Neutral citation [2023] CAT 23

Case Nos: 1304/7/7/19
1305/7/7/19
1425/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 April 2023

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED
(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Proposed Intervener

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) LONDON & SOUTH EASTERN RAILWAY LIMITED
(2) GOVIA LIMITED
(3) THE GO-AHEAD GROUP LIMITED
(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Proposed Intervener

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) GOVIA LIMITED
(3) THE GO-AHEAD GROUP PLC
(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Proposed Intervener

Heard at Salisbury Square House on 22 March 2023

JUDGMENT (INTERVENTION)

APPEARANCES

Mr Philip Moser KC, Mr Stefan Kuppen, and Ms Alexandra Littlewood (instructed by Hausfeld & Co. LLP and Charles Lyndon Ltd) appeared on behalf of Mr Gutmann.

Mr Tim Ward KC (instructed by Slaughter and May) appeared on behalf of First MTR South Western Trains Limited.

Ms Sarah Abram KC and Mr Jonathan Scott (instructed by Dentons UK and Middle East LLP) appeared on behalf of Stagecoach South Western Trains Limited.

Mr Paul Harris KC, Ms Annaliese Blackwood and Ms Cliodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of London & South Eastern Railway Limited and Govia Thameslink Railway Limited and others.

Ms Anneli Howard KC, Mr Brendan McGurk, and Ms Khatija Hafesji (instructed by Linklaters LLP) appeared on behalf of the Proposed Intervener, the Secretary of State for Transport.

A. INTRODUCTION

1. For reasons set out in a judgment issued on 19 October 2021, the Tribunal granted applications for a collective proceedings order ("CPO") in two parallel proceedings brought against the train operating companies ("TOCs") which hold or held the South Western rail ("SW") franchise and the Southeastern rail ("SE") franchise: [2021] CAT 31 ("*Gutmann 1*"). The CPO in those two proceedings, which the Tribunal directed should be heard together, was made on 18 January 2022. Further steps in those proceedings were stayed pending an appeal to the Court of Appeal, which gave judgment on 28 July 2022 dismissing the appeal: [2022] EWCA Civ 1077. Following the judgment of the Court of Appeal, the Tribunal allowed an amendment to the scope of the claims: [2022] CAT 49. The claims in those proceedings were also amended to add as defendants the parent companies of the TOC which operated the SE franchise.

2. On 24 November 2021, Mr Gutmann, who is the class representative in the proceedings concerning the SW franchise and the SE franchise, commenced a further set of collective proceedings against the TOC operating the Thameslink, Southern and Great Northern ("TSGN") franchise and its parent companies. This third set of proceedings essentially mirrors the allegations in the proceedings concerning the SW and SE franchises, and the application for a CPO was adjourned pending the appeal in the previous cases. In light of the judgment of the Court of Appeal, the respondents did not in the end oppose a CPO, and on 22 March 2023 the Tribunal decided that a CPO should be made, for reasons set out in a judgment issued a few days later: [2023] CAT 18. The Tribunal further directed that all three sets of proceedings should be case managed and heard together.

3. The nature of the claims in these proceedings is fully described in *Gutmann 1*. They arise from the fact that a Transport for London ("TfL") Travelcard is valid for travel by cardholders not only on TfL services but also on mainline rail services operated by the TOCs (with limited exceptions) within the zones covered by their Travelcard. The claims concern so-called "Boundary Fares", i.e. extension or add-on fares sold for use with such a Travelcard to cover the

part of the journey from the outer edge of the zone to which the Travelcard applies to the customer's destination. In essence, it is alleged that each TOC abused a dominant position by failing to make such Boundary Fares sufficiently available for sale, or ensuring that there was a general awareness among their customers of the existence of Boundary Fares, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey. Thus the re-amended collective proceedings claim forms in the first two proceedings state, at paras 3-4:

