

EXPERT ECONOMIC TESTIMONY IN
ANTITRUST CASES: A COMPARATIVE
LAW AND ECONOMICS STUDY*

PERITAJE ECONÓMICO EN CASOS ANTIMONOPOLIO:
UN ESTUDIO COMPARADO DESDE LA PERSPECTIVA
DEL ANÁLISIS ECONÓMICO DEL DERECHO

JUAN DAVID GUTIÉRREZ-RODRÍGUEZ**

Reception date: March 23rd, 2009

Acceptance date April 13th, 2009

TO CITE THIS ARTICLE / PARA CITAR ESTE ARTÍCULO

Juan David Gutiérrez-Rodríguez, *Expert Economic Testimony in Antitrust Cases: A Comparative Law and Economics Study*, 14 *International Law, Revista Colombiana de Derecho Internacional*, 221-251 (2009).

* This paper is an adjusted (abridged) version of my master thesis for the European Master in Law and Economics (2006-2007) at the University of Bologna and Erasmus University Rotterdam. I gratefully acknowledge the supervision and guidance received from Prof. Peter D.Camesasca (Erasmus University, Rotterdam and Howrey PLC Brussels) as my thesis supervisor.

** Lawyer (Honors, at Universidad Javeriana); European Master in Law and Economics at University of Bologna and Erasmus University Rotterdam; Professor of Competition Law at Pontificia Universidad Javeriana Law School at the undergraduate and graduate levels. Associate lawyer at Esguerra Barrera Arriaga Asesores Jurídicos.
Contact: jdg@cable.net.co.

ABSTRACT

The purpose of this document is to assess two questions that have a positive and normative nature respectively: 1) What incentives does the legal and institutional framework of the European Community (EC) and the United States (Federal level) provide to the different agents involved in antitrust proceedings in regards to the use of expert economic testimonies? 2) What legal and social norms could provide appropriate incentives to the different agents involved in antitrust proceedings in order to align the use of expert economic testimonies with antitrust enforcement goals? The research questions are assessed from a comparative law and economics approach. The law and economics approach is based upon the Asymmetric Information Theory and Principal-Agent Theory. The document contains five conclusions that may be summarized in the following statement: regarding expert economic testimonies, an antitrust enforcement system must aim at the minimization of its costs through the mitigation of the consequences of asymmetric information between the adjudicator and the expert. A cost-benefit analysis of the use of expert witnesses must take into account the incentives produced by the interaction among the different regulatory and non-regulatory features of the antitrust enforcement system.

Key words author: Antitrust, EC Competition Law, US Federal Antitrust Law, Expert Economic Testimony, Quantitative Methods, Asymmetric Information.

Key words plus: Antitrust law, International Trade Law, Asymmetric Information.

RESUMEN

El objetivo del presente documento es analizar dos interrogantes que tienen una naturaleza positiva y normativa: 1) En relación con el uso de peritajes económicos en procesos por supuesta infracción de las normas antimonopolio, ¿qué incentivos proveen los marcos jurídicos e institucionales de la Comunidad Europea y de Estados Unidos de América (en la legislación federal) a los agentes que hacen parte de dichos procedimientos? 2) ¿Qué normas legales y sociales proveen los incentivos apropiados a los agentes que forman parte de procesos por supuesta infracción de las normas antimonopolio para alinear el uso de peritajes económicos con los objetivos de las normas antimonopolios? Las dos preguntas de investigación son analizadas a partir del Derecho Comparado y del análisis económico del Derecho. El documento contiene cinco conclusiones que pueden resumirse en la siguiente afirmación: en relación con el uso de peritajes económicos, el sistema de normas antimonopolio debe procurar la minimización de sus costos de aplicación mediante la mitigación de las consecuencias de la asimetría de información entre el adjudicador y el experto. Un análisis costo-beneficio sobre el uso de peritajes económicos debe tener en cuenta los incentivos producidos por la interacción entre las características regulatorias y no regulatorias del sistema de aplicación de normas antimonopolios.

Palabras clave autor: *Derecho antimonopolios, ley de competencia de la Comunidad Europea, ley antimonopolios de Estados Unidos (federal), peritajes económicos, métodos cuantitativos, información asimétrica.*

Palabras clave descriptor: *Ley antimonopolio (Derecho internacional), Derecho comercial internacional, información asimétrica.*

SUMMARY

I. INTRODUCTION.- *A. The nature of the problem posed by the use of expert testimonies and quantitative methods in antitrust cases.- B. Economic expertise and the optimal enforcement.- C. Quantitative techniques and economic theory in antitrust cases.- D. Scope, structure and methodology of the document.- II. LAW AND ECONOMICS OF ECONOMIC EXPERTISE IN ANTITRUST LITIGATION.- A. "Adjudicator-Economic expert" relation in terms of asymmetric information.- 1. Adverse selection problem.- 2. Moral hazard problem and principal-agent conflict of interests.- B. The incentives of the US and EC enforcement systems.- 1. Institutional design.- 2. Procedural rules.- 3. Evidentiary rules.- 4. The market of economic experts and the scholars' community.- III. CONCLUSIONS. BIBLIOGRAPHY.*

I. INTRODUCTION

A. The nature of the problem posed by the use of expert testimonies and quantitative methods in antitrust cases

Competition authorities and litigants, all over the world, have increased the use of economic quantitative methods and/or economic expert witnesses as a means to interpret facts and produce evidence in antitrust cases. Quantitative analysis is not strictly necessary to decide every case¹ and generally is a complement for qualitative analysis in the proceedings.² Nevertheless, in certain prosecutions, interpretation of facts through economic methods is crucial to prove the infringement of law, the innocence of the defendants or to calculate the damages caused by the anticompetitive practice.

Economic expertise is especially relevant in cases where direct evidence is not present or conclusive and where the assessment of the economic effects is necessary to distinguish pro-competitive practices from anti-competitive ones.

Methods implemented by economic experts may vary from simple mathematics or basic economic theory to very complex statistical and econometric tools or sophisticated theoretical argumentations, which may not be apprehended by non-economist adjudicators such as justices and juries.³

The fact that the quality of the methodology applied by the expert to the data may not be assessed by the adjudicator (especially in the case of non-specialized authorities) creates a typical “*principal-agent*” scenario. In effect, information asymmetry between adjudicator (the principal) and expert (the agent, whether hired by the parties or court-appointed) creates different kinds of “*agency costs*.”⁴

1 *e.g.* It is not essential in cases of *per se* violations proved by direct evidence.

2 *Cfr.* Roger J. van den Bergh & Peter D. Camesasca, *European Competition Law and Economics. A Comparative Perspective*, 10 (2nd ed., Sweet & Maxwell, London, 2006).

3 *Cfr.* Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 *The Journal of Economic Perspectives*, 2, 91-99, 95-96 (1999).

4 *Cfr. Id.*, at 93. John L. Solow & Daniel Fletcher, *Doing Good Economics in the Courtroom: Thoughts on Daubert and Expert Testimony in Antitrust*, 31 *Journal of Corporation Law*, 490 (2006).

