UK Tribunal's First Ruling Against Collective Action Holds Telecoms Pricing Not Excessive

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The UK Competition Appeal Tribunal (Tribunal) has handed down a landmark judgment in *Justin Le Patourel v BT*, the first opt-out competition collective action which went to trial in the UK. On 19 December 2024, the Tribunal dismissed the claim against BT for abusing its dominant position in the market for landline telephony services.

Key Points

- The ruling represents the first UK decision on the merits of a collective claim nearly 10 years after the collective actions regime came into force and has implications for the future development of the regime.
- The Tribunal held that BT did not abuse its dominant position by charging excessive prices. While its prices exceeded the Tribunal's benchmark for a reasonable margin (determined to be 13.5% on these facts), the Tribunal took into account a range of intangible factors and value adds, including customer satisfaction and BT's brand reputation, to rule that the excess was not unfair. BT's prices were found to bear a reasonable relation to the economic value of the services.
- The UK class action bar has seen exploitative abuse claims (alleging unfair terms or excessive prices) as a means of creating a large consumer class claim. The ruling may cast doubt on the merits of a number of similar pending claims. In particular, the Tribunal's willingness to look at intangible factors as adding value even when a price exceeds a reasonable cost benchmark will tend to make it highly challenging to prove factually an illegal excessive price.

The Claim

The class claimed approximately 2.3 million UK customers had paid BT abusively excessive prices for residential landlines, comprising a fixed line rental charge and a variable charge for calls made.

The claim was prompted by Ofcom's provisional finding in 2017 under telephony regulatory rules that BT charged prices above competitive levels. The claim is standalone rather than follow-on because Ofcom's regulatory conclusions are not binding on the Tribunal, meaning that the class was required to prove BT's liability for the competition infringement in addition to establishing causation and quantum of damages.

The Tribunal certified the claim as an opt-out collective proceeding in 2021 — the first standalone claim to be certified under the UK's competition collective actions regime. A full trial took place between January and March 2024 and the Tribunal's long-awaited ruling on the merits of the claim was handed down on 19 December 2024.

The Excessive Pricing Test

Calculating whether a price is excessive under competition law is complex. The leading case, *United Brands*,[1] sets out a two-limb cumulative test to determine whether a price is abusively high. The first limb is whether the difference between the costs actually incurred and price actually charged is excessive (the excessive limb). The second limb is whether a price has been imposed which is either unfair in itself or when compared to competing products (the unfairness limb).

[1] *United Brands v Commission*, Judgment of the European Court of Justice in Case C-27/76, EU:C:1978:22.

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This test has been interpreted in subsequent cases, most notably in a number of proceedings brought in the pharmaceutical sector by the Competition and Markets Authority (CMA), which have been litigated over the last several years.

Competition authorities rarely bring excessive pricing cases outside of the pharmaceutical sector, with agencies focusing their resources on exclusionary pricing behaviour. There is also a widespread view that price controls should generally be administered by sector specific regulators rather than through lengthy and unpredictable competition enforcement actions.

The Tribunal's Ruling

The Tribunal found that BT held a dominant position on the narrow market for standalone fixed voice services, its legacy landline service.

On the question of whether BT abused that dominant position, the Tribunal applied the *United Brands* test and found that, while the prices charged by BT were excessive, they were not unfair because the prices reflected the value attributed to BT's services by its landline customers. BT had therefore charged a price that was fair and not abusively high.

Implications for the Law on Excessive Pricing

The *Le Patourel* judgment provides guidance on the application of the *United Brands* test outside of the limited circumstances in which it has been applied in the past.

The Excessive Limb

The Tribunal found that BT's prices exceeded a competitive benchmark price which was based on a reasonable rate of return. In this case, the Tribunal determined the applicable benchmark itself after finding that each side's expert methodology contained a number of problems which made it "necessary to strike a balance". In fixing the benchmark, the Tribunal found a reasonable margin for BT's landline service to be 13.5%, which sat between the proposals offered by the class representative and BT, and concluded that 40% of BT's common costs should be recoverable.

The Tribunal found there was an excess compared to the competitive benchmark, and that the excess was significant and persistent because it exceeded 20% for each of the claim years (ranging between 25% and 49.9%). This is notably lower than the excess found in the CMA's pharmaceutical cases, which for example ranged between 900% and 2500% in one case.

The Unfairness Limb

The Tribunal first concluded that BTs prices were not unfair in and of themselves. It noted that the excess was "significantly lower" than the class representative had claimed, which meant that it carried less weight in the overall balancing exercise required by this limb.

It also found that the prices bore a reasonable relation to the economic value of the services. The judgment, although fact-specific, provides guidance on the types of factors that can represent economic value for customers. The Tribunal found value not just in terms of particular features or value-adds provided to the customers (such as a service to helps prevent customers from receiving scam or nuisance calls) but also in BT's positive brand value as a whole. The judgment took into account evidence showing high customer satisfaction scores and significant loyalty to BT from customers that could have switched away, including evidence showing customers were not captive (in contrast to the purchasers in the pharmaceutical cases), generally inert or price insensitive.

The Tribunal further concluded that BT's prices were not unfair when compared with competing products. It found that BT's prices were often similar to, if not below, those of its comparative rivals.

Implications for the UK Collective Actions Landscape

The recent ruling in the *Le Patourel* proceedings represents the first decision on the merits of a collective claim and comes nearly 10 years after the UK collective actions regime came into force. While the regime remains relatively nascent, the last several years have seen a significant growth in the number of claims filed at the Tribunal, many of which are standalone and based on novel or unusual theories of harm.

The UK collective actions regime continues to develop and further trials are listed to take place next year. Nonetheless, future class representatives and their funders are likely to increase their scrutiny of the merits of potential standalone actions before bringing or backing claims.

The judgment provides crucial guidance in particular for parties in ongoing and future excessive pricing cases: It demonstrates a cautious approach on the question of whether a price is excessive and highlights the relevance of evidence on the value of a product to customers under the unfairness limb. Indeed, a considerable proportion of the claims before the Tribunal concern excessive pricing allegations, such as those relating to app stores, water and sewerage services, mobile network operator loyalty penalties and unfair data requirements for the provision of social networking services.

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The ruling is also a reminder that the Tribunal's conclusions for the purpose of certification do not provide any guarantees at trial. For example, it is not bound to give any particular weight to non-binding regulatory findings, even if it did so at the certification stage. The Tribunal in this case pointed out that Ofcom's findings did not strictly follow the competition law framework and that the case "demonstrates the pitfalls of attempting a rigid 'read-across' from the findings of a regulatory body, especially where there was no final conclusion". The Tribunal may, however, take a more favourable view of standalone claims inspired by final competition infringement decisions.

As Le Patourel's claim was not successful, the proceedings will not provide much sought-after guidance on the Tribunal's approach to the distribution of damages (including the returns paid to litigation funders) in collective actions. Stakeholders will no doubt continue to watch closely how the landscape develops in 2025.

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