Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee
Working Party 3 on Co-operation and Enforcement

Roundtable on Techniques for Presenting Complex Economic Theories to Judges

February 19, 2008

I. Introduction

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No. 3 (WP3) for its roundtable on “techniques for presenting complex economic analysis to judges” on February 19, 2008.

2. BIAC supports the growing acceptance of the proposition that modern antitrust enforcement should be based on a clear and objective assessment of “effects” as identified or measured by sound economic analysis. Among the reasons for this trend are the advances in economics made over the past two decades and growing convergence among economists on the proper framework of analysing for many areas of competition law.\(^1\) Much of the progress that has been made can be attributed not to the most complex economic models, but often to the thoughtful application of the simplest, for example, the use of the SSNIP test as a means of examining market definition. To be sure, the progress in economic thinking has also included the development of more sophisticated quantitative techniques that may, for instance, be applied when simulating the (unilateral) effects of mergers. While these have usefully instructed internal agency consideration, they have rarely been the subject of a court challenge.

3. Significantly, these fundamental developments coincide with increasing demands from courts for substantial economic support for antitrust challenges. As a result, a number of enforcement agencies have responded by creating or further developing institutional capacity and procedures to meet these demands.\(^2\)

4. At present, economic evidence is in particular relied on in merger control proceedings to identify the competitive interaction between the merging parties’ products and to assess (unilateral) effects and efficiencies. Similarly, economic models of anticompetitive foreclosure are progressively applied and tested by courts. And while the role of economic evidence is perhaps at first glance less at the forefront in the initial treatment of collusive and

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\(^1\) In some cases, such as in the EU, the growing willingness to apply economic analyses geared towards identifying actual economic effects (or proxies thereof) has resulted in legislative and regulatory reforms. See, e.g., John Vickers, “Competition Law and Economics: a Mid-Atlantic Viewpoint,” European Competition Journal, June 2007, p. 1-15.

\(^2\) The reform package that the EC Commission has over the past four years implemented, in particular the Office of the Chief Competition Economist and “devil advocate” panels, is just one example. Other countries, like Denmark, The Netherlands and Italy, have also set up economics departments with trained econometricians and economists over the past years. All European agencies employ economists.
other *per se* illegal conduct, such analysis may still be important in helping to establish the existence of those agreements, to prove causation in damage analyses or to calculate pass-through pricing.

5. BIAC is highly supportive of this trend. Consumer welfare is best served by a rational competition policy that is driven by the analysis of likely effects that is in turn firmly rooted in economics. The proper and transparent use of economics by agencies – together with the resulting convergence of substantive norms – contributes to a more level playing field for international business.

6. BIAC appreciates, however, that agencies and courts across jurisdictions display varying degrees of sophistication when conducting economic analyses – or failing to do so. In some instances courts have even openly acknowledged that “the economics are too complex.”\(^3\) One such area of significant divergence is the extent to which jurisdictions have developed rules and procedures that regulate the introduction of economic evidence – in particular expert witnesses – in court proceedings and that seek to ensure the integrity and quality of economic evidence in the form of economic testimony or otherwise and thereby stimulate courts to accept this type of evidence. It appears that these requirements are more developed in jurisdictions where litigation is an important phenomenon. Jurisdictions where public enforcement is relatively important may in this respect draw from the lessons of countries that have more practical experience with the enforcement of antitrust and merger control law in courts that operate under specific evidentiary standards.

7. On a more general level, BIAC notes that the proper and “successful” application of economic analyses by competition agencies – and the subsequent review and validation of those analyses by courts – is dependent on a multitude of factors, in particular the substantive standards that govern the conduct at issue, evidentiary rules, the agencies’ ability to present economic evidence in court, the receptiveness of courts to economic evidence (which in part depends on training and capacity and on the way it is presented by the economist in question) and the state of the economic research in the area that is under discussion. These interrelated factors complicate the identification of one single “success factor” for the presentation of complex economic evidence to courts.

