Neutral citation [2022] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 May 2022

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chairwoman)
PROFESSOR ROBIN MASON
JUSTIN TURNER QC

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION

Applicant /
Proposed Class Representative

- v -

QUALCOMM INCORPORATED

Respondent /
Proposed Defendant

Heard at Salisbury Square House on 30 March to 1 April 2022

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Jon Turner QC, PJ Kirby QC, George McDonald and Ciar McAndrew (instructed by Hausfeld & Co. LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Mark Howard QC, Nicholas Bacon QC, Tony Singla QC, David Bailey and Alexandra Littlewood (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Respondent/Proposed Defendant.

A. INTRODUCTION

1. This is the Tribunal's judgment on an application by the Consumers' Association, commonly known as "Which?", for a collective proceedings order ("CPO") pursuant to s. 47B of the Competition Act 1998 (the "CA"). The Proposed Defendant ("Qualcomm") is a leading telecommunications company whose principal activities include the development, design and sale of smartphone chipsets, and the licensing of intellectual property related to its technology.

2. The CPO application seeks to combine "standalone" claims under s. 47A CA alleging that Qualcomm has abused its dominant position in breach of the Chapter II prohibition in s. 18 CA and (until 31 December 2020) Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), in relation to the royalties charged by Qualcomm to smartphone manufacturers for the licensing of its patents for chipsets.

3. The essence of the claim is that Qualcomm has leveraged its dominant position in the supply of LTE chipsets to smartphone manufacturers, into the licensing of its patents, so as to charge inflated royalties for the use of Qualcomm's patents. In turn, it is said, those inflated royalties are passed on to the final consumers of smartphones. The collective proceedings are proposed to be brought on behalf of all those consumers who have made UK purchases of LTE-enabled Apple and Samsung smartphones since 1 October 2015, a total class of around 29 million consumers. The aggregate loss suffered by those consumers is estimated to be around £482.5 million including simple interest.

4. The CPO application was heard in person on 30 March to 1 April 2022. On the main certification issues, we heard submissions from Mr Turner QC for Which? and Mr Howard QC for Qualcomm. On the funding issues, which were addressed separately, we were addressed by Mr Kirby QC for Which? and Mr Bacon QC for Qualcomm.

5. The hearing included a "hot tub" in which the experts for Which? (Mr Robin Noble of Oxera) and Qualcomm (Dr Jorge Padilla of Compass Lexecon) were

questioned concurrently by the Tribunal, with some limited further questions from counsel.

6. On the second day of the hearing a differently constituted Tribunal handed down its judgment in *O'Higgins and Evans v Barclays Bank & others* [2022] CAT 16 ("*FX*") concerning the certification of proposed collective claims for follow-on damages arising from two decisions of the European Commission concerning foreign exchange spot trading of G10 currencies. At the request of Qualcomm we received brief further written submissions from both parties as to the implications of that judgment for the present case.

B. BACKGROUND

(1) The mobile telecommunications technology at issue in these proceedings

7. The way in which mobile handsets connect to mobile networks is governed by sets of common technological specifications known as standards, whose development is facilitated by standard-setting organisations ("SSOs"). These are bodies in which industry participants collaborate to produce the specifications for standards. Their members include mobile network operators ("MNOs"), original equipment manufacturers ("OEMs") and chipset manufacturers such as Qualcomm.

8. The standards relevant to the proposed collective proceedings are, primarily, the Long Term Evolution and LTE-Advanced standards (collectively the "LTE standards"), which are the main standards used by 4G mobile communications technology. In addition, certain earlier standards pre-dating the LTE standards are relevant, namely (i) the GSM standard, which is commonly referred to as a 2G technology, (ii) the UMTS standard, commonly referred to as a 3G technology, and (iii) the CDMA family of standards, which combine 2G and 3G technologies.

9. Patents that cover technology essential to a particular standard are known as standard essential patents, or "SEPs". Anyone who wishes to manufacture, use or sell a device or component which incorporates or conforms to a particular

standard must therefore be licensed under the relevant SEPs. SSOs typically require their members to commit to licensing any SEPs on fair, reasonable and non-discriminatory ("FRAND") terms.

10. Chipsets are semiconductor devices that are incorporated in every smartphone and enable the smartphone to connect to mobile networks. That requires chipsets to be compatible with the relevant standards supported by the networks. These proceedings concern chipsets that are compatible with the LTE standards, and which are therefore known as "LTE chipsets".

11. Qualcomm holds a large number of SEPs which cover technologies used in the LTE standards as well as the older 2G CDMA, 3G CDMA and 3G UMTS standards, and has undertaken to license its SEPs on FRAND terms. Qualcomm is also a leading supplier of chipsets including LTE and CDMA chipsets.

12. The proposed collective proceedings relate to the commercial policies under which Qualcomm sells its chipsets and licenses its associated SEPs.

(2) The alleged abuse by Qualcomm of a dominant position

13. Which? contends that Qualcomm holds a dominant position on the worldwide markets for the supply of LTE chipsets, that Which? provisionally identifies as comprising a market for the supply of LTE chipsets that are compatible with the UMTS and GSM standards, and a market for the supply of LTE chipsets that are compatible with the CDMA family of standards. Among other things, Which? contends that Qualcomm's market share on those markets was consistently above 60% between 2015 and 2019 and that its particular products render it an unavoidable trading partner for OEMs, at least in respect of a proportion of the OEMs' chipset requirements.

14. Which? also contends that Qualcomm is dominant on markets for the licensing of each of Qualcomm's LTE SEPs, on the basis that those are essential inputs for OEMs and chipset manufacturers who wish to implement the LTE standard.

15. According to Which?, Qualcomm's commercial policies relating to the licensing of its SEPs and supply of chipsets constitute an abuse of its dominant position in those markets, in breach of the Chapter II prohibition and Article 102 TFEU.

16. Which? objects to two specific policies (both individually and in combination):

    (1) First, Which? says that Qualcomm operates a commercial policy known as a "no licence, no chips" policy, under which a smartphone manufacturer or OEM wishing to purchase chipsets from Qualcomm must agree to take a free-standing licence of Qualcomm's portfolio of patents. Which? says that Qualcomm's licensing terms include, in particular, a requirement that OEMs pay royalties in respect of all smartphones sold by them, including those which incorporate a non-Qualcomm chipset.

