

Dealing with the Evidence

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* The views expressed are those of the speaker and do not necessarily reflect those of the UK Competition Commission or any of its Members.

An in depth assessment of effects must be compatible with and firmly rooted in the institutional context

- ▶ It is a Competition's Authority duty to:
 - ▶ provide a stable and predictable enforcement environment,
 - ▶ guarantee due process - in particular the parties' rights of defense
 - ▶ But also to enforce the law (with a minimum delay) in line with the objectives of the legislator
- ▶ **Brutal honesty:** There are trade-offs here. Beyond a certain optimum frontier one can only improve on one of this goals at the expense of the other.
- ▶ My observations today are not about what is the right balance between these goals but rather how to make sure we do not fall below the optimal frontier.



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- ▶ An Administrative enforcement system requires a structured framework to gather, process, weight evidence and take decisions that balances due process, effective enforcement and predictability.
 - ▶ The EU Commission bears the burden of establishing an infringement (or, in a merger, of showing that a merger will or will not be likely to SIEC).
 - ▶ If the Commission does not come forward with evidence sufficient to establish a prima facie case against the parties, there is no case.
 - ▶ If the Commission discharges that burden and if the defendant then seeks to avoid the conclusion that it has breached the competition rules, it has no choice but to come forward with evidence, say in response to the Statement of Objections, that either:
 - ▶ rebuts the Commission's case or
 - ▶ demonstrates that despite what appears to be an anticompetitive agreement or practice there are countervailing pro-competitive benefits or some objective justification.



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- ▶ Judicial review: the standard of review applied by EU Courts (except in cases involving fines) is not a de novo or “full merits” review.
 - ▶ However, in reviewing the facts and law asserted in the Commission’s decision, the General Court carries out a full or “comprehensive” review
 - ▶ ... except as concerns matters where the Commission enjoys a margin of appreciation.
 - ▶ In my view, in practice this is no more than a safety valve that reflects that when decisions need to be taken with imperfect evidence a value judgment is required (see Ryanair/Aer Lingus judgment)
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Reflections and observations on:

- ▶ How much evidence is necessary;
- ▶ How should an authority weight the available evidence?;
- ▶ What is the role of economic reasoning and econometric evidence?
- ▶ Do the parties bear any responsibility in the production of evidence beyond responding to the authorities requests timely, accurately and completely?



Requisite standard to discharge the burden of proof

- ▶ In *Airtours* the CFI articulated the ‘**convincing evidence**’ standard.
 - ▶ When seeking to establish the negative competitive effects of a merger: ***‘it is incumbent upon [the Commission] to produce convincing evidence thereof’***
- ▶ Not a new standard but simply a clarification of that should and has been applied before.
- ▶ This is the view reflected in the ECJ’s judgment in *Tetra Laval*, at paragraph 48:
 - ▶ *‘It follows from these examples that **the CFI carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission’s conclusions seemed to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence**’*
- ▶ How does one meet the “convincing evidence” standard?



Presumptions vs. assessment of effects

- ▶ Several factors have shifted the balance away from the use of presumptions - often structural-
towards a more direct assessment of competitive effects:
 - ▶ Judicial review: (Airtours ; Tetra/Sidel; GE/Honeywell; GSK)
 - ▶ Increased recognition by the EU Commission that practices and mergers may be motivated by efficiencies
and pro-competitive considerations
 - ▶ Capability building
 - ▶ Creation of the Chief Economist Team
 - ▶ Internal review panels
 - ▶ Continuous training
 - ▶ Dialogue with practitioners
 - ▶ Increased transparency to facilitate predictability and accountability:
 - ▶ Substantive and procedural guidelines
 - ▶ More comprehensive decisions
- ▶ But presumptions continue to play an important (albeit often misunderstood) role in
enforcement



Presumptions in EU Competition Policy

- ▶ Procedurally, legal presumptions indicate the shift of the burden of proof :
 - ▶ from the party which has proved the existence of the prima facie conditions
 - ▶ to the party that could attempt to rebut the presumption...
 - ▶ ...with some kind of extraordinary evidence that would produce an exception from the general rule.