8. BIAC strongly supports both general and specific measures to improve the correct application of robust economic theories and methodologies by agencies and their subsequent review of those analyses by courts. Indeed, in this respect the interests of agencies and the business community – the very subjects of the agencies’ control – are to a large extent aligned: proper use of economic evidence limits the risk of false positives, while at the same time improving the track record of agencies when defending their enforcement actions in court.

9. BIAC would note that the stated topic of this Roundtable, however, is somewhat misplaced. In our view, the question should not be how “to present complex economic theories” to judges, but rather how to *effectively* present economic *evidence* to the courts. Economic theory, as such, better suits the classroom than the courtroom. Economic evidence, based on accepted economic principles and sound application of facts to those principles, can shine significant light on the key questions underlying antitrust laws. Preparing and presenting this evidence, which often implies the avoidance of complex theory in favour of straightforward analysis, should be a key consideration of an agency’s case.

10. We note that economic theory and, indeed, the application of quantitative techniques should not be considered a substitute for sound factual analysis. The purpose of economics in competition law, as discussed further below, should be to develop a framework within which

\(^3\) See, e.g., the UK judgment of Mr Justice Ferris in the Premier League case, judgment of 27 August 1999.
to examine facts, not to substitute theory for these facts. Thus, while BIAC wholeheartedly
endorses the further advancement of economic techniques and the presentation of economic
evidence to courts, it notes this important caveat.

II. The Role of Economics in Antitrust Cases

11. Economics may have myriad influences on agencies’ decisions. Very generally, economic
theories may help to postulate the theory of harm (or the absence thereof), i.e. the logic and
organizing principles behind the conduct at hand.4 Second, economics may be used to test the
hypothesis, for instance by analyzing empirical data or market structure, in seeking to identify
ex ante assessments of the likely effects of mergers and other transactions. Significantly, in
many cases economic analysis may be purely or predominantly empirical, for instance in
determining whether the merging parties are “close competitors” on the basis of “win–loss”
tender data,5 or the delineation of the relevant market by means of the SSNIP test.6 While the
economic methodology applied is well-accepted in these cases, other cases provide more
challenging areas of analysis.

12. One of the most controversial areas in which economic analysis is used is the field of merger
simulation models. These models can be divided into three principal categories: (a) merger
simulation models based on minimal data, (b) merger simulation models based on
econometric evidence of elasticities of demand, and (c) econometric models that can be used
to infer the price effects of the model. The first category would include simple models based
on diversion ratios and are typically not very useful or reliable. The second category would
include the typical differentiated products merger simulation model that is often used in
assessing retail products, which can be useful. The third category would include econometric
models such as those used in Staples/Office Depot, GE/Instrumentarium7, Ryanair/Aer
Lingus8 and, perhaps to a lesser extent, Volvo / Scania. In these models, the merger effect was
determined by assessing the amount by which prices were higher in less concentrated markets.
These also can be useful. In these cases the question is whether the choice of modeling
properly reflects the structure and type of competition in the industry and whether the
specification of the model – on which the outcome depends – is correct, complete and
sufficiently robust.

13. Where this type of economic evidence is used to support the challenge of proposed mergers,
the assumptions and methodologies underlying the models are likely to be severely disputed.
Notorious examples where sophisticated economic models were used to predict post-merger
market developments to challenge the transaction include Staples/Office Depot and Whole
Foods/Wild Oats9 in the US and Volvo / Scania10 in Europe.

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4 See, e.g., Lars-Hendrik Roller, “Economic Analysis and Competition Policy Enforcement in Europe,” MODELLING
EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES 18 (Van Bergeijk and Kloosterhuis, eds.)
(2005).
5 See, e.g., Case COMP/M. 3216 Oracle/ Peoplesoft, 2005 O.J. (L 218) 6.
6 See, e.g., Case COMP/M. 2187 CVC/Lenzing 2004 O.J. (L 82) 20.
10 Case COMP/M. 1672 Volvo/ Scania, 2001 O.J. (L 143) 74.
14. It is fair to say that economic models play an important role in most, if not all significant mergers that agencies seek to challenge. Economic evidence is also – but perhaps in a less uniform manner - used in unilateral conduct cases and, in particular in the field of causation, assessment of damage, and pass-through pricing, in cartel cases. In fact, as Professor Gavil has observed, “expert testimony from economists now plays a more critical role than ever before in resolving antitrust matters before agencies and courts.”

