

Judging Competition Law Cases: The Role of Economic Evidence

Frederic Jenny

Professor of economics, ESSEC Business School

Lectures on Competition Policy

JOINT WORKSHOP CO-ORGANISED BY FNE, CRESSE AND ISCI

16th November 2016

Santiago, Chile

Issues to be addressed

- 1) Elements of economics useful in competition cases
- 2) The economic and the legal mind
- 3) Indirect economic evidence in cartel cases
- 4) Adoption of the economic approach to article 102 cases
- 5) Adoption of the *as efficient* test for exclusionary abuses of dominance by the Commission
- 6) The Intel case
- 7) Ten principles to follow when presenting complex economic evidence to a Court

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 process 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?

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.**

Measurement techniques

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 counterfactual (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.

Measurement techniques

(....) 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).

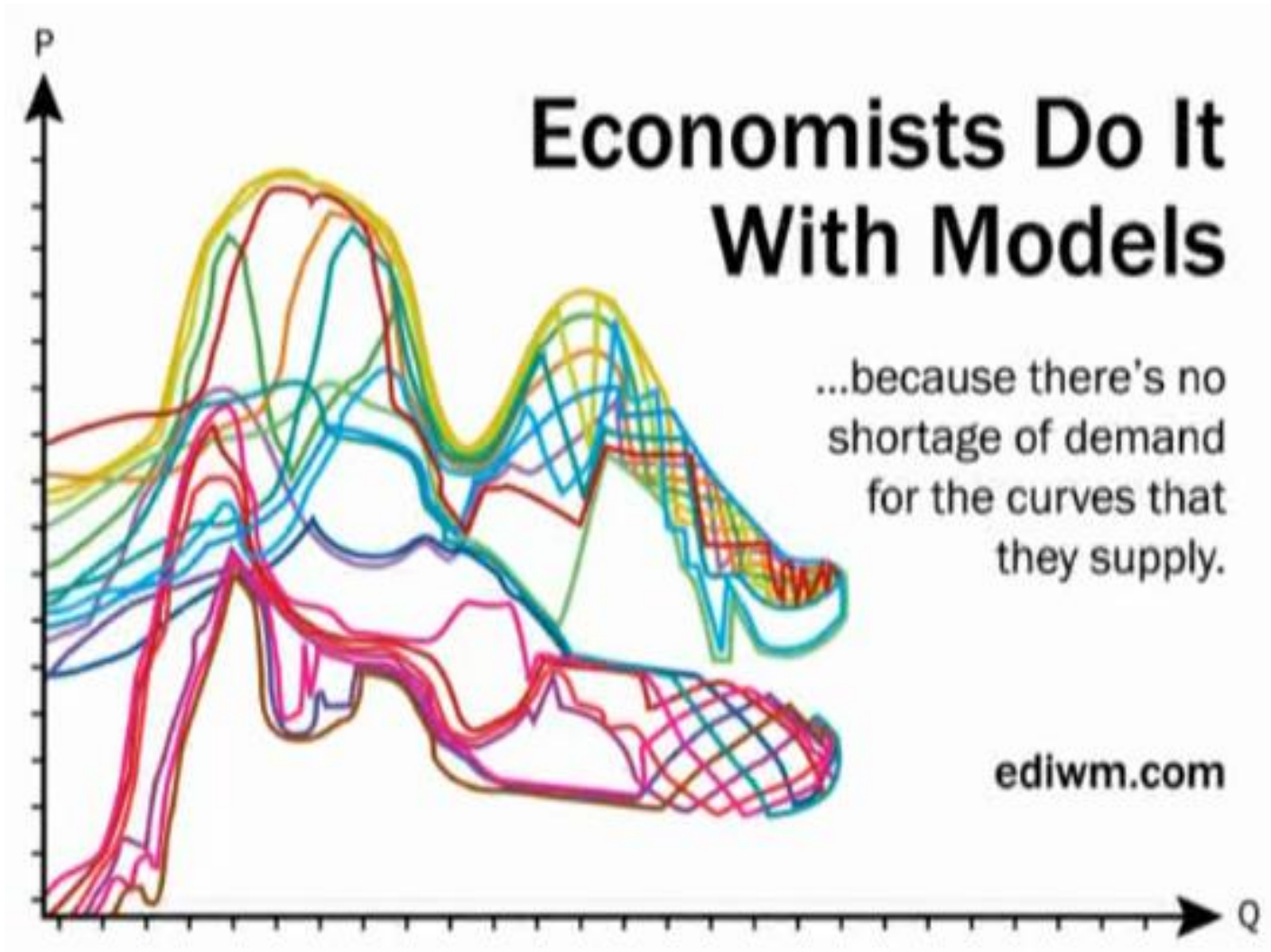
Both methods have become technically quite demanding and typically require the use of an expert trained in the use of statistics. Even in the hands of a qualified expert, both suffer from severe limitations depending on the circumstances. For example, two yardstick markets are not likely to have entirely 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 methodology



