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Agenda

Advancing economics in business

The economist on trial: can judges rely on the evidence?

Economics for Competition Lawyers **(Oxford University Press) is a new book by Oxera economists, explaining from first principles the economic concepts that underpin competition policy. It also seeks to contribute to the debate about how economic evidence, and economic experts, can be most useful in competition cases before courts, a topic explored in this article**

In recent years, several competition authorities in Europe have issued guidance on best practice when presenting economic evidence.[1] Provided that this is followed, the submission of empirical economic evidence in proceedings before competition authorities now allows for a more in-depth debate than before of the issues between the parties, and ultimately better decision-making.

In competition cases before courts, however—which are increasingly common, now also outside the USA—there is the complication that many judges have not had extensive economics training. Courts are less well equipped than competition authorities to deal with technical economic evidence. Most competition authorities have economists among their staff—indeed, many now have a Chief Economist—but judges normally cannot peer-review the evidence themselves. When presented with such evidence, should they therefore limit themselves to putting some critical questions to the expert, and, if these are answered satisfactorily, regard the expert's conclusions as reliable? Should they rely on the other side's expert to provide the required peer review? Or should they appoint their own expert?

Different jurisdictions deal with these challenges in different ways. As discussed below, the principles developed in the US and UK courts are particularly useful: namely, the *Daubert* test on the admissibility of expert evidence; and the duty to the court to ensure the expert's independence. Together with the best-practice guidance by competition authorities, these principles can make economics a more helpful discipline in competition law.

The *Daubert* principle

US case law has developed the *Daubert* test on the admissibility of scientific evidence, which also applies to economic evidence in antitrust cases. Based on a 1993 Supreme Court ruling, the test has been refined through a number of subsequent judgments and is reflected in Rule 702 of the Federal Rules of Evidence.[2] The test is intended to prevent expert testimony based on untested and unreliable theories. Its main relevant aspects are whether (i) the testimony is based on sufficient facts or data; (ii) the testimony is the product of reliable principles and methods; and (iii) the expert has applied the principles and methods reliably to the facts of the case. Only if these criteria are met is the expert evidence admitted—note, however, that admission is only the first hurdle; it does not necessarily mean that the evidence is given much weight. The *Daubert* test has been used to great effect in many antitrust cases in the past 15 years. Indeed, quite a few economists have seen their evidence not being admitted—one prominent example being a winner of the Nobel Prize for Economics. Some common themes in the application of the *Daubert* test are described below.

Economic evidence in private damages actions (which represent a large proportion of all antitrust cases in the USA) is more likely to be admitted if it is in line with one of the three 'common approaches to measuring antitrust damages' recognised in US case law: the before-and-after approach, a yardstick or benchmark approach, and regression analysis.[3] US courts have accepted the usefulness of regression analysis. In one case, it was stated that 'if performed properly multiple regression analysis is a reliable means by which economists may prove antitrust damages.'[4] Indeed, to some extent courts appear to expect experts to

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conduct a regression analysis in order to produce robust estimates:

> [The] prudent economist must account for differences and would perform minimum regression analysis when comparing price before relevant period to prices during damage period.[5]

US courts have also considered the question of how much of an expert the expert needs to be. In one antitrust case involving a clinic's refusal to continue to treat two patients, the plaintiffs' expert had a PhD in economics, but no expertise in competition economics. The court duly dismissed the expert:

> The district court's and the plaintiffs' difficulty in describing the relevant market was to a great measure the result of the plaintiffs' reliance on [the expert] as their sole economic analyst/ expert. [The expert] is the sole qualified source cited by the plaintiffs supporting their allegation of the Clinic's market power. Yet, [the expert] conceded that he was 'not an expert,' that he had no background in antitrust markets, either geographic or product, and that he had no background in 'primary care' markets. [The expert] further stated that he was not a member of any associations or industrial organization groups which form the bulwark of economists specializing in antitrust law and economics. Where supposed experts have admitted that they are 'not experts,' courts have had little difficulty in excluding their testimony.[6]

The English High Court faced a similar question in an abuse of dominance case where the expert was not an economist, but did have extensive business experience in the industry. The judge expressed a (slightly) more subtle view on this than his US counterparts:

> Whilst the concepts required to be investigated in a competition law case are no doubt most easily grasped, explained and opined upon by trained economists, they are concepts drawn from and related to the operation of the markets of the real world; and I regard it as unreal the thought that it is only trained economists with a list of learned articles to their name who have the expertise necessary to understand them and to help the court on their application to a particular case.[7]

Conversely, the question has arisen as to whether experts need to have had experience in the industry in question. In a case involving a horizontal group boycott under Section 1 of the Sherman Act, the court noted the extensive experience of the expert (an accountant) in business valuation, and was satisfied that while the expert had no prior experience in the industry concerned, he had made substantial efforts to acquaint himself with the industry for the purposes of the case.[8] This seems a sensible approach, since competition economists, like competition lawyers, can work effectively across a wide range of industries, and may often be unfamiliar with the industry in question at the start of a case. In the group boycott case, the expert's evidence was rejected for another reason—it was not based on any identifiable theory or technique, but rather on the expert's own assumptions and judgement, such that the analysis could not be objectively tested or verified by others (one of the *Daubert* criteria).

