Techniques for Presenting Complex Economic Theories to Judges

1. Introduction

Competition law is designed to underpin the efficient operation of markets and thereby promote economic growth. As such, it is to a large extent based on economic concepts, and economic analysis and evidence lies at the heart of many actual competition cases. When bringing competition cases, or defending its decisions on appeal, the UK Office of Fair Trading (OFT) therefore lays great emphasis on the robustness and clarity of presentation of its economic analysis and evidence.

We typically receive economic submissions from the parties involved, the analysis for which will usually have been carried out by specialist economic consultancies (or occasionally academic economists). In order to review these submissions, and to develop our own economic thinking and evidence, the OFT regularly uses both its own staff economists and input from independent expert economists. Economics is fully embedded within the work of the OFT. We have around 60 staff economists, and for the past seven years the OFT has been headed by an economist[1].

As a competition authority, the OFT is a decision-making body, rather than a prosecuting authority (as in some other countries) which is required to present each of its cases to a court for decision. As such, the OFT is typically only involved in presenting complex economic theories to judges when its competition decisions are appealed.

The OFT is also a consumer authority, and under consumer law we have a prosecutorial role, rather than a decision-making role. Consumer cases may in some cases involve economic issues, and are heard by non-specialist courts. We also have a role in providing amicus briefs to the courts in competition cases which raise important policy issues, but in which we have had no direct role. These can potentially cover economic issues. In addition, the OFT has experience of presenting economic evidence to Courts under the previous competition law regime, and specifically under the now-superseded Restrictive Trade Practices Act.

Based on this experience, the OFT has developed a set of ten key principles for presenting economic evidence, both in its own decisions and elsewhere. These are set out at the end of this short paper.

2. The UK Appeals Process

The competition decisions made by the OFT (and its concurrent Regulators) may be appealed in the first instance to the specialist Competition Appeal Tribunal (CAT). Although strictly speaking its role is that of an appeal court, the CAT is able to determine

[1] Formerly Sir John Vickers, and currently John Fingleton. (The current non executive Chairman of the OFT, Philip Collins, is a lawyer). The OFT's sister authorities – the Competition Commission (CC) and the concurrent sectoral regulators – also place great emphasis on the quality of their economic analysis and evidence.

facts and make its own decision in competition cases. Notably, the CAT's three-person tribunal will typically include an economist, especially where the case raises economic issues.

Appeals of CAT judgments (on points of law only) pass to the non-specialist Court of Appeal and ultimately to the House of Lords, the UK's Supreme Court.

In principle, the CAT may give directions for the appointment and instruction of experts, whether by the CAT itself, or by the parties. This can provide evidence that assists the CAT in completing the proceedings in a cost efficient way. On occasion, the CAT has set up a structured debate on specific points between the parties and their respective experts, an activity which has become known as "hot tubbing".

These powers, and the composition of panels in appeal cases, would suggest that the CAT will tend to have a greater understanding and appreciation of economic theory in competition cases, than judges (for example, those in the English Court of Appeal) or courts who will often not have backgrounds in economics, or indeed competition law.

3. Presenting Economic Evidence

The OFT makes substantial effort, both in its decisions and in its submissions to the Courts, to ensure that its economic evidence and argument is explained and presented carefully and clearly.

The OFT has the option of bringing in external economic expertise in specific instances. This is costly, but we have done it on occasion. For example, in defence of an appeal to the CAT against the OFT's original decision against Mastercard's Interchange Fee[2] (now set aside), we employed two US academic economists who are expert in the area of multi-sided platforms.

We have occasionally considered using our own economics staff as expert witnesses. So far this has not proven necessary in practice.

The OFT has more usually chosen to present its economic evidence to the courts through its lawyers (independent advocates instructed by the OFT specialising in competition law). This can require substantial preparation time to ensure that the lawyers sufficiently understand the underlying economics and its application to the case, and they clearly never become experts. However, a major advantage of this strategy is that our lawyers – once convinced of an economic case – are typically better at describing it to a court in terms that judges not versed in economics find compelling.

The OFT's 1999 case against the joint selling of television rights by Premier League football clubs (taken under the Restrictive Trade Practices Act[3]) is a good example of the

[2] Office of Fair Trading, *"Investigation of the multilateral interchange fees provided for in the UK domestic rules of Mastercard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited)",* 6 September 2005. Decision No. CA98/05/05.

