Perspectives on judging competition law cases: the role of economic evidence

Frederic Jenny
Professor of economics (ESSEC Business School)
Chair, OECD Competition Committee

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The Challenge

“I speak only for myself, and I do so without criticising anybody, but I have to say, I have never listened to evidence in any court for an hour and understood so little of it as I have understood during the last hour. It may all be as clear as daylight to my colleagues.

“All I can say is that anybody who really wants to make sure that I understand and have the ability to make an evaluation of this kind of material that we have has a very long way to go in educating me as to how I should deal with it. (....) I will sit here quietly and let it all wash over me for a reasonable amount of time, but I think that those who are asking the court to rely on this must be under no illusions that at the moment, so far as I am concerned, this is all washing over my head”.

1) Mr Justice Ferris, UK, 1999 case against the joint selling of television rights by Premier League football club
Economic methodology

Economists Do It With Models
...because there’s no shortage of demand for the curves that they supply.

ediwm.com
Core elements of economic theory

Hypotheses → Scope of theory

Reasoning → Internal logic

Prediction → Unicity of prediction

Test → Confrontation of prediction with reality

Abstraction Simplification

External logic

Realism
Some differences between the judicial and the economic perspectives

<table>
<thead>
<tr>
<th>Economic perspective</th>
<th>Judicial perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goal of the law</td>
<td>What the Law Says</td>
</tr>
<tr>
<td>Relevant facts</td>
<td>Facts</td>
</tr>
<tr>
<td>Theory of harm</td>
<td>Applicability of general legal principle</td>
</tr>
<tr>
<td>Indirect evidence</td>
<td>Direct evidence</td>
</tr>
<tr>
<td>Correlation</td>
<td>Causality</td>
</tr>
<tr>
<td>Type I / Type II errors</td>
<td>Standard of proof</td>
</tr>
<tr>
<td>Deterrence</td>
<td>Proportionality</td>
</tr>
<tr>
<td>Optimality</td>
<td>Predictability</td>
</tr>
<tr>
<td>Economic harm</td>
<td>Legal prejudice</td>
</tr>
<tr>
<td>Economic jargon</td>
<td>Legal jargon</td>
</tr>
</tbody>
</table>
II) Contribution of economics to competition law enforcement
Crucial economic issues in competition law cases

- What is the **relevant market** affected?
- Do the firms have **market power**?
- Is there a potential or real **anticompetitive** effect (or object) on the relevant market?
  
  -- exploitation (loss of **consumers surplus**)?
  
  - Vertical agreements: RPM, price discrimination
  - Abuse of dominance: excessive prices

  -- exclusion (what is an exclusionary practice)?
  
  - Vertical agreements: exclusivity
  - Abuse of dominance: refusal to deal, tying, price discrimination

- Possible **efficiency benefits**?

- **Damage estimates**
Elements of economics useful for antitrust: concepts

1) Economics can be useful to the law is in supplying various economic concepts such as “economic efficiency”, “opportunity cost”, “common costs”, “consumer surplus” « competition », etc.

An economist can advance matters by explaining their meaning.

Ex: What is an anticompetitive practice?

Maureen Brunt, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997
What is economic competition

Competition is an economic concept characterizing a market situation in which entry is free and every seller tries to increase its profits by offering to the buyers a better combination of price, quality, and service than the combinations offered by its competitors.

An anticompetitive horizontal practice is a practice whereby a group of potentially competing sellers, protected by barriers to entry and having collective market power, cooperate to eliminate competitors and/or restrict economic competition among them in order to increase their collective profits by offering combinations of price, quality or service less advantageous to the consumers than what competition would have provided them with.
Consumer surplus

Imagine you are going to an Electronics store to buy a new flat panel TV.

Before you go to the store, you decide to yourself that you are not going to pay more than $750 for a TV. This $750 is your **maximum willingness** to pay for the TV.

After entering the store, you find a TV you really like for only $500! Since you were willing to pay $750 for the TV, and you only ended up paying $500 for it, you have saved $250.

This $250 is called **consumer surplus** by economists, because it is the “extra” or “surplus” value you received from the good beyond the price you paid for it.
Goal of competition law

July 2001: Mario Monti

« the goal of competition policy in all its aspects is to protect consumer welfare »

To attain this goal:

1) Fight against exploitative practices by firms having market power individually (abuses of dominant position) or collectively (anticompetitive agreements);

2) Fight against exclusionary practices (which restrict competition and allow exploitative practices) by firms having market power individually or collectively;

3) Merger control: prevention of mergers which result in a dominant position for the merging firms (market power) or restrict competition;

4) Control of state aid which distorts competition.
Elements of economics useful for antitrust: modelling

2) 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.