So how do judges do it ?



Some differences between the judicial and the economic perspectives

Economic perspective

Goal of the law

Relevant facts

Theory of harm

Indirect evidence

Correlation

Type I / Type II errors

Deterrence

Optimality

Economic harm

Economic jargon

Judicial perspective

What the Law Says

Facts

Applicability of general legal principle

Direct evidence

Causality

Standard of proof

Proportionality

Predictability

Legal prejudice

Legal jargon

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:

... " [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 "concerted action"—an actual agreement—instead of the unilateral, independent conduct of competitors". "

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

Other jurisdictions seem to apply similar analysis.

Evidence of anticompetitive agreements

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."

Difficulty to find 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 co-operation 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.

Indirect evidence employed in cartel detection 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**

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., imultaneous 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**

Communication evidence

- 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 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.

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 (ie. 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 be linked directly to a specific agreement.

OECD Competition Committee Roundtable Prosecuting Cartels without Direct Evidence 2006

Case 1: Bid rigging detection and circumstantial evidence

- Facts of the case
- 1) Seven firms are in the lumber and plywood business;
- 2) The relevant government office offers for sale at public auction the various tracts of timber scheduled for cutting;
- 3) Lumber and plywood manufacturers receive announcements sufficiently in advance of each sale so that, as potential buyers, they may decide whether and how much to bid. The announcement indicates the quality, quantity, and location of the timber, the difficulty of logging, hauling distances, road-building requirements, climate and weather conditions, and other factors that may or may not make a particular sale attractive.
- 4) The seven firms who have operated for a long time in the area are in a position to supplement the public announcements with their own knowledge of the timber and terrain.

Case 1: Bid rigging detection and circumstantial evidence

- **Facts of the case**
- 8) From that time this new (non competitive) bidding pattern continues.
- 9) There is evidence that managers or agents of the seven firms began meeting from time to time to review the government's forecasts of upcoming sales. **At these meetings the firms discussed among themselves which of the sales would be most interesting to each respective bidder. But there is no evidence that they decided anything.**
- 10) The **government is unable to introduce direct evidence of an express agreement**, but argues that the circumstantial evidence proved the existence of the tacit agreement. More specifically it argues that no matter how self-evident the economies of the bidding conduct of the firms may have been, independent pursuit of self interest could not overcome the inference of collusion which is almost compelled by the **methodical manner in which the firms took turns acquiring without substantial competition most of the various cutting contracts offered by the Forest Service during the period covered by the indictment.**

Case 1: Bid rigging detection and circumstantial evidence

- Facts of the case

- 5) For a number of years several of the seven firms submit competing bids for each tract of timber scheduled for cutting. This period is marked by intensely competitive bidding, sometimes bringing into government coffers prices three times the appraised value of the timber offered in the auctions.
- 6) This "bidding war" comes to a halt on January 1 2010 , when firm A "is surprised" to find no one bidding against it at an auction of a small offering of government timber.
- 7) Firm A decides "to experiment", and later that same day offers no bid against firm B on another sale, with the result that Firm B takes the second sale at a nominal figure over the appraised price.