- ▶ In an administrative context that seeks to balance due process and effective enforcement, it makes sense that **all presumptions should be rebuttable** (i.e. no per-se rules as in the US context)



One important example: Horizontal Agreements

- ▶ Cartels should be subject to a double presumption:
 - ▶ (i) harmful for consumers and
 - ▶ (ii) not likely to generate efficiencies or pro-competitive effects
- ▶ Restrictions by object: presumption of harm but no presumption against efficiencies (i.e. if a defense under Article 101(3) is invoked it is the duty of the Commission to evaluate all arguments and evidence advanced)
- ▶ Restriction by effect: no presumption of harm. The Commission must prove likely anti-competitive effects.



Merger control example: Non-Horizontal mergers are less likely to harm consumers

- ▶ In the Tetra-Laval/Sidel case the Court ruled that, because vertical and conglomerate mergers are generally neutral and their effects are usually neutral or even beneficial for the consumers, there should be a higher level of proof of the opposite(par 153-155)
- ▶ The CFI criticized the Commission's decision
 - ▶ as lacking '*convincing evidence*'
 - ▶ that '*contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating conclusions drawn from it*'.
- ▶ The NHMG later reflected this position:
 - ▶ "*non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers*' because '*vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market*'.
- ▶ Similarly, the CFI's reference to the benefit to consumers was reflected in the Commission's acknowledgement that:
 - ▶ '*vertical and conglomerate mergers provide substantial scope for efficiencies*'



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- ▶ Presumptions should be applied with Aristotelian “practical wisdom”:
 - ▶ i.e. must be adapted to the overall circumstances of the case including the availability of evidence.
 - ▶ Must have an empirical character. As Hovenkamp states they should not be ‘*based on the logical necessity but on accumulated observation subject to continual testing, falsification, and modification*’.
 - ▶ Should not be applied mechanically



Posner's bus case example*

- ▶ Those against an effects-based approach may argue that:
 - ▶ statistical and econometric analysis does not provide certain answers. It thus has no evidentiary value and should be excluded
- ▶ However, all evidence is probabilistic. Thus, evidence should not be excluded merely because it is not true with certainty
 - ▶ Suppose you get hit by a bus, and it is known that 51 percent of the buses on that road are owned by Bus Company A and 49 percent by Company B.
 - ▶ You sue Bus Company A and ask for judgment on the basis of this statistic alone; You advance no other evidence.
 - ▶ If the defendant also puts in no evidence, should a jury be allowed to award judgment in your favour?

*see Gary L. Wells, 1992, "Naked Statistical Evidence of Liability: Is Subjective Probability Enough?" 62 Journal of Personality and Social Psychology 739 (1992) cited in Posner "An Economic Approach to the Law of Evidence"

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- ▶ The law's answer is intuitively “no,”
 - ▶ The problem that causes this disbelief is the tacit assumption that the statistic concerning the ownership of the buses is **the only evidence** that you can obtain.
 - ▶ *If the statistic is your only evidence*, the inference to be drawn is not that there is a 51 percent probability that it was a bus owned by A that hit you but rather:
 - ▶ that you either investigated and discovered that it was actually a bus owned by B (and let us say that B is judgment-proof and so not worth suing),
 - ▶ or that you simply did not bother to conduct an investigation

You want to merge with an upstream supplier But you get “hit” by a Statement of Objections

- ▶ The SO argues that you will have the incentive and ability to engage in anticompetitive exclusive dealing following the merger.
- ▶ But the SO shows precious little evidence as regards the effects on consumers other than some reference to economic theory
- ▶ Your defense:
 - ▶ According to established case law and the NHMG there is a presumption vertical mergers generate efficiencies
 - ▶ You advance no further evidence.
- ▶ Should the EU Commission dismiss the objections? *Probably not*
- ▶ Is it possible that given this presumption the Commission sends an SO without even making an attempt to rebut that vertical merger generate efficiencies? *Generally Yes*

