Antitrust Chronicle

CARTELS & CONCERTED PRACTICES: FROM A TO Z

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LETTER FROM THE EDITOR

Dear Readers,

This month, the Antitrust Chronicle (AC) brings you a special edition on Cartels & Concerted Practices, from A to Z. Articles in this month's AC feature discussions on issues related to hybrid settlement cases in the European Union, price signaling, private damages in different jurisdictions and the impact, so far, of the Yates Memorandum on the DOJ's investigations and prosecutions of individuals involved in cartels.

The articles address changes to cartel enforcement in several different jurisdictions. Are these changes fundamental? Evolutionary or even revolutionary? These developments are critical as antitrust authorities mature and hone their cartel enforcement, learning from their mistakes and success. "Stay tuned; there is more to come."

Some of the recent cartels featured in this month's AC given an in-depth analysis are the Cement Cartel, Timab and Euribor cases in the European Union, cartel allegations in the airline sector in United States and recent cases under the Leniency Program in Brazil as well as cases in the United States and Canada.

We hope you enjoy reading this new issue of our AC magazine.

Thank you,
Sincerely,

CPI Team

Summaries

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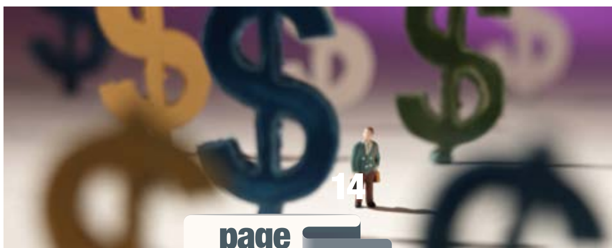
Has the Dust Settled for Cartel Settlements?

By Marieke Datema & Chris Bryant

This article examines some of the issues that have arisen in relation to the European Commission's settlement procedure and how settlement cases are handled. The authors consider the complex issues that arise for both the settling and non-settling parties in "hybrid" cases. The article addresses the Commission's considerable discretion in relation to the initiation and continuation of settlement discussions. Finally, the authors discuss the appeals by Société Générale and Tompla in relation to the fines imposed in recent settlement decisions.



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Price Signaling: Deciphering the Shipping Forecast

By Lilly Fiedler & Nicholas Frey

This article discusses the state of the law and the increased regulatory interest in price signaling. The authors consider the recent proposed "soft resolution" of alleged price signaling conduct in relation to container shipping at the EU level and the conclusions that can be drawn from recent price signaling investigations by the German Federal Cartel Office and the UK Competition and Markets Authority. The article argues that while these recent cases suggest that certain price signaling lines in the sand are becoming more "permanent", there are still a number of areas of uncertainty, which leave the area ripe for judicial challenge.

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The Yates Memorandum's Impact of U.S. Cartel Enforcement: Evolution or Revolution?

Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock

This paper suggests that the Yates Memorandum marks a significant change in the DOJ's approach to investigating and prosecuting individuals. More than a decade ago, DOJ's Antitrust Division instituted a policy of seeking to prosecute the highest-ranking responsible executives for cartel behavior. Many of the changes that the Yates Memorandum requires were already anticipated by the Division's policies. While the Yates Memorandum may have profound effects in many areas of law, for the criminal cartel bar, the changes it introduces appear to be more evolutionary than revolutionary.

Antitrust Private Damages Actions in the United States, Canada and the European Union

By Pierre Crémieux, Marissa Ginn & Marc Van Audenrode

This article compares and contrasts the well-established system of private action that prevails in the United States to those established by the recent trilogy of decisions by the Canadian Supreme Court that reshaped the Canadian landscape for antitrust private actions and the framework delineated by the European Directive on rules governing private actions for antitrust damages in Member States. The paper aims to show that the ultimate approach to damages claims may be relatively similar across Europe, United States Federal Courts and Canada.

16 Years of the Leniency Program in Brazil: Breakthroughs and Challenges in Cartel Prosecution

By Amanda Athayde Linhares Martins & Andressa Lin Fidelis

Since 2003, the prosecution of hardcore cartels has been a top priority in Brazil. The Leniency Program in Brazil has been one of the most important investigative tools for detecting collusive conduct among competitors. The Leniency Program has exhibited some breakthroughs achieved in terms of the amount of new leniency agreements signed, the use of innovative tools and the reliability of CADE's procedures. Those results increase CADE's responsibility to be effective in the execution of its Leniency Program, as well as to be prepared to address new challenges that are on their way.

The Airlines Industry, Concentration and Allegations of Collusion

By Paula W. Render

In 1978, when Congress deregulated the airline industry, there were 10 airlines that provided scheduled national and international service, and those 10 accounted for 90 percent of the domestic marketplace. Today, there are four major airlines and a few smaller ones providing comparable service, and the four major airlines provide 80 percent of U.S. domestic flights. This consolidation occurred due to mergers, but also as the result of the industry's chronic lack of profitability. The airlines have turned this dismal performance around, at least temporarily, giving rise not just to accolades for good management but also to scrutiny from the Department of Justice ("DOJ") for potential collusion.

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Cracks in the Finish: Affirming Fundamental Rights in the Cement Cartel Case

By Kyle Le Croy

This paper summarizes the recent judgment of Court of Justice of the European Union in the Cement Cartel case. The Court affirmed that certain fundamental protections that apply in the context of Commission dawn raids also apply in the context of Commission requests for information. The author suggests that the judgment is an important marker for companies subject to overly broad Commission requests for information but that it fails to address several important points of law, some of which might to be addressed in the future decisional practice of the Commission.

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Financial Sector Conspiracies and Manipulations: Should We Be Surprised?

By Rosa M. Abrantes-Metz

While investigations into Treasury auctions, FX, ISDAfix, and others are still ongoing, and more recently additional focus by regulators has been given to possible collusion and manipulation in bid-ask spreads in bonds for supranational, sub-sovereigns and agencies bonds markets, bid-ask spreads in foreign exchange, and maybe even other spreads manipulations in other markets, we should learn the lessons from LIBOR and other benchmarks. We must recognize deficient structures so that we can proactively reform them, minimizing the likelihood of abuse. And to enhance deterrence and detection of illegal behavior, we must screen these markets regularly.

CPI Spotlight

Do you want to know more about Licensing Disputes in the ICT sector? Then go to our CPI Learning Center on our website and check out our most recent Briefing Room.

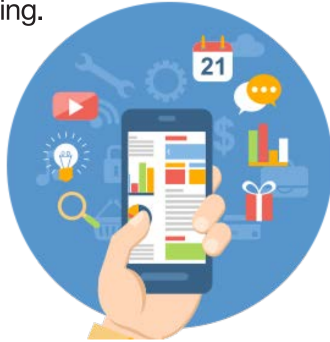
There you will find new videos from our experts explaining the role of Antirust in licensing disputes, why this is so important, what the standard setting organizations are and much more. In addition to these videos, our Briefing Room makes available relevant documents to understand the legal and economic arguments put forward, from scholarly papers, to judicial and administrative rulings.

Our Briefing Room provides a fantastic opportunity for you and your colleagues to find out more about licensing disputes and more.

VISIT:

http://competitionpolicyinternational.com/briefing

In this issue, CPI we would like to encourage our readers to learn more about mobile advertising.



Consumers have shifted their consumption of online content dramatically from websites that they browse from a personal computer to apps that they use on mobile devices. Marketers have moved with the eyeballs, particularly since people use their smartphones much of the day and carry them wherever they go. These changes have disrupted the online advertising industry.

Dr. Evans´ latest paper provides a primer on the mobile advertising business, particularly on how the economic structure of the online advertising industry has changed as a result of the move to mobile, and explores some of the issues that policymakers will need to consider as the digital economy moves from websites browsed from fixed devices to apps used on mobile devices.

Evans, David S., Mobile Advertising: Economics, Evolution and Policy (June 1, 2016). **Available at SSRN:**

http://ssrn.com/abstract=2786123

Announcements

Save the Date!

On July 28, 2016, CPI, with the support of George Washington University (GWU), will hold a conference in Washington D.C. at GWU to debate about the role of Antitrust and Regulation in the new Matchmaker Economy.

Moderated by William Kovacic

David Evans
(Global Econ.)

Jon Sallet
(FCC)

Terrell McSweeny
(FTC)

Ed Black
(CCIA)

Our experts will have a substantive discussion, inter alia, about the challenges and opportunities that online platforms and the new Matchmaker Economy are presenting to regulators.

More details to come and registration will follow soon.

What is Next?

This section is dedicated to those who want to know what CPI is preparing for the next month. Spoiler alert!

July is our Antitrust Antipasto! Get ready for your holidays with our summer issue with contributions from our Members of the Board. A variety of interesting topics, written by top members of the antirust community, will offer you excellent readings for the beach, the swimming pool, the city park or…the office.

HAS THE DUST SETTLED FOR CARTEL SETTLEMENTS?

BY CHRIS BRYANT & MARIEKE DATEMA[1]

I. INTRODUCTION

In January 2016 the European Commission reached a significant milestone when it imposed fines in the twentieth cartel settlement case. Many of the benefits of settlement have been realized since the procedure's inception in 2008. The Commission benefits from a simplified and quicker procedure, allowing it to handle more cases with the same resources, and has to contend with significantly fewer appeals. The settling parties benefit from a 10 percent reduction in the level of their fine, a shorter timeframe for the investigation, typically a more concise infringement decision and potentially more subtle benefits such as greater influence on the content of a decision than under the standard procedure.

However, this article examines some of the issues that have arisen in relation to the settlement procedure and how settlement cases are handled. In particular, we consider the complex issues that arise for both the settling and non-settling parties in "hybrid" cases. Furthermore, we examine the Commission's considerable discretion in relation to the initiation and continuation of settlement discussions. Finally, we consider the appeals by Société Générale and Tompla in relation to the fines imposed in settlement decisions.

II. HYBRID CASES

Hybrid cases, in which some parties

1 Chris Bryant, Partner, Antitrust & Competition, Berwin Leighton Paisner LLP, Chris.Bryant@blplaw.com; Marieke Datema, Senior Lawyer Consultant, Antitrust & Competition, Berwin Leighton Paisner LLP via Lawyers on Demand, Marieke.Datema@blplaw.com

choose to settle and other parties opt to follow the standard procedure, raise issues for all parties. The Commission is not able to fully benefit from procedural efficiencies. Furthermore, the settling parties may be concerned that the standard decision addressed to the non-settling parties will contain a fuller factual description and assessment of the facts, which could potentially be used in damages actions against the settling parties. The settling parties may also have to face damage claims earlier than the non-settling parties. Conversely, the non-settling parties may be concerned that they will be treated unfavorably by the Commission as a result of opting out of the settlement procedure.

While the Commission has repeatedly stated that it expects hybrid cases to be "the exception,"[2] as of 1 June 2016 there have been 5 hybrid cases out of a total of 20 cartel settlement cases. Hybrid cases are clearly more prevalent than the Commission anticipated, making a hybrid case a real possibility for any party involved in settlement discussions. The Commission must grapple with the tension between not allowing non-settling parties to disrupt the procedure while at the same time not eroding the benefits to the settling parties. It is by no means apparent that the Commission has yet found the right balance.

A. Risks for the settling parties

1. Information in the standard decision used against the settling parties

One of the advantages for settling parties is that a settlement decision generally contains far fewer details about the cartel arrangements than a standard decision. In hybrid cases, this creates an inherent conflict, as the Commission issues both a settlement decision and a standard decision.

As of 1 June 2016, the Commission has published the non-confidential standard decision in only one hybrid case–the decision addressed to the non-settling party, Timab, in the animal feed phosphates case ("Timab decision").

The Commission found that the animal feed phosphates cartel dated back to 1969 but could only establish Timab's participation in the cartel between September 16, 1993 and February 10, 2004. Nonetheless, the Timab decision surprisingly contains significantly more information than the settlement decision about the settling parties' cartel activities in relation to the period before Timab's participation, including detailed accounts of meetings in the mid-to-late 1970s involving settling parties. This information would be extremely useful to a party seeking damages from the settling parties.

It not obvious why the Commission chose to include this information in the Timab decision, as it is not relevant to Timab and clearly provides a disincentive for parties to settle in a hybrid case. The settling parties in the animal feed phosphates case would be well within their rights to feel aggrieved about the content of the Timab decision (or, at the very least, the public version). If the Commission wishes to keep encouraging parties to settle in hybrid cases, it will need to take care to avoid more information than necessary about the settling parties in the public versions of standard decisions.

2. Earlier damages claims?

Appeals of settlement decisions remain very rare. This might have the consequence of exposing settling parties to damages claims at an earlier point than the non-settling parties. In 2014 the UK Supreme Court ruled in Morgan Crucible[3] that, if an addressee of a cartel decision successfully appeals against it, this has no effect on the findings of infringement against addressees who did not appeal. As a result, the parties that do not appeal are exposed to follow-on damages claims at an earlier point than the parties that appeal the decision.

In a hybrid settlement scenario (assuming the settling parties choose not appeal the Commission's decision), the timing implications can be particularly dramatic: the settling parties will be the subject of a public settlement decision on which follow-on damages actions can be based significantly ahead of the date when the Commission may issue an infringement decision against the non-settling parties (which could then be appealed). The concept of joint and several liability means that the settling parties will be liable for all the losses suffered by the claimants and will not be able to claim contribution from the appealing parties until those parties are also subject to final infringement decisions. The main exception to this is that, once the EU Damages Directive is fully implemented, it

2 See *e.g.* Joaquín Almunia speech, "Fighting against cartels: A priority for the present and for the future", SV Kartellrecht, April 3, 2014.

3 *Deutsche Bahn AG & Ors v. Morgan Advanced Materials Plc* (formerly Morgan Crucible Co Plc) [2014] UKSC 24.

will provide a safeguard for immunity recipients who will only be liable to their own direct and indirect purchasers (unless the claimant can prove that it cannot obtain damages from other infringers).

B. Bias against non-settling parties?

The former Competition Commissioner Joaquin Almunia stated that hybrid decisions "tell companies they cannot hold up the process if the Commission finds it appropriate to follow this route."[4] He added that this was only one way that the Commission has to "protect settlement proceedings from manipulation."[5]

A party may opt out of settlement on the basis of the fine, as Timab did in animal feed phosphates, or it may dispute its involvement in the alleged cartel and therefore not be willing to admit liability (as is required under the settlement procedure). As will be discussed in further detail below, the Commission's actions in animal feed phosphates will disincentivize any party considering opting out of settlement on the basis of the fine. Opting out of settlement on the basis of liability is a different matter and parties doing so need to be cognizant of the risks of bias that they may face in such a scenario.

1. Animal feed phosphates: the Timab appeal

The above statement by former Commissioner Almunia suggests that the Commission views non-settling parties unfavorably, despite the fact that it is within a party's right to opt out of settlement. This point was considered by the General Court in the appeal brought by Timab, the non-settling party in the animal phosphates case, arguing that it was "punished" for abandoning settlement discussions.

In that case, the Commission initiated settlement proceedings with all undertakings. During settlement discussions Timab was informed that it would incur a fine between EUR 41 and EUR 44 million as a result of its participation in the infringement from December 31, 1978 until February 10, 2004. This fine range took into account the 10 percent settlement reduction, a 35 percent reduction for mitigating circumstances under the 2006 Fining Guidelines (discussed further below) and a 17 percent reduction under the Leniency Notice. After being informed of the fine range, Timab opted out of settlement proceedings but was eventually fined a far higher sum, EUR 59.85 million, under the standard procedure.

In its General Court appeal, Timab argued that the Commission had infringed its rights of defense, the principle of protection of legitimate expectations and the principle of sound administration, as well as infringing the Settlement Regulation and Notice,[6] due to the fact that it was penalized for withdrawing from settlement discussions. Timab claimed that it was punished because the likely fine that the Commission had set during settlement discussions was subsequently increased by 25 percent (despite the duration of the infringement having been reduced) and argued that the amount of the fine should in no event be higher than that corresponding to the upper limit (increased by 10 percent) in the range of fines which had been notified to them during settlement discussions.

In its judgment of May 20, 2015, the General Court noted that "even in…a hybrid case…the principle of equal treatment must be observed",[7] adding that, while the settlement procedure is an alternative to the standard procedure "in determining the amount of the fine, there cannot be any discrimination between the participants in the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure."[8]

Despite the fine of EUR 59.85 million, the infringement period in the (standard) Timab decision was September 16, 1993 and February 10, 2004, significantly shorter than the period the Commission had referred to during settlement discussions. However, the General Court found that the Commission applied the same method of calculating the fine (provided for in the 2006 Fining Guidelines) during both procedures. The difference in the two figures could be explained by the following factors:

- Timab's turnover between 1993 and 2004 increased sharply meaning that average sales (a key component of the fine) were over 50 percent

4 Joaquin Almunia speech, "Some highlights from EU competition enforcement", IBA 18th Annual Competition Conference, September 19, 2014.

5 Joaquin Almunia speech, Ibid.

6 Regulation No 773/2004 and the Notice on the conduct of settlement procedures.

7 Paragraph 72, Judgment of the General Court, May 20, 2015, Case T-456/10, *Timab Industries and Cie financière et de participations Roullier v. European Commission*.

8 Paragraphs 73 and 74, Ibid.

higher in the shorter (standard procedure) period than in the longer (settlement procedure) period;

- Timab had provided evidence to the Commission in relation to the period 1978-1993 and during settlement discussions the Commission indicated that, while it could not grant the partial immunity requested by Timab in relation to this period as its cooperation had made it possible only to determine its own participation (not to extend the duration and scope of the cartel), it would grant a reduction of 35 percent for mitigating circumstances by way of reward for Timab's cooperation outside the Leniency Notice. However, during the standard procedure, this period was not used and so the reduction no longer applied;
- Timab was granted a lower reduction under the Leniency Notice (5 percent instead of 17 percent); the 17 percent reduction the Commission intended to grant Timab during settlement discussions was based on the information it had provided in relation to the period 1978-1993;
- And the removal of the 10 percent settlement reduction.

The General Court concluded that the Commission had not penalized Timab for its withdrawal from the settlement procedure and stated that the Commission was not bound by the range of fines set out during the settlement procedure, noting that the "the range notified during the settlement procedure is irrelevant [to the standard procedure]."[9] Timab has appealed the General Court's judgment– the case is pending.

This case serves as a cautionary tale for those parties that commence settlement discussions but decide to opt out on the basis of the likely fine. Unless the Court of Justice reverses the position adopted by the General Court, the Timab case confirms that Commission can go "back to the drawing board" when calculating a fine for a non-settling party and there is a good chance that the ultimate fine will be higher than the range provided during settlement discussions. Despite the principle of equal treatment within a hybrid case, there is a risk to any party opting out settlement discussions that the Commission will take the least favorable (albeit legal) approach to calculating its fine.

2. Euribor: Crédit Agricole complaint

The Euribor case raises different questions of potential bias in relation to non-settling parties in hybrid cases. In December 2013 the Commission adopted a settlement decision and imposed fines on several banks for their role in attempting to manipulate two benchmark interest rates, LIBOR and Euribor. JPMorgan Chase, HSBC and Crédit Agricole decided against settling the Euribor probe.

Crédit Agricole complained to the EU Ombudsman about several public comments made by the then Competition Commissioner Joaquin Almunia that suggested that he had already made up his mind about the conclusion of the Euribor probe, thereby ignoring Crédit Agricole's rights of defense. Importantly, Almunia's comments were made before the Commission sent statement of objections to the non-settling parties in May 2014.

The first two comments were made in the summer of 2012: a statement in MLex: ("The evidence we have collected is quite telling, so I'm pretty sure this investigation will not be closed without results"); and a statement made in the European Parliament: ("The gravity of the infringement was 'above the average'"). The Ombudsman found that the comments gave the impression that it was "almost established that a cartel existed and that the Commission was ready to impose fines"[10] even though the investigation was at a very early stage. She added that the statements could reasonably give interested third parties "the impression that the complainant's case had already been decided."[11]

The third comment was one made by Almunia during a hearing by a committee of French senators in January 2014: "I must say that since we've uncovered a lot of information already the investigation isn't the most difficult…We'll finish the investigation."[12]

The Commission has promised to take steps to avoid such problems in the future and the current and future Competition Commissioners are likely to be more careful when commenting on ongoing investigations. However, given that the Commission's case team generally remains the same for both the settlement and standard parts of a hybrid case, the unsurprising reality is that, as a result of having

9 Paragraphs 96 and 105, Ibid.

10 Paragraph 14, Decision of the European Ombudsman in the inquiry into complaint 1021/2014/PD against the European Commission.

11 Paragraph 14, Ibid.

12 http://videos.senat.fr/video/videos/2014/video21329.html.

been involved in the settlement part of the case, the Commission, particularly the relevant case team, will have taken a view on the non-settlement part of the case. There may therefore be a case for the Commission to consider the approach used by the UK's Competition & Markets Authority in mergers which are not cleared in Phase 1: new decision-makers and some new case team members are brought in during a Phase 2 to deal with the potential bias (or appearance of bias) that those involved in Phase 1 may have.

III. THE COMMISSION'S DISCRETION IN RELATION TO SETTLEMENT

The Settlement Notice makes clear that the Commission has a broad margin of discretion in relation to whether or not to seek to settle cases. The boundaries of this discretion in initiating or continuing settlement discussions have been considered by the General Court.

A. Discretion in relation to initiating settlement discussions

On March 28, 2012 the Commission imposed fines on several companies in the Air Freight Forwarding cartel. One of those companies, Panalpina, subsequently brought an appeal challenging (among other things) the Commission's decision not to apply the settlement procedure. Panalpina argued that the Commission was obliged to make contact with the parties before it could decide whether the case could suitably be resolved by means of settlement. Furthermore, it stated that one of the relevant factors that the Commission should have taken into account when considering settlement was whether the parties were willing to take part in settlement discussions. In its judgment on February 29, 2016, the General Court rejected these arguments, stating that it is clear from the relevant legislation that the Commission is not obliged to make contact with the parties in relation to the possibility of settlement.

