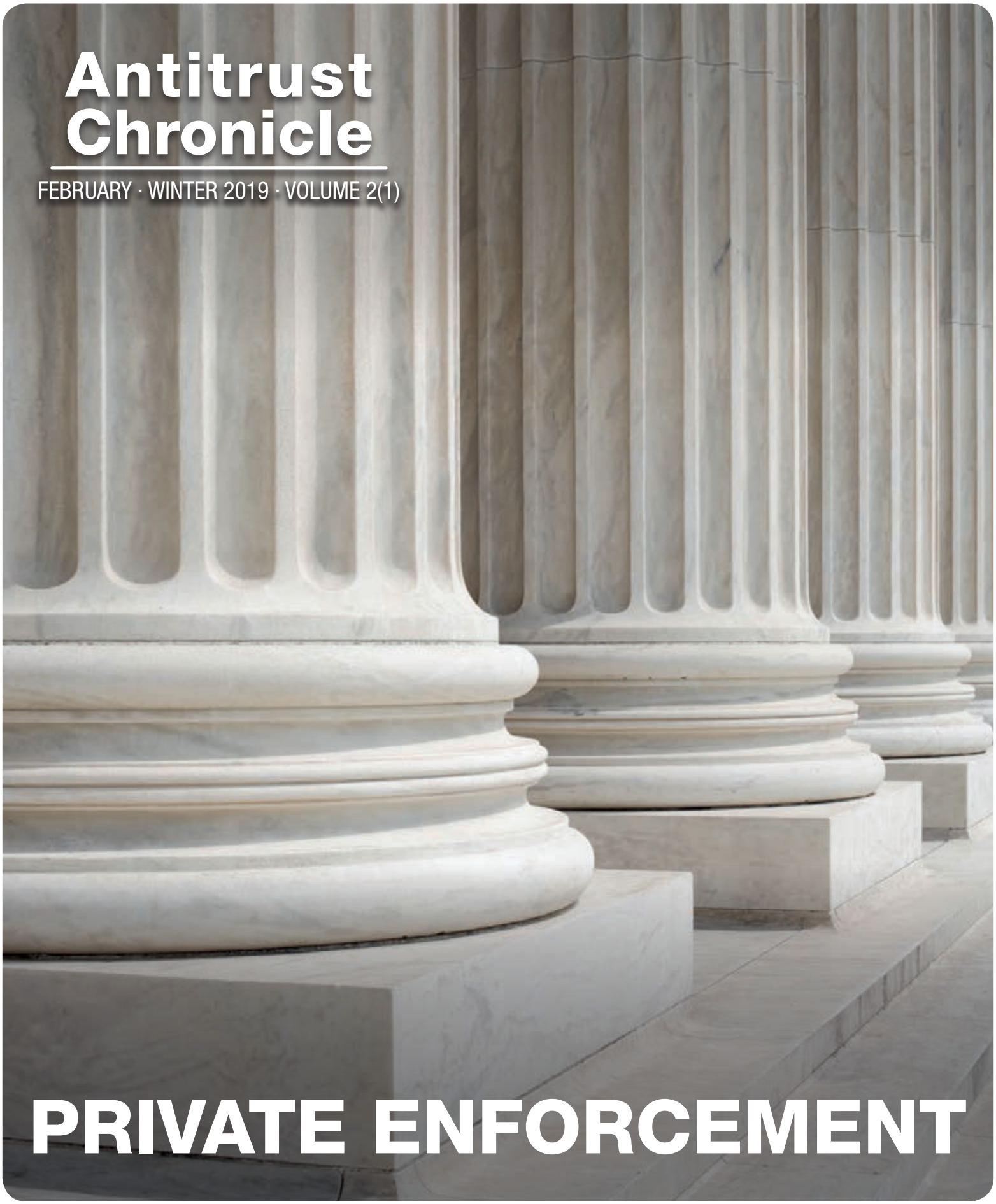

Antitrust Chronicle

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PRIVATE ENFORCEMENT

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The first CPI Antitrust Chronicle for February 2019 looks at the issue of private enforcement of antitrust laws from the view point of different jurisdictions.

As opposed to public enforcement of competition laws, private enforcement, according to the OECD, can be defined generally as "litigation initiated by an individual, a legal entity, an organisation or a public entity (such as local government and procurement agency in the bid-rigging case) to have a court establish an antitrust infringement and order the recovery of the damages suffered or impose injunctive reliefs."

There is a general consensus that private enforcement, in conjuncture with public enforcement, can improve competition regimes. But where is the right balance between public and private enforcement of antitrust policy and antitrust law enforcement? On the one hand, it is important to ensure that private enforcement does not adversely affect the effectiveness of public enforcement, encouraging greater compliance with antitrust rules, and on the other hand, jurisdictions wish to avoid potentially frivolous litigation, among other pitfalls.

Each jurisdiction has its own approach to private competition enforcement. In some jurisdictions, private enforcement of competition law still remains a relatively new phenomenon, in others it is more established. That being said, are there common building blocks to effective private enforcement? And if so what are they and what are some of the experiences lawmakers could learn from in other jurisdictions which are still forging their own path?

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

SUMMARIES

The rules governing cartel damages claims in Germany have been amended and now include a disclosure-regime. This new regime provides the possibility for a party to cartel damages proceedings to request disclosure of evidence and information from the respective other party to the cartel damages proceedings and third parties. To date, there is hardly any judicature available that provides guidance on the application of these new rules. The article provides an overview over important aspects of the newly created system of disclosure. It further highlights some of the issues parties may encounter and makes suggestions how to address them.

This essay surveys longitudinal data on private antitrust enforcement collected by the Administrative Offices of the U.S. Courts. These data suggest that the incidence of private antitrust enforcement in the United States has been relatively stable since the mid-1980s, with aggregate annual new filings typically in the range of 600-900. Resolution by trial remains a rare last resort, averaging often less than 1 percent a year. Approximately a quarter of cases settle and the other three-quarters are involuntarily dismissed at the motion to dismiss or summary judgment stage — a ratio that has not been strongly affected over recent decades by case law developments or other factors.

This article concerns the developing area of private enforcement of EU competition law, providing an analysis of the transposition across a broad selection of Member States ("MS") of a major EU Directive introduced with the aim of harmonizing and facilitating competition law damages actions across the European Union. It provides an overview of the EU Antitrust Damages Directive (2014/104/EU), looks at the transposition outcomes in sixteen MS, briefly assessing the solutions followed by each of those MS in addressing the various issues raised by the Directive. In particular the article will consider a range of problems and limitations identified in relation to both the Directive itself and its transposition.

This paper will consider whether the current approach to the secrecy of leniency documents enshrined in the 2014 EU Antitrust Damages Directive strikes an appropriate balance between maintaining the effectiveness of public enforcement and securing the right of access to justice for antitrust victims. It will argue that having a total ban on the disclosure of specific types of evidence may not be a proportionate response to the concerns for maintaining the secrecy of leniency and settlement submissions vis-à-vis ensuring that claimants can obtain the evidence that is both relevant and necessary to build their case in court.

WHAT'S NEXT?

For March 2019, our Chronicles will feature articles focused on issues related to (1) **Leadership EU**; and (2) **China - Year of the Pig**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES APRIL 2019

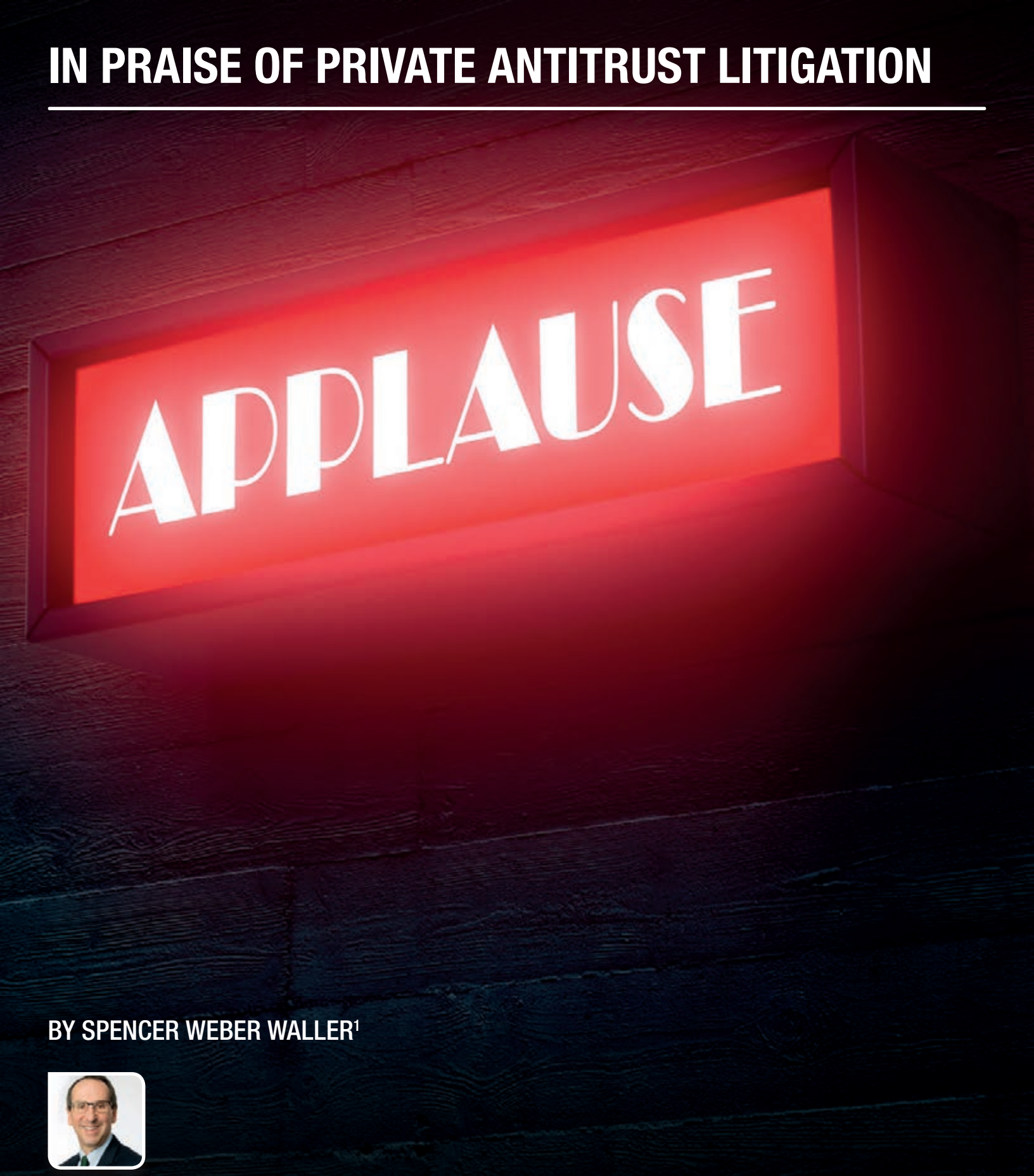
For April 2019, our Chronicles will feature articles focused on issues related to (1) Public Procurement; and (2) Online Advertising.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

IN PRAISE OF PRIVATE ANTITRUST LITIGATION



BY SPENCER WEBER WALLER[1]

1 John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law. Thanks to Darren Bush, Daniel Karon, Melissa Maxman, and James Morsch for their comments and Emily Eggmann for her research assistance.

I. INTRODUCTION

In 2017, Professor Alexandra Lahav of the University of Connecticut School of Law published an impressive book entitled *In Praise of Litigation*.[2] She argues that private civil litigation in the United States is an important tool for democracy. In the preface and introduction, she explains how private civil litigation promotes American democracy:

> Lawsuits *enforce* the law by forcing wrongdoers to answer for their conduct; they increase *transparency* by eliciting information from their adversaries that often benefits the public, and in doing so, they help people *participate* in self-government. All of this is possible when courts treat litigants as *social equals* before the law.[3]

She is not blind to the costs of the civil litigation system, but contends that those costs are often exaggerated, and the societal benefits usually underappreciated. She emphasizes that disputes about the institutions and procedure of litigation are often merely a proxy for disagreements about the proper types of regulation of potentially harmful conduct.

Antitrust is only a minor aspect of Lahav's arguments and discussions.[4] She focuses on the more general mix of civil litigation in state and federal court and showcases a variety of examples involving civil rights, employment discrimination, and tort cases.

Professor Lahav's arguments are an excellent jumping off point for how private antitrust litigation has been systematically undervalued and how private claims contribute to the proper functioning of competition policy.[5] In this essay, I argue that private treble damage litigation promotes the four values identified by Lahav: enforcement, transparency, participation, and equality before the law. I also argue that the preference for public over private antitrust enforcement cannot be justified in the text, history, or policy goals of antitrust with the rare exception of a case involving major structural relief or substantial harm to the foreign policy or the national interests of the United States. I end with a brief look at a likely future where private enforcement continues to be restricted and underserved in the United States, encouraged and nurtured abroad, and how we can do better.

II. PRIVATE ANTITRUST LITIGATION AND ENFORCING THE LAW

Lahav lays out three basic models for enforcing any given body of substantive rules. She examines direct regulation, government lawsuits, and private litigation and considers their pros and cons. Applying this model to the antitrust world is simplified by the relative absence of direct formal regulation. While both the Antitrust Division and the Federal Trade Commission have many regulatory-type tasks, they both pride themselves on functioning primarily as law enforcers (public litigators). The FTC has the power, but not the inclination, to issue substantive rules in the area of competition law, as it does from time to time in the consumer protection area. The Antitrust Division has few similarly direct regulatory powers, outside of minor niche areas.

Nevertheless, the modern trend in both agencies is toward a more regulatory approach to competition enforcement.[6] Outside the criminal area, both agencies spend an enormous amount of time and resources choosing not to proceed with civil merger and non-merger matters with no judicial review, and at best a short press release or closing statement as to their reasoning. Consent decrees face the most deferential standards of judicial review and can rarely be challenged by non-parties. The agencies develop enforcement guidelines internally and only later circulate them for an informal version of notice and comment. Other enforcement initiatives are conducted through business review letters and advisory opinions which are insulated from judicial review by their technically non-binding nature. Hearings, speeches, and the occasional retrospective study, represent a final avenue of priority setting and policy development with a distinctly regulatory flavor.

Other aspects of competition policy are subject to more formal regulation, just not by the DOJ or the FTC. The change in FCC policy regarding net neutrality has significant implications for competition policy, but the FCC drove those changes. Similarly, the DOT, FCC, and other traditional agencies conduct public interest reviews of certain mergers, joint ventures, and strategic alliances. But for better or worse, the bulk of competition policy in the United States is a combination of public and private antitrust litigation.

2 Alexandra Lahav, In Praise of Litigation (Oxford University Press 2017).

3 *Id.* at vii (emphasis in original). See also *id.* at 1-2.

4 *Id.* at 33, 27, 104, 128, 130, 168 n.10, 188 n. 41.

5 See generally Spencer Weber Waller, *Antitrust and Democracy, forthcoming* 46 Fla. St. L. Rev. (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086260.

6 Spencer Weber Waller, *Prosecution by Regulation*, 77 Ore. L. Rev.1383 (1998); Richard Steuer, *Counselling Without Caselaw*, 63 Antitrust L.J. 823 (1995).

III. GOVERNMENT ANTITRUST LITIGATION

Unfortunately, public antitrust litigation does little directly to provide compensation to the parties injured by violations.[7] Criminal litigation produces prison sentences for the individual guilty parties and whopping fines for the corporate defendants found guilty or who plead guilty. These fines are paid to the general Treasury of the United States and cannot be used for restitution. There is a victims and witness fund for such purposes which is rarely, if ever, used in criminal antitrust litigation. Guilty defendants are required to provide restitution under the general criminal sentencing law of the United States, but such restitution is generally assumed to come through subsequent private civil litigation. As a result, the sentencing court is rarely involved in ensuring that compensation to antitrust victims takes place or the adequacy of any such compensation that ensues. The FTC and the Antitrust Division only rarely seek equitable remedies including disgorgement and restitution, despite the statutory basis for doing so being reasonably well established.

IV. PRIVATE RIGHTS OF ACTION

Private rights of actions for both treble damages and injunctive relief have been a co-equal part of the antitrust laws since the enactment of the Sherman Act. Section 4 of the original Sherman Act[8] originally provided these private remedies now found in Sections 4 and 16 of the Clayton Act.[9]

Persons injured in their business or property may sue for treble damages plus attorneys' fees and costs. They may also sue for injunctive relief when they meet the full criteria for temporary or permanent injunctions or other types of equitable remedies. Since the 1970s, state attorneys general also have been allowed to sue for treble damages and injunctive relief on behalf of the natural persons in their states.

In recent years, the amount of private antitrust litigation (including state attorneys *parens patriae* suits) has substantially exceeded that brought by the Antitrust Division and the Federal Trade Commission. Private antitrust litigation usually exceeds agency litigation by a ten-to-one ratio. For example, in 2017, there were a total of 631 antitrust cases filed, of which 603 were private cases, amounting to over 95 percent of total new antitrust claims.

There is no textual or historical basis to prioritize either public or private enforcement of antitrust laws. Rather they were intended to work as equal partners.

The Kinter treatise notes the importance of private treble damage remedies:

> Although the treble damage provision is now found in the Clayton Act, the original Sherman Act already provided for the mechanism of monetary relief, including costs and attorney's fees, for injured private parties. Three principal reasons animated the adoption of this device. First and primarily, it was deemed important to compensate persons who were injured by an antitrust violation, with much the same concern as is given to victims of other unlawful conduct. Second, it was hoped that the imposition of substantial monetary penalties would act as a deterrence to anticompetitive activity. Third, providing for private lawsuits would increase the number of potential plaintiffs, *thereby offsetting the limited enforcement resources available to the government* and giving the opportunity to attack misconduct to the very persons most likely to have information thereof.[10]

The Supreme Court similarly has recognized the co-equal role of private rights of action. In *California v. American Stores Co.*, the court held that private actions for injunctions could seek to block a merger even after it had been cleared with conditions by the FTC. The Court stated: "Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[11] The Court previously spoke in *Reiter v. Sonotone* of the importance of treble damages noting:

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7 Final verdicts in government criminal and civil antitrust litigation under the Sherman and Clayton Acts do produce findings of fact and law that are conclusive to subsequent private antitrust litigation. 15 U.S.C. § 16a.

8 38 Stat. 731.

9 15 U.S.C. §§ 4, 15.

10 Earl W. Kintner et. al.11 Economic Theory, Common Law, and an Introduction to the Sherman Act § 78.2 (2017) (emphasis added).

11 *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

> Congress created the treble-damages remedy of Section 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.[12]

As recognized by Congress and the Court, private enforcement allows those most directly affected by unlawful behavior to seek a remedy. Such private remedies do not depend on electoral results or require any governmental permission or expenditure other than access to the general courts supported by tax payer dollars.

The existence of a robust private right of action further lends stability to the system. For ideological, resource, and other reasons, the federal agencies have brought few recent cases in entire categories of antitrust law including price discrimination, resale price maintenance, vertical non-price restraints, tying, monopolization, boycotts, and other areas of the antitrust laws that do not fit their enforcement priorities. Without private enforcement, many market practices would become effectively *per se* legal without any intervening legislative or judicial decision.

For example, the Supreme Court in *Leegin* determined that all allegations of resale price maintenance should be governed by the rule of reason with the majority offering rules of thumb to guide the application of the rule of reason in future cases.[13] Neither the Justice Department nor the FTC have brought subsequent litigation in this area. Private litigation is rare because of the high expense, legal risk, uncertainty, and limited expected value of such claims under the rule of reason. At most, there has been sporadic state enforcement in this area. As a result, we have the abandonment, rather than the evolution, of a body of law which can violate antitrust laws when the anticompetitive harm outweighs any legitimate procompetitive justifications.

In other areas there has been more robust private enforcement (with or without agency cases). These cases have produced important precedents and a steadily evolving body of law, rather than an effective abandonment of an entire area of competition law. Any such significant changes in the future should come from direct efforts to change the law through the democratic branches of government, rather than merely the enforcement priorities of agencies.

Private litigation is also necessary whether one favors a more progressive or conservative application of antitrust law. Without private litigation, there would be little for the Supreme Court to opine on in the antitrust area. Neither criminal cartel enforcement nor mergers are likely to generate significant circuit splits (or even many appellate opinions at all) or deemed worthy of the Supreme Court granting certiorari in the seventy-five cases which it hears in any given year. As a result, virtually all of the Supreme Court docket on substantive antitrust doctrine (as opposed to matters of procedure, jurisdiction, or immunities) are private cases. Without private litigation, the law becomes either static or de facto lawful when the agencies pursue other priorities.

V. WHEN THE GOVERNMENT SHOULD GET PRIORITY

A handful of situations exist where government enforcement does, and should, get priority in the competition law arena. Some of these situations arise because of the special status of the United States government in general civil litigation and a few are unique to competition law. However, such situations are few and far between. Any resulting tensions between public and private enforcement normally can be minimized, rather than exacerbated, as is the government's current tendency.

First, the government as a plaintiff is presumed to meet the public interest requirement in seeking temporary and permanent injunctions. To oversimplify, all forms of injunctive relief require proof of:

1) An imminent threat of harm from the defendant;

2) No adequate remedy at law (that an award of damages will fail to protect the plaintiff);

3) The balancing of equities which favors the plaintiff; and

4) The injunction serving the public interest, including the rights of third parties and public policy.[14]

12 *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

13 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

14 Tracy Thomas, et al, Remedies: Public and Private 61-62 (6th ed. 2017).

Injunctive requests by the government are presumed to meet this fourth criteria. This is more a function of the general nature of injunctions rather than anything specific to competition policy. The rule played an important in high stakes government injunctive antitrust litigation such as the *Microsoft* case and certain mergers.[15]

Major structural relief will probably remain the province of public, rather than private, litigation. The Supreme Court has made clear that private parties can seek injunctive relief in Section 7 cases in addition or instead of whatever the federal government chooses to do.[16] But there is a dearth of such cases. It appears that the first such case just occurred in October 2018.[17]

It would be similarly rare that a purely private injunctive case under Section 2 would (or should) result in the divestiture or restructuring of a firm or industry. Structural relief in a Section 2 case is a rarely sighted creature, even in the occasional government civil Section 2 litigation. Such relief was overturned on appeal in *Microsoft* and abandoned (over the objections of the state attorneys general) in the settlement ultimately approved by the court.[18] While there is no legal reason why such relief could not be sought or granted in a purely private case, it would bear a very high burden of satisfying the balance of equities and public interests tests of all injunctive relief. It seems likely that granting such relief would necessitate, as a practical matter at least, tacit support of the government to ultimately prevail in the district court and on appeal.

There will be similarly rare cases where the bringing or reaching the merits of any antitrust dispute (damages or injunctions) threatens the fundamental foreign policy or national interest of the United States. It seems suboptimal if either a public or private antitrust case were to trigger an armed conflict, ruin diplomatic relations with an important ally, or jeopardize a critical national interest at home. There have been a handful of times when the federal government has refrained from bringing a likely meritorious case for such reasons, and the courts have developed a variety of special defenses in international cases to deal with instances where a public or private plaintiff persists.[19] Even here, the exercise of sound discretion by the government and the sensitive application of special defenses such as comity will better serve the enforcement of competition law than a prioritization of public versus private enforcement.

VI. THE ASSAULT ON PRIVATE RIGHTS OF ACTION

The assault on private rights of actions has occurred in both Democratic as well as Republican administrations. Much of the damage has come from the Supreme Court with a healthy assist from Congress and the federal enforcement agencies themselves. They combine to contribute to the marginalization of private enforcement to a second-class status at odds with the language, history, and intent of the drafters of the Sherman and Clayton Acts.

