

# **Economic expertise in courts/ the need for a European framework**

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# Structure

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## The call for economic expertise in EC & national competition law

- Factual complexity and economic nature of issues in antitrust
- Evolution in recent years towards a more economic approach
- E.g. the market power requirement in Article 81
- But economic concepts do not always have the same meaning in law and in economics (e.g. Mason E.S. Monopoly in law and economics, 47 Yale L.J. 34 (1937))
- *“Antitrust is necessarily a hybrid policy science, a cross between law and economics that produces a mode of reasoning somewhat different from that of either discipline alone”* (R. Bork, The Antitrust Paradox, at 8)

# The call for economic expertise in EC & national competition law

- Economic analysis has a strong impact in a number of areas (e.g.)
  - Relevant market and market definition
  - Market power
  - Distinction between vertical and horizontal agreements
  - Collusion (concerted practice)
  - Role for efficiency gains
  - Cost-benefit analysis in Art. 81-3 EC
  - Merger control (unilateral effects...)
- A new “El Dorado” for economic consultancies
  - D. Neven, Competition economics and antitrust in Europe, *Economic Policy*, Oct. 2006, pp. 741-791)
    - “The annual turnover of the main economic consultancy firms has increased by a factor of 20 since the early 1990s and currently (2004) exceeds 20 million £”
    - Economists in competition authorities: DG Comp 83 out of 267 + Chief economist and his team (11 economists) + chief economists in several national competition authorities
    - However, there are few economic experts in Courts (ECJ, CFI and national courts)

## Different types of economic expertise in litigation

- 4 different forms of economic expertise
  - **Economic facts** (economic evidence will be used as a simple pattern of facts following a careful analysis of economic data on the situation in question)
  - **Economic authority** (courts look to economic authority in order to establish antitrust authority as a matter of law; economics contributes to the interpretation of the law but economic concepts have not yet been integrated in law)
    - These theories rest on first assumptions on which there is not always consensus in economic theory itself
    - E.g. Resale price maintenance (*Leegin Creative Leather Products v. PSKS, Inc.*) Oral hearing transcript S. Breyer “we are supposed to count economists? Is that how we decide it? (Laughter)”
    - The concept of economic normality

## Different types of economic expertise in litigation

- **Economic transplants** (economic concepts are integrated in law but their meaning is not exactly the same as it is in economics)
- **Economic laws** [“General truths derived from specialised expertise”: Learned Hand, Historical and Practical Considerations Regarding Expert testimony, 15 Harvard L. Rev. 40 (1901)]
- The role of economic expertise will be different for each type of economic concept
- Judicial appeal and judicial review (distinction)

# Points of entry of economic expertise in courts

- Two conceptions of expertise in courts
  - Expert witnesses (partisan experts): common law tradition
    - The “hired gun” problem but experts are repeated players
    - Experts can hide behind “an impenetrable wall of esoteric knowledge” (R.A. Posner)/ neutral experts, court appointed experts, standards of admissibility of economic expertise – specific rules to screen “junk science”
    - Conflicting economic evidence
  - Court appointed experts
    - E.g. Art. 143-152 of the French New Code of Civil Procedure
    - Art. 368-392 of the Greek Code of Civil Procedure
    - Art. 25 of the Statute of the Court of Justice
    - Article 65(d) & 70 of the Rules of Procedure of the Court of First Instance

## Points of entry of economic expertise in courts

- Need to devise a procedure to appoint the neutral expert: risk that the procedure loses its adversarial character
- UK: under opposition from respondents to the consultation process to any diminution of the adversarial nature of English litigation, the Woolf Report weaned away from recommending the imposition of court-appointed experts
- Innovation of the single joint expert
- Part 35 of the Civil procedure Rules endorses the Woolf Approach:
  - “1. where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only...3. Where the instructing parties cannot agree who should be the expert, the court may (a) select the expert from a list prepared or identified by the instructing parties; or (b) direct that the expert be selected in such other manner as the court may direct”

