



POLICY ROUNDTABLES

Presenting Complex Economic Theories to Judges 2008

Introduction

The OECD Competition Committee debated the techniques to present complex economic theories to judges in February 2008. This document includes an executive summary and the documents from the meeting: written submissions from Belgium, Canada, Finland, Germany, Korea, the Netherlands, Portugal, South Africa, the United Kingdom, the United States and BIAC as well as an aide-memoire of the discussion.

Overview

Modern antitrust enforcement is based on a clear and objective assessment of effects as identified or measured by sound economic analysis. Agencies and courts across the OECD, however, display varying degrees of sophistication when dealing with economic analyses.

Reasons why courts reject economic evidence include exacting standards of proof, a lack of guidance from the authorities, a lack of understanding by the judges and ineffective presentation by the competition authorities. Various techniques are used in court to help judges understand complex economic evidence. Some of them proved more effective than others, particularly if their purpose is to make complex concepts easily accessible to non-experts and to present them in a plain and clear way.

Related Topics

Managing Complex Mergers (2007)
Dynamic Efficiencies in Merger Analysis (2007)
Evidentiary Issues in Proving Dominance (2006)
Prosecuting Cartels Without Direct Evidence of Agreement (2006)
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Efficiency Claims in Mergers and Other Horizontal Agreements (1996)

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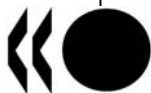
**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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TECHNIQUES FOR PRESENTING COMPLEX ECONOMIC THEORIES TO JUDGES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Techniques for Presenting Complex Economic Theories to Judges held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in February 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Techniques Permettant d'Exposer des Théories Economiques Complexes à des Juges qui s'est tenue en février 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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OTHER TITLES
SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept	OCDE/GD(96)113
6.	Competition in Telecommunications	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1
22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10

35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Non Commercial Services Obligations and Liberalisation	DAFFE/COMP(2004)19
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47.	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48.	Merger Remedies	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56.	Competition on the Merits	DAF/COMP(2005)27
57.	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58.	Barriers to Entry	DAF/COMP(2005)42
59.	Prosecuting Cartels without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60.	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18
61.	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62.	Access to key Transport Facilities	DAF/COMP(2006)29
63.	Environmental Regulation and Competition	DAF/COMP(2006)30
64.	Concessions	DAF/COMP/GF(2006)6
65.	Remedies and Sanctions	DAF/COMP(2006)19
66.	Competition in Bidding Markets	DAF/COMP(2006)31
67.	Competition and Efficient Usage of Payment cards	DAF/COMP(2006)32
68.	Vertical mergers	DAF/COMP(2007)21
69.	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70.	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71.	Public Procurement – The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72.	Competition, Patents and Innovation	DAF/COMP(2007)40
73.	Private Remedies	DAF/COMP(2006)34

74.	Energy Security and Competition Policy	DAF/COMP(2007)35
75.	Plea Bargaining Settlement of Cartel Cases	DAF/COMP(2007)38
76.	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77.	Dynamic Efficiencies in Merger Analysis	DAF/COMP(2007)41
78.	Guidance to Business on Monopolisation and Abuse of Dominance	DAF/COMP(2007)43
79.	The Interface between Competition and Consumer Policies	DAF/COMP/GF(2008)10
80.	Facilitating Practices in Oligopolies	DAF/COMP(2008)24
81.	Taxi Services Regulation and Competition	DAF/COMP(2007)42
82.	Techniques and Evidentiary Issues in Proving Dominance/ Monopoly Power	DAF/COMP(2006)35
83.	Managing Complex Merger Cases	DAF/COMP(2007)44
84.	Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations	DAF/COMP(2007)45
85.	Market Studies	DAF/COMP(2008)34
86.	Land Use Restrictions as Barriers to Entry	DAF/COMP(2008)25
87.	Construction Industry	DAF/COMP(2008)36
88.	Antitrust Issues Involving Minority Shareholding and Interlocking Directorates	DAF/COMP(2008)30
89.	Bundled and Loyalty Discounts and Rebates	DAF/COMP(2008)29

TABLE OF CONTENTS

EXECUTIVE SUMMARY 7
SYNTHÈSE 11

CONTRIBUTIONS

 Belgium 15
 Canada 17
 Finland 23
 Germany 25
 Korea 29
 Netherlands 35
 Portugal 43
 United Kingdom 57
 United States 63

and

 South Africa 73
 BIAC 77

SUMMARY OF DISCUSSION 89
COMPTE RENDU DE LA DISCUSSION 99

EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable and the member submissions, a number of key points emerge:

- (1) *Modern antitrust enforcement should be based on a clear and objective assessment of effects as identified or measured by sound economic analysis.*

The antitrust community recognises that maximisation of consumer welfare is best achieved by a competition policy centred on the analysis of the likely effects of firms' conduct. It also acknowledges that effects analysis should be solidly grounded in economics. The growing acceptance of the importance of economics has been reflected not just in the enforcement practice of national competition agencies but also in the attitude of the courts. In particular, there have been increasing demands for substantial economic support for arguments advanced in a competition law context. By developing an enforcement culture based on economics at the level of the national competition authorities one encourages the acceptance of economic methodology by the courts.

In antitrust cases, market definition and assessment of competitive effects may require extensive use of economics, although different analyses may apply. These analyses provide specific tools that help inform the examination of particular issues in a given case and bring complex factual settings to coherence. Economics is a framework for examining facts; it should not substitute for sound factual analysis.

- (2) *Agencies and courts display varying degrees of sophistication when dealing with economic analyses.*

Some courts have experienced difficulties with basic economic assumptions and theories. Indeed, in some jurisdictions the courts have expressly conceded that the economics can be too complex to understand. There is reason to be positive about progress, however: judges want to understand the economic issues; it is not the case that they are narrow in their thinking. While judges are often anxious about the methodologies employed by economists, they nonetheless wish that they could understand better the economic debate.

Divergence is particularly acute across jurisdictions concerning the extent to which they have developed rules and procedures regulating the introduction of economic evidence – in particular expert witnesses – in court proceedings. These rules and procedures aim to ensure the integrity and quality of economic evidence, including testimony at trial, and to persuade courts to accept this type of evidence. It is evident that these requirements are more developed in those states where litigation is a significant feature of the competition law landscape.

- (3) *Reasons why courts reject economic evidence include exacting standards of proof, a lack of guidance from the authorities, a lack of understanding by the judges and ineffective presentation by the competition authorities. Practical solutions were advanced concerning judicial understanding and successful presentation of evidence.*

Support was voiced for educating judges in economics and economic methodology. Such training represents a positive way to develop the judges' analytical skills. Given that in some jurisdictions judges may not understand the economics of the government's case and may seek out some procedural resolution in order to dispose of the case in a manner that does not require them to deal with the actual substance of the case, it is imperative that judges should be encouraged to become more sophisticated in competition economics. At the same time, judges should be informed of the limitations of economic evidence and that one that can rarely depend on uncontested data to produce a single numerical "solution" to a given problem.

A notable limitation concerning judicial education was noted, however. Even judges with some understanding of economics are often hesitant to question economic experts, as they recognise their relatively weak economic knowledge. Developing a list of practical questions for judges to ask experts in order to assess their credibility has reportedly been successful in France, and it could be useful elsewhere too in overcoming this reluctance. These questions should focus on the issues of reliability, relevance and internal consistency, as well as on whether the advanced theory has been published. The education of judges as to what practical questions to ask helps (re)place the decision-making in the judges' hands: it helps facilitate discussion and therefore improves the ability of the judge to decide whether or not the expertise offered is useful.

- (4) *Various techniques used in court to help judges understand complex economic evidence and theories were discussed. Some of them proved more effective than others, particularly if their purpose is to make complex concepts easily accessible to non-experts and to present them in a plain and clear way.*

In terms of effective techniques for the presentation of complex economic evidence, it is essential that the evidence be presented to the court in a way that is credible, simple and well-supported by the facts before it. The challenge here for the competition authorities is to present economic reasoning in an understandable but not less precise way to non-experts, that is, judges. In order to ensure comprehensibility, the problem at issue should be clearly identified, and any economic argument should be put forward in such a way as to allow the reader or listener to easily follow it. Complex economic arguments should not be advanced as a "smokescreen" for a weak case. Remembering one's audience, and the extent of its experience with economic argumentation, is also crucial.

The court should be informed of any assumptions relied upon as well as the reasons for determining parameters. Furthermore, advocates for the authorities should be ready to explain why other assumptions or parameters were not used. It is important to know and explain at trial the limits of the data that is relied upon. Any economic conclusions that are advanced at trial should be based on relevant facts and should draw on established economy theory. It is vital that the economic case is aligned with the legal case, and that any witnesses that appear are well prepared.

In general, economic arguments are most effective when structured and presented in a manner that is consistent with the structure of judicial reasoning and when it is of direct practical use in their decision making. Appealing to judicial intuition and using real-life examples or analogies to back up argument also proved helpful. The usefulness of visual aids such as blackboards,

overheads and projected pages from the expert report should not be underestimated, particularly given the fact that that some people learn better visually than they do through words.

- (5) *Support for the use of external economic experts, by both the competition authorities and the courts, was advanced by a number of participants. There is a need, however, to be aware of the drawbacks concerning the use of such experts in the courtroom.*

Economic consultants retained to present economic arguments in court are more likely to be perceived as credible and impartial witnesses if they are asked to explain why a certain economic theory is sound and why it should be applied to the facts of the case, rather than plead for the application of any theory with the only purpose of serving the client's cause. They may also bring new perspectives to the table. They need, however, to have “real world” experience as well as expertise in testifying in court. The introduction of such experts may create some inefficiencies, particularly given the fact that when retained such experts will have to approach a given case from scratch. Budgetary restraints that face the competition authority are also an issue for concern.

Court appointed experts may be appropriate when substantial, complex evidence is involved. The appointment of such experts must be impartial and transparent, and their reports should be made available to the parties so that they have the opportunity to rebut their contents. Indeed, any evidence offered by such experts, whether oral or written, should be subject to the possibility of rebuttal by the parties. The competition authorities may be able to help the court find an experienced and neutral expert. Importantly, all factual matters should be decided solely by the court and not by the appointed expert.

Some participants expressed a degree of caution concerning the use of economic experts at trial. First, counsel are often more skilled at describing the economic case to the court than such economic experts; counsel in effect know how to communicate with the court. Second, new facts may emerge at trial after the submission of an economist's report, that may undermine the conclusions contained in that report. Third, the courtroom, even in adversarial systems, does not provide adequate “peer review” of the arguments of expert economists. Expert economists can become advocates of their clients' position and can be persuaded to advance arguments that might be considered disingenuous by the rest of the economics community. Ideally, economic experts should be advocates for their own economic position on a given issue, and this position should be firmly grounded in economics. Publicity of testimony may help to inject discipline into the process, but such discipline takes time to develop. The use of *amicus curiae* briefs may also help to provide an extra degree of peer review.

A number of important principles should be adhered to when experts are involved in a competition law trial. Economic experts should not be relied upon as fact witnesses; rather, they should focus on the economic or econometric analysis of facts that have already been introduced and established through other witnesses. Economic theories and methodologies that are advanced should already have been sufficiently tested in the economics community. Experts should not be narrowly confined in the data they analyse. Economic experts should not be advanced as industry experts, otherwise their credibility risks being significantly jeopardised during the trial. Finally, it is important to remember that experts have both an offensive and defensive role to play in a given case.

- (6) *There are considerable advantages to the combined use of both oral and written economic testimony in competition law cases.*

Economic expert reports should be made available to the judges *before* the commencement of hearings so that the judges have time to think about the relevant issues. The author(s) of the reports should also be present in court. If both of these conditions are fulfilled, then when the hearings start, the judge would be well placed to ask the necessary questions of clarification.

In practice, oral expert testimony has helped to confirm the robustness or legitimacy of the theoretical foundations that are being used in assessing market power or in proving the existence of consumer harm. Oral presentations have the potential to do three things: (a) to make the approach used comprehensible in a non-technical way; (b) to summarise the key findings and arguments; and (c) to provide a platform for counter arguments to be used in a constructive manner.

SYNTHÈSE

Par le Secrétariat

Les débats de la table ronde, ainsi que les contributions des membres ont fait ressortir plusieurs points essentiels :

- (1) *Aujourd'hui, l'application du droit de la concurrence doit reposer sur une évaluation claire et objective des effets produits, tels qu'identifiés ou mesurés grâce à une analyse économique fiable.*

Les parties concernées par la lutte contre les pratiques anticoncurrentielles sont conscientes que le meilleur moyen de maximiser le bien-être des consommateurs est d'axer la politique de la concurrence sur l'analyse des effets pouvant découler du comportement des entreprises. Elles conviennent également que l'analyse de ces effets doit s'appuyer amplement sur les sciences économiques. Les pratiques répressives des autorités nationales de la concurrence, mais aussi l'attitude des tribunaux témoignent de cette reconnaissance croissante de l'importance de l'économie. En particulier, les intervenants se montrent de plus en plus désireux d'étayer solidement, à l'aide de données économiques, les arguments avancés en liaison avec le droit de la concurrence. Le développement, au sein des autorités nationales de la concurrence, d'une culture répressive fondée sur des principes économiques permet aux tribunaux d'accepter plus facilement la méthodologie économique.

Dans les affaires en violation du droit de la concurrence, la définition du marché et l'évaluation des effets sur la concurrence peuvent imposer de recourir largement à la discipline économique, même si différentes analyses peuvent s'appliquer. Ces analyses procurent des outils spécifiques permettant d'éclairer l'examen de questions particulières dans une affaire déterminée et donnent de la cohérence à un ensemble de faits complexe. Les sciences économiques sont un cadre qui sert à étudier les faits ; elles ne doivent pas se substituer aux analyses sérieuses des faits.

- (2) *Autorités et tribunaux sont plus ou moins rompus aux analyses économiques.*

Certains tribunaux ont eu du mal à saisir des hypothèses et des théories économiques élémentaires. De fait, dans certaines juridictions, ils ont expressément reconnu que les principes économiques pouvaient être trop ardues. Il y a néanmoins tout lieu de croire que des avancées sont possibles : les juges sont désireux de comprendre les problèmes économiques ; il est faux de dire qu'ils ont un esprit étroit. Même s'ils sont souvent inquiets quant aux méthodologies employées par les économistes, ils souhaitent mieux appréhender le débat économique.

Les divergences entre les pays sont particulièrement marquées au regard des règles et procédures développées pour régler l'introduction de preuves économiques – notamment par des témoins experts – dans les actions en justice. Ces règles et procédures sont destinées à garantir l'intégrité et la qualité des preuves économiques, y compris les témoignages devant la cour, et à persuader les tribunaux d'accepter ce type de preuves. Il va de soi que ces prescriptions sont plus développées dans les pays où les procédures judiciaires constituent un aspect important du droit de la concurrence.

- (3) *Les raisons pour lesquelles les tribunaux rejettent les preuves économiques sont notamment l'existence de critères d'établissement de la preuve contraignants, l'absence d'orientations émanant des autorités ou de compréhension des juges et l'inefficacité des exposés des autorités de la concurrence. Des solutions pratiques ont été proposées en ce qui concerne la compréhension des juges et la présentation réussie des preuves.*

Certains participants se sont déclarés favorables à la formation des juges à l'économie et à la méthodologie économique. Il s'agit là d'un moyen positif de développer les qualités d'analyse des juges. Puisque dans certains pays, les juges peuvent ne pas comprendre les aspects économiques du dossier de l'accusation et chercher à résoudre l'affaire en recourant à une procédure leur permettant de clore le dossier sans avoir à s'y intéresser sur le fond, il est indispensable d'encourager les juges à être plus au fait des aspects économiques de la concurrence. Dans le même temps, les juges devraient être informés des limites des preuves économiques et savoir qu'il est rarement possible de trouver une « solution » chiffrée unique à un problème donné en se fondant sur des données incontestées.

On a cependant noté une limite notable à la formation des juges. Même ceux qui ont des notions d'économie hésitent souvent à questionner des experts dans ce domaine, car ils sont conscients de la relative inconsistance de leur bagage économique. L'élaboration d'une liste de questions pratiques pouvant être posées par les juges aux experts afin d'apprécier leur crédibilité a, semble-t-il, fait ses preuves en France et elle pourrait aussi leur servir à vaincre leurs réticences dans d'autres pays. Ces questions doivent essentiellement concerner la fiabilité, la pertinence et la cohérence interne, ainsi que la publication ou non de la théorie avancée. Informer les juges sur les questions pratiques à poser contribue à (re)mettre la prise de décision entre les mains des juges : les discussions en sont facilitées et les juges sont davantage à même de statuer sur l'utilité de l'expertise présentée.

- (4) *Différentes techniques utilisées à l'audience pour aider les juges à comprendre des preuves et des théories économiques complexes ont été examinées. Certaines d'entre elles se sont avérées plus efficaces que d'autres, notamment lorsqu'elles visent à mettre des concepts complexes à la portée des non-spécialistes et à les présenter de façon claire et simple.*

S'agissant des techniques efficaces permettant d'exposer des preuves économiques complexes, il est déterminant de les présenter au tribunal d'une façon crédible, simple et fondée sur les faits. À cet égard, la difficulté pour les autorités de la concurrence est de présenter les raisonnements économiques de manière compréhensible, mais non moins précise, aux non-spécialistes, à savoir les juges. Pour en faciliter la compréhension, le problème étudié doit être distinctement cerné et les arguments économiques doivent être mis en avant de façon à permettre au lecteur ou à l'auditeur de suivre aisément. Les arguments économiques complexes ne doivent pas servir « d'écran de fumée » lorsqu'un dossier est mince. Il faut également tenir compte de l'auditoire et de sa connaissance de la dialectique économique.

La cour doit être informée des hypothèses retenues, ainsi que des critères de sélection des paramètres. De plus, les tenants des autorités doivent être prêts à expliquer pourquoi ils n'ont pas utilisé d'autres hypothèses ou paramètres. Il importe de connaître et d'expliquer à l'audience les limites des données sur lesquelles on se fonde. Les conclusions économiques avancées devant la cour doivent reposer sur des faits pertinents et s'inspirer de théories économiques établies. Il est impératif que l'argumentaire économique soit calqué sur l'argumentaire juridique et que les témoins qui comparaissent soient bien préparés.

En général, les arguments économiques portent davantage lorsqu'ils sont structurés et présentés en suivant la logique du raisonnement des juges et lorsque ces derniers peuvent directement s'en servir dans la pratique pour prendre leur décision. Faire appel à l'intuition des juges et utiliser des exemples concrets ou des analogies pour étayer des arguments peut aussi être judicieux. Il ne faut pas sous-estimer l'utilité des supports visuels comme les tableaux noirs, les rétroprojecteurs et l'affichage de pages tirées du rapport des experts, notamment parce que certaines personnes assimilent mieux ce qu'elles voient que ce qu'elles entendent.

- (5) *Plusieurs participants se sont déclarés en faveur du recours à des experts extérieurs en économie de la part des autorités de la concurrence et des tribunaux. Toutefois, il faut être conscient des inconvénients liés à l'intervention de ces experts en salle d'audience.*

Les conseils en économie retenus pour présenter des arguments économiques devant la cour sont davantage susceptibles d'être considérés comme des témoins crédibles et impartiaux quand on leur demande d'expliquer pourquoi une théorie économique donnée est fiable et pourquoi il convient de l'appliquer aux faits considérés que lorsqu'ils plaident pour l'application d'une théorie quelconque avec pour seul objectif de servir la cause de leur client. Ils peuvent aussi ouvrir de nouvelles perspectives. Il leur faut néanmoins disposer d'une expérience concrète et savoir comment témoigner devant les tribunaux. Le recours à ces experts peut aboutir à un manque d'efficacité, notamment parce que lorsqu'ils sont retenus, ces experts doivent aborder un dossier *ex nihilo*. Les contraintes budgétaires de l'autorité de la concurrence sont également un sujet de préoccupation.

Les experts désignés par les tribunaux peuvent être utiles lorsque l'affaire comprend des preuves substantielles, complexes. La nomination de ces experts doit se faire de façon impartiale et transparente et leurs rapports doivent être mis à la disposition des parties afin qu'elles puissent réfuter leur contenu. Les parties doivent en effet avoir la possibilité de réfuter les preuves présentées par ces experts oralement ou par écrit. Les autorités de la concurrence peuvent aider la cour à trouver un expert expérimenté et neutre. Il est à noter que l'ensemble des questions factuelles doivent être tranchées par le seul tribunal et non par l'expert désigné.

Des participants ont exprimé une certaine réserve vis-à-vis du recours à des experts en économie lors des audiences. Premièrement, les avocats sont souvent plus aptes que ces experts à décrire l'argumentaire économique à l'intention de la cour, car ils savent communiquer avec les juges. Deuxièmement, il peut arriver que des faits nouveaux risquant de remettre en cause les conclusions du rapport d'un économiste surgissent à l'audience après la remise de ce rapport. Troisièmement, même dans les systèmes contradictoires, les arguments des experts en économie ne font l'objet d'aucun examen critique en salle d'audience. Les experts peuvent en venir à défendre la position de leurs clients et on peut les persuader de faire valoir des arguments susceptibles d'être considérés comme fallacieux par le reste des économistes. Dans l'idéal, les experts en économie doivent défendre leur propre position économique sur une question donnée et cette position doit être solidement étayée par des arguments économiques. La publicité des témoignages peut contribuer à conférer une certaine discipline au processus, mais instaurer une telle discipline peut prendre du temps. Le recours à des intervenants en qualité d'*amicus curiae* peut aussi renforcer l'examen critique.

Lorsque des experts interviennent lors d'un procès portant sur le droit de la concurrence, plusieurs principes importants doivent être respectés. Il ne faut pas en appeler aux experts en économie pour qu'ils viennent témoigner des faits ; ils doivent davantage se concentrer sur l'analyse économique ou économétrique des faits qui ont déjà été présentés et établis grâce à d'autres témoins. Les théories et méthodologies économiques avancées doivent déjà avoir été

suffisamment mises à l'épreuve par les économistes. Dans leurs analyses, les experts ne doivent pas se limiter à certaines données. Ils ne doivent pas être présentés comme des experts du secteur, car cela risque de nuire gravement à leur crédibilité durant le procès. Enfin, il ne faut pas oublier que dans une affaire donnée, les experts interviennent à la fois à charge et à décharge.

- (6) *Dans les affaires liées au droit de la concurrence, recourir à des témoignages économiques à la fois écrits et oraux présente des avantages considérables.*

Les rapports des experts en économie doivent être mis à la disposition des juges *avant* le début des auditions afin de laisser aux juges le temps de réfléchir aux questions pertinentes. Le ou les auteurs des rapports doivent également être présents à l'audience. Si ces deux conditions sont remplies, le juge est alors en bonne posture, à l'ouverture des auditions, pour poser les questions nécessaires à des fins de précision.

Dans la pratique, les témoignages oraux des experts ont servi à confirmer la fiabilité ou la légitimité des fondements théoriques utilisés pour évaluer le pouvoir d'un intervenant sur le marché ou à démontrer l'existence d'un préjudice pour le consommateur. Les présentations orales peuvent avoir trois vertus : (a) rendre la méthode utilisée compréhensible aux non-techniciens ; (b) résumer les principaux arguments et conclusions et (c) fournir un cadre permettant d'utiliser les arguments contradictoires de manière constructive.

BELGIUM

What are your experiences with presenting complex economic theories or sophisticated economic evidence to courts?

We regret to report that we have no experience with presenting complex economic theories to courts.

Would you recommend that courts appoint independent economic consultants to supplement the parties' presentations on the economic issues involved in a competition case? Or do you believe that courts should rely exclusively on the economic arguments presented by the parties?

The Court of Appeal of Brussels, having jurisdiction to review decisions of the Competition Council can ask the Competition Authority to provide additional information, including economic analysis. The Court has already done so.

In view of the limited resources and the impact such question can have on the investigations conducted by the Authority, we prefer that the Court appoint independent economic consultants in case it requires expert assistance in order to analyze or supplement evidence provided by the parties.

Does presentation of complex economic theory or evidence present different issues before an appellate judge as opposed to a judge who is responsible for making factual findings?

The appellate judge having jurisdiction to review decisions of the Competition Council (the Court of Appeal of Brussels) judges on the facts as well as on questions of law. Judgments of the Court of Appeal can be reviewed by the Supreme Court (Hof van Cassatie/Cour de Cassation) but only on questions of law. It is therefore unlikely that the Supreme Court will have to examine complex economic theories.

CANADA

1. Introduction

The Canadian Competition Bureau (the “Bureau”) is pleased to provide the following discussion of the roundtable topic “Techniques for Presenting Complex Economic Analysis to Judges”.

2. Background Information on System of Adjudication for *Competition Act* Matters

By way of background, the Bureau is an independent law enforcement agency that is headed by the Commissioner of Competition (the “Commissioner”). The Bureau is responsible for the administration and enforcement of the *Competition Act*, *Consumer Packaging and Labelling Act* (non-food products), *Textile Labelling Act* and the *Precious Metals Marking Act*. The *Competition Act* (the “Act”) contains a number of criminal offences, such as conspiracies to lessen competition unduly or bid-rigging, that are subject to prosecution before criminal courts. The Act also includes civil reviewable matters, such as mergers or abuse of dominance, that are reviewed by the Competition Tribunal (the “Tribunal”).

The Tribunal is a quasi-judicial body that acts as the first-instance decision-maker for civil reviewable matters. There are up to six judicial members, who are sitting judges of the Federal Court with other judicial duties, and up to eight non-judicial members. In the past, certain of the non-judicial members have been economists. Judicial members are appointed by the Governor in Council on recommendation of the Minister of Justice, and non-judicial members are appointed by the Governor in Council on recommendation of the Minister of Industry. Members typically serve terms that are between five and seven years, which may be renewed.

Canadian competition laws are enforced through an adversarial system.

For reviewable matters, the Commissioner may seek a remedy by application to the Tribunal. To secure a remedy in a contested proceeding before the Tribunal, the Commissioner is required to discharge the burden of establishing each of the elements of the reviewable matter on the balance of probabilities. Appeals of Tribunal decisions are made to the Federal Court of Appeal, with further appeal available with leave to the Supreme Court of Canada. Appeals to the Federal Court of Appeal are restricted to questions of law, while questions of fact can be appealed only with leave.

For criminal matters, the Commissioner refers matters for possible prosecution to the Director of Public Prosecutions who may prosecute the case on behalf of the Crown before the criminal courts. In criminal proceedings, the Crown must establish each of the elements of the offence beyond a reasonable doubt. Appeals are available to the provincial courts of appeal or possibly the Federal Court of Appeal, and, with leave, the Supreme Court of Canada.

Contested civil or criminal matters under the Act are often significant and complex proceedings with full rights of hearing, including the introduction of evidence, examination and cross-examination of witnesses, as well as written and oral arguments.

3. What are your experiences with presenting complex economic theories or sophisticated economic evidence to courts?

With the exception of certain matters, such as misleading advertising or deceptive telemarketing, economic evidence plays a central role in both criminal and civil proceedings under the Act. For example, in contested merger proceedings, the Commissioner and respondents submit substantial economic evidence on a number of issues, including market definition, unilateral and coordinated effects, barriers to entry and efficiencies. Similarly, in abuse of dominance cases, the parties submit economic evidence regarding various issues, such as the definition of the relevant market, whether the allegedly dominant firm has market power, the alleged anti-competitive acts and whether the impugned conduct substantially lessens competition. In certain contested proceedings before the Tribunal, the Commissioner has utilized econometric models and statistical evidence, including regression analyses.

Economic evidence has also been a significant component of the evidence in numerous criminal proceedings. For example, to secure a conviction in respect of a cartel arrangement (other than bid-rigging cartels), the Crown must prove beyond a reasonable doubt that the agreement is likely to prevent or lessen competition unduly in a relevant market. As such, in contested cartel proceedings, the court considers economic evidence regarding the appropriate definition of the relevant market; whether the colluding firms are likely to or collectively have market power; and the competitive impact of the impugned agreement.¹

The experience regarding the presentation of economic evidence in Canada varies between individual proceedings. In some cases, courts or the Tribunal found that the economic evidence submitted by the Commissioner or Crown was persuasive. In other cases, the court or Tribunal refused to accept the economic evidence submitted by the Commissioner or the Crown on the basis that such evidence was not supported by the facts, the expert was not credible, the proposed economic theory was not valid, or for other reasons. For example, in a criminal cartel proceeding, the Court assigned little or no weight to the economic and industry evidence presented by an expert called by the Crown regarding the relevant product market.² In the Court's view, the expert lacked objectivity and his evidence was not detailed, was theoretical and failed to take into account the practical realities of the market. Courts and the Tribunal have also accepted some aspects of the economic evidence submitted by the Commissioner or Crown, while rejecting other aspects of this evidence. As an example, in a recent abuse of dominance case, the Tribunal agreed with the results of price correlations and other evidence of the Commissioner's expert regarding the issues of the appropriate definition of the relevant markets and whether the respondent was dominant in those markets.³ However, the Tribunal did not accept the evidence of the Commissioner's expert regarding the anti-competitive effects of the alleged anti-competitive conduct.

Given this varied experience, it is difficult to make general statements regarding the presentation of complex economic evidence in Canada. In respect of reviewable matters, the Tribunal has considered various forms of complex economic evidence and economic theories in determining contested proceedings. In respect of criminal proceedings, experience with the presentation of economic evidence in contested proceedings has been somewhat limited in recent years. As with other forms of complex evidence, the experience in criminal proceedings suggests that complex economic evidence is unlikely to be accepted unless it is presented in a manner that is credible, simple and well supported by the underlying factual evidence.

¹ See for example, *R. v. Clarke Transport Canada Inc. et al.*, 64 C.P.R. (3d), 1995.

² *Clarke Transport Canada Inc.*, 1995.

³ *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée.*, Competition Tribunal, 2005.

4. Can you describe which techniques proved most effective and which did not?

In contested proceedings, complex economic evidence is generally presented through one or more expert witnesses by oral testimony at the hearing, often with a written report or affidavit outlining the assumptions, findings and conclusions of the expert witness.

In terms of effective techniques for the presentation of complex economic evidence, as noted above, it is critical that the evidence be presented in a manner that is credible, simple and well supported by the facts before the court or Tribunal. In addition to these general comments, we have outlined below a few specific issues relating to techniques that have been effective in the past and techniques that may be applied in the future.

