

The value of economic expertise in cases where facts are decisive

Insights from the Which? v Qualcomm case

Lau Nilausen and Jorge Padilla¹
28 October 2026

On 10 June 2026, the Competition Appeal Tribunal (“CAT”) approved a settlement agreement between (i) the Consumers’ Association known as “Which?” in its capacity as class representative (“CR”) for British consumers, and (ii) Qualcomm.² The claim alleged that Qualcomm used its dominance in supplying mobile phone baseband chipsets to extract higher patent royalties from Apple and Samsung. Under the settlement, each party would pay its own costs and no payment would be made to the class of consumers, a so-called “drop-hands” settlement.³ This was an eleventh-hour resolution when the Trial 1 judgment was “at an advanced stage”.⁴ In approving the settlement, the CAT found that “There were substantial evidential problems” and “The case was therefore likely to fail on the facts”.⁵

We were instructed by Qualcomm in the proceedings. This article reflects on two questions: first, what role can economic expertise play in litigation cases where the factual evidence about the alleged conduct is decisive; and second, could better use of economic evidence have brought the moment of reckoning in this case forward for the benefit of all involved?

We focus on three points.

- **The relationship between facts and economic theory.** Not every factual dispute needs an economist. Economic analysis adds value when it helps explain and interpret the evidence beyond what the factual material and legal arguments already establish. A theory that does not fit the facts needs, at best, further work. The starting question, as the CAT has noted, should be: what does the case require that an economist can provide?
- **How economics can give voice to the facts by identifying and testing the factual implications of a theory of harm.** For a theory of harm to be verifiable or falsifiable and thereby testable, its economic logic needs to be compatible with some fact pattern and incompatible with others. In this case, our analysis tested whether manufacturers that bought a larger share of their chipsets from Qualcomm agreed higher royalties for Standard Essential Patent (“SEP”) licences – as the theory of harm implied. We found no such pattern. That, in our view, makes the theory of harm less plausible. The trial exchanges illustrated the importance of such tests and of interpreting the results of those tests consistently, whichever side they favour.
- **How economic analysis can help clarify and narrow the dispute before trial.** Some ambiguity about a claim is understandable at certification, before disclosure reveals many of the relevant facts. With hindsight, however, this case illustrates why parties should winnow, refine and narrow the issues as proceedings advance. In particular, the alleged mechanism should be clear before trial: retaining ambiguity can obscure the role of particular arguments, allow contradictions to persist and prevent meaningful testing. The CAT’s recent emphasis on using expert reports and joint statements to resolve disagreements is therefore welcome. The focus of that process also matters. Testing theories against the facts can help direct attention towards the issues and disagreements that matter most.

The pre-eminence of facts and their relationship with economic theory

Facts are the lifeblood of economics. As the CAT's practice direction on expert evidence explains, "Economic modelling and other analysis must arise from and be based on the facts of the case. Expert testimony that articulates a purely theoretical position is less helpful to the Tribunal than testimony that begins with the facts of the case and applies economic theory to those facts. Quantitative economic models that purport to make predictions or quantify unobserved counterfactuals should therefore be calibrated to align with the observed facts".⁶

Fact and theory should align, as the role of economics is to explain and interpret those facts. If they do not align, then its explanation is lacking and (pending refinement) unhelpful. The CAT has similarly explained that "If, to take a hypothetical situation, an expert generated an econometric model which then turned out in court to collide with the inferences properly to be drawn from internal disclosure then it would have been far better for the expert to have grappled with that inconsistency and attempted a reconciliation at the earliest possible stage in preparation for litigation. This, in my view, is preferable to the expert being subsequently challenged in cross examination at trial upon the basis that the econometric modelling was theoretical, artificial and divorced from reality. Early engagement with the underlying facts including disclosed material will, in my view, generate a more robust and defensible final analysis".⁷ Expert economists will therefore inevitably have to grapple with the facts of a case.