15. Economic evidence enters into the administrative or judicial procedures in various ways depending on the specific features of the enforcement system. Ordinarily, during the administrative part of the agencies’ procedure, economic evidence may be part of the agencies’ own analytical work and generated by the agency itself (on the basis of information submitted by the parties, third parties or other sources of information), or may be presented to the agency through submissions made by interested parties. For instance, in Europe, it is common to submit detailed economic evidence as part of the notification of a concentration under the European Merger Control Regulation. Such evidence is also frequently submitted following a Statement of Objections issued by the Commission.

16. In some jurisdictions, the litigation of competition matters between private parties also implicates economic analysis. In those instances, the development of economic theory plays out during the discovery phase of the proceedings, in which the expert economists are severely tested with respect to their conclusions and the bases for those conclusions through intensive factual inquiry, expert reports, and often-contentious depositions. In these cases, the ultimate emphasis lies on the admissibility and persuasive value of economic evidence in court proceedings. In this way, the parties are usually able to judge in advance of the trial or key hearing whether their economic evidence is likely to be compelling or weak. This frequently leads parties to a settlement that better reflects the risks inherent to the litigation process.

17. In contrast, the dialog between regulatory agencies and parties regarding the economic analysis being utilised by the agency is inconsistent and may range from virtually no communication at all to a relatively open exchange of views on the merits of a specific economic study. BIAC believes that it would be beneficial if agencies would allow a more meaningful interaction between their (staff) economists and the parties’ experts at an early stage of administrative procedures. Interaction between experts may contribute to the identification of key issues, an early resolution of disputes, and, more generally, contribute to well-founded decisions as to whether the agency’s economic analysis is likely to stand up in

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11 See, e.g., Derek Ridyard, “Economic Experts Before Authorities and Courts Roundtable,” Annual Proceedings of the Fordham Corporate Law Institute on International Antitrust Law & Policy 2005, p. 626 (“But certainly, mergers is the easy area where you can say with great clarity that economics is really driving the debate.”).


15 One example in Europe where the notifying parties’ experts had access to econometric analyses provided by a third party complainant during the first-phase review of a concentration under the European Merger Regulation is Case COMP/M. 3083 General Electric/Instrumentarium, supra note 7.
Agencies are sometimes reluctant to engage in such a discussion for fear that they may reveal their strategic thinking in a way that may later harm their ability to succeed in court. As a practical matter, however, since far more cases are resolved through negotiation than through trial, the benefits of such interaction are likely to outweigh the risks. Moreover, the discovery process ultimately allows at least some degree of insight prior to trial, which undermines the fundamental concern that is often expressed.

While expert testimony by the party’s or agency’s economic experts is the main “vehicle” for economic evidence to become part of the judicial procedure, there are alternative ways for courts to handle expert witness testimony in antitrust disputes. In Australia, New Zealand and occasionally in the United Kingdom by the CAT, “hot tub” procedures are used, whereby both parties’ experts take the stand simultaneously and question one another about their opinions. Also, in Australia and Ireland (and elsewhere), joint conferences of experts are sometimes used. In contrast to “hot tub” procedures, joint conferences take place outside the courtroom, with only the experts present. These types of meetings seek to explore areas of agreement and disagreement among the parties. The experts’ views are then presented to the court. In other cases, courts themselves may appoint economic experts to assist them in resolving these types of cases. The benefits of court-appointed experts, especially as substitutes for experts appointed by parties, are disputed.