The asymmetrical information problem between adjudicator and expert is not only relevant for antitrust law. As a matter of fact, an asymmetrical information problem is also present in civil, commercial or criminal cases where a scientific or special knowledge is needed to interpret the facts and establish the juridical consequences of a conduct.⁵ However, in the case of antitrust proceedings the “principal-agent” problem between adjudicator and expert is especially pertinent and complex due to the nature of economics as a “tooled knowledge.”⁶

B. Economic expertise and the optimal enforcement

The main economic goal of antitrust enforcement system is deterrence of welfare-reducing anticompetitive practices.⁷ Economic expertise that is well grounded in reliable information and data, methods and models, and that is adequately applied to the facts of the case renders more accuracy, legal certainty and predictability in adjudication.⁸ In this sense, the application of quantitative techniques to analyze the facts of a case or to produce evidence is aligned with antitrust law’s goals.

However, deterrence shouldn’t be attained at any price; an optimal enforcement of competition law implies the minimization of enforcement errors and administrative costs.⁹ The use of expert economic testimonies and economic evidence has incidence in the burdens of the two costs inherent to antitrust enforcement. Enforcement errors may be pervasive in scenarios where: a) parties abuse of economic expertise –by presenting biased and poorly grounded expert testimonies that seem well-grounded– and b) competition authorities and adjudicators completely disregard economic methods and expertise simply because their origin is partisan. Adjudication errors, on the other hand, consist on the sanctioning of innocent undertakings (*false*

5 See Richard A. Posner, *supra*, at 91-99.

6 Although economists use quantitative methods that are analogous to the methods used in *natural sciences*, economics is not an *exact science* but rather a *social science*. Joseph Alois Schumpeter, *History of Economic Analysis*, 7 (Oxford University Press, London, 1976 (1954)).

7 Roger J. van den Bergh & Peter D. Camesasca, *supra*, at 300-301.

8 *Cfr.* Richard Posner, *supra*, at 97.

9 Roger J. van den Bergh & Peter D. Camesasca, *supra*, at 300-301.

positives, type I error) or on the failure to sanction the infringement of the law by firms (*false negatives, type II error*).¹⁰

Furthermore, the enforcement of antitrust laws will not be optimal if administrative costs are not minimized.¹¹ The administrative costs of enforcement –which are very high in case of litigation– include both the costs for the public administration to carry out the investigation and proceedings and the costs for the private parties involved in the proceedings.¹² Indeed, expert testimonies will represent a direct cost for the private parties that hire their own expert and to the opposing party that is “*forced*” to hire it as well. Expert testimonies will also represent an indirect cost for the public administration as the sophistication of the litigation will require more resources (economic and human) and time to decide on the matters. Competition authorities will need permanent qualified economist officials or hiring temporary for advisory on specific cases in order to assess the expert testimony and contend it –if it’s the case.

In principle, the sophistication of economic evidence in antitrust cases appears to be smoothly aligned with the goal of any adjudicative procedure: to achieve accurate decisions at the lowest cost possible. However, as stressed above, an increased use of quantitative methods and economic theory will not necessarily convey more “*accurate*” decisions and creates high administrative costs in the proceedings thus possibly outweighing any of its benefits. Therefore, the use of economic expertise may be counter-productive and misaligned with antitrust law’s goals depending on the regulatory framework, institutional capacity and other features of the enforcement system.

C. Quantitative techniques and economic theory in antitrust cases

The participation of economists in the shaping of antitrust policy and antitrust proceedings (especially rendering expert testimony) has increased in the last decades in the US (where it is very common),

¹⁰ *Id.*, at 301.

¹¹ *Id.*

¹² *Id.* Cfr. Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 *St. John’s Law Review*, 1, 1-41, 3-5 (1998).

partially in the EC and in some Latin American jurisdictions, such as Argentina, Brazil, Colombia, Costa Rica, Chile, Mexico and Peru. The increasing role of economists in antitrust—both in competition authorities and as consultants for private firms—is directly linked with the increase of quantitative analysis in antitrust. The role of economic experts and economic evidence is extensive in all relevant fields of antitrust: mergers, abuse of dominant position, vertical or horizontal agreements or calculation of damages. Quantitative methods¹³ used in antitrust litigation may be categorized in four areas, according to their purpose: i) delineation of markets (product and geographic);¹⁴ ii) characterization of market structure;¹⁵ iii) pricing behavior analysis;¹⁶ iv) assessment of efficiencies;¹⁷ and v) quantification of damages.¹⁸

The difficulty for an adjudicator to determine whether complex statistical and econometrical methods are well grounded seems obvious. Indeed, biased reports may appear as convincing testimonies for laymen. Therefore, it is relevant to explain the intrinsic difficulties related to the application of these techniques and why the relationship between the economic expert and the adjudicator is permeated by information asymmetry. Economic expertise requires in-depth economic and econometric knowledge and experience in order to collect and process the data; likewise, it is very challenging to choose and build the necessary models or hypothesis and to test them.

The availability and reliability of the information needed for the procedure is the first problem that an expert faces. The source of the information may be the parties involved (*e.g.* business plans or accountant information), third parties (*e.g.* competitors, suppliers or customers), “*trade associations, trade press, independent consultants, survey*

13 A quantitative technique, for the purpose of this document, is understood as the technique “*designed to test an economic hypothesis to the exclusion of exploratory data analysis*” and that is applied by an expert economist. Office of Fair Trading, OFT, *Quantitative Techniques in Competition Analysis*, 8 (Research Papers 17, London, 1999).

14 *See Id.*, at 13-20; 59-68; sections 9 and 12.

15 *See Id.*, at 20-26; sections 10 and 13. *See also* Michael O. Finkelstein, *Quantitative Methods in Law*, chapter 5 (1st ed., The Free Press, New York, 1978).

16 *See* OFT, *supra*, at 26-34; sections 3, 4 and 5.

17 *See* OFT, *Id.*, at 35-36.

18 *See* Daniel L. Rubinfeld & Peter O. Steiner, *Quantitative methods in antitrust litigation*, 46 *Law and Contemporary Problems*, 69-141, 102-104 (1983) (for an overview of the technique of econometric forecasting) and 111-139 (for detailed assessment of their application to antitrust cases).

*information, or government sources...*¹⁹ The collection of data may be costly (e.g. general market information such as sales and market shares) or simply not accessible since it may be privately owned by third parties that are not obligated to deliver it, unless it is ordered by a judge.²⁰ The constraints concerning the data available and the fact that available information may not be up-to-date (trade association surveys or government studies are not always made in a year-by-year basis) forces the expert to make assumptions and use estimations to fill the gaps.²¹ The fragility of its testimony increases under these circumstances.

To analyze the data, a theoretical model has to be chosen. Different models may render different results with the same data which is yet another source of uncertainty. Additionally, econometrics is not a neutral technique, since it depends on the economists' decision of the kind of data used, the model and the methodology applied.²²

D. Scope, structure and methodology of the document

The purpose of this document is to assess two questions: 1) What incentives does the legal and institutional framework of the European Community (EC) and the United States (US federal level) provide to the different agents involved in antitrust proceedings in regards to the use of expert economic testimonies? and 2) What legal and social norms will provide appropriate incentives to the different agents involved in antitrust proceedings in order to align the use of expert economic testimonies with antitrust enforcement goals?

