IN THE COMPETITION APPEAL TRIBUNAL **Case No. 1318/7/7/21**

B E T W E E N :-

JUSTIN LE PATOUREL
(the "CR")

Class Representative

- and -

(1) BT GROUP PLC
(2) BRITISH TELECOMMUNICATIONS PLC
(together, "BT")

Defendants

APPLICATION FOR PERMISSION TO APPEAL

Applicant

Justin Le Patourel, [✂]

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I Introduction

1. The CR applies for permission to appeal on an expedited basis, bearing in mind the elderly demographic of at least a portion of the class, from the judgment of the Tribunal handed down on 19 December 2024, [2024] CAT 76, by which the Tribunal dismissed the CR's claim that BT abused its dominant position by charging unfair prices for BT Standalone Fixed Voice Services ("**SFV Services**") in breach of Chapter II of the Competition Act 1998 (the "**Judgment**"). The proposed Grounds of Appeal, set out below, have a real prospect of success, and there are additional compelling reasons why an appeal should be heard.

2. Under section 49(1A) of the Competition Act 1998, a decision of the Tribunal in collective proceedings can be appealed on a point of law to the Court of Appeal. The Tribunal found that there was a separate market for SFV Services, that BT was dominant in that market and that BT's SFV prices were significantly and persistently excessive. The extent of the excess on the Tribunal's analysis is very substantial: the CR estimates that it amounts to approximately 675m.[1] However, the Tribunal found that BT's excessive prices were not unfair. The CR's appeal raises novel and important questions of law concerning the law of unfair pricing especially in the context of collective proceedings. Moreover, this is the first collective proceeding to have proceeded to judgment after a full trial in a developing area of the law. A decision by the Court of Appeal would be instructive in framing this developing area of the law and practice, both for the parties to these proceedings and for other litigants in pending and future proceedings. It is right that these questions should be considered by the Court of Appeal.

3. The Tribunal's conclusions on Limb 2 of the applicable test for unfair pricing are predicated on its findings on Limb 1 of that test. Those conclusions cannot stand if the findings on Limb 1 are overturned. Further, the appeal on Limb 2 is not dependent on overturning the findings on Limb 1. There are self-standing grounds of appeal on Limb 2.

[1] This figure is calculated by first, multiplying (i) the delta between average revenue per user ("**ARPU**") and the Tribunal's competitive benchmark with (ii) the average annual number of SFV customers (at [558] of the Judgment) and (iii) a VAT uplift of 20%. Then, multiplying the resultant figures by the number of months in each financial year that are in the Claim Period. And finally, summing across years.

4. The proposed grounds of appeal are, in summary:

(1) **Ground 1 (Limb 1):** The Tribunal erred in law in finding that the Common Costs Starting Point was £250m because: BT did not produce data or direct evidence as to BT Consumer's common costs (or its indirect costs more generally); it is impossible to discern from the judgment itself how the Tribunal arrived at its estimate; the Tribunal should have drawn an adverse inference from BT's failure to produce evidence on its own costs; the Tribunal's approach incentivises dominant firms to withhold primary evidence on their costs; the Tribunal should not have relied on BT's expert Dr Jenkins's subjective opinions because they were untethered to relevant data or factual evidence; it should not have rejected the CR's case that common costs were very low or immaterial. Each of the Tribunal's findings was rationally insupportable.

(2) **Ground 2 (Limb 1):** The Tribunal erred in law in finding that the SFV Services Common Costs Contribution was 40%. That finding was rationally insupportable, given that: (i) Dr Jenkins' SAC Combinatorial analysis, on which the Tribunal relied in making that finding, had already been rejected by the Tribunal as a methodology for allocating common costs to SFV Services; (ii) the proportion of total voice lines and BT Consumer revenue accounted for by SFV Services, on which the Tribunal relied in making that finding, had each also been rejected by the Tribunal as a basis for allocating common costs to SFV Services; and (iii) having found that BT enjoyed a position of substantial dominance in the market for SFV Services, the Tribunal erred in allocating 40% of common costs to SFV Services on the basis of the flexibility enjoyed by firms in *competitive* conditions.

