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Admissibility of Expert Economic Evidence in Competition Litigation

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'In matters of opinion I very much distrust expert evidence'
Lord Jessel MR (1873)[1]

Abstract

Sir Marcus Smith, President of the Competition Appeal Tribunal, has expressed concerns over the way economists give evidence in competition cases. Namely, economists do not understand and adhere to the rules of evidence, and their use of statistical evidence differs from how lawyers and judges think about evidence. Here I respond to these claims as an economist expert witness to show that the 'interplanetary divide' between lawyers and economists is not as stark as portrayed and can be reconciled and accommodated.

Keywords: admissibility, economics, expert evidence, competition litigation, CAT

1. Background

Sir Marcus Smith's, President of the Competition Appeal Tribunal (CAT), has expressed 'entirely personal' but well-known views on the relationship between lawyers and economists in competition cases.[2] These are frank insights from a senior sitting judge expressed in a deliberately provocative article with the title 'Lawyers come from Mars, and economists come from Venus – or is it the other way around?' They require a reasoned response from those he believes occupy a different orbit.

Sir Marcus gives two reasons for the interplanetary divide between lawyers and economists – economists do not understand and adhere to the rules of evidence, and their use of statistical evidence differs from the way lawyers and judges think about evidence. I will show that the first of these claims is unjustified, and the second has substance, but the differences once understood can be accommodated in the courtroom.

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[1] *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373.

[2] Sir Marcus Smith, 'Lawyers come from Mars, and economists come from Venus – Or is it the other way around? Some thoughts on expert economic evidence in competition cases' (2019) 18 *Comp LJ* 3.

The common law has recognised the admissibility of expert evidence since *Buckley v Thomas* in 1554[3] and of 'partisan' experts retained by one or other of the parties in *Folks* v *Chadd* in 1782[4] with their duties famously set out in *The Ikarian Reefer.*[5] As Evans-Lombe J in *Barings v Coopers & Lybrand* states:

> *…expert evidence is admissible… in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues.*[6]

While there may have been instances of 'economic' evidence in England under various trade and monopoly cases[7], economists began to appear as expert witnesses in competition law litigation before the UK Restrictive Practices Court[8] established in 1956 (and abolished in 1999). However, it was rare for an economist in England and Wales to appear in court throughout the 1980s and 1990s.

This has changed. The development of and reforms to competition legislation and its administration have seen the rise of litigation and the greater use of economics. This has accelerated in the last decade with the right to claim compensation for competition law infringements reaffirmed by *Crehan*[9] and earlier by *Garden Cottage,*[10] the introduction of collective proceedings under the Consumer Rights Act 2015,[11] together with the increase in third-party litigation funding.

Competition cases can be heard in the High Court, Commercial Court and the CAT. The CAT is a specialised Tribunal dedicated to competition law litigation with UK-wide jurisdiction. The unique and significant feature of the CAT is that it is a specialised Tribunal which sits as three-member panels often with one ordinary member who is an economist. Under the Consumer Rights Act, its powers were expanded to hear stand-alone actions (ie those not dependent on a finding of an infringement by a competition authority), and collective actions for aggregate damages. The UK Supreme Court's decision in *Mastercard v Merricks*[12] which clarified the requirements for collective certification and set out a claimant-

[3] *Buckley v Rice Thomas* (1554) I Plowden 118, 124; 75 ER 182. There Mr Justice Saunders said "If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty, which it concerns, which is an honourable and commendable thing in our law. For thereby it appears we don't despise all other sciences but our own, but we approve of them and encourage them, as things worthy of commendation'. Also, Tai Golan, 'Revisiting the History of Scientific Expert Testimony' (2008) 73 *Brooklyn Law Review* 897.

[4] *Folks* v *Chadd* [1782] 3 Doug KB 157 99 Eng. Rep. 589 (1782).

[5] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1)* [1993] F.S.R. 563.

[6] *Barings and another v Coopers & Lybrand and others* [2001] PNLR 22 at 45. Also, *British Airways Plc v Spencer* [2015] Pens LR 519 at [68].

[7] The first economist to give evidence in antitrust litigation was probably in the US case of *Maple Flooring Manufacturers' Association v United States*, 268 U.S. 563 [1925]. Judge Harlan Fisk Stone a former dean of Columbia law School favoured social sciences literature to resolve legal issues.

[8] Robert B. Stevens and Basil S. Yamey, *The Restrictive Practices Court – The Judicial Process and Economic Policy* (London: Weidenfeld & Nicolson, 1965).

[9] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297. Also Damages Directive 2014/104/EU implement as Competition Act s 47F and Schedule 8A.

[10] *Garden Cottage Foods v Milk Marketing Board* [1983] AC 130.

[11] Amending Competition Act 1998 ss 47 B & C.

[12] *Mastercard v Walter Hugh Merricks CBE* [2020] UKSC 51.

friendly regime. These reforms have led to the CAT has attracted the bulk of the increase in competition cases, with many actions transferred from the High Court and Commercial Court in recent years.

There has been a significant growth in the number and complexity of the cases before the courts. After the UKSC *Merricks* decision in 2020 and the subsequent grant of the *Merricks* CPO in March 2021,[13] the number of new actions filed in the CAT increased 3.5 fold from 36 in FY2021-22 to 80 in FY2022-23, almost a doubling its total caseload.[14] This has been accompanied by increasingly complex, duplicative (mostly from multiple card interchange and trucks claims) challenging (against Big Tech firms such as Meta, Amazon, and Google) and novel claims that not only have stretched court resources but the bounds of competition law e.g. the actions against a number of water utilities linking their alleged abuse of dominance to sewages spillages.[15] The claims being filed in the CAT, especially collective actions are massive and setting legal history e.g. the £13.6 billion Ad Tech claim filed by UK publishers against Google,[16] *Merricks* initial claim of £14 billion on behalf of 45 million consumers; the Google Search claim of £7 billion on behalf of 65 million users,[17] PlayStation £5 billion claim against Apple affecting 9 million gamers,[18] the claim against £2.3 billion claim against Meta £2.3bn.[19]

The reality is that competition law has become an area of complex mega-litigation[20] with large multiparty claims often with parallel individual and collective actions and related claims at different levels of the supply chain now running into billions. With the advent of collective actions, unique to competition litigation in the UK, lawyers have become entrepreneurs instigating and funding cases, the latter directly through contingency fees or by pitching to a growing number of third-party litigation funders on a no-win-no-fee basis. Expert witnesses are generally not eminent scholars or practitioners, but professional experts backed up by teams of consultants employed by economics consulting firms who specialise in expert witness testimony.

2. Sir Marcus's Concerns

Sir Marcus' central concern is that economists do not confine their evidence to opinions based on admissible facts. In the cases he has heard economists have 'collated' the facts selectively, used facts exterior to the evidence given in court, opined on the industry and its practices on which they have no special knowledge, and introduced statistical analysis which is difficult to interpret and hard to reconcile with the direct factual and documentary evidence given at trial. These problems are compounded because the opposing experts often use

[13] *Walter Hugh Merricks v Mastercard (Further Judgment (Application for a collective proceeding order))* [2012] CAT 28.
[14] *CAT Report and Accounts 2022-2023* (HC633, 25 March 2024) 11.
[15] *Professor Carolyn Roberts PCR v Northumbrian Water* CAT Case No. 1630/7/723 and related applications.
[16] *Ad Tech Collective Action LLP Applicant/Proposed Class Representative - v - (1) Alphabet Inc (2) Google LLC Judgment (Certification)* [2024] CAT 38.
[17] *Nikki Stopford v Google* CAT Case No. 1606/7/7/23.
[18] *Alex Neill Class Representative Ltd v Sony* [2023] CAT 73.
[19] *Lovdahl Gormsen v Meta* Case No: 1433/7/7/22.
[20] Sackville J when at the Federal Court of Australia defined mega-litigation as 'civil litigation, usually involving multiple and separately represented parties that consumes many months of court time and generates vast quantities of documentation in paper or electronic form'. Sackville J, 'Expert Evidence in the Managerial Age' (Forensic Accounting Conference, Sydney, 14 March 2008). Also, his searing criticisms of economic expert evidence in *Seven Network Ltd v News Ltd* [2007] FCA 1062.

different facts and evidence to arrive at differing opinions. Economists are accused by Sir Marcus' of being 'uneducated experts,' by which he means that they do not have 'a clear understanding of what giving evidence in court actually entails.'[21]

The accusation that economists are 'uneducated experts' is harsh and unjustified. Sir Marcus says as much when he lays much of the blame for ignoring the law of evidence at the feet of English judges, which I quote at length:[22]

> *Generally speaking, the approach of our civil and commercial courts to evidence is pragmatic and sensible. We abandon – or at least do not give pre-eminence to – technical rules of evidence, which govern what evidence may and what evidence may not be admitted. Instead, we let the judge see and consider just about anything that the parties consider relevant.*
> *Thus, submissions are directed not to technical legal questions relating to the admissibility of evidence, but to why greater weight should be attached to certain evidence (in contrast to other evidence). On the whole, this is an approach that works very well.*
> *However, for the expert economist, this is – or can be – a dangerous situation. This is because of the subjective way in which the evidence that our expert will be relying upon is selected. Almost without exception, the expert reports of economists that I have seen deployed in competition litigation mix opinion with assertions of (contested) fact. For instance, assertions will be made about how the industry in question operates. Or statements will be made about historic trends in interest rates or inflation. Under our procedure, this evidence all goes in. 'Don't worry,' we say, 'it's admissible, but subject to weight…'*
> *It is fine for the experts to reach divergent opinions on the same agreed facts. It is not fine for the experts – in their reports – to adduce evidence (as opposed to referring to evidence adduced by a witness of fact) that is controversial. That, in my judgment, involves a basic confusion as to why the expert is giving evidence.*
> *That is particularly true of material relating to how an industry operates. It is at a fundamental level wrong for an expert to give evidence in relation to an industry in respect of which that expert has no specific expertise. That is a point that has been made in the case law.*[23]

