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Appeals from competition authority decisions based on economic arguments – problems and possible solutions

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Effective use of economic tools in competition law proceedings

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A different approach

Do economists and lawyers speak the same language?

$$\begin{aligned} & \int_0^\infty \dots \int_0^\infty \left[\frac{v_1}{n} + \dots + \frac{v_n}{n} \right] f(v_1) \dots f(v_n) dv_1 \dots dv_n \\ & - \int_0^x \dots \int_0^x \left[\frac{v_1}{n} + \dots + \frac{v_n}{n} \right] f(v_1) \dots f(v_n) dv_1 \dots dv_n. \end{aligned} \quad (9)$$

To explain, the first term is the sum of the n owners' values of their $1/n$ acre subparcels under all possible outcomes of the v_i , and the second term is the sum of the owners' values when all owners accept x , so the difference must be the sum of owners' values when not all of them accept x . The first term in expression (9) equals $E(v)$, and the second term reduces to n similar terms, the first of which is

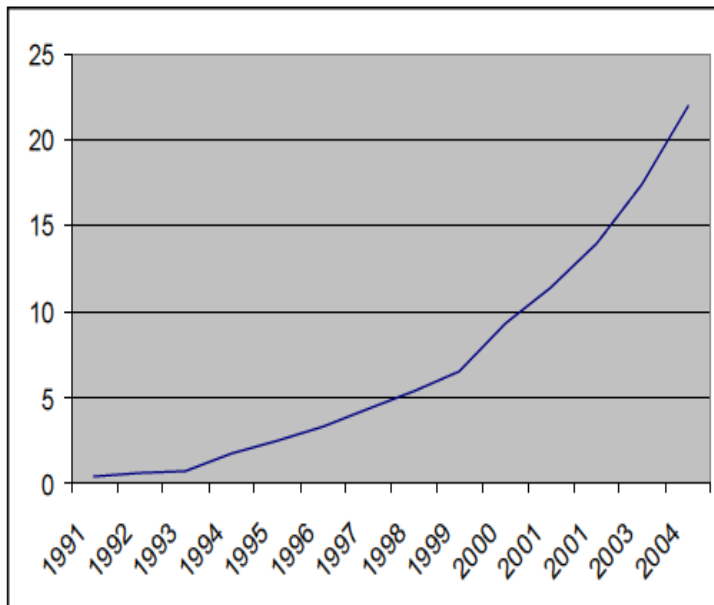
$$\begin{aligned} & \frac{1}{n} \int_0^x \int_0^x v_1 f(v_1) \dots f(v_n) dv_1 \dots dv_n \\ & = \frac{1}{n} \int_0^x v_1 f(v_1) dv_1 \left[\int_0^x f(v_2) dv_2 \right] \dots \left[\int_0^x f(v_n) dv_n \right] \\ & = \frac{1}{n} F(x)^{n-1} \int_0^x v_1 f(v_1) dv_1. \end{aligned} \quad (10)$$

The dawn of the age of Aquarius



The Empire Strikes Back

Figure 1. Turnover of economic consultancy firms (current £ million)