A. The Supreme Court's Narrowing of Private Antitrust

The Supreme Court has created numerous hurdles to private enforcement in antitrust. The Court has created or enhanced barriers to private antitrust litigation involving standing, antitrust injury (Brunswick), and the direct purchaser doctrine (*Illinois Brick*). It has created judicial exemptions for damage actions in regulated industries (filed rate doctrine), lobbying all branches of the government for anticompetitive conduct (*Noerr-Pennington*), and anticompetitive conduct by state and local governments (state action immunity).

The Court has reinterpreted and arguably amended general civil procedure and class action rules involving pleading (*Twombly*) and summary judgment (*Matsushita*) in the context of antitrust litigation, and then explicitly expanded their application to all civil litigation (*Iqbal, Liberty Lobby*). The court has enhanced the general requirements for demonstrating commonality for liability and damages in the certification of antitrust class actions (*Behrend*), as well as class actions in general (*Dukes*). There remain open issues regarding standing, mootness, ascertainability, and the availability of *cy pres* awards where the Court may limit future antitrust and general class actions.

In addition, the general trend of moving entire categories of conduct from *per se* to rule of reason destroys much of the incentive and practical ability to bring and certify class actions for such conduct. In one instance, the Court was forthright enough to acknowledge that it had

15 *United States v. Microsoft Corp.*, 253 F. 3d 34 (DC Cir. 2001).

16 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

17 Christopher Cole, Factory Ordered Sold in Groundbreaking Merger Breakup, Law360 (October 9, 2018), https://www.law360.com/articles/1090126/factory-ordered-sold-in-groundbreaking-merger-breakup.

18 Andrew I. Gavil & Harry First, The Microsoft Cases (2014).

19 Andre Fiebig & Spencer Weber Waller, Antitrust and American Business Abroad ch. 9 (4th ed. 2018).

created new virtually unscalable burdens for proving actionable predatory pricing because of a fear that plaintiffs would otherwise prevail at trial (*Brooke Group*). All of these actions were done by the Court on its own initiative without resort to either the statutory process for the amendment of the Federal Rules of Civil Procedure or the passage of a statute through normal Congressional processes.

B. Congress Attacks Class Actions

Congress has joined in on the narrowing of private rights of actions both in antitrust and in civil damage litigation more generally. While this combines with the Court and agency action to produce pernicious results, such Congressional actions at least carry with it the legitimacy of duly enacted legislation rather than dubious policy choices by the wrong institutional actors.

There are a variety of statutory exemption and immunity doctrines which bar normal court challenges. While the wisdom of such immunities is frequently challenged, Congress has the power to enact such legislation and hopefully the wisdom to weigh the value of competitive markets and other values in a democratic and open process.[20]

Congress has further required single damages and erected additional procedural hurdles to private litigation at the margins, rather than the core, of antitrust law. These include export trading companies, standard setting organizations, certain joint ventures, and successful leniency applicants.

Over the years, Congress has gone further and considered the total or discretionary elimination of treble damages in individual cases, but taken no action in that regard. Further, Congress has limited class actions as a whole in the Class Action Fairness Act and is contemplating further restrictions in the pending Fairness in Class Actions Act.

C. The Agencies Pile On

The government has a legitimate, but somewhat overblown, interest in protecting its criminal enforcement of antitrust laws. There may be instances where a pending grand jury will affect a simultaneous private damage action. Examples include a high stakes secret grand jury investigation that is not yet publicly known, a cooperating informant, or an actual protected witness, whose safety or effectiveness would be jeopardized depending on the scope and timing of discovery in a related civil case. Grand jury materials themselves normally will not be available to aid private civil litigation.[21] Most of the remaining issues can be dealt with a matter of timing, rather than a matter of priority, or exclusive rights, of the government in the enforcement of competition law.

The Justice Department tends to overreact to the very concept of private rights of actions as an existential threat to its leniency program. This reaction is short-sighted at several levels. Having about seventy percent of all cartel cases derive from the leniency program suggests an over-reliance on this tool and an underinvestment in other detection and investigation tools common in other areas of white-collar criminal investigations.[22]

The Antitrust Division also overstates the threat posed to the deterrence and disclosure facilitated by the leniency program, particularly after the 2004 ACPERA legislation.[23] Under ACPERA a successful leniency applicant and its cooperating employees receive criminal immunity, automatic detrebling, and pays single damages only on its own sales (rather than the full size of the conspiracy), but must cooperate with the plaintiff in any resulting civil litigation. While there is almost always follow-on private litigation, it is unclear whether this prospect affects the incentives of a past or future successful leniency applicant under ACPERA.

The cost benefit analysis for the applicant is that freedom from criminal fines, immunity from prosecution for cooperating employees, and the almost certain payment of single damages on a smaller base is worth self-reporting versus the risk of another defendant choosing to do so or the possibility that the cartel will never be discovered. The possibility that the government will be required to disclose a leniency application or supporting materials in subsequent civil discovery should already have been priced into the defendant's decision to proceed with its leniency application.

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20 American Bar Association, Section of Antitrust Law, Federal Statutory Exemptions from Antitrust Law (2007).

21 Fed. R. Crim. Pro. 6(e).

22 Spencer Weber Waller, *The Temple of Leniency: Thoughts Inspired by the Work of Laura Guttoso*, 37 U. Queensland L. Rev. 169 (2018).

23 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Public Law 108-237/Title II/Subtitle A.

Opposing such disclosure may also violate the private defendant's obligation under ACPERA to assist the plaintiffs in follow on litigation. The bargain that ACPERA contemplates is further jeopardized when the government fails to develop meaningful cooperation standards for defendants following acceptance into the amnesty program and remains silent or complicit when defendants fail to adequately cooperate or compensate in the ensuing private litigation.

The Agencies also participate on occasion as amicus in private antitrust litigation where the government has no direct interest at stake. This has meant, from time to time, amicus support for civil defendants, even where the government has brought criminal enforcement actions against those same defendants, as was the case in the *Empagran* litigation.[24] The government in the *Motorola FTAIA* litigation threw the private plaintiffs under the bus arguing that the court should carve out the government from any jurisdictional hurdles the court might impose on the private plaintiffs.[25]

Most recently, there is no legitimate reason for the government to participate in the pending *Apple* antitrust litigation in the Supreme Court on the scope of the indirect purchaser doctrine in private antitrust litigation.[26] Neither the Antitrust Division nor the FTC bring such cases, nor are they affected by their outcome, and therefore should be indifferent to the resolution of such issues in private litigation.

VII. A BETTER PUBLIC-PRIVATE PARTNERSHIP FOR ANTITRUST ENFORCEMENT

The unfortunate tendency to diminish the vital role played by private litigation in a healthy antitrust ecosphere continues to expand.[27] The following steps would be helpful in restoring a more balanced role for the agencies and private parties in a democratically functioning antitrust community.

The Department of Justice should follow through on the pledge by Assistant Attorney General Delrahim to enforce the provisions of Section 5 of the Clayton Act allowing private treble damage actions by the United States as a buyer of goods and services. In doing so, the government would develop valuable expertise on issues currently only the province of the private bar.

The government should go further and partner with the plaintiff bar which is the most experienced enforcers of these type of suits. The government should make a detailed factual record as to market impact in plea agreements and sentencing proceedings to ensure the maximum claim and issue preclusion in any follow-on private or public treble damage litigation. The government further should partner with private plaintiffs using Federal Rule of Civil Procedure 20(a) to jointly seeking such damages as co-plaintiffs in consolidated civil cases.

The Justice Department should insist on meaningful restitution from all guilty criminal defendants through express provisions in guilty pleas and sentences, monitoring of such restitution, and affirmative revocation of leniency single damage status for failure of the leniency recipient to cooperate adequately with private plaintiffs in subsequent litigation. Finally, the agencies should develop a model cooperation agreement with the private bar covering the type of non-confidential information sharing issues currently laid out in numerous agreements with foreign enforcement agencies. DOJ should develop model restitution plans that would satisfy the requirements of ACPERA and provide meaningful single damage restitution to injured plaintiffs and class members who do not opt out of the follow-on class actions.

The agencies further should limit amicus participation to direct government interests as a public enforcer. It is in the government's own self-interest as an enforcer to support plaintiffs on issues like class certification where full restitution has not been made, suits involve recidivist industries that collude, or the conditions of ACPERA have not been satisfied. The agencies otherwise should remain neutral in private litigation unless the plaintiffs seek major structural relief or the case poses a significant threat to foreign policy or national interests of the United States.

24 *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004).

25 *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

26 No. 17-204, *Apple Inc., v. Pepper*, On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Brief for the United States as Amicus Curiae Supporting Petitioner, https://www.justice.gov/sites/default/files/briefs/2018/08/20/17-204tsacunitedstates.pdf.

27 Spencer Weber Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, 29 World Comp. L. & Econ. Rev. 367 (2006).

The Antitrust Division is currently involved in a major initiative to promote procedural fairness in competition enforcement.[28] While this effort is focused on public enforcement and aimed primarily at foreign enforcement agencies, I would suggest adding the development and protection of meaningful private enforcement to the best practices standards and agreements being negotiated on the international level. More generally, the federal agencies should join the major competition law systems around the world in promoting, rather than restricting, private enforcement. This includes the development, rather than the restriction, of class actions and other collective litigation mechanisms so that large numbers of parties are compensated in small damage scenarios.

VIII. CONCLUSION

Too often the courts, Congress, and the federal antitrust agencies have viewed private treble damage actions as a distraction, or an active threat, to appropriate competition policy. While such an adversarial relationship may be justified in extremely rare circumstances, the more likely scenario is that both public and private enforcement of competition law are necessary partners to provide an optimal mix of punishment, deterrence, and compensation.

Professor Lahav's innovative book is an excellent starting point for a discussion on how private rights of action operate in the competition law space. Private antitrust rights of action for both damages and injunctions are a vital source of law enforcement, disclosure of information, civic participation, and treatment of all parties as equals before the law. This brief essay develops some ways these values play out in the antitrust world, with gratitude to Professor Lahav for her study of the broader questions of the benefits of the general private litigation system in the United States.

28 ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement, http://www.internationalcompetitionnetwork.org/uploads/library/doc1148.pdf.

IDENTIFYING THE BUILDING BLOCKS OF PRIVATE COMPETITION ENFORCEMENT

BY PEDRO CARO DE SOUSA[1]

1 Expert, Directorate for Financial and Enterprise Affairs at OECD.

I. INTRODUCTION

This short note summarizes a number of insights concerning the interaction between public and private competition enforcement and the pre-conditions for the functioning of an effective private competition enforcement regime. These insights arise from a Report recently written by the author for the OECD on "Individual and Collective Private Enforcement of Competition Law."[2]

Each of these topics will be discussed in its own section below. A detailed discussion of these and other topics concerning private competition enforcement can be found in the above-mentioned Report.

II. PUBLIC AND PRIVATE COMPETITION ENFORCEMENT

Competition laws employ multiple tools for enforcement. Ideally, the various enforcement mechanisms should support each other and, taken together, achieve effective deterrence in the most efficient way. While both public and private enforcement can deter anticompetitive conduct, the objectives and incentives underpinning public and private enforcement are different.

Public enforcement primarily pursues the public interest in competitive markets by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate, and ultimately punish competition law infringements. Public enforcement is not directly concerned with the compensation of damages suffered by the victims of anticompetitive conduct – reparation for such damages is traditionally the province of civil liability and private enforcement.

If by private enforcement we mean reliance on competition law by private parties in litigation, there are arguably three types of private actions involving competition law: (i) where competition law is used as a "shield," i.e. as a defense against a contractual or some other type of claim; (ii) where competition law is used as a basis for claims for injunctive relief, including interim relief; and (iii) where competition law is used as a basis for claims for damages.[3] In all these cases, private plaintiffs do not sue under competition law in order to improve the general welfare: they sue in order to pursue their own interests.[4] However, the activity of private plaintiffs has an indirect deterrent effect on anticompetitive activities by allowing courts to stamp out anti-competitive conduct that was not detected or investigated by competition authorities.[5]

Furthermore, public enforcement is also perceived as being less effective than private enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific characteristics.[6] Some regimes – most notably the U.S. – go so far as to rely on private enforcement as their main tool to deter competition infringements. Nonetheless, in most jurisdictions private enforcement has, to date, played a minor role.[7]

It is increasingly acknowledged, however, that private enforcement can provide a safety net for when public enforcement fails.[8] Private and public enforcement play different, yet complementary roles; they are better understood as parts of an integrated system in which numerous factors contribute to the complementary goals of deterrence and compensation. It is thus crucial to strike the right balance between public and private enforcement.[9] Identifying such a balance is key to ensuring that private enforcement: (i) does not adversely affect the effectiveness of public enforcement; and (ii) encourages greater compliance with antitrust rules, while avoiding wasteful litigation that could discourage socially beneficial conduct.[10]

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2 OECD (2018) "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," available at http://www.oecd.org/daf/competition/individual-and-collective-private-enforcement-of-competition-law-insights-for-mexico-2018.htm.

3 Wouter Wils, "Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future," (2017) World Competition 40(1) 3, p. 4.

4 Herbert Hovenkamp, "The Antitrust Enterprise," (Harvard, 2005), p. 58.

5 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 37.

6 Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws," (1996) Osgoode Hall Law Journal 34 461, 480.

7 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3-4.

8 Jens-Uwe Franck & Martin Peitz, "Toward a coherent policy on cartel damages," ZEW Discussion Papers No 17-009, p. 12-13.

9 Edward D. Cavanagh, "Detrebling Antitrust Damages in Monopolization Cases," (2009) American Bar Association, p. 808.

10 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3.

The correct balance will depend on the individual characteristics and mix of sanctions in each jurisdiction.[11] Nonetheless, jurisdictions around the world have adopted a number of common measures to ensure that private enforcement does not negatively influence public enforcement. These include rules restricting access by private parties to the competition agency's investigation file; protection against disclosure of leniency-related documents and information; the granting of civil immunity or otherwise limiting the liability of leniency applicants; and rules protecting the confidentiality of sensitive information even in public versions of infringement decisions. In addition, it is also common to allow or require competition agencies to provide support for courts or to intervene in private disputes that include a competition element.[12]

III. TOWARDS EFFECTIVE PRIVATE ENFORCEMENT REGIMES

Effective private competition enforcement requires more than finding an appropriate balance with public enforcement. It also requires the implementation of a number of discrete elements, and the making of important choices that will determine how the regime will operate.

This section describes the main elements common to private enforcement regimes by reference to competition damages claims, and identifies some of the main choices that a jurisdiction will have to make.

A. Setting up Appropriate Procedural Mechanisms

The first step towards implementing an effective private enforcement system is to consider what types of procedural mechanisms will be made available to private parties in their attempts to obtain damages (or other remedies) from infringers of competition law. An initial distinction can be made between judicial litigation and out-of-court dispute resolution mechanisms.

With respect to judicial litigation, the distinction between individual and collective claims is particularly relevant for competition damages claims. The harm suffered from competition infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases, damage suffered by each potential claimant can be very low and, where a claimant can only bring a competition claim individually, the costs and effort of filing a claim will probably outweigh the potential gains from a successful claim. Consequently, there is little incentive for individual victims to bring actions for compensation in relation to "atomized" damages.[13]

To help overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress – usually either opt-in, opt-out or mixed systems. Collective redress mechanisms provide a solution to the economic obstacle faced by individual claimants whose losses are too small to support the cost of litigation – by aggregating a large number of individual claims into a single action. This aggregation also allows defendants (and courts) to save the time, energy, and resources required to litigate hundreds or thousands of individual claims – particularly in the context of opt-out claims.

At the same time, however, class actions are a complex and costly way of achieving compensation and deterrence. In some cases, they might lead to speculative, opportunistic claims and excessive litigation. In order to serve the efficiency of justice and protect against frivolous litigation, systems that adopt opt-out class actions insist that the admissibility of the claims should be verified at the earliest possible stage of litigation, and that cases which do not meet the conditions for collective action (as well as manifestly unfounded cases) be dismissed as soon as possible.

Out-of-court dispute resolution mechanisms are a second type of tool for dealing with competition claims. Such mechanisms allow victims to settle cases quickly and easily on a voluntary basis. Given the costs and uncertainty of litigation, and the complexity of competition-related damage claims, most systems try to promote the resolution of claims out of court. Three main mechanisms can be found around the world: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration.[14]

11 Andrew Gavil, "The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience," (2007) Journal of Competition Law and Economics 4(1) 177.

12 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 37-39.

13 OECD (2007), Private Remedies DAF/COMP(2006)34, p. 16-17; OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 20.

14 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 79-83.

B. Removing Practical Obstacles to Bringing Private Enforcement Claims

While the existence of procedural avenues to vindicate a right to compensation is a necessary element of any system of redress, it is not sufficient to ensure the system's effectiveness. Instead, the effectiveness of any system of redress often depends on removing practical obstacles to the bringing of a claim – e.g. by allowing collective redress actions. However, given the expense and difficulty of claiming competition damages, the effectiveness of the system often depends on mechanisms that allow for sharing the risk and costs of bringing a claim, or that reduce the costs of bringing a successful claim.

A number of mechanisms that operate to this effect have been adopted, to differing degrees, in various jurisdictions. These include: (i) third-party funding; (ii) success-based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement.[15]

C. Who Should be Able to Bring Private Enforcement Proceedings

An important question in all private enforcement regimes concerns who should be able to start such claims. Economic injuries have a way of rippling through markets, creating larger numbers of victims than the typical contract or tortious dispute. In addition to consumers, the victims may also include competitors, suppliers, and firms operating in complementary markets. This creates a broad range of potential claimants. There are rules on standing for non-contractual liability – e.g. on capacity and on the existence of some "interest" or "genuine grievance" – that determine who has standing to sue. These rules tend to be purposefully vague, and hence do not really allow for the exact identification of who does or does not have the standing to sue. As a result, an important step in most jurisdictions is determining who should have the standing to bring a private enforcement claim under competition law, and whose loss is too "remote" to allow them to start judicial proceedings.

Different jurisdictions approach this matter differently, mainly because of the different objectives underlying their private competition enforcement regimes. In the United States, where the main objective of private enforcement is to punish and deter competition infringements, only direct purchasers and suppliers have standing to sue. Importantly, this means not only that other victims are unable to sue, but also that the infringing party is unable to argue that the claimant did not suffer a loss because the economic impact of the competition infringement was passed onto others.[16] Conversely, where the goal of private competition enforcement is primarily compensation, as is the case in Europe, every entity that may have suffered losses as a result of the infringement is a potential claimant.[17] Importantly, this means that both indirect purchasers (as a claimant) and infringing parties (as a defendant) may argue that a direct purchaser passed on all or part of its loss. This seeks to ensure not only that all losses are compensated, but also that compensation is correctly allocated to all levels of the supply or distribution chain.

In practice, however, the possibility of a victim claiming damages in compensatory systems depends on the applicable rules of causation, which may limit the extent to which a loss may be said to flow from a competition infringement. Rules of causation which require the harm to flow directly and immediately from the competition infringement may prevent indirect purchasers or other types of victims from being granted compensation for losses. As such, there is an intimate relationship between rules on standing and the applicable rules of causation.[18]

A related issue, which arises in compensatory damages regimes in particular, concerns "passing on." In the context of distribution or production chains, an illegal overcharge can be passed on through the chain, which means that each of the parties in that chain may suffer an antitrust injury – but also that the extent of losses suffered by parties at each level of the chain is reduced by the amount of overcharge that the party was able to pass on downstream. Therefore, passing on creates significant difficulties regarding the identification of who is entitled to compensation, since it is extremely hard to identify who ultimately bore harm and in what amount.

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15 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 87-92.

16 *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481, 494 (1968); *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977).

17 Case C-453/99, *Courage v. Crehan*, EU:C:2001:465, para. 26; Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others* (2006) EU:C:2006:461, para. 61.

18 This is particularly noticeable in compensation-based systems where standing to bring a claim may depend on an assessment of whether a competition infringement is able to cause damages to that claimant – see, for a start example, Case C-557/12, *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317. But it is also relevant even for those jurisdictions where only those directly and immediately affected by an antitrust infringement have standing to bring claims – see, for an example in the U.S., *Blue Shield of Virginia v. McCready* 457 U.S. 465 (1982), which set rules concerning remoteness of damage. On the relevance of this for standing, see Herbert Hovenkamp, "The Antitrust Enterprise," (Harvard, 2005), p. 59.

In short, identifying who can bring forth claims for competition damages entails policy choices that need to be made in light of trade-offs between the ease and incentives for claiming competition damages, the correctness in the allocation of damages, and the costs and resources devoted to addressing private competition enforcement claims.[19]

D. Defendants in Private Competition Proceedings

With respect to the identification and treatment of potential defendants, most legal systems adopt similar approaches. Most notably, private competition enforcement regimes routinely impose joint and several liability on companies that have infringed competition law; couple joint and several liability with mechanisms allowing defendants to claim a contribution for damages among themselves; adopt rules that alleviate the burden on claimants to prove fault in antitrust private litigation so as not to make it excessively difficult or practically impossible for them to exercise the right to compensation; and adopt mechanisms to promote the settlement of cases out-of-court. There is also a widespread trend towards protecting public enforcement by limiting the liability of leniency applicants.

The main area of international divergence concerning defendants in competition claims regards who should be the addressee of a damage claim. Two main approaches can be found. According to the first approach, the autonomy of corporate bodies and legal forms must be respected. As a result, a damage claim should be brought against the exact corporate entity that committed an infringement, except where lifting the corporate veil is allowed and required. A second approach focuses on the economic reality underlying the corporate entity that committed the infraction and looks at the whole corporate group as a potential defendant. While this latter approach seems to be more prevalent around the world, at least in regard to competition matters,[20] no approach is inherently superior to the other. Instead, a choice between the two will often reflect a jurisdiction's general approach to the liability of legal persons for unlawful acts.

E. Establishing that an Infringement Occurred

A very important distinction for private competition enforcement concerns how competition infringements are established in individual private enforcement cases – depending on which damages claims will be either stand-alone or follow-on.

Private parties may present damages claims even in the absence of prior public enforcement. In these cases, the claimant will have to prove that an infringement occurred in order to obtain damages. A claimant will thus either have to prove that a conduct which is unlawful, either *per se* or by object, took place – which is difficult, since those conducts are usually secret – or that a conduct had negative effects on prices, output, or innovation in the relevant market. This poses significant difficulties in practice, as suggested by the time and resources that competition agencies devote to establishing that an infringement took place.

Allowing claimants to rely on the findings of a competition authority allows them to focus on showing that they suffered losses caused by the anti-competitive conduct in question, and on the quantification of such harms. This can be achieved by granting legally binding effect to competition authorities' decisions in follow-on private actions. Binding effects can take a variety of forms along a spectrum. On one end, an infringement decision may suffice to establish that an infringement has occurred in the context of claims for damages. Further along the spectrum, an infringement decision may have *prima facie* evidentiary value that an infringement occurred. Finally, at the other end of the spectrum an infringement decision may not have any additional evidentiary value in private competition cases – in which case claimants will have, in practice, to bring stand-alone cases in order to obtain compensation despite an infringement decision having been adopted.

Even if a decision by a competition authority has binding effect, relying on such decisions in damage claims is not necessarily straightforward.[21] As a rule, the effect of the infringement decision only extends to subsequent damages actions for the same antitrust violation as that found in the decision (i.e. same geographic scope, duration, etc.). However, decisions by the competition authority usually include extensive and detailed explanations of the competition law infringement sanctioned by the authority. Deciding which elements of the decision are binding, or have additional evidentiary value, are questions that can raise practical difficulties which may be eased through statutory provisions or case law.[22]

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19 Pedro Caro de Sousa, "EU and National Approaches to Passing on and Causation in Competition Damages Cases," (2018) Common Market Law Review 55(6) 1751, p. 1759-1760.

20 International Competition Network (2017) "Setting of Fines for Cartels in ICN Jurisdictions," p. 13.

21 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 18-19. In the EU, when national courts rule on matters relating to competition law which are already the subject of an infringement decision, those courts cannot take decisions running counter to that decision. Under section 5(a) of the Clayton Act, final judgments of U.S. federal antitrust investigations are *prima facie* evidence of a violation in private antitrust proceedings.