Sir Marcus makes two principal propositions - English judges have 'abandoned the law of evidence'[24]; and experts tend to give evidence on the industry in which they are not experts. These concerns are not new. The *lassiez faire* approach to expert evidence in the English courts is often criticised in areas far wider than competition litigation. Similarly, with the transgressions of experts. In 1935 Lord Tomlin complained of the propensity of experts to offer opinions on matters which are questions for the court[25] and Lord Justice Auldmore observed that they give opinions 'masquerading as expert evidence on or very close to the factual decision that it is for the court to make.'[26] This state of affairs is not confined to England. Famously Judge Learned Hand when a young practising lawyer regarded expert

[21] Smith n 2 above 2.
[22] Smith n 2 above 4.
[23] Smith n.2 above 4 referring to *Sainsbury's Supermarkets Ltd v MasterCard Incorporated* [2016] CAT 11 (hereinafter CAT *Sainsbury's*).
[24] Sir Marcus Smith, 'Adjudicating Competition Questions – Markets, Competition and the Law' (The Eight David Vaughan CBE, QC Antitrust Litigation Lecture, 24 November 2022). Sir Marcus Smith, 'Evidence and Competition Litigation' (The Competition Appeal Tribunal 20th Anniversary Conference, 4 May 2023).
[25] *British Celanese Ltd v Courtaulds Ltd* (1935) 152 LT 537, 543.
[26] *Review of the Criminal Courts of England and Wales: Report* (London: HMSO, 2001) 574 at [133].

evidence as an '*anomaly fertile of much practical inconvenience*'[27]. Peter Huber[28] writing in 1991 on the rise of 'junk science' in the US legal system in the 1970s also put the blame on the judge: [m]ost courts … slouched towards what federal judge Patrick Higginbotham dubs the let-it-all-in approach to expert testimony'. In the US this changed at the Federal level with the introduction of the *Daubert* test and hearings on the admissibility of expert evidence.[29]

The legal position

It is useful at the outset to set out the legal position regarding the law of evidence as it affects experts.

There are two types of witnesses – witnesses of fact who have direct knowledge of the facts; and expert witnesses who do not have direct knowledge of the facts but 'give an opinion *based on the facts of the case.*'[30]

At common law, the admissibility of expert evidence is said to depend on proper disclosure and proof of the factual basis of the opinion. This is sometimes called the 'basis rule.' The expert must disclose the facts or assumptions upon which his or her opinion is based, and these must be capable of proof by admissible evidence.

Facts not known to a witness are normally inadmissible under the 'hearsay rule.' However, expert witnesses are exempt from this rule. The Civil Evidence Act 1972 allows an expert to give evidence on any matter that assists the court. Further *Dennis on Evidence* says there exists a class of 'expert facts' which while strictly hearsay is and should be admissible:

> *Expert's facts are derived from other factual situations. These facts may be experimental data, or the fruits of scholarly research and analysis, or reports from a variety of sources – textbooks, journals, databases, and so on – or the expert may learn of them in an informal way. Irrespective of whether the expert is able to testify as to the primary facts. These will represent elements of his own previous experience and the learning that he has acquired through his training and his study of the work of others. The pathologist, for example, relies in forming her judgment on her medical training, her experience of other post-mortems, information she has acquired from colleagues in the field, and so on. The expert may well have no personal knowledge of the information used in the compilation of the source material. He generally relies on the good faith and accuracy of the authors concerned. Does this mean that when he gives his own expert opinion drawing on these various sources, that he is giving a disguised form of hearsay evidence?*
>
> *Logically the answer is "Yes." The expert is expressly or impliedly asserting that the out-of-court statements are true. However, to apply the hearsay rule to full technical extent would cause immense inconvenience in this context.*[31]

While *Dennis on Evidence* does not refer to competition cases there is another reason why 'expert's facts' have a greater role in competition cases. This is because of the economic

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[27] *Learned Hand,* 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 *Harvard Law Review* 40.

[28] Peter W. Huber, *Galileo's Revenge: Junk science in the courtroom,* (New York: Basic Books, 1991) 17. Huber is more unrestrained: '[t]he pursuit of truth, the whole truth, and nothing but the truth has given way to reams of meaningless data, fearful speculation, and fantastic conjecture. Courts resound with elaborate, systematised, jargon-filled, serious-sounding deceptions that fully deserve the contemptuous label used by trial lawyers themselves: junk science.'

[29] *Daubert v Merrell Dow Pharmaceuticals*, Inc. 509 U.S. 579 (1993) and US *Federal Rules of Evidence* (FRE 702).

[30] Smith n 2 above 3.

[31] Ian Dennis, *The Law of Evidence* (London: Sweet & Maxwell, 6th edn, 2017) at [911].

nature and content of competition law. Thus, it is no surprise that the way experienced competition judges and lawyers handle expert evidence is a recognition that the expert is contributing to an understanding not only of the facts but often the law itself.[32]

The Ikarian Reefer[33] sets out the common law duties and responsibilities of experts expanded and codified by Civil Procedure Rule 35 (CPR35),[34] Practice Direction 35 (PD35),[35] the Guidance for the Instruction of Experts in Civil Claims 2014[36] and other related directions such as the CAT's Guide to Proceedings. These require that the expert evidence be the product of independent and objective assessment 'uninfluenced …. by the exigencies of litigation.' It also allows the courts to restrict expert evidence to that reasonably required (R35.4) and to appoint a single joint expert (R35.7).

While CPR35 is not binding on the CAT where the procedures are governed by procedural fairness, the CAT's Guide to Proceedings (para 7.65) states 'the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings'.[37] Rule 21(1) of The Competition Appeal Tribunal Rules 2015 No. 1648 provides that the Tribunal may give directions as to 'whether the parties are permitted to provide expert evidence', the issues on which evidence is required, the admission and exclusion of evidence, the nature of the evidence, and the number of witnesses that can be put forward. The CAT's Guide to Proceedings 2015 (section 7) sets out in detail the procedures of the CAT for 'active case management with a view to ensuring cases are dealt with justly and at proportionate cost'.[38]

Some Initial Observations

Sir Marcus overstates the case against economists. More recently he has softened his tone by declaring his utmost admiration for economists who appear as experts before the CAT. The basic problem he highlights is that the courts have 'abandoned the law of evidence'. If it is true, that English judges in practice accept most expert evidence subject to 'weight' then it is understandable and predictable that economists and instructing lawyers will take an expansive view of the evidence and analysis to be put before the court. The evidential rules and practice of the court are there as much to adjudicate on the admissibility of expert evidence in a specific case, as they are to guide experts and lawyers in the future as to what evidence will be accepted by a court. If judges provide unclear, ambiguous, permissive or no guidance; then the expert and instructing lawyers will react to this.

Further, economists do not act as experts in a void. He or she is retained by lawyers, instructed by lawyers, and ideally told by lawyers about the applicable rules of evidence, procedure and admissible content of their expert reports. The lawyers have the prime

[32] At common law, an expert cannot opine on whether the defendant has or has not infringed the law. This 'ultimate issue rule' was abolished by the Civil Evidence Act 1972 (s. 3).
[33] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1)* [1993] F.S.R. 563.
[34] Part 35 of the Civil Procedure Rules (31 May 2021).
[35] Practice Direction 35 – Experts & Assessors (31 May 2021).
[36] *Civil Justice Council's Guidance for the Instruction of Experts in Civil Claims* 2014.
[37] *PSA Automobiles SA & Others v Autoliv AB & Others* [2024] EWCA Civ 609 (setting out relationship between CPR35 and CAT Rules).
[38] Referring to Rule 4(1) and 4(2).

responsibility to ensure the relevance and proportionality of what is submitted to the courts as Sir Marcus has made clear:[39]

> *But it is up to the lawyers – who present and decide these cases – to take the lead in ensuring that what is needed to resolve cases in our legal system is clearly articulated to those whose very important function it is to provide the expert opinion evidence within the system.*[40]

Competition economists, and certainly those who put themselves forward are generally aware of their duties and responsibility to the court. They read, understand and are bound by the expert rules set down in CPR35. They know that a breach of these could render their evidence valueless and expose them to contempt proceedings and cost orders against their clients. They do not undertake the role of an expert in litigation lightly. There has grown a cohort of 'professional experts' devoted to giving economic evidence in court and regulatory proceedings.

