



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WP3/WD(2008)19
For Official Use**

Working Party No. 3 on Co-operation and Enforcement

TECHNIQUES FOR PRESENTING COMPLEX ECONOMIC ANALYSIS TO JUDGES

-- Germany --

19 February 2008

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 19 February 2008.

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JT03240287

TECHNIQUES FOR PRESENTING COMPLEX ECONOMIC THEORIES TO JUDGES

1. Preliminary remarks

1.1 *Sound economic analysis is essential for the work of competition agencies and courts*

1. In the *Bundeskartellamt's* view, there is consensus that competition agency as well as court decisions should be based on sound economic analysis.

2. In particular, stringent qualitative economic arguments and, if necessary, quantitative analysis should be used to make a case. Consequently, the antitrust decisions of competition agencies often involve a substantial body of economic analysis, e.g. economic theories, estimation methods, simulation etc. that can result in qualitative economic arguments as well as empirical findings.

3. When an agency decision is under judicial review in court proceedings, the representatives of the agencies will have to conclusively demonstrate economic arguments. In this context agencies will have to take into account that not all judges have economic qualifications.

1.2 *The debate about the degree of "economisation" of competition law*

4. In the context at issue it should not go unmentioned that there is considerable debate among competition law practitioners and scholars about the degree of "economisation" in the specific application of competition law and about consequences of wrong decisions. In the debate, a differentiation is made between two types of wrong decisions. Firstly, competition authorities can wrongly regard business conduct as abusive and as a result prohibit admissible and desirable intensive competition (type I error or over-enforcement). Secondly, the competition authority might not identify and fail to prohibit abusive behaviour as such (type II error or under-enforcement). The disadvantages of a type I error result primarily from the fact that inefficient companies are artificially kept in the market, whose business resources applied otherwise would generate greater overall welfare ("static-allocative inefficiency"). The negative welfare effects of type II error arise from the loss of consumer surplus due to insufficient competition. In addition, welfare deficits should be taken into consideration that can result from a possible squeezing-out of more efficient suppliers and from a weakening of innovative competition ("dynamic inefficiency"). The positions on the appropriate degree of economisation of competition law application reflect varying weightings of the risks and consequences of type I and type II errors.

5. In the view of the relative low number of abuse cases in Germany and Europe there should be little evidence of considerable over-enforcement and, accordingly, of an overbalance of type I errors.

1.3 *Judicial review and competition law in Germany - Parameters*

1.3.1 *Organisation of courts competent to deal with competition cases*

6. Decisions taken by the *Bundeskartellamt* in all competition matters are subject to judicial review.

7. Only two courts specialising in competition law rule on decisions of the *Bundeskartellamt*. In first instance, the Düsseldorf Higher Regional Court decides upon the findings of the *Bundeskartellamt*, both as regards facts and points of law. At the Düsseldorf Higher Regional Court, three antitrust chambers with experienced judges specialising in competition law are competent to deal with competition cases.

8. In the second instance, the case may be brought before the *Bundesgerichtshof* (Federal Court of Justice) but only on points of law. One chamber of the Federal Court of Justice composed of judges highly qualified and experienced in competition law matters decide on decisions issued by the *Bundeskartellamt*.

9. It should also be mentioned that both, the antitrust chambers of the Düsseldorf Higher Regional Court and antitrust chambers of the Federal Court of Justice also deal with claims of private parties based on competition law which give them a broad knowledge of competition cases as well as the underlying economics. Both, specialisation and experience with private competition claims, means that chambers well familiar with competition law and economics have evolved over time. Members of both courts also regularly contribute to the scientific discussions on competition law in the form of publications and speeches.

10. Furthermore, as regards other courts which deal with the competition law decisions of the antitrust authorities of the *Länder* as well as private claims based on competition law, most of them provide for chambers specialising in commercial law matters or even in competition law.

1.3.2 *Discussing competition law and economics with judges*

11. In the view of the *Bundeskartellamt*, promoting awareness of competition law and its application by the *Bundeskartellamt* in the general public is essential. Further to publishing press releases and giving speeches in public, the *Bundeskartellamt* fosters regular meetings with competition law experts. In this respect the “Working Group on Competition Law” is of great importance. For more than 40 years now the *Bundeskartellamt* has organised an annual meeting of the Working Group. The group consists of university professors from economic and legal faculties and judges from the antitrust chambers at the courts, who come together to discuss current antitrust issues. The *Bundeskartellamt* prepares a discussion paper for each meeting which serves as a basis for debate among the Working Group members¹. Furthermore, the *Bundeskartellamt* presents current and potentially contentious cases of its most recent practice in this forum.