4.1 Availability of Expert Reports

Although expert reports are required to be filed prior to the commencement of a hearing, such reports are not available to the Tribunal members until the expert testifies, unless both parties specifically agree that they be made available. The new Tribunal rules, which are expected to be implemented in Spring 2008, allow members of the Tribunal to read the reports of expert economists when they are filed, that is ten days prior to the commencement of the hearing, unless a party objects.⁴

Having the economic expert reports available to the Tribunal members prior to the commencement of a hearing is seen as critical. This is particularly the case since economic expert oral evidence does not normally take place until after fact witnesses have been heard. Economic theory, however, typically forms the foundation of competition cases. Without an economic theory of the case to which the facts can be related, there is a risk that the relevance of certain facts may be lost or misunderstood.

The Bureau anticipates that having access to the expert reports in advance of the hearing will assist Tribunal members in fully understanding the economic evidence of the parties.

4.2 Economic Expert Reports

The typical job of an economic expert report is to develop a coherent and appropriate economic theory that applies to the facts of a case. It must also be made understandable to the triers' of fact. To this end, how much economic theory is explained versus how much is assumed, including what vocabulary is used, should be adjusted as appropriate depending on the experience of the judge or Tribunal members. For example, it might be appropriate to limit use of economic jargon or other technical expressions, or to explain such terms.

As the testimony of an expert economist is largely based upon factual assumptions that are established through other witnesses or documentary evidence, to the extent possible, expert reports should identify the specific sources of any evidence relied upon by the expert.

Certain types of evidence tends to be better established through particular avenues, and other types of evidence may not be relevant to the competition issue at hand. Consequently, it may fall to the expert to not only explain what evidence is critical to his or her analysis, but also to explain why other evidence is not and should not be a consideration. For example, when trying to establish customers willingness to

⁴ Objections are typically made on the grounds of the admissibility of the expert evidence. The case law principles on opinion evidence provide that expert evidence should only be admitted where it is (1) relevant, (2) necessary to assist the trier of fact, (3) is not excluded by an exclusionary rule, and (4) the expert is properly qualified.

switch among products, customer fact witnesses testifying to their own willingness to switch may be of limited value. This is because it cannot be known whether a testifying customer is a marginal or infra-marginal buyer.⁵ Also, evidence that is compelling in its own way but is not pertinent to the competition issue at hand can, at times, be submitted. For example, the effect of divestitures on shareholder value is typically not a consideration in competition cases.

4.3 *Econometric Evidence*

The Bureau has had some success in the use of econometric evidence, such as merger simulations, in reviewable matters before the Tribunal. For example, in one case, the Tribunal characterized econometric evidence regarding the own-price and cross-price elasticities of demand in order to estimate the impact of the merger on product prices as “highly relevant” to the central issue of whether a merger is likely to result in a substantial lessening of competition.⁶ The Tribunal found that econometric evidence was more persuasive where it could be reinforced through multiple simulations, each yielding a consistent result.

4.4 *Exchange of Reports*

In the case involving econometric evidence, the Tribunal applied a useful process for the exchange of expert reports in advance of the hearing. The experts for the respective parties exchanged reports, and were then entitled to submit a rebuttal report that addressed any comments made by an expert for the adverse party. As a result of this process, the experts were able to attempt to address any deficiencies in their evidence in advance of the hearing. For example, the Commissioner’s expert recalculated the estimated price impacts in light of certain criticisms made by the respondent’s expert, and was able to demonstrate that even if the respondent’s assumptions were applied, the price increases were still likely to occur.

4.5 *Oral Testimony*

As noted above, the Crown and Commissioner also submit economic evidence at the hearing through the oral testimony of expert witnesses. The examination-in-chief of such witnesses provides a valuable opportunity for the judge or Tribunal members to ask questions of expert witnesses or otherwise attempt to clarify aspects of their evidence which remain unclear. The new Tribunal rules will limit the examination-in-chief of expert witnesses. Specifically, an expert will continue to be examined-in-chief, but only for the purpose of summarizing or highlighting the evidence contained in his or her report. Since the new rules also make economic expert reports available to Tribunal members prior to the commencement of a hearing, it is hoped that the combination of these two changes will allow for more effective examination-in chief, and will place Tribunal members in a better position to ask relevant questions.

Visual aids, such as black boards, overheads and projected pages from the expert report, are allowed as part of examination, and are felt to have been beneficial.

As noted above, fact witnesses are typically heard first, followed by expert testimony, with economic expert testimony typically occurring last. This is because the testimony of an expert economist is largely based upon factual assumptions that are established through other witnesses or documentary evidence. As further noted above, the disadvantage of this approach is that the relevance of certain facts may be

⁵ In the face of a particular price increase, infra-marginal consumers are those consumers who will continue to buy the product and marginal consumers are those who will not. Customer switching as a mechanism by which price increases are thwarted typically depends on the sufficiency of switching by marginal customers.

⁶ *Canada (Director of Investigation and Research) v. Superior Propane*, Competition Tribunal, 2000.

unappreciated or misunderstood absent a theory of the case to which they can be linked. This risk is reduced by having economic expert reports available prior to the commencement of the hearing. Oral economic expert evidence at the commencement of a hearing is a further option. This evidence would differ from that which occurs at the end of the process in that its focus would be theory of the case, or the types of theories that are generally applicable in regard to certain conduct, absent any facts. This expert could also indicate the type of facts that would be relevant to determining when an anti-competitive theory is applicable. As a practical matter, there may be further benefit in dividing these two testimonies between two experts. Such a division would help assure that the first testimony, which largely amounts to an explanation of the underlying economics, is independent and impartial.

Having two testifying economic experts would have to be justified in Canada given the Tribunal's commitment to streamlining the hearing process, but it may also help narrow and better define issues. Such a matter could be discussed in the context of case management.

4.6 *Economists as Adjudicators*

As noted above, Tribunal membership is open to non-judicial members, including economists. Having an economist, particularly one with specialization in microeconomics, as a member of the Tribunal is seen as beneficial.

5. Do you think that competition authorities can be more effective in court if they retain external economic consultants to present their cases?

Yes. In Canada, the Commissioner typically retains external economic experts to provide evidence and assist in the preparation of contested matters. In addition to providing considerable expertise, such external economists are independent of the Bureau and as such, are more likely to be perceived as credible and impartial witnesses. In addition, external economists are not as involved in certain aspects of the matter, such as parts of the investigative phase or settlement discussions, that should not be considered by the expert in reaching conclusions.

To be effective, the external economic expert must be given adequate time to become familiar with all relevant aspects of the matter. Alternatively, it is possible to retain an expert to testify only in respect of relatively narrow or technical issues. In either case, the expert economist should not opine on matters without first appreciating all relevant information.

6. Would you recommend that courts appoint independent economic consultants to supplement the parties' presentations on the economic issues involved in a competition case? Or do you believe that courts should rely exclusively on the economic arguments presented by the parties?

In cases involving significant and complex economic evidence, a court-appointed expert may be appropriate to assist the Tribunal or court in reviewing and evaluating such evidence. In general, given the procedural and due process concerns that may arise, the Bureau would not recommend that a court-appointed expert be entitled to "supplement" the evidence of the parties.

The process for appointing such an expert should be impartial and transparent. Parties should be allowed to provide comments on the appropriateness of any proposed court-appointed expert. In addition, any report prepared by the court-appointed expert should be disclosed to the parties and the parties should have an opportunity to rebut the report and/or cross-examine the court-appointed expert. Moreover, it should be clear that the responsibility of deciding factual matters is that of the Tribunal or judge, not the appointed expert.

The new Tribunal rules permit the Tribunal to appoint an expert. Such experts are subject to examination by the parties and may also be questioned by the Tribunal during the hearing of the proceeding.

Administrative tribunals, at times, also retain staff economists (for example, this is the case in Canada with the Copyright Board and the Canadian International Trade Tribunal). If this is the case, any report of such a staff person should be placed on the public record.

7. Does presentation of complex economic theory or evidence present different issues before an appellate judge as opposed to a judge who is responsible for making factual findings?

In terms of the presentation of evidence, it is highly unusual for an appellate court to permit a party to introduce additional evidence at the appellate stage of a proceeding. As such, the evidence reviewed during the appeal is the evidence submitted into the record at the initial hearing. In fact, the appellate court will generally rely upon the factual findings made by the lower court or Tribunal. Typically, the arguments made at the appellate level are confined to questions of law or questions of mixed fact and law. That said, the comments above, such as the need for simplicity and well-supported economic theories, are equally applicable to appeal proceedings. This is particularly the case because questions of law in Canada, as these matters extend beyond the particulars of any one case, can entail such questions as the correct approach to defining markets or the meaning of anti-competitive acts.⁷

⁷ See for example, *Commissioner of Competition v. Canada Pipe Ltd./Tuyauteries Canada Ltée.*, Federal Court of Appeal, 2006.

FINLAND

What are your experiences with presenting complex economic theories or sophisticated economic evidence to courts?

Finnish competition authority (FCA) has not relied extensively on complex economic theories in its case handling, whereas economic evidence has played a more important role and hence, the experience of FCA in presenting complex economic theories and related advanced economic evidence to courts is rather limited. More complex theories have been used more extensively at a preparatory stage, in the background analysis of competition cases and in a reactive manner, when the authority has been faced with statements of reason that are founded on economic theory. The Fortum / E-On case concerning an acquisition in the energy sector, a pending matter in Market Court, is an example of the latter. There is, however, a perception of risk in that, compared with the legal arguments put forward, the time and effort spent on economic argumentation is in rather unfavorable relation to its importance for the final court decisions. Such a view builds on rather recent experiences which have confirmed some concerns about that uncertainty, always present in and very specific to economic argumentation, be it inference of statistical estimates or of results of theoretical reasoning, makes a sole reliance on more complex economic theories a venturesome task.

Complex economic theories have not been used as evidence as such or in combination with putting forward evidence to the Market Court. Recent experiences point out that relying on more complex economic theories does not necessarily strengthen the point in relation to the judicial argumentation, testimonies or evidence put forward. This view is further confirmed by recent court rulings, highlighting the challenges in presenting rather straightforward economic evidence of cartel pricing in an intuitively intelligible way.

Can you describe which techniques proved most effective and which did not?

The use of written testimonials is considered less effective, and standard procedure is for an expert to orally summarize a, possibly very complex, written statement during the oral hearing.

The efficiency is concealed in making the approach and presentation used as comprehensible as possible to the court. The argumentation can, in general, be considered more effective when structured and presented in a way that it is in line with the structure of reasoning of judges and which is of direct practical use in their decision making. This comprises a general view of effective techniques with no reference made to any particular case.

Do you think that competition authorities can be more effective in court if they retain external economic consultants to present their cases?

The gain in efficiency from retaining external economic expertise has to be assessed in relation to the role and level of economic analysis in each case. The role of economic analysis and in particular of external economic expertise in improving efficiency depends on the burden of proof and how much of this is aimed to be covered by economic analysis. If the claim is to fine a defendant or defendants with, say 10% of turnover, the economic evidence should constitute evidence in itself or at least significantly support any

alternative piece of proof. This is to say that the role and expertise needed for economic analysis is largely determined by the structure of each case.

Rather than presenting the cases, the expertise of external economic consultants can improve the efficiency of the Authority in form of witness testimonies, based on the results of their analytical work in cases under consideration. This may improve the setup of case presentation, emphasizing the most relevant piece of evidence in support for a right decision to be made.

External consultants may also prove helpful in strengthening and sharpening the analysis already made, for example in that they are able to bring new perspectives to support the authorities' claims

The Neste/SEO case (FCA proposition of fines in 1993 and Supreme Administrative Court decision in 2000) concerning loyalty rebates is given as a good example, where the role and importance of external experts in providing witness testimonials was of considerable relevance.

Would you recommend that courts appoint independent economic consultants to supplement the parties presentations on economic issues involved in a competition case? Or do you believe that courts should rely exclusively on the economic arguments presented by the parties?

At the Market Court, competition cases are dealt with by legally qualified members together with a minimum of one or a maximum of three expert members. These expert members represent the independent expertise in field of economics. From one to three expert members can also take part in hearing market law and public procurement cases if the nature of the case requires it. The present system corresponds indirectly to the first part of the question. The system has proven to function well and FCA has neither objections to nor proposes a reform of this procedure.

Although experts nominated by the Market Court have so far not been utilized, the FCA identifies some potential in the possibilities that the Act of administrative procedures provides to use such nominated experts in cases where argumentation of the parties is highly complex and especially contradictory.

GERMANY

1. Preliminary remarks

1.1 *Sound economic analysis is essential for the work of competition agencies and courts*

In the *Bundeskartellamt's* view, there is consensus that competition agency as well as court decisions should be based on sound economic analysis.

In particular, stringent qualitative economic arguments and, if necessary, quantitative analysis should be used to make a case. Consequently, the antitrust decisions of competition agencies often involve a substantial body of economic analysis, e.g. economic theories, estimation methods, simulation etc. that can result in qualitative economic arguments as well as empirical findings.

When an agency decision is under judicial review in court proceedings, the representatives of the agencies will have to conclusively demonstrate economic arguments. In this context agencies will have to take into account that not all judges have economic qualifications.

1.2 *The debate about the degree of "economisation" of competition law*

In the context at issue it should not go unmentioned that there is considerable debate among competition law practitioners and scholars about the degree of "economisation" in the specific application of competition law and about consequences of wrong decisions. In the debate, a differentiation is made between two types of wrong decisions. Firstly, competition authorities can wrongly regard business conduct as abusive and as a result prohibit admissible and desirable intensive competition (type I error or over-enforcement). Secondly, the competition authority might not identify and fail to prohibit abusive behaviour as such (type II error or under-enforcement). The disadvantages of a type I error result primarily from the fact that inefficient companies are artificially kept in the market, whose business resources applied otherwise would generate greater overall welfare ("static-allocative inefficiency"). The negative welfare effects of type II error arise from the loss of consumer surplus due to insufficient competition. In addition, welfare deficits should be taken into consideration that can result from a possible squeezing-out of more efficient suppliers and from a weakening of innovative competition ("dynamic inefficiency"). The positions on the appropriate degree of economisation of competition law application reflect varying weightings of the risks and consequences of type I and type II errors.

In the view of the relative low number of abuse cases in Germany and Europe there should be little evidence of considerable over-enforcement and, accordingly, of an overbalance of type I errors.

1.3 *Judicial review and competition law in Germany - Parameters*

1.3.1 *Organisation of courts competent to deal with competition cases*

Decisions taken by the *Bundeskartellamt* in all competition matters are subject to judicial review.

Only two courts specialising in competition law rule on decisions of the *Bundeskartellamt*. In first instance, the Düsseldorf Higher Regional Court decides upon the findings of the *Bundeskartellamt*, both as

regards facts and points of law. At the Düsseldorf Higher Regional Court, three antitrust chambers with experienced judges specialising in competition law are competent to deal with competition cases.

In the second instance, the case may be brought before the *Bundesgerichtshof* (Federal Court of Justice) but only on points of law. One chamber of the Federal Court of Justice composed of judges highly qualified and experienced in competition law matters decide on decisions issued by the *Bundeskartellamt*.

It should also be mentioned that both, the antitrust chambers of the Düsseldorf Higher Regional Court and antitrust chambers of the Federal Court of Justice also deal with claims of private parties based on competition law which give them a broad knowledge of competition cases as well as the underlying economics. Both, specialisation and experience with private competition claims, means that chambers well familiar with competition law and economics have evolved over time. Members of both courts also regularly contribute to the scientific discussions on competition law in the form of publications and speeches.

Furthermore, as regards other courts which deal with the competition law decisions of the antitrust authorities of the *Länder* as well as private claims based on competition law, most of them provide for chambers specialising in commercial law matters or even in competition law.

1.3.2 *Discussing competition law and economics with judges*

In the view of the *Bundeskartellamt*, promoting awareness of competition law and its application by the *Bundeskartellamt* in the general public is essential. Further to publishing press releases and giving speeches in public, the *Bundeskartellamt* fosters regular meetings with competition law experts. In this respect the “Working Group on Competition Law” is of great importance. For more than 40 years now the *Bundeskartellamt* has organised an annual meeting of the Working Group. The group consists of university professors from economic and legal faculties and judges from the antitrust chambers at the courts, who come together to discuss current antitrust issues. The *Bundeskartellamt* prepares a discussion paper for each meeting which serves as a basis for debate among the Working Group members¹. Furthermore, the *Bundeskartellamt* presents current and potentially contentious cases of its most recent practice in this forum.

Further to that, every other year the *Bundeskartellamt* organises an international conference on competition issues (IKK – International Conference on Competition). At these traditional meetings attended by competition experts from more than 50 countries, including judges and high-ranking representatives from politics, industry and academia, current problems of competition policy and competition law are discussed².

2. **Presentation of economic arguments in court**

While preparing the presentation of a case and complex economic arguments in court the *Bundeskartellamt* takes the following into account.

¹ In 2007, the *Bundeskartellamt* prepared a paper on “The Future of Abuse Control in a More Economic Approach to Competition Law” which will be available shortly at http://www.bundeskartellamt.de/wEnglisch/Publications/Working_GroupW3DnavidW2618.php.

² For more information and documentation of recent conferences see <http://www.bundeskartellamt.de/wEnglisch/Publications/ConferencesW3DnavidW2617.php>.

2.1 *Presenting economic arguments in court*

As a general rule, complex economic arguments should be incorporated in a written submission to the court well in advance to give the court time to thoroughly prepare for the hearing.

Furthermore, as with any other reasoning, economic analysis should be well structured and presented in a comprehensible manner. This means that the problem at issue should be clearly identified, and the line of argument should be presented in such a way as to enable the reader or listener to easily follow it. Also, the agency's representative should indicate the relevance for the case at issue.

If the analysis is based on assumptions, these should be highlighted to the court and reasons for determining parameters should be given. The agency's representative should be prepared to explain why other assumptions or parameters were not employed in the analysis.

A written as well as an oral presentation should conclude with a clear answer to the problem outlined at the beginning of the presentation.

In case the presentation and the line of argument are based on data, all the figures used in the presentation should be compiled in a handout. This handout should also include references to written submissions or pages of the file that contain the relevant data. If the data can be visualized, e.g. by a graphical presentation, this will also make the argumentation easier to follow for the listener. If an argument relies on an empirical analysis conducted by the authority, the database and the calculations or estimations should be made available to the court and the parties.

When opting for a computer-based presentation, the presentation should be supplemented with paper copies for each member of the court. Furthermore, in Germany, the paperwork will become part of the court file and facilitate possible appeals on points of law, if misunderstandings should occur.

2.2 *The role of economic consultants*

For complex economic analysis, competition agencies and other parties sometimes rely on economic consultants. In Germany, courts too may appoint economists to obtain expert knowledge if necessary.

2.2.1 *Experts appointed by the competition authority*

About 45% of the *Bundeskartellamt's* staff are economists that are well-trained and familiar with the relevant economic theories, methods and have experience in dealing with antitrust cases. Nevertheless, the appointment of economic experts as consultants can be very helpful.

This is the case, in particular, where extensive expert opinions of other parties are to be assessed and commented on. Furthermore, it may be beneficial to outsource the development and realisation of complex models and calculations.

In any case, the agency should make sure to appoint a consultant that is well experienced not only with theoretical but also with “real world” economics and competition policy. Most importantly, the expert should be able to present his arguments in a clear and comprehensible way. If the expert needs to give his opinion orally in court it is an advantage if the expert has experience with expert testimony in court and some knowledge of the competition law framework and proceedings.

The appointment of an external expert can be particularly advisable if the opposing party has already appointed an expert. This may be even more true if this expert is distinguished and has elaborated an excellent expertise. In this case it would be important to be on equal terms with the opposing party. On the

other hand, if the expertise presented by the opposing party is of low value it may suffice if internal economists counter the expertise at issue by pointing out methodological or other shortcomings to show that the expertise does not support its findings. In that respect it would be convenient to focus on the most obvious deficiencies of the expert opinion and treat them one by one in a presentation before the court.

2.2.2 *Experts appointed by the court*

In case an external expert is appointed by the court, it is important to assist the court by selecting a well experienced and neutral expert. Furthermore, it is of great importance in support of the court to elaborate a precise definition of the expert's task, *i.e.* by formulating precise questions. Furthermore, it is necessary to define which facts and data should be employed as a basis in the analysis in order to make sure that the expert's findings can be verified.

KOREA

1. Introduction

Since competition law enforcement is a work of deriving legal outputs from economic inputs, economic analysis is critically needed to justify competition law enforcement. Furthermore, economic analysis is assuming greater importance as economic phenomenon gets more complex and stronger competition law enforcement takes hold.

In Korea, the court's review is initiated when one appeals against the KFTC's decision. During the court proceedings, the plaintiff, who is dissatisfied with the sanctions imposed by the KFTC, presents various economic evidence and theories to argue illegality of the KFTC's decision, while the KFTC also presents economic evidence and theories to counter the plaintiff's claim and to prove legitimacy of its decision.

Here, there are often times when the court does not fully understand the complex and hard-to-grasp economic evidence and theories presented by the two sides. This problem has triggered discussions on the effective way the competition authority can explain difficult economic evidence and theories to the court.

This report will introduce how economic evidence and theories are presented in the course of administrative lawsuits filed against the KFTC's decision with actual cases where the KFTC explained such evidence and theories to the court.

2. General facts about administrative lawsuit proceedings

2.1 *Legal procedure*

When dissatisfied with the KFTC's decision, the plaintiff files an administrative lawsuit within 30 days of receiving the KFTC's written resolution. The KFTC's decision is under the exclusive jurisdiction of the Seoul High Court, whose Special Division 6 and 7 handle related cases. Dissatisfaction with the Seoul High Court's ruling can be appealed to the Supreme Court, which then conducts judicial review mainly in the form of documentary examination.

2.1 *Method of evidence examination during legal proceedings (explanation to the court)*

Examination of evidence in administrative lawsuits can be done in the following ways; (i) the concerned person applies for evidence examination at the court and has an examiner designated by the court carry out the examination, (ii) the concerned person commissions an economist to write a written opinion and submits it to the court as profert, (iii) the court asks related individuals or organizations, such as public institutions, schools and foreign government institutions, about facts necessary for the court proceedings (normally referred to as "fact inquiry," which can be applied ex officio by the court or by the concerned individual) and (iv) the concerned person asks for witness statement to the court and let the witness testify at the trial.

3. Introduction of actual cases and answers to the given questions

3.1 *What are your experiences with presenting complex economic theories or sophisticated economic evidence to courts?*

At the litigation stage, the KFTC wrote in the preparatory pleadings its argument to support the legitimacy of the KFTC's decision and submitted materials that it had collected from the investigation stage with its analysis of them.

However, since 2005, the KFTC has sought advice from outside experts, which has been submitted to the court in the form of written opinions (as in 2. (2) (ii)). There have been a total of fourteen such cases between 2005 and 2007 as illustrated below in <Table 1>.

Table 1. Cases where the KFTC submitted to the court the advice it received from outside experts (as of Jan. 9, 2008)

Plaintiff	Type of violation	Evidence contribution	Litigation status
POSCO	Abuse of market dominance	documentary evidence	High Court: won, Supreme Court: lost
Microsoft	Abuse of market dominance	documentary evidence	lawsuit withdrawn
Shinsegae	Merger	documentary evidence	pending at the High Court
Eland Retail	Merger	documentary evidence, attendance as a reference	pending at the High Court
KT	Cartel	documentary evidence	High Court: partial win, pending at the Supreme Court
Iljin Electric	Cartel	documentary evidence	confirmed win at the High Court
Tong Yang Leisure +1	Cartel	documentary evidence	confirmed win at the High Court
SK Telecom	Cartel	documentary evidence	High Court: won, pending at the Supreme Court
Kumho Industrial +3	Cartel	documentary evidence	High Court: won, pending at the Supreme Court
KT	Cartel	documentary evidence	High Court, Supreme Court: partial win
Samsung Life Insurance + 6	Cartel	documentary evidence	High Court, Supreme Court: partial win
SK Networks + 2	Cartel	documentary evidence, witness attendance	High Court, Supreme Court: won
Samsung Card	Cartel	Court's review	pending at the High Court

Samsung Life Insurance + 2	Constitutional appeal	documentary evidence	lawsuit withdrawn
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By type of violation, there were two abuse of market dominance cases, two merger cases, two cartel cases, seven undue subsidy cases and one constitutional appeal. So cases on undue subsidies, which is a type of violation unique to Korea, accounted for the largest share out of all cases where the KFTC submitted outside experts' opinion to the court.

As for evidence contribution, submission of written opinions as documentary evidence was most common, and outside experts who produced written opinions were all economics professors. Currently, the Korean court does not have in place a system to obtain advice about complex and difficult economic problems, and the court has a limited capacity to find economists suitable for determination of legitimacy of the KFTC's decision by itself. As a result, in actual litigations, evidence examination method (ii) is most widely used.

In most cases (except for some cases of undue subsidies), the plaintiff submitted expert opinions to the court first, and then the KFTC responded by producing its own written opinions countering the plaintiff's claims and actively arguing for the legitimacy of its decision.

Apart from cases where written opinions were submitted as profert, there are also cases where a.) the KFTC called the outside experts who wrote the written opinions to witness for examination (undue subsidy cases involving SK Networks and two other companies), b.) the plaintiff's outside expert presented himself as a witness and the KFTC only cross-examined him (Microsoft's abuse of market dominance) and c.) the outside expert presented himself as a reference and explained economic matters with presentation materials and answered the judge's questions (Eland Retail's violation of merger regulations (merger between discount stores, NewCore and Carrefour Korea)).

These days, there are often times when the economist, who produced the written opinion by the above methods a.) or b.) for submission to the court, is called to the court as a witness and testifies about the written opinion, after which the other party is given the chance to counter his claims, or when the economist presents himself to the court as a reference and explains the written opinion himself. Unlike a witness, a reference does not take an oath before testifying and the counter party's right to cross-examine the reference does not need to be guaranteed, in principle. However, in reality, there is little difference between a witness and a reference since the court guarantees the opportunity for the counter party to argue against the references' claims.

Since 2006, the number of cases where the outside expert presented himself to the court as a reference to provide an explanation of economic data and theories (as in c.)) is growing. This is attributable to the Korean court's efforts to actually establish oral pleading, as part of which the court allowed the plaintiff and the defendant to state orally key issues in court and enabled their lawyers or reference persons to plead using presentation materials at a court equipped with computers and overhead projectors.

More specifically, in the Eland Retail's case, one session of sorting out genuine issues between the two parties was followed by two presentation sessions. The first presentation was dedicated to organizing the overall arguments of the lawyers of the two sides and to hearing explanations on economic analysis from the outside expert on the plaintiff's side. Then at the second presentation session, the outside expert from the KFTC's side gave an explanation on economic analysis (economic theories and economic regressive analysis were explained by different experts). In this case, one of the controversial issues was whether outlets run by Eland Retail were included as discount stores. So instead of having the judges visit

the outlets themselves, the KFTC videotaped the outlets itself and played the video clip in court. Between 30 minutes to one hour was given to each of the four presentations by the plaintiff and the defendant.

Meanwhile, concerning the merger between E-mart and Wal-Mart (handled by Special Division 6), which is similar to the Eland merger case (handled by Special Division 7), there has not been any presentations in court, which is thought to have relations to the characteristics of the judge.

d.) Next, there are also cases where the KFTC requested review of evidence to the court and an expert appointed by the court carried out the review (in the Samsung Card's undue subsidy case, the key lied in the value of the unlisted shares).

Overall, there have been four wins, two wins at the High Court (pending at the Supreme Court), two lawsuit withdrawals, two partial wins, one loss and three cases pending in the court.

3.2 *Can you describe which techniques proved most effective and which did not?*

During the litigation process, the plaintiff presents economic analysis commissioned to an outside expert. Since the court does not have enough expert knowledge in that field, the court recommends the KFTC to review and refute the analysis submitted by the plaintiff. Then the court demands the plaintiff to retort on the KFTC's refutation. Thus, it is most important to make the court recognize that the economic analysis submitted by the counterparty has faults in terms of its premises and analysis method.

To this end, economic terminologies and equations must be made easy to understand for the general public, and the premise on which the economic equations are used in analyzing economic phenomenon must be explained easily. In addition, it is effective to have the expert who produced the written opinion attend the trial himself to give explanations on the submitted opinion to the court and to answer the court's questions.

3.3 *Do you think that competition authorities can be more effective in court if they retain external economic consultants to present their cases?*

In all of the fourteen cases introduced above, outside experts (or economic consultants), not the KFTC officials, conducted economic analysis, whose results were submitted to the court. At present, the KFTC does not have enough manpower capable of economic analysis, and the court tends to trust the statement by an objective third party rather than the staff members of the KFTC, who might give statements favorable to the KFTC. For this reason, outside experts are called in when explanations are needed in the litigation process.

When getting help from outside experts, problems arise concerning inefficiency of having to review the given case again from scratch, the KFTC's budget shortage and the plaintiff's prior occupation of excellent outside experts.

In response, the KFTC has been working to secure sufficient budget and an outside expert pool in addition to establishing taskforces to handle particular cases (consisting of responsible staff, the Litigation Team and outside experts).

Due to the credibility issue the court has regarding the KFTC staff's statement and the lack of manpower within the KFTC, the court has relied on outside economic experts' advice in most cases. However, it is hard to say this method is more effective than others.

3.4 *Would you recommend that courts appoint independent economic consultants to supplement the parties' presentations on the economic issues involved in a competition case? Or do you believe that courts should rely exclusively on the economic arguments presented by the parties?*

The KFTC has never recommended the court to appoint independent economic consultants. When the two sides' economic arguments are sharply divided making it difficult for the court to make a decision, the court can ask an outside expert to confirm facts or review the evidence and ask him questions. Here, the plaintiff and the defendant are free to recommend qualified experts to the court, but the court is not bound to follow that recommendation.

The court determines the value of evidence according to its free conviction and does not have to rely only on the economic arguments presented by the two sides. Nevertheless, in case the court decides to judge based on economic arguments not proposed by the plaintiff and the defendant, it is desirable to give the two parties sufficient opportunity to defend their positions.

3.5 *Does presentation of complex economic theory or evidence present different issues before an appellate judge as opposed to a judge who is responsible for making factual findings?*

In a trial at the Supreme Court (the appellate court), the original decision is reviewed only from the legal perspective and thus, the Supreme Court conducts ex post facto review unlike the Seoul High Court. The appellate court does not carry out fact finding itself and makes a decision based on the fact finding in the original judgment by the Seoul High Court. In this regard, facts confirmed to be legitimate in the original decision are binding at the appellate court. Both the plaintiff and the defendant cannot argue fact findings of the original ruling. However, if an economic theory presented in the appellate court helps the judge's decision on the given facts, the presentation of the theory before the appellate judge will be considered possible.