This is not to say that instructing solicitors and counsel sometimes do not make clear the limits of the experts' evidence, let through statements that are strictly inadmissible because they want to introduce evidence favourable to their client, and/or are reluctant to intervene too much in the drafting of the expert report for fear of compromising the expert's independence. Sometimes the instructing solicitors get it wrong. In *BGL v CMA* the court said the expert was instructed 'in a manner which unduly exposed her into evaluating questions of fact which were the province of the Tribunal'[41]. Yet in *Flynn v CMA* the Tribunal identified areas in which the respondent's expert could have provided useful insights had it not been for the 'narrow nature' of his instructions'.[42] Often economist experts have been praised by the courts and their evidence found invaluable.[43]

This is not to say that some economists can get it wrong and some badly wrong.[44] Apart from a lack of independence, which is inexcusable, economists have sometimes overstepped the mark by opining on the law and its application to a case. These attempts have either been rejected by the court or else treated as submissions that the judge may consider.[45] Yet there can be 'extenuating circumstances' when this occurs. Competition law differs from most

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[39] *Imperial Chemical Industries Ltd v Merit Merrill Technology Ltd* [2018] EWHC 1577 (TCC) ('The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR part 35, practice direction 35. Every expert should read it.').

[40] Smith n 2 above 6.

[41] *BGL v Competition and Markets Authority* [2022] CAT 36 at 66.16.

[42] *Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority* [2018] CAT 11 at 78.

[43] See *Calor Gas v Express Fuels and D Jamieson* [2008] CSOH 13 at [35]; *BGL Holdings Limited v Competition and Markets Authority* [2022] CAT 36 at [66(3)]; *BSkyB Limited and Sky Subscribers Services Limited v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) and Electronic Data Systems LLC (formerly Electronic Data Systems Corporation)* [2010] EWHC 86 (TCC) at [303].

[44] An egregious example is the defendant's economist's expert evidence in *Royal Mail & BT v DAF* [2023] CAT 6.

[45] In *BAGS* the evidence of three experts was deemed inadmissible and other parts while technically inadmissible were treated as submissions. *Bookmakers' Afternoon Greyhound Services Ltd and others v Amalgamated Racing Ltd and others* [2008] EWHC 1978 (Ch) ('The parties dealt with the evidence of the experts in a general way as if it was all available as evidence which could be relied upon by the court'). Also, *Tesco plc v Competition Commission*, Case No 1104/6/8/08 [2009] CAT 6; *Chester City Council & Ors v Arriva Plc & Ors* [2007] EWHC 1373 (Ch).

other areas of law. Economics is part of the fabric of the law and how it is applied. Thus, the stark distinction between the law and economics, and opinion and fact are blurred. Indeed, if there is a criticism among lawyers it is that there is too much economics.[46] As the CAT stated in an early judgment 'competition law is not an area of law in which there is much scope for absolute concepts or sharp edges'.[47]

There is nonetheless a more subtle tension which arises from the symbiotic relationship between law and economics which Mr Justice Mansfield when at the Federal Court of Australia, may in part explain the irritation of some judges:

> *Law and economics are both disciplines belonging to the social sciences. As such, they employ similar modes of thought. Both rely on deductive reasoning – the application of theoretical principles to a set of facts – to adjudicate on matters of human behaviour. Perhaps this similarity explains, at least in part, the difficulty with which the law accepts economic evidence – lawyers and judges can feel their role to be usurped by economists since they present information by way of discursive theoretical constructs rather than via testimony of discrete, identifiable facts.*[48]

Economists and facts

Sir Marcus raises two concerns about the way economists deal with facts – the process of selectively collating the evidence and a tendency to take on the role of an industry expert even though they have no specialised knowledge apart from reading industry reports, data sources, third-party literature and documentary evidence.

On the collation of evidence, several observations can be made. Yes, inevitably the expert will shift through the data and evidence, and collate a narrative that supports his opinion, and those facts which do not. The CAT has come to accept that the disclosure, especially of quantitative data necessary to implement the experts' approved methodology or approach to quantification and that this should be 'expert-led,' thus muting some of the criticism.

There is one criticism made by Sir Marcus which goes to the heart of the economic evidence. He criticises economist for having prior views of the 'correct analytical approach' which guides their selection of the facts. This criticism is misplaced. The correct economic approach is to set out a hypothesis and test the hypothesis against the facts.[49] To operate in reverse is to engage in what economists and statisticians pejoratively call 'data mining' – looking at the facts and from these inferring a theory or hypothesis. If the argument is that the expert economist should act like a lawyer, then this is misconceived.

Secondly, there is tension in the gathering and collation of the evidence. All the expert's requests for data, documents and meetings with industry experts go through the instructing solicitor. The evidence and documentary material that is seen by the expert is inevitably 'filtered' by the instructing solicitors to that which he or she thinks is relevant to the expert. It is rare for the expert to see all the documents, emails, correspondence and meeting notes

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[46] Wouter P J Wils, 'The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance' (2014) 37 *World Competition* 434.

[47] *The Racecourse Association and the British Horseracing Board v OFT* [2005] CAT 29 at [167].

[48] Mansfield J, 'Opportunities and Challenges: Evidence in cases under the Trade Practices Act 1974' (Competition Law Conference 2008, Sydney, 24 May 2008).

[49] This view of scientific methodology is the basis of *Daubert* test. *Daubert* at 593 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry'.

largely because a) much is deemed irrelevant to his evidence; and b) because of the cost implications. There is a danger here that the expert gets a 'curated' picture of the available evidence which, intentionally or unintentionally, puts the client's case in a more favourable light. While in competition cases this does not seem too widespread it does risk undermining the expert in court when documents and lay witness evidence emerge that contradict his or her evidence.[50]

On the other hand, if all Sir Marcus seeks is for experts to be clear about what data and facts they are using and assuming, and what support they have for the facts and evidence they are introducing in their expert report then this is unexceptional and has solutions. As Sir Marcus points out disclosure and case management conferences are now routinely used to tease out from the experts what data and evidence they need, why these are needed, which are essential and can, if possible, require the experts to use a common set of facts.

Sir Marcus has argued the CAT should apply the rules of evidence more stringently and require experts to adhere to them. However, this is problematic given the nature of economic evidence in competition cases. This is because in competition litigation the 'facts' are malleable, and the evidence is indirect and hypothetical.

Let me explain. In a typical tort trial, A injures B, and the parties must adduce evidence of the actions of A and B, and their relationship to the injury. The court adduces the facts of a single discrete connected physical event – evidence of the parties' actions, and evidence of injury.

This is not so in competition litigation. Consider cartel offences. First, in law, there is the artificiality of treating the cartel harm as a 'single and continuous offence.' In *Royal Mail,* a follow-on action based on the European Commission decision that European truck manufacturers operated a cartel, DAF did not physically waylay Royal Mail and BT to take money in a single identifiable event. It surreptitiously extracted small overcharges on a variety of truck chassis over 14 years in thousands of otherwise legitimate consensual sale and lease transactions. Often the cartel acts episodically to increase and even decrease prices the latter taking the form of price wars to penalise those firms departing from the agreed collusive policy.

Second, most cartels are prosecuted as 'by object' infringements under Article 101(1) TFEU[51] or its equivalent Chapter 1 prohibition under the UK Competition Act 1998 where the European Commission or the Competition and Market Authority respectively, or indeed a private litigant seeking to establish liability, do not need to show an anticompetitive effect or quantify harm i.e. establish causation and quantum. In *Royal Mail* the statutory tort was not even the monetary harm to the purchasers arising from their being overcharged but the exchange of information on the list prices of trucks and emissions controls. The European Commission did not find that the parties acted on this information to raise their prices or that prices increased. This was for the parties in *Royal Mail* to prove or disprove. So, what are the adduced facts that the economist is expected to base his or her opinion on? There will be many but few on how the impugned conduct caused prices to increase and by how much. Barring cost-plus pricing with constant margins there will be little direct evidence. The relevant facts will be statistical facts – i.e., indirect evidence of the consequences of the

[50] CAT *Sainsbury's* (expert not given crucial documents).
[51] Case AT.39824 –Trucks (19 July 2016).

alleged wrongdoing. They are economic facts that it is for the expert to find through economic and quantitative analyses based on the data.

One of these key 'facts' is what would have happened in the absence of the impugned conduct. Specifically, what would have been the price at which the products would have been sold in the absence of the cartel? This is unknowable. These prices will have to be inferred by the economist by analogy, comparison, and/or statistical analysis to, in effect 'predict the past.'[52] Whatever method is used to estimate the prices in the absence of the impugned conduct it will derive these synthetically and they are hypothetical.

Thus, the proposal to restrict economists to adduced facts is highly problematic and misguided. Competition cases are complex. Damage cases are more so as they are exercises in 'proving' something that did not happen – the price in the absence of the cartel or abuse. And this hypothetical extends to other competition law infringement where the issue is would the firm or market been more competitive in the absence of the alleged infringement. One expects differences of opinion which tend to be exacerbated by the adversarial process.

Industry facts

The second concern raised by Sir Marcus is the use of experts to comment on an industry and industry practices when they do not have direct specialised knowledge of the industry. There is no doubt that experts are sometimes used by the parties to offer evidence about an industry, and often this is a necessary backdrop to the core evidence they are presenting to the court.

In CAT *Sainsbury's* and *BritNed,* the economists were admonished for giving evidence about the industry (by Sir Marcus), on appeal it was held that they could opine on the industry and realistic counterfactuals. And it appears that the court can deem industry experts capable of giving economic evidence which they have 'absorbed in the college of life'.[53] The reason is that competition cases are complex requiring both direct evidence and an understanding of general market, economic and business factors.

