
GLOBAL ANTITRUST LAW AND ECONOMICS

SECOND EDITION

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PREFACE TO THE SECOND EDITION (2011)

In the four years since the first edition, the increased globalization of antitrust law has continued apace. China, the world's third largest economy after the EU and US, has adopted an antitrust law. Many other nations have continued to modify and modernize their antitrust regimes and step up enforcement. Nor have things been static in the EU and US. The EU has adopted a new EU Treaty and new guidelines on multiple issues, and the US has experienced important new Supreme Court cases and a significant revision of its merger guidelines that reflects modern economic approaches to merger analysis.

Given these developments, this second edition expands and updates the globalized approach to antitrust law and economics that was pioneered in the first edition. The edition updates coverage of the antitrust laws in the US, EU, Australia, Brazil, Canada, Israel, Japan, South Africa, and South Korea. It also expands coverage to add not only China's new antitrust law, but also the antitrust laws of Argentina, Chile, Colombia, Egypt, India, Indonesia, New Zealand, Peru, Russia, Saudi Arabia, Singapore, Taiwan, Thailand, Turkey, and Venezuela. Antitrust laws in all the nations that have the world's leading GDPs are now covered. The US updates include the 2010 U.S. Merger Guidelines and the U.S. Supreme Court's 2009 *Linkline* decision and 2010 *American Needle* decision. The EU updates include the new EU Treaty, the new EU guidelines on abuse of dominance, the new EU guidelines on nonhorizontal mergers, and the new EU regulations and guidelines on vertical agreements.

PREFACE TO THE FIRST EDITION (2007)

No one would think of writing a casebook on Massachusetts Antitrust Law. It has long been too obvious that such a book would be parochial in at least two senses. First, markets (not to mention legal practices) generally span regions far larger than any state. Second, antitrust analysis has a common methodology applicable across the states, and thus does not benefit from a state-centric focus.

Yet antitrust casebooks continue to be parochial in the sense that they focus on the antitrust and competition law of only one nation. That perspective is rapidly becoming as outmoded as a state-centric approach would be. Markets are increasingly becoming global or at least multinational. A typical merger between large U.S. corporations must get approval not just in the United States but also by the European Community (the “EC”), for their activities often affect both markets. Likewise for large European corporations. Cartels in one nation affect supply in others. And countries are increasingly entering into treaties with each other about the content or enforcement of competition laws. Thus, businessmen, lawyers, and lawmakers can no longer content themselves with understanding only the antitrust and competition law of their nation. They must also understand the other regimes that form part of the overall legal framework that regulates competitive behavior.

Modern antitrust law is thus global antitrust law. (We shall use “antitrust” law to refer to what other nations generally call “competition” or “anti-monopoly” law.) Modern antitrust law also differs from traditional antitrust law in that it now reflects the dominance of the economic model of analyzing antitrust and competition policy. This is a shift that has occurred both in the U.S. and EC, where legal models that once included political, formalistic, corporatist, or autonomy-based notions of “competition” have embraced an exclusively economic methodology based on maximizing consumer welfare, and have done so in a way that is common to the diverging political viewpoints in each. There remain important differences between the U.S. and EC, and differing political viewpoints, but they no longer have as much to do with different values as with different presumptions about how to resolve theoretical or empirical ambiguities raised by a common framework of antitrust economics. The same is true for most other developed nations, as well as for the developing nations that increasingly borrow from the antitrust frameworks of the U.S. or EC.

These two key aspects of modern antitrust law are highly related, for the common economic methodology used in the U.S. and EC means both are amenable to analysis by a common body of scholarship that speaks an increasingly common language of antitrust economics. It differs from pure economics in that it must crucially concern itself with the administrability and implementation of economic concepts in a world where information is limited, decision-makers are imperfect, adjudication is lengthy and costly,

and parties are strategic both in litigation and in responding to different substantive rules. But those realities are common across nations, and thus this modern methodology means that antitrust and competition scholars are, whether they recognize it or not, now part of a global community and that ideas generated on one continent cannot safely be cabined and ignored on the others.

We thus organize this casebook as a study of global antitrust law and economics. Major U.S. and EC laws and cases will be presented and analyzed on each major antitrust topic. Although we also briefly summarize in each section the competition laws of other jurisdictions, our focus is on the U.S. and EC for several reasons. First, as a practical matter, the lion's share of global antitrust enforcement is done by the U.S. and EC. Second, as a conceptual matter, nations outside those jurisdictions by and large borrow the basic statutory frameworks of either the U.S. and EC and employ similar methods of antitrust analysis. Knowing how the U.S. and EC jurisdictions have grappled with the standard set of antitrust problems thus goes a long way to understanding how antitrust analysis is done in the rest of the world too. We discuss other nations in a bit more length where they seem to clearly raise a "third way" of addressing an important antitrust issue.

This is not a book on comparative law in the narrow sense of analyzing comparisons purely in order to shed light on laws that are really national in application. Rather we write with the conviction that this combination of laws from varying nations in actual practice presents a truer picture of the overall regime of competition law that now faces multinational market players. But it is surely a delightful side-benefit that this juxtaposition provides important comparative insights into differing possible approaches and their benefits and drawbacks, which will also aid analysis even in purely national markets. Nor is this a book on international antitrust law in the narrow sense of analyzing how nations resolve legal conflicts between their antitrust regimes. Such topics will certainly command attention in our final chapter, but our dominant perspective is that the antitrust laws of multiple nations are legally relevant to modern antitrust law and practice. Thus, this is not a book on comparative or international antitrust law any more than a casebook on contracts law that includes cases from multiple states is a book on comparative or interstate contracts law. It is rather a book designed to replace more parochial books on basic antitrust law by giving a more realistic sense of the range of issues and analyses relevant to modern antitrust law wherever practiced.

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GLOBAL ANTITRUST LAW AND ECONOMICS

CHAPTER 1

INTRODUCTION

A. THE FRAMEWORK OF LEGAL ISSUES RAISED BY BASIC ANTITRUST ECONOMICS

How the Basic Economics Explains the Core Legal Concerns. In a world of perfect competition, life is good. Firms can enter and exit markets instantly and without cost, products are homogeneous, and everyone is perfectly informed. Firms are so numerous that none of them is large enough to influence prices by altering output and all act independently. Supplier competition for sales thus drives prices for products and services down to the costs of providing them. (Costs here should be understood to include capital and risk-bearing costs, and thus incorporates a normal profit that reflects the capital market rate of return necessary to induce investment in firms given the risk level.) Any firm that tried to charge more than costs would be undercut by another firm that would charge less because they would gain sales whose revenue exceeded costs. Lower cost producers would thus underprice and displace higher cost producers. Their output would be purchased whenever market buyers found that the value of the product to them exceeded its price/cost but not otherwise.

If demand increased or costs decreased so that suppliers would earn supranormal profits if their output remained constant, then the existence or prospect of those supranormal profits would induce supplier expansion or entry, increasing supply until it drove prices back down toward costs. If demand decreased or costs increased so that suppliers would earn substandard profits if their output remained constant, then they would contract or exit the market, shifting any moveable capital to more profitable ventures and reducing supply until prices rise to meet costs. The nice result is to allocate societal resources towards those markets where they can best provide value to buyers. Even nicer, it does not have to be the case that suppliers are omniscient, or even know what they're doing—the market will winnow out those who guess wrong regardless.

In the real world, life is regrettably imperfect. Entry, exit or expansion are costly and take time. Products vary by brand or attributes and information is imperfect. Economies of scale mean many markets cannot sustain a large enough number of firms to leave each without any incentive to consider the effect of its decisions on market prices. But despite such unavoidable realities, typical markets are workably competitive in the sense that they produce results that are fairly close to perfect competition, at least in the long run. In any event, perfect competition provides an aspiration and useful benchmark that helps identify the sort of interferences with market mechanisms that should most concern antitrust law. The economic literature analyzing such issues can be frightfully complicat-

ed and mystifying. Luckily the essential regulatory issues flow in a simple straightforward way from the basics outlined above.

The first major concern is that firms might agree to avoid competing with each other, thus elevating prices above cost and increasing their profits to supracompetitive levels. Price-fixing agreements among competitors is a classic example. Similar results can be obtained by agreements to restrict output or divide markets or impede entry. The legal responses to such concerns about agreements to restrict competition will occupy us in Chapter 2.

A second concern is that one firm might individually be large enough to raise prices by reducing output. In the pure case of monopoly, there is only one firm and entry is impossible. Such a monopolist need not worry that, if it raises prices, it will lose business to rivals. Instead, it has incentives to raise prices above costs, up to the point that the extra profits earned from the customers willing to pay the higher price are offset by the profits lost from diminished sales to other customers who aren't willing to pay that price. The result is higher prices, lower output, and many customers who inefficiently do not get the product even though they value it more than it costs to provide. A single buyer, called a monopsonist, raises the parallel problem that it has incentives to suppress prices below competitive levels, which suppresses output from suppliers.

True monopolists are rare. More typical is what economists call a dominant firm, which is a firm that is much larger than the other firms because it has lower costs or a better product. A dominant firm also has incentives to price above cost, but is somewhat constrained by the ability of the other firms to offer the product at their costs. The dominant firm faces what is called the residual demand that results when one subtracts from total market demand the output that the other less efficient firms provide at any given price. The dominant firm effectively faces no competition for this residual demand, and thus has similar incentives to a monopolist to increase prices above its costs. A similar result follows even if rivals are not less efficient but would have difficulty expanding or entering in response to an increase in prices.

The mere possession of monopoly or dominant power need not, however, be a concern. If a firm makes a better mousetrap, and the world beats a path to its door, it may drive out all rivals and establish a monopoly; but that is a good result, not a bad one. Dominant market power normally reflects the fact that a firm is more efficient because of some cost or quality advantage over its rivals. If a firm has acquired that efficiency advantage through productive investments in innovation, physical capital, or organization, then the additional profits it is able to earn might reasonably be thought to provide the right reward for that investment, especially since any price premium it charges cannot exceed its efficiency advantage over other prevailing market options.

Typically the antitrust laws are instead focused on anticompetitive conduct that is used to obtain or maintain monopoly or dominant market power at levels that were not earned through productive efforts. A dominant firm has incentives to use anticompetitive conduct to exclude rivals from the market, impair rival efficiency, or impede the sort of rival

expansion and entry that would drive down prices toward more competitive levels. So does a firm that, while not yet dominant, thinks such anticompetitive conduct will help it obtain dominance. Because a firm that obtains or maintains monopoly or dominant market power can exploit it unilaterally, it also has incentives to engage in such anticompetitive conduct unilaterally, rather than requiring agreement or coordination with rivals. Chapter 3 will address how the law seeks to identify such unilateral anticompetitive conduct and distinguish it from procompetitive unilateral conduct.

Firms with market power might likewise have incentives to enter into agreements with suppliers or buyers to try to exclude rivals, diminish their efficiency, or impede their expansion or entry. Because these agreements are up or down the supply chain, they are generally called “vertical” agreements, in contrast to the “horizontal” agreements entered into by rivals at the same level. They thus involve concerted action but also involve firms who use such vertical agreements to obtain or maintain single firm market power. Chapter 4 addresses these sets of cases.

Firms might also engage in unilateral conduct or vertical agreements that antitrust law fears will impede competition among downstream firms. One form of unilateral conduct that some laws seek to condemn on this score is price discrimination among buyers that distorts their ability to compete downstream. Similar concerns have been raised about vertical agreements to restrain resale by buyers, including agreements to fix the prices that distributors can charge downstream, or to limit where or to whom they can sell. As we will see, legal liability for such conduct or agreements has been the subject of strong economic critique, based mainly on the observation that firms typically have little incentive to impede competition among downstream firms. Such issues will be addressed in Chapter 5.

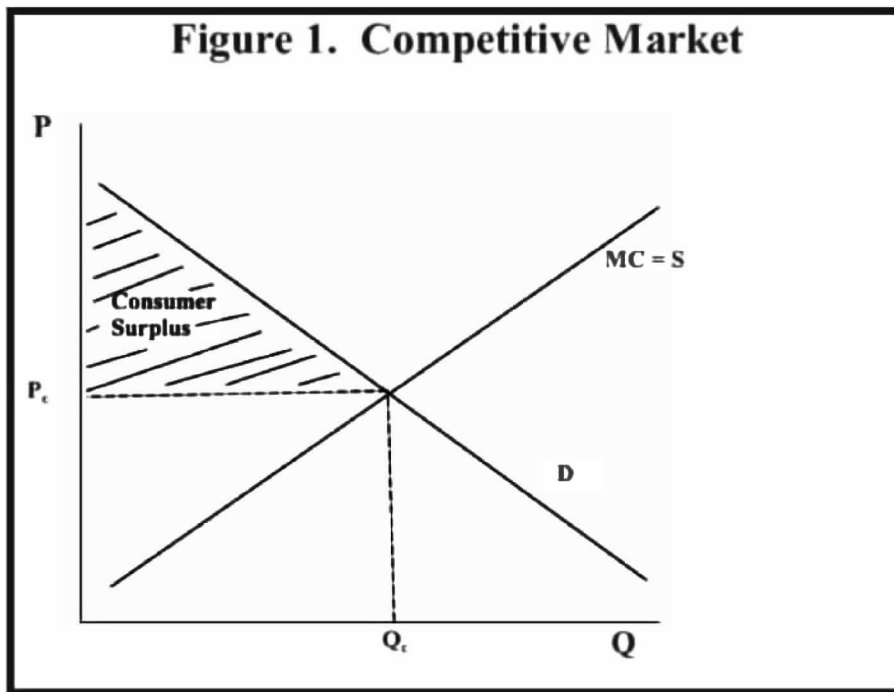
Chapter 6 then addresses how to prove the existence of an agreement, and addressed a third concern: that some markets have few enough firms that each has an influence on prices and output, and can notice and respond to the actions of each other. If so, then even without an explicit agreement, such firms may be able to coordinate to restrict output and raise prices. This is called oligopolistic coordination. The big difficulty this raises is whether such coordination can be condemned without proof of an agreement, especially when oligopolistic firms cannot avoid knowing that their pricing and output decisions will affect the behavior of other firms.

The final major concern, addressed in Chapter 7, is that rivals might merge or combine into one firm. Horizontal mergers can have anticompetitive effects if the resulting firm has monopoly or dominant market power, or the structure of the rest of the market means the merger will create an oligopoly or exacerbate its ability to coordinate on higher prices. The difficulty is determining when this is the effect of a merger and whether the merger is justified by any greater efficiencies it might create. Vertical mergers between firms up and down the supply chain raise issues similar to vertical agreements that might exclude or impair rival competition. Mergers between firms that are not related horizontally or vertically are called conglomerate mergers, which raise issues if they eliminate potential hori-

zontal competition or enable the merged firm to engage in anticompetitive exclusionary conduct.

In addressing all the above issues, antitrust courts and regulators must also face the problem that many markets span multiple antitrust regimes. In particular, on global markets, firms are subject to regulation under U.S. and EU antitrust law. As we shall see throughout the book, those laws often vary significantly from each other and from antitrust regulation in other nations, which offers a useful lens for analyzing the relevant issues. But when should a nation regulate conduct that either occurs or has effects extraterritorially, and what does one do about the international conflicts in antitrust regimes that result when multiple nations seek to regulate the same conduct? Further, what does one do with conduct that anticompetitively harms markets (typically outside the U.S. and EU) in a way that no individual antitrust authority has strong incentives to pursue? Chapter 8 addresses those topics.

Graphing the Basic Economics. The prior section explains the basic relevant economics using simple words. But some might find graphical depictions more helpful. In a competitive market, the situation is represented by Figure 1. The X-axis indicates the market quantity Q . The Y-axis indicates the market price P . The line marked D is the demand curve, which indicates what quantity buyers would demand at each price. As price (P) goes up, the quantity demanded (Q) goes down because making a product more expensive means fewer buyers will find the value of the product worth the price. That is why the demand curve goes down. The line marked MC indicates the marginal cost of production. It generally increases as quantity goes up, mainly because increasing market quantity generally requires bidding away resources from other markets or because seller's plants are operating at output levels where their marginal costs of operation would increase if they made more. The MC curve is also the same as the supply curve, S , which indicates the quantity the market would supply at each price, because in a competitive market suppliers should be willing to supply output at any price that exceeds their marginal cost. If they didn't, then a rival seller would take away the sale at any $P > MC$ because that would be more profitable to the rival than losing that sale.



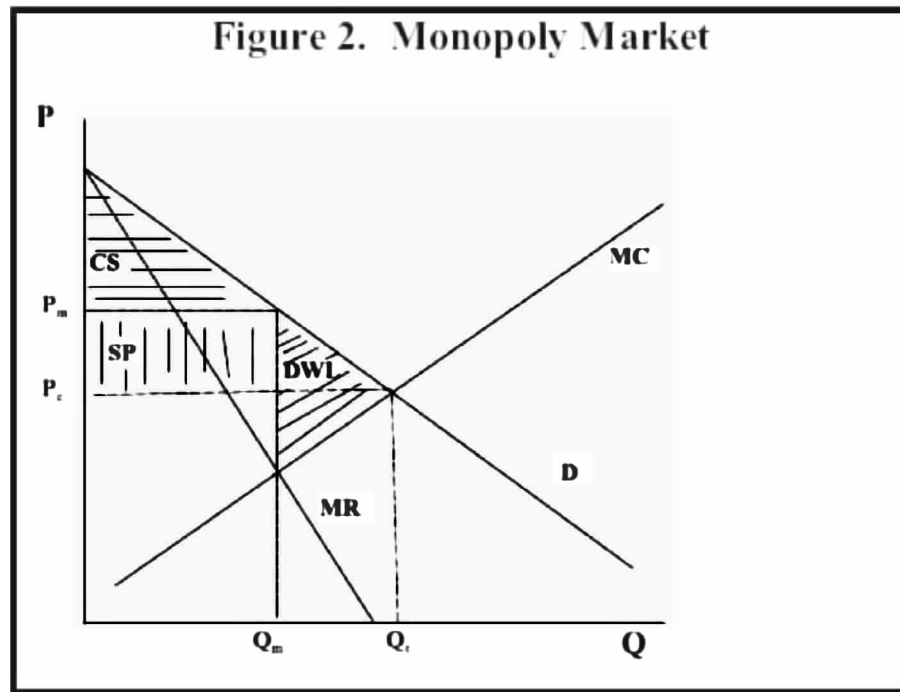
The intersection of the demand and supply curves is the competitive market equilibrium, where buyer willingness to pay matches supplier willingness to provide, and P_c and Q_c are, respectively, the competitive market price and quantity. If the price dipped below P_c , then quantity supplied would dip below Q_c but that would leave some buyer demand unsatisfied because some buyers are willing to pay a higher price, and thus they would bid up the price until it reached P_c again. If a supplier tried to charge above P_c then the quantity demanded would go below Q_c , but that would leave an opportunity for a rival seller to win sales by charging a lower price. Thus rival sellers would bid down the price until it reached P_c again.

This competitive market equilibrium has many wonderful features. Goods are never provided to buyers if the marginal cost of doing so exceeds the value buyers would put on it, as indicated by buyer willingness to pay. Goods are provided whenever buyer valuation does exceed marginal cost. If demand increases (such as if rainy weather increases the need for umbrellas), then the demand curve will shift to the right (at each price, more quantity demanded), but then a new equilibrium arises, with a higher P_c and Q_c , that again provides the good whenever buyer valuation exceeds market cost. If costs increase (such as if increased metal costs make it more expensive to make umbrellas), then the supply curve will go up, resulting in a higher P_c and lower Q_c , but again the product will be supplied whenever buyer valuation exceeds the new marginal cost. And the whole thing works in reverse if market demand or costs decrease.

Further, only the marginal buyer (the buyer on the demand curve whose willingness to pay just equals P_c) pays a price that equals her

valuation of the product. All the inframarginal buyers (buyers on the demand curve to the left of Q_c) value the product more highly than P_c , and thus enjoy a consumer surplus that reflects the difference between their valuation and P_c . The total consumer surplus is the shaded area in Figure 1.

Now suppose that instead of a competitive market, we have a monopoly market with only one supplier. Then the situation will instead reflect Figure 2. The monopolist will not simply increase its output whenever the market price exceeds its marginal cost. The reason is that the monopolist knows that if it increases output to sell to the marginal buyer, it will decrease prices to all its inframarginal buyers as well. Thus, for every increased unit of output, its marginal revenue, marked by the MR curve, is lower than the market price because selling that unit gains it the market price on the marginal unit, but also causes it to suffer a lower price on all the inframarginal units. (In a competitive market, sellers ignore this effect because the inframarginal units are sold to other sellers.) Thus, instead of setting its market output at where price equals marginal cost, a monopolist will maximize profits by setting its market output at where price equals its marginal revenue, or at Q_m . At this subcompetitive level of output, market demand will lead to a supracompetitive price, P_m .