In section II, the relation between economic experts and adjudicators is analyzed in the light of the concepts of information asymmetry, adverse selection, moral hazard and "*principal-agent*" conflicts of interest. The above mentioned section shows how asymmetric information problems between experts and adjudicators are exacerbated or mitigated by the legal and institutional framework, as well as by

19 David P. Kaplan, *The Nuts and Bolts of Antitrust Analysis: Some Thoughts on How to Develop the Facts*, in *Economic Inputs, Legal Outputs: The Role of Economists in Modern Antitrust*, 107-120, 107 (Fred McChesney, Ed. Chichester, Wiley, 1998).

20 *Id.*, at 110 and *Cfr.* Article 24 of the Statute of the Court of Justice.

21 David P. Kaplan, *supra*, at 110.

22 *Cfr.* Michael O. Finkelstein, *supra*, at 13.

social norms. Furthermore, section 2 presents different regulatory and non-regulatory alternatives for the mitigation of the effects of asymmetric information problems. The analysis is based on the assumption that the positive or negative role of economic experts in antitrust cases depends on the incentives of the different agents involved.

Finally, section III contains conclusions regarding the alignment of economic expert testimonies with the goals of antitrust and the minimization of asymmetry of information problems between adjudicator and economic expert.

The document has a law and economics approach, understood as the analysis of law using microeconomic theory and methodology. Hence, it analyzes the incentives created by different legal and social norms related to the use of economic expert testimony in antitrust cases from the theoretical standpoint of information asymmetry.

II. LAW AND ECONOMICS OF ECONOMIC EXPERTISE IN ANTITRUST LITIGATION

The experience in the US with economic expertise in antitrust proceedings has substantial differences in comparison with the experience of the EC, and of course also differs from jurisdictions in Latin America. It must be noted that while the use of economic expert testimonies in antitrust cases is the general rule in the US, it is not common in other jurisdictions.

Economic experts are supposed to have the role of bridging the gap between the adjudicator's lack of knowledge and the expertise to use economic theory or economic methods to resolve sophisticated questions in antitrust litigation. Furthermore, the testimony of an expert can be depicted as a kind of "*trust good*", understood as the goods whose quality the consumers (in this case the adjudicator) cannot evaluate completely neither before, nor after "*consumption*."

Strictly speaking, the expert "*witness is not an advisor or consultant, but someone who testifies –who offers what the law regards as 'evidence'.*"²³ Through their testimony, experts provide adjudicators a

23 Richard A. Posner, *supra*, at 92.

simplified version of the analysis that would otherwise be too costly (if not impossible), due to the effort needed for the recollection and processing of data as well as the application of the technique to the facts of the case. In theory, they should provide adjudicators the optimal amount of information necessary for them to analyze the juridical problems that are tried and/or to facilitate the interpretation of facts.

In practice, however, the relation between the economic expert and adjudicator develops in a typical asymmetric-information-setting with a high probability of opportunistic behavior by the former. Non-economist adjudicators (administrative officer, tribunal or juror) lack the information, knowledge and expertise to evaluate the quality of the expert's analysis. Thus, the adjudicator will be exposed to the perils of asymmetric information.

A. "Adjudicator-Economic expert" relation in terms of asymmetric information

1. Adverse selection problem

The parties involved in a proceeding are interested in hiring experts aligned with their interest and hence produce a testimony that is consistent with their allegations prepared by the legal counsels. Evidently, parties will not file an expert that testifies against them. This fact may incentive the expert to produce economic analysis that is less grounded on economic theory and the facts of the case, but that seems convincing and at the same time is aligned with the hiring party's allegations.²⁴ Adjudicators are aware of the latter and since they can not assess the quality of an expert's testimony they may prejudge testimonies as biased, disregarding them as a source of clarity for the case.

As reputation is an important intangible asset for economists, a serious and respected economist may not risk its "*good name*" among its peers to participate as an expert in any given case; the expert will be less prone to participate if its preliminary study of the facts leads

24 John L. Solow & Daniel Fletcher, *supra*, at 490.

him to think that the “*discourse*” that the hiring firm wants to have is economically weak. As a consequence, rigorous economists may refrain from rendering testimony due to the threat of damaging their professional reputation.²⁵ At this point the judges would be even more reluctant to take seriously any expert testimonies. As a result well grounded testimonies from experts will be scarce and in average only low quality services will be available.

Judge’s reluctance towards experts, even court-appointed experts, is a sign of failure of the market for experts. Incapacity to distinguish between *junk economics* and well-grounded analysis may lead to a “*race to the bottom*” and judges will refrain from using expert testimonies.

2. Moral hazard problem and principal-agent conflict of interests

It is not viable (or too costly) for the adjudicator to monitor the performance of the economic expert regarding the application of the quantitative techniques. Furthermore, in case experts are hired by the parties, there may be a misalignment of interests between adjudicator and expert witness. While adjudicator “*demand*s” rigorous and unbiased testimonies to analyze the facts of the case and decide upon the matters, experts have two –possibly conflicting– interests: pleasing their clients (supporting their allegations) and maintaining their reputation as honest and competent professionals (especially in case they are repeat players).²⁶

In case of court-appointed experts, the problem of monitoring will still persist but misalignment of interests may be attenuated due to the fact that their payment does not depend on the alignment of their opinion with the parties’ arguments, however, there is a risk of undesired behavior due to the fact that the expert is a repeat player and may care about a past or future hiring by one of the parties.

It must be remarked that the abstract applications of asymmetric information problems in the relationship between adjudicator and expert witnesses are just one side of the story; in reality –and as it

25 Cfr. Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 *Yale Law and Policy Review*, 480-503, 483 (1988).

26 Cfr. Richard A. Posner, *supra*, at 94.

is analyzed in the next section—agents’ incentives are influenced by legal and social norms that exacerbate or mitigate the effects of the asymmetry of information.

B. The incentives of the US and EC enforcement systems

This section develops an explicit analysis of the effects of incentives that the enforcement system gives to the different “*actors*” in the proceedings (“*principals*” and “*agents*”) emphasizing on the problems of asymmetric information (adverse selection, moral hazard and principal-agent conflicts) in the relation between adjudicator and expert in antitrust cases. The analysis is presented in four subsections: 1) Institutional design of the enforcement system. 2) Procedural rules. 3) Evidentiary rules and 4) A market for economic experts and the academic community. Although the factors that determine the behavior of the “*actors*” are analyzed individually, it must be stressed that in practice they are inter-dependent and affect to each other mutually.

In an antitrust enforcement system incentives may be created, eliminated, deterred or promoted in order to mitigate or solve the problems associated with asymmetry of information. The goal is that legal and social norms influence (incentive) the behavior of experts, parties and adjudicator in such a way that their conduct is aligned with the goals of an optimal antitrust enforcement system.

