action under the existing procedure, identifying the “greatest barrier” as being “reaching consumers who have suffered detriment”.<sup>91</sup>
178. The primary justification for enabling opt-out actions was therefore to protect the interests of consumers, particularly in cases where “the amount of damages per claimant is very low”, in which case “only an opt-out action is likely to succeed in delivering redress”.<sup>92</sup> As stated by Baroness Neville-Rolfe during a debate on the Bill, “a key feature of the revised regime is the introduction of an opt-out regime, where consumers are automatically part of a court action unless they opt out”.<sup>93</sup>

---

<sup>89</sup> §6.39 of the Guide states: “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.”

<sup>90</sup> Private Actions in competition law: a consultation on options for reform (April 2012), §§5.4 and 5.6.

<sup>91</sup> Business, Innovation and Skills Committee – Sixth Report (Consumer Rights Bill) (23 December 2013), §272.

<sup>92</sup> Private Actions in competition law: a consultation on options for reform (April 2012), §5.27.

<sup>93</sup> Hansard (HL Grand Committee (7th sitting)) 3 Nov 2014, vol.756, col. GC580, emphasis added.

179. The government was particularly concerned about the possibility of cases where it is not “economically worthwhile to bring a claim” because the sums sought are likely to be small, “e.g. the sum due for an over-priced washing machine or an excessively high coach ticket price”.<sup>94</sup>

180. See also the Tribunal’s observations in *Gibson v Pride Mobility Products* [2017] CAT 9 at §22 (emphasis added):

“One of the main purposes of the introduction of collective proceedings for competition law claims was to provide an effective mechanism for consumers and smaller enterprises to recover compensation for loss which, although significant for the victim, is individually not of such an amount as could justify bringing such a claim but which, taken together, constitute an appreciable sum.”

181. In that case, the Tribunal went on to hold that, were it not for (unrelated) issues as to the way in which the proposed class representative had defined the alleged infringement, an opt-out proceeding would have been suitable given “the size of the class” (being some 27,000-32,000 people), “the fact that the class members are individual consumers” and the “estimated amount that each represented class member could recover” (being £40 or £195 per consumer, depending on the model purchased) (§§5, 22 and 124).

#### The strength of the Claims (Rule 79(3)(a))

182. The Claims are strong.<sup>95</sup> Whilst the Claims are technically of a standalone nature, they rely heavily on the facts and findings set out in the Provisional Conclusions, the Statement and the effect of the BT Commitments. As pleaded above, Ofcom considered that BT’s prices were so high as to warrant direct price control which was avoided only by virtue of the BT Commitments. Whilst Ofcom’s intervention has resulted in lower prices for Voice Only Customers from 1 April 2018, there was no provision for BT customers to obtain redress for unlawful overcharges already paid to BT (and it is noted that Ofcom still, in 2021, considers these consumers do need protection from detriment). The Proposed Class Representative therefore seeks permission to bring these collective

---

<sup>94</sup> House of Commons Consumer Rights Bill Research Paper (27 January 2014), p.43.

<sup>95</sup> This requirement is to be understood in light of the dicta in *Merricks*: “claimants with a real prospect of (some) success should [not] be denied a trial by the only procedure available to them in practice”, and “such a merits threshold should not be applied, beyond the strike out or summary judgment levels” (§75).

proceedings in order to obtain such redress on behalf of Members of the Proposed Class in respect of BT's past and ongoing infringement.

183. Moreover, this Claim Form is also supported by the Parker Report, which constitutes strong evidence of the significant unlawful overcharges to Members of the Proposed Class and of consequent interest foregone.

Opt-in collective proceedings are not practicable (Rule 79(3)(b))

184. Given the individual sums at stake, the complexity and costs involved and the characteristics of the Members of the Proposed Class, it would not be feasible to bring this consumer claim on an opt-in basis. This is an exemplar of precisely the sort of claims for which the opt-out procedure was introduced:

- (a) as explained above, the sums in question are relatively small on an individual Class Member basis; and
- (b) as explained in §80 above, many of the Proposed Class Members are generally unengaged, elderly, in lower socio-economic households and/or (in the case of Voice Only Customers) by definition do not have access to the internet. As the Statement noted, it is exactly this low level of consumer engagement “*that has contributed to cementing BT's position in the market*”, leading to the abuse in the first place (§4.18). ) For these reasons, it is impracticable to expect these consumers to take the proactive steps required to opt into the proposed collective proceedings.

