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THE GLOBAL ANTITRUST ECONOMICS CONFERENCE

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PROGRAM

09.00 *Welcome Remarks*

Luis CABRAL | Chair, Department of Economics, NYU Stern School of Business, New York

09.05 **FIRESIDE CHAT: WHAT CAN BE EXPECTED FROM THE FTC/DOJ MERGER GUIDELINES?**

Michael JO | Assistant Attorney General, Antitrust Bureau, Office of the New York State Attorney General, New York

In discussion with: **Daniel FRANCIS** | Professor of Law, NYU School of Law, New York

09.45 **#1 FINANCIAL SERVICES IN ANTITRUST**

Owen KENDLER | Chief, Financial Services, Fintech & Banking Section, U.S. Department of Justice, Antitrust Division, Washington D.C.

Patrizia MARTINO | Senior Counsel, TD Bank Group, Toronto

José Eduardo MENDOZA CONTRERAS | Commissioner, COFECE, Mexico City

Rainer SCHWABE | Principal, Cornerstone Research, Boston

Moderator: **Bill BAER** | Visiting Fellow, The Brookings Institution, Washington D.C.

11.15 *Coffee break*

11.45 **#2 ANTITRUST IN LIFE SCIENCES**

Aileen FAIR | Senior Corporate Counsel Litigation & Government Investigations, Antitrust & Competition Law, Bristol Myers Squibb, Princeton, New Jersey

Anand KRISHNAMURTHY | Principal, Cornerstone Research, New York

Noah Joshua PHILLIPS | Former Commissioner, U.S. Federal Trade Commission | Co-chair, Antitrust Practice, Cravath Swaine & Moore, Washington D.C.

Pauline KENNEDY | Antitrust & Competition Practice Principal, Bates White, Washington D.C.

Moderator: **Lawrence WHITE** | Professor, Department of Economics, NYU Stern School of Business, New York

13.00 *Lunch*

14.00 **#3 THE ROLE OF ECONOMICS IN CRIMINAL ANTITRUST CASES**

David CHU | Assistant Chief in the New York Office, U.S. Department of Justice, New York

Jee-Yeon LEHMANN | Managing Principal, Analysis Group, Boston

Richard POWERS | Partner, Fried Frank, New York

Moderator: **Yee Wah CHIN** | Chair-Elect, American Bar Association International Law Section | Chair, New York City Bar Association Antitrust & Trade Regulation Committee, New York

15.30 *Coffee break*

16.00 **#4 ARTIFICIAL INTELLIGENCE: HOW TO REGULATE ANTICOMPETITIVE PRACTICES?**

Alden ABBOTT | Senior Research Fellow at Mercatus Center, George Mason University, Washington D.C.

Aaron HOAG | Chief, Technology and Digital Platforms Section, Antitrust Division, U.S. Department of Justice, Washington D.C.

Victoria JEFFRIES | Global Head of Competition Policy, Meta, Washington D.C.

Ioana E. MARINESCU | Division's Principal Economist, U.S. Department of Justice, Washington D.C.

Nathan WILSON | Executive Vice President, Compass Lexecon, Washington D.C.

Moderator: **Scott HEMPHILL** | Moses H. Grossman Professor of Law, NYU Stern School of Law, New York

17.15 *Cocktail reception*

FIRESIDE CHAT

WHAT CAN BE EXPECTED FROM THE FTC/DOJ MERGER GUIDELINES?

Daniel Francis

Professor of Law, NYU School of Law, New York

Concern about the core norm underlying the Guidelines

- Difficulties to understand the underlying norm expressed by Guideline 7 and the guidelines.
- The evaluative criterion of harm to competition, considering it broad and open to contradictory interpretations.
- Guideline 7 regarding the entrenchment or extension of a dominant position.
- Uncertainty about the document's focus on rebuttal within its context.
- Dominant firm practices are already covered by other guidelines, rendering Guideline 7 redundant or unnecessary.
- The dominance threshold set at 30% share might be borderline for defining dominance.
- Concerns regarding Guideline 8's ambiguity in defining a trend toward concentration.

Michael Jo

Assistant Attorney General, Antitrust Bureau,
Office of the New York State Attorney General, New York

Main purpose of the Merger Guidelines

- The Guidelines serve as a way for agencies to outline their approach to transactions, most of which are resolved through agency review. A small percentage (less than 5%) of HSR filings get second requests, and even fewer lead to litigation.
- Some critics have raised concerns that significant changes to the Guidelines could jeopardize their credibility in court. Contrarily, others believe courts might appreciate understanding the agencies' perspectives and defer to their expertise, even if their guidance changes, due to their regular involvement in cases and observations of the market.