    (2) Secondly, Which? says that Qualcomm refuses to grant exhaustive licences for the use of its patents to rival LTE chipset manufacturers, which prevents competitors from being able to offer their OEM customers an "all-in" price for their chipsets that would incorporate the relevant licences for Qualcomm's SEPs. Qualcomm is also said to require rival chipset manufacturers to inform it of their sales of LTE chipsets, so that Qualcomm can ensure that their customers have taken patent licences from Qualcomm.

17. Which?'s case is that these policies depart from competition on the merits and have the effect of inflating the royalties paid by smartphone manufacturers for the use of Qualcomm's patents, meaning that they pay higher total prices for their chipset requirements whether those chipsets are purchased from Qualcomm or rival chipset manufacturers. In turn, Which? says, those inflated prices are passed on to final consumers of smartphones in the form of more expensive and/or lower quality products.

(3) Other proceedings

18. Qualcomm's commercial policies have been the subject of various proceedings in other jurisdictions. Which? does not rely on those proceedings as forming a sufficient basis for a follow-on claim in this jurisdiction; its proposed claim is therefore brought on a standalone basis.

19. Which? did, however, say that the decisions reached in other jurisdictions are material to the issue of certification of these proposed collective proceedings, and submitted that they should be taken into account by the Tribunal in considering whether to grant a CPO.

20. First, Which? referred to the decision of a US district court in *FTC v Qualcomm*, 411 F.Supp.3d 658 (N.D. Cal. 2019), which held that Qualcomm's commercial policies set out above infringed US antitrust law. That judgment was overturned on appeal by the US Court of Appeals for the Ninth Circuit: *FTC v Qualcomm*, 969 F.3d 974 (9th Cir. 2020). Which? nevertheless contends that the district court judgment remains relevant, since the main factual findings in that judgment concerning Qualcomm's policies were left undisturbed by the Court of Appeals' decision.

21. We also note that in related proceedings the same US district court certified a class action in which purchasers of smartphones sought damages from Qualcomm on the same basis: *In re Qualcomm Antitrust Litigation* 328 F.R.D 208 (N.D. Cal. 2018). That class certification decision was vacated and remanded by the Court of Appeals for the Ninth Circuit, for reconsideration of the certification decision in light of the appeal decision in *FTC v Qualcomm*: *Stromberg v Qualcomm* 14 F.4th 1059 (9th Cir. 2021).

22. That reconsideration is still pending, and the substantive decision on the US class action is therefore not relied upon by Which? in these proceedings. Mr Noble did, however, rely on the fact that in the US class action proceedings both Qualcomm and the class plaintiffs used a hedonic pricing methodology, and he referred in particular to the approach of Dr Kenneth Flamm, the expert for the

US class plaintiffs. We were provided with a heavily redacted version of the expert report of Dr Flamm, dated 5 July 2018.

23. Secondly, Which? referred to *Tenzer v Qualcomm* [2018] QCCS 3447, in which the Quebec Superior Court certified a class action brought on behalf of consumers who purchased smartphones containing chipsets manufactured by Qualcomm or for which royalties have been paid to Qualcomm. The class action alleges that Qualcomm has abused dominant positions on the relevant chipset and licensing markets.

24. Thirdly, reference was made to the Commission decision of 24 January 2018 in case AT.40220 *Qualcomm (Exclusivity Payments)* concerning exclusivity arrangements with Apple. While the conduct addressed in that decision is not the conduct alleged to be abusive in the present proposed collective proceedings, Which? relies in particular on the Commission's findings that between at least 2011 and 2016 Qualcomm held a dominant position on the global market for the supply of chipsets compliant with certain standards, including the LTE standards.

25. Which? also relied on the infringement findings of the South Korean and Taiwanese antitrust authorities in relation to Qualcomm's commercial policies set out above.

26. We have considered these materials by way of background to these proceedings. In the event, however, we have not considered it necessary to rely on any of the findings in other jurisdictions for the purposes of this certification hearing, given the discrete points pursued by Qualcomm at this stage.

C. THE PROPOSED COLLECTIVE PROCEEDINGS

(1) The claims proposed to be combined

27. Which?'s collective proceedings claim form was filed on 18 February 2021 and amended, with the Tribunal's permission, on 7 January 2022.

28. The proposed class comprises all consumers who purchased one or more "Affected Products" in the UK during the period from 1 October 2015 until the date of final judgment or earlier settlement of the claims, other than wholly for business use. "Affected Products" are defined as LTE-enabled Apple and Samsung smartphones on the list in the appendix to the draft CPO order, and any subsequent LTE-enabled smartphone models manufactured by Apple or Samsung (or any member of their corporate groups).

29. The proposed class has been defined in that way so as to capture the majority of the sales of LTE-enabled smartphones in the UK, on the basis of Mr Noble's estimate that Apple and Samsung accounted for around 82% by value of UK smartphone sales between 2015 and 2019. The proposed class definition excludes second-hand purchases and purchases of refurbished products. There is no lower age limit for members of the proposed class, but it is anticipated that in practice there will be very few under-16 year olds in the class. The proposed class is defined on an *opt-out* basis for those in the class definition who are domiciled in the UK, and on an *opt-in* basis for class members domiciled outside the UK.

30. The 1 October 2015 cut-off date is the earliest date from which an individual claim can run under s. 47E CA[1] and paragraphs 17 and 18 of Schedule 8A to the CA. Standalone claims arising before that date are governed by Rules 119(2)-(3) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"), read together with Rules 31(1)-(3) of the 2003 Rules, which apply a two-year limitation period.

31. The proposed class definition has a conventional list of exclusions, namely officers, directors, employees and trustees of Which? and connected persons; officers, directors and employees of Qualcomm and its subsidiaries; the members of the parties' legal teams, their other professional advisors (including

[1] In respect of claims arising after 1 October 2015 but before 9 March 2017: see the saving provision of paragraph 5(2) of Schedule 2 to the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment)) Regulations 2017 (S.I. No. 385).

experts) and funders/insurers; the Tribunal members and staff assigned to these proceedings; and any judge involved in any appeal in these proceedings.