12. Further to that, every other year the *Bundeskartellamt* organises an international conference on competition issues (IKK – International Conference on Competition). At these traditional meetings attended by competition experts from more than 50 countries, including judges and high-ranking representatives from politics, industry and academia, current problems of competition policy and competition law are discussed².

2. **Presentation of economic arguments in court**

13. While preparing the presentation of a case and complex economic arguments in court the *Bundeskartellamt* takes the following into account.

¹ In 2007, the *Bundeskartellamt* prepared a paper on “The Future of Abuse Control in a More Economic Approach to Competition Law” which will be available shortly at http://www.bundeskartellamt.de/wEnglisch/Publications/Working_GroupW3DnavidW2618.php.

² For more information and documentation of recent conferences see <http://www.bundeskartellamt.de/wEnglisch/Publications/ConferencesW3DnavidW2617.php>.

2.1 *Presenting economic arguments in court*

14. As a general rule, complex economic arguments should be incorporated in a written submission to the court well in advance to give the court time to thoroughly prepare for the hearing.

15. Furthermore, as with any other reasoning, economic analysis should be well structured and presented in a comprehensible manner. This means that the problem at issue should be clearly identified, and the line of argument should be presented in such a way as to enable the reader or listener to easily follow it. Also, the agency's representative should indicate the relevance for the case at issue.

16. If the analysis is based on assumptions, these should be highlighted to the court and reasons for determining parameters should be given. The agency's representative should be prepared to explain why other assumptions or parameters were not employed in the analysis.

17. A written as well as an oral presentation should conclude with a clear answer to the problem outlined at the beginning of the presentation.

18. In case the presentation and the line of argument are based on data, all the figures used in the presentation should be compiled in a handout. This handout should also include references to written submissions or pages of the file that contain the relevant data. If the data can be visualized, e.g. by a graphical presentation, this will also make the argumentation easier to follow for the listener. If an argument relies on an empirical analysis conducted by the authority, the database and the calculations or estimations should be made available to the court and the parties.

19. When opting for a computer-based presentation, the presentation should be supplemented with paper copies for each member of the court. Furthermore, in Germany, the paperwork will become part of the court file and facilitate possible appeals on points of law, if misunderstandings should occur.

2.2 *The role of economic consultants*

20. For complex economic analysis, competition agencies and other parties sometimes rely on economic consultants. In Germany, courts too may appoint economists to obtain expert knowledge if necessary.

2.2.1 *Experts appointed by the competition authority*

21. About 45% of the *Bundeskartellamt's* staff are economists that are well-trained and familiar with the relevant economic theories, methods and have experience in dealing with antitrust cases. Nevertheless, the appointment of economic experts as consultants can be very helpful.

22. This is the case, in particular, where extensive expert opinions of other parties are to be assessed and commented on. Furthermore, it may be beneficial to outsource the development and realisation of complex models and calculations.

23. In any case, the agency should make sure to appoint a consultant that is well experienced not only with theoretical but also with "real world" economics and competition policy. Most importantly, the expert should be able to present his arguments in a clear and comprehensible way. If the expert needs to give his opinion orally in court it is an advantage if the expert has experience with expert testimony in court and some knowledge of the competition law framework and proceedings.

24. The appointment of an external expert can be particularly advisable if the opposing party has already appointed an expert. This may be even more true if this expert is distinguished and has elaborated

an excellent expertise. In this case it would be important to be on equal terms with the opposing party. On the other hand, if the expertise presented by the opposing party is of low value it may suffice if internal economists counter the expertise at issue by pointing out methodological or other shortcomings to show that the expertise does not support its findings. In that respect it would be convenient to focus on the most obvious deficiencies of the expert opinion and treat them one by one in a presentation before the court.

2.2.2 *Experts appointed by the court*

25. In case an external expert is appointed by the court, it is important to assist the court by selecting a well experienced and neutral expert. Furthermore, it is of great importance in support of the court to elaborate a precise definition of the expert's task, *i.e.* by formulating precise questions. Furthermore, it is necessary to define which facts and data should be employed as a basis in the analysis in order to make sure that the expert's findings can be verified.