Second, BIAC does not condone the concept that the testimony of experts engaged by the parties should somehow have lower evidentiary value than “objective” testimony by court-appointed experts. This is a suggestion that is explicitly made in the Green Paper on Damage Actions, which was released by the EC Commission in December 2005. BIAC submits that, while it may in some cases be proper to apply conditions ensuring a proper foundation for economic testimony provided by parties’ (and agencies’) experts, perhaps in a manner similar to that applied in the US, there is no sound rationale for a priori rejection of the testimony of party-appointed experts.

**III. Reasons that May Cause Courts to Reject Economic Evidence**

There may be various reasons that could cause a court not to accept the economic analysis advanced by agencies, some of which are (largely) outside the control of the agency.

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19 In the US, there is limited experience with these types of experts. For a discussion of court-appointed experts, see, e.g., Gavil, supra note 14 and the literature mentioned in America Bar Association, Section on Antitrust Law, Final Report of the Economic Evidence Task Force (August 1, 2006), available at http://www.abanet.org/antitrust/at-reports/01-c-ii.pdf. In Canada, the Competition Tribunal is expressly authorized to appoint one or more independent experts “to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding”. The parties may jointly recommend an expert to the Tribunal, but the Tribunal is authorized to select an expert by its own motion.

20 See, e.g., Gavil, supra note 14, who states that, while concerns have been raised against the objectivity of party experts, court-appointed experts would be ill-equipped to take over the role of those experts. In particular, court-appointed experts would be particularly helpful in evaluating the data-gathering, studying, and opinions of the party experts.


22 See also, paragraphs 28 and 29 herein.

23 See also, Gavil, supra note 14.
21. Excessively high standards of economic proof may prevent courts to support agencies’ decisions. BIAC does not believe that there is an endemic problem in this regard. Rather, it seems that courts exercise a sufficiently effective, but not overly strict review of agencies’ decisions. Besides, the required standard of proof is largely outside the control of agencies. Nonetheless, BIAC acknowledges that in many jurisdictions the debate on the question “how much and what kind of (economic) evidence is enough” continues and is supportive of efforts to clarify this issue.24

22. Lack of substantive standards and agencies’ guidelines may contribute to a poor reception of economics by courts. Indeed, courts may be disinclined to accept complex economic analyses from agencies if the state of economic research is unsettled and/or the applicable substantive standard is unclear, as is the currently the case for some types of exclusionary conduct. Here, agencies may help to build consensus on the proper analysis of these types of conduct. Also, the adoption of guidelines, such as the EC horizontal and non-horizontal merger guidelines may encourage courts to more readily accept complex economic analyses that apply the methodology of the guidelines.25

23. Courts may simply not understand the economic analyses advanced by agencies, or be unwilling to apply them. As mentioned below, agencies may, in addition to improving upon the presentation of their analyses in some cases, help to train courts in the understanding and application of economic analyses and, more generally, engage in “advocacy” efforts to make judges more comfortable applying and reviewing economic analyses. In Canada, Parliament has endeavoured to address at least in part the common concern that judges in the general court system are often ill-equipped to assess complex economic issues. The Competition Tribunal (the specialized court with exclusive jurisdiction over the reviewable trade practices set out in the Competition Act, including mergers and abuse of dominant position) is composed of judges of the Federal Court and lay members, selected for their expertise in areas such as economics, business, accounting or marketing. Although there is no statutory requirement that the lay members include trained economists, since its creation in 1986, the Tribunal has always included lay members with some training in economics. The Tribunal has also established rules of procedure designed to facilitate the receipt of complex economic evidence. Expert witnesses can testify individually or they (as well as lay witnesses) may be directed to testify as part of a panel, where the Tribunal determines that testimony by panel would be the most effective means of conveying the evidence.