Case 1: Bid rigging detection and circumstantial evidence: the defendants' arguments

- A) In a general way, the extent of a firm's interest in a future sale could have been predicted by anyone familiar with the firm's hauling distances, its product mix, its manufacturing capacity, and the other factors that determine a sale's relative desirability to that firm .
- B) The firms point to the undisputed economic and geographic factors relevant to any bidding on timber by the local operators, and argue that there was no conspiracy just the exercise of ordinary common sense by individual bidders who saw no reason to throw their money away, and who were under no legal duty to do so.
- C) **The firms argue that it must be shown that the conspiracy was knowingly formed, and that they willfully participated in the unlawful plan and that there is no such evidence.**
- D) The government is unable to provide proof of an agreement

Case 1: Bid rigging detection and circumstantial evidence: The court's decision

- This case summarizes the facts of **the USA v. Champion International Corporation case (557 F.2d 1270 1977-1 Trade Cases 61,442, 1 Fed. R. Evid. Serv. 716)**
- The defendants were convicted of engaging in a combination and conspiracy in restraint of trade. The specific charges were that they entered into a continuing agreement, understanding and concert of action: “
- (1) to eliminate competitive bidding for United States Forest Service timber;
- 2) to allocate United States Forest Service timber among themselves;
- (3) to fix, reduce, and stabilize the price paid for United States Forest Service timber at or near the minimum acceptable bid set by the United States Forest Service.

Case 1: Bid rigging detection and circumstantial evidence: the court's decision

- The trial court agreed with the defendants **that a new bidding pattern had developed by "normal economic forces"**, presumably in a noncollusive evolution, and it "delighted" the bidders.
-
- The court went on to note that for the **next two or three logging seasons the defendants were able to buy most of the sales they wanted at prices approximating the government's appraised prices**. (If a sale did not bring at least the appraised price, the government would cancel the sale.)
- But despite the innocent beginnings of the noncompetitive bidding, the **trial court found collusion in its continuation**.

Case 1: Bid rigging detection and circumstantial evidence: the court's decision

- The court found that the circumstantial evidence proved the existence of the tacit agreement
- The court found that the meetings were not innocent contrary to what the defendants had argued. It held that "In a general way, the extent of an individual operator's interest in a future sale could have been predicted by anyone familiar with the operator's hauling distances, his product mix, his manufacturing capacity, and the other factors that determine a sale's relative desirability to that operator. However, **the defendants did not leave the exchange of this information to chance. During the time covered by the indictment the defendants advised each other about the future sales upon which they were most likely to bid. Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants "had an understanding" about bidding.**

Case 2: Parallel price increases and tacit agreement

- 1) In the chemical production, product X is a mass-produced product sold to paper companies. X is a homogenous good (little differentiation)
- 2) The top three producers of X account for about 70% of the market. Altogether there are 8 firms producing X
- 3) The market for X is quite difficult for the suppliers because the buyers (the paper manufacturers) have a lot of buying power. As a result the price of product X is declining even though the cost increases.
- 4) All 8 manufacturers belong to the trade association of X producers which holds frequent meetings among its members
- 5) Several meetings are attended by 7 of the 8 firms during a ten months period starting on January 1st 2010. Senior managers participate In those meetings and they **exchange information and opinions about how to stop the decline in the price of product X and how to increase its sales price**

Case 2: Parallel price increases and tacit agreement

- 5) On June 10, 2010, the 8 firms hold a meeting during which the three majors express their intention of increasing their price and ask the remaining five firms to follow the price increase. It appears that the three largest firms have entered an agreement.
- 6) None of the remaining 5 firms express disapproval of the price increase by each of the three major companies. But there **is no proof that these 5 firms agree to raise their price.**
- 7) Following the meeting of July 1st 2010, each of the three main firms increase their price.
- 8) **On August 21 2010, each of the 5 other firms increase their price.**

Case 2: Parallel price increases and tacit agreement: the court's decision

This case is very close to the Toshiba Chemical case in Japan.

In its judgment the Tokyo High Court on September 25, 1995 stated
1) that it was not necessary to prove an explicit agreement for the Japan Antimonopoly law to apply.

