

Reliance on economic assessment in competition law enforcement

– Conference on Competition Law in Iceland

Simen Karlsen | Reykjavik | 19 May 2011

INFORMED DECISIONS



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Agenda

- **Increasing importance of economics in competition law**
- Challenges when using economics in competition law
- Surmounting the challenges – why and how?

Key developments in the last decade

- Increased focus on economics in the European Courts
 - > Several reversals in court, primarily due to inadequate economic reasoning and evidence, e.g. Airtours, GE/Honeywell, Tetra Laval/Sidel, Schneider/Legrand
 - > Court of First Instance in Schneider/Legrand:

“The Commission’s economic analysis is vitiated by errors and omissions which deprive it of probative value [...]”

Source: Court of First Instance Press Release No. 84/02, Oct. 22, 2002

- Increased focus on economics in the European Commission
 - > EC Guidance paper on exclusionary conduct (art. 102)

“The Guidance Paper constitutes a shift towards an economics-based approach to abusive conduct under Article 82. [...] In sum, the Guidance Paper reflects the current state of economic thinking and, as such, presents a solid and sound base for enforcement, and thereby provides greater clarity and predictability as to the circumstances that are liable to prompt an intervention by the Commission.”

Source: D. Neven & M. de la Mano (2009), Economics at DG Competition, 2008–2009,

Key developments in the last decade

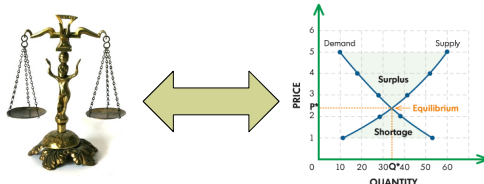
- Increased use of economists in competition authorities
 - > Establishment of chief economist team in the European Commission and in national competition authorities (e.g. DK, NL, FR, ES)

“There is also a need to improve the commission’s resources devoted to dealing with merger investigations, and in particular its economic capabilities. That is why I will be proposing to create a new position of chief competition economist, complete with the staff needed to provide both an independent economic viewpoint to decision-makers and guidance throughout the investigation process.”

Source: Mario Monti in The Economist (2002-11-07), Europe’s merger control

Economics an intrinsic part of competition law

- Natural relationship between economics and competition law
 - > Key concepts of competition law, e.g. “*competition*”, “*monopoly*”, “*oligopoly*”, and “*barriers to entry*”, are concepts derived from economics.



- Two goals of EC competition policy:
 - > Economic goal: Promotion of effective and undistorted competition. Focus on economic efficiency and consumer welfare
 - > Integration goal: Promotion of integration between Member States

→ The application of competition law should take economics into consideration

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Potential for “abuse of economics”?

- However, there is still a reluctance towards using economics in competition law
 - >One reason: Economic analysis is often considered complex and confusing
- This creates a potential for “abuse of economics”
 - >Fear that using economic analysis in competition cases may...

... be complex:

*“An **over-theoretical or exuberant approach based on economic modelling** raises the possibility of an increasing range of ‘theories of harm’ that could have no reliable basis in the realities of the market.” (Peter Freeman, Chairman of the UK Competition Commission)*

... shift focus away from the facts:

*“The scepticism is that it [economic analysis] can be massaged. [...] It is **easy to change the results** by adding another variable to the model.” (Lars-Hendrik Röller, former chief economist at DG Comp)*

... be difficult to understand:

*“It is important to determine how much weight to give to **something one does not understand completely**” (Miguel de la Mano, deputy chief economist at DG Comp)*

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Avoiding the risk of “abuse of economics”

- To avoid the risk of “abuse of economics”, competition authorities can chose to prioritise form based cases
 - >Enough to verify (i) that a firm is dominant, and (ii) that a certain form of behavior is practiced
 - >Does not require any thorough economic analysis of the actual harm
- This would reduce the burden of proof for the authorities and reduce risks associated with economic analysis

“Now, I agree that life would be a whole lot easier if we could simply conclude that “bundling is evil” or “exclusive dealing is great” without need for further clarification.” (Damien Neven, Chief Competition Economics, DG COMP)

- However, it would also eliminate benefits from economic analysis

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Reducing the risk of “abuse of economics”

- To reduce the risk of “abuse of economics”, we need to demystify the identity of economic analysis by responding to the previous claims

Claim	Nature of problem	Does this always have to be the case?
<i>“Economic analysis is complex”</i>	Content	NO
<i>“Economic analysis shifts focus away from the facts”</i>	Content	NO
<i>“Economic analysis is difficult to understand”</i>	Form	NO