(3) **Ground 3 (Limb 2):** The Tribunal erred in law by wrongly construing the concepts of economic value and distinctive value and by wrongly applying those concepts in assessing the fairness of BT's SFV prices, in particular, by finding that BT SFV Services provided "distinctive value" on the basis of "difference". As a consequence of those errors, the Tribunal was wrong to conclude that BT's excessive prices bore a reasonable relation to the economic value of BT SFV Services. The Tribunal misdirected itself by construing economic value without reference to the price which BT SFV customers would

be willing to pay in an effectively competitive market; it failed to consider whether the market for SFV Services was capable of functioning in a manner likely to produce a reasonable relationship of price to economic value; it erroneously treated the fact that many Class Members continued to pay BT's excessive prices as evidence of their economic value, thereby falling foul of the "willingness to pay fallacy"; and wrongly construed economic value as corresponding to mere difference.

The Tribunal erred in its assessment that BT SFV Services offered distinctive value because it wrongly or irrationally (i) ascribed further value to the "Gives" and BT brand under Limb 2, having already taken account of both under Limb 1; (ii) treated the Gives and BT brand as sources of distinctive and/or economic value justifying excessive prices in circumstances where each of those Gives and the BT brand were made available to bundle customers at competitive prices; (iii) found BT's Gives offered distinctive value even though BT was replicating features already provided by others or where the Gives were quickly replicated by competitors; and (iv) failed to conduct a robust or proper comparative assessment of the BT Gives and comparable offerings from BT's rivals. The Tribunal made no attempt to assess the extent of the value of any of the features, nor their significance relative to the scale of the price excesses above the competitive benchmark.

(4) **Ground 4 (Limb 2):** The Tribunal erred in law in its consideration of the so-called "*Workable competition factors*". The Tribunal erroneously rejected the CR's submission that, in a workably competitive market, economic profits (i.e. profits above costs plus) should be zero. It erred in characterising the large excesses which it identified under Limb 1 as fair under Limb 2 given the extent to which it gave BT the benefit of the doubt in constructing the benchmark and assessing common costs. The Tribunal's findings that "*price dispersion*" and "*costs efficiencies dispersion*" counted against unfairness were rationally insupportable and/or had no evidential basis.

(5) **Ground 5:** The Tribunal erred in law (a) in finding that, had it held BT to be liable, it would not have been open to the Tribunal to award compound interest to the Class Members; and (b) in the standard it applied to a claim for compound interest on an aggregate basis.

II Ground 1 (Limb 1): Error of law in assessment of the Common Costs Starting Point

5. In finding that the Common Costs Starting Point was £250m, the Tribunal made six errors of law.

6. **First**, the Tribunal's finding that the common costs of BT Consumer were £250m was rationally insupportable. BT did not produce data / direct evidence as to BT Consumer's common costs (or its indirect costs more generally) despite the production of such evidence by BT being both possible and 'exclusively in its hands' (see sub-para (1) below). The only evidence which BT put before the Tribunal on the size of BT Consumer's common costs was opinion evidence from Dr Jenkins. The Tribunal criticised BT's failure to adduce evidence of its indirect costs, as follows:

(1) At [703]:

> "there was nothing actually stopping BT from producing, admittedly after the event, some more focused analyses that did drill down into the indirect costs that could be said to relate to SFV Services. This was by no means an impossible exercise. … In its s135 response to Ofcom in 2017, BT estimated that it would take approximately 2 months' systems development work, at a cost of £120,000, together with an operational headcount for 3 months at £60,000, plus a further financial management cost of £80,000, to create retail reporting on SFV Services using BT's then accounting system. Given the sums at stake here, such an exercise might be regarded as involving only modest costs and not disproportionate. … Clearly, the only party which could have produced that information was BT. It did not do so."

(2) At [764]:

> "[Dr Jenkins'] figures suggest very significant common costs, both in relation to BT Consumer as a whole and as allocated to SFV Services by her. … That analysis is not, however, as persuasive in the present context, as direct and detailed evidence from BT on the size of BT Consumer's common costs which was not adduced, would have been."