The court gave the following reason for this interpretation: **By the nature of such an agreement as 'Unreasonable Restraint of Trade,' companies usually try to avoid making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove 'Unreasonable Restraint of Trade,' the entrepreneurs could easily get around the hands of the law, and therefore it is obvious that such an interpretation is not appropriate in reality."**

Thus the mere existence of a tacit agreement should be considered sufficient to prove a "liaison of intention" (or a " meeting of the minds"). The court said "The said "liaison of intention" means that an entrepreneur recognizes or predicts implementation of the same or similar kind of price-raising among entrepreneurs, and accordingly intends to collaborate with such price-raising".

Case 2: Parallel price increases and tacit agreement: the court's decision

In its judgment the Tokyo High Court on September 25, 1995 stated

2) That in order to prove a “liaison of intention” (or “ a meeting of the minds”),” though the mere recognition or acceptance of an entrepreneur’s price-raising by another entrepreneur is not sufficient, explicit agreement binding the related parties is not necessary. In other words, **“liaison of intention” can be proven by showing mutual recognition of other entrepreneurs’ price-raising and tacit acceptance of such price-raising by another.**

Case 2: Parallel price increases and tacit agreement: the court's decision

In its judgment the Tokyo High Court on September 25, 1995 stated

3) As regards the proof of a tacit agreement, the court in the Toshiba Chemical case stated: “Recognition and intention of the entrepreneurs should be considered by examining various circumstances before and after the price-raising, and then evaluation of whether there is mutual recognition or acceptance among entrepreneurs regarding the price-raising or not.”

Thus, in the absence of any explicit, mutually binding agreement, the existence of a tacit agreement may be proven by indirect evidence attesting to

- a) the existence of prior exchange of information and opinions among the parties concerned;**
- b) the content of negotiations among the parties concerned; and**
- c) a concerted act as a result.**

The use of indirect evidence in Japan

A cartel agreement is generally reached behind closed doors among entrepreneurs. It is a very important challenge for a competition authority to determine how to detect and prove the existence of such an agreement. As entrepreneurs have recently been more skillful in establishing cartel agreements for fear of being prosecuted by competition authorities, it is becoming more and more difficult to detect direct evidence of agreement in a cartel. Thus, in cartel cases without direct evidence, it is essential to prove the existence of cartels reasonably by the accumulation of relevant facts which are established based upon indirect evidences.

The ‘JFTC’ bases its approach on the theory that explicit agreement among the entrepreneurs is not necessary to prove a cartel agreement; i.e., ‘laison of intention,’ and a tacit agreement suffices.

In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court recognised this theory.

Establishing the proof of a tacit agreement in Japan

Different cases require different forms of evidence to prove the existence of a liaison of intention.”In particular, judgment on a tacit liaison of intention”has to be made on a case-by-case basis.

The three criteria identified in the Toshiba Chemical case would require that the following indirect facts, for example, be found:

- **Existence of prior exchange of information and opinions among the parties concerned**
 - Frequent meetings prior to the price increase
 - Telephone conversation or e-mail on such meetings
- **Content of negotiations among the parties concerned**
 - Current condition of the industry
 - Exchange of information on current price, etc.
 - Declaration of intention to raise the price
 - Discussion of measures to be taken against discounters
- **Concerted act as a result**
 - Actual price-raising by the entrepreneurs
 - Entrepreneurs’ pricing decision process

Case 3: economic evidence and communication evidence

Facts of the case:

- 1) The production of an industrial product is highly concentrated (there are just a few producers)
- 2) The product is homogeneous
- 3) Price is the most important feature of competition
- 4) Several times in the relevant period the producers raise their list prices by identical amounts and within close time frames.
- 5) There are high fixed costs in the industry

Case 3: economic evidence and communication evidence

Facts of the case

5) There is substantial excess capacity

6) The increases were not prompted by any change in costs or demand, and their result was to attract a new entrant.

7) There were a series of meetings and communications in which prices were discussed.