Ex: What is predation?

Maureen Brunt, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997
What is anticompetitive?

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.

Ex: Loyalty discounts

Diane Wood, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997
3) Economics can also be useful in providing measurement techniques.

For example, economic methodologies to assess economic damage are relatively straightforward. When no documentary evidence, the measurement of the harm will require the use of a counter factual (open to discussion).

In antitrust, the proper economic methodology to assess the harm from some practices, such as tying and bundling, is much more complex and open to debate (indeed, in the absence of the tying, the tying product would presumably have been sold at a higher price and the tied product would have been sold at a lower price).

Similarly, the area of oligopolistic markets assessing the impact of tacit agreements or exchanges of information is particularly complex because of the interdependence between the market equilibrium, the number of players, and the individual strategies of each player.

Thus, for a number of violations, the economic methodology to assess damages is open to scientific controversies.
The so-called “yardstick” method compares prices, performance, or some other index of harm in the violation market with the same variable in some alternative, or “yardstick” market that is assumed to be performing competitively. By contrast, the “before and after” method looks exclusively at the violation market, but tries to compare prices, output, or some other index from the period prior to or subsequent to the violation period (or preferably both).

Both methods have become technically quite demanding and typically require the use of an expert trained in the use of statistics. Even in the hands of a qualified expert, both suffer from severe limitations depending on the circumstances. For example, two yardstick markets are not likely to have entirely identical cost structures, wage rates, and the like. As a result, adjustments will have to be made. Further, often a cartel operates to “stabilise” prices without really increasing prevailing prices; as a result, the before and after method might understate harm. In addition, exogenous factors such as mergers, changes in technology, the overall health of the economy can all affect these measures. Over the years economists and statisticians have developed control techniques to deal with these problems or others, but no one believes that the methodologies provide more than a rough approximation of reality.
Elements of economics useful for judges

The question of whether a particular practice constitutes an antitrust violation (an illegal agreement or an abuse of a dominant position) must ultimately be a matter for the court which has to resolve the issue.

But the court cannot come to an informed conclusion without at least having some understanding of economic concepts, analysis and measurement techniques.
Economic evidence in cartel cases
The law and economics of anticompetitive horizontal agreements

1) By definition there is *no direct evidence of a tacit (contract) agreement among competitors*.

2) In most cases there will be no direct evidence of an explicit anticompetitive (contract) agreement because firms party to an agreement know that cartels are prohibited and are careful not to leave evidence.

3) If a type of horizontal agreement is not prohibited per se by the competition law, *how to assess whether it is anticompetitive or not?*

   1) Examples: certain exchanges of information are anticompetitive, others are pro-efficiency
   2) Example: a cooperation agreement on research and development may or may not be anticompetitive

Economic analysis can help solve these issues
Circumstantial evidence is employed in cartel cases in all countries.

Competition law enforcement officials always strive to obtain direct evidence of agreement in prosecuting cartel cases, but sometimes it is not available. Cartel operators conceal their activities and usually they do not co-operate with an investigation of their conduct, unless they perceive that it is to their advantage to participate in a leniency programme.

In this context, circumstantial evidence can be important. Almost every country making a written or oral contribution to the roundtable described at least one case in which circumstantial evidence was used to significant effect.

At the same time, there are limits to the use of circumstantial evidence. Such evidence, especially economic evidence, can be ambiguous.

It must be interpreted correctly by investigators, competition agencies and courts. Importantly, circumstantial evidence can be, and often is, used together with direct evidence.
The secrecy of cartels and the problem of evidence

Proving the existence of a cartel agreement, whether formal or informal, poses special problems for the competition law enforcer.

Cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it.

If an investigation into their conduct is undertaken, the participants usually do not co-operate with it, except through a leniency programme.

Obtaining direct evidence of a cartel agreement -- evidence that identifies a meeting or communication between the subjects and describes the substance of their agreement -- requires special investigative tools and techniques, which the authority may lack.

Thus, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence.
The secrecy of cartels and the problem of evidence

It is important, however, that in all cases competition laws will impose liability for entering into an unlawful agreement only if firms have consciously acted together, whether through formal or informal means of communication.

To prove a competition law violation, it must be shown that there has been a meeting of the minds toward a common goal or result, or, in other words, some "conscious commitment to a common scheme."