Reducing the risk of “abuse of economics”

1. Economic analysis is not always complex:

> In most cases, complex analyses are not necessary

*“Notwithstanding the above, the use of an effects-based approach **does not imply that it is necessary to apply very complex economic or econometric analysis.** [...] Nevertheless, **economic and econometric modelling can be a tool, and sometimes a very useful tool, in such an analysis.**”*

Source: Neven & de la Mano (2009), Economics at DG Competition, 2008–2009

Reducing the risk of “abuse of economics”

2. Economic analysis should not shift focus away from the facts

> Economics is primarily about (qualitative) understanding of the market and the actions in questions, i.e. mainly about understanding and interpreting the facts

> Explains the rationale behind the developments and the resulting effect

*“Actual or likely negative effects can in general be shown by carefully **analysing the conduct and factual developments** and the ways in which the conduct is likely to affect the market.”*

Source: Neven & de la Mano (2009), Economics at DG Competition, 2008–2009

Understanding and interpreting the facts – Case: SMS directory inquiry

- Initial situation

- > The Competition Authority claims that high marketing costs are an entry barrier:

“Through investments in marketing, both Opplysningen 1881 and other companies have built brands that make it difficult for new providers to enter and capture market share without significant investment in marketing. These sunk costs, associated with penetration of brands and card numbers constitute an effective entry barrier for operators wishing to establish themselves in the SMS directory inquiries market.”
Source: Norwegian Competition Authority (2008)

SMS-OPPLYSNINGEN
1985

Opplysningen®

1881

- Our contribution

- > We analyse the nature of marketing costs: How, when and how much do operators promote their SMS service?

- > We find that, in this market, marketing is a “top-of-mind game” which all market players have to play

TLF
2008

- The implication

- > Marketing is a part of operating expenses – does not create asymmetries

- > High marketing costs do not constitute an important entry barrier in the SMS directory inquiries market.

OPPLYSNING
1890

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Benefits from applying economic analysis

- A form based approach is less cumbersome, but not always sufficient:

“I’m afraid we will have to accept that life is a complicated undertaking and that formalistic rules often no longer offer an alternative because of the errors that their implementation induces” (Damien Neven, Chief Competition Economics, DG COMP)

- Economic analysis provides a number of benefits:

- Economic analysis provides key insight to the market and actions
 - > Analyses the conduct and its effects in the light of market characteristics
- Economic analysis strengthens a legal case
 - > Provides an explanatory framework that complements the legal analysis
- Economic analysis captures the goals of competition policy
 - > Distinguishes the effect on competition from the effect on competitors
 - > Reveals the effects on economic efficiency and consumer welfare

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Reducing the risk of “abuse of economics”

3. The results of economic analysis can be communicated in a clear and intuitive way

- Economics (just as law) can, and should, be conveyed in an easy and understandable manner
- Good communication is particularly important before a court
 - > Judges are normally not economists
 - > Often general courts; not specialized in competition law
(Confirmed by statements in Global Competition Review interviews)

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The importance of good communication

- What is “good communication”

“It’s a fatal mistake to think that being right is more important than being understood” (Daphne Gay-Grant)

“Making the simple complicated is commonplace. Making the complicated simple, awesomely simple, that is creativity” (Charles Mingus)

- Copenhagen Economics’ four rules for a good story:

- | | |
|----------------------|--|
| ▪ Flow | I can follow your logic |
| ▪ Simplicity | I can understand your argument |
| ▪ Credibility | I trust your reasoning and conclusions |
| ▪ Nerve | I am compelled to read on |



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The importance of good communication - Case: The Danish Law Society

- Initial situation:
 - > Potential liberalisation of the legal profession with purpose to increase competition
- Our contribution
 - > We conduct an economic analysis of the consequences of liberalisation and an assessment of how liberalisation could be carried out most appropriately
- The achievement
 - > The report is awarded with the Danish Management Award for best consultancy report, largely due efficient communication:

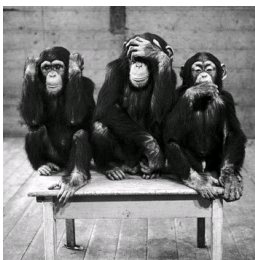
"The consultants have also shown how professional analytical work, based on professional best practice can be communicated effectively in an accessible language. The report is highly readable and thus, it sets a trend for how complex problems can be described in an easily accessible way."

Source: The Danish Management Board (2006)

Conclusions

- Using economics in competition law might seem challenging and difficult
- Three options:

1. Ignoring economics



2. Using economics as last resort



3. Using economics upfront



Questions? _____

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