22 See, for examples, Recital 31 of the EU Damages Directive, s.59 of the UK's 1998 Competition Act and U.S. case law on collateral estoppel effect.

F. Statute of Limitations

When seeking damages for infringements to competition law, claimants must not only establish that a violation occurred – they must do so in a timely fashion. Rules limiting the timeframe during which a potential claimant can bring an action for damages create legal certainty, which is why they exist in all legal systems. However, limitation periods can also create considerable obstacles to the recovery of damages depending, on when they start, on their duration, and on whether or not the duration period can be suspended.[23]

In particular, short limitation periods that begin to run from the moment the infringement started and which cannot be suspended may render the right to seek compensation practically impossible. To ensure that the right to compensation can be enforced, limitation periods should not begin to run before the infringement of competition law has ceased, and the claimant knows, or can reasonably be expected to know: (a) of the behavior and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law has caused him harm; and (c) the identity of the infringer. Additionally, specific limitation periods can also be adopted concerning the bringing of follow-on claims after an infringement decision is adopted.[24]

G. Proving Causation and Quantum

There are particular difficulties in dealing with the amount and type of evidence necessary to establish that loss flowed from a competition infringement, and to quantify damages – i.e. causation and quantum.[25] Competition cases are particularly "fact-intensive." As a rule, the burden is on the claimant to prove causation and loss, if not the infringement. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. Evidence needed by the claimant to make its case is often in the hands of the defendants, of third parties, or of the competition authority. The difficulties faced by claimant in obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions.[26]

This helps explain why public versions of cartel decisions are very important for damage claimants. Damage claimants view the public version of the infringement decision as an important source of evidence, and have an interest in getting swift access to a version which is as detailed as possible.[27] At the same time, authorities often have to consider the legitimate interest of enterprises in the protection of their business secrets. As a result, the public interest in the disclosure of information contained in an infringement decision must be balanced against the right to confidentiality of the involved parties when publishing an infringement decision.[28]

In order to address the difficulties faced by claimants when bringing claims for competition law damages, private enforcement regimes have also developed mechanisms that allow potential claimants to gain access to the evidence necessary to plead a private damages case successfully. Such mechanisms include: (i) procedures for disclosure of evidence in the possession of defendants or third parties; (ii) access to competition agencies' files; (iii) access to settlement documents; and (iv) rules on expert evidence.[29]

As regards causation, courts may face significant difficulties when trying to establish it in competition cases. Markets are complex institutions; competition infringements very often impact on sophisticated supply chains working in highly complex market structures, which makes the identification of causal links particularly difficult. In order to address this, legal regimes around the world have adopted rules and mechanisms that are specific to the operation of causation in competition cases. These mechanisms vary across countries, and include the adoption of legal and evidentiary presumptions, modifications to the allocation of the burden of proof, relaxing the standard of proof, and borrowing from the content of infringement decisions.[30]

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23 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 21.

24 OECD (2015), The Relationship between Public and Private Enforcement, WP3(2015)14, p. 3, 21-22.

25 In stand-alone claims, evidence will also be necessary to establish that an infringement took place.

26 European Commission, "White Paper on Damages Actions for Breach of EC Antitrust Rules," COM(2008) 165 final, para. 96.

27 Andreas Kafetzopoulos "European Commission policy on publication of cartel decisions," (2015) European Competition Law Review 36 295.

28 OECD (2015), The Relationship between Public and Private Enforcement WP3(2015)14, p. 34.

29 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 132-149.

30 OECD (2018), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico," p. 164-167.

As regards *quantum*, i.e. the quantification of loss, this is subject to considerable limits as to the degree of certainty and precision that courts can achieve. This is despite there being a number of economic tools developed throughout the years for the purpose of estimating damages.

Given difficulties in quantifying harm, courts will usually be able to arrive only at best estimates relying on assumptions and approximations. Since it may be difficult to square such an approach with generally applicable rules on burden and standard of proof, it is unsurprising that jurisdictions around the world have adopted tools to facilitate damage quantification. On the one hand, there may be legal rules allowing or setting up mechanisms for the estimation of damages. Various jurisdictions adopt a number of additional tools to facilitate the quantification of harm, such as modifying the burden of proof, adopting presumptions of harm, or lowering the standard of proof required for the quantification of harm flowing from a competition infringement[31] – often going as far as allowing courts to estimate damages.[32] These mechanisms are justified by a general principle of effectiveness of judicial action, which requires that damages claims should not be rendered practically impossible or excessively difficult.

In practice, and in addition to the quantification of harm actually suffered, the amount that a claimant may obtain in damages proceedings will depend on a number of policy-related factors. A first such factor is the relationship between losses suffered and the amount of the damages awarded – and, particularly, whether damages are compensatory or punitive. A second factor concerns whether passing on is a relevant consideration and, if so, whether mechanisms have been adopted that address the difficulties created by having to take passing on into account. A third factor is interest and its impact on the final amount of damages. A fourth factor concerns rules that may reduce the amount of damages that an infringing party is liable for in order to promote and protect public enforcement.

IV. CONCLUSION

While each jurisdiction has its own approach to private competition enforcement that reflects that jurisdiction's overall approach to competition enforcement and its underlying legal culture, one can identify a number of common building blocks to every effective private enforcement regime.

Within this common framework, however, jurisdictions make a number of choices which usually reflect their general approach to competition enforcement and to non-contractual civil liability. A number of these choices are particularly important because they have knock-on effects on other parts of the private competition enforcement regime. Clear examples of this are choices regarding who can claim damages, whether damages are compensatory or punitive, and what defenses are available to those found guilty of infringing competition law. However, arguably the biggest choice is that of how to balance public and private enforcement – because such a decision informs overall competition enforcement, and the design and effectiveness of private competition enforcement.

31 See, for the U.S., *Zenith Radio Corp v. Hazeltine Research Inc* 395 U.S. 100, 123 (1969), according to which courts should take into account the "*practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries*" and acknowledge that "*damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.*" Art. 17 of the Damages Directive requires Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.

32 Just to provide some examples: (i) German law expressly authorizes judges to estimate the amount of damages, as long as the results are economically reasonable and possible – see Zivilprozeßordnung [ZPO] [Code of Civil Procedure] Jan. 1877, Reichsgesetzblatt [RGBl] 30, § 287. See also judgment of July 12, 2016 – Case KZR 25/14; judgment of November 9, 2016 – Case 6 U 204/15 (Kart); judgment of December 21, 2016 – Case 8 O 90/14 (Kart); judgment of June 28, 2017 – Case 8 O 25/16. (ii) Art. 17 of the Damages Directive expressly provides for the possibility of courts to estimate damages. (iii) In the U.S., the jury "may make a just and reasonable estimate of the damage based on relevant data, so long as it is not based upon "speculation or guesswork" – see *Bigelow v. RKO Radio Pictures* 327 U.S. 251, 264-65 (1946).

DISCOVERING NEW SPHERES OF ANTITRUST DAMAGES QUANTIFICATION: THE EUROPEAN COMMISSION, NATIONAL COURTS, AND GUIDELINES ON PASSING-ON

BY HANS-PETTER H. HANSON & JOHANNES HOLZWARTH[1]

1 Hans-Petter H. Hanson is an Economist in the Chief Economist Team at the EFTA Surveillance Authority ("ESA") and a former Policy Officer at the European Commission's Directorate-General for Competition ("DG COMP"), Johannes Holzwarth is a Policy Officer at DG COMP. The views expressed in this article are those of the authors and may not under any circumstance be regarded as stating an official position of the ESA, the European Commission or DG COMP.

I. TAKE-OFF: THE EUROPEAN APPROACH TO PRIVATE ENFORCEMENT

In Europe, private enforcement of competition law is gaining more and more momentum. This is particularly true now that all of the EU Member States have measures in place to implement the major piece of European legislation in this respect: the Directive on Antitrust Damages Actions ("the Directive").[2] The Directive sets a minimum standard and had to be implemented across the EU by the end of 2016. It pursues two goals.[3] First, it intends to strike the right balance between public and private enforcement and, second, to make it easier for victims of competition law infringements to receive compensation for the harm they suffered. The second goal relates inter alia to one of the practical challenges for claimants and an issue that national courts increasingly have to deal with: the quantification of antitrust harm.[4]

Private enforcement of EU competition law is still a relatively new phenomenon. It essentially emerged in the two famous judgements of the Court of Justice of the EU ("CJEU") at the beginning of this century, namely in *Courage v. Crehan* (2001) and *Manfredi* (2006),[5] and reached a first peak when the Directive was adopted.[6] When developing private enforcement in Europe, EU lawmakers could often benefit from the experience in other jurisdictions with a longstanding tradition of private enforcement such as the United States, where private parties have enforced antitrust rules, most prominently those of the Sherman Act of 1890,[7] for a long time.

However, in relation to awarding damages for antitrust infringements, the European and US models chose paths which differ in two respects. Firstly and more generally, the European model is compensatory in nature. This means that private enforcement of EU competition law aims at compensating – no more and no less. In the European system deterrence is only a side effect. This also means that, unlike in the United States, claimants seeking compensation for infringements of EU competition law may not receive multiple or punitive damages. Secondly, more specifically and following from its compensatory nature, private enforcement of EU competition law supports the concept of passing-on of overcharges.

The general support of passing-on in the Directive contrasts with rather longstanding case law of the Supreme Court of the United States ("SCOTUS") rejecting passing-on arguments. In *Hanover Shoe Inc. v. United Shoe Machinery Co* (1968)[8] the SCOTUS rejected the passing-on defense and in *Illinois Brick Co. v. Illinois* (1977)[9] it denied indirect purchaser standing in antitrust damages actions on the basis of passing-on. However, in response to this case law, many jurisdictions in the United States have adopted laws to allow indirect purchasers to seek damages under state law, and in 2007 the Antitrust Modernization Commission recommended that Congress overrule the two Supreme Court judgments mentioned above.[10] Finally, *Pepper v. Apple, Inc*, a case currently pending before the SCOTUS,[11] has put the topic back on the court's agenda.

Should the United States end up following the European model in relation to passing-on, this may lead to a new situation in the evolution of private antitrust enforcement: a situation in which U.S. antitrust law may refer to a more experienced European counterpart, at least on this specific topic. Against this background, the following sections address selected questions of passing-on in relation to private enforcement of EU competition law.

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2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19. Although the Damages Directive has not yet been implemented in the whole European Economic Area ("EEA," including the EFTA States Norway, Iceland, and Lichtenstein), private enforcement in the EFTA States is also on the rise. In May 2018, the EFTA Court made it clear that also under the EEA agreement, anyone harmed by a violation of EEA competition law has the right to claim damages, see *Fjarsipti hf. v. Síminn hf* [2017] case E-6/17.

3 For an overview of the Directive and the intentions behind it, see Daniele Calisti & Luke Haasbeek, *The Directive on Antitrust Damages Actions and Its role in the Future Enforcement of the EU Antitrust Rules*, 1(8) CPI ANTITRUST CHRONICLE (2015).

4 For an overview of cases, see Jean-François Laborde, *Cartel damages claims in Europe: How courts have assessed overcharges (edition 2017)*, November 2017, Concurrences Review N° 4-2017, Art. N° 84981.

5 *Courage Ltd. and Bernhard Crehan*, Case C-453/99, ECLI:EU:C:2001:465; *Manfredi and Others*, Case C-295/04, ECLI:EU:C:2006:461.

6 A more comprehensive assessment of the actual impact of the Directive is likely to take more time, particularly because in many cases national courts may still have to apply pre-Directive rules pursuant to the temporal application of the national laws implementing the Directive.

7 Sherman Antitrust Act 1890, originally 15 U.S.C. §7, revised by the Clayton Antitrust Act of 1914, now 15 U.S.C. §15.

8 392 U.S. 481 (1968).

9 431 U.S. 720 (1977).

10 Antitrust Modernization Commission, Report and Recommendations, April 2007, https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

11 Docket No. 17-204, petition for a writ of certiorari granted on June 18, 2018, see 138 S.Ct. 2647 (2018).

II. A CLEAR VIEW: WHAT'S PASSING-ON, WHAT'S IN THE DIRECTIVE

Passing-on and its effects are probably best described by reference to a simplified example, such as the following, which also uses the terms of the Directive:

Firm A (*the infringer*) agreed with its competitors to fix prices for flour and, on the basis of this agreement, increased prices for the flour it supplied to firm B (*the direct purchaser*). Firm B used the flour to bake breads and, because of the price increase for flour (*the overcharge*), increased the price for the bread it sold to firm C (*the indirect purchaser*).

In this example, firm B passed the overcharge on to firm C. If, in response to this price effect, firm C also purchased fewer breads, the passing-on also had a volume effect.

The Directive allows an infringer to invoke passing-on as a "shield" against the claim of direct or an indirect purchasers arguing that they passed on the overcharge. It also allows indirect purchasers to use passing-on as a "sword" to receive compensation from the infringer for the harm they suffered when an overcharge is passed on to them.

To tackle the practical difficulties of damages quantification, the Damages Directive introduced a number of rules, including the general presumption that "cartels cause harm" (Article 17(2) of the Directive) and the specific presumption that, if an indirect purchaser can establish certain conditions, "a passing-on" occurred (Article 14(2) of the Directive). It also required the Commission to issue passing-on guidelines. The consultation on a draft ("Draft Passing-on Guidelines")[12] ended in October 2018, with plans for a final version to be adopted in 2019. However, it is important to note that these guidelines are only intended to give practical guidance. The mandate stipulated in Article 16 of the Directive does not empower the Commission to alter existing rules or establish new ones in these guidelines. For example, even if the Commission saw, *quod non* at this stage, the need to introduce a legal presumption of passing-on in a "shield" scenario or, conversely, remove the presumption of passing-on in "sword" scenarios, it would not be empowered to do so by such means.[13] In the guidelines the Commission could at most provide its own legal interpretation of the Directive. As regards the passing-on related rules this interpretation is not always clear cut.

For example, the presumptions in the Directive, namely Article 14(2) and 17(1) of the Directive, do not distinguish between price and volume effects (see the explicit wording quoted above). Therefore, it could be argued that they must cover both. To support this argument one could refer to the Directive's goal of removing practical obstacles for seeking full-compensation and the link between price effects and volume effects, i.e. the rather high likelihood of volume effects whenever there are passing-on related price effects. Such an interpretation of the Directive would help direct and indirect purchasers when they claim loss of profit due to a volume effect, in particular when the infringer has successfully demonstrated a full or partial passing-on. However, there seem to be at least equally valid counter-arguments. Other parts of the relevant Articles refer explicitly to "price increases" (Article 14(1) of the Directive) or the "overcharge" (last sentence of Article 14(2) of the Directive). The presumption of volume effects for the benefit of direct and indirect purchasers may also be at odds with the wording of Article 13 of the Directive. This Article stipulates that the "burden of proving that the overcharge was passed on shall be on the defendant." Arguably, it would go beyond the scope of this burden of proof if the infringer was required to show the *absence* of any volume effects.[14]

III. FINDING THE RIGHT DIRECTION: COMPENSATION, ESTIMATION, QUANTIFICATION

The compensatory nature of private enforcement of EU competition law requires that the victim of an antitrust infringement can effectively seek full compensation. Building on the case law of the CJEU, Article 3(2) of the Directive makes clear that a victim under EU competition law must be placed in the position in which it would have been absent the infringement, covering actual loss, loss of profit, and interest. For economists called upon to quantify antitrust harm involving passing-on, this means building a counterfactual and taking into account price as well as volume effects. However, full compensation does not equal perfect accuracy. The Directive stipulates that national judges must have the power to estimate – generally, the amount of harm (Article 17(1) of the Directive) but also more specifically, the share of any overcharge that was passed on (Article 12(5) of the Directive).

12 Available at http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/20181807_en.pdf.

13 Of course, the adoption of guidelines does not prejudice the introduction of new rules at a later stage.

14 Such requirement was essentially part of the passing-on test in relation to German law prior to the implementation of the Directive, see Bundesgerichtshof, judgement of June 28, 2011, KZR 75/10 – ORWI at 69.

The Directive does not include a definition of this power to estimate but, as referred to in paragraph 39 of the Draft Passing-on Guidelines, it envisages that national courts "base their assessment firstly on the information reasonably available and secondly strive for an approximation of the amount or share of passing-on which is plausible." In any case, as explicitly mentioned in the Directive, national courts must estimate in accordance with national procedures and, as also referred to in the Draft Passing-on Guidelines, some jurisdictions have already an established practice of estimating damages.

The United Kingdom is one of them. Its rather old case law includes a catchy, yet quite apt concept of the power to estimate. In *Watson Laidlaw & Co. Ltd. v. Pott Cassels & Williamson* [1914] the House of Lords held that "[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe."[15] Later, UK courts have applied the practice of the broad axe to antitrust damages claims,[16] and more recently, in *Asda Stores Ltd. v. Mastercard Inc.* Popplewell J nicely summarized this "pragmatic approach,"[17] referring also to the European Commission's Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union ("Practical Guide").[18]

As regards passing-on, however, it is noteworthy that there seems to be a tendency to apply the principle of the broad axe exclusively in "sword" scenarios. In *Sainsbury's Supermarkets Ltd. v. Mastercard Inc.* the Court of Appeals argued that "[t]here is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant."[19] It remains to be seen whether this argument is compatible with the Directive. One could argue it is not because Article 12(5) of the Directive introduces such power without any distinction between the two scenarios in which it can be used, i.e. as a shield (Article 13 of the Directive) or as a sword (Article 14 of the Directive). Moreover, if the power to estimate was intended to apply only in sword scenarios, one would have expected it in Article 14 of the Directive.

Although a court's power to estimate in this context is a purely legal concept, there are several reasons why economics plays a key role when courts quantify the total harm in practice. Firstly, a basic understanding of the economic theory of passing-on may be helpful for judges as it may assist them when making decisions in relation to the disclosure of data or information by assessing its potential relevance for the specific case at an early stage of the litigation. Furthermore, economic theory can also form a basis for discerning the credibility and reliability of different economic methods underpinning the link between an overcharge and the passing-on of it, as put forward by the parties.

Secondly, the construction of a counterfactual scenario to determine an overcharge usually involves economic methods. The concept of assessing a counterfactual is obviously not a distinctive phenomenon only applied to private enforcement of competition law. It lies at the heart of most antitrust analyses.[20] Hence, national courts dealing with the application of European competition law probably know the concept as such quite well.[21]

In practice, however, the construction of a counterfactual in the context of damages actions differs from the analysis in public enforcement of competition law. In a damages action it is necessary to show the actual effects of the initial overcharge on a certain level of the supply chain, while it may be sufficient for competition authorities to show only potential effects. Therefore, the estimation of harm in private enforcement may require quantification of the effects of the overcharge based on available information and data regarding the development of prices, volumes and profit margins. The choice of economic methods for quantifying these effects may depend on whether a certain method or technique meets the standard of proof required under national law. In a specific case, it may be sufficient to prove the degree of passing-on based on direct qualitative evidence, such as documents produced by the direct or indirect purchaser as well as witness statements on whether the overcharge has been passed-on.

15 1914 S.C. (H.L.) 18 at 29-30.

16 See e.g. *Devenish Nutrition Ltd. v. Sanofi-Aventis SA* [2008] EWCA Civ 1086 at 110.

17 [2017] EWHC 93 (Comm) 4 C.M.L.R. 32.

18 June 11, 2013, SWD(2013) 205.

19 [2018] EWCA Civ 1536 at 647.

20 For recent examples involving counterfactual analysis in EU Competition law, see Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Valletti, *Recent Developments at DG Competition: 2017/2018*, Rev Ind Organ. 2018; 53(4): 653–679.

21 It is noteworthy that approximately one third of the EU Member States have specialized courts or chambers dealing with enforcement of competition law.

However, the use of quantitative methods will often increase the degree of accuracy of an estimate, and a court may consider it necessary to combine such evidence with evidence of more qualitative nature in order to quantify the passing-on effects.[22] In this context it is worth noting that the concept of estimating the overcharge and the passing-on related price effect are similar. Both scenarios may involve comparing the price actually paid by a customer with the price that would have prevailed absent the initial infringement. Hence, national courts or the parties in a damages case may employ quantitative methods when estimating the passing-on effects similar to those used when estimating the overcharge. In the Practical Guide and in the Draft Passing-on Guidelines these methods are referred to as "comparator-based" methods.

One way to implement these quantitative methods is to use regression analyses. Although such analyses may appear sophisticated and require a large amount of data, national courts have shown their ability and willingness to deal with the probative value of such statistical evidence in cases where damages have been awarded.[23] In this context, they have also referred to the European Commission's Practical Guide, stating that its explanations of regressions and statistical significance "draws together the various threads extremely clearly."[24] In the Draft Passing-on Guidelines the Commission elaborates further on the use of these types of methods in relation to passing-on.

IV. AT DIFFERENT PACE: ECONOMIC AND LEGAL CAUSATION

Passing-on can lead to complex situations, certainly more complex than the flour and bread example, mentioned at the beginning of this article for the purpose of describing the basics of passing-on. In practice, it may relate to sophisticated products or services, involve multiple suppliers, affect a great number of purchasers, including end consumers, and even concern more than one antitrust infringement. This complexity appears to be one of the factors leading to the question whether there is a difference between economic and legal causation.

In the United Kingdom, the Competition Appeal Tribunal ("CAT") has given an affirmative answer. In *Sainsbury's Supermarkets Ltd. v. Mastercard Inc.*,[25] it acknowledged that, from an economic point of view, passing-on may be defined more widely. However, by reference to legal reasons, i.e. the risk of an absence of liability and the effective application of EU competition law, the CAT considered it necessary to introduce a restriction to the passing-on defense. Inter alia, it held that the infringer must show the existence of another class of claimants to whom the overcharge was passed on.[26] According to the CAT, this restriction would be particularly relevant when the overcharge is passed on and scattered among many purchasers, which are unlikely to claim damages for the relatively insignificant harm they have suffered individually.[27]

Sainsbury's Supermarkets Ltd. v. Mastercard Inc. is in line with trends in the Netherlands and Germany. There, courts argued that legal restrictions to passing-on may be introduced on the basis of a normative approach possible under the national rules on causation.[28] These courts made similar legal arguments with regard to the situation of scattered harm, namely the lack of incentives to bring small value claims and, consequently, the *de facto* relief of the infringer to compensate for harm caused by it, additionally highlighting that in such a situation the indirect purchasers may also lack evidence to bring a claim.[29] These issues of scattered harm are amplified when there is no effective system of collective redress.

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22 This is also in line with the approach adopted by competition authorities when they assess evidence in merger and many antitrust cases. Furthermore, it is important that parties submitting evidence of quantitative nature carefully describe relevant assumptions imbedded in the analysis. This could be seen as one of the best practices for the submission of economic evidence in the context of private enforcement. In the context of public enforcement the European Commission's DG COMP has set them out in the *Best practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases*, http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf.

23 See Liam Colley, Burak Darbaz & David Vincent, *Britned v ABB: the probative value of statistical evidence in cartel damages cases* (November 2018), https://emarketing.alixpartners.com/rs/emsimages/2018/Pubs/FAS/AP_BritNed_ABB_Cartel_Damages_Cases_Nov_2018.pdf.

24 *Britned Development Ltd. V. ABB AB* [2018] EWHC 2616 (Ch) at 309. Eventually, the court did not rely on a statistical model when estimating the harm but a rather novel approach taking into account "baked in efficiencies" and "cartel related cost savings." Both the claimant and the defendant have appealed the decision.

25 [2016] CAT 11 at 484.

26 See Cento Veljanovski, *The Law and Economics of Pass-On in Price Fixing Cases* E.C.L.R. 2017, 38(5), 209-218; as explained there, the "economic concept" of passing-on is not necessarily different from the "legal concept."

27 The CAT requires the defendant to show the existence of a class of claimants to whom the overcharge has been passed on.

28 *Voordeelstoerekening* under Dutch law; *Vorteilsausgleich* under German law.

