QUANTIFICATION OF DAMAGES IN COMPETITION LAW:

A BRIEF PAPER FOR THE PURPOSES OF DISCUSSION 4 MAY 2023

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Introduction

1. Even though we are marking 20 years of the Competition Appeal Tribunal judgments on the topic of quantification of damages have been relatively scarce. A similar story has been seen in the High Court. Whether it was initially a cultural uncertainty about competition law, concerns about cost or, as time has gone on, settlements, we have limited case law.

2. This paper has been prepared for the purposes of assisting the discussion of the issues of quantification at the conference. Indeed, given pending cases and applications to appeal there is a certain sensitivity about what can be said.

3. The paper does not purport to provide a comprehensive account of principles of quantification or summarise all of the relevant case law. Instead, it seeks to identify some basic points in a quantification system that remains based in the principles of tort but which has increasingly adapted to the particular exigencies of competition litigation. It briefly summarises some of the CAT's key damages case law (without getting into too much detail of what, in some instances, were epic litigation sagas). It then seeks to highlight some questions arising in relation to quantification on the following topics: (i) uncertainty and the "broad axe" approach; (ii) causation in the context of pass-on; and (iii) the compensatory principle within the collective proceedings regime.

Some basic principles

4. Private follow-on actions for damages in competition law fall under section 47A of the Competition Act 1998, which provides for parties to bring claims before the CAT in respect of an infringement decision or alleged infringement of the Chapter I or II

[1] I am grateful to Hugh Whelan for his assistance in preparation of this paper. Typos, infelicities and any idiocies are mine.

prohibitions (or infringements of Articles 101 or 102 of the TFEU for activity prior to 31 December 2020). Although there was, historically, a discussion about whether claims for competition damages should be seen as a *sui generis* tort, it now seems to be accepted that these claims fall under the tort of breach of statutory duty.

5. Prior to quantification, the Claimant must establish actionable harm, proving that damage forms the "*gist*" of the tort action on the balance of probabilities.[2] Losses are then quantified in a separate process but one which may take into account the basis for and evidence of the infringement. In non-class actions cases at least, the exercise is undertaken by reference to the compensatory principle: the tribunal seeks to "*put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*"[3]

6. Losses are not limited to the "*gist"* damage. The Claimants have a "*right to full compensation*", covering "*actual loss and… loss of profit, plus the payment of interest*", but not "*overcompensation, whether by means of punitive, multiple or other types of damages.*"[4]

7. It is the Claimant that initially bears the burden of quantifying loss before the CAT, being obliged to provide "*an estimate of the amount claimed in damages, supported by an explanation of how that amount has been calculated.*"[5] Whilst there is a substantial evidential requirement, however, it is a *cri de coeur* of claimants that they suffer from information asymmetries particularly in the face of secretive cartel behaviour which means that the burdens on them should be attenuated. Indeed, whilst it does not now apply in the UK allowances are made to the Claimant by Article 17(1) of the Damages Directive, which provides that "*neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult*".

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[2] Adopting Professor Jane Stapleton's terminology. See: Stapleton, "The Gist of Negligence: Part 1 Minimal Actionable Damage", *Law Quarterly Review*, 1988, Vol.104 (April), p.213-238

[3] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, p.39 (cited with approval in *Sainsbury's Supermarkets and others v Mastercard Incorporated and others* [2020] UKSC 24; [2020] Bus LR 1196, para 194)

[4] Article 3(2)-(3) of Directive 2014/104 ("the Damages Directive"), implemented into domestic law by The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385)

[5] Competition Appeal Tribunal Rules 2015 (SI 2015/1648), Rule 30(3)(e)(i)

8. As to the CAT's determination of a compensatory figure, it applies a 'but for' test, adopting a counter-factual scenario in which the rules of competition law were not breached.

