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Economic Experts in Criminal Antitrust Price Fixing Litigation: Discovery and Scope*

Solvejg Wewel, Samuel Weglein, David Toniatti, David Smith, and *Chris Feige***

I. Introduction

Criminal antitrust enforcement has garnered significant attention in recent years, with many high-profile cases attracting front-page headlines. With two antitrust enforcement acts—the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act,[1] and the Criminal Antitrust Anti-Retaliation Act[2]—passed in 2020 to protect whistleblowers and provide incentives to self-report and cooperate with federal investigations, more criminal antitrust enforcement activity is likely. In 2021, the U.S. Department of Justice ("DOJ") brought 19 criminal antitrust cases[3] and announced plea agreements with associated fines exceeding $100 million.[4] It also announced its first publicly disclosed criminal indictment alleging "no-poach" agreements[5] and a revision to its primer on price-fixing, bid-rigging, and market allocation schemes.[6]

As the government's approach to criminal antitrust investigations has continued to evolve, the role that an economic expert can play in criminal litigation has grown. In our experience, it differs from the expert's role in civil antitrust matters in several important ways, from expert discovery to the nature of the testimony and judges' willingness to consider economic evidence in a *per se* environment. This article provides some guidance based on our experience in a variety of criminal and civil antitrust matters, including *U.S. v. Richard Usher, et al.*[7] and *U.S. v. Akshay Aiyer*[8]—two

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* An earlier version of this article appeared as "*Criminal Antitrust: The Discovery Process and the Role of Economic Experts*" *in* THE EXCHANGE: INSURANCE AND FINANCIAL SERVICES DEVELOPMENT, a newsletter of the American Bar Association's Section of Antitrust Law.

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1 *See* Department of Justice, "Department of Justice Applauds President Trump's Authorization of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act" (Oct. 1, 2020), *available at* https://www.justice.gov/opa/pr/department-justice-applauds-president-trump-s-authorization-antitrust-criminal-penalty.

2 *See* Department of Justice, "Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act" (Dec. 24, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

3 *See* Department of Justice, Antitrust Case Filings, *available at* https://www.justice.gov/atr/antitrust-case-filings.

4 *See* Department of Justice, "One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a $107 Million Criminal Fine" (Feb. 23, 2021), *available at* https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million.

5 *See* Department of Justice, "Health Care Company Indicted for Labor Market Collusion" (Jan. 7, 2021), *available at* https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion. This was the first publicly disclosed criminal no-poach indictment since the DOJ and Federal Trade Commission's jointly issued antitrust guidance for human resource professionals in October 2016.

6 *See* Department of Justice, "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For" (Feb. 27, 2019), *available at* https://www.justice.gov/atr/file/810261/download.

7 *See* United States v. Richard Usher, *et al*., 17 Cr. 19 (RMB) (S.D.N.Y. 2018).

8 *See* United States v. Aiyer, 18 Cr. 333 (JGK) (S.D.N.Y. 2020).

criminal cases that focused on foreign exchange (FX) markets—and *U.S. v. Christopher Lischewski*[9]—a criminal case that focused on canned tuna. Although it is not intended to be definitive, this article should provide a helpful perspective for practitioners. In the first section, we examine the expert discovery process in criminal antitrust litigation relative to civil antitrust litigation. In the second section, we discuss various ways in which an economic expert can offer valuable opinions in a *per se* environment.

II. Expert Discovery Process

Information available to expert economists differs substantially between criminal and civil antitrust matters.

In civil matters, the facts alleged by each side are revealed in the lead-up to trial, starting with the plaintiff's complaint, which often reveals the basis of the plaintiff's case and some indication of the relevant episodes, facts, or defined markets that the plaintiff alleges to prove the case. As the matter progresses towards trial, fact witness depositions, document production, interrogatories, and requests for admissions establish further facts and may even shed some light on the legal and economic strategy of both sides, as well as the economic facts that will be central to each side's respective case. Expert discovery, which typically involves the submission of one or more expert reports, along with expert depositions, further reveals each side's approach and helps identify any common ground and key areas of disagreement. Dispositive motions prior to trial can further bound an economic expert witness's testimony.

Prior to trial, disclosures provide comprehensive and detailed support for the expert's proffered opinion, with reports that can stretch to hundreds of pages and often contain dozens of exhibits, figures, and graphs. An economic expert deposition is an opportunity for the opposing side to identify nature and limitations of the expert's opinions. The process is designed to avoid surprises for the opposing side as to the economic expert's opinions that will be presented at trial, and the basis for those opinions.