29 Hoge Raad, judgment of July 8, 2016, ECLI:NL:HR:2016:1483 – *TenneT v. ABB* at 4.4.3; Landgericht Dortmund, judgment of June 27, 2018 – 8 O 13/17 (Kart) at 169-171.

While national rules may limit the finding of causation,[30] it remains to be seen whether a restriction of the passing-on defense in case of scattered harm is in line with the Directive if it *a priori* excludes the passing-on defense. On the one hand, it is true that, according to the explicit wording of Articles 12(1) and 15(1) of the Directive, the "absence of liability of the infringer" must be avoided. Further, national courts seem to have suggested that this goal may be achieved by, at first glance, overcompensating the claimant that has passed on the overcharge to a great number of indirect purchasers, as this claimant may also eventually pass on the benefits of the damages award to such purchasers.[31] Therefore, at second glance, in the long run the result may not necessarily contradict the compensatory nature of private enforcement of EU competition law. However, if such a scenario involves profit maximizing firms operating in a market, it may be necessary to assume that the firm would take into account in its contemporary pricing decisions a lump sum payment received as compensation for losses many years ago. At best, such an assumption is not uncontroversial.

On the other hand, Article 3(3) of the Directive clearly states that "full compensation […] shall not lead to overcompensation." Article 15(1) of the Directive makes clear that multiple liability must be avoided when claimants from different levels in the supply chain file damages actions. This goal would be put at risk when, contrary to a court's prediction, indirect purchasers indeed brought low value claims against the infringer. To avoid multiple liability of the infringer in such a scenario, one could require these indirect purchasers to revert to the claimant that has been overcompensated due to the restriction of the passing-on defense. However, such a requirement may not be in line with the fundamental principle of private enforcement of EU competition law according to which any individual must have standing to seek compensation for harm suffered as a result of an infringement of EU competition law.[32]

Therefore, a more nuanced approach to passing-on in case of scattered harm may be appropriate, i.e. one that is case specific, taking into account the evidence that the infringer has put forward for substantiating the passing-on defense and assessing it in accordance with national procedural rules.[33] The national court could draw upon economic evidence, qualitative or quantitative, for the assessment of evidence on passing-on. This approach would not only align economic and legal causation, it would also embrace the compensatory nature of private enforcement in Europe.[34]

Such a more nuanced approach to passing-on may also replace other rather bold arguments in relation to passing-on made by courts in Germany. For example, in a case before the Landgericht Dortmund, the defendants (two manufacturers of trucks) raised the passing-on defense submitting that the direct purchaser (a transport company) had passed on the overcharge to the indirect purchasers (various customers demanding services from the transport company).[35] The Landgericht Dortmund rejected the submission stating inter alia that, in order for passing-on to be successful, it is necessary that the market on which the indirect purchaser operates is "consistent" with the market on which the infringement was committed. More specifically, the court reasoned that the infringements of competition law in the market for trucks would lead to harm only to direct customers, suggesting that trucks are not a relevant input for the indirect customer. This reasoning seems to be based exclusively on a legal approach rejecting passing-on in cases where the cartelized product is ultimately further processed and sold as new products on another market. It is difficult to reconcile with economics because, in principle, any direct purchaser may find it profitable to pass on cost increases to indirect purchasers.

30 Indeed, there is a great variety of rules on causation at national level. Following the judgement of the CJEU in *Kone* it seems clear that, in the absence of EU law, such rules can apply, provided they comply with the principle of effectiveness and equivalence, see *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, ThyssenKrupp Aufzüge GmbH v. ÖBB-Infrastruktur AG*, Case C-557/12, ECLI:EU:C:2014:1317.

31 See Rechtbank Gelderland, judgment of June 10, 2015, ECLI:NL:RBGEL:2015:3713 – *TenneT v. Alstom*.

32 See *Courage Ltd. and Bernhard Crehan* at 26 and *Manfredi and Others* at 60, both *supra* note 7 as well as Article 1(1) and 3(1) of the Directive.

33 See corresponding appellate court judgments in this respect, Oberlandesgericht Düsseldorf, judgment of August 22, 2018, VI-U (Kart) 1/17, ECLI:DE:OLGD:2018:0822.U.KART2.17.00 at 125-139 and Oberlandesgericht München, judgement of March 8, 2018, U 3497/16 Kart, ECLI:DE:OLGMUEN:2018:0308.U3497.16KART.0A at 79-82 as well as Landgericht Nürnberg-Fürth, judgement of October 11, 2018, 19 O 8786/15.

34 For different views concerning passing-on in this respect, particularly the requirements in light of the principle of full compensation and the role of economics in damages actions, see Pedro Caro De Sousa, *EU and national approaches to passing on and causation in competition damages cases: A doctrine in search of balance*, (2018) 55 C.M.L.R, 1751-1784.

35 Landgericht Dortmund, judgment of June 27, 2018, 8 O 13/17 (Kart); for similar cases and arguments see Landgericht Hannover, judgement of December 18, 2017 - 18 O 8/17 at 59-65; Landgericht Stuttgart, judgement of November 12, 2018, 45 O 6/17 at 55-61.

Therefore, a case specific approach might indeed be more suitable, i.e. an approach that does not *a priori*, for legal reasons, restrict the passing-on defenses but rather allows national courts to consider the plausibility of the defendant's submission, the availability of relevant evidence and ultimately the power to estimate. Indeed, in accordance with the procedure law of the respective Member State, the parties to the proceedings may put forward a variety of evidence that the national court may find useful to estimate passing-on effects. Among the evidence for shedding light on the likelihood of a passing-on are insights from economic theory, internal documents providing information on the relevance of certain input costs for the direct purchaser's pricing decisions, information on prices, and other relevant factors in the market where the direct purchaser operates, or in comparable markets. Of course, it may well be that, based on the circumstances of a given case, it is not possible under national law to prove a passing-on effect. However, irrespective of the outcome, it is the more nuanced and case specific approach which counts, embracing the compensatory nature of private enforcement of EU competition law.

"WELCOME TO THE HOTEL CALIFORNIA": THE BEAST OF ALGORITHMIC PRICING

BY JAY L. HIMES & TIANRAN SONG[1]

1 The authors are attorneys at the law firm of Labaton Sucharow LLP, in New York City. Mr. Himes, who co-chairs the firm's Antitrust Practice Group, is the former Antitrust Bureau Chief, Office of the Attorney General of New York.

Mirrors on the ceiling,
The pink champagne on ice
And she said, 'we are all just prisoners here, of our
own device'
And in the master's chambers,
They gathered for the feast
They stab it with their steely knives,
But they just can't kill the beast

Last thing I remember, I was
Running for the door
I had to find the passage back to the place I was before
'Relax' said the night man,
'We are programmed to receive.
You can check out any time you like,
But you can never leave!'[2]

I. INTRODUCTION

With the emergence of the internet, firms today are able to collect and analyze massive amounts of data and, as the "Internet of Things" develops, these opportunities will increase exponentially. Technological innovation has also nurtured the development of dynamic pricing algorithms, capable of monitoring market activity and setting product prices accordingly. The optimist sees the price efficiency that can result. The pessimist is afraid she's right.

Efficiency in pricing, eventually reaching equilibrium where supply meets demand, is the holy grail of economics. But what if the implementation practicalities of efficient pricing include upward bias, and informational and organizational asymmetries favor suppliers over customers? Rather than achieving equilibrium prices — the best of all possible worlds — monopoly prices that squeeze surplus from consumers may result. Algorithmic pricing challenges us to develop legal doctrine that recognizes and addresses this dilemma.

Algorithms facilitating coordinated prices by competitors implicate a core antitrust law concern. Where this condition exists because competitors agree on the pricing algorithm to use — or because they have adopted a common pricing agent — antitrust is spot on: case law establishes that this is express collusion covered by Section 1 of the Sherman Act. The hard part, therefore, is adapting antitrust law to algorithmic pricing when its effect is akin to what economists often call "tacit" collusion — the sort of pricing seen in oligarchical markets where sellers are able to watch and follow each other's pricing and supply adjustments. Under prevailing law, tacit collusion, also referred to as "conscious parallelism," does not violate Section 1.[3] Yet, algorithmic pricing can mimic this very state of affairs. That, after all, is the algorithm's intent: (1) monitor and capture the necessary real-time input data; (2) weigh and balance it against the accumulated historical data, including past supply and demand responses; and (3) spew out a profit-maximizing output price.

When public officials in Australia, Chile, and Germany attempted to provide motorists with more online price transparency for fuel, prices increased, rather than decreased.[4] Supra-competitive market prices achieved through algorithms is market harm that we should be concerned about. We discuss here the limits of prevailing antitrust law in dealing with these circumstances, and the need to look beyond when antitrust, as currently understood, does not provide an obvious answer.

2 Don Felder, Don Henley & Glenn Frey, "Hotel California," (1976) (Hotel California lyrics © Universal Music Publishing Group).

3 See generally William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 395, 405 (2011) ("Kovacic et al., Price Factors").

4 Václav Šmejkal, *Cartels by Robots—Current Antitrust Law in Search of an Answer*, at 3, https://doi.org/10.22598/iele.2017.4.2.1 ("Šmejkal, Cartels by Robots").

II. WHAT'S IT ALL ABOUT, ALGIE?

Algorithms are tools for calculation, data processing, and automated reasoning. An algorithm is any well-defined computational procedure that takes some value, or set of values, as input and produces some value, or set of values as output.[5] Pricing algorithms can look to factors such as competing firms' present or past prices, costs of production, consumer preferences and price sensitivities, market information such as suppliers' and competitors' stocks, and external information such as weather patterns.[6] Pricing algorithms are dynamic, responding quickly to market changes. Therefore, firms using algorithmic pricing can adjust prices exponentially faster than can firms relying on traditional analytic methods. In December 2013 Amazon reportedly implemented more than 2.5 million price changes ***every day*** — compared to Walmart's 54,633 changes during the entire month of November.[7] Pricing algorithms thus offer firms an alert and adaptable profit-maximizing tool for making pricing decisions and other operating adjustments.

As the U.S. enforcers have recognized, a core principle of free market competition is the ability of firms to adjust pricing in response to competitive conditions.[8] Accordingly, pricing algorithms may be procompetitive — "not as something that raises alarm bells."[9] However, algorithmic pricing can also have anticompetitive effects where it enables or facilitates collusion by competitors. In May 2017, the OECD Secretariat detailed concerns that algorithms offer opportunities to firms to achieve collusive outcomes that do not necessarily require a traditional agreement.[10] European Commissioner Margrethe Vestager echoed these concerns: "the challenges that automated systems create are very real. If they help companies to fix prices, they really could make our economy work less well for everyone else" and "as competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program."[11] Where algorithms enable not collusion, but coordinated pricing by competitors, the market harm may be comparable, but addressing it more elusive. At recent FTC hearings, "panelists agreed the use of such algorithms is difficult to analyze under traditional antitrust principles, other than in cases in which competing firms consciously decide to jointly employ an algorithm to fix prices."[12]

III. "FAST-TRACK" COLLUSION USING ALGORITHMS

Under Section 1 of the Sherman Act, it is unlawful *per se* for competitors to agree to raise, depress, fix, peg, or stabilize the price of goods or services.[13] When competitors use pricing algorithms to implement such an agreement, application of U.S. antitrust law is straightforward. Moreover, where a single firm enlists a network of suppliers who resell using dynamic algorithmic pricing made available to supplier-participants, the "hub and spoke" conspiracy construct seems to work, although this adaptation of conventional antitrust law is perhaps more debatable.

More than 20 years ago, in United States v. Airline Tariff Publishing Co.,[14] the DOJ investigated an airline industry price-fixing conspiracy. Six airlines used an online computer program called the Airline Tariff Publishing Company ("ATPCo") to coordinate and set airline fare prices. Through ATPCo, the airlines had full knowledge of their competitors' prices, and they used ATPCo to discuss and coordinate their fares.[15] After the DOJ sued for price-fixing, the airlines settled.[16]

5 Cormen et al., Introduction to Algorithms (MIT Press 2d ed. 2001).

6 *Pricing Algorithms: Economic Working Paper on the Use of Algorithms to Facilitate Collusion and Personalised Pricing* (Competition & Markets Authority, Working Paper Oct. 8, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

7 Profitero Blog, *Profitero Price Intelligence: Amazon Makes More Than 2.5 Million Daily Price Changes*, Profitero, (Dec. 10, 2013), https://www.profitero.com/2013/12/profitero-reveals-that-amazon-com-makes-more-than-2-5-million-price-changes-every-day/.

8 OECD, *Algorithms and Collusion – Note by the United States*, No. OECD Doc. DAF/COMP/WD(2017)41 § 4 (May 26, 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf ("U.S. Note").

9 *Roundtable: Discussing the Big Picture on Big Data*, 18 The Antitrust Source 1, 6 (No. 3 Dec. 2018) ("Roundtable").

10 OECD, *Algorithms and Collusion – Background Note by the Secretariat* § 6.1, No. OECD Doc. DAF/CoMP (2017)4 (June 9, 2017), https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf.

11 Margrethe Vestager, Comm'r, Eur. Comm'n, Algorithms and Competition, Remarks at the Bundeskartellamt 18th Conference on Competition, Berlin (Mar. 16, 2017), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en.

12 Janis Kestenbaum et al., *What We Heard at the FTC Hearings: Days 12 and 13*, Law360 (Nov. 28, 2018), https://www.law360.com/articles/1105676/what-we-heard-at-the-ftc-hearings-days-12-and-13.

13 See, e.g. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

14 *United States v. Airline Tariff Publ'g. Co.*, 836 F. Supp. 9 (D.D.C. 1993).

15 *Id.*

16 Final Judgment, *United States v. Airline Tariff Publ'g Co.*, No. 92-2854 (Nov. 1, 1993), https://www.justice.gov/atr/final-judgment-us-v-airline-tariff-publishing-company-et-al.

More recently, in *United States v. Topkins,*[17] the DOJ successfully prosecuted two executives and a commercial retailer who used pricing algorithms to coordinate their prices for posters sold on the Amazon Marketplace, the world's largest e-commerce platform. Using agreed-on, aligned algorithms, the defendants avoided price competition among themselves, and increased online prices for posters. DOJ enforcers noted that "[o]nce the pricing algorithms were in place . . . the conspiracy was, to a large extent, self-executing."[18] The defendants pleaded guilty to a Section 1 violation.[19]

As these cases illustrate, using a pricing algorithm does not change the antitrust analysis. Like a written or oral message from one conspirator to the other informing of a price or input change, the algorithm is just a means to implement an agreement between human beings. Thus, Professors Ezrachi & Stucke refer to this arrangement — where pricing algorithms implement or disguise the intended underlying collusion — as a "messenger" scenario.[20] Section 1's prohibition applies.

IV. HUB-AND-SPOKE ARRANGEMENTS

Section 1's conspiracy element can also be met where the agreement among competitors is "informal" — rather than explicit — and is inferred from circumstantial evidence, including economic evidence (often referred to, collectively, as "plus factors")[21]. The "hub-and-spoke" conspiracy model, for example, is a well-recognized, recurring basis for Section 1 liability. Here, competing firms use a common actor, "the hub" — to facilitate collective action by the (typically) suppliers, who form "the rim" of the wheel. The central actor can, but does not necessarily, make the pricing decisions. However, the agent acts as the intermediary through which the competing firms effectively communicate and, by inference, agree on price or otherwise restrain trade.

In *Interstate Circuit v. United States,*[22] a movie theatre communicated simultaneously, albeit independently, with eight movie distributors, insisting that each agree on minimum ticket prices and bar double-feature showings in their licensing terms. Each distributor knew the theatre communicated the same message to its competitors, and each accepted the theatre's conditions. Although all the distributor-witnesses testified at trial that they made no "agreement," the district court inferred a Section 1 conspiracy. The Supreme Court affirmed, holding that the distributors' individual acceptances permitted "the inference of agreement from the nature of the proposals made . . . [and] from the substantial unanimity of action taken upon them by the distributors."[23] Reviewing the circumstantial evidence, the Court wrote: "[i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[24]

Similarly, in *Klor's v. Broadway-Hale Stores,*[25] a dominant retailer communicated with several suppliers, each of whom thereafter refused to sell to a rival retailer. Although there were no explicit communications between the suppliers, the Court inferred a conspiracy from circumstantial evidence, and held the arrangement *per se* illegal under Section 1.[26] The recent "ebooks case," in which Apple orchestrated a conspiracy among online book publishers to change the industry's pricing model, is another example of hub-and-spoke liability.[27]

17 *United States v. Topkins*, No. CR 15-00201 (N.D. Cal. Apr. 6, 2015) (Information and Plea Agreement).

18 U.S. Note, *supra* note 8, at ¶ 15.

19 Press Release, U.S. Department of Justice, Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution (April 6, 2015), https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.

20 Ariel Ezrachi & Maurice E. Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy 46 (Harvard Univ. Press 2016) ("Ezrachi & Stucke, Virtual Competition").

21 See, e.g. *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010); Kovacic et al., *Plus Factors, supra* note 3, 110 MICH. L. REV. at 396.

22 306 U.S. 208 (1939).

23 *Id.* at 221-22.

24 *Id.* at 226.

25 359 U.S. 207 (1959).

26 *Id.* at 209-210. *See also Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (retailer orchestrated a conspiracy with suppliers to restrain competition from "discount" rivals).

27 *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), *cert denied*, 136 S. Ct. 1376 (2016).

As the *ebooks* case illustrates, e-commerce can package old wine in new wine bottles. The recent action against Uber, the world's largest transportation network company, is particularly noteworthy.[28] Uber provides a platform for riders to request car services from drivers who (Uber contends) are independent contractors. Uber uses a pricing algorithm to set the prices that drivers charge riders. While Uber has not disclosed the algorithm, it reportedly uses input factors that include supply, demand, and other external considerations such as bad weather, rush hour, and special events.[29] When the algorithm determines that the demand for rides has increased — or that the supply of Uber-available drivers has declined — the prices to riders go up to a "surge price." The surge price is communicated to riders as a multiplier of the standard rate, for example, 1.8 or 2.5 times the standard fare.[30] Uber requires drivers to charge the price that Uber's algorithm dictates.

An Uber user, suing on behalf of a proposed class of riders, claimed that Uber violated Section 1 by requiring all its independent contractor-drivers to charge riders prices called for by Uber's pricing algorithm. Instead of setting their own prices, the drivers let Uber do it as a condition of doing business on the Uber platform. In the world of hub and spoke conspiracies, Uber was like the movie theatre in *Interstate Circuit*, and the drivers were like the movie distributors furnishing product. A conspiracy, the plaintiff argued, could be inferred from the circumstantial evidence even absent an explicit agreement among the drivers.

Uber asserted that a conspiracy involving "hundreds of thousands of independent transportation providers all across the United States" would be "implausible."[31] But Judge Rakoff of the Southern District of New York was unpersuaded: "the advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave antitrust law behind."[32] The Court thus denied Uber's motion to dismiss. Significantly, however, Judge Rakoff did not decide whether the alleged conspiracy was per se illegal or had to be analyzed under the rule of reason, preferring instead to resolve that question only after discovery allowed fact development.[33] The answer to this question will have to await another case against an online platform because after Judge Rakoff's motion to dismiss ruling, the action was held subject to Uber's mandatory arbitration clause.[34]

The *Uber* ruling looks like a canary in the mine shaft. Algorithmic pricing may, indeed, have anticompetitive consequences affecting consumers. And while antitrust law is accustomed to proscribing explicit and inferred agreements among competitors, and even to inferring conspiracy from circumstantial evidence in a hub and spoke setting, the law may need to adapt when algorithmic pricing operates independently of these sorts of circumstances.

Under the current law, price coordination among firms that produces increased prices — traditional "tacit" collusion or conscious parallelism — is unlikely to be a U.S. antitrust violation. The evidence must prove, instead, "a unity of purpose" or "a conscious commitment to a common scheme" by participants.[35] Indeed, in at least some fact settings, the evidence also should exclude the possibility of independent action.[36] U.S. antitrust enforcers have themselves opined that use of independent pricing algorithms is unlikely to result in antitrust liability absent additional facts suggesting concerted action.[37]

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28 Rebecca Elaine Elliot, *Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc.*, 41 J. CORP. L. 727, 729 (2016).

29 *How Surge Pricing Works*, Uber, https://www.uber.com/drive/partner-app/how-surge-works/, (last visited Dec. 20, 2018).

30 *Id.*

31 *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 825 (S.D.N.Y. 2016).

32 *Id.*

33 *Id.* at 827.

34 *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

35 See, e.g. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation and quotation marks omitted); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946).

36 See, e.g. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

37 U.S. Note, *supra* note 8, at § 4.1. *Compare* Judgment, Case C-74/14, *"Eturas" et al. v Lietuvos Respublikos konkurencijos taryba* (Eur. Ct. Justice Jan. 21, 2016) (where a travel booking service implemented an online cap on discounts by travel agents using the service, an agent with knowledge of the cap could be presumed a participant in collective action), http://curia.europa.eu/juris/document/document.jsf;jsessionid=8271678F4CF01FB31C5B6BED549CFAA5?text=&docid=173680&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3297309.

V. ALGORITHMIC PRICING AND MARKET HARM

Let us suppose that competing firms each use algorithmic pricing to respond to ever-changing conditions. While the various stages of the competing firms' businesses are by no means identical, there will be similarities in input, manufacturing (or assembly) and distribution costs. Each firm's pricing algorithm is likely to take account of similar factors, and even though the two algorithms may not weigh each factor identically, there will still be constraining similarities. Further, as industry firms themselves increasingly use algorithmic pricing, the data points available for capture and analysis will increase, improving each algorithm's operation.[38] With analysis of increasing amounts of data and improvingly sophisticated artificial intelligence ("AI") capabilities, the competing firms will land on price points that are increasingly near each other.

The rapid and dynamic responses to changes in the market — which will include reactions to competitors' own prices — create the potential for firms to coordinate on prices without ever communicating with each other directly or through a central hub. The ability of firms to collect and analyze enormous banks of information allows sellers to adjust prices at exponentially faster rates using a variety of real-time inputs — much faster and efficiently than human actors can.[39] Equally important, an algorithm's ability to detect real-time market changes, as well as to self-learn, enable it to adjust selling prices to, ideally, the optimal profit-seeking level in real-time.[40] Companies will seek to implement price changes like Amazon, not Wal-Mart. Thus, using similar advanced algorithms, each calibrated to profit-maximize, companies may be expected to independently reach the same pricing levels. By their very design, these algorithms will coordinate prices with their competitors.

Now, if we were confident that algorithmic pricing will produce unbiased price changes, both up and down, our worries might be slight. But what basis is there for this assumption? As profit-maximizing firms, suppliers can be expected to build into their algorithms an upward bias, which attempts to capture as much consumer surplus as possible. At the same time, consumers as buyers are disadvantaged. Sellers tend to have more information about their product and its attractiveness in the market, and about market trends in general, than do buyers. Thus, informational asymmetry favors suppliers. Suppliers also sell to a customer base en masse, whereas buyers purchase for individual needs and tend toward disorganization. In consequence, buyer ability to resist rising prices — particularly when they are informationally disadvantaged — is frequently ineffective. Although organized buyers can gain negotiating leverage from volume purchasing, absent this type of buyer power, the pressure to drive prices down typically needs to come from competitors willing to sell below the price increase.

Conventional economics posits that announced or implemented price increases can be countered by companies that offer lower priced products. Buyers will identify the offerings and purchase accordingly. Absent capacity limitations, an equally (or more) efficient competitor or group of independently acting competitors — and even a timely new entrant — can provide buyers with the alternatives needed to defeat a price increase. This *is* the competitive process, conventionally understood. But for the process to work lower price offerings need "breathing space" — time for consumers to identify and purchase the alternatives.

By enabling real-time price adjustments, however, algorithmic pricing eliminates that necessary time window. Fine-tuned algorithms would recognize that one company's reduced price will be met by another's even lower price, and that pursuing a price-cutting strategy would assure a downward price spiral. The better response will be to price upward—matching the leader's increased price because anything less risks triggering the downward spiral.[41] Algorithmic pricing eliminates the incentive, and hence the ability, for competitors to discipline price increases.[42]

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38 OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* 33 (2017), www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm..