24. The agency may not apply sufficient rigor in developing complex economic analyses and present confusing or otherwise inadequate economic evidence, or may present—as such—adequate economic evidence in an unattractive or non-sophisticated manner that discourages the court to follow the agencies’ analyses. One way of improving the quality of economic analyses of agencies would be to adopt (practical) measures that prevent agencies from becoming too “insulated” from parties’ observations. As set out below, other means may include capacity building. In this respect, it is noteworthy that Damien Neven, the present Chief Competition Economist with the EC Commission is of the opinion that, given the “gross imbalance” in economic resources between parties and the Commission, the Commission needs to significantly increase its resources, in particular by reinforcing the team of the Chief

24 See, e.g., Gavil, supra note 14, who notes that “it will always be possible to demand greater economic certainty and greater economic proof” and who suggests that, before concluding that a party should be required to produce more or better economic evidence, courts and agencies would ask whether the marginal value in terms of economic certainty (reduction of error costs) outweighs the costs of demanding additional economic evidence (processing and information costs).

Competition Economist.\textsuperscript{26} BIAC supports such measures where they are likely to enhance the quality of economic analyses by agencies. Next, as set out below, agencies may want to concentrate on improving the presentation of the evidence.

IV. Evidentiary Issues

A. Burden of Proof

25. The increased use of economic analyses and the application of more or lesser accepted theories of harm over the past years have prompted courts to more carefully review agencies’ analyses and decisions. The burden of proof that must be met by agencies that seek to challenge business transactions, or whose administrative decisions are appealed, is a key variable that determines agencies’ success in court. European examples of cases where the EC Commission failed to meet the burden include AirTours,\textsuperscript{27} Schneider Electric,\textsuperscript{28} Tetra Laval,\textsuperscript{29} GE/ Honeywell\textsuperscript{30} and Sony/BMG.\textsuperscript{31} While in Europe relatively few of the EC Commission’s merger decisions are challenged before the Community Courts, the proportion resulting in annulment is high, reaching almost 50\% in prohibition cases.\textsuperscript{32} While the U.S. authorities have a better track record over the long term, recent cases in which the DOJ or FTC failed to meet their burden include Oracle, Arch Coal and Whole Foods.\textsuperscript{33} In each of these cases, the rejection of the economic testimony of the agency’s expert was critical to the ultimate decision. Similarly, in The Netherlands, the Dutch agency’s decision to approve the Nuon/Reliant merger subject to conditions was annulled by the District Court of Rotterdam and on appeal, because the mere possibility of price rises shown by the simulation models does not justify the conclusion that a dominant position will be created or strengthened.\textsuperscript{34}

26. In Europe, especially following the Tetra Laval judgment, it has become clear that the intensity of judicial control over EC Commission’s decisions varies depending on whether the courts are reviewing the correctness of the facts, the application of the law, or the correctness of the Commission’s appreciation of complex economic matters. Review of the primary facts and the application of the law are comprehensive, while the control of the economic appreciation by the Court of First Instance is more limited and takes account of a margin of discretion that the Commission enjoys when it engages in economic assessments. Still, the Community Courts must establish whether the evidence is factually accurate, reliable and consistent, and whether that evidence contains all the information which must be taken into

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\textsuperscript{26} Damien J. Neven, “Competition economics and antitrust in Europe,” \textit{ECONOMIC POLICY} 743-791 (Oct. 2006).
\textsuperscript{27} Case T-342/99, AirTours v. Commission, 2002 E.C.R. II-2585.
\textsuperscript{28} Case T-310/01, Schneider Electric v. Commission, 2002 E.C.R. II-4071.
\textsuperscript{29} Case T-5/02, Tetra Laval v. Commission, 2002 ECR II-4381, 	extit{aff’ in part}, Case C-12/03P, 2005 O.J. (C 82) 1.
\textsuperscript{34} CBB 28 November 2006, NMa v. Nuon and Essent, LJD: AZ3274. Among the reasons for not accepting the agency’s conclusions was the fact that the NMa had not established convincingly the pre-merger equilibrium price. For a discussion of the simulation models that were used in this case, see, J. De Maa and Gijsbert Zwart, \textit{Modelling the Electricity Market: Nuon/Reliant}, in \textit{Modelling European Mergers, Theory, Competition Policy and Case Studies}, p. 150-171.
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account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

27. BIAC believes that agencies’ decisions may be particularly vulnerable with regard to the relationship between the underlying facts and the specific model that the agency has chosen to predict or explain the effects of the (proposed) transaction at hand. This is in line with (summary) reports on US practice. This suggests that agencies should not only pay attention to the specific modelling technicalities, but should in particular ensure that the underlying facts are complete and that the model properly reflects the market conditions of the real world.