32. Mr Noble's provisional estimate was that the proposed class currently constitutes around 29 million people. His initial estimate of aggregate damages up to the end of the year 2020 produced a figure of £482.5 million, inclusive of simple interest, equating to an average of £7.56 per handset purchased during the period from October 2015 to the end of 2020. On the basis that most consumers would have purchased more than one handset in that period, Mr Noble estimated the average damages per class member, up to the end of 2020, as being £16.64.

33. Which? submitted that it would be just and reasonable for it to act as the class representative in the proposed collective proceedings. Which? is a registered company and charity with over 60 years' experience of representing the interests of consumers. It is the largest independent consumer organisation in the UK. It has previous experience of bringing collective proceedings before the Tribunal, having brought the first ever collective claim in *Consumers' Association v JJB Sports* (Case No. 1078/7/9/07).

34. Which? has developed a litigation plan for the proposed collective proceedings, and has entered into a litigation funding agreement with Augusta Pool 1 Limited, which has committed to providing Which? with over £18 million in claim funding, and to consider additional requests for funding if required. In addition, Which? has taken out three after-the-event ("ATE") insurance policies,[2] providing total adverse costs cover of £15 million.

35. In support of its application for certification of the proposed collective proceedings, Which? relied upon witness statements from Ms Charmian Averty, its General Counsel, Ms Nicola Boyle, a partner at Hausfeld & Co LLP, Which?'s external solicitors, and Mr Louis Young, a director of Augusta Ventures Limited, a company within the Augusta group, which provides

[2] Being (i) a pre-CPO policy to cover exposure for adverse costs up to the grant of a CPO and any appeals of the same; (ii) a post-CPO policy to cover exposure for adverse costs following the grant of a CPO; and (iii) an excess policy which also applies to the post-CPO period.

advisory services to Which?'s proposed litigation funder Augusta Pool 1 Limited.

36. Which? also relied on preliminary expert reports provided by Dr Avantika Chowdhury and Mr Noble of Oxera, setting out different aspects of the methodology proposed for the purpose of quantifying the overcharge said to have arisen from Qualcomm's abuses of its dominant position.

37. Dr Chowdhury's report addressed the method by which she proposes to calculate the FRAND royalty rate for Qualcomm's SEPs used in LTE-enabled smartphones (which rate Mr Noble proposes as an appropriate benchmark for the royalties that would have been charged by Qualcomm absent its commercial policies).

38. As we have noted above, Mr Noble provided a provisional estimate of the damages he considers may have been suffered by the proposed class members. More importantly, however, he set out a proposed methodology for quantifying those damages if the proposed collective proceedings are certified. A central plank of that proposed methodology is the use of a hedonic regression analysis for quantifying the extent of pass-on of any overcharge to consumers.

39. Mr Noble's position was explained in the course of three expert reports, the second of which was filed in the context of points raised by Qualcomm in its jurisdiction challenge (which was ultimately withdrawn as described below), and the third of which was a reply to the expert report of Dr Padilla relied upon by Qualcomm. Mr Noble expanded on those reports in his responses to the questions from the Tribunal and counsel during the "hot tub" part of the hearing.

(2) Qualcomm's objections to certification

40. On 25 May 2021, Qualcomm made an application to dispute the Tribunal's jurisdiction pursuant to Rule 34 of the Tribunal Rules. Which?'s response to that application was filed on 6 August 2021. Qualcomm's application was subsequently withdrawn by consent on 3 November 2021.

41. Qualcomm's response to the CPO application was then filed on 22 December 2021. Qualcomm does not accept the characterisation of its commercial conduct, and notes that it will fully contest the claims at trial if these proceedings were certified. For the purposes of the present certification proceedings, however, Qualcomm did not take any point as to the allegations of dominance and abuse; nor did it take issue with the viability of the analysis of the counterfactual royalty rate proposed in the expert report of Dr Chowdhury. Qualcomm did, however, contend that the application for a CPO should be refused for two reasons.

42. The first was that Mr Noble's hedonic regression methodology for quantifying pass-on to consumers is, Qualcomm said, not fit for purpose, because it is incapable of establishing a causal link between Qualcomm's allegedly inflated royalty rates and retail prices for LTE-enabled Apple and Samsung phones in the UK, and is not grounded in the facts of the market, including Apple and Samsung's pricing decisions and supply chains. On that basis Qualcomm said that the proposed collective proceedings fail both the commonality and suitability requirements in the eligibility condition for CPO certification under s. 47B(6) CA and Rule 79 of the Tribunal Rules.

43. Qualcomm relied in this regard on an expert report provided by Dr Padilla. Like Mr Noble, Dr Padilla expanded on his position during the "hot tub" part of the hearing.

44. Qualcomm's second contention was that in any event the proposed claims are not suitable to be brought in collective proceedings, on the basis that the costs of the proceedings will outweigh the benefits.

45. In addition to those two objections in principle to certification, Qualcomm contended that if (contrary to its primary position) a CPO *is* certified, the Tribunal should require Which? to obtain an Anti-Avoidance Endorsement ("AAE") to its ATE insurance policy. Qualcomm said that this is required in order for Which?'s funding arrangements to meet the requirements of s. 47B(5)(a) CA and Rule 78(2) of the Tribunal Rules.

D. LEGAL FRAMEWORK

46. Section 47B CA sets out the requirements that must be fulfilled in order for the Tribunal to make a CPO.

47. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the proposed class representative (the "authorisation condition"): s. 47B(5)(a). The authorisation condition is met if the Tribunal considers that it is "just and reasonable" for the proposed class representative to act as a representative in the proceedings: s. 47B(8)(b).

48. Secondly, the claims must be eligible for inclusion in collective proceedings (the "eligibility condition"): s. 47B(5)(b). As set out in s. 47B(6) and Rule 79(1) of the Tribunal Rules, the eligibility condition comprises three cumulative requirements:

    (1) The proposed claims must be brought on behalf of an identifiable class of persons: Rule 79(1)(a).

    (2) The proposed claims must raise common issues, or in other words the same, similar or related issues of fact or law (the "commonality requirement"): s. 47B(6) and Rule 79(1)(b).

    (3) The proposed claims must be suitable to be brought in collective proceedings (the "suitability requirement"): s. 47B(6) and Rule 79(1)(c).

