



Regional Workshop On **ECONOMIC ANALYSIS FOR COMPETITION LAW ENFORCEMENT**

HOW TO TALK TO JUDGES AND OTHER LAYPERSONS ABOUT ECONOMICS

2 June 2016 | Putrajaya, Malaysia





AGENDA

- 1) Starting Point: Understanding economics seems useful for judges
- 2) Fundamentals: Covering all areas of competition policy
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- 4) In More Detail: Remarks on the different areas
 - a) Cartels
 - b) Relevant market and market power
 - c) Abuse of dominance





1. Starting Point: Understanding economics seems useful for judges

Baye and Wright (Journal of Law & Economics, 2011) used a data set on antitrust litigation in federal district and administrative courts in the US during 1996-2006 to show that:

- the probability of appeals is increasing in the **complexity of cases**;
- decisions by judges with **economic training** (in the George Mason University Law and Economics Center (LEC)) are less likely to be appealed;
- there is an **interaction** between the two variables.

Thus, economic reasoning does not seem to be completely useless.





2. Fundamentals: Covering all areas of competition policy

- 1) Keep things **simple**.
- 2) Start with economic reasoning on the **facts of a case**, and not with statistics.
- 3) Whenever (descriptive) **statistics** is presented, explain first **why and to which end this is required** (this is not only useful for presenting to judges, but also for matters of self-discipline).
- 4) Do **not overload descriptive statistics**, for instance by presenting the market shares for x different products in y different companies over z years. Summarize the main results and relegate details to an Appendix.



2. Fundamentals: Covering all areas of competition policy

- 5) Present **figures instead of tables**. Be careful to emphasize the difference between percentage points and percent.
- 6) Relegate econometrics (if applied at all) to the Appendix, but **explain the technique in simple words** in the text. The logic behind a regression analysis is simple, if explained accordingly.
- 7) Emphasize that one can **never ever provide „proof“ by statistical analysis**: Statistical analysis is supposed to back up, and not to substitute for legal and economic reasoning.
- 8) Still, explain carefully and in plain words **what a significance level actually means** and that statistics is just an important tool for assessing circumstantial evidence.



2. Fundamentals: Covering all areas of competition policy

- 9) Discuss the material provided by companies in a fair manner and explain in simple words why you believe that the own analysis is right to the point.
- 10) Point carefully to **potential counterarguments** to your own analysis.
- 11) Do **not try to convince judges by statistical arguments when cases are weak**; this is likely to have serious negative long-term effects.
- 12) Do **not take a sledgehammer to crack a nut**, simply because you are good at statistics.



3. Differentiation: A different role of economics for different areas

- **For most cartels** (with well understood exemptions)
 - it can safely be assumed that **they are detrimental**, i.e. that they reduce both consumer surplus (CS) and welfare (CS+PS).
 - Thus, **the main role of economics is to analyze whether cartel behavior has actually taken place**. As for this, *statistical* issues may be crucial. This holds particularly true for public procurement.
- **For the definition of relevant markets and the analysis of market power**, the design and **analysis of surveys**, i.e. developing questionnaires, choosing the appropriate subject pool, and assessing the results is often important.



3. Differentiation: A different role of economics for different areas

- **For abuse of dominance**, it is about understanding whether a specific business practice **has negative effects on consumers and/or competitors**, i.e. **economic reasoning is fundamental**, while (advanced) statistics is often less important.
- **The assessment of M&A** is, in many respects, **similar to the definition of relevant markets** and the analysis of market power, with the main difference that it relates to „hypothetical market power“.



4. In More Detail: Cartels

Whenever there is hard evidence (documents or sufficiently many and clean confessions), cartel conviction is no issue.

Thus, it is about cases „without direct evidence“. In „talking to judges“, the following things seem to be crucial:

- Restrict attention to cases where you are convinced that
 - a) cartel formation took place
 - b) the case is of high importance
 - c) circumstantial evidence is overwhelming

- Create an environment (not only in cases, but generally) where judges understand that **restricting attention to hard evidence makes cartel conviction often impossible** → too many type II-errors (at the same time, emphasize the dubio-in-reo-principle).



