Damages for Consumer Surplus?

Is the majority right in *Which? v Apple*?

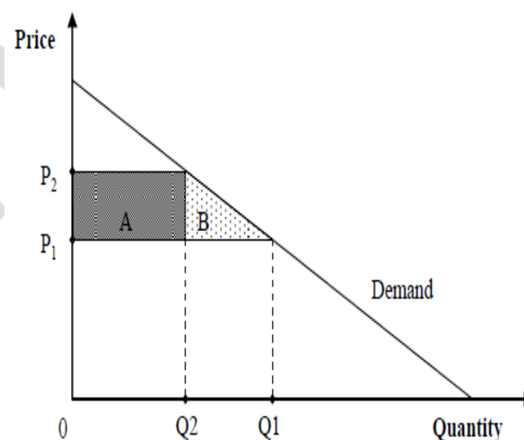
It is standard economics that the real loss from a cartel or the abuse of dominance is the foregone consumer and producer surpluses, otherwise known as Dead Weight Loss (DWL). This is set out the European Commission's Practical Guide[1] on the quantification of damages. Yet consume surplus has never been awarded in an English or European competition case. In the *Which? v Apple*[2] collective proceedings, the proposed class representative (PCR) sought to recover what it termed the foregone consumer surplus (FCS) on behalf of the 'Non-Purchasers of iCloud services'. Yes, that's correct – compensation for those who did not buy Apple's iCloud services. The Competition Appeal Tribunal (CAT) allowed FCS to be pleaded to trial in the face of a muscular dissent by the Tribunal's chair, Mr Justice Waksman. In this Casenote, I examine the ins and outs of compensation for FCS.

FCS in theory

When a firm raises its price, it generates two effects – an overcharge and a volume effect. The Commission's Practical Guide and the judgment use the economist's 'Demand Curve Diagram' to illustrate these two effects. As the Guide explains, a firm can only increase its prices if it reduces its production or sales. This is an 'economic truism'. The increase in price leads to a transfer of income from purchasers to the firms, given by the shaded rectangle labelled A. This is the overcharge damage. In addition, the contraction in output – the 'volume effect' – generates another loss given by the triangle B. This is the value that the Non-Purchasers attach to the output that they would have purchased at the non-infringement price P_1 but did not because they were not prepared to pay the overcharge P_2- P_1-. For a product used as an input in production, this would be a lost profits claim. For end-consumers, it is the FCS. Oddly, due to its biased focus on business-to-business transactions,[3] the Practical Guide recognises that there is a lost profits claim but only refers once to the possibility of FCS (para 133):

> Other customers are end consumers. If these do not purchase at price P_2 this means that they fail to enjoy the utility of these products or services, for which they would have been prepared to pay price P_1. Applicable legal rules may provide that some or all of such harm should be compensated for such failure to enjoy the usefulness of the product. At a minimum, end-consumers who have to bear higher costs (for example, for the purchase of a substitute good) and who therefore have suffered an actual loss must be able to obtain compensation.

The Practical Guide muddies the water by suggesting that the minimum compensation for an FCS claim should be the financial loss from paying a higher price for the substitute good. This, unfortunately, reinforces the view that it is only financial losses that are recoverable.



Source: Practical Guide

The paradox is that economists consider the DWL as the real 'hidden' efficiency loss, while the law focuses on the overcharge, which is a transfer of money between buyer and seller. The DWL is a hidden cost as it's not registered in the market. Nonetheless, from an economic efficiency

[1] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07)

[2] *Consumers' Association ("Which?") v Apple Inc & ors* (Judgment (Strike-out)) [2026] CAT 41.

[3] The diagram is misleading as it appears to deal with FCS but is actually dealing with foregone producer surplus for an intermediate good and hence a lost profit claim. It also assumes constant marginal costs, which will not usually be the case and will affect the statement about the magnitude of the FCS loss. I ignore these issues.

(deterrence) perspective, the appropriate measure of damages is the overcharge plus the DWL.

As already noted, the FCS has never been compensated in a European case, which, as Waksman J lamented, 'would have been useful'. But there is an example which, surprisingly, the PCR did not cite. In 2019 a Chilean court awarded compensation for FCS in a pharmaceutical excessive pricing collective proceedings.[4] Nor did the PCR cite Advocate General Wahl's Opinions in *Finnish Asphalt*[5] and *Intel v Commission*[6] on the primacy of economic deterrence and DWL compensation (not endorsed by the European Court). Hardly precedents but 'useful' nonetheless.