B. Admissibility Standards

28. Admissibility standards that govern the use of economic evidence in courts are another major factor that may determine the outcome of the court case. Over time, the US has developed a demanding system that seeks to ensure the quality of expert testimony and economic evidence generally. These rules have become an integral part of the US system of private enforcement of antitrust law. BIAC believes that these rules serve a very useful function in disciplining the adversarial process and might be a valuable reference for countries that wish to stimulate the adjudication of antitrust disputes by courts. One main element is the Daubert line of cases and the subsequent revision of the Federal Rules of Evidence.

29. Very generally, the Daubert doctrine provides that experts must be qualified to provide an expert opinion by knowledge, skill, experience, training, or education and that the expert’s testimony must be based upon sufficient foundation of facts or data, that the testimony is the product of reliable principles and methods and that the expert has applied the principles and methods reliably to the facts of the case. In practice, these requirements serve as an important filter against “junk science,” or otherwise inadequate economic evidence. The ABA’s Final Report of the Evidence Task Force provides an instructive overview of both “confusing” (unclear, confusing, or otherwise uninformative) and “unprofessional” (baseless or intentionally misleading) issues with economic testimony that may help agencies and private parties alike to avoid courts excluding economic experts.

V. Practical Suggestions for Presenting Economic Analysis and Testimony

30. The promotion of economic knowledge of judges can be facilitated by the development of a competition enforcement culture that relies on a foundation of economics. The role of judges varies across jurisdictions, but nearly always requires an analysis of the law and regulations that apply, as well as the application of judicial precedent. In this respect, the presentation of economic evidence to judges is facilitated by the adoption of a culture within the agency that

35 See, e.g., Andrew Gavil and Katherine Funk, “Daubert Comes to Washington: Managing Expert Economic Testimony in Part III Proceedings at the FTC,” Antitrust, Spring 2006, p. 21-28 (“The two most common objections (against economic expert testimony were choice of methodology (or lack thereof) and failure to properly apply the theory of methodology to the facts of the case. The respondents’ experts seemed especially likely to be challenged on the ground that they did not consider enough data or they did not consider the proper data, or that their methodology was not appropriately applied to the facts.”)


seeks to evaluate laws and regulations in light of economic principles. By leading the way in this respect, courts will take heed and begin to apply a similar methodology.

31. An example of this is the application by U.S. courts of the Herfindahl-Hirshman Index. Although the HHI test is not part of the U.S. law, regulations or Supreme Court precedent, courts routinely apply the test in large part because it is part of the Horizontal Merger Guidelines developed by the DOJ and FTC.  

32. In general terms, when presenting economic materials to judges, it is useful to supplement written submissions by oral testimony (during the hearing). Obviously, testimony by economic experts should be tailored to the audience, should reinforce the key issues, be free of unnecessary jargon and be straightforward and comprehensible.

33. There are a number of additional practical considerations that are in BIAC’s view important when presenting complex economic analyses to judges. These are based on discernible lessons from past antitrust cases and are enumerated below.

34. Economic Experts Should Not Be Relied Upon as Fact Witnesses: In some cases, economic experts have been pressed to support the agency’s case in a way that requires the economic expert to introduce and support facts, rather than focusing on the economic or econometric analysis of facts that have been introduced and established through other witnesses. One such example of this occurrence is the litigation in U.S. v. Oracle, where Professor Kenneth Elzinga, a renowned economist of impeccable credentials, became the witness responsible for demonstrating that the DOJ’s market definition was sustainable. Elzinga was called upon to describe why there was “something different” about the merging companies’ products, despite the fact that there was “no quantifiable metric” for that asserted market. In the end, the Judge rejected Professor Elzinga’s testimony in what may have been a fatal blow to the DOJ’s case.

