Calculating Interest in Competition Cases in the UK: It's no longer Simple

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In competition cases, the wheels of justice often turn slowly. Enforcement against a bad act can take years of investigation and appeals, and subsequent or standalone litigation claims can themselves take years. A victim of the infringement may be left "*out of its money*" for a very long time before redress. So calculating and awarding the correct amount of interest within the ultimate damages is crucial to fair and effective compensation. And these interest elements can be very large indeed.

In the 2023 *Trucks* decision, for example, Royal Mail Group received compensation some twelve years after the European Commission's dawn raids against a cartel that had been active for fourteen years (commencing in 1997).[2] The compound interest element sought by Royal Mail Group in its original Particulars of Claim in March 2017 was over £190 million, just over 70% of the total compensation it was seeking. In the end, the interest element was around 55% of the total compensatory damages awarded to Royal Mail Group.[3]

In the 2021 *Merricks CPO* decision, the CAT ruled out a separate head of loss for compound interest claimed by the consumer class.[4] The ruling on the compound interest point alone was estimated to have reduced the total value of the claim by approximately £2.2 billion. Indeed, the CAT referred to the interest claim in this collective action as "*a gargantuan amount*", and even on a simple interest basis was considered to exceed £6 billion (as valued in January 2021).[5]

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[2] Royal Mail Group and British Telecom v DAF Trucks, [2023] CAT 6, February 2023. I refer to here as "***Trucks***". Royal Mail Group had commenced its claim in the High Court more than six years earlier.

[3] *Trucks* Consent Order dated 3 March 2023 on the CAT website.

[4] Merricks v Mastercard, [2021] CAT 28, Further Judgment, Application for a Collective Proceeding Order ("**CPO**"), August 2021. I refer to here as "***Merricks CPO***".

[5] *Merricks CPO*, paragraphs 76 and 93.

The CAT has discretion on how it calculates and awards interest, and this is an area where the CAT's approach has evolved significantly over its first twenty years (despite there being relatively few cases in this period reaching the stage of damage award[6]). The CAT has sought to navigate tensions between law and economics, between the types of evidence and proof required, and between precision and proportionality.

Interest may not seem as glamorous as Overcharge and Pass-On, but it can have very large impacts on 'delay or pay' settlement dynamics ahead of trial, on expert and witness evidence at trial, and ultimately it is essential to whether the UK regime is truly compensatory – avoiding both under-compensation and over-compensation.[7]

This short discussion paper looks at how the CAT has evolved its approach to compensatory interest over time, and where further battles lie ahead. It tracks the move from simple interest and benchmarks – e.g., Bank of England (**BoE**) base rate plus two percentage points – to the greater precision and complexity of recent cases where compound interest losses and forensic analysis of claimant's financing choices have been analysed. And it points at some of the emerging challenges in interest calculation in collective actions and in exclusionary abuse cases.

The paper is structured in three parts:

- Part 1 examines the choices between simple and compound interest.
- Part 2 examines the choices in the level of interest to be applied.
- Part 3 looks at some of the future issues the regime will need to navigate.

Part 1: Choosing between Simple and Compound Interest

The debate between whether simple or compound interest should be applied in competition cases has featured prominently in recent CAT decisions.

Compound interest is often described as the eighth wonder of the world. If interest can be earned on the interest already earned (i.e., "*interest on the interest*"), the total grows exponentially over time. It is unsurprising that claimants seeking redress (and many economists) have often sought compound

[6] The paper focusses on a selection of key CAT decisions on competition matters. It includes learnings also from the *BritNed* decision in the High Court (BritNed v ABB, [2018] EWHC 2616 (Ch), which I refer to here as "***BritNed***"). It does not, however, look in detail at decisions in other UK courts or tribunals or areas of law.

[7] The European Damages Directive makes clear that "*interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until when compensation is paid*" (Article 12, 2014/104/EU).

interest rather than simple interest. But for many years, the law meant that only simple interest was given in damage awards.

Indeed, the CAT acknowledged in *Trucks* in 2023 that: "*For some reason, lawyers and judges seem particularly averse to compound interest. By contrast, economists have no problem with compound interest as it is what happens in the real world in borrowing and lending arrangements*."[8] The CAT ultimately concluding that "*… it is perhaps surprising that compound interest is not ordered more often and the law still seems to be wedded to simple interest*".

