COMPETITION APPEAL TRIBUNAL

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

CASE NO. 1639/7/7/24

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 29 May 2024 of an application (the "Proposed Claim" or the "Proposed Collective Proceedings") to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Bulk Mail Claim Limited (the "Proposed Class Representative/PCR") against International Distribution Services Plc (formerly Royal Mail Plc) (the "Respondent/Proposed Defendant/Royal Mail"). The Proposed Class Representative is represented by Lewis Silkin LLP, Arbor, 255 Blackfriars Road, London SE1 9AX (Reference: Andrew Wanambwa / Nigel Enticknap).

The Proposed Claim "follows on" from the Office of Communications' ("Ofcom") 14 August 2018 decision titled "*Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK*" ("Ofcom Decision"). The Ofcom Decision concluded that the Proposed Defendant ("Royal Mail") abused its dominant position in the market for "Bulk Mail" delivery services in the UK by attempting to introduce discriminatory prices via "Contract Change Notices" (or "CCNs") on 10 January 2014, contrary to the Chapter II prohibition of the Act ("the Chapter II Prohibition") and Article 102 of the Treaty on the Functioning of the European Union ("TFEU").[1] The PCR relies on the binding effect of the findings in the Ofcom Decision on infringement and fact, pursuant to section 58A and/or section 58 of the Act, read with section 371(1)-(3) of the Communications Act 2003. The Collective Proceedings Claim Form ("CPCF") refers to the abuse set out in the Ofcom Decision as "the Infringement".

Bulk mail is the type of mail typically sent by companies (such as utility companies and banks), government departments and advertisers. It includes such letters as bank statements and invoices, utility bills, council tax statements, as well as advertising mail and some magazine subscriptions. Each member of the Proposed Class (described below) purchased "Bulk Mail Retail Services" from Royal Mail and/or from other companies known as "Access Operators". Access Operators typically collect bulk mail and carry out an initial sortation, before passing that mail on to Royal Mail for physical delivery to final recipients. Royal Mail is required by law to provide these "Bulk Mail Delivery Services" and is, in effect, a monopolist on the market for such services.

The abusive conduct in issue prevented an Access Operator named Whistl UK Ltd ("Whistl") from competing with Royal Mail in the "end-to-end" delivery of bulk mail i.e. a service that included physical delivery to final customers. Whistl had in 2012 announced long-term plans to grow its bulk mail delivery operation, so that it could eventually deliver to around 42% of UK postcodes (mostly in urban areas) by 2018, allowing it to bypass Royal Mail's delivery network in those areas covered by its operation. To this end, it obtained the promise of substantial investment, as well as access to a finance facility.

Royal Mail responded to Whistl's planned expansion in a foreclosing manner, in particular by introducing discriminatory prices that penalised any entrant that sought to roll out delivery services designed to compete with Royal Mail. This attempt to foreclose competition was successful. It impacted Whistl's profitability as a new entrant into end- to-end delivery (as Whistl would still remain dependent on Royal Mail's delivery network), created uncertainty that made customers reluctant to convert from Royal Mail to Whistl, and ultimately led to the withdrawal of the investment and finance required to make Whistl's expansion plans work. But for the Infringement, Whistl's delivery network would have expanded to compete with Royal Mail's, and this competition would have led to lower prices for end-customers of Bulk Mail Retail Services across the market i.e. whether they purchased such services from Royal Mail, Whistl or other Access

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

Operators. The CPCF states that the Infringement was motivated by, and had the effect of, excluding Whistl from the market. The Ofcom Decision and CAT Judgment contain clear and comprehensive analyses concerning Royal Mail's commercial intention to foreclose when introducing the CCNs and the significant impact of the Infringement on Whistl's expansion plans.

The Proposed Claim is for damages resulting from Royal Mail's breach of the Chapter II Prohibition and/or Article 102 TFEU. It is brought on behalf of all persons who purchased Bulk Mail Retail Services between 10 January 2014 and at least 7 June 2022 ("Retail Customers") but no later than 29 May 2024. The Claim is brought on behalf of an estimated class of 290,477 Retail Customers, 94.7% of which are provisionally estimated to be small and medium-sized enterprises ("SMEs") in the private sector, and 2.7% of which are provisionally estimated to be public and non-profit sector organisations. The Claim is currently estimated to be worth £878.5m.

The PCR is Bulk Mail Claim Limited. It was incorporated for the purpose of acting as the proposed class representative in these proceedings. Its sole director and member is Mr. Robin Aaronson, an economist specialising in competition policy, including in postal markets. His experience includes, from 2001 to 2006, membership of the Postal Services Commission, or "Postcomm", the regulator of the mail industry, whose responsibilities passed to Ofcom in 2011.

The PCR submits that it would be just and reasonable for it to act as class representative because:

1. The PCR would act fairly and adequately act in the interests of the class members (Rule 78(2)(a));

2. Neither the PCR nor Mr Aaronson has any material interest that is in conflict with the interests of class members (Rule 78(2)(b));

3. The PCR is not aware of any other applicant to be the representative in connection with the same claims (Rule 78(2)(c));

4. The PCR has entered into a Litigation Funding Agreement with a third-party funderto enable it to be able to pay both the costs of the Proposed Collective Proceedings and, if ordered to do so, the Proposed Defendant's recoverable costs (Rule 78(2)(d)). The PCR has obtained a Funder's Adverse Costs Indemnity Insurance Policy to cover potential adverse costs up to the making of a CPO and thereafter;

5. The PCR has prepared a Litigation Plan for the Proposed Collective Proceedings which includes (as per Rule 78(3)(c)):

    i. A method for bringing the Proposed Collective Proceedings on behalf of the Class Members and for notifying Class Member of the progress of the Proposed Collective Proceedings;

    ii. A procedure for governance and consultation which takes into account the size and nature of the Proposed Class; and

    iii. Estimates of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the Proposed Class Representative shall provide.