35. Ensure Consistency between the Law and Economic Experts’ Testimonies: according to reports, in Rambus, experts for the defendant argued in favour of an “efficiency breach” defence which was held not to be recognized as a valid defence. Absent this, the testimony was held irrelevant. In a similar vein, in the recent Labatt case in Canada, the Competition Tribunal criticized the Commissioner’s expert on the basis that his evidence was predicated on a U.S. legal test that differed materially from the applicable test in Canada. The point is that expert evidence can only be effective if it is directly relevant to the legal and factual context in which it is being used.

36. Ensure that Economic Experts Advance Sufficiently Tested Theories and Methodologies that have been Subject of Peer review in the Economics Community: in the US, expert testimonies have been excluded for failure to adhere to accepted principles.

37. Complex Arguments Must be Reduced to Simplicity: Judges not schooled in complex economic theory often will rely on their instincts in assessing economic testimony. Thus, the ability to “boil down” complex economic theory and analysis to simple explanations, consistent with conditions observable to the judge, are often the most successful. For

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40 Id.

41 See, Gavil and Funk, supra note 37, p. 29.

42 The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al., 2007 Comp. Trib. 9.
example, in the preliminary injunction action in FTC v. Heinz,\textsuperscript{43} Dr. Jonathan Baker successfully convinced the court that the 3 to 2 merger of Heinz and Beechnut would not result in the elimination of significant competition. His analysis of unilateral effects was reduced to a simple explanation that “Beech Nut and Heinz are virtually never found in the same supermarket” and therefore “do not constrain each others’ pricing at the retail level very much.” The ability to reduce the econometric analysis to a common sense, observable conclusion that “you just don’t see these two products on the shelf competing against one another” apparently had a profound impact on the court (although the judgment of the District Court was later reversed on appeal).\textsuperscript{44} Similarly in FTC v. Staples, the FTC persuaded the court that the market should be narrowly defined to include only office supply superstores based on detailed pricing analysis which showed, in simple form, that prices were lower where these stores competed than where they didn’t. Underlying this conclusion, the FTC conducted a systematic empirical study of Staples’ pricing, presented in court by their econometric expert, Professor Orley Ashenfelter.\textsuperscript{45}

38. **Experts Should Not be Narrowly Confined in the Data They Analyze:** Economic analysis and conclusion, to be effective, must look beyond the narrow horizon of the supportive facts and be prepared to explain the contrary facts that the opposing party will rely upon. This principle was highlighted in several cases, including the recent challenge by the FTC of Whole Foods’ acquisition of Wild Oats. In that case, the FTC’s expert Dr. Kevin Murphy, also a distinguished professor of high reputation, based his market definition on the “differentiation or uniqueness” of the two stores and argued that the appropriate market definition was “premium natural and organic supermarkets.” His analysis of competition within this market led him to conclude that the merger would lead to competitive harm. But the Court found that Dr. Murphy did not adequately assess the potential competitive constraints and alternatives posed by supermarkets outside of this narrowly defined market, which, ultimately, undermined the FTC’s alleged market.\textsuperscript{46} Similarly, in U.S. v. Oracle, the Court was not persuaded that the market consisted of only three players in a highly concentrated market when alternatives outside of those three players were not fully analyzed by Dr. Elzinga. The clear lesson here is that courts will expect experts to analyze and explain data outside of the narrow range of their conclusions.

39. **Economic Experts Should Not be Advanced as Industry Experts:** The credibility of an economic expert can be significantly jeopardized in those situations where the economist takes on the mantle of industry expertise. Maintaining this distinction can be challenging, especially where the expert is assessing industry dynamics in support of the economic analysis. But placing the economist in the role of industry expert exposes the economist to potentially withering cross-examination as well as counter testimony by company representatives who often have spent a lifetime – as compared to a few months – studying the industry.