Prior to 2016, only simple interest was awarded by the CAT:

- In *Cardiff Bus* in 2012,[9] the CAT awarded a small bus operator, *2 Travel,* around £33,000 for lost profits and £60,000 for exemplary damages following an Office of Fair Trading (OFT) predatory pricing decision. Simple interest was awarded on the lost profits element only. The CAT awarded a lower interest rate – at two percentage points above the BoE base rate – than sought by the claimant. The claimant asked for interest of 8 percent per annum to provide both compensation and to mark the serious nature of intentional breach of competition law. But the CAT rejected the latter argument, affirming that the purpose of interest was purely compensatory.[10]
- In *Albion Water* in 2013,[11] the CAT awarded Albion Water just over £1.8 million in damages following an OFT margin squeeze finding against a Welsh water company. Albion had sought either simple interest at 8 percent per annum or compound interest at 1 percent above LIBOR. The CAT explicitly stated that "*[w]e do not consider that this is a case where it is appropriate to award compound interest*" but provided no further reasoning.[12] It decided to follow the *2 Travel* precedent of simple interest at BoE base rate plus two percent.

In 2016, however, the landmark *Sainsbury's* decision saw a shift to a more nuanced and forensic approach to calculating interest, part of which was to open the way to compound interest losses in competition cases (if these could be satisfactorily proven).[13]

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8 *Trucks*, paragraph 762. In the *Trucks* decision, the CAT referred extensively to extracts from *Equitas* (Equitas Limited v Walsham Brothers & Co. Limited [2013] EWHC 3264, I refer to here as "***Equitas***"), including: that "*it is impossible to borrow commercially on simple interest terms*"; and, where borrowing had taken place *"…the question of whether interest should be simple or compound answers itself. While simple interest has the virtue of simplicity as Lord Hope observed, it also has the certainty of error and injustice*".

9 2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited, [2012] CAT 19. I refer to here as "***Cardiff Bus***".

10 *Cardiff Bus*, paragraph 597.

11 Albion Water v Dŵr Cymru Cyfyngedig, [2013] CAT 6. I refer to here as *"**Albion Water**"*.

12 *Albion Water*, paragraph 226.

13 Sainsbury's v Mastercard, [2016] CAT 11, July 2016. I refer to here as "***Sainsbury's***".

The CAT relied on the House of Lords decision of 2007 in *Sempra Metals*.[14] Lord Nicholls in *Sempra Metals* had, for example, said: "*[w]e live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality*."[15]

Drawing on this precedent, the CAT established that "*a claimant may recover his actual interest losses, including a loss of compound interest, provided the claim is particularized and proved*".[16] The CAT emphasised that a claim for interest is a loss like any other.[17] It faces the same proof of loss and rules relating to the recovery of damages. It could not be merely asserted or assumed.

For business claimants, momentum behind compound interest (if claimed) now seems strong. In *Trucks* in 2023, the CAT noted: *"[w]e have <u>no difficulty</u> in favouring a compound interest calculation over simple interest. This <u>accords with economic reality</u> and there is no legal bar to compounding the appropriate interest rate that we find to be applicable. This is what happens in the real world and it therefore corresponds to Royal Mail's actual losses. If it is appropriate to charge interest on a financial transaction, then it is <u>self-evidently</u> appropriate to apply interest also on any interest that has accrued between one period and another*."[18] Further, the CAT rejected the defendant's arguments that it was necessary for the claimant to show exactly what it would have done with the money in the absence of the Overcharge.

A business claimant can, of course, choose not to claim compound interest. It may perhaps wish to simplify its case and evidence at trial. Within the same *Trucks* decision, for example, the other claimant, British Telecom, was awarded only simple interest – at BoE base rate plus two percentage points – because it had "*maintained to the end*" that it was only seeking simple interest.[19]

However, despite the recognition of the economic reality of compounding, and that it is a "... *daily experience of everyone*" (in the words of Lord Nicolls), compound interest may not be easily available

14 Sempra Metals Ltd v Commissioners of Inland Revenue, [2007] UKHL 34. I refer to here as *"**Sempra Metals**"*.

15 *Sempra Metals*, paragraph 52.

