

Insights

CAT USES BROAD AXE TO QUANTIFY TRUCKS OVERCHARGE

May 24, 2023

BACKGROUND

In July 2016, the European Commission issued a settlement decision finding that five major truck manufacturers participated in an EEA-wide cartel involving collusion on the prices of medium and heavy trucks and the timing and passing on of costs associated with emissions technologies. Royal Mail and BT each brought follow-on damages claims against DAF, claiming that they were overcharged for Trucks that were purchased during the period 17 January 1997 – 18 January 2011.

THE OVERCHARGE ISSUES AT TRIAL

In order to quantify any overcharge, both parties instructed experts to use an econometric regression analysis. Royal Mail and BT's appointed expert's analysis resulted in an average overcharge of 9.95% for Royal Mail and 11.1% for BT, while DAF's appointed expert estimated that the overcharge was zero. The difference between the two estimates boiled down to four key modelling decisions:

1. **The reliability of a before-during model:** DAF's expert relied on 'before-during-after' and 'during-after' overcharge models, while Royal Mail and BT's expert relied on separate 'before-during' and 'during-after' models;
2. **The role of currency / exchange rates:** the experts disagreed as to whether the overcharge model should be run in Pounds or Euros. This was important due to the complications of seeking to control for the impact of the exchange rate in each model;
3. **The Global Financial Crisis ("GFC"):** the experts disagreed on whether the GFC should be controlled for separately from other demand controls; and
4. **Premia for different emissions standards:** a dispute also arose as to whether the "premium" achieved by DAF on certain emission standard trucks was an effect of the cartel or was a consequence of factors such as upgrades to the Trucks and customer willingness to pay ("**WTP**") more for those upgrades.

JUDGMENT – APPLICATION OF THE BROAD AXE

Tribunal found that each model had its advantages and that it was not “possible or necessary to reach a definitive view on which was the better model to use”. In respect of the currency argument and the GFC, the Tribunal found that the answer may be found “somewhere between the opposing positions”. In relation to the emissions standards, the Tribunal considered that there was a “compelling case” for the emissions premia to be treated as overcharge. They concluded that the WTP argument made by DAF’s appointed expert was “empty” as “any effective cartel or monopoly price outcome involves the supplier exploiting the customer’s WTP”.

The Tribunal quantified the overcharge suffered by Royal Mail and BT as 5% of the relevant Truck purchases.

The Judgment includes a helpful explanation of the different legal tests that apply to establishing a cause of action and to quantifying any loss suffered. To establish their cause of action, the Claimants were required to establish that they suffered monetary harm on the balance of probabilities. Once this was established, the court assessed quantification “on a “broad axe” basis rather than on the balance of probabilities”.

The “broad axe” principle originated in the 1914 case of *Watson Laidlaw* and has recently been endorsed by the Supreme Court in *Sainsbury’s*. The quantification of damages is “accomplished to a large extent by the exercise of sound imagination and the practice of a broad axe”.

The Tribunal adopted the broad axe to quantification in this case rather than “seeking to “score” the experts point by point”. They explained that due to the complexities of the issues, “several of the imperfections in the experts’ regression models [did] not yield a definitive solution” and believed that “no regression model could”. They therefore used the broad axe to “make a judgment based both on the evidence that was presented in the experts’ models, and on a wider appreciation of the factual context and witness evidence.”

IMPLICATIONS OF THE JUDGMENT

This case is a good example of how the Courts can use the broad axe in order to quantify damages when faced with complex and opposing modelling. It shows that the Courts can and will reach conclusions on quantum that sit somewhere between two different models rather than requiring one expert’s model to be chosen.

It is worth emphasising that the broad axe did not render the detailed expert work redundant. On the contrary, the Tribunal considered each expert’s position in detail and used the broad axe to quantify losses where it determined, on the evidence before it, that the true measure of loss was likely to lie somewhere between the positions identified in the experts’ respective models.

The Courts may find the broad axe is particularly useful in cases where the complexities and issues arising out of the experts' models are caused by factors falling outside of the experts' (or parties') control. This could include cases concerning large exchange rate fluctuations or the impact of major global events such as the GFC, the Covid-19 pandemic or the war in Ukraine and their impact on costs or prices.

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