



THE ROLE OF ECONOMIC ANALYSIS IN JUDICIAL DECISIONS

**Presentation by Mr. Frédéric Jenny
Chairman of the OECD Competition Committee**

Latin American Competition Forum
10-11 September 2008
-- Session III --

Issues to be discussed

- 1) Civil law, common law**
- 2) Specificity of competition law**
- 3) Issues of fact and issues of law in competition cases**
- 4) From a form based approach to an effects based approach**
- 5) Adversarial/ Court centered systems**
- 6) Means to bring economic expertise in judicial proceedings**
- 7) Improving the dialogue between courts and the experts:
lessons from the US**

1) Civil Law and Common Law

Judicial enforcement of competition law

- **Trial courts**
 - **Civil proceedings**
 - **Criminal proceedings**

- **Judicial review of lower courts or administrative agencies decisions.**
 - **Control of the legality of decisions.**
 - **Control of the substance of decisions.**

- **Violations**
- **Damages**
- **Interim measures**
- **Compliance with administrative injunctions**
- **Mergers**

Role of Judges

- **Procedural Protections, Due Process, Rights of the Defence, Fundamental rights**
- **Accountability of the enforcement authority itself. « ‘Quis custodiat custodies »?**
- **Keeping the implementation of policy on a case-by-case basis objective, a policy credible in the eyes of the public**

Civil Law Tradition

- Legal certainty vs legal flexibility

A bad law, if clear, is better than a complex law no matter how relevant: « **If the power of interpreting laws be evil, obscurity in them must be another, as the former is the consequence of the latter¹** »

- « **Law is viewed (in civil law countries) not as a process for the perception and resolution of problems, but as a set of established rules and institutions²** »

- What does it mean for antitrust law ?

1) Beccaria « Of Crimes and Punishments »

2) John Henry Merriman; The Civil Law Tradition, Stanford University Press

Common Law / Civil Law

« From the time the Sherman Act was passed in 1890, it has been understood as a “common law” type of statute, a statute setting forth very general propositions, that the Judges in common law fashion would implement and develop on a case by case basis.

Other countries do not entrust so much of the actual formulation of competition policy to the judges. Instead, administrative agencies and expert authorities develop the fundamental rule and the judges come in at a later stage, applying it in an appellate fashion and in other ways. Judicial review is a more standard model ».

Diane Wood, *Judicial Enforcement of Competition Law*, OECD, Competition Committee, 1997

The Role of the Community Judge

The Court of First Instance is **not a trial court**, it is a court of **judicial review**. The grounds of review are essentially the same as those found in most national jurisdictions, including common law jurisdictions. That is to say, **lack of jurisdiction**, **procedural failure**, **error of law**, **defective reasons**, **manifest error of appreciation** and so forth.

Among those grounds, though not specifically mentioned in the Treaty, is now established **‘error of fact’**. (...) A decision of the Commission affecting the Channel Tunnel was annulled because the Commission made factual errors in determining what the nature of the contractual arrangements was.

The Role of the Community Judge

Firstly, his role is confined to verifying the legality of the decision submitted to him. **The Community judge verifies the conformity of the decision to the law.** He quashes the decision or rejects the appeal. But he is not empowered to hand down a new decision.

Secondly, the Community judge's verification is less stringent in decisions comprising complex economic arguments. **He does not sanction any error, merely those that are manifest, i.e. obvious.** But it is important to be clear about this; it does not mean that the judge feels he is incapable of dealing with an economically complex issue, but that the complex economic assessment reflects a choice of economic policy that belongs to the Commission.

The Role of the Community Judge

These limits do not amount to a denial of the Community judges' competence with regard to economic matters, rather a division of responsibilities between the European Commission and the judges. **The Commission defines and implements the objectives of competition law. The judge verifies ex post that these objectives are compatible with Community law.** Both the Commission and the judge manipulate economic concepts, but for the Commission they are management tools whereas for the judge they are the object of his verification.

Christopher Bellamy, *Judicial Enforcement of Competition Law*, OECD, Competition Committee, 1997

The CFI Microsoft case: manifest error of appreciation

87 The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers

88 Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's

Refusals to deal and exceptional circumstances

319 In response to those various arguments, the Court observes that, as the Commission rightly states at recital 547 to the contested decision, although undertakings are, as a rule, free to choose their business partners, **in certain circumstances** a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC unless it is objectively justified.