> "By failing to make Boundary Fares sufficiently available for sale and/or failing to use their best endeavours to ensure that there was a general awareness among their customers of the existence of Boundary Fares so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey the Defendants abused their position of dominance on the relevant market in breach of the prohibition in section 18 of the Act…
>
> As an undertaking in a dominant position the Defendants have a responsibility to ensure *inter alia* that their customers are not subjected to unfair prices or unfair trading conditions. This includes a responsibility to avoid, or to remedy, circumstances which effectively compel customers to pay a second time for part of the service provided to them in respect of which they already hold a valid ticket (a Travelcard); in particular given that the [TOC Defendants] received a share of the revenue from the sale of Travelcards under an agreement with TfL. Furthermore, the Infringement occurred against a backdrop where the Defendants must have been well aware, from data readily available to them, that only an unrealistically low number of Boundary Fares were being sold for travel on their services."

4. By an application dated 7 November 2022 ("the Application"), the Secretary of State for Transport ("the SoS") applied for permission to intervene in these proceedings. After considering the written submissions and hearing full oral submissions on 22 March 2023, the Tribunal announced its decision that the SoS would be permitted to intervene by way of written submissions regarding the regulatory framework and arrangements made thereunder, as referred to at (i) in para 11 of the Application, but otherwise refused the Application. This judgment sets out our reasons for that ruling.

B. THE FRAMEWORK FOR INTERVENTION

5. Rule 16 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules") states insofar as relevant:

"(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings…

…

(5) The request shall contain—

(a) a concise statement of the matters in issue in the proceedings which affect the person making the request;

(b) the name of any party whose position the person making the request intends to support; and

(c) a succinct presentation of the reasons for making the request…

(6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit."

6. Rule 4 of the CAT Rules sets out the "Governing principles" and includes the following:

"(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; …"

7. The application of rule 16 has been considered on a number of occasions by the Tribunal. In *B&M European Value Retail v CMA* [2019] CAT 8, the Tribunal noted that the rule involves a two-stage process. There is, first, the threshold question whether the applicant has shown a "sufficient interest" in the outcome of the proceedings; if that is satisfied, it is then a question of discretion for the Tribunal as to whether to permit an intervention, having regard to the governing

principles set out in rule 4. The Tribunal reiterated this approach in its subsequent ruling in *Sabre Corp v CMA* [2020] CAT 16 at [8].

8. In the *B&M* case, the major supermarket retailer, Tesco PLC, applied to intervene in a challenge to the CMA's decision to appoint another retailer ("B&M") as a "Designated Retailer" under the Groceries (Supply Chain Practices) Market Investigation Order 2009. Designated Retailers were subject to a series of obligations, including the duty to comply with the Groceries Supply Code of Practice ("the Code"). Tesco itself was a Designated Retailer and submitted that it wished to ensure that a consistent approach was adopted to maintain a level playing field amongst grocery retailers. It argued that it could 'add value' due to its experience of having been regulated under the 2009 Order and provide a commercial perspective in relation to how the provisions of the Code applied in practice. It further submitted that that was the first case in relation to designation of new retailers under the 2009 Order and raised issues of a wider public interest. Neither B&M nor the CMA opposed Tesco's application. The Tribunal accepted that Tesco had a sufficient interest in the proceedings but as a matter of discretion held that the application should be refused as it was not satisfied that Tesco would provide material 'added value' to the issues in the case. Since it appeared that in essence Tesco wished to provide evidence in support of the CMA's case, it could more proportionately do so by collaborating with the CMA.