8) Internal records of the participants indicated that they typically had knowledge of one another's pricing policies that they could not have acquired by public means.

Case 3: economic evidence

This case is substantially the Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004) in the US.

The Department of Justice relied on **several structural economic evidence** (on concentration, high fixed costs, excess capacity) and **several conduct economic evidence** (simultaneity of increases in price, the fact that the price increases were not justified by costs or demand variations).

But the court said that while this evidence was important, it was not sufficient in this case: 'The most important evidence will generally be non-economic evidence that there was **an actual, manifest agreement not to compete.**'"

There was also ample evidence of this kind. There had been a series of meetings and **communications** in which prices were discussed. Internal records of the participants indicated that they typically had knowledge of one another's pricing policies that they could not have acquired by public means.

The court held that in its totality the circumstantial evidence was sufficient to support the finding of an unlawful agreement.

Report by the EAGCP (July 2005)

Why an economic approach to Article 82 ?

Second, the economics-based approach guarantees that the statutory provisions do not unduly thwart pro-competitive strategies. **An effects-based analysis takes fully into consideration the fact that many business practices may have different effects in different circumstances: distorting competition in some cases and promoting efficiencies and innovation in others.** *

A competition policy approach that directly confronts this duality will ensure that consumers are protected (through the prevention of behaviour that harms them) while promoting overall increased productivity and growth (since firms will not be discouraged in their search for efficiency).

Report by the EAGCP'(July 2005)

What are the implications of an economic approach?

An economics-based approach to the application of article 82 implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anti-competitive effects generated by business behaviour.

This implies that competition authorities (and courts) will need to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains. The identification of competitive harm requires spelling out a consistent business behaviour based on sound economics and supported by facts and empirical evidence. Similarly, efficiencies –and how they are passed on to consumers– should be properly justified on the basis of economic analysis and grounded on the facts of each case.

Procedural implications

Moving from a form-based to an effects-based approach has important implications for procedure. **Whereas under a form-based approach, it is enough to verify (i) that a firm is dominant and (ii) that a certain form of behavior is practiced, an effects-based approach requires the verification of competitive harm.**

In the first place, in deciding to bring a case, the competition authority should therefore focus on identifying the competitive harm of concern. To do so, **the authority must analyze the practice in question to see whether there is a consistent and verifiable economic account of significant competitive harm.** The account should be both based on sound economic analysis and grounded on facts. In particular, **since many practices can have pro, as well as anticompetitive effects, merely alluding to the possibility of a story is not sufficient. The required ingredients of the story must therefore be properly spelled out and shown to be present.** At the same time, the authority must check to see whether the practice in question cannot also be justified as a legitimate mode of competitive behavior. If several interpretations are possible, the authority must investigate whether the data permit a distinction as to which of the different interpretations apply.

Possible use of various tests

Test	Profit sacrifice <i>Willig</i> <i>Ordover</i>	No Econ sense	Equally efficient <i>Posner</i>	Consumer surplus	Elhauge <i>Elhauge</i>
Applicable	Predation Limit pricing Mixed Bundling (difficult or impossible ?)	Cheap Exclusion Refusal to deal (Trinko?)	Fidelity rebates (British Airways) Margin squeeze	Bundling and Tying Discrimination Abusively high prices	Refusal to deal Exclusive dealing Conditional selling
Inapplicable	Refusal to deal			Predatory pricing	

2009 Publication of the Guidance notice on Article 82

The Commission Communication – **Guidance** on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. C45/7 (“Guidance Notice”) embodies some of the effect based spirit which dominated the Article 82 EC consultation.

It states that **its purpose is to set out the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings.**

Alongside the Commission's specific enforcement decisions, it is **intended to provide greater clarity and predictability on the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct** and to help undertakings better assess whether a certain behaviour is likely to result in intervention by the Commission under Article 82.

The adoption of the As Efficient Test in the Guidance paper

“The following considerations apply to price-based exclusionary conduct.

Vigorous price competition is generally beneficial to consumers.

With a view to preventing anticompetitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking”.

