THE OPEN DISPLAY ADVERTISING ECOSYSTEM: COMPETITION CONCERNS AND POLICY INTERVENTIONS

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THE ROLE OF AN ECONOMIST AT THE COMPETITION APPEAL TRIBUNAL

By Michael Waterson

The UK Competition Appeal Tribunal judges a range of cases in the competition (antitrust) sphere. There is a panel of Ordinary Members who are chosen on the basis of availability to sit alongside a judge in each case. The Tribunal normally includes one Member who is an economist by training. This article reflects on the role of the economist member, drawing on experience and knowledge of other cases. It discusses the nature of the cases, the particular role of the economist and some issues that arise in considering these cases.

I. INTRODUCTION

The Competition Appeal Tribunal ("CAT") of the UK, as its name implies, is the appellate court for competition cases brought against or by the Competition and Markets Authority ("CMA"), for cases following on from judgments by the CMA or the European Court relevant to the UK, together with cases brought by regulated bodies against their regulator or against decisions by their regulator (for example, by Openreach or a competitor to British Telecom, the dominant retail operator, against a decision of OFCOM the communications regulator). There are also cases of a competition nature between private parties. It operates on an adversarial system.

Some of these cases are Judicial Reviews ("JR"), others are Merits Appeals.[2] Also, as the name implies, the Tribunal for a particular case is composed of three members, of whom one is usually an economist. Although the Chair will lead, the other two members are treated as equals in court and in discussion. The Chair of the tribunal will normally be either the President of the CAT, a judge, or a barrister of equivalent standing, chosen from a small pool knowledgeable about the relevant types of cases, whereas the Ordinary Members, as they are called, are drawn from a panel appointed through an application and assessment process to the role for an eight-year period. The role of the economist member is quite limited in the case of a JR because the decision to be made is (or should be) a narrow one related to the law, specifically whether there has been an error in law in a previous decision by one of the above bodies. Therefore, this article will focus on the economist tribunal member's role in a merits appeal.

The CAT has a small staff assisting with the process. It has Referendaires, who are of considerable use in sifting the very considerable body of material that is involved in a particular case. (Lawyers seemingly have no concept of boiling down arguments to the crucial points.)[3] They have a legal training, so are useful for caselaw but not for assistance with the economics involved; indeed, the CAT has no economists on the staff, as opposed to in the tribunals. Fortunately, the economics involved is commonly quite straightforward in principle, but it can be potentially challenging to apply it in practice.

II. EXPERT WITNESSES

Typically, a merits appeal will involve witness statements from at least one economist on each "side" of the case, although since there is often more than one party on a particular side, and possible interveners, there may be several economists involved. Most of these in practice come from a senior representative of one of the major consulting firms in the business of economic consulting. Moreover, they may commonly provide more than one witness statement, often reacting to witness statements from the other side. These are all written statements, not repeated orally in court. Econometric analysis is sometimes adduced, although if one party produces it, the other side will normally produce its own estimates, so this means the economist panel member should lead colleagues on the possible reasons for differences between the evidential estimates and therefore whether one or the other estimate is more believable. There may also be expert witnesses from other related disciplines such as accountancy, and the economist panel member will again need to take the lead unless there happens to be an accountant member of the panel in addition.

Like all Expert Witnesses, their role is to serve the court, not their paymaster, although they commonly stray towards presenting arguments that favor the party they represent. They are questioned in various ways, dependent on the case and the view of the Tribunal. This normally includes formal cross-examination by barristers from the opposing side, but may include questions from the Tribunal, particularly the economist member. The other mechanisms are joint statements in which the economist experts set out matters on which they agree and matters where they disagree (the latter commonly being the majority), and "hot tubs" where the same set of questions is put by the economist member of the tribunal to each of the experts in turn to test out their arguments. Normally these questions will be outlined in advance of the trial. I suspect that the barristers involved in presenting cases on behalf of their client (actually, on behalf of the solicitors representing their client) dislike the loss of control that these other mechanisms potentially involve.

III. CASE TYPES IN THE CAT AND THEIR CHALLENGES

The cases coming before the CAT within the Merits framework are of several types. One common type is an appeal against a regulatory decision and/ or a fine imposed. This applies a principle of natural justice - the body that has imposed the decision and fine has investigated and produced

2 Merger decisions of the CMA are normally reviewable on a JR basis.

3 Even "skeleton arguments" appear to be getting longer!

a reasoned decision, but an aggrieved recipient of that decision may appeal in the CAT, the regulatory body being the defendant. Currently, several of these are "excessive pricing" abuses of a dominant position, following on from CMA decisions, the cases all being based on the well-known *United Brands* judgment in the European Court.[4] Others arise through regulatory decisions.