16 *Sainsbury's*, paragraph 510.

17 Indeed, in the 2021 *Merricks CPO* decision (paragraph 80), the CAT explains that "*the landmark decision of the House of Lords in Sempra Metals established the basis on which compound interest may now be awarded, not <u>on</u> damages but <u>as part of</u> the damages*." In *Sempra Metals*, Lord Scott stated that: "*…interest losses caused by a breach of contract or by a tortious wrong should be held to be in principle recoverable, but subject to proof of loss, remoteness of damage rules, obligations to mitigate damage and any other relevant rules relating to the recovery of alleged losses*".

18 *Trucks*, paragraph 768, emphasis added.

19 *Trucks*, paragraph 826.

in collective actions which potentially risks leaving a wide gap in compensation claims. The CAT has indicated concerns about whether compound interest losses can be proven on an aggregate basis. And as discussed in the next section, the recognition and move towards more claimant-specific analysis of the level of interest also works against this being a common issue in a collective setting.

The CAT explored compound interest within a collective action in the *Merricks CPO* decision of 2021. The interest element in the case is very large given the size of the class (46.2 million claimants) and the interchange infringement spanning the period 1992 to 2008. Interest on a simple basis was claimed to exceed £6 billion, with a further £2.2 billion related to compounding.[20] The interest claim had been advanced on an aggregate damages basis. The CAT, however, ultimately ruled out the compound interest head of loss.

The class representative had noted that almost everyone in the class would likely have had borrowings and savings, appearing to echo statements from *Sempra Metals*, and so should be eligible for compound interest. However, the CAT considered that it was not sufficient only to show that individuals had borrowings and/or savings, but that *"[i]t is necessary to show, on a balance of probabilities, how they funded the additional expense or what they would have done with the additional money if there had been no Overcharge*".[21]

In the CAT's view this was not plausibly possible in the collective action because the average amounts of money that individual class members would likely have paid in Overcharge each year were so small – at, on average, under £10 per year per class member. It would not be possible to know whether the claimant would have simply spent a bit more, rather than reduced their borrowings or added to their savings.

While the accountancy expert for the CPO had proposed two alternative approaches to estimate the compound interest claim – one using a blend of interest rates from public sources, and the other identifying specific subsets within the class (who could be shown to be borrowers) to receive compound interest – the CAT was not satisfied. The CAT considered that these approaches rested on an assumption that the class member would have used the savings on the Overcharge to reduce their borrowings or add to their savings, and that the approaches failed to show "*as a matter of probability, that the money would not have been used simply for a little extra expenditure*".[22] In the CAT's view, the claimants had not advanced an appropriate method to prove how class members would have responded to this extra money and so forgone compound interest. Therefore, the CAT concluded that "*[w]e consider that*

20 *Merricks CPO*, paragraph 76.

21 *Merricks CPO*, paragraph 84.

22 *Merricks CPO*, paragraph 92.

in the absence of a credible or plausible method of estimating what loss by way of compound interest was suffered on an aggregate basis, this head of claim is not suitable for an aggregate award."[23]

As many consumer collective actions will involve small amounts of money for each member, and likely little chance of proving robustly what each claimant (or most claimants) would have done with the extra money at the time, the CAT's concerns in the *Merricks CPO* do raise a high evidential hurdle to future claimants (and their experts).

In sum, the CAT has over its first twenty years moved some way towards compound interest to better reflect economic reality and to offer fuller compensation to claimants. But future collective actions in particular face a challenge in pursuing and proving compound interest.

Part 2: Choosing the Level of Interest to Apply

Whether simple or compound interest is allowed, the choice of what levels of interest to then apply over time is then material.

As noted above in *Cardiff Bus* and *Albion Water*, the CAT had historically applied BoE base rate plus two percentage points in its (simple) interest awards. Indeed, in its recent *Trucks* decision, British Telecom was awarded this level of interest on the basis that this was "*the conventional approach of the CAT*".[24] None of the earlier cases provided detailed reasoning for this level of interest, but it provides a rule-of-thumb benchmark on what may be available in competition claims if the claimant does not pursue a different level.