However, the CAT has also made it clear that expert economist engagement with the facts is not always necessary or helpful. The facts may speak for themselves; or at least, their interpretation may not require *economic* expertise. In that vein, the CAT has dismissed the relevance of expert economists providing an "interpretation of the factual, qualitative

evidence" on the basis that it is "doubtful [...] that this is really relevant admissible expert evidence" and that the panel members "are in just as good a position to analyse the factual evidence and it may be better that [they] do so without the spin and assumptions that [the economic expert witness] put on it".⁸ The Hon. Mrs Justice Bacon summarised the issues as follows: "Experts are very often asked to address issues that are really questions of either fact or legal submission. The result can be a great deal of expensive analysis that does not actually help the Tribunal decide what it needs to decide".⁹

Justice Bacon provided additional guidance that may help economic experts calibrate their contributions to cases that ultimately may hinge on the facts: "If an expert is going to be asked to address them, the prior question should be: what exactly is the economic analysis, and is it likely to add anything material, over and above the factual material and legal submissions?".¹⁰ That is a helpful starting point for economic evidence more generally: what does the case require that an economist can provide? We discuss this below in the context of *Which? v Qualcomm*.

Using economics to give voice to the facts through testable propositions

The Settlement Judgment summarises the theory of harm in *Which? v Qualcomm* as follows:¹¹

The CR alleges that Qualcomm leveraged various OEMs' dependence upon Qualcomm for 3G CDMA, 4G CDMA/LTE, 4G UMTS/LTE and 5G chipsets in order to pressurise them into accepting royalty rates that were otherwise unacceptable, distorting the negotiation process and depriving them of the protections of the fair, reasonable, and non-discriminatory (FRAND) regime.

The gist of the claim was that Qualcomm could *leverage* its alleged dominance in one market to conduct alleged harm in another

market. According to the theory: Qualcomm was a dominant supplier of baseband chipsets to suppliers of mobile phones (original equipment manufacturers, or OEMs); and used its alleged dominance to compel these OEMs to pay higher licensing fees for SEPs which enable various cellular technology standards (3G, 4G and 5G) implemented in mobile phones. The claim focused on just two OEMs, accounting for a material share of mobile phones sold in the UK: Apple and Samsung. The key issue was therefore whether Qualcomm had, in fact, resorted to abusive conduct vis-à-vis these OEMs.

The mechanism whereby the alleged conduct would translate into the alleged harm was ambiguous. That can be the case for perfectly legitimate reasons and, as such, the UK class action system does not require the CR to have a fully formed view of all aspects of its theory of harm by the time of certification.¹² However, the ambiguity can create challenges. In *Which? v Qualcomm*, it resulted in diverging views between the two sides' experts as to the types of analyses that would be helpful.

The CAT requested methodology statements at an early stage in *Which? v Qualcomm*. Its subsequent practice directions explain the potential benefits of such a process, noting that (i) "The Tribunal is also likely to require the parties to provide, at an early stage in the process, statements of the expert methodology or methodologies on which they intend to rely at trial, by reference to their pleaded cases",¹³ and (ii) "Econometric or other analytical techniques, particularly tests and criteria used to decide between alternative models, that are identified in advance of any data being analysed are likely to be given more weight by the Tribunal than techniques selected only once their effect on the outcome can be observed".¹⁴

We proposed a so-called Leveraging Analysis to test how compatible the theory of harm was with the facts we observed. Our reasoning was that: *if* the theory of harm were true, *then* its economic logic implies a

relationship between an OEM's reliance on Qualcomm's chipsets and its SEP royalties. Whether or not we can, in fact, observe such a relationship is a testable proposition.

To test the theory, we assessed the potential correlation between two categories of data points: (i) Qualcomm's share of supply of baseband chipsets to an OEM, and (ii) the SEP royalty levels agreed between that OEM and Qualcomm. This was based on two hypotheses implied by the theory of harm: (i) that Qualcomm would need to be a baseband chipset supplier to an OEM for Qualcomm to be able to leverage any baseband chipset supply in negotiations of SEP royalties with that OEM, and (ii) that an OEM which sourced a small share of its baseband chipset requirements from Qualcomm would be less susceptible to any such leveraging than one which sourced a large share of its baseband chipset requirements from Qualcomm. We therefore proposed to assess this for Apple and Samsung specifically and for Qualcomm licensees more broadly.