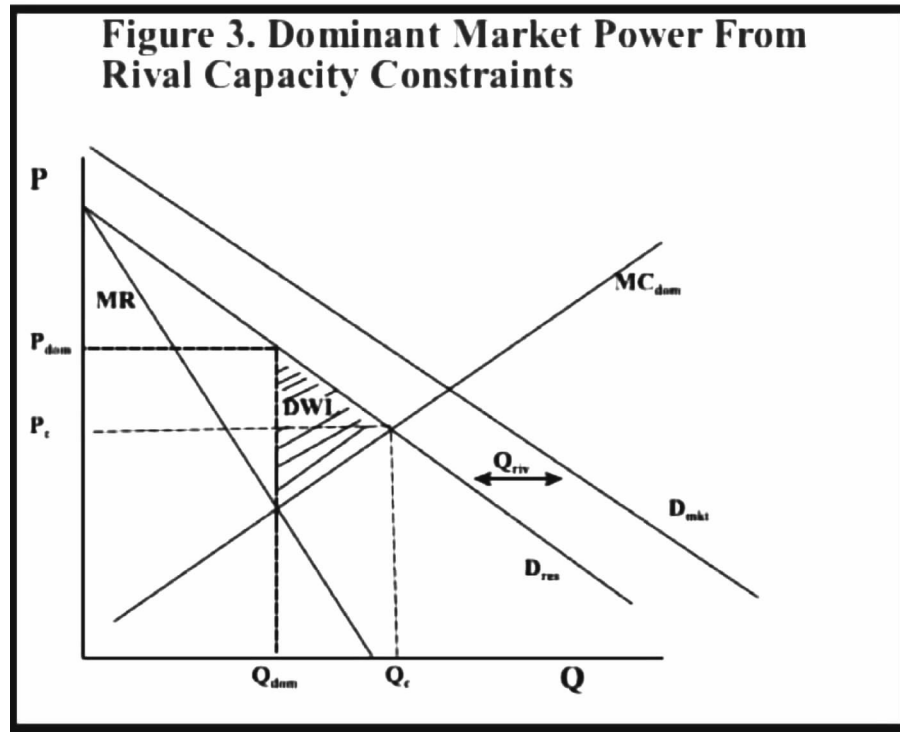


At this monopoly price there will be an allocative inefficiency, called a dead weight loss, which is marked DWL on the graph. This reflects the fact that many buyers who value the product more than it would cost to make it (all the buyers on the demand curve between Q_m and Q_c) would not get it. It is called an allocative inefficiency because it reflects an inefficient

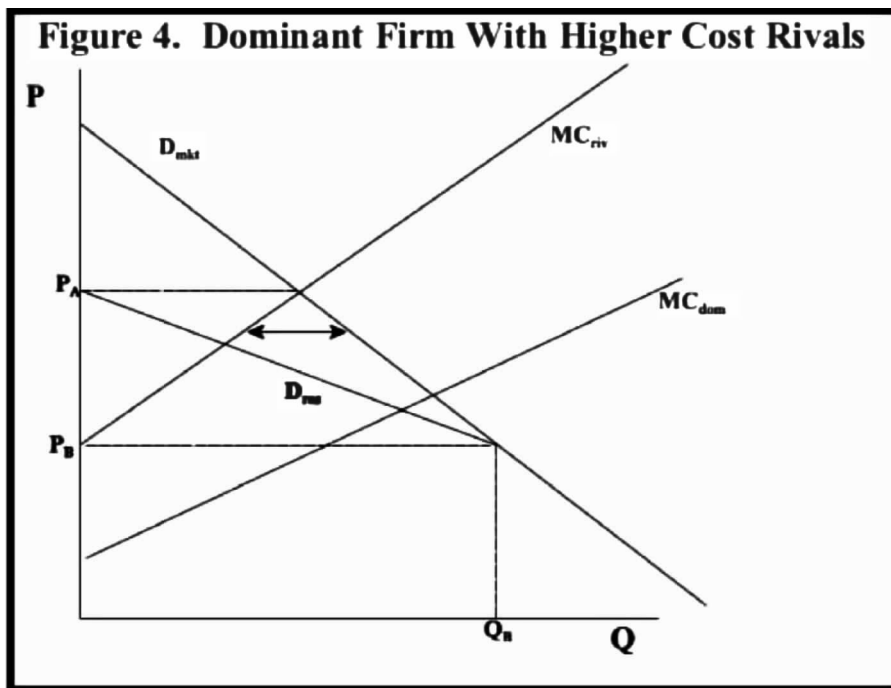
allocation of resources. The supracompetitive profits would equal the quantity produced (Q_m) times the difference between P_m and P_c , which is represented by the box marked SP. The consumer surplus would be reduced to the area marked CS on the graph. Thus, the monopoly pricing would both be inefficient and reduce consumer welfare.

In a cartel, rivals agree to make decisions about price or output together, and thus collectively act like a monopolist, maximizing their profits by agreeing to fix a price above the competitive level, or by agreeing to fix an output below the competitive level. Either strategy amounts to the same thing. Both strategies require the cartel members to reach some sort of understanding about how to allocate the market quantity among the various rivals, because all of the sales earn supracompetitive profits and thus every rival will want them.

A dominant firm prices in a way similar to a monopolist, but against a residual demand curve. Suppose, for example, a firm enjoys dominant market power because the rest of the market is capacity-constrained; rivals are making as much as they can and cannot make any more. Then the situation can be illustrated by Figure 3. D_{mkt} indicates overall market demand. At any price, the dominant firm knows that its rivals can produce no more than their capacity cap, marked as Q_{riv} . Thus, the dominant firm faces the residual demand curve, marked D_{res} . Against that residual demand curve, the dominant firm will price just like a monopolist, producing price and quantity P_{dom} and Q_{dom} . If rivals' ability to expand output is not totally blocked, but is limited so that they are more willing to expand supply at higher prices, then Q_{riv} will get larger at higher prices. This will make the residual demand curve flatter, but will not eliminate it unless rivals' supply is perfectly elastic—that is, unless rivals can expand instantly to supply the whole market if prices go above competitive levels. A firm can have such market power even if it does not have a huge share of the market if rival ability to expand output is sufficiently limited.



The situation is a bit more complicated, but similar, where a dominant firm enjoys market power because it is more efficient than its rivals. Suppose a dominant firm has marginal costs that are lower than its rivals. Then the situation can be described by Figure 4. We can ascertain the residual demand curve faced by the dominant firm by asking what quantity its rivals would supply at each price given their higher costs, and then subtracting that quantity from the market demand. For example, at price P_A , rivals operating at marginal cost will make enough output to satisfy all market demand, leaving the dominant firm with zero residual demand. At price P_B , rivals will make zero output, so that residual demand equals the entire market demand at that price, or Q_B . For any price between P_A and P_B , the residual demand available to the dominant firm is the line that connects point $(P_A, 0)$ and point (P_B, Q_B) . The residual demand at each price reflects the difference between the quantity rivals will supply at that price and the quantity the market would demand at that price, which is the difference between MC_{riv} and D_{mkt} , marked as \longleftrightarrow on the graph. Against that residual demand curve, the dominant firm prices just like a monopolist. Again, a firm can have such market power even if it does not have a huge market share.



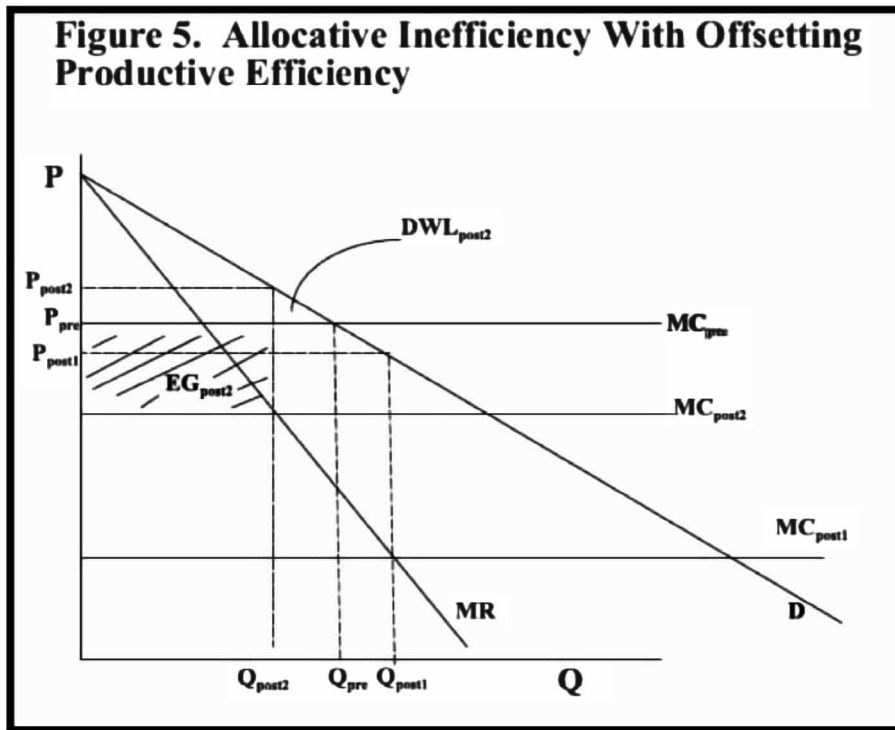
Mere possession of monopoly or market power is not a concern because it may merely indicate the fruits of investment in building more capacity or becoming more efficient than rivals. If a firm lowers its marginal costs, it is said to increase its productive efficiency, and such an increase in productive efficiency can offset any reduction in allocative efficiency. Indeed, in the above cases, buyers are clearly better off if the dominant firm exists or has lower costs, than if it did not, because if it did not then prices would be higher and quantity lower. However, agreements that create cartels that have monopoly or market power are a concern because they create no offsetting efficiencies. Likewise, anticompetitive conduct that restricts rival competitiveness, by limiting their ability to expand output or by raising rival costs, can enhance monopoly or market power without offsetting efficiencies and thus are also an anticompetitive concern.

If there are not many firms, they may be able to coordinate on prices that are above competitive levels without reaching an actual agreement. Such coordination can achieve results similar to monopoly or dominant firm pricing if the coordinating firms collectively have monopoly or market power. Mergers are often condemned because they make such coordination possible or easier. Mergers may also be condemned because they create a firm that will enjoy unilateral market power or because they make it easier for the merged firm to engage in anticompetitive conduct that impairs rival efficiency.

However, mergers and other conduct may create both productive efficiencies and allocative inefficiencies, and sometimes the former might offset the latter. Consider Figure 5. Suppose that before a merger (or some

alleged misconduct), a firm is constrained to price at marginal cost, depicted as MC_{pre} . The merger (or conduct) both lowers its marginal costs (increasing productive efficiency) and gives it market power, so it now acts as a monopolist against the demand curve, creating allocative inefficiency. Consider two cases. In case 1, the merger (or conduct) lowers marginal cost all the way down to MC_{post1} . The firm then sets output at where its marginal revenue equals its marginal costs, meaning at Q_{post1} , which results in a price of P_{post1} , which is actually lower than the initial price of P_{pre} . Here enough productive efficiency was passed on to consumers that they are that they are better off after the conduct than before, and the firm is better off since it earns higher profits than before. The merger (or conduct) in case 1 increased both consumer welfare and producer welfare, and thus increased total welfare, which is the combination of the two.

In case 2, the merger (or conduct) lowers marginal cost down somewhat less, to MC_{post2} . The firm then produces Q_{post2} , at a price of P_{post2} , which is actually higher than the initial price of P_{pre} . Now we have conflicting effects. Compared to the initial situation, there is a deadweight loss, indicated by DWL_{post2} , reflecting the fact that output is lower than it was before. However, there is also an efficiency gain, indicated by EG_{post2} , reflecting the fact that costs are lower. If, as here the size of the efficiency gain exceeds the size of the dead weight loss, then there is a net increase in efficiency and total welfare. However, consumer welfare has decreased, not only because of the deadweight loss, but also because buyers pay a higher price on the output they still buy. However, the firm gains both the latter higher prices and the efficiency gain, so the increase to producer welfare exceeds the loss to consumer welfare. Thus, conduct might simultaneously decrease consumer welfare and increase total welfare, raising the issue of which to favor. As we shall see, so far antitrust law generally favors a consumer welfare standard, perhaps on the notion that producers could always convert a total welfare gain into a consumer welfare gain by transferring some of their increased profits back to consumers. But the issue remains controversial, particularly for mergers of firms that mainly export to other nations.



B. THE REMEDIAL STRUCTURE

Understanding all the above issues requires some understanding of the basic remedial structure of U.S. and EU law. Indeed, one recurring issue throughout this book is whether differences in remedies between the United States and Europe suggest the desirability of having different substantive rules about which conduct merits a remedy. While more detail follows below, the basic differences between the U.S. and EU can be plainly stated.

In the U.S., the basic antitrust laws are enforced not only by governmental actions for injunctive relief, but by criminal penalties and by private suits brought by injured parties (or by states on their behalf) for treble damages, injunctive relief, and attorney fees. The exception is the Federal Trade Commission Act, which is enforceable only through injunctive relief in cases brought by the Federal Trade Commission (FTC) and subject to judicial approval. Most U.S. antitrust cases are brought by private parties seeking damages rather than by centralized government agencies.

In the EU, in contrast, virtually all enforcement is done by the European Commission (or national competition agencies) in a way roughly analogous to the Federal Trade Commission in the United States. EU competition law does not provide for criminal sanctions, although the competition laws of some of the Member States, such as the United Kingdom, contain criminal penalties. Although in theory any violation of EU competition law would also be subject to a private suit for (untrebled)

compensatory damages in the courts of any European nation on a general tort theory, as a practical matter this option is seldom used because private suits are hampered by lack of discovery, fee-shifting statutes and other procedural obstacles. In recent years, the European Commission has shown growing interest for private law enforcement of EU competition rules, but, so far, has done very little to overcome the procedural obstacles preventing the development of private antitrust litigation.

1. AN OVERVIEW OF U.S. ANTITRUST LAWS AND REMEDIAL STRUCTURE

The primary source of U.S. antitrust law are a handful of statutes enacted by the U.S. Congress. The Sherman Act, enacted in 1890, provides the basic laws condemning (in § 1) anticompetitive agreements and (in § 2) unilateral conduct that monopolizes or attempts to monopolize.¹ Violations of either section constitute a felony that can be criminally prosecuted by the U.S. Department of Justice (DOJ). Other provisions make the Sherman Act enforceable by DOJ actions for injunctive relief, and through private suits brought by injured parties (or by states on their behalf) for treble damages, injunctive relief, and attorney fees.²

The 1914 Clayton Act added more specific antitrust laws governing (in § 2) price discrimination in commodities, (in § 3) sales of commodities conditioned on the buyer not dealing with the seller's rivals, and (in §§ 7–8) mergers and interlocking directorates. Clayton Act § 3 remains in its original form, but the provision on price discrimination was amended in 1936 by the Robinson–Patman Act, and the provision on mergers was amended in 1950 by the Celler–Kefauver Act and supplemented in 1976 by the Hart–Scott–Rodino Act which provides for pre-merger notification to U.S. enforcement agencies.³ These Clayton Act provisions are not enforceable by criminal penalties, but are otherwise enforceable by the DOJ and private suits in the same way as the Sherman Act.⁴ They are also enforceable through prospective cease-or-desist orders by the FTC, unless the conduct occurs in an industry regulated by a special federal agency, in which case the special agency has that authority.⁵

The 1914 Congress also enacted FTC Act § 5, which generally prohibits all “unfair methods of competition.”⁶ (This provision also prohibits unfair or deceptive practices, which are addressed by a separate consumer protection branch of the FTC.) The vagueness of the “unfair” language has

1. See 15 U.S.C. §§ 1–2.

2. See 15 U.S.C. §§ 4, 12, 15–15c, 25–26.

3. See 15 U.S.C. §§ 13–14, 18–19.

4. See 15 U.S.C. §§ 12, 15–15c, 25–26. Robinson–Patman Act § 3 imposes criminal penalties up to \$5000 and a year in prison for knowingly price discriminating with an anticompetitive purpose, see 15 U.S.C. § 13a, but this provision is seldom enforced.

5. See 15 U.S.C. § 21. The special agencies are the Federal Communications Commission, the Federal Reserve Board, the Department of Transportation and the Surface Transportation Board. *Id.*

6. See 15 U.S.C. § 45(a).

been cabined by a 1994 amendment, which provides that the FTC cannot deem conduct “unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁷ The FTC Act is not enforceable by private suits, nor by the DOJ, nor by any retroactive penalties.⁸ Instead, it is enforceable only by the FTC itself, whose only remedy is to issue a prospective order to cease and desist the activity, which is in turn subject to review by the federal courts of appeals.⁹ The FTC can also go to court to seek a preliminary injunction pending a final resolution by itself and the courts.¹⁰ Although the FTC may have authority to adopt prospective rules defining the conduct it regards as an unfair method of competition, it has not exercised such authority as a matter of practice.¹¹

The FTC does not have jurisdiction to enforce Sherman Act violations, *see* 15 U.S.C. § 21, but this is of little practical importance in cases seeking injunctive relief because anything that violates the Sherman Act could also be deemed an unfair method of competition actionable under FTC Act

7. 15 U.S.C. § 45(n).

8. *See* 15 U.S.C. § 12 (defining “antitrust laws” enforceable in those ways to exclude the FTC Act); 15 U.S.C. § 56(a) (vesting the FTC with exclusive enforcement authority over the FTC Act with limited exceptions).

9. *See* 15 U.S.C. § 45.

10. 15 U.S.C. § 53(b).

11. The legal issue is surprisingly unsettled. Before 1973, it was seriously doubted that the FTC Act gave the FTC authority to issue substantive rules. *See* K. DAVIS, *ADMINISTRATIVE LAW TEXT* 130 (3d ed. 1972); Marinelli, *The Federal Trade Commission’s Authority to Determine Unfair Practices and Engage in Substantive Rulemaking*, 2 OHIO N.U.L. REV. 289, 295–96 & n.75 (1974). Then, in *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 673–78 (D.C.Cir. 1973), Judge Skelly Wright interpreted 15 U.S.C. § 46(g) to give the FTC authority to adopt substantive rules defining “unfair methods of competition” and “unfair and deceptive trade practices.” But that was a debatable interpretation because § 46(g) could be read to just authorize creating procedural rules for carrying out the FTC’s cease and desist powers. It was also dicta as applied to rules defining “unfair methods of competition” because the case was actually about a rule defining an “unfair and deceptive trade practice,” namely the failure to disclose octane levels on gas pumps. The House initially passed a bill that said the FTC had authority to enact rules defining deceptive trade practices but not unfair methods of competition; however, the House compromised with the Senate on a statute that did the former but did not purport to alter whether or not authority existed to enact rules defining unfair methods of competition. *See* 15 U.S.C. § 57a(2); H.R. Rep. No. 1107, 93d Cong., 2d Sess. 49–50 (1974), reprinted in 4 U.S. Code Cong. & Ad. News 7702, 7727 (1974); S. Rep. No. 1408, 93d Cong., 2d Sess. 32 (1974) (conference report), reprinted in 4 U.S. Code Cong. & Ad. News 7755, 7764 (1974). Thus, it appears there were insufficient legislative votes for either the proposition that the FTC could enact rules defining anticompetitive practices or the proposition that it could not. The FTC rules on its rulemaking procedure seem to carefully limit its rulemaking to deceptive practices (Rule 1.7) or special areas where it has express statutory authority to adopt rules, such as defining whether certain conduct constitutes illegal price discrimination (Rule 1.23–1.24) unless the reference in Rule 1.2.1 to “unlawful trade practices” is intended to cut more broadly. The only substantive rule related to competition that the FTC ever enacted was pursuant to its special authority to define price discrimination under 15 U.S.C. § 13(a), and has since been rescinded. *See* 58 Fed. Reg. 35907–01. The FTC does not appear to have adopted any substantive rule that purported to define “unfair methods of competition” that were not deceptive nor any procedural rule that claims general authority to enact rules defining “unfair methods of competition” that are not deceptive.

§ 5.¹² Thus, the DOJ and FTC effectively have concurrent jurisdiction over most industries when seeking injunctive relief. However, especially for mergers, they have adopted a practice of informally dividing their jurisdiction by concentrating on different industries, though an effort to adopt a written agreement that would more precisely define this division was withdrawn in the face of Congressional opposition.¹³

Federal courts have exclusive jurisdiction over federal antitrust claims.¹⁴ Antitrust cases brought by anyone other than the FTC (or special agency) are brought in the U.S. federal district courts for a trial to adjudicate the facts and determine the relevant law,¹⁵ and citations to their opinions are marked “F. Supp.” Appeals from decisions of the district courts are generally first brought to the U.S. Courts of Appeals (noted “F.2d” or “F.3d” in citations), which are often called the circuit courts because there is a different one for each region of the country. Most are numbered (e.g., “1st Cir.” is New England, “9th Cir.” comprises certain West Coast states) except for the D.C. Circuit, which sits in Washington, D.C. and tends to handle appeals from federal agency decisions. Appeals are on questions of law, though this can include such legal questions as whether there was sufficient evidence to support the factual findings and whether those findings suffice to meet the legal standard. Losing parties can then seek review before the U.S. Supreme Court (marked “U.S.” in citations), but although that Court was formerly obligated to take any appeal that presented a “substantial” federal question, it now has discretion to decide when to take a case (called taking “certiorari”), which it generally does only when the circuit courts are split on an important relevant legal issue.¹⁶

In addition, many states have their own antitrust statutes. These statutes tend to be less vigorously enforced, in part because they generally borrow U.S. antitrust standards and are usually brought as ancillary claims to U.S. antitrust claims that can be brought only in federal court. Plus, state antitrust enforcement is usually left to the understaffed offices of state attorneys general. However, state antitrust law is free to prohibit

12. See *FTC v. Cement Institute*, 333 U.S. 683, 689–95 (1948).

13. See Baer, Feinstein & Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, 18 *ANTITRUST* 15, 20–21 (Spring 2004).

14. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

15. At the FTC, the general procedure is instead (1) the five commissioners issue a complaint, (2) that complaint is adjudicated by an administrative law judge (ALJ) within the FTC, (3) that ALJ decision is appealed to the five commissioners who decide whether to issue the cease and desist order, and (4) that FTC decision is appealed directly to the Courts of Appeal, and from there to the Supreme Court where appropriate. See 15 U.S.C. §§ 21, 45. The exception is that the FTC must bring a claim for a preliminary injunction to a federal district court, 15 U.S.C. § 53(b), which generally must be done in merger cases to prevent the merger from occurring. At any step along the way, the FTC (like the DOJ) can instead settle with the parties and enter into a consent decree limiting their conduct or merger in some way, which is in fact how the bulk of cases are ultimately handled.

16. Historically, there were special statutes that provided for antitrust trials by 3 judge district courts and direct appeal to the U.S. Supreme Court, which was true in some of the cases in this book. But today direct appeal from district court to the U.S. Supreme Court is exceedingly rare, though possible in extreme cases. See 15 U.S.C. § 29.

conduct that federal antitrust law allows,¹⁷ and in the rare cases where it does so, it can have important effects. And occasionally the state attorneys general indicate a willingness to pursue a case beyond where the federal authorities think is appropriate even under the same antitrust standards, as happened in the Microsoft case where some states did not agree to the U.S.'s settlement and thus continued to pursue the states' claims.

i. Criminal Penalties. The criminal penalties for violating the Sherman Act have changed over time, and currently provide for punishment “by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” See 15 U.S.C. §§ 1–2. In addition, general U.S. criminal law allows for an alternative fine equal to twice the defendant’s pecuniary gain or the victims’ pecuniary loss. See 15 U.S.C. § 3571(d).