39 Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 Minn. L. Rev. 1323, 1352 (2016). But see *Roundtable, supra* note 9, 18 The Antitrust Source at 8 ("If you've got an algorithm that can make a pricing decision in a microsecond, which otherwise would take a marketing department a week or even a day to figure out, that's probably a good thing.").

40 *Id.*

41 See Hogan Lovells, *Exploring the Contrasting Views About Big Data in the US and EU*, Antitrust, Competition and Economic Regulatory Newsletter 15, 17 (Autumn 2018) ("if everyone applies a similar algorithm [monitoring competitors' online prices], and if these algorithms are probably even self-learning, the computer programs may conclude that they are all better off if they increase prices."), https://www.hoganlovells.com/en/publications/antitrust-competition-and-economic-regulation-quarterly-newsletter-autumn-2018; Šmejkal, *Cartels by Robots, supra* note 4, at 6

42 *Cf.* Dennis W. Carlton et al., *Communication Among Competitors: Game Theory and Antitrust*, 5 Geo. Mason L. Rev. 423, 428-30 (1997) (offering the example of two gas stations engaged in coordinated pricing, leading to a price increase, despite the absence of communications between the stations).

The story several years ago of algorithms "gone wild" is well-known. Two booksellers on Amazon bettered each other's price for a reference title, The Making of a Fly, until the online offering reached $23,698,655.93, plus $3.99 for shipping.[43] A more fine-tuned algorithm, informed by AI, would turn off the bid switch at a profit-maximizing level. But the risk that today firms will follow each other's price to that point is plain enough.

As the DOJ and FTC have themselves warned: algorithms could be highly effective in facilitating collusion due to the "speed and ease of algorithmic pricing . . . likely reduce[s] the benefit that a firm would otherwise enjoy from... defecting from collusive pricing."[44] Although the enforcers wrote in the context of the ability of algorithmic pricing to detect — and thereby deter — conspirator defection, their observation applies equally to low pricing that is intended to resist a price increase. That, too, would be quickly detected and reduce any expected benefit from trying to capture sales by offerings below the increased price.

Under a traditional pricing model where firms apply non-dynamic trial and error in a "repeated game," it is difficult for firms to sustain monopoly profits "because firms would prefer to deviate in order to make a positive profit in the short run."[45] In contrast, dynamic algorithmic pricing allows for real-time changes, or "revision opportunities," which are "frequent enough . . . [that] there is a high probability that any potential deviation will be detected even before the next customer arrives."[46] As a result, the "revising firm could react to the deviation before the deviating firm has an opportunity to make any profits."[47]

Even before machines entered the picture, concentrated industries were susceptible to follow-the-leader pricing, which could be maintained at supra-competitive levels. Use of algorithmic pricing can be expected to exacerbate this condition, thereby producing a market result similar to that of explicit collusion. Professor Bruno Salcedo cautions that this tacit collusion between firms enjoying market power "is not only possible but rather, it is *inevitable*."[48] Professors Ezrachi & Stucke similarly describe this harm as the "predictable agent" scenario — "Tacit Collusion on Steriods."[49]

Circling back to ride-sharing, the algorithmic pricing models used by Uber and Lyft illustrate this potential market harm. While neither company has disclosed the input factors driving its pricing algorithm for rider fares, each admits that similar factors, such as dynamic supply and demand, are prioritized. Both companies use surge pricing when the perceived demand in an area rises (or the driver supply declines). The pricing algorithm increases the fare to incent more drivers to "activate" and enter surge areas. As then-Uber CEO Kalanick has claimed, "We are not setting the price, the market is setting the price . . . we have algorithms to determine what that market is."[50] Similarly, Lyft states that its surge pricing, known as "Prime Time," is based on dynamic supply and demand in the market.[51] Despite differences in exactly how each pricing algorithm applies specific input factors, any increase or decrease by one of the two firms will likely result in the other responding similarly. After all, Uber and Lyft seek to derive profit by offering an attractive price to riders, compared to the alternatives.

Uber and Lyft may say that the "market" determines their prices. But each company's goal is to maximize the profit derived from each transaction — not to provide the cheapest car service. Each firm's financial incentive inevitably prioritizes the ability to charge the highest possible price without losing riders to its rivals. If both Uber and Lyft's pricing algorithms conclude that the optimal price — the price that generates the most profit for the firm per transaction — is higher *and* that aligning prices with the other yields the highest return, then the pricing algorithms will select that higher price. There is no "agreement" between Uber and Lyft, nor any use of a common agent for the two firms. Rather, each independent pricing algorithm sets a price at which each could maximize profit. And if Uber and Lyft — the market's two largest ride-share companies — use similar algorithms to price in lock-step, riders will pay the price the companies make available — not a price determined by "the market."

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43 Olivia Solon, *How a Book About Flies Came to be Priced $24 Million on Amazon*, Wired (Apr. 27, 2011), https://www.wired.com/2011/04/amazon-flies-24-million/.

44 U.S. Note, *supra* note 8, at ¶ 5.

45 Bruno Salcedo, Pricing Algorithms and Tacit Collusion 19 (Penn St. Univ. Nov. 1, 2015), brunosalcedo.com/docs/collusion.pdf.

46 *Id.*

47 *Id.*

48 *Id.* at 3.

49 Ezrachi & Stucke, Virtual Competition, *supra* note 20, at 41.

50 Salil K. Mehra, *supra* note 39, 100 Minn. L. Rev. at 1324.

51 Lyft (@Lyft), Twitter, (Jan. 1, 2018, 3:10 AM), https://twitter.com/lyft/status/947787167077507072?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E947787167077507072&ref_url=https%3A%2F%2Fdatarootlabs.com%2Fuber-lift-gett-surge-pricing-algorithms%2F.

Take away algorithmic pricing: neither Uber and Lyft could raise their prices without danger of losing riders to the other — unless, of course, they agreed to price-fix. The very efficiency of the pricing algorithm, however, creates the market harm that we need to worry about.

VI. THE TOOLS OF ANTITRUST — AND BEYOND

Antitrust "urban" legend touts the adaptability U.S. antitrust law. It's a like a Swiss army knife. Every once in a while, a different feature has to be used, or a blade needs to be sharpened. But in the end, everything needed is there to do whatever needs to be done. The increasing pace of technological change behooves us to question this article of faith. Before cars populated streets, the pace of travel did not call for stop lights or pedestrian walk signs. And so, today, we should be thinking deeply about how algorithmic pricing, souped up with big data and AI, can change the competitive process itself. Even while that reflective process is underway, however, there are approaches to try.

For example, the Federal Trade Commission should not be a shrinking violet. Section 5 of the Federal Trade Commission Act declares "unfair methods of competition" to be unlawful.[52] Section 5 reaches conduct outside the boundaries of federal antitrust law: "in measuring a practice against the elusive, but congressionally mandated standard of fairness, [the Commission], like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[53] The FTC's 2015 statement on Section 5 reiterates that the statute covers "not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."[54]

Accordingly, the FTC has sued under Section 5 when conduct approaches, but does not satisfy, a Sherman Act violation. For instance, although an "invitation" to collude may not violate the Sherman Act, sufficient potential for anticompetitive harm can give rise to liability under Section 5.[55] Thus, challenging algorithmic pricing that produces supra-competitive, coordinated pricing is within the FTC's wheelhouse. To be sure, years ago the Second Circuit rejected, as a bridge too far, the Commission's effort to apply Section 5 to distribution restraints that four companies adopted independently, but that the Commission argued facilitated price parallelism at increased price levels.[56] The prevalence of algorithmic pricing today, however, should represent significantly changed circumstances, which warrant revisiting this and similar doctrinal approaches, such as "collective" monopolization.

Whether FTC enforcement will be forthcoming is conjecture, of course. And while there is no private right of action under Section 5,[57] various states have enacted "little FTC Acts," which similarly proscribe "unfair or deceptive acts or practices," or "unfair methods of competition."[58] Under these laws, twenty states have authorized private parties to sue.[59] Accordingly, private enforcement can push the envelope by challenging increased prices produced by companies using algorithms that achieve coordinated pricing not necessarily resulting from collusion prohibited by antitrust law. States can, indeed, be laboratories of democracy, and these sorts of laws provide test tubes for experimentation.[60] Moreover, if the FTC itself does blaze a trail, little FTC Acts with private rights of action can supplement agency enforcement.

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52 15 U.S.C. § 45(a)(1).

53 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

54 Fed. Trade Comm'n, Statement on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015), https://www.ftc.gov/system/files/documents/federal_register_notices/2015/09/150921commissionpolicyfrn.pdf; See also *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

55 Consent Order, *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

56 *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984). See also *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (independent adoption of a "base point pricing" system did not violate Section 5 where substantial evidence failed to show a price effect).

57 See, e.g. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 687, 989 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (1973) (citing authorities).

58 See, e.g. Fla. Stat. Ann. § 501.204(1) ("unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices . . . are unlawful"); 815 Ill. Comp. Stat. Ann. 505/2 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices"); Mass. Gen. Laws Ann. ch. 93A § 2 (same).

59 Justin J. Hakala, *Follow-On State Actions Based on the FTC's Enforcement of Section 5*, at 6, n.26, https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00002/537633-00002.pdf (Appendix collecting statutes).

60 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

There also may be opportunities to invoke state antitrust law itself. Although "harmonization" provisions, adopted by state statute or case law, instruct that federal antitrust law should inform construction of a state's own statute, there is still play in the joints.[61] For example, the California Supreme Court has noted that "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act."[62] Similarly under New York law, federal precedent informs construction of the state's Donnelly Act, but it is "well settled that we will interpret our statute differently 'where State policy, differences in the statutory language or the legislative history justify such a result.'"[63]

One specific difference in New York is the Donnelly Act's plurality element. Unlike Section 1 of the Sherman Act, the Donnelly Act applies to "[e]very contract, agreement, *arrangement* or combination" that monopolizes or restraints trade.[64] Thus, a body of New York law holds that "*undoubtedly* the sweep of Donnelly may be broader than that of Sherman . . . ."[65] Therefore, again, state law may create an opportunity to challenge algorithmic pricing that is not readily reached under federal antitrust law.

VII. CONCLUSION

Under the Communications Act of 1934,[66] the Federal Communications Commission must take account of the "public interest, convenience, and necessity" in making licensing decisions.[67] The standard recognizes that because the broadcast spectrum is limited, licensees of the spectrum must act as "public fiduciaries" for the benefit of the public.[68] The mere presence or absence of competition is not, in itself, a sufficient basis for an FCC licensing decision, although the conditions of competition are a factor that the agency may consider.[69] The FCC similarly reviews telecommunications industry mergers under the "public interest, convenience, and necessity" standard.[70] Again, the FCC may consider factors beyond those informing a DOJ or FTC antitrust merger review — for example, universal service requirements, public health and safety, and foreign ownership restrictions.[71] The Communications Act standard reminds that, at times, the clash of competing interests requires doing something different to avoid market harm slipping through the cracks of traditional antitrust analysis. Merely protecting the process of "competition" without regard for the result produced may not be enough.

Private businesses plying their goods and services are, of course, different than broadcast licensees. However, algorithmic pricing is enabled by scraping data from the internet and any other public sources that may be collected and inputted for analysis. Although the various components of data may, for some purposes, be protected as property owned by one person or another, perhaps the aggregation of data, as a whole, can be thought of as a public good, the use of which by individual actors can be restricted for the benefit of the public at large. The advent of algorithmic pricing challenges us to think out of the box for alternatives to traditional antitrust law — lest we wake up not too many years from now to find that we've sleepwalked over a cliff.[72]

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61 See generally *In Re Dairy Farmers of America, Inc. Cheese Antitrust Litig.*, No. 9 CV 3690, 2015 WL 3988488 (N.D. Ill. June 29, 2015) (discussing various state harmonization provisions).

62 *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 877 (Cal. 2013).

63 *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1018 (N.Y. 2007) (quoting *Anheuser- Busch, Inc. v. Abrams,* 520 N.E.2d 535, 539 (N.Y. 1988)).

64 N.Y. Gen. Bus. Law § 340(1) (emphasis added).

65 *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464 (1976) (emphasis added). See generally *Experiments in the Lab: Donnelly Act Diversions from Federal Antitrust Law*, 15 N.Y. Litigator 61, 62-63 (No. 2 Fall 2010) (citing and discussing authorities).

66 47 U.S.C. §§ 151 *et seq.*

67 *Id.* § 309(a).

68 See *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 389 (1969) (a licensee may be required "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves").

69 *FCC v. RCA Commuc'ns, Inc.*, 346 U.S. 86 (1953).

70 47 U.S.C. § 214(a).

71 47 U.S.C. § 254; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Second Report and Order, 22 F.C.C.R. 15,289 (2007). See also The Effects of Consolidation on the State of Competition in the Telecommunications Industry: Hearing Before the H. Comm. on the Judiciary, 105th Cong. 21 (1998) (statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice), http://commdocs.house.gov/committees/judiciary/hju58805.000/hju58805_0f.htm.

72 See generally Šmejkal, *Cartels by Robots, supra* note 4, at 12-15 (discussing various approaches). But see Sheng Li & Claire Chunying Xie, *Automated Pricing Algorithms and Collusion: A Brave New World or Old Wine in New Bottles?*, 18 The Antitrust Source 1, 8 (No. 3 Dec. 2018) ("while the strategic games of competitive pricing may now be played at a faster tempo by automated algorithms, the fundamental rules of the game—governed by classical economic principles of supply, demand, and profit maximization—remain the same"), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-december2018/dec18_bigdata_rndtbl_12_17f.pdf.

COMPETITION DAMAGES PROCEEDINGS IN GERMANY – THE NEW RULES ON DISCLOSURE

BY DR. TILMAN MAKATSCH & BABETTE KACHOLDT[1]

1 Head of Competition Litigation and Antitrust Economics, Deutsche Bahn; and Senior Legal Counsel Competition Litigation, Deutsche Bahn. Views expressed in this article are those of the authors and do not necessarily reflect the views or policies of Deutsche Bahn AG or its subsidiaries.

I. INTRODUCTION

In 2017, the German Act Against Restrictions of Competition ("ARC") was amended to implement the EU Cartel Damages Directive ("Damages Directive").[2] The amendment aims to reinforce the claimants' position in damages proceedings relating to the infringement of EU and national competition law.[3] This aspect is also highlighted in the legislative materials provided by the German legislator.[4] The rules now enshrined in the ARC apply to claims for damages related to all types of competition law infringements. Thus, while this article focuses on cartel damages claims, the provisions described and analyzed below also apply, *mutatis mutandis*, for cases concerning, for example, vertical restraints or abuse of dominance.

Many rules set out in the Damages Directive were already part of the German system applicable to cartel damages proceedings. One of the most important new developments brought about by the implementation of the Damages Directive into German law is the introduction of disclosure rules, i.e. the possibility for a party to cartel damages proceedings to request disclosure of evidence and information from the respective other party to the cartel damages proceedings and third parties. These far-reaching provisions are an exception to the general rules governing civil litigation in Germany.[5]

This article provides a (non-exhaustive) overview of several important aspects of the newly created system of disclosure, including instances where the German legislator introduced rules that go beyond the requirements of the Damages Directive. It further highlights some of the issues parties may encounter, and makes suggestions on how to address them. So far, there are very few court decisions that deal with the new provisions. While this lack of guidance can lead to uncertainty, it can at the same time prove to be advantageous, as it allows parties to cartel damages cases to develop (new) arguments and to shape the interpretation of the new rules.

II. APPLICABLE RULES, (POTENTIAL) ISSUES AND HOW TO DEAL WITH THEM

Upon implementing the provisions on disclosure included in the Damages Directive, the German legislator created a set of rules applicable only to damages proceedings based on breaches of competition law and not in respect to other civil (damages) proceedings.

A. Background

The rationale underlying the introduction of the rules on disclosure enshrined in the Damages Directive, as well as the provisions implementing the directive in Germany, was to remedy the – perceived – lack of information damages claimants were facing in the past.[6]

Some concerns were raised in the legal community that far-reaching discovery resembling proceedings in the U.S. would now also become part of cartel damages proceedings in Germany.[7] However, while further developments can only be predicted to a certain degree, it appears unlikely that "U.S.-style" discovery will be established in Germany: The German legislator sought to ensure that the system does not allow parties to cartel damages proceedings to embark on "fishing expeditions."[8] Indeed, a number of requirements have to be successfully met in order to request disclosure of evidence from the respective other party, or third parties, in cartel damages proceedings. These requirements are quite specific and distinguish the German system of disclosure from the discovery rules applicable to U.S. proceedings and the disclosure rules applicable to UK proceedings.

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2 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union; OJ 2014 L 349/1.

3 Damages Directive, recital 3 et seqq.

4 Publication of the Parliament (BT-Drs.) 18/10207, available at http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf, p. 1, 39.

5 To some extent, disclosure plays a role in cases dealing with violations of intellectual property rights. The system of disclosure applied in these cases is however regulated by fewer, less comprehensive legal provisions and is, to a large extent, based on case-law. Further, § 142 of the German Code of Civil Procedure also stipulates that in civil proceedings, one party may request disclosure of very specific documents from the other party. However, the scope of disclosure under this provision is very narrow, and it was hardly ever used in cartel damages proceedings.

6 EU Cartel Damages Directive, Recital 15; see also legislative materials, Publication of the Parliament (BT-Drs.) 18/10207, available at http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf, p. 39.

7 Podszun, Stellungnahme zum Regierungsentwurf, S. 23; Podszun/Kreifels GWR 2017, 67, 69.

8 Preuß, WuW 2017, 301.

B. Content of the New Provisions on Disclosure

1. Relevant Provisions

The core element of the new system of disclosure, the "Right to have Evidence Surrendered and Information Disclosed," as the official translation of the provision reads,[9] is set out in Section 33g ARC. This provision is accompanied by specific procedural rules (see Sections 89b and 89d ARC).

2. System

The claim for access to evidence[10] and information can be raised by both the cartel victim (Section 33g (1) ARC) and the cartelist (Section 33g (2) ARC). Notably, when creating Section 33g (1) and (2) ARC, the German legislator went beyond the requirements of the Damages Directive. Section 33g (a) and (2) ARC grant a substantive right to request disclosure of specific pieces of evidence and/or information, rather than introducing mere procedural rules on disclosure,[11] although the latter would also have been sufficient to comply with the Damages Directive.[12]

Both the cartel victim and the cartelist may request disclosure from the respective other party, as well as from third parties. There are, however, some slight differences with respect to the requirements the cartel victim and the cartelist have to fulfill to successfully request disclosure.

a) Requirements to be fulfilled by the cartel victim

- Pursuant to Section 33 (1) ARC, the cartel victim can request disclosure of documents or information which are necessary for a claim for damages, provided the cartel victim:
- credibly demonstrates to the satisfaction of the court that he has a claim for damages, and
- specifies the item(s) or information to be disclosed as precisely as possible on the basis of reasonably available facts.

The claim can also be raised pre-trial, i.e. prior to commencing an action for damages.

To date, there is no settled case law that specifies the amount and type of information cartel victims have to provide to "demonstrate" their claim "to the satisfaction of the court." In this context, it has to be kept in mind that disclosure is intended to help the claimant gain access to "evidence necessary for a claim for damages." Hence, it would appear illogical if the cartel victim was required to substantiate and provide evidence for his claim to the same extent that would be required to satisfy the court when it rules on the actual damages claim. Some guidance can be derived from the example set by the jurisprudence in cases dealing with violations of intellectual property ("IP") rights, where disclosure requires a "significant degree of probability" that there was an infringement of IP rights.[13] However, and until the courts provide further guidance, to minimize the risk that their request is thrown out, cartel victims at this stage can only be advised to be as comprehensive as possible when they request disclosure pursuant to Section 33g (1) ARC.

Further, Section 33g (1) ARC requires the claimant to specify the item to be disclosed as precisely as possible. There is no jurisprudence yet available on the level of detail required. Some guidance can be derived from the Damages Directive, which states in Article 5 (2) that the national legislators shall ensure that courts can also order the disclosure of "categories of evidence." This implies that the claimant cannot be required to, for example, identify individual documents. It remains to be seen whether courts will accept descriptions of evidence to be disclosed that reflect the approach taken by competition authorities when they issue requests for information.[14] Further, it is still unknown whether courts will consider e-searches to be a viable instrument to identify the relevant documents.

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9 See the English translation of the ARC provided by the Federal Ministry of Justice and Consumer Protection, available at http://www.gesetze-im-internet.de/englisch_gwb/.

10 In cartel cases, evidence is mostly provided in the form of documents; other means of evidence (e.g. objects to inspect, such as electronic data) would also be admissible. In the following, where reference is made only to documents, the rules on disclosure also apply to other means of evidence.

11 BT-Drs. 18/10207, 62.

12 Klumpe/Thiede, NZKart 2016, 471, 471; Lübbig/Mallmann, NZKart 2016, 518, 519.

13 See e.g. *Bornkamm/Tolkmitt* in: Langen/Bunte, Kartellrecht, 13th ed. 2018, Introduction to §§ 33 et seqq., para. 9.

14 For example. "Provide all emails sent by custodian X between date A and date B concerning the topic "price setting.""

In this context, the question has been raised what type of information the claimant would actually need to establish and quantify damages claims – Section 33g (1) ARC refers to evidence "necessary" for a claim for damages.

At least in follow-on cases concerning hardcore cartels, the interplay between Section 33g (1) ARC and the binding effect of decisions issued by competition authorities, Section 33b ARC,[15] together with the statutory assumption that hardcore cartels cause damages now enshrined in Section 33a (2) ARC or the rules on prima facie evidence developed in case-law,[16] implies that in these cases cartel victims' requests for disclosure will center on documents and information required to quantify the harm caused by the cartel. In other cases, where there is no assumption that the competition law infringement caused harm (e.g. in cases concerning the abuse of dominance, or stand-alone cases), this will differ.

One item the cartel victim would in most (if not all) follow-on cases need access to is the competition authority's decision establishing the competition law infringement. Since access to this decision lies at the heart of any potential damages claim, and to avoid undue delays in granting the potential cartel victim access to the decision, the legislator introduced Section 89b (5) ARC. This procedural provision stipulates that the victim may apply for an interim order against the cartelist to disclose the decision. The provision stipulates that the applicant does not have to fulfill all the usual requirements for successfully applying for an interim order. The exact interpretation of this provision has been subject to debate among practitioners and scholars and was also the subject of one of the first court rulings on the new disclosure rules. Under the general rules for civil procedures in Germany, applicants for interim orders have to demonstrate that they have a claim, and that a decision is urgent. While there is consensus that applicants for an interim order would have to demonstrate that there is a certain degree of probability that they were harmed by the cartel (by providing e.g. a press release issued by the relevant competition authority, as well as proof that they purchased cartelized products from the cartelist during the cartel period), there is dissent on whether there is simply no requirement to demonstrate the urgency of the matter,[17] or whether there is a statutory assumption that the matter is urgent, which can be disproved by the claimant's behavior (e.g. if he waits too long to apply for an interim order after he learned about the cartel).[18] The Higher Regional Court in Düsseldorf followed the latter approach in a much-debated decision.[19] Other courts can be expected to follow this example.[20] Thus, claimants who intend to apply for an interim order pursuant to Section 89b (5) ARC are advised to file their application within weeks of learning about the competition authority's decision, to the extent that this is possible.[21]

b) Requirements to be fulfilled by the cartelist

Cartelists can also request disclosure of documents or information, provided they meet certain requirements. After damages proceedings have been initiated or disclosure has been requested by the cartel victim, these requirements mirror those to be fulfilled by the cartel victim. However, cartelists can only request pre-trial disclosure if certain additional conditions are fulfilled. In detail:

First, the cartelist can request disclosure of documents or information necessary for the defense against a claim for damages, provided:

- a case for a cartel damages claim is pending, or disclosure has been requested by the cartel victim, and
- the cartelist specifies the item(s) to be disclosed as precisely as possible on the basis of reasonably available facts.[22]

15 Where damages are claimed for an infringement of a provision of the ARC or of Articles 101 or 102 TFEU, the German court ruling on the damages claim shall be bound by a finding that an infringement has occurred, as made in a final decision by the German competition authority, the European Commission, or the competition authority – or court acting as such – in another EU Member State. The same applies to such findings in final court judgements on appeals against any such decision.