In *Sainsbury's*, however, a much more nuanced "claimant-specific" approach to the level of compensatory interest was taken, as I discuss below. I will then also discuss the heated debate around whether a claimant's weighted average cost of capital ("**WACC**") – or alternatively its internal rate of return or hurdle rate – can be used as an approximation of its financing costs (and the return it would have expected had it had the funds to invest internally). The CAT has, to date, not accepted the legal merits of using the WACC in interest awards.

The Move Towards Claimant-Specific Analysis of Interest

In *Sainsbury's*, the CAT considered that the supermarket group would have financed different parts of the Overcharge in different ways, meaning that the Overcharge was partitioned and different interest rates were determined for, and applied to, different parts. Further, the applicable interest rates selected were claimant-specific – i.e., what was available at the time to Sainsbury's on its cash or its new debt –

[23] *Merricks CPO*, paragraph 97.

[24] *Trucks*, paragraph 830.

rather than linked to a public benchmark like the BoE base rate. The CAT also gave detailed reasoning on why it rejected the use of the Sainsbury's WACC as the appropriate level, which I discuss a later sub-section.

First, the CAT decided that interest should only be available on that part of the Overcharge that was not passed-on. MasterCard's passing-on defence had been rejected on a legal basis. Yet the CAT still considered that "*a substantial amount of the UK MIF – 50% – would have been passed on (albeit not in a manner which would have amounted to a "defence" of pass on)* ...", and so concluded that "*Sainsbury's is not entitled to any interest in respect of that portion of the overcharge that was passed-on (in the non-legal sense)*", as it suffered no actual loss on that money.[25]

The tensions between the legal and economic approach to pass-on is beyond the scope of this paper. But suffice to say, pass-on is a complex and hotly disputed area. The reader is directed to the dissenting opinion on pass-on of Mr Ridyard in the *Trucks* decision as illustration.

However, with regard to interest specifically, *Sainsbury's* opens up the argument that an economic level of pass-on should be used in interest calculations, even if the legal rate of pass-on determined by the CAT was much lower. Therefore, there may be grounds to have both a legal and an economic pass-on rate determined in the case.[26]

Further, the CAT decided that 50% of the Overcharge would have been passed on by Sainsbury's but did not provide specific reasoning why this percentage was chosen ahead of, say, 75%. MasterCard had indeed argued that economic theory suggested a pass-on rate nearer to 100% when all rivals in a competitive market face a common cost increase. The CAT appears to have applied the "*broad axe*" in circumstances where it says elsewhere in the judgment that determining how the Overcharge would have been dealt with in pass on to customers as "*unknowable*".[27]

Second, the CAT undertook a forensic analysis of Sainsbury's budget process evidence to assess how the 50% of the Overcharge that was retained by Sainsbury's would have been funded. The CAT concluded that cost cutting and spend reduction initiatives were not relevant as they could not be causally related to the Overcharge. It similarly concluded that equity issuance and sale-and-leaseback arrangements were not directly linked to the Overcharge. So it found that Sainsbury's would have funded the Overcharge through either cash balances or borrowing.

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[25] *Sainsbury's*, paragraphs 525 and 526, emphasis added.

[26] The Court of Appeal touched briefly on this also in Sainsbury's v Mastercard, [2018] EWCA 1536 (Civ), July 2018. The Court noted (at paragraphs 339 and 341) that *"[i]t is equally plain that, in restricting compound interest on the basis that 50% of the UK MIF was passed on by Sainsbury's, the CAT was making economic assumptions different from legal principles… Whether or not the CAT was entitled to limit compound interest by making those economic assumptions is not an issue in the appeal from the CAT. That would be a matter for Sainsbury's to challenge and it has not done so*."

[27] *Sainsbury's*, paragraph 465.

The CAT applied its "*broad axe*" to decide that "*of the 50% of the overcharge that would have been retained by Sainsbury's, 20% would have resulted in higher cash balances, and 30% in lower borrowing*".[28] There was no detailed explanation in the judgment on why the 20% and 30% levels were selected.

The interest rate on cash balances that would have been available to Sainsbury's was not in dispute between the parties but was not published in the judgment. It would likely have been low.