On this point, competition cases can again be separated into two types. The first which the courts can handle relatively well are those that involve a discrete event – such as whether there has been an overcharge on a specific project (*BritNed*), or the claimant has failed to win a tender because of an illegal abuse by the defendant (*Enron*[54]).

[52] Vivian Rose, 'Predicting the Past - Constructing the Counterfactual In Antitrust Damages Claims' (Swedish Konkurrensverket Conference on The Pros And Cons of Counterfactuals, Stockholm, 6 December 2013).

[53] In *Chester City Council & Ors v Arriva Plc & Ors* [2007] EWHC 1373 (Ch) at [147] ('Whilst the concepts required to be investigated in a competition law case are no doubt most easily grasped, explained and opined upon by trained economists, they are concepts drawn from and related to the operation of the markets of the real world; and I regard it as unreal the thought that it is only trained economists with a list of learned articles to their name who have the expertise necessary to understand them and to help the court on their application to a particular case. I have no doubt that Mr Foster has sufficient expertise, no doubt largely absorbed in the college of life, to entitle him to offer his opinion to the court on the matters in question; and it is for the court to decide whether or not, or to what extent, that opinion, tested by cross-examination, is one which … the court can accept.')

[54] *Enron Coal Services v EWS Railway* [2009] CAT 36.

The second class of cases that are much harder for the courts to address are abuses and anticompetitive practices such as price fixing which cause generalised harm across a range of products and claimants perpetrated by four or five defendants over a decade or two when market and industry factors have constantly changed. For these the pragmatic approach of judges is to allow the economist to offer a broad picture of market factors which the parties to the case may not themselves be in a position to prove is sensible. Indeed, in some industries, the claimant may find it impossible to retain industry experts given the pervasiveness of the defendant's activities, such as in the card interchange fee cases where it was impossible to get an 'industry expert' to give evidence for a claimant suing Visa and Mastercard.

The expert will often include his general understanding of the industry and the key factual contentions raised in lay witness evidence by industry experts. While these general sections of the expert's report have been criticised in CAT judgments as redundant and overly long, the expert nonetheless is compelled to put these in a) to indicate what has been assumed or considered as required by CPR35 and the law of evidence, and b) to protect him/her from attacks in cross-examination.

Other factors confront the expert seeking to gather the facts. There is the practical matter of the timing of witness statements, the provision of documentary evidence and the finding of facts by the court. Often the expert report will be filed before all the lay witness statements have been served and the court determines what are the 'adduced facts.' The claimant's expert will often need to make assumptions about the facts before they have been proved in court. To be sure the claimant's expert can revise his evidence in the light of new facts and evidence, but these may come too late in the trial cycle. In any case before trial, it is not evident what facts the court will eventually admit.

Where one has sympathy with the judge's plight is when the party's respective economist experts use different data, facts and approaches. This occurred in extreme form in *Tobacco Packaging* (not a competition case) where the judge was confronted by a mountain of published and statistical analyses based on different data and approaches, much of which lacked transparency and clarity. The urge of the judge to put some cap on this and get some commonality at least as to the data to be used to form the respective parties' expert opinion is understandable and is happening.

An unacceptable practice is the use of economists to create 'facts' by rationalising their client's actions using economic theory. This is a misuse of experts as the *'front line soldiers'* propounding the case on behalf of the client.[55] This recurring problem has been rejected by the courts. Most recently in *Royal Mail* the defendant's expert economist admitted that he had not bothered to ask his client why it had participated in a 14-year cartel, yet nonetheless, saw fit to file a 'plausibility report' which claimed that DAF had done nothing wrong. While the defendant was within their legal rights not to give evidence on the issue, the economist should not have sought to explain what the defendant refused to do. The Tribunal described his evidence as 'made up,' not based on any facts on how the cartel worked and took an 'extreme position' which was partially reneged under cross-examination and 'contradicted by DAF's witness evidence'[56]. In *Napp* the defendant's economist put forward the theory that the sale of a drug would lead to follow-on sales which when added to the price charged to the claimant meant there was no illegal 'margin squeeze.'

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[55] Sackville J, 'Expert Evidence in the Managerial Age' (Forensic Accounting Conference, Sydney, 14 March 2008).
[56] *Royal Mail* at 295.

The CAT found this inconsistent with and unsupported by any internal documentation of Napp but developed by the expert 'for the purposes of this case.'[57] In *Hendry v. WPBSA*[58] the court rejected the evidence by the defendant's expert economist who claimed that there was no market for pool and billiard players, and/or pool and billiard tournaments as 'defy[ing] common sense'. In *GSK v CMA*[59] the Tribunal concluded that 'the theoretical approach adopted by [economists for GSK] does not reflect the reality of this case'.[60] In *Enron v EWS* [61] the Claimant's economic expert argued rational economic decision-maker would have selected the Claimant's bid even though the defendant gave evidence that previous bad experience with the claimant meant that its bid would not have been accepted. In *Stellantis*[62] the Court of Appeal rejected the Defendant's expert proposition that the claimant suffered zero loss based on a theoretical assertion that it would have been passed on to its customers. This is not to say that theory cannot be used to assist the court as in *Granville Technology Group v. LG* where the court accepted the defendant's expert theory of how the overcharge was likely to have been passed on to the claimant's customers.[63]

3. The Case Law on Expert Evidence

The problems portrayed by Sir Marcus are of experts and judges taking a relaxed position on the rules of evidence. But I want to suggest that there is something more deep-seated in the behaviour of English judges – it is that their treatment of experts often lacks rigor and consistency giving ambiguous and contradictory guidance. This should come as no surprise in a common law system.

To substantiate this claim, consider several leading competition law judgments handed down by the English and Wales High Court and the CAT in the last decade.

Consider first the four retailer card interchange fee decisions against Mastercard and Visa.[64] These have been a judicial disaster area. The judgments concern similar damage claims by merchants, mostly large retailers, against MasterCard or Visa for charging excessive multilateral interchange fees which were passed on to merchants in higher credit and debit card charges. The judges in these cases could not agree on the facts, counterfactuals, the theory of harm and surprisingly the law[65]. They dealt with the expert economists' evidence in conflicting and confusing ways. In CAT *Sainsbury's* (Sir Marcus was a member of the

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[57] *Napp Pharmaceutical Holdings Ltd v DGFT (No. 4)* [2002] CAT 1 at 254.
[58] *Hendry v The World Professional Billiards and Snooker Association Ltd* [2002] UKCLR 5.
[59] *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4 at 300.
[60] *The Racecourse Association and the British Horseracing Board v Office of Fair Trading* [2005] CAT 29 at [170] the CAT dismissed the (then) Office of Fair Trading's counterfactual that TV rights could have been acquired through 37 bilateral negotiations as 'a triumph of theory over commercial reality and to ignore the evidence'.
[61] *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 36.
[62] *NTN v Stellantis* [2022] EWCA Civ 16. Also, *O'Higgins and Evans v Barclays Bank & Ors* [2022] CAT 16.
[63] *Granville Technology Group Ltd v LG Displays & Ors* [2024] EWHC 13 (Comm) at 177-247.
[64] CAT *Sainsbury's* which the retailer won followed by two decisions in the High Court which the retailers lost (*Asda Stores & ors v MasterCard*[2017] EWHC 93 (Comm); *Sainsbury's Supermarkets v Visa* [2017] EWHC 3047 (Comm) but a grouped appeal by retailers which they won (*Asda Stores v Mastercard & Visa* [2018] EWCA 1536 (Civ)).
[65] Cento Veljanovski, 'Credit Cards, Counterfactuals, and Antitrust Damages - The UK MasterCard litigations' (2018) 9 *Journal of European Competition Law & Practice* 146.

Tribunal) the economists' evidence was rejected. The Tribunal ignored the evidence of the parties' witnesses of fact and economic experts to base its decision on its hypothetical construct. The High Court in two subsequent cases rejected the CAT's counterfactual and accepted that economists could give evidence on the operation of Visa and Mastercard card schemes, and the appropriate counterfactual. The Court of Appeal then heavily criticised all three first instance judgments - they were a mess, they should have accepted the European Commission's counterfactual, the CAT was incorrect to set up a bilateral counterfactual, it should not have ignored the evidence of the parties, they erred in law and so on. The future possibility of such inconsistency has been mitigated by the CAT under its umbrella proceeding where similar cases are gathered and common issues are heard together.[66]

The ironic aspect of CAT *Sainsbury's* judgment is the Tribunal's rejection of the economists' counterfactuals because they were not industry experts on card schemes. The Tribunal said there was no evidence given as to the similarity between Visa and Mastercard card schemes, and therefore the economists' evidence based on an assumed similarity was heavily discounted i.e. given no weight. This was a critical factual issue. The Tribunal by rejecting the evidence on the similarity of card schemes decided to assume that the Visa card scheme would continue to operate in the counterfactual with higher interchange fees than the zero-default multilateral counterfactual interchange fees assumed for MasterCard. It said that merchants and acquirers would negotiate bilateral interchange fees. Neither party nor their experts accepted that bilateral negotiations would have been a realistic possibility or appropriate counterfactual. The High Court in *Asda* agreed and rejected the CAT's approach – there would be no bilateral negotiations and because Visa could legally maintain higher interchange fees Mastercard would in the counterfactual be thrown into a 'death spiral.' The Tribunal's counterfactual was 'unrealistic' and rejected. The Court of Appeal rejected both the Tribunal's and High Court's counterfactuals – the similarity between Visa and MasterCard card schemes 'was obvious,' it was also obvious that the counterfactual would not permit Visa to operate with multilateral interchange fees, and there would be no death spiral.[67]