The CAT allowed this Leveraging Analysis but required it to be provided before the CR submitted its first competition economics report. This had the unusual consequence of the *defendant*, Qualcomm, filing an economic analysis before the claimant, the CR.¹⁵

The Leveraging Analysis showed no signs of any correlation between Qualcomm's share of supply of baseband chipsets to individual OEMs and the levels of their effective SEP royalties, neither for Apple and Samsung specifically, nor across the wider group of licensees. In our view, that contradicts the theory of harm because its economic logic implies a set of facts that we do not observe in practice.

The CAT engaged extensively with the Leveraging Analysis at trial.¹⁶ Although its conclusions are not published, from its engagement at trial we make two inferences about the potential value that testable propositions can provide to the Tribunal.

- **Theories are more persuasive when their testable predictions fit the facts.**

Sometimes it is not possible to test a theory against the facts. Even when possible, a test may not be determinative: compatibility with the facts is often a matter of degree. The CAT recognised both points. Nonetheless, theories with testable propositions are more compelling precisely because their consistency with the facts can be assessed. For instance, the economist panel member noted that “it is kind of a little frustrating” when the panel is presented with an economic model that “does not yield testable propositions of what really ultimately matters” and also the claim that models that attempt to do so cannot yield such propositions.¹⁷

- **The interpretation of a test should not depend on which side its result favours.** The CR considered that no correlation was required by its theory of harm. However, in response to a hypothetical scenario in which the Leveraging Analysis had, in fact, revealed a positive correlation between Qualcomm’s share of supply and OEMs’ effective LTE royalties, the CAT’s economist panel member remarked that the CR would not merely argue that such a result was consistent with its theory of harm, but “would probably put it a bit stronger than that”.¹⁸

Starting out on a case, it can be difficult to know what role, if any, economic analysis will play in informing the CAT’s assessment. However, the starting point is that a theory of harm will normally have an economic logic that makes it compatible with some set of facts, and not with others. Identifying that relationship, explaining why it should exist, and what its presence or absence would mean is where economics, typically, can contribute. *Which? v Qualcomm* suggests that the CAT is looking to economic experts to help it identify and test the relevant propositions.

Using economics to crystallise the matter in dispute

The *Which? v Qualcomm* Settlement Judgment explains that “however strong the case may have appeared on paper prior to Trial 1, certainly by its conclusion, the CR no longer had a realistic prospect of success”,¹⁹ and “Both parties agree that the trial itself did not go well for the CR at least in relation to the question of abuse”.²⁰ An assessment of whether the CR reasonably could have arrived at this conclusion at an earlier stage should be approached with some care: hindsight is obviously 20/20. At the same time, we would be remiss not to look back to see if there are lessons that our community may benefit from going forward.

As a starting point, in our experience, the traditional format of exchanging two rounds of expert reports and a joint expert statement provides a process that helps get to the nub of the matter; by resolving disagreements, or identifying the disagreements that matter most. This invariably means putting to one side issues that ultimately cannot be determinative of the final outcome. In *Which? v Qualcomm*, however, precious few issues were resolved before trial.

It seems to us that more issues could have been resolved. For example, after a four-year process culminating in a trial across 12 court days, it remains unclear to us what role the so-called “Refusal to License” element of the alleged theory of harm played in the CR’s case.²¹ This element referred to Qualcomm’s practice of licensing its SEPs to OEMs in accordance with industry practice, rather than to chipset suppliers as proposed by the CR. This was not alleged to be an abuse but merely to “buttress” the alleged abuse.²² There was no suggestion that the alleged abuse required such buttressing, such that failure of this line of argument would have fatally undermined the claim overall.

