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### **Economic expert testimonies**

The significance of economic expert testimonies in Europe is increasing. The main reason is the emergence of the more economics based approach in EC competition law. The need for more economic evidence, i.e. empirical based market facts is an important element in this approach. In addition, new theories and instruments support complex decision making processes. They are a valuable contribution to the improvement of quality. The use of information technologies - without additional time and data efforts - enhances the benefits too. The debate today is not on whether the economics based approach is appropriate or not, but rather on "how" and "in which cases".

### **Areas for expert testimonies**

In the practical work of antitrust authorities and courts, economic insights play a vital part. Expert testimonies are required in a broad array of competition law issues. Whereas in the 90ties, expert testimonies were frequently submitted in merger control proceedings at the European Commission or national competition authorities, new areas of application are competition law proceedings under Article 81 and 82 EC Treaty as well as state aid cases. Recently a new trend emerged: expert testimonies in national court cases as well as in arbitration proceedings.

### **Standards for expert testimonies in the US**

The use of economic expert testimonies in US antitrust proceedings has a long standing tradition. US expert testimonies have to deal with the high requirements of US federal legislation (*US-Federal Rules of Evidence Provisions*) on factual, quantifying decision making. The quality of expert testimonies is evaluated on a regular basis. In particular, the expert testimonies are measured by objectively valid analysis techniques.

The US-rules on expert testimonies ("rule 702") list the requirements for an expert testimony in order to hold against a denial of the expert testimony in court proceedings. According to these guidelines, an expert testimony has to be based on sufficient facts and data as well as on valid, quantifiable and reliable measurement methods and principles. The evidence of the contrary can lead to the refusal or non-admission of the expert testimony.

In practise, an increasing number of Judges complain about the insufficient quality of expert testimonies in the US. The *US v. Oracle* case is the most recent example: an expert testimony was refused due to lack of "robust econometrics". Other expert testimonies were rejected because of insufficient explanations, e.g. in which manner conclusions were drawn from the available facts or because of a simple market simulation model. Some Judges refused expert testimonies simply because they were not able to understand them or the testimony itself was confusing. These examples already prove that the requirements on expert testimonies are on one hand quite comprehensive but on the other hand rational too. Courts demand that experts should stay within the expertise of his or her professions and apply tools correctly, reliably, and explain in detail the data used and the modelling performed.<sup>1</sup> In the US, even expert testimonies of Nobel-price winners were refused because they couldn't meet those requirements.<sup>2</sup>

### Daubert Standards

Since 1993, the so called "*Daubert Rule*" is used in the US for expert testimonies. According to *Daubert v. Merrel Dow Pharmaceutical*, federal Judges are obliged to decide on the admittance of expert testimonies. This means that, a Judge must find the offered opinion testimony of economists, like that of other experts, to be useful and reliable before a finder of fact (either a jury or the Judge) can hear it. A Judge must make a "*preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and properly can be applied to the facts in issue*". The *Daubert-Standards* are important since they keep away not well founded expert testimonies from the court room. Incorrect and misleading expertise of any kind is blocked to enter the proceedings. Only reliable and proved expert testimonies are admitted.

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<sup>1</sup> Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan 8<sup>th</sup> Circuit 2000

<sup>2</sup> Brand Name Prescription Drug Litigation N.D.III 1999 – economic testimony of Nobel Laureate dismissed after the Judge's "*review of his testimony shows quite clearly how vacuous the Class Plaintiffs' evidence of conspiracy really is.*"

With the support of the *Daubert-standards* it is not only possible to decide on the admission of expert testimonies, but also to scrutinize the factual and economic adequacy of the testimony. For this purpose, the US Supreme Court developed criteria to determine the quality of testimonies already at a preliminary stage. The *Daubert-standards* encouraged on the other hand the use of new innovative methodologies. By defining the criteria for assessment, the approach for a sustainable economisation was laid down.

In advance of submitting an expert testimony a Judge has to evaluate the scientific value of the expert's methodology and of its application to the fact of the case – not on the ultimate conclusions reached. The US Supreme Court suggested four possible factors for a Judge to use in considering that methodology's reliability: (a) testable hypothesis, (b) the method's error rate, (c) peer review and (d) general acceptance in the relevant scientific community.

Thus, the significance of quality standards for the credibility and the success of expert testimonies are crucial in the US.