Excessive pricing is a difficult area for economists. Starting with the easy part, a standard initial basis for the analysis is the concept of "cost-plus". Costs consist of direct costs (relatively easily established) together with indirect costs, more a matter of judgment since jointly incurred and fixed costs are relevant but their allocation is somewhat unclear. Accountants have methods of allocating these costs; clearly one method of dubious relevance is value-based, since this potentially confounds the problem in excessive pricing cases. Other alternatives are volume based or activity based. There is then the "plus", covering what might be seen as a reasonable margin in relation to a broadly competitive market. This brings us to the concept of "workable competition" or sufficiently effective competition - something lawyers might think was a precise concept in economics but is in practice an imprecise term once favored by a more literary group of economists in the 1950s/ early 1960s. It has no precise definition.

Another concept containing pitfalls is economic value. There is no intrinsic point value that can be ascribed to a product or service. Clearly, most products have a value greater than their price to some consumers (otherwise, no one would buy them); even at a monopoly price some people value the product at least as much as that price. So, there is no one economic value, and the fact that some people are willing to pay a price does not mean that price cannot be excessive. The nearest we can perhaps get to it is the price would obtain in a "workably competitive market", but given the discussion in the previous paragraph, this is of little use! It seems reasonable that some value should be ascribed to the product above its direct cost, dependent on its features, but this might be done within the "plus" or at some later stage. Finally, the *United Brands* formulation does not make a distinction between necessary and sufficient conditions, of particular relevance given the ambiguous word "or" in their formulation. This difficulty arose in the Court of Appeal's judgments in *Phenytoin*.[5] Its solution was that there was more than one method to determine whether a price was excessive, one being whether it was unfair in itself, but that if a plausible alternative to that method (proposed in that case by the CMA) could be formulated by the appellants, the CMA should then investigate that alternative in addition. Alternatives put forward include prices which pertain after entry has proceeded for some time, prices which are sufficient to induce entry and prices of related products. The argument is then about the relevance of these.

A second but less common type of case relates to the "as efficient competitor" to a dominant former monopoly. The prime example of this is the *Royal Mail* judgment of the CAT regarding bulk mail operators' access to final delivery services.[6] Here though, it was the factual evidence rather than the ex post calculation of whether an as efficient competitor would survive given the upstream price charged that was relevant.

A third and increasingly common area for the CAT is in the various types of follow-on actions before it. These normally relate to previous decisions either in the UK or the EU with a finding that they breach either Chapter I or Chapter II of the *Competition Act 1998* or their European equivalents. A classic example is the *Trucks cartel*,[7] a European decision. In this well-known case most major truck manufacturers have been found guilty of an extended period of price collusion. This leads to follow-on actions on behalf of those affected. This class is extremely widely drawn. At the top level are new truck purchasers. Some examples are relatively straightforward, such as Royal Mail (and BT) who mainly bought trucks from DAF.[8] The main issue in dispute was the size of the overcharge and the effects this had on the business of the claimants. There are naturally many nuances to this, matters of debate amongst economists, two of the most important being resale and supply pass-on, given that Royal Mail will have disposed of the trucks at some point and may have passed on higher costs in higher prices (which in turn leads to a potential volume effect on their business). These issues were the subject of econometric analysis by experts for the parties (and therefore assessment of this expert evidence by the economist on the tribunal).

Other such follow-on actions at this level are much more complex- most truck purchasers are small firms, each of which would probably be reluctant to pursue their claim individually. A joint claim of over 18,000 claimants has been launched by the *Road Haulage Association* ("RHA")

4 Judgment of the Court of 14 February 1978. *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities. Chiquita Bananas*, Case 27/76.

5 *Phenytoin* [2020] EWCA Civ 339. Case *No: C3/2018/1847 & 1874. In The Court Of Appeal (Civil Division). On Appeal From Competition Appeal Tribunal.*

6 *[2019] CAT 27 1299/1/3/18 Royal Mail v. Office of Communications.*

7 Commission Decision of July 19, 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (AT.39824 - Trucks).

8 [2023] CAT 6 1284/5/7/18 (T) *Royal Mail Group v. DAF Trucks Limited and Others*; 1290/5/7/18 (T) *BT Group PLC and Others v DAF Trucks Limited and Others.*

on their behalf.[9] Their members will have bought trucks from many different sellers, not all of which were part of the cartel. Indeed, not all the trucks will have been purchased new.