(3) At [794]:

> "More telling, however, is the CR's related point which is that, however useful her own exercise of judgment may have been, Dr Jenkins could - and should - have been assisted by BT itself in performing this exercise. There is no reason to think that BT could not have provided input as to the status of

the costs line (as common or incremental) by reference to much more detailed descriptions of what these costs were actually for."

(4) At [799]:

"While we would not by any means simply disregard the primary approach taken by Dr Jenkins in saying what should be regarded as the common costs of BT Consumer, there are clearly some difficulties with it such that her ultimate figures cannot simply be adopted without more."

(5) At [816]:

"the common costs of BT Consumer, as stated by Dr Jenkins in her baseline scenario cannot be taken as reliably established and there is a significant risk that they have been overstated. We also come back to the observation that reliance on Dr Jenkins' judgment and a series of imperfect cross-checks is inferior to an approach that would have been based on BT's own detailed knowledge of cost causation, and which BT chose not to undertake for the current case."[2]

(6) At [895]:

"the absence of contemporaneous information about cost drivers and common costs is entirely due to the decisions BT has taken not to do the work to provide it, even though it was feasible to do so."

7. Despite those observations, the Tribunal nonetheless found that a fair allocation of the common costs of BT Consumer was £250m in 2015/16, only slightly below Dr Jenkins's 'low scenario' estimate of £261m (at [905]). In so finding, the Tribunal erred in law, including by making a perverse finding, because: (i) there was no direct evidence from BT on the size of BT Consumer's common costs to support that assessment; (ii) Dr Jenkins' estimate of BT Consumer's common costs was inherently unreliable: Dr Jenkins is not a telecom costs expert, her opinion was based on her own subjective judgment, and she had no assistance or direct evidence from BT on common costs on which to base or inform her subjective judgments; and (iii) the only direct evidence from BT which attributed costs specifically to voice services, before the Tribunal, was the 2009 RFS which (subject to being uprated) indicated that the totality of indirect costs arising out of BT SFV Services (of which common costs are a subset) was far lower than the amount of common costs in the opinion of Dr Jenkins

[2] The difficulty of relying on the subjective judgment of Dr Jenkins's SAC Combi and of testing these for reasonableness in the absence of evidence within BT's direct knowledge were highlighted, for example, in paragraphs 410-411 of the CR's Written Closings.

and/or as upheld by the Tribunal: whereas Mr Duckworth's estimate of all indirect costs attributable to SFV Services per line was £32.86 per annum (at [909]), the Tribunal's estimate of common costs only attributable per SFV line was £37.45 per annum (at [908]).

8. **Second,** the Tribunal erred in providing no (or no sufficient) analysis or reasoning in support of its conclusion (at [905]) that the common costs of BT Consumer were £250m in 2015/16. It is impossible to discern from the Judgment itself how the Tribunal arrived at this figure. This is material to the determination of the case. If the value of BT Consumer's common costs was half the size of the figure asserted in the Judgment, the costs benchmark against which to measure BT's excessive pricing would decrease by between £1 to £1.20 per month and the excess of BT's pricing over the benchmark would change from an excess of between 24-49% to an excess of between 33-59%. The absolute cumulative overcharge based on the Tribunal's £250m allocation of common costs is £675m (excluding interest); if common costs were £125m then the equivalent figure would be £767m, an increase of approximately £90m.

9. **Third,** the Tribunal erred in law in failing to draw an adverse inference against BT from the fact that BT could have, but chose not to, adduce evidence of the indirect costs of providing SFV Services. At [666], the Tribunal said:

> "We do not think it necessary or appropriate to draw adverse inferences as such from the absence of such evidence. The simple point is that BT could have adduced relevant evidence and it did not, so such evidence is simply not there."

10. Where information concerning its own costs is "exclusively in the hands" of one party, that party must produce that evidence to forestall adverse inferences being taken against it: *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2020] UKSC 24 at [216]. Further, the Tribunal's failure to draw an adverse inference against BT is inconsistent with its special responsibility as a dominant firm under the Chapter II Prohibition not to allow its conduct to impair undistorted competition, including not to charge customers unfair prices. In circumstances where Ofcom had provisionally found BT to have significant market power in the relevant services, it was under intense regulatory scrutiny for overcharging customers for those services, and had offered commitments to lower prices to one group of customers only but had continued to charge high prices to SPCs, BT was on notice that its prices to SPCs

could violate Chapter II. In the premises, BT should have assessed its SFV prices by reference to the costs attributable to those services by conducting the costs exercise identified by the Tribunal. BT's failure to produce evidence on its own costs in those circumstances should have led the Tribunal to draw adverse inferences against it.