16 According to the transitional provision of § 186 (3) ARC, § 33a (2) ARC is only applicable to claims for damages that arose after December 26, 2016, the deadline for the implementation of the EU Damages Directive (see Article 21 (1) of the Damages Directive). For claims that arose prior to this date, courts have in the past used rules on *prima facie* evidence developed by the jurisprudence. On December 12, 2018, the Federal Court of Justice handed down a judgment which might limit the scope of the application of *prima facie* evidence. At the time this article was prepared, the judgment had not yet been published, thus, the impact of the judgment on the rules on *prima facie* evidence could not be determined.

17 Langen/Bunte/*Bornkamm/Tolkmitt*, Kartellrecht, 13th ed. 2018, § 89b, para. 31

18 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

19 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

20 See, so far, Regional Court Stuttgart, judgment of June 20, 2018 – 30 O 79/18.

21 According to the Higher Regional Court Düsseldorf, applicants could be required to apply for an interim order within four weeks.

22 The discussion regarding the level of detail to be provided when specifying the documents to be disclosed described above in section 1.2.2.1 also applies with respect to the defendant.

Second, prior to the initiation of proceedings by the cartel victim, the cartelist may request disclosure, provided he

- has applied for a declaratory decision that another party has no cartel damages claim against him, and
- he does not contest the infringement upon which the expected (alleged) claim for damages is based.

The majority of the cartelists' requests for disclosure will most likely focus on documents and information that are required to argue that the cartel victim did not suffer any harm because any overcharge related to the competition law infringement was passed on to customers on the downstream market (pass-on defense).

c) Proportionality

Both cartel victims' and cartelists' requests for disclosure will only be successful if the disclosure is proportionate (see Section 33g (3) ARC). The provision sets out a non-exhaustive list of aspects to take into consideration when determining whether disclosure would be proportionate:

1. the extent to which the claim is based on available information and evidence;

2. the scope of evidence and the costs of surrendering the evidence, in particular where such evidence is requested from a third party;

3. the exclusion of a discovery of facts that are not relevant for the enforcement of the claim or for the defense against such claim;

4. the binding effect of infringement decisions issued by competition authorities;

5. the effectiveness of public antitrust enforcement;

6. the protection of operating and business secrets, as well as any other confidential information, and the protective measures taken for this purpose.

To date, there is no jurisprudence available that would provide guidance on the interpretation of the criteria listed above. However, a number of issues that need to be addressed by parties to damages proceedings have already been identified:

The scope of disclosure is directly related to the costs of disclosure: the broader the scope, the higher the costs, in particular if parties are requested to carry out e-searches across their IT-system. So far, it is unclear whether time-consuming and costly e-searches will be considered proportionate by the courts, and whether the amount of damages sought will play a role in the assessment. In any event, it would be advisable to map out the scope of e-searches as precisely as possible upfront, and to demonstrate why there are no other equally effective means to identify the relevant information.

Another area which can be expected to give rise to disputes is that of confidentiality claims, and especially the protection of business secrets included in documents to be disclosed. So far, there is no established practice in relation to cartel damages claims, and it is not quite clear yet what mechanisms will be used to protect business secrets. German courts dealing with cartel damages cases might follow the practice developed by courts dealing with IP cases.[23] Another option would be to use mechanisms that resemble "confidentiality rings" in UK cases.[24]

d) Cases in which disclosure is permanently or temporarily excluded

Disclosure is excluded if any provision that permanently or temporarily prohibits disclosure applies.

23 In IP cases, a three-step procedure applies: (i) inspection of the piece of the relevant piece of evidence by an expert nominated by the court; (ii) preparation of an expert report that is made accessible to the court and the attorney of the respective opposing party, who is bound by secrecy and may not disclose any details *vis-à-vis* his client; (iii) decision of the court on disclosure of expert report *vis-à-vis* the party, possibly with redactions applied to the report.

24 Confidentiality rings or "clubs" refer to the imposition of restrictions in the disclosure process (e.g. determination of the individuals representing the opposing party who may access documents, and how the information they contain may be disseminated; in some cases, access to documents may even be granted solely to the opponent's external legal advisors). The exact scope of access and the restriction mechanism may be negotiated by the parties.

Most importantly, disclosure of immunity applications and settlement submission is permanently prohibited (Section 33g (4) ARC). This prohibition mirrors the prohibition set out in Article 6 (6) of the Damages Directive. The exception does not apply to so-called pre-existing documents, i.e. to documents that exist independently of the proceedings of a competition authority.[25] Section 33g (4) ARC seeks to reconcile the demands of public and private enforcement of competition law. Immunity applications are one of the most important means for competition authorities to discover – previously secret – cartels. Concerns were raised that undertakings would shy away from blowing the whistle if they were afraid that their confession of wrongdoing would be made available to potential damages claimants. Whether the same argument can be used to explain why settlement submissions shall be protected against disclosure may be debated, as settlements in essence allow for more efficient and faster termination of competition authority proceedings. Whether the prohibition of disclosure of immunity applications and settlement submissions is compatible with primary EU law is subject to debate.[26] In any event, it would be up to the European Court of Justice to rule on this question if it is submitted by a national court for a preliminary ruling. Until then, the provisions remain applicable.[27]

Further, disclosure is permanently excluded if a right to refuse disclosure applies (see Section 33g (6) ARC). This concerns members of the legal profession, as well as journalists and clerics,[28] and information that constitutes art and trade secrets.[29]

Lastly, disclosure of documents is temporarily excluded until the final conclusion of the competition authority's proceedings against all parties involved if, and to the extent that, it contains (i) information that has been produced by a natural or legal person or association of persons specifically for the competition authority's proceedings; (ii) communications from the competition authority to the parties to the proceedings; or (iii) settlement submissions that have been withdrawn (see Section 33g (5) ARC).

3. Further applicable rules

The German legislator has introduced some additional rules that go beyond the requirements of the Damages Directive.

a) Reimbursement of costs

Whilst the costs of disclosing documents (or information) requested under Section 33g (1) and (2) ARC have to be taken into account to determine whether disclosure would be proportionate (see section 2.2.2.3 above; see also Article 5 (3) (b) of the Damages Directive), Section 33g (7) ARC stipulates that where the person or undertaking obliged to disclose documents or information incurs costs which may reasonably be considered necessary, the person or undertaking shall be entitled to claim reimbursement for these costs. The introduction of this provision has been criticized. It is unclear how it relates to the question of whether costs incurred render the disclosure disproportionate. One possible explanation is that proportionality does not only relate to costs in a monetary sense, but also to effort, time spent on the compilation of the relevant documents, etc. Another question that will have to be answered is how the "loser pays" rule applicable in German civil proceedings[30] affects Section 33g (7) ARC. One solution could be that expenses for reimbursements under Section 33g (7) ARC are taken into account when the amount to be paid by the losing party to compensate the winning party's expenses is determined, to avoid a situation in which a party has to bear considerable costs despite having won its case. On the other hand, it could be argued that the legislator sought to create a substantive provision, which must not be undermined by procedural rules. It remains to be seen which approach the court will follow in the future. In any event, to minimize risks, it is advisable for parties to cartel damages to ensure that costs for disclosure are kept under control, e.g. by carefully determining the information that is actually required to substantiate a claim, or the defense against a given claim. Further, it could be advisable for parties to negotiate the scope of the disclosure and the evidence sought, and to determine upfront whether evidence shall be identified by way of an – often costly – e-search, or whether there are other means of identification available, to avoid unnecessary costs.

25 See § 33g (4) sentence 2 ARC; see also recital 28 of the Damages Directive.

26 See e.g. Kersting, WuW 2014, 564, 566 f.; Makatsch/Mir, EuZW 2015, 7, 9; Petrasincu, WuW 2016, 330, 333.

27 Where a party obliged to surrender evidence claims that a piece of evidence or parts thereof are excluded from disclosure because they constitute immunity applications or settlement statements, the party requesting disclosure may demand that the relevant documents are made available to the competent court for the sole purpose of examining the validity of this claim; see § 33g (4) sentence 3.

28 The latter can refuse disclosure only to the extent the documents or information relate to editorial work or pastoral work respectively, and not where they relate to matters purely concerning e.g. advertising or administrative matters of the church.

29 Courts may examine whether the exception applies, see § 33g (6) sentence 2.

30 In German court proceedings, the "loser pays"-rule applies. However, only court fees and statutory minimum fees for attorneys are subject to the statutory obligation to reimburse the winning party; any costs for lawyers exceeding the minimum statutory fees have to be borne by the party itself.

b) Damages in case of incorrect or incomplete disclosure

The German legislator went beyond the requirements of the Damages Directive when he stipulated that, where a person or undertaking obliged to disclose evidence or information provides incorrect or incomplete evidence or information, they shall be liable for any damages incurred by the person or undertaking requesting disclosure (Section 33g (8) ARC). The Damages Directive itself only states that penalties available to the courts shall include the possibility of drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility to order the payment of costs (Article 8 (1)). Indeed, it will be difficult to determine the harm suffered where disclosure was incomplete or incorrect – a comparison would have to be made against the (hypothetical) situation that full or correct disclosure took place. Without the correct information being available, it will probably be impossible to make that comparison.

4. Interplay between disclosure pursuant to § 33g ARC and access to the competition authorities' files

Besides disclosure pursuant to Section 33g ARC, another source of information especially for cartel damages claimants could be the competition authorities' files. However, the German legislator determined that disclosure by the opposing party or third parties shall be the primary source of information in civil proceedings. Evidence or information from the authorities' files will only be made available if it is not available from other sources (Section 89c (1) No. 2 ARC). Therefore, whilst the German Federal Cartel Office was reluctant to grant access to its files beyond access to the fining decision prior to the entry into force of Section 89c ARC, it has now become even more difficult to access the evidence or information included in these files.

C. Jurisprudence Concerning New Rules: Interpretation of the Transitional Provisions, § 186 ARC

So far, there are hardly any court decisions dealing specifically with the application of the new rules on disclosure.

Two subsequent decisions handed down by the Higher Regional Court Düsseldorf were, however, remarkable. They concerned, inter alia, the question of whether the new rules on disclosure are also applicable in cases where proceedings were initiated after December 26, 2016 (the deadline for the implementation of the damages directive into national law) while the claim arose prior to this date.[31] Eventually, the court held that only the procedural rules (Section 89b ARC), in conjunction with pre-existing general rules on disclosure enshrined in the Code of Civil Procedure (which are of limited scope), but not the substantive right to request disclosure (Section 33g ARC), would be applicable in these cases. This triggered a heated debate among scholars and practitioners, especially since the legislative materials and the provisions of the Damages Directive suggest a different interpretation of the law.[32] Nevertheless, it is to be expected that for the time being lower courts will follow the example set by the Higher Regional Court in Düsseldorf. It will be up to the parties to find arguments for why the procedural rules on disclosure are to be interpreted in a manner that leads to results equal, or at least close to, those of the direct application of the substantive rules on disclosure set out in Section 33g ARC.

III. CONCLUSION

It is to be expected that disclosure will be another area that will give rise to discussions in cartel damages proceedings, in particular as the new rules require interpretation in many instances, and there is little guidance available to date.

The question has been raised whether the new provisions will be used more frequently by cartel victims, or by cartelists. At least in follow-on cases, the answer is not as straightforward as it may appear at first glance: Cartel victims need access to various pieces of information beyond the competition authority's decision (which has a binding effect, Section 33b ARC) – as explained in the Introduction, the disclosure rules were introduced to reinforce their position. At the same time, the cartelists may also benefit from the new disclosure rules, especially in cases where they seek access to the information required to successfully raise a pass-on defense. Thus, they might indeed make use of the new rules on disclosure to gain access to information in the possession of the claimant to a greater extent than anticipated when the new rules were introduced.

31 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

32 See e.g. Petrasincu/von Steuben, NZKart 2018, 286; Soyez, WuW 2018, 368.

It is not to be expected, however, that "U.S. style" discovery will now also be implemented in Germany. This assessment is reinforced by previous experience in German proceedings: While the Code of Civil Procedure contains a provision that enables a party to civil proceedings to request that the opposing party hands over documents,[33] courts were rather reluctant to apply this provision in practice, and hardly ever did so in cartel damages cases in the past.

It also remains to be seen whether the application of the newly created rules will lead to delays in cartel damages cases – there certainly is a risk that proceedings will be prolonged, especially since courts may stay proceedings on the substance of the damages claim while proceedings regarding disclosure are pending (Section 89b (4) ARC). Such a development would run counter to the interest of the cartel damages claimant, whose position the legislator intended to reinforce. At the same time, avoiding delays may also be in the interest of the cartelist, as during proceedings, interest will accrue which, in cases concerning large claims, can amount to sums that equal or even exceed the actual damage claim.

Overall, since neither courts nor legal advisors have had time yet to gain much experience with the new rules yet, parties to cartel damages proceedings are well advised to communicate openly with the courts and – to the extent that it is legally possible and strategically advisable – the opposing party to find a way of applying the new rules that prevents undue delays and avoids any unnecessary costs and other unpleasant surprises.

33 See § 142 of the Code of Civil Procedure.

PRIVATE ENFORCEMENT OF U.S. ANTITRUST LAW — A COMMENT ON THE U.S. COURTS DATA

BY DANIEL A. CRANE[1]

1 Frederick Paul Furth, Sr. Professor of Law, University of Michigan; Counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP.

I. INTRODUCTION

With the growing expansion of private antitrust enforcement in Europe and many other parts of the world, the features and effects of the U.S. private antitrust litigation system are due for reexamination. Much of the existing discussion tends to focus on case law developments—such as standing, class action, pleading, or damages rules—that shape the kinds of cases that plaintiffs bring and their disposition. There is also a significant literature on the relationship between private and public enforcement, with the predominance of private litigation in the U.S. an outlier compared to most other antitrust enforcement systems.

Relatively little attention is paid in the academic literature to statistical trends in private litigation filings and disposition. While it is common to hear influential people like Richard Posner assert (or perhaps quip) that "antitrust is dead,"[2] anyone surveying the thousands of well-heeled people mingling at the American Bar Association Antitrust Section's Spring Meeting would have to realize that antitrust law is keeping lots of people busy—and well paid. This is certainly no evidence of antitrust's effectiveness, but it does suggest that, whatever else it may be, the enterprise is far from dead.

In the U.S., at least, much of the action is in private litigation. Every year, the Administrative Offices of the U.S. Courts release workload statistics for the federal courts.[3] While highly imperfect due to reporting quirks (i.e. how case statistics are reported are, in part, a function of how litigants self-describe their matters),[4] the statistics do provide a useful overview of enforcement trends, particularly when viewed longitudinally and comparatively.[5] Also, the continuous reporting of the Administrative Offices' data provides an advantage over periodic empirical studies, which can quickly fall out of date. Though rough, the Administrative Offices' data are the best resource available to track statistical trends in private antitrust enforcement. In this essay, I will review the U.S. Courts statistics on private antitrust litigation and offer a few comments about what they reveal about the enterprise of private antitrust enforcement.

II. OVERVIEW — TOTAL CASE FILINGS OVER TIME

Table 1 below shows the reported number of private antitrust case filings from the earliest data that the U.S. Courts' data are available — 1961 — to the present. In broad brush terms, the data reflect the following narrative: From the 1960s to the mid-1970s, private antitrust litigation quadrupled, as part of the post-War private litigation explosion.[6] From the late 1970s to the early 1980s, the numbers reversed course and eventually reached an equilibrium at around half of their mid-seventies peak. The explanation for the decline can be largely found in a number of currents of judicial hostility to private antitrust enforcement. The creation of the antitrust injury requirement,[7] tightening of standing requirements,[8] and Chicago School era contraction of liability norms in such areas as vertical restraints and exclusionary conduct[9] created a less hospitable environment for new federal claims.

2 See, e.g. David Dayen, *This Budding Movement Wants to Smash Monopolies*, The Nation (April 4, 2017) (reporting Judge Richard Posner's assertion that "Antitrust is dead, isn't it?") https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/.

3 The data can be found at http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

4 For example, class action lawsuits concerning the same claim may be reported either separately or collectively, which can result in significant swings in the data. *See* William H.J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 484 n. 27 (2017) ("Examination of administrative data and hand-coded docket records reveals large numbers of separate but related antitrust case filings, which leads to large numbers of virtually identical cases that are often consolidated in ways that lead to case outcomes (such as transfer or consolidation) that are not informative on the filing or resolution of MTDs.").

5 On the statistical reliability of the U.S. Courts' data, see generally Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Offices of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre D. L. Rev. 1455, 1496 (2003) (concluding, based on empirical analysis, that the Administrative Office's "data can provide reasonably accurate estimates of the proportion of cases in which plaintiffs win damages judgments").

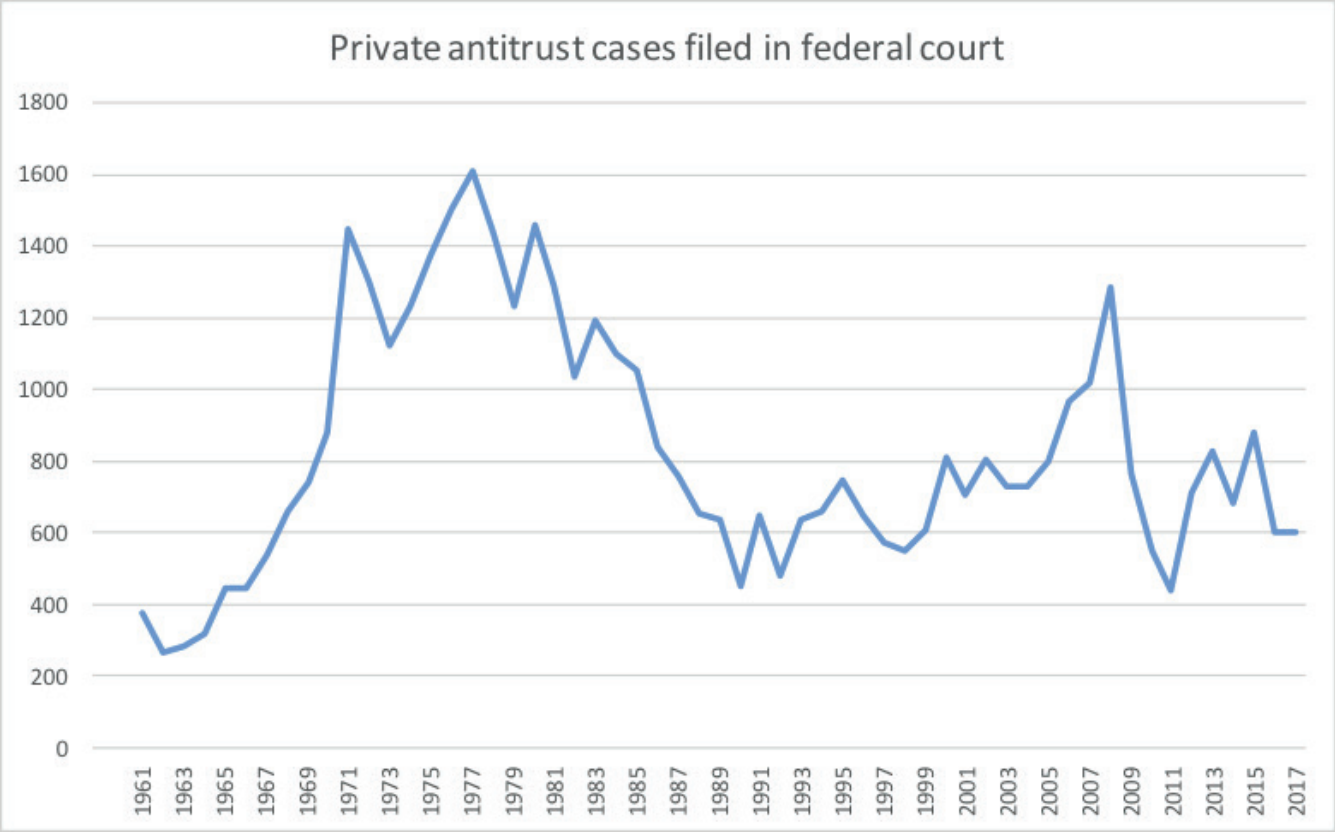
6 On the post-war litigation boom, see generally Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. 12 (2010).

7 E.g. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. 489 (1977) (creating antitrust injury requirement—that plaintiff demonstrate "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

8 E.g. *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) (prohibiting suit by "indirect purchasers," i.e., those who did not purchase directly from the defendant).

9 E.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 26 (1977) (abolishing per se illegality for non-price vertical restraints); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (announcing skepticism toward predatory pricing theories and requiring plaintiffs to present economically plausible theories of collusion and exclusion).

Still, the "new normal" of the eighties forward represented a level of private enforcement considerably higher than the baseline in the early 1960s. Of course, since the country's population grew over this period it wouldn't be fair simply to look at raw numbers, but the growth was significant even when adjusted for population. Take, as representative, the years 1964, in which 317 cases were filed (1.65 cases per million people), and 1987, in which 758 cases were filed (2.97 per million people). Despite the judicial backlash of the 1970s and 80s, private antitrust litigation had become a significant feature of U.S. antitrust enforcement.

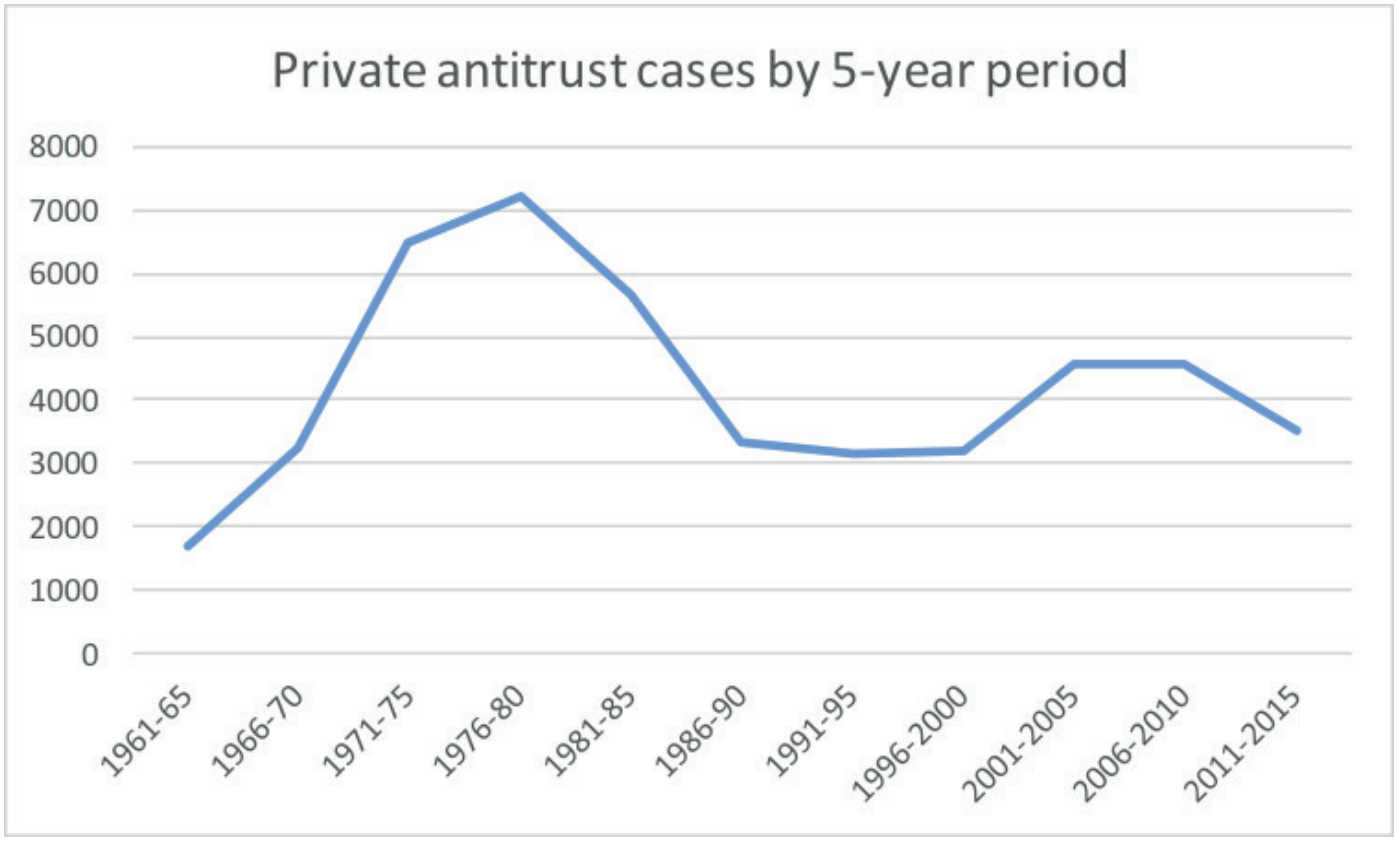


The 2000s brought a new run-up in private antitrust litigation, with a peak reminiscent of the mid-70s occurring right on the brink of the financial crisis. The numbers then plummeted back down to approximately 1990s levels, before taking a run back up and then falling off again in the last two years.

