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JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from the United States

-- Session II --

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Judicial Perspectives on Competition Law

-- United States --

1. Evidentiary Matters in Competition Cases before Courts

1. The application of competition law, apart from cartel cases,[1] usually involves economic analysis in some form. An important element typically is the delineation of a relevant market, and the ultimate issue is whether the suspect conduct has had, or is likely to have, an anticompetitive effect. Economic analyses of various sorts are important for ensuring sensible and persuasive market delineation or competitive effects assessment. Economic analysis provides not only specific tools useful in informing the analysis of particular issues, but also the essential logic that provides a sound foundation for common law development.

2. Successfully presenting a non-cartel competition case to a judge, therefore, requires effectively communicating economic analysis in a manner understandable to someone who has not necessarily had special training in economics, and who may have no prior experience with competition law. We are fortunate that many members of the federal judiciary in the U.S. have handled complex commercial cases and have familiarity with key economic concepts and principles. They may not, however, be familiar with the more technical (sometimes highly technical) forms of economic (and econometric) analysis that can play a central role in many antitrust cases. Although the best practices in any particular case will depend on the particular facts of the case and applicable procedural rules, the experience of the U.S. enforcement agencies suggests three general principles for efficiently and effectively presenting complex economic analysis to judges.

3. First, economic analysis should be fully integrated into the presentation of the case. Second, economic analysis should be fully and carefully explained in terms that are understandable, or a judge is not likely to rely on it. Third, the opinions of economists should be firmly grounded in the models and methods of economics and, when appropriate, be empirically validated. Economists are most persuasive when they do not stray outside their areas of expertise and do not adopt an advocacy posture in particular litigation.[2]

- Economic analysis should be fully integrated into the presentation of a case to a judge. It should not be presented as a separate exercise that seeks to merely validate or add to a factual story that does not rely on economics. Rather, the economic story should form the framework of the presentation, to which the facts provide support.

[1] In the United States, under the per se rule of illegality applicable to horizontal conspiracies to fix prices, rig bids, or allocate markets or customers, courts condemn each such cartel without inquiring into its effects. These "types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

[2] For a fuller discussion of these principles, *see* US Submission to OECD Competition Committee Roundtable on Presenting Complex Economic Analysis and Evidence to Judges, February 2008, DAF/COMP/WP3/WD(2008)27.

- Economic issues can present challenges to judges who may have no previous experience in adjudicating competition cases. Few other areas of law require this type of exacting review of economic principles. Most judges are not trained economists and are not necessarily equipped by training and experience to assess economic evidence or evaluate the credibility of expert economists. Economic principles cannot always be converted into "black letter" or "per se" liability rules. To partially compensate, in the United States, as in other jurisdictions, the judiciary has been given important tools to ensure that it has the capacity to review competition cases.
- The United States relies on an adversarial system in which each party presents its best case to an impartial judge. This may include opposing expert reports and live testimony by economic experts. This system allows the opposing party to challenge the economic model and the underlying factual assumptions so that the court may assess the strengths and weaknesses of each argument. This process gives judges a basis by which to assess competing expert opinions. Even without formal economic training, a judge can still demand a logical, common-sense explanation as to why a particular economic theory is likely to accurately predict the economic effects of the conduct. A judge also has the authority to appoint an expert in order to hear and consider other explanations. While advanced economic training may not be necessary, a basic understanding of economic principles can help a judge question the factual assumptions that underlie the competitive analysis and can aid judicial decision-making.
- The United States also has procedures to exclude irrelevant or unreliable expert testimony that could confuse a finder of fact. Judges are given a gatekeeper role to consider whether the expert's knowledge will be helpful for the court, whether the expert's testimony is based on sufficient facts or data and is the product of widely accepted principles and methods, and whether these have been reliably applied to the facts of the case.[3]

4. The ultimate burden of proof in all cases rests with the plaintiff, whether the FTC, DOJ, or private parties in non-government cases. To sustain a civil case, whether brought in front of a court or the FTC's adjudicative system, the court must determine that the plaintiff has proved its case by a preponderance of the evidence, meaning that it must be shown to be more likely than not that the law was violated.[4] In cases where economic effects are in doubt, the burden of proof creates an important protection against the possibility that competitively neutral conduct will be found unlawful. In civil cases, for example, in the absence of direct evidence of an agreement, courts have considered a range of economic evidence that might support a finding of an anticompetitive agreement.[5]

[3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

[4] Criminal cases must be proved beyond a reasonable doubt.

[5] See, e.g., In re Publication Paper Antitrust Litigation, 690 F.3d 51 (2d Cir. 2012); In re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781 (7th Cir. 1999); and United States' submission to the 2006 Global Forum on Competition Roundtable on Prosecuting Cartels Without Direct Evidence at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/35892784.pdf. The International Competition Network Training on Demand Project has also produced an excellent module on this topic. See http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/provingagreement.aspx.

