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The one (h)armed economist in the CAT

The UK Competition Appeal Tribunal's new expert rules

In *Royal Mail*[1], *Cabo*[2], *Granville*[3], *Autoliv*[4], *London Array*[5], *Kent*[6] and other decided cases, economists failed to comply with the expert witness rules that require them to provide independent evidence that assists the court. Instead, there has been a marked tendency toward advocacy with numerous, voluminous, sprawling and unpersuasive reports which are overburdening the courts. The Competition Appeal Tribunal (CAT) is now fed up. It has issued two new Practice Directions: PD 3/2025 on expert evidence, and PD 2/2025 on formatting and page lengths. The reaction of economists has been sheepish gratitude for the CAT's further guidance without acknowledging that it is their failures that have led to a reset in the way expert evidence will henceforth be given. If there is any doubt about this, read Ned Tidswell's, a chairman of the CAT, 'official' explanation for PD3/2025.[7]

What is going wrong – *Royal Mail*

The unsatisfactory nature of economists' evidence came to a head in *Royal Mail*. This was a follow-on action claiming overcharge damages arising from the European Commission's Trucks cartel decision.[8] The defendant's expert found that the cartel had been ineffective in raising truck prices; the Claimants' expert said the overcharges were between 6.7% and 14.7%, depending on the timeframe and truck type, both using multiple regression analysis. The Tribunal concluded that the regression analyses underpinning these estimates were 'not fully reliable and unbiased'. It awarded the claimants a 5% overcharge on about 10,000 trucks purchased over 14 years – about £38 million (including interest), which was half the damages sought – using the 'broad axe' principle.

The CAT judgment in *Royal Mail* highlighted several unsatisfactory aspects of economists' expert evidence in competition cases:

1. Lack of independence

In *Royal Mail* and all the judgments referred above, one or more of the experts was criticised by the Tribunal for being advocates, giving evidence 'which favoured their respective clients' commercial interests'. The experts were unwilling to be transparent and realistic in dealing with the differences in their respective evidence, thereby failing in their duty to the court.

In *Royal Mail,* most of the Tribunal's ire was directed at DAF's economist. This was surprising since the expert is a respected academic economist who is acutely aware of the need for reliable and unbiased evidence. He was the Chief Economist at the European Commission for five years. During his tenure, he oversaw the Commission's Staff Paper on best practices for the submission of economic evidence and data analysis.[9] Before that, the expert published an academic article on economic consulting in competition cases in which he highlighted some of the problems with and solutions to ensuring reliable economic evidence emphasising the selective focus on one side of the evidence and the European Commission's 'tendency toward extremism' 'by suppressing evidence or failing to fully consider some alternatives'.[10]

This is disappointing, as an expert is required to comply with the expert witness rules[11] and sign a declaration that he or she has complied with their overriding duty to the court to provide independent expert evidence. The Tribunal, the Court of Appeal, and now PD3/2025 [34] reiterate that the expert evidence must give objective and independent evidence.

2. Front Line Soldier

In *Royal Mail,* the Defendant (DAF) chose not to explain why it had participated in the cartel. This was its legal right. Yet the Defendant's expert filed a 'plausibility report' which sought to exonerate DAF from wrongdoing. Under cross-examination, the expert admitted that he had never asked DAF why it had participated in a cartel for 14 years or how the information it exchanged with its competitors was utilised. This 'lack of curiosity' astounded the Tribunal. It said that the expert's evidence was 'made up,' not based on any facts on how the cartel worked and took

[1] *Royal Mail & BT v DAF* [2023] CAT 6.
[2] *Cabo Concepts Ltd v. MGA Entertainment* [2025] EWHC 1451 (Ch).
[3] *Granville Technology Group & Ord (in liquidation) v. Chunghwa Picture Tubes* [2024] EWHC 13 (Comm).
[4] *Stellantis v. Autoliv* [2025] CAT 9
[5] *London Array Ltd &Ors v. Nexans France* [2025] CAT 59.
[6] *Dr Rachael Kent v Apple* [2025] CAT 67.
[7] Ned Tidswell, Keynote, Monckton / NERA 7th Annual Conference, Dec 2025.
[8] *Case AT.39824 – Trucks*, Commission Decision of 19 July 2016.
[9] 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. ('He was closely involved in … the adoption of … the Guidelines on the Submission and Evaluation of Economic evidence, which sets a framework and standards for the development of economic analysis in all cases.' Compass Lexecon bio note.
[10] Damien J Neven 'Competition Economics and Antitrust in Europe' (2006) *Economic Policy*.
[11] EWHC *Civil Procedure Rule Part 35 – Experts and Assessors* (CPR35); *Practice Direction 35* (PD35).

an 'extreme position' which the expert partially withdrew under cross-examination. The expert, said the Tribunal, 'could offer no pro-competitive credible rationale for sophisticated, profit-maximising firms to have stayed within the cartel for that time with all the attendant risks of doing so' unless it was 'regarded as extremely beneficial.'