The increased borrowing cost caused by the Overcharge was contended by the parties. Sainsbury's argued that absent the Overcharge it would have been able to avoid some of its more expensive sources of funds. The CAT dismissed these arguments as too theoretical (discussed further below). The CAT ultimately accepted the argument from MasterCard that the debt that Sainsbury's would have paid down had the Overcharge not occurred would be "*new debt taken either at a variable rate or on terms permitting regular refinancing*".[29]

So after very detailed consideration by the CAT, Sainsbury's succeeded on the argument on compound interest but received no interest on 50% of the Overcharge (economic pass-on), low interest on 20% (cash balances), and relatively low interest on 30% (new debt). There is no way to check how this ultimately compared to applying the simpler BoE plus two percent benchmark.

The move towards more claimant-specific analysis of financing costs is evident also in the Royal Mail Group element of the *Trucks* decision in 2023. The CAT rejected the use of Royal Mail's (higher) WACC, preferring to consider interest based on the cost of debt. However, there was detailed discussion on how certain internal loans are categorised. The CAT also preferred the claimant expert's approach to determining whether the rate from cash accounts (or short-term investments) or new debt should be applied. During a period when Royal Mail Group was a "*net investor*" the short-term investments rate was applied, and during a period when it was a "*net borrower*" the new debt rate was applied (as it could have borrowed less absent the Overcharge), which the CAT considered is "*how a rational business… would have used extra funds that it had at the relevant time*".[30] This latter step appears to be further refinement on the splitting approach (20% cash balances and 30% new debt) used in *Sainsbury's*.

Steering Clear of WACC (and Cost of Equity)

Another area in which there has been some tension between economic / corporate finance theory and the law has been on whether a claimant's average 'cost of capital' – incorporating a 'cost of equity' –

[28] *Sainsbury's*, paragraph 525.

[29] *Sainsbury's*, paragraph 544.

[30] *Trucks*, paragraph 824.

is an appropriate level to use for the interest calculation. To date, the CAT has rejected the 'cost of equity' being an "*actual loss*" (as referred to in *Sempra Metals*) to the company as it considers it not to be an "*actual cost*" to the company.

A firm can raise finance for its operations from a mix of debt and equity. But equity investors (shareholders) generally require a higher rate of return than lenders (debt-providers) because equity investors face more risk than lenders – for example, equity investors are generally last in line to recover any value in the event of the business entering bankruptcy. The 'cost of debt' is also usually clearly set out in regular interest payments on the loans, whereas shareholders have to hope to be paid dividends out of retained earnings (profits). A firm's weighted average cost of capital (WACC) blends together the company's 'cost of debt' and the (higher) 'cost of equity', with the weighting depending on the debt-to-equity (gearing) of the company, to give an approximation of the firm's average cost of capital. Many companies calculate and use WACC estimates in their internal financial decision-making. And many regulators and competition authorities use WACC in their assessments of firms' cost of capital – the CMA, for example, relies on WACC in economic profitability analyses.

Both Sainsbury's and Royal Mail Group sought interest at levels of their WACC (and could provide factual evidence of using WACC internally within their business), but the CAT rejected the WACC – specifically the cost of equity element within it – as an appropriate metric for interest in damages. The issue of cost of equity was assessed also in the *BritNed* case, where BritNed sought interest in line with its targeted Internal Rate of Return (IRR). I will start with *BritNed* because it helps illuminate some of the logic on cost of equity, before returning to the CAT's reasoning in *Sainsbury's* and *Trucks*.

In the 2018 *BritNed* decision, the claimant had argued that the Overcharge had required it to raise additional capital which was provided by its parent companies by way of equity. The equity was provided on the expectation of a minimum return, reflected by its IRR.

However, Mr Justice Smith decided that the unique financing structure of BritNed meant that it was seeking to claim for losses (financing costs) that were not its own. BritNed was 100% financed through equity from its two main shareholders (National Grid and TenneT), and it had no other financing/debt costs.