49. Rule 79(2) provides that in determining whether the claims are suitable to be bought in collective proceedings, the Tribunal must take into account all matters it thinks fit, including:

> "(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
>
> (d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C [CA] or otherwise."

50. It is now well-established that, when considering the commonality and suitability requirements for certification, the Tribunal is not generally required to consider the merits of the proposed collective proceedings: *Merricks v Mastercard* [2020] UKSC 51, [2021] 3 All ER 285 ("*Merricks*") at [59].

51. There are two exceptions to that. The first is where a strike out or summary judgment application is made at the certification stage. No such application is before us in the present case.

52. The second exception is that Rule 79(3)(a) requires the Tribunal to consider the strength of the claims in the context of the choice between opt-in and opt-out proceedings. In *Gutmann v First MTR South Western Trains* [2021] CAT 31 ("*Gutmann*") at [51], the Tribunal took the view that this consideration also applies even where the proposed proceedings are put forward solely on an opt-out basis, with no opt-in alternative (which is the case for all of the UK-domiciled class in the present proceedings). That approach was also common ground between the parties before us. As the Tribunal noted in *Gutmann*, however, the assessment in that regard is conducted at a high level and does not involve a full merits assessment.

53. The Supreme Court in *Merricks* did, however, acknowledge that the Tribunal has "an important screening or gatekeeping role" in the pursuit of collective proceedings (at [4]). In particular, where expert evidence is relied upon at the certification stage, the Supreme Court expressly approved the approach set out by Rothstein J in the Canadian Supreme Court judgment in *Pro-Sys Consultants v Microsoft* [2013] SCC 57 at [118]:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means

> that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

54. This test has subsequently been applied by the Tribunal in both *Gutmann* and *McLaren v MOL (Europe Africa)* [2022] CAT 10, referring to it as the *Microsoft* test. The effect of that test is to require a "plausible and well-founded method of estimating aggregate damages" or in other words a "workable or credible methodology for calculating damages with a realistic chance of being applied" (*Gutmann* at [111] and [140]).

55. It was common ground before us that the *Microsoft* test is the relevant test to apply when considering Mr Noble's evidence. It was also agreed that the scrutiny of that evidence required by the *Microsoft* test was, for the purposes of this hearing, sufficient to meet the requirement under Rule 79(3)(a) for a merits assessment for the purposes of the opt-out part of the present proceedings. In other words, if Mr Noble's evidence satisfies the *Microsoft* test then no additional hurdle needs to be overcome as to the strength of Which?'s case in reliance on that evidence.

E. THE DISPUTED ISSUES

56. It was not disputed that, if the other conditions for certification are met, it is just and reasonable for Which? to act as the class representative in these proceedings. Which? therefore meets the authorisation condition. Likewise, there was no dispute that the collective proceedings are proposed to be brought on behalf of an identifiable class of persons, for the purposes of the eligibility condition.

57. Rather, as we have set out above, Qualcomm's objections to certification turned on a quite narrow set of issues concerning the commonality and suitability requirements, and a point on the funding arrangements. We address them in turn below.

58. No other issues were raised by the parties in relation to any aspect of the commonality or suitability requirements, nor does the Tribunal consider that any further issue arises in relation to those requirements.

(1) The proposed pass-on quantification methodology

59. Qualcomm's objections to Mr Noble's proposed methodology for the calculation of pass-on to consumers were the main ground on which Qualcomm opposed Which?'s CPO application. This issue was the subject of the "hot tub" of the experts at the hearing and was addressed in submissions from counsel on both sides. We set out first a summary of Mr Noble's proposed methodology, before turning to Qualcomm's objections to that.

(a) Mr Noble's methodology

60. As Mr Noble explained in his first report, he proposes to estimate damages on an aggregate rather than an individual basis. He has therefore adopted an approach that seeks to estimate the aggregate harm suffered by the class members collectively. His proposal is that, once damages have been quantified on an aggregate basis, there are various ways in which those could be distributed amongst members of the class, which he will consider further at the post-CPO stage. As he noted, there is a trade-off between the precision of payments and the simplicity of estimating and distributing those payments.

61. Mr Noble's first report explained that his proposed methodology for the quantification of aggregate damages involves four steps: (i) establishing the relevant value of commerce; (ii) estimating the value of the damage to OEMs; (iii) assessing the extent to which such damage has been passed on to consumers; and (iv) applying an appropriate interest rate.

62. The second stage of that analysis was the subject of Dr Chowdhury's evidence, and is not contentious for the purposes of certification. For the purposes of this hearing, the only contentious issue in Mr Noble's methodology was the third stage of his damages quantification analysis, concerning the assessment of pass-on to consumers, for which he proposes to use a hedonic regression analysis.

63. Regression analysis is a well-established statistical technique that is used to evaluate quantitatively the correlation between sets of variables. The analysis compares the variables that are sought to be explained (referred to as dependent variables) with variables that are presumed to affect the dependent variables (referred to as independent variables). In damages cases, regression analysis is often used to assess the extent to which the price of a product (the dependent variable) is affected by changes in other variables such as input costs (the independent variables).

64. Hedonic regression analysis is a particular form of regression analysis, which is used to assess the relationship between a product's price (the dependent variable) and its characteristics – both physical attributes and other factors that may affect price such as contractual terms (independent variables). Hedonic pricing analysis is frequently used to derive a monetary value for particular features of a complex product that are not individually priced. The technique can be used, for example, for real estate, as well as computers and other consumer technology goods.

65. In this case, Mr Noble proposes to use hedonic regression analysis to measure the extent to which any inflated royalty was passed on to retail consumers in the form of higher prices. Since many handsets are purchased by consumers as part of a package with a contract from an MNO, he proposes to undertake two regression analyses: one for device-only sales and one for device-and-contract bundle sales. The device-only regression will take account of the various features of the phone that may affect its price; the device-and-contract regression will take account of both the phone features and contract features.

66. In many competition damages cases, it will be possible for a regression analysis to compare a period during the infringement with a prior period where prices are thought not to have been affected by the infringement. In the present case, there are no data for a prior period available, and Mr Noble's expectation is that there will be limited variability of Qualcomm's royalty rates in the data during the alleged infringement period. A key (identifying) assumption in Mr Noble's analysis is therefore that all variable costs have the same pass-on rate, and he

will therefore seek to assess the strength of the correlation between variable costs in general and retail prices paid by consumers.