11. **Fourth,** the Tribunal's approach thereby erroneously or perversely incentivises dominant firms to withhold primary evidence on their costs for the purposes of Limb 1, limiting their evidence to unsubstantiated opinion evidence according to which large amounts of costs are allocated to the impugned products. From the outset there is an asymmetry of information concerning BT's costs which is acute in the context of a consumer CPO case. The CR cannot compel BT to produce primary material on its common costs (which BT said was not available). The Tribunal's decision implies that it is acceptable for a monopolist (or near monopolist) deliberately not to advance primary evidence of its costs but rather to have an expert opine on their amount in the absence of any primary evidence. The Tribunal's approach misconceives the purpose of the Chapter II prohibition and the public interest in its enforcement.

12. **Fifth,** the Tribunal erred in law in relying on Dr Jenkins' opinion evidence, based on subjective judgment alone, to fill the evidential lacuna left by BT's failure to produce direct evidence on common costs, despite having held that BT could have produced that direct evidence. By opining on the size of common costs without any sufficient basis in primary evidence, Dr Jenkins overstepped the boundaries of her expertise (as a competition economist) in particular given that her evidence on the size of common costs was not limited to opining on the classification of a particular cost or on the allocation of common costs identified on the basis of primary evidence. The Tribunal was wrong to take account of or rely on Dr Jenkins's subjective opinions which were untethered to relevant data or factual evidence.

13. **Sixth**, the Tribunal erred in law in rejecting the CR's case that the common costs of BT Consumer were very low or immaterial. The common costs of BT Consumer concern costs at the retail level; they do not concern the costs of fixed network infrastructure, which are common costs at the wholesale level but incremental costs at the retail level. In rejecting the CR's case on that point, the Tribunal found that "*the existence and prevalence of deep discounts for bundles over the stand-alone equivalents does indicate the existence of supply-side synergies, which in turn are likely to come from common costs*" (at [775]). The Tribunal also rejected the CR's

submission that the Phone Co-Op's operation in the SFV Services market proves that common costs are low, on the basis that the Phone Co-Op is not an operator of "*real weight*" (at [769]).

14. Each of those findings was rationally insupportable:

(1) As the Tribunal itself observed, the parties did not provide "*any detailed evidence on the existence or otherwise of … common cost synergies, beyond the claims made by Dr Jenkins regarding the scale of the indirect common costs*" (at [776]). Since BT did not put evidence before the Tribunal on this point, the Tribunal should not have resolved this point on BT's own costs in its favour. There was no sound evidential basis for the Tribunal's finding that there were significant common cost synergies in supplying bundles.

(2) The Tribunal observed (at [775]) that costs synergies in supplying bundles can arise from direct costs or indirect costs. The Tribunal then found (at [776]) that "*it seems to us*" that the prevalence of bundle discounts "*tends to discount the CR's claims that common costs are immaterial*". That finding was (i) unsupported by evidence, (ii) illogical, given the Tribunal's earlier observation that bundle discounts may arise from direct costs synergies, and (iii) unsupported by any reasons from the Tribunal.[3] The Tribunal also ignored the submission at [382] of the CR's Written Closings that "*although there are economies of scope in providing voice and broadband services to a given customer, these give rise to a direct cost synergy, which is captured by bundle pricing i.e. low incremental prices for broadband*" [emphasis added].

(3) The Tribunal's rejection of the exemplar of the Phone Co-Op was irrational. The fact that the Phone Co-Op could enter the SFV Services market and profitably compete shows that common costs are low. Indeed, Phone Co-Op's total SFV revenues were substantially lower than the Tribunal's estimate of BT's common costs. The fact that BT's costs are much higher than the Phone Co-Op's costs demonstrates that those additional costs are scalable (i.e. incremental) costs, not common costs. The Tribunal's finding to the contrary

[3] The Tribunal also stated at [745]: "*We think that the real economies of scope between SFV Services and bundles do give some support to the notion of the existence of significant common costs*." That finding was similarly unevidenced and unreasoned.

was illogical. Further, the Tribunal did not provide any reasons as to why it considered David Matthew's evidence on this point to have "*force*" (at [769]).