By contrast, relatively little is revealed by either party in a criminal case prior to trial. In a Section 1 (15 U.S.C. § 1) criminal felony enforcement matter, insight into the prosecution's strategy prior to trial may only be available in the criminal indictment. The indictment typically provides a general sense of the pleadings made (*e.g.*, price-fixing), and the prosecution may not be able to deviate from the claims submitted to the grand jury. However, many specifics about the nature of the alleged conduct may only be revealed slowly and imperfectly by the prosecution between the time of the indictment and the trial. In *Usher* and *Aiyer*, for example, the prosecution disclosed episodes—defined as specific dates/times and currency pairs—in which, it alleged, anticompetitive conduct had occurred. Similarly, in *Lischewski,* the prosecution disclosed episodes in which the defendant allegedly "jabbed" executives at other companies about their aggressive prices. However, these episodes were disclosed over time and could be added to or subtracted from at the prosecution's discretion. If bills of particulars are granted, the prosecution may be required to turn over evidence that may provide the defense's economic experts with insight into the economic facts that would be the focus of the prosecution's case. Any information into the prosecution's case can help the defense's economic experts better focus their scope of review. This can be particularly useful if there is an abundance of economic evidence that is potentially (but not

[9] *See* United States v. Lischewski, 18 Cr. 203 (EMC) (N.D. Cal. 2019).

necessarily) relevant to the prosecution's case. If the prosecution does not provide additional specifics, or if a bill of particulars is denied, then much of the prosecution's case will only be revealed at trial.[10]

Depending on the nature of the allegations, and similar to a civil matter, the defense and prosecution may rely on testimony from an expert economist to provide context, rebut opposing experts, or provide affirmative testimony directly relevant to the allegations. Either side can also choose to forgo economic experts in the hope of excluding any opposing testimony on the grounds that a criminal *per se* violation does not require economic expertise. In our experience, the latter strategy is more likely to be favored by the prosecution than by the defense, both to simplify the proceedings and to increase the likelihood of a criminal conviction. In *Lischewski,* the prosecution did not offer any economic expert testimony. However, in both *Usher* and *Aiyer*, the prosecution relied on economists to describe FX trading and on data experts to present trading data. The economists refrained from reviewing any evidence in the case or testifying about any of the alleged conduct; the data experts provided the jury with summaries of trading data but offered no opinions on the implications of the data.

Early notification of economic expert testimony can occur before a criminal trial, either in the form of an affidavit or in an expert disclosure provided by counsel. These requirements must satisfy Federal Rule of Criminal Procedure 16(a)(1)(G) for government experts or 16(b)(1)(C) for defendant experts. Similar to the requirements under Federal Rule of Civil Procedure Rule 26(a)(2)(B), these criminal procedure rules require disclosure of the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. As is the case in civil matters, expert testimony in criminal matters is subject to Federal Rules of Evidence 702, 703, and 705, which require, among other stipulations, that the testimony is the product of reliable principles and methods applied to the facts of the case. However, an expert report is generally not required by the courts as part of an expert disclosure and, in our experience, is usually not provided. Instead, disclosures for economic expert witnesses have tended to provide few details about the expert's proffered opinions and leave the expert's identity and CV as perhaps the most informative aspects of a disclosure.[11] The absence of expert witness deposition prior to a criminal trial further limits any requirement for experts on either side to commit to their position prior to fully understanding the prosecution's focus at trial.

Even absent the extensive disclosures that typically characterize the role of economic experts in civil litigation prior to trial, economic questions are often central to the litigation strategy on both sides. Specifically, the data-intensive nature of many criminal trials and a focus on the economic interpretation of any communications make the economist's role highly relevant as the legal strategy is developed. For example, in both *Usher* and *Aiyer*, economists worked with the defendants' counsel to assemble and review trading data, and to examine the relationship between the alleged exchange of information, on the one hand, and any alleged attempt to fix prices given the nature of currency trading and the data patterns observed, on the other. This formed the basis for the economists' testimony and helped counsel prepare to cross-examine cooperating witnesses who were expected to testify about specific instances of alleged coordination in the FX markets.

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[10] In both *Usher* and *Aiyer*, the court denied the defendants' request for a bill of particulars, but it did require the prosecution to provide a list of at-issue episodes.

[11] Note, that in *Lischewski,* the court ruled that the expert could not testify to whether the data available to defendant were consistent with competition or that the economic data showed no changes after episodes.

Another example is *Lischewski,* in which the economist examined voluminous financial and sales records and documented the relationship between tuna prices and costs.

III. Operating in a Purely *Per Se* Environment

In the prior section, we discussed issues relating largely to process. In this section, we shift focus to more substantive topics, focusing on questions relevant to economic testimony in a criminal antitrust case with a *per se* legal standard.

In criminal antitrust enforcement matters, violations of Section 1 of the Sherman Act are always assessed under the *per se* standard. A key distinction between *per se* and rule of reason antitrust cases is the focus on the *existence* rather than the *effect* of an alleged conspiracy. Another is that the legal standard for a criminal conviction is proof beyond a reasonable doubt, rather than preponderance of the evidence for a civil conviction. Under the rule of reason standard, the plaintiff must show that the preponderance of the evidence demonstrates a significant anticompetitive effect that is not outweighed by any related procompetitive justification.[12] Under a *per se* standard, however, the existence of an agreement is sufficient to violate Section 1 even if the agreement is not actually effective in unreasonably restraining competition.[13] No assessment of reasonableness, potential economic justifications, or other underlying factors can provide a legitimate justification for conduct that is *per se* illegal.[14]

To establish a criminal *per se* Section 1 violation, the prosecution must prove three elements beyond a reasonable doubt:

(1) An agreement to fix prices, rig bids, or allocate markets was knowingly formed and was in existence at or about the time alleged.

