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**JUDICIAL PERSPECTIVES ON COMPETITION LAW**

**Contribution from European Union**

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## *Judicial Perspectives on Competition Law*

### **-- European Union --**

#### **Evidentiary Matters in Competition Cases before Courts**

##### **Question**

The evaluation of evidence in competition cases – both the amount of evidence and the expertise required to assess it – poses particular challenges for courts. Very often specialised competition agencies are in a better position to evaluate that evidence. However, the rule of law rightly requires courts' decisions to prevail over competition agencies' administrative decisions despite the greater expertise of those agencies and the difficulties that courts may have in dealing with complex economic matters.

Does lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed?

What mechanisms are there to ensure that economic matters are adequately taken into account in the context of the legal doctrines that courts must apply?

Are procedural or institutional solutions to the evidentiary difficulties faced by courts in place, and are these solutions adequate? For example: (i) do courts rely on rules (of thumb) which are easier to apply than detailed economic assessments? (ii) do the rules on burden and standard of proof provide an adequate mechanism to evaluate the aptness of economic assessments? (iii) what tools can be deployed to deal with conflicting sets of economic evidence (e.g. hot-tubing, court-appointed experts, specialised courts, etc.)?

Do standards of review of decisions by competition agencies vary depending on the level of expertise of courts? Should they?

#### **1. Introduction**

1. The European Union (EU) competition enforcement system is an administrative system, entrusted principally to the European Commission, under the judicial control of the Court of Justice of the European Union. It is the College of Commissioners that decides on cases after an investigation of the Directorate General for Competition. It is for the European Commission to ensure the application of the principles laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union<sup>1</sup> (TFEU) and in the EU Merger Regulation. The enforcement activity of the European Commission is subject to a wide and thorough scrutiny by the Court of Justice.

2. The wide scope of this scrutiny is illustrated notably by the Court's control not only over the legality of actions of the Commission, but also over the claims for failure to act and for damages. The Court can review the Commission prohibition decisions in merger and antitrust cases, as well as, for instance, conditional and unconditional clearance decisions in mergers and rejections of complaints in antitrust. Also, the legal

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<sup>1</sup> *Official Journal C 326, 26.10.2012.*

standing of the applicants before the Court is relatively broad, and is not limited, for example, to the notifying parties in merger cases or the parties on which a fine has been imposed in antitrust cases.<sup>2</sup>

3. The Court may annul a Commission decision, in full or in part, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.<sup>3</sup>

4. A Commission decision in antitrust/cartel and merger cases may be appealed, at first instance, to the General Court, which has the powers of full judicial review.<sup>4</sup> This entails that the General Court can review all points of fact and law and thus can verify evidence, factual findings and the legal qualifications derived therefrom. The General Court must also establish that the European Commission has sufficiently reasoned its decision. The General Court must not however substitute its own economic assessment for that of the European Commission (see below). Appeals against judgments and orders of the General Court may be brought before the Court of Justice on points of law only.

## 2. The evaluation of economic evidence by the European Courts

5. Economic evidence and assessment play an important role in the European Commission's competition enforcement practice. They help to understand the operation of the relevant markets and competitive interactions therein, as well as to deduce the likely consequences of the practices under review, whether a merger, an agreement or a single firm conduct. The role of economics in Commission decisions has generally increased over the years. Quantitative assessments play a particularly important role in merger reviews, where the future (post-merger) conditions of competition are not yet observable and have to be foreseen based on the best available evidence and sound economic grounds.

6. Economic assessment is not only essential for the enforcement practice of the Commission, but also in the judicial review by the European Courts. The paragraphs below illustrate how the Courts deal with economic assessment in their review.

7. In the first place, even though the Court has recognised that in the case of complex economic assessments, the European Commission enjoys a certain margin of appreciation in practice it subjects the Commission's economic analysis to rigorous scrutiny.

8. Starting with the margin of appreciation, the Court has recognised that the Merger Regulation confers on the European Commission "*a certain discretion, especially with respect to assessments of an economic nature,*" which the judicial review should take into account.<sup>5</sup> Similar expressions have been used in judgments concerning antitrust and cartel infringements. This implies that the Court does not have to enter into the

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<sup>2</sup> Pursuant to Article 263 TFEU, 4<sup>th</sup> para, an action for annulment may be instituted by any natural or legal person directly and individually concerned by a regulatory act.