III Ground 2 (Limb 1): Error of law in the assessment of the SFV Services Common Costs Contribution

15. The Tribunal's finding that 40% of BT Consumer's common costs were to be attributed to BT SFV Services was rationally insupportable and therefore an error of law.

16. The Tribunal relied on Dr Jenkins' SAC Combinatorial analysis in reaching that finding (at [906]):

> "Looking at the picture overall, we consider that a reasonable balance is struck where SFV Services are permitted to recover around 40% of the total common costs. Here, we bear in mind that under Dr Jenkins' SAC Combi approach, and applying an assumption of a 25% margin, the SFV Services' contribution to common costs would be 62%. It would fall to 56% if a 20% margin was deployed (because of the way in which the margin is itself part of each SAC Combi calculation), and of course we proceed upon the basis of a 13.5% margin, which would suggest (using Dr Jenkins' approach) a contribution to common costs of a little below 50%." (emphasis added.)

17. The Tribunal, in finding that the SFV Services Common Cost Contribution was 40%, therefore relied on the fact that Dr Jenkins' SAC Combinatorial analysis would suggest a contribution of "*a little below 50%*" where a 13.5% margin is used. In effect, the Tribunal adopted the output of Dr Jenkins' SAC Combinatorial analysis, subject to a small downward adjustment.

18. The Tribunal's apparent reliance on the Dr Jenkins' SAC Combinatorial analysis in support of the SFV Services Common Costs Contribution was perverse or irrational, in circumstances where the Tribunal had categorically rejected Dr Jenkins' SAC Combinatorial analysis in the Judgment. At [856], the Tribunal stated:

> "Overall, we consider that Dr Jenkins' approach, insofar as it is based on the SAC Combi exercise, is seriously deficient, and it cannot justify the competitive benchmarks which are said to result from it."

19. The Tribunal also rejected Dr Jenkins' DSAC and FAC 'cross-checks' on her SAC Combinatorial analysis: at [874] ("*her DSAC analysis does not act as a meaningful crosscheck to her SAC Combi*") and at [896] ("*there are real problems with each of*

her cross-checks. Just because there is a number of different analyses, and permutations thereof, it does not follow that all of them are correct, or that the right approach is to be found in a simple average from the various individual flawed approaches"). The SAC Combinatorial analysis, on the Tribunal's own findings, was therefore incapable of supporting the conclusion it reached at [906] of the Judgment.

20. Further, the Tribunal's attempt (at [907]) to justify a 40% allocation of common costs to SFV Services by reference to SFV Services' percentage share of total voice lines and BT Consumer's revenue was irrational, in circumstances where the Tribunal had already rejected the use of customer and revenue allocation rules as a basis for allocating common costs to SFV Services (at [885] and [889]).

21. Still further, the Tribunal's purported justification (at [907]) of the allocation of common costs to SFV Services is irrational. In observing that firms should enjoy a considerable degree of flexibility in how costs are recovered "*in competitive conditions*", the Tribunal misdirected itself because BT was not operating in competitive conditions, given the extent of its market power.

IV Ground 3 (Limb 2): Error of law in the assessment of economic value

22. The Tribunal erred in law by wrongly construing the concepts of economic value and distinctive value, as set out below, and by wrongly applying those concepts in assessing the fairness of BT's SFV prices under Limb 2, in particular, by finding that BT SFV Services provided "*distinctive value*" on the basis of "difference". As a consequence of those errors, the Tribunal was wrong to conclude under Limb 2 that BT's excessive prices (at the level found by the Tribunal under Limb 1) bore a reasonable relation to the economic value of BT SFV Services.