The *Which? v Apple* strike-out judgment

In *Which? v Apple,* the Majority held that whether FCS was recoverable should proceed to trial, identifying two routes:

(i) a pecuniary route, based on aggregate class loss evidence through demand-curve economics and counterfactual pricing analysis;

(ii) failing that, a potential non-pecuniary route based on the deprivation of a valuable service, drawing on 'loss of fun' cases such as *Ruxley.*[7]

The Majority's pecuniary route (i) is based on the willingness to pay of Non-Purchasers. The alternative non-pecuniary loss (route (ii)) is more novel and contentious in law and economics.

Waksman J dissenting judgment

Mr. Justice Waksman dissented in the first time a Chair and a sitting High Court judge has been outvoted by the Tribunal's Ordinary Members (a retired lawyer and economist), a factor that will carry weight in the pending appeal.

Waksman J held that there was no basis in law for compensation for the subjective losses, such as FCS. He did not deny the existence of FCS, only that 'does not translate into a valid legal remedy under English law' (203). Moreover, because the success or failure of the contested claim did not depend on the resolution of facts or presentation of evidence, which would only be at trial, he considered that it should be struck out now and not left to trial. Further, because no individual claim for FCS could be made in law, claims could not be aggregated under the collective proceedings regime.

As regards the claim for nonpecuniary loss, Waksman J concluded that the case law did not support a claim in damages. He said it was hard to distil the *ratio* in *Ruxley* (the leading case on the matter) and that Lord Mustill's reference to consumer surplus (citing the article by my one-time colleagues proposing FCS as a remedy in contract[8]) was not a statement of law. And in any case, the Court in *Ruxley* gave compensation based on the court's objective calculation, not the subjective value of the claimant.

The evidential problems

Compensating Non-Purchasers who have not suffered any financial loss is certainly a challenge. Surely, say the sceptics, how does one compensate a group of unidentified Non-Purchasers claiming that they would have bought the product and then monetise their self-assessed 'subjective' loss of utility and enjoyment of the product? This would be an evidential nightmare, which was more or less Waksman J's central objection - FCS is a subjective loss which claimants are 'permitted to value'. And to those who point out that law compensates for Foregone Producer Surplus (lost profits), he says, '[T]he reason why end-consumers are in a different position, in law, from intermediate traders, is precisely because there are no materials which a court or tribunal can ultimately assess other than their own subjective valuations, however well they are demonstrated.' (222)

Waksman J's evidential concerns are real, but with respect, overblown. The FCS is not based on the claimant's self-assessed utility. It is measured by his or her willingness to pay above the non-infringement price, as given by the area B under the demand line in the figure above. The estimation of this loss in aggregate using a 'top-down' methodology uses the same 'market metrics' as for the overcharge. The volume effect can be estimated using elasticities for the product in question, and monetised by applying, say, an average price of half the difference between the non-infringement (estimated for the overcharge) and excessive prices. While I have not seen the PCR's calculations, the judgment tells us that the FCS was estimated at 13% of total damages, using, as just suggested, an average price of half the difference between the actual and non-infringement prices times the volume effect. This does, however, leaves unresolved the identity of legitimate Non-Purchasers.

Further considerations supporting FCS

The pending appeal will decide the law, but in the meantime, I offer several considerations on the recoverability of FCS, some of which are touched on by the PCR. An infringement of competition law is a statutory tort to be interpreted in terms of the statute's objectives. The objective of the Competition Act 1998 (CA98) is the protection of the competitive process and consumer welfare. Secondly, the Damages Directive, as transposed in CA98, gives any individual or entity harmed by an infringement the right to full compensation. This has an expansive scope, not limited by considerations of remoteness or foreseeability. The award of damages for pure financial loss and to indirect purchasers are examples of where the statutory provisions extend the compensatory principle. But most significantly, the CAT can award aggregate damages on a class-wide basis (CA s. 47C) in collective proceedings such as *Which? v Apple*. This removes the normal requirement that damages be objectively assessed on an individual basis, which

[4] C-1940-2013 *Servicio Nacional Del Consumidor / Farmacias Cruz Verde S.A* judgment 17 December 2019, 10º Juzgado Civil De Santiago

[5] Opinion of AG Wahl of 6 February 2019, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy NCC Industry Oy Asfaltmix Oy*, EU:C:2019:100.