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- ▶ The intuition here is that the burden of production of the efficiencies should be on the parties
 - ▶ If the parties advance no evidence, (as in the bus example) it is legitimate to assume that either there are no efficiencies or the parties did not bother to think about them – despite the presumption
 - ▶ In other words, the strength of the presumption (and thus the evidence required to rebut it) is not absolute but depends on the quality of the available evidence advanced to validate it.

 - ▶ Corollary: note that economic analysis - in particular economic reasoning and descriptive quantitative analysis (e.g market shares) - will often be crucial to validate presumptions just as it is to prove effects.
 - ▶ Fallacy: If we move away from an assessment of effects “economic analysis” is not necessary
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Presumptions need to be adapted to reality and not be applied mechanically

- ▶ Typically two considerations:
 - ▶ Probability of making an error
 - ▶ Consequences of making such error
- ▶ Probability of making an error often depends on the accuracy of the presumption (or test) (but not only)
- ▶ Take a “sacrifice” bright-line test to establish predation:
 - ▶ **A firm has illegally predated if $P < ATC$**
- ▶ Assume:
 - ▶ In 90% of cases where a firm predares price will be below ATC (10% risk that the firm engages in non-price predation – false negative)
 - ▶ In 90% of cases where there is no predation $P > ATC$ (10% risk that the firm engages in promotional or penetration pricing – false positive)

▶ Is this a reliable presumption?

Typically? No!

- ▶ In light of the modern theories of predatory conduct assume market circumstances for rational predation are present rather infrequently.
- ▶ Assume that on average, only 1% of firms will find predation rational (i.e. predation is unlikely but not a myth)
- ▶ Take 1000 dominant companies
 - ▶ Typically 10 are truly predating. If they predate the price-cost test comes positive in 9 cases (the remaining firm engages in non-price predation or above cost predation)
 - ▶ The remaining 990 are not predating but the test can be inaccurate for them too. Up to 99 of them will price below ATC
 - ▶ So there are 108 positive results in total but only 9 are accurate
 - ▶ **So for any case where $P < ATC$ the chance there is predation is around 8%!!**



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- ▶ In sum, presumptions are not immutable, should be applied judiciously and require economic analysis to be validated
 - ▶ As circumstances change, instruments and institutions evolve, so should the use of presumptions. Ultimately the merits of using a presumptions depends on the counterfactual: relative to not using it a presumption should:
 - ▶ Facilitate administrability by the reducing the extent of the evidence to discharge the burden of proof (but still evidence is required to validate the presumption)
 - ▶ Guide the production of the necessary evidence (to validate or refute the presumption)
 - ▶ Enhance predictability
 - ▶ Facilitates judicial scrutiny
 - ▶ There may be difficult trade-offs between this criteria: example predictability and administratibility and the merits of priming one or the other changes over time



Main Sources of Evidence

- ▶ Internal Documents
 - ▶ Beware: Incomplete, outdated, hypotheticals; do not interpret out of context
- ▶ Reports by Industry experts
 - ▶ Beware: Different purpose
- ▶ Surveys (mostly self-completion questionnaires) / meetings
 - ▶ Beware: Respondent bias
- ▶ Large-scale customer surveys
 - ▶ Beware: Poor design, non-representative sampling
- ▶ Economic and econometric models
 - ▶ Always check validity of assumptions and test derived hypothesis
 - ▶ Difficult to weight (depends on relevance and robustness)