Role of structure in the Guidelines

- Some have criticized an excessive emphasis on structure in the Draft Guidelines. Others suggest that the Draft Guidelines treat increased concentration itself as a harm, a deeper criticism.
- However, the rebuttal section in the Draft Guidelines centers on efficiency measures and consumer impacts, not solely on structure.
- Structural presumptions are part of a burden-shifting framework, not meant to dictate the final outcome but instead acting as evidentiary devices, given that merging parties often possess more evidence than the Government.
- The structural presumption aligns with antitrust enforcers' role under Section 7 of the Clayton Act to address anti-competitive conduct at an early stage, and the underlying values of the statute.

Marie de Monjour drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

Guideline 7

- Guideline 7 addresses cases not encompassed by other guidelines, acting as a complement to fill gaps in merger evaluations. It is intended to cover mergers beyond the typical horizontal or vertical structures.
- It focuses on scenarios where time frames are crucial in assessing competition, especially regarding potential shifts due to technological transitions.
- Guideline 7 also tackles situations where markets overlap or differ between consumers, aiding in the analysis of complex market dynamics, particularly in cross-market mergers.
- The 30% dominance threshold in Guideline 7 is a sliding scale, intensifying concerns as market share increases beyond this level.
- More clarity or a limiting principle could be useful for this Guideline, referencing the idea of artificial competitive advantages, and connecting to the availability of rebuttal arguments, to avoid misconceptions of this Guideline in assessing mergers.

Guideline 8

- Defense of Guideline 8 by tying it to the statutory mandate and historical legislative intent of Section 7 of the Clayton Act.
- Guideline 8 might best address extreme cases where a market tips toward monopoly.
- There is a lack of emphasis on Guideline 8 by principal guideline drafters in their public discussions, suggesting that the final draft may limit the scope of this provision.

PANEL 1

FINANCIAL SERVICES IN ANTITRUST

Bill Baer (Visiting Fellow, The Brookings Institution, Washington D.C.) moderated the discussion. The panel focused on the important evolution of competition in financial services over the last couple decades. The main questions are the following: how things have evolved, what the nature of competition is, and how markets have changed.

Owen Kendler

Chief, Financial Services, Fintech & Banking Section,
U.S. Department of Justice, Antitrust Division, Washington D.C.

Rise of Fintech and asset-backed lenders

- Rise of Fintech and asset-backed lenders is reshaping competition in financial services.
- Benefits from Fintech include new services and increased competition, but resistance to change persists among some industries.
- Incumbents often resist new competition, safeguard their territory, and may incorporate new entrants rather than compete directly.
- Asset-backed lenders offer certain lending practices but haven't fundamentally challenged traditional banking services.
- This mixed competition challenges market definitions and enforcement strategies to prevent incumbents from stifling new entrants and market threats.
- The situation prompts questions about competition in the US and highlights the need to balance innovation with market protection.

Interaction between sector regulators and competition enforcers

- Biden's executive order on competition prompted closer collaboration between the DOJ, FTC, and other agencies, fostering discussions in the early stages of regulatory proposals.
- Agencies consult DOJ for input during the initial phase of rule considerations, adhering to ex parte rules during formal rulemaking processes.
- The order served as a vehicle to initiate conversations, allowing agencies to discuss concerns from a competition perspective alongside other regulatory concerns.
- DOJ maintains an independent approach, offering comments that applaud positive steps in regulations while also highlighting concerns and suggesting considerations for potential loopholes.
- The DOJ's increased engagement with regulatory agencies involves more comment submissions, offering a balanced perspective by expressing support and raising questions or concerns where applicable.

Banking merger Guidelines

- DOJ reviews bank mergers in collaboration with banking regulatory agencies; mergers are not subject to the HSR Act but undergo competitive reviews.
- Dealing with numerous bank mergers that do not trigger HSR thresholds, DOJ seeks alternative data sources beyond deposit-based screens to detect competitive overlaps effectively.
- Considering shifts in banking services like mortgages and small business lending, challenges arise in defining product and geographic markets accurately for the mergers, as these markets evolve due to Fintech and asset-backed competition.

- While new opportunities emerge with online banking, there remains a consumer preference for local banking relationships and nuances, impacting competition dynamics in the market.
- Collaboration with banking regulatory agencies involves reconciling different perspectives; the broader mandates of these agencies prioritize banking stability over competition where DOJ's role is omitted by statute.
- DOJ has access to specific and detailed data on merging parties, unlike banking regulators with broader yet less in-depth datasets.

Visa / Plaid case overview

- The case challenged the merger under Section 7 and Section 2 due to Visa's dominant market position and Plaid's potential as a future competitor.
- Plaid had strategic relationships, access to consumer data, and was positioned to introduce a new payment rail, which concerned Visa.
- The case highlighted the significance of nascent competition and potential future threats in antitrust enforcement.
- It aimed to promote competition by introducing innovative payment options and reducing traditional interchange and network fees for merchants.