2009 Publication of the Guidance notice on Article 82

The introduction of effect based variants in the Commission's analysis is to be welcomed. It reduces the risk of over regulation and of chilling competition, which may result from formalistic analysis. It aims to distinguish between competition on the merits and anticompetitive unilateral action.

Yet, the practicality of the effect based analysis is challenging. The move from a formalistic approach to an economic based approach creates **uncertainty as to the relevant benchmarks used to establish an abuse and their limiting principles.**

The Intel case

The products concerned by the Decision are **Central Processing Units (CPU) of the x86 architecture**. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's "brain". The manufacturing process of CPUs requires high-tech and expensive facilities. **The market is worldwide.**

In the 10 year period covered by the Decision (1997-2007), Intel held consistently very **high market shares in excess of or around 70%.**

Since 2000, Intel and AMD are essentially the only two companies still manufacturing x86 CPUs.

Intel conditional rebates

Hypothesis: the competitor cannot supply more than 25.000 to the consumer

Unit price of microchips for Intel **10**

Average cost of microchips for Intel 8

Quantity bought by NEC 100.000

Rebate for NEC if it buys 80% of its
Demand from Intel = 10%

Cost for NEC of 100.000 units = **900.000**

Unit price of microchip for AMD **7**

Average cost of microchips AMD 6,5

Quantity bought by NEC
with Intel 75.000
with AMD 25.000

Rebate for NEC granted by Intel = 0%
(The condition that it buys 80% from
Intel is not met)

Total cost of getting 100.000 units for
NEC :

$75000 \times 10 = 750.000 +$

$25000 \times 7 = 175.000$

Soit **925.000**

The Intel case:

The as efficient competitor test

(28) On top of showing that the conditions of the case-law for finding an abuse are fulfilled, the **Decision also conducts an economic analysis of the capability of the rebates to foreclose a competitor which would be as efficient as Intel, albeit not dominant.**

In essence, the **test establishes at what price a competitor which is 'as efficient' as Intel would have to offer CPUs in order to compensate an OEM for the loss of any Intel rebate.**

(29) This as efficient competitor analysis is a hypothetical exercise in the sense that it analyses whether a competitor which is as efficient as Intel **but which seeks to offer a product that does not have as broad a sales base as that of Intel is foreclosed from entering.** This analysis is in principle independent of whether or not AMD was actually able to enter.

The General Court judgment in the Intel case

12 June 2014

143 First of all, it should be recalled that a finding that **an exclusivity rebate is illegal** does not necessitate an examination of the circumstances of the case . **The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis.**

144. **Next, it follows from the case-law that, even in the case of rebates falling within the (...) category, for which an examination of the circumstances of the case is necessary, it is not essential to carry out an As Efficient Competitor test.**

Thus, in Michelin I, paragraph 74 above (paragraphs 81 to 86), the **Court of Justice relied on the loyalty mechanism of the rebates at issue, without requiring proof, by means of a quantitative test, that competitors had been forced to sell at a loss in order to be able to compensate the rebates falling within the third category granted by the undertaking in a dominant position.**

The General court judgment in the Intel case (12 June 2014)

145 Moreover, it follows from Case C-549/10 P Tomra, paragraph 73 above (paragraphs 73 and 74), that, in order to find anti-competitive effects, it is not necessary that a rebate system force an as-efficient competitor to charge 'negative' prices, that is to say prices lower than the cost price. **In order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism** (see, to that effect, Case C-549/10 P Tomra, paragraph 73 above, paragraph 79).

146 It follows that, **even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would still not be necessary to demonstrate those effects by means of an As Efficient Competitor test.**

The General Court judgment in the Intel case (12 June 2014)

149 First of all, it should be borne in mind that a **foreclosure effect occurs not only where access to the market is made impossible for competitors. Indeed, it is sufficient that that access be made more difficult** (see paragraph 88 above).