1. Institutional design

Antitrust enforcement systems may be characterized according to many aspects, among others: the nature of the authorities that enforce the law (administrative or judiciary); their degree of specialization (e.g. ordinary, commercial or exclusively antitrust); the nature of the procedure (administrative, criminal and/or civil); the type of the sanctions (administrative, criminal and/or civil); the distribution of powers of investigation, prosecution and adjudication among institutions (concentration in one body or division among different entities); and the role of public authorities and private parties in the proceedings (adversarial or inquisitorial). Most of these characteristics have

direct incidence over the incentives of adjudicators, expert witnesses and parties involved in the proceeding.

a. Nature of authorities and degree of specialization

Both in the US and in the EC competition authorities are administrative bodies with unit divisions that are specialized in the enforcement of antitrust laws. Furthermore, the authorities are multidisciplinary (lawyers, economists and accountants) and economists are in important decision-taking positions. Hence, the asymmetric information problems between competition authority and economic experts are less daunting than the case of non-specialized authorities. Experts hired by parties know that competition authorities may monitor their performance and evaluate the quality of their reports; therefore, economic experts are disciplined by the fact that competition authority has the capacity to unveil an excessive partisanship and a poorly grounded economic expertise.

In the case of the EC, the Commission's decisions may be appealed before courts that are not specialized in antitrust: both the Court of First Instance (CFI) and the European Court of Justice (ECJ) have jurisdiction to decide on diverse issues.²⁷ The members of the CFI are chosen from persons "*who possess the ability required for appointment to high judicial office.*"²⁸ In the case of the ECJ the members are chosen from persons "*who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence...*"²⁹ Hence, justices are not necessarily specialized in antitrust litigation nor have an economic background.

Furthermore, the Chambers by which cases are adjudicated are not divided by the areas of the EC law; cases are allocated in simple order

27 In the year 2007, the CFI and the ECJ were composed by 27 judges of each Member State (Articles 221 and 224 EC Treaty and article 48 of the Statute of the Court of Justice) and decisions are taken by Chambers composed of different number of judges or the full court, depending on the complexity and importance of the case (Article 221 EC Treaty, article 16 of the Statute of the Court of Justice, and article 52 of the Statute of the Court of Justice).

28 Article 224 EC Treaty.

29 Article 223 EC Treaty.

according to the date in which they were registered at the Registry. In spite of the fact that a great deal of cases that the Courts have to decide upon have an economical or commercial nature,³⁰ few of the actual members of CFI and the ECJ have formal education and experience in economics.³¹ In sum, between the CFI and ECJ and expert economic witnesses there will be asymmetry of information that should be mitigated to avoid its effects.

In the case of the US, in the proceedings where antitrust agencies only carry out the investigation and prosecution, a court is in charge of adjudication. In fact, District Courts have original jurisdiction over antitrust matters³² as well as other diverse legal issues.³³ The Courts of Appeals³⁴ with the exception of the United States Court of Appeals for the Federal Circuit have “*jurisdiction of appeals from all final decisions of the district courts of the United States...*”³⁵ In contrast with the case of the EC, there have been Justices of the Courts of Appeals with an economic background that have made important contributions for antitrust and in general for law and economics such as: Learned Hand, Richard Posner, Frank Easterbrook, Guido Calabresi and Robert Bork, among others.

Finally, the Supreme Court has jurisdiction to review certain decisions from the Courts of Appeals³⁶ and is composed by a Chief Justice and eight Associate Justices³⁷ that have mainly a legal background.

Although it appears that US courts have, in general, broader economic background than the CFI and ECJ, there still will be asymmetry of information between them and the economic experts whenever the justices have no formal education and experience on economics. An obvious solution to reduce the information asymmetry in the

30 See European Court of Justice, *Annual Report*, 84, 90, 176 and 178 (2006). *Cfr.* Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti & Adam Tomkins, *European Union Law: text and materials*, 125 (Cambridge University Press, Cambridge, 2006).

31 Actually not more than three of the Justices have some background in economics or antitrust. Most of the current members of the ECJ and the CFI are specialized in public, civil or international law.

32 Title 28 US Code § 1337.

33 See Title 28 US Code §§ 1330-1369.

34 Divided in thirteen judicial districts. Title 28 US Code §41.

35 Title 28 US Code §1291.

36 See Title 28 US Code §§ 1253-1259.

37 Title 28 US Code §1.

“*principal-agent*” relation between the expert and the adjudicator is higher economic training for the latter. Hence, if the adjudicator of the case (obviously excluding the cases where juries take the decision) were trained in economics and econometrics the problem would be significantly mitigated. In principle, it is important that courts deciding upon antitrust matters have economical training since competition laws have an economic rationale. Nevertheless, just aiming at increasing the economic skills is a very limited answer to the problem: the opportunity cost for the adjudicator of acquiring the expertise, gathering the information and performing the empirical analysis may be too high. Furthermore, the same argument could be said regarding any other specialized knowledge that is decisive for a case: Medicine, Engineering, Psychology, Accounting, etc. But, it is not economically feasible –perhaps not even desirable– that all adjudicators (especially judicial) have expertise on diverse knowledge due to the costs that it would entail and the scarcity of the State’s resources.

A practical solution that many jurisdictions employ to organize the judiciary systems is a division of the courts in complex issues where the benefit of having a specialized judge outweighs its cost. This could be the case of antitrust and this is why many jurisdictions of the world have competition authorities, entities that are specialized in enforcing competition laws. It is a simple development of the principle of “*division of labor*” where agencies and courts are transformed into repeat players that are more qualified to decide upon matters.

In the case of courts, the decision could be taken upon having a specialized court in competition issues³⁸ or allocating antitrust cases to specific chambers (EC) or panels (US) of the Courts. The latter seems feasible in both jurisdictions and wouldn’t imply a big distortion of their judiciary system nor –in principle– excessive

38 The Directorate General Competition, DG COMP, through working papers, has even proposed the creation of “*specialist courts*” or “*specialist panels*” for damages claims based on competition laws. The latter, due to the complexity of the topic it requires an expertise that civil judges may not have and to foster “*a culture of expertise of the judges involved and could play a positive role in promoting efficient enforcement of competition law*”. Directorate General Competition, DG Comp., *Annex to the ‘Green Paper: Damages actions for breach of the EC antitrust rules’*, paragraph 255 (2005).

increase of costs. The former is the case of Chile that has a specialized Competition Tribunal (of judiciary nature) composed of five Justices: three lawyers (with antitrust background) and two persons with undergraduate or graduate education in economics.³⁹

Finally, another possibility could be appointing economists in adjudicating positions. The EC has already given a step forward by creating a Chief Competition Economist post has been created in the Commission.⁴⁰

b. Distribution of powers and the role of authorities and parties

In the EC the Commission is entitled to exercise investigative and adjudicative functions. The EC's antitrust enforcement system has an inquisitorial nature and partisan expert testimonies are not allowed by procedure rules; only court-appointed experts may render their reports in the proceedings. This system gives fewer incentives for parties to support their pleadings through economic expertise and there is no confrontation of expert testimonies; unless the Court appoints more than one expert, there is no cross-examination among experts.

The scarce demand for economic experts in antitrust proceedings (even the Courts rarely appoint them as expert witnesses) causes a lack of a market for economic experts and of economists with experience on expert testimony, which also has consequences that are analyzed in section 2.2.4.