Experts clearly cannot rely only on their past experience. They are also expected to engage with the details of the case, and ensure that their analysis fits the facts. In an antitrust dispute between boat builders and an engine manufacturer, the appeal court rejected the plaintiff's expert because his Cournot oligopoly model 'did not incorporate all aspects of the economic reality' of the market in question, and it 'ignored inconvenient evidence'. The Cournot model itself was not challenged—it is, after all, a well-accepted model—but two experts on the other side criticised the way it had been applied in the case at hand, and the court considered that there was 'simply too great an analytic gap between the data and the opinion proffered'.[9]

In another case, which concerned price discrimination, the plaintiff's expert was rejected because his analysis was not based on authoritative industry data or recognised financial data, but rather on the 'deposition testimony, estimates, feelings and beliefs' of one of the plaintiff's executives.[10] This executive would have been the main beneficiary of the damages claim (and so might have been biased). The court also considered him insufficiently qualified to provide the general opinions on which the expert relied in calculating the damages, since he had no specialised education and was neither an economist nor an accountant. Furthermore, the court stated that the expert had not made any effort to verify the executive's estimates, through consultation with either industry experts or the relevant literature.

These themes have also arisen in the UK courts. In a recent damages action (outside competition law), where economic and business experts commented on the effect of a failed customer relationship management system on the claimants' number of pay-TV subscribers, the High Court stated that:

> It is clear that [the expert] is a person who has a great deal of relevant experience in this field and could provide a valuable opinion on the effect of the CRM System on Sky's customers. However, I found that his evidence failed to live up to expectations. It seemed that he had little grasp of the detailed facts and had not properly

> understood some features which were necessary to make churn predictions for Sky.[11]

In *Enron v EWS* (2009)—a damages case following an abuse of dominance finding by the Office of Rail Regulation—the question that arose was whether in the counterfactual (in the absence of the abuse) the claimant would have secured a major four-year contract to supply coal to a coal-fired power station.[12] The economic expert for the claimant argued that the operator of the power station, as a rational economic decision-maker, would have been more likely to select the claimant's bid in the counterfactual. However, neither the facts nor the executive at the power company who was responsible for the coal supply contract at the time supported this argument. The executive gave various business reasons why he would probably not have granted the contract to the claimant in the counterfactual. The Competition Appeal Tribunal (CAT) found that the executive gave his evidence 'candidly and in a straightforward manner', and was 'impressed by his overall consistency on key points'.[13] In the end, the CAT placed greater weight on this evidence from the actual decision-maker than on what the economic expert said a hypothetical rational decision-maker would have done.

Duty to help the court

There are various ways to involve experts in court proceedings, and the rules differ across jurisdictions. For example, parties can each appoint their own expert, or they can appoint one expert jointly. Courts may themselves appoint an expert, either as the main expert in the case or as the arbiter resolving any differences between the party-appointed experts. On the face of it, a court-appointed expert can assess the merits of the technical evidence as independently as the judge can.

However, one system that works well is that used in the English courts, where experts are usually party-appointed. This approach combines a number of powerful mechanisms that provide the incentives for experts to do the job properly: (i) a duty on the experts to help the court; (ii) a requirement on the experts to agree on points of agreement and disagreement; and (iii) robust cross-examination of the experts by a barrister if the case goes to trial.

Part 35 of the Civil Procedure Rules (and the accompanying Practice Direction) determines that experts have a duty to help the court on matters within their expertise.[14] This duty overrides any obligation to the parties from whom experts have received instructions or by whom they are paid. Experts are expected to provide objective, unbiased opinions on matters within their expertise, and not to assume the role of an advocate. Under these rules, they should also make it clear when a question or issue falls outside their expertise, and when they are not able to reach a definite opinion—for example, because they have insufficient information.

Judges tend to rapidly dismiss the evidence of an expert who does not appear to be willing to help the court—for example, when the expert gives the impression of behaving like an advocate, seems unwilling to comment on a matter from the other side's perspective when asked to do so, or appears to be hiding behind narrow instructions. This can be seen in the following quote, from a 1995 judgment that was influential in the development of the duty to the court principle. (The expert evidence here did not relate to economics but to architecture, since the case involved a property rights dispute over the copying of a house design.)