9. The Tribunal in *Sabre* similarly refused an application by the American Society of Travel Advisors, the world's largest association of travel agents, to intervene in a challenge to the decision of the CMA prohibiting a merger between two US companies involved in the provision of software and technology to the airline industry. Nor have such refusals been limited to private parties. In *Flynn Pharma Ltd and Pfizer Inc v CMA* [2019] CAT 2, the Tribunal refused an application by the Office of Communications ("Ofcom") to intervene in the consequential stage of the proceedings concerning costs, where the CMA argued that 'costs follow the event' should not be the starting point for a decision

on costs against the CMA as the public competition authority.[1] In support of its application, Ofcom submitted that the decision of the Tribunal on costs in those proceedings was likely to have a direct effect on Ofcom in the future due to its concurrent jurisdiction (with the CMA) to make enforcement decisions pursuant to the prohibitions under UK and EU competition law, and further that the Tribunal's decision could also affect Ofcom's position on costs in relation to appeals against its regulatory decisions taken under the Communications Act 2003. Among the considerations which led the Tribunal to refuse Ofcom's application were that it would not be consistent with the just and proportionate conduct of the proceedings. The Tribunal stated, at [15]:

> "We are concerned to keep the scope of these proceedings in relation to costs within reasonable bounds and to avoid expanding their scope unduly."

10. By contrast, the Tribunal has on a number of occasions allowed the complainant to intervene in appeals by the undertaking against whom an infringement decision has been taken. Moreover, in another set of collective proceedings against a TOC, *Boyle and Vermeer v Govia Thameslink Railway Ltd*, the Tribunal recently allowed the SoS to intervene. There, although the Tribunal dismissed the SoS' application to intervene as premature at the pre-certification stage, it gave a strong indication that the SoS should subsequently be permitted to intervene (see [2021] CAT 38 at [22]); and in its ruling on the structure of the trial the Tribunal held that such intervention was justified but did not set out full reasons: [2022] CAT 46 at [3]. Ms Howard KC, appearing for the SoS, relied on that case and we return to it below.

C. APPLICATION FOR PERMISSION TO INTERVENE

11. The Application, as supplemented by a Note dated 14 November 2022 summarising the SoS' interest and then in the skeleton argument and oral submissions for the hearing, puts the SoS' interest under several heads. Although the enumeration of the grounds or heads varied in the various

[1] On the final appeal concerning the Tribunal's subsequent decision on costs, the Supreme Court permitted Ofcom (along with the Solicitors Regulation Authority and various other bodies) to intervene but by way of written submissions only: [2022] UKSC 14.

documents, in response to questioning from the Tribunal it appears to us that it came down broadly to four distinct heads.

12. First, the SoS is said to carry out a "quasi-regulatory" role in the administration of the railways, having regard to the framework of governing regulations and then the various franchise agreements which he enters into with the TOCs. This was described as a complex regulatory regime in which the SoS is heavily involved. It was submitted that it would be relevant for the Tribunal to understand this regime and that the SoS is well-placed to explain this framework, acting as what the Application termed "an amicus".

13. Secondly, under the terms of the franchise agreements (as amended) or the contracts which may have replaced them, there are provisions for sharing of revenue and risks as between the TOCs and the SoS, whereby various costs and liabilities falling on the TOC may be recoverable from the SoS. Depending on the particular agreement and its terms, that may apply to the damages which the TOC may be found liable to pay. In addition, the SoS said that if the TOCs had to make changes as a result of an adverse judgment in these proceedings, e.g. by modifying their ticket vending machines, upgrading their software for online sales, or providing further training for ticket office staff, the TOCs may seek to recover those costs from the SoS, as they may also as regards their legal costs of these proceedings. Moreover, a significant increase in the sale of Boundary Fares instead of full journey fares will reduce the TOCs' revenue and if a TOC should in consequence fail financially, the statutory duty on the SoS to ensure the provision of rail services may require him to step in as, or by appointing, an operator of last resort.

14. Thirdly, the SoS referred to the provision in para 4 of Sch 3 of the Competition Act 1998 ("CA"), which provides:

> "Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking."