332 It also follows from that case-law that the following circumstances, in particular, must be considered to be exceptional:

- in the first place, the refusal relates to a product or service **indispensable** to the exercise of a particular activity on a neighbouring market;
- in the second place, the refusal is of such a kind as to **exclude any effective competition** on that neighbouring market;
- in the third place, the refusal **prevents the appearance of a new product** for which there is potential consumer demand.

Refusals to deal and exceptional circumstances

334 The Court notes that the circumstance that the refusal prevents the appearance of a new product for which there is potential consumer demand is found only in the case-law on the exercise of an intellectual property right.

Indispensability

207 The Commission adopted a **two-stage approach** in determining whether the information at issue was **indispensable**.

It **first** examined the **degree of interoperability** with the Windows domain architecture that the work group server operating systems supplied by Microsoft's competitors **must achieve in order for those competitors to be able to remain viably on the market**.

It then proceeded to **determine whether the interoperability information to which Microsoft refused access was indispensable to the attainment of that degree of interoperability**.

The alleged error of law on indispensability

378 (...) Microsoft claims that it is not necessary for its competitors' work group server operating systems to attain the degree of interoperability required by the Commission in order for them to be able to remain viably on the market.

379 It must be emphasised that the Commission's analysis of that question in the contested decision is based on complex economic assessments and that, accordingly, it is subject to only limited review by the Court (see paragraph 87 above).

388 As the Windows operating system is (...) present on virtually all client PCs installed within organisations, non-Windows work group server operating systems cannot continue to be marketed if they are incapable of achieving a high degree of interoperability with Windows.

389 the Court observes that, according to the contested decision, it is important that non-Windows work group server operating systems can interoperate not only with Windows client PC operating systems but also, more generally, with the Windows domain architecture.

391 The Court therefore finds that Microsoft has not established that that assessment is manifestly incorrect.

Lessons from Magill and IMS

647 The circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health, paragraph 107 above, cannot be the only parameter which determines **whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC**. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

648 It was on that last hypothesis that the Commission based its finding in the contested decision. Thus, **the Commission considered that Microsoft's refusal to supply the relevant information limited technical development to the prejudice of consumers** within the meaning of Article 82(b) EC (recitals 693 to 701 and 782 to the contested decision) and it rejected Microsoft's assertion that it had not been demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).

649 **The Court finds that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect.**

2) Specificity of Competition Law

What Is Special About Antitrust ?

« **The technical character of competition law is not exceptional in itself.** Law frequently deals with technical matters -- for example, medical law, patent law.

But competition law is different, not only because it applies law to economics but **because it grafts economic concepts onto law.**

It is not confined like medical law to applying the rules of civil liability to a doctor's activity. **It issues prohibitions with reference to economic concepts;** for example, it prohibits abuse of dominant position. This prohibition cannot be understood and applied only in its economic sense. **Economic concepts thus become legal rules.** The transmutation is essentially a political choice, a political act ».

André Potocki, *Judicial Enforcement of Competition Law*, OECD, Competition Committee, 1997

What is special about competition law ?

Few areas of laws draw more heavily, or more directly, on economics learning than competition or antitrust law. The reason for this is simple: **in order to condemn only practices that are anticompetitive and to leave markets free otherwise, competition law needs a screening device that will single out for enforcement only practices that undermine the market.** Of the many such devices available, economics is *prima inter pares*: whether a country purports to rely solely on economic criteria, or it prefers to use economic criteria along with other factors, **it is a virtual certainty that economic criteria will play a central role in competition policy and enforcement.**

Diane Wood, *Judicial Enforcement of Competition Law*, OECD, Competition Committee, 1997

Elements of Economics useful for Antitrust

1) the economist's method of analysis used in applied work. This consists essentially in a combination of the inductive and the deductive to form a syllogism which purports to model reality. The steps required are: first, to scan the raw facts (here, the raw evidence) second, to abstract the relevant facts third, to construct a model, using available theory, which has the form: since $A + B$ are present, C follows.

Maureen Brunt, *Judicial Enforcement of Competition Law*, OECD, Competition Committee, 1997

Elements of Economics useful for Antitrust

2) The second way in which economics can be useful to the law is in supplying **various economic concepts such as “economic efficiency”, “opportunity cost”, “common costs”, “cross-subsidization” etc.**

An economist can advance matters by explaining their meaning.