> That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by [the expert] is a euphemism for 'misleading selectivity'.[15]

There have been several judgments in which courts have explicitly stated that they found an economic expert's evidence to be credible, persuasive or authoritative, and that they felt they could rely on the expert. Equally, courts have indicated where there were some doubts in this respect. This would seem to confirm that the duty to the court principle works effectively. The following extracts from recent court judgments illustrate the point. In a vertical agreement case before the Court of Session in Edinburgh, the judge observed:

> I noted the considered and thoughtful way in which [the expert] gave his evidence. I am entirely satisfied that he acted throughout as an independent expert offering his opinions to assist the court … His credentials to give expert evidence on this subject are impressive. On the material issues, I accept all of [the expert]'s evidence and his conclusions.[16]

In a High Court ruling on an abuse of dominance case, the judge made the following comment about the claimants' expert:

> I was satisfied that [the expert] was giving his evidence honestly and was doing so in proper recognition of his duties to the court. I recognise, however, that he has been close to the action on the claimants' side of the record, and that there is therefore a risk that his opinion may perhaps have become unconsciously coloured by the claimants' interests.[17]

Under the Civil Procedure Rules, the experts from both sides of the dispute are normally expected to hold discussions and to produce a joint statement setting out the issues on which they agree and disagree (and their reasons for disagreeing). This may also involve the experts sharing their data and calculations with each other. Together with the duty to the court, this requirement on experts to narrow the issues in dispute can be a powerful mechanism to help courts to understand the economics of a case. Indeed, it is a mechanism that arguably ought to apply in any type of competition proceeding. It would be equally helpful in administrative merger and abuse of dominance inquiries if the economists at the competition authority and those advising the parties could agree in advance what the relevant economic questions are, discuss which parts of the other side's analysis and conclusions they agree and disagree with, and state their reasons clearly.

The Civil Procedure Rules state that 'the purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues'.[18] These expert discussions may not always bring the parties' cases much closer together, but it is already helpful if there is agreement on at least some basic principles, and the discussions do often contribute to narrowing and clarifying the economic issues for the court—see the following statement by the judge in a recent damages case (outside competition law):

> The quantum experts have managed to make very good progress in agreeing figures. This meant that the issues between them were more limited. Both [expert 1 and expert 2] were impressive witnesses and although their approaches on particular issues differed, this was the result of opinion on such matters as validation of costs. I have therefore been able to see clearly what their views are and decide which view I prefer on particular issues.[19]

Finally, in addition to the duty to the court and the requirement to meet with the other expert, an economist involved in these proceedings faces the prospect of cross-examination by a barrister representing the other side—not always the friendliest of encounters. Applying some economic logic, the most powerful incentive on the expert to produce a carefully thought-through economic analysis is provided by the combination of the prospect of close scrutiny by the other expert and cross-examination by the barrister, and the desire to avoid a damning quote in the final judgment if one's analysis is shown to be unreliable. Indeed, these incentives are probably stronger than those faced by a court-appointed expert, who is subject to a lower degree of scrutiny and peer review.

[1] European Commission (2010), 'Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases', January; Competition Commission (2009), 'Suggested Best Practice for Submission of Technical Economic Analysis from Parties to the Competition Commission', February 24th; Bundeskartellamt (2010), 'Standards für ökonomische Gutachten', October 20th.
[2] *Daubert v Merrell Dow Pharma, Inc*, 509 U.S. 579 (1993). For a more detailed discussion of the test, see Berger, M. (2000), 'The Supreme Court's Trilogy on the Admissibility of Expert Testimony', in Federal Judicial Center, *Reference Manual on Scientific Evidence*, second edition; and Cwik, C. and North, J. (2003), 'Scientific Evidence Review: Admissibility and Use of Expert Evidence in the Courtroom', monograph no. 4, American Bar Association.
[3] *Conwood Co. L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 793 (6th Cir. 2002).
[4] *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1238 (3d Cir.1993).
[5] In re *Aluminum Phosphide Antitrust Litig*., 893 F.Supp. 1497, 1507 (D.Kan.1995).
[6] *Nelson v. Monroe Regional Medical Center*, 925 f.2d 1555 (7th Cir. 1991), para 73.
[7] *Chester City Council v Arriva* [2007] EWHC 1373 (Ch), para 147.
[8] *Champagne Metals v. Ken-Mac Metals, Inc*., 2002 U.S. Dist. LEXIS 27722 (W.D. Okla., Oct. 1st 2002).
[9] *Concord Boat Corp v Brunswick Corp*, 207 F.3d 1039 (8th Cir. 2000), paras 61, 56, 52.
[10] *Vernon Walden, Inc., v. Lipoid GmbH and Lipoid USA, LLC*, civ. no. 01-4826(drd), United States District Court for the District of New Jersey.
[11] *BSkyB Limited and Sky Subscribers Services Limited v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) and Electronic Data Systems LLC (formerly Electronic Data Systems Corporation)* [2010] EWHC 86 (TCC), para 288.
[12] Competition Appeal Tribunal (2009), *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 36, December 21st.
[13] Ibid, para 70(a).
[14] These Rules are updated regularly and are available on the Ministry of Justice website: http://www.justice.gov.uk/civil/procrules_fin/index.htm.
[15] *Cala Homes v Alfred McAlpine Homes East* [1995] FSR 818.
[16] *Calor Gas v Express Fuels and D Jamieson*, Court of Session [2008] CSOH 13.
[17] *Chester City Council v Arriva* [2007] EWHC 1373 (Ch), para 149.
[18] Civil Procedure Rules, op. cit., para 9.2.
[19] *BSkyB Limited and Sky Subscribers Services Limited v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) and Electronic Data Systems LLC (formerly Electronic Data Systems Corporation* [2010] EWHC 86 (TCC), para 303.