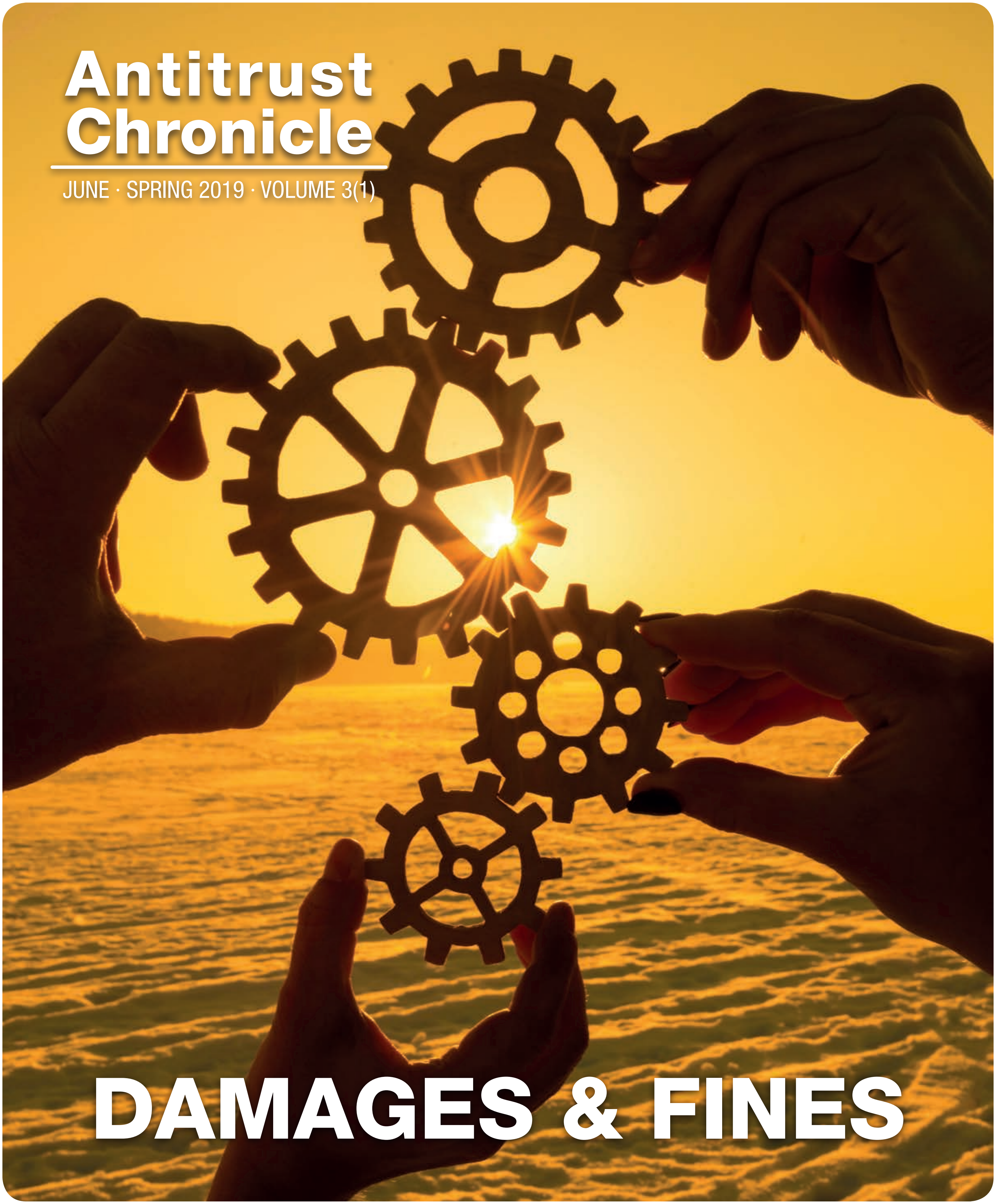
Antitrust Chronicle

JUNE · SPRING 2019 · VOLUME 3(1)



DAMAGES & FINES

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

This month's CPI Chronicle focuses on antitrust damages and fines, with particular consideration to cartel damages.

Internationally, there is a patchwork of private and public enforcement of antitrust laws with varying damages and fines. Does this enforcement reflect clear concepts of justice and compensation and concepts that are consistent with a fundamental notion that a core purpose of antitrust enforcement (both public and private), and damages and fines, is to deter conduct?

In this edition of the Chronicle, one author asks: Is there an "ambivalent effect" of antitrust damages actions? Other authors discuss the "Difference-in-Differences" estimation procedure for the estimation of counterfactual prices. In addition, other articles focus on the nursing labor market, recent developments in private enforcement in Italy, ACPERA, and the "cautionary tale" of *Penn State Hershey*.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

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

Sincerely,

CPI Team

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The Ambivalent Effect of Antitrust Damages on Deterrence

By Miriam C. Buiten

When a cartel is revealed, cartel participants face substantial civil damages claims next to public fines. In Europe, the recent increase in private damages actions brought on the concern that the leniency program could become less attractive, since they shield firms only from public fines. At the same time, civil liability may help discourage cartels altogether by increasing the expected costs of colluding. This note discusses this ambivalent effect of antitrust damages actions. It considers how fines and damages compare for leniency applicants and non-cooperating firms in Europe and the U.S. Favoring successful leniency applicants for civil liability as well as for fines may help retain leniency incentives, but may be difficult to achieve when punitive damages are prohibited. Alternatively, individual sanctions might need to be considered in order to encourage leniency applications while promoting civil antitrust claims.

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The Difference-in-Differences Approach in the Estimation of Cartel Damage

By Frank P. Maier-Rigaud & Slobodan Sudaric

A crucial step in the quantification of damage in the context of damages claims is the estimation of the counterfactual price level: the price level that would have been observed in the absence of the cartel. This article discusses the Difference-in-Differences ("DiD") estimation procedure for the estimation of counterfactual prices. While DiD is a very powerful estimation method, it is demanding in terms of conditions that need to be satisfied to allow a proper application, notably the common trend assumption. The aim of this article is to introduce the DiD approach, the underlying common trend assumption, and to draw implications for its use in the quantification of damage.

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Private Antitrust Enforcement in Italy

By Mario Siragusa & Alessandro Comino

In 2017, Italy implemented Directive No. 2014/104/EU by adopting Legislative Decree No. 3/2017, which introduced a number of procedural and substantive provisions to facilitate damages claims by victims of antitrust infringements. Even though the Italian legal framework already provided judicial protection for victims seeking damages arising from antitrust infringements, these new provisions are expected to increase private antitrust litigation in Italy. This article highlights the main changes that the Decree has introduced in the Italian legal framework, including procedural aspects, disclosure, effects in judicial proceedings of Italian Competition Authority decisions, and the statute of limitations. Finally, it refers to the most recent and noteworthy cases in Italy to provide specific guidance.

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Comment on Cartel Enforcement in the Trump Administration

By John M. Connor

This comment examines trends in anti-cartel enforcement by the Antitrust Division of the U.S. Department of Justice (the Division) and coordinated actions by other U.S. Government agencies, with particular attention paid to developments in 2017 and 2018. It examines three measures of cartel-enforcement. Whether the Trump administration can develop a strong anti-cartel enforcement record by the end of 2020 is dubious. Progress demonstrated in 2017-2018 seems to rest primarily upon initiatives launched in the late Obama administration. During 2017-2018, the Division's cartel record on (1) the number of cases initiated in 2017-18, (2) the *number* of cartels penalized, (3) the number of cartelists punished, and (4) the size of penalties imposed is very low by the standards of the W. H. Bush and Obama administrations. Moreover, by scanning what has become public about cartel investigations initiated in 2017-2018, the backlog of potentially important cartel cases appears to be slim.

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Antitrust Damages, Fines, and Deterrence: Collusion in the Nurse Labor Market

By Roger D. Blair & Anita Walsh

Those who violate the Sherman Act are subject to fines and to treble damage actions under §4 of the Clayton Act. The economic rationale for those sanctions is deterrence rather than retribution. In the context of collusion in the nurse labor market, this paper recognizes that the optimal rate of antitrust violations is not zero due to enforcement costs. The paper also examines the policy variables available for deterrence. These include resources allocated to detecting and prosecuting antitrust violations, the fines imposed by the courts, and the multiplier for private damages. The paper mentions, but does not develop in depth, the political difficulties with efforts to increase deterrence.

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Penn State Hershey: A Cautionary Tale for Antitrust Litigators

By Margaux Poueymirou

This article addresses a recent decision by the Court of Appeals for the Third Circuit, *Fed. Trade Comm'n v. Penn State Hershey Med.* Ctr., 914 F.3d 193 (3d Cir. 2019), upholding the denial of attorneys' fees to the Commonwealth of Pennsylvania in an action filed by Pennsylvania and the Federal Trade Commission to enjoin the proposed merger of two major Pennsylvania hospital systems, on the grounds that it would substantially lessen competition for general acute care inpatient hospital services in the four-county area surrounding Harrisburg. It examines the clash between the district court and Third Circuit's interpretation of what it means to "substantially prevail" under Section 16 of the Clayton Act and concludes by arguing that in joint actions brought by the Commission and State Attorneys General, it is now particularly incumbent on the latter to litigate under the more demanding Clayton Act standard for granting injunctive relief in order to protect future attorneys' fee awards.

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It Ain't Over 'Til It's Over: Can Making Acpera Restitution Conditional Help Fill a Gap in the Law?

By Meegan Hollywood & Dave Rochelson

The Department of Justice Antitrust Division (the "Division") has secured dozens of guilty pleas and convictions, and billions of dollars in criminal fines over the past decade, but imposed less than $100 million in restitution to victims. Division policy explains that "[f]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims." Private plaintiffs have taken up that mantle, securing $3 billion per year in compensation for victims. But private actions sometimes encounter unique procedural issues that preclude victims from receiving compensation for the harm they suffered. We offer a proposal to fill this gap in the law. Division policy already provides that, when granting leniency to a defendant pursuant to the Antitrust Criminal Penalty Enhancement & Reform Act of 2004 ("ACPERA"), payment of restitution is a condition of "final leniency." While civil actions remain the best way to maximize relief for victims of anticompetitive conduct, we propose that the Division retain its restitution power until any related civil cases have resolved. This approach would still provide defendants with some relief from the risk of treble damages, while giving victims of the conspiracy a failsafe in the event that private enforcement falls through. At the end of the day, where the defendants' guilt is not in question, victims should be compensated.

WHAT'S NEXT?

For July 2019, we will feature Chronicles focused on issues related to (1) **Arbitration & Antitrust**; and (2) ***AT&T/Time Warner* & Vertical Mergers**.

ANNOUNCEMENTS

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

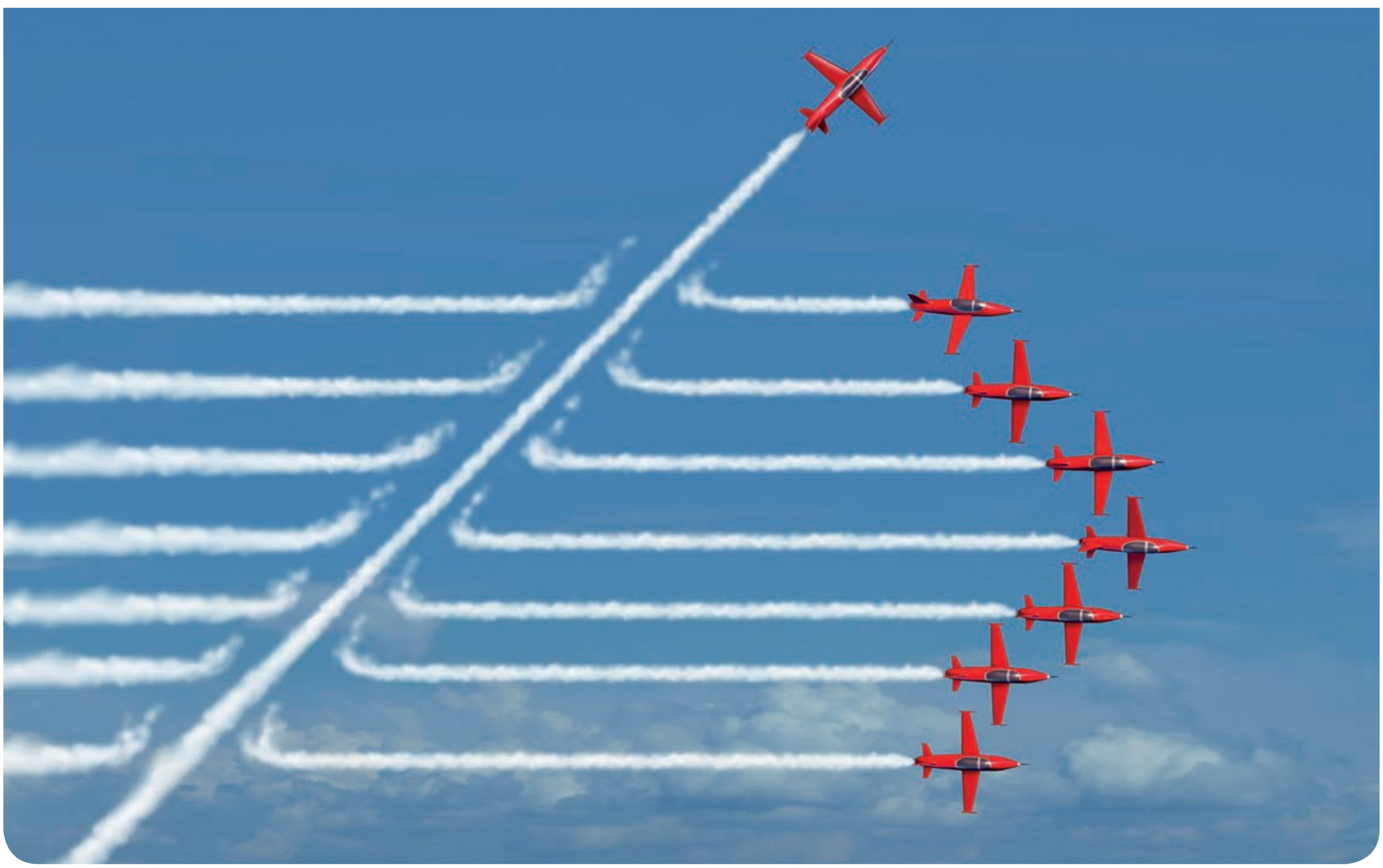
CPI ANTITRUST CHRONICLES August 2019

For August 2019, we will feature Chronicles focused on issues related to (1) **Editorial Board Antipasto**; and (2) **State AGs**.

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

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

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



THE AMBIVALENT EFFECT OF ANTITRUST DAMAGES ON DETERRENCE

BY MIRIAM C. BUITEN[1]

1 Junior professor of Law and Economics at the University of Mannheim (buiten@uni-mannheim.de).

I. NTRODUCTION

The volume of antitrust damages actions in Europe has continuously increased since the European Commission's Antitrust Damages Directive ("Directive") was introduced.[2] Today's cartelists face substantial damages claims in addition to public fines in the event that the cartel is revealed. Leniency applicants may escape fines, but are still vulnerable to damages actions, as the air cargo cartel case illustrates. Lufthansa was offered immunity in all jurisdictions as the first cartel member to report the cartel. However, mere days after the dawn raids, Lufthansa together with its co-conspirators faced twenty class action lawsuits in the U.S.[3] and numerous claims in the EU, including a €3 billion claim by Deutsche Bahn alone.[4]

The possible undermining effect of such damages actions on leniency programs was hotly debated leading up to the adoption of the Directive.[5] The concern was that the prospect of damages claims would discourage colluding firms from applying for leniency, since the leniency program only shields them from public fines, not from civil damages.

In the debate on balancing public and private antitrust enforcement, less attention was given to the potential of damages actions to help deter collusion. The idea of private enforcement as a deterrence instrument took center stage in the Green Paper on antitrust damages actions but faded into the background in subsequent policy documents, disappearing altogether in the final Directive. The Green Paper noted that both public and private enforcement "are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them."[6] The Directive did away with the deterrence language, focusing instead on effective compensation of antitrust harm for injured parties and ensuring coherence between public and private antitrust enforcement.

Regardless of whether deterrence is an explicit goal of private enforcement in Europe, improving compensatory justice inherently produces beneficial effects in terms of deterrence of future anticompetitive conduct.[7] This is particularly the case if damages, rather than dissuading companies from reporting cartels, discourage companies from colluding altogether. The leniency program has proven to be a useful instrument for disclosing cartels, but leniency applications are not a goal in itself. Given the harm that cartels cause to society, preventing cartels altogether is preferable to discovering cartels through leniency applications. Civil damages may contribute to the goal of preventing cartels by increasing the expected costs of starting a cartel.[8]

However, civil damages may not enhance antitrust deterrence if colluding firms believe it to be unlikely that competition authorities will detect their cartel. With low detection probabilities, civil damages may not discourage firms from colluding, but may discourage them from applying for leniency. In such cases, leniency fails to offer sufficient benefits as compared to risking detection. For leniency programs to put cartel members in a prisoners' dilemma, confessing must be more attractive than staying quiet. If civil damages are substantial, leniency may not sufficiently improve a colluding firms' position as compared to their non-reporting co-conspirators.

In this light, this note discusses the ambivalent effect of antitrust damages actions on deterrence. It considers how fines and damages compare for leniency applicants and non-cooperating firms in Europe and the U.S., illustrating how favoring successful leniency applicants for civil liability as well as for fines may help retain leniency incentives, but may be difficult to achieve when punitive damages are prohibited. Alternatively, individual sanctions might need to be considered in order to encourage leniency applications while also encouraging civil antitrust claims.

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2 Kuijpers, M., Palumbo, T., Whiteford, E. & Paul, T.B. (2018), "Actions for Damages in the Netherlands, the United Kingdom and Germany," Journal of European Competition Law & Practice, 9(1), 55-73.

3 Bergman, H., & Sokol, D.D. (2014), "The Air Cargo Cartel: Lessons for Compliance," Anti-Cartel Enforcement in a Contemporary Age-Leniency Religion (Caron Beaton-Wells & Christopher Tran, editors, Hart Publishing 2015).

4 See www.reuters.com/article/deutsche-bahn-airlines-idUSL6N0TK0GK20141130 (last visited April 29, 2019).

5 See e.g. Migani, C. (2014), "Directive 2014/104/EU: in search of a balance between the protection of leniency corporate statements and an effective private competition law enforcement," Global antitrust review, 7, 81-111; Cauffman, C., "The Interaction of Leniency Programmes and Actions for Damages," The Competition Law Review 7 (2) 2011, 181–220.

6 European Commission, Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, December 19, 2005, p. 3- 4; *Courage v. Crehan*, Case C-453/99, judgment of the Court of September 20, 2001, paras. 26-27.

7 European Commission, White Paper on actions for breach of the EC antitrust rules, COM(2008) 164, p. 3.

8 Buiten, Miriam C., Peter van Wijck & Jan Kees Winters, "Does the European Damages Directive make consumers better off?," Journal of Competition Law & Economics 14, no. 1 (2018): 91-114.

II. PUBLIC ENFORCEMENT

A. Fines

Classical deterrence theory suggests that a violation can be deterred if the expected sanction, consisting of the value of the sanction and the probability it will be imposed, exceeds the expected gain from the violation. The theory of optimal deterrence builds on the work of Becker & Landes.[9] In order to induce firms to refrain from cartel behavior, the expected illegal profit from colluding must be lower than the expected sanction, given by the anticipated fine multiplied by the probability of being discovered and convicted.

In practice it can be impossible to quantify either the gains originating from a cartel or the harm caused by the cartel. One reason is that it is difficult to determine how long the cartel has operated. Competition authorities have to rely on information collected by investigators or experts' findings to estimate the duration of cartels. Even if they obtain accurate information, the economic impact of the collusion may have extended beyond the period that can be legally proven.[10]

Another reason is the lack of reliable data to accurately estimate the price that would have prevailed in a competitive market, the but-for price. This counterfactual world is difficult to characterize because the but-for price is influenced by many factors.[11] Competition authorities are not under a duty to quantify the gains from an infringement or to investigate the effect of the cartel.[12]

In practice, authorities use reference numbers. The U.S. antitrust authorities take 20 percent of the affected volume of sales as a starting point, consisting of 10 percent of the affected sales as a base fine and another 10 percent for the harm inflicted upon consumers.[13] The basic amount of the fine is the greatest of $100 million, twice the gross pecuniary gain derived from the crime, or twice the gross pecuniary loss caused to the victims. The total cartel fines generally range from 15 to 80 percent of affected sales in the U.S.[14] In the air cargo cartel, for instance, the fines imposed (all through plea agreements) ranged between 14 and 56 percent of affected sales (see *Table 1*).

Table 1: Fines levied in the air cargo cartel

Airline	*US fine[15]*		*US fine as % of affected sales*	*US fine as % of global turnover*	*EU fine*	*EU fine as % of global turnover[16]*
British Airways	$200 mln	€144 mln	14.31%	1.59%	€104 mln	1.15%
Cargolux Airways	$119 mln	€86 mln	33.43%	9.09%	€80 mln	8.49%
Cathay Pacific Airways	$60 mln	€43 mln	14.56%	0.70%	€57 mln	0.92%
LAN Cargo/Aerolinhas Brasileiras	$109 mln	€78 mln	32.63%	3.11%	€8 mln	0.32%
Qantas Airways	$61 mln	€44 mln	24.96%	0.50%	€9 mln	0.10%
SAS Cargo Group	$52 mln	€37 mln	33.81%	0.88%	€70 mln	1.65%
Singapore Airlines Cargo	$48 mln	€35 mln	56.07%	0.55%	€75 mln	1.19%
Air France/KLM	$350 mln	€252 mln	42.76%	1.20%	€310 mln	1.48%

9 G.S. Becker, "Crime and Punishment: An Economic Approach," 76 J. Political Economy 169 (1968); W.M. Landes, "Optimal Sanctions for Antitrust Violations," 50 University of Chi. L. Rev. 652 (1983).

10 Boyer, M., Faye, A.C., Gravel, E. & Rachidi, K. (2018), "Challenges and Pitfalls in Cartel Fining," CCLR, 31, 50, at 19.

11 Boyer et al. 2017, at 16-25.

12 European Competition Authorities, *Pecuniary Sanctions Imposed on Undertakings for Infringements of Antitrust Law Principles for Convergence*, para. I.3, (May 2008), available at www.autoritedelaconcurrence.fr/doc/eca_principles_uk.pdf (last visited April 28, 2019).

13 United States Sentencing Commission, 2011 Federal US Sentencing Guidelines Manual (Washington DC, the Commission, 2011).