Panalpina also argued that the Commission made an error of assessment in determining that the Air Freight Forwarding case was not suitable for settlement. The General Court also rejected this argument. When considering the possibility of settlement the Commission "must take account of the probability of reaching a common understanding, regarding the scope of the potential objections… in that context, the Commission may take account of factors such as the number of parties involved, foreseeable conflicting positions on the attribution of liability, and the extent to which the facts may be disputed."[13] The General Court referred to the large number of parties (47) under investigation and noted that a significant proportion of the parties did not cooperate with the Commission's investigation, concluding that it was therefore likely that at least some aspects of the Commission's findings would be disputed. In these circumstances, the Commission was justified in deciding that all parties were unlikely to agree to a settlement, undermining the efficiency benefits which arise in a case where all parties settle.

Despite the General Court confirming the Commission's wide scope of discretion in relation to the settlement procedure, it was unwilling to put the Commission's decision in relation to whether to initiate settlement discussions beyond scrutiny, stating that there was "no need to give a ruling on whether the Commission's decision not to explore the willingness of the parties to enter into a settlement can be the subject of proceedings."[14]

B. Discretion in relation to continuing settlement discussions

The Smart Card Chips case was the first time that the Commission commenced and then abandoned settlement proceedings. In its press release on September 3, 2014 the Commission stated that it had explored the possibility of settling the case with some of the companies but decided to discontinue the settlement discussions and to revert to the normal procedure because of the clear lack of progress of these discussions. In a speech on September 19, 2014, the then Commissioner Joaquin Almunia stated that "[w]hen we noticed that the talks were stalling because they were refusing to acknowledge liability for an infringement for which we had good evidence, we went back to the ordinary procedure."[15] Philips and Infineon, two out of the four parties fined by the Commission, have issued appeals against the Commission's decision. The significant issues raised in both appeals validate the Commission's decision to discontinue settlement

13 Paragraph 215, Judgment of the General Court, Case T-270/12, *Panalpina World Transport (Holding) Ltd, Panalpina Management AG, Panalpina China Ltd v. European Commission*.

14 Paragraph 233, Ibid.

15 Joaquin Almunia speech, "Some highlights from EU competition enforcement", IBA 18th Annual Competition Conference, September 19, 2014.

discussions in this case.

IV. APPEALS AGAINST FINES IMPOSED IN SETTLEMENT DECISIONS

Settling parties' rights to appeal are limited given that the settlement procedure requires the parties to admit liability. The general expectation has also been that settling parties will not appeal, even though a settlement decision is subject to a right of appeal. However, two parties have now appealed settlement decisions.

Société Générale was fined EUR 445 million in December 2013 in relation to the Euribor cartel. It subsequently made legal history by being the first party fined under the Commission's settlement procedure to appeal to the General Court. In its appeal, Société Générale challenged the way in which the Commission established the value of sales relevant to the cartel, a key component of how its fine was calculated. In March 2016, Société Générale announced that it expected its fine to be cut and simultaneously withdrew the appeal. The Commission subsequently announced on April 6, 2016 that Société Générale's fine had been reduced to EUR 227 million–slightly over half of the original amount. The reduced fine was calculated based on revised data, but applying the same methodology. Although the appeal itself was dropped, Société Générale achieved a huge reduction in the level of its fine and its decision to appeal will therefore be viewed as a success.

Société Générale is, however, not the only party that has appealed the fine in a settlement decision. Tompla filed an appeal in relation to the fine imposed by the Commission in December 2014 in the Paper Envelopes settlement case. Tompla argued that the Commission infringed the duty to state reasons and the principle of equal treatment in its approach to setting the basic amount of the fine and infringed the principles of proportionality and non-discrimination by failing to take account a fine imposed by the Spanish Competition Authority.

The outcome of Tompla's appeal will be awaited with great interest, especially in the light of the reduction in Société Générale's fine. It is notable that, in neither case, was the party's liability challenged, and it will almost certainly remain the case that challenges to settlement decisions on liability grounds will be difficult and unlikely. However, the cases do highlight that, when issues concerning the calculation of the fine are concerned, settling and appealing may no longer be regarded as mutually exclusive options.

V. CONCLUSION

The Commission has referred to the settlement procedure as a "success story."[16] Given the number of cases and the relative absence of appeals, this has to be correct. However, settlement cases are not immune from problems, especially hybrid decisions, which are more common than the Commission perhaps anticipated.

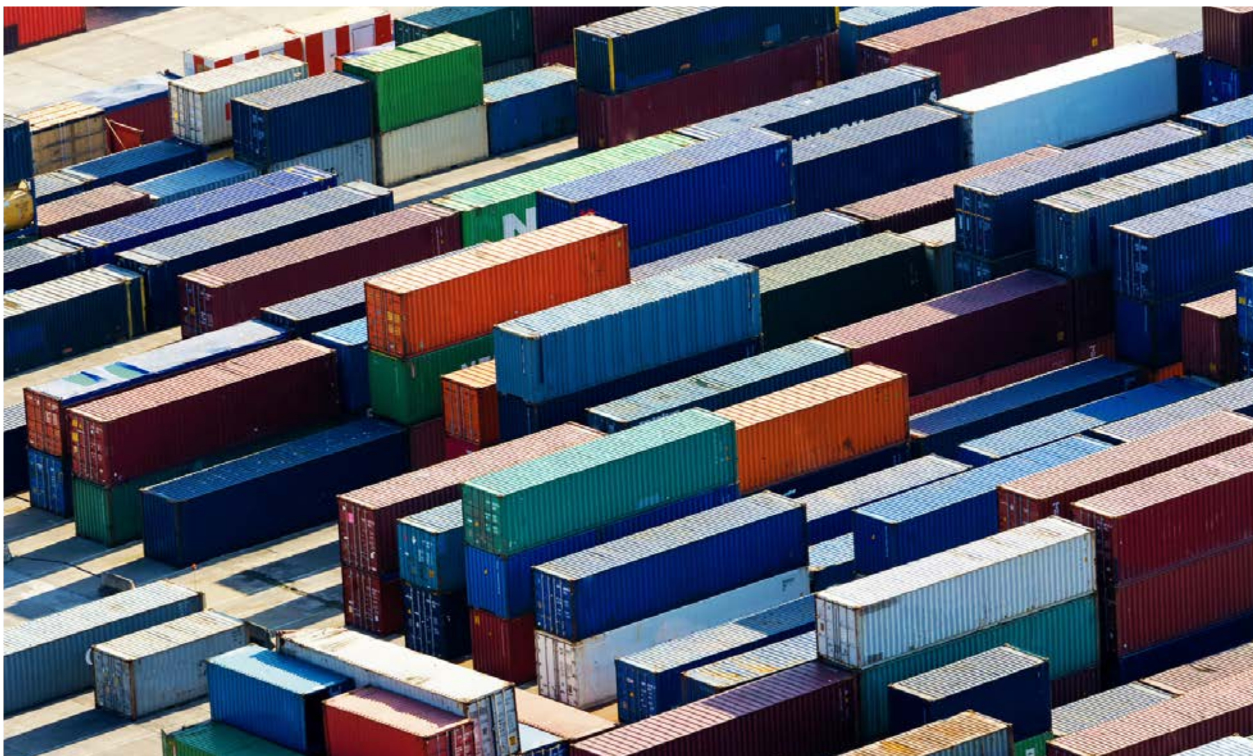
Parties considering settling will need to weigh the advantages of doing so against the potentially significant disadvantages associated with hybrid cases, regardless of whether they are a settling or non-settling party. The detailed information provided about the settling parties' cartel activities in the Timab decision provides a strong disincentive for parties to settle and the Commission will need to ensure that this issue is addressed in any future hybrid decisions. Parties opting out of settlement also need to think carefully, in the knowledge that the Commission may well take the least favorable approach to calculating its fine under the standard procedure. Parties opting out of settlement in a hybrid case on the basis of liability need to be aware of the risks of bias.

More generally, the Commission retains considerable discretion in relation to the initiation and continuation of settlement discussions and this appears unlikely to change. However, one change that may be afoot is that settling and appealing may no longer be regarded as mutually exclusive options.

16 See *e.g.* Eric Van Ginderachter's presentation at IDEE, "European Commission's settlement procedure–a success story", November 28, 2014.

PRICE SIGNALING: DECIPHERING THE SHIPPING FORECAST

BY LILLY FIEDLER & NICHOLAS FREY[1]



I. INTRODUCTION

Price signaling, which broadly refers to the unilateral public announcement of future strategic information, is a "Golem" in the antitrust world with both positive and potentially less desirable traits. In a world of Big Data and increasing amounts of information being published online and elsewhere, it is increasingly important for undertakings to consider where the boundary for anti-competitive price signaling lies. Unfortunately, the law surrounding price signaling in the EU has historically been shrouded in uncertainty—with limited case-law, and limited guidance as to what could be considered anti-competitive conduct.

This article discusses the state of the law and the increased regulatory interest in price signaling, through consideration of: (i) the recent proposed "soft resolution" of alleged price signaling conduct in relation to container shipping (at EU level), as interpreted against general EU competition law principles; and (ii) the conclusions that can be drawn from recent price signaling investigations by the German Federal Cartel Office ("Bundeskartellamt") and the UK Competition and Markets Authority ("CMA").

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The article argues that while these recent cases suggest that certain price signaling lines in the sand are becoming more "permanent"—in particular, as regards the acceptable content for, and timings of, pricing announcements—there are still a number of areas of uncertainty, which leave the area ripe for judicial challenge.

II. THE EU CONTAINER LINER SHIPPING INVESTIGATION

In November 2013 (and subsequently also on November 13, 2015), the European Commission (the "Commission") opened formal antitrust proceedings against 15 container liner shipping companies offering freight services from and to Europe to investigate their practice of regularly publishing their intended price increases on their websites, via the press, or in other ways.[2]

In 2009, shortly after the repeal of block exemptions for liner shipping conferences by the Commission,[3] the carriers at issue had started to publish individually: (i) their intended price increases per transported container unit; (ii) details of the shipping route affected; and (iii) the intended date of implementation of the price increase. These price announcements, known as General Rate Increase ("GRI") announcements, were usually made three to five weeks before the planned implementation date.

Most of the carriers at issue made announcements around the same time that reflected identical or similar price increase intentions. Moreover, the GRIs were sometimes postponed or modified by some carriers, possibly to align them with the GRIs announced by their competitors. This had the effect that by the planned date of implementation all or most of the carriers under investigation offered the same prices. In addition, the announcements as made did not seem to include the full information on the new prices relevant for the customers.

In order to address the Commission's concerns that the carriers were primarily coordinating their price policies (by so-called "price signaling") instead of providing useful information to their customers, the carriers have offered commitments to stop publishing general rate increase announcements.[4] Instead, the carriers have broadly[5] stated that they would, for a period of three years for all routes from and to the EEA, provide more detailed price figures that would be broken down according to base rates, bunker charges, security charges, terminal handling charges and peak season charges (if applicable). The proposed commitments were supposed to make the announcements more helpful to customers than publication of a generic price increase. Furthermore, the carriers stated that future price announcements would not be made more than 31 days before their implementation date and would be binding as a maximum price, with carriers being free to provide container shipping below that price should they wish to do so.

Under Article 9(1) of Regulation 1/2003, the Commission, in a Communication dated February 16, 2016, has indicated that—subject to market testing—it intends to declare the commitments legally binding on the carriers and close its investigation.[6] At this time, the results of the market testing have not been announced. However, the potential "soft resolution" of this case, without any formal decision (and with the parties not accepting

2 Press release of the European Commission, publ. 22 Nov 2013, available at: http://europa.eu/rapid/press-release_IP-13-1144_en.htm; Press release of the European Commission, publ. Feb. 16, 2016, available at: http://europa.eu/rapid/press-release_IP-16-317_en.htm.

3 For more information, see press release of the European Commission, publ. Sept. 25, 2006, available at: http://europa.eu/rapid/press-release_MEMO-06-344_en.htm?locale=en.

4 Press release of the European Commission, publ. Feb. 16, 2016, available at: http://europa.eu/rapid/press-release_IP-16-317_en.htm.

5 Two exceptions are included in the commitments. The commitments shall not apply to: "(i) communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers and (ii) communications during bilateral negotiations or communications tailored to the needs of specific identified purchasers." The carriers consider these situations as unlikely to raise competition concerns.

6 Communication of the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39850—*Container Shipping*, Feb. 16, 2016, para. 16, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.060.01.0007.01.ENG&toc=OJ:C:2016:060:TOC.

that there has been an infringement), has not settled the question as to where the boundary for anti-competitive price signaling under EU law lies, which has also been exacerbated inter alia, by the German and UK cases discussed below.

II. PRICE SIGNALING—ANTI-COMPETITIVE UNDER EU COMPETITION LAW

A. General rules

Price signaling under European law does not amount to a distinct form of antitrust infringement[7], nor is there a clear test that has been espoused in case law—and the Container Liner case does not change that. In each case when assessing whether the publication of pricing data amounts to an infringement, it is therefore necessary to look to the general principles of European antitrust law.

Both Article 101(1) TFEU and Article 53(1) EEA prohibit agreements and concerted practices that may affect trade and prevent or restrict competition. While agreements between competitors can be demonstrated by the existence of any direct or indirect contact, concerted practices—the basis on which price signaling is typically caught—are often far less easy to identify. The Court of Justice of the European Union ("CJEU") has held that a concerted practice is a "form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition."[8] By having the same collusive nature as agreements, concerted practices are distinguishable from agreements only by their intensity and the form in which they manifest themselves.[9] A unilateral information disclosure can also constitute a concerted practice under Article 101(1) when there is reciprocity or acceptance.[10] Both agreements and concerted practices fall under the prohibition in Article 101(1) TFEU and Article 53(1) EEA if they have either as their object or effect the prevention, restriction or distortion of competition.

Advance pricing announcements and general announcements on pricing can have both beneficial and negative objects and effects. Pricing announcements can have positive effects on competition by reducing information asymmetries—for example, by reducing search costs and improving consumer choice.[11] However, pricing announcements can also facilitate collusive behavior and thus restrict competition.

The guidance in case law and legislation as to what is and is not beneficial for competition is vague and often depends on a contextual assessment. Some general rules do however apply. Genuinely public unilateral announcements, e.g. through newspapers or company websites, do not "generally" constitute a concerted practice (although they may in certain circumstances, especially when followed by announcements by competitors).[12] Similarly, intelligent responses to a competitor's behavior or announcement do not amount to a

7 As compared to jurisdictions such as Australia (see the Competition and Consumer Amendment Act (No 1) 2011, No. 185, 2011 that came into force on June 6, 2012).

8 CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 26; CJEU (Wood pulp), Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307, para. 63.

9 CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 23.

10 OECD Unilateral Disclosure of Information with Anticompetitive Effects [2012], para. 12-13, available at: http://ec.europa.eu/competition/international/multilateral/2012_feb_disclosure.pdf.

11 Dewenter & Löw, *Kommunikation zwischen Unternehmen als kollusives Instrument: Eine ökonomische Betrachtung,* NZKart 2015, 458, 458; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, para. 57. In its most recent joint report on "Competition Law and Data" together with the French *Autorité de la concurrence*, the *Bundeskartellamt* also underlined again that greater transparency may benefit consumers and in some cases can also facilitate market entry of new competitors. See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on "Competition Law and Data", published on May 10, 2016, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2, p 14.

12 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, footnote 4 to para. 63.

concerted practice per se.

In addition, parallel pricing behavior in an oligopolistic market will not amount to a concerted practice where it is explicable on other grounds than collusion, such as "barometric price leadership",[13] for example where an increase in price of a raw material forces one party to increase its prices, with other parties (also suffering from the raw material price increase) following suit. Parallel pricing after unilateral price announcements can also in many cases be explained not by collusion, but by the oligopolistic market structure.[14] The Wood Pulp case established in this context that "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct."[15] It is widely acknowledged that parallel pricing behavior is a typical feature of oligopolistic markets, or markets which have characteristics akin to oligopoly, namely: (i) transparency (allowing easy monitoring of competitors); (ii) sustainability (i.e. ability to maintain discipline among competitors); and (iii) absence of competitive constraints (competitive action does not undermine collusive behavior). [16]

In considering whether price announcements are anti-competitive, it is also necessary to give thought to the broader law (and related uncertainties) regarding anti-competitive information exchange. According to the CJEU, the decisive factor as to whether an exchange of information is anti-competitive in this context, is whether each undertaking still determines independently the policy which it intends to adopt on the common market.[17] Therefore, exchange of information "which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object."[18]

Whether information exchange is capable of removing uncertainties will, according to the Horizontal Guidelines,[19] include consideration inter alia of: (i) whether the information is strategic; (ii) the market coverage of the companies publishing the data; (iii) the age of the data (historic data less likely to give rise to concerns); and (iv) the frequency of the publication of the data (in more unstable markets, more frequent exchanges of information may be necessary to sustain collusion). In each case, it is also necessary to consider the relevant market context.[20]

B. Considerations in Container Shipping Case Applying EU Law Principles

There is some uncertainty, applying the above principles, whether the commitments offered in the Container Shipping case are sufficient.

The commitments offered by the container shipping companies would result in a series of public future pricing announcements—albeit with steps taken to

13 European Commission, Zinc producers group, [decision, 1984] 84/405/EEC L 220/27, paras. 75—76.

14 In the case *Bertelsmann and Sony Corp. of America v. Impala* (C-413/06 P), the Court implicitly even indicated that tacit collusion may not even fall under Article 101(1) TFEU: "Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article [101 TFEU] in order to be able to adopt a common policy on the market." Para. 122—123. This seems to indicate that if there is another explanation for it than only collusion, there is no infringement.

15 CJEU (Wood pulp), Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307, para. 71.

16 Parties therefore often run an "oligopoly defense" when confronted with allegations of being involved in a concerted practice in breach of Article 101, see CJEU, Cases T-202/98 etc., *Tate & Lyle v. Commission* [2001] ECR II-2035, para. 46; for the characteristics of oligopolistic markets see OECD Policy Roundtable: Information Exchanges Between Competitors under Competition Law, Background Paper, pp. 28—29.

17 CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 32; CJEU, Case 172/80, *Zuchner v. Bayerische Vereinsbank AG* [1981] ECR 2021, para. 13.

18 CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 41.

19 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, paras. 58, 86—94; *Pischel/Hausner, Informationsaustausch zwischen Wettbewerbern–Zum Stand der kartellrechtlichen Entwicklung, EuZW* 2013, 498, 500—502.

20 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, paras. 77—85.

give consumers more information, and reduce the ability for competitors to adapt to unilateral price increases.

It is not clear that the shipping market is an oligopoly of the type envisaged in Wood Pulp and therefore whether concertation must be the only plausible explanation for the unilateral announcements. A key first question is whether the revised unilateral price increase announcements can be explained on other grounds than having as their object the coordination of behavior among competitors. The rationale in the shipping containers commitments seems to be that the price announcements, in providing more detail, would benefit consumers.

However, benefitting consumers may not be in itself sufficient to address any antitrust concerns. The announcements, in providing more information for customers (and competitors), also contain strategic information relating to future prices published with a relatively high frequency. Frequent exchanges of individualized data regarding intended future prices or quantities can amount to an object restriction, according to the Horizontal Guidelines.[21] However, the Commission has recognized that if it can be demonstrated that a company is fully committed to its announced future prices (that is to say, it cannot revise them), there would typically not be an object infringement.[22] Of note in this context is that the maximum price would be fixed, but not the price itself. There is, therefore, scope for debate.

IV. PRICE SIGNALING IN GERMANY

The uncertainties surrounding European competition law enforcement in relation to price signaling have not been much clarified by recent German case law. However, the Bundeskartellamt has taken quite a strict view on publicly accessible price data (in line with European case law).[23]

A. *Mortar Industry Investigation*

In 2009 and 2010, the Bundeskartellamt imposed fines totaling approximately EUR 53 million against several companies in the mortar industry for their announcement of sensitive price data in a case very similar to the Container Shipping case.[24]

Due to increases in costs of dry mortar silo constructions, the implementation of an extra "set-up fee" for erecting these silos was discussed internally within (not among) most of the main dry mortar producers for several months and some had already made unilateral price announcements in this respect. The costs for the silos had previously nearly always been included in the mortar price. Being well aware of the risks of entering into a "classic" price-fixing agreement, the producers finally met during a sector meeting in 2006 which had been organized by the opposite market side. In that meeting the dry mortar producers independently announced their individual plans to implement an extra set-up fee. Each mortar producer also gave further detailed information on its intended discount, bonus and early payment/cash discount program relating to the fee. The set-up fee was then implemented on exactly the same date across almost the entire German mortar sector.[25]

Upholding the decision by the Bundeskartellamt, the Higher Regional Court of Düsseldorf ("OLG Düsseldorf") stated that it makes no difference to the antitrust

21 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, para. 74.

22 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, footnote 4 to para. 74.

23 For more information see Zimmer, in: *Immenga/Mestmäcker, Wettbewerbsrecht*, 2014, GWB § 1, para. 92—93.

24 Press release of the *Bundeskartellamt*, publ. Mar. 2, 2010, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/02_03_2010_Baustoff-Fachhandel.html; Press release of the *Bundeskartellamt*, publ. July 3, 2009, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/03_07_2009_Silostellgeb%C3%BChr.html?nn=3591568; Upheld by Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I"), V-1 Kart 1-6/12 (OWi).