NETHERLANDS

1. Introduction

In this paper some comments are offered on the issue of (techniques for) presenting (complex) economic analysis to judges. What follows is a short discussion of a few aspects of this topic on the basis of some examples. Although the number of occasions where the Netherlands Competition Authority (hereinafter: NMa) has had to present (complex) economic evidence in court has not been numerous so far, the experiences drawn from these occasions nevertheless give an impression of the Dutch courts' approach towards economic issues in competition cases, which might be useful for the Working Party.

We will first discuss how the judicial system with respect to competition law works in the Netherlands. Then we will briefly discuss how the (specialised) courts have up until now considered economic issues in competition cases. We will do this by presenting some of the relevant cases. We will also discuss one specific case (Nuon-Reliant) in which complex economic analysis was presented. Although the NMa's track record for court cases also shows more positive results, we chose to discuss examples that resulted in a negative (for the NMa) outcome in this area, since these are more suitable to demonstrate "lessons learned". In general, they show that the Dutch courts seem inclined to put a heavy burden of (factual) proof on the NMa, even with respect to basic economic issues.

2. The judicial system in the Netherlands

The Netherlands Competition Act [*Mededingingswet*] is analogous to European Community competition law (EC Treaty) as regards substantive law rules. The statutory framework for enforcement provides for both a civil and administrative enforcement system. The NMa has been responsible for administrative enforcement of competition law since 1998. Review of the NMa decisions is regulated by the Competition Act and the General Administrative Law Act. According to Article 93 of the Competition Act, the (District) Court of Rotterdam (administrative law department) is the competent court in respect of judicial appeals against decisions of the NMa. Judgements of the Court of Rotterdam are subject to a judicial appeal to a specialised tribunal, the Trade and Industry Appeals Tribunal (CBb).

The Court of Rotterdam is the only ordinary court which is competent to handle cases of the NMa and other regulators, such as OPTA (telecommunication). A limited group of judges has been trained/specialised in economic public law, but the court has no experts in competition law or economics. The CBb is a specialised court in financial and economic public law. This court not only judges questions of law, but also investigates the merits of the case. Consequently, two courts (first instance, appeals court) perform a full review of cases. Unfortunately, the Court of Rotterdam and the CBb take a different stance on a number of fundamental principles. This is however not surprising, bearing in mind that the Dutch Competition Act is relatively new.

3. Selected cases

3.1 *Secon*

This case was about (vertical) retail price maintenance (RPM) of G-star clothing. The NMa considered that RPM was prohibited ‘per se’ and, hence, did not have to analyse the effects of the RPM on the market.

According to the appeals court (CBb) RPM can indeed be considered as a ‘per se’ forbidden agreement, but it still needs to be proven that the agreement has the potential to appreciably restrict competition on the market. More specifically, the Court ruled that it was the NMa’s job to investigate and establish the appreciability of the restriction, which cannot be done *in abstracto* but has to be done by taking into account the concrete factual and economic circumstances. Since the NMa had failed to investigate these circumstances, its fining decision was quashed and the NMa was ordered to reassess the case.

From an economic substantive point of view this decision may be considered sensible. Though from a legal point of view, with respect to the desired burden of proof, the consequences might be far-reaching. Did the court imply that all ‘per se’ forbidden agreements, ‘horizontal’ ones also, should be investigated with respect to appreciable restrictions of competition? And if so, should this be limited to some kind of market-share analysis only (see below on the ‘bicycle’-case), or should the NMa establish some sort of effect on the market? Subsequent rulings seem to imply that the appreciability issue is to be addressed primarily by looking at the market shares of the undertakings involved.

Since all the evidence on the character of the G-star-agreement pointed in the direction of very low market shares, the NMa did not consider it worthwhile to investigate the matter in more detail after the CBb’s quashing of the decision, and decided to drop the case.

3.2 *Bicycles*

This case concerned a horizontal price-fixing agreement between bicycle producers in the Netherlands that was also deemed ‘per se’ forbidden by the NMa. In this case the court sustained the NMa’s decision, but, more importantly, the court also ruled that the agreement was an appreciable restriction of competition because of the large combined market share of the producers involved of over 75%.¹

Since it was evident in this case, on grounds of the large market share, that the agreement (given its ‘hard core’ nature) was to be considered an appreciable restriction of competition, the court’s ruling in the bicycle-case did not give the NMa much guidance on the required burden of proof in less “straightforward” cases.

3.3 *Modint*

This was also a case of RPM, at least according to the NMa. Although the case is more complicated than presented here, basically the court decided that the NMa had not established that the agreement was a case of RPM. The court ruled that the agreement had to be analysed (which had not been done by the NMa) in its economic context in order to determine whether the agreement constituted RPM at all. Again, this could not be done *in abstracto* by looking at the content of the agreement only. In this case, the NMa

¹ In a later case on ‘bid rigging’ the court even went so far as to rule that, at least in that case, ‘bid-rigging’ practices were not only forbidden ‘per se’, but also ‘appreciably’, because of the fact that this specific ‘auction’ constituted a market by itself.

decided that a certain system of (given) rebates between producers and retailers constituted an instance of RPM.

More specifically, the Court was of the opinion that the system of rebates did not constitute RPM, but should be considered as a specific payment system for administrative services delivered by the retailers' trade association.

Essentially, the Court pointed out to the NMa that agreements should be considered in the economic and legal context in which the agreement functions or takes effect, in order to determine whether or not they (may) restrict or distort competition. Part of this analysis should be dedicated to the issue of the appreciability test.

3.4 *Psychologists*

A case in which it became particularly clear how thorough the Court seems to want the NMa to investigate cases with respect to economic aspects, is the case concerning 'psychological services'. The Court seems to demand not only a detailed economic 'story' behind the case, but also requires this 'story' to be supported by the facts in the file and demonstrate that a restriction of competition did indeed take place.

The case involved three trade associations of psychologists. These associations offered (fixed and equal) advice on tariffs to be employed by psychologists (differentiated with respect to specific types of psychological help, like, for instance, 'psychotherapy' or 'labour psychology'). The NMa considered this market to be a contestable market, open to competition between psychologists.

The Court, however, was very sceptical about the actual possibilities for psychologists to compete. The Court pointed out that the NMa should have established, on the basis of facts, that the psychologists did in fact have room to compete, given the role of health insurers and the way people requiring psychological help ('consumers') were directed by their general health practitioners to certain psychologists. The Court, in other words, seems to suggest that the specific circumstances in this market, more specifically that 'consumers' did not choose their own psychologist, nor would they be very interested to do so (given the nature of their insurance policies), meant that competition was weakened to begin with. If psychologists did not or need not compete with one another within this specific economic context, then there was no competition to be restricted either.

The case is now under review by the CBb. In its defence statement, the NMa basically argues as follows:

Psychologists are free to advertise, charge any price, determine working hours etc., hence are free to compete, generally speaking. Consumers may choose any psychologist they want. Even if consumers choose on the advice given by a general practitioner or health insurer, still psychologists are able to compete with respect to consumers, general practitioners and health insurers.

It will not be easy to convince the CBb with these arguments, since there is no new factual evidence to sustain them other than the facts on which the court based its judgment. It is possible therefore that the CBb will adopt the Court of Rotterdam's reasoning. In that case the NMa may be required to (additionally) prove/investigate that indeed consumers, general practitioners and insurers can and also do choose between psychologists on the basis of, for instance, price and quality.

3.5 *KLM*

In this case the NMa investigated a complaint of excessive pricing by the Royal Dutch Airlines (KLM) and found that there was no reason to assume the existence of excessive pricing. On the basis of these conclusions, the NMa did not give much consideration to other elements of the complaint that also related to ‘high prices’. These elements consisted of ‘the non-availability of low priced tickets’ and ‘overbooking of airplane capacity’. The Court of Rotterdam pointed out that these elements of the complaint should have been investigated, because they might have constituted a separate ‘abuse of a dominant position’. The Court did not dispute the NMa’s decisions concluding that the tickets were not excessively priced.

The NMa adopted a new decision and defended in detail why and how the additional elements of the complaint were related to pricing policy and, in the specific case at hand (hence, not in general), could not constitute forms of abuse independent of excessive pricing, on which the court has sustained the NMa’s previous decision. Therefore, no new investigation or market research was necessary with regard to these elements.

The Court remained unconvinced, though, and retained its point of view that factual analysis had been necessary; a theoretical description of the relation between the different aspects of the complaint was insufficient to conclude that no separate abuses were possible.²

3.6 *Mobile operators*

The NMa imposed fines on the five mobile telephony operators in the Netherlands for a concerted practice in violation of Article 81 EC and its national equivalent in the Dutch Competition Act. The operators convened (on one occasion) and discussed a reduction of the bonuses paid to independent dealers for each telephony subscription sold to consumers (‘prepaid’ and ‘post paid’ mobile telephony packages). More specifically, the operators discussed the timing of this bonus reduction, which the NMa considered an attempt to avoid a ‘first mover disadvantage’ (market share decline because of unilaterally reducing the bonuses) for the operator who is the first to reduce bonuses. In its decision, the NMa qualified this concerted practice as a severe violation of article 81 EC, having as its object the restriction of competition. The undertakings involved were fined heavily.

This time the Court of Rotterdam and the CBb did not so much focus on the (absence of) economic content of the reasoning, but more on the legal requirements of proving the existence of a concerted practice. With respect to ‘prepaid’ packages, both the Court and the CBb ruled that it was only proven that one party had unilaterally stated its intention to reduce bonuses for prepaid packages. There was no evidence of any response the other parties might have given to this announcement, during the one() meeting. Hence, there was no proof of concerted practice (which required some sort of “mutuality”). With respect to ‘post paid’ subscriptions the Court of Rotterdam ruled that the meeting constituted a concerted practice (there was no question of just a unilateral statement) as opposed to the ‘prepaid’-part of the case and that this practice had the object of reducing competition.

With respect to ‘post paid telephony packages’, the Court of Rotterdam ruled that there was a violation of competition law, but that the concerted practice ‘only’ concerned the timing of the reduction of bonuses and therefore did not constitute a *severe* violation, in contrast to the NMa’s findings. According to the Court, the reduction of bonuses would have happened unilaterally by each operator anyway, due to the

² The case was won by the NMa in higher appeal, but the economic content of the CBb’s ruling is rather scanty.

oligopolistic structure of the market. So, the Court put its own economic reasoning in place of that of the NMa. This was one of the reasons for the NMa to appeal the Court's decision.

In its ruling, the Court of Rotterdam referred to the Anic-case law (Polypropylene), as the NMa had done in its decision.³ According to this case law, undertakings that take part in a meeting where commercially sensitive information is exchanged with the goal of restricting competition and that remain active on the market after such a meeting, are deemed to take this information into account when determining their market behaviour. Hence, the causal link with their market behaviour is given, unless these undertakings can prove to the contrary ('the Anic rule'). The court ruled that there was no case law preventing the application of the abovementioned Anic-rule in cases where the concerted practice existed of only one meeting between competitors.

The CBb is not yet convinced though, and recently stated that it will request the European Court of Justice for a preliminary ruling. One of their questions concerns the CBb's dilemma on exactly what criterion should be used in order to determine whether a concerted practice has the goal of restricting competition. Another question is whether the 'Anic-rule' also holds in case of one meeting only, since Anic concerned a complex cartel with a longstanding concerted practice.

So, on the substantive economic issues the CBb has not yet decided, as this will only happen after the judgement of the European Court of Justice.

3.7 *Nuon and Reliant merger case*

Nuon and Reliant were independent energy producers and (wholesale) energy traders. With respect to electricity Nuon was a relatively small producer, while Reliant had ample production capacity. After the second-phase investigation, the NMa cleared the merger on condition that 90 tranches of 10 MW of Nuon's *firm* capacity were auctioned between July 1, 2004 and December 31, 2004. Total capacity in the Netherlands is about 20.000 MW (2001-figure). Some market parties (Nuon, Essent and Electrabel) were excluded from these auctions. Nuon and Reliant objected to the obligations and appealed before a Dutch court.

The NMa had based its decision, among other things, on two econometric simulation models of the Dutch electricity market, one of which was a 'supply function equilibrium model' (SFE-model). SFE-models are relatively complex models and typically generate many equilibria.

The models predicted that the merger would lead to significant price-increases (ca. 10% on average; see below), depending on the time of day, i.e. the moments which allowed the parties to exercise (significant) market power. Hence, these studies tried to measure market power directly. The SFE-models' forecast was that the merger would lead to a different set of equilibrium-solutions so that, compared to the pre-merger set of equilibria, the low-price equilibria disappeared. The 'median' price was thus higher and was presented as the predicted result.

The Court ruled that the NMa had failed to prove that the merger would result in a dominant position with respect to electricity production. One important reason for this conclusion was that the Court did not accept the outcome of the econometric analysis as prove of dominance, but considered these merely as an indication that prices could rise as a result of the merger. Beside, the Court was not convinced by the argument that in the SFE-model the median price would rise. The NMa had not proven convincingly what the pre-merger equilibrium price was and how the merger would lead to a higher equilibrium price. Put differently: the fact that many equilibria exist before and after the merger with no proof of what the actual

³ European Court of Justice, d.d. 8 July 1999, Commission/Anic Partecipazioni, C-49/92P, I-4125.

equilibrium was before the merger and what would be the likely equilibrium after the merger, caused the judge to be hesitant in accepting the results.

The Courts even seemed to doubt the applicability of an assumption like ‘profit maximization’. This seems to have been a side-issue as well in some of the other cases described before. Do firms maximise profits and if not, in what sense would or could they have incentives to restrict competition, seems to be the underlying question of the courts. Consequently, the NMa should possibly go as far as to prove that firms do indeed (intend) to maximise profits.

All in all, the court was not convinced that the SFE-model in particular, with its many equilibria, could forecast with precision whether prices would rise. Besides, they were not convinced that a dominant position would be created based on market share analysis.

The CBb decided along the same lines. According to the CBb the market share analysis did not point to a position of dominance. The CBb also did not accept proof of price rises based on the econometric models as direct proof of dominance. The CBb based this decision on the reasoning that such proof of price rises *assumed* dominance instead of implying dominance.

4. Some tentative conclusions

The Court’s decisions in the Nuon-Reliant case seems to point to the tension between an analysis of dominance in terms of market shares and qualitative analysis on the one hand, obviously preferred by the courts, and (direct) econometric evidence of dominance on the other, possibly dismissed on the basis of a faulty argument.

Whether and in what way this is due to the presentation of the analysis by the NMa remains to be seen. The NMa has of course tried to think about how to present the same type of econometric analysis used in the case of the proposed merger between Nuon and Essent, but this has not been put to the test, due to the fact that both parties withdrew their merger plans.

On the other hand, based on the other cases described, it seems that the courts themselves experience difficulties in deciding how to deal with basic economic assumptions and theories, especially where the ‘translation’ of abstract economic principles to concrete cases is concerned. The courts pointed out that the NMa’s analysis has not been sufficient in a couple of cases, and they have doubted some of the underlying assumptions of the functioning of the markets as described by the NMa. Still, they have not pointed out exactly what is required to convince them. For instance, should the NMa always prove that firms (or professionals in the market) maximise profits and hence have the incentive to restrict competition?

So, the NMa is still wrestling with the question what exactly is required with respect to the facts (like the functioning of a market) and economic analyses and, consequently also with the question how to present an economic analysis. To base the analysis on the facts of the case at hand as required by the courts – and less ‘*in abstracto*’ – is obviously a very sensible starting point and the courts are certainly willing to review both the facts, the (economic) reasoning and the logic between them in order to be able to assess the conclusions drawn by the NMa. That much is clear. It is also clear that in the past the NMa has not always performed this exercise satisfactorily. Still, it is unclear what the courts expect from the NMa with respect to the level of detail of economic analyses, underlying assumptions and the facts required to underpin them and the presentation of the analysis.

It follows from the above that the questions posed by the OECD cannot be answered very satisfactorily at this moment. Still, that may be informative in its own way.

One of the OECD's questions is whether we think that competition authorities can be more effective in court if they retain external economic consultants to present their case(s). Another question is whether we are in favour of courts appointing independent economic consultants to supplement the parties' presentations on the economic issues involved in a competition case. Or do we believe that courts should rely exclusively on the economic arguments presented by the parties? We cannot answer these questions based on our experience.

Does presentation of complex economic theory or evidence present different issues before an appellate judge as opposed to judge responsible for making factual findings? We do not have a strict answer to this question, since in the Netherlands the appellate judge and the 'fact finding' one do not differ in their approach. Both the court in appeal and the court in higher appeal are inclined to fully test the facts and the theories presented by all parties.

PORTUGAL

1. Introduction

The purpose of the present paper is to provide an insight on the techniques which have been used by the Portuguese Competition Authority (PCA) for presenting complex economic evidence (theories, sophisticated methodologies or empirical analysis) in Court.

The paper is divided in four sections. We shall first, in this section, present the national legal framework on the way economic evidence can be considered in competition cases and presented in Court. We shall then consider in greater detail the use of economic evidence on competition cases and its presentation before the Courts (section II). The latter is illustrated by means of a concrete case dealt with by PCA, namely the “salt cartel”, whose decision (from June 2006) has been confirmed by the two Portuguese Jurisdictional Instances, in 2007, where economic analysis has been used, mostly, for the computation of the economic benefit obtained by the cartel members from that conduct (section III). Finally, we conclude with some remarks and comments on open issues (section IV).

1.1 *Legal framework*

Law and Economics have always been at the heart of competition assessment. However, over the past years, the complexity of economic analysis used in competition cases has increased. This trend is visible in merger analysis and particularly in anti-trust proceedings. Often, competition cases involve several economic studies presented both by the parties and by Competition Authorities, showing antagonising theories about the same case. Frequently, it is for the Judge to decide which economic theory is more appropriate to assess a particular case.

In Portugal, Judges and Public Prosecutors do not have any research or economic staff to assist their assessment of economic analysis. Portuguese Law Schools generally include basic economic theory in their curricula and the Centre for Judicial Studies (*Centro de Estudos Judiciários*) provides accounting and management training to Judges and Public Prosecutors¹.

¹ In order to provide Judges and Public Prosecutors more in-depth understanding of competition law and economics, the PCA, in co-operation both with the Centre for Judicial Studies – the body responsible for, *inter alia*, the initial, supplementary and ongoing training of Judges and Public Prosecutors – and the Attorney General's Office have organised several Seminars targeted at the Judiciary.

The I *Training Course for National Judges in European Competition Law* (November 2004), co-financed by the EC and endorsed by the Superior Judicial Council, was attended by 85 Judges. In June 2005, a *Course on European Competition Law for Public Prosecutors*, co-organised with the Attorney General's Office, was attended by 82 Public Prosecutors and legal staff from the Office.

In addition, from 2005 to 2007, PCA staff co-operated in a series of Seminars organised countrywide by the main Portuguese Consumer Association, and also targeted at the Judiciary training.

In May 2006, the PCA and the Centre for Judicial Studies signed a Cooperation Protocol to assure a broader knowledge of competition issues and administrative offence law, on the basis of initiatives carried out on a regular basis. In June 2006, the PCA participated in a Seminar EC and *National Competition Law* organized by the Centre for Judicial Studies in the context of Judges and Public Prosecutors initial training.

Nevertheless, such basic teaching is in general insufficient to cope with the increasing complexity of economic studies involved in competition cases.

Therefore, the procedural rules applicable to appeals of PCA decisions establish mechanisms to overcome such “*technical lacuna*”.

A way to provide Judges a further insight on economic studies used in competition cases is the testimony of witnesses in Court.

Through testimonial evidence, the Court can better comprehend the methodology used by economists in order to establish the facts on which subsequent analysis will be based on. Furthermore, the relevance of such facts and its significance for the implementation of the chosen methodology, as well as the justification for the selection of any given methodology can be clarified by means of a testimony in Court.

Moreover, according to Portuguese procedural rules, Courts can be assisted by independent experts, whose intervention can be required by the parties or determined *ex officio*. Experts can only intervene when the assessment of certain *facts* requires special technical, scientific or artistic knowledge. In highly complex cases, more than one expert can intervene and the law provides that experts may have different views on the same facts.

Experts are appointed by the Judge, who also determines the scope of their intervention. After the analysis, experts provide a report and can also be heard in Court. In order to assist the expert opinion assessment, the Public Prosecutor and the parties involved can designate their own technical consultant, who can question the expert.

The law foresees that the experts’ technical, scientific and artistic opinion cannot be freely appreciated by the Judge – unlike all other evidence, which can be assessed by the Judge unreservedly – and that the Judge must duly justify its assessment whenever it disagrees with the expert’s opinion. However, this restriction only applies to the expert technical opinion and not to the assessment of facts on which that technical assessment is based. Therefore, the Judge can reject any economic analysis if the underlying facts are found not proved.

In practice, as will be described in further detail below, the Lisbon Commerce Court (*Tribunal do Comércio de Lisboa*, the national first jurisdictional instance on appeals of PCA decisions) has accepted that PCA economists and econometricians testify in Court as witnesses. Therefore, PCA specialists have had been given the opportunity to explain during trial, in an intelligible manner for the Court, PCA economic assessment reasoning answering to questions posed by the different trial participants: the Public Prosecutor, PCA, the involved undertakings, and the Judge. Furthermore, PCA provides its view on the economic studies presented by the involved undertakings, thus helping Judges to construe those studies in a more balanced and critical way.

Reciprocally, economic specialists of the involved undertakings have also testified in Court, in a similar way as the PCA.

So far, there has not been a case where an independent expert, in the legal sense described above, has been called in proceedings dealing with an appeal of a PCA decision.

In October 2007, the PCA and the Attorney General’s Office organised a *Seminar on the Application of National and Community Competition Law*.

The Seminars and Courses organised so far have benefited from an active participation of Judges and Public Prosecutors, allowing for a broad and fruitful exchange of experiences.

1.2 *The scope of economic evidence*

In Portugal, only the Lisbon Commerce Court (first instance), which reviews PCA's decisions both on the merits and procedural issues, has the competence to assess facts on proceedings related to appeals of PCA decisions.

Economic evidence may, yet, go beyond facts and rely on specific methodologies (theoretical or econometric) which, as opposed to facts, have a subjective (or potentially contestable) nature and may thus, in case of appeal, be subjected to further assessment of the Second Jurisdictional Instance, the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*).

National Courts have so far well accepted the economic evidence presented by PCA and this, in part, due to the simplicity and intuitive reasoning underlying the presented methodologies, being thus explicit to Judges and Public Prosecutors.

Since National Courts are not, in principle, coadjuvated by economic expertise, the methodologies presented before Courts must be explained in a simple and intuitive way.

2. **Use of economics in competition cases and its presentation before the courts**

As stated before, economic evidence is useful (and used) in merger and anti-trust cases. On the anti-trust cases, economic evidence has been used, notably, on:

- The relevant market definition;
- The identification of effects stemming from the conduct; and
- The economic benefit and/or damage, resulting from the conduct.

Since the creation of PCA in 2003, although two merger decisions have so far been appealed, the appeals are still pending. Only anti-trust cases, namely cartels, have been subjected to by now completed judicial review. No judgement has yet been given on abuse of dominance cases.

A more general (and more difficult) use of economic evidence, not yet considered in decided national cases, regards indirect proof of anti-trust conducts (v.g., cartels) for which there is no direct evidence of an agreement (*maxime*, documentary evidence).

Some issues on the use of economic evidence on anti-trust cases are detailed hereafter.

2.1 *Relevant market definition*

Economic analysis is important for defining the relevant product/service (material) and geographic dimensions of the market, either by the means of the substitutability criterion (*vide* the SSNIP – *Small but Significant and Non-transitory Increase in Price* – criterion) which may require econometric estimates of elasticities (if such values are unavailable) or by the means of any other economic analysis tool.

Economic analysis for the relevant market definition based on the SSNIP criterion is, notably, important for assessing complex cases where the concerned product may have close substitutes or where more than one relevant market may be concerned (v.g., cases where the involved undertakings are vertically integrated).

2.2 *Effects resulting from the conduct*

Anti-trust conducts may produce pro- and/or anti-competitive effects.

Whilst a conduct producing pro-competitive effects, which outweigh possible anti-competitive effects, may be considered justified, anti-competitive effects contribute to increase the infringement's gravity and are thus taken into account on the determination of the amount of fines.

Effects can be further disentangled between observable effects, sustained by direct evidence (v.g., documentary evidence of selling price increases), and unobservable effects, which need to be inferred by the means of specific economic or econometric analysis.

In an economic sense, effects measure the difference in consumer and social welfares between the observed market state, subjected to the anti-trust conduct, and the unobserved market situation in a competitive environment.

It follows from the distinction between an observable and an unobservable market states that part (if not most) of the effects stemming from an anti-trust conduct are unobservable.

That means that, despite the available direct evidence, economic or econometric analysis tools may always be required to infer (part of) the unobservable effects stemming from the conduct in question.

Moreover, Portuguese Courts, and notably the Lisbon Commerce Court, have stated that any referred effect from the conduct must be clearly demonstrated.

Two effects-related concepts are "economic damage" and "economic benefit", the first defining the cumulated effects stemming from the conduct and the latter being the part of economic damage which is captured by the infringing parties (as detailed in subsection II.3 hereafter).

2.3 *Economic benefit / damage resulting from the conduct*

The economic damage (or cumulated effects) resulting from the conduct equals the sum of the economic benefit (which the infringing parties perceived) and the economic harm to consumers (and customers of the latter parties). Theoretically, both the economic damage and the economic benefit are quantifiable, although the latter is more hardly quantifiable than the former as it requires, in addition to the economic benefit, inferring and comparing the demand structure between the unobserved competitive environment and the observed market state subjected to the anti-trust conduct.

Yet, since part of the economic benefit is not quantifiable, in practice one can only hope to get an underestimate of the real economic benefit, whose value is, in principle, lower than that of the economic damage.²

Apart from being harder to quantify than the economic benefit, the concept of "economic damage" is not clearly defined within the national competition law, other than being possibly considered a cumulating factor to the infringement's gravity. The concept of "economic benefit", on the other hand, is expressly mentioned in the legislation as one of the criteria for determining the fine, as "[t]he *advantages that the offending undertakings have enjoyed as a result of the infringement*" (ex vi Article 44(b) of the PCL).

² In theory, it cannot be excluded that an anti-trust conduct, though anti-competitive, may result in benefits for final consumers, thus implying a total economic damage lower than the economic benefit the infringing parties retrieved from the conduct.

PCA has successfully defended in Court a cartel case containing an assessment of economic benefit, known as the “salt cartel” (further detailed in section III below).

2.4 *Economic evidence as indirect proof of a cartel*

On the use of economic evidence as indirect proof of an anti-trust conduct, we shall focus on the specific case of cartels.

According to the EC Treaty and the PCL, the concept of “cartel” may fall into two distinct types of conduct: an agreement and a concerted practice. Whilst there is a distinction between these two types of conduct – an agreement results from a communion of will and a concerted practice consubstantiates a less formal coordinated behaviour such as that stemming from a set of communications – the same standard of proof is applicable.

If direct evidence may be sufficient to establish the existence of a cartel, the exclusive use of circumstantial or indirect evidence is possible but riskier, as it must dismiss any other plausible explanation that the observed conduct may not emerge from a cartel,³ and may, also for this reason, prove insufficient to convince courts.

Indirect evidence can be notably of two types: communication and economic evidence.

Communication evidence shows that the parties established contacts about issues related with their alleged agreement, thus suggesting the existence of the latter but without proving it *per se*. Special types of communication evidence are the so-called “*facilitating practices*”, which include price signalling and the “most favoured nation” and “meeting competition” clauses.⁴

In the absence of communication evidence, it becomes even harder to prove the existence of a cartel exclusively on the basis of economic evidence and, notably, if the relevant market has a structure which favours (tacit or explicit) collusive behaviour. If such is the case, it becomes almost impossible to disentangle between “plus factors” which can *per se* dismiss the possibility that the observed parallel behaviour stems from any other type of (licit) conduct than concertation.

Rather than establishing proof of a cartel, indirect (economic) evidence should be mostly used, as it has been in Portugal, (i) *ex ante* screening device to the formal opening of a cartel investigation in case that evidence cannot dismiss the possibility of collusion or/and (ii) *ex post* as a way of inferring (unobserved) effects from the conduct.

³ In the famous “EC pulpwood case”, the European Court of Justice (ECJ) ruled that “*parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct*”. That is to say that, although collusion which distorts competition is prohibited by law, the EC Treaty “*does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors*” (see *Ahlström and Others v. Commission*, Cases No. C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECJ decision, 31 March 1993, paragraph 71).

⁴ See v.g. Massimo Motta, 2004. *Competition Policy: Theory and Practice*, Cambridge University Press, United Kingdom, chapter 4, for details.

The recent national “*Wheat millers cartel*”, decided by PCA in October 2005, fully illustrates a case where both communication and economic evidence have been used in order to establish the infringement. The appeal of the case is still pending before the Lisbon Commerce Court⁵.

3. Case study: The Portuguese “Salt Cartel”

The national “salt cartel”, detected in mid 2005 and sanctioned by PCA in June 2006, is a highly instructive case in Portugal for a twofold reason:

- It was the first hard core cartel case to be assessed and upheld by the Lisbon Commerce Court, the first instance court, albeit the total fine reduction, from € 910,728 to € 704,500, and whose decision has been totally confirmed by the Lisbon Court of Appeal (the second jurisdictional instance);
- It was the first cartel case with an assessment of the economic benefit the four infringing parties obtained from the agreement, which, according to PCA, amounted to about € 5,2M.

This case’s proceedings together with the two jurisdictional instances’ judgements are summarized in greater detail hereafter.

3.1 PCA Decision

3.1.1 Relevant market

The relevant market consisted in the wholesale of salt to the food and industrial sectors within the national borders. The geographic dimension of the market was mostly justified on the basis of transportation costs.⁶

Apart from its importance to the general food sector, salt (sodium chloride, *NaCl*) is, notably, an important raw material for several industries, such as construction and public works, glass manufacturing, chemical industry, and metalworking.

3.1.2 PCA investigation and findings

Following dawn raids, PCA found hard (documentary and testimonial) evidence that, from about October 1997 to January 2005, four salt producers and wholesalers had been involved in a hard core cartel, in pursuance of which they held regular secret meetings in order to coordinate their commercial behaviour, fixed target and/or minimum prices, agreed target sales quotas among themselves and monitored the progress of the said collusive arrangements.