14 Boyer et al. 2017, at 28.

15 Ghosal & Sokol 2013, at 520.

16 As reported in the European Commission Decision.

The European Commission sets the basic amount of the fine at up to 30 percent of the value of the affected sales, multiplied by the number of years that the infringement lasted.[17] A fixed component equal to 15-25 percent of annual EEA sales is added as a further deterrent.[18] The basic amount is then adjusted according to aggravating and mitigating circumstances.[19] However, the total fine may not exceed 10 percent of the worldwide annual turnover of the undertaking.[20] In the air cargo Cartel, most of the imposed fines did not come close to this upper limit (see *Table 1*). The highest nominal fines were imposed on Air France/KLM, totaling €252 million in the U.S. and €310 million in the EU, constituting 1.2 and 1.48 percent of the group's turnover respectively.

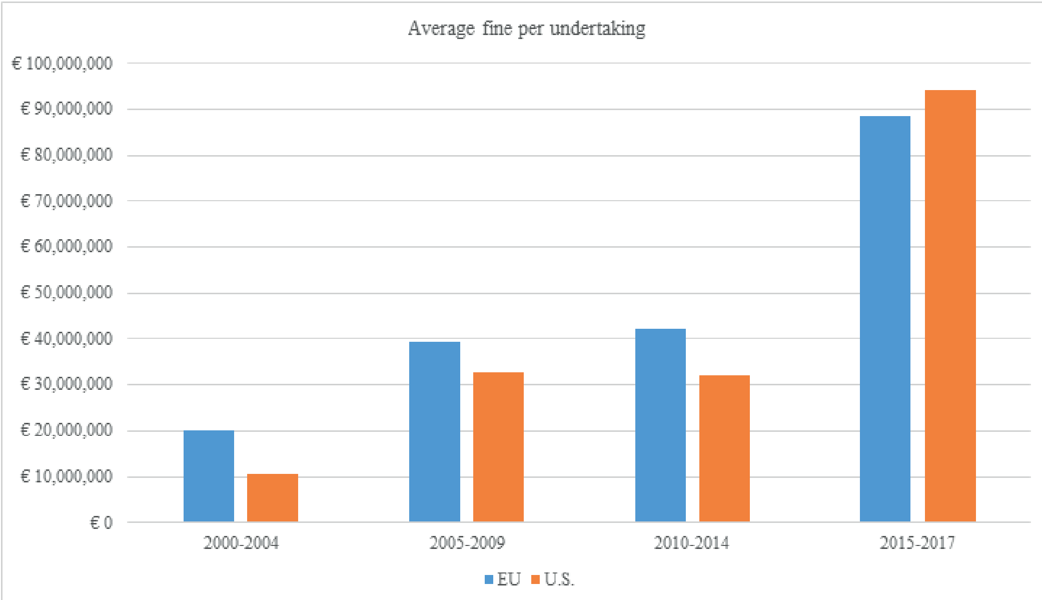

Figure 1: Average fine per undertaking. Data sources: Antitrust Division Workload Statistics 2000–2009 and 2008–2017; European Commission Cartel Statistics 2019.

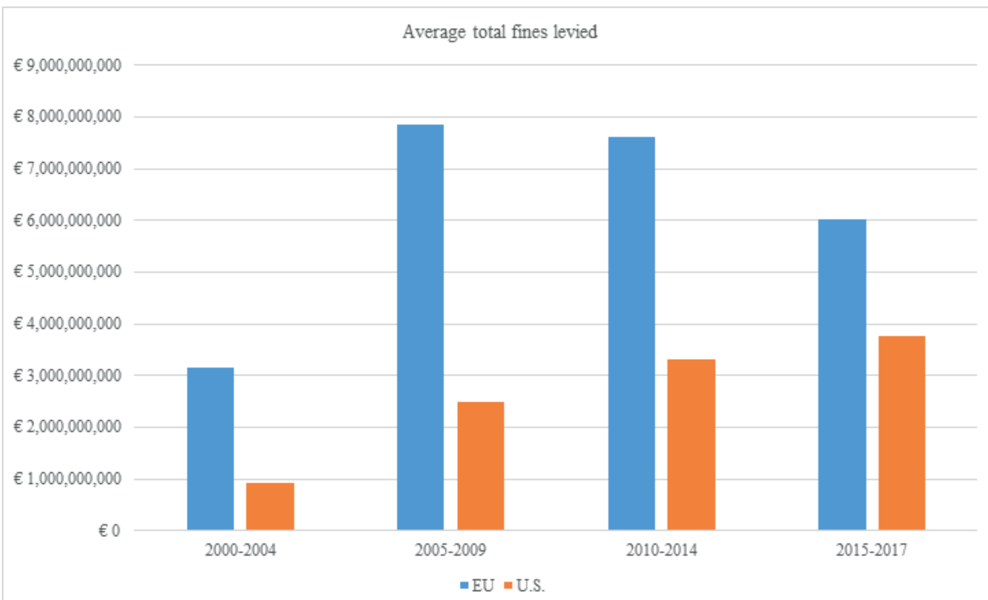

Figure 2: Average total fines levied. Data sources: Antitrust Division Workload Statistics 2000–2009 and 2008–2017; European Commission Cartel Statistics 2019.

17 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210, 1.9.2006 ("2006 Fining Guidelines"), para. 21.

18 2006 Fining Guidelines, para. 25.

19 2006 Fining Guidelines, paras. 21–29.

20 2006 Fining Guidelines, para. 32.

On average, the fines levied on cartel participants have increased substantially in the last decade, reaching record amounts in Europe and the U.S (see *Figures 1 and 2*).[21] Academic views vary as to whether the fines set in the EU and the U.S. are high enough to deter anticompetitive behavior, or in fact too high. Adler & Laing (1999) and Denger (2003) find the fines imposed on cartels in the U.S. "excessive."[22] Connor & Lande (2008) conclude that the presumption that cartels overcharge on average by 10 percent much too low.[23] They find an average overcharge lying in the range of 31 to 49 percent and a median in the range of 22 to 25 percent. Combe & Monnier (2011), too, conclude that the fines imposed against cartels by the European Commission are too low.[24] Conversely, Allain et al. (2015) find that the majority of firm-level fines imposed by the European Commission over the period 2005-2012 are above the deterrence level.[25]

A study by Mariniello (2013) estimates that fines might not even be high enough to offset the additional profits by collusion, let alone deter cartels given the low detection probability.[26] This detection probability is difficult to estimate, since we do not know how many undetected cartels are in operation. Empirical studies estimate detection probabilities in the U.S. and the EU to be well below 20 percent.[27] Given that these estimates are based on the data available on detected cartels, the actual probability of cartel detection, unconditional on the cartel ever being detected, is probably even lower.[28]

B. Leniency Programs

In practice, it is not detection by competition authorities but discovery through leniency programs that is the primary way in which cartels are revealed. In the U.S., over 90 percent of penalties imposed by the Department of Justice for cartel violations since 1996 are linked to investigations assisted by leniency applicants.[29] A 2013 EU study found that out of 57 cartels for which a full decision was published since 2000, 53 were discovered through a leniency application.[30] Moreover, with the introduction of leniency programs in the EU and the U.S., the number of cartels detected in these jurisdictions has considerably increased in the last decade.[31]

The European Commission first introduced a leniency program in 1996, revised it in 2002, and subsequently in 2006.[32] The program offers full exemption from fines for the first company to report the cartel, on condition that the company provided sufficient evidence on the cartel (enough for a sustainable conviction), fully cooperated with the commission and had not coerced other companies to join the cartel or to remain in it. The EU leniency program also offers up to 50 percent discounts on fines to the second and subsequent companies to come forward, provided that they commit to active cooperation with the Commission and report sufficiently valuable information to prove the case.

The U.S. leniency program offers leniency only to the first company to elicit a collusive agreement, and to their directors, officers and employees.[33] Discounts are not available to subsequent companies that come forward. However, subsequent applicants do have the possibility of entering into plea agreements or settlements to benefit from reduced fines or sentences in exchange for their guilty plea and full cooperation.

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21 Boyer et al. 2017, at 3.

22 Adler, H. & D.J. Laing (1999), "As corporate fines skyrocket," Business Crimes Bulletin 6, 1; Denger, M.L. (2003), "Too Much or Too Little, A Summary of Discussion," American Bar Association's Antitrust Remedies Forum, Washington, DC.

23 Connor, J.M. & R.H. Lande (2008), "Cartel Overcharges and Optimal Cartel fines," Issues in Competition Law and Policy, S.W. Waller (ed.), Volume 3, AMA Section of Antitrust Law, chapter 88, pp. 2203-2218.

24 Combe, E. & C. Monnier (2011), "Fines against hard core cartels in Europe: The myth of over-enforcement," Antitrust Bulletin 56, 235-275.

25 Allain, M.L., M. Boyer, R. Kotchoni & J.P. Ponssard (2015), "Are Cartel Fines Optimal? Theory and Evidence from the European Union," International Review of Law and Economics 42, 38-47.

26 Mariniello, M. (2013), "Do European Union fines deter price-fixing?," Bruegel Policy Brief 2013/04, No. 780.

27 13 percent (Combe, E., Monnier, C. & Legal, R. (2008), "Cartels: The probability of getting caught in the European Union," available at SSRN 1015061) and 13-17 percent (Bryant, P. G. & Eckard, E. W. (1991), "Price fixing: the probability of getting caught," The Review of Economics and Statistics, 531-536.).

28 Boyer et al. 2017.

29 G.J. Werden, S.D. Hammond & B.A. Barnett, "Deterrence and Detection of Cartels: Using All the Tools and Sanctions," 56 Antitrust Bull. 207, 224 (2011).

30 O. Dominte, D. Serban & A.M. Dima, "Cartels in EU: Study on the Effectiveness of Leniency Policy," 8 Mgt. & Mkt .529 (2013).

31 Boyer et al. 2017, 13.

32 Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 298, December 8, 2006.

33 United States Corporate Leniency Policy 1993.

Leniency programs are often credited with the successful detection and prosecution of cartels. However, the increase in the number of cartels detected may also be due to an increase in cartel activity. Leniency programs could have an ambivalent effect on deterrence. On the one hand, leniency policies put cartel members in a prisoner's dilemma, making collusion harder to sustain.[34] The possibility to escape fines by telling on the other cartel members diminishes trust among the conspirators, increasing the need to monitor each other.[35] On the other hand, the reduced fines in leniency programs may raise the expected benefit from continuing to collude.[36]

In order to maintain deterrence, fine reductions need to be offset by a corresponding increase in the probability of detection. Another option is to increase the level of fines imposed when cartel members do not cooperate. Yet there are limits on the maximum possible levels of fines, for instance because of bankruptcy concerns.[37]

III. PRIVATE ENFORCEMENT

Along with fines, conspirators also face damages claims by injured parties. Whereas in the EU private antitrust damages actions have only started to emerge in the last decade, civil claims have been common practice in the U.S. for many years.

In principle, civil damages increase the expected costs of collusion, thereby contributing to deterrence.[38] However, private claims may also dilute incentives to apply for leniency. Leniency applicants are exempted from paying a fine, but still have to pay damages. Given the central role leniency programs play in discovering cartels, civil damages may reduce the deterrence effects of competition policy.

The U.S. found a remedy against civil damages dissuading potential leniency applicants. Generally, claimants can obtain punitive damages for cartel harm up to three times the harm incurred (treble damages).[39] Cartel members are moreover jointly and severally liable for the entire harm caused by the cartel. Until 2004, these rules applied indistinctly to leniency applicants and other cartel members. In 2004, as a way to prevent damages from dissuading potential leniency applicants, the law was reformed. The reform limits the civil liability of leniency applicants who come forward first to actual damages incurred, and exempts them from joint and several liability.[40] In order to qualify for exemption from treble damages and from joint and several liability, leniency applicants have a duty to cooperate with plaintiffs in their civil actions.[41] Escaping joint and several liability is particularly relevant given that cartelists have no statutory right to seek contribution from the other conspirators in federal antitrust cases.[42] In short, the U.S. rules favor leniency applicants not only in terms of fines, but also in terms of civil damages.

The EU did not adopt a similar system when introducing the Directive in 2014. Given that the Directive does not allow punitive damages,[43] a discount in civil liability for leniency applicants could preclude injured parties from obtaining full compensation for their harm. This was deemed unacceptable in light of the full compensation-objective of the Directive.

34 J.E. Harrington Jr., *Optimal Corporate Leniency programs,* 56 The J. Indus. Econ. 215, 217, (2008).

35 G. Spagnolo, *Divide et Impera: Optimal Leniency Programmes,* CEPR Discussion Paper No. 4840, (December 2004).

36 M. Motta & M. Polo, *Leniency Programs and Cartel Prosecution*, 21 Intl. J. Indus. Org. 347, 349 (2003).

37 Guttuso, L. (2015), "From 'mono'to 'stereo': fine-tuning leniency and settlement policies," World Competition, 38(3), 395-421, at 402.

38 Buiten, van Wijck & Winters (2018).

39 Section 15a, paragraph 4 of the Clayton Act.

40 Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. See further Bartalevich, D. (2017), "EU competition policy and US antitrust: a comparative analysis," European Journal of Law and Economics, 44(1), 91-112, at 99; Scharaw, B. (2014), "Commission proposal for a Directive on antitrust damages and recommendation on principles for collective redress: the road towards 'private antitrust enforcement' in the European Union," European Competition Law Review, 35(7), 352, at 356; Baker, D.I. (2012), "Private and Public Enforcement: Complements, Substitutes and Conflicts - A Global Perspective," in A. Ezrachi (Ed.), Research Handbook On International Competition Law. Edward Elgar, at 259.

41 See further Eric Mahr & Sarah Licht, "Making ACPERA Work," 29 Antitrust Magazine, 2015, at 31–36.

42 *Texas Industries, Inc. v. Radcliff Materials*, Inc., 451 U.S. 630 (1981).

43 Article 2 paragraph 3 Directive.

Instead, the Directive limits access for claimants to leniency documents and other sensitive information.[44] This rule helps to ensure that leniency applicants are not in a worse position in civil claims than non-cooperating conspirators are.[45]

Additionally, the Directive exempts immunity recipients from joint and several liability. Immunity recipients are only liable towards their own direct and indirect purchasers, whereas other cartel participants are liable for the entire harm of the cartel.[46] Notwithstanding the practical relevance of this exemption for defendants, the advantage for immunity recipients is considerably smaller than in the U.S. In the EU, cartel participants have a right to seek contribution from their co-defendants based on responsibility for the harm caused, meaning that non-cooperating cartel participants normally each pay their own share of the damages. They may risk having to cover the entire harm of the cartel if co-defendants are unable to pay for civil damages. However, in such cases the Directive provides that immunity recipients are also jointly and severally liable, to ensure full compensation for victims.[47] Summarizing, leniency applicants in the EU, in principle, face the same civil liability as their non-cooperating co-conspirators.

In order to reconcile the prohibition on punitive damages in the EU with keeping the leniency program attractive, a limit on the civil liability of immunity recipients has been suggested as a "last resort."[48] This solution, which Hungary applied before the Directive came into force, would exempt the immunity recipient from civil liability, unless injured parties cannot obtain compensation from the other cartel participants.[49]

This solution has not been adopted in the Directive. Immunity recipients may even find themselves the primary target of claimants, given that they are often the only defendants not to appeal the Commission's Decision.[50] In the air cargo cartel case, Lufthansa is co-defendant in civil claims on behalf of numerous injured parties in Germany, the Netherlands, and the United Kingdom.

As of 2019, nine years after the European Commission first levied its fine, most of these civil claims are still ongoing. One reason for the long duration of these cases may be that many legal issues still have to be hashed out, such as legal standing and limitation periods. Another may be that the European rules regarding contribution and punitive damages do not encourage defendants to settle early on.[51]

Conversely, the U.S. rules regarding joint and several liability and contribution make litigation risky for cartelists, encouraging them to settle with plaintiffs.[52] The majority of the airlines involved in the air cargo cartel had settled class actions in the U.S. by 2011. Settlements totaled over $433 million.[53] Lufthansa paid among the largest settlement amounts with $85 million, next to British Airways ($89.5 million), KLM/Air France/Martinair ($87 million) and LAN Cargo/AerolinhasBrasilerias ($66 million).

44 Articles 5-8 Directive.

45 See further Guttuso, L. (2014), "The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings," Global Competition Litigation Review 7 (1), 10–22; Peyer, S. (2013), "Disclosure of leniency documents in the United Kingdom: Is the draft Directive creating barriers?," Competition Policy International 8, 1–8.

46 Article 11 Directive.

47 Article 11, paragraph 4 under b Directive. Additionally, small and medium-sized firms are exempted from joint and several liability.

48 Cauffman (2011).

49 Art 88D Hungarian Competition Act.

50 Geradin, D. & L.-A. Grelier (2014), "Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?," in N. Charbit & E. Ramundo (Eds.), William E. Kovacic, An Antitrust Tribute, Liber Amicorum, Volume II, pp. 257–276. Institute of Competition Law.

51 Kortmann, J. & R. Wesseling (2013), "Two concerns regarding the European Draft Directive on Antitrust Damage Actions," Antitrust Chronicle 8 (1), 1–9.

52 Bornemann, B. (2018), "Cartel Damages: Liability and Settlement," available at SSRN 3208840, at 43.

53 Hausfeld. Hausfeld Announces Two Major New Settlements Totaling Over $150 Million in Air Cargo Cartel Case, www.hausfeld.com/news-press/hausfeld-announces-two-major-new-settlements-totaling-over-150-million-in-a (last visited April 23, 2019).

IV. OUTLOOK

With the rise of antitrust damages actions in Europe, concerns are voiced that the prospect of civil liability could dilute incentives to apply for leniency. This would be problematic given key role of leniency programs in disclosing cartels. At the same time, civil damages could help deter cartels by increasing the costs of colluding.

It is difficult to empirically verify the effect of damages actions on leniency programs and on deterrence due to the secrecy of cartels. Fewer leniency applications may imply that the enforcement system is failing, in the sense that leniency incentives are diluted, or it may mean that enforcement is succeeding, meaning that the number of cartels has decreased.

In order to maintain leniency incentives while promoting civil claims, legal solutions could help create a gap between the civil liability of immunity recipients and non-cooperating firms. U.S. laws favor successful leniency applicants by not only waiving fines, but also reducing their expected civil liability. As a result, applying for leniency offers significant benefits even in the face of damages actions. In Europe, the prohibition of punitive damages and the possibility of seeking contribution preclude such an approach. Another solution of limiting immunity recipients' civil liability to a "last resort" was not adopted either, possibly because it would be viewed as too lenient.

Rather than aiming to optimize the levels of fines and damages targeted at corporations, individual sanctions could be introduced or enhanced as an alternative to increase the deterrent effect of competition policy. Evidence from the U.S., where individuals can face high fines and prison sentences of up to 10 years, suggests that leniency programs may be more effective when they incorporate sanctions against individuals.[54] The incentives of employees within the company may not be aligned with the company when it comes to engaging in or reporting cartel conduct.[55] This misalignment of incentives could be exploited: if individuals within the company risk personal sanctions, the prospect of high damages payments may not dissuade them from applying for leniency.

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54 S.D. Hammond, *Cornerstones of an Effective Cartel Leniency Programme,* 4(2) Competition Law Intl. 4 (2008).

55 Guttuso 2015, 402; F. Thépot, *Leniency and Individual Liability: Opening the Black Box of the Cartel,* 7 *CLR* 221, 225 (2011).

THE DIFFERENCE-IN-DIFFERENCES APPROACH TO THE ESTIMATION OF CARTEL DAMAGE

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I. INTRODUCTION

At first, damages claims typically rest on an estimation of cartel price overcharges — the price increase above the competitive price level due to the cartel. As only cartelised prices are observable but not competitive prices, the calculation of cartel overcharges requires an estimation of the competitive price level but-for the infringement, the so-called counterfactual price level.

Competition economists apply a variety of methods for estimating counterfactual prices.[4] Among the most widely used approaches generally recognized by competition authorities are comparator-based methods.[5] These methods rest on the assumption that by comparing the cartelised market to a suitable comparator market the cartel overcharge can be precisely identified if all other differences between the two markets are being controlled for. The comparator market can either be a comparable geographic or product market, the cartelised market itself at a different point in time (either before or after the cartel period), or a combination of the two (the so-called Difference-in-Differences approach, "DiD").[6]

The DiD approach combines the temporal comparison of a before-after ("BA") approach with a comparison to a non-cartelised product market ("comparator market"). Assuming that the comparator market and the cartelised market had evolved through time according to a common trend in the absence of anti-competitive conduct ("common trend assumption"), the cartel overcharge in the cartelised market can be calculated by comparing the price differences between the two markets during the cartel period to price differences in the post-cartel period. The development of the comparator market then essentially mirrors the development of the counterfactual cartelised market.

The DiD approach is sometimes seen as generally superior to other comparator-based estimation procedures. This alleged superiority is in turn often used as the sole justification for the choice of using the DiD approach over other estimation procedures, without consideration of whether the underlying conditions, under which the DiD has the potential to outperform other methods, are actually met.[7]

In the following article we will show that the DiD-approach is not generally superior to other methods, but that its superiority in individual cases is due to specific circumstances and data conditions that are not generally present. In particular, the validity of the DiD approach crucially depends on whether the central assumption of a common trend existing between the cartelised market and the comparator market is met.

The article is structured as follows: Section II introduces the DiD approach in more detail. Section III demonstrates how a violation of the common trend assumption might affect the results of a DiD estimation and discusses robustness tests. Section IV draws implications for the use of DiD in the quantification of damage.

4 For an overview see Maier-Rigaud, F., & Schwalbe, U. (2018), *Quantification of Antitrust Damages*, in: D. Ashton, Competition Damages Actions in the EU: Law and Practice (2 ed.), Cheltenham: Edward Elgar; Maier-Rigaud, F. (2014) *Toward a European Directive on Damages Actions*, Journal of Competition Law and Economics, 10(2), 341-360; Maier-Rigaud, Frank (2014) *Umbrella Effects and the Ubiquity of Damage Resulting from Competition Law Violations*, Journal of European Competition Law and Practice, 5(4), 247-251; Maier-Rigaud, Frank (2017) *Damages Regimes on Both Sides of the Atlantic: An Economic Critique*, Antitrust Bulletin, 62(2), 334-347. For overviews in German, see Inderst, R., Maier-Rigaud, F., & Schwalbe, U. (2019), *Quantifizierung von Schäden durch Wettbewerbsverstöße*, in: A. Fuchs, & A. Weitbrecht, Handbuch der Privaten Kartellrechtsdurchsetzung (S. 287-332), München: C.H. Beck and Maier-Rigaud, F. (forthcoming), *Quantifizierung von Schäden*, in: A. Traugott, S. Riegler, & A. Lukaschek, Handbuch des österreichischen Kartellschadenersatzrechts, Wien: Manz.

5 See European Commission (2013), *Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*. Strasbourg: European Commission.

6 In a sense other approaches, ranging from cost-based methods to simulations and structural models, also rely on a comparator. See Maier-Rigaud & Schwalbe (2018).

