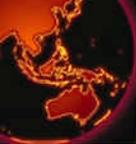


Competition Proceedings before the European Community Courts: Role of Economic Concepts and Economic Analysis

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Introduction

To what extent do economic concepts and analyses play a role in proceedings before the Community Courts?

To what extent can the Community Courts review decisions of the Commission based on an economic assessment?

Margin of Discretion

Under Article 230 of the EC Treaty the Community Courts have competence to review the legality of acts adopted by the Commission. When reviewing decisions of the Commission in the field of competition, traditionally the Community Courts have afforded the Commission a margin of discretion in relation to the assessment of complex economic matters:

"The basic provisions of [Regulation 4064/89] , in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature...Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations" ("Kali v Salz" paragraphs 223 and 224)

Manifest Error

- ◆ This standard of review has been described as the "manifest error standard":
- ◆ "examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers" (Joined Cases C-204/00 P Aalborg Portland, para 279).
- ◆ The Community Courts therefore appear to have a limited level of review of economic assessments undertaken by the Commission when compared to, for example, the level of review in relation to assessments of a factual nature.

Review of Economic Assessments in Practice

- ◆ There are however examples of the Community Courts finding that the Commission has not satisfied the requisite standard of proof in relation to an economic assessment.
- ◆ In Case T-114/02 *Babyliiss* the Commission relied on the "range effect" theory as one of the reasons for concluding that the merger would not result in a dominant position in the countries not covered by commitments. However, when questioned by the Court on the economic principles underlying the range effect factor, the Commission admitted that it had no economic study available to it on the subject. In addition, the Commission had not even proved that the merging company's turnover from strong products was less than 10% of its total turnover. The CFI concluded:
- ◆ "It follows that the Commission has not established to the requisite legal standard the correctness of its theory of the range effect, which it has used to justify the absence of serious doubts in the countries not covered by the commitments" (paragraph 363).

Review of Economic Assessments in Practice (2)

In Case T-210/01 General Electric v Commission the CFI reviewed the Commission's reliance on the "Cournot effect" in its conclusion that, post-merger, the parties would have the incentive to engage in mixed bundling. However, the CFI concluded:

"The Commission could produce convincing evidence by relying on the Cournot effect only if it demonstrated its applicability to this specific case. Accordingly, by merely describing the economic conditions which would in its view exist on the market after the merger, the Commission did not succeed in demonstrating, with a sufficient degree of probability, that the merged entity would have engaged in mixed bundling after the merger" (paragraph 462).

Conclusion

- ◆ Economic concepts and analysis have an important role in proceedings before the Community Courts, particularly in merger cases.
- ◆ The Courts are hesitant about examining the Commission's economic assessments, but will do so in clear cut cases