Whereas with the first contribution of the economist, it is a matter of debate or argument as to whether the model truly represents reality - something for the court to assess - with the second contribution it is a matter of right or wrong – something for the economist to assess.

Maureen Brunt, Judicial Enforcement of Competition Law, OECD, Competition Committee, 1997

Elements of Economics useful for Antitrust

The question of whether a particular practice constitutes an abuse of a dominant position must ultimately be a matter for the court which has to resolve the issue.

But it cannot come to an informed conclusion without at least having some understanding of certain concepts identified by professional economists, such as "sunk costs" and "strategic barriers to entry".

**Ronan Keane, Judicial Enforcement of Competition Law,
OECD, Competition Committee, 1997**

3) Issues of Fact and Issues of Law in Competition Cases

Issues of facts/Issues of Law

Economists and lawyers alike - can agree that a decision must be “based on the facts”,

But facts by their very nature are insufficient. there must be a selection of relevant facts and a linking together of these facts into a causal sequence: an explanation or prediction.

In the antitrust field, the significance of a fact may often only be known by economic argument.

1) Basic facts

First of all, there are **primary or basic facts**: what happened? did such a meeting indeed take place? was there such and such telephone call? if so, was an agreement in fact made?

No clear standard of proof has been established. (...) We have not yet articulated the difference known in common law systems between the criminal standard of ‘**proof beyond reasonable doubt**’ and the civil standard of ‘**balance of probabilities**’, a difference which is also known in civil law systems but not perhaps articulated in quite the same way. **In practice, we are applying something very close to the criminal standard but perhaps subconsciously making some allowance in cartel cases for the inherent difficulty of proving collusion.**

2) Economic Facts

Economic facts: what is the relevant market? what is substitutability? is there a dominant position?

This is probably a question of fact or a mixed question of fact and law.

We do not yet have a clear finding on whether the question like that of the market is a point of law or a pure point of fact. In practice in this area, it is somewhat difficult to dislodge the findings of the Competition Authority on what the relevant market is. The Court of Justice has done so in the past (the Continental Can Case, as early as 1972, 25 years ago, is an example where the Court said that, on the supply side, there is no market for metal cans for fish paste, there is just a market for metal cans, and upset an economic finding of fact on the basis, in effect, of **manifest error). **If this kind of factual evaluation is contested, both parties will file experts' reports.****

2) Economic Facts

In practice, if these reports are sufficient to raise doubts in the minds of the courts (...), **we do not proceed, as a Common Law court would, to cross examination or even to a confrontation among the experts.** The more normal model would be to **appoint a court expert or even a panel of three experts, one nominated by each party and one chosen to be neutral, and to rely on the report of the experts** (see the Diestuffs decision and the Wood Pulp case).

(...) As regards questions of **abuse of dominance** , probably the question of whether a particular conduct is to be regarded as abusive, that is to say whether it is justified or not, becomes more close to **a question of law rather than a question of fact.**

The question of whether there is some **effect on trade between Member States** is also now pretty well a question of law and not any longer a question of fact.

3) Balancing anti-competitive and pro-efficiency effects

In the third category of facts, one is probably moving away from facts strictly so-called and almost entering the question of policy. For example, in a decision granting exemption under Article 85-3 of the Treaty, the competition authority, the Commission, will have to decide **whether certain alleged improvements flowing from the agreement, perhaps as a joint venture, are such as to outweigh the detriment to competition and are indispensable.** In this respect, we accord, in practice, **a considerable margin of appreciation to the competition authority** and it is only rarely that the Tribunal of First Instance will interfere on a factual issue. However, Tribunal' judges do have the possibility of entering via a very convenient route known as **'defects in the reasoning' or 'défauts de motivation'**. It is probably by that route that the decisions of the Commission are most closely controlled.

Conclusion

- **Relevant facts can be established only through an understanding of economic concept**
- **Putting those facts into perspective to establish whether there is a violation also requires recourse to economic reasoning**
- **Granting an exemption requires complex economic trade-offs**
- **Hence, points of law cannot be separated from points of facts and facts cannot be established without reference to economic analysis.**
- **Crucial issue for both trial courts and review courts is to acquire the necessary economic expertise.**

4) From a form based approach
to an effects based approach

The EAGCP report

“An economics-based approach implies that competition authorities will need **to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains.** The identification of competitive harm requires **spelling out a consistent business behavior based on sound economics and supported by facts and empirical evidence.** Similarly, efficiencies, and how they are passed on to consumers, should be properly justified on the basis of economic analysis and grounded on the facts of each case.