Interpreting and Weighting circumstantial evidence

- ▶ **Virtually all evidence is circumstantial**
 - ▶ circumstantial evidence is evidence in which an inference is required to connect it to a conclusion of fact.
 - ▶ By contrast, direct evidence supports the truth of an assertion directly—i.e., without need for any additional evidence or the intervening inference.
- ▶ **An uncomfortable reality: respondent bias**
 - ▶ Strategic responses by market participants
 - ▶ Non-representative sampling
 - ▶ Bounded rationality and decisional illusions
- ▶ **A clear and present danger: agency “manifest error”**

Respondent bias: Merging Parties or defendants

- ▶ To the extent they are providing industry facts, firms often provide reliable, straightforward, objective information—e.g., descriptions of product lines and major customers.
- ▶ **However:**
 - ▶ They are advocates for the position that the merger or practice poses little or no competitive risks.
 - ▶ Their statements, therefore, must be considered in this light (e.g. fixed costs savings)

Competitor statements

- ▶ Usually uniquely placed to provide important evidence on: (i) competitive alternatives, (ii) entry conditions, (iii) market shares, (iv) former market participants, (v) contacts at large customers, etc.
- ▶ However, competitor opinions must be assessed critically (incentives not aligned with that of customers). If the competition concern is:
 - ▶ Unilateral effects: Competitors may support an anti-competitive merger
 - ▶ Vertical effects: downstream competitors may oppose an efficiency-enhancing merger that RRC but generates efficiencies
 - ▶ Coordinated effects:
 - ▶ some competitors may support an anti-competitive merger that creates collusion;
 - ▶ others may oppose a pro-competitive merger that destabilizes pre-existing collusion

Customers can be a valuable source of factual information...

- ▶ Availability and suitability of substitute products
- ▶ What product and firm characteristics are of greater value to them
- ▶ who competes currently, or who has competed previously, for their business.
- ▶ the manner in which competition operates in the marketplace
- ▶ information about past influential events

...but customers' opinions are not direct evidence of anticompetitive effects (see Heyer 2006)

- ▶ Rational Ignorance: Information is not costless to obtain.
- ▶ Direct customers of the merging parties are often intermediate customers. The interests of intermediate customers cannot be equated with that of final consumers.
 - ▶ Downstream competitors rely on input in different degrees
 - ▶ Past customers may be somewhat protected from the harmful effects of the merger relative to future customers (e.g. stocks or locked-in pre-merger prices)
 - ▶ Common cost increases may be largely passed-through if demand is highly inelastic
- ▶ Self-selection bias
- ▶ Gaming: (specially with respect to remedies assessment)
- ▶ Different respondents within a firm have different perspectives and different objectives.
- ▶ “Decisional Illusions”: defaults matter (e.g. evidence from consummated mergers)

Use of economic reasoning and econometric analysis to avoid relying *only* on views of market agents

- ▶ Sound economic analysis relies, to the extent possible, on **objective and verifiable factual evidence** (e.g., data).
- ▶ Encourages analytical rigor. Articulation of the theory can clarify thinking by laying bare key assumptions and reasoning steps, and by structuring the collection of evidence.
- ▶ Helps focus the attention of decision-makers on the connection between the economic theory of the case and the evidence and clarify what hypotheses are in dispute and what evidence could help test them.
- ▶ Economic analysis is also indispensable to handle two problems inherent in competition policy enforcement:
 - ▶ identification (clarifying the basis on which one theory can be preferred to another in nonexperimental evidence) and
 - ▶ causality (e.g. through construction of the but-for world)

Economic evidence needs to be weighted with care

- ▶ Economic and econometric analysis relies on assumptions that are, at best, only approximations of reality.
 - ▶ and results can be very sensitive to one or more of the model's assumptions
- ▶ Data is not always as reliable as necessary: suspect sources of data; measurement or recording error; incomplete data
 - ▶ Such deficiencies cannot always be appropriately accounted for.
- ▶ It is important to choose methodologies that fit the particular facts and are relevant to the key issues under consideration
- ▶ However useful economics may be, as is the case with customer evidence, it will rarely, if ever, prove conclusive. To be most effective, parties will continue to need a combination of documentary, economic, and customer evidence.