25 Heyers, *Systemkonformität der kartellrechtlichen Beurteilung sog. Informationsaustauschs*, NZKart 2013, 99, 99; Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I"), V-1 Kart 1-6/12 (OWi), paras. 37—133.

assessment if the direct customers agreed to the practice or even encouraged it.[26] In addition, the OLG Düsseldorf underlined that the fact that some dry mortar producers had already decided on how to proceed with regard to the set-up fee and had already announced this to their customers, did not prevent a concerted practice at the later sector meeting.[27] The announcements at the meeting had established a climate of certainty that facilitated the concerted behavior, leading to a uniform set-up fee in almost the entire mortar sector. Therefore, both Bundeskartellamt and OLG Düsseldorf held that Section 1 of the Gesetz gegen Wettbewerbsbeschränkungen ("GWB") had been violated (Section 1 GWB is the German equivalent to Article 101 TFEU and Article 53 EEA). Furthermore, the OLG Düsseldorf clearly stated that if unilateral announcements are made at a meeting with competitors present, this already crosses the line to a direct information exchange with competitors. Therefore, the standards applied in this case were stricter than the ones in the container liner shipping investigation should the commitments be accepted by the Commission.

B. Milk Sector Inquiry and Investigation

Regarding the publication of price related data, the Bundeskartellamt further examined so-called "Market Transparency Systems" in their Milk Sector Inquiry of 2012.[28] In contrast to the abovementioned cases, the data is here collected and processed by organizations/institutions and private companies which publish reports on the supply volume of raw milk and the milk prices paid to producers by dairies, in addition to the already existing official reports on raw milk procurement and other data published by governmental institutions. In its inquiry, the Bundeskartellamt came to the general conclusion that market transparency in the milk sector due to publication of up-to-date, individualized company data is not encouraging competition but rather restricting it, and that it will continue to emphasize this point in both German and European legislation and regulation by providing input to the German and European legislative process.[29]

Concerned by the Bundeskartellamt's interim report on the inquiry,[30] the company AMI asked the Bundeskartellamt to assess whether its planned information system for the procurement of raw milk was compatible with competition law.[31] The Bundeskartellamt found that the company's plan to publish individualized milk prices (which is the price a dairy pays its farmers/producers for their raw milk) is prohibited by Section 1 GWB, unless the data is "historic" (which is in this case defined by the Bundeskartellamt as older than six months). It further raised significant concerns towards the publication of individualized milk prices in the form of a basic price with separate identification of surcharges and discounts, as the separate amounts might reveal details of the contracts with the dairies or cooperatives. As surcharges and discounts are valid for a longer period, the information would not therefore be considered as historic. The Bundeskartellamt further stated that the publication of current milk prices would only be compatible with antitrust law if the data was published via a non-identifying (aggregated) market information system, where the data cannot be attributed to any individual dairy and it made detailed specifications on the number and size of the dairies which have to be included in each sample to fulfil this criteria.[32]

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26 The CJEU also held in the past that Article 81 EC (now Article 101 TFEU) "is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such", see CJEU, Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38.

27 Higher Regional Court of Düsseldorf (OLG Düsseldorf), Judgment of Oct. 29, 2012 („Silostellgebühren I"), V-1 Kart 1-6/12 (OWi), para. 139.

28 *Bundeskartellamt*, Milk Sector Inquiry, Final Report Jan. 2012, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Final%20Report.pdf?__blob=publicationFile&v=7.

29 *Bundeskartellamt*, *Sektoruntersuchung Milch* (B2-19/08), Endbericht Jan. 2012, p, 11.

30 *Bundeskartellamt*, Market Power in the Milk Sector–Interim Results of a Sector Inquiry by the *Bundeskartellamt*, Jan. 11, 2010, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Milk%20Sector%20Inquiry%20-%20Interim%20Results.pdf?__blob=publicationFile&v=5.

31 *Bundeskartellamt*, Case Summary of Sept. 26, 2011, Competition law friendly design of market information systems for the procurement of raw milk, B2–118/10.

32 In detail, the *Bundeskartellamt* stated that there need to be a "collective representation of at least five dairies, of which the largest should not receive more than

AMI adjusted its systems accordingly.

In contrast to the EU Container Liner Shipping case, this investigation did not concern unilateral announcements per se but a market transparency system run by a third party— potentially leading to the stricter approach adopted by the Bundeskartellamt, including greater restrictions on the data published.

C. Fuel Investigation

Despite its position in the above two cases, it was the Bundeskartellamt who supported the implementation of the "German Market Transparency Unit for Fuels" (Markttransparenzstelle für Kraftstoffe) in 2013.[33] Companies that operate public petrol stations or have the power to set their own prices are now obliged to report price changes for the most commonly used types of petrol in real time to the Market Transparency Unit for Fuels. The Transparency Unit then passes on the incoming price data to consumer information service providers. Accordingly, motorists are now able to view information on current fuel prices online and find the cheapest petrol station in their surrounding area. However, while intended to increase competition, the work of the Transparency Unit has had little to no effect on petrol prices so far. In fact, the Transparency Unit has been much criticized for having had no effect at all, apart from imposing onerous disclosure obligations on market participants and facilitating the supervision of the market by the Bundeskartellamt.[34] In this context, it is important to highlight that the Bundeskartellamt tried for years, unsuccessfully, to prove that high fuel prices in Germany were the result of anti-competitive agreements in the sector.[35] In addition, in contrast to the milk investigation, the transparency in this case is actually relevant for the direct end consumer.

D. Joint Report on "Competition Law and Data"

In its most recent joint report on "Competition Law and Data" together with the French Autorité de la concurrence, the Bundeskartellamt emphasized again that data on competitors' pricing could limit competition, especially in the context of the unprecedented level of transparency in online markets.[36] This seems to underline that the Bundeskartellamt will look closely at multiple unilateral announcements that can lead to a very high level of transparency and where parallel behavior can be observed. The Bundeskartellamt again indicated that it will check whether the transparency actually benefits consumers and, if parallel behavior is a consequence of the transparency, whether there can be another explanation for it than coordination:[37]

> [F]irst, market transparency is generally said to benefit consumers when they have – at least in theory – the same information as the companies and second, no coordination may be necessary to achieve such supra competitive results.

V. PRICE SIGNALING IN THE UNITED KINGDOM

As set out below, recent UK cases

33% of the total volume of milk supplied to the dairies represented in the random sample and the two largest dairies should collectively receive less than 60% of the total volume of milk supplied to the dairies represented in the random sample"; *Bundeskartellamt*, Case Summary of 26 Sept. 2011, Competition law friendly design of market information systems for the procurement of raw milk, B2–118/10, p. 4.

33 See press release of the *Bundeskartellamt*, publ. Dec 1, 2013, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/01_12_2013_MTS.html; Knauff, *Staatliche Benzinpreiskontrolle*, NJW 2012, 2408. See also the Austrian surveillance system 'The Fuel Price Database', an example of regulatory intervention, where prices are submitted each day by noon to the e-control, so that they can then be made available to motorists, see for further information: http://www.init.at/en/case_study/open-source-as-fuel-the-fuel-price-database/.

34 Knauff, *Staatliche Benzinpreiskontrolle*, NJW 2012, 2408, 2408.

35 See *Bundeskartellamt*, Fuel Sector Inquiry, final report, May 2011–summary.

36 See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on "Competition Law and Data", published on May 10, 2016, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2, p. 14.

37 See *Bundeskartellamt* and *Autorité de la concurrence*, joint report on "Competition Law and Data", published on May 10, 2016, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2, p. 15.

demonstrate both a strict and slightly more lenient approach, while providing only limited guidance as to the boundaries for anti-competitive price signaling.

A. Cement Investigation

The CMA in January 2016 published its final order prohibiting British cement suppliers from sending generic price announcement letters to their customers. Instead, any price announcement letter will have to be specific and relevant to the customer receiving it, setting out the last unit price paid, the new unit price, and the specific details of other changes that apply to the customer.

This CMA order gave effect to one of the measures ordered by the Competition Commission ("CC") following its two-year investigation into the supply or acquisition of aggregates, cement and ready-mix concrete in Great Britain ("GB"). The CC found that features of the British aggregates, cement and ready-mix concrete market had an adverse effect on competition (not strictly an application of Article 101, but parallels can be drawn). In particular, the CC was concerned that the general characteristics of the cement market (high concentration, high transparency, high barriers to entry, product homogeneity, customer behavior and vertical integration) facilitated collusive behavior among suppliers and softened customer resistance to price increases.[38]

The CC indicated in its report that "Price increase letters could serve as a focal point for coordination (if it were occurring), or they could be used by the GB cement producers to signal to each other the expected outcome from coordination (i.e. the level of price or of price increase which is sought in the coordinated outcome, thereby facilitating price parallelism)".[39] The price announcement letters were sent by individual suppliers to their customers to notify them of intended increases in prices for cement. These letters were typically sent out at least once a year. While there was not strictly any public announcement or publication of these letters, most of the GB cement producers were customers of each other and would therefore receive these price announcement letters directly.[40]

Prior to imposing this remedy the CC conducted four separate sets of pricing analysis: (i) an analysis focused on possible coordination regarding the timing, amount and identity of which supplier announced prices first—the CC found "clear parallelism" with suppliers appearing to signal that "they will try to accommodate the other GB producers' price increases in many cases"; (ii) whether the announced prices were achieved on average—the CC found inter alia that "in many cases" an average price increase of more than half of the announced price increase was achieved; (iii) the extent to which there was parallelism between the price announcements and price increases for individual customers—the CC found that, broadly, increases did not cluster around an announcement; and (iv) whether there was correlation in average prices—the CC found a "very high" level of correlation between the three main cement producers.

In imposing the remedy, the CMA recognized that the CC was trying to ensure that any future announcements were beneficial to customers, rather than merely benefiting competitors. In its report, the CC stated:

> By being permitted only to produce customer-specific price announcement letters, it will be more difficult for the GB cement producers to appreciate the level of price increase their competitors are seeking to apply. Whilst some leakage of information is always possible (eg customers may provide their letters to another GB cement producer), having knowledge of one customer's specific price increase would not be sufficient to deduce accurately the gross price increase being sought that year by that cement producer. It is also possible that suppliers and customers may be less willing to allow price announcement letters to be circulated more widely within the market, if they were to contain customer-specific information

38 Competition Commission, *Aggregates, cement and ready-mix concrete market investigation: Final Report*, January 14, 2014, available at: https://assets.digital.cabinet-office.gov.uk/media/552ce1d5ed915d15db000001/Aggregates_final_report.pdf, chapter 12.

39 Ibid, para. 7.189.

40 Ibid, footnote 97 to para. 7.193.

about the prices to be charged.[41]

This case provides few hard lines in the sand. Nonetheless, similarities can be seen between the information which will now have to be included in the price announcement letters and the commitments offered by the carriers in the Container Shipping case. In both cases there is an emphasis on presenting the information which is most helpful to the customer, while providing for very limited wriggle room between announced pricing intention and actual price.

B. Energy Market Investigation

Prior to the CMA's Phase II energy market investigation, Ofgem[42] conducted a State of the Market Assessment in which it examined potential collusive behavior in the retail energy market. While concluding that there were no possible breaches of competition law,[43] Ofgem nonetheless found that the retail energy market was characterized by a high level of concentration, price transparency, stable demand and high barriers to entry and expansion. The conclusion was therefore that the conditions for collusion were prevalent.

Ofgem did not express a view as to whether there was any tacit collusion among the "Big Six" energy firms but did observe that price announcements tended to be aligned both in terms of timing and magnitude and that intensity of competition appeared to have diminished in recent years.[44] The Big Six announce their price changes broadly around the same time each year. While there may be different changes for different tariffs, the public statements which generate media attention usually refer to a single, average figure for each fuel and an implementation date. Ofgem therefore commented that these price announcements "are a particularly informative measure, because through them, energy suppliers condense complex tariff adjustments in a single figure for gas and electricity that can be monitored by customers and competitors, and to which both customers and competitors can react."[45]

The CMA went on to produce a working paper regarding tacit coordination between the Big Six via price announcements. While recognizing the initial view that the market had some characteristics conducive to collusive behavior, the CMA found no evidence of suppliers using price announcements to signal their future price intentions to rivals. The announcements of future prices were justified on the basis that price announcements are used to manage relationships and reputation with domestic customers and comply with regulatory disclosure requirements.[46]

The CMA also considered the fact that the period between the public announcement and notification of the price change to customers[47] and/or implementation had since mid-2011 been at most 10 days. This effectively meant that there was a very small window in which the announcing firm could modify or withdraw the price it had announced, especially given the media attention usually generated by price announcements. In fact, five of the Big Six confirmed that they had never modified the level or timing of a price change between announcement and implementation; the sixth, Scottish Power, could only identify one immaterial change that resulted from a slight error in a regulatory announcement which was withdrawn, an apology issued, and the corrected notice republished.[48] Had this period been longer, there would have been a greater opportunity for suppliers to use the public announcements to coordinate prices.[49] There is a clear parallel between this consideration and the commitment offered by the carriers in the Container Shipping case to make future announcements binding as maximum prices and to set a maximum time between announcement and implementation.

VI. SIGNALING THE FUTURE

41 Ibid, para. 13.186.

42 The UK regulatory authority for gas and electricity.

43 Ofgem, *State of the Market Assessment*, Mar. 27, 2014, available at: https://www.ofgem.gov.uk/publications-and-updates/state-market-assessment, paras 1.26-1.27.

44 Ibid, paras. 4.11, 4.61—4.71.

45 Ibid, para. 4.64.

46 CMA, *European Market Investigation: Coordination in the retail market facilitated by price announcements*, March 5, 2015, available at: https://assets.digital.cabinet-office.gov.uk/media/54f8765de5274a1414000001/Coordination_retail_pricing.pdf, para. 42.

47 At which point the supplier is effectively bound to implement the change. Ibid, para. 49.

48 Ibid, paras. 50—51.

49 Ibid, paras. 44—48.

The cases discussed above demonstrate a continued regulatory interest in price signaling. However, the cases also show regulators, while often taking a "hardline" approach, in many cases reaching soft resolutions with entities—commitments, or orders to alter conduct, without the imposition of any fine—and without any appeal or test of the case law by affected parties. As Richard Whish has suggested "for a competition authority to go the whole way and to actually say there's enough going on in this market [in terms of price signaling] to impose a fine, it seems to me that's a really tall order."[50]

As things stand, there are nevertheless some strands that can be drawn from the above cases and which those making price announcements should consider:

The risk of an infringement seems lesser:

- the closer to an implementation date a price announcement is made, the key consideration being from what time an announcement is actually useful for customers—i.e. when the customer generally starts ordering;
- if the company is fully committed to the announced future price and will not react to the announcements by its competitors after it has announced its own intentions;
- if companies do not publish generic price increases, but, where possible, provide additional details (such as base rates, additional charges) that are relevant to the customers so that it is clear that the companies are not publishing the information in order to collude with their competitors, but to inform their customers;
- if, in case of generic price increase communications, a maximum price is published; and
- if the price announcements are not regular and are not always made at around the same time as competitors' announcements.

It is also clear from these cases that companies need to consider: the risk of indirect disclosure through customers (hub and spoke risk); the risk of unilateral disclosures in meetings with competitors and customers being assessed as direct information exchange between competitors; and the fact that information providing a benefit to direct customers may not be sufficient to avoid price signaling issues.

While the introduction of a clear separate price signaling offense does not seem necessary, further clear lines would certainly be welcome—a "brave" defendant hopefully, at some stage, rescuing this "damsel in distress."

50 In comments at the Global Competition Review Brussels Conference 2014, as reported. See http://globalcompetitionreview.com/news/article/37260/demonstrating-price-signalling-will-tall-order-says-whish/.

THE YATES MEMORANDUM'S IMPACT ON U.S. CARTEL ENFORCEMENT: EVOLUTION OR REVOLUTION?

BY ROBERT E. BLOCH, KELLY B. KRAMER & STEPHEN M. MEDLOCK [1]

The Yates Memorandum marks a significant, or even revolutionary, change in the Department of Justice's ("DOJ") approach to investigating and prosecuting individuals. More than a decade ago, DOJ's Antitrust Division (the "Division") instituted a policy of seeking to prosecute the highest-ranking responsible executives for cartel behavior. Many of the changes that the Yates Memorandum requires were already anticipated by the Division's policies. While the Yates Memorandum may have profound effects in many areas of law, for the criminal cartel bar, the changes it introduces appear to be more evolutionary than revolutionary.

I. THE YATES MEMORANDUM

In September 2015, DOJ made public a memorandum drafted by Deputy Attorney General Sally Yates announcing new policies intended to hold corporate executives accountable for criminal conduct. The memorandum, colloquially known as the "Yates Memo," outlines six policy changes or clarifications regarding DOJ's approach to corporate executives, as follows:

1. In order to be eligible for cooperation

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credit, companies must "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority and provide to [DOJ] all facts relating to that misconduct."

2. DOJ attorneys must focus on individuals at the outset of corporate investigations.
3. DOJ's criminal and civil attorneys must maintain "[e]arly and regular communication" with each other to ensure that parallel proceedings are coordinated.
4. DOJ may not release executives from criminal liability except in "extraordinary circumstances" or as a part of the Division's Leniency Program.
5. DOJ attorneys must develop a "clear plan" to resolve criminal cases against executives before resolving a corporate investigation and any releases of executives must be approved by the relevant U.S. Attorney or Assistant Attorney General.
6. DOJ's civil attorneys should "focus on individuals as well as the company," and the decision as to whether to pursue "civil actions against culpable individuals should not be governed solely by those individuals' ability to pay."

II. THE DIVISIONHAS LONG FOCUSED ON INDIVIDUAL ACCOUNTABILITY

Almost twenty years ago, the Division began adopting policies and developing enforcement techniques based on the proposition that individual accountability was the most effective way to deter cartel conduct. Those policies appear, in retrospect, to have been ahead of their time.

A. The Division's Approach to Prosecuting Executives For Cartel Conduct

Price-fixing has not always been viewed as a serious criminal offense. Until 1974, price-fixing and bid-rigging were misdemeanors. Even until the 1990s, the Division still often recommended non-custodial sentences for foreign nationals who voluntarily surrendered to the United States. For business executives—especially foreign business executives, who generally faced little or no risk of extradition—the prospect of serving significant prison time for cartel offenses must have seemed remote.[2]

These policies began to change in the 1990s, as the Division began steadily escalating the pressure on executives. As part of its leniency programs, the Division adopted a series of carrots and sticks to convince foreign companies and their executives to plead guilty and to agree to serve prison time. At the same time, the Division abolished "no jail time" plea agreements for foreign executives. The Division also embarked on a remarkably successful global lobbying effort to convince other nations to criminalize cartel conduct. Today, more than 30 countries impose criminal liability for cartel activities, including major economic powers like Australia, Brazil, Canada, Israel, Japan, Mexico, South Korea, the United Kingdom, and Russia.

The Division's prosecution of foreign executives has also increased and been successful. Prior to 2010, the Division had never successfully extradited a foreign executive. That year, however, after a long effort, the United Kingdom extradited Ian Norris, the former CEO of Morgan Crucible PLC, to the United States. Even though Norris was extradited to face a charge of conspiring to obstruct justice, not for a violation of the Sherman Act, the fact that the Division succeeded in bringing a fugitive to the United States was a landmark development.

In March 2012, on the heels of Mr. Norris' extradition, the Division won its first trial victory against foreign executives accused of price-fixing. As part of its case against AU Optronics Corporation, the Division alleged that many of its top executives had conspired with competitors to fix the price of thin-film transistor liquid crystal display panels. After an eight week trial, a jury found AU Optronics' President, Hsuan Bin Chen, and Vice President, Hui Hsiung, guilty of violating the Sherman Act.[3]

In April 2014, the Division announced

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2 This is not to say that there were not significant improvements in DOJ's cartel enforcement program between 1974 and the 1990s. In 1978, DOJ announced its original Corporate Leniency Policy. In 1990, the maximum fine for a corporate violation of the Sherman Act was increased from $1 million to $10 million. In 1994, DOJ announced its Individual Leniency Policy.

3 The jury acquitted two other AU Optronics' executives, and a mistrial was declared as to the fifth.

that Germany had agreed to extradite Romano Pisciotti, an Italian citizen, to face U.S. antitrust charges—making Pisciotti the first person ever to have been extradited to the United States based solely on antitrust charges. The story behind Pisciotti's extradition reflects the Division's commitment to pursuing fugitives. Pisciotti was an Italian-based executive at Parker ITR Srl ("Parker"). In 2010, Parker pled guilty to price-fixing in the marine hose industry between 1999 and May 2007. In Parker's plea agreement, the Division "carved out" Pisciotti (i.e. retained the right to prosecute him), who ran Parker's marine hose business from 1985 to 2006. Six months later, the Division secured an indictment against Pisciotti, alleging that he participated in a global price-fixing conspiracy among manufacturers of marine hoses. Notably, the Division filed the indictment under seal, presumably because Pisciotti refused to travel to the United States to face the charges.

The Division then set out to try to secure Pisciotti's presence in the United States. Because Italy did not criminalize cartel conduct until after the events at issue in the case, extradition appeared to be out of the question.[4] The Division thus elected to file a "Red Notice" with Interpol, which obligated member countries to seek to detain Pisciotti with an eye towards his potential extradition. In June 2013, as he sought to clear customs at Frankfurt Airport while flying from Nigeria to Italy, German authorities arrested Pisciotti. At the U.S. government's request, German prosecutors initiated extradition proceedings.

Pisciotti challenged the validity of his extradition in various European courts, but without success. On April 3, 2014, the Higher Regional Court of Frankfurt ceded to requests from the Division and ordered the extradition of Pisciotti. Just three weeks later, Pisciotti agreed to plead guilty to participating in a conspiracy to rig bids, fix prices and allocate market shares of marine hose sold in the United States. Pisciotti agreed to serve two years in prison—with credit for the nine months and 16 days he was held in custody in Germany—and to pay a $50,000 fine.

4 Most extradition treaties require "dual criminality," meaning that extradition is only available when the conduct at issue is illegal in both the countries making and considering the extradition request.

