

Interest on antitrust damages

Simple, compound, negative

Historically the courts have declined to award interest on damages or when they have, to use commercially sensible approaches. This *Casenote* takes a critical look at two related issues in the development of prejudgment interest awards in England and Wales - what interest rate(s) to use; and whether to use simple or compound interest.

Principles

The [EU Damage Directive](#) (Art 2) states that “[F]ull compensation” shall include the “payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid”. Its purpose is “to compensate a claimant from being kept out of his money” ([Cardiff Bus](#)). The courts have discretion to decide which rate or rates to use, for which damages, and over which periods.

Which interest rate?

The courts can use a number of statutory and judicial interest rates.

Claimants typically plead the statutory rate payable on judgment debts (*Administration of Judgments Act 1970*, s 44) which since 1994 has been 8% per annum. Other rates can be sought – such as the Bank of England base rate plus 8% under the *Late Payment of Commercial Debts (Interest) Act 1998*. These are unlikely to be awarded in antitrust cases ([Albion Water](#)).

The commercial courts use much lower rates (*Senior Courts Act 1981*, s 35A) such as the Bank of England base rate plus 1 per centage point (Base+1); or the High Court rates of Base+1 (large company) to Base+4 (small company). Many commercial loans are linked to Libor (itself rigged) which can also be pleaded. These rates may be displaced if it would be substantially unfair to either party.

Similar rates have been applied in the few reported competition cases (see table below). In *Crehan* the Court of Appeal suggested a rate of Base+3.5 but the claimant failed in the House of Lords. The remaining cases have been decided by the Competition Appeal Tribunal (CAT). In *Cardiff Bus* and [Albion Water](#) the CAT awarded Base+2. In

Albion Water the Tribunal rejected the use of Libor, and because the loss had not happened on day one of the claim set interest to run from the mid-date of the infringement period. [Sainsbury's](#) adopted three rates – 0% on 50%, the cash rate of Base only on 20%, and the pre-tax new debt rate (not given) on 30% of the damage award respectively.

Table 1 Interest awards in UK competition decisions

Case (Court)	Damages	Rates	Comments
<i>Cardiff Bus</i> (CAT)	Lost profits £33,818.79 Exemplary £60,000	Base+2 (£13,311.70) No interest	Simple
<i>Albion Water</i> (CAT)	Lost profits £1,694,343.50 Lost opportunity £160,149.66	Base+2	Simple from mid-date of claim period
<i>Genzyme</i> (CAT)	£2 million	No interest	Interim award
<i>Crehan</i> (HC/CA)	Lost profits (HC) £1,311,500 (inc interest) CA - Lost profits + lease premium £131,336	Base+3.5	Simple - small business rate but no damages in HL
<i>Sainsbury's</i> (CAT)	Overcharge £68,582,245 (credit cards) £760,406 (debit cards)	0% on 50%; Base on 20%; new debt rate on 30%	Compound

Simple v compound interest

Interest can be calculated at simple or compound rates. Simple interest is interest on the cumulative damages each year; compound interest applies the rate to the cumulative damages plus interest i.e. interest on interest. Statutory rates are simple; judicial rates can be simple or compound at the court’s discretion.

While Albert Einstein may (not) have said that compound interest was the ‘the most powerful force in the universe’ and the ‘eighth wonder of the world’, there has been no similar epiphany among English judges. The common law denied interest, and when it did only gave simple interest. Until recently all interest awards in competition cases have been simple. The CAT in *Cardiff Bus* rejected a claim for compound interest at Libor+1 saying that the case was not one “where it is appropriate to award compound interest” but gave no reasons.

Simple interest does not reflect commercial reality nor is likely to achieve full compensation. As the Scottish Law Commission commented “the case against the compounding ... was essentially a case against interest itself”. The Court of Appeal agreed in *Sempre Metals v. Inland Revenue* [2008] AC 561 in a historic break it permitted compound interest in tort and contract damages provided the claimant could particularise and prove that compound interest was paid by, for example, taking out a loan or as lost cash balances (although actual proof of loss may not be necessary as *per Equitas* [123]). *Sainsbury’s* is the first reported competition case to award compound interest following *Sempre*.

Illustration using Vitamins cartel

Pre-judgment interest can make a dramatic difference to the size of the final award. To illustrate, consider the duration of the European *Vitamins* cartel. The cartel operated between 1990 to early 1999, taking a further six years for some UK claimants to settle - in total 16 elapsed years. Assume an annual overcharge of £100 giving total overcharge damages of £1,000. Applying simple interest at the prevailing statutory rates (15% to 8%) would have given the claimants £970 almost doubling damages. Simple interest at Base+2 would be one-third less at £640 but still a substantial uplift (Figure 1). At Base+2 compound the award would have been much larger, and coincidentally similar to simple interest at the higher statutory rates (£904 versus £970). This was because the two rates were similar over the claim period (Figure 2).

Figure 1: Interest awards at prevailing and current rates



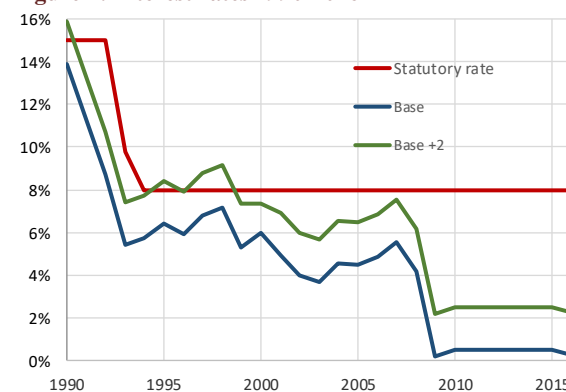
Generally, the interest award will be greater the higher the interest rate, whether compound rather

than simple, and the longer the duration of the cartel and/or time to settlement. For example, interest for the six years between the Commission’s *Vitamins*’ decision and settlement would have been around half the total interest award (Figure 1).

The threat of negative interest

The importance of interest is set to decline. Prior to 2008 statutory and base rates were high and not dissimilar. This altered dramatically following the adoption of quantitative easing (QE). Figure 1 charts the statutory (bold red line) and base rates from 1990. The base rate fell from levels near the statutory rate in the early 1990s to historical lows of 0.05% in 2008 and 0.25% in August 2016. In some countries ‘base rates’ are negative (ECB rate, Switzerland, Japan) and more widely real rates are negative.

Figure 2: Interest rates 1990-2016



The impact of these lower rates will be significant. If the recent Base+2 (= 2.5%) rate is used for the *Vitamins*’ cartel, the claimants would have received simple and compound interest of £288 and £348 (Figure 1, last two columns) or a half to one-third of the interest awarded at the then prevailing rates respectively.

Low interest rates have wider implications. They make antitrust infringements more likely because they increase the net present value of the illegal gains, encourage defendants to delay settlement as the interest penalty is lower, and discourage claimants from suing as damages are lower.

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