Conversely, liability cannot be found where firms communicated purely in the form of market place action, or where firms communicated, but did not develop some "conscious commitment to a common scheme."
Circumstantial evidence in countries that are relatively new to anti-cartel enforcement

A country just beginning to enforce its competition law may face obstacles in obtaining direct evidence of a cartel agreement. It probably will not have in place an effective leniency programme, which is a primary source of direct evidence.

There may be lacking in the country a strong competition culture, which could make it more difficult for the competition agency to generate cooperation with its anti-cartel programme.

In short, the competition agency could have relatively greater difficulty in generating direct evidence in its cartel cases, which would imply that it will have to rely more heavily on circumstantial evidence.

OECD Competition Committee Roundtable Prosecuting Cartels without Direct Evidence 2006
Parallel behaviour and tacit agreement

Over the years, courts, competition authorities and competition experts have come to accept that conscious parallelism,”which involves nothing more than identical pricing or other parallel behaviour deriving from independent observation and reaction by rivals in the marketplace, is not unlawful.

This view is well grounded in economic theory. Something more than conscious parallelism is required.

One formulation, developed in the United States in civil cases requires that there exist certain plus factors,’which prove that agreement is more likely the cause of the parallel conduct than independent action. One US court described the standard in a recent decision as follows:

\[ \ldots \text{[W]e have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behaviour show that certain plus factors also exist. Existence of these plus factors tends to ensure that courts punish \text{\}`concerted action\text{\}—an actual agreement- instead of the \text{\}unilateral, independent conduct of competitors\text{\}.”} \]

In other words, the factors serve as proxies for direct evidence of an agreement.

Other jurisdictions seem to apply similar analysis.
Two types of circumstantial evidence: communication evidence and economic evidence.

Of the two, communication evidence is considered to be the more important.

Communication evidence is evidence that cartel operators met or otherwise communicated, but *does not describe the substance of their communications*. It includes, for example, records of telephone conversations among suspected cartel participants, of their travel to a common destination and notes or records of meetings in which they participated.

Communication evidence can be highly probative of an agreement. Almost all of the circumstantial cases described by delegations included communication evidence; in some the evidence was compelling.
- evidence that **cartel operators met** or otherwise communicated, but does not describe the substance of their communications:

- records of **telephone conversations** between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.

- **other evidence** that the parties communicated about the subject – e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitor's pricing strategy, such as an awareness of a future price increase by a rival.
Economic evidence: conduct and structure

Economic evidence can be categorized as either conduct or structural evidence.

Conduct evidence includes, most importantly, evidence of parallel conduct by suspected cartel members, e.g., simultaneous and identical price increases or suspicious bidding patterns in public tenders. It can also include evidence of facilitating practices, though that conduct could also be characterised as quasi-communication evidence.”

Structural economic evidence includes evidence of such factors as high market concentration and homogeneous products.

Of these two types of economic evidence, conduct evidence is considered the more important.

Economic evidence must be carefully evaluated. The evidence should be inconsistent with the hypothesis that the market participants are acting unilaterally in their self interest.
Economic conduct evidence

**Conduct evidence** is the single most important type of economic evidence. Careful analysis of the conduct of parties is important to identify behaviour that can be characterised as contrary to the parties’ unilateral self-interest and which therefore supports the inference of an agreement.

Conduct evidence includes, first and foremost:

**Parallel pricing** – changes in prices by rivals that are identical, or nearly so, and simultaneous, or nearly so. It includes other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns, e.g., a predictable rotation of winning bidders.

**Industry performance** could also be described as conduct evidence. It includes:
- abnormally high profits;
- stable market shares;
- a history of competition law violations.
Economic conduct evidence

- Facilitating practices are a subset of conduct evidence. Facilitating practices that can make it easier for competitors to reach or sustain an agreement. It is important to note that conduct described as facilitating practices is not necessarily unlawful.

But where a competition authority has found other circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement.

They can explain what kind of arrangements the parties set up to facilitate the formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thus supporting the “collusion story” put together by the competition law enforcer.

Facilitating practices include:
• information exchanges;
• price signalling;
• freight equalisation;
• price protection and most favoured nation policies; and
• unnecessarily restrictive product standards
Economic structural evidence

2) Evidence related to market structure can be used primarily to make the finding of a cartel agreement more plausible, even though market structure factors do not prove the existence of such an agreement.

Relevant economic evidence relating to market structure includes:
• high concentration;
• low concentration on the opposite side of the market;
• high barriers to entry;
• high degree of vertical integration;
• standardised or homogeneous product.