Rainer Schwabe

Principal, Cornerstone Research, Boston

Evolution of competition and its impact on enforcement

- Technological change and regulation are major forces shaping competition in financial services.
- Evolution of stock market trading: In the 1990s, major exchanges accounted for a large majority of trading (e.g., NYSE, NASDAQ).
- The NYSE transformed from an active trading floor to a data center in New Jersey.
- SEC's NMS regulations in 2007 enforced rules like the trade-through rule and public price information.
- Result: Increased fragmentation in stock trading, with the NYSE accounting for only about 10% of US trading presently.
- Market structure revolutionized in stock trading with disruptive entries like IEX, focusing on market participants' incentives.
- Competition among brokers led to commission reductions, from $40 to $12 by 2010, then disruptive entry by Robinhood and Webull brought commissions to zero by 2015.
- Brokerages switched to zero-commission models, offering trading apps with better prices and faster execution than stock exchanges.
- Despite complexities, market changes show increased competition and consumer benefits by antitrust economist criteria.

Interaction between sector regulators and competition enforcers

- Sector regulators play a crucial role in improving competition, especially in highly regulated sectors like finance.
- The SEC proposed new rules aiming to enhance competition in stock trading, specifically focusing on retail stock trading.
- One proposed rule involves retail stock trading dynamics between brokers and market makers, addressing concerns about the potential impacts of payment for order flow on price and lack of order-by-order competition.
- Another proposed rule is directed to competition between stock exchanges. When a firm trades on an exchange, it will pay a small fee, a transaction fee.
- The SEC's concerns arise regarding potential trade-offs between market maker payments to brokers and the quality of prices offered to retail investors, alongside the lack of competitive bidding for orders.
- The rules have not yet been approved or implemented. They would alter industry structure in complex ways and could have unintended consequences.

Antitrust litigation

- Private litigation holds substantial importance for financial institutions and their clients.
- Actions or enforcement by regulatory agencies often trigger subsequent private cases, with large antitrust class actions, especially in financial services resulting in substantial settlements, and litigation that can linger for years.
- A wave of class action litigation emerged post-financial crisis, spanning various areas like interest rate manipulation, foreign exchange markets, credit default swaps, metals trading, and bond markets, leading to extensive legal battles.
- Recent private litigation intersects with stock market issues and target brokerages and large market makers.

Patrizia Martino

Senior Counsel, TD Bank Group, Toronto

Evolution of the competitive landscape

- Discussion contrasts the Canadian market with the US, emphasizing fewer banks and debates on market protection.
- Debates revolve around reconsidering market protection, especially in financial services, telecom, and grocery sectors, considering new entrants.
- Fintech and Big Tech disrupt financial services by entering different parts of the value chain, challenging traditional big banks.
- Development of open banking frameworks will reshape the landscape, allowing smaller players access to financial data, sparking debates about balancing innovation with industry safety and security.
- Incumbents face difficulties in innovation due to heavy regulation, contrasting with the agility of Fintech players who operate outside stringent regulatory frameworks.

Interaction between sector regulators and competition enforcers

- Advocacy and enforcement constitute the Competition Bureau's strategy, aiming to influence Government departments and enforce the Competition Act.
- The Bureau advocated for an open banking framework to drive innovation in financial services, engaging with the Finance minister and focusing on enhancing Canada's competitiveness.
- The Bureau conducted a study highlighting entrenched market power of dominant players, fewer new entrants, and startups, urging a reevaluation of regulatory frameworks and policies to foster competitiveness.
- Criticism surrounds amendments made without sufficient consultation. One of the proposed amendments seeks to grant the Competition Bureau formal market study powers, enhancing their ability to compel evidence.
- Market study findings are intended to guide advocacy efforts with regulators, but criticisms exist regarding the enforcement of recommendations and their implementation timeframe.
- Generally criticism arises from the broad scope of proposed amendments being contemplated (e.g., to address specific market study findings), igniting discussions about their industry-agnostic nature and unintended consequences.

Antitrust litigation

- The merger between Royal Bank of Canada and HSBC Canada has been reviewed by the Competition Bureau. The media described it as increasing market share in Canada's financial services; however, this doesn't translate to antitrust markets.
- Despite some public concerns, the Bureau's analysis showed that the post-merger market shares in relevant markets didn't breach the threshold for challenging the merger.
- The report focused on digital banking's impact on local branches, finding that while online banking is growing, physical branches are still essential for some customers.
- The Bureau highlighted concerns about increased concentration in certain relevant markets, barriers to entry, and potential conditions for coordinated behavior in certain markets.
- The final decision on approval rests with the Department of Finance, considering the Bureau's report and concerns about concentration and market dynamics.

José Eduardo Mendoza Contreras

Commissioner, COFECE, Mexico City

Evolution of competition in the financial markets in Mexico

- In 2014, banks were strong in profits and market capitalization but lacked innovation, hindering consumer mobility and resulting in high interest rates.
- In 2021, survey results revealed a significant portion of the population without financial products or bank accounts in Mexico, a lack of digital payments for businesses, and a substantial informal economy.
- OECD suggested introducing Fintech and digital services to pressure the banking system, reduce interest rates, and broaden access to credit and financial services for society.
- The Mexican Competition Commission issued opinions to financial regulators, conducted market investigations, and studies to encourage improved regulation, enabling Fintech entry for the benefit of the Mexican economy.