<sup>3</sup> Second paragraph of Article 263 TFEU.

<sup>4</sup> See Article 256 TFEU and Article 58 of the Statute of the Court of Justice of the EU.

<sup>5</sup> Case T-342/07, *Ryanair v Commission*, 2010, para 29; Case T-279/04, *Éditions Odile Jacob v Commission*, 2010, para 248.

complexity of re-doing the economic analysis or revising the conclusions drawn therefrom by the European Commission. Indeed, as stated by the Court, "*it is not for the [General Court] to substitute its own economic assessment for that of the Commission.*"<sup>6</sup>

9. As indicated, the European Commission's discretion in economic assessments does not mean that the Court in practice refrains from reviewing the Commission's interpretation of information of an economic nature. As the Court noted "*Not only must [it] establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also 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.*"<sup>7</sup>

10. Thus, in mergers, in *Ryanair v Commission* the General Court devoted a substantial part of its judgment to a detailed review of the European Commission's fixed-price effects regression analysis and cross-section price regression analysis, demonstrating significant economic expertise.<sup>8</sup> Similarly, close examination of the economic assessment was conducted by the Court in other merger cases.<sup>9</sup> The Court's review of such evidence may play a crucial role also in procedural matters. For instance, in *UPS v Commission*<sup>10</sup> the General Court assessed in detail the technical changes made by the European Commission in the econometric model between the Statement of Objections and the final decision, to decide whether a violation of the rights of defence had taken place; as a result, the General Court annulled the Commission decision.

11. In an antitrust case, when the European Commission had rejected a complaint on the basis that the market involved was of limited size or economic importance, the General Court critically reviewed the Commission's assessment of the market concerned. The General Court found, among others, that while the European Commission had considered that the complaint concerned only a market of limited size, it had failed to substantiate that assessment with any market data.<sup>11</sup>

12. These examples show that the Court fully appreciates and routinely scrutinises economic evidence in considerable detail, even while recognising a certain margin of discretion for the European Commission in such matters.

13. Secondly, there is a long standing practice for the parties to use economic studies or reports during the Court proceedings in support of their arguments. The parties may

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<sup>6</sup> Case T-342/00, *Petrolessence SA v Commission*, 2003, para 101.

<sup>7</sup> Case T-342/07, *Ryanair v Commission*, 2010, para 30. See also Case C-413/06, *Bertelsmann and Sony Corporation of America v Impala*, 2008, para 69; Case C-12/03 P, *Commission v Tetra Laval*, 2005, para 39; Case T-210/01, *General Electric v Commission*, 2005, para 63; Case T-342/99, *Airtours v Commission*, 2002, para 64, Case T-168/01 *Glaxo v Commission*, 2006, para 242.

<sup>8</sup> Case T-342/07, *Ryanair v Commission*, 2010, paras 146-183 and paras 190-195.

<sup>9</sup> See, for example, Case T-175/12, *Deutsche Börse v Commission*, 2015.

<sup>10</sup> Case T-194/13, *UPS v Commission*, 2017. The Commission's appeal against this judgment to the Court of Justice is currently pending.

<sup>11</sup> Case T-427/08, *CEAHR v Commission*, 2010.

also bring an expert in order to make an oral presentation during the Court hearing.<sup>12</sup> In addition, the Court may put to the parties to the proceedings specific questions or invite them to make oral or written submissions on certain aspects of the proceedings, including to clarify the relevant economic assessment.<sup>13</sup> In many competition cases, the Court explicitly refers to the parties' economic submissions.<sup>14</sup>

14. Thirdly, the Court can itself appoint an economic expert to submit neutral expert evidence. To that end, Article 25 of the Statute of the Court of Justice provides that: "*The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.*"

15. The Court can commission this task on its own initiative or at the request of the parties.<sup>15</sup> In competition cases, the Court has however rarely made use of the possibility to obtain an expert's report. Expert's reports were commissioned in the *Dyestuff*<sup>16</sup> and *Woodpulp*<sup>17</sup> cases, where both reports related to the proof of concerted practices in the presence of parallel behaviour. As the parties have ample opportunity to supply the Court with detailed economic studies and reports from various experts, the Court may also already consider itself sufficiently informed in most cases.