The agreement aimed wholesaling to two “families” of customers: industry (family 1) and the general food sector (family 2), the latter regrouping general food wholesalers and large retailing groups.⁷

⁵ More information on this case can be found at:
http://www.autoridadedaconcorrenca.pt/Download/pressrelease11_2005.pdf.

⁶ According to the EC, the wholesale of salt ranges from 400km to 800km around the distribution centres, delimiting, *in casu*, the geographic market to the national territory (v.g. EC Merger decisions IV/M.1522 – CSME/MSCA/ROCK, 11 June 1999, and COMP/M.2176 – K+S/SOLVAY/JV, 10 January 2002).

PCA decision was addressed to *Vatel* (integrated, since 2002, into the current European market leader, ESCO – European Salt Company) and to three national undertakings, *Salexpor*, *Sociedade Aveirence de Higienização de Sal* (SAHS), and *Salmex*. These four undertakings controlled altogether, in 2004, about 75%-90% of the relevant market.

3.1.3 *Object and effect of an appreciable restriction to competition*

PCA concluded that the agreement had the object and effect of appreciably distorting and restricting competition in the whole of the national market”, thus violating competition law.

From the agreement’s duration (seven years, at least) as well as from its object and effect of significantly distorting and restricting competition, resulted, necessarily, an economic benefit for the involved undertakings and an economic damage to the market as a whole (competitors and consumers).

However evidence only allowed to determine, and in a simple way, the minimal value of the economic benefit, and thus part of the total economic damage.

3.1.4 *Modus operandis of the agreement and compensation scheme*

The undertakings established their target sales quota, for the two customer families (industry and food sector), on the basis of their historical annual sales (in tons of salt)⁸ over the period 1995-1997.

In order to ensure the agreement’s sustainability, the cartel members set a compensation scheme which imposed that, at the end of each year, undertakings whose (effective) realized annual sales exceeded their quota paid compensation to those selling below their quota.

Compensations could be paid either in monetary value or in quantities, but corresponded to a fixed monetary value for each ton of salt sold over quota. That compensation value was set to € 12,5/ton and € 17,5/ton of salt sold to the industry (family 1) and the food sector (family 2) respectively.

3.1.5 *Economic benefit*

The substantial collected evidence allowed for the determination, in a simple and (strongly) intuitive manner, of the minimal value of the economic benefit the infringing parties perceived from the cartel, over the period 1998-2004 (see Appendix for details).

At the end of each year, an undertaking selling below her quota, would gain from the cartel an economic benefit, at least, equal to the value of her compensation. Reciprocally, undertakings exceeding their quota would enjoy from the cartel an unitary economic benefit (per ton of salt), at least, equal to the value they paid as compensation for that same quantity of salt, and therefore those undertakings, selling above their quota, obtained an economic benefit, at least, equal to what they got from increasing their sales cut by the compensation they paid by selling above their quota.

Accordingly, the economic benefit amounts, in the total of the four undertakings to, at least, € 5,2M during the seven year period, 1998-2004.

⁷ In general, only large buyers, such as wholesalers and large retailing groups, have the dimension to buy directly in the supply market. Wholesalers supply downstream small retailers such as traditional small grocery shops and the hotels, restaurants and cafés channel.

⁸ Except if otherwise mentioned, sales refer here and henceforth to quantities, in tons of salt.

3.2 *First Instance's Decision*

Following the appeal of the decision by the addressees of PCA decision,⁹ the Lisbon Commerce Court upheld most of PCA findings, including the proposed methodology to evaluate the economic benefit, dismissing an alternative methodology proposed by one of the parties, albeit with a reduction in the amount of the fine, from € 910,728 to € 704,500.

In its decision of 2 May 2007, this Court rejected some of PCA findings and, in particular, the alleged impact on trade between EU Member States.

Despite the fact that the parties might control altogether between 75% and 90% of the (relevant) market and the fact that the national market represents a substantial part of the EU market, the Court found that the PCA should have further demonstrated that the relevant product (salt) is, by its nature, important for intra-EU trade and/or for any undertaking which may wish to expand her activity to Portugal.

Although the Court dismissed the PCA finding on the concrete economic benefit value,¹⁰ it upheld the PCA economic benefit methodology, by stating that:¹¹

“PCA departs from two evident premises [...] It is thus secure to state [as claimed by the PCA] that between the minimal value of the economic benefit and the compensation value there is a direct cause-effect relation [...] Therefore, those who pay compensations [by exceeding their quota] have an economic benefit, at least, equal to the total amount of compensations they paid” (cf. pp. 97 and 100 of the Judgement), and

“if [undertakings which paid compensations] stayed, during seven years, in an agreement which forced them to pay annual compensations to the other parties [...] that is because what [they] paid [as compensations] allowed them, even in that way, to gain in a market whose underlying uncertainty was strongly limited by force of the agreement, being certain that such limitation cannot be dissociated from the obtained gains” (cf. p. 100 of the Judgement).

Moreover, in consonance with PCA, the Court considered irrelevant for (reducing) the economic benefit value the fact that undertakings had not effectively paid due compensations, concluding that:

“Actually, when not effectively paying due compensations, the infringing party has an additional economic benefit: she obtains the agreement's benefits majored by the amount she should have paid but did not” (cf. Sentence, p. 101)

The economic analysis related to economic benefit computation was presented in Court by PCA, not only through its written reply to the undertaking's appeal (which contained further economic analysis counter arguing the economic benefit methodology proposed by one of the defendants), but also by means of testimonial evidence of PCA economists and econometricians.

PCA experts presented economic reasoning in a complete but intuitive way, resorting to a simplified, although not less rigorous, language, which proved to be quite efficient in Court.

⁹ One of the involved parties (Salmex) did not appeal as it got insolvent before the PCA decision.

¹⁰ According to the Court, on computing the economic benefit, the PCA based herself on quantity elements apprehended, during the dawn raids, from one of the parties, but not rightly authenticated during proceedings.

¹¹ Only the Portuguese version of both the two Instances' decisions is available and authentic. Translations are our own.

3.3 *Second Instance's Decision*

In its decision of 7 November 2007, the Lisbon Court of Appeal confirmed the first instance's decision, corroborating, in particular, the reasoning behind the PCA methodology to compute the economic benefit.

On the economic benefit, the Court stated that:¹²

“In what concerns the existence and value of the economic benefit (if the latter cannot yet, at least in part, be considered a factual finding and is, for that reason, an issue that cannot be subtracted from this court's assessment), it must be noted that the amount that has been received as a compensation by the parties selling below their quotas [...] effectively represents a benefit (the minimal benefit, as stated in the [first instance's] judgment [and in the PCA decision]) which those parties would have not received if the cartel would have not been constituted. Therefore, that benefit must be considered as a factor on the determination of the fine.” (cf. p. 40, first paragraph, our enhancement)

The Lisbon Court of Appeal thus points out the extent up to which assessment of economic evidence may go beyond the factual scope, allowing it, in case of appeal, to be subject to the additional assessment of a second jurisdictional instance.

4. **Final remarks**

The challenge of competition authorities is to present economic reasoning in an understandable but not less precise way to non-economists, in particular to Judges.

The fact that lawyers and economists work as a team within PCA has contributed to a better mutual understanding of each others thinking and scientific language. This experience has produced positive results, as shown by the salt cartel case. The simplified language and the strong underlying intuition of the economic analysis have been, perhaps, the main reasons why the salt cartel case has been so well accepted by the two Portuguese jurisdictional instances.

Moreover, specific training targeted at the judiciary has also proved to be a positive way to develop further analytical skills.

The increased complexity of economic analysis required in anti-trust cases demands an additional effort from Judges in assessing competition authorities' decisions. Competition authorities must, therefore, and in the interest of the values they pursue, contribute to convey economic theory in an intelligible way to non-economists and to provide thorough and constructive co-operation with the Courts, either through written documents or by means of testimonial evidence.

¹² Only the undertakings which received compensations from the agreement appealed from the first instance's decision, *i.e.* all except Vatel and the insolvent Salmex.

APPENDIX

MATHEMATICAL PROOF OF THE ECONOMIC BENEFIT IN THE “SALT CARTEL” CASE

Given the evidence available on:

- The 4 undertakings’ effective annual sales (in tons of salt), denoted by q_i for undertaking i , over the period 1998-2004;
- The 4 undertakings’ target sales quota, denoted by q_i^* for undertaking i , discriminated between the two customer families (food sector and industry), that each should satisfy at the end of each year;
- The unitary compensation value (k), discriminated between the two customer families; and, finally, on the fact that
- At the end of each year, undertaking i pays a total compensation (in €) equivalent to $k(q_i - q_i^*)$ in case she sells above her quota ($q_i > q_i^*$) or receives that same amount in case she sells below her quota ($q_i < q_i^*$),

It was straightforward to show that the total economic benefit the four undertakings got from the agreement corresponded, at least, to € 5,2M during the seven years period, 1998-2004.

Consider, first, the determination of the unitary economic benefit, denoted by m_i for undertaking i (specific to a given year), *i.e.* the unitary margin i obtained from the cartel in addition to what she would have obtained in a competitive (oligopolistic) environment. Theoretically, m_i equals the mark-up differential between the observed anti-trust behaviour (cartel) and the unobserved state of a well-functioning competitive market, in oligopoly.

Should there be no compensation scheme, undertaking i would get a total (annual) economic benefit (EB) equal to $m_i q_i$.

Given compensations, the latter amount is increased by $k(q_i^* - q_i)$ in case she sold below her (target) quota and cut by $k(q_i - q_i^*)$ in case she exceeded her quota.

Mathematically, that means that the (annual) EB is, in general, given by:

$$EB_i = m_i q_i - k(q_i - q_i^*), \quad (1)$$

If i satisfied her quota ($q_i = q_i^*$), she would not have received or paid any compensation and had thus:

$$EB_i^* = m_i q_i^*, \quad (2)$$

Undertakings selling below their quota always receive, at least, the compensation $k(q_i^* - q_i)$, albeit not selling ($q_i = 0$). Such undertakings had thus always an incentive to cooperate, *i.e.* to keep the agreement.¹

Yet, *ab initio* when setting the agreement and at the beginning of each year, cartel members ignored how the market would have cleared at the end of the year and thus whether they would have met their quota, *i.e.* whether or not they would have had to pay a compensation.

The existence and sustainability of the agreement (during, at least, seven years) implied, therefore, that the benefit each cartel member got by exceeding her quota covered, at least, the benefit she would have obtained should she had satisfied her quota.

In other words, the expressions (1) and (2) above must, at least, be equal, namely:

$$[m_i q_i - k(q_i - q_i^*)] \geq m_i q_i^*, \quad (3)$$

or

$$(m_i - k)(q_i - q_i^*) \geq 0, \quad (4)$$

Given that, as afore referred, this incentive compatibility constraint only mattered for undertakings exceeding their quota ($q_i > q_i^*$), expression (4) was satisfied for those undertakings if and only if,

$$m_{(q>q^*)} \geq k, \quad (5)$$

In other words, a *sine qua non* condition for the agreement to last (as it has lasted), *ab initio* when it was established (in October 1997) and *a posteriori* given its duration (up to January 2005), was that the EB an undertaking retrieved from one ton of salt (m) covered, at least, what she was prepared to pay as compensation (k) for that same quantity (in case she exceeded her quota).

Given result in (5), it follows from expression (1) above that the EB an undertaking exceeding her quota retrieved from the cartel was, at least, equal to:

$$EB_{(q>q^*)} = kq_i - k(q_i - q_i^*) = kq_i^*, \quad (6)$$

Whilst result in (2) above ensures that $m_i > 0$ (for all i), as an undertaking selling below her share received always, at least, the compensation, it is irrelevant for her the way her m_i is determined.

¹ Undertakings selling below their share have thus an unbiding incentive compatibility constraint.

In other words, whilst result in (5) above holds for undertakings exceeding their quota, undertakings which sold below their quota might have an unitary EB (m) satisfying $0 < m_i < k$; the EB they retrieved from the cartel would always be, at least, equal to the value of their compensation, namely

$$EB_{(q < q^*)} = k(q_i^* - q_i), \quad (7)$$

Q.E.D.

LEXICON

DG	Directorate General
EC	European Commission
ECJ	European Court of Justice
EC Treaty	Treaty establishing the European Community
EU	European Union
NCA	National Competition Authorities
PCL	Portuguese Competition Law (Law No. 18/2003, 11 th June)
PCA	Portuguese Competition Authority
Lisbon Commerce Court <i>(Tribunal do Comércio de Lisboa)</i>	the national Court of first instance in competition cases
Lisbon Court of Appeal <i>(Tribunal da Relação de Lisboa)</i>	the national Court of second instance in competition cases

UNITED KINGDOM

1. Introduction

Competition law is designed to underpin the efficient operation of markets and thereby promote economic growth. As such, it is to a large extent based on economic concepts, and economic analysis and evidence lies at the heart of many actual competition cases. When bringing competition cases, or defending its decisions on appeal, the UK Office of Fair Trading (OFT) therefore lays great emphasis on the robustness and clarity of presentation of its economic analysis and evidence.

We typically receive economic submissions from the parties involved, the analysis for which will usually have been carried out by specialist economic consultancies (or occasionally academic economists). In order to review these submissions, and to develop our own economic thinking and evidence, the OFT regularly uses both its own staff economists and input from independent expert economists. Economics is fully embedded within the work of the OFT. We have around 60 staff economists, and for the past seven years the OFT has been headed by an economist.¹

As a competition authority, the OFT is a decision-making body, rather than a prosecuting authority (as in some other countries) which is required to present each of its cases to a court for decision. As such, the OFT is typically only involved in presenting complex economic theories to judges when its competition decisions are appealed.

The OFT is also a consumer authority, and under consumer law we have a prosecutorial role, rather than a decision-making role. Consumer cases may in some cases involve economic issues, and are heard by non-specialist courts. We also have a role in providing *amicus* briefs to the courts in competition cases which raise important policy issues, but in which we have had no direct role. These can potentially cover economic issues. In addition, the OFT has experience of presenting economic evidence to Courts under the previous competition law regime, and specifically under the now-superseded Restrictive Trade Practices Act.

Based on this experience, the OFT has developed a set of ten key principles for presenting economic evidence, both in its own decisions and elsewhere. These are set out at the end of this short paper.

2. The UK Appeals Process

The competition decisions made by the OFT (and its concurrent Regulators) may be appealed in the first instance to the specialist Competition Appeal Tribunal (CAT). Although strictly speaking its role is that of an appeal court, the CAT is able to determine facts and make its own decision in competition cases. Notably, the CAT's three-person tribunal will typically include an economist, especially where the case raises economic issues.

¹ Formerly Sir John Vickers, and currently John Fingleton. (The current non executive Chairman of the OFT, Philip Collins, is a lawyer). The OFT's sister authorities – the Competition Commission (CC) and the concurrent sectoral regulators – also place great emphasis on the quality of their economic analysis and evidence.

Appeals of CAT judgments (on points of law only) pass to the non-specialist Court of Appeal and ultimately to the House of Lords, the UK's Supreme Court.

In principle, the CAT may give directions for the appointment and instruction of experts, whether by the CAT itself, or by the parties. This can provide evidence that assists the CAT in completing the proceedings in a cost efficient way. On occasion, the CAT has set up a structured debate on specific points between the parties and their respective experts, an activity which has become known as "hot tubbing".

These powers, and the composition of panels in appeal cases, would suggest that the CAT will tend to have a greater understanding and appreciation of economic theory in competition cases, than judges (for example, those in the English Court of Appeal) or courts who will often not have backgrounds in economics, or indeed competition law.

3. Presenting Economic Evidence

The OFT makes substantial effort, both in its decisions and in its submissions to the Courts, to ensure that its economic evidence and argument is explained and presented carefully and clearly.

The OFT has the option of bringing in external economic expertise in specific instances. This is costly, but we have done it on occasion. For example, in defence of an appeal to the CAT against the OFT's original decision against Mastercard's Interchange Fee² (now set aside), we employed two US academic economists who are expert in the area of multi-sided platforms.

We have occasionally considered using our own economics staff as expert witnesses. So far this has not proven necessary in practice.

The OFT has more usually chosen to present its economic evidence to the courts through its lawyers (independent advocates instructed by the OFT specialising in competition law). This can require substantial preparation time to ensure that the lawyers sufficiently understand the underlying economics and its application to the case, and they clearly never become experts. However, a major advantage of this strategy is that our lawyers – once convinced of an economic case – are typically better at describing it to a court in terms that judges not versed in economics find compelling.

The OFT's 1999 case against the joint selling of television rights by Premier League football clubs (taken under the Restrictive Trade Practices Act³) is a good example of the converse; a situation in which a judge found it difficult to grasp and adjudicate on the economic evidence presented by two expert economists. In this case, the judge, Mr Justice Ferris commented in court as follows:

"I speak only for myself, and I do so without criticising anybody, but I have to say, I have never listened to evidence in any court for an hour and understood so little of it as I have understood during the last hour. It may all be as clear as daylight to my colleagues.

² Office of Fair Trading, "Investigation of the multilateral interchange fees provided for in the UK domestic rules of Mastercard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited)", 6 September 2005. Decision No. CA98/05/05.

³ *"In the matter of an agreement between the Football Association Premier League Ltd & the Football Association Ltd & the Football League Ltd & their respective member clubs : in the matter of an agreement relating to the supply of services facilitating the broadcasting on television of premier league football matches & the supply of services consisting in the broadcasting on television of such matches"* (Judgment 27 August 1999)

“All I can say is that anybody who really wants to make sure that I understand and have the ability to make an evaluation of this kind of material that we have has a very long way to go in educating me as to how I should deal with it. At the moment, I am firmly, myself, of the school which says ‘this is all too difficult, we had better give up’. I simply warn that - I am very sorry, it is all above my head. I will sit here quietly and let it all wash over me for a reasonable amount of time, but I think that those who are asking the court to rely on this must be under no illusions that at the moment, so far as I am concerned, this is all washing over my head”.

“I am thinking of buying a little flag which I can raise when we get to a part of the case that I just do not understand, but perhaps a notional flag will do. It is up at this part of the case.”

This was in the context of highly complex and technical witness evidence on appropriate techniques for econometric regression in this case. In the final judgment, the rather more judicial wording read as follows:

“The evidence of the econometricians displayed an enormous degree of expertise and diligence, but we have to say that we found it of limited assistance. Mr. Bishop and Dr. Szymanski had exchanged a number of reports dealing with the attempt to measure, by the application of statistical processes, the impact of television coverage on attendances at matches. Unfortunately there was little common ground between them. Having regard to this fact, the highly technical nature of the statistical discipline which was being applied, the limited scope of the underlying data and the difficulties involved in taking proper account of all the factors which may affect a person's decision whether or not to attend a football match, we do not feel able to prefer the evidence of one of the experts to that of the other.”⁴

4. Ten key principles for presenting economic evidence

As described above, the UK CAT, due to its composition, should be in a better position to take in, and adjudicate on, economic evidence than a court where the judge(s) are not versed in economics. Nevertheless, the OFT considers that there are ten key principles that it is useful to seek to follow when presenting complex economic evidence to any Court, or indeed to a competition authority.

- 1. Explain underlying intuitions.** In some cases, economists fail to describe the underlying intuitions behind their findings. It is important to remember that judges who are not versed in economics may not fully understand the intuition underlying even basic economic concepts, such as why three competitors are typically better than two, let alone more complex concepts such as the effects of competitors exchanging information or predatory or exclusionary conduct. One useful tool for providing the intuition behind complex economic concepts is by way of analogy or by using worked examples.
- 2. Ensure that economic theories are grounded in the facts of the case.** While any economic model will necessarily involve some degree of abstraction from reality, it is important to ensure that the key elements of any economic theory employed are broadly grounded in the empirical evidence. The OFT was criticized by the CAT failing to do exactly this in its judgment in the appeal against the OFT's *Attheraces* (ATR) decision:

⁴ It seems that the OFT faced an uphill struggle in explaining the economic reasoning underlying its case. When the case was mentioned in the UK Parliament, one Member of Parliament (David Mellor) commented: *“I cannot imagine how even some pointy-headed quasi-intellectual in the Office of Fair Trading could seriously believe that [the independent selling of TV rights by Premier League clubs] lies within the world of practical reality.”* (Hansard, 2nd July 1996).

“Ultimately, however, the whole [...] question appears to us to be anyway probably too theoretical to be of real practical utility. The OFT’s case is founded on the assertion that ATR could have gone about the purchasing exercise in a fundamentally different way from that which ATR originally acknowledged was the only practical way; and that, had it done so, it could have picked up the requisite rights at an appreciably lower price.”

“[I]n our judgment the evidence before the OFT did not entitle them to be confident as to the correctness of their interpretation of such events.”⁵

Likewise, in the recent appeal *Albion Water Limited v Director General of Water Services*, the CAT was clearly more positively disposed towards the expert evidence of one witness, which it viewed as ‘practical’ and ‘dynamic’ than the evidence submitted by another witness, which it characterized as ‘theoretical’ and ‘static’.⁶

3. **Know and explain the limits of your data.** A common technique in challenging empirical analysis is to point to one or two of the underlying data points and show that they are shaky, or even wrong. In most cases, these one or two data points will not actually be determinative of the analytical conclusions reached, but this form of attack on the evidence can undermine a Judge’s confidence in the analysis. It is therefore important to check the robustness of the data – and the likely effect of changing the data – before getting into Court, in order to be in a position to show that any apparent data deficiencies do not affect the overall conclusions.⁷
4. **Carry out sensitivity analysis.** Another common technique in challenging economic modeling work is to show that the assumptions underlying the model are not precisely accurate. Sensitivity analysis can be used to demonstrate that the same results hold under a variety of different realistic assumptions, which in turn makes modeling analysis more robust to such criticisms and assists in building a judge’s confidence in the evidence.
5. **Employ (and develop) simple rules.** In a legal context, it can be valuable to provide and justify an analytical rule or approach, before going on to apply it. The most commonly used rules in competition cases are the Areeda-Turner (or Akzo) test for predation and the Hypothetical Monopolist (or SNIIP) test and ‘Critical Loss Analysis’ for market definition. Economists have an important role to play in developing the set of useful rules. However, it is also important to note that these simple rules can potentially be misleading in some circumstances and cannot always be applied dogmatically. Economists also have an important role to play in explaining when and how this can occur and thus why the application of the rules will be appropriate in some cases, but not in others.
6. **Use plain, non-technical language.** Economists sometimes forget that non-economists find it hard to understand economic terms, such as what a regression means, let alone ‘heteroscedasticity’ (see *Premier League* case above). The correct technical terms must be used, but they must be explained in plain, non-technical language and often the use of analogies is helpful. Plain language and analogies should not, however, be used at the expense of the accuracy and robustness of the economic reasoning.

⁵ *“The British Horseracing Board v Office of Fair Trading”*, [2005] CAT 29, paragraphs 200/201.

⁶ *“Albion Water Limited v Director General of Water Services”*, [2006] CAT 23, paragraph 662.

⁷ An alternative solution to this problem can be for the Court to require both parties to use a dataset that they have jointly agreed upon in carrying out their analysis.

7. **Where possible, draw on the established stock of economic theory, not the latest advances.** Economic theory is continuing to develop quickly in a number of areas (for example, buyer power and multi-sided markets). While recent developments explored in newer papers can be useful in supporting or complementing established theories, the latest papers can sometimes be less robust than the body of established theory. This point has been emphasised (although not in the context of court submissions) in a speech by Professor Paul Klemperer.⁸ Hence the latest advances need to be presented with caution and in context.
8. **Make sure the economic case is well aligned with the legal case.** In some cases presented to the OFT (especially in the mergers field) or by parties in court in competition cases, the economic and legal analyses are presented as more or less distinct sets of arguments, and can even make inconsistent assumptions. This is particularly common when the economic evidence is included as an annex to the main submissions, rather than being fully embedded within the submissions. Judges will be well used to dealing with properly presented legal submissions and may be confused by a set of separate, unintegrated and inconsistent economic arguments and thus tend to discount them.
9. **Don't try to use complex economics as a smokescreen for weak arguments.** If the case is weak on the evidence and/or economic theories, no amount of complex economic evidence is likely to save it before a judge. All you are likely to do is annoy the judge. But this does not mean that competition authorities should not pursue complex economics in the appropriate cases, even where the economic theory is still being developed and its application explored.
10. **Ensure your expert witness is well prepared and doesn't hector or talk down to the Judge.** Completely obvious, but sometimes forgotten. Expert witnesses are likely to have written extensively and given evidence in other cases. They need to be prepared to deal with apparent inconsistencies or contradictions between their evidence in the case in question and positions taken elsewhere; in some cases it may be better to deal with this as part of their initial evidence so that the Judge's confidence in the witness and the evidence is not undermined when the evidence is examined in court. And judges never like to feel that they are being patronised!

⁸ Paul Klemperer, "Using And Abusing Economic Theory", *2002 Alfred Marshall Lecture to the European Economic Association*. Reprinted in *Journal of the European Economic Association*, 2003

UNITED STATES

1. Introduction

Apart from cartel cases, the application of competition law always involves economic analysis in some form. An important element typically is the delineation of a relevant market, and the ultimate issue is whether the suspect conduct has had, or is likely to have, an anticompetitive effect. Economic analyses of various sorts are required for sensible and persuasive market delineation or competitive effects assessment. Economic analysis provides not only specific tools useful in informing the analysis of particular issues, but also the essential logic that brings order to the chaos of real world factual settings.

Successfully presenting a (non-cartel) competition case to a judge, therefore, requires effectively communicating economic analysis in a manner understandable to someone who has not necessarily had special training in economics, and who may have no prior experience with competition law. This is often a difficult task. Although the best practices in any particular case will depend on the particularities of the case and applicable procedural rules, the experience of the U.S. enforcement agencies suggests three general principles for efficiently and effectively presenting complex economic analysis to judges.

First, economic analysis should be fully integrated into the presentation of the case. It generally is counterproductive to treat economic analysis as a separate and discrete element of proof. Second, economic analysis should be fully and carefully explained in terms that are understandable, or a judge is not likely to rely on it. Third, the opinions of economists should be firmly grounded in the models and methods of economics and, when appropriate, be empirically validated. Economists are most persuasive when they do not stray outside their areas of expertise and do not adopt an advocacy posture in particular litigation.

2. Economic Analysis Should Be Fully Integrated Into the Presentation of the Case

The core issue in a competition case commonly is the actual or likely impact of particular conduct on the competitive process and its resulting implications for consumer welfare. Proper adjudication of such a case demands that a judge thoroughly understand how the competitive process operates, what role in the process is played by the competitors whose conduct is at issue, exactly how the conduct at issue affects the process, and what implications for consumer welfare that effect is apt to have. Effectively presenting such a case, therefore, requires weaving the factual threads into a tapestry realistically depicting the competitive process and illustrating the impact of the conduct at issue. Properly applied, economic analysis can turn jumbled facts into a coherent pattern.

For economic analysis to perform this function, it is vitally important that the relevant analysis be communicated to a judge clearly and in a timely manner, and every opportunity should be taken to communicate the relevant economic analysis. What opportunities exist depends on particular legal institutions, but a judge is likely to have latitude with respect to procedures, and a competition agency should make constructive suggestions as to what may work best for the judge.

When possible, a judge should be provided with a written statement setting out the legal theory of the case and the associated economic analysis, and this statement should be provided as early in the

proceedings as possible.¹ Such a statement should be the product of robust collaboration between economists and lawyers, it should fully integrate the law and economics in the case, and it should commit the agency to a particular legal theory and economic analysis that is maintained throughout the case. A written statement is likely to be far more accurate, clear, complete, and concise than any oral presentation could be. Providing the statement in advance allows a judge enter the courtroom with a reasonably clear picture of the case already in mind. In no event should the jumble of facts be laid before a judge before a framework for their analysis has been established.

Although extremely useful, a written statement is unlikely to be entirely adequate. A judge almost certainly will have questions about the relevant economics and how it applies to the case. It is highly desirable to use a procedure through which the judge has an early opportunity to ask questions raised by the written statements of the opposing parties. Clearing up points troubling the judge may enable the judge to focus better on the evidence to be presented and to view it in the proper light. Many questions are best addressed by an economist. The depth of understanding that comes from advanced technical training and experience in the practice of economics can be critical in providing clear, and above all, accurate, answers to a judge's questions.

An interesting approach used by a judge in a case brought by one of the U.S. enforcement agencies was to preview the testimony of all of the economic experts prior to the trial. Each of the experts was given an opportunity to provide an overview of the case in narrative form, and the judge asked questions.² A competition agency should not hesitate to propose novel procedures that could provide a judge with a better understanding of, or an earlier exposure to, the economic analysis in a case.

3. Economic Analysis Should Be Fully and Carefully Explained

A judge is not likely to be persuaded by mere assertion. Economic analysis can be expected to play a prominent role in a competition case only if it is fully and carefully explained. The explanation should indicate what models or methods of economics have been employed and basically how they work, why those models or methods are suited to the specific task of understanding the actual or likely competitive effect of the particular conduct at issue, and how those models or methods support particular conclusions on the basis of the facts of the case.³ Almost as important as explaining why an agency's economic analysis is appropriate is explaining why its analysis is more appropriate than the competing analysis put forward by the defense. An agency and its economists should explain why their analysis is more consistent with the facts of the case or economic literature, or simply how its logic is more compelling.

¹ Two U.S. trial judges indicated when interviewed that "they would be receptive to counsel's request for an early opportunity to brief the key economic issues in the case." Lisa A. Wood, *Trying Antitrust Cases Before Generalist Judges*, ANTITRUST, Fall 2006, at 85, 86. Another wrote that judges "frequently need to understand the technical material long before the case gets to trial." Lewis A. Kaplan, *Experts in the Courthouse: Problems and Opportunities*, 2006 COLUMBIA BUSINESS LAW REVIEW 247, 254.

² The case was *United States v. First Data Corp. and Concord EFS, Inc.* (D.D.C., filed Oct. 23, 2003), 2004-2 Trade Cas. (CCH) ¶ 74,481 (2004) (final judgment and competitive impact statement). The case was settled between the expert preview and the start of the trial.

³ Under rules applied in U.S. federal courts, expert testimony, including from economists in competition cases, is admissible only if there is a good "fit" between the testimony and the pertinent inquiry. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993). Courts exclude opinions when there is "too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). In one competition case, the appeals court demanded a "thorough analysis of the expert's economic model," holding that it "should not be admitted if it does not apply to the specific facts of the case," and the court excluded the expert's model because it was "not grounded in the economic reality" of the industry. *Concord Boat v. Brunswick Corp.*, 207 F.3d 1039, 1055-56 (8th Cir. 2000).

