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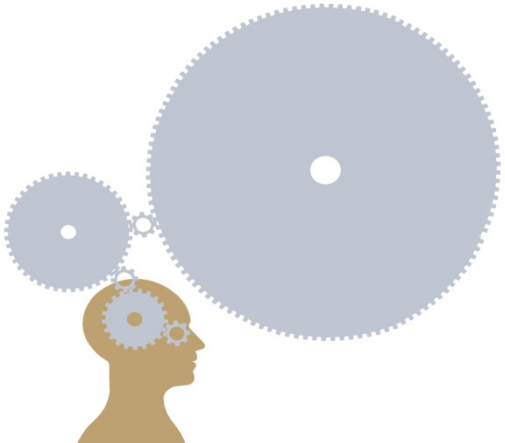
The economist and the judge: role of the expert

Lear Conference, Rome

Dr Gunnar Niels



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Outline

- courts recognise the importance of economics
- rules of engagement for economic experts
- economic evidence in damages actions
- courts going back to first economic principles

Accepting the importance of economics

'When considering the alleged effect on competition, an economic approach is called for. The approach must be realistic. There must be a proper market analysis of the position with the relevant restriction and the position in the absence of the relevant restriction. Not every restriction on conduct amounts to a restriction on competition, much less to a significant restriction on competition'[1]

'The introduction of an Article 81 [now Article 101] defence will add to the burden on the Respondents by way of disclosure, may give rise to a need for expert evidence, and may therefore drive up the costs of the litigation, and delay its resolution significantly'[2]

Determination of dominance 'requires a detailed and careful enquiry, not least because the consequences to the undertaking if it is found to be in a position of dominance in the market and if, in addition, there is evidence of abuse of that position are or can be serious'. Judge considered it insufficient that claimants only relied on two factual witnesses for dominance[3]

[1] *BAGS v AMRAC.*
[2] *Sportswear & Four Marketing v Stonestyle* [2006] EWCA Civ 380.
[3] *Ineos v Huntsman* [2006] EWHC 1241 (Ch).

Can judges rely on economic experts?

'That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. **Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins.** An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by Mr. [Expert] is a euphemism for 'misleading selectivity"[1]

'I accept Dr [Expert]'s opinion, whose evidence I found authoritative, persuasive and convincing'[2]

'I noted the considered and thoughtful way in which Mr [Expert] gave his evidence. I am entirely satisfied that he acted throughout as an independent expert offering his opinions to assist the court. … His credentials to give expert evidence on this subject are impressive. On the material issues, I accept all of Mr [Expert]'s evidence and his conclusions'[3]

[1] *Cala Homes v Alfred McAlpine Homes East* [1995] FSR 818.
[2] *Chester City Council v Arriva*, [2007] EWHC 1373 (Ch).
[3] *Calor Gas v Express Fuels and D Jamieson*, Court of Session [2008] CSOH 13.

Rules of engagement for the expert

- best practice for economic evidence
  - BKa, European Commission, Competition Commission
- Daubert test in US courts
  - established principles and methods
  - hard data, not 'estimates, feelings and beliefs' of industry expert
  - rooted in facts of case (Nobel Prize for Economics won't do)
- no 'triumph of theory over commercial reality'
  - the 'rational' versus the 'real' business person

Source: *Vernon Walden, Inc., v. Lipoid GmbH and Lipoid USA, LLC*, civ. no. 01-4826 (drd), United States District Court for the District of New Jersey; *Enron Coal Services v EWS* [2009] CAT 36.

Role of the expert (cont'd)

- duty to help the court
  - experts to talk to each other (also at settlement negotiation stage)

    'The quantum experts have managed to make very good progress in agreeing figures. This meant that the issues between them were more limited. Both [expert 1 and expert 2] were impressive witnesses and although their approaches on particular issues differed, this was the result of opinion on such matters as validation of costs. I have therefore been able to see clearly what their views are and decide which view I prefer on particular issues.'[1]
  - critical review and cross-examination provide the right incentives

[1] *BSkyB v EDS* [2010] EWHC 86 (TCC).

Experts are experts?