[3] "*In the matter of an agreement between the Football Association Premier League ltd & the Football Association ltd & the Football League ltd & their respective member clubs :*

converse; a situation in which a judge found it difficult to grasp and adjudicate on the economic evidence presented by two expert economists. In this case, the judge, Mr Justice Ferris commented in court as follows:

> "I speak only for myself, and I do so without criticising anybody, but I have to say, I have never listened to evidence in any court for an hour and understood so little of it as I have understood during the last hour. It may all be as clear as daylight to my colleagues.
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> "All I can say is that anybody who really wants to make sure that I understand and have the ability to make an evaluation of this kind of material that we have has a very long way to go in educating me as to how I should deal with it. At the moment, I am firmly, myself, of the school which says 'this is all too difficult, we had better give up'. I simply warn that - I am very sorry, it is all above my head. I will sit here quietly and let it all wash over me for a reasonable amount of time, but I think that those who are asking the court to rely on this must be under no illusions that at the moment, so far as I am concerned, this is all washing over my head".
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> "I am thinking of buying a little flag which I can raise when we get to a part of the case that I just do not understand, but perhaps a notional flag will do. It is up at this part of the case."

This was in the context of highly complex and technical witness evidence on appropriate techniques for econometric regression in this case. In the final judgment, the rather more judicial wording read as follows:

> "The evidence of the econometricians displayed an enormous degree of expertise and diligence, but we have to say that we found it of limited assistance. Mr. Bishop and Dr. Szymanski had exchanged a number of reports dealing with the attempt to measure, by the application of statistical processes, the impact of television coverage on attendances at matches. Unfortunately there was little common ground between them. Having regard to this fact, the highly technical nature of the statistical discipline which was being applied, the limited scope of the underlying data and the difficulties involved in taking proper account of all the factors which may affect a person's decision whether or not to attend a football match, we do not feel able to prefer the evidence of one of the experts to that of the other[4]."

Ten key principles for presenting economic evidence

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in the matter of an agreement relating to the supply of services facilitating the broadcasting on television of premier league football matches & the supply of services consisting in the broadcasting on television of such matches" (Judgment 27 August 1999)

[4] It seems that the OFT faced an uphill struggle in explaining the economic reasoning underlying its case. When the case was mentioned in the UK Parliament, one Member of Parliament (David Mellor) commented: *"I cannot imagine how even some pointy-headed quasi-intellectual in the Office of Fair Trading could seriously believe that [the independent selling of TV rights by Premier League clubs] lies within the world of practical reality."* (Hansard, 2nd July 1996).

As described above, the UK CAT, due to its composition, should be in a better position to take in, and adjudicate on, economic evidence than a court where the judge(s) are not versed in economics. Nevertheless, the OFT considers that there are ten key principles that it is useful to seek to follow when presenting complex economic evidence to any Court, or indeed to a competition authority.

1. **Explain underlying intuitions**. In some cases, economists fail to describe the underlying intuitions behind their findings. It is important to remember that judges who are not versed in economics may not fully understand the intuition underlying even basic economic concepts, such as why three competitors are typically better than two, let alone more complex concepts such as the effects of competitors exchanging information or predatory or exclusionary conduct. One useful tool for providing the intuition behind complex economic concepts is by way of analogy or by using worked examples.

2. **Ensure that economic theories are grounded in the facts of the case.** While any economic model will necessarily involve some degree of abstraction from reality, it is important to ensure that the key elements of any economic theory employed are broadly grounded in the empirical evidence. The OFT was criticized by the CAT failing to do exactly this in its judgment in the appeal against the OFT's Attheraces (ATR) decision:

> "Ultimately, however, the whole […] question appears to us to be anyway probably too theoretical to be of real practical utility. The OFT's case is founded on the assertion that ATR could have gone about the purchasing exercise in a fundamentally different way from that which ATR originally acknowledged was the only practical way; and that, had it done so, it could have picked up the requisite rights at an appreciably lower price."
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> "[I]n our judgment the evidence before the OFT did not entitle them to be confident as to the correctness of their interpretation of such events.[5]"

Likewise, in the recent appeal *Albion Water Limited v Director General of Water Services*, the CAT was clearly more positively disposed towards the expert evidence of one witness, which it viewed as 'practical' and 'dynamic' than the evidence submitted by another witness, which it characterized as 'theoretical' and 'static'[6].