67. As for the data which Mr Noble proposes to use for that analysis, he will need disclosure of Qualcomm's royalty charges for Apple and Samsung. Apart from that, however, he proposes to use primarily publicly-available data sources, as follows:

(1) For prices (including device-and-contract bundles), he proposes to use data from Pure Pricing and IDC, which are market intelligence firms that gather mobile and broadband pricing data for the UK market, and internet searches of retail prices.

(2) For component costs for Apple and Samsung smartphones, he proposes to use publicly-available cost data available from IHS Benchmarking/IHS Markit. This is a market research and analytics firm, which provides "teardown" estimates of the costs of individual components on current and historical models of Apple and Samsung handsets, by deconstructing each handset into component parts and then using market pricing data to estimate the wholesale cost of the components.

(3) To assess product characteristics relevant in controlling for the quality of the handset, such as operating system, battery storage capacity, screen size, camera megapixels and processor speed, he proposes to use data from IDC and the technology analyst firm Canalys, as well as internet searches.

(b) The factual basis for Mr Noble's methodology (in general)

68. Qualcomm's overarching objection to Mr Noble's methodology was that it fails the *Microsoft* test because it is insufficiently grounded in the facts. In particular, Qualcomm criticised Mr Noble's decision not (at least initially) to seek disclosure as to how Apple and Samsung set retail prices for smartphones in the UK, how they choose which features to include in new smartphones, how they

manage their cost efficiency, how MNOs and other retailers set prices and choose which handsets to offer, and the use of focal pricing by Apple, Samsung, MNOs and/or other retailers to set prices (i.e. charging retail prices that end in either "49" or "99").

69. Qualcomm's reasons for contending that this is fatal to certification of the collective proceedings, by reference to the *Microsoft* test, were put in various different ways in its skeleton argument, Mr Howard's submissions and Dr Padilla's comments in his expert report and at the hearing.

70. The bluntest formulation of the argument was simply to say that Mr Noble's proposed methodology "is not (and will not be) supported by any factual evidence", and that his model "has no proper basis in fact" without evidence as to the pricing and value chains of Apple, Samsung, the MNOs and other retailers. (There were numerous other similar statements of this nature in Qualcomm's written submissions and Mr Howard's oral submissions at the hearing.)

71. That contention is plainly wrong. Mr Noble's proposed methodology is not remotely a purely theoretical model, but is a regression analysis that is grounded in the factual evidence, using in particular the various different data sources that are described at [67] above. This is therefore not at all a case where the claim of causation is based on "economic theory only" (cf *FX* at [234(2)]), but one where the proposed economic model will use extensive empirical data on costs, product characteristics and retail pricing.

72. Thus Mr Noble notes that, as a matter of economic theory, if the relevant markets are competitive then changes in input costs (caused for example by inflated royalty rates) would be expected to be fully translated into higher selling prices for a given quality of handset. However his proposed hedonic model does not assume that to be correct; rather, it is designed to test whether that theoretical expectation holds true on the facts of the present case.

73. Moreover, although Mr Noble's starting point is that the data sources set out above are likely to provide him with sufficient data to specify his model and to

carry out a sufficiently robust analysis, he is not, as Qualcomm claimed, "unwilling" to seek third-party disclosure from Apple and Samsung. Quite the contrary, as he confirmed in his expert reports and again at the hearing, he is entirely open to making targeted requests for third-party disclosure if, during the course of his analysis of the data set out above and the appropriate specifications for his model, he considers that it would be helpful or necessary to obtain further data from other sources.

74. A particular example of the latter is the issue of fixed costs. Mr Noble's model currently focuses on variable costs, for the reasons explained in his expert reports. He accepted, however, that if it were to prove necessary to take account of fixed costs (such as R&D costs) in order to understand their relevance to handset pricing decisions, then in addition to publicly-available data sources (such as published company accounts) he would consider seeking disclosure from Apple and Samsung of specific data.

75. Qualcomm suggested that this was an "empty promise" because the litigation plan and budget did not take account of third-party disclosure of this nature. We do not accept that argument. It would be an entirely unrealistic expectation for Which?'s litigation plan to envisage every evidence-gathering step that might be taken in the course of lengthy proceedings, particularly a step that Which?'s expert currently considers unlikely to be required.

76. As for the budget, Which?'s current litigation budget (including VAT) allows for costs of up to £1.2 million for obtaining third-party disclosure, plus around £1.8 million for processing and using that disclosure. Those are already large sums by comparison with the total budget of approximately £25.4 million, and Mr Young's first witness statement notes that the litigation funding agreement enables Which? to request an increase to the funding amount via a budget variation request if necessary. Given the large sums already at stake, and the overall size of the collective proceedings, it is in our view inconceivable that Which? and its legal and economic advisors would be prevented by the terms of the funding arrangements from seeking to obtain third-party disclosure if that were considered necessary in order to establish the claims.

(c) Causation vs correlation

77. The next way in which Qualcomm put its case on the insufficiency of the facts was to say that without disclosure from Apple, Samsung and others as to their pricing decisions, the Tribunal would have no factual basis on which to assess whether any statistical relationships between prices and costs derived from Mr Noble's regression analysis implied causation, as opposed to simply showing correlation between those factors.

78. The Tribunal agrees that correlation does not necessarily imply causation. That does not, however, mean that a regression model – which at its heart is, as described above, a technique for testing the strength of the correlation between variables – can never be used as evidence of causation. As Mr Noble explained in his third report, in order to ascertain the impact of a change in one variable on another variable it is important to control for the possible impact of other variables. A well-specified regression analysis will therefore (among other things) seek to control for all factors that might reasonably be expected to influence the dependent and independent variables being tested.

79. In the present case, where the variables under scrutiny are the prices of handsets and the variable costs of those handsets, Mr Noble said that he will seek to control for all factors that might reasonably be expected to influence the prices paid by consumers, such as the quality of the features of the handset (and in the case of device-and-contract bundled sales the features of the relevant MNO packages). By controlling for those factors, Mr Noble said that he will be able to draw reasonable inferences about causation, because he will be able to conclude that any change in price can only have been caused by the change in the variable costs and not by other factors.