15. This provision accordingly sets out a limited derogation from competition law, that applies in particular circumstances. The domestic provision corresponds to Art. 106(2) of the Treaty on the Functioning of the European Union which is expressed in effectively identical terms as regards EU competition law. Ms Howard submitted that the operation of the railways were services of general economic interest ("SGEI services") and that the SoS will be able to make submissions as to how this provision is engaged in the present case from the public perspective, as opposed to the commercial perspective of the TOCs. The SoS could explain the particular tasks which have been assigned to the TOCs (e.g. obligations to provide particular concessionary fares, such as child fares, or to operate services at particular times of day). The SoS would wish to submit how a reduction in the TOCs' income from wider use of Boundary Fares might obstruct their ability to perform some of those tasks. That would not simply be a matter for the TOCs since it would lead to discussions between each TOC and the SoS to balance the various competing interests, in which the SoS acts as the guardian of the public interest.

16. Fourthly, as recorded in *Gutmann 1* at footnote 2, the Government's operator of last resort took over the running of the rail services on the network covered by the SE franchise as of 17 October 2021. The claims for damages against the London & South Eastern Railway Ltd ("LSER") which operated the SE franchise, and its parent companies, therefore cover a period terminating on that date: para 20 of the re-amended collective proceedings claim form. However, the SoS submitted that if and insofar as the Tribunal may find an abuse as alleged, the operator of the SE franchise will feel obliged to make changes to the methods of selling Boundary Fares to avoid further abuse, and the resulting costs will therefore fall directly on the SoS (unless by then that franchise has been awarded to an independent TOC); and similarly the loss in revenue that will result from increased sale of Boundary Fares will impact directly on the SoS.

17. The SoS applied to intervene by way of (i) written submissions "regarding the regulatory framework and arrangements thereunder as would assist the Tribunal in understanding the issues in dispute; and (ii) "to make non-duplicative written and oral submissions as necessary" to protect the wider interests as explained

under the second-fourth heads set out above. The skeleton argument for the SoS stated:

> "The Secretary of State does not envisage filing any separate expert evidence but may wish to comment on the expert reports filed by the main parties, to the extent that they relate to the existence of any infringement, anticompetitive effects, objective justification or counterfactual analysis as those matters may be relevant for the application of the SGEI regime."

18. The Application was supported by the TOCs and opposed by the Class Representative.

D. ANALYSIS

Sufficient interest

19. As regards the threshold question of whether the SoS has a sufficient interest, we doubt that the second ground put forward (i.e. that the financial impact on the TOCs might be passed on to the SoS) would in itself amount to a sufficient interest for the purpose of rule 16. There are many cases where the financial consequences of the litigation as regards damages and costs will impact directly on, and may be borne by, a third party: insurers, third party funders and parent companies of a joint venture are among the obvious examples. We do not see that this gives them a sufficient interest for the purpose of an intervention pursuant to rule 16. We do not see why a different interpretation should apply to the SoS as a public body. However, it is unnecessary to reach a concluded view on this point since we are satisfied that the SoS does have a sufficient interest for the purpose of rule 16 on the basis of the other three grounds put forward to justify his intervention.

Discretion

20. On the question of discretion, although the Class Representative submitted that an account by the SoS of the framework for regulation of the railways and the arrangements made thereunder was irrelevant, we do not feel able to determine that at this stage of the proceedings. Since the SoS seeks to intervene on that matter only in writing, in what he described as an amicus role, we do not see

that such intervention will give rise to any material costs or prolongation of the trial and we consider that a neutral account of the regime from the SoS who has the responsibility for overseeing it, may be helpful. We therefore consider it appropriate and proportionate to permit the SoS to intervene in writing in that respect.

21. As regards the second head put forward, even if it afforded a sufficient interest on the part of the SoS, we have no doubt that in our discretion we should refuse to permit intervention on that basis. That ground is not an issue in the case. It is simply advanced as a gateway for the SoS to participate in support of the TOCs. However, the TOCs are well represented in these proceedings by experienced solicitors and counsel, who will conduct their defence appropriately. We do not see that the fact that the SoS may bear the financial consequences of the litigation means that he can provide 'added value' to the proceedings.