9. This process often entails technical, economic consideration of the 'but for' world. In cases where it is alleged that an overcharge was imposed by reason of the unlawful conduct, an assessment of the counter-factual competitive price against actual prices is undertaken. The measure of overcharge can then be applied to a value of commerce affected. In assessing loss, however, questions of pass on and/or volume effects may also play a role. Damages can be awarded for harm that extends beyond the established infringement period where it can be shown that there is a 'run off' effect.[6]

10. Adopting the (somewhat dated but nonetheless) evocative language of case law it has been said that the tribunal may quantify damages on a "*broad axe*" basis, "*taking into account of all manner of risks and possibilities*".[7] Complexity will not deter the CAT in quantifying damages: "*If the necessary elements of the tort are made, the claimant or claimants have a right to damages, no matter how difficult or recondite the assessment process*".[8] Notably Article 17(3) of the Damages Directive provides for national competition authorities to "*assist [the] national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.*"[9] That sort of involvement seems less likely to be significant (even where permissible) om *inter-partes* proceedings where extensive disclosure is the norm (albeit in certain cases involving regulatory schemes, regulators have already provided certain assistance[10]).

Some quantification cases – short summaries

Cardiff Bus[11]

[6] *Healthcare At Home v Genzyme* [2006] CAT 29

[7] *BritNed Development Ltd v ABB AB and another* [2018] EWHC 2616 (Ch). Para 12(6)

[8] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16, para 172

[9] Article 17(1)-(3) Damages Directive

[10] See, for example the *Gas Insulated Switchgear* litigation.

[11] *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19

11. This was a follow-on action from an OFT decision,[12] which had found that between 19 April 2004 and 18 February 2005, the Defendant had abused its dominant position by operating "no frills" bus services with the intent of excluding the Claimant from the market. The CAT awarded a sum of £33,818.79 plus interest for loss of profits, adopting its own counterfactual scenario to arrive at this sum. The CAT rejected the claims for loss of a capital asset, loss of commercial opportunity, wasted staff and management time, and liquidated costs, holding that the Claimant would have become insolvent in any event. But the tribunal did award exemplary damages of £60,000, due to its finding that the Defendant "*knew that it was doing something illegal*", which was in "*cynical disregard*" of the Claimant's rights.[13] The tribunal viewed itself to be capable of awarding exemplary damages because no fine had been initially imposed by the OFT, meaning there was no risk of double jeopardy.

Albion Water[14]

12. This was a follow-on action from an Ofwat appeal, which had found that the Defendant had abused its dominant position by imposing a margin squeeze on the price it charged the Claimant for the use of its water pipes. The CAT rejected the Defendant's submission that the counterfactual should assume the Defendant would have charged the maximum possible amount, instead holding that the counterfactual price should be "*reasonable*".[15] The CAT awarded compensatory damages of £1,694,323.50 plus interest. The CAT also awarded damages for the Claimant's loss of a chance to supply water to a third party, to the sum of £160,149.66 plus interest.[16] The CAT relied on the Defendant's quantum model to arrive at these sums. The CAT declined to award exemplary damages, lacking evidence that the Defendant intended to issue an unlawfully excessive price or deliberately closed its eyes to the excessive price.

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[12] CA98/01/2008

[13] *Cardiff Bus*, paras 586-593 (emphasis in original). Note that this Award of exemplary damages would no longer be possible under Article 3(3) of the Damages Directive, which has effect in relation to any infringements that started on or after 9 March 2017 (see Part 8, Schedule 8A of the Competition Act 1998)

[14] *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6

[15] *Albion Water*, para 71

[16] Cf. *Enron Coal Services v English Welsh & Scottish Railway Ltd* [2009] CAT 36, where the CAT held that the Defendant had abused its dominant position by offering discriminatory haulage rates to the Claimant, but declined to award damages for the Claimant's loss of chance to offer competitive haulage rates to a power station, EME, because the Claimant "*had no real or substantial prospect of supplying coal to EME*" (at [221]).

Sainsbury's Supermarkets[17]

13. This was a hybrid action wherein the CAT held that the Defendant had acted in breach of Article 101 TFEU by implementing fees known as Multilateral Interchange Fees ("MIFs"), which the Claimant was required to pay on card transactions under the Defendant's payment scheme. The CAT quantified damages by reference to the counterfactual scenario of what fees would have been set were they not in breach of competition law, taking account of expert views while also engaging in its own "*counterfactual speculation*".[18] The CAT held that there had been no pass-on and awarded a sum of £66,582,245 plus interest to the Claimant, less the Claimant's collateral benefit. The Defendant appealed to the Court of Appeal and then the Supreme Court, which broadly upheld the CAT decision, subject to the question of the broad axe principle within pass-on.[19]

BritNed[20]