Another hiatus surrounds the CAT's collective certification procedure. In the first two collective certification order (CPO) applications under the new scheme,[68] it became apparent that the class representatives' economist report would be central to the application. The CAT's rules governing certification set a low evidential hurdle to determine whether there was sufficient common interest among the proposed class and whether the application was suitable for an award of aggregate damage. Accepting that this was virgin territory the CAT in *Merricks*[69] rejected the CPO application on grounds that a) there would be insufficient data to implement the accepted top-down methodology, and b) the proposed method of distribution of the aggregate award was not compensatory being on a per capita rather than individual loss basis. The Court of Appeal and then Supreme Court struck down the entirety of the CAT's judgment on grounds that it had incorrectly turned the proceedings into a 'mini trial' requiring the class representative's expert to establish the factual basis for an aggregate damage award based on individual losses and that the CAT had exceeded its authority in

[66] CAT Practice Direction 2/2022 - Umbrella Proceedings, 6 June 2022.
[67] Sir Marcus has maintained his position.
[68] *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9 (failed); *Walter Merricks v MasterCard International* [2018] CAT 16 (granted after appeal to the Court of Appeal and UK Supreme Court).
[69] *Walter Merricks v MasterCard International* [2018] CAT 16. Rachael Mulheron and Douglas E. Elin, 'The Mere Mirage of a Class Action? A challenge to *Merricks v Mastercard Inc'* (2018) 37 *Civil Justice Quarterly* 216; Cento Veljanovski, 'Collective Certification in UK Competition Law - Commonality, costs and funding' (2019) 42 *World Competition* 121.

addressing the distribution of compensation. The experts in these cases were simply unaware of the evidential standard that the CAT would impose, and as it turned out the CAT had adopted the wrong evidential basis as confirmed by the Supreme Court.[70] Further, and critically, the CPO application procedure pushes the expert economist to give evidence which is and cannot be based on 'facts adduced at trial'.

BritNed also illustrates the problem. This was a claim for damages against ABB which had participated in a bid-rigging cartel for submarine power cables. BritNed claimed that it had been overcharged by ABB on the interconnection project between Britain and the Netherlands. The facts and data in the case, or at least those relied on, were largely supplied by the defendant. The claimant's economist expert undertook a regression analysis which the court rejected; a matter I will come back to below. Sir Marcus sitting in the High Court concluded on the evidence of the defendant's witnesses that the claimant had not been overcharged. The defendant's witnesses of fact, those that put together the BritNed tender, had done so without knowledge of the cartel and had costed it along competitive lines. The record of negotiations between the parties showed that the contract price had been reduced in negotiations so that there was no overcharge. This should have been the end of the matter.

But the court was unwilling to let it rest there. It said there were a few documents given in evidence which indicated that ABB used thicker copper cables than its competitors; and because the defendant and its co-conspirators allocated tenders among themselves, they would have saved tendering costs and benefited in other ways such as being able to plan work schedules better. Sir Marcus then awarded damages for excessive costs (termed 'built-in inefficiencies') and 'common cost savings,' neither of which had been pleaded by the claimant and which the court said the Claimant had not borne. Whatever the merits or otherwise of this way of calculating cartel damages,[71] the court's approach was not based on adduced facts given by the parties, the pleadings, and the common cost saving was a hypothetical arithmetic calculation made by the judge unsupported by any facts. Thus, here a court effectively had made up the evidence and awarded heads of damages which were not pleaded, and which the Court of Appeal rejected as restitutionary. The judgement not only violated the common law principle that damages are compensatory but also the rule that a court must decide on the case as framed by the parties.

Sir Marcus' treatment of the claimant's economist's evidence is also instructive. The claimant's economist expert declined to use ABB's costs in her multiple regression analysis because she believed the data had been affected by the operation of the cartel. Sir Marcus rejected this on the grounds that the cost data was sound and that the proposed proxy costs that she had used were insufficiently aligned with ABB's actual costs. Then Sir Marcus went on to take the claimant's economist's concern that ABB's costs were affected by the cartel as a basis for his calculation of 'cost-based damages.' The Court of Appeal found that the trial judge had made 'an error of law' in awarding this head of damages[72]. It said that the trial judge's approach violated the compensatory principle of damages by looking at the defendant's alleged gains rather than the claimant's losses; that his attempt to translate the purported cost savings into an 'overcharge' was mere assertion 'not open to the judge', and in any case the judge had expressly found that any cartel savings had been competed away with no effect on the price of the BritNed project. The Court of Appeal reiterated that

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[70] *Mastercard* v *Walter Merricks* [2020] UKSC 51.

[71] *See* Cento Veljanovski, 'Damages for Bid-rigging - The English High Court's idiosyncratic cost-based approach in *BritNed'* (2019) 10 *Journal of European Competition Law and Practice* 109.

[72] *BritNed v ABB* [2019] EWCA Civ 1840 235

judges must base their decisions on the evidence before them and that they are to focus exclusively on the loss to the claimant and not the gains to the defendant.

What is the message sent to experts by these cases? The point I am making here is that the judiciary is far from educating economists on what evidence they will require and how they will deal with expert evidence.

4. Potential Solutions

Sir Marcus understandably wants the evidential process better regulated, simplified, constrained and focused by a stricter adherence to the laws of evidence, a clearer demarcation between opinion and factual evidence, and case management that narrows the disclosure required so that the respective parties and experts work from common and the agreed factual evidence and data that is material to the issue that the judge must decide. He suggests that disclosure the experts should set out their intended process of evaluation and the data they need under the supervision of a judge, preferably the trial judge. This he sees as flushing out differences, difficulties and subjectivities at an early stage. The Tribunal has moved in this direction.

The Tribunal in CAT *Sainsbury's* made some of these requirements plain. It was 'incumbent upon the parties to ensure that the experts gave their opinions based upon a common – and if possible, agreed – factual base.'[73] It went on to say:

> *For the future, in cases where significant economic evidence is being adduced by economic experts who lack specific expertise in the particular factual field under consideration, we consider that the parties need to be especially assiduous in ensuring that the economic experts are:*
> *(1) Clearly instructed on the legal principles they are to apply, and in particular any assumptions they are being required to make.*
> *(2) Absolutely clear as to the factual material on which their reports are to be based.*[74]

Law of evidence is not the Key

Sir Marcus' key recommendation is greater adherence to the law of evidence: 'I am beginning to think that, for competition cases, a strict evidential approach needs to be taken, so as to make everyone appreciate (and I include the judge in this) that fact is different from expert opinion.'[75]

The more rigid application of the law of evidence in competition cases is not the key to ensuring more proportionate and relevant expert evidence and would, I suggest, be a retrograde step. It would stifle the economic evidence, for the very reason that there is not a sharp distinction between the law and economics, and opinion and fact in competition cases. The courtroom is also an unnatural setting for economics. The idea that there is an underlying 'truth' that can be exposed by the economists is a vain hope. The oath that the expert must swear 'to tell the truth and only the truth' is itself dubious – what truth but his or her opinion among several incompatible opinions?

[73] CAT *Sainsbury's* at [37].
[74] CAT *Sainsbury's* at [41].
[75] Smith n. 3 above.

As Sir Marcus says the present system has worked well. The late Professor Maureen Brunt, the doyen of Australian competition law, once observed: 'the common law rules relating to hearsay and expert opinion evidence might almost have been designed to frustrate the reception of economic evidence, especially the testimony of economists.'[76] The adoption of these expert rules in Australia was heavily criticised for the very reason that they reinforced the adversarial procedure and undermined the Australian Competition Tribunal's procedural innovation of the 'hot tub' which was designed to be more receptive to economic evidence and which is now part of the procedural arsenal of the English courts including the CAT.[77]

Competition litigation differs from most other areas calling for expert evidence in another essential respect. This is because economics is interwoven into the law. Much anticompetitive conduct can also be consistent with pro-competitive behaviour. The use of counterfactuals while they appear to assist often do little more than repackage the issue or serve only to add another layer of complexity and ambiguity.[78] Econometrics, increasingly used to estimate overcharges has statistical and interpretative problems adding technical complexity which often cannot be resolved by the experts or the court, and which consume consider resources both of the parties and the courts only to neutralise each other.

The consequences of a stricter approach to expert evidence can be seen from the experience with the stricter rules governing admissibility adopted by the US Federal Courts. The *Daubert* line of cases as incorporated in the revised Federal Rules of Evidence (FRE 702) requires that an expert be qualified to provide an expert opinion by knowledge, skill, experience, training, or education, the expert's testimony must be based upon a sufficient foundation of facts or data, the testimony is the product of reliable principles and methods; and that the expert has applied the principles and methods reliably to the facts of the case'.[79] Many economists would subscribe to these criteria for good economic theorising.