In contrast, the US's antitrust enforcement system has an adversarial nature and the system renders more incentives for the parties involved to invest in economic expertise to support their pleadings. Recurrence to economic expert witnesses by the parties involved not only has made the proceedings more litigious and complex, but also has had an effect in the production of rules by the courts (related to the admissibility of the expert testimonies) as the demand for specialized economic experts has created its own market. The prolific academic work on economic expert testimonies (which also

39 Article 6 of the Competition Act, Decreto Ley 211 de 1973 [Chile].

40 Wouter P. J. Wils, *Principles of European Antitrust Enforcement*, 153 (Hart Publishing, Oxford, Portland, Oregon, 2005).

contrasts with its absence in the EC) is a clear signal of the existence of such market and its importance.

The confrontation of private parties makes the respective expert's testimonies frequently contradict each other. In the proceedings parties have the opportunity to request the exclusion of the opponent's expert testimony by objecting its content and even its qualifications to testify. Cross-examination among experts has positive and negative effects. On one side, experts mutually discipline themselves to produce well-grounded testimonies since any obvious lack or rigor would be revealed by the counterpart.⁴¹ On the other hand, due to the lack or "*professional consensus*" on many issues of antitrust, two completely contradicting opinions about the same facts may be legitimately argued.

For a non-economist adjudicator, the contradiction among testimonies will signal the partisanship of the parties' experts and would significantly diminish their value as evidence that sheds lights for the decision of the matter. In the case of jurors, they may be prone to think that the contradicting testimonies cancel-out each other, not being able to choose among them. Consequently, the expertise presented by the parties will be wasted because the juror will disregard it for the decision of the case.⁴²

2. Procedural rules

In this section the incentives that procedural rules give to the different parties involved in a proceeding are analyzed from three points of view: 1) The role of court-appointed experts. 2) Mandatory disclosure rules; and 3) Compensation for the expert's services and legal punishments in case of perjury.

a. Court-appointed experts

In the US, Rule 706 of the Federal Rules of Evidence (Fed. R. Evid.) allows the court, "*on its own motion or on the motion of any party*", to appoint an expert "*of its own selection*" or "*agreed upon by the*

41 *Cfr. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).

42 Richard A. Posner, *supra*, at 93.

parties” who’s “*reasonable*” compensation is set by the court.⁴³ The court-appointed expert is vested of neutrality since it is not hired nor remunerated previously by the parties and the court sets its compensation.⁴⁴ In contrast, in the case of experts hired and paid by parties it is difficult to expect that they give a disinterested testimony.⁴⁵ The Court may find useful to select and appoint an expert in order to have a “*neutral*” assessment of the facts of the case and to assess the quality of the expert testimonies presented by the parties.⁴⁶

In the EC, the CFI and the ECJ are empowered to commission expert opinions “*at any time...*” and to “*any individual, body, authority, committee or other organisation it chooses...*”⁴⁷ The entrustment of this task to an expert is a “*measure of inquiry*” in the context of their “*fact-finding role.*”⁴⁸

In cases where both type of experts participate in a proceeding, parties’ and court-appointed, the former will be disciplined by the presence of the latter. The court-appointed expert would have a “*sobering effect*” on the expert and on the party that hires it since it would “*screen*” the incompetence or undue bias.⁴⁹ A discrepancy from the conclusions of the court-appointed expert may be counter-productive in terms of convincing the adjudicator of the value of the parties’ expert testimony. Parties may also cross-examine the court-appointed expert. The participation of court-appointed experts in the proceedings may also have the long-term effect of enhancing the adjudicator’s confidence on economic expertise and solve the “*lemons problem*” described in section 2.1.1.

In the US and in the EC it would be desirable that parties mutually agreed upon the experts that should be appointed by Courts,⁵⁰ saving

43 The compensation of the court-appointed expert is payable from funds provided by the law in criminal and certain civil cases and in the other proceedings by the parties in the proportion directed by the court. Fed. R. Evid. Subsection (b) 706.

44 *Id.*

45 Richard A. Posner, *supra*, at 93.

46 *Cfr.* Richard A. Posner, *supra*, at 95-96. Daniel L. Rubinfeld & Peter O. Steiner, *supra*, at 140-141.

47 Article 25 of the Statute of the Court of Justice (SCJ).

48 See Koen Lenaerts & Dirk Arts, *Procedural Law of the European Union*, 381-386 (Sweet & Maxwell, London, 1999).

49 US Committee, *Notes on Rules to the 2000 Amendments*, Fed. R. Evid. 706.

50 Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 *Columbia Law Review*, 1048-1097, 1096 (1985).

costs (instead of the “*duplication of costs*” when there are two partisan experts), giving more legitimacy to the expert and possibly increasing quality of the expert opinion.⁵¹ It must be remarked that, while the hiring of an expert by the parties is the general rule in the US antitrust proceedings, the appointment of experts by courts is not a common practice. The latter is possibly due to the skepticism of judges towards the neutrality of the experts⁵² and the impossibility for them to directly evaluate the validity of the expert’s methodology and results.

b. Mandatory disclosure rules

Mandatory disclosure rules may permit further “*screening*” to decrease information asymmetry. In the case of the US, Federal Rules of Civil Procedure (Fed. R. Civ. P.) establishes a mandatory disclosure, before trial,⁵³ of the identity of the expert⁵⁴ and a detailed written report of the content of the statements, the data considered and information about the expert, among others.⁵⁵ The procedure allows the opposing party to object and exclude the admissibility of the testimony.⁵⁶ Disclosure allows an early scrutiny of the testimony, deterring “*irresponsible expert testimony*.”⁵⁷ Furthermore, the rule allows Courts to check if expert’s current opinion deviates from a previous opinion in a similar case or in publications.⁵⁸ Finally, the Court may inquire whether

51 Directorate General Competition, *supra*, at paragraph 259.

52 See Tahirih V. Lee, *supra*, at 480-503 (explaining the reasons for the reluctance of US Courts: “*fear of undue judicial influence*”, “*fear of interference with adversarial counsel*”, “*fear of lack of judicial objectivity*”, and “*lack of judicial resources*.”) Richard A. Posner, 1999, *supra*, at 92.

US Committee, *Notes of Advisory Committee*, Federal Rules of Evidence 706, and *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002), at 23-24.

53 Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(a)(2)(c).

54 The information that must be disclosed, according to the rule, is related not only to the testimony but also information of the expert such as: “*the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years*.” (Fed. R. Civ. P. 26(a)(2)(b)).

55 *Id.*

56 Gregory J. Werden, *The Admissibility of Expert Economic Testimony in Antitrust Cases*, Chapter 35, *ABA Section of Antitrust Law, Issues in Competition Law and Policy*, 20 (2006).

57 Richard A. Posner, *supra*, at 94.

58 In relation to the deviation of the expert from its own opinion, a mandatory rule that mandated the expert to state explicitly whenever he is going to deviate from something written in the past and to justify the change would also serve the purposes of “*screening*” and detecting excessively biased testimonies.

the expert risks having pre-defined interests, *e.g.* having served as a partisan expert in others cases for the same party.⁵⁹

c. Compensation and punishment of experts

Remuneration and punishments are factors that may determine alignment of goals between a principal and an agent. A solution to the problem of misalignment of interests in agency relations is reward and punishment schemes.⁶⁰ In the US, experts called by parties are remunerated by them –at any rate–⁶¹ increasing the probability of aligning the interests between the expert and the party in detriment of the alignment between goals of the court and the expert's. Prohibition of contingency fees is the only limit that parties have in relation to the compensation of their experts in the US⁶² and they are also banned in some EC Member States. If the compensation of the expert was allowed to be contingent on the result of the proceeding, it would give more incentives to the expert to align its testimony in greater degree to its client's plead to support it, thereby decreasing the rigor of the testimony.