Interaction between sector regulators and competition enforcers

- Four years after the financial sector review, Mexico introduced a Fintech law. The Commission issues non-binding recommendations, aiming to influence regulators.
- The Commission's recommendations influenced certain aspects of the Fintech law but highlighted concerns about entry barriers for Fintech companies.
- The Commission initiated a payment systems market investigation in 2018 and applied the OECD's competition assessment toolkit in a 2022 study, fostering engagement with regulators.
- Over time, technological changes and market studies have encouraged regulators to engage more actively with the Competition Commission.
- Recommendations focused on opening up regulations for Fintech and other payment systems, urging the central bank to control interconnection, inter-compatibility, and interchange fees. This collaborative approach defines the Commission's current strategy in these markets.
- The Supreme Court ruled that when there is a specialized regulator, COFECE cannot submit a specific regulation, it can only give recommendations and engage with the regulator to change the regulation. Nevertheless, it is essential to establish a legal obligation for specialized regulators to provide an explanation when opting not to implement COFECE's recommendations.

Antitrust litigation

- Class action lawsuits are complex due to jurisdiction issues between specialized, constitutional, administrative, and civil courts.
- Efforts are underway within the Competition Commission to resolve these jurisdictional challenges.
- The Competition Commission's actions in other contexts, such as the electricity sector, resulted in private firms leveraging the arguments for their own protection.
- Despite losing the constitutional controversy in the electricity sector, the law remains in a state of uncertainty, offering protection to private companies without a clear constitutional ruling.

Panel 2

ANTITRUST IN LIFE SCIENCES

Lawrence White (Professor, Department of Economics, NYU Stern School of Business, New York) moderated the discussion.

Noah Joshua Phillips

Former Commissioner, U.S. Federal Trade Commission | Co-chair, Antitrust Practice, Cravath Swaine & Moore, Washington D.C.

Pharmaceutical mergers overview from the last 4 years

- The FTC's approach to pharmaceutical mergers has shifted significantly in recent years. BMS Celgene merger marked the beginning of this change.
- In this merger, dissents highlighted the FTC's alleged failure to address substantial concerns and suggested insufficient litigation against major mergers.
- The concerns raised in BMS Celgene were echoed in subsequent mergers like AbbVie-Allergan.
- The Pharmaceutical Merger Task Force was established by acting chair Slaughter to investigate potential harms in pharmaceutical mergers.
- Despite discussions and theories developed, no significant actions were taken until the case involving Amgen and Horizon, which employed a novel theory related to cross-market and cross-benefit bundling.

General level of collaboration among the various entities involved

- The existing collaboration guidelines, particularly in terms of antitrust regulations, still hold significance and remain in effect.
- While mergers have been a priority for regulatory bodies like the FTC, there has been less emphasis and enforcement concerning collaborations among firms, barring a few exceptions.
- Instances of enforcement related to collaborations typically revolve around hardcore practices or clear-cut violations rather than broader collaborative efforts.
- Agencies have expressed concerns about specific areas such as information sharing, particularly visible in healthcare guidelines, suggesting potential future cases in this regard.
- Despite concerns, there haven't been significant policy changes or a consistent focus on portraying collaborations as inherently negative from an antitrust perspective. Enforcement in this domain remains limited except in specific instances.

Pharmacy Benefit Managers (PBMs)

- The FTC has been evaluating PBM mergers and conduct but hasn't taken action based on concerns linked to pharmacies or competition issues.
- There's growing vocal concern from independent pharmacies about market displacement due to PBM influence, particularly in vertical integration.
- The agency has shifted its stance, signaling potential scrutiny: issued 6B letters to study various issues related to manufacturers and pharmacies.
- The FTC's move garnered attention with independent pharmacists and even congressional involvement, signaling a significant shift under new leadership.
- They quietly removed prior supportive guidance regarding PBMs, signaling a different approach to potential liabilities.
- A policy statement suggested multiple legal liability theories for concerning conduct, followed by strong statements from Commission members, implying a more critical stance toward PBMs.
- Overall, the FTC seems notably more interested in investigating PBMs, hinting at a more negative perspective compared to previous public expressions.

Aileen Fair

Senior Corporate Counsel Litigation & Government Investigations, Antitrust & Competition Law, Bristol Myers Squibb, Princeton, New Jersey

Ms. Fair began by explaining that the views expressed in the conference were her own views and did not represent the views of BMS or any other entity.

BMS Celgene merger

- BMS's acquisition of Celgene aimed to solidify the company's standing as a leading biopharma company creating innovative therapies for patients, with a valuation of $74 billion.
- The FTC highlighted a potential overlap in the psoriasis market due to Celgene's oral medication, Otezla, and BMS's drug in development, Tyk2.
- BMS divested Otezla to Amgen for $13.4 billion, allowing the BMS/Celgene deal to close successfully four years ago.
- Merging companies involves significant effort, including extensive regulatory reviews worldwide. The process culminated in achieving global regulatory approval and the successful merger.