40. **Economic Conclusions Must Be Based On Robust Facts:** In FTC v. Arch Coal, the FTC advanced an argument (not central to their overall objection to the merger) that 8800 Btu coal constituted a separate relevant product market from 8400 Btu coal. The FTC’s economic expert examined the conditions that distinguish one relevant market from another, observed that in some cases 8400 Btu coal could not be substituted for 8800 Btu coal, and concluded that 8800 Btu coal was likely a separate relevant product market. The

Court rejected this conclusion as speculation, because Dr. Morris had not examined the factual conditions that lead to his conclusion of non-substitutability and also because he did not analyze and explain the circumstances under which 8400 Btu coal could be substituted for 8800. This exposed a fracture in the factual analysis that caused the court to view the two products as wholly interchangeable, even under conditions where the substitutability may have been limited. A further examination of the factual underpinnings of customer substitution could have lead either to a more robust rationale for the hypothesis that 8800 constituted a separate market, or to the abandonment of the argument prior to trial, which likely would have preserved witness credibility. In Canada, similar issues have arisen, for example in the Superior Propone case, where it became apparent that the Commissioner had not established a sufficient evidentiary basis for the opinions expressed by her experts in connection with the complex efficiencies defence.

41. Experts Should Be Prepared to Play Both Offence and Defence: In most contested proceedings, both the agency and the defendant parties will have economic experts. The most successful parties will have spent as much time preparing their economist to critique and undermine the testimony of the opposing expert as they have spent on preparing their affirmative story. In many cases, neutralizing the opposing expert is key to a successful outcome. In this respect, it is important to examine burden of proof and presumption issues. If a party can project that the burden of proof (or the burden of persuasion) will shift to the opposing party due to fundamental facts, then an effort to undermine the economic testimony of the opposing expert may be the most important aspect of the case. For example, in the U.S., a rebuttable presumption of competitive harm is established in mergers in which the resulting market concentration reaches a certain threshold in a well defined market. Thus, in those instances where the market is reasonably well defined and the concentration levels are sufficiently high, the burden shifts to the merging parties to rebut the presumption of competitive harm. Thus, it is important in these cases for the agency to prepare their economic expert to destabilize the parties’ economic expert testimony. If, on the other hand, the burden is on the agency to establish prima facie elements, such as the relevant product market, then the agency should focus more attention on advancing the testimony of its own expert.

VI. Concluding Observations

42. BIAC supports the growing acceptance of the proposition that modern antitrust enforcement should be based on a clear and objective assessment of “effects” as identified or measured by sound economic analysis. However, it notes that agencies and courts across jurisdictions display varying degrees of sophistication when conducting economic analyses – or failing to do so.

43. BIAC believes that agencies’ decisions may be particularly vulnerable with regard to the relationship between the underlying facts and the specific model that the agency has chosen to predict or explain the effects of the (proposed) transaction at hand. This suggests that agencies should not only pay attention to the specific modelling technicalities, but should in particular

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ensure that the underlying facts are complete and that the model properly reflects the market conditions of the real world.

44. Interaction between economic experts engaged by agencies and the parties (or third parties) may contribute to the identification of key issues, an early resolution of disputes, and, more generally, contribute to well-founded decisions as to whether the agency’s economic analysis is likely to stand up in court.

45. BIAC supports the use of Daubert-type rules to ensure the quality of economic evidence. In addition, it supports the adoption of general and specific measures aimed both at agencies and courts to improve the reception of economic analyses by courts as set out in this paper.

46. Among the practical considerations for presenting economic analysis and testimony that BIAC submits are the suggestion that economic experts should not be relied upon as fact witnesses, the need to ensure consistency between the law and economic testimonies, the adherence to accepted principles, the need to base economic conclusions on robust facts and the ability to “boil down” complex economic analysis to simple explanations that are consistent with conditions observable to courts.