An economics-based approach will naturally lend itself to a « **rule of reason** » approach to competition policy, since careful consideration of the specifics of each case is needed, and this is likely to be especially difficult under « per se » rules”.

5) Adversarial / Court centered systems

Adversarial systems

Where experts are likely to disagree is on the application of accepted principles to the facts of the particular case.

There is **unquestionably a tendency under an adversarial system for expert witnesses, even of high standing, to become advocates for the side by whom they are retained.**

This can present particular difficulties for the court dealing with the issue, since it may not have from either side to a particular dispute the impartial assessment of the economic issues which may be of importance in the particular case.

Ronan Keane, *Judicial Enforcement of Competition Law*,
OECD, Competition Committee, 1997

Adversarial systems

There is no question that the adversarial fact-gathering process used in the American system has the unfortunate result of creating an incentive to distort the facts.

But American judges have broad powers both to sanction abuses and to control the fact-finding process through case management procedures. Judges have the authority to structure pretrial and trial proceedings so as to narrow issues before trial and to isolate issues for separate stages of trial, such as liability and damages.

Judges can also exert considerable control over the order and quantum of proof submitted and the form in which it is submitted.

Sarah Vance, Judicial Enforcement of Competition Law, OECD, Competition Committee, 1997

Difference between Adversarial and Court centered systems

Systems that rely on experts accountable solely or primarily to the court have the advantage of reducing the gamesmanship that is possible when dueling experts of the parties have the responsibility for submitting the economic evidence. Furthermore, this can be a lower cost way of collecting the necessary information, which benefits the system as a whole.

The principal disadvantage of a court-centered system lies in the completeness of the information that will be available. The adversary system relies on the incentive of the parties to make the best possible case for themselves; they will give their own experts access to all the crucial data, voluntarily.

6) Means to bring economic expertise in judicial proceedings

Bringing Economic Expertise to the Courtroom

- 1) **Training judges ?**
- 2) **Specialized Courts ?**
- 3) **Concentration of cases ?**
- 4) **Should economists become judges ?**
- 5) **More extensive use of experts, including court appointed experts ?**

Court appointed experts and specialized competition court

In an **adversarial system** the court dealing with the issue **may not have** from either side to a particular dispute **the impartial assessment of the economic issues** which may be of importance in the particular case.

How is this problem to be dealt with? **One modest reform would be for the legislation to provide that, in dealing with competition cases, the judge would have the assistance of a professional economist appointed by the court itself and not employed by any of the parties to the case.** Under such a procedure, the "court economist" would not have any adjudicative role: the responsibility for determining the case would remain solely with the judge.

There is clearly a case for going further and establishing a special "competition court".

Economic expertise in court centered proceedings

The **ability to appoint a court expert**, expected to be unbiased, is a **necessary but insufficient condition**, in court centered proceedings, to allow the court to discharge its duty of enforcing competition law or reviewing a competition decision by a lower court or an administrative agency.

The role of the expert is to provide answers to questions raised by the judge.

Unless the judge knows which are the relevant questions to raise and is able to put into perspective the answers provided by the expert, there is a risk that either the expert will waste his time and the time of the court answering the wrong questions, or he will determine the outcome of the case through his own choices of methodology.

7) Improving the dialogue between courts and the experts: lessons from the US

Improving the dialogue between economists and courts: Drawing on US experience

- **Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).**
 - Key: relevance and reliability of *methodology*
- **General Electric Co. v. Joiner, 522 U.S. 136 (1997)**
 - Standard of Review: *abuse of discretion*
- **Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998), and rev'd, 119 S. Ct. 1167 (1999)**
 - *Daubert* applies to *all expert testimony*
 - *Criteria of reliability* flexible and unique to each area of expertise
 - District Court as *gatekeeper*

Revised Rule 702 (2000): Relevancy and Reliability

A witness “qualified as an expert...may testify ...in the form of opinion or otherwise,” *if*:

- (1) testimony is based upon **sufficient facts or data**,
- (2) testimony is the product of **reliable principles and methods**, *and*
- (3) witness has **applied the principles and methods reliably to the facts** of the case.