7 See, for example, OECD (2011), *Quantification of Harm to Competition by National Courts and Competition Agencies,* Policy Roundtables, p. 36. While the authors acknowledge the DiD approach is superior under the condition that data for a suitable comparator market is available, said condition is often ignored within the quantification of cartel damages. Sources such as the OECD-study are sometimes cited (wrongly) as suggesting the general superiority of the DiD approach, neglecting that the superiority of the method is entirely dependent on the specifics of the case and no general superiority exists.

II. THE DIFFERENCE-IN-DIFFERENCES APPROACH

Consider the following example for illustration purposes. Let “A” be the cartelised market and “B” the comparator market. Besides the cartel effects in market A, both markets exhibit identical development, so that market B is a suitable comparator market. Prices during the cartel period in market A are 8 € and prices in market B are 6 €, whereas prices in the post-cartel period are 10 € for market A and 9 € for market B.

A naive before-after comparison of cartel prices (8 €) and post-cartel prices (10 €) in the cartelised market would not allow inferences about the cartel overcharge to be made, as prices were not only affected by the cartel, but also by changes in demand and supply side factors. An overcharge estimation based on the before-after approach therefore requires the decomposition of prices into explanatory variables in order to isolate the cartel effect from other factors driving prices.[8] In the example, the decomposition could have revealed that prices are largely determined by production costs, leaving firms in the cartelised market a profit margin of 1 € in a competitive environment after costs. Supposing production costs during the cartel period were 6 €, the BA approach would suggest counterfactual prices of 6 € (costs) + 1 € (estimated profit margin) = 7 € (competitive price level). Comparing the competitive price level to the observed prices during the cartel period yields the cartel overcharge of 8 € – 7 € = 1 €.

The DiD approach would estimate the cartel overcharge from the comparison of price differences in the cartel and post-cartel period: the price difference in the cartel period is 8 € – 6 € = 2 €, whereas the price difference in the post-cartel period is 10 € – 9 € =1 €. Assuming that the price difference in the post-cartel period corresponds to the “natural” difference in prices between the cartelised market and the comparator market, resulting from different market characteristics, any excess price difference must be the result of cartelised behaviour. The difference in price differences (DiD) 2 € – 1 € =1 € therefore corresponds to the cartel overcharge.

This example demonstrates the inherent difficulty in the estimation of cartel overcharges: the separation of price increases due to cartel behaviour from remaining price influencing factors. While a before-after comparison tries to achieve this separation by predicting counterfactual prices through a set of explanatory variables, the DiD approach attempts to isolate the cartel overcharge through the assumption that the confounding factors are adequately captured in the development of the comparator market.[9]

This gives rise to different data requirements. While a before-after comparison requires data from the cartelised market only, it requires a complete set of data on price influencing factors. The DiD approach requires data for a comparator market but has potentially lower requirements with respect to explanatory factors, as long as the development of these confounding factors is adequately mirrored by the development of prices in the comparator market.[10] In terms of data requirements, the DiD is therefore particularly powerful if the full set of explanatory variables required for the before-after comparison is either unknown or data is simply not available, and if a suitable comparator market is available. However, identifying a suitable comparator market often poses a substantial challenge.[11]

The validity of the DiD approach stands or falls with the availability of a suitable comparator market. In particular, it relies on the presumption that in the absence of the cartel both the comparator and the cartelised market would have evolved according to a common trend. This assumption is equivalent to saying that there is no difference *in the development* of the two markets over time, except for the existence of a cartel in one of them; in other words, changes in both markets that are unrelated to the cartel are of the same order of magnitude.[12] Going back to the

8 Competition economists typically control for price factors within a regression analysis, either using the forecast method or the dummy-variable method. Properly executed and given sufficient data both methods yield equivalent results. See McCrary, J., & Rubinfeld, D. (2014), *Measuring Benchmark Damages in Antitrust Litigation,* Journal of Econometric Methods, 3(1), 63-74

9 The BA approach therefore requires data on all factors systematically influencing prices, some of which may not be available. While the lack of data for these factors would cause estimation problems in the BA approach, the effect of those unobservable variables would be taken into account in a DiD approach through the observed developments in the comparator market, as long as the unobservable factors affect the comparator market and the cartelised market to the same extent.

10 Typically, also in the DiD approach additional control variables are used. This is, for example, the case, if a factor affects the common trend property, but the common trend can be restored by adequately controlling for this factor. A typical example would be a regulatory measure that has been introduced in the comparator market, but not in the cartelised market. By controlling for the regulation when conducting the DiD analysis, the effect of the regulation on the comparator market can possibly be isolated allowing the common trend between the two markets to be restored.

11 It is also possible to construct a synthetic comparator market that can be interpreted as a weighted average across different comparator markets. Under certain conditions, this procedure may yield a more suitable comparator market for conducting a DiD analysis. See Abadie, A., Diamond, A., & Hainmueller, J. (2010), *Synthetic control methods for comparative case studies: Estimating the effect of California's tobacco control program*, Journal of the American statistical Association, 105(490), 493-505.

12 Notably, a suitable comparator market does not have to exhibit exactly the same price level, so that systematic (that is constant) differences concerning the level of prices are unproblematic. In a sense, a similar assumption is made in the BA approach, where it is assumed that the only systematic difference between the cartel and the post-cartel period is the existence of a cartel.

example, if the price difference of 1 € in the post-cartel period does not reflect the counterfactual price difference in the cartel period, then there is no reason to assume that the DiD estimate adequately reflects the cartel overcharge.

While this assumption is easily satisfied in some experimental and quasi-experimental settings, it is much less likely to be an innocuous assumption in situations in which a variety of economic, political and societal factors can impact market changes.

The idea behind the DiD approach was first introduced by Snow (1855),[13] who demonstrated that cholera infections in London were transmitted by contaminated water instead of air by comparing death rates between two city districts. Both districts were initially supplied by a common, contaminated water source, while one district switched its water supply to a non-contaminated water source. The DiD setup allowed Snow to isolate the effect of the switch of water sources from unrelated differences in the death rates of the two districts. The DiD approach was subsequently introduced and developed in the fields of psychology, medical sciences, and public health policy research,[14] and remains a key experimental design setup in instances where a randomised control trial (RCT) is not feasible.[15]

In an RCT a researcher would randomly assign an underlying population to two groups: one group would obtain a treatment (the "treatment group"), the other group would remain untreated (the "control group"). If the assignment to groups is random, there is no reason to believe that the groups exhibit systematic differences besides the treatment. A direct comparison of the two groups is therefore enough to isolate the treatment effect. Clearly, an RCT is rarely feasible in economic research and entirely unfeasible in the estimation of cartel damages: competition economists cannot randomly assign market transactions to a treatment group (cartelised market) and comparator market (control group) and impose a treatment on one of them (cartel). Rather, competition economists must take the treatment (cartel) and the allocation of market transaction across groups (cartelised market and comparator market) as given, and find a suitable method to analyse such a situation. The DiD approach is such a method.

The DiD approach is used to compare the development of a treatment group (city district with new water source; cartelised market) to the development of a control group (city district with old water source; comparator market).[16] The crucial assumption of this quasi-experimental setup is that (i) the treatment only affects the treatment group but not the control group, and (ii) all factors except the treatment affect both the control and the treatment group to the same extent (common trend). The extent to which this quasi-experimental setup — where the only difference between the groups over time is the treatment itself — is applicable to the comparison of a cartelised market to a non-cartelised market is, however, often questionable and requires careful evaluation.

The following section demonstrates how a violation of the common trend assumption may affect the quantification of damage.

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13 Snow, J. (1855), *On the Mode of Communication of Cholera*, London: John Churchill.

14 See, for example, Rose, A. M. (1952), *Needed research on the mediation of labor disputes*, Personnel Psychology, 5(3), 187-200.

15 See Wing, C., Simon, K., & Bello-Gomez, R. A. (2018), *Designing Difference in Difference Studies: Best Practices for Public Health Policy Research*, Annual Review of Public Health, 39, 453-469.

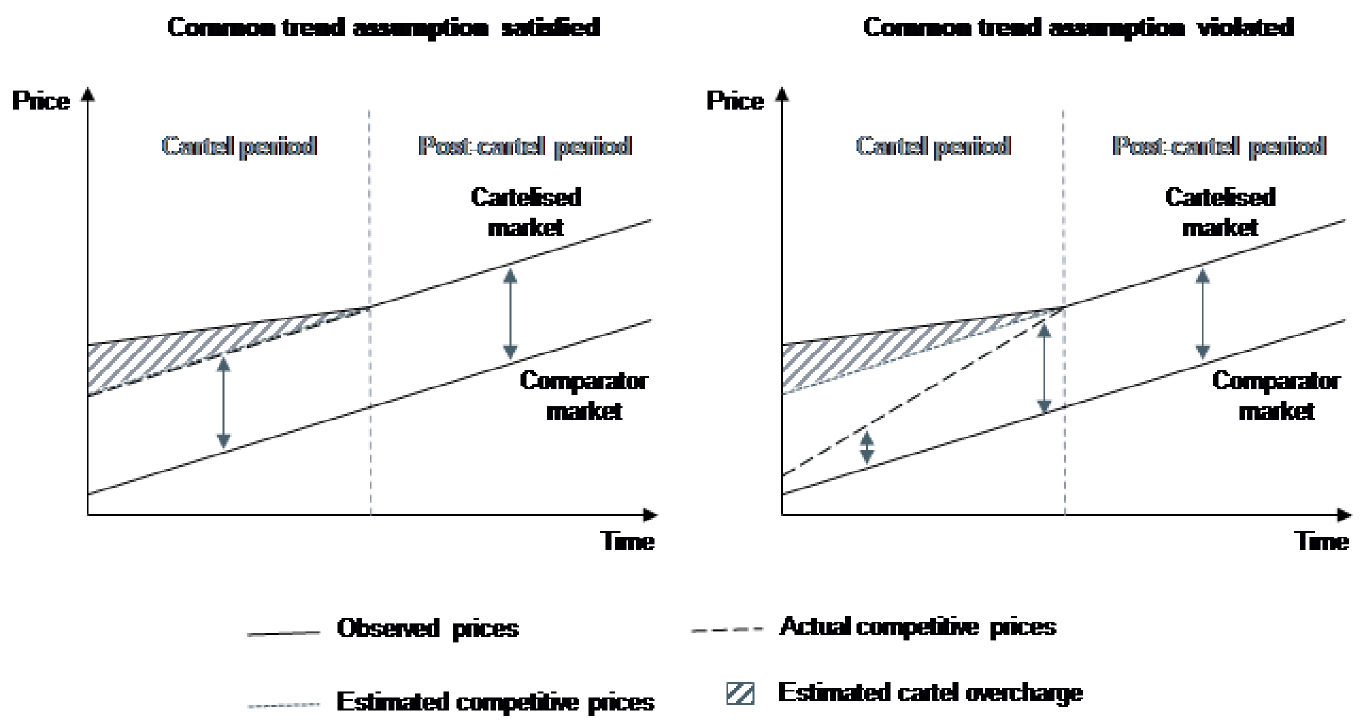
16 Early economic applications of the DiD approach focused mostly on the effect of wages on employment. See Lechner, M. (2011), *The estimation of causal effects by difference-in-difference methods*, Foundations and Trends in Econometrics, 4(3), 165-224. for an historical overview.

III. ROBUSTNESS OF THE COMMON TREND ASSUMPTION

The importance of the common trend assumption for the estimation of cartel damage is illustrated in Figure 1. The DiD approach is demonstrated in a case where the common trend assumption is satisfied (left figure) and in a case where it is violated (right figure). The figures show the observed development of prices over time in the cartelised market (upper black line) and in the comparator markets (lower black line). Suppose that the (unobserved) competitive price level in the absence of the cartel is given by the dashed line.

Consider first the case where the common trend assumption is satisfied (left figure). As indicated in the figure, the comparator market exhibits a constant price difference in the post-cartel period,[17] suggesting a common trend for both markets. Under the assumption that this common trend would also hold in the cartel period in the absence of the cartel, the counterfactual price level can be obtained by adding the price difference to the price level in the comparator market (dotted line). The difference between the counterfactual and factual prices in the cartel period yields the cartel overcharge (shaded area). If the common trend assumption is indeed satisfied, i.e. the price difference observed in the post-cartel period would have been observed in the cartel period in the absence of the cartel, the estimated competitive price level corresponds to the "true" competitive price level (the dashed line and the dotted line coincide). The cartel overcharge is correctly estimated.

Figure 1
Common trend assumption and the estimation of cartel overcharges



Now consider the case where the common trend is not satisfied (right figure). As the price difference in the post-cartel period is unchanged, applying the DiD approach would yield the same estimated competitive price level as before (dotted line). If the actual competitive price level had evolved differently (dashed line), i.e. if the common trend assumption is not satisfied, the estimated competitive price level would no longer correspond to the actual competitive price level. In this example this would entail an underestimation of cartel overcharges, as actual competitive prices would have been lower than suggested by the DiD approach.[18]

17 Note that real market prices typically are not linear lines but exhibit some form of non-linearity. A necessary condition for the common trend assumption to hold, is that the difference between the price series outside the cartel period is constant, irrespective of whether the series are linear or non-linear. The linear specification is only used for illustration purposes. It should be noted, however, that a common trend of transformed data (e.g. log-prices) rules out a common trend in levels. See Angrist, J., & Pischke, J.-S. (2009), *Mostly Harmless Econometrics*, Princeton: Princeton University Press, p. 230. For an estimation procedure which allows for common trends of transformed data, see Athey, S., & Imbens, G. W. (2006), *Identification and inference in nonlinear difference-in-differences models,* Econometrica, 74(2), 431-497.

18 Of course, a violation of the common trend assumption can also lead to the opposite outcome if the competitive price level had been higher in the cartel period than suggested by the DiD approach.

The robustness of the estimation of cartel overcharges using a DiD approach therefore critically depends on the extent to which the common trend assumption is satisfied. If the common trend assumption is violated, the estimates obtained from the DiD approach are biased and it may not even be possible to tell whether they exhibit an upward or downward bias.[19]

In the example shown, it was straightforward to check whether the common trend assumption is satisfied. The actual competitive price level is, however, unobservable and of a counterfactual nature. Therefore, there is no conclusive test to find out whether the common trend assumption is satisfied. Due to this inherent problem, the use of the DiD approach comes at the cost of potentially uncertain robustness.

While there is no statistical procedure to conclusively test whether the cartelised market indeed would have developed as suggested by a common trend over the cartel period, there are test procedures that can be indicative of whether this is likely to be the case: visual inspection and statistical testing of price trends outside the cartel period.

These tests cannot provide certainty on whether the cartelised market and the comparator market are subject to a sufficiently similar price influencing factors over time which may warrant a common trend assumption. They can, however, be a useful indication of how much confidence one should have that the common trend assumption holds. These tests have been performed by competition authorities in the *ex post* evaluation of mergers,[20] as well as in the academic literature in the assessment of DiD studies.[21]

Visual inspection is a simple yet powerful tool, and can pick up trend differences which may indicate that an uncontrolled candidate comparator market may not be a reasonable counterfactual for the cartelised market.[22] The idea is that, if outside the cartel period the two markets exhibit a common trend, it might be reasonable to assume that this would have also been the case throughout the cartel period. Ideally, the inspection would take place in both the pre-cartel and the post-cartel periods. If in both cases a common trend can be detected, it may be a reasonable assumption that the common trend would have continued to hold throughout the cartel period. If only post-cartel data is available, the visual inspection is already less indicative, in particular if the cartel period spans a longer time period. Nevertheless, a necessary condition for the common trend assumption to be warranted in this case would be that at least the post-cartel period exhibits a common trend.

Visual inspection may be less insightful if the price data is very noisy and highly non-linear. In this case, the test can also be performed more rigorously using a statistical testing procedure as used by the European Commission in their *ex post* analysis of telecom mergers. The key intuition behind the statistical test is to check whether the cartelised market exhibits significant trend differences compared to the comparator market outside the cartel period.[23] If this is the case, then the comparator market is unlikely to adequately capture all the factors that influence prices in the cartelised market; the common trend assumption is unlikely to be satisfied.

It is important to stress, however, that these tests are only indicative but not conclusive regarding the validity of the common trend assumption. Given this uncertainty, the question of robustness arises, as the relevance of the test procedures crucially depends on the extent to which trends outside the cartel period are likely to hold within the cartel period.

Data availability can impose a further substantial restriction. The fewer observations are available, the harder it becomes to substantiate the assumption of a common trend.[24] This is particularly relevant in instances where only few observations outside the cartel period are available,

19 Another source of possible estimation bias in the DiD approach is so-called autocorrelation. See Bertrand, M., Duflo, E., & Mullainathan, S. (2004*), How Much Should We Trust Differences-in-Differences Estimates,* The Quarterly Journal of Economics, 119(1), 249-275.

20 Directorate-General for Competition (European Commission) (2016), *Ex post analysis of two mobile telecom mergers: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands*, European Commission.

21 Angrist & Pischke (2009), Ashenfelter, O. C., Hosken, D. S., & Weinberg, M. C. (2013), *The price effects of a large merger of manufacturers: A case study of Maytag-Whirlpool*, American Economic Journal: Economic Policy, 5(1), 239-261. The robustness of DiD settings is also of great concern in the medical sciences. Wing, Simon & Bello-Gomez (2018) provide an overview of best practices for public health policy research.

22 Angrist & Pischke (2009) demonstrate how visual inspection can be used by discussing the DiD setup in Card, D., & Krueger, A. (1994), *Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania*, American Economic Review, 84(4), 772-793.

23 More formally, the statistical test used by the European Commission is implemented as follows. In a first step, prices in the pre-treatment period are regressed on observed explanatory variables and a dummy for each point in time that takes on the value of 1 only for the treatment group. In a second step, the coefficients of the dummy variables are regressed against a linear slope to test whether the estimated slope is statistically different from zero. If the slope coefficient is non-zero and statistically significant, it suggests that there could be unobserved confounding factors affecting the treatment group which have not been controlled for by the control group. There are several ways how these "placebo tests" can be implemented. For an alternative test procedure see also Angrist & Pischke (2009), p. 237ff.

24 Consider the introductory example where only one observation per market is available in the post-cartel period. In this case, there is no trend in the development of prices which could be statistically tested or even inspected.

for example, because the cartelised behaviour ended only recently. Similarly, price data is typically available only on “one end” of the cartel period. Constant price differences in the post-cartel period are not necessarily indicative for the entire cartel period, especially if the cartel period spans a longer time period. These data limitations may further reduce the extent to which the underlying common trend assumption can be tested.

IV. CONCLUSION

Given a suitable comparator market, the DiD approach is a powerful method for the estimation of counterfactual prices. The identification of a suitable comparator market, however, poses a substantial challenge as it requires finding a market that satisfies the common trend assumption.

In the absence of a suitable comparator market, i.e. in instances where the common trend assumption is not satisfied, the DiD approach leads to biased estimates and it may be impossible to make predictions about the direction of the bias.

In summary, while the DiD approach can be a very powerful estimation method, it should not be considered as generally superior compared to other estimation methods. Rather, the choice of the estimation method should be the result of a careful evaluation of all relevant circumstances, including constraints imposed by data availability.

PRIVATE ANTITRUST ENFORCEMENT IN ITALY

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I. INTRODUCTION

In Italy, private antitrust lawsuits can be brought in connection with any possible infringement of national competition law or Articles 101 and 102 TFEU. Victims of anticompetitive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution, and injunctive relief.

Italy has a long-standing (and increasing) tradition of private antitrust enforcement.

Stand-alone actions are more common for unilateral conduct, in particular when the dominant position is not controversial, or if it has already been established in previous decisions by competition authorities. Nonetheless, follow-on actions have higher chances of success considering the high evidentiary value that national courts give to Italian Competition Authority ("ICA") findings.

On February 3, 2017, Legislative Decree No. 3, dated January 19, 2017, ("Decree"), implementing Directive No. 2014/104/EU on actions for antitrust damages ("Damages Directive"), entered into force. According to the Damages Directive, any natural or legal person who has suffered harm caused by an infringement of competition law can exercise the right to claim for full compensation. The Decree introduced a number of substantive and procedural provisions to facilitate damages claims by victims of antitrust infringements. The Decree is expected to increase private antitrust litigation in Italy, particularly follow-on actions to ICA cartel decisions. The new rules are applicable both to individual and collective actions.

This article compares the Decree and the Damages Directive, highlighting the main consistencies and discrepancies, and pointing out the important changes that the Decree has introduced in the Italian legal framework. It does so by analyzing key features of the private enforcement regime including procedural aspects, disclosure, effects of ICA decisions, and the statute of limitations. Finally, it refers to the most recent and noteworthy cases in Italy on these points.

II. THE NEW REGULATORY FRAMEWORK ON PRIVATE ENFORCEMENT

A. Procedural Aspects

From a procedural standpoint, the Italian legislator used the transposition of the Damages Directive to increase the degree of specialization in antitrust matters before first instance courts. It did so by dividing Italy into three macro-regions: Giving the Milan court jurisdiction over Northern Italian districts, the Rome court over Central Italian districts, and the Naples court over Southern Italian districts.[2]

B. Disclosure

The Damages Directive introduces a number of harmonizing provisions concerning the disclosure of evidence. It does so in order to tackle one of the main obstacles to successful litigation in private enforcement of competition law across the EU.

Disclosure is now regulated by the Decree in Articles 3 to 5, which fully mirror the corresponding provisions of the Damages Directive.

A specific feature of the Decree relates to the possibility for national courts seized of an action for damages to suspend their proceedings if access to grey listed documents is requested, so as to wait until the ICA proceedings come to an end. In this regard, the Decree goes beyond the Damages Directive and makes the comfort zone of the ICA even wider.

Rules on disclosure in the Decree make it easier for victims of antitrust infringements to support their claims. The Italian system already had a provision allowing similar disclosure (Article 210 of the Civil Procedure Code), but courts had used this provision in very few cases in the context of antitrust damages actions. Under Article 210, the party seeking disclosure had to show that the documentation was necessary and indispensable for the case. Moreover, according to the traditional strict interpretation of Article 210, only disclosure of precisely identified documents could be granted.

The Decree increases the powers of national courts to collect evidence to prove the existence of antitrust infringements.
First, one of the most significant changes compared to the previous rules relates to the power of Courts to order the counterparty or third parties

2 According to D. Bonaretti, President of Chamber at the Court of Appeal of Milan, almost 90 percent of antitrust claims in Italy are lodged before the Court of Milan (speech given at the AAI conference held in Florence on May 24, 2019).

to disclose specific items of evidence or categories of evidence available to them. The concept of categories of evidence was not in the previous Italian civil procedure rules. Although Article 3 of the Decree attempts to define it by making reference to the exact wording of Recital 16 of the Damages Directive, the Decree only provides vague guidance, leaving room for a substantial degree of judicial discretion. Whether or not this change will have a practical effect will depend on the willingness of national judges to make use of their powers.