While the Division has made significant progress in extraditing executives accused of price-fixing, its record is far from perfect. The Division has great difficulty compelling the appearance of foreign executives. Even after Pisciotti and Norris, extradition appears to be the exception, rather than the rule. It remains to be seen how foreign governments will handle the Division's extradition requests for criminal antitrust charges.

B. The Division's Tools for Investigating and Prosecuting Cartelists

These developments highlight the Division's increasing use of all of the cartel enforcement tools at its disposal. Some of those tools are as follows:

Sealed indictments. One of the lessons of the Pisciotti extradition is that an executive may not even know that he or she has been indicted in the United States. By way of example, Pisciotti was indicted under seal on August 26, 2010. The indictment remained sealed until August 1, 2013, when Pisciotti was detained by German authorities. While it is not publicly known how many other foreign executives have been indicted under seal, it seems likely that the Division has obtained numerous sealed indictments of foreign executives.

INTERPOL Red Notices. The Division has long used Interpol Red Notices to make international travel difficult for indicted foreign executives. However, the recent criminalization of cartel offenses in many countries makes international travel increasingly treacherous for foreign executives that may be the subject of an Interpol Red Notice.

To be sure, Red Notices are far from perfect, as illustrated by the marine hose cartel. Although Pisciotti was extradited from Germany to the United States, his co-conspirator Uwe Bangert remains at large despite being detained twice under an Interpol Red Notice. Bangert, a German national, was detained in Columbia and Spain, but each time he was returned to Germany. Likewise, in December 2002, Tamon Tanabe, a Japanese national who was indicted for fixing the prices of nucleotides, was detained in India pursuant to an Interpol Red Notice. Although Tanabe was held in India for several months, the Division was not able to extradite him. Despite

the increasing use of Interpol Red Notices, a 2012 law review article estimated that a total of 47 individuals of varying nationalities who were charged in the United States with international price fixing during the period 1990-2009 are fugitives.

Increasing Prosecution of Carve-Outs. Another factor that shows the Division's "get tough" approach toward individuals including foreign executives accused of fixing prices is the increasing prosecution of carve-outs. By way of example, since January 20, 2009, the Division has prosecuted 417 individuals. At least 65 percent of these individuals were U.S. citizens. In the ongoing investigation of the automobile parts industry, the Division has filed charges against 58 executives—a surprisingly large number when compared to the Division's other recent international cartel investigations, as shown in the table below.

International Cartel Investigation	Prosecutions/Carve Outs	Percentage of Individuals Prosecuted
Optical Disk Drive	4/4	100%
Marine Hose	12/14	85.7%
DRAM	17/22	77.3%
TFT-LCD	16/27	59.3%
Automotive Parts	46/78	58.9%
Refrigerant Compressors	2/6	33.3%
Air Passenger and Air Cargo	16/86	18.6%
Freight Forwarders	0/19	0%
Total	**113/256**	**44%**

As a result of the success and strength of the Division's criminal cartel enforcement efforts, the Division has recently persuaded a number of foreign executives to voluntarily travel to the United States, plead guilty to a Sherman Act violation, and serve a sentence in a federal prison. In many cases, foreign executives do so because pleading guilty allows them to avoid the risk of an unexpected arrest during travel based on an international arrest warrant. Moreover, the negotiated sentence in a plea agreement is likely to be lower than one imposed by a court following a criminal conviction.

III. THE YATES MEMORANDUM'S IMPLICATIONS FOR U.S. CARTEL ENFORCEMENT

While the broad strokes of the Yates Memorandum are clear enough, it is not obvious how the Division will implement it in practice. What documents and information will the Division request from a company regarding individuals beyond the usual requests for documents, calendars and expense reports and company phone records? How much information and at what level of detail will a company need to disclose regarding its employees before receiving cooperation credit? When will the Division request these disclosures? These questions remain to be answered.

The preliminary reaction from Division officials suggests that the Yates Memorandum will have some impact on cartel investigations, but not a significant impact. Deputy Assistant Attorney General Brent Snyder explained that "[t]he [A]ntitrust [D]ivision has long prioritized prosecution of individuals" and that it "continues to be a fundamental policy of the [A]ntitrust [D]ivision, and both that practice as well as the way we investigate and resolve our cases, we believe, is entirely consistent with the Yates Memo."[5] Snyder acknowledged, however, that the Yates Memorandum may speed up the prosecution of certain individuals.[6]

5 Leah Nylen, *Yates Memo Won't Change DOJ Criminal Antitrust Investigations, Snyder Says*, MLex (Sept. 29, 2015).

6 *Id.* ("there will probably be some cases where we see earlier prosecution of individuals" but that "there will be other cases where the nature of the investigation and the speed at which companies come in and begin to

Whether this is the case, there are some conclusions concerning the Yates Memorandum's impact on criminal cartel investigations and prosecutions that seem apparent.

A. The Division's Leniency Program Will Not Change

The Yates Memorandum, by its own terms, will have no effect on antitrust amnesty applicants and their executives. Even under the Yates Memorandum, amnesty means amnesty—if a company perfects a corporate amnesty application, it can protect itself and its employees from criminal prosecution in the United States. In this sense, the Division's Leniency Program will continue to create different challenges and opportunities for companies and their executives than are created by most other federal criminal enforcement programs.

B. Companies May Need to Disclose More about Individual Executives to Obtain Cooperation Credit

Outside of the amnesty context, the Yates Memorandum could signal changes for U.S. cartel enforcement. The Yates Memorandum appears to indicate that companies must provide detailed information regarding all of its culpable executives—including very senior officials—prior to receiving cooperation credit. For example, the Yates Memorandum's reference to "determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs," may cause prosecutors to demand additional, detailed information about senior executives at a non-amnesty company seeking cooperation credit.

This could mark a significant practical change. Many companies have cooperated over the years in different ways and to varying degrees of specificity when it comes to their senior executives. Part of this depends on the extent to which the executives themselves are involved in the conduct being investigated; the size of the company involved and whether it is public; whether it has any formal compliance protocols to deal with internal investigations; whether the board of the company becomes actively involved; whether the company deals with the government; and the scope of the problem. While companies have taken several steps to show their "substantial cooperation" with the Division's investigation, they generally have not gone out of their way to implicate high-level executives in wrongful conduct when they do not have to (unless it cannot be avoided) and have provided only the information necessary to resolve their issues. It is always difficult and dangerous to generalize because some companies have done more and some have done less depending upon many of the factors listed above. The Yates Memorandum appears to discourage this practice by tying cooperation credit to the disclosure of specific information about specific executives. However, it is still unclear when companies seeking a cooperation credit will be required to disclose information regarding their executives, and how much information the Division will require to be disclosed.

C. Executives May Need to Retain Their Own Counsel Earlier in the Investigation

The Yates Memorandum may force individual representation earlier in the investigative process. The memorandum requires DOJ attorneys to focus on individuals from the outset of corporate investigations in order to create a better factual record against individuals, to "increase the likelihood that [employees] with knowledge of the corporate misconduct will cooperate with the investigation and maximize the chances [of a] final resolution . . . against culpable individuals." This early focus on individual culpability coupled with the renewed emphasis on individual prosecution may make it more likely that company and employee interests diverge early in the investigative process. As a result, companies and their counsel may face more difficulties when attempting to secure complete cooperation from executives during internal investigations.

D. Company Counsel May Need to Provide More Robust Upjohn Warnings

The Yates Memorandum also highlights the difficulties that executives may face early in a corporate investigation. It provides additional guidance regarding what it means when

cooperate will mean companies resolve before individuals do.").

DOJ demands that a company produce non-privileged information. To earn cooperation credit, a company must produce all relevant facts, including the facts obtained through interviews conducted as part of its internal investigation. As a result, an executive's early interviews with company counsel, including damaging admissions of culpable conduct (or false exculpatory claims), will likely be disclosed to DOJ.

Given this increased focus on individuals, companies should consider making more robust Upjohn warnings and memorialize them to ensure that employees understand the scope of the attorney-client relationship, and that the company can disclose facts learned during the interview at its sole discretion. These Upjohn warnings should be made early in the company's internal investigation because executives may choose to retain their own counsel, often at the expense of the company, at a much earlier stage of the investigation. It is unclear as a practical matter whether corporate counsel must now advise that the company will provide the details of any interview to the government to ensure employees fully understand their rights. Certainly, such a warning would likely chill an employee from speaking freely or without counsel.

E. Internal Investigations May Be Complicated by Individual Liability

The government's increased focus on individual liability may complicate compliance efforts. Employees may be more wary of speaking with investigators because they know that companies need to identify individuals in order to get credit for cooperating with an investigation. While individuals may be reluctant to provide information to internal investigators, a company still needs to ensure that it receives all possible information for its proffers to DOJ. These competing issues may lead to increased tensions between the company and its executives during an internal investigation.

F. Foreign Executives Are Increasingly Likely to Face Charges in the United States

The Yates Memorandum's increased emphasis on both corporate cooperation and the prosecution of individuals, especially culpable executives of multi-national companies who are located abroad, means that they are at a greater risk of prosecution in the United States. And when coupled with the Division's recent success on the extradition front, as well as the increasing criminalization of cartel offenses around the world, the Yates Memorandum may mean that more foreign executives will be prosecuted in the United States.

G. The Yates Memorandum May Change Some Carve-Out Decisions

More broadly, the combination of the Division's increased cartel enforcement efforts and the Yates Memorandum would seem to mean that it will be increasingly difficult for corporate and individual counsel to argue, and for prosecutors to justify, that a particular executive should be "carved-in" to a corporate plea agreement without substantial corporate disclosure about his or her conduct. But how broadly will this extend? Will it impact an employee's willingness to cooperate with his employer thereby jeopardizing the employee's continued employment? Does cooperation mean disclosing knowledge about other employees? Does it undermine the employee's attorney-client privilege? Does it require a company to terminate an executive at some point? Does cooperation mean a company has to somehow support or agree not to interfere with the possible extradition of an employee by say, agreeing to disclose his location and travel plans? Will the demand for cooperation by DOJ's different offices and staff attorneys be applied consistently? The answers to these questions are not known yet but raise significant issues concerning striking an appropriate balance between aggressive investigations and prosecutions and protecting the due process rights of those being investigated and prosecuted. Broadly speaking, however, the Yates Memorandum could prompt prosecutors to "carve-out" a larger number of individual executives.

H. Executives May Face Civil Liability

Following the spirit of the Yates Memorandum, the Division recently announced that it will consider bringing civil enforcement actions against individuals alleged to have participated in price-fixing. The Division has

not provided any guidance on when or whether it will pursue civil actions against executives. This leaves many unanswered questions. How would the Division evaluate an individual's culpability when determining whether to bring a civil action, especially when it prosecutes that individual? Would knowing but passive acquiescence in a subordinate's conduct be enough for the Division to pursue a civil case? What would an appropriate remedy be—a fine, disgorgement, or injunctive relief? Will civil prosecution be limited to conduct in certain industries like the banking, financial, and securities sectors, which are already regulated by other agencies? Until the Division provides further guidance, companies will need to update their corporate compliance programs to inform employees about their possible exposure to civil antitrust prosecution.

IV. CONCLUSION

The Yates Memorandum did not change the fundamentals of U.S. cartel enforcement. Prior to the Yates Memorandum, the Division had significant enforcement tools at its disposal, including the ability to indict individuals under seal, Interpol Red Notices, and an increasingly aggressive and successful track record in criminal antitrust cases. While it is too soon and still unclear how the Yates Memorandum will be implemented, the Memorandum will likely provide the Division with additional leverage in its criminal cartel investigations. Companies will need to make difficult decisions regarding how robust an Upjohn warning they should provide, when to provide legal counsel to their employees, and how much information they should provide to the government regarding its employees. Likewise, individuals will need to determine the extent to which they will cooperate with a corporate internal investigation, given the Division's increased focus on criminal and civil liability for individual wrongdoing. Stay tuned; there is more to come.

ANTITRUST PRIVATE DAMAGES ACTIONS IN THE UNITED STATES, CANADA AND THE EUROPEAN UNION

BY PIERRE CRÉMIEUX, MARISSA GINN & MARC VAN AUDENRODE[1]

I. INTRODUCTION

Competition in the marketplace is widely perceived as politically, legally and economically desirable. As of 2014, over 120 countries had adopted antitrust laws aimed at providing protection against anti-competitive behaviors, up from just 38 countries in 1990[2].

As competition is considered desirable, and because enforcement is unlikely to identify all instances of illegal violations, deterrence often includes penalty mechanisms that can exceed a disgorgement of profits. This may be achieved through trebling of damages or through multiple overlapping claims. Fines by government agencies may result in disgorgement by the antitrust violator of any benefit from the violation, but private enforcement may further enhance the deterrence effect of government agency enforcement. Specifically, private enforcement can provide a direct individual private compensation mechanism not achieved through public enforcement, as proceeds of fines imposed through

1 Marc Van Audenrode, Ph.D., and Pierre Crémieux, Ph.D., are Managing Principals at Analysis Group; Marissa Ginn, Ph.D., is a Vice President at Analysis Group. The usual disclaimer applies, namely that these views are solely those of the authors and do not necessarily reflect the views of Analysis Group.

2 "Unveiling the World of Antitrust," Columbia Law School website at www.law.columbia.edu/media_inquiries/news_events/2014/march2014/bradford-antitrust-project (accessed October 26, 2015).

public enforcement generally remain public[3]. Enforcement of antitrust policies relies on two main sources of action: public and private. Public action is traditionally seen as focusing on deterrence, while private action serves not only as further deterrence but also as compensation for direct, and in some instances indirect, customers of the lawbreakers. Beyond these broad similarities, countries differ in their application of antitrust policies.

This article compares and contrasts the well-known and well-established system of private action that prevails in the United States to those established by (a) the recent trilogy of decisions by the Supreme Court of Canada that reshaped the Canadian landscape for antitrust private actions,[4] and (b) the framework delineated by the recent European Directive on rules governing private actions for antitrust damages in member countries[5].

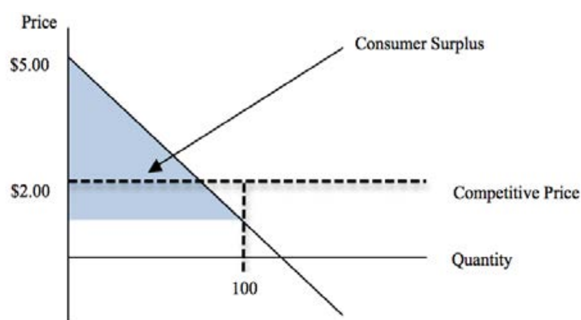
The main contribution of this paper is to show, via illustrative examples using different elasticities of demand[6] and different margins (levels of profit), that the ultimate approach to damages claims may be relatively similar across Europe, United States Federal Courts and Canada in as much as direct purchaser plaintiffs would likely ignore pass-on and claim harm exclusively from the overcharge, despite the European allowance for plaintiffs' claims to additional damages for lost profits on lost sales[7].

II. WHY ANTITRUST ENFORCEMENT?

Competition is desirable because it results in an efficient, optimal allocation of resources. In other words, under competitive conditions, goods will be produced in quantities and sold at prices such that society's overall welfare is maximized, at least in a static sense[8].

This can be illustrated using a simple example. Figure 1 represents the market for hotdogs sold by street vendors in a city. Demand for hotdogs on a given day is decreasing in price: the higher the price, the lower the demand[9]. In this figure, on any given day, some people are willing to pay up to $5.00 for a hotdog, but most are not. As price decreases, demand increases. This individual willingness to pay for a hotdog is driven by many factors such as tastes, wealth and how people value their time.

Figure 1: Market for Hotdogs



3 For instance, in 2011, the American Department of Justice ("DOJ") took in $2 billion USD in judgments and settlements, of which only $116 million went to restitution. The proceeds from fines and penalties went to the U.S. Treasury and those from forfeiture went to the DOJ Asset Forfeiture Fund or the Department of Treasury Forfeiture Fund. (http://www.justice.gov/opa/pr/department-justice-secures-more-2-billion-judgments-and-settlements-result-enforcement, accessed October 8, 2015)

4 Sun-Rype Products Ltd. v. Archer Daniels Midland Company, 2013 SCC 58 [Sun-Rype]; Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 [Microsoft]; and Infineon Technologies AG v. Option consommateurs, 2013 SCC 59 [Infineon Technologies].

5 "Directive 2014/I04/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," available online at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN (accessed October 8, 2015) [European Directive].

6 The elasticity of demand measures the magnitude of the reaction of demand to change in prices. For example, an elasticity of -1 means that when prices increase by one percent, quantity demanded decreases by 1 percent. An elasticity of -2 means that when prices increase by one percent, quantity demanded decreases by two percent.

7 In Canada, where direct and indirect purchasers are grouped into the same class, their joint damages claims are also likely to be only related to the overcharge, as explained further herein.

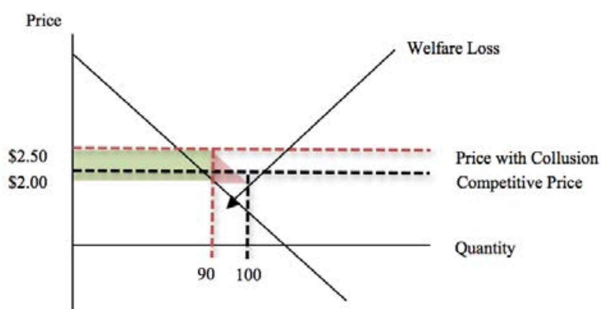
8 Although we will not discuss this here, imperfect competition and monopoly power may result in greater long-run dynamic efficiency and consumer surplus by encouraging innovation, for example, through patents.

9 The demand curve shown is the market demand curve and we assume that all sellers charge the same price.

In this example, we assume that the prevailing price for hotdogs would be $2.00 and that vendors would sell 100 of them. Note, however, that every single buyer except for the last one would have been willing to pay more than $2.00 to get their hotdog and is therefore better off after purchasing the hotdog (i.e. the value to the consumer of the item purchased is greater than its price). The difference between the price people are willing to pay and the price they actually pay is referred to by economists as consumer surplus and is represented in Figure 1 by the blue triangle.

If street vendors were to collude and artificially raise hotdog prices to, say, $2.50, what would happen? This is illustrated in Figure 2.

Figure 2: Market for Hotdogs under Collusion



The most immediate and obvious effect is that value is redistributed from the consumers to the hotdog vendors as prices and profits increase. In this example, buyers pay $2.50, $0.50 more than the competitive price of $2.00. Nevertheless, every customer purchasing a hotdog is, by definition, better off after the purchase as they freely decided to purchase the hotdog despite the higher price. However, some former customers preferred to keep the $2.50 rather than purchasing the hotdog, resulting, in our example, in sales of 90 hotdogs instead of 100.

Customers who valued the hotdog somewhere between $2.00 and $2.49 purchased the hotdog at the competitive price but are not willing to purchase the hotdog at the collusive price of $2.50. They suffer a loss. In fact, the reduction in hotdogs sold results in a redistribution of value from the consumers to the vendors, as illustrated by the green rectangle, and a loss of welfare, as illustrated by the red triangle in Figure 2. This welfare loss (the red triangle) is a loss to the consumer that is not redistributed to the vendor. Because this welfare is lost for all, it is at the heart of economists' love affair with competition.

In this example, were buyers to be compensated for the overcharge (represented by the green rectangle), the redistributive effects of the collusion would be erased. However, the welfare loss would not be reversed. No direct mechanism can, through private action, compensate consumers who chose not to buy a hotdog because of the price elevation.

Consider a slightly more complex scenario where hotdog producers collude and raise the price of hotdogs to street vendors. Two situations can result, depending on whether the vendor passes this cost increase onto the final customer.

If the vendor fully absorbs the increase in cost that results from the collusion, the market for hotdogs will continue to look like Figure 1, despite the producers' collusion. The impact of the collusion will not reach the final consumer. There will be no resulting welfare loss from the collusion, but the street vendor will suffer a drop in profits equal to the overcharge it faced. Such lost profits, directly attributable to absorbing the overcharge, are not to be confused with lost profits arising from lost sales as sales were not reduced in this situation. There will be redistribution from the vendor to the producer but the final consumer will remain unharmed and total welfare unchanged.

On the other hand, if the vendor passes the overcharge on to the final consumer (either partially or fully), the outcome of the producers' collusion will be similar to that described in Figure 2. The price to the final consumer will increase and the number of hotdogs sold will decrease. If the overcharge is fully passed-on, the burden of the overcharge will now reside with the consumer, who will experience harm. The vendor will not be harmed directly by the overcharge, but will lose profits on the units not sold as a result of the price increase to consumers. Here, as in the first situation, compensating the street vendor for its lost profits does not erase the consumer welfare loss, and leaves consumers who no longer purchased the hotdog harmed and difficult to identify.

A. Key Elements Governing Antitrust Private Actions

The short description above illustrates why tracking the source and victim(s) of harm from an antitrust violation can be so difficult. This explains why there exists a vast literature on the topic of assessing damages in price-fixing actions, and, in part, why countries differ in their approaches to private antitrust damages.