185. In short, the characteristics described at §80 (and references therein) above which led many of the Members of the Proposed Class to buy a BT SFV Service and suffer detriment from BT's action (for example, lack of engagement) are precisely the characteristics which render the Class inapt for an opt-in claim. Consequently, the Proposed Class Representative considers, based on his experience, that an opt-in claim is very unlikely to serve as an effective means of seeking redress for at least a large part of the Class, and their interests will be most effectively advanced by bringing an opt-out claim (see §§30 – 32 and 89 of the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/10-12**] and [**JLP Bundle/1/26**]).

186. As the Proposed Class Representative states (at §32 [**JLP Bundle/1/12**]):

“Even with the most intensive efforts to notify claimants, and even if they were offered every conceivable way to register their claim, forcing members of such a disengaged and technically unconfident group to opt-in to a little-known process concerning a claim about technologies they don't really understand would inevitably lead to a huge drop-out rate even among those who were aware they might be due damages”

187. Although it may be possible to identify and contact Proposed Class Members (or at least many of them<sup>96</sup>) by reference to BT's customer records, which the Guide notes in general terms might favour an opt-in, the major obstacle would arise after Members of the Proposed Class have been identified and contacted. Individual Members of the Proposed Class are very unlikely to take the proactive steps required to opt *into* a class action; nor is it likely to be feasible for most Members of the Proposed Class to conduct their own assessment of the merits of the claim, as the Tribunal presumes to be the case for opt-in Members of the Proposed Class (1<sup>st</sup> indent, §6.39 of the Guide).

#### **PART VI: SUMMARY OF THE BASIS ON WHICH THE PROPOSED CLASS REPRESENTATIVE SEEKS TO BE AUTHORISED (RULES 75(3)(D) AND 78)**

188. This part provides a summary of the basis on which the Proposed Class Representative seeks to be authorised to act in that capacity on the basis that such authorisation is just and reasonable in accordance with Rules 75(3)(d) and 78(1)(b). See, also, the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/3-32**].
189. Pursuant to Rule 78(2), in determining whether it is just and reasonable for the Proposed Class Representative to act as the class representative the Tribunal shall consider five matters (together, “**the Just and Reasonable Considerations**”). Each consideration is met in the instant application for the reasons addressed in turn below.<sup>97</sup>

#### **The Proposed Class Representative would fairly and adequately act in the interests of the Class Members (Rule 78(2)(a))**

190. Rule 78(1)(a) provides that the Tribunal may authorise a person to act as the representative in collective proceedings “*whether or not*” the Proposed Class

---

<sup>96</sup> It is unknown how many ex-customers of BT may have moved address and so be uncontactable.

<sup>97</sup> This Application is also accompanied by a Witness Statement [**JLP Bundle/1/3-32**] in which the Proposed Class Representative addresses the considerations raised by Rule 78, as envisaged by §6.13 of the Guide. Further reference is to be made to that statement.

Representative is a Class Member. As explained in his Witness Statement at §77 and §80, Mr Le Patourel is not a Class Member [**JLP Bundle/1/23**].

191. The Proposed Class Representative would act fairly and adequately in the interests of the Members of the Proposed Class for the following reasons:

- (a) He has considerable experience in the telecoms industry with a specific focus on matters which stop consumers from switching from one service provider to another in order to get a better deal, including the conduct of the CPs themselves. As a result, he has an in-depth understanding of the motivations, behaviours and difficulties faced by telecoms consumers, particularly those who are vulnerable, elderly or less comfortable with technology. He believes that this is directly relevant to the experience of SFV Customers during and prior to the Claim Period, and enables him to understand the Members of the Proposed Class, and act fairly and adequately in their interests (Witness Statement of the Proposed Class Representative, §§62 - 84 [**JLP Bundle/1/19-24**]). He is also well-placed as a result of his previous experience and knowledge to manage the proceedings.
- (b) He wishes to represent the Proposed Class in order to secure justice for them (Witness Statement of the Proposed Class Representative, §§33 – 59 [**JLP Bundle/1/12-18**]).
- (c) He has the benefit of the expertise of the advisory panel, which he has started to assemble to assist. The Proposed Class Representative has identified certain individuals with specific expertise and experience in consumer rights, particularly in the context of vulnerable consumer matters, to assist him. This has led to the appointment of Jane Vass OBE – former Director of Policy and Research at Age UK. See §§82 - 84 of the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/24**]).