In *Daubert*, the Supreme Court considered the meaning the test of relevancy and reliability in the context of scientific evidence.

*Daubert v. Merrell Dow Pharms.,
Inc., 509 U.S. 579, 590 n.9 (1993).*

The case:

The plaintiffs claim that a drug taken by their mothers during pregnancy had caused their birth defects.

The evidence:

Eight experts for the plaintiffs sought to testify on the basis of in vitro, animal, and epidemiological studies that the drug Bendectin taken by the plaintiffs' mothers during pregnancy could cause or had caused the plaintiffs' birth defects.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 n.9 (1993).

1) Relevancy

The expert's theory must be tied sufficiently to the facts of the case. “Rule 702’s standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”

2) Reliability

To determine whether proffered scientific testimony or evidence satisfies the standard of evidentiary reliability, a judge must ascertain whether it is “**ground[ed] in the methods and procedures of science.**” The Court, sets out a nonexclusive list of four factors that bear on whether a theory or technique has been derived by the scientific method.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 n.9 (1993).

- 1) “Whether [a theory or technique] can be (and has been) tested” is the
“methodology [that] distinguishes science from other fields of human inquiry.”
- 2) Has the theory been **peer reviewed** or published,
- 3) Are the known or potential **error rates** known
- 4) Are the **standards controlling the technique’s operation** accepted by the scientific community ?

General Electric Co. v. Joiner, *522 U.S. 136 (1997).*

The Case:

The 37-year-old plaintiff, a longtime smoker with a family history of lung cancer, claimed that exposure to polychlorinated biphenyls (PCBs) and their derivatives had promoted the development of his small-cell lung cancer.

The scientific evidence presented by the plaintiff:

The plaintiff's expert presented studies involving infant mice that had massive doses of PCBs injected directly into their bodies; Joiner was an adult who was exposed to fluids containing far lower concentrations of PCBs.

General Electric Co. v. Joiner, *522 U.S. 136 (1997).*

The infant mice developed a different type of cancer than Joiner did, and no animal studies showed that adult mice exposed to PCBs developed cancer or that PCBs lead to cancer in other animal species.

The expert also presented studies involving humans claiming the studies showed a link between PCBs and cancer if the results of all the studies were pooled (even though none of them concluded that PCBs had caused the excess rate).

General Electric Co. v. Joiner, **522 U.S. 136 (1997).**

The trial court applied the *Daubert* criteria and excluded the opinions of the plaintiff's experts.

The court of appeals reversed the decision, stating that “[b]ecause the Federal Rules of Evidence governing expert testimony **display a preference for admissibility**, we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.

The Court concluded that it was within the **district court’s discretion** to find that the statements of the plaintiff’s experts with regard to causation were nothing more than speculation.

General Electric Co. v. Joiner, *522 U.S. 136 (1997).*

The court noted that the plaintiff never explained “how and why the experts could have extrapolated their opinions « from animal studies far removed from the circumstances of the plaintiff’s exposure.

It also observed that the district court could find that the four epidemiological studies the plaintiff relied on were insufficient as a basis for his experts’ opinions.

Consequently, the court of appeals had erred in reversing the district court’s determination that the studies relied on by the plaintiff’s experts “were not sufficient, whether individually or in combination, to support their conclusions that Joiner’s exposure to PCBs contributed to his cancer.

Kumho Tire Co. v. Carmichael

118 S. Ct. 2339 (1998)

The case:

The plaintiffs brought suit after a tire blew out on a minivan, causing an accident in which one passenger died and others were seriously injured. The tire, which was manufactured in 1988, had been installed on the minivan sometime before it was purchased as a used car by the plaintiffs in 1993. **The plaintiffs claimed that the tire was defective.**

The evidence:

The plaintiffs relied primarily on deposition testimony by Dennis Carlson, Jr., an expert in tire-failure analysis, who concluded **on the basis of a visual inspection of the tire that the blowout was caused by a defect in the tire's manufacture or design.**

Kumho Tire Co. v. Carmichael

118 S. Ct. 2339 (1998)

The district court examined Carlson's visual-inspection methodology in light of the four factors mentioned in *Daubert*—the theory's testability, whether it was the subject of peer review or publication, its known or potential rate of error, and its general acceptance within the relevant scientific community.