The Supreme Court has held that defendants can be criminally liable even for rule of reason offenses.¹⁸ However, proving a criminal violation of the Sherman Act requires proving a criminal intent (called *mens rea*), which necessitates proof that the conduct either (1) had “anticompetitive effects” and was “undertaken with knowledge of its probable consequences” or (2) had “the purpose of producing anticompetitive effects . . . , even if such effects did not come to pass.”¹⁹ Thus, criminal violations require proof either of an anticompetitive intent or of knowledge that anticompetitive effects were probable and in fact ensued. The Supreme Court has explained that the reason for adding these elements in a criminal suit, even though the same elements would not be required in civil suit alleging a violation under the very same statutory language, was the concern that, compared to civil penalties, criminal penalties would produce greater “overdeterrence” of “procompetitive conduct lying close to the borderline of impermissible conduct.”²⁰

The Department of Justice (DOJ) brings criminal prosecutions, and indeed most of the DOJ’s cases are criminal cases. The DOJ Manual generally limits enforcement to conduct that is clearly unlawful, known to be unlawful, intended to suppress competition, or a repeat offense.²¹ The DOJ does not limit its enforcement to per se violations, and indictments have even been sustained against agreements that other district courts found legal under the rule of reason.²² But as a matter of practice, virtually all the criminal prosecutions are for patently per se illegal horizontal agreements like price-fixing between unrelated competitors. These cases thus tend to raise few interesting legal issues in their adjudication. More interesting are the enforcement policy implications arising from the facts that the size of criminal penalties and number of criminal cases have both

17. See *California v. ARC America Corp.*, 490 U.S. 93, 104–05 (1989).

18. See *Nash v. United States*, 229 U.S. 373, 376–78 (1913).

19. *United States v. United States Gypsum*, 438 U.S. 422, 444 & n.21 (1978).

20. *Id.* at 441.

21. II PHILLIP E. AREEDA, ROGER D. BLAIR, & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 303, at 29 (2d ed. 2000).

22. See *id.* at 29–30 & n.9.

increased over time, that these cases are increasingly focused on foreign-based conspirators, and that the DOJ has had increasing success by offering leniency to the first conspirator who reveals the conspiracy or implicates the other conspirators.

ii. Treble Damages. The most distinctive feature of U.S. antitrust enforcement is that it provides actions for treble damages that mean government enforcement is supplemented, and in many areas dominated, by private suits. “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” can sue the violator for three times their damages plus litigation costs, including reasonable attorney fees.²³ The requirement of an injury to “business or property” excludes claims for physical injury but includes any claim of monetary injury.²⁴ If a court concludes the defendant has improperly delayed the antitrust suit, it can also award interest covering the period from the time the plaintiff filed suit to the time of judgment.²⁵

Treble damages often sound excessive because, at first cut, single damages should be adequate to deter any conduct whose harm exceeds its benefits. However, in fact treble damages are not as draconian as they sound because they are reduced by the fact that: (a) plaintiffs cannot collect pre-suit interest and usually cannot collect prejudgment interest, (b) plaintiffs have difficulty proving harm from the fact that the anticompetitive overcharge caused them not to buy the product at all (that is, the dead-weight loss triangle usually cannot be collected), and (c) in many courts, plaintiffs cannot recover damages for the harmful umbrella effect an overcharge causes by increasing the prices of rivals or substitutes. It has been calculated that the combination of these three factors reduces treble damages to single damages on average.²⁶ Further, single damages are likely to underdeter anticompetitive conduct because it is often difficult to detect or prove. Some conduct (like a cartel) is hard to detect, but once detected is easy to prove to be anticompetitive. Other conduct may be easier to detect, but harder to prove it is anticompetitive, such as a tie of some computer software to other software. High litigation costs may also deter many claims. Because expected damages will be the actual damages times the odds of detection and adjudicated punishment, they may well be less than the gains of conduct that inflicts greater costs than benefits.

Damage claims can be brought not only by private parties but by governments injured in their own “business or property,” though foreign governments are limited to single damages unless they themselves were not eligible for foreign sovereign immunity from antitrust claims because they

^{23.} See 15 U.S.C. § 15. “Antitrust laws” are defined to include the Sherman and Clayton Acts (as amended by later acts) but not the FTC Act or Robinson–Patman Act § 3. See 15 U.S.C. § 12; *Nashville Milk v. Carnation Co.*, 355 U.S. 373, 378–79 (1958). The former is enforceable just by injunctive claims by the FTC and the latter just by criminal actions by the DOJ, which are rarely brought.

^{24.} *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

^{25.} See 15 U.S.C. § 15.

^{26.} See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651 (2006).

were engaged in commercial activities.²⁷ In addition, states can bring a treble damages action on behalf of its residents (called a “*parens patriae*” action) for monetary injuries they suffered from a Sherman Act violation, unless those residents opt out of such litigation.²⁸ In such a *parens patriae* case, the district court can either distribute the damages to the injured parties or deem the damages a civil penalty and deposit them in the state treasury.²⁹ Few *parens patriae* are in fact brought, which probably reflects not only the uncertainty of gain to the state treasury but also a provision that makes the state liable for the defendant’s attorney fees if the court determines the action was in bad faith.³⁰

To prove damages, a party must show: (1) that the antitrust violation was a material but-for cause of its injury; (2) that its injury flowed from the anticompetitive effects of the violation; (3) that the link between the violation and injury was sufficiently direct or proximate; and (4) the amount of damages it suffered from the injury.

(1) *Material But-For Causation*. Like any plaintiff seeking damages, an antitrust plaintiff must show the violation was the “but-for” cause of its injury. This does not mean the plaintiff must show that the injury definitely would not have occurred but for the violation nor that other factors did not contribute to the likelihood or extent of that injury. The plaintiff need only show the violation was a “material cause” of its injury or “materially contributed” to that injury.³¹ Under this standard, “It is therefore enough that the antitrust violation contributes significantly to the plaintiff’s injury even if other factors amounted in the aggregate to a more substantial cause.”³² Lower courts have interpreted this to mean that there need only be a “reasonable probability” defendants’ antitrust violation caused plaintiffs’ injury; plaintiffs “need not rule out ‘all possible alternative sources of injury.’”³³ In short, to show but-for material causation, a plaintiff need only show that, but for the violation, the probability or extent of its injury would have been significantly lower. Just what constitutes “significantly lower” is not clear, but it is clear that the violation does not have to be more than 50% responsible for the probability or extent of injury.

27. See 15 U.S.C. § 15a (authoring federal suits); *State of Georgia v. Evans*, 316 U.S. 159 (1942) (holding that states are “persons” authorized to sue under the statute); 15 U.S.C. § 15(b) (limiting damage claims of foreign nations).

28. See 15 U.S.C. § 15c.

29. See 15 U.S.C. § 15e.

30. See 15 U.S.C. § 15c(d).

31. *Zenith Radio Corp. v. Hazeltine Research, Inc. (Zenith I)*, 395 U.S. 100, 114 & n.9 (1969) (“It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.”); *Continental Ore v. Union Carbide*, 370 U.S. 690, 702 (1962) (enough that violation “materially contributed” to the harm).

32. II AREEDA ET AL., *supra* note 21, at ¶ 338a, at 317.

33. *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir.1986); see also *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 539 (4th Cir. 1998); *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 149 (4th Cir. 1990).

Further, a defendant cannot defeat causation by arguing that it *could* have caused the same injury through lawful conduct.³⁴ Nor can it defeat causation by arguing that others would have chosen to act in the same way absent an anticompetitive restraint that dictated that choice.³⁵ The basic rationale is twofold. First, where defendants themselves thought they needed to restrain a certain market choice, it is highly likely that their restraint was in fact necessary to prevent that choice because defendants are unlikely to adopt restraints that they think have no purpose or effect. Second, any inquiry into whether defendants and others would have engaged in the same conduct absent a restraint that dictated that conduct involves a highly burdensome and counterfactual inquiry into a state of affairs that never existed. Because it is defendants' own fault that this unrestrained state of affairs did not exist, antitrust courts and plaintiffs should not bear the burden on this hypothetical inquiry.

(2) *Antitrust Injury*. An antitrust plaintiff seeking damages must also show that its injury constituted “*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.”³⁶ In short, a plaintiff must allege an injury that results from an anticompetitive aspect of the antitrust violation rather than from a procompetitive aspect of the challenged conduct. The basic point of this requirement is to preclude actions by antitrust plaintiffs that would suffer no injury unless the challenged conduct were actually procompetitive.³⁷

Thus, the Supreme Court has twice found no antitrust injury for rivals challenging horizontal mergers because the mergers would hurt the rival only if they *decreased* market prices to more competitive levels.³⁸ It has also found no antitrust injury for rivals challenging nonpredatory price-fixing or output restrictions (whether horizontal or vertical) because the challenged agreement would benefit the rival if they raised prices and thus could injure the rival only by bringing prices closer to competitive levels.³⁹ On the other hand, when a rival is an unwilling participant in the conspiracy and is punished or threatened with punishment for deviating from it, then it

34. *Virginia Vermiculite*, 156 F.3d at 540; *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir.1979); *Irvin Indus. v. Goodyear Aerospace Corp.*, 974 F.2d 241, 245–46 (2d Cir. 1992). *Cf.* *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 914 (6th Cir. 2003) (in Sixth Circuit, defendant can defeat causation by showing that legal conduct *would* have caused the same injury even without any antitrust violation).

35. *See* *United Shoe v. United States*, 258 U.S. 451, 462 (1922); X AREEDA, ELHAUGE & HOVENKAMP, *ANTITRUST LAW* ¶ 1753c, at 294–96 (1996) (collecting cases).

36. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (emphasis in original).

37. *See* *Los Angeles Memorial Coliseum v. NFL*, 791 F.2d 1356, 1364 (9th Cir. 1986) (“[T]he *Brunswick* standard is satisfied ‘on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant’s acts.’”)

38. *See Brunswick*; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

39. *Matsushita Electric v. Zenith Radio*, 475 U.S. 574, 586 (1986); *Atlantic Richfield v. U.S.A Petroleum*, 495 U.S. 328 (1990).

does suffer antitrust injury and has standing to sue.⁴⁰ Indeed, even a plaintiff that voluntarily agreed to an anticompetitive restraint can bring an antitrust claim, if the plaintiff was injured by the anticompetitive aspects of that restraint or by its enforcement against the plaintiff and if the plaintiff was not equally responsible for the restraint.⁴¹

This antitrust injury doctrine provides an enormously useful function: it screens out those plaintiffs whose anticompetitive motives make litigation unlikely to benefit consumer welfare. This not only saves litigation costs but also lowers the risk that antitrust courts will mistakenly impose liability that deters procompetitive conduct. Thus, like the *mens rea* requirement in criminal cases, this doctrine is an important part of reducing the overdeterrence of procompetitive conduct that antitrust law inevitably creates given errors or difficulties in distinguishing such conduct from anticompetitive conduct.

(3) *Proximate Causation*. An antitrust plaintiff seeking damages must also show that its injury was sufficiently direct or proximate. This generally, but not always, precludes antitrust claims by a plaintiff that claims the antitrust violation harmed an intervening party that passed the harm on to it. For example, if an antitrust violation harms a corporation, then its shareholders, employees and creditors cannot bring an antitrust suit. However, the Supreme Court has held that whether it terms an injury “direct” or “indirect” turns not on formalisms, such as whether an intervening party exists but rather on the application of three policy factors.⁴² Those factors are: (1) whether a more directly injured party could bring the same cause of action to vindicate the interest in statutory enforcement; (2) whether allowing suit by the indirect party would require complicated apportionment of damages to avoid duplicative damages; and (3) whether indirectness makes the causal inquiry too speculative.⁴³ The Court interprets these factors to foster, rather than frustrate, enforcement by concentrating the antitrust claim in the hands of the private party with the best incentives to vigorously enforce the statute.⁴⁴ The goal is to pick the best plaintiff, not to bar all plaintiffs.

40. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

41. See *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 138–141 (1968); *id.* at 143–48 (White, J., concurring). Because Justice White was the fifth vote for the Court opinion, his concurring opinions would seem to limit language in the Court opinion that suggested a plaintiff could sue even if it were equally responsible.

42. *Associated General Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983) (rejecting the “directness of the injury” test, stating that instead “courts should analyze each situation in light of the factors set forth in the text”); *Holmes v. SIPC*, 503 U.S. 258, 272 n.20 (1992) (interpreting the antitrust standard for incorporation to RICO cases and concluding, “Thus, our use of the term ‘direct’ should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text.”)

43. *Associated General*, 459 U.S. at 538–45; *Holmes*, 503 U.S. at 269, 273 n.20.

44. See *Associated General*, 459 U.S. at 542 (noting that the Court does not deny standing when that is “likely to leave a significant antitrust violation undetected or unremedied” and inquiring into “existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.”); *Kansas v. UtiliCorp*, 497 U.S. 199, 214 (1990) (“our interpretation of [Clayton Act] § 4 must promote the vigorous enforcement of the antitrust laws.”).

Thus, in *Associated General Contractors*, the Court denied antitrust standing to unions complaining that (a) the defendants had boycotted landowners and general contractors who used unionized subcontractors, (b) who in turn may (to some extent) have declined to use unionized subcontractors, (c) who in turn may have passed on some (unspecified) harm onto unionized employees, (d) who in turn may have passed on some (unspecified) harm to the unions who were the plaintiffs.⁴⁵ The Court concluded that this causal chain was too speculative, rife with possibilities for duplicative or hard to apportion damages, and that more direct plaintiffs existed. On the other hand, the Court stated that the unionized subcontractors allegedly injured at step (b) would have standing even though they were indirectly injured.⁴⁶ Why? Because the three factors were met for those plaintiffs. (1) Although more directly injured, the landowners and general contractors would have had little incentive to sue because they could avoid the harm by declining to use unionized subcontractors. (2) The unionized subcontractors' injury of lost business was distinct from the harm to landowners and general contractors of not being able to choose their preferred subcontractors. (3) The causal connection was not unduly speculative, especially since the harm to the unionized subcontractors was clearly intended and foreseeable.

Likewise, *McCready* found antitrust standing for patients complaining that a conspiracy to withhold coverage for psychologist services in the insurance sold to their employers meant that the patients were unable to obtain reimbursement for psychologist services.⁴⁷ Why did the patients have standing even though they did not directly purchase from the defendants? Because they met the three policy factors. (1) No more direct party could sue for these damages because only the patients paid the medical bills.⁴⁸ (2) There was no difficulty apportioning to avoid duplicative damages since the harm to the patients was distinct from harm to employers or to psychologists, the latter of which could also sue for their separate (also indirect) injury of lost business from other patients who (to avoid losing reimbursement) switched to psychiatrists.⁴⁹ (3) Causation was not too speculative (even though the intervening employers could have changed insurers) because the insurance contracts meant the patients' medical costs could be ascertained to the penny.⁵⁰

In *Illinois Brick*, the Supreme Court dealt with a more commonly occurring type of case, a claim that price-fixing injured indirect purchasers because the direct purchasers passed on some of the supracompetitive prices to their downstream customers.⁵¹ The Court concluded that generally the indirect purchasers could not sue, reasoning that the direct purchasers had adequate incentives to sue and that allowing suits by both direct

45. 459 U.S. at 538–45.

46. *Id.* at 541–42.

47. *See* *Blue Shield v. McCready*, 457 U.S. 465 (1982).

48. *Id.* at 475, 483.

49. *Id.* at 483.

50. *Id.* at 475 n.11 & 480 n.17.

51. *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

and indirect purchasers would require complicated and difficult inquiries into the extent to which the inflated prices were passed on. Such a complicated and difficult inquiry would increase the evidentiary burdens on plaintiffs and thus discourage statutory enforcement.⁵² Thus, it concluded “that the antitrust laws will be more effectively enforced by concentrating the full recovery . . . in the direct [party].”⁵³ In the same decision, the Court recognized that indirect purchasers may have standing if they bought under pre-existing, cost-plus contracts.⁵⁴ Why? Because none of the policy factors indicate that the latter sort of indirect claim should be barred if the direct purchaser has a cost-plus contract that fixes quantity. (1) The more direct party has no incentive to sue because the cost-plus contract meant it suffered no injury. (2) The cost-plus contract also eliminates any difficulty in apportioning to avoid duplicative damages. (3) The cost-plus contract further means causation is not at all speculative.⁵⁵ On the other hand, when the cost-plus contract does not specify the quantity, then the direct purchaser is given standing instead of the indirect purchaser because supracompetitive prices would harm the direct purchaser by reducing output.⁵⁶

In the wake of *Illinois Brick*, many states enacted “*Illinois Brick* repealer” statutes that authorized indirect purchasers to bring suit under state antitrust law. Indeed, this is the main area where state antitrust law differs significantly from federal antitrust law. In *ARC America*, the Supreme Court held that such statutes are not preempted by federal antitrust law, holding that there is no duplication problem necessitating apportionment where damages under state antitrust law might duplicate federal antitrust damages because there is no “federal policy against states imposing liability in addition to that imposed by federal law.”⁵⁷

(4) *Proving the Amount of Damages*. Proving antitrust damages is often very difficult because it requires comparing what actually happened

52. See *id.* at 737 (rejecting apportionment option because “it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness”); *id.* at 745–46 (doctrine concentrating claims in most directly injured party supports “the longstanding policy of encouraging vigorous enforcement of the antitrust laws” because they thus are “not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge”); *id.* at 732 (trying to trace complex economic adjustments through a second market level would “reduce the effectiveness of already protracted treble-damages proceedings”). See also *McCready*, 457 U.S. at 475 n.11 (task of disentangling overlapping damages would “discourage vigorous enforcement of the antitrust laws by private suit”); *Associated General*, 459 U.S. at 545 (agreeing that apportionment must be rejected because it “undermines the effectiveness of treble-damage suits.”); *California*, 490 U.S. at 104 (“*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute.”)

53. *Illinois Brick v. Illinois*, 431 U.S. at 735.

54. *Id.* at 736.

55. See also *California*, 490 U.S. at 102 n.6 (“*Illinois Brick* . . . was concerned . . . that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them.”).

56. *Utilicorp*, 497 U.S. at 220.

57. *Id.* at 104–05.

to a but-for world that never occurred. Unless we gain the ability to observe parallel universes, courts can never be certain just what would have happened in the but-for world. The U.S. Supreme Court has responded by adopting a “traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury.”⁵⁸ This traditional rule has two elements. First, proof of injury can be more uncertain in an antitrust case than in other cases. This reflects the practical fact that antitrust damages are inherently more difficult to prove because they rest on counterfactual claims about what would have happened in the market absent defendants’ restraint of trade.⁵⁹ Second, once the plaintiff establishes the *fact* of antitrust damages (that is, material proximate causation) by a preponderance of the evidence, then it can collect damages even though the *amount* of antitrust damages is uncertain.⁶⁰ The rationale for this doctrine is that antitrust defendants should not be permitted to profit from the uncertainty created by their own antitrust violations.⁶¹ It suffices that some “reasonable inference” can be made about damages “although the result be only approximate.”⁶²

In short: “The Court has repeatedly held that in the absence of more precise proof, the factfinder may ‘conclude as a matter of just and reasonable inference from the proof of defendants’ wrongful acts and their tendency to injure plaintiffs’ business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants’ wrongful acts had caused damage to the plaintiffs.’ ”⁶³ In practice, what this typically means is that the antitrust plaintiff first comes

58. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981).

59. *J. Truett*, 451 U.S. at 566 (“Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land.”); *Zenith I*, 395 U.S. at 123 (damages resulting “from a partial or total exclusion from a market . . . are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts.”)

60. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (“there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.”).

61. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”); *Story Parchment*, 282 U.S. at 563 (“Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts”); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (“a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.”); *J. Truett*, 451 U.S. at 566 (“Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. . . . [I]t does not ‘come with very good grace’ for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.”); *Zenith I*, 395 U.S. at 124 (same).

62. *Story Parchment*, 282 U.S. at 563; *J. Truett*, 451 U.S. at 565–66; *Zenith I*, 395 U.S. at 123; *Bigelow*, 327 U.S. at 264.

63. *Zenith I*, 395 U.S. at 123–24 (collecting cases).

forward with (a) evidence showing that it suffered the sort of injury that the proven antitrust violation tends to create and (b) some rough method of approximating the amount of damages it suffered. Although this burden does not require the plaintiff to disprove the possibility that other causal factors also contributed to the injury, the defendant then has an opportunity (and burden) to prove that the other causal factors in fact created all or some portion of the alleged injury. In the typical case involving injured firms claiming lost profits, antitrust defendants usually employ various “blame the victim” arguments that the injured firm would have lost profits anyway because it was poorly managed, poorly located, had a bad product, or was less efficient than other firms in some other way. In cases claiming inflated prices, the defendants will typically argue either that prices actually went down or would have increased anyway because of increased costs or other market factors.

Under this rough-approximation-of-damages standard, the Supreme Court has approved awarding lost profits damages based on assumptions that, absent the antitrust violation, the plaintiff would have (1) acquired the same market share as it had in another nation, (2) made the same profits as another firm, (3) made the same profits as it made in the past, or (4) enjoyed the same prices as it enjoyed in the past.⁶⁴ One cannot really know whether, absent an antitrust violation, a firm would have done as well as another or as it did in a different nation, nor that past profits or prices will continue into the future. But such crude assumptions are permitted to deal with the uncertainty caused by defendant’s antitrust violation.

Thus, the typical method allowed is to pick some contemporaneous or past baseline where or when markets or firms were not affected by the anticompetitive conduct and assume that any difference between the baseline and reality was caused by the anticompetitive conduct. Unfortunately, contemporaneous or past baselines may be inaccurate because of different costs or demand, because they were also affected by the same anticompetitive conduct, or because the firms in those baselines differ in their efficiency or other features. The past can also be a poor baseline in the typical case where a monopolist is engaging in anticompetitive conduct precisely to slow down the inevitable erosion of a monopoly power it initially earned.⁶⁵ In such cases, using a past baseline may falsely suggest the conduct caused no damages even though the conduct did anticompetitively make prices higher than they would have been in the but-for world without that conduct.

Plaintiffs thus often must base their cases on expert projections about what prices or profits would have been but for the anticompetitive conduct in a way that accounts for differences between the but-for world and the posited baseline. One possible method is to run a regression analysis that correlates various features of the market and firms with prices or profit levels to predict what prices or profits would have been but for the anticompetitive conduct, in a way that accounts for differences in market

^{64.} *Zenith I*, 395 U.S. at 124–25; *Bigelow*, 327 U.S. at 259–65; *Kodak*, 273 U.S. at 379; *Story Parchment*, 282 U.S. at 562–66.