3. **Know and explain the limits of your data**. A common technique in challenging empirical analysis is to point to one or two of the underlying data points and show that they are shaky, or even wrong. In most cases, these one or two data points will not actually be determinative of the analytical conclusions reached, but this form of attack on the evidence can undermine a Judge's confidence in the analysis. It is therefore important to check the robustness of the data – and the likely effect of changing the data – before

[5] "*The British Horseracing Board v Office of Fair Trading",* [2005] CAT 29, paragraphs 200/201.

[6] "*Albion Water Limited v Director General of Water Services*", [2006] CAT 23, paragraph 662.

getting into Court, in order to be in a position to show that any apparent data deficiencies do not affect the overall conclusions.[7]

4. **Carry out sensitivity analysis**. Another common technique in challenging economic modeling work is to show that the assumptions underlying the model are not precisely accurate. Sensitivity analysis can be used to demonstrate that the same results hold under a variety of different realistic assumptions, which in turn makes modeling analysis more robust to such criticisms and assists in building a judge's confidence in the evidence.

5. **Employ (and develop) simple rules.** In a legal context, it can be valuable to provide and justify an analytical rule or approach, before going on to apply it. The most commonly used rules in competition cases are the Areeda-Turner (or Akzo) test for predation and the Hypothetical Monopolist (or SNIIP) test and 'Critical Loss Analysis' for market definition. Economists have an important role to play in developing the set of useful rules. However, it is also important to note that these simple rules can potentially be misleading in some circumstances and cannot always be applied dogmatically. Economists also have an important role to play in explaining when and how this can occur and thus why the application of the rules will be appropriate in some cases, but not in others.

6. **Use plain, non-technical language**. Economists sometimes forget that non-economists find it hard to understand economic terms, such as what a regression means, let alone 'heteroscedasticity' (see Premier League case above). The correct technical terms must be used, but they must be explained in plain, non-technical language and often the use of analogies is helpful. Plain language and analogies should not, however, be used at the expense of the accuracy and robustness of the economic reasoning.

7. **Where possible, draw on the established stock of economic theory, not the latest advances**. Economic theory is continuing to develop quickly in a number of areas (for example, buyer power and multi-sided markets). While recent developments explored in newer papers can be useful in supporting or complementing established theories, the latest papers can sometimes be less robust than the body of established theory. This point has been emphasised (although not in the context of court submissions) in a speech by Professor Paul Klemperer[8]. Hence the latest advances need to be presented with caution and in context.

8. **Make sure the economic case is well aligned with the legal case**. In some cases presented to the OFT (especially in the mergers field) or by parties in court in competition cases, the economic and legal analyses are presented as more or less distinct sets of arguments, and can even make inconsistent assumptions. This is particularly common when the economic evidence is included as an annex to the main submissions, rather than being fully embedded within the submissions. Judges will be well used to dealing with

[7] An alternative solution to this problem can be for the Court to require both parties to use a dataset that they have jointly agreed upon in carrying out their analysis.

[8] Paul Klemperer, "Using And Abusing Economic Theory", *2002 Alfred Marshall Lecture to the European Economic Association.* Reprinted in *Journal of the European Economic Association, 2003*

properly presented legal submissions and may be confused by a set of separate, unintegrated and inconsistent economic arguments and thus tend to discount them.

9. **Don't try to use complex economics as a smokescreen for weak arguments.** If the case is weak on the evidence and/or economic theories, no amount of complex economic evidence is likely to save it before a judge. All you are likely to do is annoy the judge. But this does not mean that competition authorities should not pursue complex economics in the appropriate cases, even where the economic theory is still being developed and its application explored.

10. **Ensure your expert witness is well prepared and doesn't hector or talk down to the Judge.** Completely obvious, but sometimes forgotten. Expert witnesses are likely to have written extensively and given evidence in other cases. They need to be prepared to deal with apparent inconsistencies or contradictions between their evidence in the case in question and positions taken elsewhere; in some cases it may be better to deal with this as part of their initial evidence so that the Judge's confidence in the witness and the evidence is not undermined when the evidence is examined in court. And judges never like to feel that they are being patronised!

NOTE

The above paper was presented to an OECD Roundtable on **Presenting Complex Economic Theories to Judges** in February 2008.

An executive summary of the discussion, and copies of the documents that were discussed, may be found here.