



EE&MC COMMENTS¹

on BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA COLLECTION IN CASES CONCERNING THE APPLICATION OF ARTICLES 101 AND 102 TFEU AND IN MERGER CASES

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Introduction

The European Commission released its drafts on Best Practices in January 2010. The Best Practices for discussion comprise of three different documents, which contain detailed explanations how the Commission intends to work. The goal of these papers is to further enhance the transparency and the predictability of the Commission's antitrust proceedings.

The following EE&MC comments refer to the "Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases". Our comments do not cover the Best Practices for antitrust proceedings and the Guidance on the role of the Hearing Officers.

The EE&MC comments are divided into two sections. The first section covers practical recommendations with respect to content of the Best Practices. The second section discusses specific issues of the document.

General comments

EE&MC **strongly supports** the Commission's intent to publish guidelines on how to conduct economic analysis in the EC competition rules.

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Over the past years, economic analyses are of increasing importance in antitrust proceedings. This development was initiated by the EC Courts which advocated for better economic analyses. Against this background, the adoption of Best Practices for the Submission of Economic Evidence and Data Collection is highly welcomed.

The draft contains a well structured guideline how to handle economic analysis but focuses **on empirical methods**. The view of the Commission relating to the requirements of empirical investigations becomes evident. The issues elaborated in the paper are coherent with normal scientific work. It is even mandatory that students already apply the scientific standards outlined in the paper. From the practical point of view it is quite nice to read such basics again e.g. on statistical significance (para.34) or the robustness of analysis (para.37).

However, for an economic consulting firm fully focused on the application of competition economics in EC competition law, the **added value of the current Best Practices is limited**. Important issues for competition economists are not discussed. In the following two examples are elaborated:

- **More substantial input on the “more economics based approach” by discussing economic theories /European school**
- **Concrete guidance on the application of analysis tools like merger simulation models or other economic models**

More substantial input on the “more economics based approach” by discussing economic theories/European school

The “**more economics based approach**” or effects-based approach is now applied since 1997. With the publication of the Notice on the “Definition of the Relevant Market” in December 1997 and the overall reform on “Vertical Restraints” in the same year, the first keystones of this approach were issued. The approach entails a strong focus on industrial economics and quantitative methods of analysis, both in case investigations and in formulating legislation and defining the criteria that are to be set. In the following years, this approach had considerably influenced policy making and case law. It is of particular importance that the Commission discusses in its guidelines the distinction of the **European “more economics based approach”** from the US antitrust schools.

The European approach is strongly imbedded in the TFEU. In addition, case law from the European Courts provides solid guidance. It even seems that the European Courts have shaped the “more economics based approach”. This case law could be included in the Best Practices.

What is of particular importance and what should be stressed by such guidelines is that the European approach does not change depending on issues like which school of thought is "en vogue" or which political party rules the country. In contradiction to the European approach in the US for example, competition economics shifted from the Harvard school to the Chicago school, and then to the Post Chicago school and in our days probably to the new emerging Berkeley school. Every school of thought in the US favored different economic models and insights and used different analytical methodologies. The point is that with such changing schools of thought different economists with different perspectives may interpret **the same empirical facts in different ways**, depending on the school of thought preferred.

The Harvard school's main emphasis is for example on markets. Attributes are market structure, market conduct or behavior, and market result or performance. The circular combination of these three elements is called the structure - conduct - performance paradigm. The Chicago school of thought on the other hand emphasizes non-intervention from government and considers regulation in laissez-faire free markets as inefficient. The Chicago school is also associated with neoclassical price theory. The liberal Chicago school de-emphasizes market structure, 'concentration' and 'barriers to entry' and denies the extensive possibility that Harvard scholars could prove empirical relationships. They question in particular, the structure-conduct-performance framework and criticize the empirical studies concerning this paradigm by demonstrating that the relationship between concentration, entry barriers and monopoly profits is not stable or sometimes does not exist at all. One of the major results of their work is that there is no causal link between high concentration and high profit. The US Supreme Court has used the Chicago school approach in several recent cases.² However, that might change in the future.