Daubert however has been to create a large hurdle for claimants. A study by James Langenfeld and Christopher Alexander showed that 50% of challenges against Claimants' experts succeeded and most of the rejected testimonies involved damage calculations.[80] Nicola Giocoli's later analysis of all *Daubert* challenges between 2012 and 2018 confirms this. Giocoli found that 'more often than in any other field of law …. economists' testimony in antitrust litigations have failed to satisfy the *Daubert* standard and thus have been rejected by courts as either irrelevant or unreliable, or both.'[81] The reason Giocoli speculates is that 'there is something in the economists' methodology in general, and in the antitrust economists in particular, that exposes them to devastating attacks under the *Daubert* doctrine'.[82] Why? Giocoli suggests it is because economics does not have a well-developed

[76] Maureen Brunt, 'The Use of Economic Evidence in Antitrust Litigation: Australia' (1986) 14 *Australian Business LR* 308, 304.
[77] PD 35.11 introduced following the recommendation of the *Review of Civil Litigation Costs: Final Report* (London: TSO, 2010).
[78] Cento Veljanovski, 'Counterfactuals in Competition Law' (2010) 9 *Competition LJ* 436.
[79] The court in *Daubert* at 593 quotes Karl Popper's that 'the criterion of the scientific status of a theory is its falsifiability, refutability, or testability'. Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (New York: Basic Books, 1962) 37. Also, Milton Friedman 'The Methodology of Positive Economics' In Milton Friedman *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953).
[80] James Lagenfeld and Chris Alexander '*Daubert* and other Gatekeeping challenge of Antitrust Experts' (2011) 25 *Antitrust* 21, appendix.
[81] Nicola Giocoli, 'Antitrust Economists as Expert Witnesses in the Post-*Daubert* World' (2020) 42 *J History of Economic Thought* 203, 205.
[82] Giocoli n 81 above 214.

standard for the selection and application of models and methods and therefore has difficulty meeting the four *Daubert* criteria for a 'valid science'. The English courts have gone the other way with more pragmatic liberal rules on the admissibility of expert evidence. This is amply reflected in the low threshold for the certification of collective actions which are based on the permissive approach set out by the Canadian Supreme Court in *Pro-Sys v Microsoft.*[83]

Another approach is for the expert's instructions to set out several scenarios based on 'assumed facts' upon which the expert is to offer his or her opinion evidence. This was not unusual in Australia following *Arnott's*[84] where an economist for one side was instructed to attend the whole trial and then put on the stand to give his opinion on whether the defendant had infringed competition law. The judge can see what facts have been assumed and on which the economist has relied and concentrate on the proposed economic evidence based on these. The major drawback of this approach both for the parties, expert and the court is that it forces the economist to express opinions on hypothetical scenarios which may or may not be the 'adduced fact' found by the court. If the latter, then the evidence is rendered irrelevant, and in any case, he cannot express an opinion as to the relevance of the assumed facts.

The solutions lie elsewhere

The Woolf Report[85] concluded that the parties' lawyers and experts could not be relied on the reasonably manage the process. There has arisen active case management by the Courts. The court has a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings, requires the parties to seek permission to call an expert or put in evidence; and allows for the instruction of a single joint expert.

While Sir Marcus will know the pressures on judges and the difficulties of adjudicating competition cases it is not clear that judges are as lax as he suggests. If one looks at recent competition cases in the CAT and High Court expert evidence does not appear to be waved through. There are ample examples in decided competition cases where expert evidence has been refused, ruled inadmissible and actively controlled by the Tribunal's case management with the experts required to follow directions and rules. The courts have little hesitation in refusing the use of experts,[86] and finding expert evidence unreliable.[87]

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[83] *Pro-Sys Consultants Ltd v Microsoft Corp.* [2013] SCC 57. CAT Rules 77-79.

[84] *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 25 at 597 ('The use of an expert witness to filter the facts, asking the witness to hear or read all the evidence and then express factual conclusions is … illegitimate. It must be stopped.'). Also *ACCC v Liquorland Pty Ltd* (2006) FCA 826.

[85] *Interim Report to the Lord Chancellor on the civil justice system of England and Wales* (London: HMSO 1995) chapter 23. Lord Woolf MR 'Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers on, whose main expertise is to craft reports which conceal anything that might be to the disadvantage of their clients.' Lord Woolf, *Final Report to the Lord Chancellor on the civil justice system of England and Wales* (London: HSMO 1996) 183.

[86] The cause celebre is Sackville J in *Seven Network Limited v News Limited* [2007] FCA 1062 at [22] ('a substantial proportion of the costs incurred by the parties in producing this material was wasted. Some reports were inadmissible; some were largely repetitive of other reports …; some expressed opinions on the basis of elaborate factual assumptions that have not been borne out by the evidence …'. He chastised the parties for their propensity to engage in 'heavy, often unthinking reliance on expert evidence' at [23].

[87] *Leeds City Council v Watkins* [2003] EWHC 598 (Ch) (economists acting as advocates and exhibiting bias; failure to comply with CPR35). *Aberdeen Journals v OFT* (No. 2) [2003] CAT 11 (failure of comply with CPR35). *Napp Pharmaceutical Holdings Ltd v DGFT (No. 4)* [2002] CAT 1 (rejects economists' theoretical justification for defendant's abuse as 'coined … for the purposes of this case'*), Hendry v The World Professional Billiards and Snooker Association Ltd* [2002] UKCLR 5 (defendant's economist

The procedural rules of the CAT give it considerable control over expert evidence. It makes extensive use of Case Management Conferences (CMCs) to determine what evidence is to be heard and to gain agreement on methodology and disclosure. This is to avoid what it describes as 'passing ships in the night' where the different experts use different data, different techniques, and address different issues which make it difficult and burdensome for the Tribunal to compare and evaluate their often conflicting evidence.[88] The CAT can and has denied approval to admit expert evidence if it deems it unnecessary or disproportionate, as happened in *Royal Mail* where the Defendant sought to provide a second expert report on pass-on or it rejects the expert's proposed methodology[89] or technique[90] and can order multiple claimants and defendants respectively to appoint a single expert on common issues to avoid wasteful duplication, and is now moving to constrain lawyer involvement by requiring that proceedings be issue-based and expert-led rather than lawyer focused.

The CAT under Sir Marcus' leadership is responding not through stricter application of the law of evidence but through new procedural rules and active and assertive case management. These include bringing the experts together at an early stage in litigation to cooperate on setting out common or agreed methodologies, the relevant issues, data and the disclosure of common data to minimise 'the passing ships in the night' problem. Procedurally it has begun segmenting multiple individual claims into 'waves' (trucks),[91] grouping cases with similar issues (interchange fees) under the Umbrella Proceedings Practice Direction and setting more assertive deadlines. In the Trucks Second Wave Proceedings, the CAT has required the use of single lead economic experts for multiple claimants and/or defendants respectively on common issues and an 'issues-based, expert-led' approach to reduce the role of lawyers.

5. Statistical Evidence

Much of Sir Marcus' concern regarding econometric evidence came out of his experience in *BritNed* when sitting as a single judge in the High Court. His view that there are differences between economists and lawyers on the nature of statistical evidence are well founded. This is not surprising as statistics and econometrics were not designed for the courtroom, and do not adhere to legal concepts of proof and causation. Indeed, the law of evidence is distinctly

evidence seemed to 'defy common sense' and risked 'not seeing the wood for the trees'); *British Telecommunications plc v Office of Communications* CAT [2016] CAT 25 (excessive volume of evidence, evidence blurred boundaries between fact, expert opinion and argument); *Streetmap v Google* [2016] EWHC 253 (Ch) (each expert an advocate for the party instructing them); CAT *Sainsbury's v MasterCard* (experts' evidence on card schemes inadmissible); *BritNed Development v ABB* [2018] EWHC 2616 (Ch) (economists evidence on costs inadmissible as had no industry expertise), *Royal Mail* (economists lacked independence and biased).

[88] This issue arose in CAT *Sainsbury's* ('In these circumstances, it was incumbent upon the parties to ensure that the experts gave their opinions based upon a common – and if possible, agreed – factual base. That did not occur in this case: […] Their expertise involved considering certain material, and providing their economic analysis in relation to it. To the extent that this material was incomplete, or referred to them late, their analysis was liable to be undermined.'). In *InterDigital v Lenovo* [2023] EWHC 539 (Pat) the High Court complained that it was confronted by an 'unnecessarily complicated' 'blizzard of figures' with forensic accountants using different data and different definitions of past sales.

[89] *Dr Liza Lovdahl Gormsen v Meta* [2023] CAT 10.

[90] In a trucks carriage dispute between UKTC and RHA the CAT rejected the proposed simulation approach in favour of econometric analysis *UK Trucks Claim v Stellantis & DAF Trucks; Road Haulage Association v MAN, Daimler & Volvo* [2022] CAT 25.

[91] *The Trucks Second Wave Proceedings Ruling (Future Conduct of Proceedings)* [2024] CAT 2.

'unstatistical.' Nonetheless, statistics is gaining a critical role in the courtroom, and lawyers and judges must know its uses and abuses.

Sir Marcus identifies three areas where he sees a divide between lawyers and economists:

- Probabilities as proof
- Statistical significance and confidence limits
- Causation.

Let me deal with these in turn.[92]

Probabilities as proof

The first difference thrown up by Sir Marcus is that the economists' (or is it the statisticians') concept of proof jars with that in law. He cites Lord Mackay's speech in *Hotson*[93] which warns against the 'danger of using statistics as the basis on which to prove proximate cause and indicated that it was necessary at the minimum to produce evidence connecting the statistics to the facts of the case.' Sir Marcus says while lawyers would agree with Lord Mackay he muses 'but I wonder if economists and statisticians do?' The answer is an unreserved yes. Lord Mackay gives the example of a person knocked down by a cab but cannot recall its colour. There are three blue and one yellow cabs in the town where the accident occurred. Since blue cabs make up 75% of the number of cabs, the law only requires that for a fact to be proved it be more likely than not; so that statistics 'prove' that the claimant was hit by a blue cab.