This leads on to considering other follow-on actions at a further stage downstream. A good example is a case on the part of consumers in progress against Mastercard. Mastercard's multilateral interchange fee was the subject of an EU judgment under Article 101. Sainsburys eventually settled its claim against Mastercard. However, this does not affect further claims. In particular, there is class action at a fairly early stage which dwarfs the RHA claim in terms of numbers affected. The *Merricks*[10] case against Mastercard is one example of a new type of case in English law, an opt-out action (the broad equivalent of a class action). In this and other current opt-out actions, of which there are now many, the claim is brought by a suitable individual on behalf of a large group of claimants, here many millions who are included unless they exclude themselves.[11] The group is so large that an individual may not be aware they are involved. This raises novel issues, discussed below.

IV. FURTHER ISSUES FOR ECONOMISTS

These opt-out actions are funded by investment firms. Their incentive is to make a return on their outlay on the assumption that judgment will ultimately be in the claimants' favor, presumably from payments made by the defendant that are unmatched by claimants coming forward to receive their compensation. This raises new issues for the CAT and therefore for its economist member. The CAT must determine whether the consumer representative is a suitably qualified individual to pursue the claim and, if so, whether the arrangements for the case including publicity and arrangement for payments in the event of a successful outcome from the claimants' point of view. Here the two parties in the court are not strictly opposed to the exclusion of others, in fact the CAT has a duty to the ultimate claimants as to the arrangements should the claim be successful. It would not be satisfactory if the claim succeeded but most of the class remained unaware of the fact. Nor would a satisfactory outcome be a quick settlement that paid claimants a trivial amount. Therefore, the grant of a Collective Proceedings Order by the CAT, allowing the claim to proceed further, is an important step.

Most of these cases proceed slowly, so may eventually be settled or judged many years after their start, which in any case will be some time after the original legal judgment against the respondent. This leads to a vexed issue for economists. The *Senior Courts Act 1981* specifies that, in the absence of further compelling evidence, simple interest is allowable as part of a claim, but compound interest is not. This really matters because of the lengthy delay. An economist's natural assumption is that compound interest is the more relevant. But legally this requires the successful argument that the money saved by the claimant had the illegal action not taken place in the first case would have been invested, or that the claimant would have had to borrow money to finance the shortfall arising as a result of the illegality. Of course, this issue is relevant in all follow-on actions.

In cases where there are thousands or millions of potential claimants, they will naturally have been affected by a particular illegal action to a greater or lesser extent. Within the set of claimants, it may be possible to identify classes amongst them who are more affected and others less. The economist may be useful here in assessing evidence, including econometric evidence, on this. The alternative commonly employed is the "broad axe" where all claimants would receive an equal payment should the action be successful.

A quite different tricky issue for economist members, across all types of case before the CAT, is the precedent system in the law of England and Wales (amongst other jurisdictions). Not all judges in the past have made sensible economic decisions, or decisions whilst being otherwise sensible contain elements that do not make sense to the typical economist. If the case is cited with approval or accepted, then this may grate with the economist who does not accept an aspect of the judicial decision. To take one situation where this might be relevant, consider the case where there are several stages involved in producing a product, but the final stage is essentially competitive whilst an intermediate stage involves a monopoly. If the argument is over whether the final price is in some sense too high, then attention needs to be directed to the intermediate stage as the seat of the potential problem.

Precedent is also rather one-sided. Precedence in legal judgments is well-established. But there is no equivalent in economic arguments. Thus, an empirical finding, for example regarding passthrough in similar but not identical situations that is not adduced by the parties, would not normally be admissible if introduced by the economist tribunal member. This would remain true even if the passthrough estimate was produced in good faith in a peer-reviewed academic paper by well-established authors in a reputable journal. This of course contrasts with

9 1289/7/7/18 *Road Haulage Association Limited v. Man SE and Others* (in progress).

10 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (in progress).

11 None of these yet have a final judgment issued.

a previous legal judgment on a similar matter, which is routinely adduced in writing Tribunal judgments. One way to see this is to note that in preparation for a case, the lawyers on each side will create a bundle of Authorities to present to the court. These will solely be legal authorities, that is past judgments. Any past estimates on economic matters would come into the case through the witness statements. An example would be typical paths on prices for drugs following loss of patent protection.

In fact, there is a more general challenge for the adversarial system. It may suit both "sides" of a case not to deal with certain aspects, which may be economically important to the outcome. In that case, it is very difficult to introduce the necessary arguments.

V. CONCLUDING REMARKS

To conclude, the role of the economist panel member of a Tribunal in the CAT is well-established as important and relevant, not least because economists are much better than lawyers at handling certain issues (and less good with other issues). However, given their relatively recent introduction, the CAT having existed for only 20 years but cases involving competition matters have existed for a much longer time, there are still asymmetries in their involvement.

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