^{65.} Einer R. Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 337–39 (2003).

features or firms.⁶⁶ Where the claim involves future lost profits, a present value calculation must also be conducted to reduce the stream of future lost profits into a current damage amount.⁶⁷

Often, it is attractive to build a model of how prices are set in the relevant industry, and then use it to predict what but-for prices would have been absent some change caused by the conduct. This can lead to conflicting results because models with different assumptions can lead to quite different results. One promising modern approach, called the New Empirical Industrial Organization (NEIO) approach, is to use empirical analysis to estimate the conduct parameters rather than assume them.⁶⁸ In particular, with empirical estimates of (1) the relevant demand-elasticities, (2) seller concentration levels, and (3) producer price-cost margins, one can calculate (4) the extent to which firms in the market act competitively (“the conduct parameter”).⁶⁹ One could then use such data to calculate the extent to which that conduct parameter changed with the relevant conduct and how much that change affected prices. Or one might calculate the extent to which changes in seller concentration levels might alter prices if the conduct parameter remained constant. Or one might be able to assume, say

66. II AREEDA ET AL., *supra* note 21, at ¶¶ 393, 394b.

67. *Id.* ¶ 392c.

68. See, e.g., Timothy F. Bresnahan, *Empirical Methods for Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert Willig eds., North Holland 1989); Timothy F. Bresnahan & Valerie Y. Suslow, *Oligopoly Pricing with Capacity Constraints*, 15/16 ANNALES D’ECONOMIE ET DE STATISTIQUE 267–89 (1989); Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 AM. L. & ECON. REV. 386, 427–29 (1999).

69. For example, as we shall see in Chapter 7, the Cournot Model of competition predicts that (without any collusion or coordination), $(P-MC)/P = HHI/\epsilon$, assuming the products are homogeneous and marginal costs are constant, where P is price, MC is marginal cost, HHI is the sum of squares of the market shares of the firms, and ϵ equals the absolute value of the marketwide demand elasticity. In contrast, the Bertrand Model predicts that prices will equal marginal cost even in a duopoly. Finally, monopoly models predict that a cartel (or perfectly coordinating oligopoly) would set prices at $(P-MC)/P = 1/\epsilon$. Rather, than assuming a particular model is true, one could simply set $(P-MC)/P = HHI(1+k)/\epsilon$, where k is the conduct parameter, which could vary from -1 (where the Bertrand prediction holds) to 0 (if Cournot holds) or to positive numbers (where collusion or coordination is true) up to $k = (1-HHI)/HHI$ (where collusion or coordination is perfect). With a conduct parameter calculated from data rather than assumed by model, one could then calculate what the change in conduct parameter must have been between two periods if one has the data on price, cost, market shares and demand elasticity in the two periods, and then calculate what effect that change in conduct parameter had given current prices, costs and market shares. Or, if one wants to calculate the effects of a merger, one might calculate the current conduct parameter, conservatively assume that it would not be any higher after the merger (i.e., that the merger would not increase the degree of oligopolistic coordination), and then calculate what the change in market prices would be.

Other models can be used to calculate the predicted price effects of a merger if one instead assumes Bertrand competition on differentiated markets. Assuming the merged firms are closest to each other in the relevant product space, one need simply calculate the cross-elasticities of demand between the firms and the aggregate elasticity of the alleged product space using current price-output data, and then (with varying assumptions about the shape of the demand curve) predict the prices that the merged firm would charge, and thus the extent to which those prices would be higher than premerger levels. Using this method, one can even calculate the extent to which a posited decrease in marginal costs would offset any tendency toward increased prices.

in a cartel case, that the conduct parameter was at maximum anticompetitive levels, and then calculate one of the other missing variables.

Where a plaintiff can show that prices were inflated by the defendants' anticompetitive conduct, it is entitled to recover the amount of the price overcharge times the quantity it purchased.⁷⁰ Notwithstanding arguments that business purchasers should be limited to the lost profits that more accurately measure their injury, they are entitled to recover for the full overcharge because the *Illinois Brick* doctrine concentrates the antitrust claim in their hands rather than allowing indirect purchasers to sue for any overcharge that was passed on downstream. However, this does seem to undercompensate for the total harm inflicted by the violation, which will include not only this overcharge but the deadweight loss caused because the price increase will diminish output and crowd some purchasers out of the market. In theory, a plaintiff should be able to satisfy the requisite standards on causation and damages by showing that it would have bought a greater amount but for the antitrust violation, or (if it purchased nothing) that it would have been a direct purchaser but for the antitrust violation. But proof of that will usually be difficult. This undercompensation problem is to some extent offset by trebling damages.

(5) *Allocating Damages Among Defendants.* When multiple firms engage in a conspiracy that causes anticompetitive harm, their liability is joint and several.⁷¹ This means that, although a plaintiff can sue all the defendant co-conspirators, the plaintiff also has the option to sue just one (or some) of the defendant co-conspirators for the entire amount of the injury resulting from the conspiracy.⁷² The plaintiff need not even *name* the co-conspirators in its complaint,⁷³ though in some cases specificity might be necessary to adequately allege the conspiracy. The fact that the plaintiff actually did not buy from the defendant does not matter as long as the price at which the plaintiff bought was fixed by the conspiracy.⁷⁴ Indeed, if the defendant and his co-conspirators fixed prices in a way that caused market prices to rise generally, a plaintiff should be able to recover even if the plaintiff did not buy from a co-conspirator at all, on the ground that the illegal conspiracy did materially contribute to the higher prices the plaintiff paid in a way that directly flowed from the anticompetitive aspects of the conduct. However, the cases are somewhat split on this last point.⁷⁵

70. See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

71. See *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 646 (1981).

72. See *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 392 n.8 (4th Cir. 1982); *MacMillan Bloedel Limited v. Flintkote Co.*, 760 F.2d 580, 584–85 (5th Cir. 1985); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980).

73. See *Texas Industries*, 451 U.S. at 632–33 (plaintiff complaint allowed to proceed that did not even name who defendant's horizontal co-conspirators were).

74. See *Chattanooga Foundry*, 203 U.S. at 396 (upholding antitrust verdict against horizontal co-conspirator of actual seller, even though actual seller was not sued). Thus, a plaintiff who alleges it paid retail prices that were fixed by an illegal vertical price-fixing agreement between a manufacturer and dealer can elect to sue just the manufacturer or just the dealer or both. See II AREEDA ET AL., *supra* note 21, at ¶ 346h, at 369; VII AREEDA, ANTITRUST LAW ¶ 1459b4, at 186–87 (1986).

75. See II AREEDA ET AL., *supra* note 21, at ¶ 347, at 384–85.

The Supreme Court has also held that a defendant cannot even seek contribution from its co-conspirators for their share of the damages caused.⁷⁶ This does not mean that a plaintiff can get double recovery by separately suing each defendant for the full amount of its loss. Rather, each defendant is entitled to a defense of payment for any amount previously paid by other co-conspirators.⁷⁷ However, the non-contribution rule does create incentives for plaintiffs to settle early with some co-defendants for less than their pro-rata share of damages in order to fund the rest of the litigation and minimize the downside risk, confident that the remaining co-defendants are still on the hook for all other damages. It also creates corresponding incentives for co-defendants to settle early to avoid being the nonsettling defendant left exposed to a disproportionate share of the liability risk.

iii. Injunctive Relief. Claims for injunctive relief to prevent Sherman or Clayton Act violations can be brought not only by the Department of Justice, but also by private parties injured by those violations.⁷⁸ The FTC can also seek or impose injunctive relief as noted above for Clayton and FTC Act violations.⁷⁹ “In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief.”⁸⁰ In contrast, a private plaintiff must prove “threatened loss or damage,” in other words that the violation threatens to have a material causal link to an injury that would constitute antitrust injury.⁸¹ Thus, two of the elements necessary to prove damages have parallels in private injunctive claims. The other two do not. A private plaintiff seeking injunctive relief need not prove that any causal link is proximate because an injunction poses no danger of duplicative or speculative damages.⁸² And obviously the plaintiff seeking injunctive relief need not prove the amount of its damages. Rather, it must generally show the opposite: that damages do not provide it an adequate remedy, which is true whenever some portion of its injury is too difficult to quantify in damages.⁸³ Thus, a private plaintiff will typically seek damages and injunctive relief in the alternative because denial of the former supports the latter. Often a plaintiff will be able to quantify past

^{76.} *Texas Industries*, 451 U.S. at 646–47.

^{77.} *See Zenith Radio Corp. v. Hazeltine Research, Inc. (Zenith II)*, 401 U.S. 321, 348 (1971); *Burlington Indus.*, 690 F.2d at 391–92.

^{78.} *See* 15 U.S.C. §§ 4, 25–26.

^{79.} *See* 15 U.S.C. §§ 21, 45, 53(b).

^{80.} *See California v. American Stores*, 495 U.S. 271, 295 (1990). However, as shown below, if the government is not simply seeking injunctive relief to prevent or undo the anticompetitive conduct, but also seeks affirmative injunctive relief to undo the anticompetitive effects or force disgorgement of anticompetitive gains, it must show a material causal link between the defendant’s conduct and those anticompetitive effects or gains.

^{81.} *See id.*; 15 U.S.C. § 26; *Cargill*, 479 U.S. at 111 (private plaintiff seeking injunction must prove antitrust injury); *Zenith I*, 395 U.S. at 130 (injunctive “remedy is characteristically available even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur” to show the requisite causal connection); II AREEDA ET AL., *supra* note 21, at ¶ 337b, 310–13.

^{82.} *Cargill*, 479 U.S. at 110–111 n.6.

^{83.} *See Blue Cross v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir.1998) (Posner, J.).

but not future damages, in which case it should get a damage award for the past, and injunctive relief for the future. Subject to the above limitations, private parties have the same right to seek extraordinary injunctive relief like divestiture as the government does, though district courts are not obligated to order such remedies in every case where the government could obtain it.⁸⁴ If a private party “substantially prevails” on a claim for injunctive relief, it is also entitled to have the defendant reimburse its litigation costs and reasonable attorneys’ fees.⁸⁵

Injunctive relief should be awarded not only (1) to prevent or undo the anticompetitive conduct but also (2) to undo any anticompetitive effects the conduct had on the market and (3) to deny the defendant the fruits of its antitrust violations.⁸⁶ Thus, injunctive relief need not be limited to either prohibiting illegal conduct nor to returning the market to the status quo ante, but can include more affirmative relief to undo anticompetitive effects or gains.⁸⁷ District courts have considerable discretion to fashion remedies to achieve these goals, including orders requiring firms to: divest or create companies, share access to physical or intellectual property, enter into contracts or modify them, or refrain from certain businesses or practices even though they are normally legal.⁸⁸

Injunctive relief cannot be punitive in the sense of seeking to inflict hardships on the defendant that are unnecessary to accomplish the above three goals, but it is also true that defendant hardships cannot relegate the plaintiff to injunctive relief that is less effective at accomplishing those three goals.⁸⁹ When the injunctive relief sought does not simply seek to prevent or undo antitrust violations, a material causal connection must generally be shown between the anticompetitive conduct and the anticompetitive effects it seeks to undo or the fruits it seeks to take away, even in a suit brought by the government.⁹⁰

Injunctions to undo the conduct’s anticompetitive effects can include conduct regulation designed to influence markets far into the future: in *Ford Motor* the Supreme Court awarded injunctive relief designed to affect how the market would look like ten years in the future, and stressed that drafting an antitrust decree by necessity “involves predictions and assump-

84. See *American Stores*, 495 U.S. at 295–96.

85. See 15 U.S.C. § 26.

86. See *United States v. Microsoft*, 253 F.3d 34, 103 (D.C.Cir.2001) (en banc) (“[A] remedies decree in an antitrust case must seek to ‘unfetter a market from anticompetitive conduct’ [and] . . . deny to the defendant the fruits of its statutory violation . . .”) (citing *Ford Motor v. United States*, 405 U.S. 562, 577 (1972), and *United States v. United Shoe*, 391 U.S. 244, 250 (1968)); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128–29 (1948) (injunctive relief “serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act.”)

87. See *Professional Engineers v. United States*, 435 U.S. 679, 697–98 (1978); *United States v. Loew’s*, 371 U.S. 38, 53 (1962); *Ford Motor*, 405 U.S. at 573 n.8; *American Stores*, 495 U.S. at 283–84.

88. See II AREEDA ET AL., *supra* note 21, ¶ 325a, at 248 (collecting cases).

89. See *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326–27 (1961).

90. See *Microsoft*, 253 F.3d at 106.

tions concerning future economic and business events.”⁹¹ Courts can also modify injunctions many years after trial (whether or not the court expressly retained jurisdiction in the original decree) if subsequent evidence indicates the earlier injunction was not completely effective.⁹²

Injunctions to deprive the defendant of the fruits of its anticompetitive conduct should include injunctions ordering the defendant to divest property:

“if the property was acquired . . . as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. . . . [T]he requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution.”⁹³

This language would appear broad enough to authorize the government to bring antitrust claims seeking the disgorgement of any supracompetitive profits causally related to antitrust violations.⁹⁴ Although not yet frequently sought as a remedy, the FTC has sought disgorgement as injunctive relief and had its authority to do so upheld,⁹⁵ as has the DOJ.⁹⁶ Further, the Sherman Act gives the DOJ express authority to obtain forfeiture of any property owned by or pursuant to any antitrust conspiracy that crosses state or national boundaries.⁹⁷ This can be done in a civil action rather than criminal prosecution.⁹⁸

Governments and private parties can also obtain preliminary injunctions to prevent conduct from occurring or continuing pending litigation under the normal standards that balance the likelihood of ultimate success on the merits, the harm the preliminary injunction would cause the defendant, and whether any injury to the plaintiff or public from allowing the conduct would be irreparable later.⁹⁹ Such preliminary injunctions are typically the remedy sought in the biggest area of antitrust practice: suits to prevent mergers from occurring.

iv. Consent Decrees and the Interplay Between Public and Private Enforcement. Treble damages compensate for the underdeterrence problems that might otherwise result because it is often hard to

91. 405 U.S. at 578.

92. *United States v. United Shoe*, 391 U.S. 244, 251–52 (1968).

93. *United States v. Paramount Pictures*, 334 U.S. 131, 171–72 (1948).

94. See *II AREEDA ET AL.*, *supra* note 21, at ¶ 325a, at 245 (“equity relief may include . . . the disgorgement of improperly obtained gains”); Elhauge, *Disgorgement as an Antitrust Remedy*, 76 *Antitrust L.J.* 79 (2009).

95. See *FTC v. Mylan Labs.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (collecting cases upholding authority of FTC to seek disgorgement as an injunctive relief).

96. See *U.S. v. Keyspan Corp.*, 2011 WL 338037 (S.D.N.Y. 2011).

97. See 15 U.S.C. §§ 6, 11.

98. 28 U.S.C. § 2461(a).

99. See 15 U.S.C. §§ 4, 25–26, 53(b).

detect antitrust violations and costly and risky to bring antitrust actions. The regime is thus often said to enlist “private attorneys general” to aid antitrust enforcement. This can result in tension because private parties often pursue cases that government agencies view as wrongheaded. Further, private suits are an omnipresent factor in judicial interpretation because courts interpreting a U.S. antitrust statute (other than the FTC Act) know that they cannot simply adopt broad interpretations to give disinterested government agencies authority to root out all possible undesirable conduct, confident that they will typically exercise their prosecutorial discretion to avoid bringing cases that involve overinclusive applications of that interpretation. Instead, courts know that any such overinclusive applications will be pursued by private litigants whenever it is profitable to do so. The antitrust injury requirement helps reduce this overdeterrence problem by barring suits by private plaintiffs that could not suffer any injury unless the alleged conduct were procompetitive, but it remains a serious problem given the difficulties of accurately sorting out procompetitive conduct. This makes courts inclined to interpret U.S. antitrust statutes more narrowly than they might if the statutes authorized only government suits.

However, government agencies also rely on private enforcement to supplement their efforts. Indeed, sometimes agencies will decline to pursue cases precisely because they believe that the incentives for private suit are adequate, and thus the agencies conclude that they should allocate their scarce resources to those areas where private suits are less likely. Agencies also sensibly focus their energies on cases that have the most general impact, leaving to private litigation issues that are of relevance to a more limited set of parties. Thus, a governmental decision not to bring suit after investigation does not create an adverse inference about private litigation over the same matter. In contrast, if the government obtains a judgment after obtaining testimony, then that judgment has preclusive effect in subsequent private lawsuits, unless the judgment constitutes a consent decree entered before testimony was obtained.¹⁰⁰ The statute of limitations for private suits is also suspended pending the government suit.¹⁰¹ And even if the government loses its litigation, subsequent parties may be able to benefit from the discovery the government collected. Accordingly, potential plaintiffs often lobby the government agencies to bring the cases first, and defendants often enter into consent decrees in order to avoid adverse effects on subsequent private suits.

To be effective, governmental consent decrees must be approved by courts under the Tunney Act after others have had sixty days notice to comment.¹⁰² The rather vague statutory standard is the court can approve

100. Although the antitrust statutes state that the prior government judgment only constitutes prima facie evidence of a violation, *see* 15 U.S.C. § 16(a), modern developments in collateral estoppel law give prior litigated judgments (whether in public or private suits) preclusive effect, effectively mooting this provision. *See* II AREEDA ET AL., *supra* note 21, ¶ 319c, at 204.

101. *See* 15 U.S.C. § 16(i).

102. *See* 15 U.S.C. § 16(b)–(h)

the consent decree only if it determines it is in the “public interest.”¹⁰³ However, courts cannot review the government’s decision to simply dismiss a case without any consent judgment.¹⁰⁴ Nor can a judge refuse to accept a consent decree based on facts that the government’s complaint never alleged and were never tested by the adversary process and appeal.¹⁰⁵ Given that the government generally files its complaints and corresponding consent decrees at the same time, this means that the government can generally avoid any meaningful review of pre-litigation settlements by simply tailoring its factual allegations closely to its consent decree relief. Even without these limitations, one suspects that courts would generally approve consent decrees because it is difficult to make a reluctant agency prosecute a case effectively and the courts can hardly take over the prosecution of a case themselves. The main utility of the Tunney Act is to provide better information about such consent decrees and to avoid unintended adverse consequences for other parties or markets that might be caused by the decree’s terms.

v. Statute of Limitations. Whether brought by a private or public actor, antitrust claims seeking injunctive relief have no statute of limitations, but claims seeking damages must be brought within four years from when the claim accrued.¹⁰⁶ However, suits seeking injunctive relief can be barred by the doctrine of laches when suit is unjustifiably delayed, though this doctrine normally does not apply to government suits and some courts seem drawn to four years as a baseline measure of unjustifiable delay.¹⁰⁷ Criminal antitrust cases fall within the general five-year statute of limitations for criminal prosecutions.¹⁰⁸

A cause of action “accrues” in a way that begins the limitations period when a defendant commits a violation that injures a plaintiff.¹⁰⁹ That is, *both* requirements must be fulfilled: misconduct and injury. The limitations period can be tolled not only by a prior government suit, as noted above, but by three other doctrines.

(1) *The Fraudulent Concealment Doctrine.* The statute of limitations is tolled during any period where the defendant fraudulently concealed the violation, as long as the plaintiff was unaware of the concealed violation despite due diligence.¹¹⁰

(2) *The Continuing Conduct Doctrine.* When a defendant engages in a continuing series of anticompetitive conduct, then each act that is part of the violation and injures the plaintiff restarts the period of limitations, even though the plaintiff knew the illegality began much earlier.¹¹¹ Howev-

103. 15 U.S.C. § 16(e).

104. See *In re IBM Corp.*, 687 F.2d 591, 600–03 (2d Cir. 1982).

105. See *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C.Cir.1995).

106. 15 U.S.C. § 15b.

107. See *II AREEDA ET AL.*, *supra* note 21, at ¶ 320g, 237–39.

108. 18 U.S.C. § 3282.

109. *Zenith II*, 401 U.S. at 338.

110. See *II AREEDA ET AL.*, *supra* note 21, at ¶ 320e, at 231–35.

111. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

er, although this doctrine allows the plaintiff to sue for conduct that began more than four years ago, it can recover only for injuries suffered from those acts that occurred within the last four years.¹¹² To illustrate, if defendants engage in a continuous course of horizontal price-fixing from 2000 to 2004, then a plaintiff can bring suit in 2006, even though it knew the price-fixing began in 2000, because each sale at the fixed price restarts the statute of limitations period. However, unless some other tolling doctrine applied, the plaintiff could not recover for the inflated prices it paid before 2002.

(3) *The Speculative Injury Doctrine.* Even if the misconduct and injury have occurred, the statute does not begin to run until the injury becomes sufficiently non-speculative to form the basis for reasonably ascertainable damages.¹¹³ The logic is fairly straightforward: a plaintiff cannot be penalized for delaying suit if an earlier suit would have been barred on the grounds that its damages had not yet become reasonably ascertainable. For example, if the exclusionary conduct started producing injury to rivals in 2000, but the magnitude was not reasonably measurable until 2003, then the limitations period would not start until 2003, and thus a lawsuit could still be brought in 2006 for all injury since 2000.

vi. Class Actions. Antitrust cases are often particularly well-suited for resolution by class action because antitrust aims to protect marketwide competition, not individual firms or buyers, and therefore necessarily requires resolution of issues that are marketwide and thus common to any class of persons in that market. This includes market definition, market power, market shares, foreclosure shares, characterization of the conduct, whether the conduct had anticompetitive effects, whether it had procompetitive effects, whether there was less restrictive alternative, whether it caused injury, whether that injury constituted antitrust injury, and what the total damages were. Because those issues are all common to any class of persons in that market, requiring separate litigation of those issues would be greatly duplicative. Also, where there are many persons in the market, each may lack a sufficient incentive to litigate given their individual stakes and the large costs of antitrust litigation. These problems are worsened by collective action problems that make every person in the market prefer to have others bear the burden of litigation and free ride on those efforts either by enjoying the benefits of an injunction for the market or through later collateral estoppel in their own damages claim.

The main obstacle to class actions has been finding a common methodology for distributing those total damages among different persons in the market who may have bought on varying terms or have varying preferences. These problems can be overstated because these variances exist not only in the actual world but also in the but-for world without the anticompetitive conduct, so they generally cancel out using the method of rough approximation allowed to calculate antitrust damages when a violation has been proven.¹¹⁴ Still, problems with proving individual damages sometimes

112. *Id.*

113. *Zenith II*, 401 U.S. at 339–40.

