

THE AMBIVALENT EFFECT OF ANTITRUST DAMAGES ON DETERRENCE



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I. INTRODUCTION

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.

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-idUSL6NOTKOGK20141130 (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.

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.

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

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.

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.autoritedelaconurrence.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).

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

<i>Airline</i>	<i>US fine¹⁵</i>		<i>US fine as % of affected sales</i>	<i>US fine as % of global turnover</i>	<i>EU fine</i>	<i>EU fine as % of global turnover¹⁶</i>
<i>British Airways</i>	\$200 mln	€144 mln	14.31%	1.59%	€104 mln	1.15%
<i>Cargolux Airways</i>	\$119 mln	€86 mln	33.43%	9.09%	€80 mln	8.49%
<i>Cathay Pacific Airways</i>	\$60 mln	€43 mln	14.56%	0.70%	€57 mln	0.92%
<i>LAN Cargo/Aerolinhas Brasileiras</i>	\$109 mln	€78 mln	32.63%	3.11%	€8 mln	0.32%
<i>Qantas Airways</i>	\$61 mln	€44 mln	24.96%	0.50%	€9 mln	0.10%
<i>SAS Cargo Group</i>	\$52 mln	€37 mln	33.81%	0.88%	€70 mln	1.65%
<i>Singapore Airlines Cargo</i>	\$48 mln	€35 mln	56.07%	0.55%	€75 mln	1.19%
<i>Air France/KLM</i>	\$350 mln	€252 mln	42.76%	1.20%	€310 mln	1.48%

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.

¹⁴ Boyer et al. 2017, at 28.

¹⁵ Ghosal & Sokol 2013, at 520.

¹⁶ As reported in the European Commission Decision.

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.



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.

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

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.

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.

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

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. Ponsard (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.

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).

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.

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 par-

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.

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.

ticipants 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).

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.

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).

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.

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).



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