The vast majority of economic concepts applicable in competition cases can be clearly and succinctly explained. Economic theory and econometrics can be presented to judges in a non-technical manner that omits most details, unless specifically queried on them by the judge, but nevertheless avoids statements that are so simplistic that they are highly misleading. It is rarely either necessary or wise to sacrifice substantial accuracy in the pursuit of comprehensibility, and it is most unwise to simplify so much that the essential logic is lost and no economics actually remains.⁴

Effectively communicating complex economic analysis demands a great deal of advance preparation. Typically, it is best to begin with an objective description of the factual setting that is detailed, precise, and above all clear. To the extent possible, the description should be presented in the form of tables, graphs, and charts (as well as in narrative form), and it should include the key quantitative details necessary to understand the case. The economic analysis can then begin to explain which are the key facts and how they matter.

When a case raises an empirical issue, such as the elasticity of demand, the economic analysis should explain why it is a key issue and how data and inference inform the issue. When a case raises a theoretical issue, such as how a merger alters unilateral pricing incentives, the economic analysis should articulate a relevant model of competitive interaction and explain what assumptions drive the model and why they are reasonable in the context of the case. The presentation of economic theory should be made as concrete as possible and should be made quantitatively whenever that is feasible.

4. The Opinions of Economists Should Be Firmly Grounded in Economics

The U.S. enforcement agencies believe that an economist is unable to educate or persuade a judge if the judge perceives that the economist is acting merely as an advocate for a litigating position.⁵ This perception is best avoided by making sure that an economist offers sound economics, and does nothing else, when appearing in court. In preparing for court, competition agencies should carefully consider both the conclusions and methodologies of their economists. Agencies should strongly discourage their economists from offering opinions for which they are unable to articulate a clear basis that is firmly grounded in the models and methods of economics and also the facts of the case.

Although economic experts should not act as advocates for a litigating position, they should act as advocates for their own economic analysis. In coming to any useful view in a competition case, an economist makes many choices. For example, an economist in a merger case may choose some particular basis for assigning market shares (e.g., sales or capacity) or rely on some particular theoretical model of competitive interaction for predicting the price effects of a proposed merger. If these choices appear to matter and yet seem arbitrary, a judge is unlikely give much weight to the economist's conclusions. Thus, an economist should always explain the logic underlying these choices based on knowledge, experience, and especially the evidence in the case.

⁴ At the Fordham conference on International Antitrust Law & Policy, a judge of the Court of First Instance commented: "I don't think it is a good idea that we be provided with an economic message which is 'economics for beginners' really. We would like to have the full demonstration in economic terms. . . . If you want to raise the importance of economics in courts, give us the real thing." *Economic Experts before Authorities and Courts Roundtable*, in 2005 FORDHAM CORPORATE LAW INSTITUTE 615, 642 (Barry E. Hawk ed., 2006).

⁵ In the United States, where expert witnesses are used extensively in jury trials, a common critique is that they often act not as experts at all, but rather as advocates for the position taken by the litigant that engaged them. See, e.g., Lewis A. Kaplan, *Experts in the Courthouse: Problems and Opportunities*, 2006 COLUMBIA BUSINESS LAW REVIEW 247, 251–53.

5. The Use of Complex Economic Analysis in Appellate Courts

In the United States, appeals in competition cases generally do not reconsider the factual findings made by the trial court;⁶ rather, they address points of law. The logic of competition law is thoroughly infused with economics, so rules of competition law generally have rationales based on economic analysis, and many rules of competition law themselves invoke economic analysis. Thus, economic analysis can play a central role in an argument for the adoption of a particular rule of law or in an argument for a particular interpretation of an existing rule.

In the United States, appellate arguments are almost entirely written in briefs with strict word limits. Consequently, economic analysis must be presented concisely and selectively. An appellate brief in a competition case should identify the key strains of economic analysis bearing on the legal questions posed by the case, concisely relate the basic logic of and insights from the economic analysis, and refer the court to significant contributions in the economic literature. Painstaking drafting may be required to convey the essential logic of the economic analysis in a manner comprehensible by a generalist judge and to strike the right balance between simplicity and accuracy. Economic jargon generally should be avoided and any essential terminology should be clearly defined. Perhaps most important, an appellate brief in a competition case should clearly explain why the economic analysis presented should be given significant weight in deciding the questions of law that have been posed.

⁶ Findings of fact are set aside on appeal only if found to be “clearly erroneous.” Consequently, factual findings normally are not challenged.

CASE ANNEX

1. United States v. Visa U.S.A.

The effective presentation of complex economic analysis was central to the Department of Justice's successful lawsuit against the Visa and MasterCard credit card networks. In this civil non-merger case, the government alleged that the defendants violated Section 1 of the Sherman Act through certain governance arrangements and through the adoption of exclusionary rules that kept member banks from issuing cards on other networks (such as American Express and Discover). The case was presented to a federal judge (without a jury) in a trial that lasted 34 days with thousands pages of trial testimony and close to six thousand admitted exhibits.

To prove its case, the government put forth economic analysis with respect to the essential elements of the case—market definition, market power, and competitive effects—from its expert, Dr. Michael Katz, Professor of Economics and Business Administration at the University of California at Berkeley. Utilizing sound and accepted methodologies, Professor Katz provided his expert opinion to the court that the defendants had market power in the properly defined relevant markets and that the challenged conduct was anticompetitive. In the end, the district court agreed with the government's and Professor Katz's core contentions, finding that the exclusionary rules violated the antitrust laws, and the Court of Appeals affirmed that finding¹.

The process of presenting coherent and persuasive expert testimony began long before trial. Recognizing the importance of economics to the ultimate outcome of the case, the government retained Professor Katz at the early stages of the matter, making sure that he was involved with the development of the case throughout the discovery and pre-trial periods. For example, Professor Katz attended important depositions, reviewed documentary material, and considered the defendants' arguments as the case developed; in this and other ways, he became well-versed in the myriad details of the important issues well before trial began.

As the case progressed from discovery toward trial, the government took advantage of opportunities to present to the Court the relevant economic issues and frame our view as to the appropriate analysis. While there was no formal pre-trial hearing on economic issues, the government set forth the general economic concepts in various legal briefs, and, in the pre-trial brief, provided a detailed explanation of the disputed economic issues.

At trial, the government called Professor Katz as its final witness, after the numerous fact witnesses had been heard and documentary evidence submitted. In his direct testimony, Professor Katz fully and carefully worked through the numerous issues, explaining his methodology, highlighting key evidence, and making extensive use of charts, graphs, and other visuals.

His testimony on market definition provides an example of the importance of using economic analysis to provide a framework for analyzing the evidence. The government had to prove that credit card network

¹ *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004). The district court ruled in the defendants' favor on the allegations concerning governance practices, and the United States did not appeal that finding.

services constituted a relevant market, and that, from a consumer perspective, credit cards were a market distinct from other forms of payment. To support its market definition, the government presented extensive testimony and documentary evidence demonstrating consumer preferences, merchant and bank requirements (merchants and banks are the “customers” of credit card network services), and admissions by the defendants. In his testimony, Professor Katz was able to synthesize this extensive evidence and, applying the appropriate economic tests and performing empirical analyses, opine that the evidence amply supported the government’s proffered relevant market. The Court agreed, assessing the evidence in the framework of Professor Katz’s opinion.²

As stated above, economic analysis used in litigation should be carefully explained to the court and be firmly grounded in economics. The debate at trial surrounding a survey proffered by MasterCard’s expert demonstrates the types of disputes between opposing economic experts that courts must resolve. MasterCard’s expert claimed that a survey of consumer preferences demonstrated that, in the face of a price increase, consumers would readily switch from credit cards to other forms of payment. Professor Katz disputed this finding, testifying that the study contained a fundamental and crucial error, *i.e.*, it based the price increase on the price of the product being purchased rather than the cost of the use of the credit card. The defendant Visa’s expert was forced to concede the importance of MasterCard’s expert’s error. In the end, the Court found that given the facts of the credit card industry and the issues raised by Professor Katz, “it is essentially impossible to make a definitive calculation of consumer price sensitivity or elasticity of demand via survey”—a finding that served to refute the MasterCard survey.³

In retrospect, one aspect of the expert presentation was not particularly effective. The parties had agreed to provide the direct testimony of the experts through written statements. There was no live direct examination of the economic experts, meaning that Professor Katz (and the defendants’ experts), upon taking the stand, immediately were subject to cross-examination by counsel for the opposing party. Although the judge had previously been provided the experts’ written direct testimony, this procedure made for a somewhat confusing courtroom presentation of the important economic issues. While it may be impractical (indeed, tedious) to present an expert’s entire direct testimony through live questions and answers, it would be worthwhile to petition the court for an abbreviated live direct examination where the expert could provide the court an overview of his or her written statement prior to hostile cross-examination.

In conclusion, the Department’s experience in the *Visa* case shows the importance of presenting sound and persuasive economic analysis to the court. A credible expert can provide invaluable assistance to assist the court in putting voluminous evidence in context, providing a framework for addressing the ultimate legal questions, and, ultimately, reaching the correct decision.

² See *Visa*, 163 F. Supp. 2d at 335-40. The structure of the Court’s opinion itself shows the importance of using economic testimony to provide a framework for the relevant analysis. In its discussion of market definition, the Court initially sets forth Professor Katz’s opinion and methodology and then discusses the evidence that supports his conclusions. The Court of Appeals echoed this analytical structure when it, citing the explanation of “the government’s expert witness,” found no reason to doubt the District Court’s market definition finding. 344 F.3d at 239.

³ *Visa*, 163 F. Supp. 2d at 336. For a more in-depth discussion of the issues surrounding the survey, see pp. 40-41 of the United States’ appellate brief. Brief for the United States, *United States v. Visa U.S.A.*, available at <http://www.usdoj.gov/atr/cases/fl11700/11793.pdf>.

2. In the Matter of Evanston Northwest Healthcare Corp., Docket No. 9315 (Federal Trade Commission Decision 2007)

This case was a challenge to a consummated merger of two Chicago-area hospitals. Evanston Northwest Healthcare Corporation (ENH) acquired Highland Park in January 2000. The acquisition combined ENH's Evanston and Glenbrook Hospitals—located in Cook County, Illinois—with Highland Park, the nearest hospital to the north.

Under its statutory authority, the Federal Trade Commission (Commission) filed an administrative complaint in February 2004, alleging that following the acquisition, ENH was able, as a result of the transaction, to raise its prices charged to health insurers far above price increases of other comparable hospitals. The matter was tried before an Administrative Law Judge (ALJ) of the Commission.

According to the Commission's complaint, the price increase resulted in higher costs to insurance purchasers and hospital services consumers. The complaint alleged that the merger violated Section 7 of the Clayton Act. Economic analysis provided the basis for much of the evidence that the merger was anticompetitive.

Prior to this action, combined, the Commission, the Department of Justice, and the California Attorney General's Office lost their last six hospital merger challenges. In most of these cases, the courts reasoned that it was unlikely that the merging parties would increase prices anticompetitively because patients and their health insurers would continue to have many hospital choices. This conclusion was based on findings of relatively large geographic markets for hospital services, which in turn was based on the observation that many patients travel long distances for hospital care.

Economic studies, however, suggested that insured patients rarely face a change in their relative out-of-pocket costs when a hospital in their health plan's network increases its price. Moreover, key to hospital prices is the negotiation between the health plan and the hospitals for inclusion in the health plan's network. Hence, patients who see no change in the relative price of hospitals in their network are unlikely to switch hospitals in response to a price increase unless their health plan drops the hospital from its network. Thus, if patients do not switch hospitals, as economic studies indicated, geographic markets are typically smaller than those found by the courts in previous hospital merger challenges. The Commission's challenge to ENH presented an opportunity to change judicial thinking on this issue.

In most industries, even those that are very competitive, prices increase over time. A simple observation of a post-merger price increase does not necessarily imply an increase in market power. To test for an increase in market power, one needs to measure the difference between the post-merger price increase and the price increase that would have occurred absent the merger. Because the latter cannot be observed, proxies for this "but-for" price increase are needed. A good proxy for the but-for price increase is the contemporaneous price increase that occurred at non-merging hospitals that are similar to the merging hospitals in most other respects. Despite the differentiation of hospitals that makes the selection of a control group difficult, the "difference in differences" method of isolating the price effect of the merger has the inherent advantage of "differencing out" any unexplained, but hospital-specific variation in prices.

The trial was held before an Administrative Law Judge in late 2004 and early 2005. Each side sponsored expert economic testimony, which informed the trier of fact of the respective sides' economic analysis and conclusions. Both ENH and the Commission litigation teams found that the post-merger price increase was larger than the price increases at control hospitals, although ENH's economic expert's estimate of this difference was slightly smaller than the estimate of the FTC staff's economic expert. In briefing and in testimony during the trial, FTC staff argued successfully to the trier of fact that this relative

price increase was evidence that ENH had gained market power through the merger and that, therefore, the merger was illegal.

The Commission's expert economist at trial was an outside academic economist. She was assisted in her research by the Commission's internal economics staff, who worked closely with staff attorneys. At trial, she testified first about the nominal post-merger price increases that had taken place. Then, she explained how her analysis of the merged hospitals in comparison with the control group of hospitals sought to separate benign causes of the post-merger price increases from any portion due to the anticompetitive effects of the merger. Finally, the witness described and displayed her econometric estimates using several demonstrative slides to help the ALJ grasp the analysis.

In a decision released in October 2005, the ALJ ordered the divestiture of Highland Park Hospital by ENH. In August 2007, the full Commission affirmed on liability, but ordered a more limited remedy in the case.

3. In the Matter of Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc., Docket No. 9300 (Federal Trade Commission Decision 2005)

In an administrative opinion issued in January 2005, the Federal Trade Commission affirmed an Administrative Law Judge's (ALJ) ruling, issued in June 2003, that Chicago Bridge & Iron Company (CB&I) illegally acquired certain Pitt-Des Moines, Inc. (PDM) assets. CB&I completed the acquisition of PDM assets in February 2001, while the agency was investigating the transaction. The Commission found that the acquisition substantially lessened competition in four relevant product markets in the United States. The Commission therefore held that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

At the time of the acquisition, CB&I was one of the world's leading global engineering and construction companies. PDM was a diversified engineering and construction company, and a distributor of a broad range of carbon steel products. Prior to the 2001 transaction, CB&I and PDM competed against each other as the two leading U.S. producers of large, field-erected industrial and water storage tanks and other specialized steel-plate structures.

The Commission's complaint alleged, among other things, that the consummated merger significantly reduced competition in four separate markets involving the design and construction of various types of field-erected specialty and industrial storage tanks in the United States: liquefied natural gas storage tanks; liquefied petroleum gas storage tanks; liquid atmospheric gas storage tanks; and thermal vacuum chambers.

During the trial, the Commission's legal team offered the expert economic testimony of an economist from the Commission's Bureau of Economics. The expert economist testified that CBI and PDM were by far the two strongest competitors in the U.S. market at the time of the merger and that other firms could not readily replace the competition lost through the merger. To assist the ALJ to contextualize the effects of the merger, the expert explained that economic theory offers various reasons why some firms might have an advantage in selling a product. These include lower costs obtained through learning-by-doing, a reputation for reliability obtained through years of successfully meeting customer expectations, and better access to key assets.

With this contextual background, the Commission staff was then able to show that these specific factors made CBI and PDM the two strongest competitors in the markets in question. Using other fact witness testimony, the Commission's legal team offered evidence that buyers viewed CBI and PDM as the two strongest competitors in the market. Moreover, the companies' own documents showed that the

merging firms viewed each other as their strongest competitor in these markets. Evidence on the history of sales in these markets similarly went to show that CBI and PDM were the two strongest competitors. Given these facts, the Commission's expert economist, drawing on economic teachings, was able to offer the opinion that following the acquisition of its strongest competitor, a firm would be expected to increase price up to the point where it began to lose sales to other firms (either fringe competitors or new entrants).

During his testimony, the Commission's expert economist made extensive use of demonstrative exhibits, including pie charts showing the percentages of U.S. projects built by the defendants, maps showing where CBI, PDM, and foreign firms had built liquid natural gas tanks throughout the world, and bar charts showing the size of CBI compared to smaller domestic firms. These aids helped to present the ALJ with a more understandable picture of the relevant markets, the competitive presence of the defendants in those markets, and the anticompetitive effects of the merger.

Following the trial, the ALJ ruled that the acquisition was anticompetitive. The Commission affirmed and, to restore competition as it existed prior to the merger, ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. In January 2008, a federal appeals court affirmed the Commission's opinion in the case.⁴

⁴ See *Chicago Bridge & Iron Co. v. Federal Trade Commission*, No. 05-60192 (5th Cir. Jan. 25, 2008).

SOUTH AFRICA

The South African competition authorities rely substantially on evidence presented by economists, acting in merger hearings and restrictive practices cases as experts for the Commission, for merging parties, for interveners, complainants and respondents. Economists generally present five kinds of evidence: (1) evaluation of strategic, marketing and other documents and the economic interpretation of these; (2) an analysis of descriptive data including prices, production capacities, output and sales, transport costs and investments required to enter and expand in a market; (3) econometric estimation of demand and supply relationships to establish in particular the degree of substitutability based on data developed independently or by one or other of the interested parties in a matter; (4) direct surveys of customers and competitors undertaken by the economists themselves, generally in intermediate input markets where the number of customers and competitors is limited, as well as analysis of independent larger sample surveys; and (5), modeling exercises where the costs and benefits of different sorts of behaviour are evaluated in merger analysis, or models that assess the impact of a firm's behaviour on competition in the case of abuse of dominance cases or restrictive agreements.

We will focus on four points. These are the composition of the adjudicative bench; the methodology of economics and its interrogation in proceedings; the notion of the economist as 'independent expert witness'; and the nature of empirical evidence utilized in anti-trust hearings.

1. The composition of the adjudicative bench

The Competition Tribunal is our effective court of first instance. This is an administrative body whose members are each required to possess 'suitable qualifications and experience in economics, law, commerce, industry or public affairs'. The Tribunal comprises a pool of 10 full time and part-time members, 8 of whom are lawyers and 2 of whom are economists. Each hearing before the Tribunal is before a panel of three of these members appointed by the Chairperson. At least one of these members is required to have legal training and experience.

A major consideration underlying the decision to utilise an administrative tribunal as the decision-making body in competition law (as opposed, that is, to the civil courts) was precisely the ability to appoint economists to the adjudicative body. Furthermore, the Tribunal has an extensive work load and most of its members are now well into their second term of office. Considerable experience built up through hearing many cases as well as from participating in international forums such as the OECD's Competition Committee and the ICN has resulted in those Tribunal members without any formal economics training developing substantial knowledge and experience in interpreting and assessing the arguments and analysis typically presented by economists. This has worked well for the Tribunal. However, the Competition Appeal Court – the body that hears appeals from the decision of the Tribunal – is comprised of serving members of the high court, none of whom have any training in economics.

Important decisions of the Competition Appeal Court reflect its composition. While judges are naturally required to possess legal training and experience, nothing would preclude the body responsible for appointments to the court from seeking out those high court judges who also have some training in economics although there are probably few that even possess an undergraduate degree in economics. In the event it often appears that an attempt is made to overcome this shortcoming by appointing judges with commercial law experience in the mistaken belief that this constitutes a greater experience in economics.

At the time of drafting the Competition Act consideration was given to requiring the court to sit with assessors who possessed expertise in economics although this was ultimately rejected. With hindsight the appointment of assessors with expertise in economics should have been required.

An additional difference between the Tribunal process and that of the CAC is that the Tribunal ruling is the product of intensive engagement with the economic arguments and evidence presented during the hearing, that is, the economic debates which are thrashed out in some depth during a typical hearing. The CAC hearing is not well suited to engagement with these debates and thus the CAC has to fall back on the generally voluminous record in order to critically assess the arguments presented to it by the appellant.

2. Understanding the methodologies of economics

One of the successes of the South African Tribunal processes is the level of engagement with economic theory and the key factual foundations on which the economic analysis rests. This has been particularly evident in the move towards a more effects based approach and the engagement with what John Vickers and others have termed the ‘post -Chicago synthesis’. Examples in recent years include cases turning on concerns of foreclosure, bundling, exclusionary behaviour and excessive pricing. Rather than complex econometric analysis these cases have involved critically assessing theory and evidence, in short, the methodology underlying the conclusions of the economists appearing before the Tribunal.

Our experience points to the need for proper appreciation of the methodologies of economics and the nature and limitations of economic evidence on the part of competition adjudicators who have not had formal training in or experience of economic analysis. Attempts to overcome this through training generally involves attempts to teach non-economists esoteric industrial organization theory when they would rather be better served by training that focused on the methodologies of economic analysis and an understanding of the nature and limitations of economic evidence. Hence in the case of a relatively straightforward concept like the SSNIP test, we frequently encounter the expectation from the Appeal Court that the application of the test will produce a number that will be readily accepted by the parties before the tribunal. Greater experience with the methodologies of economics and, in this instance, particularly with the data limitations that economists face (particularly in the time frames of an anti-trust investigation), would help non-economists understand that the test expresses a methodological approach to understanding substitution and one that can rarely rely on uncontested data to produce a single numerical ‘solution’. These problems are compounded in the face of more complex theories and tests.

3. The economist – independent experts or expert advocate?

The economists presenting argument and evidence are generally presented in the category of ‘independent, expert witness’. The implicit analogy is with a scientist or medical specialist being called to provide expert testimony in, say, a road accident case. This representation is of course substantially at odds with reality.

The truth is that the economists who give evidence in competition hearings do so as advocates of their clients’ cases, rather than as independent experts assisting the adjudicators. Many are credible academics but their case work is not subject to the peer reviews to which their academic work is subject. Nor is their profession governed by the same ethical rules as those of, say, the medical profession. They are then simply constrained, as would be any factual witness, to tell the ‘truth’ although much of their evidence consists not of facts but of support for theoretical propositions that are frequently subject to significant contestation. This characterization applies with significantly less force to the economists representing the enforcement agency than to those representing private parties.

It is difficult to know how to deal with this reality although the simple acknowledgement of their lack of independence – if not of expertise – may represent a step forward. A possible solution is for the court to subject their expert submissions to peer review through the use of expert *amici curiae*.

To the extent that the theoretical positions of economist expert witnesses are subject to factual verification it is generally the case that their initial reports are filed before discovery takes place and so many facts are simply unavailable to them at the time of the drafting of their reports, although, of course economists for the parties in a merger should have the facts at their disposal. New facts emerge in oral evidence and even if, as is normally the case in our hearings, the experts are called after the presentation of a party's factual witnesses, they generally do not have the opportunity to absorb fully these new facts into the framework of the submissions on which they rely.

Our proceedings are essentially adversarial with expert witnesses subject to robust cross examination. However not much of the cross examination goes to the 'merits' of the contending theoretical positions. Generally the cross examination would attempt to establish that the economists submissions were 'merely' theoretical propositions that enjoyed no proven relationship to the 'real world' or, worse, that proven facts in the real world called into question the usefulness of their theoretical propositions. The theoretical positions may be more effectively elucidated and evaluated if the adjudicator were to set up the gathering of expert evidence in such a way that the experts wrote or even made their oral submissions directly to each other rather than through the intermediation of their legal counsel who, uncomfortable with testing the internal coherence or otherwise of theoretical economic propositions, prefer to focus on subordinating all theoretical propositions to 'real world' empirical tests.

We repeat though, that although solutions are not easy to find, the adjudicative process would be assisted by mere recognition that these independent experts are in fact more accurately characterized as expert advocates.

4. Economic Evidence

Economic theories would have greater credibility if they were supported by more persuasive and intelligible factual evidence. Hence the theories that go to the question of changing incentives and strategic considerations are often usefully supported by strategic documents that are frequently brought to light in the discovery process. This evidence – which is relatively easy to understand – often elucidates the most complex economic theories that are presented to judges.

There are two related points here. First, greater attention needs to be given to the gathering and presentation of data, including by the Competition Commission (as the enforcement agency). Parties in opposition to the Commission have an incentive to obstruct the collection of such data or to overstate its complexity and hinder its interpretation. As the Commission continues to build expertise this should be less significant, although will inevitably always be present.

Second, particular attention needs to be given to clear explanation of statistical tests and the role and limitations of modeling exercises. The ability to adjudicate even relatively accessible theoretical propositions is often bedeviled by the inability to gather sufficiently comprehensive or sufficiently well focused data samples. The economists providing expert evidence – including those of the enforcement agency - do not have the time or resources to carry out large market surveys. However consideration needs to be given to gathering credible consumer data even within the confines of these resource and time constraints. For example, greater use of consumer focus groups should be explored. Again data sets that are well chosen and clearly presented may be able to elucidate complex theoretical arguments and propositions.

Statistical techniques used by economists in South Africa are price correlation tests for market definition and price-concentration studies, particularly in retail markets, to assess anti-competitive effects of a merger. Cross-price elasticities of demand are another means of defining markets, although these not often used due to data limitations. Other more exotic means of defining markets, particularly where competition is not based on prices, or where price data is not readily available, such as principal component analysis (a technique used to minimise the number of variables in a model, and produce new variables that essentially define markets), are also used from time to time. The intuition behind many of these techniques is readily explainable, although the limitations of these techniques must be fully understood. Hence the fact that prices of two products that move together indicates some level of discipline from one product to another is easy to understand. Interestingly expert economists in many instances fail to appreciate the limitations of the technique in a time series setting. For example problems of cointegration are rarely mentioned. In addition the limitations of simple correlations are often not appreciated such as accounting for the impact of other variables such as the products having similar cost components, which could be driving the similar price movements. That firm concentration affects prices is also intuitive; prices are higher the more concentrated markets are. The importance of measuring the impact of having one of the merging parties as opposed to both in different geographic areas is self-explanatory. However, one of the problems with these studies is that if the extent of the geographic areas over which concentration and prices are measured is not carefully determined, the results may be misleading. Demographic information, such as race and income, is also important to control for, as these factors determine willingness to pay to some extent, and may be causing prices in different areas to differ. Measuring cross-price elasticities of demand where there is some market power already present, gives rise to the ‘cellophane fallacy’, where products become substitutes because their prices are high due to market power, rather than any substitutability between the products. The usefulness of many of these statistical techniques in abuse of dominance cases is limited, since market power lies at the heart of the dispute, which will give rise to cellophane fallacy type problems. One of the most important problems facing an adjudicative body is the reliability of the data used in these analyses, which in a merger is usually provided by the merging parties themselves. These statistical analyses must also be weighed against documentary evidence and testimony by factual witnesses. Provided that these techniques are presented with their limitations, and the importance of documents and factual witnesses are given their proper weight, the economic evidence is likely to be of value to judges.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee's Working Party No. 3 (WP3) for its roundtable on "techniques for presenting complex economic analysis to judges" on February 19, 2008.

BIAC supports the growing acceptance of the proposition that modern antitrust enforcement should be based on a clear and objective assessment of "effects" as identified or measured by sound economic analysis. Among the reasons for this trend are the advances in economics made over the past two decades and growing convergence among economists on the proper framework of analysing for many areas of competition law.¹ Much of the progress that has been made can be attributed not to the most complex economic models, but often to the thoughtful application of the simplest, for example, the use of the SSNIP test as a means of examining market definition. To be sure, the progress in economic thinking has also included the development of more sophisticated quantitative techniques that may, for instance, be applied when simulating the (unilateral) effects of mergers. While these have usefully instructed internal agency consideration, they have rarely been the subject of a court challenge.

Significantly, these fundamental developments coincide with increasing demands from courts for substantial economic support for antitrust challenges. As a result, a number of enforcement agencies have responded by creating or further developing institutional capacity and procedures to meet these demands.²

At present, economic evidence is in particular relied on in merger control proceedings to identify the competitive interaction between the merging parties' products and to assess (unilateral) effects and efficiencies. Similarly, economic models of anticompetitive foreclosure are progressively applied and tested by courts. And while the role of economic evidence is perhaps at first glance less at the forefront in the initial treatment of collusive and other *per se* illegal conduct, such analysis may still be important in helping to establish the existence of those agreements, to prove causation in damage analyses or to calculate pass-through pricing.

BIAC is highly supportive of this trend. Consumer welfare is best served by a rational competition policy that is driven by the analysis of likely effects that is in turn firmly rooted in economics. The proper and transparent use of economics by agencies – together with the resulting convergence of substantive norms – contributes to a more level playing field for international business.

¹ In some cases, such as in the EU, the growing willingness to apply economic analyses geared towards identifying actual economic effects (or proxies thereof) has resulted in legislative and regulatory reforms. See, e.g., John Vickers, "Competition Law and Economics: a Mid-Atlantic Viewpoint," *European Competition Journal*, June 2007, p. 1-15.

² The reform package that the EC Commission has over the past four years implemented, in particular the Office of the Chief Competition Economist and "devil advocate" panels, is just one example. Other countries, like Denmark, The Netherlands and Italy, have also set up economics departments with trained econometricians and economists over the past years. All European agencies employ economists.

BIAC appreciates, however, that agencies and courts across jurisdictions display varying degrees of sophistication when conducting economic analyses – or failing to do so. In some instances courts have even openly acknowledged that “the economics are too complex.”³ One such area of significant divergence is the extent to which jurisdictions have developed rules and procedures that regulate the introduction of economic evidence – in particular expert witnesses – in court proceedings and that seek to ensure the integrity and quality of economic evidence in the form of economic testimony or otherwise and thereby stimulate courts to accept this type of evidence. It appears that these requirements are more developed in jurisdictions where litigation is an important phenomenon. Jurisdictions where public enforcement is relatively important may in this respect draw from the lessons of countries that have more practical experience with the enforcement of antitrust and merger control law in courts that operate under specific evidentiary standards.

On a more general level, BIAC notes that the proper and “successful” application of economic analyses by competition agencies – and the subsequent review and validation of those analyses by courts – is dependent on a multitude of factors, in particular the substantive standards that govern the conduct at issue, evidentiary rules, the agencies’ ability to present economic evidence in court, the receptiveness of courts to economic evidence (which in part depends on training and capacity and on the way it is presented by the economist in question) and the state of the economic research in the area that is under discussion. These interrelated factors complicate the identification of one single “success factor” for the presentation of complex economic evidence to courts.

BIAC strongly supports both general and specific measures to improve the correct application of robust economic theories and methodologies by agencies and their subsequent review of those analyses by courts. Indeed, in this respect the interests of agencies and the business community – the very subjects of the agencies’ control – are to a large extent aligned: proper use of economic evidence limits the risk of false positives, while at the same time improving the track record of agencies when defending their enforcement actions in court.