1. Punitive or Compensatory?

The first potential source of divergence among countries lies in the objective of private antitrust damages actions. Should antitrust law be designed to compensate parties for their losses, act as deterrents, or both? The American system, which provides for treble damages in antitrust private action damages, clearly envisions deterrence as part of its role. The recent Canadian Supreme Court decisions, on the other hand, emphasize the desire not to overcompensate private plaintiffs.[10] Similarly, the recent European Directive states that full compensation should not lead to overcompensation.[11]

2. Sources of Damages

The second potential divergence relates to the alternative sources of damages considered in private actions. North American practices, both American and Canadian, focus on the redistributive effect of the overcharge. Hence, damages are principally focused on undoing the transfer of welfare from buyers to sellers that results from an artificial price elevation.[12]

In contrast, the recent European Directive provides for compensation arising from the overcharge (the redistribution between buyers and sellers), but also explicitly from lost profits on lost sales for intermediaries. Returning to our prior example where hotdog producers collude to raise the price of hotdogs, the US and Canadian antitrust regimes capture the transfer of welfare from hotdog vendors to hotdog producers; the EU antitrust regime also captures harm associated with the lost sales hotdog vendors suffer as a result of an overcharge.[13] In doing so, the European Directive emphasizes its objective to provide full compensation for losses suffered by the parties along the supply chain.[14] However, as our previous example shows, lost profits on lost sales by intermediate buyers will occur only if some of the original overcharge reaches the final consumer and therefore reduces the total volume transacted.[15]

3. Indirect Purchasers and Pass-on Defense

Finally, the attitude of the courts with respect to the standing of indirect purchasers and to the admissibility of a pass-on defense can shape the nature of private antitrust damages actions. In a system that emphasizes the compensatory aspect of private action damages, excluding indirect purchasers, who ultimately might suffer from the overcharge, may be suboptimal. Nevertheless, courts in Canada, for example, have struggled to establish a rationale for the legal standing of indirect purchasers in such private actions, an issue only recently resolved by the Supreme Court of Canada, as described in more detail below.

Table 1 summarizes the key elements that shape private antitrust damages actions in the United States, Canada and in the European Directive.

Table 1: Summary of Key Factors Governing Private Antitrust Damages

10 In *Microsoft*, the Supreme Court of Canada ruled that the risk of double or multiple recovery "cannot be lightly dismissed" and that the expectation is that courts would manage the risk (*e.g.* for suits filed in multiple jurisdictions, a judge "may deny the claim or modify the damages award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery").

11 European Directive, Article 3.3.

12 Although we are not aware of any Canadian cases where lost profits on lost sales for intermediate buyers were claimed by plaintiffs, it is not clear that the state of the law in Canada would preclude such claims.

13 European Directive, Article 3.2.

14 European Directive, Article 3.

15 To be clear, there are three possible scenarios: (1) profits on existing sales for the intermediate buyers (*e.g.* retailers) decrease by the full amount of the overcharge if they absorb the full overcharge from producers; (2) profits on lost sales are foregone if intermediaries pass-on the full extent of the overcharge; and (3) profits on existing sales decrease and profits on lost sales are foregone if there is partial pass-on because of partial absorption of the overcharge and loss of sales resulting from the increased price to consumers.

	United States	Canada	European Union
Philosophy of Damages	Compensatory AND Deterrent	Compensatory	Compensatory
Source of Damages	Overcharge	Overcharge	Overcharge AND Lost Profits
Pass-On Defense	NO	NO	YES
Indirect Purchasers	Federal–NO	YES	YES
	States–YES		
Consequences	Since Damages are trebled and no pass-on defense, Defendants at risk of paying multiples of the damages incurred. Structure to avoid this not fully set.	To avoid over compensation, Direct and Indirect part of the same class.	If pass-on is found, must be accounted for when setting damages for other Plaintiffs along chain of distribution.

Only in the United States do private antitrust damages actions serve an explicit punitive purpose illustrated by the trebling of damages. The punitive nature of private actions is further enhanced by the existing dynamics that take place between Federal and State Courts. Pivotal decisions by the U.S. Supreme Court have long established that indirect purchasers may not recover damages in Federal Court, while direct purchasers may recover 100 percent of damages associated with overcharges resulting from antitrust violations, regardless of whether they passed-on these overcharges to the next level of the distribution chain (the no pass-on defense principle).[16] However, 27 American States, as well as the District of Columbia and Puerto Rico, have enabled Illinois Brick repealer statutes allowing for State-level suits brought by indirect purchasers in parallel with Federal direct purchaser actions.[17] This hybrid set-up allows total damages to reach many times the original value of the overcharge.[18] In 2007, the American Antitrust Modernization Commission recommended that Congress "overrule the Supreme Court's decisions in Illinois Brick and Hanover Shoe to the extent necessary to allow both direct and indirect purchasers to recover for their injuries."[19]

The recent Canadian dynamics have been different. First, the long influence of Civil Code principles has made Canadian courts reluctant to allow any overcompensation.[20] Second, and despite that long established principle, the Supreme Court of Canada had held, in a different context, that the pass-on defense should not be available to defendants.[21] Taken together, these two principles may result in overcompensation to direct plaintiffs in private damages actions while excluding indirect plaintiffs who carried the burden of the overcharge from any form of compensation. The Supreme Court of Canada resolved that conundrum by ruling that both direct and indirect purchasers could sue for damages, but that their claims should be combined into a single action. In deciding so, it rendered the issue of pass-on defense moot,[22] but opened the door to issues of allocation of harm and

16 *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) [*Hannover Shoe*] and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) [*Illinois Brick*].

17 In addition, four other states have repealed *Illinois Brick* through case law. Practicing Law Institute, *Antitrust Law Answer Book 2015*, Chapter 1, p. 23.

18 For example, if an indirect purchaser can established that the overcharge was passed-onto him by the direct purchaser, defendant could ultimately be liable for six times the original overcharge.

19 U.S. Antitrust Modernization Commission, Report and Recommendations (April 2007), available online at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (accessed October 18, 2015).

20 *See, e.g.* Stroud, Patrick, "Civil and Common Law: A Historical Analysis of Colonial and Postcolonial Canada," Butler Journal of Undergraduate Research, Vol. 1, Issue 8, April 2015.

21 *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 2.

22 In *Microsoft*, the Supreme Court of Canada ruled that "[i]t is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been 'passed on' by the plaintiff" because this would burden the courts with "the endlessness and futility of the effort to follow every transaction to its ultimate result."

conflicts within the class.[23]

Perhaps because it started from a blank slate, the European Directive has opted for an approach that allows for compensation arising both from the overcharge and lost profits due to pass-on of the overcharge.[24] It permits actions by both direct and indirect purchasers as well as a pass-on defense.[25] To avoid overcompensation and to ensure that each party will be correctly compensated, it requires that actions taken at every level of the distribution chain be consistent with rulings and decisions from other levels.[26]

A. Dynamics of Private Damages Actions in the United States, Canada and the European Union

Cross-country differences in principles underlying private antitrust damages actions can lead to very different damages outcomes.

In the United States, the higher the overcharge, the higher the damages in Federal Court. Because no pass-on defense is available to defendants, pass-on of the overcharge down the distribution chain is irrelevant. In State Courts, higher overcharges still result in higher damages to indirect purchasers but the upstream and downstream pass-on at each level of the distribution chain will also affect damages.

The dynamics are not as straightforward in the Canadian set-up. Private antitrust actions may include both direct and indirect purchasers joined together as plaintiffs in a class. Plaintiffs and defendants will likely disagree in their measurement of the magnitude of the overcharge. How damages will be affected by pass-on is still unclear as the first private antitrust lawsuits since the Supreme Court's landmark decisions involving both direct and indirect purchasers have yet, to our knowledge, reached the damages phase.[27] Pass-on is unlikely to affect total damages except insofar as it illustrates the conflicts inherent in any certified class comprising both direct and indirect purchasers. However, pass-on will affect which plaintiffs were injured and by how much. Direct purchasers will be injured by the overcharge if they did not pass-on the entire alleged overcharge to their downstream purchasers, while indirect purchasers will be injured if direct purchasers passed-on any of the overcharge that indirect purchasers then absorbed.

The dynamics created by the new European Directive are also still uncertain. Larger overcharges will result in higher damages, ceteris paribus, regardless of whether plaintiffs are direct purchasers, indirect purchasers, or both. The European Directive entitles plaintiffs to damages from lost profits on lost sales, which can only arise from pass-on. If the overcharge is not passed on beyond the direct purchaser, sales are not reduced and no damages from lost profits on lost sales ensue down the distribution chain. This, combined with the European Directive's requirement for consistency across the different levels of the distribution chain, implies that no pass-on results in no lost profits beyond direct purchasers (from the overcharge) and, therefore, lower damages.

If defendants in the European Union are found to have conspired to raise the price of their products by, say, €1 to direct purchasers and plaintiffs did not pass-on that overcharge down the distribution chain, defendants can fully compensate direct purchasers by a damages award calculated as €1 times the volume of commerce at issue. Furthermore, consistency along the distribution chain means that indirect purchasers, who suffered no damages, lack any basis to bring any action on their own.

If instead the court had found that direct purchasers had passed-on €0.50 to the lower levels of the distribution chain (i.e. a pass-on rate of 50 percent), direct purchaser plaintiffs will be compensated for the overcharge by a damages award of €0.50 times the volume of commerce at issue. Given the European Directive's requirement for consistency across the different levels of the distribution chain, indirect purchasers will be compensated for the overcharge by a damages award of €0.50

23 Ginn, Marissa and Marc Van Audenrode, "An Economic Perspective on the Recent Indirect Purchaser Rulings by the Supreme Court of Canada," *Canadian Competition Law Review*, Vol. 27, No. 1, 2014.

24 European Directive, Article 12.3.

25 European Directive, Articles 12.1 and 13.

26 European Directive, Article 12.

27 We note that there do appear to have been settlements of certain cases, but it is not clear to us how, if at all, pass-on may have affected these settlements.

times the volume of commerce at issue. Moreover, as a portion of the overcharge is passed-on, full compensation will require payment for harm resulting from lost profits on lost sales to intermediate purchasers. Hence, in the framework set-up by the European Directive, if the overcharge is passed-on along the distribution chain, lost profits on lost sales will result.

Unlike in the United States and Canada, under the new European Directive, even a plaintiff found to have passed-on the overcharge may have suffered damages because of lost profits from lost sales. The next section analyzes this problem in detail.

B. *The Trade-off between Overcharge Damages and Lost Profits on Lost Sales for Plaintiffs*

This section presents a few simple numerical examples to illustrate the impact of the European Directive on damages. We assume a set-up similar to the hotdog vendor example described in section 2 where producers collude to artificially raise the price of a product sold to retailers who in turn sell to final consumers.

Table 2 analyzes the situation where retailers before the conspiracy were earning relatively high margins on their sales. The numerical example shows a situation where retailers enjoy high margins, and analyzes two cases, one in which retailers face a relatively low demand elasticity (-0.5), and another in which they face a relatively high elasticity (-2.5).[28]

We then suppose that the conspiracy raises price to retailers (direct purchasers) by €1, raising the unit cost from €5 to €6 in this example. We also suppose that, at the same time, prices charged by retailers to the final consumers also increased by €1, from €10 to €11, when the cost increase is fully passed-on.[29]

28 As noted above, the elasticity of demand measures the magnitude of the reaction of demand to change in prices. For example, an elasticity of -1 means that when prices increase by one percent, quantity demanded decreases by 1 percent. An elasticity of -2 means that when prices increase by one percent, quantity demanded decreases by two percent.

29 For illustrative purposes, we assume that the price increase does not depend on the elasticity. However, in general, a price increase will be smaller when the elasticity of demand is greater.

Table 2: High Margin Case

Elasticity of Demand	-0.5	-2.5
Before Conspiracy		
Quantity Sold	100	
Price	€10	
Unit Cost	€5	
Margin	€5	
During Conspiracy		
Increase in Cost	€1	
Full Pass-on		
Price	€11	
Quantity Sold	95	75
Damages to Consumers	95 * €1 = €95	75 * €1 = €75
Damages to Direct Purchasers	5 * €5 = €25	25 * €5 = €125
No Pass-on		
Price	€10	
Quantity Sold	100	100
Damages to Consumers	€0	€0
Damages to Direct Purchasers	100 * €1 = €100	100 * €1 = €100

As Table 2 shows, full pass-on results in greater damages overall than if no pass-on to final consumers occurred. Moreover, when the elasticity of demand is high, direct purchasers lose many sales because of pass-on, and damages resulting from those lost profits may be higher than damages from the overcharge in the case of no pass-on (in this example, €125 versus €100, respectively).

Table 3 shows a similar example where the retailer margins are smaller than in Table 2. When margins are smaller, damages to plaintiffs from lost profits on lost sales are lower.

Table 3: Low Margin Case

Elasticity of Demand	-0.5	-2.5
Before Conspiracy		
Quantity Sold	100	
Price	€10	
Unit Cost	€8	

Margin	€2	
During Conspiracy		
Increase in Cost	€1	
Full Pass-on		
Price	€11	
Quantity Sold	95	75
Damages to Consumers	95 * €1 = €95	75 * €1 = €75
Damages to Direct Purchasers	5 * €2 = €10	25 * €2 = €50
No Pass-on		
Price	€10	
Quantity Sold	100	100
Damages to Consumers	€0	€0
Damages to Direct Purchasers	100 * €1 = €100	100 * €1 = €100

To contrast these two cases of high and low margins, we focus on the damages to direct purchasers in the presence of full pass-on, as the other damages amounts do not change.[30] What these examples show is that direct purchasers' loss in profits from lost sales could exceed their damages from fully absorbing the overcharge. Indeed, when margins are high and the elasticity of demand is high, damages compensation may be greater for direct purchasers when the overcharge is passed-on compared to when the overcharge is not passed-on. However, such a situation is highly unlikely as high elasticity of demand is usually associated with low margins while low elasticity of demand is usually associated with high margins.

We have focused on either full pass-on or no pass-on above, for simplicity, but pass-on is most often incomplete.[31] Incomplete pass-on entails additional complexities in how the damages from the overcharge and lost profits on lost sales would be calculated and distributed among the plaintiffs. When pass-on is incomplete, total damages will be lower than in the case of full pass-on, but damages for indirect purchasers may be relatively higher, depending on the demand elasticity and the margin.[32]

III. CONCLUSIONS

When only direct purchasers can sue for damages, as in United States Federal Courts, then the overcharge directly impacts damages for these plaintiffs. In jurisdictions where actions can be brought by direct and indirect purchasers, both the overcharge and pass-on can have implications for the plaintiffs' damages compensation. In situations where the overcharge is not passed on by direct purchasers, the outcome is identical in Canada, Europe and the United States Federal Courts. However, the private enforcement mechanism in the United States may lead to hold-up which, in State courts, may result in settlements despite a lack of pass-on and, as a result, duplicative recovery. In the presence of pass-on of the overcharge, there will be duplicative recovery in the United States (full recovery by direct plaintiffs in Federal Court and recovery proportional to pass-on by indirect purchasers in State Courts), there should be full recovery in Canada allocated to direct and indirect purchasers proportionately to the pass-on as should occur in Europe with an additional explicit focus on damages for lost profits on lost sales for all purchasers other than final customers.

Furthermore, under the new European Directive on antitrust private damages actions, direct purchaser plaintiffs will suffer greater damages when the overcharge is not passed-on, unless they face a highly elastic demand and earn high margins on their products, a highly unlikely combination. Hence, plaintiffs' claims to damages for lost profits on lost sales in European antitrust private damages actions, while economically consistent with full compensation, may nevertheless result in an outcome similar to that of United States Federal Courts whereby direct purchaser plaintiffs ignore pass-on and claim harm exclusively from the overcharge.

30 The examples provided assume a simple case of two levels along the distribution chain: direct purchasers and end consumers. However, the results for direct purchasers apply to other intermediate purchasers along the distribution chain as well.

31 Incomplete pass-on is pass-on that ranges from just over 0 percent to just under 100 percent. Pass-on may also be above 100 percent in certain instances.

32 Specifically, damages for indirect plaintiffs will be higher relative to the case of full pass-on when both the elasticity of demand and the pass-on rate are lower.

NEARLY 16 YEARS OF THE LENIENCY PROGRAM IN BRAZIL: BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION

BY AMANDA ATHAYDE LINHARES MARTINS & ANDRESSA LIN FIDELIS[1]

I. INTRODUCTION

The Brazilian Leniency Program[2-3] was first introduced in 2000,[4] with the objective of strengthening the activity of fighting cartel. The prosecution of hardcore cartels is a top priority in Brazil since 2003, when the first

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2 For more information, see Cade's draft Guidelines on the Antitrust Leniency Program ("2016 Leniency Guidelines"), available at [http://www.cade.gov.br/upload/Guidelines%20CADE's%20Antitrust%20Leniency%20Program.pdf].

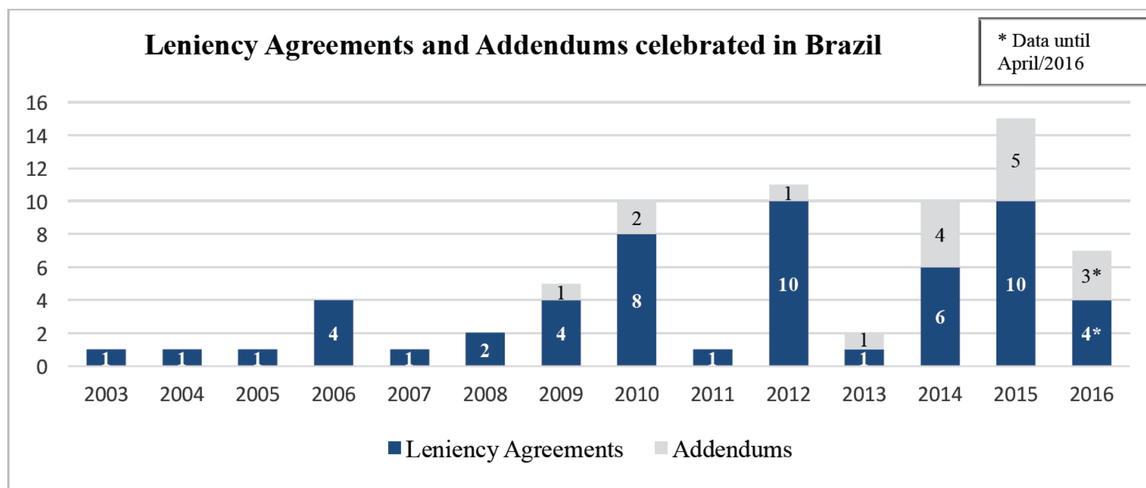
3 For the purpose of this document, "leniency" refers to full immunity, amnesty or reduction in fine in case Cade is already aware of the reported violation but still does not have enough evidence against the applicant.

4 Law No. 10.149/2000, which amended Law No. 8.884/1994 (arts. 35-B and C).

leniency agreement was signed.[5] Throughout those almost 16 years, the Leniency Program has been one of the most important investigative tools for detecting collusive conduct among competitors in Brazil.[6] Since its introduction until April 2016, 54 Leniency Agreements and 17 Addendums were signed (see graphic below).

process by submitting information and documents capable of proving the reported conduct and identifying other participants.

The prosecution of cartels in Brazil is carried out at three levels: administrative, criminal, and civil. The administrative



The authority responsible for the execution of the Leniency Program in Brazil is the Administrative Council for Economic Defense ("Cade" in its Portuguese acronym), through its investigative body, the General Superintendence ("SG/Cade" in its Portuguese acronym). The Leniency Program allows companies and/or individuals involved in a cartel or other antitrust conspiracy to obtain administrative and criminal immunity by committing to cease the reported conduct, confess the participation in the wrongdoing and cooperate throughout the investigation

prosecution is performed by Cade.[7] In the criminal level, the state and federal Public Prosecution Services[8] are entitled to investigate and bring to courts actions against the defendants when there is sufficient evidence.[9] In the civil level, injured consumers can file lawsuits in courts against the cartel

5 In October 2003, one of the members of a bid-rigging cartel involving security service provider companies with activities in the state of RS applied for leniency in Brazil. In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence, including employees' testimonies and audio records of telephone conversations held between competitors. For more information see Cade, "Fighting Cartels: Brazil's Leniency Program" (2009), available at: [http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf].

6 Out of the 70 administrative proceedings opened to investigate cartels in Brazil in the last five years (2011-2015), 28 of them were opened after a Leniency Agreement was signed.

7 Administrative fines for companies may vary from 0.1 percent to 20 percent of the gross revenues of the company, while individuals can be fined in 1 percent to 20 percent of the total amount imposed to the company. See art. 36 of Law No. 12.529/2011.

8 The Public Prosecution Service ("MP" in its Portuguese acronym) traditionally takes part in the Leniency Agreements celebrated with SG/Cade in order to guarantee the criminal benefits for the leniency applicant and the incentives of the Leniency Program in the criminal sphere.

9 Criminal penalties for individuals vary from 2 to 5 years of imprisonment and fine. See art. 4º, II, of Law No. 8.137/1990. According to art. 12, such penalty may be increased by 1 to ½ if the crime causes serious harm to society, is committed by a public-sector employee, or is related to goods or services essential to life or health. There are today over 300 individuals currently facing criminal prosecution in Brazil regarding cartel violations. See CALLIARI, Marcelo. "Criminalization of Cartels and Leniency: An Exercise in Complexity" (2015). *CPI Antitrust Chronicle*.

participants to obtain an order to cease the antitrust violation and to receive damages.[10]

The Brazilian Leniency Program provides administrative and criminal benefits. Administratively, applicants may receive full immunity (total leniency) or the reduction by one-third to two-thirds of the applicable fine (partial leniency).[11] Criminally, entering into a Leniency Agreement suspends the limitation periods and prevents the criminal prosecution of the leniency recipient.[12] Both benefits are definitively granted upon declaration of fulfillment of the Leniency Agreement by the plenary session of Cade's Tribunal, when the administrative proceeding is finally decided (art. 86, §4, of Law No. 12.529/2011).[13] There is no benefit granted in the civil level, and even the leniency applicant may be held jointly liable for civil damages resulting from the overcharge caused by the cartel (art. 927 of the Civil Code).