One interpretive question concerning the data concerns the effects, if any, of the U.S. Supreme Court's Twombly[10] decision on new case filings. Since *Twombly* came right on the eve of the financial crisis, it is difficult to disentangle the effects of *Twombly's* heightened pleading standard from the effects of the financial crisis. However, the rebound to roughly pre-*Twombly* levels in the mid-2010s suggests that, whatever else it may have done, the *Twombly* decision had little significant long-run impact on the sheer number of new antitrust case filings.

Although Table 1 suggests somewhat of a see-saw trend line, if presented by a five-year period rather than annually (thus smoothing out reporting anomalies to some extent), the data suggest a story of relative stability in private filings from the mid-1980s to the present. Changes in political administration, in the economy, and in procedural or substantive antitrust law over this period have not significantly affected the volume of private antitrust filings. While the numbers of new private filings have dipped below "normal" levels in the first two years of the Trump administration, it remains to be seen whether this represents a long-term trend or merely statistical "noise."

10 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (rejecting conclusory pleading of conspiracy and requiring plaintiff to assert economically plausible claims of conspiracy in order to withstand motion to dismiss the complaint).



III. DISMISSAL RATE, SETTLEMENTS, AND TRIALS

The U.S. courts reports do not provide the sort of detailed information about antitrust cases that would be necessary to replicate the empirical work done 35 years ago in the informative Georgetown Study of Private Antitrust Litigation.[11] (Incidentally, if anyone interested in private antitrust enforcement is looking for a worthwhile empirical project, updating the influential Georgetown study would be a great service to the antitrust community). For example, it is not possible to discern basic facts like whether the case raised cases of collusion under Section 1 of the Sherman Act or exclusion under Section 2, whether the case followed government litigation, whether it was a class action, or the identity of the plaintiff (i.e. customer, competitor, other). Even beyond the previously acknowledged reporting issues, the data reported are quite limited, and hence so are the inferences one can draw.

Nonetheless, the limited data reported do enable some inferences to be drawn. In each reporting year, we learn (1) how many private antitrust cases were terminated in the federal courts; (2) how many were terminated through no action of the court; (3) how many were terminated by court action before the pretrial conference; (4) how many were terminated by court action after the pretrial conference; (5) the percentage reaching trial; and (6) within the cases reaching trial, the break-down between jury and bench trials.[12] We can further specify category (2) — termination with no action of the court — as consisting mostly of settlements. (Some plaintiffs may voluntarily dismiss without a settlement, but those instances are relatively rare). Ideally, one would like to capture the defendant success rate on motions to dismiss and for summary judgment, but the data do not permit inferences as to those gradations. Category (3) — termination by court order before the pretrial conference, includes all involuntary dismissals under Federal Rule of Civil Procedure 12, but it also includes any summary judgment motions granted prior to the pretrial conference. Category (4) — termination between the pretrial conference and trial, probably consists mostly of late-granted summary judgment motions (*in limine* motions typically would not result in the total dismissal of a case, but rather the settlement negotiation dynamics).

For this essay, I compiled the data from 2002-2017, in part in order to capture the five-year period prior to *Twombly*. Some results of interest: Over the relevant period, the percentage of cases resolved through settlement, involuntarily dismissed by the court, and trial remained pretty constant: roughly 25 percent of all cases are settled, 74 percent involuntarily dismissed, and (on average) about 1 percent tried. Given the vanishingly small number of trials, the jury/bench trial mix varies somewhat by year, but skews 105-49 in favor of jury trials in total.

11 See Lawrence J. White, *The Georgetown Study of Private Antitrust Litigation*, 54 Antitrust L. J. 59 (1985).

12 Table C-4 in the Administrative Office's annual reports contains these data.

One would have wanted to test the effects of *Twombly* on involuntary case dismissals, but the data allow only glimpses through glass darkly. Comparing the five years preceding *Twombly* to the five years following *Twombly*, the data show the total involuntary dismissal percentage rising from 73 percent to 78 percent. However, contrary to popular wisdom, the data also show that that, post-*Twombly* a greater share of cases dismissed were being dismissed after the pre-trial conference than during the earlier period. In the five years preceding *Twombly*, 88 percent of involuntarily dismissed cases were dismissed pre-trial, whereas in the five years following *Twombly*, only 82 percent of all involuntarily dismissed cases were dismissed pre-trial. Could *Twombly* really have made courts more willing to grant summary judgment compared to motions to dismiss? That result would seem counterintuitive, since the ostensible effect of *Twombly* was to grant district courts license to dismiss more cases at the pleading stage, prior to discovery. But perhaps *Twombly* forced plaintiffs to submit higher quality complaints on average, which in turn increased the attractiveness of summary judgment as a case-screening gate.[13] The data do not allow much room for these kinds of interpretations, underlying once again the importance of using the Administrative Office's reports as only a beginning point for asking statistical question about the incidence of private antitrust enforcement.

IV. CONCLUSION

Caution must again be urged with respect to the interpretation of these quite loosely reported and presented data. Overall, the inferences that I would defend most stoutly from the Administrative Office's data are these: In statistical terms, the incidence of private antitrust enforcement in the United States has been relatively stable since the mid-1980s, with aggregate annual new filings typically in the range of 600-900. Resolution by trial — whether jury or bench — remains a rare last resort, averaging often less than 1 percent a year. As a broad rule of thumb, a quarter of cases settle and the other three-quarters are involuntarily dismissed at the motion to dismiss or summary judgment stage — a ratio that has not been strongly affected over recent decades by case law developments or other factors. The numbers have dipped in the last couple of years; how long this trend of long-term stability continues remains to be seen.

13 To be clear, the U.S. Courts' data are far from sufficient to resolve the overall issue of the effect of *Twombly* on dismissal rates or the quality of pleadings — matters already discussed in a divided literature, much of it focusing on particular substantive areas other than antitrust. See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117 (2015) (empirically assessing the effects of *Twombly* and *Iqbal* on employment discrimination and civil rights cases). See also Gregory G. Wrobel, Michael J. Waters & Joshua Dunn, *Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, 26-FALL-ANTIRUST 8 (2011) ("Courts dismissed one or more antitrust claims in 74 percent of decisions (annual rates of 73 to 76 percent), and denied dismissal of one or more antitrust claims in 41 percent (annual rates of 39 to 46 percent and trending somewhat higher for 2008-2011)."); See also, Hubbard, *supra* n. 4 (reporting that "rates of dismissal with prejudice have held steady, motions to dismiss remain uncommon, and settlement and filing patterns have not changed appreciably in the wake of Twombly and Iqbal"); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1246-48 (2013) (collecting empirical studies on the effects of Twombly and Iqbal).

TRANSPOSITION OF THE ANTITRUST DAMAGES DIRECTIVE: CRITICAL OBSERVATIONS

BY BARRY RODGER, MIGUEL SOUSA FERRO & FRANCISCO MARCOS[1]



1 Professor, Strathclyde University Law School; Professor, University of Lisbon Law School; Professor, IE Law School.

I. INTRODUCTION

This article provides a brief overview of a research project recently undertaken by the co-authors, which sought to review and analyze the implementation of the Antitrust Damages Directive across a selected number of EU Member States ("MS") (The book based on the project, The Antitrust Damages Directive: Transposition in the Member States, was published by OUP in December 2018.) The project sought to examine the transposition of this Directive into national law primarily from a generic EU law implementation perspective, considering the MS processes followed in implementing the Directive. The book also looks more specifically at the national debates and their consequences for the substantive choices adopted in terms of implementation of the Directives various provisions.

While there has been some literature published on key substantive aspects of the Directive[2] this project was the first to deliver a comprehensive and important account of the transposition process and outcomes across the EU.

Because of the prevalence of private enforcement practices and the significance of the Directive's measures for competition litigation in certain MS, all of the "States with considerable private enforcement experience" within the EU were covered by the project: Belgium, France, Germany, Italy, Spain, the Netherlands, and the UK. We then selected four MS from "States with developing private enforcement experience": Greece, Ireland, Portugal, and Sweden; and three countries from the May 2004 Accession States: Hungary, Poland, and Lithuania. Finally we selected two MS from "States with limited private enforcement experience": Cyprus and Luxembourg. This article will provide a brief, critical overview of the Directive and its key provisions before outlining the findings of the research project comparing the transposition processes and outcomes in the selected MS.

II. THE ANTITRUST DAMAGES DIRECTIVE: AN OVERVIEW

The Directive can be considered as another step towards a progressive decentralization of enforcement, in which — for the first time — victims of antitrust infringements are given a main role in enforcing competition prohibitions. The Directive firmly empowers them to claim damages against infringers if there has been harm that can be proven and traced back to the infringement. In this regard, it consolidates the case-law of the ECJ and ultimately also reflects the influence of U.S. law,[3] where damages claims are the predominant way of making antitrust prohibitions effective.

The Directive enshrines the right to compensation for anyone harmed by an infringement of competition law and introduces several rules regarding the content, the features, and the exercise of such a right before national courts, but does not change the traditional dynamics of the relationship between EU law and MS' national laws regarding the conditions in which victims' claims have to be made. National rules on remedies, procedures, and institutions will be followed as long as the principles of effectiveness and equivalence are respected. Thus, it would clearly be going against the Directive if national rules made the right to compensation impossible or excessively difficult.

However, the Directive marks a meaningful retreat from the principle of MS remedial and procedural autonomy by introducing several rules that go, in various respects, beyond the mere recognition of the existence of a right to compensation (extending to the amount of compensation, limitation period, multiple liability, standing, quantification of harm, and binding force of final decisions of NCAs). MS will have to incorporate those rules to comply with the Directive. In addition, the Directive further introduces a discovery process to be inserted in the domestic civil procedure rules that is, for most MS, revolutionary. It will be a challenge for the parties and for courts to adequately put them into practice when the national legal system is not familiar with these tools.

The harmonization sought by the Directive is limited and fragmented and it extends to only some of the issues relevant for the exercise of damages claims. It presents an incoherent framework, regulating some issues but not considering or even mentioning others. At the same time, the Directive's provisions are inherently biased in addressing, for the most part, issues raised by follow-on claims, damage caused by cartels, and harm flowing downstream. Again, in matters upon which the Directive is silent, MS' domestic rules will continue to govern, subject to the principles of effectiveness and equivalence.

2 See *Shaping Private Antitrust Enforcement in Europe*, edited by Mel Marquis & Giorgio Monti, Hart Studies in Competition Law (Hart, 2018); *Competition Damages Directive, First Experiences of the New Regime*, edited by Vladimir Bastidas, Marios Iacovides & Magnus Strand (Hart 2018) and *Harmonising EU Competition Litigation: The New Directive and Beyond*, edited by Maria Bergström, Marios Iacovides & Magnus Strand (Hart, 2016).

3 The starting point in the U.S. is section 4 of the Clayton Act (15 U.S.C. §15): "*any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor (…) and shall recover threefold damages (….).*" See Niamh Dunne, "Antitrust and the making of European tort law," (2015) *Oxford Journal of Legal Studies* 21; Franck P. Maier-Rigaud, "Toward a European Directive on damages actions," (2014) 10/2 *Journal of Competition Law & Economics* 347.

In addition, many of the Directive's provisions that encroach upon MS remedial or procedural autonomy are drafted in a generic or vague manner, and this will surely raise interpretation problems in the future which may themselves render damages claims difficult. Questions remain in relation to many issues dealt with by the Directive, starting with its temporal scope; but uncertainties also persist in crucial aspects of multiple liability and claims by indirect victims when harm has flown along the supply-distribution chain (and the passing-on defence). Significantly, the most clear-cut and concise provisions of the Directive are those aimed at safeguarding public enforcement of competition law by restricting access to evidence contained in the files of competition authorities provided by the beneficiaries of immunity deals or by parties that have entered into a settlement agreement with a competition authority. The Directive sets absolute and temporal limits on access to these case files to prevent the disruption of public enforcement of competition law (leniency and settlement included). Nevertheless, even those rules may be controversial, as they run counter to the objective of facilitating damages claims since the prompt disclosure of information may ease the burden of proof and assist victims with the quantification of harm.

When compared to the pre-existing situation, it may be said that the Directive introduces some improvements to the rules and legal tools for bringing forward successful antitrust damages claims. However, the critique of many of its provisions by practitioners and academics may be justified. The Directive is short-sighted in omitting any provision dealing with two crucial issues that the Commission's preparatory work identified as being necessary for damages claims to be brought: funding of claims and collective redress. No such measures were ultimately introduced, nor are they expected in the near future. Moreover, some of the legal solutions that are provided in the Directive appear too vague or too complex, which will inevitably lead to interpretation problems that, in turn, may negatively affect the outcome of damages claims or even the incentive to bring claims in the first place.

Still, a more positive assessment is feasible. Focusing on its shortcomings, legal imperfections, and loopholes would not provide a full and accurate appraisal of its potential impact.

First, the Directive is the most recent step in the EU's policy of enhancing antitrust enforcement by looking at a particular aspect—damages claims by victims—which was not previously covered by EU rules; but this does not mean that it is the final or definitive step. At this stage, this is the most that the compromise of different affected interests could deliver.[4] The Directive itself provides for its review by the end of 2020 and, depending on its impact, amendments can be proposed to correct any weaknesses identified and to improve its rules (article 20).

Second, and more importantly, the Directive is an achievement in itself (as a corollary of the work by the European Commission on this subject), representing a significant component in the discussion of competition policy in the EU. The adoption of the Directive and its implementation by MS has publicised the availability of damages claims within the enforcement landscape. The debate around the transposition of the Directive has undoubtedly raised business' awareness of the use of antitrust claims alternatively as a weapon and as a shield, and a significant additional tool in the antitrust enforcement portfolio.[5]

Third, given that the Directive leaves room for national remedial and procedural autonomy, idiosyncratic rules within MS legal systems that do not contravene the principle of effectiveness will continue to exist and be applied. With this fragmented and incomplete harmonization of the Directive, interested parties will continue to be able to choose to litigate their claims in different MS, where they may perceive advantages.

Finally, it remains to be seen how the new rules adopted by MS in compliance with the Directive will enhance or promote damages claims in particular and private enforcement of competition law in general. The Directive will ultimately be regarded as a successful measure if it has a positive impact in terms of increasing the amount of successful damages claims in the MS national courts.

III. MEMBER STATE TRANSPOSITION OUTCOMES

The project has been particularly novel (though see also the more geographically limited work by Piszcz in relation the Central and Eastern European ("CEE") States),[6] in focusing on the transposition of the Directive across the EU MS. For this purpose, a cross-section of 16 MS were selected to analyse how the Directive was transposed in those MS, considering the debates raised about its potential impact and how best to incorporate it within the pre-existing national legal provision.

4 See "'One bird in the hand…' The Directive on damages actions for breach of the competition rules," (2014) 51 *Common Market Law Review* 1333–42.

5 See David J. Gerber, "Private enforcement of competition law: a comparative perspective," in Thomas M. J. Möllers & Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge: CUP, 2007) 450–1.

6 *Implementation of the EU Damages Directive in Central and Eastern European Countries* edited by Anna Piszcz (University of Warsaw Faculty Management Press, 2017).

The central narrative of the Directive and its reception across the States is that it ensures a certain minimum level of harmonisation of both important procedural and substantive rules which may be of significance for successful damages actions, with notable re-emphasis and reiteration of two established central principles: those of full compensation and effectiveness.

Nonetheless, in terms of both transposition processes and outcomes, one can witness, distinctive national contexts and stories. Transposition across those 16 MS has involved a variety of different processes, legislative measures, stakeholder involvement, level of parliamentary debate, and timescales for implementation. In relation to the actual Directive provisions, there has been considerable resort to the simple copy-out technique, though there have also been aspects of gold-plating, particularly in relation to the substantive scope of the Directive's provisions, albeit with considerable divergence across the MS. In some MS certain provisions were not transposed, often on the basis that there already was some national legal provision for the issue. The transposition of some provisions, for instance in relation to the binding effect of infringement decisions, clearly caused controversy in some MS, and there is also the possibility that some of the ways in which certain provisions were transposed will indeed be incompatible with the Directive. One of the underlying problems here, recognised in some of the transposition processes, was that the Directive was essentially drafted by a public agency lacking familiarity with the particularities and divergences that exist in national procedural, private, and indeed constitutional law provisions across the EU.

Despite this, it has been acknowledged that certain provisions introduce significant and important claimant-favourable changes to existing practice, for instance in relation to the time-bar limitation rules and knowledge requirement for triggering the limitation period, as discussed particularly in relation to the UK context. The provisions on discovery and access to documentation are particularly interesting in that the key provision in Article 5 required little or no changes to existing legal provisions in a few MS, whilst in most States the rules were perceived as constituting a revolutionary change in traditional modes of litigation practice. Notwithstanding these different impacts, the new provisions ironically also arguably constitute a retrograde step (at least from the perspective of potential cartel damages claimants) by backtracking from prior ECJ (and national) jurisprudence to automatically exclude litigant access to leniency application-based information.

IV. PROBLEMS AND LIMITATIONS IN THE TRANSPOSITION OF THE DIRECTIVE

Nonetheless, the key problems in implementing the Directive concern the gaps around and behind the framework of many of the legal provisions as set out therein. Some of the Directive's rules are drafted in broad and uncertain terms, providing discretion in their implementation, and many MS have opted for leaving to national courts the task of interpreting them. Indeed, there are a number of unresolved and complicated issues, for instance around the practical application of rules on the presumption of harm, passing-on, and quantification of damages, that are particularly important in ensuring the practical impact of the Directive on successful competition damages litigation.

There are a range of specific issues where the precise application of the provision has been neither clarified by the general terms of the Directive nor its equivalent transposition measure, and there is consequently both considerable uncertainty remaining and/or the adoption by MS of different views on how best and most appropriately to implement the provision. This is evidenced clearly for instance in relation to a number of key issues which may be central to establishing liability and which have already been considered by courts (or at least in theoretical debates considered by the national rapporteurs); three such issues are causality and fault requirements, how to determine liability within groups of companies, and how to apportion joint and several liability between co-infringers. In the short term, at least, there is a serious risk of inconsistency in approach between different national courts and, consequently, the potential and incentive for forum-shopping across the MS.

Moreover, certain fundamental mechanisms, institutions, and rules, which are essential for a thorough and effective system of competition law damages actions, have been omitted completely from the Directive framework. These issues are effectively unregulated at the EU level and have been left to MS to make appropriate provisions. The most significant absence is that of any Directive provision for collective redress (albeit noting the Commission's 2013 Recommendation on the issue), although some MS have taken the opportunity offered by the transposition process to review and reconsider their approach to consumer/collective redress in the context of competition law. Besides, the Directive has no provision in relation to specialised or centralised court structures within MS for dealing with competition litigation, despite a growing consensus about the value of a specialised judiciary in this context.

Finally, there is no Directive provision dealing with either litigation costs or funding mechanisms, which are essential for creating a vibrant competition Bar and which make different legal systems more attractive to competition claimants. Accordingly, there is both uncertainty and some scepticism among the MS about the extent to which the Directive and the national transposition measures will produce a significant impact on the level and success of competition damages actions. However, to a great extent this is dependent on the number and quality of public infringement decisions for subsequent follow-on cases, which consequently help to establish a sustained body of litigation practice thereby enhancing awareness of competition law, culture and rights. In the meantime, it is likely that the larger MS, notably Germany, the Netherlands, and the UK (at least until Brexit has an impact) will continue to be the most attractive fora for much of the pan-European damages litigation actions.

V. CONCLUDING REMARKS

It has been suggested that many of the substantive issues established by the Directive provisions and implemented by the transposition measures will require further interpretation by national courts, and subsequently the ECJ. The transposition of the Antitrust Damages Directive can be viewed as part of a slow process of minimal harmonisation of aspects of the procedural and substantive rules surrounding private antitrust enforcement, set in the context of national institutional, substantive, and procedural contexts and rules, and the overarching EU law requirement that these contexts must ensure the effectiveness of EU law rights. There already are some challenges to pre-existing national provisions in light of the Directive and it will be interesting to follow the development of the ECJ case-law in the near future in determining the compatibility of MS legal systems post-transposition with the effectiveness of EU law.

This new regime has introduced special rules for antitrust damages actions, which derogate a great number of general principles and rules in the domestic legal orders of several MS. The Directive has already led to changes beyond its strict scope, namely as a result of the MS option to harmonise the rules applicable to EU law and to purely national law infringements. But it is possible that the existence of these special rules in the legal orders of the MS, relating to access to evidence, to time-barring, etc., which were introduced because they were deemed necessary for ensuring the effectiveness of the rights being protected, will, in the long run, lead to a broader debate about the justification of the more restrictive general regimes. The Damages Directive may prove to be just one of the first steps in a much wider reform of the legal systems of the MS.

BALANCING EFFECTIVE PUBLIC ENFORCEMENT AGAINST THE NEEDS OF ACCESS TO JUSTICE: CURRENT DEBATES ON THE ACCESS TO NCA-HELD EVIDENCE IN THE COURSE OF CIVIL PROCEEDINGS

BY ARIANNA ANDREANGELI[1]

1 Senior Lecturer in Competition Law, Edinburgh Law School, University of Edinburgh. Heartfelt thanks are owed to Dr. Grant Stirling of Hull Law School for his comments on an earlier draft of this paper. Any errors or omissions are the author's only responsibility.

I. INTRODUCTION

Allowing claimants seeking compensation for antitrust injuries to access the evidence they need in order to bring their claim has been a hotly debated subject. The confidentiality of the National Competition Authorities' ("NCAs") case files, and in particular of leniency statements and settlement submissions, as well as concerns over the effectiveness of public enforcement, have provided powerful arguments for limiting the possibility of litigants to petition competition agencies for access to this evidence. The 2014 Directive on action for competition damages sought to address this important question. It strengthened the role of national courts in adjudicating questions of disclosure of evidence held by third parties, including NCAs. However, it excluded outright the possibility of accessing leniency statements and settlement submissions in a trial.

This paper will consider whether this position strikes an appropriate balance between maintaining the effectiveness of public enforcement and securing the right of access to justice for antitrust victims. It will analyze the rules on disclosure contained in the 2014 Directive with particular regard to leniency statements and settlement submissions. It will be argued that the emphasis placed on the position of national courts as the prime decision-makers on questions of access to evidence is welcome since it allows the competing interests of the litigants to be decided in an *inter partes* manner.