114. Suppose, for example, that a monopolist has engaged in anticompetitive foreclosure that has raised market prices, but each buyer pays somewhat different prices because they

causes courts to balk at certifying an antitrust class action on damages under Federal Rule of Civil Procedure 23. However, even in such cases, a class can often be certified on all other issues, including the existence of liability and the appropriateness of injunctive relief, leaving only proof of individual damages to separate trials. In addition, modern economic methods of measuring damages and the increasing computerization of sales data makes it easier and easier to devise common methods for calculating individuated damages from the common market injury.

Even when a private class action cannot be certified under Rule 23, states continue to have the right to bring “*parens patriae*” actions that are effectively class actions on behalf of their residents.¹¹⁵ Where it is too difficult to distribute individuated damages to the injured parties, an antitrust statute allows the problem to be avoided by simply depositing the damages in the state treasury.¹¹⁶ Another provision specifies that, in a *parens patriae* action challenging price-fixing, damages can be shown through aggregate statistical methods without need to prove individual damages.¹¹⁷

vii. *Personal Jurisdiction and Venue.* Antitrust suits against corporations “may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”¹¹⁸ The latter clause is understood to allow worldwide service of process,¹¹⁹ but the courts are split on whether that process provision depends on showing venue under the first clause.¹²⁰

If the clauses are independent, then the service of process clause confers personal jurisdiction in any district court, which allows suit to be

have varying negotiating ability. This would be no obstacle to measuring classwide damages because that variance in negotiating ability would exist in *both* the actual world and the but-for world, and thus cancels out. That is, suppose each buyer pays a price for the product in the actual world of $P_{\text{actual}} + N_i$, where P_{actual} is the average market price in the actual world with the defendant’s conduct, and N_i reflects the varying negotiating of each of i buyers, being negative for buyers that have the negotiating ability or power to get reductions from the average and positive for buyers who are sufficiently lacking in ability or power that they pay above the average. Such an ability or inability to negotiate for favorable pricing presumably would also hold in the but-for world, and can reasonably be approximated to be about the same in magnitude in both the actual and but-for worlds. Thus, the price the i th buyer pays in the but-for world would be $P_{\text{butfor}} + N_i$, where P_{butfor} is the average price each buyer would have paid in the but-for world. The injury to each buyer will accordingly equal: $(P_{\text{actual}} + N_i) - (P_{\text{butfor}} + N_i) = P_{\text{actual}} - P_{\text{butfor}}$. Because each buyer’s varying negotiating ability or power cancels out, each buyer is injured by the difference in the average price between the actual and but-for worlds. If separate trials were conducted, that would require duplicating this same inquiry about the difference in average prices at each trial.

115. See 15 U.S.C. § 15c.

116. See 15 U.S.C. § 15e.

117. See 15 U.S.C. § 15d.

118. See 15 U.S.C. § 22; *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1414–16 (9th Cir. 1989).

119. See, e.g., *Go-Video*, 885 F.2d at 1413.

120. See *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 422–23 (2d Cir. 2005) (collecting the conflicting cases).

brought in any district against corporations because a general venue state allows suit in any district that a corporation is subject to personal jurisdiction (and against aliens in any district) as long as they have minimum contacts with the United States.¹²¹ If the process clause does depend on the venue clause, then the worldwide service of process provision applies only if the case is brought in a district where the corporation is an inhabitant, may be found, or transacts business. This “dependent” interpretation does not bar showing venue under the general provisions of 28 U.S.C. §§ 1391, but normal service of process limitations would apply if that is the basis of venue, which usually require a state long-arm statute and minimum contacts with the state in which the district court sits.¹²²

This split may not matter much, however. Even under the “dependent clause” interpretation, if a defendant is not subject to jurisdiction in any state because it lacks sufficient contacts with any one state, then Federal Rule of Civil Procedure 4(k)(2) allows worldwide service of process based on nationwide contacts. Thus, neither interpretation allows a foreign firm to avoid personal jurisdiction in the United States as long as it has minimum contacts with the nation as a whole. The main effect of the “dependent clause” interpretation is that, in cases where a corporate defendant has minimum contacts with some states and not with others, the plaintiff cannot bring the case in a district located in a state where the defendant has no contacts. But even under the “independent clause” interpretation, if a plaintiff brings a case in such a forum, the defendant should be able to get the case transferred to some district where it does have minimum contacts under the doctrine of *forum non conveniens*.¹²³ Thus, under either interpretation, a plaintiff can bring suit in some U.S. district as long as the defendant has minimum contacts with the United States as a whole, but the plaintiff’s ability to forum-shop among the districts will be constrained where the defendant has contacts with some states but not others.

Noncorporate antitrust defendants are not subject to any special antitrust service of process provision and are subject either to the general venue provisions or under the antitrust venue provision to suit “in any district court of the United States in the district in which the defendant resides or is found or has an agent.” 15 U.S.C. § 15. Antitrust venue thus does not extend to any district in which a noncorporate defendant “transacts business,” but it does extend to any district in which such a defendant may be “found.” Under the general venue statute, aliens may be sued in any district,¹²⁴ subject to ordinary service of process limits, which (as we have seen) allow worldwide service if the alien would not otherwise be subject to suit in any district.

121. See 28 U.S.C. § 1391(c)–(d); *Go-Video*, 885 F.2d at 1408–16; *Icon Indus. Controls Corp. v. Cimatrix, Inc.*, 921 F.Supp. 375, 376 (W.D.La.1996); *Kingsepp v. Wesleyan Univ.*, 763 F.Supp. 22, 24–25 (S.D.N.Y.1991) *But see* *Cumberland Truck Equipment Co. v. Detroit Diesel Corp.*, 401 F. Supp. 2d 415 (E.D. Pa. 2005).

122. See *Daniel*, 428 F.2d at 427.

123. See 28 U.S.C. § 1404(a); *United States v. National City Lines*, 337 U.S. 78 (1949); *Capital Currency Exchange v. National Westminster Bank*, 155 F.3d 603 (2d Cir. 1998).

124. 28 U.S.C. §§ 1391(d) (“An alien may be sued in any district.”)

However, for both corporate and noncorporate defendants, if service is only feasible in a foreign nation, then it is only valid if it complies with foreign or international law or is expressly authorized by some other federal law.¹²⁵ Thus, theoretically worldwide service of process might be restricted by foreign prohibitions, though this is not usually an obstacle because foreign nations typically want firms to be amenable to service for other purposes.

viii. Limits on Antitrust. Application of U.S. antitrust laws is limited in three ways. First, the statute has been interpreted to exclude certain conduct, like state legislation or petitioning for governmental action, even though it results in fixed prices or other anticompetitive effects. Second, in some areas, federal statutes explicitly or implicitly exempt specific industries or conduct from antitrust liability. Third, the statute requires some trivial effect on interstate commerce, and does not cover foreign restraints that have no substantial effect on U.S. markets.

(1) *State Action and Petitioning Immunity.* The antitrust statutes have been interpreted not to apply to “state action” on the ground that Congress did not intend to interfere with the traditional state power to regulate markets, even though such regulation often fixes prices, restrains output, and restricts entry.¹²⁶ Nor do the antitrust statutes apply to private petitioning efforts that are designed to obtain such anticompetitive government regulation, even though such genuine petitioning efforts might incidentally impose direct anticompetitive effects.¹²⁷

a. STATE ACTION IMMUNITY. Antitrust state action doctrine employs three different tiers of immunity depending on who has set the terms of the challenged anticompetitive restraint.

1. Top of Three Branches of Government—An anticompetitive restraint is per se immune from antitrust scrutiny if the terms of that restraint were set by the state legislature, the highest state court acting legislatively, or (probably) the governor.¹²⁸ However, even though such state efforts are immune from antitrust scrutiny, they do face dormant commerce clause review if they exploit out-of-staters.¹²⁹

2. State Agencies and Municipalities—Public entities that are subordinate to the top levels of state government, like state agencies or municipalities, enjoy antitrust immunity if their restraints are clearly authorized by one of the entities that acts directly for the state (such as the state legislature, supreme court, or governor).¹³⁰ The “clear authorization” test

^{125.} See Fed. Rule Civ. Proc. 4(f), (h)(2); *Prewitt Enterprises, Inc. v. OPEC*, 353 F.3d 916 (11th Cir. 2003).

^{126.} *Parker v. Brown*, 317 U.S. 341, 350–52 (1943); see generally Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991) (synthesizing the caselaw and explaining its underlying theory).

^{127.} *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); see generally Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177 (1992).

^{128.} See *Hoover v. Ronwin*, 466 U.S. 558, 567–69 (1984). The Supreme Court’s approach suggests that the actions of state governors will also be per se immune, but it has left the issue open. See *id.* at 568 n.17.

^{129.} See Elhauge, *supra* note 126, at 732.

^{130.} See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57, 60–61, 62–63 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38–40, 46–47 &

is something of a misnomer because it does not require much clarity or authority. As for clarity, it suffices that the state has given the agency or municipality some general regulatory authority that could foreseeably be exercised to suppress competition, even though the state never contemplated either those anticompetitive effects or the specific restraint being challenged.¹³¹ As for authority, municipalities and state agencies have been found immune even when their specific restraints were literally *unauthorized* because they exceeded the scope of their regulatory authority.¹³²

In short, if a disinterested municipality or state agency has been given general regulatory authority, it enjoys antitrust immunity when adopting any regulation that—whether or not actually authorized—has the sorts of anticompetitive effects one could have foreseen from the regulatory authority that was granted, whether or not any of the top three branches of government actually approved or contemplated those effects. The word “disinterested” is included in the last sentence because the caselaw makes clear that even someone that has been formally designated a state official or agent will be deemed a “private” actor (and thus governed by the third tier below) if they operate businesses that are financially interested in the terms of the challenged restraint.¹³³ More generally, state action immunity may not apply when a municipality or state agency acts as a commercial participant rather than just as a regulator, especially when it furthers the financial interests of its residents by imposing extraterritorial costs.¹³⁴

Although *City of Boulder* might suggest a more narrow immunity because it held that municipal home rule authority did not constitute a sufficiently clear authorization to merit antitrust immunity,¹³⁵ a later decision held that municipal regulation of this sort could be subject to review only as unilateral conduct under Sherman Act § 2, thus effectively limiting antitrust review to cases where the municipality had the sort of market power over outsiders that would give it a financial interest in the regulation.¹³⁶ Further, the Local Government Antitrust Act of 1984 has

n.10 (1985); *Hoover*, 466 U.S. at 568–69; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50–54 (1982).

131. See *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372–73 (1991); *Hallie*, 471 U.S. at 41–42; *Southern Motor Carriers*, 471 U.S. at 64; Elhauge, *supra* note 126, at 691–92.

132. See *City of Columbia*, 499 U.S. at 370–72; Elhauge, *supra* note 126, at 692.

133. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 & n.2, 789–92 (1975) (state bar enjoyed no antitrust immunity even though it was a statutorily designated state agency exercising an authority granted by the state); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 703 n.11, 706–07 (1962) (defendant enjoyed no antitrust immunity even though the Canadian government had appointed the defendant its official agent and delegated to it “discretionary agency power to purchase and allocate to Canadian industries all vanadium products.”); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 501 (1988) (citing *Goldfarb* and *Continental Ore* for the proposition that “persons with economic incentives to restrain trade” are not state actors who enjoy antitrust immunity); Elhauge, *supra* note 126, at 683–91.

134. See *City of Columbia*, 499 U.S. at 374, 379; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403–04 (1978); Elhauge, *supra* note 126, at 732–33.

135. 455 U.S. 40.

136. *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); Elhauge, *supra* note 126, at 734–35.

eliminated damage claims in cases involving municipal action, thus leaving antitrust review of municipal action that imposes extraterritorial costs out-of-town much the same as dormant commerce clause review of state action that imposes extraterritorial costs out-of-state.¹³⁷

3. Private Actors—Anticompetitive restraints by “private” persons are immune only if those restraints are both (1) clearly authorized and (2) actively supervised by the state, which can include supervision by municipalities or state agencies.¹³⁸ As the Court has interpreted the active supervision requirement, it effectively requires evidence that some disinterested state or municipal official exercised substantive control over the terms of the relevant restraint.¹³⁹ Mere rubberstamping by a public official does not suffice: the official must make a substantive decision in favor of the restraint’s terms.¹⁴⁰ Nor can the substantive approval come after-the-fact: the public official must make the substantive decision before the restraint is imposed on the market.¹⁴¹ When disinterested public officials do not control the terms of the relevant restraint, then no state action immunity applies even if a state statute explicitly allows or even requires private actors to adopt such restraints.¹⁴² On the other hand, when disinterested public officials do substantively control the terms of the restraint, then antitrust immunity applies whether or not they “conspired” with the regulated private actors.¹⁴³

4. Combining the Three Tiers—Given how the cases define clear authorization and active supervision, one can simplify these complex tiers into one test: “restraints are immune from antitrust review whenever financially disinterested and politically accountable persons control and make a substantive decision in favor of the terms of the challenged restraint before it is imposed on the market.”¹⁴⁴

b. PETITIONING IMMUNITY. Petitioning immunity clearly applies when the complaint is that the petitioning led some disinterested public lawmaker to impose an anticompetitive restraint, even if the petitioner “conspired” with the lawmaker.¹⁴⁵ In such a case, the petitioning immunity

137. 15 U.S.C. §§ 35–36; Elhauge, *supra* note 126, at 735.

138. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 & n.9 (1980); Patrick v. Burget, 486 U.S. 94, 101–03 (1988) (evaluating whether supervision by various state agencies was sufficiently active). An additional prong applies when a facial challenge is brought against a state statute or municipal ordinance. If the state action doctrine does not provide immunity, the statute or ordinance is facially preempted only if it authorizes or mandates conduct that per se violates the antitrust laws. See *Fisher*, 475 U.S. at 264–65; *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). This prong does not apply when plaintiffs challenge a statute or ordinance as applied. See *Fisher*, 475 U.S. at 270 n.2; *Rice*, 458 U.S. at 662 & nn.7–8.

139. *Patrick*, 486 U.S. at 101; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344–45 & n.7 (1987).

140. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *Patrick*, 486 U.S. at 100–01.

141. See Elhauge, *supra* note 126, at 714–15.

142. See *324 Liquor*, 479 U.S. at 343–45; *Midcal*, 445 U.S. at 105–06; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951).

143. See *City of Columbia*, 499 U.S. at 374–79; Elhauge, *supra* note 126, at 704–06.

144. Elhauge, *supra* note 126, at 671, 696. Here, “politically accountable” means that the authority of the public official can be traced to an election, appointment by elected officials, or through some chain of appointment starting with elected officials. *Id.* at 671 n.10. A judge is thus politically accountable within the meaning used here.

145. See *City of Columbia*, 499 U.S. at 379–84; *United Mine Workers v. Pennington*, 381 U.S. 657, 660–61, 669–72 (1965).

could be deemed derivative of the state action immunity that applies to the challenged restraint. By the same token, petitioning immunity clearly does not apply to efforts to persuade a financially interested market participant to impose an anticompetitive restraint that would not enjoy state action immunity.¹⁴⁶ Nor does petitioning immunity apply if a financially interested market participant imposes the challenged market restraint in order to coerce government action.¹⁴⁷

The difficulty is with dual effect cases where the same private activity both (a) indirectly helps procure government action and (b) directly restrains trade in a way that would cause anticompetitive effects whether or not the government made a favorable substantive decision. Petitioners are always immune for the former effects given state action immunity,¹⁴⁸ and are also immune for the latter direct effects when they are incidental to genuine petitioning efforts that are valid by the standards of the relevant governmental process.¹⁴⁹ Immunity for the direct effects is thus denied if the alleged input into public decisionmaking was a “sham” in the sense that the activity was not genuinely designed to influence government action,¹⁵⁰ or if the direct effects were inflicted by a restraint that was in fact separate from the valid effort to influence the government and thus was not “incidental” to any such petitioning.¹⁵¹ Such cases are not true dual effect cases because one of the effects is a sham or the duality does not really exist because the effects are severable.

Even in true dual effect cases, immunity for the direct effects is also denied if the restraint violates the prevailing standards for providing input to the relevant government decisionmaking process.¹⁵² Under the no-holds-barred standards for providing input to the political process, this can protect even deceptive and unethical speech.¹⁵³ Under the more stringent standards for providing input into the adjudicative process, immunity can be lost for the direct effects of conduct that violates the legal standards applicable to litigation.¹⁵⁴ This does not mean immunity is lost for the

146. See *Allied Tube*, 486 U.S. at 501; *Continental Ore*, 370 U.S. at 707–08; Elhauge, *supra* note 126, at 1200–03.

147. See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 421–25, 427 (1990); *Allied Tube*, 486 U.S. at 503; Elhauge, *supra* note 127, at 1206–11, 1237–40.

148. See *Allied Tube*, 486 U.S. at 499; *Noerr*, 365 U.S. at 135–36; *City of Columbia*, 499 U.S. at 378–79; Elhauge, *supra* note 127, at 1213, 1220, 1240–42.

149. See *Noerr*, 365 U.S. at 142–44; Elhauge, *supra* note 127, at 1213–37.

150. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 58–61 (1993); *City of Columbia*, 499 U.S. at 380; *Allied Tube*, 486 U.S. at 500 n.4, 508 n.10; *Noerr*, 365 U.S. at 144.

151. Elhauge, *supra* note 127, at 1215–19 (collecting cases).

152. See *id.* at 1219–21.

153. See *Noerr*, 365 U.S. at 140–41 & n.20 (stressing that the challenged activity was in widespread use and apparently not prohibited by the laws applicable to lobbying); Elhauge, *supra* note 127, at 1223–26.

154. See *Allied Tube*, 486 U.S. at 499–500; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512–13 (1972); *Professional Real Estate*, 508 U.S. at 62–66 (judging whether conduct constitutes an abuse of process under traditional litigation standards).

results of a favorable court decision obtained by invalid litigation conduct, just that there is no immunity for the direct effects that flow regardless of whether substantive judicial approval obtained, such as the litigation costs imposed by the process itself.¹⁵⁵ Immunity is also denied to a firm that procures a patent by filing false information with the Patent Office, a holding that can be explained on the grounds that, because the Patent Office does not check the accuracy of filings before issuing a patent, it has effectively delegating factual determinations to the financially interested applicant, thus making this a direct effect of financially interested decision-making.¹⁵⁶

(2) *Federal Antitrust Exemptions and Limitations*

a. IMPLIED EXEMPTIONS OR LIMITATIONS. A federal statute enacted subsequent to an antitrust statute is always free to partially repeal the antitrust laws by exempting particular industries. However, important canons of interpretation adopt powerful presumptions against interpreting any federal statute to create an antitrust exemption and for narrowly construing any exemption that does exist.¹⁵⁷

Absent an explicit antitrust exemption, an antitrust exemption can be “implied only if necessary to make the [non-antitrust statute] work, and even then only to the minimum extent necessary.”¹⁵⁸ This test does not require a showing that the specific challenged conduct or rule is necessary for the regulatory scheme to function, but rather a conclusion that the regulatory system could not work properly if antitrust liability could conflict with regulatory determinations about the desirability of the conduct.¹⁵⁹ The doctrine generally denies an exemption if the agency either (a) lacks the power to authorize, require, or prohibit the relevant sort of conduct, or (b) has such power but has not exercised it, unless the decision not to exercise such a power reflects a regulatory judgment to allow the challenged sort of conduct despite consideration of its potential anticompetitive effects.¹⁶⁰

155. See *Professional Real Estate*, 508 U.S. at 60–61; *City of Columbia*, 499 U.S. at 380; Elhauge, *supra* note 127, at 1228–29, 1249–50.

156. *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); Elhauge, *supra* note 127, at 1248–50.

157. E.g., *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

158. *Silver v. NYSE*, 373 U.S. 341, 357 (1963); *Nat’l Gerimedical*, 452 U.S. at 389.

159. See *Gordon v. NYSE*, 422 U.S. 659, 662, 683 (1975); *United States v. NASD*, 422 U.S. 694, 726–28 (1975); *Nat’l Gerimedical*, 452 U.S. at 389.

160. See *Nat’l Gerimedical*, 452 U.S. at 389–90; *NASD*, 422 U.S. at 726–28; *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *United States v. Borden*, 308 U.S. 188 (1939); *Nader v. Allegheny Airlines*, 426 U.S. 290, 301 (1976); *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). In addition, even without any implicit antitrust exemption, regulators are sometimes held to have primary jurisdiction in the sense that antitrust courts should defer their adjudications until the agency has had a chance to address the issue first, generally either because the agency has an expertise advantage in determining the facts relevant to the antitrust claim or because agency resolution might affect whether an antitrust exemption existed. See *id.* at 301–04; *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305, 307 (1973); *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 222 (1966); *Far East Conf. v. United States*, 342 U.S. 570, 574–75 (1952). However, other cases have somewhat inconsistently held

In *Credit Suisse*, the Court held that federal securities law precludes antitrust law when the two are “clearly incompatible” given “(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct,” and that “(4) . . . the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.”¹⁶¹ The Court emphasized that the possible conflict need not be a present one: even if the federal securities agency currently prohibits precisely the same conduct that antitrust law prohibits, it suffices for an antitrust exemption that, in the future: (a) the agency could create a conflict by choosing to exercise its regulatory authority differently, or (b) the agency and antitrust courts might interpret or apply their similar prohibitions differently.¹⁶²

This test uses factors similar to those considered by prior implied exemption cases, but goes beyond them to suggest an affirmative test of when an antitrust exemption would be implied. If generalizable beyond securities cases, it indicates that an implied antitrust exemption applies if: (1) a federal non-antitrust agency has an exercised power to regulate the relevant conduct, and (2) current or future agency choices about how to exercise or apply that power might create a risk of a conflict with antitrust standards on conduct that is squarely within the core area covered by the non-antitrust law. Two features indicated, however, that the Court was trying to cabin this implied exemption doctrine a bit. First, the limitation of implied exemption to the core areas covered by non-antitrust laws indicated a potential narrowing of implied exemption law. Second, the Court suggested in several places that the potential-conflict exemption test might be unique to securities law.¹⁶³

One can see why the Court might be worried about applying this standard outside of securities cases. Given the extent of modern federal regulation, it may well be the case that, in most of our economy, some agency has an exercised power to regulate some conduct that might also constitute an antitrust violation. If all such conduct were exempt from antitrust scrutiny, there could well be little left to the antitrust laws. Further, usually Congress has authorized the relevant agency to regulate the conduct in some more limited way, or based on more limited standards that are unrelated to competitive concerns. It seems implausible that in all such cases that Congress really meant to oust antitrust review, or that doing so would be socially desirable. Instead, Congress may well have intended to express even more concern about the relevant conduct, by

that agencies should hold off until an antitrust court has addressed the relevant issue. *See California v. FPC*, 369 U.S. 482 (1962). Perhaps the best resolution is that the latter was a merger case brought a federal antitrust agency, which generally both requires a quick decision (and thus makes deferring impracticable) and means the agency in the antitrust suit has an equal or greater claim to expertise.