4. In More Detail: Cartels

Emphasize that a holistic approach needs to be taken: **There is nothing like one piece of evidence that makes it evident.** Then, proceeding along the following lines seems promising:

- 1) Start with **simple statistical key factors** such as prices, regional divisions, and comparable markets if possible. Thereby,
 - relegate complex statistics to the Appendix;
 - frankly point to the possibility of tacit collusion but provide arguments why tacit collusion is less likely than cartel formation.

This is far more promising for (complex) business practices (e.g. discount schemes or regional differences in prices) compared to e.g. standard prices and quantities. **Keep in mind: Procurement cases are most promising.**



4. In More Detail: Cartels

- 2) Proceed to what you know on any kind of **information exchange**. Explain why exchanging information is required for
 - coordination on strategies and
 - dividing the surplus.

- 3) When possible, **assess the detrimental economic consequences** (i.e. basically the likely mark-up coming from cartel behavior).

- 4) When possible, **refer to similar cases** from other countries or comparable markets, to show that the circumstantial evidence presented is reasonably authoritative.



4. In More Detail: Relevant market and market definition

- 1) Except for trivial cases, **pure intuitive reasoning is not sufficient** for defining the relevant market (different kinds of groceries, airlines serving different routes, gas stations in different regions,...).
- 2) Nevertheless, irrespectively of what you did, start with some intuitive reasoning and rationalize why additional analyses may be required. If so, **refer to the SSNIP-test** in order to convey the reasoning behind an empirical analysis.
- 3) **Survey data is pretty easy to understand**, and results are usually perceived as interesting also by non-experts. Thus, surveys for defining the relevant market may serve as a nice starting point for inspiring lawyers' interest in statistical analyses.



4. In More Detail: Relevant market and market power

- 4) Structure the material **in very simple graphs and explain carefully** how the subject pool was chosen. No details on statistical results required;
- 5) Focus on **results that are potentially not perfectly intuitive**;
- 6) Anticipate and **partially discuss potential objections**;
- 7) This may be **complemented by simple statistics from the data**, e.g. price correlation (but most often, this should then be backed up by regression analyses in the Appendix). Surveys are usually to be preferred;



4. In More Detail: Relevant market and market power

- 8) For market structure and market power one may rely **mainly on market shares**, potentially amended by information on **vertical relationships**.
- 9) Additional facts contributing to market power (or not) **should be structured in a table**; but statistical analyses will most often not be carried out (time consuming, difficult and - in particular - always challengeable).
- 10) **Back up with international cases** whenever possible.



4. In More Detail: Abuse of dominance

- 1) Economic **training for judges** seems fundamental, as the anti-competitive effects of e.g. specific kinds of discounts are not so easy to understand.
- 2) The **use of statistics** for assessing potential abuse is **far less common** compared to defining the relevant market and detecting collusion:
 - Requires assessing the **consequences of non-price-related business practices**, which is rather challenging.
 - Statistics could be used, however, **for predatory pricing**, where the same reasoning as for the other fields applies (start with simple statistics on prices and costs, relegate potential regression analyses to the Appendix).



4. In More Detail: Abuse of dominance

- 3) Thus, for abuse, the most important part from economics is **economic reasoning**. Thereby
- describe the well-known potential **detrimental consequences** of the business practice applied;
 - clearly point to the **specifics of the case** (see e.g. the decision on Michelin II) and discuss pros and cons;
 - proceed to a **fair assessment**
 - relate, if possible, to **other cases** when feasible.
- 4) For young agencies, one might wish to restrict attention to business practices that have often been challenged, i.e. to
- predatory pricing,
 - exclusive dealing, and
 - unjustified discrimination between trading partners.



Thank you for your attention!





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