14. This was a follow-on action from a European Commission decision, which found a cartel among producers of high voltage power cables between 1999 and 2009.[21] The High Court accepted the Claimant's overcharge claim, but rejected claims for lost profit and compound interest. The Claimant was awarded €11,700,000 in damages. On appeal, the Court of Appeal reduced the damages payable to the Claimant, owing to fact that the Defendant's cartel savings had not caused demonstrable loss to the Claimant.[22]

DAF Trucks[23]

15. This was a follow-on claim from the European Commission's decision that five trucks manufacturers had breached Article 101 TFEU and Article 53 EEA between 1997 and 2011, principally through the exchange of commercially sensitive information.[24] The CAT ruled that the infringement had caused the Claimants loss in the form of overcharge. The

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[17] *Sainsbury's Supermarkets Ltd v Mastercard Incorporated and others* [2016] CAT 11

[18] *Sainsbury's* (CAT), para 219

[19] *Sainsbury's Supermartkets Ltd v Mastercard Incorporated and others* [2020] UKSC 24; [2020] Bus LR 1196

[20] *BritNed Development Ltd v ABB AB and another* [2018] EWHC 2616 (Ch)

[21] *Case AT.39610 – Power Cables*

[22] *BritNed Development Ltd v ABB AB and another* [2019] EWCA Civ 1840; [2020] Bus LR 1073

[23] *Royal Mail Group Limited and others v DAF Trucks Limited and others* [2023] CAT 6

[24] *Case AT.39824 – Trucks* (19 July 2016)

CAT rejected the regression models proposed by all the parties, which had estimated the overcharge as ranging between 0% to 11.1% of the value of commerce.[25] Instead, the CAT applied a broad axe approach and assessed the overcharge to be 5% on the value of commerce throughout the relevant period. The CAT rejected DAF's mitigation defences, categorised as Complements, Resale Pass-on, and Supply Pass-on. In respect of Overcharge losses, the CAT ordered DAF to pay a sum of £15,702,463 to Royal Mail and £1,974,068 to BT, plus interest. In respect of Financing Losses, DAF was ordered to pay Royal Mail a sum of £19,400,249, plus interest.

Issue 1: Uncertainty & the Broad Axe

16. Damages actions frequently concern historical infringements about which the parties lack the requisite information for exact quantification. Whilst the Tribunal (and the High Court) seek to glean relevant information from the prior infringement decision (in follow on cases) and the extensive disclosure of contemporaneous material that is normally provided, there generally remains an uncertainty problem.

17. A partial solution has been provided by recourse to expert evidence, which models the Claimant's loss. But the reliance on this evidence poses its own problems. In *DAF*, the CAT observed that many of the issues relating to overcharge rested "*on highly technical choices over the precise specification of the econometric models that the experts employed… Nevertheless, on all those issues, [the experts for the Claimant and Defendant] firmly concluded on the side that produced the outcome in favour of their respective clients.*"[26] As such, whilst expert evidence may be of assistance, it cannot be assumed to have resolved the uncertainty problem.[27]

18. One tool which has been reached for in order to address this problem of uncertainty is the "broad axe" principle. The term is derived from *Watson Laidlaw & Co Ltd v Pott, Cassells and Williamson*, where Lord Shaw observed that "*the restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the*

[25] 0% proposed by DAF in relation to all claims; 9.95% proposed by BT in relation to its claim; 11.1% proposed by Royal Mail in relation to its claim.

[26] *DAF* at [235].

[27] Indeed, the CAT has adopted its own modelling in various proceedings (*DAF*, *Cardiff Bus*, *Sainsbury's*), as has the High Court (*BritNed*).

practice of the broad axe".[28] This dictum was applied in Devenish Nutrition Ltd v Sanofi-Aventis SA (France), which concerned damages arising from a vitamin cartel, and where Lewison J observed that the courts have taken a "*pragmatic view of the degree of certainty with which damages must be pleaded and proved*".[29] On appeal, the Court of Appeal approved this approach, observing, "*A judge wielding the broad axe is capable of doing justice in such a case*" where quantum is uncertain.[30]

19. The broad axe approach is not intended to alter the principles of assessment of harm in competition law. The burden remains on the claimant to prove actionable harm, and it is only at the quantum stage that the claimant "*may benefit from the application of the "broad axe" principle*".[31] Similarly, the approach is not intended to alter the compensatory principle. Rather, it is intended to support the compensatory principle and in doing should pursue the overriding objective set out in the Civil Procedure Rules of enabling the court or tribunal to deal with cases justly and at proportionate cost. The point was noted by the Supreme Court in Sainsbury's: "*The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates.*"[32]