Mr Justice Smith accepted that the shareholders may have invested in the hope of BritNed achieving and returning to them a target IRR, but there was still risk in that IRR estimate (it was not certain or committed), and "*[to] calculate interest damages [for BritNed] by reference to the hoped-for <u>profit</u> of National Grid and TenneT is fundamentally wrong... [it] would involve clear over-compensation:*

damages would be calculated by reference to a projected rate of return on a risky project without any reference to the risks to that profit being achieved."[31]

Mr Justice Smith concluded: *"The cost of the equity injection is one borne by the shareholders, and one which, in principle, ought to be recoverable by them. But they are not party to these proceedings...*".[32] BritNed (the company itself) was not awarded any interest, as the expected shareholder returns were not an 'actual cost' to the company ("*the equity stake … involves no cost to BritNed*"), but rather were merely the 'hoped for' profits of its equity investors.

WACC was also examined extensively in the 2016 *Sainsbury's* decision. Sainsbury's considered WACC best reflected average financing costs of a company and should be used irrespective of which of Sainsbury's particular funding sources were directly affected by the unlawful Overcharge (i.e., it was not necessary to link the Overcharge directly to a change in its cost of equity).

The expert for Sainsbury's relied on the Modigliani-Miller theorem, a cornerstone of corporate finance theory[33], which posits that in perfectly efficient, frictionless markets a profit-maximising firm's WACC would be unaffected by its chosen debt-equity ratio (or "*gearing*"). In essence, each firm faces a fundamental level of risk attached to the activity in which it engages, and this is reflected in its financing costs. It can choose different capital structures (mixes of debt and equity) but with efficient and frictionless financial markets, the debt and equity costs adjust such that the firm's capital structure will not affect its WACC.

The CAT dismissed Sainsbury's argument for including cost of equity:

- The CAT considered that key assumptions of the Modigliani-Miller theorem are not, and cannot be, met in real world markets. For example, despite its efforts, Sainsbury's could not demonstrate that its capital structure was optimal or near optimal throughout the claim period, meaning a key assumption of the theorem was unmet. The CAT states: *"[i]t may well be that the WACC has its place in the assessment of what would be an appropriate price for the raising of large scale future capital for a firm. But it is a wholly inappropriate measure in the present case. The Modigliani-Miller theorem is so based on assumptions that do not pertain to the real world, that it seems to us prima facie fundamentally unsuited to an assessment of damages."* [34]

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[31] *BritNed*, paragraph 549, emphasis in original.

[32] *BritNed*, paragraph 549(6), emphasis in original.

[33] The theorem was first set out in the *American Economic Review* in 1958. This advance in the economic theory of capital structure and firm financing contributed (amongst other work) to both authors being awarded the Nobel Prize in Economics - Franco Modigliani (1985) and Merton Miller (1990).

[34] *Sainsbury's*, paragraph 541.

- Sainsbury's could not demonstrate causation between the Overcharge and a change in its gearing or cost of equity. The CAT went further to say that "*even if any changes in the cost of equity had occurred … these would have been too remote to be attributable to the overcharge*" and "*in our view, a change in gearing even many times larger than the overcharge would not mechanically lead to a change in a company's cost of equity in the real world.*"[35]
- Sainsbury's had not actually raised equity during the claim period, which in the CAT's view meant that "*[an] increase in the theoretical cost of equity does not equate* to *actual loss paid out by the company in real life.*"

In *Trucks*, the CAT again rejected the use of WACC because "*the legal test is clear*" that the "*actual losses*" suffered by the victim must be based on "*actual costs*" to the victim.[36]

The CAT, however, accepted that, "*[f]rom an economist's point of view, it is not right to treat equity finance as costless or "free" because equity investors have only a reasonable expectation, not a right, to a return on the funds they commit to a firm.*"[37] A company might have paid dividends to its shareholder had it not had to pay the Overcharge, and failure to so may damage the company's share values and make it more expensive to raise capital in the future. But the CAT was not convinced that Royal Mail had suffered any "actual cost" (an actual cash outflow) – and "*[u]sing retained earnings may cause loss to its shareholder but Royal Mail itself has not suffered any loss therefrom*".

The precedent thus far has shown the CAT taking a firm steer away from WACC – and cost of equity – as an appropriate basis. There are concerns about these equity costs being too theoretical and assumptions based, or better recovered by the shareholders (rather than the company itself). And so compensatory interest in damages appears to be anchored at levels commensurate with debt. This does create risks of under-compensation within the UK regime as a whole (for example, practically, many smaller businesses may be owner operated without separate shareholder entities to recover losses).