161. *Credit Suisse Securities v. Billing*, 551 U.S. 264, 275 (2007).

162. *Id.* at 271–73, 278–82.

163. *Id.* at 269, 275.

indicating it was undesirable not only under competition standards, but under other normative standards as well. If these concerns prove persuasive, it may be the case that *Credit Suisse* does not generate a new broad general doctrine of implied exemption, but rather has defined a “securities exemption” that, like the labor and insurance exemptions discussed below, is a special exemption doctrine with its own elements that do not extend to other sorts of cases.

The filed rate doctrine differs from an exemption in that it provides only that a party may not collect damages (in antitrust or otherwise) based on an overcharge that reflected a rate filed with and approved by a federal regulator.¹⁶⁴ This doctrine does not provide an exemption because it bars only some damage claims and not others, and bars no claims for injunctive relief or criminal penalties.¹⁶⁵ Unlike with state action immunity, rubberstamp approval by a federal regulator suffices for the filed rate doctrine even absent evidence that the agency considered any anticompetitive conduct.¹⁶⁶ However, a filed rate that the agency either disapproves or lacks authority to regulate can form the basis for an antitrust action.¹⁶⁷ The filed rate doctrine bars only claims that seek damages on the grounds that the rate reflected an overcharge, and thus does not bar claims that seek damages from a requirement to buy the product or service,¹⁶⁸ or from a filed rate that excluded rivals (because it reflected a price squeeze or predatory price) and thus resulted in lost profits to that rival.¹⁶⁹

U.S. government agencies enjoy sovereign immunity from antitrust liability unless there is a statutory waiver, and even when a general waiver exists, are not deemed “persons” eligible to be defendants under the antitrust statutes unless the agency statute explicitly provides otherwise.¹⁷⁰

b. **EXPLICIT EXEMPTIONS OR LIMITATIONS.** Congress has also frequently enacted explicit exemptions or alterations of antitrust standards. These include exemptions that:

164. See *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 415–420 (1986).

165. See *id.* at 418–19, 422.

166. See *Mississippi Power & Light v. Mississippi*, 487 U.S. 354, 374 (1988); *Square D*, 476 U.S. at 47 n.19. Some lower courts have extended the filed rate doctrine to rates approved by state agencies, but it seems unlikely the Supreme Court would approve such an extension because the Court has (1) expressed doubts about the wisdom of this doctrine and adhered to it only because it was statutory precedent that Congress left unaltered, *id.* at 420, 423–24, and (2) denied state action immunity to state agencies that engage in the sort rubberstamp approvals that receive protection under the filed rate doctrine, see *Ticor Title*, 504 U.S. 621.

167. See *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 820 (2d Cir.1983); *Florida Municipal Power Agency v. Florida Power & Light*, 64 F.3d 614 (11th Cir. 1995).

168. See *Litton*, 700 F.2d at 820.

169. See *Cost Management Service v. Washington Natural Gas*, 99 F.3d 937, 944–45 (9th Cir. 1996); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982).

170. See *United States Postal Service v. Flamingo Indus. (U.S.A) Ltd.*, 540 U.S. 736 (2004). An earlier case had held that the United States was not a “person” who could be an antitrust damages plaintiff or defendant, see *United States v. Cooper Corp.*, 312 U.S. 600, 607–09, 614 (1941), and Congress had responded with a statute that did not make the United States a “person” who could sue and be sued, but rather simply gave the United States standing to sue for antitrust damages, see 15 U.S.C. § 15a.

1. Allow those who farm and fish to form cooperatives without those cooperatives being considered agreements in restraint of trade, although the Secretary of Agriculture has authority to enjoin cooperatives that unduly enhance prices.¹⁷¹ This exemption does not extend to agreements with nonexempt persons, nor to exclusionary conduct by cooperatives against rivals or other nonmembers.¹⁷²

2. Exempt certain mergers and television agreements by sports leagues.¹⁷³ Baseball also enjoys a special judicially-created antitrust exemption, other than for conduct that affects the employment of ballplayers,¹⁷⁴ which is instead governed by the labor exemption described below.

3. Immunize charitable gift annuities or charitable remainder trusts.¹⁷⁵

4. Exempt the medical resident matching program.¹⁷⁶

5. Provide more generous antitrust standards for mergers and agreements between newspapers when one is a failing firm.¹⁷⁷

6. Exempt professional review bodies from antitrust damages for actions that are based on the quality of a physician's care and may adversely affect the physician's hospital privileges or society memberships, provided the actions were based on a reasonable belief that they would enhance the quality of health care and were made after reasonable investigation and process.¹⁷⁸

7. Exempt collective rate making that is known and approved by the Interstate Commerce Commission.¹⁷⁹

8. Exempt shipper conduct that is already prohibited by the Shipping Act of 1984.¹⁸⁰

9. Exempt agreements that the President finds vital to national defense.¹⁸¹

10. Exempt joint research and development that has been approved by the Small Business Administration.¹⁸²

11. Provide more generous antitrust standards for judging bank mergers.¹⁸³

171. See 15 U.S.C. § 17, 7 U.S.C. § 291; 15 U.S.C. § 521.

172. See *United States v. Borden*, 308 U.S. 188, 194, 205 (1939); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466-68, 471-72 (1960).

173. See 15 U.S.C. §§ 1291-95.

174. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972); 15 U.S.C. § 26b.

175. See 15 U.S.C. § 37.

176. See 15 U.S.C. § 37b.

177. See 15 U.S.C. § 1803.

178. See 42 U.S.C. § 11111-12, 11151(9)-(11).

179. See 49 U.S.C. § 10706.

180. See 46 U.S.C. § 1706(c)(2).

181. See 50 U.S.C. § 2158. See also 15 U.S.C. § 640.

182. See 15 U.S.C. § 638.

183. 12 U.S.C. § 1828(c).

All of these exemptions require examination of the detailed statutory requirements. Two other exemptions require a bit more discussion because of their importance and doctrinal development.

c. **STATE-REGULATED INSURANCE ACTIVITIES.** The McCarran–Ferguson Act exempts insurance practices that are regulated by state laws unless the practices involve boycotts.¹⁸⁴ To receive this exemption, all of the following three requirements must be met:

1. **The Practice Involves the Business of Insurance—**To merit this exemption, it is not enough that the defendant is an insurer. Rather, the challenged practice itself must involve the “business of insurance” under a doctrine that considers three factors, all of which are relevant but none of which are determinative: “*first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.”¹⁸⁵ Thus, the exemption does not cover insurer practices that are not integral to the transfer or spread of risk, such as (i) health insurer agreements with pharmacies on the prices charged to fill prescriptions, or (ii) insurer peer review of the reasonableness of professional fees or treatment.¹⁸⁶

2. **The Practice Is Regulated By State Laws—**The McCarran–Ferguson Act governs more than just antitrust. It states:

“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.”¹⁸⁷

Read literally, the second clause provides no freestanding antitrust exemption, but rather *limits* the first clause’s exemption in cases involving antitrust statutes, which means that an antitrust exemption should require a showing that the antitrust statute would “impair” the state regulation in addition to the factors in the second clause. However, based on certain legislative history, the Supreme Court has traditionally read the second clause as an independent affirmative grant of immunity from federal

^{184.} See 15 U.S.C. §§ 1011–1103; *Group Life & Health Ins. v. Royal Drug*, 440 U.S. 205, 210 n.4, 220 (1979).

^{185.} *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781–82 (1993); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

^{186.} See *Group Life*, 440 U.S. 205; *Pireno*, 458 U.S. at 129–31. On similar logic, most courts also hold the exemption inapplicable to insurer decisions to limit or exclude reimbursement for nonphysician services. See *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 484 (4th Cir. 1980); *Hahn v. Oregon Physicians Serv.*, 689 F.2d 840 (9th Cir. 1982). *But see* *Health Care Equalization Comm. v. Iowa Med. Socy.*, 851 F.2d 1020 (8th Cir. 1988).

^{187.} 15 U.S.C. § 1012(b).

antitrust law for insurance practices that are regulated by state law.¹⁸⁸ Still, the most recent Supreme Court opinion more accurately describes the second clause as an exception to the first,¹⁸⁹ suggesting that future courts may instead follow the plain meaning of the statute and require a showing of impairment. This would also be more consistent with the statutory canon requiring narrow interpretation of any antitrust exemption, as well as with the full legislative history.¹⁹⁰

Leaving aside the possible future addition of this impairment test, the traditional regulated-by state-law standard does not require proof that the state “effectively” enforces its regulation of the practice as long as the state “authorizes enforcement through a scheme of administrative supervision.”¹⁹¹ This element is also satisfied if the state regulator permits or authorizes the relevant practice, like collective ratemaking, even though the regulator does not substantively control those rates, as long as the practice is open and supervised by the state regulator.¹⁹² Although the

188. See *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 563 n.3 (1958).

189. See *Hartford Fire*, 509 U.S. at 780. If it does, this would narrow the exemption because, in non-antitrust cases, the Court has found such impairment only when the federal claim would directly conflict with state regulation or frustrate a declared state policy. See *Humana Inc. v. Forsyth*, 525 U.S. 299, 311–12 (1999). The main difference is that, unlike the regulated-by-state-law standard, the impairment standard does not preclude federal prohibitions of the same sort of conduct prohibited by state law. For example, state regulation of deceptive insurance practices does not preclude RICO efforts to penalize such deception under the impairment standard, *id.*, but does preclude FTC efforts to penalize such deception under the regulated-by-state-law standard. See *National Casualty*, 357 U.S. at 563.

One might wonder whether reading the second clause as an exception renders it superfluous on the ground that federal antitrust law could never impair state law when the matter is not regulated by state law. But the impairment clause applies to any state law enacted for the “purpose” of regulating insurance whether or not it actually does so. Thus, a plain meaning interpretation would not create superfluity because under it the federal antitrust laws would apply when they impair a state law that has the purpose of regulating insurance but does not actually do so. It is unclear the extent to which such state laws actually exist, but it is not superfluous for Congress to provide for the possibility. In any event, superfluous language in statutes is in fact commonplace, and the canon against superfluous language is not followed when it conflicts with the most sensible reading of statutory language.

190. Of the legislative history cited in *National Casualty*, the only part that actually supports its statutory reading is that Senator McCarran did state that state regulation would oust federal antitrust liability. See 91 Cong. Rec. 1443. However, given the context, he may have simply been assuming a case where the antitrust liability would impair the state regulation, especially since what the Senators mainly had in mind was state regulations authorizing collective ratemaking by insurers subject to state supervision. See *id.* at 1444, 1481, 1484. Other Senators supporting the statute read the language to mere be a “positive declaration” of when antitrust applied notwithstanding the impairment clause, see *id.* at 1444 (Sen. O’Mahoney), or stressed that state regulation would preclude antitrust liability only when the state regulation was “in conflict” with antitrust law or affirmatively “permitted” conduct that would otherwise violate antitrust law, *id.* at 1481 (Sen. Murdock), which is quite similar to the impairment standard. None of the legislative history suggested that the antitrust laws would be deemed inapplicable when they did not conflict with state law or some declared state policy, and thus none of it conflicts with applying the impairment standard to antitrust cases.

191. See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 551 (1978); *National Casualty*, 357 U.S. at 564–65; *Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 526 F.2d 795, 797 (8th Cir. 1975).

192. *Group Life*, 440 U.S. at 223; *St. Paul Fire*, 438 U.S. at 548 n.21, 549; *Pireno*, 458 U.S. at 129; *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178, 1181 (6th Cir. 1971).

occasional court mistakenly thinks it suffices that *insurers* are generally regulated by the state, in fact the test is whether the particular *insurance practice* is regulated by the state in that it either (a) prohibits undesirable instances of the practice and has some system of enforcement, or (b) has made a considered regulatory judgment to permit the practice subject to ongoing public monitoring.¹⁹³ This is less rigorous than the state action immunity requirement that the regulator actually substantively approve the terms of any immune restraint, but comes fairly close to the standards for determining whether a federal statute creates an implicit antitrust exemption.

Further, for the McCarran–Ferguson antitrust exemption, the practice must both occur in *and* have effects in the state that regulates the practice; there is thus no federal antitrust immunity for conduct that is regulated by the state in which the insurer exists and committed the practice but has effects in other states.¹⁹⁴ Even if immune from federal antitrust law, insurance practices remain subject to state antitrust law unless it provides otherwise.

3. The Practice Does Not Constitute a “Boycott.”—The insurance exemption has an exception which states that nothing in the McCarran–Ferguson Act “shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.”¹⁹⁵ This creates an interesting interpretive question because a “boycott” is a concerted refusal to deal, and one could think of any agreement in restraint of trade as a concerted refusal to deal on anything other than at the restrained terms. Indeed, in defining the substantive law of antitrust, the Supreme Court has characterized a concerted refusal to deal at less than a fixed price as a “boycott” even though it noted it could also be considered a price-fixing agreement.¹⁹⁶ And yet the McCarran–Ferguson Act was intended to allow insurers to collectively agree on insurance prices and terms (subject to state monitoring) and thus must have been using a more narrow understanding of the word “boycott.”

Accordingly, the Supreme Court has held that the “boycott” element of the insurance exemption requires a concerted refusal to deal that went

193. See sources collected in last two notes. The claim that any state regulation of insurers ousts all federal antitrust regulation of nonboycott insurer practices is inconsistent with the statutory text, which makes clear that federal antitrust laws continue to apply “to the extent” insurers are not regulated by states, 15 U.S.C. § 1012(b), rather than “only if” insurers are not regulated by states. This claim is also inconsistent with the legislative history. It was specifically rejected by Senator McCarran, who agreed with Senator White that the federal antitrust laws “shall be applicable to whatever extent the State fails to occupy the ground and engage in regulation. . . . If . . . the state goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State’s activity.” See 91 Cong. Rec. 1444. Senator McCarran even agreed with Senator Barkley that “where States attempt to occupy the field—but do it inadequately— . . . these [federal antitrust] acts still would apply.” *Id.*

194. See *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 297–99 (1960). The Court left open the question whether the exemption might apply if all the states in which the conduct had effects also effectively regulated it. *Id.* at 298 n.4.

195. See 15 U.S.C. § 1013(b).

196. See *Trial Lawyers*, 493 U.S. at 422–23, 432–36 & n.19.

beyond refusing to deal on other than desired terms.¹⁹⁷ This includes an absolute concerted refusal to deal with a party (either entirely or on some transactions) in order to punish that party for its past conduct.¹⁹⁸ It also includes a conditioned refusal to deal that is designed to coerce the party to change its future conduct to meet the condition, but only if the scope of the refusal includes matters “unrelated” or “collateral” to the desired terms in the transaction with the refused party.¹⁹⁹ Under this standard, if a conspiracy sought to sell an insurance product at \$10 or only on term *X*, then a concerted refusal to sell that product to any buyer for less than \$10 or terms worse than *X* would not be a boycott. But it would be a boycott to have a concerted refusal to sell that product (on nondiscriminatory terms) to buyers based on their *other* transactions (such as with noncomplying sellers) or to refuse to buy or sell some *other* product (on nondiscriminatory terms) to firms that don’t buy or sell the first product at \$10 or on term *X*.

d. THE LABOR EXEMPTIONS. Without a labor exemption, ordinary union activities like strikes or setting labor prices in collective bargaining agreements would be horizontal boycotts and price-fixing agreements subject to the risk of antitrust liability. To avoid this, Congress has enacted statutes that provide antitrust exemptions for, and bar injunctions against, such ordinary labor union activities as collective refusals to supply labor or agreements not to compete on wages or other employment terms.²⁰⁰ This explicit statutory exemption protects agreements among labor employees, but not among independent contractors who collectively engage in boycotts or price-fixing.²⁰¹ The explicit statutory exemption extends only to conduct and agreements by employees and their unions, and not to their agreements with non-labor groups.²⁰²

The Court has also recognized what it calls a “nonstatutory exemption” for agreements between unions and employers, but only to the extent necessary to make the collective bargaining process work.²⁰³ It would be more accurate to call this exemption “implicit” rather than “nonstatutory”

197. See *Hartford Fire*, 509 U.S. at 801–03. Although in substantive antitrust law, the Court sometimes uses “boycott” to refer to those concerted refusals to deal that are per se unlawful, the boycott exception to the insurance exemption does not require that the concerted refusal be per se unlawful. See *St. Paul Fire*, 438 U.S. at 542.

198. *Hartford Fire*, 509 U.S. at 801.

199. *Id.* at 801–803, 806, 810–11.

200. See 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–115.

201. See *AMA v. United States*, 317 U.S. 519, 526–27, 536 (1943) (physicians); *United States v. National Ass’n of Real Estate Boards*, 339 U.S. 485, 489 (1950) (real estate brokers); *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143 (1942) (fisherman). Those employees who are considered managers, which generally includes professionals who have any supervisory responsibilities, are also not eligible to form labor unions and bargain collectively. See *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (licensed practical nurses); *FHP, Inc.*, 274 N.L.R.B. 1141, 1142–43 (1985) (physicians who were HMO employees).

202. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

203. *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); see also *Pennington*, 381 U.S. at 662 (collecting cases); *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797, 810 (1945) (“the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups.”).

given that it is in fact implied from the statute. The Court has interpreted this nonstatutory (implicit) labor exemption to extend even to horizontal agreements among employers on the other side of the same collective bargaining process about the terms they will offer as part of that process or impose if the union does not agree, on the grounds that such immunity is necessary to make multi-employer collective bargaining work.²⁰⁴ In short, the labor exemption allows the competition model favored by antitrust to be replaced with the model of bilateral collective bargaining between sellers and buyers that is favored by labor law. In the latter type of case, the process is policed by the National Labor Relations Board rather than by antitrust courts.²⁰⁵

The nonstatutory (implicit) labor exemption is limited to activities that are legitimately within the collective bargaining process about wages, hours, and other employment terms. Even collective bargaining agreements between union and businesses can lose their immunity when used to suppress competition from a rival business²⁰⁶ or to restrain competition by employers in their product markets.²⁰⁷ *A fortiori*, this doctrine offers no immunity when a union and business impose a direct restraint on market competition outside any collective bargaining agreement.²⁰⁸ Accordingly, the courts have repeatedly held that alleged conspiracies between unions and businesses to suppress competition from another business enjoy no antitrust exemption.²⁰⁹ For example, *Connell* involved an agreement between a union and general contractor that the general contractor would award subcontracts only to firms that had a contract with the union.²¹⁰ The Court held that this was not exempted because it involved a direct restraint on a business market, rather than being part of a collective bargaining agreement limited to the standardization of wages and working conditions.²¹¹ It did not matter that the union's only goal was the legal one of organizing as many subcontractors as possible because the method violated antitrust law.²¹² In *Pennington*, the allegation was that the union and large coal operators conspired to exclude small coal operators from the market by

204. See *Brown v. Pro Football*, 518 U.S. 231 (1996).

205. *Id.* at 242.

206. See *Pennington*, 381 U.S. at 662–69 (holding that this lack of immunity applied even when the restraint involves a compulsory subject of collective bargaining).

207. See *id.* at 662–63; *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

208. See *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853, 855–56 (11th Cir.1984) (no exemption if Agreement was not part of a collective bargaining relationship); *C & W Constr. Co. v. Brotherhood of Carpenters*, 687 F.Supp. 1453, 1464 (D. Hawai'i 1988) (union-business refusal to deal that was outside any collective bargaining agreement was per se outside the labor exemption).

209. See *Connell Constr.*, 421 U.S. at 623–26; *Pennington*, 381 U.S. at 662–69; *Allen*, 325 U.S. at 809–810; *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190 (1954); *Philadelphia Record v. Manufacturing Photo-Engravers Assn.*, 155 F.2d 799, 803 (3d Cir. 1946); *Gilmour v. Wood, Wire & Metal Lathers Intern.*, 223 F.Supp. 236, 248 (N.D. Ill. 1963).

210. 421 U.S. at 618–19.

211. *Id.* at 623–26.

212. *Id.* at 625.

imposing an agreed-upon wage on smaller coal operators.²¹³ The Court concluded that, although those wages were a compulsory subject of bargaining, the agreement to impose those wage levels on other employers outside the bargaining unit stated an antitrust claim.²¹⁴

The inapplicability of the labor exemption does not eliminate the need to prove the nonexempt conduct actually violates antitrust law. Nor does the inapplicability of the nonstatutory exemption to an agreement between unions and employers remove the statutory exemption for agreements among union members. Rather, where the nonstatutory exemption does not apply, the horizontal agreement among union members remains exempt under the statutory exemption and the only issue is whether the union's nonexempt vertical agreement with the employer violates antitrust law. For example, when *Connell* held the nonstatutory labor exemption inapplicable, it remanded for a determination of whether the vertical "agreement between Local 100 and Connell . . . restrains trade," not whether the horizontal agreement among union members of Local 100 did.²¹⁵ Likewise, *Pennington* removed only the nonstatutory exemption for the vertical "agreement between [United Mine Workers] and the large operators," not the statutory exemption for the horizontal agreement among members of United Mine Workers. In cases where the nonstatutory labor exemption does not apply, the situation comes close to treating the union as a single entity, but is distinct from it because any union decision to offer a wage or refuse to deal with an employer would remain immune under the statutory labor exemption even when the union collectively has monopoly power that would, if it were a single business entity, make such decisions reviewable as predatory pricing or unilateral refusal to deal when certain conditions are met.

(3) *Effect on U.S. Interstate Commerce.* Finally, the U.S. antitrust statutes require some effect on U.S. interstate commerce. This imposes three limitations. First, the effects of the conduct cannot be limited to one state, but must have some interstate effects. However, the required effect is so trivial that this rarely poses a practical barrier. Second, for foreign restraints, U.S. law requires some substantial effect on U.S. markets or exporters. Third, the restraint or anticompetitive effect must be on "commerce" rather than on some noncommercial activity.

a. *EFFECT ON INTERSTATE COMMERCE.* All of the U.S. antitrust statutes require that the challenged conduct involve or affect interstate commerce.²¹⁶ But while this requirement was historically important, it has been narrowly interpreted in a way that makes it practically irrelevant. Even a restraint of a highly local market within one state has the requisite interstate effects as long as lawyers remember to dutifully plead that some sort of business is transacted across state lines by either the defendants or any firms in the market directly affected by the defendant's conduct.²¹⁷ It is

213. 381 U.S. at 664.