The evidentiary value of structural evidence can be limited, however. There can be highly concentrated industries selling homogeneous products in which all parties compete. Conversely, the absence of such evidence cannot be used to show that a cartel did not exist.

Cartels are known to have existed in industries with numerous competitors and differentiated products.
Circumstantial evidence: Happyland Guidelines on cartels

According to the Guideline on Cartel of Competition Authority in Happyland, it will consider the following as cartel indicators.

None of these factors are conclusive on their own but the presence of several may lead to finding of a cartel (holistic approach):

- Small number of business actors and high concentration market (structural)
- Comparable size of those business actors (structural)
- Homogeneous products (structural)
- Multiple contacts between competitors (conduct)
- Overstock/oversupply of products (conduct)
- Affiliation between competitors (structural)
- High entry barriers (structural)
- Stable and inelastic demand (structural)
- Buyers have no counter-vailing power (structural)
- There is regular information exchange between competitors (conduct)
- There is a regulated price or contract (conduct)
The proper use of economic evidence

In order to identify economic evidence that is useful, the competition authority should have a good sense of the appropriate model representing what the investigated firms would have done if they had acted independently (i.e. without agreeing on a common action).

First, the authority must identify the set of actions that can be characterised as unilateral, non-cooperative best response behaviours in a given case.

Then, and only then, can it identify actions that are inconsistent with that behaviour and thus support the hypothesis that an illegal cartel was formed.

In other words, actions compatible with unilateral, non-cooperative best response behaviour serve as a benchmark to which a firm's behaviour can be compared during the period of suspicious activity.
A holistic approach to circumstantial evidence.

One delegate described the methodology for evaluating circumstantial evidence as like an impressionist painting, comprising many dots or brush strokes which together form an image.

Another likened the process to a jig-saw puzzle. In this way, circumstantial evidence, which by definition does not describe the specific terms of an agreement, can be better understood.

The materials submitted for the roundtable described a few cases in which courts declined to use this holistic approach, requiring instead that each item of evidence be linked directly to a specific agreement. The result was that the cases failed.

(...) On balance, the holistic approach is much preferable to a requirement that each item of circumstantial evidence be linked directly to a specific agreement.
In most countries, cartels (and other violations of the competition law) are prosecuted administratively. The principle administrative sanctions applied to this conduct are fines, usually only assessed against organisations but sometimes against natural persons, and remedial orders.

In a minority of countries, but a growing one, cartels are prosecuted criminally. In most instances the burden of proof facing the competition agency is higher in a criminal case.

The result is that it is usually more important that direct evidence of agreement be generated in these cases.

The United States has long used the criminal process in the cartel cases prosecuted by the government, and virtually all of its cases are built on direct evidence. Still, circumstantial evidence is admissible, and useful, in that country and elsewhere.
Circumstantial evidence and the courts

A few jurisdictions in which there has been judicial review of decisions by competition agencies in cartel cases reported that courts sometimes view cases built on circumstantial evidence with skepticism.

In this regard, as more cases are appealed to courts, the standards that they apply to circumstantial evidence are continuing to evolve.

Hopefully, courts will come to see that circumstantial evidence subjected to sound economic analysis and viewed holistically can be highly probative.

OECD Competition Committee Roundtable Prosecuting Cartels without Direct Evidence 2006
But no distinction should be made between direct and circumstantial evidence

Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant’s guilt beyond a reasonable doubt from all of the evidence in the case.

* * *

In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreements. Very often in cases like this, such evidence is not available. You may find that the required agreement or conspiracy existed from the course of dealing between or among the individuals through the words they exchanged or from their acts alone.

III) How to present economic evidence in courts
How to present economic evidence in court?

(1) Modern (antitrust) enforcement should be based on a clear and objective assessment of effects as identified or measured by sound economic analysis.

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 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.

Based on the roundtable on « Complex economic evidence in courts » held in the OECD Competition Committee
The **experience of FCA** in presenting complex economic theories and related advanced economic evidence to courts is **rather limited**.

More complex theories have been used more extensively at a preparatory stage (…)  
*There is, however, a perception of risk in that, compared with the legal arguments put forward, the time and effort spent on economic argumentation is in rather unfavorable relation to its importance for the final court decisions.*

*Recent experiences point out that relying on more complex economic theories does not necessarily strengthen the point in relation to the judicial argumentation, testimonies or evidence put forward. This view is further confirmed by recent court rulings, highlighting the challenges in presenting rather straightforward economic evidence of cartel pricing in an intuitively intelligible way.*
How to present economic evidence in court?