General level of collaboration among the various entities involved

- Collaboration within the life sciences industry is one important way companies achieve advances in healthcare, especially in drug development.
- The cost of bringing a drug to market is approximately $2.6 billion, with a mere 12% success rate for drugs entering clinical trials.
- Small biotech companies face high investment risks, and collaboration with larger firms can enable smaller companies to invest in assets that they may not have otherwise been able to do.
- Collaborative efforts often result in faster drug development and more products reaching the market.
- According to the Congressional Budget Office, between 2010 and 2019, the number of drugs approved was 60% higher than the previous decade.
- Despite progress, there remains a lot of unmet medical needs, especially in rare diseases where only 5% of the estimated 7,000 rare diseases have effective treatments.
- Collaboration not only occurs between smaller and larger companies but also can occur between larger companies, further expediting product development and market access.

PBM

- The PBM industry is, in many instances, vertically integrated with insurers.
- PBM have substantial influence over drug access for patients through access controls like formulary placement.

Anand Krishnamurthy

Principal, Cornerstone Research, New York

Amgen-Horizon merger

- The FTC's pursuit of the theory of harm in the Amgen-Horizon case revolved around bundled rebates.
- Allegations suggested that Amgen could leverage its market power with blockbuster drugs to obtain favorable formulary placement for the target drug acquired in the merger.
- Anchor products, often blockbuster drugs, were central to this theory, assessing their market power and potential influence in bundled agreements.
- Evaluating differentiation in the protected product market was crucial; if these drugs offered distinct treatment benefits, PBMs might resist exclusion from formulary listings.
- Considerations also extended to the nature of the firms and the distinction between pharmacy benefit drugs (anchor products) and medical benefit drugs (protected products) involved in the case.

Pauline Kennedy

Antitrust & Competition Practice Principal, Bates White, Washington D.C.

Consent decree

- The idea of using blockbuster drugs to obtain an anti-competitive restriction on drugs that are monopolies is misguided. The only way pharmacy benefit managers can negotiate discounts is when there are therapeutic substitutes in the class.
- Drug manufacturers offer rebates as part of a menu, varying based on exclusivity in the formulary and preferred positions, but PBMs assess these offers considering their clients' overall costs.
- The complaint seems flawed in assuming manufacturers' offers are accepted without consideration for the broader impact on health plans, unions, and group insurance purchases.
- The consent decree involved a provision preventing the merging parties from offering rebates.
- It is unusual for a competition agency to restrict discounts as they are typically used to increase drug usage by offering better prices. Discounts aim to balance the price per unit with higher volume, creating a scale economy in pharmaceuticals.
- The provision seemed odd as it discouraged the exclusion of future alternative drug producers by offering a more favorable formulary position, a common aspect of competition in the pharmaceutical sector.

PBMs

- PBMs act as intermediaries negotiating drug prices for health plans and drug plans with manufacturers and pharmacies.
- They aim to secure the lowest drug prices for the plans they represent by leveraging their formularies, which list covered drugs and their tiers.
- PBMs' negotiation effectiveness relies on the existence of therapeutic substitutes; they lack leverage for monopoly drugs with no competing alternatives.
- PBMs also negotiate reimbursement rates with pharmacies for the dispensed drugs on behalf of their clients, including commercial, Medicare, and Medicaid plans.
- Medicaid has its own regulated rebates that PBMs manage within the system.
- PBMs negotiate significant discounts off the list prices of drugs, often around 50-60%.
- Concerns arise over how PBMs utilize the negotiated rebates for formulary placement.
- Worries involve potential interference with generic drug entry; generics typically receive preference on formularies due to lower costs.
- In cases of biologics, where generic entry doesn't substantially decrease prices, concerns emerge about preferential formulary treatment based on rebates.
- There's apprehension regarding whether lower-cost new entrants without rebates receive fair treatment compared to high-rebate drugs, focusing on effective net prices for decision-making by PBMs.

Panel 3

THE ROLE OF ECONOMICS IN CRIMINAL ANTITRUST CASES

Yee Wah Chin (Chair-Elect, American Bar Association International Law Section | Chair, New York City Bar Association Antitrust & Trade Regulation Committee, New York) moderated the panel.

David Chu

Assistant Chief in the New York Office, U.S. Department of Justice, New York

Economic expertise in the U.S. vs Aiyer case

- Economic experts are usually the exception rather than the norm in prosecutions, as economic nuance is not central in criminal cases. The *US vs Aiyer* case is an exception in which both the prosecution and the defense used economists.
- The court excluded a significant portion of the defense experts' testimony, which can be explained by invasion of the jury's province and the judge's role in instructing the jury.