In order to carry out the Leniency Program, Cade has established a marker system[14] as it only grants one Leniency Agreement (immunity) per conspiracy – not per market/product. If a second, third, fourth or so on company and/or individual inquire SG/Cade about a leniency application while the case is still under negotiation with the first-in, latecomers stay "in line" in the event the marker becomes available again. If the marker is not available and/or the Leniency Agreement is executed, the second-in applicant and all subsequent applicants, in order of arrival, can propose a Cease and Desist Agreement (TCC in its Portuguese acronym) to Cade.[15]

Signing a TCC generates benefits in the administrative sphere if the proponent: (i) pays a pecuniary contribution; (ii) admits having participated in the investigated conduct; and (iii) cooperates with the investigation. The financial contribution is subject to fine reduction brackets, depending on the order of arrival of the companies and/or individuals.[16]

10 Civil prosecution is described in art. 47 of Law No. 12.529/2011. "*The aggrieved parties, on their own accord or by someone legally entitled . . . may take legal action in defense of their individual interests or shared common interests, so that the practices constituting violations to the economic order cease, and compensation for the losses and damages suffered be received, regardless of the investigation or administrative proceeding, which will not be suspended due to Tribunal action.*." For information regarding private damages in Brazil, see: MARTINEZ, Ana Paula. ARAÚJO, Mariana Tavares. "Private Damages in Brazil: Early beginnings, bid stumbling blocks" (2016). *CPI Antitrust Chronicle*.

11 See art. 86, §4, of Law No. 12.529/2011. "*The Tribunal shall, upon the judgment of the administrative proceeding, once compliance with the agreement is verified: I – terminate the punitive action of the public administration in favor of the transgressor, if the settlement proposal has been submitted to the General Superintendence without prior knowledge of the notified violation; or II – in the other cases, reduce the applicable penalties from one 1 to 2/3, observing what is set forth in Art. 45 of this Law, also considering the classification of the penalty with the effective cooperation provided and the transgressor's good faith in the complying with the lenience agreement.*." If SG/Cade already had prior knowledge of the conduct but did not have enough proof to ensure a conviction, then the applicant may be entitled to receive partial leniency.

12 The criminal benefits involves specifically the crimes set forth in the Economic Crimes Act (Law No. 8.137/1990) and other crimes directly related to participation in a cartel, such as those set forth in the General Procurement Act (Law No. 8.666/1993) and in article 288 of the Penal Code (criminal conspiracy). Signing the Leniency Agreement extinguishes the ability to sanction the above crimes (art. 87 of Law No. 12.529/2011). It is worth noting that after Brazil's Federal Supreme Court has decided that the serving time can begin right after the first Court of Appeal confirms the first instance's conviction decision, the number of individuals actually serving time due to cartel activity in Brazil it is expected to increase. See http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=310153.

13 Until today, there has not been a case of benefit withdrawal when the administrative proceeding is finally decided by Cade.

14 For further information on Brazil's marker system, see OECD. "Use of markers in Leniency Programmes" (2014). Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/ ?cote=daf/comp/wp3/wd(2014)47&doclanguage=en].

15 For further information concerning Cease and Desist Agreements ("TCC" in its Portuguese acronym), see art. 85 of Law No. 12.529/2011 combined with arts. 184 to 189, Ricade, as well as Cade's TCC Guidelines ("TCC Guidelines"), available at [http://www.cade.gov.br/upload/Guia%20TCC%20-%20Vers%C3%A3o%20Atual.pdf].

16 While a proceeding is still being investigated by SG/Cade, the first TCC applicant can be granted a reduction from 30 percent to 50 percent of the expected fine, the second TCC applicant can receive a reduction from 25 percent to 40 percent, and the others a reduction of up to 25 percent. After the case is remitted do Cade's

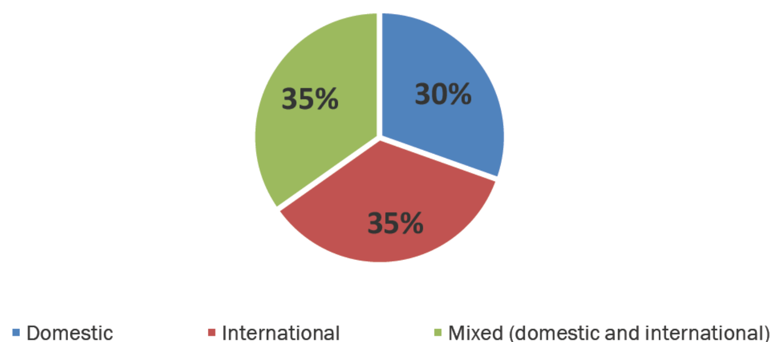
There are no limits in terms of quantity of TCCs that can be signed with Cade, being that a subsequent proponent will not be entitle to receive the same amount of fine reduction already granted by Cade to the previous one.

In order to further promote Cade's Leniency Program and Settlements Policy involving cartels persecution, in 2015 Cade released Guidelines for both instruments,[17] in order to make its policy and practices more transparent, predictable, efficient, and secure.

II. BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION THROUGH THE BRAZILIAN LENIENCY PROGRAM

The data reflects the success of Cade's Leniency Program to fight cartel as one of the most active jurisdictions among developing — and even developed — countries.[18] In those nearly 16 years of Leniency Program in Brazil, it is possible to point out two main phases: "Phase One: Establishment of the Brazilian Leniency Program" (2000-2011) and "Phase Two: Consolidation of the Brazilian Leniency Program" (2012-2016). This analysis allows some conclusions about the breakthroughs of Brazil's Leniency Program.

"Phase one: Establishment of the Brazilian Leniency Program" (2000-2011), would represent the first years that were necessary for the establishment of the Leniency Program in Brazil. It took some years for the companies, individuals, lawyers and the Brazilian society in general to be aware of the legislation, to be attracted to it and to be confident with its procedures. In this sense, the Leniency Agreements of this early phase were mostly related to international cartels. Cade had already imposed one of its highest fines in 2010, totaling around R$2,9 billion, in the international cartel case known as "industrial gases."[19] The overseas experience in negotiating Leniency Agreements with other antitrust authorities allowed positive spillovers for the Brazilian cartel enforcement. In this "Phase One," 23 new Leniency Agreements were celebrated and three Addendums. Taking into account those 23 Leniency Agreements, seven of them related exclusively to domestic cartels (30 percent), eight exclusively to international cartels (35 percent) and eight to "mixed" cartels (i.e., those related to cartels that occurred partially in Brazil and partially abroad) (35 percent). In this sense, 70 percent of the Leniency Agreements in "Phase One" were related to international cartels, either exclusively or partially (see graphic below).



The entry into force of Law No. 12.529/2011 ("the Brazilian Competition Law") on May 29, 2012, represents a new momentum of development of the Brazilian Leniency Program and launched "Phase Two: Consolidation of the Brazilian Program" (2012-2016).

Phase Two is characterized by severe

Tribunal, the applicant may be granted a reduction of up to 15 percent (arts. 187, parts I, II, III and 188 of Ricade). The discount brackets are explained at Cade's 2016 Leniency Guidelines.

17 See Cade's 2016 Leniency Guidelines and TCCs Guidelines.

18 For instance, see SNYDER, Brent. *Individual Accountability for Antitrust Crimes* (2016). Remarks Prepared for the Yale School of Management – Global Antitrust Enforcement Conference, p. 1.

19 Administrative Proceeding No. 08012.009888/2003-70, Reporting Commissioner Fernando Furlan, decided on 09.01.2010.

fines imposed by Cade's Tribunal and an accentuated cartel prosecution activity conducted by SG/Cade. In 2015, for instance, 22 cartel cases were judged by Cade's Tribunal, against a historical average of four cases per year.[20] Those cartel convictions resulted in the imposition of fines against companies and individual that already exceeded R$4,3 billion.[21] Out of those fines imposed, it has been effectively received over R$500 million in 2015, which is ten times the amount received in 2012.[22]

Phase Two also highlights the high risk of detection of the anticompetitive conducts in Brazil. Thereby, during 2012-2016, 31 new Leniency Agreements and 14 Addendums were celebrated. Taking into account those 31 Leniency Agreements, 20 of them related exclusively to domestic cartels (65 percent), five exclusively to international cartels (16 percent), and six to "mixed" cartels (19 percent). It represents a significant shift, since 84 percent of the Leniency Agreements in "Phase Two" therefore relates to domestic cartels, either exclusively or partially. Still, international cartels investigations continue to be a remarkable target when the conduct has potential anticompetitive effects in Brazil.[23]

During this Phase Two, Cade has learned from its own experience and has been requiring stronger cooperation and a higher standard of evidence from the leniency applicants. Cade has been prioritizing "strong" applications, with robust probative value *vis a vis* "weak" applications, in which the evidence of anticompetitive behavior does not suffice. Especially in international cartel cases, the leniency applicants have to provide solid information and evidence not only on the existence of the collusion, but also about the potential anticompetitive effects of the international cartel in Brazil.[24] So much so that for each Leniency Agreement signed with Cade in 2015, there were around two leniency applications rejected and/or withdrawn. The robustness of the cases can be noticed by the number of TCCs proposed right after a Leniency Agreement was signed. In 2015, for instance, 90 percent of the Leniency Agreements signed were followed by at least one company applying for a TCC in Cade.

Additionally, it is imporant to notice that cartel prosecution in Brazil does not depend exclusively on the Leniency Program. In fact, over the last five years, 70 different administrative proceedings of cartels were opened, while only 17 new Leniency Agreements were signed. Companies and individuals involved in cartels are increasing their awareness of Cade's *ex officio* expertise to detect and fight domestic and international cartels — including through the innovative use of screening intelligence —, encouraging an early approach of the offenders to apply to Cade for leniency.

Unavoidably, those breakthroughs consequently involve new challenges.

One challenge involves the rate of final decisions reached by Cade in administrative proceedings that followed a Leniency Agreement. As previously mentioned, until April 2016 there were 54 new Leniency

20 See Carvalho, V. M., "Cartéis Internacionais: perdidos em Marte?" (2016), Portal Jota, available at [http://jota.uol.com.br/elos-entre-jurisdicoes-as-pontes-no-combate-a-carteis].

21 It is worth noting that in 2014 only, Cade imposed one of its higher fines in a cartel case in the cement market, totaling about R$ 3,1 billion, charged from 6 companies, 6 individuals, and 3 associations. See Administrative Proceeding No. 08012.011142/2006-79, Reporting Commissioner Alessandro Octaviani, case decided on 05.28.2014.

22 See Cade's 2015 Report (2016), available at http://www.cade.gov.br/upload/Balan%C3%A7o%20%202015%20%28final-site%29.pdf.

23 Although the Brazilian Competition Law could theoretically reach a wide scope of domestic and international cartels around the world with any kind of actual or potential direct/indirect impact on the Brazilian economy, Cade only prosecutes the ones that fulfill the minimum requirements established by the Authority. See SG/Cade's final conclusion in the CRT glass' Administrative Proceeding No. 08012.005930/2009-79 (Nov/2015).

24 ROSEMBERG, Barbara. et al. "Recent Trends in Leniency Agreements in Brazil" (2014). *CPI*. A leading case regarding SG/Cade on the minimum requirements to investigate an international cartel with regard to the effects in Brazil was first stated in the CRT's glass' cartel case.

Agreements celebrated in Brazil. However, only nine cartel cases resulting from Leniency Agreements have been decided by Cade's Tribunal,[25] all with convictions. There are other six[26] cases pending judgment by Cade's Tribunal, which is expected to occur in 2016, and the others are still in the SG/Cade.[27] Those forthcoming decisions will provide legal certainty for the leniency and settlement applicants, as well as for the ones who chose not to cooperate, better signaling the incentives that the antitrust authority aims to establish for the early approach of the parties. Cade's final decision in those cartel cases are also expected to increase the deterrence effects of the Leniency Program, improving consumer's welfare.

Another challenge in Brazil is related to the use of the Leniency Plus.[28] Cade granted this benefit for the first time in 2015, in the alleged Petrobras cartel case,[29] alongside with other two cases. This instrument is being increasingly applied by companies and individuals. This innovative tool is consistent with Cade's higher objective of fighting cartels, given that the collaboration by the applicants provides information and documents regarding different anticompetitive conducts that the antitrust authority had no previous information.[30] However, Cade's challenge is to be aware of the potential strategic use of this tool by leniency applicants, and to assess the convinience to apply a "penalty plus" for those who deliberately chose not to present all cartels in which they were involved.

A third challenge in Brazil concern the harmonization of the procedures of the administrative Antitrust Leniency Program with the one in the criminal sphere. Unlike the Leniency Agreement, the TCC does not automatically generates criminal benefits, although SG/Cade can assist the applicant in the interaction with the Prosecution Service and/or Federal Police for the negotiation of a potential agreement with such authorities. In this context, Cade is experiencing increasing cooperation with the criminal authorities, which is generating a better and coordinated public enforcement in combating cartels. In 2015, there have been successful precedents in which a TCC signed with Cade led to a

25 Those cartel cases occurred in the following markets: (i) private security firms (08012.001826/2003-10); (ii) hydrogen peroxide (08012.004702/2004-77 and 08012.007818/2004-68); (iii) air cargo (08012.011027/2006-02 and 08012.000084/2010-34); (iv) marine hose (08012.010932/2007 and 08012.001127/2010-07); (v) perborates (08012.001029/2007-66); and (vi) compressors (08012.000820/2009-11).

26 Those cartel cases occurred in the following markets: (i) gas-insulated switchgear (08012.001376/2006-16) (ii) CRT's glass (08012.005930/2009-79); (iii) DRAM (08012.005255/2010-11); (iv) TPE plastic (08012.000773/2011-20); and (v) ABS plastic (08012.000774/2011-74 and 08700.009161/2014-97).

27 The vast majority of international cases awaiting Cade's final decision are due to pending notification of the defendants located abroad, postponing the beginning of the proceeding.

28 A Leniency Plus consists of the reduction by one-third to two-thirds of the applicable penalty for a company and/or individual that does not qualify for a Leniency Agreement in a cartel in which it has participated, but that provides information on a second cartel about which Cade had no prior knowledge of (art. 209 of the RICADE combined with art. 86, paragraph 7, and paragraph 8 of Law No. 12.529/2011).

29 For further information, see [http://www.cade.gov.br/Default.aspx?d064b246df35cb57a390a3be8ab3] and [http://globalcompetitionreview.com/news/article/38253/cade-publish-leniency-details-bid-rigging-probe/]. In that case, a company already investigated in the administrative proceeding involving the alleged cartel applied for a marker in a different market (i.e., public bid of Eletronuclear – Angra 3), in which SG/Cade had no prior information. Additionally, the company decided to propose a TCC regarding the Petrobras cartel investigation. By informing Cade of the alleged Eletronuclear cartel and by confessing its guilty and collaborating to both investigations, the company qualified for receiving the TCC discount cumulated with the discount derived from the Leniency Plus signed in the investigation of the cartel in Eletronuclear.

30 Regarding the new violation reported (New Leniency Agreement), once the legal requirements have been met, the leniency applicant will receive all the benefits of the Leniency Agreement (art. 86 of Law No. 12.529/2011). With regard to the violation already under investigation by the SG/Cade (Original Leniency Agreement), the leniency applicant may benefit from a reduction of 1/3 of the applicable penalty (leniency plus), to the extent it cooperates with the investigations. It is possible to obtain discounts related to both the TCC and Leniency Plus agreements, as detailed by Cade's Leniency Guidelines.

plea agreement in the criminal sphere, and vice versa, facilitating the prosecution of the offense. A cornerstone in this cooperation between the administrative and the criminal authorities in the field of TCC was taken in March 2016, when Cade announced the celebration of a Memorandum of Understanding with the Federal Prosecution Service in São Paulo, in its Anti-Cartel Group.[31] Through this MOU, the dynamics for the cooperation with the criminal authority was first draw, signaling the possibility of two types of cooperation agreements depending on the characteristics of the case and the phase of the proposal: one based in the Law No. 12.850/2013 (art. 4º)[32] and another based on the Law No. 8.137/90 (art. 16º).[33] This step is expected to provide more transparency and predictability in the cooperation between the administrative and the criminal authorities.

Additionally, there is the fourth challenge in Brazil of harmonizing procedures of the Antitrust Leniency Program with other administrative collaboration agreements in the Brazilian legislation. For instance, there is the Leniency Agreement established in the Anticorruption Act (Law No. 12.846/2013), applied by the Federal General Controller ("CGU," in its Portuguese acronym"). This law foresees a Leniency Program for companies — not for individuals — that collaborates with the investigation. This new provision for Leniency at the Anticorruption Act can boost Cade's Leniency Program, as many cartel cases occur in the context of public bids in which there are also corruption-related offenses involved.[34] There is a path to be trekked in order to align the incentives of those two Programs, especially considering the current incertitude surrounding the Anticorruption Leniency Agreements.[35] Alongside with this boost comes the need of a harmonic negotiation process, urging the need of cooperation between the two independent instances.

Finally, Cade's Leniency Program faced recently a fifth challenge, related to civil actions for antitrust damages. Although the Brazilian experience with private enforcement of antitrust law is incipient, the Superior Court of Justice in Brazil has recently ruled that the confidentiality of leniency materials could be disclosed before Cade's Tribunal reaches its final decision on the administrative proceeding. Although the case is still pending final decision in Brazil, and even though its reasoning may be convergent to some aspects of foreing jurisdictions (such as the 2014's Directive of the Europpean Commission), it would be valuable if Cade takes this challenge as an opportunity to give one step forward to address the adequate balance between private and public enforcement rules.[36] It might include not only the topic of acess to the leniency's documents and informations, but also joint/limited liability, treable/de-trable damages and limitation periods for bringing the lawsuit. In the meanwhile, Cade commits to use its best efforts to maintain the confidentiality of the leniency material.

In conclusion, those almost 16 years of the Brazilian Leniency Program exhibit breakthroughs achieved in terms of new Leniency Agreements signed, the use of innovative tools and the reliability of Cade's procedures, recognized nationally and internationally.[37] Consequently, those results

31 For further information concerning the MOU between Cade and the Anti-Cartel Group of MPF/SP, see: [http://www.cade.gov.br/upload/MEMORANDO%20DE%20ENTENDIMENTOS%20SG%20e%20MPFSP_TCC%20e%20Acordos%20de%20Colabora%C3%A7%C3%A3o_15.03.2016.pdf].

32 Criminal Organization Act (Law No. 12850/2013).

33 Economic Crimes Act (Law No. 8.137/1990).

34 See, for example, the notorious Operation Car Wash investigating crimes of money laundry, corruption, cartel, among others regarding Petrobras.

35 The Interim Measure No. 703/2015 amended the Anticorruption Act to allow second-in companies to apply for leniency and to allow leniency recipients to continue participating in public procurement proceedings. Regarding this measure, the Federal Court of Accounts (TCU in its Portuguese acronym) is assessing whether it can be at odds with its Normative Instruction No. 74/15.

36 According with art. 207 of Ricade, the identity of the leniency applicant and the essential information to understand the case may be disclosed only after Cade's final decision.

37 E.g., Competition Advocacy Award (honorable mention, 2016), promoted by ICN and WB; Agency of the Year – Americas (2015); promoted by GCR; III Best

increase Cade's responsibility to be assertive and effective in the execution of its Leniency Program, as well as to be prepared to address the new challenges that are on its way.

Practices Award (2015), promoted by the CGU.

THE AIRLINES INDUSTRY, CONCENTRATION, AND ALLEGATIONS OF COLLUSION

BY PAULA W. RENDER[1]

I. INTRODUCTION

In 1978, when Congress deregulated the airline industry, there were 10 airlines that provided scheduled national and international service, and those 10 accounted for 90 percent of the domestic marketplace.[2] Today, there are four major airlines and a few smaller ones providing comparable service, and the four major airlines provide 80 percent of U.S. domestic flights.[3] This consolidation occurred due to mergers, but also as the result of the industry's chronic lack of profitability. The airline industry lost about $60 billion in the three decades following deregulation.[4] There were over 160 airline bankruptcy filings in that period, leading the Government Accountability Office ("GAO") to conclude in 2005 that bankruptcy is "endemic" to the industry because of underlying structural issues.[5] As Virgin Airlines

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2 Micheline Maynard, *Did Ending Regulation Help Fliers?*, N.Y. Times (Apr. 17, 2008), http://www.nytimes.com/2008/04/17/business/17air.html?_r=0.

3 Drew Harwell, Ashley Halsey III & Thad Moore, *Justice Dept. Investigating Potential Airline Price Collusion*, The Washington Post (Jul. 1, 2015), https://www.washingtonpost.com/business/economy/doj-investigating-potential-airline-collusion/2015/07/01/42d99102-201c-11e5-aeb9-a411a84c9d55_story.html.

4 Caitlin Kenny, *Why Airlines Keep Going Bankrupt*, NPR (Dec. 16, 2011), http://www.npr.org/sections/money/2011/12/16/143765367/why-airlines-keep-going-bankrupt.

5 U.S. GOV'T ACCOUNTABILITY OFF.,

CEO Richard Branson stated, "If you want to be a millionaire, start with a billion dollars and launch a new airline."[6]

The airlines have turned this dismal performance around, at least temporarily, giving rise not just to accolades for good management but also to scrutiny from the Department of Justice ("DOJ") for potential collusion. For the first three quarters of 2015, the combined net income of U.S. airlines was $17.9 billion.[7] Compared to earlier years, when the industry's combined net income rarely topped $2 billion, 2015 was a dramatic departure from the past. The record earnings are attributed to lower fuel prices, higher fees and full planes.

It is the latter that are the focus of a pending DOJ investigation. The DOJ is apparently concerned that the airlines are colluding to restrict capacity to keep airfares high. At the same time, lawmakers and consumer advocates are demanding an investigation to determine whether concentration in the industry has facilitated collusion. As Senator Richard Blumenthal put it: "[c]onsumers are suffering rising fares and other added charges that seem to be the result of excessive market power concentrated in too few hands and potential misuse of that power."[8]

The industry's history suggests that the airlines have gotten tired of red ink and learned to manage for profitability. This paper summarizes the historical forces that have led to the current focus on capacity, which is most likely explained as the natural result of the lawful desire to run a profitable business.