(2) Agencies and courts display varying degrees of sophistication when dealing with economic analyses.

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.

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.
How to present economic evidence in court?

(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 parties.

Practical solutions were advanced concerning judicial understanding and successful presentation of evidence.
Netherlands I

Nuon and Reliant were independent energy producers and (wholesale) energy traders. Nuon was a relatively small producer of electricity, while Reliant had ample production capacity.

After the second-phase investigation, the NMa cleared the merger on condition that 90 tranches of 10 MW of Nuon’s firm capacity were auctioned between July 1, 2004 and December 31, 2004. Total capacity in the Netherlands is about 20.000 MW (2001-figure). Some market parties (Nuon, Essent and Electrabel) were excluded from these auctions.

Nuon and Reliant objected to the obligations and appealed before a Dutch court.

The NMa had based its decision, among other things, on two econometric simulation models of the Dutch electricity market, one of which was a ‘supply function equilibrium model’ (SFE-model). SFE-models are relatively complex models and typically generate many equilibria.

The SFE-models’ forecast was that the merger would lead to a different set of equilibrium-solutions so that, compared to the pre-merger set of equilibria, the low-price equilibria disappeared. The ‘median’ price was thus higher and was presented as the predicted result.
The Court ruled that the NMa had failed to prove that the merger would result in a dominant position with respect to electricity production. The Court did not accept the outcome of the econometric analysis as proof of dominance, but considered these merely as an indication that prices could rise as a result of the merger.

Besides, the Court was not convinced by the argument that in the SFE-model the median price would rise. The NMa had not proven convincingly what the pre-merger equilibrium price was and how the merger would lead to a higher equilibrium price. Put differently: the fact that many equilibria exist before and after the merger with no proof of what the actual equilibrium was before the merger and what would be the likely equilibrium after the merger, caused the judge to be hesitant in accepting the results.

The Courts even seemed to doubt the applicability of an assumption like ‘profit maximization’.
The Court’s decisions in the Nuon-Reliant case seems to point to the tension between an analysis of dominance in terms of market shares and qualitative analysis on the one hand, obviously preferred by the courts, and (direct) econometric evidence of dominance on the other, possibly dismissed on the basis of a faulty argument.

Whether and in what way this is due to the presentation of the analysis by the NMa remains to be seen.

On the other hand, based on the other cases described, it seems that the courts themselves experience difficulties in deciding how to deal with basic economic assumptions and theories, especially where the ‘translation’ of abstract economic principles to concrete cases is concerned.

The courts pointed out that the NMa’s analysis has not been sufficient in a couple of cases, and they have doubted some of the underlying assumptions of the functioning of the markets as described by the NMa. Still, they have not pointed out exactly what is required to convince them.
How to present economic evidence in court?

4) 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.

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.
5) **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.
In this respect the “Working Group on Competition Law” is of great importance. For more than 40 years now the Bundeskartellamt has organised an annual meeting of the Working Group. The group consists of university professors from economic and legal faculties and judges from the antitrust chambers at the courts, who come together to discuss current antitrust issues.

The Bundeskartellamt prepares a discussion paper for each meeting which serves as a basis for debate among the Working Group members. Furthermore, the Bundeskartellamt presents current and potentially contentious cases of its most recent practice in this forum.
Ten principles to follow when presenting complex economic evidence to any Court

1. **Explain underlying intuitions.** One useful tool for providing the intuition behind complex economic concepts grounded in the empirical evidence.

2. **Ensure that economic theories are grounded in the facts of the case.**

3. **Know and explain the limits of your data.** (to be in a position to show that any apparent data deficiencies do not affect the overall conclusions.)

4. **Carry out sensitivity analysis.**

5. **Employ (and develop) simple rules.** (Economists also have an important role to play in explaining why the application of the rules will be appropriate in some cases, but not in others).
Ten principles to follow when presenting complex economic evidence to a Court

6. Use plain, non-technical language.

7. Where possible, draw on the established stock of economic theory, not the latest advances. (the latest advances need to be presented with caution and in context).

8. Make sure the economic case is well aligned with the legal case. In some cases, the economic and legal analyses are presented as more or less distinct sets of arguments, and can even make inconsistent assumptions.

9. Don’t try to use complex economics as a smokescreen for weak arguments. All you are likely to do is annoy the judge.

10. Ensure your expert witness is well prepared and doesn’t hector or talk down to the Judge.