While accepting that this is an example only, the use of such a naked statistic to impute causation and liability is contrived. The claimant offering this single statistic as the only evidence of the defendant's culpability would fail in law. And the statistician would also not be impressed by its use. Standard Bayesian probability theory would take account of the other factors referred to in Lord Mackay's speech to calculate the conditional probability of one or the other cab type hitting the victim. An economist would regard the 'market share' of blue cabs as only one factor in the evidence to be weighed up, just as they look at market share in dominance as only one factor to see whether there has been an abuse.

Statistical, practical and legal significance

Sir Marcus raises questions about the relationship between the statistical and legal significance of evidence. He asks why the statistical 'proof' is set at the 95% confidence limit while proof in a civil case is a mere 51%.

Let me first state the difference between the civil standard of proof and statistical significance.

The civil standard of proof is more likely than not or the balance of probabilities. The courts have said that they will accept something as a proven fact if they are at least satisfied that it is more likely to be true than not. In numerical terms, it has at least a 51% probability of being true.

This civil standard of proof is applied in a binary way. Each fact in the chain of causation is subject to the standard and treated as proven or not. If it is proven it serves as the certain factual base for the next stage in the assessment of the chain of causation. Thus, if it is

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[92] For an extensive discussion of the use and limitations of econometric in competition litigation see Cento Veljanovski, *Cartel Damages – Principles, Measurement and Economics* (London: OUP 2020).

[93] *Hotson v East Berkshire Area Health Authority* [1987] AC 750, 789 at n 12.

necessary to decide whether the defendant acted negligently, and if so whether the negligent act resulted in the claimant's loss; the legal approach is first to determine whether there is negligence, and if yes then to treat this a certain fact. The standard of proof is then applied to whether there is a causal link between the loss and the negligence disregarding the prior uncertainty over negligence. That is the defendant's action is negligent if it is 51% or more likely; if it is, then it is treated as 100% certain. The loss is actionable if conditional on a finding of negligence it was 60% likely.

Neither approach is the way a Bayesian statistician would look at the matter. He or she would use the 'product rule' - if there is a 51% chance that there was negligence and a 60% that the infringement caused the loss; then the conditional probability that the defendant's actions caused the loss would be 51% x 60% = 30%. If this were applied using the civil standard more likely than not, the claimant would fail in his or her action for damages.

It is also not the way proof is treated in econometric analysis. Statistical significance in econometric analysis deals with a different question and uses a more stringent test of 'proof' than in civil cases.[94] The accepted statistical approach is what is known as hypothesis testing. This is a test of the 'null hypothesis' that the defendant is not guilty or in the typical sellers' cartel damage cases, did not illegally raise their prices.

Suppose that multiple regression analysis is used to determine whether a cartel increased prices to its customers. The null hypothesis would be that the cartel did not affect prices. To test whether the null hypothesis is 'true' statisticians typically use a 95% confidence limit developed by the Oxford statistician Ronald A. Fisher on the argument that a 5%, or 1 in 20, chance that the estimated regression coefficient does not reflect the true estimate is a 'rare event'. [95] It is designed to minimise false positives or Type I errors[96], and if it passed the best that can be said is that the null hypothesis has not been disproved.

Several features of statistical significance should be understood. The first is that the conventional levels are arbitrary.[97] The 95% confidence limit is a convention only and has no scientific basis. Statistical packages will report 99%, 95% and 90% statistical significance levels. Moreover, the value of the estimate and confidence interval depends on the sample size, the quality of the data, and the possibility that the regression equation omits key variables and other statistical problems found in any standard econometrics textbook. Some of these matters were considered and dealt with in the *BritNed* judgment.

For much statistical research, the 95% significance level is reasonable. Imagine if the legal civilian standard of proof were used to evaluate clinical trial data on the causes of cancer. If the more-likely-than-not approach were used as a measure of statistical significance the number of potential carcinogens would rise to an unmanageable number with no ability to say with any degree of certainty what was and what was not a carcinogen. It would not be a useful analysis. The use of the 50% confidence interval would increase dramatically the likelihood of a Type I error (a false positive) and narrow the range of values of the confidence

[94] Note that two different statistical theories are being discussed in the text – Bayesian and frequentist, the latter which underlies multiple regression analysis.

[95] Ronald A Fisher, *Statistical Methods and Scientific Inference* (New York: Hafner Press 3rd edn, 1973) 45.

[96] David H. Kaye, 'Statistical Significance and the Burden of Persuasion' (1983) 46 *Law and Contemporary Problems* 13; David H. Kaye, 'Do We Need a Calculus of Weight to Understand Proof Beyond a Reasonable Doubt?' (1986) 66 *Boston University Law Review* 657.

[97] The attempt to reduce the statistical significance level to 50% to align with the civil standard of proof was rejected by the US Supreme Court, Docket No. 09-1156.

interval which would be good for claimants and consistent with the way the courts deal with Type I errors.

The general way statistical significance levels are offered by econometricians should not disguise the vigorous debate about the role and efficacy of statistical significance among statisticians and econometricians. This is highlighted in Diedre McCloskey and Stephen Ziliak's provocative book titled *The Cult of Statistical Significance: How the standard error costs us Jobs, justice and lives*.[98] Even the American Statistical Association took the unusual step of setting out a formal position against the slavish use of conventional statistical thresholds.[99] Nor should it gloss over the fact that experts can carry out many permutations of the data and specifications to report only those results favourable to their client as happened in *Royal Mail*.

Returning to Sir Marcus' musing why 51% confidence limit could not be used, my response is that there is no impediment in principle. Fisher set the 95% limit on the argument that this would make a false positive a 'rare event'. But the law is not concerned with the rarity of a false positive. Indeed, quite the opposite - it is highly tolerant of false positives as it is happy to be 49% wrong in civil cases. The law weights the prospect of Type I and Type II errors in a very different way than statistics. It in effect gives different weights to the probabilities that reflect the losses or seriousness of one or other state of affairs. This non-Bayesian way of dealing with the issue is to allow a trade-off between Type 1 and Type II errors based on how costly the errors are.

Johnson et al which seeks to cut a middle road between statistical and legal significance propose that 'statistical standards need to fit the circumstances,' be 'viewed contextually' and 'against the backdrop of other evidence in the case' combined with non-statistical evidence, and attention to the relative importance of Type I and Type II more aligned to the law's evidentiary standards. As Johnson *et al* note:

> *… it is not at all uncommon when conducting statistical analysis in antitrust matters to obtain results that have potentially important practical implications but, for lack of data, do not meet conventional thresholds for statistical significance. A rule rejecting the use of regression estimates that do not achieve conventional significance levels could well make the effectiveness of antitrust enforcement in any given case dependent upon the quantity and quality of historical data. Given the reality that the antitrust violators often control the relevant data, this situation would be problematic.*[100]

This is not only sensible, but I believe the legal position and the position that would be accepted by most economists.

Interpreting confidence intervals

Sir Marcus has also posed the question – Why can't the lower value of the confidence interval be used as an estimate of the amount the cartel increased prices? This refers to the confidence interval associated with a given level of statistical significance. To explain. A multiple

[98] Deirdre N. McCloskey and Stephen T. Ziliak, *The Cult of Statistical Significance: How the standard error costs us Jobs, justice and lives* (Ann Arbor: U Michigan Press, 2008).

[99] American Statistical Association (ASA), Press Release, *American Statistical Association Releases Statement on Statistical Significance and P-values*, 7 March 2016. Angelika M, Stefan and Felis D. Schönbrodt, 'Big little lies: a compendium and simulation of p-hacking strategies' (2023) 10 *Royal Society Open Science* 1.

[100] Phillip Johnson, Edward Leamer and Jeffrey Leitzinger, 'Statistical Significance and Statistical Error in Antitrust Analysis' (2017) 81 *Antitrust LJ* 666, 653.

regression equation seeks to disentangle the individual effects of a variable from those of the other effects bearing on the variable of interest such as the effect of a cartel on prices. It generates an estimated coefficient of the individual effect together with statistical tests of significance of the estimate. By convention, the estimated coefficient is the mean of the distribution of values which are consistent with the 95% or other confidence level.
In *BritNed* the court confronted, and must be said was shocked, by the wide range of values of the confidence interval which led it to reject the econometric evidence as 'unreliable'. As Sir Marcus said:

> *Dr Jenkins suggested that the overcharge at the lower bound must constitute the minimum overcharge, being a figure that commanded a 95% or 51% confidence (as the case might be). I reject this point. As Mr Biro made clear … a confidence interval provides a measure of the degree of uncertainty relating to an estimate of overcharge, but it does not provide a measure of certainty. I have regarded the size of the interval – ranging (at a 95% confidence) from €885,000 to €108.7 million as an indicator that the model is not producing useful outcomes such that I can rely upon.*

On this point, the court unfairly rejected the claimant's economist's view that the lower value of the confidence interval could be used. Both experts were correct. The view that the confidence interval provides a 'measure of the uncertainty' of the point (mean) estimate of the overcharge is technically correct. Dr Jenkin's statement that the lower bound of the confidence interval 'constitutes the minimum overcharge' at the 95% confidence level is an accepted interpretation as the confidence interval 'provides a range of plausible values.'[101]

These different ways of interpreting the confidence interval emphasize the contextual nature of statistical significance. Depending on the losses and benefits associated with Type 1 errors one might select a value which is not the mean value. For example, Sfikas, Greenhalgh and Lewis[102] study of vaccination policies designed to eliminate Rubella used a large database of blood samples to see how many Rubella infections resulted from a single case of the disease. From this, they determined the minimum proportion of children that must be vaccinated if the disease was to be eliminated. They calculated this at 74% with a confidence interval of 67% to 76% which they treated as plausible values for the vaccination rate. The researchers suggested that given the seriousness of a Rubella epidemic, a vaccination rate of 76% at the upper limit of the confidence interval was required.