The district court's and the plaintiffs' difficulty in describing the relevant market was to a great measure the result of the plaintiffs' reliance on [the expert] as their sole economic analyst/expert. Dr. [expert] is the sole qualified source cited by the plaintiffs supporting their allegation of the Clinic's market power. Yet, Dr. [expert] conceded that he was "not an expert," that he had no background in antitrust markets, either geographic or product, and that he had no background in "primary care" markets. Dr. [expert] further stated that he was not a member of any associations or industrial organization groups which form the bulwark of economists specializing in antitrust law and economics. Where supposed experts have admitted that they are "not experts," courts have had little difficulty in excluding their testimony.[1]

[1] *Nelson v. Monroe Regional Medical Center*, 925 f.2d 1555 (7th Cir. 1991).

Experts are experts? (cont'd)

Expert 1 not an economist: 'Whilst the concepts required to be investigated in a competition law case are no doubt most easily grasped, explained and opined upon by trained economists, they are concepts drawn from and related to the operation of the markets of the real world; and I regard it as unreal the thought that it is only trained economists with a list of learned articles to their name who have the expertise necessary to understand them and to help the court on their application to a particular case'[1]

Expert 1 'undoubted closeness to the action': 'I was satisfied that Mr [Expert] was giving his evidence honestly and was doing so in proper recognition of his duties to the court. I recognise, however, that he has been close to the action on the claimants' side of the record, and that there is therefore a risk that his opinion may perhaps have become unconsciously coloured by the claimants' interests'[2]

[1, 2] *Chester City Council v Arriva* [2007] EWHC 1373 (Ch).

Courts accepting first principles of economics

- precedent: bus services in separate market

'In any analysis of whether local buses form an exclusive product market, the usual approach is to hypothesise a small but significant non-transitory increase in price for bus services of 5 to 10% and determine alternative modes of transport (if any) become a substitute. That is the right approach, whereas Mr [Expert 1] appeared to regard it as equally relevant to consider whether buses were a substitute for cars. Buses may be competitively constrained by cars, but cars may not be competitively constrained by buses'[1]

- precedent: market shares measured by turnover or mileage

Judge accepts opinion of Expert 2 that where market is defined based on supply-side substitution, capacity is the best metric for measuring market power[2]

[1, 2] *Chester City Council v Arriva* [2007] EWHC 1373 (Ch).

Principles for excessive pricing as abuse (I)

- status of excessive pricing under Article 102 unclear
  - 'economic value' criterion of *United Brands* [1978] ECR 207 ambiguous
  - European Commission guidance on Article 102 does not cover it
- *Attheraces v British Horseracing Board* [2007] EWCA Civ 38
  - significant discussion of fundamentals of 'economic value'

Source: European Commission (2008), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', December 3rd.

Principles for excessive pricing as abuse (II)

'On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what Article 82 [now Article 102] and section 18 envisage, because the premise is that the seller has a dominant position enabling it to distort the market in which it operates'[1]

'On the other hand, it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position'[2]

'… we conclude that, in holding that the economic value of the pre-race data was the cost of compilation plus a reasonable return, the judge took too narrow a view of economic value in Article 82 [now article 102]. In particular he was wrong to reject BHB's contention on the relevance of the value of the pre-race data to ATR in determining the economic value of the pre-race data and whether the charges specified by BHB were excessive and unfair'[3]

[1, 2] Attheraces v British Horseracing Board [2007] EWCA Civ 38, at [205]–[206].
[3] Attheraces v British Horseracing Board [2007] EWCA Civ 38, at [218].

Damages: need for evidence that fits within the legal reality

- 'search for the truth' versus practical approaches
  - commercial reality is complex (don't blame economists)
  - need to explain economic concepts in an accessible way
- differences in data availability and standards of proof
  - disclosure rules differ across jurisdictions
  - data availability differs at different stages of a case
  - courts in several Member States (eg, Germany, Italy, Sweden) have discretion to determine the damages value when evidence is limited

Source: Oxera et al. (2009), 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts', report prepared for DG Competition, December.

Evidence that fits within the legal reality (cont'd)

- principles of causation, remoteness, foreseeability
- cartels: overcharge claim by actual purchasers more likely than lost-volume claim or claim by would-be purchasers
- exclusionary conduct: actual loss versus lost profit and loss of chance
  - *Conduit Europe v Telefónica*;[1] *Enron v EWS*[2]