The use of economists to propound speculative theories to rationalise the abusive actions of their clients has been routinely rejected by the CAT, e.g. *NAPP*[12], *O'Higgins/Evans*[13] and *NTN v Stellantis.*[14] This use of an expert as a 'front line soldier' to defend the client, when the defendant has declined to make its own defence, is wholly illegitimate, and a misuse and abuse of expert evidence. Even at the basic level, this gives the impression that the expert is a hired gun.[15]

Industry Adviser

The Defendant's expert failed to disclose that he had been an advisor to DAF since 2013, well before the Commission's Decision published in 2016. The Tribunal did not find that an adviser could not be an expert, but did question the expert's lack of candour. Experts are now required to give a full account of their previous involvement with the parties (PD3/2025 [8] –[10]).

3. Volume of evidence

There has been an excessive reliance on expert economic evidence. In *Royal Mail,* the Tribunal received 48 expert reports running to thousands of pages, which it regarded as 'excessive' and 'highly burdensome'. In *Cabo*, there were 38 reports, and in *Kent,* one expert filed 2,000 pages. As Roth J observed a decade ago, there is 'the potentially endless ping-ponging of expert evidence where each expert puts in a further report responding to the criticism in the last report of the opposing expert'.[16] In *Royal Mail,* the economic evidence was criticised for an excessive focus on subsidiary issues, which further complicated and confused the evidence. Even the Joint Experts Statement (JES), which should be a brief outline of the areas of agreement, disagreement, and reasons for the disagreement between the experts, is now used as yet another opportunity to rehash the conflicting evidence with requests to the CAT to append further supplementary reports.

The Tribunal said in *Royal Mail* that in future, the parties must 'exercise some restraint and sense of proportion in the preparation of their expert evidence.' PD2/2025 makes this explicit by placing a page limit on the expert report and lawyers' skeleton argument (75 pages/double-spaced/12 point font). It also says that after the JES, the experts may be asked to produce a summary report, which will be treated as their evidence at trial. This should sharpen the evidence. On the other hand, there remains the tension in an adversarial system that the expert will have a limited scope to defend his or her position within the word limit.

Unreliability of econometric evidence

What emerged in *Royal Mail* (and in the unreported parallel truck cartel case of *Ryder & Dawsongroup v DAF*[17]*,* which settled a week after *Royal Mail)*, is that the parties' experts using the same data, the same statistical package, and the same statistical techniques came to starkly different estimates of the overcharges.[18] The experts used different variables and specifications to generate the result that favoured their respective clients.[19] The Tribunal concluded that these differences were irreconcilable, making the regression evidence unreliable, but 'not futile'.

Despite the lofty view of many economists as to the superiority of econometrics, in all but one of the cartel decisions to date (*Granville*), it has failed to assist the Tribunal. There is a growing view, both in the UK and other jurisdictions, that econometrics has been oversold. As the replication crisis in academia has shown, econometric analysis gives the practitioner too many degrees of freedom to fashion a client-friendly report. The saving grace in litigation (as opposed to academia) is that the opposing expert can critically assess the other side's econometrics, and the CAT, as can the Tribunal as a specialised Tribunal sitting with an economist member. Nonetheless, the Tribunal is usually left with irreconcilable differences produced by the same econometrics applied to the same data.

The Reasons Why

In *Royal Mail,* the problems were seen as 'perhaps the inevitable consequence of the adversarial process', where the parties are encouraged to take 'chunks out of their opponents' evidence. The expert's closeness to their client's lawyers and the adversarial proceedings inevitably lead to varying degrees of 'bias' as he or she starts looking for supporting evidence and discounting that which is not. This can and has erupted into conscious bias. And obviously, experts are selected based on their willingness to support the client's case (selection bias). All this reflects the more general tendency that where you start from often determines where you end up.

At the same time, the expert is put in an invidious position. He or she is a 'partisan expert' hired by one of the parties, yet with an overriding duty to the court to be independent. This creates a conflict which, if not properly managed, pulls in the direction of the client. As the Jackson Committee concluded, the conduct of complex commercial litigation can not be left to the parties – the court has to exercise control.

Others see the problem in broader terms. Sir Marcus Smith J, past President of the Tribunal, attributes the problem to an endemic failure of all those involved - judges, lawyers and experts - to adhere to the law of evidence. Economists are described as 'uneducated experts' who do not understand the rules of evidence and

[12] *Napp Pharmaceutical v DG of Fair Trading* [2002] CAT 1.
[13] *O'Higgins FX Class Representative Ltd v. Barclays Bank plc and Evans v. Barclays Bank plc* [2023] EWCA Civ 876.
[14] *NTN Corp v Stellantis* [2022] EWCA Civ 6.
[15] Sackville J, 'Expert Evidence in the Managerial Age' Forensic Accounting Conference, Sydney, 14 March 2008 (Reprinted *Hearsay,* Bar Council of Queensland 2025).
[16] *Generics UK v CMA* [2016] CAT 24 (ruling expert evidence) 5.
[17] *Ryder & Dawsongroup v DAF Case 1291&5/5/7/18 (T)*
[18] Econometrics in UK Cartel Damage Cases: Why is it Failing? *J Antitrust Enforcement* forthcoming.
[19] Cento Veljanovski, *Cartel Damages* (OUP 2020).