23. The Tribunal summarised the concept of "*distinctive value*" at [83]:

> "... we would adopt the concept of distinctive value as a useful yardstick by which to measure that value in the product which is different to its cost (as established for these purposes by the relevant competitive benchmark under Limb 1) and which is something in some way different from the offerings of other sellers, but which can include the brand or other value ascribed subjectively by the customer for the product, as distinct from the product's particular features. In that regard, innovation in its features is not necessary if they are perceived by the customer (subjectively or objectively) to amount to a better quality product in some way."

24. In concluding that BT SFV Services provided "*distinctive value*" to Class Members, the Tribunal found that:

(1) Class Members ascribed "*real*" and "*positive value*" to several of the Gives provided by BT (at [973], [987], and [995]);

(2) Class Members reported high or relatively high levels of satisfaction with BT's landline services, and this evidence (taken together with other evidence) showed the economic value of BT SFV Services (at [1089]); and

(3) The decision by Class Members to continue purchasing BT SFV Services, in circumstances where the evidence showed that Class Members were not generally inert and were engaged with their BT SFV Service, implied a degree of positive value attached to the BT brand (at [1135]).

25. The Tribunal's approach to the assessment of economic value involved the following errors of law.

26. **First**, the Tribunal misdirected itself by construing economic value without reference to the central consideration of the price which BT SFV customers would be willing to pay in an effectively competitive market. In *Phenytoin CoA*, Green LJ observed at [154]-[155]:

> "The concept of economic value is not defined. In broad terms the economic value of a good or service is what a consumer is willing to pay for it. But this cannot serve as an adequate definition in an abuse case since otherwise true value would be defined as anything that an exploitative and abusive dominant undertaking could get away with. It would equate proper value with an unfair price. ...
>
> The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not therefore an indication it reflects a reasonable relationship with economic value. But a proxy might be what consumers are prepared to pay for the good or service in an effectively competitive market."

27. Green LJ also said at [172]: "*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 ... economic value ...*". The principles articulated by Green LJ in *Phenytoin CoA* are consistent with the overarching test for unfair pricing, which is whether the dominant entity has reaped trading benefits which

it would not have obtained in conditions of normal and sufficiently effective competition.

28. Consequently, the Tribunal erred under Limb 2 by failing to ask whether the excessive prices which it identified under Limb 1 bore a reasonable relationship to the prices which those customers would be prepared to pay in a workably competitive market, wrongly focusing instead on subjective questions of ascription of value to aspects of BT's SFV Service by consumers as set out below.

29. **Second,** the Tribunal erred in law in its assessment of fairness under Limb 2, by failing to consider whether the market for SFV Services was capable of functioning in a manner likely to produce a reasonable relationship of price to economic value (*Albion Water II* [2008] CAT 31 at [268]) and whether the constrained nature of competition explained BT's ability to charge excessive prices (as identified by the Tribunal under Limb 1) in that market. Although the Tribunal correctly identified that this is a consideration relevant to its assessment of price and that the Tribunal should review with care the lawfulness of a price unconstrained by competitive considerations whatsoever (at [69]), it failed to follow its own direction in assessing economic value. Given that the Tribunal found that BT had a very high market share (at [461]) which was almost 100% for SPCs and that there were barriers to expansion which provided "*a material degree of protection to BT*" and "*some insulation from effective competition*" (at [467]), it erred in law in by failing to consider whether those market features explained BT's ability to charge excessive prices.

30. **Third,** the Tribunal erred in law by treating the fact that many Class Members continued to pay BT's excessive prices (rather than switching away) as evidence of their economic value, thereby falling foul of the willingness to pay ("**WTP**") fallacy. In particular, the Tribunal: (i) misdirected itself that it may be possible to infer that those who stay with the product have actively chosen to stay because they subjectively attach a positive value to the product or brand, and (ii) erred in going on to conclude that a substantial number of Class Members who remained with BT "*probably did so out of a sense of loyalty to the BT brand*" and that their decision to remain with BT "*implies a degree of positive value that they attached to the BT brand*" (at [1134]-[1135]). The Tribunal thereby wrongly elided the concept of economic value with the customer's willingness to pay the excessive price, contrary to the law stated in *Phenytoin CoA*. Further, the Tribunal's rejection of the WTP

fallacy on the basis that it arises only where customers "*are in a truly captive market in all respects and have nowhere else to go*" (at [960]) was wrong in law, as it would wrongly confine the WTP fallacy to cases of true or near monopoly. The Tribunal was therefore wrong to infer positive economic value from the fact that Class Members paid BT's excessive prices, particularly given the characteristics of the SFV market and BT's position within it, as set out in the foregoing paragraph.

