The use and misuse of economic evidence in antitrust

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Games economists play
Using economics in competition cases

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Second, *economic theory* can also identify the efficiencies that those agreements and/or conducts may generate and the sort of qualitative and quantitative evidence needed to verify those efficiencies. Economics can then be used to quantify efficiencies and measure their impact on consumer welfare.
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Third, economic theory can help with the selection of the legal standard to be applied when assessing an agreement.
Economic theory? Seriously!?

I am conscious that some economists have told you that “economic theory” can prove whatever you want and that anyone using the words “according to economic theory …” is a fool.

They are wrong and I am not a fool.

I am not the only one who opines that economic theory has contributed and will continue to contribute to designing effective policy responses to market failures, including the existence and exercise of market power.
From economic theory to metrics

Economic and econometric tools and methods can be used to measure the price and output effects of competition infringements, e.g. cartels. They can also be used to forecast / simulate the price effects of mergers.
From economic theory to metrics: mergers

**Horizontal Mergers**
- Demand analysis
- Upward Pricing Pressure
- **Merger simulation**
- Natural experiments
- Calculating efficiencies

**Non-horizontal Mergers**
- Focus on incentive and ability
- **Vertical arithmetic**
- Assessment of likely effects using game theory
Critical Voices
Economics is not a science

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W.P.J. Wils, EU Hearing Officer, *World Competition*, 2014
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“We therefore need to remember that there are a few robust economic presumptions that can be drawn from the available literature, i.e. there are few or no “universal economic truths” … Those familiar with economic theory will know that a large of number results can often be reversed by making alternative assumption. This is particularly true of modern economic analysis which employs game theoretic methodology”.

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Economics ⇒ Useless complexity

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Economists are dishonest

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How can you tell when an economist is lying? His lips are moving.
Eppur si muove …
Rigorous economic analysis

When alternative studies produce contradictory conclusions, their relative merits should be carefully investigated. The right approach cannot be to discard them all as if they were equally incorrect or unscientific. In fact, it may well be the case that all those studies prove valuable in spite of their apparent contradictions. Those inconsistencies may simply reflect some inescapable “ambiguity”.

If the analyses submitted to test a given proposition in a competition policy case produced contradictory results but (i) all of them were scientifically valid and (ii) none of them could be consider intrinsically superior to the other(s), the only legitimate conclusion would that the available evidence can neither validate nor falsify or refute that proposition “beyond reasonable doubt”.

“We need to develop a greater tolerance for ambiguity. We must face up that we cannot answer all of the questions that we ask”

There is no such a thing as a perfect economic and econometric model. All models involve simplifying assumptions and/or are based on imperfect data. However, in many circumstances, those simplifications and imperfections do not have an impact on the quantitative and/or qualitative results of the analysis.

"... In that empire, the art of cartography reached such perfection that the map of one province alone took up the whole of a city, and the map of the empire, the whole of a province. In time, those unconscionable maps did not satisfy, and the Colleges of Cartographers set up a map of the empire which had the size of the empire itself and coincided with it point by point. Less addicted to the study of cartography, succeeding generations understood that this Widespread Map was useless and not without impiety they abandoned it to the inclemency of the sun and of the winters. In the deserts of the West some mangled ruins of the Map lasted on, inhabited by animals and beggars; in the whole country there are no other relics of the Disciplines of Geography."

Dealing with complexity

Economic and econometric techniques range from basic descriptive analyses to the application of statistical and econometric methods. Simple data analyses may go a long way to clarify the issues at stake in a competition policy matter. Yet “legitimacy should not be sacrificed in search of simplicity, and [the fact finder] must be certain that the results from these simple analyses are not misleading”.


“Because intuition turned out to be deceptive in so many instances, and because propositions that had been accounted true by intuition were repeatedly proved false by logic, mathematicians became more and more skeptical of the validity of intuition. They learned that it is unsafe to accept any mathematical proposition, much less to base any mathematical discipline on intuitive convictions.”

H. Hahn, The crisis in intuition, 1933.
Deontological issues

- Some practitioners have rightly warned about the potential for abuse.
- Economists are no more honest or dishonest than any other professional.

“Private investigator, huh”, he said thoughtfully. “What kind of work do you do mostly?” “Anything that is reasonably honest” I said. He nodded. “Reasonably is a word you could stretch. So is honest” I gave him a shady leer. “You’re so right,” I agreed. “let’s get together some quiet afternoon and stretch them.”