The renewed attention to the behaviour of the companies is reflected in the latest developments of industrial economics, sometimes called the new industrial economics. The centre of attention is the possible strategic behaviour of companies in oligopolistic situations. Deduction is attempted, within the framework of more sophisticated microeconomic models and with the help of game theory, what the most likely company strategies are and whether collusion is likely or not. This fits in well with the moderate, less ideological and more technical approach of problems in the new century.

² Continental T.V., Inc. v. GTE Sylvania Inc., 433 US 36 (1977); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 US 1 (1979); National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 US 85 (1984); Spectrum Sports, Inc. v. McQuillan, 506 US 447 (1993); State Oil Co. v. Khan, 522 US 3 (1997); Verizon v. Trinko, 540 US 398 (2004); Leegin Creative Leather Products Inc. v. PSKS Inc., 551 US (2007)

What really would be required from a practical point of view from the Best Practices of the European Commission is guidance on which school of thought should be applied in the EC competition rules.

So far we only know that the drafters of the EC Treaty were inspired by the ideas of the ordoliberalism of the Freiburg school. During the Second World War, scholars at the University of Freiburg in Germany developed their ideas with respect to a European post-world war. Today, it is known and widely accepted,³ that the ideas of the Freiburg school and not US ideology determined the legal language in Article 101 and 102 TFEU. Thus, the Freiburg school represented in fact the guiding principles in EC competition law.

The ordoliberalism of the Freiburg school starts from the very premise that the market order is a constitutional order, that it is defined by its institutional framework and, as such, subject to (explicit or implicit) constitutional choice. Thus, the Freiburg school or Ordoliberalism⁴ is a school of liberalism, which emphasizes the need for the state to ensure that the free market produces results close to its theoretical potential.

Ordoliberal theory holds that the state must create a proper legal environment for the economy and maintain a healthy level of competition through measures that adhere to market principles. Therefore, defining the 'rules of the game' of a competitive market society is an Ordoliberal scholar's underlying mission. The model of complete (perfect) competition provides the substantive standards for competition law, requiring that law to be used to prevent the creation of monopolistic power, to abolish existing monopoly positions where possible and, where this was not possible, to control the conduct of monopolies. Therefore, the monopoly prohibition in the Freiburg school is directed primarily at cartels and other anti-competitive agreements between competitors. This conception of competition law focuses attention on one core problem - private economic power. This broad conception of economic power is one of the features of German and European competition law thinking that most clearly **distinguishes it from its US antitrust law analogues**. In fact in post-world war II, the Ordoliberalism of the Freiburg school contributed a major part of the theoretical foundations on which the creations of the Social Market Economies in Europe are based on.

Because of these reasons there is a clear need that the more economics based approach and the underlying school of thought should be discussed in the Best Practices. This is a mandatory requirement in order to choose an appropriate theory of harm. Depending on the school of thought

³ See for example Gerber (2001), p. 264; Gormsen (2006); Cseres (2005), p. 82; Marenco (2002), p. 303

⁴ also called German neoliberalism

applied, theories of harm may differ. If different theories are used, economic results may differ as well.

Concrete guidance on the application of analysis tools like merger simulation models or other economic models

In this section, the application of adequate economic instruments is discussed. The economic instruments' abilities contain much more than just the simple quantification of market structures. The discussion is rather on the question of how and in which cases these methods should be used.

From the practical point of view, guidance should be given how to apply for example Merger Simulation models.

Control of mergers is a field, in which the discussion about economical analysis takes precedence. Particularly, the models of simulating a merger are attracting much attention. Modern market simulation models are qualified to contribute to a better decision making process by linking theoretic hypothesis and empirical observations together. In practice, the weight of modeling is increasing.

The main focus of an analysis of unilateral effects is for example on price changes set by the merging parties. Typically, the price of the product of the smaller of the two merging firms rises by most, followed by that of the larger of the two merging firms. Lost sales from the smaller firm are usually captured by increased sales by the larger firm. The art of modelling is now simplifying reality and yet capturing all the important determinants of a merger. However, the implementation is decisive. Therefore, **guidance on the concept of a merger simulation model would be helpful.** Based on this model concept, relevant data can be collected, e.g. on prices and market shares representing the status quo. This information needs to be "fed" into the model and multifaceted econometric analyses are performed. These models are able to forecast price increases according to unilateral effects.