22. As regards the third head put forward, the derogation in para 4 of Sch 3 CA as potentially applicable in these proceedings involves three questions:

    (1) whether the rail services on the network are SGEI;

    (2) what are the particular tasks assigned to these TOCs;

    (3) whether prohibition of the impugned practice or conduct would obstruct their performance of any of those tasks, in law or in fact.

23. We accept that if there were a serious dispute as to whether the rail services on the relevant networks were SGEIs, it would be valuable to have submissions from the SoS as he would bring a different and important perspective to the determination. But we do not think it is seriously arguable that these services are not SGEI, and Mr Moser KC on behalf of the Class Representative very properly did not suggest otherwise.

24. The second element of the SGEI derogation set out above will, as we understand it, be reflected in the terms of the amended franchises and supplementary

agreements between the SoS and the TOCs, or perhaps in some other documents. Ms Howard took us to Regulation 1370/2007 on public passenger transport services by rail and road, which we were told continues to apply as retained EU legislation, and which makes provision for special obligations and requirements to be imposed on the operators of such services. Art 4(1) of that Regulation states:

> "Public service contract and general rules shall:
>
> (a) clearly set out the public service obligations , defined in this regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned."

Accordingly, it seems unlikely that the question of the relevant "tasks" assigned to the TOCs will be contentious and we consider that the SoS will be able to set out the position in his written intervention describing the franchising arrangements and other governing documents. Further and in any event, the TOCs themselves will of course be aware of the particular tasks that have been assigned to them and will therefore be able to address the Tribunal on this. We do not see that any further intervention by the SoS is necessary or justified on this point.

25. As regards the third element, we understood from Ms Howard that the SoS has a role in approving different fare types or categories and, in answer to a question from the Tribunal, she confirmed that the introduction of Boundary Fares was approved by the SoS. The main thrust of the claims in these proceedings, as set out above, is that the TOCs failed to make these Boundary Fares sufficiently available to rail passengers, with the result that those passengers who held TfL Travelcards paid twice for part of their journeys. As summarised by the Court of Appeal in its judgment (see para 1 above) at [115]:

> "The essential premise in the present case is that the defendants have double-charged consumers for travel and have been enabled to do this by use of a system that is said to be opaque and inaccessible."

Unsurprisingly, Ms Howard did not suggest that the SoS' position was that, in the public interest, passengers should have only limited opportunity to purchase existing Boundary Fares and that they should be charged twice for part of their journey, since otherwise the TOCs would be impeded in carrying out the

particular tasks which had been assigned to them. Such a submission would, in our judgment, be manifestly unsustainable. Instead, she focused on the allegation in the claims that for those types of promotional or discounted fare for which no Boundary Fare existed, it was an abuse for the TOCs not to have offered one.

26. As a matter of substance, that relates to Advance Fares and season tickets. However, those allegations have to be seen in context. As regards Advance Fares, as noted in *Gutmann 1* at [66], counsel for one of the TOC defendants, Stagecoach South Western Trains Ltd, pointed out that this category accounted for only a tiny proportion of the claim. The expert for the Class Representative in his report addressing both the SW and SE franchises noted that Advance Fares accounted for only 6.5% of all national rail journeys in Great Britain. As regards season tickets, as Mr Moser pointed out, the claims are limited to season tickets for travel out of London, which is believed to account for a very small proportion of journeys by holders of season tickets which include travel in the TfL travel zones.

27. The total damages estimated by the expert on his, admittedly preliminary, calculations were never more than £20 million a year for the SW franchise and a little over £12 million for the SE franchise (excluding season tickets in each case). Therefore the share attributable to Advance Fares appears to be at most some £1.3 million p.a. for the SW franchise and under £0.8 million p.a. for the SE franchise. As regards season tickets, the expert estimated the loss attributable to season tickets at £2.94 million for the entire period 1 October 2015 to 31 March 2020 on both the SE and SW networks combined. For the TSGN franchise, the expert estimated the entire loss (including season tickets) for the period 16 November 2015 to 31 March 2021 at £12.41 million, amounting to an average of £2.31 million p.a. Clearly only a small proportion of that figure will be accounted for by Advance Fares and season tickets.