### **Standards for expert testimonies in Europe**

In Europe, former Competition Commissioner Karel van Miert initiated the more economics base approach in the late 90ties. Today, the economisation of competition law is achieved - more or less - in every aspect of EC competition law. Europe managed the implementation of such a comprehensive and more economics based approach within a few years only. According to US competition economists, the comparable development in the US took over 30 years.

Due to the novelty of the approach to assess market facts in an empirical manner, corresponding court standards are not yet fully developed. However, a few judgements of the Court of First Instance and the European Court of Justice respectively - for example on issues like collective dominance or Article 82 EC Treaty - provide guidance. In particular, they confirm impressively which quality standards are required to perform economic analyses. The European Commission itself has sorrowfully experienced the stringent standards of the Courts in a few cases already.

In addition, the European Commission took over the initiative to develop guidance by means of numerous guidelines and notices. In 1997, e.g. the Commission outlined the methodology on market definition, the Hypothetical Monopolist Test, in a Notice. The 2004 Guidelines for the assessment of horizontal mergers provide information on how mergers should be empirically assessed. Different guidelines on Article 81 and 81(3) EC

Treaty respectively address the concrete procedures in an economic appraisal. The European Commission intends to publish additional guidelines on Article 82 EC Treaty as well as on vertical mergers and conglomerates. The European Commission as well as experts assigned by the parties or the Courts are obliged to apply these guidelines with the support of the correspondent economic instruments.

A few requirements applied in the US are also applicable in Europe. Expert witnesses under oath are obliged to tell the truth and to follow comprehensive requirements. In practice, the expert testimony should be intersubjectively traceable, comprehensible and checkable. If an economic expert testimony becomes so technical that only a few experts can talk about it, the goal is missed. It can be assumed that in Europe - as in the US - court judgements will finally decide on the design and standards of expert testimonies.

### **Review of an EE&MC expert testimony by a Supreme Court**

In February 2005, the Austrian Supreme Court ruled on the merger transaction *Lenzing/Tencel*, which was prohibited first by the Austrian Cartel Court in October 2004. *Lenzing* is a company active world-wide in the fibre industry. The company appealed against the prohibition. This judgement is of particular interest since it represents one of the rare occasions that the highest Court was able to judge on a merger case decided by the Cartel Court. The Supreme Court confirmed the prohibition judgement of the Cartel Court in every aspect.

In course of the merger proceeding *Lenzing/Tencel*, the Cartel Court asked EE&MC to make and submit an expert testimony. The task for EE&MC was to provide a testimony on market definition and market assessment within eight weeks.

For the market definition, EE&MC performed by means of computer-based Conjoint Analyses two Hypothetical Monopolist Tests world-wide. The appellant, *Lenzing*, argued in the proceedings that the EE&MC expert testimony was in contradiction with the obligatory approach: the testimony reached the conclusion that the appellant holds a dominant position in a relevant market. The Supreme Court did not agree with the appellant. In contradiction, the Supreme Court confirmed explicitly the methodology on market definition applied by EE&MC in the expert testimony.

The core of the expert testimony was the Hypothetical Monopolist Test. The Court did not find any evidence that the conclusions drawn by EE&MC from the personal interviews conducted were in contradiction with a logic approach. The conclusions drawn by EE&MC from the gathered

evidence and the empirical analyses were logically comprehensible for the Court. The Supreme Court confirmed – since the Cartel Court applied the conclusions drawn by the expert testimony – that this does not represent an error in law.

Finally, the Court concluded that it is not possible to attack the EE&MC expert testimony on the applied methodology. The Court confirmed in the judgement that the methodology applied by EE&MC is in line with the guidelines on market definition which were developed by the European Commission.

### **Benefits of modern tools**

The examples illustrated so far clarify the benefits of economic methodologies and their significance in modern competition law proceedings. A quantification of the most important competition parameters increases the accuracy of the assessment. Profound and robust prognoses turn out to be possible: The obtained results are based on calculations and not on intuition. Therefore, modern tools provide the chance for a better understanding, description and evaluation of competition issues. Market definition, damage calculations or market simulations in merger proceedings demonstrate that economic tools are appropriate to practically measure various impacts of changing market situations.

Especially modern market simulation models are interesting tools to contribute to a qualitative improved decision making. They link theoretical hypothesis with empirical observations thereby answering concrete questions which can be applied even under high time constraints. Thus the increased use of quantitative tools are not only practicable, they represent an additional benefit for authorities and Courts.