ASK NOT WHAT **YOU** CAN DO FOR THE CLIENT

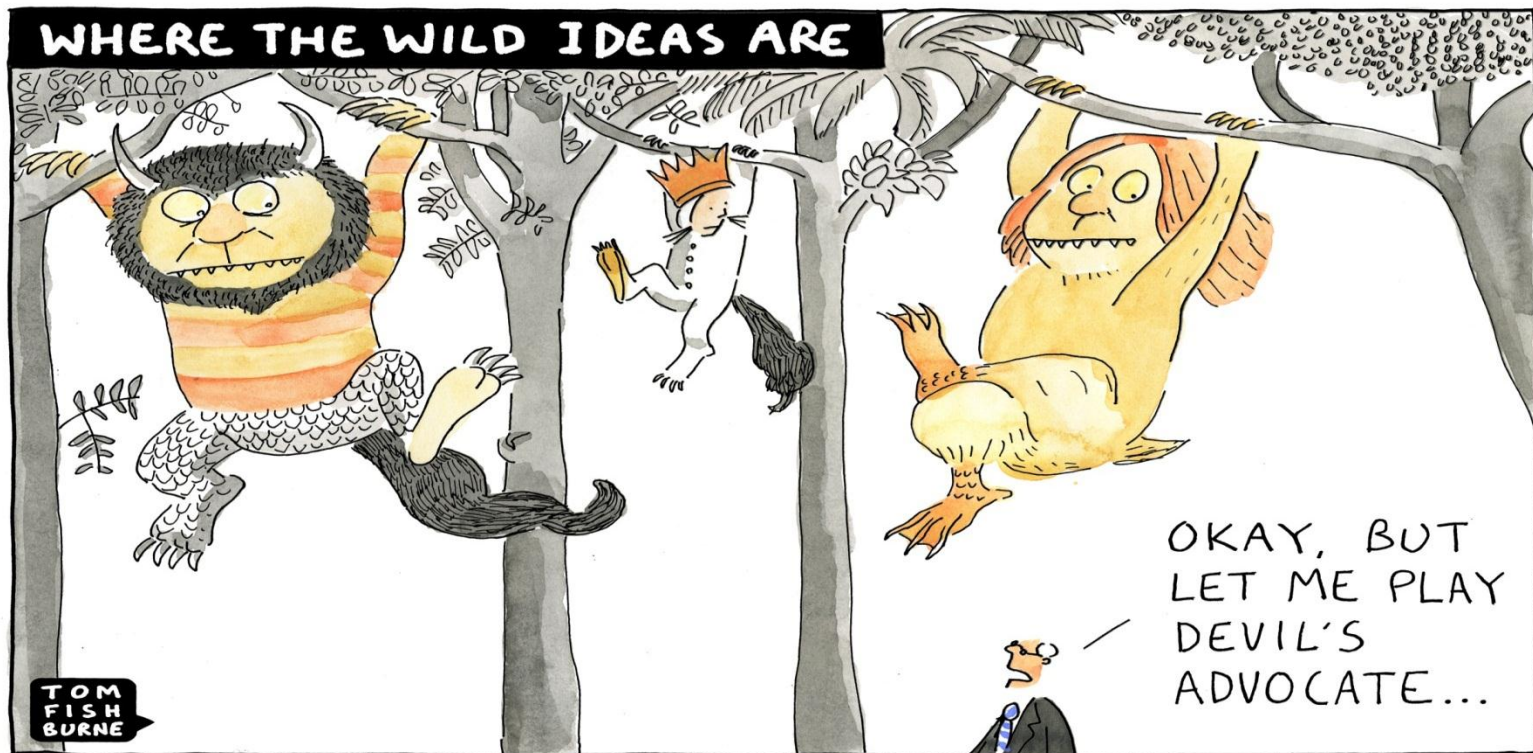


ASK WHAT THE **ECONOMISTS** CAN DO FOR HIM

(Damien Neven, Competition economics and antitrust in Europe, 2005)

The rise of the devil's advocate

- European Commission: Chief Economist Team
- UOKiK: Departament Analiz Rynku



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But what about the courts?

Starting with the appeal of Tetra/Sidel under an accelerated timetable in 2001, all hearings on merger decisions at the [GC] in Luxembourg have featured economists, including most famously in GE/Honeywell (with as many as eight economist taking the stand).

(C. Caffarra and M. Walker, An Exploration into the use of Economics before Courts in Europe, 2010)

Difficulties (1)

- 1) *The scepticism is that [economic analysis] can be massaged. [...] It is easy to change the results by adding another variable to the model.*

(Lars-Hendrik Röller, Economic Analysis and Competition Policy Enforcement, 2005)

- ▶ standard of **proof** for economic evidence?

(To digress: standard of proof problems in a nutshell)

- Goal: to prove wrong Ezra Solomon, who said in *Psychology Today* (1984):

The only function of economic forecasting is to make astrology look respectable.



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Difficulties (2)

2) ... *important to determine how much weight to give to something one does not understand completely*

(Miguel de la Mano, Dealing with the evidence, 7th GCLC Conference, 2011)

- ▶ standard of review?

Standard of review (1)

- Comprehensive (full) review
 - ▶ legal rules
 - ▶ the facts

Standard of review (2)

- Marginal review (aka “judicial deference”?)