BIAC would note that the stated topic of this Roundtable, however, is somewhat misplaced. In our view, the question should not be how “to present complex economic theories” to judges, but rather how to *effectively* present economic evidence to the courts. Economic theory, as such, better suits the classroom than the courtroom. Economic evidence, based on accepted economic principles and sound application of facts to those principles, can shine significant light on the key questions underlying antitrust laws. Preparing and presenting this evidence, which often implies the avoidance of complex theory in favour of straightforward analysis, should be a key consideration of an agency’s case.

We note that economic theory and, indeed, the application of quantitative techniques should not be considered a substitute for sound factual analysis. The purpose of economics in competition law, as discussed further below, should be to develop a framework within which to examine facts, not to substitute theory for these facts. Thus, while BIAC wholeheartedly endorses the further advancement of economic techniques and the presentation of economic evidence to courts, it notes this important caveat.

2. The Role of Economics in Antitrust Cases

Economics may have myriad influences on agencies’ decisions. Very generally, economic theories may help to postulate the theory of harm (or the absence thereof), i.e. the logic and organizing principles

³ See, e.g., the UK judgment of Mr Justice Ferris in the Premier League case, judgment of 27 August 1999.

behind the conduct at hand.⁴ Second, economics may be used to test the hypothesis, for instance by analyzing empirical data or market structure, in seeking to identify ex ante assessments of the likely effects of mergers and other transactions. Significantly, in many cases economic analysis may be purely or predominantly empirical, for instance in determining whether the merging parties are “close competitors” on the basis of “win –loss” tender data,⁵ or the delineation of the relevant market by means of the SSNIP test.⁶ While the economic methodology applied is well-accepted in these cases, other cases provide more challenging areas of analysis.

One of the most controversial areas in which economic analysis is used is the field of merger simulation models. These models can be divided into three principal categories: (a) merger simulation models based on minimal data, (b) merger simulation models based on econometric evidence of elasticities of demand, and (c) econometric models that can be used to infer the price effects of the model. The first category would include simple models based on diversion ratios and are typically not very useful or reliable. The second category would include the typical differentiated products merger simulation model that is often used in assessing retail products, which can be useful. The third category would include econometric models such as those used in Staples/Office Depot, GE/Instrumentarium⁷, Ryanair/Aer Lingus⁸ and, perhaps to a lesser extent, Volvo / Scania. In these models, the merger effect was determined by assessing the amount by which prices were higher in less concentrated markets. These also can be useful. In these cases the question is whether the choice of modeling properly reflects the structure and type of competition in the industry and whether the specification of the model – on which the outcome depends – is correct, complete and sufficiently robust.

Where this type of economic evidence is used to support the challenge of proposed mergers, the assumptions and methodologies underlying the models are likely to be severely disputed. Notorious examples where sophisticated economic models were used to predict post-merger market developments to challenge the transaction include Staples/Office Depot and Whole Foods/Wild Oats⁹ in the US and Volvo / Scania¹⁰ in Europe.

It is fair to say that economic models play an important role in most, if not all significant mergers that agencies seek to challenge¹¹ Economic evidence is also – but perhaps in a less uniform manner - used in unilateral conduct cases¹² and, in particular in the field of causation, assessment of damage, and pass-

⁴ See, e.g., Lars-Hendrik Roller, “Economic Analysis and Competition Policy Enforcement in Europe,” *MODELLING EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES* 18 (Van Bergeijk and Kloosterhuis, eds.) (2005).

⁵ See, e.g., Case COMP/M. 3216 Oracle/ Peoplesoft, 2005 O.J. (L 218) 6.

⁶ See, e.g., Case COMP/M. 2187 CVC/Lenzing 2004 O.J. (L 82) 20.

⁷ Case COMP/M. 3083 General Electric/ Instrumentarium, 2004 O.J. (L 109) 1.

⁸ Case COMP/M.4439 Ryanair/Aer Lingus (June 27, 2007), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf.

⁹ *FTC v. Staples, Inc.*, 970 F.Supp. 1066 (D.D.C. 1997).

¹⁰ Case COMP/M. 1672 Volvo/ Scania, 2001 O.J. (L 143) 74.

¹¹ See, e.g., Derek Ridyard, “Economic Experts Before Authorities and Courts Roundtable,” *Annual Proceedings of the Fordham Corporate Law Institute on International Antitrust Law & Policy 2005*, p. 626 (“But certainly, mergers is the easy area where you can say with great clarity that economics is really driving the debate.”).

¹² See, e.g., Case COMP/C-3/37.792 EC Commission/Microsoft, (Mar. 24, 2004), *available at* <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

through pricing, in cartel cases.¹³ In fact, as Professor Gavil has observed, “expert testimony from economists now plays a more critical role than ever before in resolving antitrust matters before agencies and courts.”¹⁴

Economic evidence enters into the administrative or judicial procedures in various ways depending on the specific features of the enforcement system. Ordinarily, during the administrative part of the agencies’ procedure, economic evidence may be part of the agencies’ own analytical work and generated by the agency itself (on the basis of information submitted by the parties, third parties or other sources of information), or may be presented to the agency through submissions made by interested parties. For instance, in Europe, it is common to submit detailed economic evidence as part of the notification of a concentration under the European Merger Control Regulation. Such evidence is also frequently submitted following a Statement of Objections issued by the Commission.

In some jurisdictions, the litigation of competition matters between private parties also implicates economic analysis. In those instances, the development of economic theory plays out during the discovery phase of the proceedings, in which the expert economists are severely tested with respect to their conclusions and the bases for those conclusions through intensive factual inquiry, expert reports, and often-contentious depositions. In these cases, the ultimate emphasis lies on the admissibility and persuasive value of economic evidence in court proceedings. In this way, the parties are usually able to judge in advance of the trial or key hearing whether their economic evidence is likely to be compelling or weak. This frequently leads parties to a settlement that better reflects the risks inherent to the litigation process.

In contrast, the dialog between regulatory agencies and parties regarding the economic analysis being utilised by the agency is inconsistent and may range from virtually no communication at all to a relatively open exchange of views on the merits of a specific economic study. BIAC believes that it would be beneficial if agencies would allow a more meaningful interaction between their (staff) economists and the parties’ experts at an early stage of administrative procedures.¹⁵ Interaction between experts may contribute to the identification of key issues, an early resolution of disputes, and, more generally, contribute to well-founded decisions as to whether the agency’s economic analysis is likely to stand up in court.¹⁶ Agencies are sometimes reluctant to engage in such a discussion for fear that they may reveal their strategic thinking in a way that may later harm their ability to succeed in court. As a practical matter, however, since far more cases are resolved through negotiation than through trial, the benefits of such interaction are likely to outweigh the risks. Moreover, the discovery process ultimately allows at least some degree of insight prior to trial, which undermines the fundamental concern that is often expressed.

¹³ See, e.g., Julian Joshua, “Supermodels, Geeks and Gumshoes: Forensic Economics in EC Cartel Investigations,” Paper prepared for Workshop sponsored by Amsterdam Centre for Law and Economics “Forensic Economics in Competition Law Enforcement,” (Mar. 17, 2006), *available at* <http://www.kernbureau.uva.nl/acle/object.cfm/objectid=BE1896B4-D560-43DC-92F385214D106506/download=true>.

¹⁴ See, Andrew Gavil, “The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons From the American Experience, *Journal of Competition Law and Economics* (forthcoming).

¹⁵ One example in Europe where the notifying parties’ experts had access to econometric analyses provided by a third party complainant during the first-phase review of a concentration under the European Merger Regulation is Case COMP/M. 3083 General Electric/ Instrumentarium, *supra* note 7.

¹⁶ See, e.g., Maarten Pieter Schinkel, “Forensic Economics in Competition Law Enforcement,” *Journal of Competition Law and Economics* (forthcoming), who argues that an open decision-making process safeguards the quality of economic analyses.

While expert testimony by the party's or agency's economic experts is the main "vehicle" for economic evidence to become part of the judicial procedure, there are alternative ways for courts to handle expert witness testimony in antitrust disputes. In Australia, New Zealand and occasionally in the United Kingdom by the CAT, "hot tub" procedures are used, whereby both parties' experts take the stand simultaneously and question one another about their opinions.¹⁷ Also, in Australia and Ireland (and elsewhere), joint conferences of experts are sometimes used. In contrast to "hot tub" procedures, joint conferences take place outside the courtroom, with only the experts present. These types of meetings seek to explore areas of agreement and disagreement among the parties. The experts' views are then presented to the court.¹⁸ In other cases, courts themselves may appoint economic experts to assist them in resolving these types of cases.¹⁹ The benefits of court-appointed experts, especially as substitutes for experts appointed by parties, are disputed.²⁰

Second, BIAC does not condone the concept that the testimony of experts engaged by the parties should somehow have lower evidentiary value than "objective" testimony by court-appointed experts. This is a suggestion that is explicitly made in the Green Paper on Damage Actions, which was released by the EC Commission in December 2005.²¹ BIAC submits that, while it may in some cases be proper to apply conditions ensuring a proper foundation for economic testimony provided by parties' (and agencies') experts, perhaps in a manner similar to that applied in the US,²² there is no sound rationale for *a priori* rejection of the testimony of party-appointed experts.²³

3. Reasons that May Cause Courts to Reject Economic Evidence

There may be various reasons that could cause a court not to accept the economic analysis advanced by agencies, some of which are (largely) outside the control of the agency.

Excessively high standards of economic proof may prevent courts to support agencies' decisions. BIAC does not believe that there is an endemic problem in this regard. Rather, it seems that courts exercise a sufficiently effective, but not overly strict review of agencies' decisions. Besides, the required standard of proof is largely outside the control of agencies. Nonetheless, BIAC acknowledges that in many

¹⁷ See, Lisa C. Wood, "Experts in the Tub," *Antitrust*, Summer 2007, p. 95.

¹⁸ See, Lisa C. Wood, "Out of the Hot Tub and into the Joint Conference," *Antitrust*, Fall 2007, p. 89.

¹⁹ In the US, there is limited experience with these types of experts. For a discussion of court-appointed experts, see, e.g., Gavil, *supra* note 14 and the literature mentioned in America Bar Association, Section on Antitrust Law, Final Report of the Economic Evidence Task Force (August 1, 2006), *available at* <http://www.abanet.org/antitrust/at-reports/01-c-ii.pdf>. In Canada, the Competition Tribunal is expressly authorized to appoint one or more independent experts "to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding". The parties may jointly recommend an expert to the Tribunal, but the Tribunal is authorized to select an expert by its own motion.

²⁰ See, e.g., Gavil, *supra* note 14, who states that, while concerns have been raised against the objectivity of party experts, court-appointed experts would be ill-equipped to take over the role of those experts. In particular, court-appointed experts would be particularly helpful in evaluating the data-gathering, studying, and opinions of the party experts.

²¹ Green Paper on Damage Actions for Breach of the EC Antitrust Rules, *available at* <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html#greenpaper>.

²² See also, paragraphs 28 and 29 herein.

²³ See also, Gavil, *supra* note 14.

jurisdictions the debate on the question “how much and what kind of (economic) evidence is enough” continues and is supportive of efforts to clarify this issue.²⁴

Lack of substantive standards and agencies’ guidelines may contribute to a poor reception of economics by courts. Indeed, courts may be disinclined to accept complex economic analyses from agencies if the state of economic research is unsettled and/or the applicable substantive standard is unclear, as is the currently the case for some types of exclusionary conduct. Here, agencies may help to build consensus on the proper analysis of these types of conduct. Also, the adoption of guidelines, such as the EC horizontal and non- horizontal merger guidelines may encourage courts to more readily accept complex economic analyses that apply the methodology of the guidelines.²⁵

Courts may simply not understand the economic analyses advanced by agencies, or be unwilling to apply them. As mentioned below, agencies may, in addition to improving upon the presentation of their analyses in some cases, help to train courts in the understanding and application of economic analyses and, more generally, engage in “advocacy” efforts to make judges more comfortable applying and reviewing economic analyses. In Canada, Parliament has endeavoured to address at least in part the common concern that judges in the general court system are often ill-equipped to assess complex economic issues. The Competition Tribunal (the specialized court with exclusive jurisdiction over the reviewable trade practices set out in the Competition Act, including mergers and abuse of dominant position) is composed of judges of the Federal Court and lay members, selected for their expertise in areas such as economics, business, accounting or marketing. Although there is no statutory requirement that the lay members include trained economists, since its creation in 1986, the Tribunal has always included lay members with some training in economics. The Tribunal has also established rules of procedure designed to facilitate the receipt of complex economic evidence. Expert witnesses can testify individually or they (as well as lay witnesses) may be directed to testify as part of a panel, where the Tribunal determines that testimony by panel would be the most effective means of conveying the evidence.

The agency may not apply sufficient rigor in developing complex economic analyses and present confusing or otherwise inadequate economic evidence, or may present –as such – adequate economic evidence in an unattractive or non-sophisticated manner that discourages the court to follow the agencies’ analyses. One way of improving the quality of economic analyses of agencies would be to adopt (practical) measures that prevent agencies from becoming too “insulated” from parties’ observations. As set out below, other means may include capacity building. In this respect, it is noteworthy that Damien Neven, the present Chief Competition Economist with the EC Commission is of the opinion that, given the “gross imbalance” in economic resources between parties and the Commission, the Commission needs to significantly increase its resources, in particular by reinforcing the team of the Chief Competition Economist.²⁶ BIAC supports such measures where they are likely to enhance the quality of economic analyses by agencies. Next, as set out below, agencies may want to concentrate on improving the presentation of the evidence.

²⁴ See, e.g., Gavil, *supra* note 14, who notes that “it will always be possible to demand greater economic certainty and greater economic proof” and who suggests that, before concluding that a party should be required to produce more or better economic evidence, courts and agencies would ask whether the marginal value in terms of economic certainty (reduction of error costs) outweighs the costs of demanding additional economic evidence (processing and information costs).

²⁵ Guidelines on the assessment of horizontal mergers and guidelines on the assessment of non-horizontal mergers, *available at* http://ec.europa.eu/comm/competition/mergers/legislation/notices_on_substance.html#hor_guidlines.

²⁶ Damien J. Neven, “Competition economics and antitrust in Europe,” ECONOMIC POLICY 743-791 (Oct. 2006).

4. Evidentiary Issues

4.1 Burden of Proof

The increased use of economic analyses and the application of more or lesser accepted theories of harm over the past years have prompted courts to more carefully review agencies' analyses and decisions. The burden of proof that must be met by agencies that seek to challenge business transactions, or whose administrative decisions are appealed, is a key variable that determines agencies' success in court. European examples of cases where the EC Commission failed to meet the burden include AirTours,²⁷ Schneider Electric,²⁸ Tetra Laval,²⁹ GE/ Honeywell³⁰ and Sony/BMG.³¹ While in Europe relatively few of the EC Commission's merger decisions are challenged before the Community Courts, the proportion resulting in annulment is high, reaching almost 50% in prohibition cases.³² While the U.S. authorities have a better track record over the long term, recent cases in which the DOJ or FTC failed to meet their burden include Oracle, Arch Coal and Whole Foods.³³ In each of these cases, the rejection of the economic testimony of the agency's expert was critical to the ultimate decision. Similarly, in The Netherlands, the Dutch agency's decision to approve the Nuon/Reliant merger subject to conditions was annulled by the District Court of Rotterdam and on appeal, because the mere possibility of price rises shown by the simulation models does not justify the conclusion that a dominant position will be created or strengthened.³⁴

In Europe, especially following the Tetra Laval judgment, it has become clear that the intensity of judicial control over EC Commission's decisions varies depending on whether the courts are reviewing the correctness of the facts, the application of the law, or the correctness of the Commission's appreciation of complex economic matters. Review of the primary facts and the application of the law are comprehensive, while the control of the economic appreciation by the Court of First Instance is more limited and takes account of a margin of discretion that the Commission enjoys when it engages in economic assessments. Still, the Community Courts must establish whether the evidence is factually accurate, reliable and consistent, and whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

²⁷ Case T-342/99, *AirTours v. Commission*, 2002 E.C.R. II-2585.

²⁸ Case T-310/01, *Schneider Electric v. Commission*, 2002 E.C.R. II-4071.

²⁹ Case T-5/02, *Tetra Laval v. Commission*, 2002 ECR II-4381, *aff' in part*, Case C-12/03P, 2005 O.J. (C 82) 1.

³⁰ Case T-210/01, *General Electric Company v. Commission*, 2005 E.C.R. II-5575.

³¹ Case T-464/04 *Impala v Commission*, 2006 E.C.R. II-2289.

³² See, Bo Vesterdorf, "The European Courts' Case Law in the Area of Merger Control: New Standards for the Commission's Practice?," *Competition Law and Economics, Advances in Competition Policy and Antitrust Enforcement* 250 (Mateus and Moreira, eds.) (2007).

³³ See, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (D. Cal. 2004); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); and *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

³⁴ CBB 28 November 2006, *NMa v. Nuon and Essent*, LJN: AZ3274. Among the reasons for not accepting the agency's conclusions was the fact that the NMa had not established convincingly the pre-merger equilibrium price. For a discussion of the simulation models that were used in this case, see, J. De Maa and Gijsbert Zwart, *Modelling the Electricity Market: Nuon/Reliant*, in *Modelling European Mergers, Theory, Competition Policy and Case Studies*, p. 150-171.

BIAC believes that agencies' decisions may be particularly vulnerable with regard to the relationship between the underlying facts and the specific model that the agency has chosen to predict or explain the effects of the (proposed) transaction at hand. This is in line with (summary) reports on US practice.³⁵ This suggests that agencies should not only pay attention to the specific modelling technicalities, but should in particular ensure that the underlying facts are complete and that the model properly reflects the market conditions of the real world.

4.2 *Admissibility Standards*

Admissibility standards that govern the use of economic evidence in courts are another major factor that may determine the outcome of the court case. Over time, the US has developed a demanding system that seeks to ensure the quality of expert testimony and economic evidence generally. These rules have become an integral part of the US system of private enforcement of antitrust law. BIAC believes that these rules serve a very useful function in disciplining the adversarial process and might be a valuable reference for countries that wish to stimulate the adjudication of antitrust disputes by courts. One main element is the *Daubert* line of cases and the subsequent revision of the Federal Rules of Evidence.³⁶

Very generally, the *Daubert* doctrine provides that experts must be qualified to provide an expert opinion by knowledge, skill, experience, training, or education and that the expert's testimony must be based upon sufficient foundation of facts or data, that the testimony is the product of reliable principles and methods and that the expert has applied the principles and methods reliably to the facts of the case. In practice, these requirements serve as an important filter against "junk science," or otherwise inadequate economic evidence. The ABA's Final Report of the Evidence Task Force provides an instructive overview of both "confusing" (unclear, confusing, or otherwise uninformative) and "unprofessional" (baseless or intentionally misleading) issues with economic testimony that may help agencies and private parties alike to avoid courts excluding economic experts.³⁷

5. **Practical Suggestions for Presenting Economic Analysis and Testimony**

The promotion of economic knowledge of judges can be facilitated by the development of a competition enforcement culture that relies on a foundation of economics. The role of judges varies across jurisdictions, but nearly always requires an analysis of the law and regulations that apply, as well as the application of judicial precedent. In this respect, the presentation of economic evidence to judges is facilitated by the adoption of a culture within the agency that seeks to evaluate laws and regulations in light of economic principles. By leading the way in this respect, courts will take heed and begin to apply a similar methodology.

³⁵ See, e.g., Andrew Gavil and Katherine Funk, "Daubert Comes to Washington: Managing Expert Economic Testimony in Part III Proceedings at the FTC," *Antitrust*, Spring 2006, p. 21-28 ("The two most common objections (against economic expert testimony) were choice of methodology (or lack thereof) and failure to properly apply the theory of methodology to the facts of the case. The respondents' experts seemed especially likely to be challenged on the ground that they did not consider enough data or they did not consider the proper data, or that their methodology was not appropriately applied to the facts.")

³⁶ *Daubert v. Merrell Dow Pharms., Inc.*, 509 US 579 (1993). On the requirements applying to economic experts, see, e.g., Gavil, *supra* note 35 and Gregory Werden, *Making Economics More Useful in Competition Cases: Procedural Rules Governing Expert Opinions*, Annual Proceedings of the Fordham Corporate Law Institute on International Antitrust Law & Policy, 2005, p. 601-615.

³⁷ See *supra* note 19. See also, Andrew Gavil, "Competition Policy, Economics, and Economists: Are We Expecting Too Much?," Annual Proceedings of the Fordham Corporate Law Institute on International Antitrust Law & Policy, 2005, p. 575-601.

An example of this is the application by U.S. courts of the Herfindahl-Hirshman Index. Although the HHI test is not part of the U.S. law, regulations or Supreme Court precedent, courts routinely apply the test in large part because it is part of the Horizontal Merger Guidelines³⁸ developed by the DOJ and FTC.³⁹

In general terms, when presenting economic materials to judges, it is useful to supplement written submissions by oral testimony (during the hearing). Obviously, testimony by economic experts should be tailored to the audience, should reinforce the key issues, be free of unnecessary jargon and be straightforward and comprehensible.

There are a number of additional practical considerations that are in BIAC's view important when presenting complex economic analyses to judges. These are based on discernible lessons from past antitrust cases and are enumerated below.

- Economic Experts Should Not Be Relied Upon as Fact Witnesses

In some cases, economic experts have been pressed to support the agency's case in a way that requires the economic expert to introduce and support facts, rather than focusing on the economic or econometric analysis of facts that have been introduced and established through other witnesses. One such example of this occurrence is the litigation in *U.S. v. Oracle*, where Professor Kenneth Elzinga, a renowned economist of impeccable credentials, became the witness responsible for demonstrating that the DOJ's market definition was sustainable. Elzinga was called upon to describe why there was "something different" about the merging companies' products, despite the fact that there was "no quantifiable metric" for that asserted market. In the end, the Judge rejected Professor Elzinga's testimony in what may have been a fatal blow to the DOJ's case.⁴⁰

- Ensure Consistency between the Law and Economic Experts' Testimonies

According to reports, in *Rambus*, experts for the defendant argued in favour of an "efficiency breach" defence which was held not to be recognized as a valid defence. Absent this, the testimony was held irrelevant.⁴¹ In a similar vein, in the recent *Labatt*⁴² case in Canada, the Competition Tribunal criticized the Commissioner's expert on the basis that his evidence was predicated on a U.S. legal test that differed materially from the applicable test in Canada. The point is that expert evidence can only be effective if it is directly relevant to the legal and factual context in which it is being used.

- Ensure that Economic Experts Advance Sufficiently Tested Theories and Methodologies that have been Subject of Peer review in the Economics Community

In the US, expert testimonies have been excluded for failure to adhere to accepted principles.

³⁸ Horizontal Merger Guidelines of the United States Department of Justice and the Federal Trade Commission, *as revised* April 8, 1997, *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

³⁹ See, e.g., *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Ca. 2004).

⁴⁰ *Id.*

⁴¹ See, Gavil and Funk, *supra* note 37, p. 29.

⁴² *The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al.*, 2007 Comp. Trib. 9.

- Complex Arguments Must be Reduced to Simplicity

Judges not schooled in complex economic theory often will rely on their instincts in assessing economic testimony. Thus, the ability to “boil down” complex economic theory and analysis to simple explanations, consistent with conditions observable to the judge, are often the most successful. For example, in the preliminary injunction action in *FTC v. Heinz*,⁴³ Dr. Jonathan Baker successfully convinced the court that the 3 to 2 merger of Heinz and Beechnut would not result in the elimination of significant competition. His analysis of unilateral effects was reduced to a simple explanation that “Beech Nut and Heinz are virtually never found in the same supermarket” and therefore “do not constrain each others’ pricing at the retail level very much.” The ability to reduce the econometric analysis to a common sense, observable conclusion that “you just don’t see these two products on the shelf competing against one another” apparently had a profound impact on the court (although the judgment of the District Court was later reversed on appeal).⁴⁴ Similarly in *FTC v. Staples*, the FTC persuaded the court that the market should be narrowly defined to include only office supply superstores based on detailed pricing analysis which showed, in simple form, that prices were lower where these stores competed than where they didn’t. Underlying this conclusion, the FTC conducted a systematic empirical study of Staples’ pricing, presented in court by their econometric expert, Professor Orley Ashenfelter.⁴⁵

- Experts Should Not be Narrowly Confined in the Data They Analyze

Economic analysis and conclusion, to be effective, must look beyond the narrow horizon of the supportive facts and be prepared to explain the contrary facts that the opposing party will rely upon. This principle was highlighted in several cases, including the recent challenge by the FTC of Whole Foods’ acquisition of Wild Oats. In that case, the FTC’s expert Dr. Kevin Murphy, also a distinguished professor of high reputation, based his market definition on the “differentiation or uniqueness” of the two stores and argued that the appropriate market definition was “premium natural and organic supermarkets.” His analysis of competition within this market led him to conclude that the merger would lead to competitive harm. But the Court found that Dr. Murphy did not adequately assess the potential competitive constraints and alternatives posed by supermarkets outside of this narrowly defined market, which, ultimately, undermined the FTC’s alleged market.⁴⁶ Similarly, in *U.S. v. Oracle*, the Court was not persuaded that the market consisted of only three players in a highly concentrated market when alternatives outside of those three players were not fully analyzed by Dr. Elzinga. The clear lesson here is that courts will expect experts to analyze and explain data outside of the narrow range of their conclusions.

- Economic Experts Should Not be Advanced as Industry Experts

The credibility of an economic expert can be significantly jeopardized in those situations where the economist takes on the mantle of industry expertise. Maintaining this distinction can be challenging, especially where the expert is assessing industry dynamics in support of the economic analysis. But placing the economist in the role of industry expert exposes the economist to potentially withering cross-examination as well as counter testimony by company representatives who often have spent a lifetime – as compared to a few months – studying the industry.

⁴³ *FTC v. H. J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000).

⁴⁴ See, *FTC v. H.J. Heinz Co.*, 345 U.S. App. D.C. 364, 2001-1 Trade Cas. (CCH) P73,243 (D.C. Cir. 2001).

⁴⁵ *FTC v. Staples, Inc.*, 1997 U.S. Dist. LEXIS 9322; 1997-2 Trade Cas. (CCH) P71,867 (D.D.C 1997).

⁴⁶ *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

- Economic Conclusions Must Be Based On Robust Facts

In *FTC v. Arch Coal*, the FTC advanced an argument (not central to their overall objection to the merger) that 8800 Btu coal constituted a separate relevant product market from 8400 Btu coal. The FTC's economic expert examined the conditions that distinguish one relevant market from another, observed that in some cases 8400 Btu coal could not be substituted for 8800 Btu coal, and concluded that 8800 Btu coal was likely a separate relevant product market. The Court rejected this conclusion as speculation, because Dr. Morris had not examined the factual conditions that lead to his conclusion of non-substitutability and also because he did not analyze and explain the circumstances under which 8400 Btu coal could be substituted for 8800.⁴⁷ This exposed a fracture in the factual analysis that caused the court to view the two products as wholly interchangeable, even under conditions where the substitutability may have been limited. A further examination of the factual underpinnings of customer substitution could have lead either to a more robust rationale for the hypothesis that 8800 constituted a separate market, or to the abandonment of the argument prior to trial, which likely would have preserved witness credibility. In Canada, similar issues have arisen, for example in the *Superior Propone*⁴⁸ case, where it became apparent that the Commissioner had not established a sufficient evidentiary basis for the opinions expressed by her experts in connection with the complex efficiencies defence.

- Experts Should Be Prepared to Play Both Offence and Defence

In most contested proceedings, both the agency and the defendant parties will have economic experts. The most successful parties will have spent as much time preparing their economist to critique and undermine the testimony of the opposing expert as they have spent on preparing their affirmative story. In many cases, neutralizing the opposing expert is key to a successful outcome. In this respect, it is important to examine burden of proof and presumption issues. If a party can project that the burden of proof (or the burden of persuasion) will shift to the opposing party due to fundamental facts, then an effort to undermine the economic testimony of the opposing expert may be the most important aspect of the case. For example, in the U.S., a rebuttable presumption of competitive harm is established in mergers in which the resulting market concentration reaches a certain threshold in a well defined market.⁴⁹ Thus, in those instances where the market is reasonably well defined and the concentration levels are sufficiently high, the burden shifts to the merging parties to rebut the presumption of competitive harm.⁵⁰ Thus, it is important in these cases for the agency to prepare their economic expert to destabilize the parties' economic expert testimony. If, on the other hand, the burden is on the agency to establish prima facie elements, such as the relevant product market, then the agency should focus more attention on advancing the testimony of its own expert.

⁴⁷ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

⁴⁸ *Commissioner of Competition v. Superior Propane Inc. et al* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.); (2001), 11 C.P.R. (4th) 289 (F.C.A.); (2002), 18 C.P.R. (4th) 417 (Comp. Trib.), aff'd (2003), 23 C.P.R. (4th) 316 (F.C.A.).

⁴⁹ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁵⁰ See, e.g., *FTC v. H.J. Heinz Co.*, 345 U.S. App. D.C. 364, 2001-1 Trade Cas. (CCH) P73,243 (D.C. Cir. 2001).

6. Concluding Observations

BIAC supports the growing acceptance of the proposition that modern antitrust enforcement should be based on a clear and objective assessment of “effects” as identified or measured by sound economic analysis. However, it notes that agencies and courts across jurisdictions display varying degrees of sophistication when conducting economic analyses – or failing to do so.

BIAC believes that agencies’ decisions may be particularly vulnerable with regard to the relationship between the underlying facts and the specific model that the agency has chosen to predict or explain the effects of the (proposed) transaction at hand. This suggests that agencies should not only pay attention to the specific modelling technicalities, but should in particular ensure that the underlying facts are complete and that the model properly reflects the market conditions of the real world.

Interaction between economic experts engaged by agencies and the parties (or third parties) may contribute to the identification of key issues, an early resolution of disputes, and, more generally, contribute to well-founded decisions as to whether the agency’s economic analysis is likely to stand up in court.

BIAC supports the use of Daubert-type rules to ensure the quality of economic evidence. In addition, it supports the adoption of general and specific measures aimed both at agencies and courts to improve the reception of economic analyses by courts as set out in this paper.

Among the practical considerations for presenting economic analysis and testimony that BIAC submits are the suggestion that economic experts should not be relied upon as fact witnesses, the need to ensure consistency between the law and economic testimonies, the adherence to accepted principles, the need to base economic conclusions on robust facts and the ability to “boil down” complex economic analysis to simple explanations that are consistent with conditions observable to courts.