20. The CAT first referenced the "broad axe" approach in Sainsbury's, albeit without substantive detail as to what this approach might entail.[33] The issue was considered in more depth on appeal. The Court of Appeal rejected the proposition that a "broad axe" approach should be adopted to make allowances for uncertainties in a mitigation defence: "*There is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant.*"[34] However, the Supreme Court overruled the Court of

[28] (1914) 31 RPC 104, paras 117-118

[29] [2007] EWHC 2394 (Ch), paras 523-524

[30] [2008] EWCA Civ 1086, para 159 (Tuckey LJ)

[31] BritNed (CA), para 244

[32] Sainsbury's (SC), para 217. To similar effect, see: London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann [2022] EWCA Civ 1077, para 59, which noted that the broad axe was "*not so much a substantive principle of law as a description of a well-established judicial practice whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead use their forensic skills to do the best they can with limited material to achieve practical justice.*"

[33] Paras 423(3); 501; 526

[34] Sainsbury's (CA), para 331

Appeal on this point: "*We see no reason in principle why, in assessing compensatory damages, there should be a requirement of greater precision in the quantification of the amount of an overcharge which has been passed on to suppliers or customers, because there is a legal burden on the defendants in relation to mitigation of loss.*"[35] As such, the Supreme Court considered the broad axe approach to aid not only Claimants in bringing a claim, but also Defendants in asserting mitigation.

21. As to the application of the broad axe in practice, judges have been reticent to apply any strict rules. An attempt to guide the application of the principle was made in *Asda Stores Ltd v Mastercard Inc*, where Popplewell J proposed that the court should "*err on the side of under-compensation.*"[36] But this position was not accepted by the Court of Appeal in *BritNed*: "*the aim of the court should always be to give the right amount of compensation, without erring in either direction.*"[37] Beyond this broad statement, the CAT has held that relevant methods for employing the broad axe approach include "*averages, extrapolations and aggregates.*"[38]

22. In the face of a lack of clear guidelines, it may be that the broad axe approach can be seen as having afforded the courts and tribunal wide discretion when quantifying damages. It is not yet clear that a consistent approach to the wielding of the axe is being adopted.

23. In *BritNed*, the High Court quantified the Claimant's loss by reference to the cost of the additional copper the Defendants would have absorbed in a counter-factual scenario to maintain the bid that was the subject of the overcharge, in addition to the money saved from common costs. This approach was upheld as aligning under the "broad axe" principle on appeal.

24. In *DAF* the CAT began by reasserting the orthodox assessment that the broad axe approach would be "*largely based on expert econometric evidence*".[39] Then, the CAT declined to adopt either expert's model of loss, and cast doubt on the expert evidence provided in

[35] *Sainsbury's* (SC), para 219

[36] *Asda Stores Limited and others v Mastercard Incorporated and others* [2017] EWHC 93 (Comm), para 307

[37] *BritNed* (CA), paras 64-65

[38] *Dawsongroup plc v DAF Trucks NV* [2020] CAT 3, para 40(3), cited in *DAF*, para 174

[39] *DAF*, para 174

relation to various sub-issues.[40] Concerned to avoid what it considered "*would be an exercise in spurious accuracy.*[41] the CAT relied on the broad axe, "*as the authorities enable us to do*", concluding "*a fair and reasonable broad axe view on Overcharge comes out at 5% for both Claimants (ie approximately half of what they are claiming)*."[42] The CAT emphasised that its judgment was "*based both on the evidence that was presented in the experts' models, and on a wider appreciation of the factual context and witness evidence.*"[43] DAF is, at the time of writing, subject to applications for permission to appeal. It is, therefore, inappropriate to comment further upon it. Instead, there are perhaps two more general points which arise for discussion:

24.1. Beyond showing on the balance of probabilities that there was some loss (a gist of loss is made out), does a claimant bear any burden of proof as to a range of loss?