Second, another significant change relates to disclosure of confidential documents. Before the Decree, no provision empowered the judge to deny or limit access to confidential documents. As a result: (i) parties frequently refused to submit relevant documents in order to prevent the disclosure of confidential information; and/or (ii) disclosure orders were frequently challenged. Under the new set of rules, the courts have the power to give practical directions aimed at reconciling access to evidence and the protection of confidential data. For the first time, Article 3 of the Decree provides a non-exhaustive list of judicial orders to protect confidentiality, such as duty of secrecy, redacted versions of documents, non-confidential summaries, and data rooms (most of these measures are already well known in the Italian court practice, though mainly in patent infringement litigation).

Third, important changes also relate to penalties in case of failure or refusal to comply with disclosure orders, or destruction of relevant evidence. Before the Decree, parties' failure to comply with disclosure orders merely allowed the judge to draw very weak evidential inferences (Article 116 of the Civil Procedure Code). Regarding non-parties' failure to comply, the law was completely silent. According to the Decree, both parties and non-parties who refuse to comply with disclosure orders can now be subject to heavy fines, the amount of which (from €15,000 to €150,000) is much higher than the fines in the Civil Procedure Code.[3] Notwithstanding the above, there is still the risk that the addressee considers it more profitable to pay the fine and refuse to disclose. Hence, parties are subject to an additional "procedural" penalty: The judge can draw adverse evidential inferences from a party's refusal or failure to comply. When the addressee of the disclosure order is a party to the proceedings, fines and adverse evidential inferences can both be applied at the same time.

C. Effects of ICA Decisions

Regarding the effects of national competition authorities' decisions in judicial proceedings, the Decree is consistent with the Damages Directive, but introduces significant changes to the Italian legal framework.

Based on case-law prior to the Decree,[4] the ICA's findings – if confirmed by administrative courts or no longer subject to appeal – were already considered as special evidence of the infringing conduct. Courts have always considered those decisions as highly reliable evidence, so called "prova privilegiata," namely something in between legal evidence and evidence left to the evaluation of the judge. The practical effect was, in fact, the inversion of the burden of proof on the defendant (i.e. they created a rebuttable presumption with respect to the existence of the infringement). This approach conferred special evidentiary value on the final decisions, without compromising the discretional assessment of the judge and without precluding the possibility for counter-party rebuttal.

The Decree goes a few steps further, considering that the evidentiary value of competition authorities' decisions is now dictated by law:

– A final ICA finding of infringement, which is confirmed after judicial review or no longer subject to appeal, is binding on civil courts having jurisdiction over follow-on damages actions in relation to the nature of the infringement and its actual, personal, temporal and territorial scope;

– Moreover, the final finding of infringement by a competition authority or an appeal court in another Member State *may* constitute "evidence to be assessed along with other evidence" against the author of the infringement.[5]

Only final ICA decisions, which are confirmed after judicial review or no longer subject to appeal, are binding on civil courts having jurisdiction in follow-on damages actions. On the contrary, ICA decisions subject to judicial review are not fully and immediately binding. In those cases, civil courts must still assess the evidence and facts of the case. The burden of proof lies with the claimants, who must prove the facts on which their claims are founded. The defendants, on the other hand, must offer evidence in support of their objections or counterclaims.

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3 See, *inter alia*, the fines imposed in case the custodian does not perform its duty (Article 67 of the Civil Procedure Code: from €250 to €500); for refusal to allow an inspection (Article 118 of the Civil Procedure Code: €250 to €1,500); and for lack of attendance of witnesses or refusal of witnesses to attend the trial (Article 255 and 257-*bis* of the Civil Procedure Code: from €100 to €1,000).

4 See Supreme Court, February 13, 2009, No. 3640, *ANC/Inaz Paghe*; *Id.*, May 28, 2014, No. 11904.

5 Unlike the Damages Directive, the Italian Decree does not use the term "*prima facie evidence*," presumably because this term has not previously been used in the national legal framework.

This solution was the result of a debate relating to the unconstitutional nature of rules on the binding force of competition authorities' decisions (some scholars considered such binding force to conflict with the constitutional principles according to which judges are independent and subject only to the law). While providing for the binding force of final ICA decisions, the Decree stresses the fact that administrative courts are entitled to fully review the facts upon which the challenged decisions are grounded.

In any case, the binding effect of ICA decisions appears to be limited to infringement decisions. In contrast, ICA discharge decisions will still be weighed by the court as atypical evidence. Moreover, such binding effect is not absolute since, even in follow-on actions, the claimant carries the burden of proof with respect to: (i) the occurrence of damages, and (ii) the causal link between the antitrust conduct and the alleged damages (Article 7 of the Decree).

D. Statute of Limitations

The statute of limitations is specifically regulated by Article 8 of the Decree, which is broadly consistent with the corresponding provisions of the Damages Directive.

The Decree clarifies – and, to some extent, changes – the previous national time-bar rules. In particular, the Decree:

- States that the limitation period for bringing an action for damages is five years, confirming that antitrust damages actions are equal to tort actions (which are subject to a five-year limitation period pursuant to Article 2946 of the Civil Code);

- Provides that the limitation period starts to run when: (i) the infringement of competition law has ceased; and (ii) the claimant is – or, using reasonable care, should be – aware (a) of the behavior and the fact that it constitutes an infringement of competition law, (b) of the fact that the infringement of competition law caused harm to the claimant, and (c) of the identity of the infringer; and

- In order to facilitate follow-on actions, changes the legal framework by providing that the limitation period is suspended if the competition authority opens an investigation or proceedings concerning the infringement of competition law to which the action for damages relates, until one year after the adoption of the final infringement decision or the closing of the proceedings.

E. Joint and Several Liability

Joint and several liability is regulated by Article 9 of the Decree, which fully implements the corresponding provisions of the Damages Directive.

In Italy, the principle of joint and several liability was established even before the adoption of the Decree. However, in accordance with the Damages Directive, the main changes introduced by the Decree relate to small or medium-sized enterprises (SMEs) and immunity recipients under leniency programs:

- Joint and several liability of SMEs is limited to their own direct and indirect purchasers, provided that the other conditions set out in Article 9 are met and without prejudice to the right of full compensation.

- Immunity recipients under leniency programs are jointly and severally liable only to their direct and indirect purchasers or providers, whilst they are liable to other damaged parties only when they cannot obtain full compensation from the other infringers.

F. Passing-on

The Damages Decree introduces detailed rules concerning passing-on of the overcharge. The passing-on is regulated by Articles 10 to 13 of the Decree, which fully implement the corresponding provisions of the Damages Directive.

Even though a few judgments dealt with the passing-on defense before the implementation of the Damages Directive,[6] the Decree expressly recognizes the passing-on defense and offence for the first time.

6 See Court of Milan, June 27, 2016, No. 7970, *Swiss/SEA*.

G. Quantification of Harm

The national legal framework for the quantification of harm already appears mainly compliant with the provisions of the Damages Directive. The Decree merely recalls the relevant applicable national rules.

In line with the Damages Directive, the Decree also provides the courts with the possibility to be assisted by the ICA – as technical expert – with respect to the determination of the quantum of damages. The ICA estimation is not binding upon the court. This provision is rather controversial since there may be doubts about ICA neutrality and independence in this regard, especially when its assistance is requested in follow-on actions.

Moreover, in line with the Damages Directive, the Decree for the first time expressly includes a rebuttable presumption that cartel infringements cause damage (Article 14(2)).[7]

III. GUIDANCE FROM CASE-LAW

A. Soft Application of the Burden-of-Proof Principle in Stand-Alone Actions

Even before the Decree was adopted, the Italian Supreme Court had taken a proactive approach in antitrust private enforcement, by fostering a broad interpretation of the existing provisions relating to the gathering of evidence and the burden of proof. Regarding stand-alone cases, the Supreme Court held that, in line with the Damages Directive and even before it was transposed into national law, civil courts must take into due account the information asymmetry among the parties in access to evidence. It also held that civil courts must guarantee the effectiveness of the right to antitrust damages through a less strict interpretation of procedural rules on disclosure and court-appointed experts.[8]

Following the adoption of the Decree, rules on disclosure of evidence should ensure an even more effective application of competition law in private actions.

B. The Importance of Technical Expert Reports

In the context of a follow-on action, the Court of Milan awarded damages in tort for the plaintiff's loss of profit arising from the discriminatory termination tariffs the defendant charged the plaintiff, which were less favorable than those the defendant charged to itself. The defendant challenged the first instance ruling, inter alia, on the grounds that: (i) there was no evidence of causal link between the conduct and the damage; and (ii) in the assessment of the causal link, the Court had made uncritical reference to the report of the technical experts.

In dismissing the appeal, the Court of Appeal of Milan confirmed that ICA infringement decisions constitute privileged evidence of anticompetitive conduct. It also confirmed that technical expert reports play a crucial role in cases involving complex economic assessments, in particular with regard to the assessment of causal link and calculation of damages.[9]

C. Binding Effects of Antitrust Decisions or Full Jurisdiction?

In a judgment before the new Decree regime was introduced, the Court of Appeal of Milan cast doubt on whether ICA decisions should have binding force in civil proceedings. The judgment suggested that national courts can have several genuine reasons to depart from the ICA infringement decision assessment (such as the need to consider new events and facts).

In January 2012, the ICA found that Pfizer had abused its dominant position in the market for a glaucoma treatment based on the active ingredient Latanoprost (marketed by Pfizer as Xalatan) through a complex legal strategy.[10]

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7 Even before the Decree was adopted, according to settled case-law, a direct link could be presumed to exist between a cartel and the damages suffered by consumers, because downstream contracts between cartelists and consumers are usually the means by which a cartel is implemented. See Supreme Court, October 31, 2016, No. 22031, *M.M. & Figli S.n.c., A. e S.M./Reale Mutua Assicurazioni*.

8 Supreme Court, June 4, 2015, No. 11564, *Cargest*.

9 Court of Appeal of Milan, January 2, 2017, *Brennercom*.

10 ICA decision, January 11, 2012, *Ratiopharm/Pfizer* (Case No. A431).

The ICA found that this abusive strategy, aimed at delaying generic companies' entry into the market, was implemented by Pfizer through several attempts to extend its active ingredient patent coverage until 2011, including by lodging a divisional patent application with the European Patent Office ("EPO"). At the same time, Pfizer Italia had started legal and administrative actions against competing generics producers before national courts.

The first-instance administrative Court, TAR Lazio, annulled the ICA decision, but the Council of State then upheld it on appeal. In particular, the Council of State dismissed Pfizer's arguments on the full compliance of its divisional patent application with intellectual property law, and its underlying rationale of protecting extensive R&D investments.

Following the Council of State's judgment, the Italian Ministries of Health and of Economics and Finance brought a follow-on action against Pfizer claiming damages of approximately €14 million for the Italian National Health System due to the abusive conduct found by the ICA.

In July 2017, the Court of Rome dismissed the claim.[11]

First, the Court found that a company's exercise of its Intellectual Property rights is presumed to be lawful insofar as its legitimate protection purposes are not distorted. It concluded that IP protection is actually pro-competitive as long as its aim is to make R&D activities profitable. The Court of Rome also found that Pfizer's application for a divisional patent, together with its other administrative actions, were not part of an exclusionary strategy because they had a legitimate legal and/or economic rationale. Secondly, regarding the alleged abuse of dominance through a complex vexatious litigation strategy, it recalled established EU case-law, which requires two cumulative conditions to be met to consider a legal action as abusive. In particular: "(i) the action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition."[12] These conditions must be interpreted narrowly.

In reaching its conclusion, the Court of Rome did not apply Article 7 of the Decree, which only came into effect after the judicial proceedings. Therefore, it did not consider the ICA's infringement decision as binding in relation to the nature of the infringement as well as its material and territorial scope. Additionally, it confirmed the necessity for the claimant to prove in all circumstances two elements: (i) the damage and (ii) the causal link between the alleged damage and the infringement of competition law.

The Court of Rome found that the plaintiffs had submitted inadequate evidence to corroborate their allegations. In particular, they had failed to prove both the damage and causal link between the infringement and damage. Moreover, the existence of the antitrust infringement itself was questionable because, after the ICA's decision, the EPO Technical Board of Appeal, overturning the previous decision of the EPO Opposition Division, confirmed the validity of Pfizer's divisional patent application.

In this context, as seen in more recent cases, national courts have stressed the importance of the assessments contained in ICA infringement decisions.

This is particularly the case in relation to a number of rulings concerning abuse of dominant position by the manager of the Malpensa and Linate Milan airport, Società Esercizi Aeroportuali ("SEA"). In 2008, the ICA found that SEA had charged unfair and excessive prices in connection with the provision of airport facilities to cargo ground-handling service operators.[13]
Between February and July 2018, the Court of Milan issued three judgments regarding cargo ground-handling service operators' follow-on damages claims.[14]

In particular, in the *ITR Handling* case, the Court of Milan upheld the plaintiff's claims by relying heavily on the findings contained in the 2008 ICA infringement decision. Interestingly, in the *Brussels Airlines/American Airlines/Aegean* case, while the plaintiffs did not take part in the proceedings before the ICA, they were considered to fall within the scope of the ICA decision because they directly carried out part of the ground-handling services related to their flights. Accordingly, they could benefit from the evidentiary value of the ICA's findings.

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11 Court of Rome, July 24, 2017, No. 15020, *Ministry of Health and Ministry of Finance /Pfizer*.

12 *Agria Polska and Others v. Commission*, Case T-480/15, ECLI:EU:T:2017:339.

13 In particular, the ICA found that the fees that the SEA charged for sub-letting airport space and infrastructure to the cargo handlers were significantly higher than those determined for these purposes by the Italian Civil Aviation Authority (ENAC).

14 Court of Milan, February 16, 2018, No. 1671, *ITR Handling*; March 15, 2018, No. 3011, *Brussels Airlines/American Airlines/Aegean*; and July 27, 2018, No. 8374, *Schenker Italiana*.

D.Convergence of Statute of Limitations Principles Towards the Damages Directive and the Decree

The statute of limitations is often critical in determining whether an action for damages should be dismissed or successful.

In the *Iveco* case, concerning a claim following the EU trucks cartel,[15] the Court of Milan had to establish whether or not the action was time-barred, based on the legal framework that was applicable before the Damages Directive and the Decree.[16]

The defendant submitted that the time period had started to run from the opening of the investigation by the UK Competition and Markets Authority in September 2010 or, in the alternative, the opening of the investigation by the European Commission in January 2011.

The Court of Milan dismissed the defendant's argument and pointed out that the documents filed by the defendant reporting the opening of these investigations against the truck manufacturers could not provide reliable and complete awareness of the damage. In particular, the Court stated that:

> The press releases filed by the defendant contain opinions and analysis which are irrelevant from a legal standpoint and do not provide detailed information about facts and infringements. From such general information, it is not possible to assume any awareness of all the components of the unlawful conduct – at that date yet to be ascertained – including the specific antitrust infringement and the damage deriving from it. None of the press articles and documents produced by the defendant provide, at the dates, detailed, reliable and accurate information of the defendant's antitrust infringements and the subsequent damage to the plaintiff.

The Court of Milan appears to share the same rationale of the recent ECJ judgment in *Cogeco*.[17] In its reference for a preliminary ruling, the Portuguese court sought clarification on the Damages Directive's time-barring rules. It also sought clarification on the extent to which, in cases involving rights arising from the TFEU, pre-existing national statute of limitations rules have to be interpreted (or even set aside), in line with the solution reached in the Damages Directive.

In her opinion, Advocate General Kokott held that the Damages Directive did not apply – ratione temporis – to the applicant's claim.[18] Nonetheless, AG Kokott clarified that national courts must comply with other relevant EU law principles. Particularly the principle of effectiveness, which states that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. Although AG Kokott maintained that a three-year statute of limitations period generally complies with EU law, she concluded that Portugal's statute of limitations was not compatible with EU law because it: (i) began to run before the damaged party had full knowledge of the harm; and (ii) was not suspended during investigations by the competition authority. In the preliminary ruling on March 2019, the ECJ substantially agreed with AG Kokott's opinion.

The Court of Milan judgment in the *Iveco* case does not appear to conflict with the abovementioned principles, because the five-year time-barring period starts to run when the infringement of competition law has ceased, and the claimant is – or, using reasonable care, should be aware: (i) of the behavior and the fact that it constitutes an infringement of competition law; (ii) of the fact that the infringement of competition law caused harm to the claimant; and (iii) of the identity of the infringer. Accordingly, in the specific case, the press releases filed by the defendant, who bears the burden of proof, did not provide the plaintiff with any reliable and full awareness of the unlawful conduct.

15 In July 2016, the European Commission reached a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault, finding that truck manufacturers colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules.

16 Court of Milan, (preliminary ruling) October 4, 2018, No. 9759, *Cave Marmi Vallestrona/Iveco.* The Court of Milan took the view that statute of limitation rules have a substantive nature and, consequently, are not retroactive. Interestingly, the Court also ruled on the binding effects of Commission settlement decisions, maintaining that they have the same binding force as infringement decisions.

17 *Cogeco/Sport TV Portugal*, C-637/17, ECLI:EU:C:2019:263.

18 AG Kokott, Opinion, January 17, 2019, *Cogeco/Sport TV Portugal*, C-637/17, ECLI:EU:C:2019:32.

COMMENT ON CARTEL ENFORCEMENT IN THE TRUMP ADMINISTRATION

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I. INTRODUCTION

This comment examines certain trends in anti-cartel enforcement by the Antitrust Division of the U.S. Department of Justice (the Division), and coordinated actions by other U.S. Government agencies, with particular attention paid to developments in 2017 and 2018. By long-standing DOJ policy, criminal enforcement refers exclusively to the investigation of hardcore (*per se* illegal) cartel conduct and the imposition of penalties under Section 1 of the Sherman Act. Among the performance indicators examined are three measures of cartel-enforcement success that were highlighted by Assistant Attorney General for Antitrust Makan Delrahim's written testimony before the antitrust subcommittee of Congress in October 2018.[2] Delrahim's testimony is important because it is the first formal explanation to Congress of the first year or two of President Trump's antitrust enforcement goals and accomplishments.[3] Applying traditional metrics, cartel enforcement has markedly slowed in 2017-2018.

This note also comments on the Antitrust Division's cartel enforcement goals and its expected future actions.[4] As this paper can only analyze publicly available information, it is possible that the Division may have a number of significant big cases in the pipeline that could modify the recent downturn, or it could be redeploying its resources into novel collusion cases. I also discuss these possibilities.

Finally, a smattering of recent reports and news articles purport to find a decline in cartel enforcement activity among a broad swarth of antitrust authorities.[5] Therefore, I examine whether the recent decline in the Division's enforcement outcomes is *sui generis*, or part of a global phenomenon.

II. TIMING

President Trump assumed office on January 21, 2017 and very soon thereafter took control of the Justice Department. Jeff Sessions, long a member of the Senate Committee on the Judiciary, became Attorney General on Feb. 9, 2017. Delrahim was nominated in March 2017 and was confirmed by the Senate on September 27, 2017.[6] Both Sessions and Delrahim wrote publicly of their support for Trump's candidacy in early 2016. The Trump administration revealed its proposed FY2018 federal budget in late February 2017 and submitted it virtually unchanged to Congress in March 2017. The DOJ and the Division's proposed budget was unchanged from the past two budget years.[7]

Convictions of detected cartel members involve three main steps. First, nearly all begin with negotiating guilty-plea agreements signed by DOJ prosecutors and attorneys for the cartelist(s) admitting guilt. The agreements are submitted to a district court judge for formal approval. Thus, the first publicly known conviction milestone is the date of a press release by the DOJ or by the defendant.[8] The second step is a sentencing hearing by a district court judge, during which prosecutors argue in favor of the terms of conviction, primarily the extent to which the sentencing terms comply with the U.S. Sentencing Guidelines and why the defendant deserves a fine discount for cooperation with the Government; an officer of the corporation testifies as to his understanding of the legal implications of the agreement, such as the loss of rights to a jury trial and

2 Delrahim's written testimony is dated October 3, 2018 – one year after his being confirmed for office and one year after his first full federal fiscal year in office. This Comment focuses on the top two bullet points of "Criminal Highlights," which in my opinion are the three most important quantitative indicators of the Antitrust Division's enforcement achievements. (See page 3 of *Statement of Makan Delrahim before the Subcommitte on Antitrust, Competition Policy, and Consumer Rights, Committeee on the Judiciary, United States Senate* https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2018/12/13/delrahim_statement_10-03-18_on_atr_laws.pdf.

3 The conventional purpose of such testimonies is to put the Division in the best possible light with respect to meeting its mission by citing supportive enforcement facts. Although such testimonies are expected to be somewhat selective in their supporting facts, they should not be deceptively unbalanced in the facts assembled for Congress.

4 The Congressional testimony was reinforced by a subsequent speech (see Makan Delrahim, *Remarks at the American Bar Association Antitrust Section Fall Forum.* Washington, DC (Nov. 15, 2018)). https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

5 See Morgan, Lewis & Bockius LLP, *Global Cartel Enforcement Report Year-end 2018* (2019), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2018_190022.pdf ("Morgan Lewis 2019") and Simpson Thacher & Bartlett LLP, *2018 Global Cartel Enforcement Report* (2019), https://www.stblaw.com/docs/default-source/Publications/globalcartelenforcementreport_january2019.pdf ("Simpson Thatcher 2019"). In early 2019, these studies were cited in the *Financial Times* and the *Competition Policy International Newsletter.*

6 Delrahim was immediately preceded by Acting Assistant Attorney General for Antitrust Brent Snyder, who had served as Deputy AAGA since November 2013 (https://www.justice.gov/atr/public-documents/division-update-spring-2014/new-leadership-new-office-antitrust-division-criminal-program). Snyder reported directly to Sessions until Sept. 27, 2017. For several months (as early as March to September 2017), Delrahim served as Deputy Assistant to the President and Deputy White House Counsel. Typically during such interregnums, Snyder would have deferred making significant policy changes and would have informed (and perhaps sought approval of) AG Sessions about decisions regarding major antitrust cases.

7 Trump's 2018 budget was enacted late (in March 2018), so the Division operated under continuing resolutions through March 2018.

8 Unknown to the public are the identities of companies that applied or were accepted to the Corporate Leniency Program. Successful applicants are immunized from federal prosecution and must fully cooperate with the Division by providing evidence and testimony about the particulars of a cartel. While such evidence may be sufficient to convict the remaining members of the cartel, the Division gives very large fine discounts for the second member of the cartel to cooperate.

to appeal. These public (but not usually reported by the press) hearings are often held on the same day as the press release, but are sometimes delayed for a few weeks. The third date (or dates) of consequence are those on which cartel fines are paid to the Treasury or an individual is incarcerated. Increasingly, corporate fines are paid in multi-year installments with post-conviction interest added.[9] Collection dates and amounts are typically known only to the DOJ, the overseeing judge, and the convicted firm.