Analogously, if the expert is a repeat player –*i.e.* due to its involvement in any other kind of economic services such as consultancy– and the firm offers high compensations, expert will also have a strong incentive to serve the “*client*” in the precise way in which the latter desires in order to be hired in future occasions.⁶³

However, it must be stressed that the perverse effect of contingency fees and high compensations with experts as repeat players is moderated by the other factors analyzed in this section. It may even be argued that high compensation for economic experts also attracts capable professionals into this kind of “*service*” and contribute to generate a market for experts, aspect that will be analyzed in section 2.2.4.

59 *Cfr.* Richard A. Posner, *supra*, at 94.

60 *Cfr.* Joseph E. Stiglitz & Carl E. Walsh, *Principles of Microeconomics*, 336-339 (4th ed., W. W. Norton & Company, New York, 2006). Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics*, 627 (6th ed., Prentice Hall, Rochester, 2004).

61 Richard A. Posner, *supra*, at 93.

62 *Id.*

63 *Cfr. Id.* John L. Solow & Daniel Fletcher, *supra*, at 490.

Legal sanctions that punish experts who commit perjury may be a powerful deterrent against undesired behavior. In the EC, if a Court finds that the appointed expert breaches its duty of impartiality, it may report the perjury of the expert before the respective competent national authority of the “*Member State whose courts have penal jurisdiction.*”⁶⁴

3. Evidentiary rules

The US and EC also contrast in their evidentiary rules regarding expert economic witnesses in antitrust proceedings. In the US the use of economic evidence and expert testimonies in antitrust procedures, specifically their admissibility in trial, is set by case law and the Fed. R. Evid. As remarked by the Committee’s Notes on Fed. R. Evid. 702, the concern for the use of partisan expert testimonies in trial has been an issue for tribunals and scholarship that dates from the 19th century.⁶⁵ While the US is prolific in statutory provisions on expert witnesses, in case law that establishes rules for their admissibility (even specifically for antitrust proceedings) and in continuous scholar debate, the EC has broad regulation for expert testimonies and almost no specific case law rules on their admissibility. The only relevant precedent related to antitrust in the EC is the *Wood Pulp case*⁶⁶ related to concerted practices between undertakings where the Court of Justice ordered two expert reports on parallelism of prices and on the characteristics, functioning and structure of the market.⁶⁷

a. Admissibility rules of expert testimonies in the US

Admissibility rules set the standards for admission or rejection of an expert testimony in trial. The main objective of these rules is to avoid poorly grounded testimonies from parties’ experts. In the US,

64 Article 6 of the EC Supplementary Rules.

65 See US Committee, *Notes*, Fed. R. Evid. 702.

66 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and others v. Commission* [1993] ECR I-1307.

67 In the decision, the Court puts forward in a detailed manner the findings of the experts in which they explicitly contend and criticize the Commission’s arguments. (See, *Id.* pars. 31-32, 75-79, pars. 82-86 and pars. 100-125).

the proponent of the testimony has the burden of the proof regarding its admissibility⁶⁸ or else it may be excluded by the court.⁶⁹ In this sense, it is established case law that the court has a gatekeeper role since the “*rules are designed to shield inexperienced fact finders (the jurors) from evidence that might confuse, distract, or inflame them...*”⁷⁰ Fed. R. Evid. 702, amended in the year 2000 in response to the Supreme Court’s *Daubert decision*⁷¹ and the cases applying it,⁷² establishes the conditions for the admissibility of expert testimonies in trial. These conditions, applicable both to bench trials and jury trials,⁷³ may be summarized in two broad aspects: a) qualifications of the person who testifies and b) relevance and reliability of the testimony for the case and its facts.

Regarding the first condition, the qualification of the witness, there are several characteristics that could be taken into account: academic formation, practical experience and training in the field and publications on the issue.⁷⁴ However, the issue is not as simple as checking a list of abstract attributes. On the contrary, the analysis of the qualification of a person should be strictly related to the necessities for the case.⁷⁵ Case law has been clear in the sense that: 1) there are no specific credentials that are necessary or sufficient to be accepted as a qualified expert for a specific case⁷⁶ and 2) certain issues or methods may be not be assessed by any kind of economist, but by a more specialized antitrust expert.⁷⁷ Furthermore, case law has rejected prior experience as expert witness as a condition to be qualified.⁷⁸

68 Gregory J. Werden, *supra*, at 20. John L. Solow & Daniel Fletcher, *supra*, at 490.

69 Pursuant to Fed. R. Evid. 403, relevant evidence “*may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...*”

70 Richard A. Posner, *supra*, at 92.

71 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993). The adoption of the Fed. R. Evid. and the *Daubert standard* supersedes the “*general acceptance standard*” or *Frye test*, according to which a scientific method or technique must have general acceptance in its particular field to be admitted as evidence. (Gregory J. Werden, *supra*, at 5-6).

72 *Cfr.* Gregory J. Werden, *supra*, at 1. Advisor Committee, *Notes on Rules to the 2000 Amendments*, Fed. R. Evid. 702.

73 Gregory J. Werden, *supra*, at 2.

74 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) at 13.

75 Gregory J. Werden, *supra*, at 4.

76 *Id.*, at 3-4.

77 *Id.*, at 4.

78 *Id.*, at 5.

The rules regarding the qualification of the expert are a form of “screening.” The rule forces the informed party (expert) to reveal information to the uninformed party (adjudicator). The information conveyed is not about their “product” but simply concerning the professional qualifications of its producer: education and experience in the relevant economic area. However, parties already have the incentive to “signal”⁷⁹ that the expert hired is very competent and that its testimony will have a high quality. Bringing a respected, competent and well known scholar or professional is a “strong” signal of quality of the testimony because this signal is easier to convey for “high-quality” professionals than for “low-quality” professionals.⁸⁰ When a party files an expert that has no previous experience—academic or professional—in the specific economic issue debated in the case it may signal that it was unable to find a “knowledgeable economist” willing to testify in support of their arguments.⁸¹

Second and third conditions for the admissibility of a testimony—which are often a subject of discussion in antitrust cases⁸²—consist in the reliability of its economic grounding and its relevance for the facts of the case.⁸³ The second condition, the grounding of the testimony in economics, evaluates the economic tools used by the economist to derive its conclusions. Since the standard regards to the reliability of the procedure used by the expert, it’s not a judgment of the correctness of its substantial conclusions but of the principles and methodology applied;⁸⁴ furthermore, case law has clearly established that two contradicting testimonies may be equally admissible.⁸⁵ Hence, the determination of which expert testimony is “correct” is left to the jury.⁸⁶ Other standards developed by case law include that the methods used by the expert are the same ones that it would have used for its regular work (academic or professional) or that at least

79 See Joseph E. Stiglitz & Carl E. Walsh, 2006, *supra*, at 335-337.

80 See Robert S. Pindyck & Daniel L. Rubinfeld, *supra*, at 620.

81 Richard A. Posner, *supra*, at 94.

82 John L. Solow & Daniel Fletcher, *supra*, at 492.

83 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) at 9-11.