24.2. What are the principles which should govern the circumstances and extent to which the broad axe is to be wielded?

Issue 2: Pass-on & the issue of causation

25. The doctrine of pass-on applies where an individual is making an overcharge claim "*and in its defence, the defendant claims that the claimant passed on all or part of the overcharge… to another person*".[44] It has been accepted that it is for the defendant to prove pass on notwithstanding the information asymmetry problem arising in the 'opposite direction' from issues in relation to overcharge. It is noted that Article 13 of the Damages Directive establishes that "*[t]he burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.*" The Supreme Court has provided two doctrinal justifications for pass-

[40] See, e.g.: Regression models: "*we do not think it possible or necessary to reach a definitive view on which was the better model to use*" (at para 372). Currency and exchange rates: "*we do not say one approach is right and the other wrong. Instead, we are left with the feeling that the answer is more nuanced than that and that the Infringement effect lies somewhere between the two [expert's] positions*" (at para 410). Global Financial Crisis: "*the actual answer may be found somewhere between the opposing positions which is more likely to reflect the true impact of the GFC and DAF's pricing*", (at para 440).

[41] *DAF*, para 479

[42] *DAF*, para 484

[43] *DAF*, para 479

[44] Paragraph 11, Schedule 8A of the Competition Act 1998

on: (1) "*it is required by the compensatory principle*", and (2) pass-on addresses the "*need to avoid double recovery through claims in respect of the same overcharge*" by direct and subsequent purchasers.[45]

26. While raised as a defence, the Supreme Court has clarified that "*pass-on is an element in the quantification of damages rather than a defence in a strict sense.*"[46] In this context, pass-on has introduced novel issues into the quantification of damages, principally through the concept of causation: what must a Defendant do to prove that an overcharge has been passed on?

27. The CAT addressed the problem of causation in *Sainsbury's*, emphasising that a causal connection between Overcharge and pass-on must be established for pass-on to apply: "*(i) First… the pass-on defence is only concerned with identifiable increases in price by a firm to its customers. (ii) Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so.*"[47] The CAT also distinguished the economic question of pass-on from the more confined legal question of pass-on: "*whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.*"[48]

28. On appeal, the Court of Appeal did not accept that it was a requirement for the Defendant to establish that there would be other parties who could claim the amount passed on. Upon further appeal, the Supreme Court broadly affirmed the pass-on approach of the inferior courts and tribunals.[49] As to the matter of causation in pass-on, the Supreme Court quoted the following statement from *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*: "*when in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished*

[45] *Sainsbury's* (SC), para 198

[46] *Sainsbury's* (SC), para 198

[47] *Sainsbury's* (CAT), para 484(4)

[48] *Sainsbury's* (CAT), para 484(4). Note that this characterisation was disputed in Mr Ridyard's dissenting opinion in *DAF* at para 698.

[49] With the exception of the "broad axe" point discussed in the previous section.

his loss, the effect in actual diminution of the loss he has suffered may be taken into account".[50]

29. Notions of legal causation were referred to extensively by the CAT in *DAF*. The Defendants alleged that the Claimants had passed-on the entirety of any overcharge, which was evidenced by the Claimants' disclosed budgetary processes and the regulatory schemes under which they operated. In determining this issue, the Tribunal sought to find "*a test that enables the court or tribunal to work out who has actually suffered loss as a result of the Overcharge.*"[51] The CAT emphasised that it was not enough for the Defendant to prove a factual connection between the overcharge and the increase in rates charged. Instead, the Defendant must prove the existence of a "*necessary proximate and direct causative link required by the legal test for causation*".[52] The CAT held that no such causative link existed on the facts: it was "*not enough for DAF to say that all costs*", including the overcharge, "*are fed into the Claimants' or their regulators' business planning and budgetary processes. There must be something more specific than that*".[53]

30. The CAT did not, however, consider the fact that the cartel was secret was critical, noting that "*knowledge of the Overcharge… is not a necessary factor to establish a sufficient causal connection.*"[54] The CAT also questioned the helpfulness of the Supreme Court's categorisation of a Claimant's options in response to an overcharge in the *Sainsbury's* judgment, appearing instead to advocate for a more practical approach to questions of pass-on, based in fact.[55] Finally, the CAT gave examples of factors that a Defendant might rely on to prove legal causation, including "*Knowledge of the Overcharge*" and "*the relationship or association between what the Overcharge is incurred on and the product whose prices have been increased*", among others.[56]

31. A further point of note from the *DAF* judgment was the dissenting opinion of Mr Derek Ridyard, the economist member of the Tribunal. Mr Ridyard disputed the majority's

[50] Emphasis added by Supreme Court.