214. *Id.* at 665–69.

215. 421 U.S. at 637.

216. See 15 U.S.C. §§ 1–2, 12(a), 13, 14, 18, 44–45.

217. See *Summit Health v. Pinhas*, 500 U.S. 322, 329–33 (1991); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 235–36; 241–46 (1980).

hard to know how one could ever fail to satisfy this requirement unless one had an odd market where no sellers or buyers ever made interstate sales, purchases, loans, or phone calls. Indeed, at least one prominent judge has concluded that the requirement is so trivial that merely pleading the bare conclusion that interstate commerce was affected should suffice.²¹⁸ The U.S. Supreme Court has held the interstate commerce requirement satisfied in a case where the defendants allegedly conspired to deny staff privileges in a Los Angeles hospital to a single surgeon.²¹⁹ The Court has also interpreted the Sherman Act to extend to the furthest reaches of congressional power to regulate interstate commerce,²²⁰ which itself covers even a farmer's decision to grow wheat for his farm's own consumption.²²¹

b. **EFFECT ON U.S. COMMERCE.** Unless it has a sufficient effect on U.S. commerce or exporters, the U.S. antitrust laws do not cover restraints on foreign soil or domestic restraints on export trade. Further, even with sufficient effects on U.S. commerce, the reach of U.S. antitrust law may be limited by principles of comity (where foreign law is in conflict) or by sovereign immunity and the act of state doctrine (when the conduct involves foreign governmental action). The complex set of rules on this topic is addressed in Chapter 8, which generally deals with the problem of coordinating antitrust jurisdictions on global markets.

c. **EFFECT ON COMMERCE.** To be covered by U.S. antitrust law, the restraint or anticompetitive effect must be on "commerce," which is to say on some market that involves the sale of goods, services or property in exchange for valuable consideration. A restraint on a donative activity, such as an agreement between two charities that one will provide or solicit donations in the eastern United States and the other in the western United States, would not be a restraint on commerce.²²² This does not mean that charities or nonprofit *entities* are not covered by the antitrust laws. To the contrary, nonprofits are covered whenever they restrain some commercial market, such as providing medical care or college education in exchange for money.²²³ Further, even noncommercial activities, like donations or promulgating safety standards, are restraints on commerce if their terms

218. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778–79 (7th Cir. 1994) (Posner, J.)

219. *Summit*, 500 U.S. 322.

220. *Summit*, 500 U.S. at 328–29 & n.8, 332–33; *McLain*, 444 U.S. at 241. Other cases have held that the Clayton Act and Robinson–Patman Act did not go quite so far because they did not apply to any conduct that affected interstate commerce but rather required that the defendants and their activities be "in" interstate commerce, *see* *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 275–84 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194–203 (1974). However, Congress amended Clayton Act § 7 to include persons and conduct affecting interstate commerce, *see* 15 U.S.C. § 15, and amended FTC Act § 5 to include conduct in or affecting commerce, *see* 15 U.S.C. § 45, and the FTC has authority to enforce the Clayton and Robinson–Patman Act. In addition, the Sherman Act likely covers any anticompetitive conduct covered by Clayton Act §§ 3,7, *see infra* Chapters 4, 7.

221. *Wickard v. Filburn*, 317 U.S. 111 (1942).

222. *See* *Dedication & Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 712 (9th Cir. 1995).

223. *See id.* at 713; *infra* Chapter 2.

affect some commercial market.²²⁴ However, Congress has enacted specific exemptions for charitable gift annuities and charitable remainder trusts.²²⁵

2. AN OVERVIEW OF EU COMPETITION LAWS AND REMEDIAL STRUCTURE

i. The EU Competition Provisions and Enforcement Architecture

(1) *Origins, Content and Basic Institutional Framework.* The sources of European competition law can historically be traced back to the 1951 European Coal and Steel (ECSC) Treaty. This treaty initiated a process of deep economic integration in the steel and coal sectors between Belgium, Italy, Luxembourg, France and the Netherlands. Besides a number of legal and economic provisions organizing the trade of steel and coal between its Member States, the treaty contained a few competition law provisions which had been drafted by several antitrust experts, among them Robert Bowie, then a Harvard Law Professor.²²⁶ These competition provisions were threefold: a prohibition of cartels, a ban on the “misuse” of economic power and a system of merger control.

A few years later, the Members of the ECSC decided to extend the scope of their economic integration to a larger number of sectors by establishing the European Communities (hereafter the “EC”). Convinced of the merits of economic competition, the drafters of the EC Treaty found a useful source of reference in the competition provisions of the ECSC Treaty. It is therefore not surprising that the EC Treaty, signed in Rome in 1957, holds undistorted competition as one of its fundamental objectives,²²⁷ and lays down a complete set of competition provisions. With the entry into force of the Lisbon Treaty on December 1, 2009, the EC Treaty was amended and renamed the Treaty on the Functioning of the European Union (TFEU). This led to a renumbering of the provisions that were initially contained in the EC Treaty. The main competition provisions of the EC Treaty can now be found at Article 101 to Article 109 TFEU. As will be seen below, the name of the Court of First Instance, which plays an important role as it is the Court that reviews the appeals lodged by private

224. See *American Soc’y v. Hydrolevel*, 456 U.S. 556, 560–62 (1982) (nonprofit liable for issuing a letter that, without any financial benefit to the nonprofit, interpreted a safety standard in a way that restrained trade); *Allied Tube*, 486 U.S. at 501 (antitrust rule of reason applies to safety standard setting by disinterested nonprofit associations); *Virginia Vermiculite*, 156 F.3d 535 (donation of land by mining company with restrictive covenants prohibiting its use for mining was an agreement in restraint of commerce); *Ozee v. American Council*, 110 F.3d 1082, 1093 (5th Cir. 1997) (donation to charity is treated as a commercial transaction when the donor receives an “annuity, substantial tax advantage, and the satisfaction of having given to charity.”)

225. See 15 U.S.C. § 37.

226. See David J. Gerber, *Law and Competition in Twentieth Century Europe—Protecting Prometheus*, Clarendon Press Oxford, 1998 at p.340.

227. Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, O.J. L 102/1.

parties against decisions of the European Commission, has also been changed to “General Court”. Given the fact these changes entered into force very recently, the vast majority of the materials we use in this casebook refer to the old numbering system. In order to avoid confusion, we will either refer to the new numbers and replace the old numbers with the new numbers in the documents examined below or leave the old numbers unchanged but add the new numbers to which they correspond between brackets. While Articles 101 and 102 of the TFEU respectively prohibit restrictive agreements between firms and abuses of a dominant position, the TFEU also contain rules aimed at preventing its Member States from taking measures that distort competition. Article 106, for instance, prevents Member States from adopting measures vis-à-vis public (i.e., State-owned) firms and firms in charge of services of general economic interest that would *inter alia* violate competition rules. Similarly, Article 107 prevents Member States from granting State aids that restrict competition and affect intra-EU trade to firms. Articles 106 and 107 of the TFEU find no equivalent in U.S. antitrust law. Throughout this book, we will thus focus on the prohibitions imposed by Articles 101 and 102.

As far as the EU institutional framework is concerned, a number of authorities are in charge of applying EU competition rules. First, at the EU level the Commission is in charge of ensuring the application of such rules. Within the Commission, there is a special “directorate” that has been entrusted with the enforcement of EU competition rules, i.e. DG Competition (also known as “DG COMP”), which comprises several hundred officials (lawyers and economists) who operate under the leadership of a Director General. Within the College of Commissioners (the political body which formally adopts the decisions prepared by DG COMP), there is one Commissioner in charge of competition policy.

Second, at the national level, all Member States set up national competition authorities (often referred to as “NCAs”), which are in charge of applying EU and national competition rules. Some of these authorities, such as the Office of Fair Trading in the UK and the Bundeskartellamt in Germany, enjoy staff and resources that are considerably larger than the Commission. National courts are also entitled to apply EU and national competition rules. Depending on a number of factors, such as the rapidity of the procedure or the possibility to ask for compensatory damages, plaintiffs will start proceedings before the NCAs or the national courts and even in some cases before both. When anticompetitive practices produce effects in several Member States, plaintiffs may initiate legal proceedings in several Member States, the authorities of which will then have to coordinate to decide which of them will investigate the matter.²²⁸

(2) *Other Competition Law Provisions adopted by the Council or by the Commission.* Besides the TFEU competition law provisions, secondary sources of EU competition law can be found in Regulations adopted by the Council of Ministers (a body which comprises the relevant ministers of the different Member States), as well as in a range of legal acts adopted by the

²²⁸. Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, O.J. L 335/43.

Commission such as Block Exemption Regulations, Guidelines, Notices, Guidance letters, etc.

a. **THE EU MERGER REGULATION.** The now defunct EC Treaty contained no provision establishing a merger control system. In 1989, however, the Council adopted Regulation 4064/89, establishing an EU Merger Control regime. The Regulation was subsequently revised in 1997 and in 2004 (it is now Regulation 139/2004).²²⁹ A noticeable feature of the EU Merger Regulation is that it provides for a “one stop shop”, whereby all transactions crossing the turnover thresholds contained in the Regulation fall within the exclusive jurisdiction of the European Commission. Below these thresholds, the Commission has no jurisdiction to examine the merger (since it has no “Community dimension”). It is thus left to the jurisdiction of national authorities.

b. **ADOPTION OF BLOCK EXEMPTION REGULATIONS FOR CERTAIN SECTORS/CATEGORIES OF AGREEMENTS.** Pursuant to Article 101(3), agreements “improving the production or distribution of goods or . . . promoting technical or economic progress” are exempted from the Article 101(1) prohibition, provided a number of conditions are met. It did not take long for the Commission to realize that the vast majority of the agreements entered into by firms (cooperation agreements, licensing agreements, etc.) fulfilled these conditions. Thus, the Council (under the authority of Article 103), or the Commission (under delegated authority from the Council) adopted so-called “block exemption regulations.” Under these regulations, certain categories of agreements or agreements concluded in specific sectors automatically benefit from the Article 101(3) exemption. Examples of the former include transfer of technology agreements,²³⁰ distribution agreements,²³¹ specialization agreements,²³² and research and development agreements.²³³ Examples of the latter include motor vehicle distribution agreements²³⁴ and agreements in the insurance sector.²³⁵

c. **PROLIFERATION OF SOFT LAW INSTRUMENTS.** In recent years, the increased complexity of competition law, both in terms of substance (increased economically-driven approach) and procedure (by virtue of the

229. See Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. 2004, L 24/1.

230. See Commission Regulation 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, O.J. 2004, L 123/11.

231. Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, O.J. L 102/1.

232. Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, O.J. L 335/43.

233. Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, O.J. L 335/36.

234. Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, O.J. 2010, L 129/1.

235. Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, O.J. 2010, L 83/1.

complex decentralization process) has induced the Commission to adopt numerous soft law instruments, so as to clarify its approaches with respect to an heterogeneous set of issues. These instruments, often labeled “Guidelines” or “Notices”, do not bind courts. They, however, bind the Commission and are thus very helpful for firms and their counsel seeking to determine whether their conduct is likely or unlikely to be challenged by the Commission. Examples of such documents include Guidelines on Vertical Restraints,²³⁶ Guidelines on Technology Transfer Agreements,²³⁷ or Guidelines on the Assessment of Horizontal Mergers.²³⁸

(3) *Case-law of the European Court of Justice and of the General Court.* A final source of EC competition law emerges from the case-law of the European Court of Justice (the “ECJ”) and the General Court (the “GC”) of the European Union. All institutions in charge of applying EU competition law (see our discussion below) are bound to follow the interpretations of the ECJ, whose pronouncements on EU law have the same interpretative value as those of the U.S. Supreme Court on U.S. law.

(4) *National Competition Laws.* Besides EU competition rules, all Member States have adopted national competition rules. These rules are closely patterned on EU competition law and contain provisions that are (nearly) identical to Articles 101 and 102 TFEU. The application of national competition laws must not lead to the prohibition of agreements or concerted practices that are not prohibited under EU competition law.²³⁹ Member States may, however, apply stricter competition rules to unilateral conduct.²⁴⁰

ii. The EU Enforcement System and Remedial Structure

(1) *Regulation 17’s Conferral of Enforcement Authority on the European Commission.* Council Regulation 17/62 centralized the enforcement of Article 101 and 102 within the hands of the Commission, giving it far reaching investigative and regulatory powers.²⁴¹ In addition, it required firms to notify all agreements falling within the scope of Article 101 to the Commission. If the agreement was contrary to Article 101(1), the Commission had sole jurisdiction to deliver an exemption on the basis of Article 101(3). In contrast, existing National Competition Authorities (hereafter “NCAs”) and national courts only played a marginal role in the implementation of EU competition rules.

(2) *Reform of the Enforcement System in 2003.* In the early 2000s, the Commission concluded that the notification procedure had considerably overloaded its staff and resources, preventing it, in turn, from focusing on

^{236.} Guidelines on Vertical Restraints, O.J. 2010, C 130/01.

^{237.} See Guidelines on the application of Article 81 of the EC Treaty [now 101 of the TFEU] to technology transfer agreements, O.J. 2004, C 101/2.

^{238.} See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2004, C 31/5.

^{239.} See Article 3(2) of Regulation 1/2003, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty [now articles 101 and 102 of the TFEU], O.J. 2003, L 1/1.

^{240.} *Id.*

^{241.} Regulation 17/62/main implementing Regulation, O.J. Spec. ed., 1959–62, 87.

the most serious violations of EU competition rules, such as hardcore cartels.²⁴² Meanwhile, most Member States had set up NCAs and entrusted them with the mandate to apply national competition statutes, drafted in language close to the now defunct EC Treaty. The combination of these two evolutions induced the Commission to ask the Council to (i) abolish the notification procedure, and (ii) entrust NCAs and national courts with the application of Article 101(3).

The Council followed the Commission's proposals and adopted Regulation 1/2003, which replaced Regulation 17/62 effective May 1, 2004. Regulation 1/2003 sets out a decentralized system where NCAs and national Courts are at the forefront of the enforcement of EU competition rules. The increased decentralization achieved in turn allows the Commission to redeploy its resources in other directions. The Commission now focuses its investigations on sectors "where there are only a few players, where cartel activity is recurrent, or where abuses of market power are generic." In addition, the Commission increasingly monitors the action of NCAs and retains the possibility to intervene in cases dealt with at the national level.

(3) *Administrative vs. Judicial Remedies.* Unlike U.S. antitrust law where remedies are generally obtained through court litigation, EU competition law is mostly enforced through administrative remedial mechanisms (before the Commission or before NCAs). An important feature of the European competition law enforcement system is that it is based upon administrative agencies whose powers go beyond the mere seeking of injunctive relief. In contrast with U.S. agencies (DOJ and FTC), the Commission and the NCAs do not need litigation before courts of law to obtain a finding of infringement, negotiate behavioral and/or structural remedies and impose fines. These competition agencies enjoy important decision powers of their own and thus offer attractive remedies to complainants.

In contrast, judicial remedial mechanisms (i.e. before national courts) are traditionally left unexplored by plaintiffs. This is the case for a number of reasons.²⁴³ First, unlike before U.S. Courts, rules of discovery are underdeveloped in Europe. This means that in most Member States, parties are under no obligation to produce relevant information and often will only be ordered to do so when the requesting party can identify the individual document he seeks, which in many cases will simply not be possible. Second, plaintiffs' incentives to bring court actions are less obvious than in the U.S., as in most cases national courts do not grant punitive/treble damages. They merely provide compensation/restitution and often, judges are reluctant to assess the damage caused by an anti-competitive practice. Third, in most Member States, the rules governing legal cost provide that the loser pays costs (although these can be divided in cases of partial

242. See 1999 White Paper on the Modernisation of the Rules implementing Article 81 and 82 EC [now 101 and 102 of the TFEU], COM (1999) 101 final. Of course, the burden on the Commission had been slightly reduced through the adoption of block exemption regulations, notices, guidelines and comfort letters.

243. These reasons have been empirically identified in a Comparative Report by Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, 31 August 2004.

success). However, it is often the case that fees are not fully recoverable in practice. Combined with the substantial costs of litigating antitrust issues, this generates a clear disincentive for private parties to initiate judicial proceedings.

On December 19, 2005, the European Commission published a Green Paper on how to facilitate actions for damages caused by violations of EU competition rules' ban on restrictive business practices and abuse of dominant market positions (Articles 101 and 102 respectively).²⁴⁴ The Green Paper notes that violations of these rules, in particular by price fixing cartels, can cause considerable damage to companies and consumers but numerous obstacles can hinder actions for damages by injured parties in national courts. The Green Paper identifies certain of these obstacles, such as access to evidence and the quantification of damages, and presents various options for debate for their removal. This Green Paper was followed up by a White Paper on "Damages Actions for Breach of the EC antitrust rules"²⁴⁵ suggesting a new model for achieving compensation for consumers and businesses who are the victims of antitrust violations.²⁴⁶ The White Paper comprises various suggestions to ensure that victims of competition law infringements have access to truly effective mechanisms for claiming full compensation for the harm they have suffered, whilst ensuring respect for European legal systems and traditions. The model outlined by the Commission is based on compensation through single damages for the harm suffered. The White Paper's other key recommendations cover collective redress, disclosure of evidence and the effect of final decisions of competition authorities in subsequent damages actions. The European Commission is now expected to propose directive on private damages for breach of antitrust rules.

(4) Administrative Remedies—Actions by the Commission and the NCAs

a. THE DIVISION OF COMPETENCIES BETWEEN THE NCAs AND THE COMMISSION. The NCAs and the Commission form an integrated network of agencies (referred to as the "European Competition Network"). They act in a complementary fashion and hold distinct duties.

On the low end of the network, the decentralized enforcement framework established by Regulation 1/2003 entrusts NCAs with the bulk of Article 101 and 102 cases. As there are more than 25 NCAs in the EU, the allocation of jurisdiction between national agencies may be a delicate issue, in particular for practices affecting several Member States' territories. In principle, the NCA that should have jurisdiction to inquire into a specific practice should prove that it is "well placed" to act. For a NCA to be "well placed", three conditions should be fulfilled.²⁴⁷ First, the agreement or

²⁴⁴. Green Paper, Damages actions for breach of the EC antitrust rules, 19 December 2005; Commission Staff Working Paper, Damages actions for breach of the EC antitrust rules, COM (2005) 672 final, 19 December 2005.

²⁴⁵. COM (2008) 165, 2 April 2008.

²⁴⁶. See "Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches" IP/08/515, 3 April 2008.

²⁴⁷. See Commission Notice on cooperation within the Network of Competition Authorities, O.J. C 101 of 27 April 2004, pp. 43–53.

practice must have substantial direct actual or foreseeable effects on competition within its territory and must be implemented within or must originate from its territory. Second, the NCA must be able to effectively bring to an end the entire infringement, i.e. it must be able to adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it must be able, where appropriate, to sanction the infringement adequately. Third, it must be able to gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.²⁴⁸

On the high end of the network, the Commission holds a wider range of roles. First, it intervenes with respect to the most serious infringements (i.e. hardcore cartels or severe abuse of dominance cases)²⁴⁹ or agreements and practices with important cross border effects, that is those that have effects on competition in more than three Member States.²⁵⁰ Second, the Commission defines EU competition policy through the adoption of guidelines, notices, guidance letters, etc. Recent initiatives in that respect have, for instance, led the Commission to focus on a number of sectors (through the opening of inquiries in the energy and banking fields, etc.) or on a specific provision of the TFEU (e.g., Article 102). Third, the Commission holds an assistance mission to the NCAs when the latter apply EU competition law.²⁵¹ Finally, the Commission acts as the watchdog of the European Competition Network. It monitors actions taken by the NCAs on the basis of EU competition rules. Ultimately, it enjoys the power to remove a case from a NCA (taking over the case in question) on the basis of Article 11(6) of Regulation 1/2003, if for instance the national authority is not applying EU rules in a correct fashion.

b. REMEDIES BEFORE THE EUROPEAN COMMISSION.

1. *Initiation of Proceedings by the European Commission.* The Commission may initiate proceedings following (1) a complaint, (2) a request or transfer of a NCA or (3) simply acting of its own motion (after an investigation or information received through any channel, such as trade journals, etc.).

(i) Action upon complaint.—Plaintiffs can lodge formal complaints before the Commission.²⁵² Article 7 of Regulation 1/2003 provides that “natural or legal persons who can show a legitimate interest” can lodge a complaint before the Commission. Any person who can show that she is

248. A number of other cooperation mechanisms are provided for, when several NCAs open parallel proceedings or where a NCA that considered it was “well placed” is, in fact, not “well placed” to deal with a practice. *See id.* at §§ 18–19.

249. *See* Recital 3 of Regulation 1/2003, *supra* note 235.

250. *See* § 14 of Commission Notice on cooperation within the Network of Competition Authorities, *supra* note 224.

251. *See* Article 11(5) of Regulation 1/2003, *supra* note 229, where the NCAs can consult the Commission when applying EU Competition law. This assistance duty is also addressed to national courts, where the latter can request the Commission to provide them with information it holds or with an opinion on a point of law. *See* Article 15 of Regulation 1/2003.

252. *See*, on the following, Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [now 101 and 102 of the TFEU], O.J. 2004, C 101/65.

suffering or likely to suffer injury or loss from the alleged infringement has a legitimate interest for lodging a complaint before the Commission (party to a terminated agreement, actual or potential competitors facing predatory behavior, consumer associations, etc.). In addition, the potential plaintiff can lodge “informal” or anonymous complaints to the Commission, the main difference being the procedural duties bearing on the Commission. When dealing with a formal complaint, the Commission is under a duty to examine the complaint with “vigilance” (i.e. it has to “consider attentively all the matter of facts and law which the complainant brings to its attention”).²⁵³ Furthermore, it has to answer to the complaint within a reasonable time frame, provide an opportunity to the complainant to be heard (if the Commission envisions rejecting the application), and give sufficiently precise and detailed reasons in case it actually rejects the complaint.

(ii) Action on the basis of request or transfer of a NCA.—Pursuant to Article 11 of Regulation 1/2003, the Commission and NCAs cooperate with each other through extensive exchange of information protocols. The information circulated by NCAs may trigger the initiation of proceedings by the European Commission, in which case NCAs are relieved of their competence to apply Article 101 or 102 to a given practice.²⁵⁴

(iii) Initiation of proceedings by the Commission on its own motion.—The Commission can initiate proceedings on its own motion, on the basis of any information which it considers sufficient to that end. The Commission may open procedures when, for instance, “the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market.”²⁵⁵

2. Powers and Remedies Available at the Commission Level

(i) Cease and Desist Orders.—Pursuant to Article 7 of Regulation 1/2003, the Commission, if it “finds that there is an infringement of Article [101] or of Article [102] of the Treaty, [...] may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end.” If the agreement or abusive behavior has already been terminated, the Commission may nonetheless issue a declaration that it constituted an infringement.