80. The validity of this approach in principle is recognised by the European Commission in its "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" ("Pass-on Guidelines") [2019] OJ C 267/4, paragraph 102, noting that:

> "In a regression analysis, a number of data observations for the variable under consideration and the likely influencing variables are examined. The

> relationship identified is usually expressed in the form of an equation. This equation makes it possible to estimate the effects of influencing variables on the variable under consideration and to isolate them from the effects of the infringement. Based on a regression analysis, it is possible to estimate how closely the relevant variables are correlated with each other, which may in some instances be suggestive of a causal influence of one variable on the other."

81. The question for the Tribunal will ultimately be whether Mr Noble's hedonic regression analysis sufficiently controls for all other relevant factors that causality can be inferred from whatever evidence of correlation between prices and variable costs the model produces. As a general proposition, there will be greater confidence in an inference of causation where the control factors (i.e. the independent variables) are well-chosen and well-specified. By contrast, there will be less confidence in causality if it appears that an important independent variable may be missing from the analysis, or where there is doubt as to the robustness of the model specification.

82. It is therefore possible that, having assessed the robustness of the regression model, the Tribunal might conclude that no inference of causality can be drawn from it without additional qualitative corroborating evidence from Apple, Samsung and others. But that will turn on the assessment of the results of the regression model and detailed consideration of its specification at trial. We certainly cannot conclude now that Which?'s case will inevitably fail without the evidence referred to by Qualcomm.

(d) Model specification

83. A further way in which Qualcomm put its case – developed in particular by Dr Padilla in his evidence – was to say that evidence from (in particular) Apple and Samsung would be required in order for Mr Noble's regression model to be based on robust data and appropriately specified. In that regard, Dr Padilla made various points which we address in turn.

84. *Measurement of component costs*. Dr Padilla said that the "teardown" estimates of component costs which Mr Noble proposes to use may not reflect Apple and Samsung's actual costs, if they have negotiated particular favourable terms. We do not consider that this point fundamentally undermines Mr Noble's analysis.

As Mr Noble pointed out, many of the handset components are relatively commodified and their costs are to that extent likely to be fairly commodified. He would, in addition, be able to carry out a cross-check against Qualcomm's own chipset costs, and if necessary further benchmarking could be sought from other specialist data providers.

85. There is therefore no doubt that in this regard Mr Noble's proposed methodology is grounded in the facts of the case. The potential dispute is merely as to which data sources are required for the analysis, and Dr Padilla fairly accepted that he did not yet know whether there would be any concerns with Mr Noble's cost data. Insofar as this remains a material issue of dispute between the parties, therefore, we consider that this is a matter to be assessed at trial.

86. *Focal pricing.* Dr Padilla noted that Mr Noble's proposed model would assume a linear relationship between prices and variable costs. He pointed, however, to the use of focal pricing by (at least) Apple, and possibly also by Samsung and the MNOs, which would imply that prices would move in steps rather than there being a linear price/cost relationship. Dr Padilla considered that the only way of determining whether, in these circumstances, a linear specification of the regression model would be correct would be to obtain evidence on the pricing policies of the companies.

87. Mr Noble's response was that on average, looking at a large range of data across different handsets, different OEMs and different sales channels, any non-linearity in the response of price to costs would be smoothed out. He emphasised, however, that he had not yet determined exactly how to specify his regression model, and that one question to consider in the process of model development would be the extent to take account of any non-linearity in the cost-price relationship, through the use of an appropriate econometric technique.

88. This is, in our view, paradigmatically an issue that will fall to be tested at trial, by reference to the data as to the extent of focal pricing and the decisions made by Mr Noble in due course as to the appropriate specification of his model in response to those data. At the present stage, at which we necessarily have neither

those data nor a full specification of Mr Noble's model, we cannot say whether Mr Noble's approach will prove to be flawed or not. For the purposes of certification, the question is whether the proposed approach is sufficiently credible or plausible, and sufficiently grounded in the facts. We consider that Mr Noble's responses to this issue meet that test.

89. *Fixed costs*. Mr Noble's position was that, as noted above, his model will focus primarily on variable costs rather than fixed costs. Dr Padilla objected that it is necessary to obtain evidence of Apple and Samsung's pricing policies in order to establish whether the model should, in fact, also take account of the effect of fixed costs on prices.

90. Mr Noble's response was to maintain that his starting point is a valid one. As he explained in his third report, in most industries variable costs are substantially more likely to affect price-setting than fixed costs, and the Pass-on Guidelines specifically note that fixed costs are less likely to be passed on than variable costs, because at least in the short run "such costs typically do not affect the direct purchaser's price setting" (paragraph 52). He confirmed, however, that he does not exclude the relevance of fixed costs at this stage, but will consider – as his specification of the model develops – whether further data are required to address this point.

91. That position is, in our view, entirely reasonable. The objection at this stage is therefore premature. Insofar as there remains a dispute as to this aspect of the model specification, that will be a matter to address at trial, but it does not prevent certification.

92. *Pass-on rates*. As we have indicated, a key assumption made by Mr Noble is that all variable costs have the same pass-on rate, such that the pass-on of any inflated royalty can be estimated by measuring the pass-on of other variable costs. Effectively, therefore, Mr Noble's proposed starting point is to aggregate all categories of variable costs in his regression model. In his comments in the "hot tub" Dr Padilla disputed this assumption, and doubted whether Mr Noble's methodology was capable of determining with confidence the royalty pass-on

rate if prices did not respond to royalties in the same way as to other variable cost categories.

93. Again, we regard this as an issue for trial. The assumption, at this stage of the analysis, that different variable cost categories are passed on in the same way is a plausible one. Moreover, to the extent that that assumption does not hold true, Mr Noble confirmed in his comments in the "hot tub" that if necessary, when considering the detailed specification of his model, he would be able to explore the use of different cost variables to reflect costs that might behave in different ways.

94. We also note that the premise of aggregating cost categories in any event only arises because of Mr Noble's expectation that there will be limited variability in Qualcomm's royalty rates. That premise, however, is one that will need to be tested, and Mr Noble expressly did not rule out the possibility of treating royalties separately if the royalty agreements disclosed by Qualcomm revealed sufficiently large variations in the royalty rates.