SUMMARY OF DISCUSSION

The Chair opened the discussion and introduced the three expert panellists: Judge Douglas Ginsburg, US Court of Appeal for the District of Columbia Circuit; Dr Lilla Csorgo, the Special Economic Advisor to the Canadian Commissioner on Competition; and Dr Frédéric Jenny, Cour de Cassation, France. He thanked the delegations that made submissions to the roundtable. The Chair stated that the meeting would consist of a discussion among the panellists and then questions and comments from the floor.

Judge Ginsburg believed that the quality of the submissions was uniformly high and that the consistency of the content was quite impressive. There was a virtual unanimity on both the importance of and the specific role of economic evidence in pursuing competition cases. Although there were some procedural differences in the submissions, there was virtual unanimity on the role of economic experts and on some of the limitations that one faces when introducing economic testimony. One important difference was noted in this context: whether one faces a specialised or generalised tribunal in the first instance or in the first instance of judicial review.

Judge Ginsburg noted that in the United States the Federal Trade Commission (FTC), a specialised collegiate agency, conducts hearings and reaches its own decisions subject to judicial review. The Department of Justice (DoJ) however must bring its cases before generalist judges. Such judges may have no prior experience with either competition policy or microeconomics. It is a challenge for the DoJ to make its case in front of such non-specialist judges in a sophisticated way that is appropriate in today's competition environment.

Judge Ginsburg quoted the advice that he received from Ronald Coase at the University of Chicago: that if an economist couldn't express himself adequately in plain language then it is likely that he did not know what he was talking about. This advice does not discount the value of econometrics or scientific technical advice, it simply acknowledges that in a generalist forum it is essential that the material be presented in an ordinary language narrative that can be understood by a willing and intelligent judge or panel of judges.

Graphical aids may be very useful, as was mentioned in the German submission. Judge Ginsburg noted that he recently participated at the FTC in a mock trial of a unilateral effects case against a merger where such visual aids would have been useful to explain the concept of the competitive space within which the merging parties operated. He also noted that it was extremely rare for him – as a judge - to receive a legal brief with a diagram in it. In practice, judges will often end up creating their own illustration in order to better understand the case in front of them. Judge Ginsburg noted the importance of bearing in mind that some people learn better visually than they do through words.

Judge Ginsburg then highlighted his support for continuing judicial education. Most US states require lawyers – as opposed to judges – to take several hours a year of educational instruction. Judicial instruction, including classes in economics, is offered by both the Federal Justice Centre and by private and public universities. Judge Ginsburg noted that in some jurisdictions judges may not understand the economics of the government's case and may seek out some procedural resolution in order to dispose of the case in a manner that does not require them to deal with the actual substance of the case. Judges should be encouraged to become more sophisticated in competition economics.

The Chair thanked Judge Ginsburg for his comments and gave the floor to Dr Csorgo.

Dr Csorgo described her first encounter with the judicial process, in particular the difficulties she encountered explaining the concept of the downwards sloping demand curve to a non-specialist judge. According to Dr Csorgo, when economists are making their cases in front of judges they should remember their audience. The onus is on the economist to ensure that what is being explained is understood. Knowing one's audience is itself a difficult task. One may be faced with a judge for the first time, for example. Or it may be a number of years since a given judge has sat on a competition law case.

Dr Csorgo believed that judges should feel free to ask the proverbial 'dumb question'. Importantly, economic expert reports should be made available to the judges before the commencement of hearings so that the judges have time to think about the relevant issues. If this were the case, then when the hearings start and an economic expert is on the stand, the judge would be well placed to be able to ask the necessary questions of clarification to make sure that he/she has actually truly understood the points being made. The key to ensuring judicial understanding is that the reports be made available to the judges *before* the hearings start. In short, the economist must ensure that he/she takes the time to explain his position, makes the economic reports available beforehand, and encourages questions.

Dr Csorgo noted that even if the judgment is in the economist's favour it may not necessarily be so for the right reason; indeed, the judgment may display a lack of real understanding of the economic issues involved. According to Dr Csorgo, this makes for poor jurisprudence. Appointing an economist as an adjudicator has its advantages in this regard, provided it is done in a transparent manner.

The Chair thanked Dr Csorgo for her comments and gave the floor to Dr Jenny.

Dr Jenny concentrated on the French legal system. According to Dr Jenny, there is a different perspective on the relationship between the judge and the expert depending on whether one is in a common law country or a civil law country. In France, a civil law jurisdiction, the heritage of the French Revolution is felt: the judiciary cannot intrude into the areas reserved for the other two powers (i.e. the executive and the legislature). Consequently, in France, judges are supposed to read and apply the law; they cannot interpret the law. If one starts with this background, it is very difficult to deal with competition/antitrust law: it is difficult to pretend that competition/antitrust law is complete or clear and that it does not need to be interpreted.

For Dr Jenny, there are at least three potential roles for economists in front of the courts, two of which are problematic. The first role is to measure the damage and measure the dimensions of the relevant markets. According to Dr Jenny, this role is the least problematic. Indeed, judges are given the opportunity to ask experts to explain things when necessary. The second role, where the economist is asked to inform the judge what relevant facts should be taken into consideration, is more problematic. It is here that one moves from fact-finding to interpretation, as the relevant facts depend very much on the underlying theory. A third role for the economist entails considering what is supposed to be legal and what is supposed to be illegal, that is, what is supposed to be pro- or anti-competitive. With this role, one gets completely into the area of economic analysis. As with the second role, this causes problems, as the judiciary are very ill at ease with experts telling them what facts to consider and what interpretation of the law to adopt concerning the relevant facts.

Judges in France are not specialised; they do not therefore necessarily know anything about economics. For Dr Jenny, this is not something that is particularly unusual: judges often adjudicate cases concerning issues of which they are relatively ignorant, for example in medical malpractice cases. Dr Jenny also briefly noted that the system in France is not an adversarial system, but a court-centred system,

and that this creates potential problems, such as how a judge should communicate with experts. Dr Jenny would come back to this point later in the discussion.

The Chair thanked Dr Jenny for his contribution. He then asked the panellists:

- whether their respective legal regimes consider economic analysis of some form to be essential at some stage of the decision-making process or in defining the relevant market and whether a thorough presentation of the relevant economic analysis is useful in adjudicating such cases;
- whether a clear explanation of the economic as well as the legal theories at the outset of a cases is important; and
- whether there is a preferred method for making an introductory presentation of the economic issues.

Dr Csorgo stated that the Canadian regime considers economic evidence to be essential in many ways. It is always part of the process; and the Competition Bureau contacts economists at an early stage of an investigation. In Canada there is a specialised tribunal – the Competition Tribunal – which by its very nature recognises that economic analysis is a very important part of the process. In Canada, however, there is one exception to this situation: questions are generally applicable to any number of matters so that once a decision on that matter is made, it is applicable potentially to all the matters that have the same issue arising. Issues concerning the test for defining a relevant market and the definition of efficiencies, for example, are actually considered as questions of law. It is not problematic when those questions of law are decided by the specialist Competition Tribunal – but it could be problematic when such questions are appealed to non-specialist courts. In this context, Dr Csorgo gave the example of a (non-specialist) appeal court deciding whether the hypothetical monopolist test is the right test for defining a market. For Dr Csorgo, a thorough presentation of the relevant economic analysis is useful in adjudicating competition cases. There is a definite advantage in having that presentation take place at the beginning of the process. Dr Csorgo conceded that not everyone in Canada would agree with her on the issue of timing. But for her at least, it is essential to have the presentation early on so that one can have a sense of how to fit these facts into a ‘reasonable story’.

Judge Ginsburg pointed out that in the US in recent years there has emerged a category of cases in which the enforcement agencies have brought to court direct evidence of effects and in the process have attempted to dispense with the requirement of defining the relevant market. In those cases the courts have scrutinised such direct evidence. In other cases, a great deal of attention is placed on market definition. Indeed, in some cases market definition may well be the determinative issue. It has become an area that is sufficiently technical and disciplined that the experts generally agree on basic propositions about market definition and narrow the issue for the court in a manner that is essential to its ruling.

Dr Jenny noted that the word ‘relevant’ is not employed in French law when considering the concept of ‘market’. The problem for Dr Jenny here is that there is no unique definition of ‘market’: definitions change depending on whether one is talking about trade law, competition law, unfair trade law etc. The law does not concentrate on ‘relevant market’ and doesn’t differentiate between the different markets that one should have in mind depending on what kind of law one deals with. Hence there is a certain difficulty. The value of econometrics and regressions in determining markets is not very high for judges in France, as for any regression there may be a counter regression which is presented that provides a different result. For Dr Jenny, regression is useful for adjudicating cases where the regression confirms the original intuition of the judge.

Dr Jenny was a little hesitant to answer the second part of the first question, as he was not sure what ‘thorough presentation’ actually implies. If it were to mean thoroughness in terms of the *issues*, he would answer in the positive; by contrast, if thoroughness refers to setting out all of the excruciating details of the finesse of the technical expertise, his answer would be in the negative, as judges may get lost in the detail. Dr Jenny also stated that an early presentation of the economic issues is useful as it helps the judges to know in which direction they should look during a case. In France, typically a lead lawyer will be designated by all the participants in a case and will spend around half an hour setting out the basic contours of the case.

Judge Ginsburg picked up the point that Dr Jenny introduced concerning judicial intuition. For Judge Ginsburg, the intuition of a judge can be informed as well as appealed to; ‘homey examples’ are useful in this regard. One needs to find in every case the illustration of the principle involved in a way that appeals to the intuition of the court.

The Chair noted that the earlier comments on plain language were still relevant here. Comments from the other participants were then offered.

The delegate from Brazil agreed that judges can be confused by the economic issues and that graphics and visual aids may be helpful in reducing this confusion. An example of a Brazilian case where diagrams were particularly useful was provided. The Brazilian delegation asked for more specifics on the decision-making process in the US.

Judge Ginsburg explained that when expert economic testimony is presented in the US it is often in written form with a summary given at the hearing. The real value of this evidence is determined by what happens during cross-examination where a given lawyer tries to discredit the other side’s expert. There is no real use in trying to discredit an expert’s credentials, as the expert will usually have been well-chosen. Rather, one has to discredit his/her economic reasoning. It is almost unheard of to allow the experts to question each other. The process is mediated through lawyers who have to become fluent with this material in order to cross-examine effectively a hostile witness.

Dr Jenny came back to the point concerning the differences between adversarial and inquisitorial systems. In France, one does not have experts on both sides talking to each other with the judge waiting to see the result of their exchange at the end. However, in France judges can ask the experts questions. According to Dr Jenny there is a major problem here: judges rarely ask the experts questions either because they do not know what questions to ask or because they will not understand the answer. Dr Jenny has provided training to judges specifically on this issue. For him the *Daubert*¹ test in the US is useful. Dr Jenny has developed a set of 20-25 questions that any judge can ask any expert in order to have some sense of the value of the expert advice that he gets. These ‘fairly simple’ questions develop the ideas of reliability, relevance, internal consistency, and whether the theory has been published etc. Successful use of these questions has been reported to Dr Jenny. For him, the education of judges as to what questions to ask helps (re)place the decision-making in the judges’ hands; it helps facilitate discussion and therefore improves the ability of the judge to decide whether or not the expertise offered is useful to his case.

Dr Csorgo questioned the usefulness of the adversarial system when economic evidence is considered. The process of cross-examination generally enables the judge to determine ‘what is left over’ after both parties have had their say. But with economic testimony, the judge may not be in a very good position to determine what is indeed left over after the process of cross-examination, particularly if economists use this process to indirectly communicate with one another at a level that is beyond the non-expert’s comprehension.

¹ Daubert v. Merrell Dow Pharmaceuticals 509 U.S. 579 (1993).

The delegate from South Africa noted some unique aspects of the competition regime in his country. South Africa has an adversarial system with inquisitorial powers. In practice, the panels of the tribunal demand additional evidence and discovery, instruct experts to prepare additional reports and evidence, and question such experts when necessary. These experts reply to any questions in writing. It was suggested that, while robust cross-examination occurs, experts do not 'speak' to one another and that there is no real 'peer review' of their testimony in the strict sense of the word. For the delegate from South Africa, one way of introducing that kind of dimension into the process would be to have the expert economists communicating directly with one another both orally and in writing. Publicity during hearings was also noted as an effective disciplinary tool as far as economists are concerned. Indeed, it was submitted that the public nature of hearings in South Africa appears to be quite an effective constraint on some of the wilder fantasies of expert economists.

The Chair then asked the panellists if any of them had any experience with 'hot tubbing', that is, where the experts and the court talk directly to one another.

Judge Ginsburg stated that he had never seen such a practice, but did know of one trial judge who had found it to be quite useful. Judge Ginsburg had, however, done something very similar in his court, which he found to be highly effective: after hearing successive arguments from counsel on appeal, he recalled the first expert and kept both experts in the well of the court and addressed them alternately in order to narrow an issue as much as possible.

Dr Jenny did not know of any examples but believed that such a practice might be useful to the judge, as it could help clear away side issues on which there is general agreement.

The Chair submitted that it would require the lawyers to teach their experts to speak in plain language while they were cross-examining each other so as not to lose the judge in the process.

On the question of oral versus written testimony, the Chair wished to seek clarification from the Finnish delegation. In their submission, the delegation highlighted the advantage of oral presentations; but was that meant as a supplement to written submissions or instead of written submissions?

The delegate from Finland replied that it was as a supplement to written material. In Finland the court process is initiated with the help of written background material which may be quite substantive in its economic theory and analysis. However, during the course of the court process the overall presentations or testimonies have been considered more effective when they are provided by appointed expert witnesses such as established scholars who are able to translate theories into normal language. It has helped in confirming the robustness or legitimacy of the theoretical foundations that are being used in assessing market power or in proving the existence of consumer harm. Moreover these presentations have the potential to do three things: (a) to make the approach used comprehensible in a non-technical way; (b) to summarise the key findings and arguments; and (c) to provide a platform for counter arguments to be used in a constructive manner.

The Chair then asked the following questions:

- can a simplified and conclusory presentation be effective (in other words how do you balance the danger of getting into too much detail either in length or in terms of technicality against the desire not to go in the other direction of being so overly simplistic that you haven't explained much)?;
- what are the impediments to a judge without specialised training in economics understanding moderately complex analysis?; and

- should a judge reject economic analysis that he/she doesn't fully understand because it wasn't well explained, and if so, what is the judge to do in such a situation?

Dr Jenny believed that the judge should indeed reject something that he/she did not understand. On the second question, he submitted that there is a very important issue of language. To substantiate this point, Dr Jenny offered the example of the different meanings of the word 'price' (e.g. money actually paid out versus the point where demand equals supply). There have been cases with which Dr Jenny was uncomfortable where this difference in interpretation of 'price' has been instrumental in leading to a decision. Dr Jenny submitted that the real impediment to a judge comprehending economic analysis is not the use of the jargon or the type of presentation, it is the fact that the economist starts with a hypothesis; this is incomprehensible for the judge because it means that maybe the hypothesis isn't valid and may tend to mislead. Dr Jenny conceded that there is a level of complexity that should be avoided in a courtroom setting.

Dr Csorgo concentrated on the first question. She agreed that the economic presentation should be intuitive and in clear and simple jargon. She also highlighted the fact that one needs to be careful not to oversimplify while at the same time making the theory accessible.

Judge Ginsburg came back to Dr Jenny's earlier point about probability. He submitted that merger control is inherently predictive and that US statutory law calls for a predictive judgment. Judge Ginsburg did not believe that in the US judges are uncomfortable with the recognition that one should consider the probability of something occurring. He contended that while the government has lost a number of merger cases in recent years, it was not because of a judicial rejection of the notion of probability.

Dr Jenny expanded on his earlier comments concerning assumptions that need to be made. He submitted that in any abuse case one has to assume that the firm was aiming to maximise its profit; one starts from this assumption of rationality and applies it to a dominant firm. In Europe judges find this a little bit unsettling. For Dr Jenny, there is only one area where the judges don't seem to have a problem: predation. Predation is an anticompetitive practice if you assume that whoever is doing the predation is in fact being rational: he is losing money in order to eliminate competition. According to Dr Jenny, the reason why judges don't have a difficulty with predation has nothing to do with the fact that they accept the assumption that the people who are doing this are rational; rather, it has to do with the fact that it is perceived as being grossly unfair.

Judge Ginsburg then considered the third question. He submitted that if judges don't understand the economic analysis then they don't know whether it is because it was not well explained or because it is inexplicable; either way it has to be rejected.

According to the delegate from the United States, some lawyers prefer to edit all of the economics out of the economic argument and to jump from the facts to the conclusion. But the judge generally wants to hear the economics, wants to try to understand it and frequently can understand if it is explained properly. It was submitted that it is almost never appropriate to leave any of the economics out. Nonetheless, it may have to be simplified, particularly in terms of language.

The Chair moved on to the next questions. These included the following:

- Are there things one can do with the process or the format that maximises the chance that the arguments will be well explained and that the judge will better understand them?
- Is an adversarial system most likely to shed the most light on the issues versus a court-directed system?

- Should one have written or oral presentations by counsel or by economists?
- What about the role of court appointed economists as opposed to party proffered economists?
- What about the concept of basic tutorials?

Judge Ginsburg stated that the best way to calibrate the economic presentations to the needs of the court is to start with as basic a level as possible, having the court indicate when it is ready to go forward. This approach would be much less risky than being too sophisticated and running the risk that the court will be embarrassed or shy about asking questions. On the business of court appointed experts, Judge Ginsburg noted that the rules in the US do allow a trial court to appoint an expert and that this procedure is relatively uncontroversial when it is done in accordance with the applicable rules (i.e. transparently): the parties know who the expert is; the court expert makes a presentation or submits something in writing and shares it with the parties. However, Judge Ginsburg noted that it has been suggested on a couple of occasions by important jurists that an appeal court should be able to draw their own experts as well, either through the judicial system retaining experts for this purpose or on a purely ad hoc basis in a particular case. It was submitted that such an idea would be impractical: the appeal process could become so elaborate and so repetitive of what had been done in the trial court that it may not be worth the effort involved.

Dr Jenny considered the questions as they applied to France. In France there is no real choice between written and oral presentation: any argument which has not been written up in the conclusions is not considered to be relevant. The process has to start with a written presentation. Then the focus turns to how the economists or experts intervene. Dr Jenny's experience is that typically it is much better when it is the counsel who understands the economic argument. The main reason for this is that the counsel is known by the court and generally knows how to talk to the court better than the economists do. Dr Jenny noted that when economic evidence started being used in antitrust cases, economists were ready to argue almost anything and that there was no quality control concerning their submissions. Over time some of these economists developed a reputation for arguing anything; consequently, no judge wanted to hear them. Dr Jenny underlined the point that it takes time to refine the field so that it will be self-disciplined.

Dr Csorgo commented on the court-appointed economist. In Canada there are rules that attempt to make any appointment transparent. The report of the court-appointed expert is available and the economist can be cross-examined by the parties and by the members of the tribunal. In fact, in Canada all of the written and oral presentations by the parties' economists are available, as well as the arguments of the court-appointed economists. The process is adversarial, even though it is conducted in front of a specialised tribunal. Dr Csorgo believed that this process works well. Where specialised tribunals do not exist, it was submitted that it would be very useful to provide judges with questions to test the credibility of experts, as suggested by Dr Jenny.

The Chair noted that the German submission refers to the possibility of court-appointed experts. The Chair asked the German delegation to address the question of whether there is anything that the competition agency can do to support the judge either in the choice of the expert or in defining an expert mandate to help the process.

The delegate from Germany replied that the German competition authority (the Bundeskartellamt) believes that it is important that the court appoints an expert that is experienced and neutral. In Germany decisions are appealed to a specialist court in the first and second instance, but judges generally only have legal, as opposed to economic, training. It was submitted that in principle the Bundeskartellamt and its economists are arguably closer to the world of economics and to those who might appear in court as an expert. Consequently, they could help find experts and advise courts on who might have deeper insights

and experience on a given issue. As to the questions that might be formulated, the delegate from Germany submitted that it is vital that one formulates questions as precisely as possible and defines which facts and data should be employed as a basis for the analysis, in order to ensure that the expert's findings can be verified at a later stage.

The Chair raised the point that many competition agencies have economic expertise in-house and have the option of either using in-house expertise in presenting the evidence or of hiring an outside expert. He noted that the submission of the Portuguese authority emphasises the fact that they use exclusively internal experts. The Chair asked the Portuguese delegate to elaborate on the use of internal experts.

The delegate from Portugal provided the example of a case concerning a salt cartel in Portugal. In this case the Portuguese competition authority found hard evidence of the cartel following dawn raids among four undertakings which controlled 80% of the market. Apart from this hard evidence the authority also found quite strong evidence concerning the compensation scheme that those firms had established within the cartel. This evidence enabled the authority to compute in a quite simple, intuitive and mathematically-sustained way the economic benefits that these undertakings retrieved from the conduct. This simplicity was sustained in court so as to avoid using difficult economic language. According to the delegate from Portugal, even if one of the parties presented an alternative method in a more technical manner in court, for reasons related to comprehension, the authority's position was not only confirmed in the first instance but also on appeal.

The Chair then asked the delegate from Korea to briefly summarise the Korean Fair Trade Commission's (KFTC) experience concerning the pros and cons of using outside economic experts.

The delegate from Korea noted that in 14 cases between 2005 and 2007 the KFTC used outside experts. Using external experts has a number of merits especially when economic evidence is crucial in deciding a pending case. In general the judge tends to trust the state's objective third party rather than the internal staff of the KFTC. In other words, using outside experts is more useful for securing the credibility of the economic evidence submitted by the KFTC. According to the delegate from Korea, at the end of 2005, the KFTC created a new unit called the Econometric Analysis Team which is composed of several economists in order to reinforce the capabilities concerning economic analysis. But currently the KFTC does not have enough internal staff to conduct its economic analyses. The KFTC has experienced problems when getting help from outside experts, in particular as a result of the limited choice of economists available. The relatively small budget of the KFTC, particularly compared to that of the opposing party, is also a negative factor.

The Chair requested comments from the United Kingdom on the issues raised.

The delegate from the United Kingdom stated that the critical message in the UK submission was to 'keep it simple'. Ten principles are set out in that submission;² they include the idea of using plain, non-technical language as well as making sure that the economic case is well aligned with the legal case. It was submitted that one has to make sure that the economic theory is well grounded in the evidence of the case. Two judicial quotes were given to illustrate that judges may be confused by economic evidence. For the UK delegate, all economic arguments must be tested to destruction by colleagues who will concentrate on whether such arguments are understandable to the judge; no assumption of understanding must be made.

The delegate from BIAC intervened and noted that BIAC has drawn up a list which happens to be quite similar to the list contained in the UK submission; it contains ten 'simple' recommendations. In particular, it recommends a simple presentation of the economic evidence which appeals to the logic of the

² See DAF/COMP/WP3/WD(2008)24, at 4-6.

court and which is aligned with intuition. The delegate from BIAC noted that there have been cases where the economists have tried to postulate a theory or have tried to demonstrate a certain methodology which was not aligned with legal analysis, and that this is something to avoid. If economists rely on robust theories and not on theories that have not been accepted by a large number of their peers then, according to BIAC, the chances of failure in court would definitely be reduced. On a more general level, BIAC submitted that it is important that courts embrace economics: economics is important in many cases as it can show where the harm or absence of harm is. BIAC would be in favour of general as well as specific measures that would enhance the reception of economic evidence by the courts.

The Chair thanked BIAC for its submission asked the panelists for their concluding remarks.

Dr Csorgo agreed that the economic theory should be clearly grounded in the evidence. What is also of (admittedly less) value, however, is the evidence that is somehow not relevant to the matter at hand. This evidence has merit because there are a lot of facts that are thrown out that add interesting colour to a matter. The economist expert can play a role in highlighting why a certain set of information - however interesting - is actually not pertinent in what one is trying to decide and explain.

Dr Jenny wished to point out that even though there are difficulties in presenting economic evidence to judges there has been progress in this area. Judges want to understand; it is not the case that they are narrow in their thinking. But they are worried about the methodology, and they wish they could understand better and participate better in the debate. For Dr Jenny, this is a positive thing.

Judge Ginsburg picked up on the point made by the UK about not pressing novel arguments or arguments that have not withstood a good deal of scrutiny over the years. Competition law is unusual and perhaps unique in that it incorporates by reference the body of learning and social science that is inherently subject to evolution, to further advances and to the disconfirmation of hypotheses as we go along. Lawyers are inclined to use any argument that might enable them to win. Judge Ginsburg noted that it is an important responsibility for competition agencies not to allow their lawyers to evoke what are essentially novel economic arguments; it does not serve the law or competition law to make decisions based on the most recent issue of the economic journals only to have those views rejected a few years later.

The Chair thanked the delegations for their submissions as well as the three panelists and drew the Roundtable to a close.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la discussion et présente les trois membres de la Commission d'experts : M. Douglas Ginsburg, Juge à la Cour d'Appel de Circuit du District de Columbia (États-Unis) ; Mme Lilla Csorgo, Conseiller économique spécial auprès du Commissaire de la concurrence du Canada ; et M. Frédéric Jenny, Cour de Cassation, France. Il remercie les délégations qui ont présenté des communications à la table ronde. Le Président déclare que la réunion comportera une discussion entre les membres de la Commission suivie de questions et de commentaires de la salle.

Le Juge Ginsburg estime que toutes les communications ont été d'une grande qualité et que la pertinence de leur contenu est remarquable. Les participants sont pratiquement unanimes en ce qui concerne l'importance et le rôle spécifique des données économiques dans le traitement des affaires concernant la concurrence. Bien que les communications fassent apparaître certaines différences quant aux procédures, les participants sont pratiquement unanimes pour ce qui est du rôle des experts économiques et de certaines des limites que l'on rencontre pour la présentation de témoignages en matière économique. Une différence importante est soulignée dans ce contexte, selon que l'on a affaire à une juridiction spécialisée ou à compétence générale en première instance ou en appel.

Le Juge Ginsburg note qu'aux États-Unis une agence collégiale spécialisée, la Federal Trade Commission, procède à des auditions et dispose d'un pouvoir de décision sous réserve d'un recours judiciaire. Toutefois, le Département de la justice doit soumettre ses affaires à des juges généralistes. Ces juges peuvent ne pas avoir d'expérience préalable en matière de politique de la concurrence ou de microéconomie. La difficulté consiste, pour le Département de la justice, à présenter les affaires à des juges non spécialisés avec toute la complexité qui convient au contexte actuel de la concurrence.

Le Juge Ginsburg cite l'avis exprimé par Ronald Coase à l'Université de Chicago selon lequel, si un économiste ne peut s'exprimer de manière appropriée en termes simples, il est probable qu'il ne sait pas de quoi il parle. Cette opinion ne conteste pas la valeur de l'économétrie ou des avis techniques exprimés par des scientifiques, elle reconnaît simplement le fait que, dans une instance généraliste, il est essentiel que les informations soient présentées dans un langage narratif courant qui puisse être compris par un juge ou un groupe de juges bien disposés et avisés.

L'aide de représentations graphiques peut être très utile, comme l'indique la communication de l'Allemagne. Le juge Ginsburg note qu'il a participé récemment dans le cadre de la Federal Trade Commission, à un jugement fictif d'une affaire concernant des effets unilatéraux d'une fusion dans le cadre duquel ces aides visuelles auraient été utiles pour expliquer la notion d'espace concurrentiel dans le cadre duquel les parties à la fusion opéraient. Il indique par ailleurs qu'il reçoit très rarement – en tant que juge – un dossier juridique accompagné d'un graphique. En pratique, les juges finissent souvent par créer leurs propres illustrations afin de mieux comprendre l'affaire qui leur est soumise. Le juge Ginsburg souligne la nécessité de tenir compte du fait que certaines personnes retiennent mieux les informations visuelles que celles qui leur sont présentées verbalement.

Le juge Ginsburg met ensuite l'accent sur son soutien à la poursuite de la formation des juges. La plupart des États américains obligent les avocats – et non les juges – à suivre pendant plusieurs heures par an une formation. La formation des juges, qui comporte des cours d'économie, est assurée à la fois par le Federal Justice Center et par des universités privées et publiques. Le juge Ginsburg note que, dans

certaines juridictions, il est possible que les juges ne comprennent pas l'aspect économique de la position de l'administration et s'efforcent d'aboutir à une résolution de procédure afin de traiter l'affaire d'une manière qui ne les oblige pas à l'aborder au fond. Les juges devraient être invités à approfondir leurs connaissances en matière d'économie de la concurrence.

Le Président remercie le Juge Ginsburg pour ses commentaires et donne la parole à Mme Csorgo.

Mme Csorgo fait part de son premier contact avec la procédure judiciaire, et notamment des difficultés qu'elle a rencontrées pour expliquer la notion de courbe de demande à pente descendante à un juge non spécialiste. Selon Mme Csorgo, lorsque les économistes exposent leurs affaires à des juges, ils doivent tenir compte des réactions de leurs auditeurs. C'est à l'économiste qu'incombe la charge de s'assurer que ce qu'il explique est bien compris. La connaissance de l'auditoire est en elle-même une tâche difficile. On peut, par exemple, se trouver face à un juge pour la première fois. Ou bien il est possible qu'un juge n'ait pas eu connaissance d'une affaire de droit de la concurrence depuis plusieurs années.

Mme Csorgo estime que les juges doivent se sentir libres de poser la « question stupide » proverbiale. Il est important que les rapports des experts économiques soient mis à la disposition des juges avant le début des auditions afin que ceux-ci aient le temps de réfléchir aux problèmes posés. Dans ce cas, au moment où l'audition débute et où un expert économique se trouve à la barre, le juge serait en mesure de demander les précisions nécessaires pour s'assurer qu'il/elle a réellement bien compris les arguments invoqués. La condition essentielle pour assurer une compréhension satisfaisante des juges est que les rapports soient mis à leur disposition *avant* le début de l'audition. En résumé, l'économiste doit veiller à prendre le temps nécessaire pour exposer sa position, à transmettre les rapports économiques suffisamment à l'avance et à inviter les juges à poser des questions.

Mme Csorgo note que, même si le jugement est favorable à l'économiste, ce n'est pas nécessairement pour la bonne raison ; en fait, le jugement peut faire apparaître une absence de compréhension réelle des problèmes économiques posés. Selon Mme Csorgo, il en résulte une jurisprudence qui n'est pas satisfaisante. La nomination d'un économiste comme juge présente des avantages à cet égard, à condition qu'elle ait lieu dans des conditions de transparence.