[6] Opinion of AG Wahl of 20 October 2016, Case C-413/14 P *Intel Corporation Inc. v European Commission.* EU:C:2016:788.

[7] *Ruxley v Forsyth* [1996] AC 34.

[8] D R Harris, A I Ogus & J Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 *LQR* 581.

Waksman J puts forward as the major ground for denying recovery of FCS. On this point, it is worth quoting the UK Supreme Court in *McLaren v MOL*[9]:

> Secondly, this is a claim for aggregate damages under section 47C CA 1998 which as the Supreme Court explained in *Merricks* entails a "radical" departure from normal principles of compensation (*ibid* paragraphs [58] and [76]). Aggregate loss is not computed by reference to the traditional bottom-up position of individual consumers. Instead, it is determined by reference to the top-down position of the class as a whole. On such an approach, there might well be individuals or groups of individuals who suffer no loss when their positions are compared with the counterfactual, but that is not fatal to the claim, as the CAT pointed out in its Judgment. The Supreme Court in *Merricks* (*ibid* paragraph [77]) and in *Lloyd v Google LLC* [2021] UKSC 50 ("Lloyd") (at paragraph [32]) and the Court of Appeal in *Le Patourel* (*ibid* paragraph [32]), made clear that the CAT was not bound by traditional principles of compensation. When both quantifying and distributing aggregate damages, the CAT might, wielding its broad axe, work with new techniques and principles to achieve practical justice.

Finally, the difficulties of quantification cannot deprive the Claimant of its right to full compensation. The Courts use a 'broad axe' to quantify, which, together with the principle of effectiveness, means that the difficulties and lack of precision in quantifying damages cannot be used to defeat the right to full compensation. It is ironic that Lord Shaw's 'broad axe' metaphor in *Watson, Laidlaw*[10] was made not in relation to the difficulties of calculating financial losses to which it has so far been applied in competition cases, but non-pecuniary losses:

> In a second class of cases, restoration being in point of fact difficult— as in the case of loss of reputation— or impossible— as in the case of loss of life, faculty, or limb— the task of restoration under the name of compensation calls into play inference, conjecture, and the like. And this is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe.

The case against FCS

There is, however, a case for denying FCS, not made in the judgment. The FCS is a lost opportunity. It is for this reason that economists describe it as a 'hidden' cost. The Non-Purchasers suffer no out-of-pocket loss, not even paying the non-infringement price. The money they have avoided paying is available to purchase a substitute good or service, which will give them an offsetting consumer surplus. While this is not likely to be taken into account as an offset under the general principles of mitigation, assuming that the FCS was recoverable in law. But it is a consideration in determining whether it should be recoverable if the FCS is a relatively small (as it will tend to be) and largely offset by the consumer surplus from the substitute product.

The other practical obstacle is how to identify the class of legitimate Non-Purchasers. It is one thing to make a hypothetical estimate of aggregate loss, an entirely different proposition to say who suffered this loss. There is no easy way to identify the class of Non-Purchasers, especially for cartels which have operated for a long time. This problem also affects the distribution of the Non-Purchasers' pot of aggregate damages, as few may claim. One possible imperfect solution is to make the recoverability of FCS on an opt-in basis.

Conclusion

What emerges from this admittedly incomplete discussion is that one can make a case for compensating FCS from the purpose and provisions of CA98 or alternatively deny it based on ordinary tort compensation principles. While this is not a binary choice, it is clear that the statutory framework allows compensation to any individual harmed for types of losses that would not be permitted under the common law principles. On the other hand, the 'hidden' loss of FCS has never been awarded in English law, and there is an argument that it is at best *de minimus*, largely offset by the consumer surplus on the substitute product bought by the Non-Purchasers, a class of Claimants practically impossible to identify.

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[9] *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd & ors* [2022] EWCA Civ 1701 para 35.
[10] *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* [1914] SC (HL) 18, para 29– 30.