Economist's involvement between criminal and civil antitrust cases

- In civil cases, economists play a multifaceted role, participating in various stages (class certification, summary judgment, damages). Those proceedings are public, thus providing transparency and easy access to information.
- In criminal cases, the use of economists is exceptional and started appearing only around 2018. There is a lack of public awareness until the trial stage, with a focus on initial utilization during investigations.
- Information disclosure and discovery differ significantly between civil and criminal cases. Indeed, there are detailed expert reports and depositions in civil cases, compared to the more limited expert disclosures under Rule 16 in criminal cases.

Different ways in which economists are deployed by the Ministry of Justice

- Economic experts can play a key role in prosecution:
  - > Experts are used for "table setting" during trials, especially in cases involving complex markets in order to explain unfamiliar market mechanics.
  - > In wholly foreign conduct cases, which raises jurisdictional challenges, economic experts help establish the effects of the foreign conduct in the US.
  - > In manipulation cases across various markets, economists and product market experts are constantly involved in investigation and trial teals.
- Economic experts can also play a key role in investigations:
  - > Helping lawyers by providing expertise in understanding unfamiliar markets.
  - > Helping lawyers to prepare for the trial, such as for cross-examination.

DOJ's commitment to prosecuting no poach and labor cases

- The Bogan case of 1998 has pivotal influence and introduced complexity especially in defining affected markets even in *per se* cases.
- However the Deslandes vs McDonald case of 2023, from the Seventh Circuit, provided clarity with the courts treating no-poach

and non-solicit cases as *per se* illegal without distinguishing between them.

- While it involves an inherent legal risk, the *per se* approach allows to eliminate the need to address market power or definition issues, simplifying the legal considerations.

The challenges of economic testimony in labor market cases

- A key distinction between labor and product market cases lies in the nature of data, which adds a layer of complexity for labor cases:
  > In contrast with foreign exchange cases, where pricing data is abundant and easily accessible, labor market cases face opaque and less robust data.
  > The difficulty in tracking individuals' transitions between firms is an example.
- There is a significant difference when considering factors beyond wages and salary. Moreover, total utility is not solely reflected in salary adjustments. Thus, difficulties arise in capturing the comprehensive evaluation of utility, especially when reasons

Economic testimony in criminal proceedings (Section 2 of the Sherman Act)

- Civil cases allow for economic nuance, market power analysis, and greater granularity. They may involve more complexity and ambiguity in conduct, necessitating sophisticated economic analyses and expert testimony.
- However, for criminal cases, the focus is on overt and evident conduct, steering away from nuanced economic analyses.

Jee-Yeon Lehmann

Managing Principal, Analysis Group, Boston

Economic testimony in two recent criminal trials

- Examples of economist testimony in two recent criminal trials in US Federal Court in Denver, Colorado:
  > *US v. Penn* was a case involving allegations of bid rigging and price-fixing conspiracy within the broiler chicken industry, with first two trials ending in hung jury and an unprecedented third trial in June 2022, which ended with an acquittal of all defendants.
  > *US v. DaVita* was the first criminal prosecution of an alleged no-poach agreement that the US Department of Justice brought against DaVita, a kidney dialysis company, and its former CEO, Kent Thiry. After a three-week trial in April 2022, the jury acquitted both DaVita and Thiry.
- In both cases, the defense called an economist to testify but the Government did not. In pre-trial motions, the Government sought to exclude the defense's economic testimony on the grounds they were not relevant to a *per se* matter. In both *Penn* and *Davita,* the judge allowed most of the economic testimony in for the jury to consider, except for any testimony related to potential procompetitive justification for the agreement.
- At both trials, economic testimony focused on qualitative and quantitative analysis of whether the evidence was consistent with the existence of the agreement alleged by the Government.

Similarities and differences in economist involvement in criminal and civil antitrust cases

- In both criminal and civil antitrust cases, economists can play a key role in the analysis and preparation of the case, by helping attorneys understand the relevant economic factors at play, industry dynamics, and decision-making processes. They also play a vital role in analyzing relevant data.
- However, there are several salient differences:
  > First, although there are certain similarities in the types of analyses that are presented in civil and criminal antitrust cases, there are nuanced differences in how economic analyses are

framed. In criminal cases, there can be increased sensitivity to how economic analyses are presented and discussed so that they stay within the bounds ruled admissible by the judge in a criminal matter.

> Second, there is often an absence of a battle of experts in criminal cases, which can change the focus of the testimony and cross-examination.

> Third, prior to recent amendments on expert disclosure requirements, there was no obligation for the expert to produce a report or back-up to the analyses the economist is offering. Without depositions, this meant that there was often limited information about the contents of the economic testimony for the other side's cross-examination. Changes to the expert disclosure requirements at the end of 2022 closed the gap between civil and criminal cases, and these developments may impact how the Government and the defense prepare for economic testimony at trial.