In view of these dates, it seems fair to assign at least partial responsibility to the Trump administration for cartel enforcement decisions (opening cases, obtaining plea agreements, and imposing penalties on cartelists), beginning approximately from February 2017. Full control over the Trump administration's antitrust enforcement begins no later than October 2017, when Delrahim was appointed. Thus, nearly all enforcement activity for calendar years 2017 and 2018 may reasonably be assigned to President Trump and his appointees. However, some government statistics, including the Division's *Workload Statistics*, are reported using Federal Fiscal Years; FY2017 began on October 1, 2016, which means that 8 of its 12 months fall into the Trump presidency (the period of partial control); statistics from FY2018 will correspond to the Trump period with full control over antitrust policy.[10]

This Comment will develop statistics of trends in antitrust enforcement to compare *calendar* years 2017 and 2018 with earlier years. The cartel-related indicators I primarily focus on are the three highlighted by DAGA Delrahim: (1) corporate criminal fines; (2) criminal cases initiated; and (3) individuals convicted.[11] I also illustrate some large and important cases, as these tend to drive the totals presented.

A. Corporate Criminal Fines According to DOJ Sources

Delrahim states that the Division imposed over $3.243 billion in criminal cartel fines in FY2016 and FY2017, nearly all of which are *corporate*, not individual, fines.[12] These fines are close to the criminal fines reported in the FY2017 *Workload Statistics*.[13] The fines for FY2017 alone ($2.785 billion) are the highest U.S. criminal cartel fines ever recorded for a single FY.[14]

Clearly, the Trump administration cannot be credited with fines reported for FY2016 because these were approved wholly by officials appointed by the Obama administration. Furthermore, I believe that the fines reported for FY2017 should also be credited almost entirely to decisions made during the Obama administration.

The reason is rooted in the distinction between the date on which a fine is *announced* or *"agreed to"* and the time when it's ordered by a court (i.e. *obtained*).[15] Announced dates are those on which a press conference is held or a press release issued with details on a company's guilty plea (or, rarely, a trial outcome). When a guilty plea is announced, the Government's prosecutorial effort with respect to the named defendant is for all practical purposes completed, and its government penalty is fixed.[16] Plea dates are the ones reported by the press and are the most straightforward to link to fines. However, with one exception, the DOJ does not add up fines according to the year they were "*agreed to*."

9 Installments are usually over five or six years, but one case involves more than 20 years' of annual payments. In unusual cases, a company may have to accept a court-appointed monitor to supervise injunctive or structural relief.

10 The DOJ's *Workload Statistics* are released more than a year after the FY ends, so FY2018 is not available for this comment. (See https://www.justice.gov/atr/file/788426/download)

11 This comment also focuses on data generated by international cartels because they tend to account for almost all of the penalties imposed for price fixing.

12 Individual fines amounted to $5.25 million and $1.02 million in FY2016 and FY2107, respectively. These individual fines are negligible (0.2 percent) compared to the corporate fines reported.

13 These data were provided to me by the DOJ upon request. As of late Dec. 7, 2018, these data were not yet posted on the DOD Website – 14 months after FY2017 ended. The total shown is $3.238 billion.

14 The previous high of $1.905 billion was in FY2014.

15 Italicized words are the unique jargon developed by the DOJ for dating penalties.

16 When the DOJ makes its recommendation to a court for penalties, courts nearly always approve in a brief *pro forma* sentencing hearing, at which defendants renounce their rights to appeal their sentences. Other than collecting the monetary penalties (i.e. fines and mandatory restitution) and forwarding them to the Treasury, little remains to be done by the DOJ after a plea agreement. Payments for antitrust fines are due in full (or as a first installment) in as little as ten days; late payments of U.S. fines are unheard of. Moreover, although DOJ prosecutors sign multiple guilty plea agreements sequentially, the first corporate cartelist to confess is the first public key event that cracks a cartel, after which the rest of the cartelists usually soon fold with less work per case by prosecutors.

In contrast, *imposition* dates are those on which a judge holds a hearing that orders or approves the payment of a fine, mandatory restitution, or other penalty. At such hearings, a corporate officer or the individual defendant is present and affirms the terms of the sentence. Sometimes a sentencing hearing is held on the same day as a plea agreement, but often the sentencing is delayed. Penalties proposed by prosecutors are practically never challenged by judges.[17]

Collection dates are different still. Most fines are paid in full within a few weeks of sentencing. Alternatively, if the penalty is paid to the Treasury in multi-year installment payments with added interest, these collection dates may be spread over six or seven years after the plea. Installment payments became very common in the 2000s. Collection dates are not usually available in posted documents on the DOJ Web site, so delays in recording fines after announced dates are hidden from easy access. That is, it is difficult to reconcile guilty-plea-agreement dates with the DOJ's "collection" dates typically reported in the Division's *Workload Statistics*.[18]

Although the U.S. DOJ *Workload Statistics* reports on fines collected, few, if any, of the worlds' 140 other antitrust authorities use "collection" dates to compile their enforcement statistics. Nearly all other antitrust authorities in the world assign as a fining date the day a decision is announced, which is most comparable to a plea-agreement date. This distinction is of pivotal importance in evaluating the enforcement record of the Trump administration. If one evaluates penalties using the date of imposition, almost all U.S. cartel fines since January 2017 are attributable to enforcement actions taken during the Obama administration.

This statement can be proven by identifying most of the companies that were fined as part of the $2.785 billion in FY2018. Identification of the particular companies is possible because the DOJ reveals the names, cartel product, fiscal year, and other key facts about companies in the "$10-million-fine Club" (that is, all companies fined $10 million or more for price fixing).[19]

Table 1. Companies Assigned to FY2017 for DOJ Criminal Fines & Key Dates

Defendant	Cartel	DOJ FY	Date DOJ probe made public	Date of Guilty Plea	DOJ Fine ($ mil.)
Citicorp	FOREX	2017	11/12/14	5/20/15	925.0
Barclays	FOREX	2017	11/12/14	5/20/15	650.0
JPMorgan	FOREX	2017	11/4/14	5/20/15	550.0
RBS	FOREX	2017	11/12/14	5/20/15	395.0
Hitachi	Auto Parts	2017	8/9/16	8/9/16	55.4
Bumble Bee	Tuna	2017	3/14/15	8/2/17	25.0
Rubycon	Capacitors	2017	5/26/15	8/22/16	12.0

Source: ANTITRUST DIVISION: *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (Oct. 25, 2018), DOJ press releases, and tradet press reports.

Table 1 lays out the identity of most of the companies[20] and fines that appear in the DOJ's *Workload Statistics* for FY2017; their fines add up to $2.612 billion out of the reported FY2017 total cartel fines of $2.785 billion – 94 percent. The bottom-row cases (Hitachi, Bumble Bee, and Rubycon) show a normal pattern of prosecutorial dates: guilty pleas are announced in FY2017 itself or very late in FY2016, and sentencing hearings are presumably scheduled within a few weeks of a guilty-plea agreement date (i.e. after October 1, 2017). Thus, recording these fines *announced* in FY2016 as *imposed* in FY2017 is perfectly reasonable.

17 I know of only two times since 1990 when a judge revised a penalty (upwards) from a plea agreement.

18 Confusingly, the DOJ jargon for reported collection dates are the fiscal years fines are "*imposed.*" This linguistic practice supports the fiction that it is courts that actively set cartel fines rather than prosecutors. (See footnote 18 in the current DOJ *Antitrust Workload Statistics*). Usually, fairness hearings are held soon after plea agreements are signed, so the two dates are very close. However, as Table 1 shows, at least $2.52 billion in cartel fines were announced in May 2015 but were not recorded as "imposed" until FY 2017; knowledge of this delay was delayed until November 2019. Similar retardation in reporting is caused by installment plans.

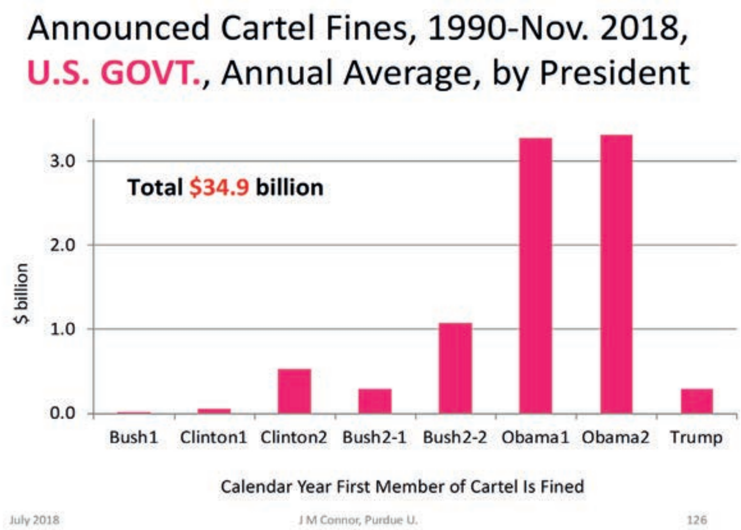
19 *See* Sherman Act Violations Yielding a Corporate Fine of $10 Million or More https://www.justice.gov/atr/page/file/991706/download, which is current as of Oct. 25, 2018. The source excludes three significant FY2019 fines totaling $82 million and restitutions of $154 million by three petroleum and petroleum-wholesaling companies based in South Korea.

20 The *Workload Statistics* states that a total of 11 companies were fined, so four unnamed companies assigned to FY 2017 and accounting for $173 million in fines cannot be positively identified.

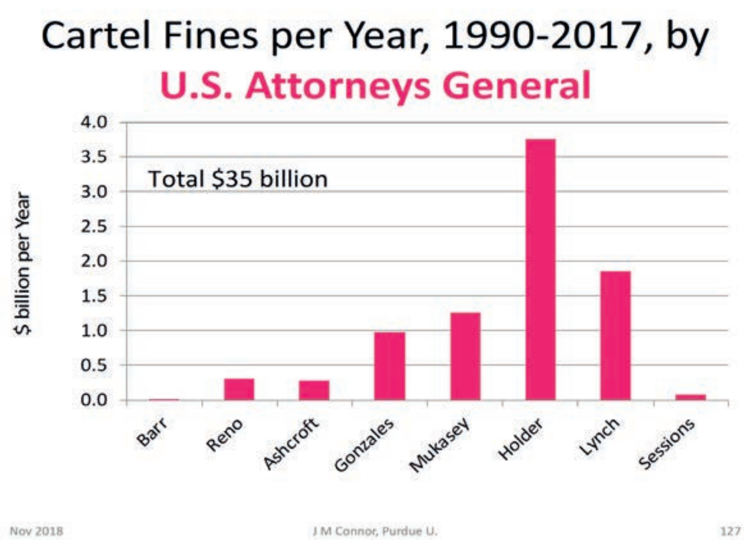
However, the four huge fines on banks imposed for *FOREX Currency Exchange* collusion display strange, unorthodox dating for DOJ statistical reporting. Financial newspapers reported the existence of criminal investigations in November 2014 (two years before the 2016 U.S. Presidential election) and all four banks pled guilty seven months later (May 2015). Indeed, class actions were filed in *November 2013*, most likely shortly after a grand jury was empaneled. Although these were complex cases involving coordination with other agencies of the federal government, this phase was largely completed by late 2013 when the CFTC fines were announced. Why the date of the fines imposed was delayed from May 2015 to the year after October 1, 2017 is unknown, but the lion's share of prosecuting against these four banks was certainly accomplished during the Obama administration. It is doubtful that the Delrahim-Trump team deserves any enforcement credit.

III. CORPORATE CARTEL FINES BY YEAR IMPOSED

U.S. Government fines[21] announced *per annum* arrayed by Presidential term are shown below, including the first two years of the Delrahim-Trump regime. This figure demonstrates that when the timing issue of fines is assigned according to announcement dates, the Trump administration's record is very weak compared to all recent presidents, except for President George H.W. Bush ("Bush 1" in the figure below). Indeed, the Obama record is *eleven times* higher on an annual basis than the first two years of the Trump administration.



The following slide arranges the same U.S. Government cartel fines according to the tenure of the Attorney General. Trump's Attorney General Sessions' record shows a similarly low level of cartel fines compared to the previous six AGs.[22]



21 Civil fines imposed by the CFTC and other federal agencies in concert with the DOJ (that is, as members of federal "Task Forces") are included in the slide with DOJ-recommended fines.

22 However, fines approved by AG Sessions do exceed those of AG Barr in the early 1990s. Note that Barr was appointed to succeed Sessions as AG in mid-February 2019. Accounting for inflation does little to modify the relative size of the fines.

IV. CASES INITIATED

Case counts are somewhat weak indexes of future enforcement efforts and prosecutorial success.[23] However, Section 1 corporate criminal cases opened (indictments) in one fiscal year almost inevitably result in a conviction in the same year or the next one.[24] Thus, case-opening counts revealed in the DOJ's *Workload Statistics* are precursors of the number of criminal indictments and convictions likely to be registered in the near future.[25]

Section 1 cases opened in the Trump administration (FY2017 and FY2018) averaged 26 per year.[26] The 26-case count is 37 percent lower than the annual average of 41.4 during Obama's eight years, and is 65 percent lower than the previous 27 years (i.e. the FY1990-FY2016 annual average). Such low numbers of investigations opened presages very low numbers of convictions in the remainder of Trump's term in FY2019-FY2020.

To be fair, a small number of cases can still lead to heavy sanctions on large numbers of cartelists in a year or two. For example, the Division is known to be investigating suspected cartel activity in the *Generics Pharmaceuticals* industry. This case now involves alleged price-fixing on 300 products by more than a dozen manufacturers.[27] The large sales' size of the industry and exceptionally high overcharges suggests that likely fines will be very high.

V. INDIVIDUALS CONVICTED

The final claim to superior enforcement made by Delrahim is that 30 individuals were sentenced in FY2017 to incarceration for price fixing, the highest number since FY2012. There is no reason to doubt this number, but it is worth noting that most of the persons involved appear to be connected with conduct in one case covering four states, *Public Real Estate Foreclosure Auctions*. As of early 2016, this case has resulted in more than 100 individual guilty pleas going back to at least 2010.[28] Affected commerce in the Auctions cases is quite low relative to *LIBOR, FOREX*, and similar financial manipulation cases. However, these individuals were sentenced to rather short prison terms by historical standards; the mean average is 8.6 months, whereas in the G. W. Bush and Obama administrations the average prison sentence was 20.4 and 21.1 months, respectively.

VI. THE FUTURE OF U.S. CARTEL ENFORCEMENT

A full and fair assessment of the initial Trump years should also consider the *quality*, potential severity, or innovativeness of Sherman Act initiatives. Here there are three developments of interest. First, the Division has announced that it will be suing under Section 4A of the Clayton Act, which since 1990 has permitted the federal government to obtain treble damages from overcharges it paid. This enforcement power has been used sparingly in the past 30 years.[29] However, in November 2018, the Division obtained criminal guilty plea agreements from three petroleum companies that had rigged bids on fuels supplied to the U.S. military stationed in South Korea.[30] The three will pay $236 million in monetary penalties, including restitution under Section 4A that is greater than single damages. Delrahim promises to "revitalize" Section 4A enforcement in the near future.[31]

23 See note 25 *infra*.

24 Cases opened against individuals on average involve longer lags to completion, and a significant share of individual indictments involving cooperating witnesses are dismissed. Corporate Leniency Program applicants that are rewarded with amnesty are not indicted.

25 Over fiscal years 1990 to 2017, the number of Section 1 cases opened is significantly positively correlated with the number of grand juries opened one year later (r=+0.29), with a two-year lag (r=+0.29), or a three-year lag (r=+0.23). Similarly, the number of criminal cases opened is positively correlated (r=+0.27 and r=+0.30) with the number of companies criminally charged one and two years later. Although positive, these correlations are not high (i.e. close to one).

26 The FY2017 figure is 38 cases (from *FY2017 Workload Statistics*) and the 14-case figure for FY2018 was compiled by Robert Connolly (*Cartel Capers* blog, Nov. 2018).

27 See Christopher Rowland, Investigation of Generic "Cartel" Expands to 300 Drugs, *The Washington Post* (Dec. 9, 2018). (https://www.washingtonpost.com/business/economy/investigation-of-generic-cartel-expands-to-300-drugs/2018/12/09/fb900e80-f708-11e8-863c-9e2f864d47e7_story.html?noredirect=on&utm_term=.fc13aa0bf2db).

28 See *Division Update Spring 2016* (https://www.justice.gov/atr/division-operations/division-update-2016/real-estate-foreclosure-auctions). Many earlier fines and prison sentences were very large (up to 10 years, $1 million).

29 Albert A. Foer (ed.), *The Next Antitrust Agenda*. Vandeplas (2008): 23. See also Delrahim *supra* note 2, stating that only three very minor restitutions were obtained in those years.

30 See Complaint, *United States v. GS Caltex Corp. et al., Case No. 2:18-cv-1456, U.S. District Court for the Southern District of Ohio*. (Nov. 14, 2018).

31 Delrahim also threatens to seek full treble damages if defendants refuse to cooperate by litigating claims.

Second, the DOJ has very recently filed an amended complaint that asserts that "...agreements to unlawfully exchange competitively sensitive information..." is a violation of Section 1 of the Sherman Act.[32] Although this complaint is entered as a civil matter, the outcome of this case may have far-reaching implications for anti-cartel enforcement when viewed in an international context. For years, the European Union and scores of antitrust authorities using the EC template for antitrust enforcement have taken a far harder line on the exchange of commercially sensitive information, such as future price and product announcements and planned strategic competitive moves. The EC has been treating sharing these with rivals as practically *per se* violations of competition law, whereas Common Law countries like the United States have by-and-large not considered them a basis for prosecution (except as ancillary factors in the few civil collusion cases filed). If this innovation presages a more uniform alignment of multilateral cartel-prosecution standards, it would add to the already impressive voluntary harmonization of these policies among global antitrust authorities.

Third, Delrahim has announced his intention to continue to prioritize enforcement of buyer-power collusion in labor markets, so-called no-poach agreements, a policy announced in October 2016.[33] The no-poach enforcement policy clarifies how sharing compensation data may constitute an illegal exchange of competitively sensitive information. In April 2018, the Division announced its first indictment involving employee non-competition agreements, a civil suit against a French and a U.S. manufacturer of railway equipment.[34] The two defendants agreed to conduct restrictions and to cooperate with the DOJ to prosecute a third alleged violator. This trail has been blazed by at least two private antitrust suits for skilled "high tech" R&D employees in California markets for cutting-edge electronics products, and for special skills in animation studios.[35] These two suits were successful in settling for several hundred million dollars each even though they were not, as far as is known, preceded by a criminal investigation by the DOJ.

VII. IS THE SLOWDOWN NATIONAL OR GLOBAL?

The most current information on enforcement from the Division itself is available in four *Criminal Enforcement Trends Charts*, which encapsulate ten fiscal years of data through the end of FY2018 (i.e. September 30, 2017).[36] Much attention has focused on the Division's 2017-2018 data showing historic declines in new criminal cases opened (the lowest number since 1972), corporations charged, and collected criminal fines.[37]

Compilations of fines made by global law firms also show declines, but the methods used and rates found are not consistent,[38] and time periods are very short.[39] A time-tested source of consistent, long-term data on the world's largest cartels can be found in the Private International Cartels ("PIC") data set.[40]

A. Detections Are Down

The following slide illustrates the temporal pattern of detections on international cartels by the Division (221) or other federal agencies (23) since 1989. After peaking in 2015, the number of new cartels publicly known to be under investigation in 2017 and 2018 fell below the average of the 1990s. World detections also peaked in 2015 and declined each year thereafter, but not as rapidly as in the U.S.

32 Amended Complaint, *United States v. Sinclair Broadcast Group, Inc. et al Case No. 1:18-cv-2609-TSC, U.S. District Court for the District of Columbia* (Dec. 13, 2018).

33 U.S. Department of Justice. *Press Release: Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation.* (October 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals. Technically, the policy statement is a joint DOJ-FTC Guidance. The Guidance says that *naked* no-poach agreements will be investigated as criminal felonies, whereas other types will be brought as civil indictments.

34 U.S. Department of Justice. *Press Release: Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees.* (April 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete. The final judgment was filed in July 2018; no criminal or monetary penalties are imposed. Delrahim is quoted as endorsing the DOJ's 2016 policy, but is silent on whether he will favor criminal or civil indictments.

35 See *In re: High-Tech Employee Antitrust Litigation* (U.S. District Court, Northern District of California 11-cv-2509) and *In re: Animation Workers Antitrust Litigation* (12/14).

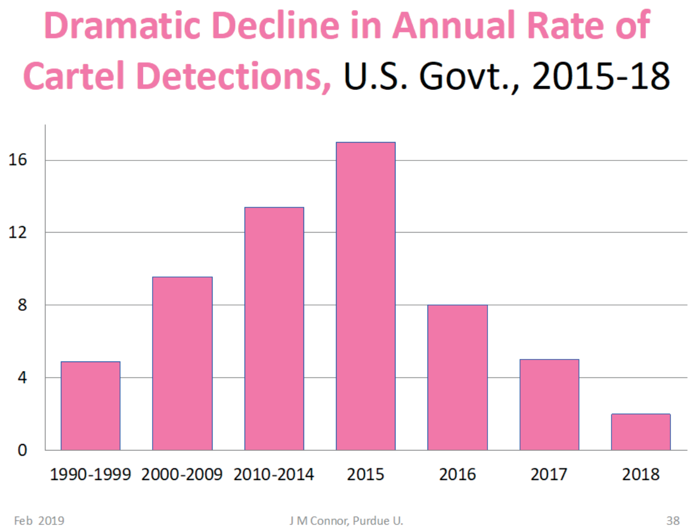
36 Antitrust Division, *Criminal Enforcement Trends Charts* (Updated January 28, 2019), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

37 A deep reduction in prison sentences in 2017-2018 is obscured by long averaging in one chart.

38 E.g. Simpson Thatcher cites U.S. cartel fines in 2018 of $96 million, Morgan Lewis $406 million.

39 The Simpson Thatcher (2019) analysis reports a 54 percent decline in global cartel fines and 17 percent decline in U.S. cartel fines from 2016 to 2018. This report is unclear, but apparently reports fines both "agreed to" and "imposed." A less complete analysis by Morgan Lewis (2019) computes a 75 percent decline in U.S. cartel penalties and a 72 percent decline in ten major jurisdictions from 2016 to 2018.