31. **Fourth**, the Tribunal wrongly construed economic value under Limb 2 as corresponding to mere difference from the offerings of other sellers pursuant to its construction of "distinctive value". The existence of a difference between the excessively-priced product compared to other products on the market, without more, cannot, on its own, constitute economic or distinctive value such as to justify an excessive price under Limb 2. The consequence of construing distinctive value in that way would be that unfair pricing cases would be practically inconceivable, save in wholly undifferentiated product markets. Nor is it sufficient to ask whether the customer ascribes some subjective value to an aspect of the product in order to assess its economic value and/or fairness under Limb 2. Accordingly, the Tribunal's yardstick for measuring value under Limb 2 was wrong in law and/or imported a threshold for that assessment which was too low and/or meaningless.

32. **Fifth,** the Tribunal made the following errors of law in its assessment that BT SFV Services offered distinctive value (which was treated as constituting economic value) for the purposes of assessing fairness under Limb 2, in the form of Gives and brand value:

    (1) The Tribunal erred in ascribing further value to the Gives and BT brand under Limb 2, having already taken account of both the costs of the Gives and brand costs under Limb 1 including allocating a "reasonable margin" to them. As such, the Tribunal wrongly double-counted those aspects of BT's service by treating them as sources of further economic value which justified the price excess under Limb 1.

    (2) The Tribunal was wrong to treat three of the Gives (Onshoring of customer call centres, Call Protect, and the Fault Fix Guarantee) and the BT brand as sources of distinctive and/or economic value which justified the excessive SFV prices in circumstances where each of those Gives, and the BT brand, were made available by BT to bundle customers at competitive prices. The Tribunal should have

concluded from the fact that bundle customers (many of whom were SFV Customers previously) receive the same features in their services, without paying excessive prices, that the Gives are not a source of additional economic value above cost plus and do not justify the large price excesses identified by the Tribunal. The Tribunal's reasoning below in rejecting the CR's submission to that effect at [1029] of the Judgment is inadequate and/or unclear and/or irrational:

> "We do not agree; it does not mean that Gives cannot constitute economic value from the point of view of the Class Members, which ultimately has to be assessed by reference to the impact on those customers and the excess which we have found."

(3) The Tribunal's assessment that BT's Gives offered "distinctive value" in the form of a material difference of offering was irrational and/or unsubstantiated given that BT was either replicating features already provided by others (including a major competitor) or where BT's "innovation" was quickly replicated by competitors. Rivals could and did offer the Gives in their own SFV / bundle offerings. In a workably competitive market, BT would not be able to extract excessive prices from customers by offering Gives which were available from rivals. The Tribunal should have but failed to consider whether BT could have extracted the excessive prices identified by it in conditions of workable competition by offering the Gives and/or whether Class Members would have been prepared to pay BT's excessive prices in an effectively competitive market.

(4) Further, even applying its own test of 'difference' (which is wrong in law), the Tribunal failed to conduct a robust or proper comparative assessment of whether the BT Gives differed (at all or to a material extent) from comparable offerings from BT's rivals; and it lacked the evidentiary material to conduct such an assessment, and made unsupported assumptions and/or inferences as too subjective value. Consequently, the Tribunal's conclusions as to the "positive value" of the Give (at [973] in relation to Onshoring; [984]-[985] in relation to Call Protect; and [995] in relation to Fault Fix) were not a sufficient or rational basis for identifying distinctive value such as to render the excessive prices fair.

33. Finally, the Tribunal wrongly failed to consider whether the features which it characterised as sources of distinctive value under Limb 2 were sufficient to justify the price excesses above the competitive benchmark which it had identified under

Limb 1, cumulatively £675m over the Claim Period, so as to render the overall price fair. The Tribunal made no attempt to assess or gauge the extent of the value of each of those features, nor to consider their significance relative to the scale of the price excesses above the competitive benchmark. Rather, the Tribunal conducted an amorphous assessment of these features arriving at imprecise conclusions that they had "some positive value", which turned largely or wholly on vague and/or subjective notions of value.