Correlation and causation
It is a mantra of statisticians that correlation does not imply causation. Just because Christmas cards are sent before Christmas does not imply that Christmas cards 'cause' Christmas. Nonetheless, statistical analysis can assist with the determination of causation.

Consider standard price regressions used in cartel overcharge cases. These estimate the effect of each variable holding all other variables constant. In this narrow sense, it purges the price data of the effects of other variables to isolate the separate effect of the cartel variables of interest. This has a strong causal aspect as it uncovers the effect and size of the effect of the cartel on prices while adjusting for myriad other effects affecting prices. There is no way that the simple inspection of the data could disentangle the effects in this way.

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[101] Geoff Cumming, *Understanding the New Statistics – Effect sizes, confidence intervals, and Meta-analysis* (London: Routledge, 2012) 78-84 and specifically 'Interpretation 2'.
[102] N. Sfikas, D. Greenhalgh and F. Lewis, 'The Basic Reproduction Number and Vaccination Coverage Required to Eliminate Rubella from England and Wales' (2007) 14 *Mathematical Population Studies* 3.

In more elaborate analysis one can seek to identify and estimate the underlying structural relations and deal directly with cause and effect. This is known in statistical analysis as the 'identification' problem. Price is the outcome of the interaction of supply and demand so to simply look at the effect of prices does not isolate the supply and demand schedules. By modelling these interrelations one can adopt an approach that expresses the relationship in terms of exogenous variables and identifies the supply and demand schedules.

The Role of Econometrics

Sir Marcus is correct when he says the economists and court can hold different 'world views.' This was highlighted in *BritNed* where the claimant's economist used a multiple regression analysis based on a small sample of all ABB tenders during and after the alleged cartel period. The matter that she perceived to be at issue was whether ABB had overcharged its customers during the cartel period. However, that was not the action before the court. It was whether, on the BritNed tender, the claimant had been overcharged. Putting aside the statistical issues, the claimant's expert was estimating the average overcharge across all of ABB's tenders whereas the court was concerned with the specific overcharge on the BritNed tender. Had the action been on behalf of all those that awarded a tender of ABB during the cartel period then the approach would have made sense. The reason why estimating an average overcharge across all tenders was troublesome is that each tender was bespoke and subject to negotiations between the parties, and not concerning the price charged for, say, a can of peas in millions of transactions. The consensus among economists was that the technique was inappropriate to the case.

BritNed also illustrated the relationship between statistical and documentary evidence. The legal approach operates best when there are discrete events. In *BritNed* and *Enron* the court had to deal with a single tender and a lost opportunity of securing a tender, respectively. In both cases, lay witnesses gave evidence on the facts surrounding these discrete events. In both cases, this evidence trumped the economist's evidence, or at least that of the party relying predominantly on statistical evidence. In more complex cases this will not be so easy and reliance on factual witness evidence may be misleading. In a price-fixing cartel involving different products, thousands of sales and extending over a long duration where market and firm conditions are constantly changing the court must ultimately rely on some form of quantitative analysis which by its nature must look outside the specific facts presented by the defendants. This necessarily involves using large volumes of data and reference to market and extraneous factors events which will need to be explained. The economist can contribute to this, and the CAT now recognises the need for top-down econometric evidence of market-wide overcharges and pass-on rather than bottom-up evidence.[103]

The exclusive reliance on econometric evidence unsupported by documentary and witness evidence however has significant risks. *BritNed* showed this and more graphically in *Royal Mail* where very different statistical estimates of the overcharge led to the court to in effect rejecting the evidence as 'not unhelpful' and then picking what seemed to amount between the party's divergent estimates.

As Sir Marcus says: 'It is a mistake to see economic evidence as containing 'The Answer''[104]; it 'is evidence … that goes into the pot with all the other evidence, which the judge has to weigh'.[105] This is unexceptional. The European Commission's *Practical Guide* states:

[103] *Ryder Limited and Others v MAN SE and Others (Ruling (Disclosure))* [2020] CAT 3 41.
[104] Smith n 2 above 16.
[105] Smith n 2 above 16.

15. … econometric modelling can be useful, but it inherently involves simplification and reliance upon multiple assumptions and rarely, if ever, is it conclusive in and of itself. It must therefore be verified against the evidence it relies upon and the real life facts of the markets in which it operates.
16. It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of article 101 or 102 TFEU. Prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated. Estimation of the hypothetical non-infringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability or inaccessibility of data will often add to this intrinsic limitation.
17. For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single 'true' value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations.

As Sir Marcus declares when faced with regressions analysis and statistical confidence limits judges 'do not shrink in terror but stare the material boldly in the face and deal with it'[106]; as do the advocates. This is certainly a change when in 1999 Ferris J in the Restrictive Practices Court said in exasperation that 'this is all washing over my head'[107] when confronted by multiple regression analysis. Today judges are assisted by 'best practice' guidelines issued by competition authorities on the submission of economic and statistical evidence.[108] These were quoted extensively in *Tobacco Packaging*[109] where the court said: 'The [CMA] guidance is relevant to the [econometric] analysis which arises in the present case since it sets out how such evidence should be prepared and tendered in order to achieve maximum probative value.'[110] In *BritNed* reference was made to the European Commission's *Practical Guide*[111] on quantification of damages. The CAT is in a good position to control and evaluate this evidence as the Panel will invariably include an economist.

The Courts are correct to treat econometric evidence circumspectly given its open-ended nature and selective use. This was highlighted in *Royal Mail* where the economists were admonished for selecting the econometric analysis which most suited their client. The fact that econometrics can generate overcharge estimates ranging from zero to 15% using the same data, same statistical technique and same statistical software programme demonstrates its fluidity. The evidential limitations of econometrics are now amply recognised following Royal Mail and the Court of Appeal's observations in *UK Trucks v Stellantis:*

…. any regression analysis and determination will be highly sensitive to the assumptions made and data input. There is an inevitable element of subjectivity both in the selection of the data and these

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[106] Smith n 2 above 5.
[107] *In the matter of an agreement between the Football Association Premier League Ltd and the Football Association Ltd & the Football League Ltd & their respective member clubs: in the matter of an agreement relating to the supply of services facilitating the broadcasting on television of premier league football matches & the supply of services consisting in the broadcasting on television of such matches,* Judgment 27 August 1999, [2000] E.M.L.R. 78 RPC.
[108] DG Competition, *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases,* 6 January 2010. Competition Commission, *Suggested Best Practice for Submission of Technical Economic Analysis from Parties to the Competition Commission,* CC2com3, 24 February 2009.
[109] *BAT & Ors v Secretary of State for Health* [2016] EWHC 1169 (Admin) at 326-329. ("*Tobacco Packaging*").
[110] *Tobacco Packaging* at 325.
[111] EU Commission Staff Working Document, *Practical Guide* on *Quantifying Harm in Actions for Damages Based on Breaches of Articles 101 or 102*, C(2013) 3440.

> *assumptions. Without in any way being critical of or doubting the integrity of Dr Davis, complete objectivity in expert economic evidence cannot really be achieved. This was a point made by the CAT in Royal Mail in relation to the expert evidence there on overcharge at [475] to [480]. Since there is no single, objectively ascertainable, 'right' answer to the overcharge pass on issue, and the decision of how to advance an argument on this issue in the proceedings will inevitably involve some strategic considerations …*[112]

The selective use of econometrics and scientific evidence is not a problem confined to its in litigation. It plagues the scientific world. For decades peer-reviewed research published in scholarly economics, medical and scientific journals has been shown to be flawed due to coding errors, poor data cleaning and more concerning selective specifications and presentation of results. A recent evaluation of articles published in the *American Economic Review*, the journal of the American Economic Association, found widespread 'selective reporting of analytical specifications that exaggerate effect sizes and statistical significance'.[113]

6. Conclusions

As the role of economic evidence has increased so too has the complexity of competition cases generating challenges for the courts, lawyers, parties and experts. Stricter adherence to the rules of evidence is not however the key to regulating expert evidence. The CAT has an arsenal of possible controls and is innovating new procedural rules to encourage the relevance and proportionality of expert evidence. The interpretation of statistical evidence poses a challenge for the parties and the court. The challenge comes not so much from its technical nature and different concepts of proof but the selective presentation of results that favour the experts' respective clients which impair its probative value as shown in *Royal Mail.* The court can be expected to respond by developing clear protocols for the admissibility of such evidence.

[112] *UK Trucks Claim Limited v Stellantis NV & Others* [2023] EWCA Civ 875 at 96.
[113] Douglas Campbell *et al.* 'The Robustness Reproducibility of the American Economic Review' I4R Discussion Paper Series No. 124, Institute for Replication (I4R) s.l., 2024).