[51] *DAF*, para 217

[52] *DAF*, para 230

[53] *DAF*, para 228

[54] *DAF*, para 224

[55] *DAF*, para 218

[56] *DAF*, para 228

reasoning on the matter of supply pass-on. The disagreement was on two bases: first, Mr Ridyard disagreed with the majority's effective position that "*an effect that is too small to measure cannot exist*"; second, Mr Ridyard viewed the Defendant's expert to have adequately proved how the relevant regulatory processes showed that it "*was capable, and that in all likelihood it did in fact, achieve its stated aim, of allowing the Claimants to pass on reasonably incurred costs in downstream prices.*"[57] But this likelihood did not mean that Mr Ridyard diverged from the majority's ultimate conclusion rejecting the supply pass-on defence. On this matter, Mr Ridyard viewed himself to be bound by the principle of effectiveness such that if pass on were to be allowed in this case, the effectiveness of competition law and damages actions would be undermined. He observed that his dissent may be useful "*in future cases in which the points on which we disagree might lead to different outcomes on damages awards.*"[58]

32. Again, in circumstances where DAF may be subject to applications to appeal, it is inappropriate to comment on the case in any detail. However, general questions arise in relation to issues of pass on:

    32.1. What is the role and significance of legal causation?

    32.2. Are lawyers hunting for limiting criteria in relation to pass on that economists would consider unnecessary?

    32.3. Even taking account of the Supreme Court's ruling, what should any limiting criteria be?

Issue 3: Collective proceedings & the (not) compensatory principle

33. Whilst the case law on non-collective damage quantification raises a number of important questions, it has nonetheless been faithful to principles of compensation. The novel class action regime has shown greater 'promiscuity'.

34. Section 47C(2) of the Competition Act 1998 provides, "*[t]he Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the*

[57] *DAF*, para 738

[58] *DAF*, para 693

amount of damages recoverable in respect of the claim of each represented person." This provision is supplemented by Rule 79(2) of the CAT Rules 2015, which provides: "*[i]n determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph 1(c), the Tribunal shall take into account all matters it thinks fit, including – […] (f) whether the claims are suitable for an aggregate award of damages*".

35. The requirements for quantifying damages in class actions were a key issue in the *Merricks* litigation. The CAT refused to certify the applicant's CPO application. One reason for this refusal was the applicant's failure to adopt a model of damage distribution that accorded with the compensatory principle. While recognising the role of the "broad axe" approach, the CAT noted that "*[t]he governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach… [T]his application for over 46 million claims to be pursued by collective proceedings would not result in damages being paid to those claimants in accordance with that governing principle at all.*"[59]

36. On appeal, the Court of Appeal held that the CAT's ruling on this point contained a legal error. The relevant statutory provisions for collective actions did not require aggregate damages to be distributed according to the compensatory principle.[60] The Supreme Court agreed: "*[a] central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss.*"[61] Indeed, the Court appeared to go further than the Court of Appeal, holding that in class action schemes, "*the compensatory principle is expressly, and radically, modified… The only requirement, implied because distribution is judicial supervised, is that it should be just, in the sense of being fair and reasonable.*"[62]

37. There are numerous class claims pending where difficult questions as to the approach to assessing of class quantum will be considered. Without wanting to pre-empt the 'fun' that these cases involve, it is clear that the lack of need for particularised loss by specific

[59] *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2017] CAT 126, para 88

[60] *Merricks v Mastercard Incorporated and others* [2019] EWCA Civ 674; [2019] Bus LR 3025

[61] *Merricks v Mastercard Incorporated and others* [2020] UKSC 51; [2021] Bus LR 25, para 77

[62] *Merricks* (SC), para 58

individuals may affect approaches to evidence and quantification in this novel jurisdiction. The extent to which any such developments might also modify non-collective claims is a matter of entertaining speculation. Some questions which arise include:

37.1. Does the CAT need an even broader axe (or a sharper scalpel) in order to deal with collective action quantification?

37.2. Is the burden on the class simply to show a gist of loss or prove some sort of range of quantum?

37.3. How significant is direct factual evidence in collective action quantification: is it simply anecdote (in either direction)?