150. However, **it must be stated that an As Efficient Competitor test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult.** (....) However, a positive result means only that an as-efficient competitor is able to cover its costs (in the case of the AEC test as carried out in the contested decision and proposed by the applicant, only the average avoidable costs). That does not however mean that there is no foreclosure effect. **The mechanism of the exclusivity rebates (...), is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible.**

Advocate General Kokott in the Post-Denmark case (21 May 2015 Case C-23/14)

2. (...) **The crux of the issue here is whether Post Denmark engaged in an exclusionary practice by granting rebates of up to 16% on the distribution of direct advertising mail provided that its customers reached certain standardised volume or turnover thresholds over a reference period of one year.** The rebate in question was retroactive, which is to say that it was applied to all direct advertising mail distributed for the customers concerned throughout the reference period.

4. These questions are **particularly important at a time when there are mounting calls for European competition law to adopt a more economic approach.** It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case, **the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.**

Advocate General Kokott at her desk



Advocate General Kokott in the Post-Denmark case (21 May 2015 Case C-23/14)

65. It would of course **not be inconceivable**, in theory, **to make a finding of price-based exclusionary conduct routinely conditional on the carrying out of an As Efficient Competitor test**, and therefore to prescribe such a test also in the case of rebate schemes operated by dominant undertakings. **However, such a reorientation of the case-law concerning Article 82 EC warrants some scepticism, on a number of grounds.**

Advocate General Kokott in the Post-Denmark case (21 May 2015 Case C-23/14)

66. On the one hand, **the added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of the competition authorities and the courts, which are then unavailable for the purposes of effectively enforcing the competition rules in other areas.** The methodology applied can (as the submissions made before the Court by Post Danmark, Bring Citymail and the Danish Government amply demonstrate) prompt considerable differences of opinion. What is more, **the data available for use as a basis for such analyses are not always reliable and presuppose that the dominant undertaking is genuinely ready to cooperate with the competition authorities and the courts,** which, as the German Government has pointed out, is not always necessarily the case.

Advocate General Kokott in the Post-Denmark case (21 May 2015 Case C-23/14)

67. On the other hand, **it is wrong to suppose that the issue of price-based exclusionary conduct can be managed simply and in such a way as to ensure legal certainty by applying some form of mathematical formula based on nothing more than the price and cost components of the businesses of the undertakings concerned.** As I have already said, corporate data is not uncommonly open to different interpretations.

68. In particular, however, a finding of abuse in the context of Article 82 EC, as in other contexts, always requires an evaluation which takes into account all the relevant circumstances of the individual case in question and must not be confined to an examination of price and cost components alone. On the contrary, **there are many other factors, such as the specific modus operandi of a rebate scheme and certain characteristics of the market on which the dominant undertaking operates, that may also be relevant to a finding of abuse. In fact, they may be much more informative than a price/cost analysis.**

Advocate General Kokott in the Post-Denmark case (21 May 2015 Case C-23/14)

71. It follows a fortiori that Article 82 EC is not capable of giving rise to a legal obligation to carry out an As Efficient Competitor test where, because of the way in which the market is structured, it is impossible for another undertaking to be as efficient as the dominant undertaking. This may be because of the particular conditions of competition prevailing on the relevant market (such as the fact that the market — as here — is characterised by high barriers to entry, high economies of scale and/or network-based services) or because the level of the dominant undertaking's costs is specifically attributable to the competitive advantage which its dominant position confers on it. (45)

Wouter Wils on the Intel judgment

the (post-)Chicago (consumer) **welfarist approach to competition** takes a unduly narrow view of the benefits of undistorted competition, by considering only the value of maximal achievement (consumer welfare or efficiency), while **neglecting the process values of undistorted competition (including the right to compete on the merits, and equality of opportunity between economic operators)**.

Wouter Wils: “The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance, *World Competition*, Volume 37, Issue 4, December 2014, pp. 405-434

Wouter Wils on the Intel judgment

In the EU legal system, which is founded on the rule of law, it is the task of the Court of Justice to provide the authoritative interpretation of Article 102 TFEU (....)