Crucial economic testimony in *DaVita*

- The economics testimony offered a scientific-method-based framework for the jury to think through allegations and to directly evaluate the questions that the judge instructed the jury to consider during their deliberation process.
- Prior to the economic testimony, Government witnesses with immunity protection described the alleged agreement in different ways ("no-poach," "non-solicitation," "tell-your-boss rule"), which may have created confusion for the jury about what the agreements actually were. The economic testimony offered a different, ostensibly clearer framework for thinking through the allegations.
- A unique aspect of the case, in which the judge allowed jurors to ask questions to each witness, provided an interesting view into the jury's thinking and their engagement with the economic testimony. Their questions demonstrated that they were carefully thinking through the issues through the lens of the scientific framework that had been offered by the economist.
- In particular, the only question that the jury asked during their deliberation process ("Can you define what is meaningful competition?") highlighted that they were thinking through the main question that the defense had underscored during closing could be evaluated through an economic lens.

The challenges of economic testimony in labor market antitrust cases

- Generally speaking, there are parallels between the types of information and data that an economist might examine in labor- and product-market antitrust cases, such as those related the nature and scope of the market, quantity (sales volume versus employee hiring, movement, turnover), and price (sales price versus compensation).
- However, there are some unique aspects of labor market analysis related to the fact that supply and demand for labor deals with people with individual preferences and distinct abilities. Such heterogeneity among individuals creates difficulties in characterizing the relevant set of competitors and the scope of the relevant labor market.
- Unlike product markets, labor market pricing involves both pecuniary and non-pecuniary aspects. There are challenges in valuing non-wage compensation, non-monetary benefits, and match quality of jobs, especially for workers with complex compensation structures.

Trial preparation

- Mock trials are conducted by both the defense and the Government to gauge jury perception and preferences.
- Economists are trained in economic theory and analysis, but they may not necessarily be experts in the particular industry at issue. Industry experts can play an important role in helping economists and the jury understand factors that affect the market dynamics in a particular setting.

Richard Powers

Partner, Fried Frank, New York

Christopher Lischewski's prosecution

- Christopher Lischewski, former CEO of Bumble Bee Foods, was charged with a price-fixing conspiracy related to packaged seafood.
- The government relied on cooperating witnesses who testified about their involvement in the conspiracy, supported by corroborative evidence.
- The defense used an expert witness, which generated an extensive pretrial litigation regarding the scope of the expert's testimony. Christopher Lischewsk testified, and defendant testimony can play a pivotal role in criminal trials.

Economists in the DOJ's investigations and litigation

- Economists play a critical role at different stages of legal proceedings in both civil and criminal aspects within the DOJ.
- Economists are crucial when dealing with complex financial products to understand how competition is impacted, especially in cases with extraterritorial dimensions.
- Economists are integral in various phases of investigations and litigation at the DOJ:
  - > Early engagement during investigations to develop evidence effectively is necessary. There is a need for continuous collaboration for effective outcomes.
  - > Engagement post trial can be necessary, particularly in criminal antitrust cases where convictions lead to sentencing considerations. Cooperation with economists should be ongoing and integrated throughout legal proceedings.

Strategic utilization of economic evidence

- While economic evidence can play a pivotal role in shaping the dynamics of legal proceedings, there is a spectrum of government case strength in which economic expert testimony have a varying effectiveness in creating doubt in jurors' minds about the existence of an agreement beyond reasonable doubt.
- The spectrum ranges from document-heavy cases with fewer inside witnesses to those heavily reliant on leniency witnesses. Thus, there is a central theme of aligning defense strategies with the strength of the government's case.

Expected approach to economics testimonies of the DOJ

- The way the DOJ will navigate the challenges of defendants using expert witnesses is expected, which is a growing trend, particularly in non-labor market cases.
- From a defense counsel's perspective, turning a case into a «battle of the experts» is advantageous. DOJ prosecutors are certainly mindful of this defense strategy.
- There is a complexity of the DOJ's balancing act in allocating resources and navigating the challenges posed by labor market cases, taking into account court decisions and ongoing priorities. The DOJ is faced with an ongoing challenge of maintaining focus on no-poach enforcement while managing resource limitations.

Deciphering Section 2 violations

- Section 2 of the Sherman Act offers three routes for violation: conspiracy, attempt, and monopolization, each with distinct elements.
- Regarding criminal prosecution under Section 2, historical historical precedents, due process considerations and recent updates to the Antitrust Division's primer for law enforcement underscore the importance of criminal intent in Section 2 violations.
- This emphasis on clear evidence of intent ensures the strategic focus on prosecuting unambiguous violations, safeguarding against challenges in gray area business conduct.

Panel 4

ARTIFICIAL INTELLIGENCE: HOW TO REGULATE ANTICOMPETITIVE PRACTICES?

Scott Hemphill (Moses H. Grossman Professor of Law, NYU Stern School of Law, New York) moderated the panel.

AI's potential in detecting corruption

- A recent Brazilian study used machine learning on corruption data, by conducting audits in municipalities receiving central government funds.
- The study had a dual purpose: resource optimization and enhancing detection.
- In order to anticipate a paradigm shift, it should be considered to revisit and reimagine the application of AI in order to identify complex patterns associated with corruption.

Aaron Hoag

Chief, Technology and Digital Platforms Section,
Antitrust Division, U.S. Department of Justice, Washington D.C.