[35] *Sainsbury's*, paragraph 542.

[36] *Trucks*, paragraph 796.

[37] *Trucks*, paragraph 795.

Part 3: Interesting Issues Ahead for the CAT

The CAT has evolved its approach to interest over its first twenty years, and this paper has briefly reviewed some of the key steps and battlegrounds.

Greater precision on interest is welcome but creates greater case and evidential complexity, and to some extent greater *ex ante* uncertainty.[38] Tensions between the law and the economics also remain to be navigated. And the future expected case-mix of the CAT will likely cause further confounding issues.

First, the wave of collective actions entering the CAT, particularly those involving small businesses within the claimant class, face the challenge of how to prove and calculate compound interest losses on an aggregate basis. Preventing compound interest ever being claimed in collective matters increases the risks of under-compensation (and may also weaken settlement incentives for defendants). Smaller businesses (SMEs) within these collectives are also more likely to be owner-operated rather than drawing on funds from external shareholders, which could – in theory – make more attractive WACC-level interest rate levels easier to justify.

Second, many of the claims entering the CAT now involve exclusionary abuses: a smaller rival (e.g., entrant) claiming losses due to a dominant firm squeezing it from the market, and so losing profits during the abuse and potentially for many years into the future. This creates two issues for consideration. Whether it is fair to award the smaller rival only a level of interest related to its cost of (new) debt when it (and its shareholders) were taking the risk to enter the dominant firm's market and may have been starved of funding to pursue necessary growth. If recoverable interest is only related to the (lower) cost of debt, then perceived barriers/risks to entry into markets will be higher. Whether there will be tensions with respect to the 'discount rate' applied to convert the lost stream of future profits into a present value. In economics and corporate finance, the discount rate often applied in present value calculations is derived from the WACC. Yet the concerns the CAT has raised about the applicability of WACC in interest calculations could raise similar issues with using WACC in discounting of future lost profits.

Third, to avoid the situation illuminated in *BritNed* and thereby avoid under-compensation, claimants may seek ways to keep the cost of equity element of the WACC level through introducing the key shareholders into the claim (or as separate claims). This may be the pragmatic way for shareholders not to miss out on compensation that they should otherwise have received for damage to their investment, yet it will complicate disclosure and case management processes.

Fourth, defendants may explore widening the divide between legal and economic pass-on rates first exposed in *Sainsbury's* (and to some extent in the dissenting opinion in *Trucks*). In *Sainsbury's*, even

[38] To illustrate anecdotally, the *Cardiff Bus* judgment dealt with interest issues in one paragraph, whereas *Trucks* devoted more than eighty paragraphs of detailed reasoning to the competing experts' evidence on interest.

though the CAT found that the passing-on arguments from MasterCard had failed on a legal basis, the CAT accepted that – from an economic perspective – some of the Overcharge would have been passed on over time, and so interest was awarded only on 50% of the Overcharge. Defendants may seek to make similar arguments to avoid overcompensation of claimants in relation to interest, leading to both 'legal' and 'economic' pass-on rates being debated in cases.

Fifth, for the experts – economists and forensic accountants – grappling with interest calculations in cases, the challenge is the number of different scenarios that will need to be explored and tested. The calculation of the appropriate level of interest depends on many earlier decisions on appropriate value of commerce, Overcharge, pass-on, and volume effects. As each of those earlier elements may themselves take on a range of values[39], and will only be decided at trial, the consequent universe of scenarios to assess on interest ahead of trial can be very large indeed. This would multiply further in collective or group actions involving businesses if 'claimant-specific' analysis of financing costs is done. This may be an unavoidable case management challenge.

Finally, the UK has entered a period of higher inflation and interest rates, meaning the time value of money will become more material in quantum terms in future cases. Higher interest opportunity or exposure will simply lead to more heated debate.

With all these compounding factors, compensatory interest in UK competition litigation is certainly no longer simple!

[39] For example, how a company would have financed an Overcharge of 2% may be very different to how it would have financed an Overcharge of 15%.