However, we will question whether having a total ban on the disclosure of specific types of evidence may be a proportionate response to the concerns for maintaining the secrecy of leniency and settlement submissions vis-à-vis ensuring that claimants can obtain evidence that is both relevant and necessary for building their case in court. The paper will submit that the approach adopted by the 2014 Directive risks jeopardizing the position of antitrust claimants in those cases where evidence for their claim can only be found in NCAs' files, as well as shielding defendants who may have benefitted already from immunity from fines or the civil consequences of their unlawful behavior.

It will be concluded that while the 2014 Directive brought in much needed clarity on several issues surrounding the access to evidence in civil competition proceedings, it did not address in a fully satisfactory manner the question of how far protecting the effectiveness of public enforcement should go without unduly restricting the right of access to justice for antitrust victims. It will also be suggested that the Directive might be part of a broader trend towards reinforcing the position and role of the competition authorities. However, it is not clear how a transition toward making the NCAs the "stronger partner" in what should be a complementary and thus egalitarian relationship could be reconciled with the current EU acquis.

II. LENIENCY DOCUMENTS, EQUALITY OF THE ARMS AND EFFECTIVE JUDICIAL PROTECTION—SQUARING THE CIRCLE?

A. Judicial Approaches to Balancing Access to Justice Against the Effectiveness of the Promise of Immunity

The question of whether a judge could order the disclosure of NCA-held documents was controversial for a long time: it is undoubted that these documents are particularly important for, and hence coveted by, competition claimants, who are usually disadvantaged when it comes to gathering evidence of secret collusive behavior on which to found their claims.[2] However, allowing access to sensitive evidence and in particular to leniency documents and statements made by an undertaking with a view to settling a competition investigation could discourage cartel members from cooperating with NCAs and thereby weaken the effectiveness of these tools in detecting competition infringements.[3]

2 See inter alia Gamble, "The European embrace of private enforcement," (2014) 35(10) ECLR 469, especially pp. 478-479; also id., "The Parliament, the Commission and the Court - three institutions and their effect on private enforcement of anti-competitive conduct in the EU," (2015) 36(12) ECLR 501, pp. 503-504; see also Juska, "The future of collective antitrust redress: something new under the sun?," (2015) 8(1) GCLR 14 at 23-24.

3 See inter alia Slot, "Does the Pfleiderer judgment make the fight against cartels more difficult?," (2013) 34(4) ECLR 197 at 205-206.

How can these apparently competing public interest concerns be reciprocally counterbalanced? In respect of documents held by the EU Commission, the Court of Justice held in, inter alia, the CDC decision that the Transparency Regulation (namely Council Regulation No 1049/20014) was applicable to competition case files. However, it made clear that the EU Commission could rely on the general public interest of maintaining the effectiveness of competition enforcement as a ground for refusing access to evidence gathered during the course of antitrust investigations.[5]

Coming to domestic competition proceedings, in the *Pfleiderer* and *Donau Chemie* decisions[6] the Court of Justice recognized that in the absence of harmonization each member state could decide how to regulate access to competition files, subject only to the limits of effectiveness and equivalence.[7] Thus, it held that a claimant seeking redress for a competition injury should not be prevented outright from seeking access to documents obtained by a competition agency as the result of an application for leniency.[8] The national court seized of the damages' action should therefore weigh up the competing interests of, respectively, maintaining the secrecy of the evidence in issue and to safeguarding the effectiveness of the claimant's right to seek compensation, in light of the circumstances of each case.[9] Safeguarding the effectiveness of the promise of immunity as a tool to boost detection of cartels could justify restricting judicial powers of disclosure[10] but could not be relied on as a ground for a "systematic ban" on revealing documents contained in the case file of a NCA.[11] To hold otherwise would have amounted to allowing the defendant—who had already benefitted from full or partial immunity from fines—to circumvent the civil consequences of unlawful behavior.[12]

The *Pfleiderer* and *Donau Chemie* preliminary rulings were welcomed as a restatement of the centrality of domestic courts in the adjudication of these claims. [13] However, the position of the Court of Justice was criticized as creating legal uncertainty around the accessibility of NCA-held documents across the Union[14] and as potentially jeopardizing the efficacy of the promise of immunity as a tool for cartel detection.[15] It was therefore inevitable that the 2014 Directive would have addressed the issue of disclosure of third party-held evidence, including evidence contained in NCAs' case files. The next section will consider the legislative response to this issue.

B. The 2014 Directive on Antitrust Damages and the Disclosure of "Sensitive" Documents: Does Cartel Detection Trump Access to Justice?

The previous section sketched out the EU Court of Justice's approach to the disclosure of NCA-held documents in court proceedings, concentrated on evidence linked to leniency applications, and suggested that the position adopted in the *Pfleiderer* decision, despite being consistent with demands of access to justice, could have potentially jeopardized the role of leniency in boosting cartel detection. This section will examine how the 2014 Directive addressed this issue.

4 Regulation (EC) of the European Parliament and the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43 ("the Transparency Regulation").

5 *CDC Hydrogene Peroxide Cartel damage Claims v. Commission*, [2011] ECR II-8251, especially para. 35-36 and 49-51; Case C-365/12P, *EnBW Energie v. Commission*, [2014] ECR I-112, especially para. 62-64, 83 and 100-101. For commentary see e.g. Rey, "The interaction between public and private enforcement of competition law, and especially the interaction between the interests of private claimants and those of leniency applicants," (2015) 8(3) GLCR 109, p. 117. See also Lianos, Nebbia & Davis, "Damages claims for the infringement of EU Competition Law," 2015: OUP, p. 267.

6 Case C-360/09, *Pfleiderer*, [2011] ECR I-5161; Case C-536/11, *Donau Chemie*, [2013] ECR I-366.

7 Id., para. 23-24; see also para. 26.

8 Id., para. 30-32.

9 Id., para. 32.

10 *Donau Chemie, supra* note 6, para. 43.

11 Id., para. 43-44.

12 Id., para. 44.

13 See *Pfleiderer*, *supra* note 6, para. 31-32; for commentary see e.g. Lianos et al, *supra* note 5, p. 271-272; see also, inter alia, Rizzuto, "The procedural implications of Pfleiderer for the private enforcement of European Union competition law in follow-on actions for damages," (2011) 4(3) GCLR 116 at 119, p. 121.

14 See inter alia Guttuso, "The enduring question of access to leniency materials," (2014) 7(1) GCLR 10, pp. 19-20.

15 Inter alia, Rey, *supra* note 5, pp. 110-111; see also Lianos et al., *supra* note 5, p. 272.

Providing a "minimum level of disclosure *inter partes*" was identified as one of the tools to allow "weaker" litigants, namely those who are more disenfranchised and who lack access to relevant evidence, to obtain those documents that are necessary to substantiate their claims.[16] Thus, Article 5 of the 2014 Directive obliged the Member States to set up a mechanism for the court-ordered disclosure of evidence held by either another litigant or by a third party. The national courts must be satisfied that the claim made by the requesting party is specific and "plausible" and backed up by a "reasoned justification containing reasonably available facts and evidence" pointing to a *prima facie* case.[17] The request must be justified by the nature of the claim, the evidence submitted to it, and the scope and cost of each disclosure. The court must take into due consideration the interests of all parties and can devise "arrangements (…) for protecting (…) confidential information."[18]

Article 6 extends the regime of Article 5 to the disclosure of documents held by a national competition authority. However, it provides special rules for particular types of NCA-held evidence. Documents prepared by an investigated undertaking "specifically for proceedings before a competition authority" can be disclosed in court proceedings only after the investigation has been closed.[19] Documents prepared by the NCA during the course of an investigation can be disclosed at any time, subject to an appraisal of their relevance and of the conformity of the request with the criteria listed in Article 5.[20]

Leniency statement and settlement submissions, however, are subject to absolute immunity from disclosure.[21] Article 6(7) provides that if a controversy arises as to whether a specific document is potentially immune, the Court, after hearing the parties, can ask the competition authority to have sight of it so as to decide whether the disclosure ban applies or not. The national courts can order the release of redacted versions of documents to exclude statements in themselves immune from disclosure.[22]

It is suggested that the Directive's approach is broadly consistent with the Court of Justice's solution in *Pfleiderer*, since it focuses on the role of the national courts as regards the adoption of decisions on whether specific evidence that is held by a third party (including NCAs) should be disclosed.[23] The outright ban on the disclosure of leniency statements and of settlement submission, however, sits somewhat at odds with the trust that the EU legislature has placed on the domestic courts as well as with the paramount objective of the Directive, namely strengthening the right of access to justice of competition claimants.[24] It is submitted that denying access to leniency statements and settlement submissions outright and without exceptions could prevent certain claimants from accessing the evidence that they need to support their plea and access to which cannot be secured in any other way.[25] It would also shield successful whistleblowers from an action for damages in certain cases, thereby allowing them to avoid the civil consequences of their unlawful behavior.[26]

It is therefore unclear whether the 2014 Directive provided a satisfactory response to the concern for the effective judicial protection of claimants. It is acknowledged that the demands of public enforcement should be considered when seeking to enhance the effectiveness of competition litigation. It is argued, in this respect, that striking a fair balance between these concurrent interests conforms to viewing the relationship between public and private antitrust enforcement as complementary and mutually reinforcing, in accordance with the EU Court of Justice's case law.[27]

16 2014 Directive, Preambles 21-23. For commentary, see e.g. Vandenborre et al., "Actions for antitrust damages within the European Union," (2014) 7(1) GCLR 1, especially pp. 3-4; also Andreangeli, "Competition litigation in the EU and the UK after the 2014 Antitrust Damages Directive," (2016) 35(4) CJQ 342 at 350-351.

17 Article 5(3), 2014 Directive.

18 Article 5(4), 2014 Directive.

19 Article 6, 2014 Directive; for commentary see e.g. Singh, "Disclosure of leniency evidence: examining the Directive on damages actions in the aftermath of recent ECJ rulings," (2014) 7(4) GCLR 200 at 206-207; also Andreangeli, *supra* note 16, pp. 356-357.

20 See inter alia Lianos et al., *supra* note 5, pp. 255-256.

21 See Singh, *supra* note 19, p. 207.

22 Lianos et al., *supra* note 5, p. 257.

23 See e.g. Lucey, "EU Competition law Damages Directive: recalibrating the equilibrium between private and public enforcement?," (2018) 5 JBL 390, p. 398.

24 See e.g. Singh, *supra* note 19, p. 208; also Andreangeli, *supra* note 16, p. 360. See also European Parliament, Report on the Draft Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union of February 4, 2014, COM(2013)0404, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0089+0+DOC+XML+V0//EN (the Schwab report), recitals 4-5.

25 See e.g. Andreangeli, *supra* note 16, pp. 353-354.

26 Id., p. 354; see also, inter alia, Wardaugh, "Cartel leniency and effective compensation in Europe: the aftermath of Pfleiderer," (2013) 19(3) Web Journal of Current Legal Studies, available at: http://webjcli.org//article/view/251, p. 22.

27 See inter alia Case C-295/04, *Manfredi v. Lloyd Adriatico SpA*, [2006] ECR I-6619, see e.g. para. 41.

However, it is legitimate to query whether restricting so significantly the access to evidence held by a NCA in cases where a decision was either taken following a leniency application or as a result of a settlement would be consistent with this vision or indeed with the 2014 Directive's objectives.[28] It is submitted that due to the secrecy of cartel behavior and to the confidentiality surrounding these proceedings, together with the summary nature of settlement decisions, the approach enshrined in Article 6 of the 2014 Directive could lead to a denial of justice for antitrust victims wishing to take action against either successful whistleblowers or undertakings who settled with competition agencies, since the former would not be able to access perhaps the only evidence that is indispensable to found their claim.[29]

It is concluded that the 2014 Directive, while constituting a valiant attempt at facilitating access to justice for competition claimants, does not appear to have resolved some of the questions that arise from the complex relationship between competition litigation and the detection and sanctioning of cartels by the competition agencies and that could affect the access to justice for individual victims.

C. Disclosure of Evidence in Competition Damages Actions Post-2014 Directive: Just More of the Same? Implementing Legislation in the United Kingdom, Italy, and Ireland

The previous section summarized the features of the 2014 Directive and argued that Articles 5 and 6, despite attempting to balance the concurring interests of effective access to justice and public enforcement of competition rules, seemed to privilege the latter at the expense of the antitrust damages remedy option. A quick examination of the measures adopted in the United Kingdom, in Ireland and in Italy to transpose the 2014 Directive indicate that Articles 5 and 6 were implemented almost verbatim.

In the UK Section 30(2) of Part 6 of the new Schedule 8A to the Competition Act 1998[30] empowers a court to order the competition authority to disclose documents it holds in its case files if the judge is "satisfied that no-one else is reasonably able to provide the documents or information." Sections 32 to 34 reiterate almost word for word the ban on the disclosure of leniency statements and settlement submissions as well as the stipulation that other documents held in the file should be disclosed only after the investigation has been closed.

Similarly, in Italy Article 4(5) of the Legislative Decree No 3/2017[31] forbids the courts from disclosing to a third party any of the "sensitive documents" identified by Article 6(6) of the 2014 Directive. As for other documents, judges can order disclosure of other evidence only if the applicant is seeking access to the evidence as part of an action for competition damages and has identified reasonably clearly the evidence of which he or she is seeking to have sight. In this assessment, the judge must also take into consideration the demands of effective public enforcement (Articles 3 and 4).

As for Ireland, according to Regulation 5 of Statutory Instrument No 43/2017,[32] the courts can order disclosure of third-party held evidence subject to several conditions: the claimant must have made a prima facie case and the request must not be generic; the court must also consider whether the documents are of a confidential nature[33] and must give due consideration to the effectiveness of public enforcement.[34] According to Subsection 33, documents held by a NCA as part of a case file that originated from the investigated part can only be shown after the closure of the investigation. Subsection 4 reproduces verbatim the ban on disclosure of leniency statements and settlement submissions.[35]

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28 See Lucey, *supra* note 23, pp. 399-400.

29 See Wardaugh, *supra* note 26, p. 21-22.

30 Schedule inserted in the Competition Act 1998 by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, SI 2017/385.

31 Decreto Legislativo 19 gennaio 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea (17G00010), GU Serie Generale 15 of 19 Janiary 2017; available at: http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2017-01-19&atto.codiceRedazionale=17G00010&elenco30giorni=true.

32 EU (Actions for damages for infringements of EU competition law) Regulations 2017, SI No 43 of 2017, available at: http://www.irishstatutebook.ie/eli/2017/si/43/made/en/pdf.

33 Part 2, section 5.

34 Id., section 6.

35 Id., section 6(4).

It is submitted that the 2014 Directive had a significant impact on the procedural laws of the member states considered above: the national courts seized with competition law disputes now enjoy strong disclosure powers vis-à-vis third parties, including the NCAs.[36] However, it is unclear whether the verbatim implementation of the ban on the disclosure of leniency documents and settlement submissions may be consistent with the access to justice objectives that the 2014 Directive aims to achieve.[37]

It is acknowledged, as was illustrated earlier, that protecting the efficacy of these cartel detection tools constitutes a legitimate concern which must be counterbalanced against the demands of access to justice of antitrust claimants. Nonetheless, it is argued that when a damages' action is launched against a successful whistle-blower, the claimant would find it very difficult, due to the secret nature of cartel behavior and the confidentiality of the leniency proceedings, to gather any evidence supporting his or her claim[38] and consequently to obtain compensation for the losses suffered as a result of the defendant's unlawful behavior.[39] Accordingly it is unclear whether the new disclosure rules would uphold the commitment to the effectiveness of the EU law right to seek competition damages[40] which is at the core of the 2014 Directive.[41]

More generally, it is submitted that the 2014 Directive's stance on disclosure of evidence held by the competition agencies could signify a slow shift from a complementary relationship to one in which a hierarchy exists between the administrative detection and sanction of anti-competitive behavior and the private enforcement of competition rules.[42] It is argued that the fact that in matters of evidence the demands of public enforcement are ultimately given greater prominence than those of an effective civil adjudication of antitrust claims might be interpreted as heralding a transformation in this complex interplay,[43] as a result of which the enforcement by NCAs is the stronger partner vis-à-vis civil antitrust litigation.[44] It is however unclear whether this outcome could "fit within" the principles governing this relationship: some argue that it would be difficult to reconcile with the Court of Justice's longstanding view of this relationship, according to which public and private enforcement "complement" one another and are therefore linked by an egalitarian relationship.[45]

In conclusion, the new rules have certainly brought about much needed certainty to several areas surrounding the litigation of competition claims. It is clear, however, that the Directive's approach to accessing NCA-held evidence may have an unforeseen impact on the future interplay between public competition enforcement and civil antitrust litigation and may even jeopardize the right of access to justice for certain claimants.

III. ENCOURAGING COMPETITION CLAIMANTS OR BOOSTING PUBLIC ENFORCEMENT? TENTATIVE CONCLUSIONS

The 2014 Directive on competition damages was hailed as a step forward for private antitrust enforcement in Europe since it sought to make it easier for claimants to overcome the "information gap" with defendants by granting the national courts a stronger role in adjudicating over the disclosure of third-party documents. In this context, it is legitimate to impose limits to the exercise of this judicial power in order to safeguard the effectiveness of public enforcement. However, can an entire category of documents be excluded outright from the national courts' jurisdiction? The previous sections discussed the issues arising from the disclosure in court proceedings of leniency statements and settlement submissions. It was argued that denying access to those sensitive documents in all cases could lead to a denial of justice for claimants who have no other way of gathering evidence in support of their pleas, and at the same time could result in successful whistleblowers being sheltered from the civil consequences of their unlawful conduct.

36 See, inter alia, Singh, *supra* note 19, p. 206; see also Wardaugh, *supra* note 26, pp. 21-22; see also Case C-360/09, *supra* note 6, per AG Mazak, para. 40.

37 See inter alia Lucey, *supra* note 23, p. 400; also Andreangeli, *supra* note 16, p. 356-357.

38 Wardaugh, *supra* note 26, p. 22; see also Singh, *supra* note 19, p. 209-210.

39 See inter alia Sitarek, "The impact of EU law on a national competition authority's leniency programme," (2014) 7(9) Yearbook of Antitrust and regulatory Studies 185, pp. 194-195 and 200-202; also Neumayr and others, "The Gordian know of access to file: legislation will have to resolve it," (2014) GCLR 7(3) GCLR 186 at 190-191.

40 See inter alia Andreangeli, *supra* note 16, p. 353-354.

41 Inter alia, see Singh, *supra* note 19, pp. 209-210; also Lucey, *supra* note 23, p. 403.

42 See Lucey, *supra* note 23, p. 400.

43 Id., p. 403; see also Wardaugh, supra note 26, p. 20-21.

44 Inter alia, see Singh, *supra* note 19, pp. 209-210; also Lucey, *supra* note 23, p. 403.

45 Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6297, para. 26-27; Case C-295/04, *Manfredi v. Lloyd Adriatico SpA*, [2006] ECR I-6619, see e.g. para. 41.

The forgoing analysis led to more general questions about the impact of the 2014 Directive on the interplay between public enforcement and private litigation in competition cases. It was questioned whether upholding the secrecy of certain type of evidence in all cases, in the interests of cartel detection, could over time lead to making the NCAs the "strong partner" vis-à-vis the civil courts. However, it was argued that moving away from an egalitarian relationship to one that is more hierarchical in nature would be difficult to justify in light of the EU acquis and could even undermine the Directive's own efficacy.

It is concluded that the rules on disclosure of evidence contained in the 2014 Directive should be welcomed as an attempt to facilitate competition claims. However, to the extent that they contain a blanket ban on the handing of certain evidence, namely leniency statements and settlement submissions, they appear to hint toward privileging the demands of public enforcement at the expense of providing an effective judicial remedy to antitrust victims. It is acknowledged that the 2014 Directive should be seen against a background in which strengthening the NCAs is at the forefront of the legislative debate.[46] However, it is unclear whether encouraging the creation of a hierarchy between public enforcement and civil competition litigation would enhance access to justice for antitrust victims.

46 Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017) 142final (2017/0063 COD), available at: http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf. See also Press Release of May 30, 2018 (18-3996), available at: http://europa.eu/rapid/press-release_STATEMENT-18-3996_en.htm.

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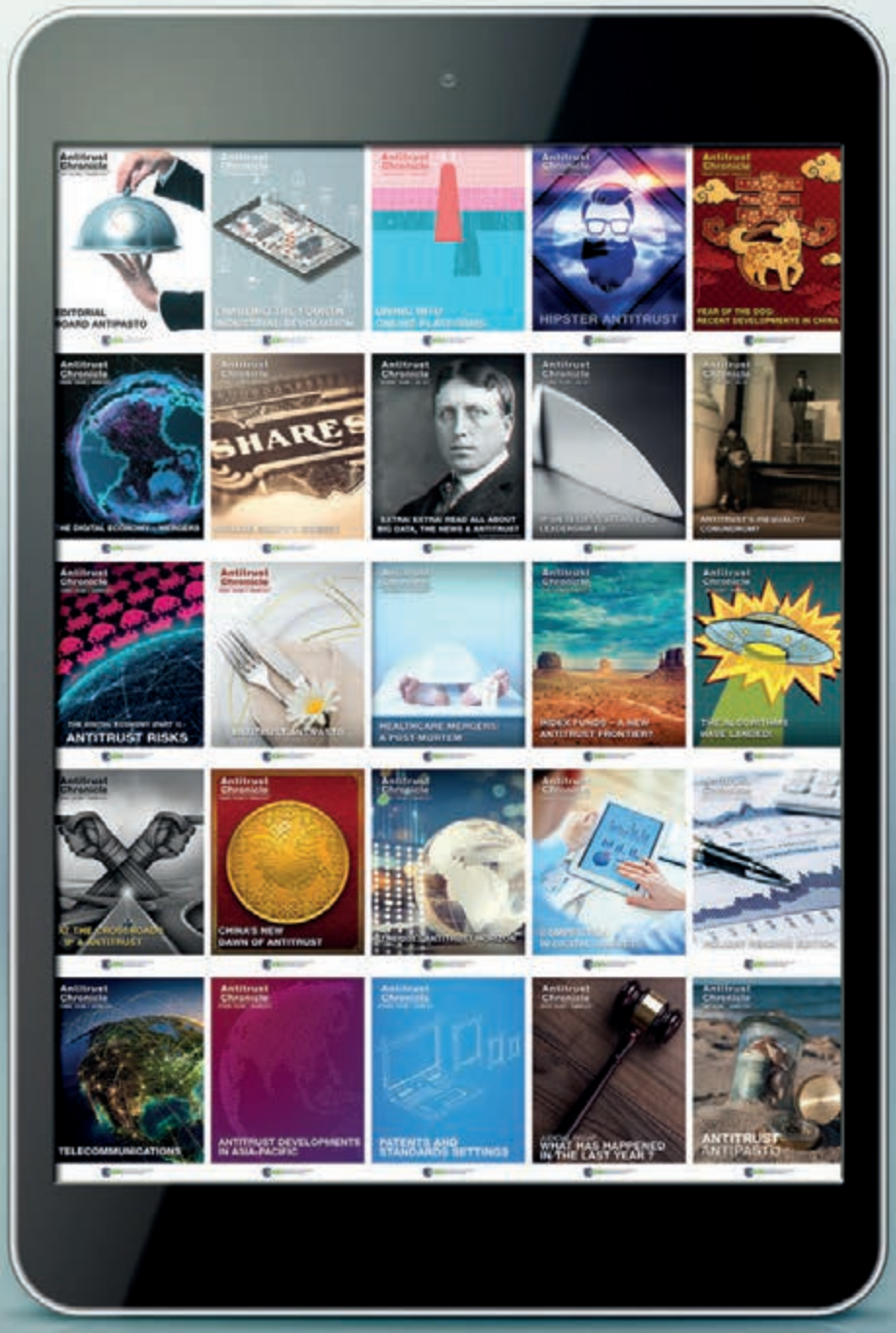


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