Even when the economic analysis is sound presentation and explanation of results is a practical hurdle

- ▶ It is difficult to know how much probative weight to give to something one does not understand
 - ▶ especially when the “experts” on both sides reach completely divergent conclusions based on the same set of facts, as is often the case.
- ▶ Confusion and disinterest can result from:
 - ▶ Use of unnecessary jargon (or failure to provide definitions)
 - ▶ lack of transparency in the underlying data or model (and its assumptions),
 - ▶ failure to show how the analysis fits in with market realities and facts
 - ▶ the sheer complexity of the statistical methodologies used.
 - ▶ ... even oversimplification



Avoiding Commission's “manifest errors of assessment”

- ▶ Substantive Guidelines: binding on the Commission
- ▶ Transparency
- ▶ Judicial Scrutiny
- ▶ Best Practice Guidelines on Economic Submission
 - ▶ Beware of lawyer “biases”
- ▶ Develop expertise in conducting professional and objective investigations

Transparency

- ▶ Trade-off between encouraging the decision maker to develop its own capability to assess economic evidence and ensuring that sufficient transparency exists to safeguard the quality of economic analyses.
- ▶ Transparency matters for at least three reasons:
 - ▶ First, a transparent process reduces the scope for factors other than substantive arguments to influence decision-making. That is, favoritism, lobbying, political pressuring, etc.
 - ▶ Second, a transparent process allows for all parties involved to learn as case law develops.
 - ▶ Third, the economists involved in competition cases can build—and destroy—their reputations. When economic analyses are available for critical examination by peers, sloppy or fabricated arguments are exposed.
- ▶ However, note that there is also a trade-off between transparency and the time available to make a decision.

Judicial scrutiny

- ▶ “According to well established case law in reviewing a Commission decision in the area of competition EU Courts shall review not only 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” (Ryanair/Aer Lingus decision, par 30)

Best practices on economic submissions

Goals:

- ▶ (i) ensure that economic analysis meets certain minimum standards at the outset,
- ▶ (ii) facilitate the efficient gathering and exchange of facts and evidence, in particular any underlying quantitative data, and
- ▶ (iii) use in an efficient way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative

Scope of the Best Practices

- ▶ Provides recommendations regarding the content and presentation of economic or econometric analysis.
 - ▶ This is meant to facilitate its assessment and the replication of any empirical results by DG Competition and/or other parties.
- ▶ Provides guidance to respond to Commission requests for quantitative data to ensure that timely and relevant input for the investigation can be provided.

Important Remarks

- ▶ The desire to ensure transparency and accountability that guide these best practices apply to all parties involved in proceedings, including DG Competition
- ▶ Best Practices do not create or alter rights or obligations as set out in the Treaty on the Functioning of the European Union and in secondary law
- ▶ Standard disclaimers:
 - ▶ Principles may be further developed and refined by DG Competition in individual cases when appropriate in light of future developments.
 - ▶ The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices.

Investigative tools and experience matters

Example of Bad Surveys*

- ▶ Newspaper Headlines (e.g. Daily Telegraph end of 2007):
 - ▶ **“Doctors Say No to Abortions in their Surgeries”**
 - ▶ (just imagine this headline reading
 - ▶ **“consumers say they will not switch in the event dominant firm raises its price by 5-10%”** or
 - ▶ **“competitors say the merging parties will refuse supply to a valuable input post merger”**)
 - ▶ “Family doctors are threatening to revolt against government plans to allow them to perform abortions in their surgeries[...]
 - ▶ Four out of five GPs do not want to carry out terminations even though the idea is being tested in NHS pilot schemes, a survey has revealed”

▶ *from “Bad Science” by Ben Goldacre.