[W]hether the relevant procedural rules have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

(Judgment of the Court of July 11, 1985, in Case 42/84, *Remia BV and others v Commission*, para. 2575)

Grundig

- A ***judicial review*** of [the Commission's complex evaluations on economic matters] ***must take account of their nature by confining itself to an examination of the relevance of facts and of the legal consequences which the Commission deduces therefrom.***

(Judgment of the Court of July 13, 1966, in Joined Cases 56 and 58/64, *Consten and Grunding v Commission*, para. 347)

Remia (1)

- Although **as a general rule the Court undertakes a comprehensive review** of the question whether or not the conditions for the application of Art. 101(1) are met, ...
- ... it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking **the Commission has to appraise complex economic matters** ...
- The Court must therefore **limit its review to** ...

Remia (2)

- ... verifying:
 - ▶ *whether the relevant procedural rules have been complied with,*
 - ▶ *whether the statement of reasons is adequate,*
 - ▶ *whether the facts have been accurately stated and*
 - ▶ *whether there has been any manifest error of appraisal or misuse of power.*

(Judgment of the Court of July 11, 1985, in Case 42/84, *Remia BV and others v Commission*, para. 37)

Wood Pulp

- Judgment of the Court of September 27, 1988, Joined Cases 89, 104, 114, 116, 117, and 125-129/85, *Wood Pulp*,

in which the judges
 - ▶ reviewed a substantial body of economic arguments
 - ▶ engaged their own economic experts

The break-through merger cases

- Case T-342/99 Airtours v Commission,
- Case T-310/01 Schneider Electric v Commission, and
- Case T-5/02 Tetra Laval v Commission:

[The General Court] departed from principles laid down by the Court of Justice in its judgment in Kali und Salz in terms of both the nature of judicial review carried out by it and the standard of proof which it required the Commission to satisfy

(Commission claim on appeal; Judgment of the Court of February 15, 2005, in Case C-12/03 P, *Commission of the European Communities v Tetra Laval BV* para. 25)

The „forgotten paragraph”

*Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, **that does not mean that the [EU] Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature.***

(Judgment of the Court of February 15, 2005, in Case C-12/03 P, *Commission of the European Communities v Tetra Laval BV*, para. 39)

- ▶ „[I]ntense—though marginal—review”

(Marc Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review? *Journal of European Competition Law & Practice*, 2011)

Impala

[T]he [GC] committed an error of law, first, in requiring, in essence, that the Commission apply particularly demanding requirements as regards the probative character of the evidence and arguments put forward by the notifying parties in reply to the statement of objections and, secondly, in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the appellants' arguments in defence amounted to an unlawful delegation of the investigation to the parties to the concentration

(Judgment of the Court of July 10, 2008, in Case C-413/06 P, Bertelsmann and Sony Corporation of America v Impala, para. 95)

Ryanair / Aer Lingus

- Judgment of the General Court of July 6, 2010, in Case T-342/07, *Ryanair vs Commission*:
 - ▶ *panel and cross-section regressions*
 - ▶ *fixed effects and*
 - ▶ *two-stage regressions*

Marginalizing marginal review

- **Limits** of the Commission's discretion
 - ▶ clear determination of the limits of the margin of appreciation doctrine
 - ▶ meaning of „complex economic assessments”

The meaning of „complex” (1)

- Difficult to understand because of the underlying economic theories exposed?
- Overly time-consuming?
- Encompassing economic reasoning that has to be applied to a puzzle of facts and, as a result, becomes hard to decipher?
- Targeting situations where the Commission makes economic policy choices?

The meaning of „complex” (2)

„complex” \neq „difficult”

- even though it may make the task of the judge extremely difficult or burdensome:



But what about the judges? – possible solutions

- Specialization of judges
- The CAT example
- The French example
- A Chief Economist for EU courts?

Conclusion

- *[O]nly [...] for as long as the decision taker has access to all relevant data, and has the appropriate resources to carry out the necessary economic analysis.*

(Judge Nicholas Forwood, The Commission's More Economic Approach, 2009)

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The colour drawings on slides 8 and 22 of this presentation were made to measure by Piotr Przybylski, a young aspiring cartoonist, who is available for freelance assignments and can be contacted at przybylski.pm@gmail.com.





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