As with all of the other economic models, there is a high demand for quality. By developing simulation models, economists must interpret the aspect of a realistic illustration of the market conditions. One of the biggest challenges that economists face is realistically reflecting the reactions of the consumers to price changes. They must consequently use different methods, which include multi-level budgeting, logit models, and conjoint analysis. **Guidance by the Commission on these issues would be welcomed too.**

The EC Courts even require from the European Commission the application of such models. Guidance on the appropriate application in the Best Practices would be really helpful.

In the *General Electric (GE)/Honeywell*-case for example the Court discussed at length the application of such models. The Court found that the European Commission did not succeed in this case in applying the economic theory correctly to market realities. The Court claimed that the likely effects on the market were not properly evaluated.

A major issue in this case was that the European Commission did not examine demand side reactions to such product offers. The Court argued that the European Commission assumed a competitive threat through **bundled offers** without examining if the reaction of the demand side would lead in fact to such a foreclosure effect. This error was aggravated by the fact that the European Commission stated several times during the investigation that an empirical survey would be necessary to substantiate such a theory. Such an empirical survey of the demand side reactions was never carried in this case and the Court therefore criticized this inaccuracy: *„In the absence of a detailed economic analysis applying the Cournot effect theory to the particular circumstances of the present case, it cannot be concluded from the Commission’s brief mention of that theory in the contested decision that the merged entity would have been likely to engage in mixed bundling after merger.“*⁵

Thus, according to the Court a mere discussion of economic models does not suffice. The Court clarified, that the application of these models to reality must go along with appropriate empirical studies. Convincing conclusions can only be drawn, if the applicability of theories to a specific case is given: *„The Commission could produce convincing evidence (...) by relying on the Cournot effect only if it demonstrated its applicability to this specific case.“*⁶

Again the Court requires the use of economic models. The Commission should use the possibility and describe such modeling in the Best Practices in a more detailed way.

Specific comments

In the following, we comment on a few aspects only:

No. 10: We consider verbal arguments as necessary with economic submissions. In our opinion every economic analysis should be part of the appraisal of a case.

No. 11: In the center of this paragraph is the counterfactual analysis in merger assessments. The Commission should consider adding simulation models which enable the simulation of price increases and potential efficiency gains.

No. 12: An evaluation of the “realistic” assumptions should be mentioned too.

⁵ CFI, Judgement of 14.12. 2005, Case T-210/01, GE/Kommission, para. 462

⁶ CFI, Judgement of 14.12. 2005, Case T-210/01, GE/Commission, para. 462.

No. 18: This passage should include examples for relevant questions and similar economic questions. Next to the formulation of a relevant question, a look at the results of similar questions would enhance the classification of the hypothesis to the case at hand.

No. 23: A more specific guideline to minimum standards with respect to data pools would be welcomed (e.g. additional instruction on how to handle outliers).

No. 24: A discussion of potential methodologies would be fine.

No. 32: This section would benefit from examples which empirical tools/software can be used. A list of qualified and unqualified software programs could be added. Duplication by parties would be much easier if the software the Commission uses is known. Examples on possible software reporting and results interpreting could also be included.

No. 35: An intuitive explanation of the coefficients should be included if possible.

No. 38: Sensitivity analysis can be described in a more detailed way.

Section on other recommendations

We fully agree that in regards to data and data collection, it is of vital importance that one ascertains that everything needs to be done efficiently and effectively. As gathering and analyzing data takes some time as well as costs, consulting economists of the parties at an early stage is mandatory to avoid any unwanted mistakes. We welcome the opportunity that the Commission intends to meet with parties and their economic consultants as soon as possible to settle any discrepancies, as well as to make swift progress.

We agree that economists should prepare themselves well in advance with potential theories, methods of collection, etc. The empirical work, which will potentially be implemented, should be thoroughly described already at an early stage in the procedure. Everything with respect to the economic analyses should be taken into account before the actual collection occurs.

We also agree that methodology of analysis and the corresponding factors of analysis should be discussed well in advance. Providing evidence that prove tests, empirical analyses, and theories applicable is mandatory.

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