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- ▶ Where do the figures come from? A systematic survey of all GPs, with lots of chasing to catch all non-respondents? Telephoning them at work?
 - ▶ No it was an online vote on a doctors' chat site where doctors go to complain that produced this major news story.
 - ▶ Here is the (sloppy) questions and the options given:
 - ▶ **“GPs should carry out abortions in their surgeries”**
 - ▶ Strongly agree, agree, don't know, disagree, strongly disagree”

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- ▶ What does “should” mean?
 - ▶ And what does “abortion” mean? (surgical vs. oral pill for termination)
 - ▶ Nearly all “respondents” seemed to think it was about surgical abortions.
Some comments:
 - ▶ “This is a preposterous idea. How can GPs ever carry out abortions in their own surgeries. What if there was a major complication like uterine and bowel perforation?”
 - ▶ “What are we going on about? Let’s all carry out abortions in our own surgeries, living rooms, kitchens, garages, corner shops, you know, just like in the old days”

Lessons from economic theory for competition lawyers and their clients?



“‘Honesty is the best policy.’ O.K.! Now, what’s the second-best policy?”

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- ▶ Current enforcement system seeks to maintain a welfare enhancing balance between effectiveness, speed, and due process
 - ▶ Parties and in particular their expert advisors share the responsibility with the Competition Authority to maintain this balance
 - ▶ “manifest errors of evidence production”
 - ▶ Sit on the evidence: “see no evil, hear no evil”
 - ▶ Cherry-picking:
 - ▶ Excuse me?: “Please explain as if I was a 5 year old”
 - ▶ Hold-up: “timely submitting evidence pays off later – holding it up until very last minute pays off now”
 - ▶ Smothering: “there is no needle in this haystack, we swear”
 - ▶ Obfuscation: “For every action, there is equal and opposite criticism”
 - ▶ Divide and conquer: “He who hesitates is usually right”

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- ▶ Such actions may allow the parties to obtain the desired outcome in a given case but if persistent and systematic they may prompt a step-back or a move towards a more adversarial enforcement system
 - ▶ Some may welcome such move but, in my view, an adversarial system is generally less predictable, slower, and significantly more burdensome.
 - ▶ And this would tend to chill pro-competitive conduct and limit the ability of firms to react and adapt to an ever changing competitive environment in ways that enhance profits and benefits consumers



Findings of the Court regarding “non-technical evidence”

- ▶ Par 136: Furthermore, the applicant’s assertion that the ‘non-technical evidence’ cannot be taken into account unless it is supported by ‘technical evidence’ cannot be upheld. There is no need to establish such a hierarchy.
- ▶ It is the Commission’s task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted. That examination and the associated reasoning are subject to a review of legality which the Court carries out in relation to Commission decisions on concentrations.
- ▶ It is thus in that context that it is necessary to examine the applicant’s arguments relating to the conclusions which should have been drawn by the Commission with regard to the various econometric analyses carried out during the administrative procedure and the impact which those conclusions should have had on the evaluation of the competitive situation.

When evidence points in different directions... (ref: airport substitutability):

- ▶ 108 ... The technique used by the Commission of bundling evidence to assess a concentration may, of course, include positive and negative factors. The conclusion which the Commission arrived at following its analysis of the various factors taken into consideration cannot be called into question simply because a negative factor also emerges from the investigation.
- ▶ That factor is duly noted and was taken into account by the Commission and, contrary to what the applicant asserts without demonstrating its assertion in any other way, was not distorted.

Evidentiary value of “imperfect” evidence: (e.g.: price correlation analysis):

- ▶ Par 115: In relation to the criticism of the price correlation analysis carried out during the administrative procedure, it should be noted that the Commission recognises that the price correlation does not prove that two airports fall within the same market. However, the Commission correctly submits that such a factor, together with others, constitutes a relevant factor for the analysis.
 - ▶ Par 116: ...The Commission can thus not be criticised for **having set out the reasons why the price correlation analysis could lead to limited results** while stressing at the same time that those results, *as limited as they might be*, **could none the less be taken into consideration under certain conditions**.
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