

Cognitive biases in the discovery and assessment of evidence in competition law cases

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Introduction

Three points:

1. Understanding the nature of the issues
2. Possible examples of cognitive biases manifesting in competition law
3. Mitigation strategies

Draws on:

C Decker and G Yarrow 'On the discovery and assessment of economic evidence in competition law' RPI, *Studies in Regulation* December 2011

Wider challenges of using economic evidence

- Social sciences not like the physical sciences
- Additional challenges when assessing information/evidence in public policy contexts
- Potential for cognitive biases to affect choices in how economic evidence is collected, used and presented

Understanding the nature of the issues

- Examining systems of interactions
- Substantial scope for discretionary choices
 - Open textured nature of legal provisions; multiple interpretations of data; different views on purposes and goals of policy
- Multiple biases/influences could impact approach
 - *Individual biases*: attention bias; reductionism; overconfidence; primacy effect/anchoring etc.
 - *Organisational influences*: priorities; cultures; resources; politics
 - *Private interests*: selective evidence use to win the case; desire for the quiet life

A core cognitive risk: confirmation bias

- The single most problematic aspect of cognitive reasoning that deserves attention above all others (Nickerson (1998))
- Long pedigree in philosophy and psychology
 - Medicine, science, academia, government policy making, witch hunting...
- An approach to evidence gathering and decision making which:
 - Seeks information supportive of a favoured hypothesis/ belief
 - Conversely, does not seek, or avoids, ‘counter—indicative’ information
 - “Unwitting selectivity in acquisition and use of evidence” (R.S. Nickerson (1998) ‘Confirmation Bias: A Ubiquitous Phenomenon in Many Guises’, Review of General Psychology)
- Effect is to protect or insulate a privileged hypothesis; and therefore distort competition among competing alternative hypotheses

Confirmation bias: contributing factors

- *Unwitting*: not intended to refer to purposive, deliberate or conscious decision to be selective in use of evidence
 - Lack of awareness of bias is fundamental to the concept
- Arises even where there is no obvious, material, personal interest in outcome or a particular hypothesis
 - Medical diagnosis, science, public policy making

Contributing factors:

- Motivation
- Cognitive influences
- Other factors
- Organisational behaviours/influences

Could such cognitive biases exist in competition law?

- *“The observations that **the Commission may decide early on cases and search for selective evidence or that theories are neglected are consistent with the incentives generated by the inquisitorial regime with a prosecutorial bias implemented by the EU**” **“Overall, it would thus appear that the self confirming biases that may be induced by the prosecutorial role that the Commission assumes cannot be dismissed as insignificant”** Damien J Neven (2006) ‘Competition economics and antitrust in Europe’, *Economic Policy*, p 32*
- *“If such confirmation bias is indeed a general tendency of human reasoning, there is no obvious reason why the persons within the European Commission dealing with an antitrust case would be immune from it.” Wouter Wils (2004) ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ *World Competition*, vol 27, p 216*
- *“There are of course obvious potential disadvantages to merger, predominantly concerned with the possible impact on fairness from confirmation bias when the whole decision-making pathway in a case—from receipt of complaint to opening an initial investigation to choice of ‘tool’ to phase 1 decision to phase 2 decision and finally to remedies decision—takes place within a single body” Laura Carstensen (2011) ‘Keynote speech by Laura Carstensen, Deputy Chairman of the Competition Commission, to the Association of Corporate Counsel Europe Seminar’, 9 March 2011.*

Possible manifestations in past cases

Past cases considered by the Courts which – to an outside observer– closely resemble or approximate some of the biases discussed. Indicate something beyond the occurrence of random administrative errors and failures.

- *Airtours*: Court critical of omission of certain key evidence on rate of demand growth in Form CO; reliance on a market study which turned out to be a one-page extract; failure to produce an econometric study relied on in the decision
- *Impala*: Court referred to the Commission's approach to the economic evidence as '*succinct, superficial, unsubstantiated*' and '*purely formal*'. Commission's treatment of campaign discounts (an important element of the case) was "*imprecise, unsupported, and indeed contradicted by other observations in the Decision*".
- *Tetra Leval* : CFI found that Commission's forecast "*was inconsistent with the undisputed figures ... contained in the other reports*". On appeal, ECJ noted that Commission's conclusions "*seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence*"

Intel decision (COMP 37.990 Intel)*

III. INTEL'S ALLEGATION OF BIAS IN THE COMMISSION'S ENQUIRY

(36) Intel has alleged that the Commission's enquiry has been "discriminatory and partial"³¹ According to Intel, the Commission "has blindly adopted wholesale AMD's theories and allegations blaming Intel's pricing and other conduct for each AMD failure to win the business of the OEMs".³² Intel also alleges that the Commission "has distorted the evidence and the record",³³ that it is guilty of "suppression of exculpatory evidence",³⁴ and that it has shown "bias and lack of objectivity".³⁵ Intel speaks of "systematic, willful administrative malfeasance that infects the entire administrative procedure."³⁶ Intel also expressed "serious doubts on the fairness and the independence of the Case Team [the Commission staff handling the investigation]".³⁷

(37) The Commission considers that there are no grounds for the serious allegations made by Intel. As the Commission has already specified to Intel during the proceedings, "the Commission has carried out a thorough and balanced enquiry in the present case. It has conducted several surprise inspections [in 2005 and 2008 at the premises of various actors in the market [21 premises], and has gathered a broad range of information from many sources."³⁸ As regards the body of evidence that the Commission has gathered, the Commission sent requests for information pursuant to Articles 11 and 18 of Regulation (EC) No 1/2003 to 141 companies in this case, including all major OEMs, the main European PC retailers, Intel and AMD. As a result, there are more than 3900 document

* Disclosure: Yarrow and Decker provided expert economic evidence in Intel

Intel decision: European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission. 14 July 2009, para [82].