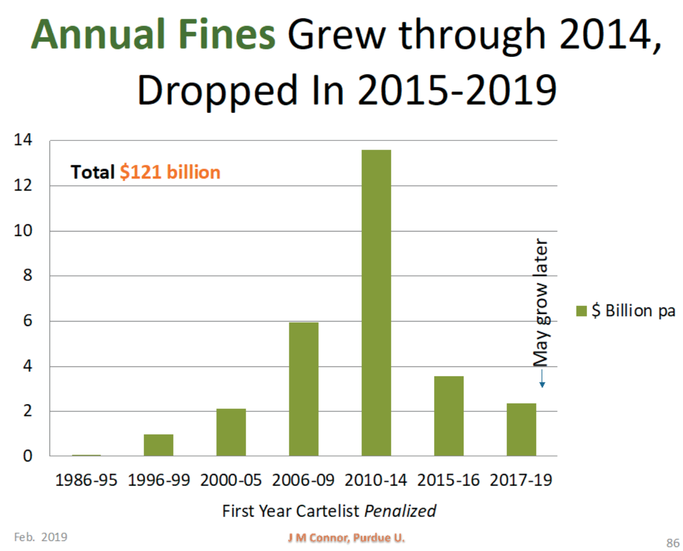
40 Beginning in 2019, this data set will be freely available and updated regularly by the Competition Committee of the Organisation of Economic Co-Operation and Development in Paris.



Detection counts can be understated. Data on detections in the most recent years are understated because in criminal systems grand juries and some criminal indictments are kept under seal; in other jurisdictions raids are also sometimes unreported by the press and their dates not revealed until several years later. Government investigations on average take two or three years to be completed. Detection rates based on reliable counts (up through 2015) are rising rapidly.

B. Cartel Penalties Trends

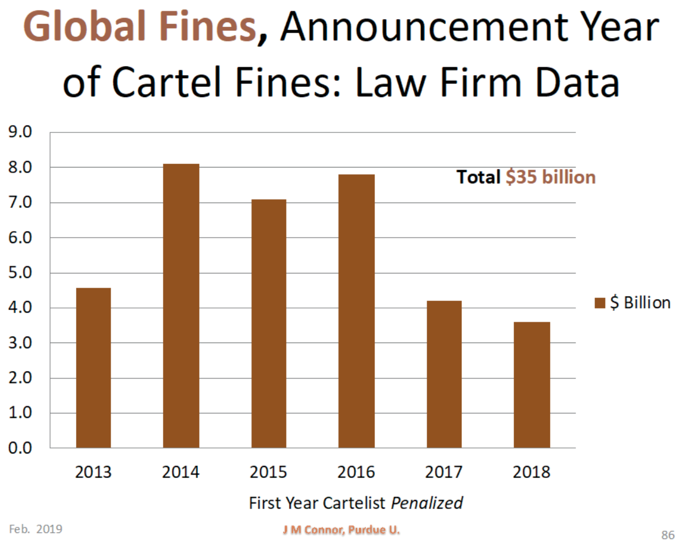
The PIC data set records fines on the day they are agreed to or the day the authority announces its decision.[41] Imposition and collection dates are ignored, as are subsequent changes in penalties by appeals courts. The following figure shows $121 billion in *announced* fines world-wide: they peaked in 2010-2014 and fell precipitously thereafter. The global trend is very similar in the United States, the Rest of the World (ROW), and the EU, except that the latter fell less sharply.[42] The figure omits damages settlements, which peaked in 2005-2007 (settlements in damages cases are usually announced more slowly than fines, typically sequentially years after fines are determined, and the last settlement agreements are announced several years after the first).



41 To make these penalties comparable across jurisdictions, U.S., Brazilian, and a few other jurisdictions' monetary penalties are dated in the year the *first cartelists'* penalty is announced; subsequent fines tend to flow out quickly thereafter. However, the timing of these penalties may appear slightly front-loaded compared to other data sets.

42 The drop in the EC's annual fines in 2017-2018 was 68 percent and 71 percent compared to 2015-2016 and 2010-2014, respectively, whereas the EU's NCAs experienced a far slower decline (11 percent and 54 percent).

The PIC data may be sensitive to the methods of data collection employed or the announcement dates used by the author. While there are no comparable data sets on cartel fines that are as comprehensive in geography or time, several large international law firms try to compile similar data. The most comparable in terms of geographic breadth are the annual *Global Cartel Enforcement Reports* of the Morgan Lewis law firm for the years 2013-2018.[43] The Morgan Lewis data shown below demonstrate that 2017-2018 fines are indeed lower than the 2013-2016 years, but the decline is not as sharp as other data sources suggest.



Thus, by-and-large, trends in U.S. fines have mirrored trends in most other jurisdictions. There may be some common underlying factors that may explain these widespread declines after 2015 or so. One possibility is that after 15 to 25 years' experience, companies no longer find applying for antitrust amnesty as appealing as they did a decade before.[44] Some observers infer that cartel cases and fines increased primarily because of increases in usable amnesty applications and, contrariwise, because cases and fines have declined so have previous applications.[45] One problem with this hypothesis is that U.S. amnesty applications and awards are unobservable.[46] Thus, there is no way to confidently link U.S. applications to subsequent enforcement performance. Also, there have been recent appraisals of the U.S. Leniency Program that conclude that it is superior in most ways to an EC-style program.[47] Moreover, a recent thorough survey of economic studies of leniency programs concluded that evidence for positive effects on deterrence, while somewhat mixed, is strongest in the United States.[48]

43 My examination of these reports for the six overlapping years 2013-2018 indicates that the Morgan Lewis reports covered 91 percent of the fines found in PIC. (Available at https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2018_190022.pdf).

44 See Robert B. Bell & Kristin Millay, *The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?*, Antitrust 33 (2018): 80-87. The authors' straightforward thesis is that the effective Leniency and amnesty programs were "incredible" successes (i.e. increased the number of applications and the share of cartels prosecuted after leniency was available) and caused a subsequent increase in detections and in fines.

45 Bell and Millay (*infra* fn. 42) at p. 82 assert that "....[leniency programs] seem to be the most significant factor...." explaining reduced U.S. cartel enforcement in 2017-2018. These authors rely heavily of threats of increased severity from DOJ speeches around 2014, plus one anecdote, to make their case. I am unpersuaded.

46 Annual numbers of leniency applications are not available from DOJ statistics. Bell & Millay (*infra* fn. 42) rely upon facts cited in official speeches, which stopped giving aggregate data for the years after 2010.

47 Evgenia Motchenkova & Giancarlo Spagnolo, Leniency Programs in Antitrust: Practice v. Theory, *Competition Policy International Antitrust Chronicle* (January 2019): Table 2.

48 Catarina Marvao & Giancarlo Spangolo, Cartels and Leniency: What We Have Learnt, Chapter 4 in *Handbook of Game Theory and Industrial Organization: V. II.* Cheltenham, UK: Edward Elgar (Feb 2018).

VIII. BACKLOG

There is a distinct possibility that the low U.S. enforcement indicators in 2017-2018 could signal a pause in enforcement activity rather than a break with the cartel-policy regime. Some reports are upbeat about big cartel cases in the offing.

> "There is also a strong pipeline of new investigations and enforcement actions across all industry sectors and geographies. It is likely that 2019 will see some of these develop into multi-jurisdictional cases…." (Simpson Thatcher 2019: 4).

As of February 2019, the only large international cartel investigations known to be on the cusp of active convictions are *Generic Pharmaceuticals, Sovereign Bonds*, and *Diesel Motor Emissions*.[49] This is not a long list, and the possibility of such prosecutions has to be counterbalanced against substantial concerns about dwindling professional resources in the Division. An investigation by a leading business newspaper found that staff numbers available in Washington for cartel investigations were down 27 percent in the first two years of the Trump administration.[50]

IX. SUMMARY

Assessing a President's four-year accomplishments with only two years' information is a perilous exercise.[51] Yet, whether the Trump administration can develop a strong anti-cartel enforcement record by the end of 2020 is dubious. Supporting data presented about its progress in 2017-2018 at this point seem to rest primarily upon initiatives launched in the late Obama administration. Furthermore, based on the number of cases initiated in 2017-18, the *quantity* of cartels, cartelists, and penalties imposed is likely to be low by the standards of the H.W. Bush and Obama administrations.

Moreover, by scanning what has become public about cartel investigations initiated in 2017-2018, the backlog of potentially large cartel cases appears to be slim. Perhaps the Obama administration was simply lucky to have several huge cartels crack open under its watch -- vast international cartels like *Auto Parts, LIBOR, FOREX,* and other collusive banking schemes. While most cartel investigations are kept confidential by prosecutors until a guilty plea is announced, grand jury witnesses can and do reveal the existence and targeted markets of criminal investigations, and this information is often publicized.

AAGA Delrahim's Congressional testimony and official speeches offer a few intimations that the administration is committed to an assertive enforcement stance. First, Delrahim cites several widely accepted indicia of active cartel-enforcement performance: many Section 1 cases initiated, high annual corporate fines, and lengthy prison sentences for cartel managers. Second, Delrahim has committed the Division to three initiatives that will broaden its anti-cartel mandate and will further harmonize policies and practices among the world's antitrust authorities. They are: (1) seeking greater restitution for federal government agencies harmed by bid rigging; (2) bringing more indictments against collusive conduct involving sharing commercially sensitive, strategic sales information; and (3) a commitment to investigate no-poach agreements. While offering some grounds for optimism, the true tests for the Division's commitment to strong anti-cartel enforcement are whether its long-standing campaign against international cartels persists, and whether some of its information-sharing cases allege criminal conduct.

49 The *Petroleum Products for the Military in Korea* cartel is supposed to be continuing, but there are unlikely to be any more significant penalties imposed. A fifth case in development is *Skilled-Labor Poaching by Raiwway Equipment Maufacturers*, also likely to generate modest fines.

50 US: Antitrust Regulator Faces Staffing Issues, *CPI Newsletter* (February 10, 2019).

51 The teacher in me wants to assign a grade of C-, but an "incomplete" grade may be fairer.

ANTITRUST DAMAGES, FINES, AND DETERRENCE: COLLUSION IN THE NURSE LABOR MARKET

BY ROGER D. BLAIR & ANITA WALSH[1]

1 Department of Economics, University of Florida. We thank Tirza Angerhofer for her assistance in editing and preparing the manuscript and Kassidy House for constructing the figures.

I. INTRODUCTION

Those firms that violate Section 1 of the Sherman Act face fines of up to $100 million[2] and are vulnerable to treble damages in suits by private parties that have suffered antitrust injury.[3] In this paper, we examine the role that fines and antitrust damages play in deterring collusion. To make our discussion a bit more concrete, we do this in the context of collusion in the nurse labor market.

Initially, we provide some background regarding collusion in the nurse labor market. We then identify the social cost of collusion and the corresponding antitrust damages. Next, we recognize that the socially optimal number of antitrust violations is not zero due to the cost of enforcement. We then examine the role of fines and antitrust damages in deterring collusion. This allows us to identify the policy variables that may be adjusted to enhance deterrence. We close the paper with some concluding remarks regarding our ability to evaluate the effectiveness of the deterrence.

II. ALLEGATIONS OF COLLUSION IN THE NURSE LABOR MARKET

There have been several class action antitrust suits filed by nurses alleging collusion in local nurse labor markets. The most recent cases include suits filed in Albany (N.Y.),[4] Chicago,[5] Detroit,[6] Memphis,[7] and San Antonio.[8]

In most instances, the defendants are alleged to have wielded collusive monopsony power in the local labor markets for hospital nurses by: (1) Agreeing to exchange and exchanging on a regular basis detailed, non-public information regarding the current and future compensation paid to registered nurses ("RNs") in the area, (i.e. RN wages, signing bonuses, merit raises, certification bonuses, hours, and the like); (2) agreeing not to compete with one another in setting RN compensation; (3) paying RNs at the same or nearly the same rate; and (4) jointly recruiting RNs at job fairs to avoid competition. In addition, there were allegations of frequent telephone exchanges of competitively sensitive information by hospital HR professionals regarding RN compensation. The plaintiffs allege that these information exchanges are used to avoid competition in the nurse labor market and thereby depress RN wages.

In the nurse labor market, the hospitals are buyers of labor services rather than sellers. At least since *Mandeville Island Farms*, collusion among buyers has been condemned under Section 1 of the Sherman Act.[9] Consequently, if the conduct that has been alleged in these cases had occurred, the hospitals would have been guilty of a Section 1 Sherman Act violation.

III. ECONOMIC CONSEQUENCES OF COLLUSION AMONG EMPLOYERS

In this section, we examine the economic consequences of collusion in the nurse labor market. We begin with the competitive benchmark and then introduce collusion. We then examine the effect of collusion on wages and employment. In addition, we discuss the consequences of collusion for social welfare.

A. Competitive Benchmark

Under competitive conditions in the market for RNs, supply and demand determine the number of nurses employed and their wage. Figure 1 depicts the competitive solution where demand given by the marginal revenue product ("MRP") and supply ("S") are equal. At that point, the competitive wage is w_1 and the number of nurses employed is N_1. In this competitive equilibrium, every nurse who is willing to work at the competitive wage will be employed. Similarly, at the competitive solution, every hospital willing to pay the competitive wage is able to employ nurses.

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2 Section 1 of the Sherman Act (15 U.S.C. §1).

3 Section 4 of the Clayton Act (15 U.S.C. §15) holds that a victim of an antitrust violation "Shall recover three fold the damages by him [or her] sustained."

4 *Fleischman v. Albany Medical Center*, 06-CV-0765 (N.D.N.Y. July 22, 2010).

5 *Reed v. Advocate Health Care*, N.D. Ill., No. 06C3337, 9/28/09.

6 *Cason-Merenda. v. Detroit Medical Center*, Case No. 2:06-cv-15601.

7 *Clarke v. Baptist Memorial Healthcare Corp.,* 264 F.R.D. 375, 377 (W.D.Tenn.2009).

8 *Maderazo v. VHA San Antonio Partners*, L.P., Case No. 5:06-cv-00535 (W.D. Tex.).

9 *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948).

Economic Effects of Collusion in the Nurse Labor Market

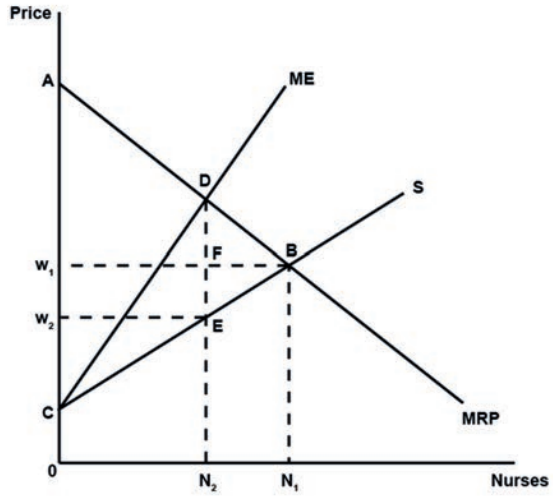

Figure 1

B. Collusive Monopsony

Now suppose that the hospitals agree among themselves to act together as though they were a single employer (i.e. a monopsonist).[10] By acting collusively, the hospitals can depress the wage, but must curtail employment to do so. In order to maximize their collective profits, the hospitals must restrict employment to the point where the marginal value of employing an additional nurse is just equal to the marginal cost of that additional nurse.

The marginal value is given by the height of the demand curve in Figure 1. The marginal cost is a little more complicated. The total wage bill for nurses is the product of the wage paid and the number of nurses employed: $w \cdot N$. In order to hire an additional nurse, the wage must rise to induce the additional supply. Absent wage discrimination, however, the hospital must pay that increased wage to all nurses and, therefore, the marginal impact on the wage bill equals the wage paid to the added nurse plus the change in the wage paid to all the nurses previously employed. This sum is referred to as the marginal expenditure, which is shown as ME in Figure 1.[11] Consequently, the colluding hospitals will employ N_2 nurses and pay the wage on the supply curve at N_2, which is w_2. Over the years, there has been a persistent shortage of nurses. The exercise of monopsony may well be a contributing factor. As one can see in Figure 1, the socially optimal level is N_1, but only N_2 nurses will be employed. The difference between N_1 and N_2 is a measure of the shortage.

C. Welfare Implications of Collusive Monopsony

The effect of collusive monopsony on economic welfare can be illustrated in Figure 1. For the hospitals, employer surplus is the difference between their willingness to pay as reflected in the demand and the wage that the market requires. At the competitive solution, this is given by area ABw_1. For the nurses, supplier surplus is the difference between the minimum wage at which the nurses will work as reflected in the height of supply curve and the wage that the market dictates. At the competitive solution, the supplier surplus is given by area w_1BC in Figure 1.

Competition in this market leads to the maximum sum of employer and supplier surplus, which is area ABC in Figure 1. No other wage and employment level will generate a larger total surplus. The sum of employer surplus and supplier surplus is a measure of social welfare. The economic foundation for an antitrust policy that promotes and protects competition is the maximization of social welfare that results from competition.

10 For an extensive treatment of monopsony, see Roger D. Blair & Jeffrey L. Harrison, *Monopsony in Law and Economics,* (2010).

11 The total expenditure on nurses is $w(N) \cdot N$. The marginal expenditure (ME) is $\frac{dw(N)N}{dN} = w(N) + N\frac{dw(N)}{dN}$. Consequently, ME is equal to the wage paid to the added nurse ($w(N)$) plus the increased wage that must be paid to all of the nurses $\left(N\frac{dw(N)}{dN}\right)$.

Collusive monopsony has an adverse effect on the welfare of the nurses and on social welfare. Profit maximization by the colluding hospitals results in a reduction in supplier surplus equal to w_1BEw_2. Part of this reduction, area w_1FEw_2, is converted into employer surplus (or profit) and part of it, area FBE, is simply lost. The net effect on social welfare is a loss equal to the triangular area DBE. As one can see in Figure 1, the social cost of hiring the nurses between N_2 and N_1, as measured by the height of the supply curve, is below the value that these nurses provide, as measured by the height of the demand curve. From a social perspective, too few nurses are being employed. The collusive monopsony solution is allocatively inefficient due to under-employment. This allocative inefficiency is what causes the reduction in social welfare.

D. Impact on Hospital Costs

Since there is widespread concern over burgeoning health care costs, one might suppose that the reduced wages will reduce the hospitals' costs and thereby benefit patients. This, however, is not the case. It is consistent with our intuition that the reduced wages will reduce the average cost of producing acute care hospital services. This average cost reduction improves hospital profits and thereby provides an incentive for collusion. But the effect of monopsony is to raise marginal cost. Since marginal cost is what drives price and output decisions, the increase in marginal cost leads to a reduction in the hospitals' output and higher hospital charges.[12] Thus, collusive monopsony, in addition to harming the nurses, does not benefit patients and, therefore, has no redeeming virtues.

IV. ANTITRUST DAMAGES

In most circumstances, an antitrust violation has many victims. Some – but not all – of them are entitled to recover treble damages. Section 4 of the Clayton Act, appears to confer a private right of action upon literally anyone who is an antitrust victim.[13] But this is not the case since the Supreme Court has placed limits on those who have standing to pursue damages. First, a would-be plaintiff must have suffered antitrust injury.[14] This means that the injury must flow from the anticompetitive consequences of the antitrust violation. In the case of collusion in the nurse labor market the anticompetitive consequences are in the depression of wages and/or salaries below the competitive level and in the reduction in the number of nurses employed. Since these consequences flow from the unlawful agreement, the nurses would appear to have suffered antitrust injury.

Second, a plaintiff must have been injured directly by the unlawful conduct. This requirement is meant to avoid duplicative damages or the need for complex apportioning. In the case of collusion in the nurse labor market, the nurses are the direct victims of the collusion.

Third, the damage estimate may not be speculative. To avoid charges of speculation, the damages claimed must be based on a just and reasonable inference rather than mere guesswork.[15]

A. The Measure of Damages

Assuming that the collusion among the hospitals is impermissible, the nurses will have standing to sue for damages. The measure of damages is the underpayment suffered by the victims of the conspiracy (i.e. the nurses). Consequently, the appropriate measure of damages (Δ) is the difference between the competitive wage, the wage "but for" the collusion (w_{bf}), and the actual wage (w_a), times the number of nurses actually employed (N_a):

$$\Delta = (w_{bf} - w_a)N_a$$

In Figure 1, we can see that the damage will be equal to the difference between w_1, which is the but for wage and w_2, which is the actual (collusive) wage, times N_2, which is the actual number of nurses employed.

12 For further analytical details, see Roger D. Blair & Christine Piette Durrance, *The Economics of Monopsony*, In W. Dale Collins (ed.), *Issues in Competition Law and Policy* (2014).

13 Section 4 of the Clayton Act, 15 U.S.C. §15, provides that "any person who shall be injured in his business or property by anything forbidden in the antitrust laws may sue therefor…and shall recover threefold the damages by him sustained…"

14 See *Brunswick Company v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), which defined the concept of antitrust injury. See Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vanderbilt. Law Review 1539 (1989) for application to monopsony.

15 For additional details, see Roger D. Blair & Wenche Wang*, Buyer Cartels and Private Enforcement of Antitrust Policy*, 38 Managerial and Decision Economics 1185 (2017).

There are nurses who would have been employed but for the collusion — in fact, there are $N_1 - N_2$ of them. They have suffered antitrust injury because the competitive wage (w_1) exceeds their reservation wages. They are essentially priced out of the market by the collusion among the hospitals. The major problem is proving that one would be willing to work at the competitive wage. In addition, the damage for these nurses would be the difference between the competitive wage and the reservation wage, which is the height of the supply curve. This gap narrows as one slides along the supply curve from point e to point b in Figure 1. Proving (or disproving) each nurse's reservation wage along that segment of the supply is ordinarily not feasible.

Proving the amount of damages for those nurses who are actually employed can be an econometric challenge as an estimate of antitrust damages requires a reliable estimate of the "but for" wage. In order to determine the "but for" wage, we must reliably estimate the supply of and demand for nurses. These are typically difficult, but not impossible, to estimate. In the absence of reliable estimates, however, we are left with speculation and guesswork. These do not provide the evidentiary foundation for an admissible estimate of damages.

Plaintiffs can estimate the wage differential $w_{bf} - w_a$ directly or may estimate the non-collusive wage w_{bf} and rely on actual wages in the record, w_a, to calculate the wage differential. Both of these approaches will provide the best estimate of the underpayment due to collusion among hospitals in the nurse labor market. It is not the result of mere speculation or guess work. Instead, it results from the sound application of econometrics to the available data.

Though imprecision may remain with relevant data and rigorous econometric examination, nonetheless, the estimated wage differential is still the most reliable damage estimate that the plaintiff can produce. The estimated damages should be accepted by the court given that the standard of proof is the preponderance of the evidence.

V. OPTIMAL DETERRENCE

In section II, we pointed out that there were five recent cases of alleged collusion in the nurse labor market. Assuming that collusion was, in fact, present, the economic question is whether this number is too large or too small. In other words, is collusion in the nurse labor market over-deterred or under-deterred in terms of social welfare? Or, do we have it just right? In this section, we address the issue of socially optimal deterrence.