The CPCF states that the Proposed Class definition is intended to capture all persons who suffered from the Retail Customer Overcharge as a result of Royal Mail's abusive conduct, whether they purchased or paid for Bulk Mail Retail Services from one or more of Royal Mail, Whistl and/or other Access Operators. The Proposed Class definition includes: (a) public bodies and charities (e.g. NHS Trusts who sent patient letters), and (b) Retail Customers who may have purchased Bulk Mail Retail Services indirectly, for example agency access customers.

The PCR submits that the claims are eligible to be brought in collective proceedings because:

1. The Proposed Collective Proceedings are brought on behalf of an identifiable class of persons. Proposed Class Members will easily be able to determine whether or not they fall within the scope of the Proposed Claim by reviewing records of purchases of Bulk Mail Retail Services and/or Bulk

Mail Delivery Services from Royal Mail, Whistl or other Access Operators. Royal Mail will be able to identify Direct Access Retail Customers, since it will either provide Bulk Mail Retail Services through its own end-to-end network or provide services through Access Operators, for which Royal Mail invoices the Direct Access Retail Customer. Further, Royal Mail is likely to be able to identify Retail Customers served by Access Operators, with whom Royal Mail does not have a contractual relationship, because of the contractual agreements between Royal Mail and Access Operators.

2. The Proposed Claim raises "common issues", as defined by section 47B(6) of the Act and Rule 73(2) to mean "*the same, similar or related issues of fact or law*". The common issues are:

    i. Market definition: what were the relevant markets on which (i) Royal Mail provided Bulk Mail Delivery Services, and (ii) Royal Mail, Whistl and other Access Operators provided Bulk Mail Retail Services. Royal Mail is bound by the findings in the Ofcom Decision.

    ii. Dominance: whether, at all material times, Royal Mail occupied a dominant position on the market for Bulk Mail Delivery Services. Royal Mail is bound by the findings in the Ofcom Decision.

    iii. Abuse: whether, and the extent to which, Royal Mail abused a dominant position. As Royal Mail is bound by the findings of the Ofcom Decision, the only dispute may relate to the scope of the binding aspects of the Ofcom Decision and the outcome of any such dispute will be common across the Proposed Class.

    iv. Causation and loss: whether the Infringement caused Proposed Class Members to suffer loss and damage. In order to establish that the Infringement caused Proposed Class Members to suffer losses, it will be necessary to establish that, in the counterfactual scenario, Retail Customers would have benefited from lower Bulk Mail Retail Services prices. This question will primarily involve considerations of (a) the extent to which Whistl would have expanded its service offering, and (b) the impact that Whistl's expansion would have had on the prices of Bulk Mail Delivery and Retail Services prices. Neither of these matters requires consideration of the individual positions of Proposed Class Members.

    v. Quantum: the amount of damages which should be awarded to compensate Proposed Class Members for the loss and damage suffered as a result of Royal Mail's abusive conduct. Whilst (i) Bulk Mail Retail Customers in different Bulk Mail Segments and (ii) VAT-rated and VAT-exempt Retail Customers may have suffered different overcharges, the PCR proposes to use an aggregate methodology which is common to all Proposed Class Members.

    vi. Interest: establishing an appropriate basis for awarding interest to the Proposed Class Members and calculating the rate of such interest. The PCR claims simple interest on behalf of the Proposed Class (there is no need for the Tribunal to address class-specific issues that may arise from a claim for compound interest).

3. The claims are suitable for an aggregate award of damages pursuant to s.47C(2) of the Act and Rule 73(2) of the Rules:

    i. The Proposed Collective Proceedings present an appropriate means for the fair and efficient resolution of the common issues. Requiring Retail Customers to bring individuals claims would be unfair and inefficient.

ii. The costs of bringing the Proposed Collective Proceedings are significant. That said, the costs of proceedings are proportionate to: (a) the likely award of aggregate damages for the Proposed Class; (b) the benefits to the Proposed Class Members, who cannot practically bring individual claims relating to the Infringement; (c) the necessary complexity of competition law proceedings of this kind; and (d) the class-size.

iii. To the extent that the PCR is not successful in this litigation, any costs risk is covered by Adverse Costs Indemnity Insurance.

iv. The PCR is not aware of any separate proceedings making claims of the same or a similar nature having been commenced.

v. The Proposed Class includes a mixture of different sized businesses and public sector and nonprofit organisations, the majority of whom are SMEs. It is not feasible for the Proposed Class Members to bring individual prococeedings.

vi. The Proposed Claim is suitable for an award of aggregate damages because: (a) it combines a large number of individual claims with common features; (b) each of the principal issues in the individual claims is a "common issue"; (c) the PCR has proposed a clear methodology for calculating an award of aggregate damages for the Proposed Class.

4. It would not be practicable for the Claim to be brought on an opt-in basis.

The relief sought in the Proposed Collective Proceedings is:

1. Damages to be assessed on an aggregate basis pursuant to section 47C(2) of the Act.
2. Interest thereon, calculated from the date each individual Claim arose.
3. The PCR's costs.
4. Any such further or other relief as the Tribunal may see fit.

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

Charles Dhanowa OBE, KC (Hon)
Registrar
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