II. FROM REGULATION TO DEREGULATION

The first commercial flight occurred in 1914. It flew from St. Petersburg, FL, to Tampa, at an altitude of 15 feet above Tampa Bay. The single passenger seat on the 23 minute flight was sold at auction for over $9,000 in today's dollars.[9]

The development of commercial aviation as well as its regulation began with the Air Mail Act of 1925.[10] The Act authorized the awarding of government mail contracts to private carriers, established the rates for transporting mail and setting the airmail rates. In 1926, the Air Commerce Act of 1926 established federal regulations regarding aircraft, personnel, navigational facilities and air traffic.[11] It also provided for the federal government to build airports and take steps to make flying safer. Other Acts followed, as Congress experimented with different forms of regulation. The Civil Aeronautics Act of 1938 created a new agency, eventually called the Civil Aeronautics Board ("CAB"), to regulate airline fares, routes, and safety and investigate aircraft accidents. Over the following decades, the federal government established passenger taxes to fund the creation of new airports and continued the regulation of prices and routes, air traffic, accident investigation and other aspects of airline operation. Airlines could not add or drop routes or change fares with permission from CAB.

CAB's regulation of the airline industry was criticized as preventing competition and entry. In 1976, Senator Ted Kennedy published a law review comment[12] summarizing the case for deregulation, based on a Senate investigation into that subject. He reported that although CAB had received 79 applications from would-be entrants since 1950, it had denied them all and had not permitted any new "trunk" airlines (the term used then for airlines that provided scheduled national and international air service) to compete with the original trunk airlines. Senator Kennedy reported that CAB had "secretly instituted a route moratorium" in which it denied "virtually all" proposals for route competition. According to his article, CAB had also "virtually outlaw[ed] price competition and now sets all coach and first class fares within the Continental United States according to a formula which seems to be based primarily on administrative convenience."[13] Kennedy offered the example of World Airways,

GAO-05-945, COMMERCIAL AVIATION: BANKRUPTCY AND PENSION PROBLEMS ARE SYMPTOMS OF UNDERLYING STRUCTURAL ISSUES 12 (2005) ("2005 GAO Report").

6 Alex Mayyasi, *Can Airlines Make Money?*, PRICEONOMICS (Nov. 5, 2015), http://priceonomics.com/can-airlines-make-money/.

7 Bart Jansen, *Airlines to Report 'Blowout' Record Profits Amid Low Gas Prices, Higher Fees*, USA TODAY (Jan. 12, 2016), http://www.usatoday.com/story/travel/flights/2016/01/12/airline-profits-2015/78647924/.

8 THE WASHINGTON POST, *supra* note 2.

9 Susan Carey, *First Airline Offered No Frills, Many Thrills*, THE WALL STREET JOURNAL (Jan. 1, 2014), http://www.wsj.com/articles/SB10001424052702304361604579290493407153708.

10 39 U.S.C. § 5401 *et seq*.

11 49 U.S.C. § 171 *et seq*.

12 Edward M. Kennedy, *Comment: The American Airlines Industry and the Necessity of Deregulation*, 9 AKRON L. REV. 631 (1976).

13 *Id*. at 632.

a small airline that in 1967 offered to fly coast to coast for $75 while CAB's approved fare for that route was $145. CAB sat on the application for six years and then dismissed the application as "stale." The investigation led the Senate Subcommittee on Administrative Practice to recommend deregulation and an overhaul of CAB's oversight procedures.

The recommended reforms were implemented by the Airline Deregulation Act of 1978, which opened up competition in the airline industry by allowing carriers to enter and leave domestic markets and set prices and conditions of service without government authorization.[14] This Act completely transformed the airline industry. In the regulated world, the airlines' rate of return was guaranteed. Without the ability or need to compete on price, they had competed on amenities and service. They offered economy class lounges, at-your-seat meat carving and meals served by on-board chefs, a standard seat pitch of 34 inches (versus today's 31 inches), and other features that today's traveler will never see. On the other hand, few consumers could afford to fly. In 1974, an airline could not charge less than $1,442 (in inflation-adjusted dollars) for a flight between New York City and Los Angeles[15]; today, we can fly that route for far less.[16] In 1965, no more than 20 percent of Americans had ever flown in an airplane. By 2000, 50 percent of the country took at least one round-trip flight a year. The average was two round-trip tickets.[17]

Deregulation led to other changes that impact competition today. The legacy airlines transformed their routes into a hub-and-spoke design. In this design, all routes have an end-point at a few major airports, the hubs. The other endpoint of the routes, or spokes, reach other, non-hub airports. This allowed the airlines to improve the capacity utilization of their planes by concentrating passenger flow through the hubs. The hub design made it possible for airlines to provide service to a greater number of cities, and more frequent service, than the previous point-to-point design that existed in the regulated regime.[18] The hub design has also been the focus of scrutiny for allegedly raising barriers to new entry.[19]

Deregulation also resulted in the development of low-cost carriers ("LCCs"). LCCs offer few amenities, charge for baggage and drinks, offer simplified rate structures, standardize their fleets to reduce cost and offer lower fares than "legacy carriers" (the airlines that existed during regulation). They focus on shorter routes where cost control can have more impact than on long-haul routes, and at least initially, LCCs provided point-to-point service rather than using the hub design. Today most have moved to a hybrid in which they use focus cities (or "mini-hubs") and point-to-point routing. PeopleExpress was an early LCC that perhaps exemplified the no-frills approach of the LCCs. It collected fares inflight, permitted one free bag and charged for each additional, and charged fifty cents for a can of soda. Its fares were equally no-frills. For example, its flight between Brussels and Newark in 1985 cost the equivalent of $334.00 in today's dollars. By 2003, the surviving LCCs competed in 45.5 percent of the routes served by legacy airlines, serving 84.6 percent of passengers in the top 5,000 markets.[20]

The industry expanded threefold between

14 *Statement of John M. Nannes, Deputy Assistant Attorney General, Antitrust Division, Before the Committee on Transportation & Infrastructure, U.S. House of Representatives, Concerning Antitrust Analysis of Airline Mergers*, U.S. Department of Justice, June 13, 2000, available at https://www.justice.gov/archive/atr/public/testimony/4955.pdf, at 2-3.

15 Derek Thompson, *How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed)*, The Atlantic (Feb. 28, 2013), http://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/.

16 According to American Airlines' website on April 29, 2016, the cheapest ticket available to fly the New York LaGuardia to LAX route on May 29, 2016, was $442. A first class ticket could be purchased for $1,151. The fares shown on the website reflected another interesting aspect of today's airline pricing: the available fares included $442 for coach class; $16,694 for business class (to confirm, the business class fare was sixteen thousand six hundred and ninety-four dollars), and $1,151 for first class.

17 Thompson, *supra* note 14.

18 Nannes, *supra* note 13, at 3.

19 For example, the Division's concern that Northwest and Continental "dominate their respective hubs" was a factor in its opposition to Northwest's attempt to buy a controlling interest in Continental in 1998. *The Importance of Entry Conditions in Analyzing Airline Antitrust Issues Address by John M. Nannes, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the International Aviation Club*, U.S. Department of Justice, July 20, 1999, available at https://www.justice.gov/atr/speech/importance-entry-conditions-analyzing-airline-antitrust-issues. *See also infra* note 19, at 16 (reporting on higher fares paid by passengers served by "fortress hubs.").

20 U.S. Gov't Accountability Off., GAO-06-630, Airline Deregulation: Reregulating the Airline Industry Would Likely Reverse Consumer Benefits and Not Save Airline Pensions 17 (2006) ("2006 GAO Report").

1980 and 2005. The consumption of airline travel as measured by revenue passenger miles ("RPM") grew from 188 billion RPMs in 1978 to 584 billion RPMs in 2005, while airline capacity grew at a similar pace—from 306 billion available seat miles ("ASM") in 1978 to 758 billion ASMs in 2005. The number of unique city-pairs served by airlines rose from just over 6,000 in 1980 to more than 15,000 in 2012.[21] The average number of competitors increased from 2.2 per city-pair to 3.5 in that period.[22] Over the same period, passengers increased from 254 million to 670 million.[23] This explosion in demand did not lead to higher prices. The median airfare declined almost 40 percent in that period.[24]

III. FROM RED INK TO PROFITABILITY

In the years following deregulation, demand exploded, competition expanded and flights and service increased. It was all good news, except for the financial performance of the industry, which was among the worst in the U.S. economy.

LCCs struggled initially after deregulation to compete with better-capitalized legacy carriers, and a number failed. According to a report by the GAO, most of the new entrants into the airline industry during the 1980s and 1990s failed.[25] But the tide eventually turned against the legacy carriers. The GAO observed that the legacy airlines carried over cost structures that had developed during the period of regulation when airfares were set by a guaranteed rate of return, including a heavily unionized labor force. Demand for air travel declined significantly in the early 2000s due to an economic downturn, the September 11, 2001, terrorist attacks and the outbreak of SARS. At the same time, the legacy carriers were losing passengers to the new LCCs. The GAO noted that the legacy airlines had reduced costs in response to market costs, but mostly by reducing capacity and not nearly enough to be competitive with low cost airlines.[26]

The airline industry overall lost over $30 billion in the three decades following deregulation, according to data from Airlines for America, an airline trade association.[27] As Figure 1 shows, in the 25 years since deregulation, the industry had negative net income in 16 years and never managed to be profitable for more than 6 years in a row.

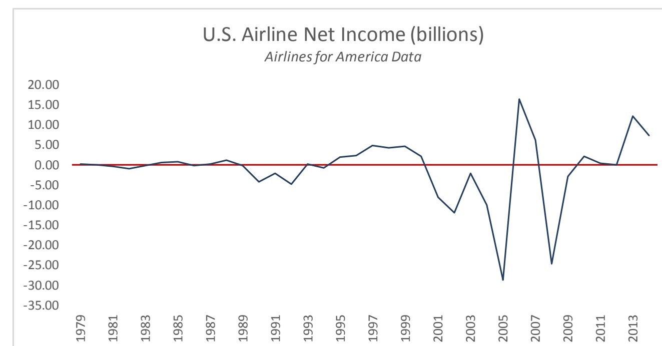

Figure 1.[28]

According to a McKinsey study, between 1965 and 2007, the airline industry generated one of the lowest returns on capital of all industries.[29]

One cause of this dismal performance was excess capacity. Capacity in the airlines industry is measured in ASMs, and capacity utilization is measured by the "load factor." An airline's break-even load factor varies depending on fuel and other costs. The Department of Transportation reported that break-even load factors increased sharply from 2000 to 2003, increasing for United Airlines and US Airways, for example, from 77.7 percent in the first quarter of 2000 to 114 percent in the first quarter of 2003. In other words, those airlines could not have been profitable at then-prevailing prices even if they sold every seat. Other carriers had break-even load factors approaching 100 percent. Far from reaching these break-even points, however, from the late 1990s until 2008, airlines frequently added flights, increased plane size and added new routes, not based on demand but in a battle for market share.[30]

21 IATA Economics Briefing No. 10: Profitability and the air transport value chain 19 (International Air Transport Association 2013).

22 2006 GAO Report, at 4.

23 *Id*. at 10.

24 *Id*. at 18.

25 *Id*. at 16.

26 2005 GAO Report, at 5.

27 Caitlin Kenny, *Why Airlines Keep Going Bankrupt*, NPR (Dec. 16, 2011), http://www.npr.org/sections/money/2011/12/16/143765367/why-airlines-keep-going-bankrupt.

28 *Profitability Trends of U.S. Passenger Airlines in the Deregulated Era*, Airlines for America (last visited May 2, 2016), http://airlines.org/data/profitability-trends-of-u-s-passenger-airlines-in-the-deregulated-era/.

29 IATA Economics Briefing No. 10, *supra* note 20, at 12.

30 Ben Mutzabaugh, *Airline 'Capacity Discipline' in Spotlight After Justice Probe*, USA Today (July 1, 2015), http://www.usatoday.com/story/todayinthesky/2015/07/01/airlines-capacity-discipline-in-spotlight-after-justice-probe/29580687/.

This attempt to buy market share had the predictable results, especially given the one-passenger per plane difference between black and red ink.

In 2008 and 2009, the worldwide financial crisis slashed demand for air travel, oil prices shot up and airline income plunged again.[31] To stem their losses, the airlines began cutting routes and the frequency of flights on the routes they continued to serve.[32] But as demand increased in the years following the financial crisis, the airlines did not add significant capacity, even as demand increased.[33] The average domestic load factor for all airlines in the United States by year increased from 72.68 percent in 2003 to a high of 84.98 percent in 2015.[34]

IV. THE CURRENT INVESTIGATION

In June 2015, the DOJ launched an investigation into "possible unlawful coordination by some airlines."[35] Delta Air Lines, Southwest Airlines, American Airlines, and United Airlines confirmed that they are among the airlines being investigated. The investigation initially focuses on public statements by airline executives about "capacity discipline," meaning a resistance by the airlines to add more planes and flights even though their profits have soared. News articles report that Division officials are also concerned that common ownership of airlines by large investors may facilitate capacity coordination and result in higher prices.[36] The officials have asked the airlines for information on meeting at which industry capacity was discussed with investors whose stake in the airlines exceeds two percent.[37]

The airlines are focused on what they refer to as "capacity discipline."[38] As then-United Airlines CEO Jeff Smisek explained in 2011, "[w]e've been very disciplined at United and across the industry in making sure we've got the right level of capacity and not supplying overcapacity, driving down pricing."[39] Capacity increases in early 2015 unnerved investors; in June 2015, airline executives addressed those fears at a meeting of the International Air Transport Association. Delta's president, Ed Bastian, told the press that his airline was "continuing with the discipline that the marketplace is expecting." American Airlines' chief, Doug Parker, said the airlines had learned their lessons from past price wars. "I think everybody in the industry understands that," he told Reuters.[40]

The only question is whether the airline managers are focused on capacity discipline because of an unlawful agreement, or because the history of the industry has led them to conclude that flooding the marketplace with empty seats is a bad strategy. With more than $30 billion lost by this industry in the last three decades, a federal investigation hardly seems necessary.

V. CONCLUSION

If the DOJ discovers that the airlines have reached an unlawful agreement to constrain capacity, then it can take steps to punish the wrongdoers and protect consumers. But given the history of the industry, it is not at all difficult to believe that the airlines have simply decided to stop cutting their own throats.

31 IATA Economics Briefing No. 10, *supra* note 28.

32 *See* Geoff Colvin, *Jeff Smisek: United Continental's king of the skies*, Fortune (Apr. 21, 2011), http://archive.fortune.com/2011/04/19/news/companies/jeff_smisek_united_continental.fortune/index.htm.

33 *Airline Industry Will Have to Maintain Capacity Discipline to Remain Profitable*, Forbes (Jun. 20, 2014), http://www.forbes.com/sites/greatspeculations/2014/06/20/airline-industry-will-have-to-maintain-capacity-discipline-to-remain-profitable/#6c320a475eb0.

34 Load Factor (passenger-miles as a proportion of available seat-miles in percent (%)) All Carriers - All Airports, United States Department of Transportation, Office of the Assistant Secretary for Research and Technology, Bureau of Transportation Statistics (last visited May 2, 2016), http://www.transtats.bts.gov/Data_Elements.aspx?Data=5.

35 The Washington Post, *supra* note 2.

36 David McLaughlin and Mary Schlangenstein, *U.S. Looks at Airline Investors for Evidence of Fare Collusion*, Bloomberg (Sept. 22, 2015), http://www.bloomberg.com/news/articles/2015-09-22/do-airfares-rise-when-carriers-have-same-investors-u-s-asks.

37 *Id.*

38 It is worth noting that capacity discipline does not mean capacity reduction. Business Travel News reported in July 2015 that total U.S. airline capacity increased 3.8 percent in June 2015 compared to June 2014, and that "[o]verall demand rose in the same proportion, and thus load factors remained steady at 86.5 percent." *Total U.S. airline capacity increased 3.8 percent in June compared with the same month last year*, Business Travel News (Jul. 15, 2015), http://www.businesstravelnews.com/Strategic-Sourcing/Total-U-S-airline-capacity-increased-3-8-percent-in-June-compared-with-the-same-month-last-year-.

39 Colvin, *supra* note 31.

40 James B. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times (June 11, 2015), http://www.nytimes.com/2015/06/12/business/airline-discipline-could-be-costly-for-passengers.html.

CRACKS IN THE FINISH: AFFIRMING FUNDAMENTAL RIGHTS IN THE CEMENT CARTEL CASE

BY KYLE LE CROY [1]

I. INTRODUCTION

In quashing a European Commission ("Commission") decision that required a party under investigation to make excessive disclosures, the Court of Justice of the European Union ("CJEU") affirmed in a recent judgment that certain fundamental protections that apply in the context of Commission dawn raids also apply in the context of Commission requests for information.

This affirmation is welcome. Yet the judgment itself falls short of affording the clarity and judicial scrutiny appropriate to cases alleging interference with the same fundamental rights which the judgment purports to protect. Moreover, whereas the Advocate General advised that the Commission decision should be quashed on no fewer than five of the seven grounds pleaded by the appellants, the CJEU—as is often the case—limited its judgment only to the issues that it thought were absolutely necessary to cover.

In consequence, while the judgment is obviously an important marker for companies subject to overly broad Commission requests for information, the judgment fails to address

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several important points of law, some of which might now fall to be addressed, piecemeal and with little or no advanced guidance, in the decisional practice of the Commission.

II. AN INVESTIGATION BEGINS—BACKGROUND TO A DISPUTE

In November 2008 and September 2009 the Commission carried out unannounced inspections, pursuant to Article 20 of Council Regulation 1/2003 ("Reg. 1/2003"), at the premises of certain companies active in the cement industry, including those of HeidelbergCement. Acting under Article 18(2) of Reg. 1/2003, the Commission subsequently sent HeidelbergCement requests for information in September 2009, February 2010, and April 2010.

In November 2010, the Commission notified HeidelbergCement by letter of its intention to issue a decision, under Article 18(3) of Reg. 1/2003, ordering HeidelbergCement to reply to a further questionnaire ("Contested Decision"), a draft of which the Commission provided with the letter. In December 2010, the Commission gave notice of its intention to open a formal investigation, pursuant to Article 11(6) of Reg. 1/2003, and in March 2011 the Commission adopted the Contested Decision, to which it annexed the final questionnaire. The questionnaire included 11 groups of questions and ran to some 94 pages.

The Contested Decision and the questionnaire annexed thereto became the subject of an appeal by HeidelbergCement, first to the General Court and then to the CJEU. Before the EU courts, HeidelbergCement argued, inter alia, that the Contested Decision infringed Article 18(3) of Reg. 1/2003 by failing to state the purpose of the request for information and by failing to contain an adequate description of the alleged infringement, the geographic market(s), and product market(s) at issue.

III. CJEU'S APPROACH IN HEIDELBERGCEMENT

The CJEU first recalled that, under the general rule in Article 296 TFEU, measures taken by the EU institutions must contain a statement which enables each person concerned to ascertain the reasons for such measures and to enable competent review of their lawfulness by the EU courts. In respect of a request for information specifically, the CJEU held that the duty to state the purpose of the request, expressly contained in Article 18(3) of Reg. 1/2003, is a fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to cooperate and to safeguard their rights of defense.

Turning to the facts before the court, the CJEU held that the Contested Decision's recitals contained only an "excessively brief statement of reasons" which was "vague and generic", particularly by comparison to the "extremely numerous" matters covering "very different types of information" contained in the questionnaire. (Nor, alternatively, was such necessary and sufficiently precise information available to HeidelbergCement in the statement of reasons within the Commission's earlier decision to initiate proceedings.)

The Contested Decision required disclosure by HeidelbergCement of extremely extensive and detailed information relating to a considerable number of transactions, both domestic and international, in relation to 12 Member States over a period of 10 years. The contrast between the scope of the reasons provided and scope of the information requested was even starker, as the CJEU observed, because the Commission had issued the Contested Decision more than two years after it had already instigated a series of investigative measures which would have permitted the Commission to present more precisely its suspicions of infringement.

Upholding HiedelbergCement's appeal, the CJEU set aside the General Court's judgment and, exercising its discretion under Article 61 of the Statute of the CJEU, annulled the Contested Decision.

IV. ON THE FACE OF IT—IMPLICATIONS OF THE JUDGMENT

The CJEU's judgment in HeidelbergCement affirms that certain limitations on the Commission's investigatory powers sought in Nexans (Case C-37/13P) and successfully obtained in Deutsche Bahn

(Case C-583/13P), both in the context of dawn raids, also apply to the Commission's requests for information. Although the Commission is not required to communicate to the addressee of a decision requesting information all the information at its disposal, or to make a precise legal analysis of those infringements, the Commission must nonetheless clearly indicate the suspicions which it intends to investigate.[2]

Inclusion in a decision of an "excessively succinct, vague, and generic—and in some respects, ambiguous—statement of reasons" is no longer acceptable practice.[3] In more condemning language, Advocate General Wahl described such a practice as "inexcusable",[4] observing that the purpose of a request for information under Article 18 of Reg. 1/2003 was "not to bring to light any possible infringement of EU competition rules in a given sector or by a given undertaking" but "certain specific infringements." And the absence of at least some indications of what those specific infringements might be has the result that "the adoption of a decision to request information under Article 18(3) may be considered to be an arbitrary measure of investigation."[5]

V. A WIDER READING—MORE QUESTIONS, THEN ANSWERS?

Reading the Opinion of Advocate General Wahl in HeidelbergCement reveals that there were a number of additional grounds of appeal that the CJEU did not examine in its judgment (since the CJEU allowed the appeal on the first ground, so declined to consider the other six grounds).

Even the CJEU's discussion of that first ground, however, omits answers to certain important questions raised by Advocate General Wahl. For example, must every decision adopted pursuant to Article 18(3) of Reg. 1/2003 have its own statement of reasons, or in exceptional circumstances might the statement of reasons in one decision refer to the statement of reasons in another? Advocate General Wahl advised the CJEU to adopt the latter approach, but in its judgment the CJEU examined the statements of reasons in the Contested Decision and the earlier decision to initiate proceedings without expressly articulating any necessary relationship between them.