84 *Id.*, at 14.

85 Advisor Committee, *Notes on Rules to the 2000 Amendments*, Fed. R. Evid. 702. *Cfr.* John L. Solow & Daniel Fletcher, *supra*, at 492.

86 John L. Solow & Daniel Fletcher, *supra*, at 496.

the expert performs at the same level of rigor that it would for this usual practice.⁸⁷ Finally, the last condition of admissibility is aimed to verify that the method “*fits*” the facts of the case.⁸⁸ The latter includes also the reliability of the data.⁸⁹ The capacity of the expert to explain the relevance of the methods applied will be crucial.

The rules regarding the requirements of relevance and reliability of the testimony for the case aim at disciplining the expert’s testimony by creating a high possibility of being rejected if the Court considers that the economic methods and their application to the facts are not well grounded. The admissibility rules for expert testimony in the US represent the standard of proof that the adjudicator must use to “*monitor*” the performance of the expert.⁹⁰ The probability that the testimony is objected either because the testimony (i) is not based upon sufficient facts or data; and/or (ii) is product of principles and methods that are not reliable and/or (iii) these principles and methods are not adequately applied y to the facts⁹¹ will definitely discipline the economic expert’s conduct.

As explained before, the main sanction resulting from the failure to comply with the standard of proof is the lack of admission by itself. It has negative consequences both for the party that proposes it as well as for the economic expert. For the party, it represents the loss of an important evidentiary support for the pleading and a disadvantage in regard to its contender. For the expert, the rejection of its testimony is a strong blow for its reputation among its peers and for its future professional exercise.

b. Admissibility rules of expert testimonies in the EC

Since the EC doesn’t have detailed rules on the admissibility of expert witnesses, the standard of proof set for the testimony is the same that is applied for any other evidence. There are no explicit rules regard-

87 *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003), at 10.

Cfr. Gregory J. Werden, *supra*, at 10.

88 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) at 11.

89 Gregory J. Werden, *supra*, at 16.

90 Cfr. Robert S. Pindyck & Daniel L. Rubinfeld, *supra*, at 627.

91 Federal Rules of Evidence, Fed. R. Evid. 702.

ing the expert's qualifications or about the minimum standards for its report. The task and content of the opinion is strictly defined by the Court's order⁹² and the expert is summoned to carry out its task "*conscientiously and impartially*."⁹³ Courts and parties will practice the "*monitoring*" of the expert's performance. Judge-Rapporteur has the explicit task to supervise the task of the expert and keep the Court informed.⁹⁴ Hence, direct "*monitoring*" by Courts is precarious and costly in the sense that Justices do not have a solid formation or experience in economics or econometrics.

This situation is mitigated by the fact that parties have the right to examine the expert and may serve as indirect "*monitors*" of the expert's performance. However, the parties have a restricted role in this regard. Parties have the right to object an appointed expert, within two weeks from its appointment, due to lack of competence or appropriateness.⁹⁵ The objection is resolved by the Court,⁹⁶ which also has the exclusive power to order the examination of the expert. Parties may attend the examination of the expert and their formulation of questions is subject to the control of the President of the Court.⁹⁷

4. The market of economic experts and the scholars' community

A high "*demand*" for expert economic testimonies creates also a "*supply*" of competent professionals. A robust market for experts is crucial for guaranteeing high quality of testimonies since the appointment of capable experts by courts will be more feasible.

One of the advantages (and potential pitfall) of the adversarial system of the US is the frequency that the contending parties in antitrust cases call expert witnesses that cross-examine each other. This "*demand*" has created, as mentioned before, an important market for economists, especially in Industrial Organization economics.

92 Article 49(4) of the ECJ Rules of Procedure (ECJ RP) and article 70(4) of the CFI Rules of Procedure (CFI RP).

93 Article 124 of the ECJ RP and article 70(5) of the CFI RP.

94 Article 49(2) of the ECJ RP and article 70(1) of the CFI RP.

95 Article 50(1) of the ECJ RP and article 73(1) of the CFI RP.

96 Article 50(1) of the ECJ RP and article 73(1) of the CFI RP.

97 Article 49(5) of the ECJ RP and article 70(5) of the CFI RP.

Increased “*supply*” of such “*service*” by better prepared professionals has a positive effect on the selection of court-appointed experts since it will allow the adjudicator to find more capable specialists available that don’t have pre-defined interests.

In the EC, in contrast, there is less interest in expert economic witnesses since only Courts may appoint them. The lack of a developed market for economists may actually hinder Courts from finding impartial and capable professionals and, in a vicious circle, may deter Courts from appointing experts in antitrust cases.

On the other hand, the desire for reputation in the market by economists has further mitigation effects regarding asymmetric information problems. An agent’s good reputation will reduce the costs of monitoring for the principal since it will signal good quality.⁹⁸ Agents whose remuneration is linked with good reputation due to the fact that they are repeat players,⁹⁹ especially when services are “*experience goods*” as in the case of economists, will have a strong incentive to deliver “*high-quality*” products. Reputation issues are also related to the fact that strong academic communities may exert social punishments to an economist that delivers low-quality and biased economic expertise to support a pleading before a court.¹⁰⁰

98 Joseph E. Stiglitz & Carl E. Walsh, 2006, *supra*, at 339. Robert S. Pindyck & Daniel L. Rubinfeld, *supra*, at 618.

99 *Cfr.* Richard A. Posner, *supra*, at 94.

100 *Id.*, at 94.

III. CONCLUSIONS

There are diverse and inter-dependent factors that determine incentives for adjudicator's, parties' and the economic experts' behavior in antitrust proceedings in the EC and the US. These factors were analyzed throughout this paper as well as the consequences of asymmetric information between adjudicator and expert in antitrust proceedings. The analysis was based on the premise that the combination of legal and social norms and their interaction determines alignment or misalignment of the use of economic expert testimonies with the goals of antitrust.

The main conclusions regarding the two research questions posed at the beginning of this paper are the following:

1. There is no "*one-size-fits-all*" legal framework that guarantees elimination of asymmetric information or mitigation of its effects. There are different systems and alternatives to mitigate asymmetric information problems. Furthermore, one alternative may be innocuous if one of the factors is absent and vice versa, since the legal and social norms are inter-dependent and affect each other mutually. For example, in an adversarial system cross-examination among parties' experts may only shed light in a case if experts are strongly disciplined by legal and social punishments, there is a developed market of experts, the adjudicator has a strong economic background and/or is assisted by court-appointed experts that are capable and neutral.

2. However, there are legal and non-legal features of the enforcement system that mitigate asymmetric information and its effects. Asymmetry of information between adjudicator and expert may be mitigated through: a) More economics training of adjudicator (either by specialized courts, division of tribunals in specialized chambers or appointment of economists). b) Court-appointed experts that lower costs of "*monitoring*" quality of testimonies rendered by parties' experts. c) Early mandatory disclosure rules that permit "*screening*" of the expert's credentials and quality of its testimony.