28. Even allowing for the provisional nature of these estimates, and that the average figure for the TSGN claim may be depressed by the lack of travel in 2020/21 due to the Covid pandemic, on any view the amount of annual TOC fare revenue

that is subject to the claim in respect of Advance Fares and season tickets is a very small proportion of the turnover of each TOC defendant.

29. It is obvious that there are manifold ways in which a TOC may seek to make up for such a loss of revenue, whether by a small increase in some of their charges or reductions in some expenditure or some combination of the two. Moreover, we were told that any changes to fares are subject to discussion and agreement between the TOC and the Department for Transport on behalf of the SoS. Other than at the highest level of generality, which we consider can equally well be the subject of submissions by the defendants, any submissions by the SoS as to what obligations or tasks of each TOC defendant might be obstructed by the financial impact of this loss of revenue would have to be supported by evidence, and would give rise to disclosure of the policy approach of the SoS to shortfalls in TOC revenue and how those have been addressed in the past. The Class Representative would clearly be entitled to cross-examine any witness called by the SoS.

30. Furthermore, as noted in *Gutmann 1* at [16], there is a Travelcard Agreement between the TOCs and a subsidiary of TfL which provides for the TOCs to receive a share of the revenue from the sale of Travelcards. The Class Representative's amended reply at the pre-certification stage in the first two proceedings states, at para 104(a), quoting from the Travelcard Agreement:

> "Under the Travelcard Agreement, TOCs receive a share of the revenue resulting from the sale of TfL Travelcards. The agreement provides that revenue from the sales of Travelcards shall be apportioned among the parties according to the Apportionment Factors agreed between LRT and ATOC "so as to reflect as nearly as possible the value of passenger kilometres travelled on each party's services"".

We have not seen this agreement, but we anticipate that it takes some account of the degree to which holders of Travelcards are considered to use those cards to cover travel on TOC services. If the sale of Boundary Fares should significantly increase, that would correspondingly increase the degree to which Travelcard holders use those cards for such travel, and therefore it may well increase the share of Travelcard revenue which the TOCs receive from TfL. Further or alternatively, when the Travelcard Agreement expires, it would

doubtless be renegotiated on that basis. Any assessment of the financial impact on the TOCs regarding their ability to perform tasks assigned to them as SGEIs would accordingly have to consider what offsetting increase in revenue might be expected from TfL. And if the SoS were permitted to intervene under this head, it seems to us that TfL might equally be entitled to intervene.

31. This is compounded by the fact that Ms Howard told us that the SoS would wish to make submissions as to the likely impact of a finding of abuse as a precedent for the operation of other TOCs that are not defendants to any of these proceedings. That in turn would involve consideration of the arrangements for use of other metropolitan travelcards for travel on other TOCs, the extent to which the allegations in the present cases would apply on the facts there, and the financial impact on those various other TOCs. The Class Representative would of course have to be afforded a fair opportunity to challenge and contest any submissions and evidence advanced by the SoS.

32. All of this indicates, in our view, that although affecting only a minor part of the claims there is a likelihood that, even with robust case management, this aspect of the proposed intervention by the SoS brings the prospect of the trial turning into a broad-ranging examination of the funding and finances of the various operations carried on by, at the very least, the TOC defendants and the policies of the SoS as regards rail passenger transport. In our judgment, that would significantly expand the scope of the case in a manner that is wholly disproportionate and contrary to the Governing principle in rule 4.

