Working Party No. 3 on Co-operation and Enforcement

EXECUTIVE SUMMARY OF THE ROUNDTABLE ON TECHNIQUES FOR PRESENTING COMPLEX ECONOMIC THEORIES TO JUDGES

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Competition Delegates will find attached FOR INFORMATION the Executive Summary by the Secretariat of the roundtable on techniques for presenting complex economic theories to judges.

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EXECUTIVE SUMMARY

By the Secretariat

1. 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.**

2. 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.

3. 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.**

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.
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.

11. 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.

12. 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.

13. 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.

14. 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 sufficiency 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.

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

15. 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.

16. 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.