16. Fourthly, to facilitate the proper presentation of economic evidence, the European Commission has adopted 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.<sup>18</sup> This guidance document contains recommendations regarding the presentation and content of economic and econometric analysis. The purpose of the best practices is to ensure that economic analysis is framed in such a way that the European Commission and/or other parties such as the Courts can understand and evaluate its relevance and significance. The European Commission itself follows the principles set out in its best practices in antitrust and merger cases. In that regard, in the body of its decisions the European Commission strives to explain and summarise its economic assessment in a clear and non-technical way; a more comprehensive description with technical details is typically set out in an annex to the decision. This facilitates the Court's and other parties' understanding of the European Commission's reasoning.

<sup>12</sup> See e.g. Case T-29/92, *SPO and Others v. Commission*, 1995, para 42; Order in Case T-201/04 R, *Microsoft v. Commission*, 2004, para 261.

<sup>13</sup> Article 89 of the Rules of Procedure of the General Court; Articles 61 and 62 of the Rules of Procedure of the Court of Justice. See, for example, Case T-194/13 *UPS v Commission*, 2017, paras 150 and 162.

<sup>14</sup> See, for instance, Case T-141/94, *Thyssen Stahl v Commission*, 1999, para 254.

<sup>15</sup> See further, Articles 96-100 of the Rules of Procedure of the General Court and Articles 70-73 of the Rules of Procedure of the Court of Justice.

<sup>16</sup> Case 48/69, *ICI v Commission*, 1972; Case 49/69, *BASF v Commission*, 1972; Case 51/69, *Bayer v Commission*, 1972; Case 52/69, *Geigy v Commission*, 1972; Case 53/69, *Sandoz v Commission*, 1972; Case 54/69, *Francolor v Commission*, 1972; Case 55/69, *Casella v Commission*, 1972; Case 56/69, *Hoechst v Commission*, 1972, and Case 57/69, *ACNA v Commission*, 1972.

<sup>17</sup> Case C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström and others v Commission*, 1993.

<sup>18</sup> Available on [http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf).

17. Finally, in any event, while economic evidence is important, it is not always decisive, by itself, for the outcome of a Court's review.

18. Economic assessment is only one of the sources of evidence relied upon by the European Commission. The findings of the quantitative assessment are usually used to support or refine the findings of the qualitative analysis. The Commission's task is to make "*an overall assessment*" based on a "*set of indicative factors*".<sup>19</sup> There is also no hierarchy between "*non-technical evidence*" and "*technical evidence*" in the sense that the latter must necessarily support the former.<sup>20</sup> The prevailing principle in EU law is that of the "*unfettered evaluation of evidence*", and the only relevant criterion for such evaluation relates to its reliability.<sup>21</sup> Hence, the Court verifies the arguments of the parties against the whole body of evidence and conclusions set out in a Commission decision.

19. Furthermore, the application of the party appealing the decision defines the scope of the action. Parties cannot later amend their pleas or raise new issues of law.<sup>22</sup> In cases before the General Court, the initial submission of evidence is therefore dependent on the scope of contestation of the decision. Parties are expected to submit the evidence in the first exchange of pleadings. During the written procedure, both the European Commission and the party that appeals the decision will submit the evidence that they view necessary to support their arguments. This entails that for an appeal that is limited to only certain aspects of the decision, the amount of (economic) evidence that is submitted will also be more limited.<sup>23</sup> There is no obligation to submit to the Court all the evidence relating to a case, although the Court may request access to such evidence at a later stage of the proceedings.

### 3. Conclusion

20. The importance of the assessment of economic evidence in competition cases is recognised both by the European Commission and the European Court of Justice. The European Courts have sufficient methods and measures in place to ensure an adequate review of economic evidence.

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<sup>19</sup> Case T-342/07, *Ryanair v Commission*, 2010, para 136.

<sup>20</sup> *Ibid.* See also Case T-175/12, *Deutsche Börse v Commission*, 2015, paras 132-133.

<sup>21</sup> C-411/04 P, *Salzgitter Mannesmann v Commission*, 2007, para 45; Joined Cases C 239/11 P, C 489/11 P and C 498/11 P, *Siemens AG and Others v Commission*, 2013, para 163.

<sup>22</sup> Article 84(1) of the Rules of Procedure of the General Court.

<sup>23</sup> Article 85(1) of the Rules of Procedure of the General Court.