95. *Effect of royalties on both prices and product characteristics.* Mr Noble's starting assumption is that quality choices by Apple and Samsung in the design of their handsets will have been determined without regard to the royalty rates, i.e. exogenously. The starting point will therefore be to define quality characteristics as separate independent variables in the regression model. Both Mr Noble and Dr Padilla agreed that if quality choices turn out to have been at least in part responsive to price (i.e. endogenous) that would require a different approach to the regression modelling.

96. It was apparent from the lively debate between Mr Noble and Dr Padilla on this point that Mr Noble was both aware of this potential difficulty and had not excluded the necessity of amending his specification to address it. Given that the experts were also agreed as to the particular econometric techniques that could be used to address this endogeneity problem, if it were to arise, we consider that this is again a matter to be addressed at trial rather than at this stage

97. *Ad valorem royalty rates.* For completeness, we note that a different kind of endogeneity problem might arise if Qualcomm's royalty rates were set *ad valorem* by reference to end-prices rather than at absolute levels. In that case the experts were agreed that causation would run in the opposite direction – from prices to royalty rates rather than the other way round.

98. There was no material before us to indicate whether this was likely to be a significant problem, but Mr Noble was initially inclined to believe that this would not be likely to make a material difference to the overall analysis if variable costs were considered in aggregate, since royalties make up a relatively small proportion of the overall variable costs that would be included in the model. This is, in any event, not a point going to the question of whether Mr Noble should seek additional disclosure from the OEMs in order to specify his model, but rather simply a question as to how the model specification should deal with a potential problem arising from the terms of the individual royalty agreements when those are disclosed.

99. In those circumstances, again, we regard this as a matter for debate at trial, rather than an issue that prevents certification at this stage.

100. *Conclusion on model specification*. We do not consider that any of Dr Padilla's points on model specification fundamentally undermines the credibility or plausibility of Mr Noble's methodology for the purposes of certification of the proposed collective proceedings. Rather, as was apparent from the debate between the experts in the "hot tub", these are matters that will fall to be considered in the detailed model specification that is eventually adopted by Mr Noble. As Mr Noble made clear, he had not reached a concluded view on any of the issues raised by Dr Padilla, and at this preliminary stage we would not expect him to have done so. Dr Padilla's criticisms are therefore premature. The proper place to consider them will be at trial, when it will be possible to consider whether the final model specification adopted by Mr Noble adequately addresses the points raised, such that the results of the regression analysis can be regarded as sufficiently robust.

(2) Cost-benefit analysis

101. Qualcomm's second objection to certification was that irrespective of the criticisms made of Mr Noble's proposed regression analysis for establishing pass-on of any inflated royalties to the proposed class, the costs of permitting the proposed collective proceedings to continue would outweigh any benefits. On that basis, Qualcomm said that the proceedings would fail to meet the suitability requirement.

102. In particular, Qualcomm noted that according to Which?'s budget, the total cost of bringing the proposed claim would be in excess of £25 million (including VAT). Set against that, Which?'s own estimates are that on average the damages that each class member would be able to claim, up to the end of the year 2020, would be £16–17. At that level of damages, Qualcomm argued that there was a real risk that take-up of any damages award would be very limited. Qualcomm noted in that regard the findings of a US Federal Trade Commission Staff Report, "Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns" (September 2019) which found a median uptake of damages from class action settlements of 9% and a weighted mean of 4%.

103. By contrast, Qualcomm noted that the litigation funder will be entitled to at least 15–25% of the damages award and/or settlement sum if there are sufficient undistributed damages, and subject to the Tribunal disallowing some part of that return.

104. As Rule 79(2)(b) of the Tribunal Rules makes clear, the costs and benefits of continuing the collective proceedings are a relevant factor to take into account in assessing whether the claims are suitable to be brought in collective proceedings. Mr Howard argued that in the present case the cost-benefit analysis was sufficiently weighted against certification that the Tribunal should refuse the CPO on grounds of suitability, even if (as we have found above) the Tribunal were to consider that the proposed collective proceedings would otherwise meet the requirements of the *Microsoft* test.

105. As the Tribunal noted in *Gutmann* at [171], it is relevant to consider whether the proposed collective proceedings are likely to benefit principally the lawyers and funder as opposed to the members of the class. In that regard, we do not exclude that in a particular case the cost-benefit analysis might so clearly weigh against certification that this might in itself be a ground for finding that the claims were not suitable to be brought in collective proceedings.

106. We do not consider, however, that the facts of the present case come close to representing such a case. In the first place, in the current economic climate, and given the cost of living challenges faced by many consumers, we do not consider that an average claim of £16–17 per consumer is such a small sum that take-up is inherently likely to be limited. In addition, as Ms Boyle pointed out, the value of individual claims will continue to rise as the proposed collective proceedings progress, as existing class members may purchase additional smartphones (and new consumers will also become part of the class).

107. Nor do we accept that take-up of damages is in this case likely to be limited. We agree with Ms Boyle's comments that smartphones are significant purchases, made relatively infrequently for most consumers, and in relation to which consumers are therefore likely to be able to provide documentation from their bank records or electronic receipts. The present case is therefore very different to that of *Gutmann*, which concerned historic rail journeys, for which bank records would not suffice since they would not show the kind of tickets that had been purchased, in circumstances where even recalling the specific journeys might be difficult (see [168] and [175] of the judgment in that case).

108. We are also unpersuaded that the facts of this case indicate that take-up of a damages award is likely to be as little as the average figures reported by the FTC in its 2019 report. We agree with Ms Boyle that Which? is well-placed to ensure that notifications to the class of the availability of damages will be effective. She commented that in the first 36 hours following the announcement of the CPO application, there were 131 related news items with a very wide reach, including broadcast and radio interviews and national and local newspapers. We would expect the publicity to be at least as significant were the proposed collective proceedings to be successful either at trial or following a settlement.

109. The costs of the proceedings are, unsurprisingly, substantial. But they are not out of line with the costs of other collective proceedings, and overall the total budgeted costs represent only around 5% of the total estimated claim value of £482.5 million. We do not consider that to be disproportionate.