After concluding that none of the *Daubert* factors was satisfied, the court excluded Carlson's testimony and granted the defendant's motion for summary judgment.



Kumho Tire Co. v. Carmichael

118 S. Ct. 2339 (1998)

The Eleventh Circuit reversed the district court’s decision in *Kumho*, holding, as a matter of law under a de novo standard of review, that *Daubert* applies only in the scientific context.

The court of appeals opinion stressed the difference between expert testimony that relies on the application of scientific theories or principles—which would be subject to a *Daubert* analysis—and testimony that is based on the expert’s “skill- or experience-based observation.

Kumho Tire Co. v. Carmichael

118 S. Ct. 2339 (1998)

The court then found that **Carlson's testimony is non-scientific** Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry. Instead, Carlson rests his opinion on his experience in analyzing failed tires. **After years of looking at the mangled carcasses of blown-out tires, Carlson claims that he can identify telltale markings revealing whether a tire failed because of abuse or defect.** Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what “bead grooves” and “sidewall deterioration” indicate as to the cause of a tire's failure. . . . Thus, we **conclude that Carlson's testimony falls outside the scope of *Daubert* and that the district court erred as a matter of law by applying *Daubert* in this case.**

Kumho Tire Co. v. Carmichael 118 S. Ct. 2339 (1998)

The **Supreme Court**, in an opinion by Justice Breyer, **unanimously rejected the Eleventh Circuit’s dichotomy between the expert who “relies on the application of scientific principles” and the expert who relies on “skill- or experience-based observation.”**

The Court noted that Federal Rule of Evidence 702 “makes **no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge,**” and “applies its reliability standard to all . . . matters within its scope.”

Kumho Tire Co. v. Carmichael

118 S. Ct. 2339 (1998)

Furthermore, said the Court, “no clear line” can be drawn between the different kinds of knowledge, and “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”

The Court then examined the record and concluded that **the trial court had not abused its discretion when it excluded Carlson’s testimony**. Accordingly, it reversed the opinion of the Eleventh Circuit.

Relevance for economic evidence

Possible Additional Criteria

- Internal consistency

-External consistency

Preliminary questions regarding an economic expertise (I)

1) Is the expert qualified ?

- 1) – does he have a degree in economics
- 2) – is the expert specialized in a relevant field (ex: microeconomics, industrial organization, market theory)
- 3) – has the expert published in professional journals ?

2) Is the method used by the expert reliable ?

- 4) – Does the expert use economic methods or reasonings to justify his opinions ?
- 5) – Are the methods or the models used by the expert described with sufficient precision ?
- 6)- Have the methods or models used been used in other similar cases ?

Preliminary questions regarding an economic expertise (I)

- 7) - Have the methods or models used by the expert been published in a refereed scientific journal or have they been specifically designed for the case ?**
- 8) - Does the expert justify why he chose a particular model or method for the case?**
- 9) - If the expert does not use a classical economic approach, does he justify why he departs from traditional economic analysis?**
- 10) - Is there a clear and logical relationship between the assumptions, the reasoning and the conclusion ?**

Preliminary questions regarding an economic expertise (II)

2) Is the method reliable ? Daubert criteria

11) –Can the theory or the technique be empirically tested ?

–Has the theory or the technique been peer reviewed and/or published ?

12) –Is the error rate of the method known ?

–Is the methodology generally accepted by the scientific community ?

3) Is the analysis of the expert relevant ?

Note: There is a need to distinguish between the analysis of an expert critically

Appraising the work of another expert and the analysis of an expert trying to establish A fact or a causal relationship

Preliminary questions regarding an economic expertise (II)

13)- Does the expert have a particular knowledge of the relevant industry or issue

14)- Could the expert's analysis equally apply to many other industries or issues ?

15)- Does the expert rely on industry specific data or facts ?

16)- Did the expert gather the data independently or was the data provided by the client ?

17)-Have some important factors relevant to the industry been ignored by the expert ?

4) Is the analysis of the expert externally consistent?

18)- Are some of the hypothesis or some of the conclusions of the expert in contradiction with known facts about the industry or the market?

Thank you for your attention

frederic.jenny@club-internet.fr