*“While the Commission has a reasonable margin of discretion as regards its evaluation of what constitutes a relevant fact, **the Commission, when seeking to ascertain relevant facts, should not make a distinction between evidence which may indicate that an undertaking has infringed Article 81 EC or Article 82 EC (inculpatory evidence) and evidence which may indicate that an undertaking has not infringed Article 81 EC or Article 82 EC (exculpatory evidence).** In sum, **the Commission has a duty to remain independent, objective and impartial when gathering relevant information in the context of the exercise of its investigatory powers pursuant to Article 81 EC and 82 EC.**”*

Ombudsman concluded that the Commission had committed an instance of maladministration

Intel decision

- Theory of harm relied on two conditions:
 - i. Switching would entail a loss of **‘significant and disproportionate’** part of Intel rebates (¶1306); and
 - ii. There was a **‘sufficiently clear understanding’** that Intel would award certain rebates if it remains exclusive, and will not award them if it buys from competition (¶1939)
- Was there a ‘sufficiently clear understanding’ of potential loss of ‘significant and disproportionate’ rebates?

“ – there are two schools of thoughts within Dell. One side believes that Intel will hurt us and hurt us bad and the other side is that things will get better even if they hurt us in the short term.” (¶1266) (my emphasis)

- Two hypotheses to explore:
 - (i) Switching would result in significant and disproportionate loss (*‘hurt us and hurt us bad’*);
 - (ii) Switching would be beneficial (*‘things will get better’*) even if (a conditional statement) it involves short-term harm
- Commission dismissed the second hypothesis (*that things will get better*) on basis that email showed that Dell would get ‘hurt’
 - Failed to explore differences in views within Dell about its single sourcing policy, and whether would result in significant and disproportionate impacts.
 - Did not seek out diagnostic information which could challenge an established narrative

Mitigation: procedural and institutional proposals

- Better internal checks and balances
 - Peer review teams (Wils, slide 7)
- Shift towards an adversarial system (Neven, slide 7)
 - Open up economic arguments to ‘competition’ and detailed scrutiny
 - Can address incentives in inquisitorial systems to suppress evidence and fail to consider alternative interpretations
- Institutional separation of investigatory and decision-making functions
- A ‘devil’s advocate’

Mitigation: a diagnostic framework for evaluating economic evidence

- Ensure that assessors are skilled, engaged and impartial
 - *Skilled*: capable of integrative complexity (an ability to sustain a number of alternative, ‘competing’ perspectives on the problems of interest, and to continue to use those different perspectives in assessing how the evidence as a whole ‘stacks up’).
 - *Engaged*: willing to bear the costs of attention during the task
 - *Impartial*: ability to step away from one’s own material interests to allow for evaluation of large amounts of contextual information (recognising that it is not possible to eliminate all biases)
- Focus on the diagnosticity of evidence
 - Diagnostic evidence: data/information that is consistent with a particular hypothesis, and not consistent, or not as consistent with a competing hypothesis
 - Seek out evidence that has significantly *different* likelihoods under the alternative, competing hypotheses
 - Popper’s principle of severe testing: make theories ‘stick their necks out’
 - If evidence/data consistent with more than one hypothesis then not diagnostic
 - In cases where the evidence is considered sufficient to reject a particular hypothesis outright, it can be said to be *decisive*.

Mitigation: a diagnostic framework for evaluating economic evidence

- Keep several competing hypotheses in play
 - Competing propositions, hypotheses and theories tend to assist assessment by establishing multiple perspectives from which both existing evidence/information and the search for new evidence/information can be viewed
 - Provides protection against assigning an over-inflated, initial likelihood to a privileged theory.
 - Different theories tend to have different implications, which can point towards the types of evidence that may be diagnostic.
- Contra-indicators and cumulative effects
 - *Contra-indicators*: examine and focus on contra-indicators (pieces of diagnostic information that might be expected to reduce the likelihood of a theory being true)
 - *Cumulative effects*: at the end of the assessment process, the perceived likelihood of a particular hypothesis may have changed very substantially, even though no one piece of evidence has, by and of itself, led to a dramatic shift in the balance of probabilities (i.e.: no one piece has been decisive).

Concluding remarks

- More data and information available than ever before. This carries both opportunities and risks
 - Greater scope for diagnostic information to be discovered and assessed vs. greater scope for unwitting selectivity/biases to influence decisions
- Theories, hypotheses and data/information abound: it is diagnostic evidence that serves to narrow the field.
- While there is often a focus on checks and balances mechanisms (such as devil's advocate etc; second pair of eyes; standards of review) there is benefit in fostering a culture of the engaged, skilled impartial assessor.
 - Recognising that those values are much easier to identify than to sustain in practice
- Acknowledging the existence of such cognitive biases is a critical first step
 - Training people to think of alternative hypotheses early in investigation
 - Seek out data or information that is highly diagnostic
 - Introducing frameworks where the likelihood of competing hypotheses are adjusted in light of new evidence