The Court of Justice does not have complete freedom to adopt any interpretation of Article 102 TFEU, nor the European Commission to propose any interpretation. Indeed, even if the prohibition of abuse of a dominant position laid down in Article 102 TFEU is to a significant extent vague, and thus leaves scope for different interpretations, **Article 102 TFEU and the EU Treaties as a whole contain a number of rules, principles and statements of purpose that are binding upon the Court of Justice and the European Commission, and that could only be altered by changing the Treaties.**

Wouter Wils: “The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance, *World Competition*, Volume 37, Issue 4, December 2014, pp. 405-434

Wouter Wils on the Intel judgment

The EU Treaties clearly specify the objective of the EU competition rules. Hence there is no room for the Court of Justice or the European Commission (or the competition authorities and courts of the EU Member States, when applying EU competition law, or the Council, when exercising its legislative powers under Article 103 TFEU) to make a different choice.

Indeed, **it is clear from Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon, that the objective of Article 102 TFEU (and of the other EU competition rules) is a system of undistorted competition, as part of the internal market established by the EU**

(...)

Wouter Wils: “The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance, *World Competition*, Volume 37, Issue 4, December 2014, pp. 405-434

Protocol (N°27) on the internal market and competition

The High contracting parties,

Considering that the internal market as set out in Article 3 of the Treaty on European Union **includes a system ensuring that competition is not distorted,**

Have agreed that:

To this end , the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union

Wouter Wils on the Intel judgment

Article 102 TFEU and the other EU competition rules thus protect the competitive process as such. In doing so, the EU competition rules no doubt have positive effects on consumer welfare and on efficiency, but the EU Treaties do not allow these effects to be substituted for the objective of a system of undistorted competition, to the exclusion of the other benefits of undistorted competition (recognised by many economists, from Adam Smith to Amartya Sen, as mentioned above), such as variety and consumer choice, the right to compete on the merits, and equality of opportunity between economic operators.

Wouter Wils on the Intel judgment

(....) a system of undistorted competition as part of the internal market is the objective of Article 102 TFEU as determined by the EU Treaties. **Whatever views this or that economist or other person or many or most of them may have as to what the objective of Article 102 TFEU should be is irrelevant, unless a debate were to be opened on changing the EU Treaties.**

Wouter Wils on the Intel judgment

Indeed, the right to compete on the merits and equality of opportunity between economic operators are particularly important aspects of the objective of a system of undistorted competition as part of the internal market, because they reflect the fundamental idea that economic operators from any EU Member State should have equal and undistorted access to the market throughout the EU internal market.

Wouter Wils on the Intel judgment

(...) the **objective of Article 102 TFEU** (and of the other EU competition rules) **is a system of undistorted competition**, as part of the internal market established by the EU.

The EU case-law is properly effects-based, in that it considers practices on the basis of their effects on this objective. In the absence of an objective justification, the use of exclusivity rebates by a dominant undertaking is prohibited, because, as the General Court explained in the Intel judgment, "**the capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates**" and "**the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market.**" The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor".

Wouter Wils on the Intel judgment

All relevant effects of the choice of interpretation should be considered, including enforcement costs and risk allocation

The effects of the business practice are not the only relevant effects.

When choosing between one or another interpretation of Article 102 TFEU (for instance, between the existing EU case-law and the so-called 'more economic approach'), all relevant effects of the choice of interpretation should be taken into account, including enforcement costs, and the degree of legal uncertainty and the corresponding allocation of risk.

Advocate General Nils Wahl



Advocate General Nils Wahl on the Intel judgement

An analysis of the context of the impugned conduct aims to ascertain that it has been established, to the requisite legal standard, that an undertaking has abused its dominant position. Otherwise, conduct which on occasion is simply not capable of restricting competition would be caught by a **blanket prohibition**. Such a blanket prohibition would also risk catching and penalising pro-competitive conduct.

The Advocate General therefore **concludes that the General Court erred in finding that 'exclusivity rebates' constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position.**

Court of Justice of the European Union PRESS RELEASE No 114/16 Luxembourg, 20 October 2016 Advocate General's Opinion in Case C-413/14 P Intel Corporation Inc. v Commission

What to do when presenting complex economic evidence to a Court



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.**