Since resources must be expended in uncovering collusive activity, trying the cartel members, and imposing sanctions, the optimal number of Section 1 Sherman Act violations is not apt to be zero.

The probability of the cartel's avoiding detection (p) will be a function of the resources (R) invested in this enforcement activity. The social harm (H) caused by collusion is assumed to be a constant for purposes of illustration.

The expected harm due to collusion is the probability of undetected cartel behavior times the harm of collusion: $p(R) \cdot H$. We assume that this expected harm declines with increased enforcement efforts, i.e. $\frac{dp(R)H}{dR} < 0$. We also assume that the expected cost declines at an increasing rate, i.e. $\frac{d^2p(R)H}{dR^2} > 0$.

The cost of enforcement is an increasing function of the resources devoted to enforcement, i.e. μR, where μ is the price of the enforcement resources.

The total cost of collusion is equal to the sum of the expected harm and the cost of enforcement.

$$C = p(R)H + \mu R$$

This cost is minimized by devoting resources to enforcement such that

$$\frac{dC}{dR} = \frac{dp(R)H}{dR} + \mu = 0$$

In other words, R should be increased until the marginal reduction in the expected harm is just equal to the marginal cost of the resources necessary to accomplish this reduction.

These results are captured in Figure 2. As is plain to see, the socially optimal investment of resources in enforcing Section 1 (R^*) does not result in the complete elimination of collusion since $p(R)H$ is not zero at R^*. Not surprisingly, the complete elimination of collusion is too costly.

In most — if not all — cases, price fixing among competing buyers or sellers reduces social welfare and may lead to an undesirable redistribution of wealth. All else being equal, therefore, a decrease in such conduct will be welcome. But nothing in life is free. Consequently, it will not be socially optimal to reduce antitrust violations to zero. In our nurse labor market example, we pointed to allegations of collusion over a ten-year time frame in five cities. Is this too many, too few, or just the right amount? It is difficult to say.

Optimal Resource Allocation to Deterrence

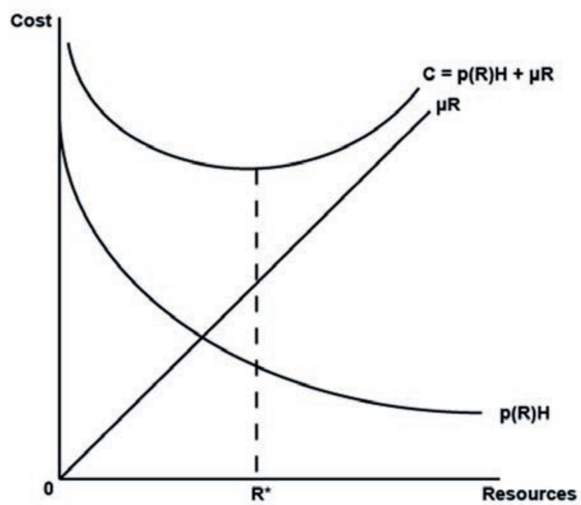

Figure 2

VI. THE ROLE OF FINES AND DAMAGES

Hospitals — whether for profit or not-for-profit — that collude in the nurse labor market are vulnerable to fines of up to $100 million and treble damage actions. The economic role that these sanctions play is deterrence.[16] Fines and antitrust damages are intended to make collusion unprofitable. An examination of deterrence will reveal the policy variables that may be applied to deter unlawful conduct.

Suppose that a hospital will earn a profit of π_1, if it does not engage in collusion. Colluding with other area hospitals in the nurse labor market will result in higher profit equal to π_2 provided that the conspiracy is not detected. If the conspiracy is detected and successfully challenged in court, sanctions will be imposed and the net profit will fall to π_3 where

$$\pi_3 = \pi_2 - F - 3\Delta$$

Where F denotes the fine and Δ denotes the damages.

The deterrent function is

$$D = \pi_1 - E[\pi]$$

Where the expected value of π is $(1-p)\pi_2 + p\pi_3$

Where $(1-p)$ is the probability of avoiding detection and p is the probability of conviction.[17]

The deterrent function is then $D = \pi_1 - [(1-p)\pi_2 + p(\pi_2 - F - 3\Delta)]$

16 As an economic matter, punishment for its own sake or retribution makes no sense. The idea of sanctions is to deter undesirable conduct.

17 This formulation assumes that hospitals are risk neutral, i.e. they are influenced only by expected values. The variance in profit plays no role in the decision to engage in collusion.

If the deterrent function is positive, the expected profit with collusion is less than the profit without collusion. Consequently, collusion will be deterred. If D is negative, the profit without collusion is lower than the expected profit with collusion and the unlawful conduct will be profitable and, therefore, will occur.

There are a few public policy variables that may need adjustment if, on some reckoning we conclude that the number of violations is too large.[18] First, more resources could be devoted to deterring and convicting those hospitals engaged in collusion. This effort would decrease $(1 - p)$ and increase p, which decreases the expected profit.

A second policy change could involve increasing the fine ("F"), which would require amending The Sherman Act. This, however, may not be enough. The current maximum fine is $100 million. Increasing that maximum only addresses the deterrence problem if judges are willing to impose substantial fines. If they are reluctant to impose hefty fines, then amending The Sherman Act may do no good.

Section 4 of the Clayton Act already provides for treble damages. Increasing the multiplier would decrease the expected profit, but that would require amending the Clayton Act.

VII. CONCLUDING REMARKS

Violations of Section 1 and/or Section 2 of the Sherman Act cause both public and private harm. Public sanctions for these violations involve fines of up to $100 million. Private damage awards under Section 4 of the Clayton Act equals three times the damages suffered by the victims of the antitrust violations.[19] This combination of public and private enforcement may deter anticompetitive conduct, but we do not know to what extent. To determine the effectiveness of the deterrence, we have to know the number of contemplated but uncommitted violations as well as the number of undeterred violations, and the number of deterred violations.[20] Thus, there is ample room for future research.

18 Similar, but opposite, remarks can be made if we believe that too few violations have occurred.

19 Individual sanctions may involve fines of up to $1.0 million and/or prison sentences of up to 10 years.

20 Nobel Laureate George Stigler made this point long ago, see George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 The Journal of Law and Economics 225 (1966).

IT AIN'T OVER 'TIL IT'S OVER: CAN MAKING ACPERA RESTITUTION CONDITIONAL HELP FILL A GAP IN THE LAW?

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I. INTRODUCTION

In the past two years, the Department of Justice Antitrust Division's (the "Division's") criminal enforcement activity has fallen off a cliff. From 2009 to 2016, the Division charged an average of 20.5 corporations per year; from 2017 to 2018, that average dropped to 6.5 per year, a decline of 68 percent. Similarly, the average number of individuals charged per year fell 53 percent; the average number of criminal cases filed per year fell 66 percent; and, significantly, the average figures for criminal fines & penalties levied fell by 90 percent, from $1.18 billion to $119 million per year.[2]

Yet, there is one aspect of the Division's criminal enforcement that has held steady: restitution. Indeed, the annual figures for restitution to victims has been, and has stayed, low. Over the period from 2008 to 2016, the Division imposed orders of restitution in connection with criminal cases of, on average, just $8.6 million per year.[3] Although the 2017 figure of $2.2 million reflects a significant drop from that average,[4] it is still higher than the figures for 2014 and 2015. In fact, in only two years since 2008 has the Division imposed restitution of more than $10 million.

These low figures for criminal restitution serve as an important reminder that, as the Division's criminal enforcement waxes and wanes, private enforcement remains virtually the only way that victims of anticompetitive conduct by cartels and dominant firms can receive compensation. In the five years from 2013 to 2018, private antitrust suits recovered over $19 billion for victims in antitrust class actions, or about $3 billion per year.[5] Settlements of less than $10 million or of $10-99 million grew at an average annual rate of over 30 percent, and settlements between $100-499 million grew at an average annual rate of almost 120 percent.[6]

These recoveries help explain the Division's statement that, "[f]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims."[7] This approach is one manifestation of a larger assumption underlying much of our antitrust law and policy: that public enforcement (by regulators) and private enforcement (via civil action) are essential and complementary elements of a comprehensive scheme. As Justice Brett Kavanaugh wrote earlier this month in the much-anticipated *Apple v. Pepper* decision, the law reflects a "longstanding goal of effective private enforcement and consumer protection in antitrust cases."[8] Division Policy reflects that goal, too.

But what happens when private litigation is unable or unlikely to provide relief to victims?

In many cases, the Division determines antitrust liability, imposes fines, secures guilty pleas and sentences executives to jail, but declines to impose restitution. By design, private actions secure compensation for victims. Every once in a while, however, the civil action encounters a quirk of the law or other unique circumstance that precludes victims from receiving compensation, despite the fact that the criminal action established liability. Cases like that fall into a gap in the law, which allows companies who knowingly violate antitrust laws to remain free from the obligation to compensate their victims.

One way to partially fill this gap, at least where one of the subjects of the criminal action has applied for leniency under the Division's Corporate Leniency Program, is to make sure the Division retains the power to provide restitution to victims in the event that the civil action can't. Under Division policy and the Antitrust Criminal Penalty Enhancement & Reform Act of 2004 ("ACPERA"), an applicant for leniency who informs the Division about criminal cartel activity can be absolved of criminal liability and have their civil liability limited to "actual damages," provided they make information and witnesses available to private plaintiffs and provide restitution to victims. The fact that the Division requires restitution as a condition of ACPERA leniency is not well-known and rarely discussed, perhaps because it is honored more in the breach than in the observance. But it reflects the praiseworthy policy goal of guaranteeing compensation to victims. Allowing the DOJ to retain restitution power pending the outcome of civil litigation could ensure that goal is realized.

2 U.S. Dep't of Justice, Criminal Enforcement Trend Charts, available at https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

3 U.S. Dep't of Justice, Antitrust Division Workload Statistics, FY 2008–2017, available at https://www.justice.gov/atr/file/788426/download, at 12.

4 The Division has not yet published restitution figures for 2018.

5 American Antitrust Institute ("AAI"), *The Vital Role of Private Antitrust Enforcement in the U.S.* (May 10, 2019), at 2.

6 *Id.* at 4.

7 2008–2017 Workload Statistics, at 12 n. 19.

8 *Apple Inc. v. Pepper*, No. 17-204, 2019 U.S. LEXIS 3397, at *21 (May 13, 2019).

II. THE COMPLIMENTARY RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

While restitution is available to the Division, the Division almost never seeks it, whether the defendants are leniency applicants or not. As noted above, Division orders of restitution in criminal cases average less than $10 million per year — a small fraction of what it secures in criminal fines.[9] The disclaimer that "[f]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims" appears in the Division's annual Workload Statistics every year.[10] This division of labor (so to speak) makes sense. The Division's criminal arm, with its subpoena, warrant, leniency, and other powers, is best positioned to use its limited resources to uncover, build, develop, and prosecute cases against conspiracies that otherwise might never come to light. Private Plaintiffs, while doing many of these things as well, are particularly adept at securing compensation for victims.

The Division is careful in pursuing remedies that do not limit compensation due to victims in several ways. For instance, Division policy provides that criminal fines "should not interfere with the [defendant's] ability to make restitution."[11] The model plea agreements that the Division uses as templates provide that a sentence "does not include a restitution order" because civil causes of action "potentially provide for a recovery of a multiple of actual damages."[12] Sure enough, this language routinely appears in Division plea agreements and sentencing memoranda for both corporate and individual defendants, citing the availability of both treble damages and joint and several liability.[13] Courts have tended to agree with this approach. In a sentencing hearing for a guilty-pleading corporate defendant in one of the *Auto Parts* cases, the court explained the decision not to impose restitution:

> [T]he Court has considered the parties['] joint request that I do not impose . . . an order of restitution in the case, recognizing . . . the likelihood of restitution accomplished by virtue of private lawsuits brought by the various levels of victims in this case, and it does strike the Court that it is much more efficient and properly more accurate for the restitution to be obtained by civil litigation where the details and the scope of the violation can be better presented and understood, and ultimately more efficiently and probably more accurately arrive at an appropriate level of payment than would be the case in the context of this Court attempting to identify the appropriate restitution amount as part of its sentencing process.[14]

9 2008–2017 Workload Statistics, at 12. Note that criminal fines, which a defendant typically pays to the government, should not be confused with restitution, which a defendant pays to victims.

10 *Id.* at 12 n. 19; see also, e.g. U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, available at http://www.justice.gov/atr/public/workload-statistics.html, at 11 n.15 (same); see also 5 Antitrust Laws and Trade Regulation, 2nd Edition § 97.01 (2019).

11 Antitrust Division Manual (5th Ed.), available at https://www.justice.gov/atr/file/761166/download, at IV-80 (citing 18 U.S.C. § 3572).

12 See Antitrust Guidelines and Policy Statements § 40, Model Annotated Corporate Plea Agreement ("(c) In light of the [availability of civil causes of action] OR [civil cases filed against the defendant, including [CASE NAME, CASE NUMBER], in the United States District Court, [X] District of [X]], *which potentially provide for a recovery of a multiple of actual damages*, the recommended sentence does not include a restitution order for the offense charged in the Information.]") (emphasis added); Antitrust Guidelines and Policy Statements § 41, Model Annotated Individual Plea Agreement (same).

13 See, e.g. Sent'g Mem., *United States v. LG Chem, Ltd.*, 13-cr-473 (N.D. Cal. Sept. 3, 2013), ECF No. 13 at 7 (stating that "[t]he civil process provides potential victims with a variety of options to expand their recovery well beyond that which would be available as part of restitution in the criminal case," including treble damages and joint and several liability); Joint Sent'g Mem., *United States v. Polo Hsu*, No. 11-cr-0061 (N.D. Cal. March 15, 2011), at 3 (explaining that civil suits "potentially provide for a recovery of a multiple of actual damages" and "the courts in the related civil cases . . . are best suited to compensate those parties who may be aggrieved and would otherwise receive restitution"); Joint Sent'g Mem., *United States v. Japan Airlines Int'l, Co., Ltd.*, No. 08-cr-00106 (D.D.C. April 30, 2008), ECF No. 5 at 3 ¶ 4 ("The United States will not seek restitution in this case in light of . . . the many civil class action cases filed . . . which each potentially provide for a recovery of a multiple of actual damages."); Sent'g Mem., *United States v. Gonzalez*, No. 10-cr-20790 (S.D. Fl. Feb. 29, 2012), ECF No. 403 at 6 ¶ III(C) ("In light of civil cases filed which potentially provide for a recovery of a multiple of actual damages, the United States agreed not to seek a restitution order for the offense charged in the Indictment."). But see *In re Morning Star Packing Co.*, LP, 711 F.3d 1142, 1144 (9th Cir. 2013) (concluding that "the district court committed legal error in denying restitution because of . . . the potential availability of civil remedies").

14 Guilty Plea and Sentencing Hr'g Tr., *United States v. Corning Int'l Kabushiki Kaisha*, No. 16-20357 (E.D. Mich. May 16, 2016), ECF No. 15 at 22. Robins Kaplan LLP serves as co-lead counsel for end payor plaintiffs in *In re Auto Parts Antitrust Litig.* See also Hr'g Tr., *United States v. LG Chem, Ltd.*, 13-cr-473 (N.D. Cal. Oct. 10, 2013), ECF No. 35 at 30:25-31:3 ("Restitution is waived in light of . . . all of the civil actions which are pending. Court finds it would be more appropriate to resolve issues of restitution in that forum.").

Another reason the Division often declines to seek restitution, according to its sentencing memoranda and plea agreements, is the risk of prolonging the sentencing process[15] — a justification rooted in the U.S. Sentencing Guidelines.[16] Here, too, courts have tended to agree.[17] The Division has also explained a decision not to seek restitution by citing the fact that civil plaintiffs may allege a broader conspiracy than is at issue in the criminal action.[18] Ordering restitution might require the Division to determine who is or is not a victim of the criminal conspiracy, which "could adversely affect arguments certain parties might advance on the civil side when seeking recovery."[19]

One final consideration is that, given "the per se nature of antitrust criminal violations," which "relieves the prosecution from having to introduce evidence of harm resulting from the violation to secure a conviction," the Division may not always undertake a damages analysis that could inform a restitution award.[20] Private plaintiffs, on the other hand, must build their cases from the outset with damages in mind, particularly in the wake of the Supreme Court's decision in *Comcast Corp. v. Behrend*.[21] Thus, they routinely handle such issues while preparing expert damages testimony or administering claims following a settlement.

Despite these myriad reasons not to seek restitution, the Division's employee manual provides that "attorneys *should* consider seeking orders for restitution in cases in which victims are *unable or unlikely* to seek treble damages."[22] In other words, the Division should seek restitution if, for example, there are not enough damages at stake to provide incentives for a private civil action. In recent cases relating to public real estate foreclosure auctions, for instance, the Division secured over a dozen guilty pleas and approximately $2 million in restitution.[23] Because an antitrust case can be among the most complex and expensive to litigate, routinely requiring millions of dollars in fees and costs, the scope of the damages there may have been insufficient to incentivize private plaintiffs to bring suit.

In the typical case, however, private civil suits provide appropriate incentives for victims to seek redress, and private plaintiffs are well-equipped to do so.

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15 See, e.g. *LG Chem* Sent'g Mem. at 7 ("The government believes that the complexity of this case and the resulting difficulty of making any accurate estimation of damages as part of a sentencing proceeding make restitution inappropriate in this instance."); Sent'g Mem., *US v. UCAR Int'l Inc.*, No. 98-cr-177 (E.D. Pa April 21, 1998), at 5–6 ("Given the remedies afforded [antitrust victims] and the active involvement of private antitrust counsel . . . the need to fashion a restitution order is outweighed by the difficulty [in determining losses] and the undue complication and prolongation of the sentencing.").

16 See U.S.S.G. §§ 5E1.1(b)(2) ("Restitution") (providing that restitution is not mandatory where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process"), 8B1.1(b)(2) ("Restitution – Organizations") (same), available at https://www.ussc.gov/guidelines/2018-guidelines-manual. See also Antitrust Division Manual (5th Ed.) at IV-83 (citing 18 U.S.C. §3663A(c)(3)); U.S. Dep't of Justice, Overview of Victims' Rights, available at https://www.justice.gov/atr/overview-rights-federal-crime-victims (providing that "victims of Federal offenses such as antitrust violations are entitled to certain rights," including "[t]he right to restitution as provided in law," but noting that "Division attorneys represent the United States and not the victims of antitrust violations" and "[c]rime victims are encouraged to seek the advice of their own attorneys . . .").

17 *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010); *accord United States v. Rahal*, No. 2:08-cr-0566 TLN, 2016 U.S. Dist. LEXIS 44262 (E.D. Cal. Mar. 30, 2016), at *5–6.

18 See, e.g. *LG Chem* Sent'g Mem. at 7-8. One reason it is common for civil plaintiffs to allege a broader conspiracy is that civil plaintiffs face a lower burden of proof than the Division would face in a criminal case. See Taladay, John, "Why ACPERA Isn't Working and How to Fix It," CPI Chronicle (January 2019) at 4 n. 15.

19 *LG Chem* Sent'g Mem. at 7-8.

20 Antitrust Division Manual at IV-84.

21 569 U.S. 27 (2013).

22 Antitrust Division Manual at IV-84 (emphasis added). *See also* 8 Antitrust Laws and Trade Regulation, 2[nd] Edition § 174.05 (2019) ("Restitution has been imposed in connection with criminal cases where treble damage actions have not been filed by the victims of the criminal antitrust conspiracy.").

23 Gibson Dunn, 2016 Year-End Criminal Antitrust and Competition Law Update (Jan. 10, 2017), available at https://www.gibsondunn.com/2016-year-end-criminal-antitrust-and-competition-law-update/#_ftn74 ("In total, 15 defendants in both California and Georgia were ordered to pay approximately $2.3 million in restitution to victims."). Some commentators have also noted that the Division has imposed orders of restitution when it is recovering on behalf of the government itself as a purchaser. See R. Lande & J. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U.L. Rev. 315, 326. For instance, the Division secured over $600 million in restitution, penalties and disgorgement from large financial institutions in relation to the conspiracy to rig bids in the municipal bond derivatives market. See U.S. Dep't of Justice, Municipal Bonds Investigation 2014, available at https://www.justice.gov/atr/division-update/2014/municipal-bonds-investigation. It is not clear why these figures are not included in the Division Workload Statistics for the years in which the Division announced the penalties, 2010 and 2011, which reflect restitution of only $24.3 million and $6.4 million, respectively. It may be because defendants paid restitution to federal and state agencies rather than individuals or businesses. Notably, a related private action secured $225 million in settlements for the injured parties. See $100M In Settlements End Class Action in Muni Bond MDL, Law360 (July 8, 2016), available at https://www.law360.com/articles/815462.

III. ANTITRUST CLASS ACTIONS CONTINUE TO SECURE SUBSTANTIAL RECOVERIES FOR VICTIMS OF ANTICOMPETITIVE CONDUCT

Case law and Division policy assume that consumers will enforce their rights against cartels and monopolists. To quote Justice Kavanaugh again, where "plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers," the courts should allow the case to proceed because "[t]hat is why we have antitrust law."[24]

Private plaintiffs have delivered on that promise. In the past five years alone, the private antitrust bar has secured over $19 billion in settlements and awards. In many of those cases, the Division obtained guilty pleas or convictions, but did not impose restitution. To cite just a few recent examples:

- In *In re Automotive Parts Antitrust Litig.*, the Division obtained numerous guilty pleas from dozens of defendants and collected fines in excess of $2.9 billion, but did not order restitution to victims. To date, private plaintiffs secured over $1.9 billion to compensate automobile dealership plaintiffs, direct purchasers and end payor purchasers, and that number continues to grow.[25]

- In *In re Foreign Exchange Antitrust Litig.*, the Division obtained felony guilty pleas from the parent corporations of five major financial institutions and secured criminal fines of more than $2.5 billion, but did not order restitution to victims.[26] Private plaintiffs secured $2.3 billion to compensate purchasers.[27]

- In *In re Capacitors Antitrust Litig.*, the Division obtained guilty pleas from eight corporate defendants and convictions of two individuals, but did not order restitution to victims.[28] Private plaintiffs secured over $250 million to compensate purchasers.[29]

- In *In re Air Cargo Shipping Services Antitrust Litig.*, the Division obtained guilty pleas from 21 companies and individuals and criminal fines of more than $1.8 billion, but did not order restitution to victims.[30] Private plaintiffs secured over $1.2 billion to compensate purchasers.[31]

Antitrust class actions as they exist in the popular imagination often involve a payout of maybe a few dollars per claim. Perhaps that is why claimants sometimes ignore settlement notices based on the mistaken belief that the amount of time and effort needed to file a claim exceeds the amount of any potential recovery. While it is true that some consumer cases may involve claims worth less than $100 (take the *eBooks* case, for example), that scenario only describes a subset of antitrust class actions. In some instances, class members can recover tens of thousands of dollars or more. In *Air Cargo*, for example, most class members were "freight forwarder" companies that purchased freight services from large airlines.[32] Some class members collected hundreds of thousands of dollars and several recovered amounts north of $1 million.[33] Certain class members in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.* and *In re Graphite Electrodes Antitrust Litig.* also recovered more than $1 million.[34] In *In re TFT-LCD (Flat Panel) Antitrust Litig.*, eight claimants recovered over $10 million.[35] And, even in those cases involving small claims figures for individual class members, the case for private enforcement is all the more pronounced because a single claim would not justify the costs of litigation. Therefore, aggregating those claims in a class action suit is critical if victims of the conspiracy expect to ever see recovery.