Moreover, the lack of detailed discussion of the relationship between, on the one hand, the contents of the statement of reasons and, on the other hand, factors such as the stage of the investigation, the breadth of the questions posed, and the sophistication of the undertaking concerned may afford a wide discretion to the Commission to develop the principle through its own decisional practice in requests for information, to the detriment of the legal certainty of their addressees.

However, some of the issues most important to businesses in practice and raised as grounds of appeal were not addressed by the CJEU at all. To what extent, for example, may the Commission require the addressee of a decision to undertake extensive, complex, and time-consuming clerical and administrative tasks, such as formatting or consolidation of data?[6] Further, in respect of the arguments around the seventh ground of appeal – regarding a breach of HeidelbergCement's rights of defense—Advocate General Wahl expressly acknowledged that the "Court has, so far, not taken a position as to whether an undertaking which replies to a compulsory self-incriminatory question is, in doing so, waiving its rights and, consequently, the Commission is entitled to use that reply as evidence."[7] The author of this column considers the CJEU's failure to address this key argument a rather regrettable outcome.

VI. CALL IT "CONFERRAL", OR CALL IT "LIMITED GOVERNMENT"

Protection of privacy rights is an ever-growing challenge, as new technologies expose methods of greater retention and re-organization of increasingly greater amounts of data. The fundamental right to a private

2 Case C-247/14P, *HeidelbergCement v. Commission* ("*HeidelbergCement*"), para. 21.

3 *HeidelbergCement*, para. 38.

4 Opinion of Advocate General Wahl in *HeidelbergCement*, point 51.

5 Opinion of Advocate General Wahl in *HeidelbergCement*, point 73.

6 Opinion of Advocate General Wahl in *HeidelbergCement*, points 107—112.

7 Opinion of Advocate General Wahl in *HeidelbergCement*, point 164.

life, however, is well established in the constitutional traditions of the Member States. As early as 1763, for example, courts in the United Kingdom held that a "general warrant" affording a public authority "a discretionary power…to search wherever their suspicions chance to fall…certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[8]

Today the right to respect for one's private life is a general principle of EU law which extends to both domestic and commercial premises[9] and is engaged not only where an antitrust authority may seek to enter private premises[10] but also when such authority demands that an undertaking provide information, including information held electronically, for inspection at the authority's own premises.[11] Where a public body such as the Commission enjoys a wide margin of discretion to exercise investigatory powers which interfere with fundamental rights with no or little ex ante judicial control,[12] ex post judicial control—including a clear articulation of the principles on which the Commission and addressees alike may rely—is indispensable.

Other jurisdictions have successfully addressed similar challenges. Articles commemorating the contributions and recent passing of U.S. Supreme Court Justice Antonin Scalia, for example, have observed that through his opinions, the United States has made "significant adaptations of the Founders' concerns to modern privacy cases."[13] The European Union, too, needs a robust judicial response equal to the challenge of protecting fundamental rights in antitrust investigations. Indeed, the fact that HeidelbergCement did not withdraw its appeal to the CJEU, even after the Commission terminated the cement cartel investigation in July 2015, demonstrates the importance of this right to undertakings in the European Union.

There is no insurmountable reason why the EU courts cannot work toward that goal. The judgment in HeidelbergCement is an example of such progress, but it also falls short in missing what should have been an overwhelming vindication of the limits of the discretionary power of institutions in the European Union. The consequences of the CJEU's omission will continue to be felt most by the recipients of requests for information whose rights, at least on the narrow point examined by the court, the judgment purports to protect.

8 Pratt LCJ, *Wood v. Wilkes* (1763) 98 ER 489.

9 Case C-583/13, *Deutsche Bahn v. Commission*, paras. 19—20.

10 *Vinci Construction and GMT v. France* nos. 63629/10 and 60567/10.

11 *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08.

12 Opinion of Advocate General Wahl in Case C-583/13, *Deutsche Bahn v. Commission*, point 61, referring to Article 13 of the Rules of Procedure of the Commission (C(2000) 3614) (OJ 2000 L 308, p. 26), as amended.

13 Donald Alpin, 'Scalia's Fourth Amendment Voice Will Be Missed, *Bloomberg BNA* (February 22, 2016), quoting Edward R. McNicholas, Partner, Sidley Austin LLP, Washington, available at http://www.bna.com/scalias-fourth-amendment-n57982067562/ (accessed March 23, 2016).

RECENT FINANCIAL SECTOR CONSPIRACIES AND MANIPULATIONS: HOW TO PREVENT FUTURE SIMILAR CONDUCTS?

BY ROSA M. ABRANTES-METZ[1]

I. DEFICIENT STRUCTURES FACILITATING ILLEGAL BEHAVIOR

A veritable "who's who" of high profile financial benchmarks have been under investigation for years now, and likely for years to come. The interest on USD LIBOR ("LIBOR") started in 2008, with Wall Street Journal articles by Carrick Mollenkamp and Mark Whitehouse.[2] I and co-authors Albert Metz, Michael Kraten and Gim Seow followed with an August 2008 paper extending the analysis further back in time, and first pointed to the possibility of collusion and manipulation having started well before the financial crisis.[3] But at the time, the

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2 C. Mollenkamp & L. Norman, *British bankers group steps up review of widely used Libor*, W. S. J., C7 (April 17, 2008); C. Mollenkamp & M. Whitehouse, *Study casts doubt on key rate; WSJ analysis suggests banks may have reported flawed interest data for Libor*, W.S.J., A1 (May 29, 2008).

3 R. Abrantes-Metz, M. Kraten, A. Metz, & G. Seow, LIBOR Manipulation? 36 J. Banking & Finance 136-150 (2012), first publicly available in August 2008 at http://papers.ssrn.com/sol3/papers.cfm?abstract_

overall evidence on possible LIBOR abuse available to the general public by all sources was mixed. For example, an October 2008 report by the International Monetary Fund provided supporting evidence that LIBOR had not been abused.[4]

Only in March 2011 it became public that LIBOR investigations had started, at least for UBS, and in June 2012 we learned of the first direct evidence of LIBOR manipulation contained in Barclay's settlement with authorities. Later that year in December, the first evidence of collusion among various institutions to rig LIBOR was made public through UBS' settlement with authorities.

Investigations on USD LIBOR extended to other "Ibors" including Euribor, Yen LIBOR and TIBOR. To date, many banks have already settled claims totaling several billions of dollars, and it may not be over yet, especially given that conspiracy claims by plaintiffs have been revived by the most recent LIBOR decision.[5]

After the "Ibors" came foreign exchange ("FX"), when in 2013 Bloomberg presented evidence of a possible abuse. Applications of screening by Bloomberg reporters Liam Vaughan and Gavin Finch helped trigger worldwide investigations on FX, a market of more than 5 trillion dollars a day. They reported the possibility that traders at some of the world's biggest banks had been rigging benchmark WM/Reuters rates, according to current and former dealers with knowledge of the practice. In their August 2013 article,[6] they screened the FX market for possible manipulation and collusion affecting a selected group of exchange rates, identifying abnormal spikes in these rates around 4 p.m. London time WM/Reuters fixing. In January 27, 2014, Vaughan and Finch followed up with another screening of this market. They showed that after news came out that regulatory bodies and competition authorities began investigating the FX market, the frequency and magnitude of these abnormal spikes had been reduced, evidence which is consistent with a possible break of a cartel.

My own work on FX was contained in a December 2013 complaint filed in New York which extended Bloomberg's analysis and showed further evidence of highly anomalous price spikes at key times of the day when certain indices are set.[7] In 2015 I also developed evidence consistent with artificiality in FX futures prices, in particular, in the CME price settlement procedure that takes place during a very narrow window of time of just 30 seconds, and which determines the benchmark futures settlement price for the day.[8] To date, FX settlements have also totaled several billions of dollars.

The London Gold and Silver Fixings were next. In December 2013, I wrote an opinion article arguing that the large price declines I observed around the time of the London gold pm fixing, when the "price of gold" for the day is determined for the purposes of many derivative contracts, were consistent with collusion to manipulate this benchmark. I provided similar evidence for silver.[9] A Bloomberg article followed in February 2014 which described additional results from my research on gold.[10] Immediately after, approximately thirty law suits were filed in the United States alone. I

id=1201389.

4 International Monetary Fund, *Financial Stress and Deleveraging, Macrofinancial Implications and Policy*, 77-81 (October 2008).

5 In Re: Libor-based financial instruments antitrust litigation. United States Court of Appelas for the Second Circuit (May 23, 2016), available at http://blogs.reuters.com/alison-frankel/files/2016/05/052316-2nd-Cir-Libor-decision.pdf.

6 L. Vaughan and G. Finch, *Currency Spikes at 4 P.M. in London Provide Rigging Clues*, Bloomberg (Aug. 27, 2013), available at www.bloomberg.com/news/2013-08-27/currency-spikes-at-4-p-m-in-london-provide-rigging-clues.html.

7 Class action complaint filed on behalf of Prudent Forex Fund, LLC and Prudent Capital Management, LLC, by Lowey Dannenberg Cohen & Hart, LLC, Cohen Milstein Sellers and Toll, PLLC, and Gold Bennett CERA & Sidener, LLP, (13-CV-9237) (December 31, 2013).

8 Class action complaint filed on behalf of Jeffrey Sterk, Kimberly Sterk, and Michael Melissinos, by Quinn Emanuel Urquhart & Sullivan, LLP and Grant & Eisenhofer, PA., (15-CV-2705), (April 7, 2015).

9 R. Abrantes-Metz, *How to Keep Banks from Rigging Gold Prices,* Bloomberg (December 19, 2013), available at http://www.bloomberg.com/news/2013-12-19/how-to-keep-banks-from-rigging-gold-prices.html.

10 L. Vaughan, *Gold Fix Study Shows Signs of Decade of Bank Manipulation*, Bloomberg (February 28, 2014), available at http://www.bloomberg.com/news/2014-02-28/gold-fix-study-shows-signs-of-decade-of-bank-manipulation.html.

conducted additional analyses of the gold and silver London fixings contained in two class action complaints, showing results consistent with sustained conspiracy and manipulation of these benchmarks over many years.[11] In May 2014 the UK's FCA fined Barclays on gold manipulation. And last April, Deutsche Bank settled with both gold and silver plaintiffs.

Moving on to yet more benchmark rigging, in early 2013 Bloomberg reported that the U.S. Commodity and Futures Trading Commission ("CFTC") had found evidence of manipulation of ISDAfix, the key swaps benchmark. My collusion analysis on ISDAfix, contained in the class action complaint filed in September by Alaska Electrical Pension Fund, showed that once again, banks likely coordinated to move this benchmark price.[12] Four days after this complaint was filed, Bloomberg reported that the CFTC had found evidence of criminal behavior.[13] Since then both Barclay's and Citigroup have settled with authorities on claims of manipulation of ISDAfix, and seven banks have also settled claims with plaintiffs. In addition, last March the complaint survived a motion to dismiss also on conspiracy claims, added by the empirical evidence provided by screens.[14]

Allegations of wrongdoing have also been made with respect to the warehousing of metals such as aluminum and zinc, focusing on whether some large institutions have colluded to drive up the price of these metals. In aluminum, the debate centers on the role of a specific set of warehouses, which are located in the Midwest and are part of a network approved by the London Metal Exchange ("LME"). The LME warehouse system was set up to act as a buffer, absorbing aluminum when producers' supply exceeded demand and releasing the metal in times of shortage. The question is whether the LME warehouse system has been playing its proper role in recent years, particularly after a number of banks and trading firms gained control of a large portion of LME warehouses.

According to aluminum buyers, some banks and traders have been preventing metal from leaving the warehouses, resulting in long waits for delivery of metal since the date it is requested for release by the metal owner. The wait time moved from just a few weeks to well over one year. This induces larger storage fees and higher prices. In a July 2013 opinion article I put forward concerns with this warehousing setting,[15] and I followed with a paper from September 2013 providing the first preliminary analysis consistent with possible artificiality in aluminum premiums.[16] In addition, I also argued that given the flawed structure of this setting, the incentives at play, the conflicts of interest, the large concentration of stored metal in a few warehouses, and the empirical evidence consistent with artificiality, that abuse may have occurred. I conducted additional analyses of artificiality in this market which are contained in the class action complaint by indirect aluminum purchasers.[17]

II. WHY HAS SO MUCH ILLEGAL BEHAVIOR OCCURRED?

11 In Re Commodity Exchange, Inc., Gold Futures and Options Trading Litigation, class action complaint filed by Quinn Emanuel Urquhart & Sullivam, LLP, and Berger & Montage, PC, (14-MD-2548 (VEC)), (March 16, 2015); and In Re London Silver Fixing, LTD. Antitrust litigation, class action complaint filed by Lowey Dannenberg Cohen & Hart, PC and Grant & Eisenhofer, PA, (14-MD-02573-VEC), (January 26, 2015).

12 Class action complaint filed on behalf of Alaska Electrical Pension Fund; Genesee County Employees' Retirement System; County of Montgomery, Pennsylvania; County of Washington, Pennsylvania; and City of New Britain, Connecticut, by Quinn Emanuel, Urquhart & Sullivan, LLP, Robbins Geller Rudman & Dowd LLP, and Scott+Scott, Attornmeys at Law, LLP, (14-cv-7126 (JMF), 14-cv-7907 (JMF), 14-cv-8342 (JMF), 14-cv-8365 (JMF), and 14-cv-8576 (JMF), (February 12, 2015).

13 M. Leising and T. Schoenberg , *CFTC Said to Alert Justice Department of Criminal Rate Rigging*, Bloomberg (Sep. 9, 2014), available at http://www.bloomberg.com/news/articles/2014-09-08/cftc-said-to-alert-justice-department-of-criminal-rate-rigging-i2z7ngfn.

14 Opinion and Order issued on March 28, 2016 (14-CV-7126 (JMF)).

15 Rosa M. Abrantes-Metz, *Banks' Role in Metal Trade Deserves Scrutiny*, Bloomberg, July 31, 2013, available at http://www.bloomberg.com/news/2013-07-31/banks-role-in-metal-trade-deserves-scrutiny.html.

16 Rosa M. Abrantes-Metz, "Aluminum Market Dislocation: Evidence, Incentives and Reform," September 18, 2013, Working Paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328902.

17 In Re Aluminum Warehousing Antitrust Litigation, filed by Kessler, Topaz, Meltzer & Check, LLP, Girard Gibbs, LLP, Cuneo, Gilbert, LaDuca, LLP, (13-md-02481-KBF), March 12, 2014.

Is this an epidemic of illegal behavior in the financial sector? Is the likelihood of abuse routinely underestimated? Is that preventing more proactive reforms of deficient benchmark structures and other market structures? And are regulatory authorities too complacent, preferring for the most part to "sit back and wait" for wrongdoers to come forward so that a leniency application can be filed, rather than also proactively screening markets for suspicious pricing patterns?

The question of whether manipulation of a financial benchmark, rate or price will occur depends on whether someone is both willing and able to effectively move prices. The question of "willingness" is generally outside the control of authorities; it is just human nature, and while most people will not try, some others will, given the incentive. Usually the incentive is also outside of the control of authorities, and it is directly related to the potential gains from manipulation: as long as those gains are significant, the incentive will be there to engage in manipulation, and some will end up bieng attracted into undertaking such abuse. Instead, authorities and benchmark administrators should focus on the design of structures to reduce the ability for abuses to occur.

Let's look at LIBOR more closely. For decades, LIBOR was a daily report of the interest rate at which large banks could borrow in the interbank market. There are literally trillions of dollars in transactions and derivatives benchmarked to LIBOR, making it one of the most important financial rates in the world and creating an obvious (and arguably irreducible) incentive to manipulate it. But what allowed the manipulation of LIBOR to be as prolonged and successful as it was rests with the structure of its setting. Historically it was based on a simple trimmed average of rates reported by the participating banks, information voluntarily supplied by banks with deeply vested interests in the ultimate outcome. It was administrated by the British Banking Association, essentially the banks themselves. It is not surprising that abuse was rampant.

Unfortunately, these sorts of structural deficiencies are not limited to LIBOR, but are instead more commonplace than we might hope. For example, the London gold fixing was set twice a day by five competing banks who participated in private undisclosed calls during which they entered into a live auction to buy and sell gold while simultaneously trading in the public exchanges and over the counter. The benchmark administrator was again the banks themselves through the London Gold Market Fixing, with no independent oversight. The auction prices of these private calls among competitors determined the AM and PM fixings, on which many hundreds of billions of dollars in transactions and derivatives were based. Silver worked similarly, with only three banks involved and one daily benchmark.

ISDAfix is another important financial benchmark which was based only on a survey. The structure of this benchmark had always been flawed, facilitating abuse. A small number of banks submitted quotes to broker ICAP reflecting their individual views of the relevant market price at 11 a.m. ET. They had the option to either accept a proposed reference rate put forward by ICAP at that time (which was supposedly based on current transactions and in principle representative of the market), or instead submit their own quotes. And no one was obliged to trade at their quoted values.

Moreover, participants had 15 minutes to submit and revise their submissions, which facilitated signaling and coordination. There was a direct conflict of interest since the benchmark administrator's clients are the market players themselves. The administrator had a direct financial interest in the value taken by ISDAfix, as the banks — ICAP's clients — had derivatives indexed to this number which could benefit many millions of dollars from just a couple of basis points of rigging. Additionally, and as in all benchmark rigging cases uncovered to that, there was a lack of independent oversight in this setting. So is it really so surprising that manipulation did occur?

On the metals warehousing concerns, metal storage became a very profitable business, and the more metal is held in the warehouse, the more profitable it is. The incentives to slow the release of aluminum from the warehouses are clear. To start, by keeping the aluminum in for longer they collect more rents, and the LME receives a portion of the fees collected by its affiliated warehouses.

In addition, the accumulation of inventories in these warehouses makes aluminum relatively less available elsewhere and increases the opportunity cost of aluminum to producers, potentially inducing inflated prices and consequently higher production, which is then stored in these warehouses, generating further rents collection. Moreover, many of the warehouse owners are also traders in aluminum markets and are potentially benefiting from a manipulation of the supply of aluminum. In any event, by controlling the warehouses the players gain important inside information potentially providing them the edge in these markets. It should be noted that unlike equities, trading on this type of private information for commodities is legal.

Having these warehouses owned by parent companies which, until recently, also owned the LME while at the same time being main traders in this market, represents a conflict of interest. At the end of the day, the question is why did regulators authorize a few large institutions to control, in many cases, commodity warehousing, distribution, trading, and sometimes production as well? Isn't this a recipe for trouble? The verdict is not out yet on whether illegal behavior has in fact occurred, but why increase the risk by allowing such a flawed structure to operate?

III. WHERE ELSE SHOULD WE PREVENT AGAINST THIS TYPE OF BEHAVIOR?

There is no doubt that there was widespread failure to recognize the means, motive and opportunity to rig key financial benchmarks and other structures. That can perhaps be dismissed as a mistake of the past. Many of these benchmarks have already been reformed, though some more robustly than others. The question now is what other structures may present similar deficiencies making them highly susceptive of abuse, and what can be done to deter and detect such conduct?

Auction bid rigging is the most frequent cartel offense, but why? Because many procurement structures are defective, easily enabling coordination among a small number of powerful bidders with completely aligned interests, and lacking independent oversight. This describes the bond auction market even today. New debt is often financed through the issuance of bonds sold to interested parties through auctions, though not all bond issuance is subject to auctions. Typically there are a fairly small number of large participants in these auctions obtaining correspondingly large shares of these bonds. These entities have an obvious interest in buying the bonds as cheaply as possible. There is nothing wrong with that as long as the parties do not manipulate prices artificially away from market fundamentals.

In June 2015 we learned of an investigation into the possible bid-rigging of US Treasuries by primary dealers, the large financial institutions who, along with other market participants, bid in these auctions. Primary dealers often keep more than half of the newly auctioned securities and have a common interest in buying them at the lowest possible prices. When dealing with such large volumes, even a very small price movement can generate enormous additional profits. It is not clear that any entity is responsible for routinely screening each auction for possible abuse. Empirical evidence that I prepared contained in class action complaints filed in 2015 and 2016,[18] shows that Treasury auction prices may have been too low at least since 2007, that this effect is increasing with the participation of the large primary dealers in the auctions, and that these patterns suddenly changed when an investigation by the Department of Justice became public. All this suggests a possible break of coordination among dealers.

IV. WHAT LESSONS MUST WE LEARN AND IMPLEMENT?

While investigations into Treasury auctions, FX, ISDAfix, and others are still ongoing, and more recently additional focus by regulators has been given to possible collusion and manipulation in bid-ask spreads in bonds markets for supranational, sub-sovereigns and agencies, bid-ask spreads in foreign exchange, and maybe even other spreads manipulations in other markets, we should learn the lessons

18 See for example, class action complaint filed by Quinn Emanuel Urquhart & Sullivan, LLP and Cohen Milstein Sellers & Toll, PLLC, (MDL No. 2673), (February 16, 2016).

from LIBOR and other benchmarks.

We must recognize deficient structures so that we can proactively reform them, minimizing the likelihood of abuse. And to enhance deterrence and detection of illegal behavior, we must screen these markets regularly: screens have historically flagged many of the largest financial scandals and they can continue doing so into the future. Indeed, our detection methods must become more sophisticated, unless we are willing to rely on the wrongdoers to continue leaving incriminatory emails and text messages detailing their collusive and manipulative efforts. On the contrary, they have surely learned their lessons from LIBOR and other cases; they now know they can get caught and their own messages can "hang them."

Authorities need to face the reality that direct evidence will be harder to come by, and that proactive reform of deficient structures is needed, coupled with active market screening. It is passed time we learned our lessons.

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