(2) The defendant knowingly joined the alleged agreement for the purpose or with the effect of unreasonably restraining trade.

(3) The alleged agreement affected interstate or foreign commerce of the United States.[15]

In our experience, the first element is often the most contentious, and therefore, is often the focus of the prosecution's case at trial.[16] Furthermore, the prosecution's case in criminal cartel litigation often relies heavily on communications between alleged cartel members. While proving a negative—here, that an agreement did not exist—may be challenging, an economic expert's perspective on the actual corresponding economic evidence can offer a more nuanced or even a different perspective than one suggested by the sorts of communications on which prosecutors tend to rely.

First, economic analysis can help provide context for certain facts. For example, in both *Usher* and *Aiyer*, the defense argued that relying solely on the language in the chat transcripts could be

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[12] *See* Department of Justice Archives, Elements of the Offense, *available at* https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

[13] *See*, for instance, *In re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 656–57 (7th Cir. 2002) ("An agreement to fix list prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occur at a lower price.").

[14] *See* Department of Justice Archives, Elements of the Offense, *available at* https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

[15] *See* Department of Justice Archives, Elements of the Offense, *available at* https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement. *See also* T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 632–33 (9th Cir. 1987).

[16] In *Usher*, where the defendants all lived and worked in London, the third element was also contested at trial.

misleading without a closer look at the corresponding data. An exchange of information may be an attempt to fix prices, an attempt to complete a vertical trade, or a lot of bluster unsupported by the underlying data. An economic expert's analysis of chat transcripts, side by side with trading data, can assist the finder of fact in distinguishing among communications that are designed to further an illegal scheme, communications that are expected or even necessary in the normal course of business, and communications that are meaningless and disconnected from any market reality. We found that when combined with a thorough explanation of relevant economic concepts, including the functioning of FX markets, such an exercise was useful in helping the trier of fact distinguish between *per se* illegal behavior and behavior unrelated to any illegal scheme. As another example, in *Lischewski*, the economist analyzed the tuna brands' margins during the alleged conspiracy. The court in that case found that the analysis was probative and relevant to the existence of the alleged conspiracy—and admissible under *Continental Baking Co. v. United States*—because it addressed alternative explanations for pricing behavior.[17]

Second, an economic expert can present evidence of economic conduct that is directly inconsistent with the existence of an agreement, notwithstanding the alleged intent that is supposedly apparent in the communications in evidence. In *Usher*, for instance, the defense argued that the accused traders had a propensity to claim to be trading in a particular way when, in fact, they were not—what one trader described as a form of bluffing, as if they were playing poker. In such instances, a look at trading data revealed not only that the alleged communications were inconsistent with price-fixing, but also that they were among the procompetitive tools used by traders to complete the transactions requested by their clients. Such an analysis, if permitted, can provide a powerful rebuttal to what might otherwise be seen as evidence of an agreement.

Moreover, economic analysis can open the door to alternative (and procompetitive) explanations for evidence that is presented by the prosecution in support of an alleged agreement to coordinate on prices. In *Usher*, for example, one of the themes that the defense brought out through its experts was that although FX traders often compete with each other, they are often counterparties as well—that is, they buy and sell currency from and to each other. When traders transact with one another, discussing prices is essential. Hence, there can be a completely benign alternative explanation for discussions about pricing.[18] An expert in FX markets can assist the jury by explaining how traders interact and can also use actual trading data to show that the traders did indeed transact with one another regularly, including during the times at which a conspiracy has been alleged.

One could argue that there exists a third category of topics that an economist might opine on in a criminal antitrust case, even a *per se* case—namely, price impact. This analysis may inform the question of whether alleged co-conspirators were even *trying* to have an impact in the first place. If the alleged actors are seen to have had no impact on price in the marketplace, that may indicate that there was no *intent* to impact price in the first place. In our experience, this avenue is a risky one—judges may view this as an attempt to inject the question of "effect" into the case and may prohibit the expert from testifying on those topics.

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[17] *See* Continental Baking Company v. United States, 281 F.2d 137, 145 (6th Cir. 1960).

[18] An economist would expect that transactions between market makers at different banks would have procompetitive effects that accrue to the banks' customers. If traders can more easily offload a long or short position in the market, they are more likely to offer lower prices to their customers.

IV. Conclusion

As we have discussed above, although the economic analysis may not differ between civil or rule of reason antitrust matters on the one hand, and criminal, *per se* matters on the other, the disparate nature of pre-trial rulings between these two types of cases and the presentation of economic analyses both before and at trial can differ greatly. Where permitted by the court, the addition of economic expert analysis and testimony can add powerful insights relevant to the finder of fact in criminal matters.