

# THE BATTLE OF THE EXPERTS: EVALUATING DAMAGES IN FOLLOW-ON CLAIMS

*What are the methodologies behind quantifying harm caused by cartels?*

A rash of recent cases has led to a considerable uptick in the profile of competition-related claims. These have been rendered more practical by rulings made by the Supreme Court that have opened the door to opt-out group actions being brought in the UK. In parallel, we are seeing a renewed focus of the Competition and Markets Authority (CMA) on areas of consumer harm. Many commentators are predicting that these circumstances will lead to a step-change in the number of follow-on claims being heard by the Competition Appeal Tribunal (CAT).

However, one of the challenges encountered in bringing such claims is the evaluation of the damages suffered by the claimants. The challenge is rooted in the fact that such evaluations must define and assess a scenario in which the anti-competitive behaviour did not take place. As such, this ‘counter-factual’ scenario lies somewhere between an empirical approach based upon known facts and reference data, and one that deploys economic theories of harm.

The attraction of the economic approach is that it deals with the absence of direct evidence of the effect of the anti-competitive behaviour by deploying theoretical models of the behaviour of market participants. In contrast, the empirical approach uses the available evidence of actual trading activity such as sales prices, volumes and margins to arrive at the financial effect of the behaviour that is being complained of.

## Hard evidence

In some cases, the lack of sufficiently relevant empirical evidence will inevitably lead to the need to lean more heavily on economic theories of market and price behaviours. However, it is more often the case that there is sufficient hard evidence and reference data from which an empirical assessment may be constructed. Indeed, claims made for lost profits caused by either a breach of contract or a catastrophic event have routinely been constructed in this way.

In the first judgment handed down in a private cartel damages follow-on claim in England (*BritNed Development Limited v ABB AB & ABB Ltd*) the principle of compensatory damages was considered in the context of the two approaches described above.

This case, heard in the High Court, centred on the supply and installation of a power cable between the Netherlands and the UK. The claim was a follow-on from the European Commission’s finding that ABB had

been a member of a cartel with other suppliers of high-voltage power cables.

The judgment addressed a range of issues including, of course, the evaluation of the harm suffered by BritNed as a result of the operation of the cartel. The claimant’s expert adopted the economic approach – a regression analysis to assess the theoretical overcharge. In contrast, ABB’s expert used the empirical approach – reviewing the profit margin on the contract in question and comparing this with those it achieved on other comparable projects which would have not been affected by the cartel’s operation.

## Actual data

The judgment and award validated the empirical approach – underlining the principle that the use of actual data, where it is available, is preferable to the use of proxy data. The Court of Appeal subsequently confirmed this approach was appropriate, although it disagreed with other elements of the judgment.

Naturally, the specific outcome of the ABB case was dependent upon its own unique circumstances. However, understanding where such data may be stored and used in a multi-national corporate environment, combined with real in-house experience in using, reporting and interpreting such data, is a skill set which is vital.

FRA’s litigation and arbitration expertise is built around this core experience, which is set to be as compelling in the CAT environment as it is in the commercial courts and with arbitration panels. It is clear that where a methodology is based upon real financial performance, it is likely to be considered as a more suitable basis for quantifying the harm caused.



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