Le Président remercie Mme Csorgo pour ses commentaires et donne la parole à M. Jenny.

M. Jenny met l'accent sur le système juridique français. Selon lui, la relation entre le juge et l'expert doit être envisagée dans une optique différente selon que l'on se trouve dans un pays de « common law » ou dans un pays de droit civil. En France, qui est un pays de droit civil, l'héritage de la Révolution se fait sentir : le pouvoir judiciaire ne peut s'immiscer dans les domaines réservés aux deux autres pouvoirs (c'est-à-dire le pouvoir exécutif et le pouvoir législatif). En conséquence, en France, les juges sont censés lire et appliquer la loi ; ils ne peuvent l'interpréter. Si l'on part de ce contexte, il est très difficile de traiter du droit de la concurrence/antitrust : il est difficile de prétendre que le droit de la concurrence/antitrust est complet ou clair et qu'il n'a pas besoin d'être interprété.

Pour M. Jenny, les économistes ont face aux tribunaux au moins trois rôles potentiels à jouer, dont deux sont problématiques. Le premier rôle est d'évaluer les préjudices causés ainsi que les dimensions des marchés concernés. Selon M. Jenny, ce rôle est le moins problématique. En fait, les juges ont la possibilité de demander des explications aux experts en cas de nécessité. Le second rôle, qui consiste pour l'économiste à informer le juge des faits à prendre en considération est plus problématique. C'est là que l'on passe de la collecte de données à leur interprétation, car les faits pertinents dépendent dans une large mesure de la théorie sous-jacente. Un troisième rôle pour l'économiste consiste à rechercher ce qui est considéré comme légal et ce qui est considéré comme illégal, ainsi que ce qui est considéré comme favorable à la concurrence ou anticoncurrentiel. Ce rôle relève complètement du domaine de l'analyse

économique. Comme en ce qui concerne le second rôle, cela pose des problèmes, dans la mesure où le pouvoir judiciaire se trouve très mal à l'aise lorsque des experts lui indiquent les faits à prendre en compte et l'interprétation de la loi à adopter concernant ces faits.

En France, les juges ne sont pas spécialisés ; ils n'ont donc pas nécessairement de connaissances économiques. Selon M. Jenny, ce cas n'est pas particulièrement rare : les juges ont souvent à se prononcer dans des domaines qu'ils connaissent relativement mal, par exemple dans les affaires d'erreurs médicales. M. Jenny note par ailleurs brièvement que le système qui s'applique en France n'est pas accusatoire mais inquisitoire, et que cela donne lieu à des problèmes potentiels, notamment pour ce qui est de la manière dont un juge doit communiquer avec des experts. M. Jenny reviendra sur ce point dans la suite de cette discussion.

Le Président remercie M. Jenny de sa communication. Il demande ensuite aux membres de la Commission :

- si leurs régimes juridiques respectifs considèrent l'analyse économique, sous une forme ou sous une autre, comme essentielle à un certain stade du processus de décision ou pour la définition du marché à prendre en compte et si une présentation approfondie de l'analyse économique pertinente est utile pour juger ce type d'affaires ;
- si une explication claire des théories économiques comme des théories juridiques est souhaitable dès le début des procédures ; et
- s'il existe une méthode qui a leur préférence pour une présentation préalable des problèmes économiques posés.

Mme Csorgo déclare que, dans le régime en vigueur au Canada, les données économiques sont considérées comme d'une importance essentielle à de nombreux égards. Elles jouent toujours un rôle dans la procédure. Par ailleurs, le Bureau de la concurrence prend contact avec des économistes dès le début d'une enquête. Au Canada, il existe un tribunal spécialisé – le Tribunal de la concurrence – qui, par sa nature, même reconnaît que l'analyse économique constitue un élément très important de la procédure. Cependant, il existe une exception à cette situation : lorsqu'une décision est prise dans un domaine, elle est potentiellement applicable à tous les domaines dans lesquels le même type de problèmes se pose. Les problèmes concernant le critère de définition d'un marché pertinent et la définition des efficacités, par exemple, sont actuellement considérés comme des questions de droit. Cela ne pose pas de problème lorsque ces questions de droit sont tranchées par le Tribunal spécialisé de la concurrence – mais cela pourrait en poser lorsqu'elles sont soumises à des tribunaux non spécialisés. Dans ce contexte, Mme Csorgo donne l'exemple d'une cour d'appel (non spécialisée) qui doit décider de la question de savoir si le test du monopole hypothétique est bien approprié pour la définition d'un marché. Pour Mme Csorgo, une présentation détaillée de l'analyse économique pertinente est utile pour rendre des jugements dans des affaires concernant la concurrence. Le fait que cette présentation ait lieu au début de la procédure présente un avantage certain. Mme Csorgo admet qu'au Canada tout le monde n'est pas d'accord avec elle sur la question de la date. Elle estime cependant pour sa part qu'il est nécessaire que cette présentation ait lieu dans des délais rapides afin que l'on puisse replacer les données dans un cadre cohérent.

Le Juge Ginsburg fait observer qu'aux États-Unis on a assisté ces dernières années à l'apparition d'une catégorie d'affaires dans lesquelles les administrations chargées de l'application de la loi ont présenté aux tribunaux des éléments de preuve directs des effets de certaines pratiques et se sont efforcées, dans le cadre de la procédure, de se dispenser de l'obligation de définir le marché pertinent. Dans ces cas, les tribunaux ont examiné avec soin ces données directes. Dans d'autres cas, la définition du marché fait

l'objet d'une attention particulière. En fait, dans certains cas, cette définition du marché pourrait bien être le point déterminant. Ce domaine est désormais devenu suffisamment technique et structuré pour que les experts s'entendent d'une manière générale sur les propositions de base concernant la définition du marché et puissent préciser la problématique à l'intention du tribunal d'une manière déterminante pour sa décision.

M. Jenny note que le mot « pertinent » n'est pas employé en droit français lorsqu'on envisage le concept de « marché ». Le problème pour M. Jenny est dû au fait qu'il n'existe pas de définition unique du « marché » : les définitions varient selon que l'on parle de droit commercial, de droit de la concurrence, de droit des pratiques commerciales déloyales etc. Le droit ne met pas l'accent sur « le marché pertinent » et ne fait pas de différence entre les différents marchés à prendre en compte selon le type de droit qu'il y a lieu d'appliquer. Cela donne lieu à certaines difficultés. Les juges français n'accordent guère de valeur à l'économétrie et aux régressions pour la détermination des marchés, dans la mesure où, pour toute régression, il est possible d'en présenter une autre qui donne un résultat différent. Pour M. Jenny, la régression est utile pour le jugement des affaires dans lesquelles elle confirme l'intuition initiale du juge.

M. Jenny hésite un peu à répondre à la deuxième partie de la première question, car il n'est pas certain de la signification des mots « présentation détaillée ». Si cela désigne les détails quant aux *questions posées*, il répondrait par l'affirmative ; en revanche, si l'exhaustivité consiste à indiquer tous les détails fastidieux de l'expertise technique, sa réponse serait négative car les juges risquent de se perdre dans les détails. M. Jenny déclare par ailleurs qu'une présentation précoce des problèmes économiques posés est utile, dans la mesure où elle aide les juges à savoir dans quelle direction ils devront mener leurs recherches au cours de l'occasion d'une affaire. En France, un avocat désigné par l'ensemble des parties concernées est généralement chargé de piloter les recherches et passe environ une demi-heure à définir les caractéristiques de base de l'affaire.

Le Juge Ginsburg relève la remarque faite par M. Jenny concernant l'intuition des juges. Selon lui, il faut faire appel à cette intuition tout en l'éclairant ; des exemples familiers sont utiles à cet égard. Il est nécessaire de trouver dans chaque cas l'illustration du principe en cause d'une manière qui fasse appel à l'intuition du tribunal.

Le Président note que les commentaires antérieurs sur le langage courant restent toujours pertinents. Les autres participants proposent ensuite leurs commentaires.

Le délégué du Brésil convient que les juges peuvent être embarrassés par les problèmes économiques et que des graphiques et documents visuels peuvent leur être utiles et leur donner des éclaircissements. Il donne l'exemple d'une affaire traitée dans son pays dans laquelle les graphiques ont été particulièrement utiles. La délégation brésilienne demande plus de précisions sur le processus de décision aux États-Unis.

Le Juge Ginsburg explique que lorsque des rapports d'experts économiques sont présentés aux États-Unis, ils le sont souvent sous une forme écrite dont un résumé est présenté lors de l'audition. La valeur réelle de ces données est déterminée par le déroulement de l'examen contradictoire au cours duquel un avocat s'efforce de discréditer les dires de l'expert de la partie adverse. Il n'est pas réellement utile de s'efforcer de discréditer les références d'un expert dans la mesure où, en général, celui-ci a été bien choisi. En revanche, il faut discréditer son raisonnement économique. Il n'y a pratiquement pas de cas où les experts sont autorisés à se poser mutuellement des questions. La procédure a lieu par l'intermédiaire des avocats qui doivent se familiariser avec ce type de dossier pour procéder à un examen contradictoire efficace d'un témoignage de l'adversaire.

M. Jenny revient à la remarque concernant les différences entre les systèmes accusatoires et inquisitoires. En France, les experts des deux parties ne communiquent pas entre eux tandis que le juge attendrait de connaître le résultat définitif de leur échange de vues. Toutefois, les juges peuvent poser des

questions aux experts. Selon M. Jenny, cela pose un problème majeur : les juges posent rarement des questions aux experts soit parce qu'ils ne savent pas quelles questions poser soit parce qu'ils ne comprendraient pas la réponse. M. Jenny a assuré à des juges une formation spécifique dans ce domaine. Selon lui, le test *Daubert*¹ aux États-Unis est utile. M. Jenny a mis au point une série de 20 à 25 questions que tout juge peut poser à tout expert afin d'être en mesure d'évaluer l'avis d'expert qui lui est donné. Ces questions « assez simples » développent les idées de fiabilité, de pertinence, de cohérence interne, de publication éventuelle de la théorie en cause etc. M. Jenny a eu connaissance de cas dans lesquels l'utilisation de ces questions a été efficace. Selon lui, une formation des juges leur permettant de savoir quelles sont les questions à poser contribue à replacer le processus de décision entre leurs mains ; elle contribue à faciliter la discussion et, par conséquent, améliore la capacité du juge de décider si l'expertise proposée est utile dans le cadre de l'affaire qu'il a à traiter.

Mme Csorgo s'interroge sur l'utilité du système accusatoire lorsqu'on examine les données économiques. La procédure d'examen contradictoire permet en général au juge de déterminer « ce qui reste » après que les deux parties aient présenté leurs dires. Cependant, en présence de témoignages économiques, il est possible que le juge ne soit pas très bien placé pour déterminer effectivement les conclusions à tirer de la procédure d'examen contradictoire, notamment si les économistes utilisent cette procédure pour communiquer indirectement entre eux à un niveau qui dépasse la compréhension des non-spécialistes.

Le délégué d'Afrique du Sud note certains aspects exceptionnels du régime de la concurrence dans son pays. L'Afrique du Sud applique un système accusatoire comportant des pouvoirs inquisitoires. En pratique, les commissions du tribunal exigent des éléments de preuve et des communications additionnelles, chargent des experts d'établir des rapports et des documents complémentaires et interrogent ces experts en cas de nécessité. Ceux-ci répondent à toutes les questions par écrit. Il est fait observer que, si des examens contradictoires solides interviennent, les experts ne communiquent pas entre eux et il n'existe pas de véritable « examen par les pairs » de leur témoignage au sens strict du terme. Pour le délégué d'Afrique du Sud, l'un des moyens d'introduire ce type de composante dans la procédure consisterait à faire en sorte que les économistes communiquent directement entre eux oralement et par écrit. La publicité des auditions est également mentionnée comme un instrument de discipline efficace en ce qui concerne les économistes. En fait, il est fait observer qu'en Afrique du Sud le caractère public des auditions apparaît comme une contrainte très efficace pour inciter les experts en économie à se montrer plus rigoureux.

Le Président demande ensuite aux membres de la commission s'ils ont eu des expériences d'interventions simultanées (« hot tubbing ») c'est-à-dire de cas où les experts et le tribunal communiquent directement entre eux.

Le Juge Ginsburg déclare qu'il n'a jamais assisté à une telle pratique mais il connaît un juge qui l'a trouvée très efficace. Le Juge Ginsburg a en revanche eu recours dans son tribunal à une pratique très comparable qui lui a semblé très efficace : après avoir entendu les arguments successifs des conseils des parties au moment du recours, il rappelle le premier expert, fait venir les deux experts à la barre et s'adresse à eux à tour de rôle afin de préciser la question dans la mesure du possible.

M. Jenny n'a pas connaissance d'exemples mais il estime qu'une telle pratique pourrait être utile au juge car elle permettrait d'évacuer les questions annexes sur lesquelles il existe un consensus.

Le Président précise qu'il oblige les avocats à faire en sorte que leurs experts s'expriment en langage courant lorsqu'ils procèdent à des examens contradictoires de manière à ne pas induire le juge en erreur.

¹ Daubert v. Merrell Dow Pharmaceuticals 509 U.S. 579 (1993).

Sur la question de savoir s'il faut donner la préférence à un témoignage oral ou écrit, le Président souhaite demander des éclaircissements à la délégation finlandaise. Dans sa communication, celle-ci a souligné l'avantage des communications orales ; mais celles-ci doivent-elles constituer un complément aux communications écrites ou un substitut à celles-ci ?

Le délégué de la Finlande répond qu'il s'agit d'un complément au document écrit. En Finlande, la procédure judiciaire est lancée sur la base de documents de référence écrits qui peuvent s'appuyer sur des théories et analyses économiques très approfondies. Toutefois, au cours de la procédure judiciaire, on a estimé que les conclusions d'ensemble ou témoignages étaient plus efficaces lorsqu'ils sont présentés par des experts confirmés qui sont en mesure de traduire les théories en langage courant. Cela a contribué à confirmer la solidité ou la légitimité des fondements théoriques qui sont utilisés pour déterminer le pouvoir de marché ou pour prouver l'existence d'un préjudice causé au consommateur. De plus, ces présentations offrent trois possibilités : (a) rendre l'approche utilisée compréhensible par des non-spécialistes ; (b) résumer les principales conclusions et arguments ; et (c) fournir un cadre pour l'utilisation d'arguments contradictoires d'une manière constructive.

Le Président pose ensuite les questions suivantes :

- une présentation simplifiée et convaincante peut-elle être efficace (en d'autres termes comment conciliez-vous le risque de trop entrer dans les détails par une longueur ou une technicité excessive avec le désir de ne pas tomber dans l'excès inverse par une approche excessivement simpliste qui ne donne guère d'explications) ? ;
- quels sont les obstacles qui empêchent un juge ne disposant pas d'une formation spécialisée en économie de comprendre une analyse relativement complexe ? ; et
- Un juge doit-il rejeter une analyse économique qu'il/elle ne comprend pas totalement parce que celle-ci n'a pas été bien expliquée, et dans l'affirmative, que doit faire le juge dans une telle situation ?

M. Jenny estime que le juge doit effectivement rejeter une analyse qu'il/elle ne comprend pas bien. Sur la seconde question, il souligne qu'il existe un très important problème de terminologie. Pour illustrer ce point, il donne l'exemple des différentes significations du mot « prix » (s'agit-il en effet de la somme effectivement versée ou du point où l'offre est égale à la demande). Dans certains cas, M. Jenny s'est trouvé embarrassé par le fait que cette différence d'interprétation du « prix » a joué un rôle dans la prise de décision. Il souligne que le véritable obstacle à la compréhension de l'analyse économique par un juge n'est pas l'utilisation de termes techniques ou le mode de présentation, mais le fait que l'économiste part d'une hypothèse ; cela est incompréhensible pour le juge parce que cela signifie que l'hypothèse peut n'être pas valable et risque donc d'induire en erreur. M. Jenny admet qu'il existe un niveau de complexité à éviter devant un tribunal.

Mme Csorgo met l'accent sur la première question. Elle convient que la présentation économique doit être intuitive et utiliser un langage technique clair et simple. Elle souligne par ailleurs le fait qu'il est nécessaire de veiller à ne pas simplifier à l'excès tout en rendant la théorie accessible.

Le Juge Ginsburg revient à la remarque précédente de M. Jenny concernant la probabilité. Il fait observer que le contrôle des fusions est essentiellement prédictif et que la loi américaine prévoit un jugement prédictif. Le Juge Ginsburg ne pense pas que les juges américains soient embarrassés par la prise en compte du fait qu'il faille envisager la probabilité de survenance d'un événement donné. Il affirme que si le gouvernement a été débouté dans un certain nombre d'affaires de fusions ces dernières années, ce n'est pas à cause d'un rejet par les juges de la notion de probabilité.

M. Jenny développe ses commentaires antérieurs concernant les hypothèses à retenir. Il fait observer que, dans tout cas de pratiques abusives il faut partir de l'hypothèse que l'entreprise s'efforce de maximiser son profit ; on part de cette hypothèse de rationalité et on l'applique à une entreprise dominante. En Europe, les juges trouvent cela un peu troublant. Selon M. Jenny, il n'y a qu'un domaine qui ne semble pas poser de problème aux juges : la prédation. La prédation est une pratique anticoncurrentielle si l'on admet que toute personne qui la pratique a en fait un comportement rationnel : elle subit une perte financière afin d'éliminer la concurrence. Selon M. Jenny, la raison pour laquelle les juges n'ont pas de difficulté avec la prédation n'a rien à voir avec le fait qu'ils admettent l'hypothèse selon laquelle les personnes qui la pratiquent ont un comportement rationnel ; elle est plutôt due au fait que ce comportement est perçu comme manifestement déloyal.

Le Juge Ginsburg examine ensuite la troisième question. Il fait observer que, si les juges ne comprennent pas l'analyse économique, ils ne savent pas si c'est parce qu'elle n'a pas été bien expliquée ou parce qu'elle est inexplicable ; de toute manière, elle doit être rejetée.

Selon le délégué des États-Unis, certains avocats préfèrent couper les analyses économiques dans leur argumentation et passer directement des faits à la conclusion. Cependant, le juge souhaite en général entendre les analyses économiques, s'efforcer de les comprendre et souvent il est en mesure de le faire si les explications données sont appropriées. Il n'est presque jamais souhaitable de laisser de côté certains éléments d'analyse économique. Néanmoins, il peut être nécessaire de les simplifier, en particulier quant aux termes utilisés.

Le Président passe ensuite aux questions suivantes :

- Y a-t-il des moyens de faire en sorte que la procédure ou la présentation utilisée maximise les chances que les arguments soient bien expliqués et que le juge les comprenne mieux ?
- Un système accusatoire a-t-il plus de chances de faire la lumière sur les questions traitées qu'un système inquisitoire ?
- Faut-il prévoir des exposés écrits ou oraux d'avocats ou d'économistes ?
- Qu'en est-il du rôle à donner aux économistes nommés par le tribunal par opposition à ceux qui sont choisis par les parties ?
- Qu'en est-il de la notion de formation de base ?

Le Juge Ginsburg déclare que le meilleur moyen d'adapter les présentations économiques aux besoins du tribunal est de partir d'un niveau aussi basique que possible, et de demander au tribunal s'il est prêt à aller au-delà. Cette approche serait beaucoup moins risquée qu'une présentation trop complexe qui pourrait embarrasser les juges ou les dissuader de poser des questions. En ce qui concerne les fonctions d'experts nommés par le tribunal, le Juge Ginsburg note que les règles applicables aux États-Unis autorisent la nomination d'un expert par décision d'un tribunal et que cette procédure est relativement peu controversée lorsqu'elle a lieu conformément aux règles applicables (c'est-à-dire de manière transparente) : les parties savent qui est l'expert ; l'expert auprès des tribunaux présente un exposé ou transmet une communication par écrit aux différentes parties. Cependant, le Juge Ginsburg note qu'à plusieurs reprises d'importants juristes ont estimé qu'une cour d'appel devait être en mesure de citer ses propres experts, soit qu'elle les ait spécialement désignés à cette fin, soit qu'ils soient choisis ponctuellement dans chaque cas d'espèce. Il est fait observer qu'une telle idée serait peu commode : la procédure d'appel pourrait devenir si complexe et comporter tant de redites par rapport à la procédure suivie devant le juge du fait que le jeu n'en vaudrait pas la chandelle.

M. Jenny examine les questions dans leur application à la France. Dans son pays il n'y a pas réellement de choix entre une présentation écrite et une présentation orale : tout argument qui n'a pas été écrit dans les conclusions n'est pas considéré comme recevable. Le procès doit débiter par une présentation écrite. Par conséquent l'accent est mis sur la manière dont les économistes ou les experts interviennent. Selon l'expérience de M. Jenny, en général, il est nettement préférable que l'avocat comprenne les arguments économiques. Cela s'explique surtout par le fait que c'est lui qui est connu des juges et il sait en général mieux comment s'adresser à eux que les économistes. M. Jenny note que, lorsque des éléments de preuve économique commencent à être utilisés dans des affaires antitrust, les économistes sont prêts à donner des arguments sur presque tous les points et qu'il n'existe pas de contrôle de qualité concernant leurs déclarations. Au fil du temps, certains de ces économistes ont acquis la réputation de soutenir n'importe quoi ; par conséquent, aucun juge n'accepte de les écouter. M. Jenny souligne qu'il faudra du temps pour préparer le terrain à l'autodiscipline.

Mme Csorgo fait part de ses commentaires sur les économistes nommées par le tribunal. Au Canada, il existe des règles destinées à faire en sorte que toute nomination soit transparente. Le rapport de l'expert nommé par le tribunal est disponible et les dires de l'économiste peuvent faire l'objet d'un examen contradictoire des parties ainsi que des membres du tribunal. En fait, au Canada, l'ensemble des présentations écrites et orales des économistes des parties sont disponibles, ainsi que les arguments des économistes nommés par le tribunal. La procédure est accusatoire, même lorsqu'elle est menée face à un tribunal spécialisé. Mme Csorgo estime que cette procédure fonctionne bien. Lorsqu'il n'existe pas de tribunaux spécialisés, il est fait observer qu'il serait très utile que les juges aient à leur disposition des questions leur permettant de tester la crédibilité des experts, comme l'indique M. Jenny.

Le Président note que la communication de l'Allemagne mentionne la possibilité de faire intervenir des experts nommés par le tribunal. Le Président demande à la délégation de l'Allemagne de traiter la question de savoir ce que peut faire l'autorité de la concurrence pour aider le juge, soit dans le choix de l'expert, soit dans la détermination de son mandat dans le cadre de la procédure.

Le délégué de l'Allemagne répond que l'autorité de la concurrence de l'Allemagne (le Bundeskartellamt) juge nécessaire que le tribunal nomme un expert expérimenté et neutre. En Allemagne, les décisions peuvent faire l'objet de recours devant un tribunal spécialisé en première et en seconde instance, mais les juges n'ont en général qu'une formation juridique et non économique. Il est fait observer qu'en principe le Bundeskartellamt et ses économistes semblent plus proches du monde de l'économie et des personnes qui pourraient intervenir dans un tribunal en tant qu'experts. En conséquence, ils pourraient contribuer à la recherche d'experts et conseiller les tribunaux sur ceux qui auraient les connaissances les plus approfondies et l'expérience requise concernant une question donnée. Quant aux questions qui pourraient être formulées, le délégué de l'Allemagne fait observer qu'il est essentiel de les énoncer aussi précisément que possible et définit les faits et les données qui devraient être utilisés comme base de l'analyse afin de faire en sorte que les conclusions de l'expert puissent être vérifiées à un stade ultérieur.

Le Président fait observer que de nombreuses autorités de la concurrence disposent d'une expertise économique en interne et ont le choix soit d'utiliser cette expertise dans la présentation des données soit de faire appel à un expert extérieur. Il note que l'exposé de l'autorité de la concurrence du Portugal met l'accent sur le fait que celle-ci a recours exclusivement à ses propres experts. Le Président demande au délégué du Portugal de donner des précisions sur le recours aux experts internes.

Le délégué du Portugal donne l'exemple d'une affaire concernant une entente sur le marché du sel dans son pays. Dans cette affaire, l'autorité portugaise de la concurrence a trouvé des preuves concluantes de l'existence de cette entente à la suite de descentes à l'aube dans quatre entreprises qui contrôlaient 80 % du marché. Outre ces preuves indiscutables, l'autorité a également trouvé des preuves convaincantes concernant le mécanisme de rémunération que ces entreprises avaient mis en place dans le cadre de cette

entente. Ces données ont permis à l'autorité de calculer d'une manière très simple, intuitive et mathématique les avantages économiques que ces entreprises tiraient de leur comportement. Cette simplicité a été maintenue au cours de la procédure judiciaire de manière à éviter l'emploi de termes économiques complexes. Selon le délégué du Portugal, bien que l'une des parties ait présenté une autre méthode sous une forme plus technique devant le tribunal, pour des raisons liées à la compréhension, la position de l'autorité de la concurrence a été confirmée non seulement en première instance mais aussi en appel.

Le Président demande ensuite au délégué de la Corée de résumer brièvement l'expérience de la Korean Fair Trade Commission (KFTC) concernant les avantages et les inconvénients du recours à des experts économiques extérieurs.

Le délégué de la Corée note que, dans 14 affaires entre 2005 et 2007, la KFTC a eu recours à des experts extérieurs. Le recours à de ces experts présente un certain nombre d'avantages, surtout lorsque l'obtention de données économiques est essentielle pour trancher une affaire en cours. En général, le juge a tendance à faire confiance à un tiers objectif du secteur public plutôt qu'au personnel de la KFTC. En d'autres termes, le recours à des experts extérieurs est préférable pour assurer la crédibilité des données économiques transmises par la KFTC. Selon le délégué de la Corée, à la fin de 2005, la KFTC a créé une nouvelle unité désignée sous le nom d'Équipe d'analyses économétriques qui est composée de plusieurs économistes afin de renforcer les capacités d'analyse économique. Cependant, elle ne dispose pas actuellement d'un personnel suffisant pour mener à bien ses analyses. La KFTC a rencontré des problèmes pour obtenir la contribution d'experts extérieurs, notamment du fait du choix limité d'économistes dont elle disposait. Le budget relativement limité de la KFTC, notamment si on le compare à celui des parties adverses, est également un facteur négatif.

Le Président demande au Royaume-Uni de commenter les questions posées.

Le délégué du Royaume-Uni déclare que le message essentiel de sa communication est de « rester simple ». Dix principes sont énumérés dans cette communication² ; ils comprennent l'idée d'utiliser un langage simple et non technique et de s'assurer que l'aspect économique de l'affaire correspond bien à son aspect juridique. Ils soulignent la nécessité de s'assurer que la théorie économique est bien fondée par rapport aux données concernant l'affaire. Deux citations judiciaires sont données pour montrer que les juges peuvent être embarrassés par des données économiques. Pour le délégué du Royaume-Uni, tous les arguments économiques doivent être testés jusqu'à leur remise en cause par des collègues qui mettront l'accent sur la question de savoir si de tels arguments sont compréhensibles pour le juge ; en aucun cas il ne faut partir de l'hypothèse que ces arguments sont compris.

Le délégué du BIAC intervient et note que cet organisme a établi une liste qui se trouve être très proche de celle qui figure dans la communication du Royaume-Uni ; elle contient dix recommandations « simples ». En particulier, elle recommande une présentation simple des données économiques qui fait appel à la logique du tribunal et qui relève de l'intuition. Le délégué du BIAC note qu'il y a eu des cas dans lesquels les économistes se sont efforcés d'adopter pour postulat une théorie ou de démontrer une certaine méthodologie qui ne cadrerait pas avec l'analyse juridique, ce qui est à éviter. Si les économistes s'appuient sur des théories solides et non sur des théories qui n'ont pas été acceptées par un grand nombre de leurs pairs, les chances de voir rejeter leur argumentation par un tribunal se trouvent nettement réduites. Plus généralement, le BIAC souligne la nécessité, pour les tribunaux, de maîtriser l'économie : l'aspect économique est important dans de nombreux cas, dans la mesure où il peut montrer où se trouve le dommage ou l'absence de dommage. Le BIAC serait favorable à des mesures générales ainsi qu'à des mesures spécifiques permettant d'améliorer la perception des données économiques par les tribunaux.

² Voir DAF/COMP/WP3/WD(2008)24, 4 à 6.

Le Président remercie le BIAC de sa communication et demande aux membres de la Commission de faire part de leurs conclusions.

Pour Mme Csorgo il est clair que la théorie économique doit s'appuyer sur les faits. Toutefois, les données qui, pour une raison ou pour une autre, ne sont pas pertinentes pour l'affaire en cause présentent également un intérêt (il est vrai moindre). Ces données présentent des avantages, dans la mesure où beaucoup de faits qui sont laissés de côté ajoutent un éclairage intéressant à une affaire. L'expert économiste peut jouer un rôle en expliquant pourquoi un certain ensemble d'informations – par ailleurs intéressant – n'est pas réellement pertinent pour ce que l'on essaie de décider et d'expliquer.

M. Jenny souhaite faire observer que, même si la présentation de données économiques aux juges présente des difficultés, des progrès ont été accomplis dans ce domaine. Les juges cherchent à comprendre et les problèmes posés ne sont pas dus à une étroitesse d'esprit de leur part. Pourtant, ce qui les inquiète c'est la méthodologie utilisée et ils souhaiteraient mieux la comprendre et mieux participer aux débats. Selon M. Jenny ce point est positif.

Le Juge Ginsburg reprend la remarque formulée par le Royaume-Uni sur la nécessité de ne pas invoquer d'arguments nouveaux ou d'arguments qui n'ont pas résisté à une analyse approfondie au fil des années. Le droit de la concurrence est singulier et peut-être unique en son genre, dans la mesure où il fait référence à un corps de connaissances et de sciences sociales qui sont essentiellement sujettes à une évolution, à de nouveaux progrès et à l'infirmité de certaines hypothèses à mesure que l'on progresse. Les avocats ont tendance à utiliser tout argument qui peut leur permettre de gagner. Le Juge Ginsburg note qu'une importante responsabilité des autorités de la concurrence consiste à ne pas permettre à leurs avocats d'évoquer des arguments économiques entièrement nouveaux ; prendre des décisions fondées sur les derniers numéros des revues économiques si c'est seulement pour voir ces opinions rejetées quelques années plus tard ne présenterait aucun avantage pour le droit de la concurrence.

Le Président remercie les délégations pour leurs communications ainsi que les trois membres de la Commission et clôt les travaux de la Table ronde.