On the other hand, adverse selection problem may be mitigated through: a) A strong academic community (more capable experts and moral sanctions that discipline them). b) Mandatory disclosure

rules and/or registry. c) Detailed admissibility rules (standard of proof). Finally, the moral hazard problem and principal-agent conflict of interest may be mitigated through: a) Court-appointed experts (fostering that the parties agree upon one expert). b) Prohibition of contingency fees; and c) A strong academic community.

3. Non-regulatory factors that evolve over time may have big influence on the effects of asymmetric information. In the case of the EC, the raise of stakes in the antitrust scenario and the possible increment of private enforcement make necessary the introduction of more detailed admissibility rules. Especially because the lack of rules gives too much discretion to Courts. However, codification of admissibility rules for expert testimonies would not be enough, since the possibility of finding competent and honest professionals without pre-defined interests depends more upon the development of a market for experts and a strong academic community that disciplines them.

4. Blind “*legal borrowing*” is not a recommended path for less developed enforcement systems. In theory, the same rule in different legal systems should provide similar or analogous incentives for the agents subject to its compliance; however, in practice—due to social, economical, cultural and institutional differences—actual effects of a rule can be completely different from jurisdiction to jurisdiction. The more a legal rule corresponds to social norms, the more effective it will be and its enforcement will be less costly.¹⁰¹ Hence, expert testimonies pose the same advantages but also risks of pitfalls for less developed competition regimes. The latter is due to the lack of resources and capacity to assess technical economical information of competition authorities and judiciary tribunals, exacerbated in developing or transitional economies, which contrasts with the well resourced firms that hire experts for litigation.

5. There are other mechanisms to lower the enforcement costs, increase detection and increase deterrence. For example, the leniency programs that were first established in the US (1978) and that

101 See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *American Journal of Comparative Law*, 5 (1997).

Ugo Mattei & Alberto Monti, *Comparative Law and Economics. Borrowing and Resistance*, 1 *Global Jurist Frontiers*, 2, (2001).

have been implemented in several jurisdictions like the EC (1996),¹⁰² Brazil (2000),¹⁰³ Mexico (2006),¹⁰⁴ and the Czech Republic (2007).

In sum, economic expertise may be useful –even inevitable– in certain types of antitrust cases to analyze the facts and produce evidence. Nevertheless, its use in the proceedings entails high costs that must be borne either by the enforcing authorities, the private parties or society in general. These costs must be weighed with the possible benefits that economic expertise has (accuracy, legal certainty and predictability), in order to determine if their implementation will render an efficient outcome.

Hence, regarding economic expert testimonies, an antitrust enforcement system must aim at the minimization of its costs through the mitigation of the consequences of asymmetric information between the adjudicator and the expert.

102 Roger J. van den Bergh & Peter D. Camesasca, *supra*, at 309.

103 Article 35-B of the Law N. 10.149 / 2000.

104 Article 33 bis 3 of the Decree that amends the Federal Law on Economic Competition.

BIBLIOGRAPHY

Books

- Bergh, Roger J. van den & Camesasca, Peter D., *Competition Law and Economics. A Comparative Perspective* (2nd ed., Sweet & Maxwell, London 2006).
- Chalmers, Damian, Hadjiemmanuil, Christos, Monti, Giorgio & Tomkins, Adam, *European Union Law: Text and Materials* (Cambridge University Press, Cambridge, 2006).
- Finkelstein, Michael O., *Quantitative Methods in Law* (1st ed., The Free Press, New York, 1978).
- Lenaerts, Koen & Arts, Dirk, *Procedural Law of the European Union* (Sweet & Maxwell, London, 1999).
- Pindyck, Robert S. & Rubinfeld, Daniel L., *Microeconomics* (6th ed., Prentice Hall, Rochester, 2004).
- Schumpeter, Joseph Alois, *History of Economic Analysis* (Oxford University Press, London, 1976 (1954)).
- Stiglitz, Joseph E. & Walsh, Carl E., *Principles of Microeconomics* (4th ed., W. W. Norton & Company, New York, 2006).
- Wils, Wouter P. J., *Principles of European Antitrust Enforcement* (Hart Publishing, Oxford, Portland, Oregon, 2005).

Essays and other

- Baker, Jonathan B. & Rubinfeld, Daniel L., *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 *American Law and Economics Review*, 386-435 (1999).
- Blair, Roger & Page, William H., *The Role of Economics in Defining Antitrust Injury and Standing*, in *Economic Inputs, Legal Outputs: The Role of Economists in Modern Antitrust* (Fred S. McChesney, Ed. Chichester, Wiley, 1998).
- Calkins, Stephen, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 *St. John's Law Review* (1998).
- Directorate General for Competition, DG Comp., *Annex to the 'Green Paper: Damages actions for breach of the EC antitrust rules'* (2005).
- European Court of Justice, *Annual Report* (2006).
- Kaplan, David P., *The Nuts and Bolts of Antitrust Analysis: Some Thoughts on How to Develop the Facts*, in *Economic Inputs, Legal Outputs: The Role of Economists in Modern Antitrust* (Fred McChesney, Ed. Chichester, Wiley, 1998).
- Lee, Tahirih V., *Court-Appointed Experts and Judicial Reluctance: A proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 *Yale Law and Policy Review* (1988).
- Mattei, Ugo, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *American Journal of Comparative Law* (1997).
- Mattei, Ugo & Monti, Alberto, *Comparative Law and Economics. Borrowing and Re-*

- sistance*, 1 *Global Jurist Frontiers*, 2 (2001).
- Office of Fair Trading, OFT, *Quantitative Techniques in Competition Analysis* (Research Papers 17, London, 1999).
- Posner, Richard A., *The Law and Economics of the Economic Expert Witness*, 13 *The Journal of Economic Perspectives*, 2 (1999).
- Rubinfeld, Daniel L., *Econometrics in the Courtroom*, 85 *Columbia Law Review* (1985).
- Rubinfeld, Daniel L. & Steiner, Peter O., *Quantitative methods in Antitrust Litigation*, 46 *Law and Contemporary Problems* (1983).
- Solow, John L. & Fletcher, Daniel, *Doing Good Economics in the Courtroom: Thoughts on Daubert and Expert Testimony in Antitrust*, 31 *Journal of Corporation Law* (2006).
- US Committee, *Notes on Rules to the 2000 Amendments*, Fed. R. Evid. 702, available at <http://www.law.cornell.edu/rules/fre/ACRule702.htm>.
- US Committee, *Notes on Rules to the 2000 Amendments*, Fed. R. Evid. 706, available at <http://www.law.cornell.edu/rules/fre/ACRule706.htm>.
- US Committee, *Notes*, Rule Fed. R. Evid. 702, available at <http://www.law.cornell.edu/rules/fre/ACRule702.htm>.
- Werden, Gregory J., *The Admissibility of Expert Economic Testimony in Antitrust Cases*, Chapter 35, *ABA Section of Antitrust Law, Issues in Competition Law and Policy*, (2006). Available at SSRN: <http://ssrn.com/abstract=956397>.