110. As for the return to the litigation funder, the comments of the Tribunal at [176] of *Gutmann* are equally apposite in this case: third-party funding is inevitable in this sort of consumer litigation, and a commercial funder will not take the significant financial risk involved without the potential for significant profit in return. The funding arrangements for the present case appear to be broadly comparable with other litigation funding arrangements (and indeed Qualcomm has not sought to suggest otherwise, subject to the point that we address below regarding the lack of an AAE).

111. In all the circumstances, therefore, we do not consider that the cost-benefit analysis is in this case a basis to refuse certification of the proposed collective proceedings.

(3) Funding

112. Qualcomm's final contention was that if these proceedings are certified, the Tribunal should require Which? to obtain an AAE in relation to its post-CPO ATE insurance policies.

113. In that regard Mr Bacon said that the ATE policies create unacceptable uncertainty for Qualcomm, since they (i) contain exclusions attributable to (among other things) Which?'s failure to cooperate with its legal representatives; (ii) permit the rescission or cancellation of the policy in the event of Which?'s fraudulent or deliberate breach of the duty of fair presentation of the risk to the insurer; (iii) permit the termination of the policy on a variety of grounds such as Which?'s decision to continue the dispute without the insurer's approval, when the legal representatives have advised that the collective proceedings do not have reasonable prospects of success; and (iv) do not allow Qualcomm to enforce the policies directly.

114. In response, Which? proposed the amendment of clause 2.1.1 which concerns Which?'s failure to cooperate. In its original form, clause 2.1.1 in each of the policies reads:

> "The Insurer shall not, unless stated otherwise in this Policy, indemnify the Insured under this Policy for Opponent's Costs to the extent that (and only to the extent that) the Opponent's Costs were directly caused by or directly attributable to:
>
> 2.1.1 The Insured's [i.e. Which?'s] failure to co-operate with or to follow the advice of the Representative [i.e. Which?'s legal advisers]".

115. Under the proposed amendments, clause 2.1.1 will read:

> "The Insurer shall not, unless stated otherwise in this Policy, indemnify the Insured under this Policy for Opponent's Costs to the extent that (and only to the extent that) the Opponent's Costs were directly caused by or directly attributable to:
>
> 2.1.1 the Insured's
>
> (a) non-trivial failure to co-operate with the Representative; or
>
> (b) failure to follow the reasonable advice of the Representative,
>
> provided that where it is reasonably practicable to remedy the failure:
>
> 2.1.1.1 the Representative or the Insurer has promptly notified the Insured in writing of the Insured's failure and of the potential consequences for the Insured of that failure under this Policy; and
>
> 2.1.1.2 within 3 working days of any such notice, the Insured has not remedied the failure by co-operating with and/or following the advice of the Representative."

116. Which?'s insurers have confirmed that, if so ordered by the Tribunal, they will agree to amend the ATE policies to incorporate those amendments to clause 2.1.1 at no cost.

117. We consider that it is appropriate for clause 2.1.1 to be amended in that way, to clarify the scope of the exclusion in 2.1.1, and will so order.

118. Which? has also confirmed that three of its four post-CPO ATE insurers have agreed wording for an AAE in the event that the Tribunal should order this to be provided as a condition of certification. The position of the fourth insurer is that it will consider providing a quote for an AAE in relation to its share of post-

CPO cover should an AAE be ordered by the Tribunal as a condition of certification. Which? submitted, however, that it should not be required to add AAEs to its post-CPO ATE policies, not least because of the quoted cost of £1,707,978. Mr Kirby submitted that this was a disproportionate expense to incur, in circumstances where the risk of any exclusion being applied was minimal given Which?'s reputation and experience.

119. We agree with Which? on this issue. Which? is a long-established and reputable charity, with its own in-house lawyers and an experienced team of external professional advisors. We regard the risk that it would act unreasonably, so as to engage any of the exclusions in the ATE policies, as very minimal indeed, particularly given the tighter wording of the amended clause 2.1.1.

120. Even less likely is the prospect that Which? would have acted in fraudulent or deliberate breach of its duty of fair presentation, so as to give rise to a risk of rescission of the policy. We note that the Tribunal reached a similar conclusion in respect of the Road Haulage Association's ("RHA's") ATE policy in *UK Trucks Claim and Road Haulage Association v Fiat Chrysler Automobiles and MAN and others* [2019] CAT 26 ("*Trucks (Funding)*") at [83].

121. As for the fact that Qualcomm is not able to enforce the policy directly, we have not seen anything indicating that there is any risk at all that Which? would not take steps to claim under its ATE policies in order to meet an adverse costs order. The Tribunal rejected a similar complaint in relation to the RHA's policy in *Trucks (Funding)* at [84].

122. Finally, we note that Mr Bacon appeared, during the hearing, to suggest that an AAE would avoid the risk of termination of the ATE policies with prospective effect, for example if Which? were to fail to follow a recommendation to discontinue the collective proceedings. That submission was, however, obviously misconceived: there is no prospect of Which? obtaining an AAE that would exclude all possibility of termination by the insurer. In any event, as the Tribunal pointed out at the hearing, if Which?'s ATE cover were to be terminated during the course of proceedings, the proceedings would then

undoubtedly come to an end (an outcome that would be welcomed by Qualcomm) unless satisfactory alternative cover could be put in place.

123. Any problem is not, therefore, the risk of prospective termination of cover, but the risk of either rescission or exclusions operating during the period of cover. For the reasons set out above, we regard those risks as being insufficient to justify the substantial additional expense of an AAE in this case.

F. CONCLUSION

124. For the reasons set out above, the Tribunal unanimously concludes that:

(1) Which? meets the authorisation condition.

(2) The claims meet the eligibility condition. There is an identifiable class, the claims raise common issues, and they are suitable to be brought in collective proceedings.

(3) Clause 2.1.1 of Which?'s ATE policies should be amended as set out above. We do not, however, require Which? to add AAEs to its post-CPO ATE policies as a condition of certification of the proposed collective proceedings.

125. We will therefore make a CPO pursuant to s. 47B(4) CA on an opt-out basis for those of the class domiciled in the UK, and on an opt-in basis for class members domiciled outside the UK.

The Hon. Mrs Justice Bacon
Chairwoman

Professor Robin Mason

Justin Turner QC

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

Date: 17 May 2022