5. The opportunity for judicial review of the initial legal determination is essential to the effectiveness and efficiency of any adjudicative system. In the United States, there is generally a different standard of review for factual and legal determinations. A federal judge's factual findings will be upheld if they are not clearly erroneous. Such findings will generally be upheld unless they are unsupported by substantial evidence, lack adequate evidentiary support in the record, or are against the clear weight of the evidence. A judge's interpretation of the law, however, is given less deference. An appellate court reviews de novo the lower court's articulation of the legal standard and its application of the legal standard to the facts. If the appellate court finds that the lower court applied the incorrect legal standard, it will reverse and remand the matter, typically with instructions, so that the lower court may apply the correct standard. Notwithstanding some differences in the standards of review applicable to FTC administrative adjudication and DOJ court cases, the two agencies tend to achieve broadly similar results in civil cases.

2. Interactions between Courts and Competition Authorities

6. While it is not unusual for judges and attorneys for the United States antitrust agencies to encounter each other outside of the courtroom through participation in bar association activities,[6] principles of due process generally minimize the interaction between judges and the agencies in relation to particular cases.[7] While the Federal Judicial Center and academic institutions conduct training program for judges,[8] the U.S. antitrust agencies rarely participate out of concern that their litigation interests be perceived as a conflict of interest.

7. However, the U.S. agencies have cooperated with judges in conducting numerous educational programs for judges in other jurisdictions as part of their capacity-building efforts. Those programs have been most effective and well-received when the impetus comes from within the judiciary. In many cases judges prefer learning from their judicial peers. While competition authorities, practitioners, and academics may have great expertise, judges often welcome programs led by fellow judges. Capacity building is best carried out in partnership with established national judicial training institutions. Finally, of course, any judicial training must take into account the relevant legislation, jurisprudence, and legal traditions of the jurisdiction.

3. Experience and Lessons Regarding the Use of Specialized and Generalized Courts

8. In the United States, an early and fundamental question regarding the competition laws was whether to entrust their enforcement to the general judiciary or to an expert body. When the Sherman Antitrust Act was passed in 1890, the power to decide liability was given to the general federal judiciary, with the Department of Justice serving as a

[6] A Federal judge serves as the judicial liaison to the American Bar Association's Section of Antitrust Law in order to promote dialogue between judges and practitioners.

[7] The codes of professional responsibility that govern both judges and lawyers generally prohibit communications about a case except when all parties are present. *See* ABA Model Code of Judicial Conduct, Rule 2.9; ABA Model Rules of Professional Responsibility, Rule 3.5(b).

[8] George Mason University, for example, operates a highly regarded program. See http://masonlec.org/divisions/mason-judicial-education-program/.

prosecutor. Given that standards for adjudication were not well advanced at the time, the results were mixed. A quarter century later, Congress considered whether to create an independent expert body to enforce the law. This debate ultimately resulted in a political compromise, which led to the establishment of the Federal Trade Commission as a second enforcement agency.[9] The Department of Justice retained the authority to enforce the Sherman Act before the general federal courts, while the Federal Trade Commission was authorized to enforce a prohibition against unfair methods of competition as well as to share enforcement of the newly-enacted Clayton Act with the Department of Justice.[10] The FTC was established as an expert body with the authority to adjudicate through the administrative process, with its final rulings ultimately subject to review by the federal appellate courts.[11] While a few specialized courts have been established in the United States in other fields, no specialized court has been established for competition law cases.

9. U.S. law provides a private right of action that allows aggrieved private parties to seek treble damages, including an action by an individual state on behalf of its state residents injured by conduct that violates the antitrust laws.[12] In addition, all of the 50 American states have state antitrust laws that are sometimes enforced before non-specialized state court judges. Neither involves the competition authorities. This body of jurisprudence is supplemented with numerous compilations of relevant precedent in publications and periodicals compiled by bar and academic institutions.[13]

[9] Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust Law Journal 1 (2003), *Available at:* https://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf

[10] The courts have ruled that any conduct that violates the Sherman Act is also an unfair method of competition, thus including within the FTC's authority the same substantive civil authority as exercised by the Justice Department.

[11] See Maureen K. Ohlhausen, "Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?" Journal of Competition Law & Economics (2016) (demonstrating results over the past the four decades where antitrust adjudication by the agency has been increasingly successful), *available at* https://www.ftc.gov/system/files/documents/public_statements/1005443/ohlhausen_administrative_litigation_at_the_ftc_effective_tool_for_developing_the_law_or_rubber.pdf.

[12] See Clayton Antitrust Act, §4(a), 15 U.S.C. §15(a) and Clayton Antitrust Act, §4C, 15 U.S.C. §15c.

[13] See, e.g., ABA, Antitrust Section, Antitrust Law Developments (Darren S. Tucker, ed., 8th ed., ABA 2017); Herbert Hovenkamp & Philip E. Areeda, Antitrust Law (4th ed. 2016).