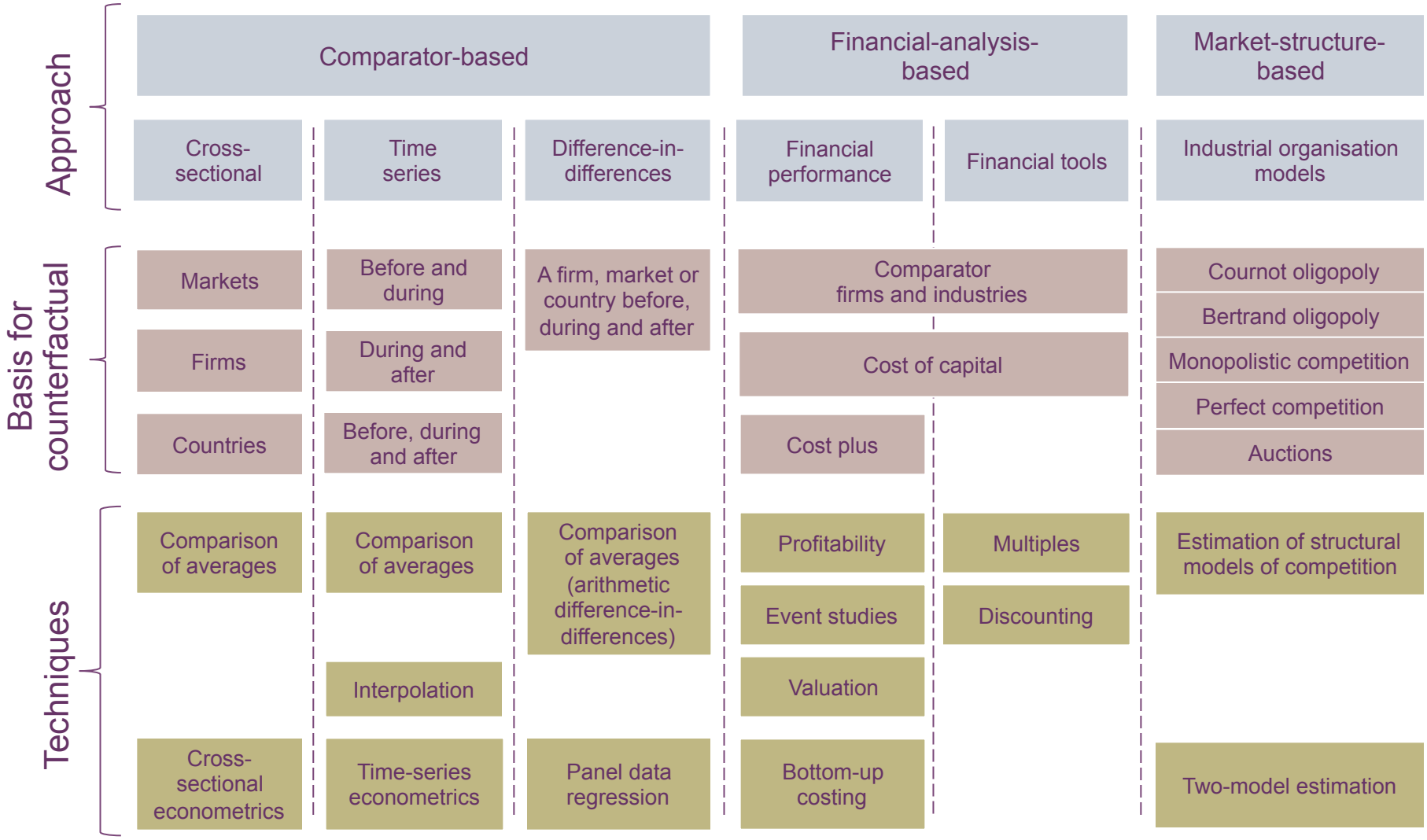
[1] Juzgado de lo Mercantil Madrid (Madrid Commercial Court), *Conduit Europe, S.A. v Telefónica de España S.A.U*, judgment of November 11th 2005.
[2] Competition Appeal Tribunal (2009), *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 36, December 21st.