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24 *Apple*, 2019 U.S. LEXIS 3397, at *24.

25 AAI Report at 10. Robins Kaplan LLP is co-lead counsel for the end payor class.

26 U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

27 AAI Report at 11.

28 *Id.* at 12.

29 *Id.*

30 Doroshow, Joanne, First Class Relief: How Class Actions Benefit Those Who are Injured, Defrauded and Violated (October 2014), at 31. Robins Kaplan LLP is co-lead counsel for Direct Purchaser Plaintiffs in *Air Cargo*.

31 *Id.* at 32.

32 *Id.* at 32.

33 *Id.*

34 *Id.*

35 *Id.*

It is therefore not surprising that Division policy assumes that private plaintiffs will pursue and obtain compensation for victims of antitrust violations, and they do. Until they don't…

In the criminal action in *In re Vehicle Carrier Services*, for example, the Division secured multiple convictions and guilty pleas, as well as hundreds of millions of dollars in fines.[36] The guilty pleas did not seek restitution and the court agreed that restitution was not appropriate in light of the pending civil actions.[37] Under similar circumstances, the victims of the conspiracy — in this case, purchasers of shipping services for the transportation of cars and trucks, including automobile dealerships and others — are typically able to recover compensation through private civil action. But in 2017, the Third Circuit ruled that federal maritime law precluded direct and indirect purchasers' antitrust claims.[38] Instead, the court required plaintiffs to seek redress before the Federal Maritime Commission. In 2018, an Administrative Law Judge issued an initial decision dismissing plaintiffs' claims, and an appeal before the full Commission is still pending.[39] Thus, *Vehicle Carrier Services* is an example of a case where there is a wrong without a remedy. Despite evidence of liability in the criminal action, including criminal fines paid to the Division and indictments of corporate executives, the actual victims of the conspiracy have not been able to demonstrate the harm they suffered or receive compensation for that harm.

What then?

IV. CASES THAT FALL THROUGH THE CRACKS: IS CONDITIONAL RESTITUTION THE ANSWER?

With ACPERA due for renewal next year,[40] practitioners and commentators have begun debating whether there is a way to revise the statute to encourage more leniency applications and, perhaps, an uptick in criminal enforcement.

In the 1970s, the Division began what would become its Corporate Leniency Program, often considered "the single most effective tool in the detection and prosecution of cartels ever devised by enforcers."[41] Pursuant to that program, the Division declines to seek criminal charges against a cartel participant who approaches authorities to report the illegal conduct.[42] However, the so-called "leniency applicants" could still face treble damages and joint and several liability in a subsequent civil action. Thus, in 2004 Congress passed ACPERA to improve the program and address those perceived deficiencies.[43] In addition to avoiding criminal penalties such as prison time or criminal fines, the statute provides that the amnesty applicant can be liable only for "actual damages . . . attributable to . . . the applicant" in any subsequent civil action arising from the same facts or based on the same violation.[44] In exchange, the applicant must provide "satisfactory cooperation to the claimant with respect to the civil action."[45]

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36 See, e.g. Buyers Tell 3rd Circ. Car Shipping Antitrust Ruling Misfired, Law360 (June 21, 2016), available at https://www.law360.com/articles/809134/buyers-tell-3rd-circ-car-shipping-antitrust-ruling-misfired.

37 See, e.g. Transcript of Guilty Plea and Sent'g, *United States v. Wallenius Wilhelmsen Logistics AS*, No. 16-cr-362 (D. Md. Sep. 12, 2016), ECF No. 21 at 26:24-27:1 ("Restitution . . . is not going to be imposed based upon the pending civil litigation that is being pursued in this matter."); Transcript, *United States v. Compania Sud Americana de Vapores S.A.*, No. 14-cr100 (D. Md. May 1, 2014), ECF No. 23 at 30:2-7 ("[A]lthough restitution is not being ordered directly . . . there are numerous civil cases related to the same conduct, and . . . the disposition of those civil cases is being handled appropriately, without the necessity for a specific order of restitution."); see also Plea Ag't, *Wallenius*, No. 16-cr-362, ECF No. 17 at 7 ¶ 9(b); Plea Ag't, *Compania Sud Americana*, ECF No. 12 at 7 ¶ 9(b); Plea Ag't, *United States v. Nippon Yusen Kabushiki Kaisha*, No. 14-cr-612 (D. Md. Mar. 11, 2015), ECF No. 20 at 7 ¶ 9(b); Plea Ag't, *United States v. Kawasaki Kisen Kaisha, Ltd.*, No. 14-cr-449 (D. Md. Nov. 5, 2014), ECF No. 19 at 7 ¶ 9(b); Plea Ag't, *United States v. Otoda*, No. 15-cr-34 (D. Md. Mar. 26, 2015), ECF No. 18 at 9; Plea Ag't, *United States v. Tanaka*, No. 15-cr-22 (D. Md. Mar. 10, 2015), ECF No. 15 at 9; Plea Ag't, *United States v. Yamaguchi*, No. 14-cr-613 (D. Md. Feb. 6, 2015), ECF No. 12 at 9; Plea Ag't, *United States v. Tanioka*, No. 14-cr-610 (D. Md. Feb. 2, 2015), ECF No. 14 at 9.

38 *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71 (3d Cir. 2017). Robins Kaplan LLP serves as co-lead counsel for the end payor class.

39 See *In re Vehicle Carrier Services*, Fed. Mar. Comm. Do. Nos. 16-01, 16-07, 16-10, 16-11.

40 DOJ Antitrust Head Says Leniency Program 'Alive And Well', Law360 (April 11, 2019), available at https://www.law360.com/articles/1149183.

41 Klawiter, Donald, "The U.S. Corporate Leniency Policy: It Is Time for a Renaissance," CPI Chronicle (January 2019), at 2.

42 *Id.* at 3.

43 150 Cong. Rec. S3610, S3613 (Apr. 2, 2004) (statement of Sen. Kohl) ("Our bill will give the Justice Department the ability to offer those applying for leniency the additional reward of only facing actual damages in antitrust civil suits, rather than treble damage liability. This will result in more antitrust wrongdoers coming forward to reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels.").

44 Antitrust Criminal Penalty and Reform Act of 2004, Pub. L. No. 108-237, Tit. II, 118 Stat. 661 (June 22, 2004), § 213 ("Limitation on Recovery").

45 *Id.* § 213(b).

But "[t]he initial grant of leniency is conditional," and moving from "conditional" leniency to "final" leniency requires a showing that cooperation is in fact "satisfactory."[46] Although ACPERA itself defines "satisfactory cooperation" to require the provision of documents and testimony, Division guidance provides that a "final grant of leniency" also requires "payment of restitution to victims."[47] Indeed, "[t]here is a strong presumption in favor of requiring restitution in leniency situations."[48] The Division's Model Corporate Conditional Leniency Letter requires the applicant to "mak[e] all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported."[49] Division guidance also provides that "[r]estitution is excused only where, as a practical matter, it is not possible."[50] As noted above, however, the Division often declines to seek restitution for various reasons and courts routinely find that it is "more efficient" and "more accurate" to address compensation for victims in private civil actions.[51]

Treatment of restitution under ACPERA is one of the issues that has come up as the statute approaches renewal next year. The defense bar has tended to focus on ways to reassure leniency applicants that they will receive final leniency, including by clarifying that applicants will enjoy a rebuttable presumption of "satisfactory cooperation" well before the civil action goes to trial.[52] But at least one proposal suggests "[e]liminating ACPERA altogether and instead requiring a leniency recipient to pay restitution into a fund that would be administered by the Antitrust Division, so that the leniency recipient is not subjected to civil liability in private follow-on litigation."[53] This proposal, though extreme on its face, gets one thing right: victims are entitled to compensation. But instead of absolving the leniency applicant of all civil liability, the Division should retain the power to impose restitution until the civil case is fully resolved. If private plaintiffs secure a recovery, the Division can relinquish this power. If not, the Division could require the applicant to at least partially compensate the injured parties. Indeed, this approach could help to address a gap in current law: civil actions like *Vehicle Carrier Services* that, despite evidence of guilt in the criminal action, encounter procedural obstacles that bar compensation to victims.

That's not to say payouts should proceed where private enforcement fails by its own merits, but rather contemplates a narrow scenario: one in which the Division obtains guilty pleas or convictions, declines to impose restitution, but the civil action encounters a quirk of the law or other unique circumstance that precludes victims from receiving compensation. As it is, a leniency applicant may not receive final assurance of its immunity until trial or other ultimate resolution of the civil case. Under our proposal, restitution would be a conditional obligation, just as the applicant's other cooperation obligations are conditional. After all, Division policy already provides that its attorneys "should consider seeking orders for restitution in cases in which victims are *unable or unlikely* to seek treble damages."[54] But in practice, while the Division applies the "unlikely" portion of this statement, it will typically relieve a leniency applicant of its restitution obligations in the plea agreement — long before anyone knows if victims will be "unable" to seek recourse via civil action. The approach we propose would still provide defendants with some relief from the risk of treble damages, while giving victims of the conspiracy a failsafe — single damages via restitution — in the event that private enforcement falls through. At the end of the day, where the defendants' guilt is not in question, victims should be compensated.

V. CONCLUSION

In the vast majority of cases, the system works. The Division's approach of pursuing guilty pleas, convictions, and fines while declining to impose restitution is sensible in light of the billions of dollars private plaintiffs have succeeded in obtaining for victims. Still, there will sometimes be a case where, despite evidence of criminal guilt, plaintiffs are unable to achieve compensation because of a unique circumstance or procedural issue. In those rare instances where a case does fall through the cracks, a modest adjustment to the Division's treatment of restitution will help ensure that antitrust law continues to achieve the "longstanding goal" of compensation for victims.

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46 U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (Jan. 26, 2017), available at https://www.justice.gov/atr/page/file/926521/download, at 24.

47 *Id.*

48 *Id.* at 18.

49 Model Conditional Leniency Letter ¶ 2(g), available at https://www.justice.gov/atr/leniency-program.

50 Division FAQ at 18.

51 See *Corning* Sent'g Hr'g Tr., No. 16-20357 (E.D. Mich.), ECF No. 15 at 22.

52 Taladay at 5.

53 Latham & Watkins Client Alert, US DOJ Weighs Reform Options for Antitrust Leniency Law Set to Expire (April 16, 2019), available at https://www.lw.com/thoughtLeadership/US-DOJ-Weighs-Reform-Options-for-Antitrust-Leniency-Law-Set-to-Expire.

54 Antitrust Division Manual at IV-84 (emphasis added).

PENN STATE HERSHEY: A CAUTIONARY TALE FOR ANTITRUST LITIGATORS

BY MARGAUX POUEYMIROU[1]

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I. INTRODUCTION

This article addresses a recent decision by the Court of Appeals for the Third Circuit, *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 914 F.3d 193 (3d Cir. 2019) ("*Penn State Hershey*"), upholding the denial of attorneys' fees to the Commonwealth of Pennsylvania ("Pennsylvania") in an action filed by Pennsylvania and the Federal Trade Commission (the "FTC" or "Commission") to enjoin the proposed merger of two major Pennsylvania hospital systems, on the grounds that it would substantially lessen competition for general acute care inpatient hospital services in the four-county area surrounding Harrisburg.

The decision matters because attorneys' fees matter, not just to plaintiffs and their lawyers, but to the public interest. The ability to obtain attorneys' fees pursuant to fee shifting provisions, like Section 16 of the Clayton Act ("Section 16") under which Pennsylvania sought its fees, incentivizes lawyers to take cases on behalf of clients who could not otherwise afford the cost of litigation. Fee shifting also allows states to pursue complex, resource-intensive investigations into anticompetitive conduct that affects the lives of millions.

This is particularly true in healthcare markets, which are traditionally viewed as a matter of local concern falling within the states' policing powers. State Attorneys General have been persistently active in policing mergers in this arena. They have often joined the FTC in challenging healthcare mergers, as they have learned firsthand how large healthcare providers can increase their market power and thereafter impose significant price hikes on consumers without suffering the loss of patients.[2]

By declining to award Pennsylvania attorneys' fees in a case where the injunctive relief sought was granted, the appellate court established a precedent in the Third Circuit and persuasive authority elsewhere that could have far-reaching consequences for state Attorneys General who not only represent the interests of their states' "natural persons," municipalities, and public entities, through statutory *parens patria* authority, but also the general welfare and economy of the state.

II. FEE SHIFTING IN ANTITRUST: A DEPARTURE FROM THE "AMERICAN RULE"

Although the American Rule, which governs most civil litigation in the United States, requires a party to bear its own legal costs unless a statute, contract, or court provides otherwise, certain laws that promote a public purpose — including claims brought pursuant to the federal antitrust statutes — include a fee shifting provision where the prevailing or "substantially prevailing" plaintiff may or shall receive reasonable attorneys' fees from the defendant.[3] Significantly, the first federal antitrust statute, the Sherman Act of 1890, was among the first statutes to pioneer the concept of fee shifting in American jurisprudence. [4] Its one-way fee shifting provision served as a model for legislation in other areas.[5]

Congress' decision to depart from the American Rule for antitrust actions is reflected in Section 4 of the Clayton Act ("Section 4"), which provides treble damages and "the cost of suit, including reasonable attorney fees" to a prevailing plaintiff in a civil damages action.[6] Section 16 governs injunctive relief under the Clayton Act and mandates that "[i]n any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee."[7] This attorneys' fee provision was added to Section 16 in 1976 in response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In that case, the Supreme Court held that federal courts lacked the power to award fees absent statutory authority, except in a few narrow circumstances. In response to *Alyeska*, Congress amended Section 16, noting that "the need for the awarding of attorneys' fees in [Section] 16 injunction cases is greater than the need in [Section] 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting

2 See Brief of Amicus Curiae The States of California, Washington, Pennsylvania, Connecticut, Delaware, Illinois, Iowa, Kentucky, Maine, Maryland, Mississippi, Montana, Nevada, New Mexico, Oregon, and Tennessee, *St. Luke's Health Care System v. FTC and State of Idaho*, at 6 (9th Cir. 2014).

3 While attorneys' fees are discretionary under some statutory schemes, they are mandatory under others, including the federal antitrust statutes.

4 See Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51 (1988), available at: http://ir.lawnet.fordham.edu/flr/vol57/iss1/2.

5 The concept of fee-shifting, a vestige of early English rule that did not survive the American Revolution, returned to the American landscape through three pioneering federal statutes: voting rights legislation (1870), the Interstate Commerce Act (1887), and the Sherman Act (1890). Since that time, hundreds of federal statutes have adopted fee shifting provisions. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law and Contemporary Problems 9-36, at 25 (Winter 1984), available at: https://scholarship.law.duke.edu/lcp/vol47/iss1/2; see also Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51 (1988), available at: http://ir.lawnet.fordham.edu/flr/vol57/iss1/2.

6 15 U.S.C. § 15.

7 15 U.S.C. § 26.

of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect."[8] And Congress believed that "[a] prevailing plaintiff should not have to bear such an expense."[9]

III. TEXTUALISM AND THE RIGHT TO FEES UNDER SECTION 16

Despite the fact that the injunctive relief Pennsylvania had sought was granted and the merger abandoned, the Third Circuit determined the State should bear the expenses of litigation in *Penn State Hershey*. As background, in March 2015, the Boards of Penn State Hershey Medical Center and Pinnacle Health System, the two largest hospitals in the Harrisburg area, approved a plan to merge. Following an investigation, the Commission issued an administrative complaint alleging that the proposed merger violated Section 7 of the Clayton Act, which proscribes mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly."[10] To maintain the status quo pending the outcome of the Commission's adjudication on the merits, Pennsylvania and the Commission sought a preliminary injunction in federal court pursuant to Section 16 and Section 13(b), which respectively authorize Pennsylvania and the Commission to seek injunctive relief. The district court denied this relief, discounting the Plaintiffs' geographic market analysis and concluding that there were many procompetitive benefits to consumers in the area should the merger occur. The Third Circuit reversed and remanded the case, directing that the merger be enjoined as a preliminary step, pending the Commission's adjudication on the merits. In response to the Third Circuit's decision, the hospitals abandoned the merger. Thereafter, the Commonwealth moved for attorneys' fees over the opposition from defendants.

The district and Circuit courts each denied Pennsylvania's motion for attorneys' fees, but on wholly different grounds. The district court held that the Commonwealth was entitled to seek fees despite the fact that the appellate court's granting of preliminary injunctive relief had been made pursuant to Section 13(b), a statute that can only be enforced by the Commission and which does not contain a fee shifting provision. The court reasoned that because Congress had drafted Section 16 to protect plaintiffs from "the very high price of obtaining judicial enforcement of . . . the antitrust laws," it would follow along the spirit of Section 16 to allow Pennsylvania to seek fees regardless of whether Section 13(b) had formally served as the basis of relief.[11] After all, the district court observed, Pennsylvania brought a lot to the table by providing "supplemental knowledge of the region and by assuming the role of advocate on behalf of Pennsylvania citizens."[12] Refusing to award fees would "disincentivize" the participation of states from seeking to enforce antitrust laws.[13] Additionally, the district court stressed, it was in the interest of judicial economy to allow Pennsylvania to seek fees even though the relief granted formally occurred pursuant to Section 13(b). Otherwise states would pursue their own injunctive relief in separate proceedings that would ultimately involve "repetitive arguments" and would be "highly inefficient."[14]

Nonetheless, the district court denied Pennsylvania attorneys' fees on the grounds that it had not "substantially prevailed" under Section 16, as the statute's plain language requires. First, the court observed that even if the Third Circuit's grant of a preliminary injunction had catalyzed the hospitals to abandon their merger, voluntary cessation "lacks the necessary judicial imprimatur" because "the change in the parties' legal relationship must be the product of judicial action" to support a finding of prevailing-party status.[15] To this extent, the district court extended the U.S. Supreme Court's rejection of the "catalyst theory" in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, a case that addressed the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act, to antitrust actions under Section 16. Consistent with *Buckhannon*, the district court stressed that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees."[16] Here, however, the plaintiffs had merely convinced the Third Circuit that there was a likelihood of success on the merits. Because a "likelihood does not mean more likely than not,"[17] there had been no resolution of any merit-based issue. Given those facts, fee shifting was

8 H. R. REP. NO. 94-499, PT. 1, AT 19, 20.

9 *Id.*

10 15 U.S.C. § 18.

11 *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, No. 1:15-CV-2362, 2017 WL 1954398, at *3 (M.D. Pa. May 11, 2017) (quoting H.R. Rep. No. 94-499, at 19-20 (1976)).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at *6.

16 *Id.*

17 *Id.* (quoting *Singer*, 650 F.3d at 229).

inappropriate. By holding that preliminary injunctive relief under Section 16 cannot provide a basis for attorneys' fees because "likely success" does not meet the merits requirement, the district court amended the statute's plain language. Section 16 does not delineate between permanent and preliminary injunctive relief; yet, under the district court's analysis, attorneys' fees would be inappropriate in preliminary injunction cases.

In contrast, the Third Circuit's decision to deny attorneys' fees to Pennsylvania was premised on the textualist argument the district court rejected, namely, that the State was wholly foreclosed from seeking attorneys' fees because preliminary injunctive relief had been granted under Section 13(b) and not Section 16, which only awards fees to a plaintiff who substantially prevails "in any action *under this section*."[18] Since no relief had been awarded under Section 16, no party had prevailed "under th[at] section."

The Third Circuit focused on the different standards for granting preliminary injunctive relief under Section 13(b) and Section 16. Section 13(b) involves a far more deferential standard, which requires courts to assess only two factors when considering whether a preliminary injunction would be in the public's interest: First, the Commission's likelihood of success on the merits, and second, the weight of the equities.[19] Under a Section 16 analysis, however, the four-part traditional equities test is used for determining the appropriateness of preliminary injunctive relief. Thus, in addition to what the Commission must prove under Section 13(b), a plaintiff must also make a showing of irreparable injury and that the balance of equities tip in its favor. In *Penn State Hershey*, the parties and the appellate court consistently evaluated the merits of preliminary injunctive relief under Section 13(b)'s more deferential two-part standard. Even when it came to legal analysis, it was clear — to the Third Circuit at least — that the only cause of action that had prevailed was the Commission's.

The Third Circuit could have recognized that preliminary injunctive relief was equally warranted under Section 16, or that while the two modes of preliminary injunctive analyses are distinct, they are not so different as to compel a denial of attorneys' fees. Had the Third Circuit included a single line in its decision recognizing that the Governments had prevailed under Section 13(b) *and* Section 16, the Commonwealth would have likely had a claim to its fees. To this extent, the denial of fees reads like an unnecessary consequence of taking the road easiest to travel: a two-part analysis rather than a four-part one.

IV. CONCLUSION

Penn State Hershey should serve as a cautionary tale to plaintiffs who join in FTC actions. When the relief a litigant seeks can be achieved through two modes of analyses, one of which is simpler than the other, courts often will take the simpler road. Under the rule established in *Penn State Hershey*, that decision will cost plaintiffs their fees even when the Section 16 claims arise from the same facts that support the Court's Section 13(b) analysis and even when the state co-counseled the case.

Penn State Hershey should compel states to make clear that the anticompetitive harms alleged not only support a finding of injunctive relief under the Commission's more deferential permissive Section 13(b) standard, but also the more exacting Clayton Section 16 standard. This would preempt the kinds of arguments that the defendants in *Penn State Hershey* made in their Opposition to Pennsylvania's motion for attorneys' fees, namely, that Pennsylvania had not only failed to satisfy the more exacting Section 16 standard, but had also failed to articulate that standard at any point in the litigation.[20] Going forward, state attorneys general should remind the courts that they bring important knowledge of local markets and the effect of anticompetitive conduct on those markets when seeking injunctive relief and fees under Section 16 — knowledge that courts must account for when issuing their orders.

18 15 U.S.C. § 26 (emphasis added).

19 *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016).

20 See Defendants' Opposition to the Commonwealth of Pennsylvania's Motion for Attorneys' Fees and Cost, at 3–5.

COMPETITION POLICY INTERNATIONAL