Page limits on expert reports should have constrained the incentives to pursue arguments that cannot affect the outcome of the case. The fact that they did not do so in

this case therefore suggests to us that the CR perhaps wished to retain the flexibility to adapt its theory of harm into something more akin to one of foreclosure of rival chipset suppliers, similar to that which the FTC had previously pursued and ultimately lost.²³

A degree of flexibility is not unreasonable at the certification stage. Certification is an early stage in the process before many of the facts are known. Adapting to deal with unforeseen developments down the line is something the process must allow for. However, it poses some challenges, particularly when it affects the theory of harm itself:

- First, the CAT has explained that engagement with the proposed theory of harm early on “is necessary in order to assess whether the theory of harm reveals a prospective class-wide loss. This is what we understand is meant by the idea of a ‘blueprint to trial’”.²⁴ Although a theory of harm may inherently have some ambiguities before the CR gets access to disclosure, there would equally seem to be a point at which such ambiguities must be resolved for that theory of harm to actually be able to serve as a blueprint to trial.
- Second, flexibility increases the risk of contradictions. For example, in *Which? v Qualcomm* the CR’s expert considered that the “Refusal to License” limb of the theory of harm was a way for Qualcomm to leverage supply of other chipset suppliers’ chipsets to extract higher royalties.²⁵ However, in that scenario the alleged abuse would not be related to Qualcomm’s own position as supplier of baseband chipsets and any related alleged dominance. That would contradict the claim that Qualcomm leveraged any such dominance.
- Third, retaining flexibility can get in the way of articulating the relevant theory of harm fully. However, formalising the mechanism behind the theory of harm is exactly what provides clarity on its

strengths and weaknesses. That clarity should be in the interest of the claimant, a failure to commit to a tightly defined theory of harm before trial in itself becomes a red flag.

The CAT “expects experts to acknowledge and respond in a fair-minded manner to evidence and views that challenge their positions, changing their minds if appropriate, particularly where the facts change or new evidence emerges”.²⁶ The parties instructing economic experts equally benefit from this expectation: only in this way will they know their true position by the time of trial.

Conclusion

The critical importance of a robustly articulated theory of harm for any claim for damages is well established in the UK.²⁷ As the CAT recently explained, “The theory of harm is of central importance in the articulation of the economic methodology, because it provides the framework within which the proposed empirical analysis must be assessed. Without a clear understanding of that theory, the Tribunal cannot assess whether the proposed methodology is capable of testing the alleged effects of the infringement at trial”.²⁸ For expert economists, the challenge thereby becomes to actually perform such testing in light of the facts of the case. While this may come with practical difficulties and the results may be inherently imperfect, a theory of harm which is not testable at all would seem to fall foul of the requirement that “effects must not be purely hypothetical”.²⁹

The development of a theory of harm naturally precedes its testing. In part for that reason, “importantly, by design, cases before the CAT are intended to evolve. They might start wide but as they progress the CAT expects and demands that the parties winnow, refine and narrow”.³⁰ By engaging in the actual testing of the relevant theory of harm, economic analyses can play a critical role in that process of refinement.