V Ground 4 (Limb 2): Error of law in relation to workable competition factors

34. The Tribunal correctly stated that (i) the overarching test for unfair pricing is whether the dominant firm has reaped trading benefits which it could not have obtained in conditions of workable competition, and (ii) it was therefore relevant to consider, under Limb 2, "*what the position might be in the putatively workably competitive market*" for SFV Services (at [1137]-1138]).

35. However, the Tribunal rejected the CR's submission that in a workably competitive market, economic profits (*i.e.* profits above costs plus a reasonable margin) should be zero (at [1140]). The Tribunal also found that "*price dispersion*" and "*costs efficiencies dispersion*" counted against unfairness under Limb 2 (at [1151] and [1157]).

36. The Tribunal's consideration of these workable competition factors involved four errors of law.

37. **First**, the Tribunal erred in law in rejecting the CR's submissions that economic profits in a workably competitive market over the long term should be zero. An operator in a workably competitive market would not be able to generate economic profits, above costs plus a reasonable margin, for any significant period of time, unless it was providing some additional value that was not replicated by rivals, or was more efficient than rivals on a long term basis. In the circumstances of this case, the Tribunal should, at the very least, have considered whether BT's ability to generate economic profits (i.e. charge excessive prices) for such a long period of time reflected its significant market power.

38. **Second,** the Tribunal erred in characterising the large excess which it identified under Limb 1 as fair under Limb 2 given the extent to which the Tribunal gave BT the benefit of the doubt in constructing the benchmark, including its assessment of the

Common Costs Starting Point and the SFV Services Common Costs Contribution. In the circumstances, the Tribunal should have treated the significant and persistent excess which it identified – over and above that benchmark – as evidence of unfairness. Its failure to do so was perverse.

39. **Third,** in addressing price dispersion, the Tribunal erred in relying on the evidence drawn from Ofcom's Pricing Trends Report (at [1146]). The prices identified in that material refer to the different prices charged to the same customer over time (as one might move from a promotional price to a non-promotional price after an introductory offer ends). Further, the material shows variation in returns between customers of the same providers, not variations in returns between providers. For these reasons, the evidence the Tribunal relied on cannot be used for the purpose for which the Tribunal invoked it and the Tribunal relied on an irrelevant consideration.

40. **Fourth**, the Tribunal's finding that cost efficiencies dispersion counted against a finding of unfairness had no evidential basis. The Tribunal stated that firms in a workably competitive market can have a range of cost levels (at [1152]), and can therefore have a range of profit levels (at [1154]), and that BT had a "*lower costs base*" and "*lower unit costs*" than other firms (at [1154]-[1155]). However, there was no evidence before the Tribunal as to the relative costs faced by BT and its rivals in the SFV Services market. BT's own Written Closings stated (at [833]) that cost efficiencies had not been "*the focus of evidence in these proceedings*", save for whether BT's rivals were likely to have had materially higher customer acquisition costs.

VI <u>Ground 5 (Quantum): Error of law in concluding the Class Members could not recover compound interest</u>

41. The Tribunal made an error of law in concluding that (had it found BT liable) the Class Members were not entitled to recover compound interest on the overcharge. The Tribunal misapplied the decisions of the House of Lords in *Sempra Metals v IRC* [2008] 1 AC 561 and *Merricks Remittal* [2021] CAT 28 in the context of aggregated awards of damages in collective proceedings. It should have found that the CR had produced sufficient evidence to support an award of compound interest as a head of aggregate damages in these collective proceedings.

VII Conclusion

42. For the above reasons, the CR respectfully requests permission to appeal the Judgment. The proposed Grounds of Appeal have a real prospect of success. There are additional compelling reasons for the appeal to be heard, as set out in paragraph 2 above. The CR will develop these points in written submissions in the usual way.

43. The CR requests that his application for permission to appeal be considered and determined at the consequentials hearing which is yet to be listed.

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20 January 2025