33. As regards the fourth head put forward (i.e. the SoS' operation since 17 October 2021 of the SE network as operator of last resort), the fact that the SoS and not LSER will suffer any resulting loss of revenue in future does not affect the issues in the case and we do not see that intervention by the SoS on that score brings any added value. However, Mr Harris KC, appearing for LSER, pointed out in his brief oral submissions that it may be relevant for the Tribunal to consider the cost of making the various changes to methods of sale (modifying ticket vending machines, upgrading software for online sales and training staff). He said that those costs at the time of trial would not be in the knowledge of LSER which had not been involved in running the network since late 2021. That is

true, but we doubt that the current costs of making such modifications are likely to be relevant in considering allegations of abuse that terminate in 2021. Insofar as those costs are relied on as a matter of objective justification for not taking those steps, it will be the costs at the time of the impugned conduct that are relevant, not the costs that would be incurred some years later. But in any event, if it is thought relevant to put in evidence of the current costs, it seems to us that such evidence can be obtained from the SoS and put in by LSER. We do not see that this requires the SoS to make separate submissions as an intervener.

34. Finally, Ms Howard referred to the *Boyle* case where, as noted above, the SoS was recently permitted to intervene. However, in *Boyle* the alleged abuse concerns the charging of differential "branded" fares for tickets for travel on the London-Brighton line according to the degree of flexibility of those tickets for use on the different branded services which the defendant TOC operates. Moreover, it is alleged that this practice constitutes a breach of the regulatory regime imposed by the SoS: see *Boyle and Vermeer v Govia Thameslink Railway Ltd* [2022] CAT 35. In their response to the claims, the TOC and its parent companies stated:

> "The [Respondents'] position is that the [Applicants'] claims are deeply flawed on the substance and highly unlikely to succeed at trial. A summary of some of the critical defects in the [Applicants'] claim is set out in §9 of the Response. In short, the [Respondents] deny that there has been any breach of the applicable regulatory regime and (in any event) deny that any such breach would constitute an abuse of dominance…the complexity of the legislative underpinnings of the applicable regulatory regime, the manner in which the regime has evolved over time and the role and discretion that the [Department for Transport] exercises in regulating the sector in the public interest, in accordance with its statutory duties, which together have the effect that the [Respondents] would need to submit substantive, factual, evidence (including from the [Department for Transport]) in order to explain to the Tribunal why [the Respondents have] always been compelled to comply with the provisions of the regulatory regime when setting and imposing its fares."

Therefore, that case is concerned with a fundamental aspect of fare-setting policy and the regulatory regime, which the defendants contend was mandated by the Department for Transport. In those circumstances, it is hardly surprising that the Tribunal considered it appropriate to permit the SoS to intervene. In our view, *Boyle* raises very different considerations from those in the present cases.

E. CONCLUSION

35. In *British Sky Broadcasting Ltd v Ofcom* [2012] CAT 18, the Tribunal stated, at [6]:

> "Given the potential for interventions to add complexity and cost to proceedings, it is important that the Tribunal has the necessary information to decide whether these factors are outweighed by the intervener's potential contribution in the particular proceedings concerned. This evaluation will be highly dependent on the facts of the individual case, so that reference to previous Tribunal decisions is unlikely to be helpful. In all cases it is incumbent on a proposed intervener to advance sufficiently detailed reasons to enable the Tribunal to exercise its discretion under rule 16."

We have cited from some previous decisions above simply as setting out the governing approach under rule 16 and to illustrate how it has been applied. Our decision to grant the SoS permission to intervene only by way of written submissions on a limited basis, but not otherwise, is based on the issues arising and facts which are likely to be relevant in these proceedings. Altogether, the exercise of our discretion has reflected our evaluation of the broad considerations there summarised by the Tribunal in *BSkyB*.

36. We should add that rule 50 of the CAT Rules sets out a special provision concerning intervention by the Competition and Markets Authority ("CMA") on issues relating to the application of EU or UK competition law. The CMA is entitled to submit written observations to the Tribunal and may apply for permission to make oral submissions. The CMA has not made such an application so far in the present proceedings and nothing in this judgment relates to the way the Tribunal would consider any application to intervene under rule 50.

37. This judgment is unanimous.

The Hon. Mr Justice Roth
Chair

Simon Holmes

Prof. Robin Mason

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 6 April 2023