AI's perceived impact on competition

- AI has the potential to empower smaller competitors and disrupt markets, as the transformative role of cloud computing in app development. Indeed, smaller companies could leverage AI tools to compete effectively and innovate.
- Concerns are raised about the substantial costs and resources required for large-scale AI development and training, which leads to questioning the accessibility of these tools for competitors and potential restrictions.
- Addressing anti-competitive conduct is of main importance in order to enable AI's value to materialize in the marketplace. The ongoing Google case is a perfect example of a demonstration of AI's potential while acknowledging the uncertainties surrounding its flourishing.

AI and information exchanges

- AI has a transformative nature when handling shared data for pricing strategies.
- Direct information exchange may become obsolete as AI, centralizing data, negates the need for explicit sharing among competitors.

AI as an investigative tool

- The immediate use of AI tools for document review in investigations is proposed, as it could address the challenges posed by large volumes of documents.
- It could enhance investigative efficiency and streamline the identification of pertinent documents within extensive datasets.

Alden Abbott

Senior Research Fellow at Mercatus Center,
George Mason University, Arlington, Virginia

- **AI development and regulatory considerations**
- There is a tension between the advantage of established firms and disruptive potential of breakthrough by smaller firms.
- Indeed, obtaining patents could lead to lawful exclusion which poses questions related to "killer acquisitions" a related to patent acquisitions.
- Section 5.3 of the President's recent executive order on AI is a potential signal for the FTC to propose rules on AI. However, there is uncertainty about the FTC's course of action.

- **FTC's role in AI-related collusion cases**
- The FTC actively investigates potential collusion cases involving AI to safeguard fair competition, without stifling innovation.
- As it lacks criminal authority, the FTC has an advantage in dealing with invitation to collude cases. It can intervene without a formal agreement of the parties, focusing on potential competition impact. Section 1 of the Sherman Act, which is a criminal statute, applies only to actual collusion, not mere invitations to collude.

Challenges in competition rulemaking

- An FTC advanced notice of proposed rulemaking on commercial surveillance and security touching on privacy raises serious legal and policy concerns. .
- The use of cost-benefit analysis as a method to assess the regulatory landscape is advocated for. Indeed, evaluating issues comprehensively is key, especially when considering the intricacies of the Magnuson-Moss Act, where it is statutorily required.
- Competition rulemaking under section 6(g) of the FTC Act probably lacks legal authority.. Indeed, the over 50 year-old Octane Posting case is a rare instance where the FTC won a rulemaking case (involving joint competition and consumer protection rulemaking) and doesn't seem like a viable precedent for competition rulemaking.

Nathan Wilson

Executive Vice President, Compass Lexecon, Washington D.C.

AI and regulation

- While the exponential rise in discussions about algorithmic pricing is acknowledged, concerns are expressed about being early in the conversation on AI and algorithms.
- AI and algorithms can be viewed as technologies, and as such, like prior innovations, there will be winners and losers in the marketplace. The distribution of effects, i.e., favoring smaller or larger firms, is still unsure.
- Discussions and forums are needed to better understand and articulate the potential risks and consequences of AI. However, preemptive regulation is not to be rushed as it can lead to unintended consequences (e.g. of the European GDPR).

Price discrimination and competition

- Price discrimination and competition have an intricate relationship. Models have suggested that in competitive environments, price discrimination may have limited impact due to the bidding down effect.
- A monopoly scenario with increased visibility into willingness to pay can influence price discrimination, as it has a potential for greater profit extraction.
- A balanced approach in drawing regulatory lines that address potential abuses of predictive analytics without stifling legitimate negotiations is encouraged.
- The complexity of the issue and the importance of thoughtful regulatory design is highlighted.

Ioana E. Marinescu

Division's Principal Economist, U.S. Department of Justice, Washington D.C.

AI in anti-competitive conduct

- AI has the potential to enable systematic sharing of private information, price fixing and collusion, all the while being more sophisticated than a human. For example, in labor markets, AI could be used to surveil workers on and off the job, leading to blacklisting and boycotting employees.
- AI can be an advantage for conducting anticompetitive behavior, but doesn't provide a safe harbor (e.g., US v. Cargill).
- However, while AI may engage in anti-competitive behavior, it's the conduct that matters.

Competitive dynamics in algorithm adoption

- Incentives are an intriguing issue when multiple competitors adopt the same algorithms, as misaligned incentives can lead to deviations in competitive pricing.
- Competitors and the common third party selling algorithms share differing incentives:

  > Competitors aim to sell more units;

  > Third parties seek to sell more algorithms and AI.

AI as an investigative tool

- There could be efficiency gains in investigations with a well-designed, general-purpose tool capable of analyzing extensive text and data concurrently.
- However, some challenges are inherent to detection tools as sophisticated entities being investigated may employ obfuscation tactics to counter detection.
- Thus, there is a need for continuous adaptation, understanding the adversarial nature of the investigative process.