fail consistently to apply their opinion evidence to the facts adduced at trial. They make up facts and mix facts with their opinions. The courts rarely rule expert evidence inadmissible but wave it through to trial, when they then give it more or less weight.[20] This laissez-faire approach to expert evidence is a common criticism of the English legal system. It is a small comfort that Sir Marcus's primary target was lawyers for not properly instructing their experts. If this is an accurate description of the state of affairs, it implies that the Courts and Tribunal are to a large extent the authors of their own misfortune, and it is little wonder that experts find themselves in bother.

There are other difficulties with the use of economics and econometrics in court. Economics' open structure allows nearly any outcome or behaviour to be rationalised as pro- and anti-competitive based on differing assumptions and models. This theoretical latitude enables fairly convincing yet contradictory theories of harm to be advanced by testifying experts. The same goes for quantitative methods, which can generate disparate estimates of overcharges and pass-on rates based on differing treatment of the data while staying within professional bounds.

It is right for the CAT to call out biased and unreliable evidence. But at the same time, it must be recognised that the inherent ambiguity of competition law concepts and that much evidence, whether economic or otherwise, is counterfactual, circumstantial and subject to legitimate differences of opinion among experts.

The ping-ponging of voluminous expert reports is most often not due to the inherent complexity of the evidence but the belief of some testifying economists that they should leave no stone unturned and no criticism unanswered. This is compounded by the misguided belief that they must give the Tribunal mathematical proof of some economic proposition or statistical technique. Some of this is explicable in an adversarial system, which forces the expert to be over-expansive to avoid attack by his or her opposite and at trial under cross-examination for some omission or unsupported claim.

Guidance to Experts

Royal Mail is an extreme example of a line of cases where the expert evidence and conduct of the experts have been criticised by the CAT. The subsequent cases and rulings by the CAT revealed a disquiet about the way economists were giving evidence in court and flagged the changes announced in PD3/2025. Green LJ in the Court of Appeal devoted his entire judgment to restating how expert evidence should be given in light of *Royal Mail*.[21] He emphasised that the experts have a duty to cooperate with the other experts (CAT Rule 4(7)), which he describes as 'a duty with bite'. The expert must give a 'full and frank disclosure of anything, including prior relations with the client, impacting upon the objectivity and independence of their opinion. The CAT is also entitled to expect experts to adjust their opinions, even to the detriment of their clients, in light of the evidence as it emerges.'

PD3/2025 codifies Green LJ's guidance. It will lead to fewer, shorter reports and more cooperation between experts. The role of lawyers will be diminished, as the CAT also (at times at least) regards many cases as being over-lawyered, resulting in delays and the framing of expert evidence. Removing lawyers from the process does, however, expose the expert and does not necessarily guarantee better proportionate evidence. The recent experiment by the CAT of 'issue-based expert-led' disclosure in the Second Wave trucks proceedings has not been a success[22] (which the CAT has indicated is unlikely to be repeated). The experience in *Boyle v Govia*[23], although arising from exceptional circumstances, was an expert-led, wasteful, directionless expedition in excessive disclosure.

There will be attempts to work around the PD. Much of what is required by the new PD has been in place for decades, but has not restrained experts. Paradoxically, the PD may drive up the costs as shorter reports lead to more expert pre-analyses.

Perhaps the CAT should move to a *Daubert* test or at least pre-screening, so that the expert comes to the Tribunal with a properly fleshed-out methodology statement before work starts, rather than the vague methodology statements so far. Or use its powers to depose expert witnesses as suggested by Marcus Smith J, or more radically (and a non-starter), require that the expert be appointed by the other side, giving effect to the Civil Justice Council's definition of independence: 'that the expert would express the same opinion if given the same instructions by an opposing party.'[24]

Declaration: The author not been involved in *Royal Mail*. He was an expert in *Ryder & Dawson v DAF* and for numerous claimants in the Wave 2 truck proceedings before the CAT.

[20] Marcus Smith J 'Lawyers come from Mars, and economists come from Venus' (2019) *Competition LJ*.
[21] *Royal Mail & BT v DAF* [2024] EWCA Civ 181.
[22] *Re: The Trucks Second Wave Proceedings* [2024] CAT 2.
[23] *David Courtney Boyle v Govia Thameslink Railway & Ors* [2025] CAT 26 (costs and next steps).
[24] Civil Justice Council, *Protocol for the Instruction of Experts to Give Evidence in Civil Claims*, 2012 [3.2.3].