## Points of entry of economic expertise in courts

- Discussion between experts (Part 35.12 CPR)
  - 35.12(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing – (a) those issues on which they agree; and (b) those issues on which they disagree and a summary of their reasons for disagreeing”
  - 25.12(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement
- The “hot tub” procedure in Australia and New Zealand (the procedure ensures that the experts called have an opportunity to deal with the case on the basis of the evidence adduced and the issues raised by the parties in a disconnected way)

# Points of entry of economic expertise in courts

- Other Alternatives
  - **Assessors** (e.g. Part 35.15 CPR; Woolf Report: there should be two assessors, one instructed by each party whose function would be to evaluate the expert evidence or guide the judge)
  - **Amicus curiae or advice from competition authorities**
    - Art. 15 of Regulation 1/2003 – National courts may ask the Commission to transmit them information in its possession or its opinion in questions concerning the application of EC competition law
    - Art. 15(3) – national competition authorities may submit written and oral observations to the national courts of their Member State
    - The Commission may also submit written observations to national courts “when the coherent application of Art. 81 or 82 so requires”
  - **Internal economic expertise** (clerks, research and documentation units with economists)
  - **Economists as judges – specialised courts**

# Evaluation of economic expertise

- Principle of procedural autonomy or the need for an harmonized procedure?
- The Daubert test in the United States
  - Expert testimony must be subject to a strong and careful judicial gatekeeper function
  - *Frye v United States* (1923): the general acceptance standard
  - Rule 702 of the Federal Rules of Evidence: “if scientific, technical or other specialised knowledge will assist the tier of fact to understand the evidence or to determine a fact in issue, a witness qualifies as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case”
  - “Trilogy of restrictions on expert testimony, qualification, reliability and fit”

## Evaluation of economic expertise

- Daubert factors (*Daubert v Merrell Dow Pharmaceuticals*, 1993)
  - Determine whether a theory or technique is “scientific knowledge”
  - Whether the theory or technique has been subjected to peer review and publication
  - In the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error
  - “General” or “widespread” acceptance in the relevant scientific community
- *General Electric Co. v. Joiner* (1997) – courts of appeals are to apply abuse of discretion standard when reviewing district court’s reliability determination)
- *Kumho Tire v Carmichael* (1999) – extension of the general gatekeeping obligation to testimony based on technical or other specialised knowledge

## Evaluation of economic expertise

- Principles for evaluating economic expertise in courts: important concerns
  - Are decisions made consistently?
  - Is there sufficient recognition of minority views in science?
  - Difficulty to square the legal standards of proof with the economic standards: courts should assess the range of acceptable disagreement within the scientific community and measure these various opinions against legal standards of admissibility and sufficiency of evidence

## Evaluation of economic expertise

- *Daubert*: “...there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.

The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypothesis, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment – often of great consequence – about a particular set of events in the past...”

- The balance that is struck by the Rules of Evidence is designed “not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes”

# Evaluation of economic expertise

- Standards of proof and economic evidence
  - Principle of procedural autonomy (Recital 5 of Reg. 1/2003)
  - See Makis Komninos' presentation on the standard of proof
  - A value judgment? (Type I-Type II errors): Advocate General A. Tizzano *Commission v Tetra Laval* (Case C-12/03), para. 79: “By stipulating that, if the Commission does not make a decision in good time, the concentration must be deemed to be authorised, the Community legislature demonstrates as a matter of fact that it considers that, in the case of uncertainty as to whether or not the transaction is compatible with the common market, the interest of the undertakings seeking to make the merger must prevail. In other words, in similar situations, it has been thought preferable to run the risk of authorising a transaction incompatible with the common market, rather than the risk of prohibiting one that is compatible, so unjustifiably restraining the parties' freedom of economic activity”



**THE END!**

**THANK YOU FOR YOUR ATTENTION!**