192. The Proposed Class Representative has prepared a plan for the Proposed Collective Proceedings (the Litigation Plan [**JLP Bundle/2/33-160**] and Notice and Administration Plan [**JLP Bundle/2/60-149**]) which includes:

- (a) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings (see section 4). Both the Litigation Plan and the Notice and Administration Plan place emphasis on the fair treatment of older, lower income, and vulnerable consumers, and are designed not only to target Members of the Proposed Class, but also their friends, family and carers who may assist them with their decision-making process, and draw to their attention issues such as this, which may affect them (Witness Statement of the Proposed Class Representative, §§85 – 95 [**JLP Bundle/1/25-27**]), Notice and Administration Plan (see section 3) [**JLP Bundle/2/67-71**]);
- (b) notification proposals at pre-CPO, CPO and distribution stages (see Notice and Administration Plan [**JLP Bundle/2/72-91**] at sections 4 - 7)
- (c) a procedure for governance and consultation which takes into account the size and nature of the class, including the appointment of an advisory panel (Litigation Plan, section 4 [**JLP Bundle/2/44-45**], and the Panel terms of reference [**JLP Bundle/18/842-850**]);
- (d) consideration of matters in relation to disclosure, evidence and witnesses (Litigation Plan, section 6);
- (e) consideration of the litigation timetable (Litigation Plan, section 7);
- (f) a procedure for distributing any award of aggregate damages (Litigation Plan, section 8); and
- (g) a cost budget for the Proposed Collective Proceedings (Litigation Plan, section 8 [**JLP Bundle/2/54**] and Annex 2 to that Plan [**JLP Bundle/2/150**] as well as a litigation timetable [**JLP Bundle/2/151**]).

193. The Proposed Class Representative has instructed Case Pilots (a claims administration company) and Media Zoo (a PR agency) in order to assist with the administering and notifying the Proposed Collective Proceedings. Background to the Litigation Plan and the Notice and Administration Plan (including biographical information for Case Pilots

and Media Zoo) is set out at §§85 - 95] of the Witness Statement of the Proposed Class Representative [**JLP Bundle/1/25-27**]).

**The Proposed Class Representative does not have a material interest that is in conflict with the interests of Class Members (Rule 78(2)(b))**

194. As set out in the Witness Statement of the Proposed Class Representative (§§77, 109 and 112),<sup>98</sup> there is no conflict of interest which prevents him from acting as Class Representative for the Proposed Class [**JLP Bundle/1/27-30**].

**There is not more than one applicant seeking approval (Rule 78(2)(c))**

195. §165 above is repeated and relied upon.

**The Proposed Class Representative will be able to pay the proposed defendant's<sup>2</sup> costs if ordered to do so (Rule 78(2)(d))**

196. As set out in the Witness Statement of the Proposed Class Representative (§§96 - 115) [**JLP Bundle/1/27**], he has made arrangements to ensure that he will be able to pay the Proposed Defendant's<sup>2</sup> costs if ordered to do so (or if he agrees to do so). The Proposed Class Representative's costs budget can be found as Annex 2 to the Litigation Plan [**JLP Bundle/2/150**].

197. The Proposed Class Representative has arranged appropriate funding for the Proposed Collective Proceedings (as explained in the Witness Statement of the Proposed Class Representative, §§96 - 115 [**JLP Bundle/1/3-32**], and Litigation Plan, section 8 [**JLP Bundle/2/54**]).

---

<sup>98</sup> See also §§97 and 188 - 193 above.

198. Specifically, as part of the funding arrangements<sup>99</sup> for the Proposed Collective Proceedings, Harbour Fund V, L.P. have agreed to pay any adverse costs award on favour of BT (or any adverse costs that the Proposed Class Representative agrees to pay) BT in relation to the Proposed Collective Proceedings. In line with this obligation, Harbour Fund V, L.P. has purchased adverse costs insurance in relation to the Proposed Collective Proceedings. See further details set out in the Witness Statement of the Proposed Class Representative (§§96 - 15) [JLP Bundle/1/27-30].
199. The costs of BT should not exceed those of the Proposed Class Representative<sup>100</sup>: BT will already have substantial knowledge of the factual and legal issues that will arise for determination in the proposed proceedings on account of the 2017 Review, the BT Commitments (and their on-going obligations), and the 2020 Review (including BT's new proposed voluntary commitments), the adverse costs cover obtained by the Proposed Class Representative is more than adequate.