Raymond Chandler, *The Little Sister*
Deontological issues

What we need is appropriate processes to assess economic evidence. Competition authorities and courts can adopt measures aimed at facilitating the assessment of seemingly contradictory economic and econometric evidence.

• One option is to publish *best practices* on the submission of economic evidence.
• Another option is to request the opposing experts to explain their discrepancies in intuitive terms, possibly, though not necessarily, working in cooperation.
• An alternative is to instruct the opposing experts to meet and discuss, *inter alia*, data issues, economic theory and modelling approaches.
• Following the U.S. Supreme Court’s ruling in *Daubert* in 1993, federal court judges are asked to make a “preliminary assessment” of whether expert testimony is “scientifically valid,” focusing “solely on principles and methodology”.

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Best practices

The aim of these rules is to ensure that those analyses

- pose questions that are relevant to the competition inquiry at issue;
- state clearly the facts that they seek to explain and the data they are meant to investigate;
- discuss how the modelling techniques employed fit the facts of the case and relate to the questions they purport to address;
- interpret their findings in clear terms stating unambiguously the assumptions upon which they rely.
- evaluate the robustness of those results, discussing their consistency (or lack of) with other sources of evidence, with previous empirical analyses addressing similar or related issues, as well as with the principles of economic theory.
Concurrent evidence

Agenda
Advancing economics in business

Using the ‘hot tub’: how concurrent expert evidence can help courts

Australian courts and agencies have been acknowledged as having the most experience with the ‘hot tub’ method, in which experts give their evidence concurrently—although international interest is developing, for example in the USA, Canada and the UK. Justice Steven Rares of the Federal Court of Australia and the Supreme Court of the Australian Capital Territory explains some of the history of expert evidence; the purposes and technique of concurrent evidence; the technique’s virtues.

When expert evidence is tendered in contested proceedings, traditionally each party will call one or more experts to give evidence, whose evidence, in turn, supports the party’s case. Cross-examination is the traditional common law method for testing that evidence. The forensic use and testing of expert evidence in this way has often produced a number of concerns:

- each expert is asked to test, directly through his cross-examination, the other expert’s assumptions and is then asked to make his counterparts’ assumptions;
- considerable court time is absorbed as each expert cross-examines in turn;
- the expert witness can become subsumed or blurred in a mass of detail;
- juries, judges, and tribunals frequently become concerned that an expert is partisan or biased;
- often the evidence is technical and difficult to understand;
- the experts feel artificially constrained by having to answer questions that may misconstrue or misunderstand their evidence;
- the experts feel that their skill, knowledge, and often considerable professional accomplishments are not accorded appropriate respect or weight;
- the court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are being cross-examined in areas where they are not cross-examined in areas of the court—rather, experts are concerned, with justification, that the process is being used to test or discount their views, or by subtle shifts in questions, that they do not regard as evidence.

In 1999, an empirical study of Australian civil courts that 50% considered bias as the main issue with expert evidence. Another is that the presentation of evidence was often confusing. This was modified in about 2000 and the instructions to the expert to explain the evidence to the expert, the use of language.

In many situations, conflicting evidence or expert reports for a much more solemn evidence for all those involved, it is of the expert’s job to explain each of the experts, lawyers, other professionals, and judges.

The technique is now being applied to topics as diverse as ad persona rules, the protective requirements, often, only in the Australian context. Pronouncements also (2005) consider the appropriate finding. Those in 2000, and the meeting of the experts’ views.

A short historical excursion

Courts have struggled for a long time to grapple with the consequences of the use by lawyers, for the benefit of experts, of advice that they have encountered in areas of work, the remedy lay in removing the protection or the role of the expert as an impartial expert.

Oxera Agenda November 2013
Daubert challenges

The US Supreme Court’s ruling directs trial judges to consider at least four factors when determining the admissibility of scientific evidence in legal proceedings:

(a) whether the theory or methodology can be tested,
(b) whether the proffered work has been subject to peer review,
(c) whether the rate of error is acceptable and
(d) whether the method at issue enjoys wide acceptance.

The US Supreme Court also held that expert testimony is admissible only if it is “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute,” i.e., only if there is a good “fit” between the testimony and the pertinent inquiry.

The Court again stressed this “fit” requirement in cautioning that a court should not “admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”
Thank you!