Endnotes and references

- ¹ Jorge Padilla is a Senior Managing Director and Chair of the Board at Compass Lexecon International; Lau Nilausen is a Senior Vice President. Both advised Qualcomm in the *Which? v Qualcomm* case. The views expressed in this article are the views of the authors only and do not necessarily represent the views of Compass Lexecon, its management, its subsidiaries, its affiliates, its employees, or its clients.
- ² [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), Available at: <https://www.catribunal.org.uk/judgments/13827721-consumers-association-v-qualcomm-incorporated-judgment-csao-10th-june-2026>.
- ³ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶16.
- ⁴ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶16.
- ⁵ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶129.
- ⁶ CAT, Practice Direction 3/2025, Expert Evidence, ¶16, Available at: <https://www.catribunal.org.uk/about/announcements/practice-direction-expert-evidence-tue-02122025-1200>; See also [2023] CAT 6 Royal Mail Group v DAF Trucks, ¶¶108 and 407, Available at: <https://www.catribunal.org.uk/judgments/1284-royal-mail-1290t-bt-judgment-7-feb-2023>.
- ⁷ [2017] CAT 2 Peugeot v NSK, ¶21, Available at: <https://www.catribunal.org.uk/judgments/12485716-peugeot-sa-and-others-v-nsk-ltd-and-others-ruling-disclosure-2017-cat-2-26-jan>.
- ⁸ [2026] CAT 11 Merchant Interchange Fee Umbrella Proceedings (pass-on), ¶279. See also ¶¶284 and 288 in the same judgment, Available at: <https://www.catribunal.org.uk/judgments/151711722-um-merchant-interchange-fee-umbrella-proceedings-judgment-trial-2-17-feb-2026>; See also [2025] CAT 9 Stellantis, ¶¶158, 159 and 161, Available at: <https://www.catribunal.org.uk/judgments/14355722-t-stellantis-auto-sas-others-v-autoliv-ab-others-judgment-21-feb-2025>.
- ⁹ Opening address at Frontier Economics competition litigation discussion event, Speech by The Honourable Mrs Justice Bacon, "The use (and misuse) of economics in UK competition cases" (20 May 2026), p. 4, Available at: <https://www.catribunal.org.uk/about/announcements/opening-address-frontier-economics-competition-litigation-discussion-event-wed>.
- ¹⁰ Speech by The Honourable Mrs Justice Bacon, "The use (and misuse) of economics in UK competition cases" (20 May 2026), p. 5.
- ¹¹ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶4.
- ¹² [2026] CAT 75 JLP v Apple Inc. and Others - Judgment (CPO), ¶¶51(3) and 51(7), Available at: <https://www.catribunal.org.uk/judgments/17597725-jlp-aa-class-representative-limited-v-apple-inc-and-others-judgment-cpo-28-sep>.
- ¹³ CAT, Practice Direction 3/2025, Expert Evidence, ¶6.
- ¹⁴ CAT, Practice Direction 3/2025, Expert Evidence, ¶18.
- ¹⁵ Order of the Chair (CMC4 Directions) 29/01/2024, ¶9, Available at: <https://www.catribunal.org.uk/cases/13827721-consumers-association>.
- ¹⁶ Transcript of Trial (Day 8), 16 Oct 2025, p. 49, line 17 *et seq.*
- ¹⁷ Transcript of Trial (Day 8), 16 Oct 2025, p. 66, line 23 *et seq.*
- ¹⁸ Transcript of Trial (Day 8), 16 Oct 2025, p. 76, line 4 *et seq.*
- ¹⁹ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶119.
- ²⁰ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶15.
- ²¹ [2026] CAT 50 Consumers' Association v Qualcomm (CSAO Application), ¶4.
- ²² Transcript of Trial (Day 7), 15 Oct 2025, p. 177, line 15 *et seq.*
- ²³ Federal Trade Commission v Qualcomm Inc., No. 19-16122 (9th Cir. 2020), Available at: <https://law.justia.com/cases/federal/appellate-courts/ca9/19-16122/19-16122-2020-08-11.html>.
- ²⁴ [2026] CAT 34 Stasi v Microsoft, ¶71, <https://www.catribunal.org.uk/judgments/16967724-dr-maria-luisa-stasi-v-microsoft-corporation-microsoft-limited-microsoft-ireland>.
- ²⁵ Transcript of Trial (Day 7), 15 Oct 2025, p.186, line 22 *et seq.*
- ²⁶ CAT, Practice Direction 3/2025, Expert Evidence, ¶3.
- ²⁷ [2024] CAT 11 Gormsen v Meta, ¶7(2)(iii), Available at: <https://www.catribunal.org.uk/judgments/14337722-dr-liza-lovdahl-gormsen-v-meta-platforms-inc-and-others-judgment-cpo-0>; [2025] CAT 37 Merchant Interchange Fee Umbrella Proceedings, ¶¶10(3) and 80, Available at: <https://www.catribunal.org.uk/judgments/151711722-um-merchant-interchange-fee-umbrella-proceedings-judgment-27-jun-2025>; [2025] UKSC 48 Evans v NatWest Markets Plc and others, ¶108, Available at: <https://caselaw.nationalarchives.gov.uk/uksc/2025/48>; [2026] CAT 34 Stasi v Microsoft, ¶71.
- ²⁸ [2026] CAT 75 JLP v Apple Inc. and Others - Judgment (CPO), ¶133. See also [2025] CAT 37 Merchant Interchange Fee Umbrella Proceedings, ¶10(3).
- ²⁹ Case C-377/20, Servizio Elettrico Nazionale and Others EU:C:2022:379, ¶70, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0377>.
- ³⁰ [2026] EWCA Civ 993 Meta v Gormsen, ¶36, Available at: <https://caselaw.nationalarchives.gov.uk/ewca/civ/2026/993>.