**No interim injunction is sought (Rule 78(2)(e))**

200. The Proposed Class Representative does not seek an interim injunction so Rule 78(2)(e) is inapplicable.

**PART VII: RELIEF SOUGHT (RULE 75(3)(I))**

201. For the reasons given above, in summary, the relief sought in the Proposed Collective Proceedings is:

---

<sup>99</sup> The Proposed Class Representative seeks confidentiality protection over these agreements under Rule 101 of the Rules. The Proposed Class Representative is nonetheless willing to agree to the terms of an appropriate confidentiality order and confidentiality ring with BT, with a view to making an application to the Tribunal, by consent, for the creation of a confidentiality ring pursuant to Rule 53(1) and 53(2)(h) so that BT can understand the funding terms. Moreover, in order to act transparently vis-à-vis Proposed Class Members, the Proposed Class Representative will, in due course, make non-confidential versions of the funding agreements available to the Proposed Class Members upon request via a designated website which has been established to assist with providing notice to the Proposed Class Members.

<sup>100</sup> See *Gibson v Pride Mobility Products* [2017] CAT 9 §143: "it is not evident why the costs of Pride [the respondent] should exceed those of the Applicant, particularly when Pride's lawyers have already done a great deal of work in gathering documentation and responding to the inquiries made in the course of the OFT's investigation"

- (a) Damages to be assessed on an aggregate basis pursuant to section 47C(2) of the Act;
- (b) interest, calculated from the date each individual claim arose on either a compound, or alternatively simple, basis as pleaded above;
- (c) the Proposed Class Representative's costs; and/or
- (d) any such further or other relief as the Tribunal may see fit.

202. As to the estimate of the amount claimed in damages, aggregate damages are currently estimated at £589 million (on the illustrative basis of 8% simple interest, and comprised of £238 million for BT Voice Only Customers and £351 million for BT Split Purchase Customers) on the basis set out in §§139 - 144 above. As explained therein, this is a preliminary estimate only and may require further revision once disclosure of appropriate data has been provided by the Proposed Defendants.

**Ronit Kreisberger Q.C.**  
**Alison Berridge**  
**Jack Williams**  
**MONCKTON CHAMBERS**  
**15 January 2021**  
**Amendments: 4 March 2021**

**Statement of Truth**

I believe that the facts stated in this Claim Form are true.

Full name: JUSTIN LE PATOUREL

Signed: 

.....  
 (Applicant / Proposed Class Representative)

Dated: 15 January 2021

**Statement of Truth**

I believe that the facts stated in this Amended Claim Form are true.

Full name: JUSTIN LE PATOUREL

Signed:



.....

(Applicant / Proposed Class Representative)

Dated: 4 March 2021

## LIST OF ANNEXES

1. Glossary
2. Expert economic report by David Parker (Parker Economics), dated 13 January 2021
3. Ofcom's Statement, "Review of the market for standalone landline telephone services", 26 October 2017 (non-confidential)
4. Ofcom's Evidence, "Evidence supporting this statement: Review of the market for standalone landline telephone services", 26 October 2017 (non-confidential)
5. Ofcom's Provisional Conclusions, "Review of the market for standalone landline telephone services", 28 February 2017 (non-confidential)
6. Ofcom's Provisional Conclusions Annexes, 28 February 2017 (non-confidential)
7. Draft Collective Proceedings Order
8. Draft Notice to Members of the Proposed Class of the CPO
9. Ofcom Press Release of 2017 Review
10. Ofcom 2020 Review
11. Ofcom's Statement "Fixed Narrowband Retail Services Markets", 15 September 2009
12. Ofcom's Consultation on end-of-contract and out-of-contract notifications, 31 July 2018 (non-confidential)

The Application for a CPO is also supported by a Witness Statement of Justin Le Patourel (the Proposed Class Representative) [**JLP Bundle/1/3-32**] and Rob Murray (of Mishcon de Reya LLP) [**RPM Bundle/1/3-12**], which are provided in separate bundles (with accompanying exhibits, including the Litigation Plan [**JLP Bundle/2/33-160**] and Notice and Administration Plan [**JLP Bundle/2/60-149**]).