Main stages in any damages estimation

1. Determining the counterfactual ('but for') scenario
   - usually the stage which involves most analysis (and debate)

2. Moving from the factual/ counterfactual to a final value
   - includes discounting and applying interest
   - can make a significant difference in damages estimates

Classification of methods and models



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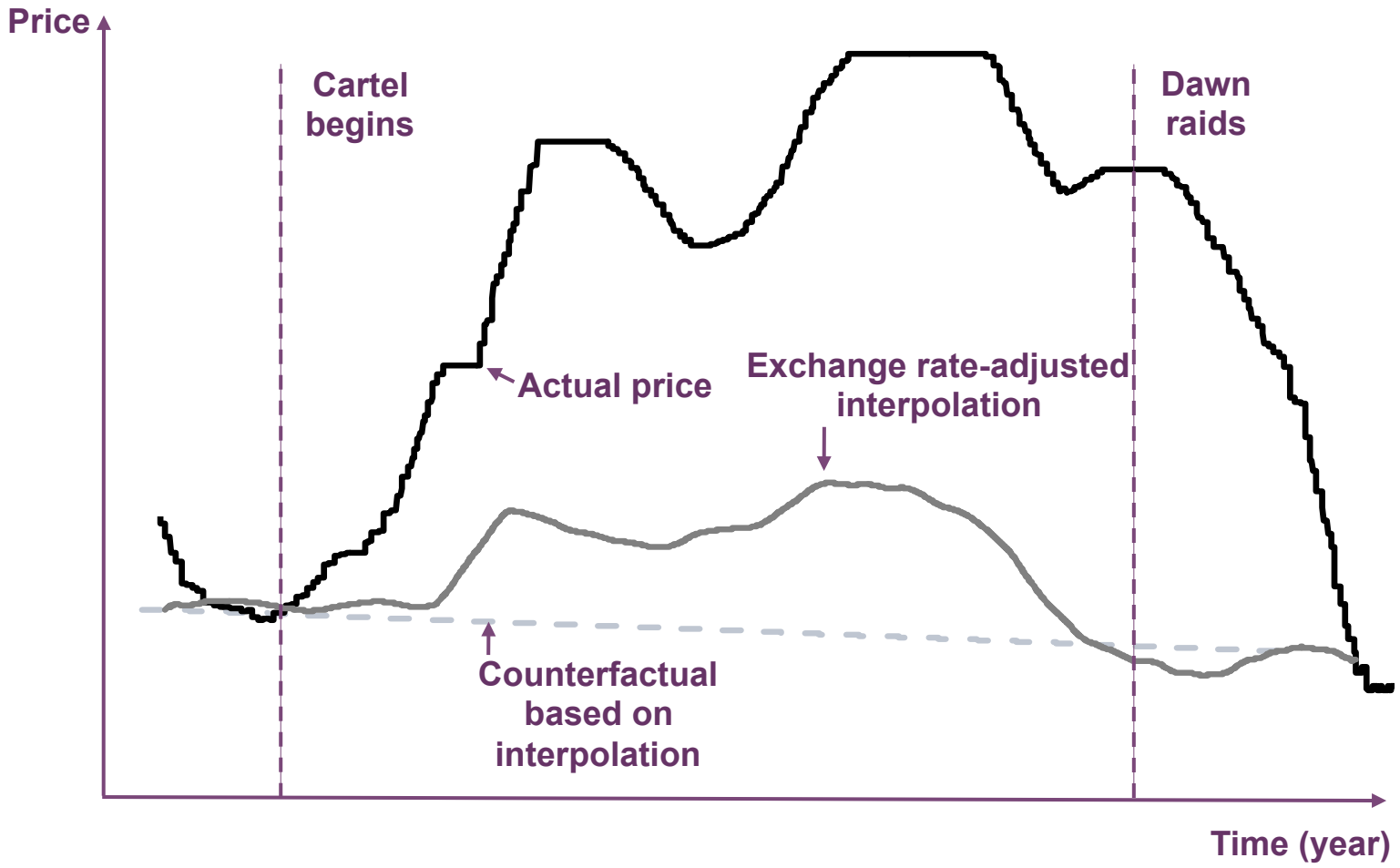
How to choose the right approach?

- within each approach there is a range of techniques—from the simple to the more sophisticated
  - eg, simple averages versus regression in comparator-based approaches
- the appropriate method will depend on data availability and legal requirements
  - the methods are complements not substitutes; difficult to prescribe *a priori*
  - the better the data, the more sophisticated it can get
  - 'pooling' of (reliable) results is an acceptable method to get to single final value

Example of before–during–after analysis



Conclusion: courts can handle a degree of complexity

> '[The] prudent economist must account for differences and would perform minimum regression analysis when comparing price before relevant period to prices during damage period.'

In re *Aluminum Phosphide Antitrust Litig*., 893 F.Supp. 1497, 1507 (D.Kan.1995).

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www.oxera.com

Contact:

Dr Gunnar Niels

+44 (0) 1865 253 004
gunnar.niels@oxera.com