(ii) Behavioral and Structural Remedies.—In order to bring an infringement to an end, the Commission enjoys the power to impose behavioral and structural remedies on the parties. For instance, in an illegal refusal to supply case, the Commission is entitled to order the supply of the product concerned,²⁵⁶ or the conclusion of licensing agreements on the intellectual property right at hand.²⁵⁷ Regulation 1/2003 brings, however, a qualification with respect to structural remedies:

253. See ECJ C-119/97, *UFEX v. Commission* [1999] ECR I-1341 at § 86.

254. See Article 11(6) of Regulation 1/2003, *supra* note 229.

255. *Id.* at Article 17.

256. See *e.g.*, ECJ, 6-7/73, *Commercial Solvents v. Commission*, [1974] ECR-223.

257. See *e.g.*, ECJ 241-242/91, *RTE and ITP v. Commission*, [1995] ECR II-1439.

“Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.”

The explicit possibility for the Commission to adopt structural remedies is a novelty introduced by Regulation 1/2003. It seems that these remedies are only available to bring an abusive behavior to an end. In contrast, structural remedies do not seem available to correct the consequences of illegal exclusionary behavior so as to reestablish a *statu quo ante* (for instance, through ordering a dominant firm to divest the share of products gained after having successfully forced its competitors out of the market).

(iii) Interim Measures.—Regulation 17/62 did not explicitly envisage the possibility for the Commission to order interim measures. However, following an extensive interpretation of Article 3 of that regulation in its *Camera Care* order, the ECJ did bestow upon the Commission the power to order such measures.²⁵⁸ In practice, though, most interim measures were ordered upon the request of undertakings rather than by the Commission acting on its own initiative.²⁵⁹ This power has since then been codified at Article 8(1) of Regulation 1/2003.²⁶⁰

(iv) Settlements and Commitments.—In the course of its investigations and prior to adopting a cease and desist order, the Commission has the possibility to terminate or suspend proceedings because the agreement or conduct at hand is terminated or amended by the parties (who wish to comply with EU competition rules). The Commission does not need to adopt a formal decision. The vast majority of the cases brought before the Commission are settled without the adoption of a formal decision. Often, the parties offer commitments to meet the anticompetitive concerns identified by the Commission during its preliminary assessment. Pursuant to Regulation 1/2003, the Commission enjoys the possibility to make these commitments binding on the parties by adopting a decision which concludes that there is no longer ground for action.²⁶¹

The Commission may nonetheless reopen proceedings if (i) there has been a material change in any of the facts on which the decision was based; (ii) the firms concerned have disregarded their commitments; or (iii) where the decision was based on incomplete, incorrect or misleading information provided by the parties.²⁶²

^{258.} See Order of the European Court of Justice, Case C-792/79, *Camera Care v. Commission*, [1980] ECR, 119 at para. 18.

^{259.} See, for a well-known example, Commission decision of 3 July 2001, *NDC Health/IMS Health*, (2003) O.J. L. 268/69.

^{260.} See Article 8(1) of Regulation 1/2003, *supra* note 235: “In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.”

^{261.} See Article 9 of Regulation 1/2003, *supra* note 235.

^{262.} *Id.*

Given that commitment decisions or settlements do not establish the existence of an infringement to EU competition rules, NCAs and national courts keep the possibility of adopting decisions finding an infringement of Article 81 or 82.²⁶³

(v) Fines.—Regulation 1/2003, empowers the Commission to fine a firm up to 10% of its total turnover in the preceding business year where, intentionally or negligently: “they infringe Article 101 or Article 102 of the Treaty; or they contravene a decision ordering interim measures [. . .]; or they fail to comply with a commitment made binding by a decision [. . .].”²⁶⁴ Fines represent the main EU legal instrument to remedy and deter violations of competition law. The ECJ indicated in *Musique Diffusion France*, that the underlying rationale for the imposition of fines is to ensure the implementation of Community competition policy and, in particular, to ensure (i) the suppression of illegal activity and (ii) the prevention of recidivism.²⁶⁵

In fixing the amount of the fine, the Commission should take into account the gravity and the duration of the infringement.²⁶⁶ The calculation method follows a four step process.²⁶⁷ First, a “basic amount” for the fine is calculated based on (i) the qualification of the infringement as minor, serious or very serious and (ii) of an assessment of the duration of the infringement as short, medium or long. Second, the Commission examines whether it should reduce or increase the basic amount with reference to any aggravating or mitigating circumstances.²⁶⁸ The factors that can be held as aggravating encompass recidivism, leading role, retaliatory measures against other undertakings, refusal to co-operate, etc. Attenuating circumstances on the other hand include passive role, non-implementation of the offending agreement, and termination of the infringement as soon as the Commission intervened. Third, the Commission determines whether the company under inquiry can benefit from the principles set out in the leniency notice, which may reduce the fines or even lead to the non-imposition of fines.²⁶⁹ Fourth, the Commission can adjust up or down the amount of fines to reflect that an undertaking manufactures a wide portfolio of products or to reflect the economic or financial benefit derived from the anti-competitive conduct or their ability to pay.²⁷⁰ Finally, during its step-by-step construction of the final fine the Commission must also bear in mind that it must stay within the confines of the statutory ceiling of 10% of the world-wide turnover of the undertaking in question.

263. *Id.* at Recital 13.

264. *Id.* at Article 23(2).

265. See Damien Geradin & David Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Case-Law of the European Courts*, 1 *European Competition Journal*, 2005, 401.

266. See Article 23(3) of Regulation 1/2003, *supra* note 236.

267. See Guidelines on the method of setting fines, O.J. C 9 of 14 January 1998.

268. *Id.* at Sections 2 and 3.

269. See Commission Notice on the non-imposition or reduction of fines, published in O.J. C 45 of 19 February 2002.

270. Guidelines, *supra* note 261, at Section 5.

In June 2006, the European Commission adopted new Guidelines on the method of setting fines that increase their deterrent effect on violations of EU competition rules in three ways.²⁷¹ First, the revised Guidelines provide that fines may be based on up to 30% of the company's annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement, subject to the Council Regulation 1/2003 limit that companies may be fined only up to 10% of their total annual turnover. Second, for seriously illegal conduct like cartels, a part of the fine may be imposed irrespective of the duration of the infringement. In other words, the mere fact that a company enters into a cartel could "cost" it at least 15 to 25% of its yearly turnover in the relevant product. Third, the new Guidelines introduce important changes with regard to aggravating and mitigating circumstances, the most significant of which concerns repeat offenders. Up to now, the Commission's practice is to increase a fine by 50% where the undertaking has been found to have been previously involved in one or more similar infringements. The new Guidelines change this approach in 3 ways: (i) the Commission will take into account not only its own previous decisions, but also those of National Competition Authorities applying Articles 101 or 102; (ii) the increase may be up to 100%; and (iii) each prior infringement will justify an increase of the fine.

While subject to a certain degree of codification, the Guidelines nonetheless leave a margin of maneuver to the European Commission when setting fines. This, in turn, is giving rise to two related phenomena. First, the Commission has been freely developing a heavy handed fining policy that recently culminated with the levying of a €497.2 million fine on Microsoft for alleged abuses of a dominant position.²⁷² As noted above, this increase in the fines imposed by the Commission may, however, be warranted by the need to deter firms from violating EU competition law. Second, firms are increasingly challenging Commission decisions before the GC in order to obtain a reduction of the fines imposed by the European Commission.²⁷³

(vi) Guidance Letters.—Conscious of the importance of legal certainty for the business community, the Commission allows firms in doubt with respect to the legality of an agreement or practice to solicit its views.²⁷⁴ A request for Commission guidance will only be admissible if it fulfills the following cumulative conditions: it raises a novel question in law; guidance is useful for the case at hand; and the information provided by the company is sufficient for the Commission to provide guidance (no further investigative measures are needed).²⁷⁵ The legal value of guidance letters is unclear.

271. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (text with EEA relevance), June 2006.

272. See Commission Decision, Microsoft, Case COMP/C-3/37/792, not published yet.

273. See Damien Geradin and Nicolas Petit, "Judicial Remedies under EC Competition Law: Complex Issues arising from the 'Modernisation' Process", Fordham Corporate Law Institute, forthcoming 2005.

274. See Recital 38 of Regulation 1/2003, supra note 235.

275. See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty [now Articles 101 and 102 TFEU] that arise in individual cases, O.J. 2004, C 101/78, at § 8.

The Commission notice on guidance letters takes the view that the issuance of a guidance letter does not prejudice its assessment of subsequent cases.²⁷⁶ However, it is clear that the Commission could be found to violate the general principle of legitimate expectations if it ignored its pronouncements with respect to a practice covered by a guidance letter. As far as NCAs and national courts are concerned, the notice provides that they are not formally bound by Commission guidance letters.²⁷⁷

c. REMEDIES BEFORE NCAs. The remedies which can be offered by NCAs are provided for by national statutes adopted by the Member States. It would be out of the scope of the present casebook to analyze in detail the various remedies offered under national laws. Regulation 1/2003 seeks nonetheless to ensure a minimal amount of homogeneity among national remedies. It provides that, when applying Article 101 and 102 of the TFEU, NCAs shall be able to take the following decisions:

“requiring that an infringement be brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments or any other penalty provided for in their national law.”²⁷⁸

(5) *Judicial Remedies at the National Level.* National courts can also apply Article 101 and 102.²⁷⁹ In spite of the fact that they can neither act of their own motion nor impose fines on companies infringing EU competition law, the initiation of proceedings before national courts presents several advantages over the system of administrative remedies described above. First, national courts can award damages for losses incurred as a result of a violation of Articles 101 or 102.²⁸⁰ Second, in complex litigation matters, the initiation of proceedings before a national court enables plaintiffs to combine claims related to the application of national competition law with claims based on EU competition provisions. Third, unlike the Commission and competition authorities, national courts cannot drop complaints (or refuse to launch an investigation) and are required to take a judgment on the merits of the claims advanced before it.

The settings in which EU competition law is invoked before national courts are generally twofold. A first setting (usually referred to as the “Euro-defense” setting) arises when Articles 101 or 102 are invoked by a defendant in a national procedure as a shield against a complainant seeking to enforce an agreement/practice that infringes EU competition law.²⁸¹ For instance, a licensee may seek to escape the payment of royalties demanded

^{276.} *Id.* at § 24.

^{277.} *Id.* at § 25.

^{278.} *See* Article 5 of Regulation 1/2003, *supra* note 236.

^{279.} *Id.* at Article 6.

^{280.} *Id.* at Recital 7.

^{281.} *See* ECJ, C-453/99, 20 September 2001, *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, [2001] ECR I-6297 at § 24 “[...] any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.”

by a patent holder by arguing that the license agreement infringes Article 101 and does not benefit from an exemption under Article 101(3).

A second setting (usually referred to as the “Euro-offense” setting) arises when a claimant seeks to obtain injunctive relief, remedies or the attribution of damages by arguing that the defendant has forced him to enter into an anti-competitive agreement or abused a dominant position. In *Courage vs. Crehan*, for instance, the ECJ upheld the possibility for a pub owner to lodge a counter-claim for damages against a brewery, which had forced the former to enter into an anticompetitive exclusive purchase agreement.²⁸²

Regulation 1/2003 lays down a number of mechanisms that seek to ensure that national courts apply Article 101 and 102 in a proper and consistent fashion. First, national courts must avoid taking decisions that could run contrary to a decision adopted by the Commission.²⁸³ They must also avoid adopting decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, national courts may decide to stay proceedings until the Commission adopts a decision.

Second, national courts shall forward to the Commission a copy of any written judgment deciding on the application of Article 101 or Article 102 TFEU.²⁸⁴ This duty is of a purely informative nature.

Third, in a fashion similar to the *amicus curiae* procedure under U.S. law, both the NCAs and the Commission can, acting on their own initiative, submit written observations to the national courts of their Member State on issues relating to the application of Articles 101 or 102 of the Treaty.²⁸⁵ With the permission of the court in question, they may also submit oral observations.

Finally, in proceedings involving Articles 101 or 102, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.²⁸⁶

iii. Judicial Review of Commission’s Decisions

(1) *Annulment Proceedings Pursuant to Article 304.* Article 304 of the TFEU allows natural or legal persons to bring annulment proceedings against Commission decisions before the GC on all points of facts and appeal in law before the ECJ. In the field of Articles 101 and 102 infringements, firms often appeal Commission decisions. However, annulment actions against Commission decisions banning mergers have for a long time been rare. This was explained by the fact that parties to a forbidden merger had no incentives to bring their case to the European courts as proceedings were too long (on average 21 months) to give them a

^{282.} In *Courage v. Crehan*, the ECJ held that the contracting party entitled to damages from an anticompetitive contract was the one with the weakest bargaining power. See § 33.

^{283.} See Article 16 of Regulation 1/2003, *supra* note 236.

^{284.} *Id.* at Article 15(2).

^{285.} *Id.* at Article 15(3).

^{286.} *Id.* at Article 15(1).

chance to resume their transaction in case of an annulment. This situation was problematic as it gave the Commission a final say on any merger transaction. The Commission only prohibited a small number of mergers (19 in total since 1989). Yet, it made extensive use of the threat of a prohibition to extract substantial commitments from the merging parties. This situation has recently evolved as a result of two distinct events. First, in order to effectively ameliorate the effectiveness of its control of the Commission's merger decisions, the GC's Rules of Procedure were amended in December 2000 to introduce a "fast track" procedure.²⁸⁷ Second, the GC handed down, in 2002, a series of judgments where it annulled several high profile merger control decisions, which it found illegal under EU law.²⁸⁸ These cases addressed a signal to the business community that the GC was ready to carry out an extensive control of the Commission's review of mergers. The combination of these two events induced merging parties to increasingly appeal Commission's mergers decisions before the GC and the Commission to make a more careful assessment of the mergers notified to it.

(2) *Revision of Fines Imposed by the European Commission.* Article 31 of Regulation 1/2003 allows the GC and the ECJ to "cancel, reduce or increase the fine or periodic penalty imposed" by the European Commission in the application of EU competition rules. Thus far, the GC has exercised its control with moderation. The GC does not repeat the whole assessment process. It restrains itself to assessing whether the factors linked to duration and gravity, leniency and methodology have been correctly applied. The implementation of these principles has, nonetheless, allowed the GC to substantially reduce the fines imposed by the Commission in a range of decisions. On the other hand, the GC has never revised a fine upwards. Several authors have cast doubts on the possibility of the GC and ECJ to do so. Insofar as an appeal to revise a fine is brought by the undertaking being sanctioned, any increase in the fine would involve giving a ruling on points that the applicant did not raise. The GC has however dismissed this argument in the *Graphite Electrodes* cases where it confirmed the possibility for the EU courts to revise a fine upwards.²⁸⁹

(3) *Suspensive Orders and Interim Relief.* The introduction of annulment proceedings before the GC has in principle no suspensive effect on a Commission decision. However, the TFEU allows plaintiffs to obtain either (i) the suspension of the contested decision pursuant to Article 278, or (ii) the ordering of interim measures pursuant to Article 279, in parallel with the introduction of an annulment action on the basis of Article 263. Suspensive orders and interim relief are granted by the President of the GC (with a possible appeal before the President of the ECJ). To obtain the

^{287.} See Amendments to the Rules of Procedure of the Court of First Instance [Now General Court] of the European Communities, O.J. 2000, L 322/4.

^{288.} See Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; Case T-310/01, *Schneider Electric v. Commission*, [2002] ECR II-4071; Case T-5/02, *Tetra Laval v. Commission*, [2002] ECR II-4381.

^{289.} See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. and others v. Commission*, 29 April 2004, not yet reported at para. 165.

granting of interim relief a plaintiff must satisfy two conditions.²⁹⁰ First, the plaintiff must bring evidence of a *fumus boni juris*, i.e. a *prima facie* case against the challenged decision. Second, the plaintiff has to show that there is “urgency” in obtaining the interim relief, in order to prevent “serious and irreparable harm” to the applicant. Only if these conditions are met, will the President consider the granting of interim relief. In general, however, the President additionally balances the interests at stake (the plaintiffs interests versus the interests which the Commission was trying to attain through the adoption of its decision) in order to decide on whether or not granting the requested measures.

(4) *Possibility to Introduce Claims for Compensation for Illegal Action by the European Commission.* Article 340(2) allows parties which would have suffered a damage resulting from the action of an EU institution to seek to obtain damages by initiating a proceeding before the GC.²⁹¹ This also applies to decisions in the field of competition law. Such an action could for instance be launched when the Commission has been shown to have acted illegally by wrongly prohibiting a conduct or a merger between undertakings. In the past, this provision was almost never used in the field of competition law. However, in recent times, the virulence of the statements formulated by the GC in its *Airtours*, *Schneider* and *Tetra Laval* annulment judgments and the serious consequences resulting from the Commission’s prohibition decisions (abandonment of the mergers in question) encouraged a number of firms to introduce actions based on Article 340(2).²⁹²

Three conditions must be met for such actions to succeed. First, the relevant institution must have committed a sufficiently serious breach of a legal rule designed to confer rights on individuals. The assessment of the factor “sufficiently serious breach” must be carried out in the light of two parameters. On the one hand, it depends on the extent of discretion possessed by the EU institution in question and, on the other, on the complexity of the situation under consideration. Following a sliding-scale approach, the greater the degree of institutional discretion, the more serious the illegality must be to make that institution liable. Second, the applicant must have suffered real and definite harm. In line with classic tort law principles, the harm may consist in a *damnum emergens* (material damage) or a *lucrum cessans* (loss of profits). In principle, the burden of establishing the amount of the actual damage rests on the applicant. Finally, the applicant must prove that there is a direct and immediate causal link between the damage and the act of the institution.

To date, private applicants have only in one case successfully obtained compensation for a breach of Community law by the Commission.²⁹³ The

290. See Article 104(2) of the CFI’s rules of procedures, *supra* note 281.

291. This provision states: “[...] the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”

292. See Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; Case T-310/01, *Schneider Electric v. Commission*, [2008] ECR II-4071; Case T-5/02, *Tetra Laval v. Commission*, [2002] ECR II-4381.

293. See Case T-351/03, *Schneider Electric SA v. Commission*, [2007] ECR II-2237.

reason for the limited number of successful application for damages is that the three conditions laid down in the case-law are very difficult to satisfy. *Holcim v. Commission* amply demonstrates this. In this case the Commission fined various undertakings in its Cement decision for operating a cartel. The decision eventually came before the GC. The latter partially annulled the Commission's decision as a result of finding that two undertakings, Alsen and Nordcement, had not violated Article 101.²⁹⁴ These undertakings, which had given bank guarantees in order not to pay the relevant fine immediately, requested the Commission to reimburse the fees paid to obtain these guarantees. After their request was rejected by the Commission, the undertakings (which in the meantime had merged giving rise to a new undertaking Holcim) lodged a fresh appeal for indemnity before the GC. They claimed that the illegal Commission decision caused them harm through having to pay bank fees. The GC carried out an examination to see whether the three conditions had been fulfilled. It considered that the first condition was not satisfied insofar as:

“regard being had to the fact that Cement was a particularly complex case, involving a very large number of undertakings and almost the entire European cement industry, to the fact that the structure of Cembureau made the investigation difficult owing to the existence of direct and indirect members, and to the fact that it was necessary to analyse a great number of documents, including in the applicant's specific situation, it must be held that the defendant was faced with complex situations to be regulated. Last, it is necessary to take account of the difficulties in applying the provisions of the EC Treaty in matters relating to cartels. Those practical difficulties were all the greater because the factual elements of the case in question, including in the part of the decision concerning the applicant, were numerous. On all of those grounds, it must be held that the breach of Community law found in the Cement judgment as regards the part of the decision concerning the applicant is not sufficiently serious.”

The appeal was therefore rejected. The above passage reveals the extremely cautious approach followed by the Court when dealing with action for damages. In insisting on the difficulties of applying the provisions of the Treaty with respect to cartel agreements (which are amongst some of the most clear and precise rules in the field of competition law), the GC also casts serious doubt on the possibility to successfully lodge an appeal for indemnity against an illegal Commission intervention in a field as complex and speculative as, for example, merger control.

In its *Schneider v. Commission* ruling, the GC, however, found the Commission liable for damages incurred as a result of its unlawful prohibition of a notified merger case. In 2001, the Commission had adopted a decision declaring the merger of Schneider and Legrand as incompatible with the common market. The Commission then adopted a further decision ordering Schneider to divest Legrand. The parties, however, appealed this decision and, in 2002, the GC annulled both of the Commission's decisions on incompatibility and divestiture. The Commission then began a second

²⁹⁴. See Case T-28/03, *Holcim v. Commission*, [2005] ECR II-1357.

review of the transaction and closed its file after Schneider completed its divestment of Legrand. Schneider agreed to sell Legrand to a third party at a reduced price (because a long delay between signing and completion was agreed). The GC ordered the EU to compensate Schneider for (i) the expenses incurred by Schneider during the Commission's second review of the transaction and (ii) the reduction in the sale price of Legrand.²⁹⁵

Although Schneider obtained compensation, the GC's judgment does not reverse its traditionally reluctant approach towards indemnity applications in the field of competition law. In *Schneider v. Commission*, the Court identified an egregious infringement of Schneider's rights of defence which in turn had inflicted a serious damage to the applicant.²⁹⁶ The Court, however, did not provide guidance on the thornier question of whether substantive legal and economic errors made by the Commission in its decision entitled the parties to obtain compensation. The GC merely indicated that "manifestly serious breaches vitiating the underlying economic analysis" can in principle give rise to a right of damages.²⁹⁷ However, it sounded a note of caution in recalling that the Commission must enjoy a wide margin of discretion in its assessment of complex economic issues.

Subsequent to its *Schneider* judgment, the GC confirmed its cautious approach with respect to actions for damages as it dismissed the claim for damages against the European Commission brought by MyTravel. In 1999, the Commission had prohibited the merger between MyTravel (then Airtours) and First Choice plc, on the basis that the transaction would create a collective dominant position on the market for UK short-haul holiday packages. MyTravel brought an appeal and in 2002 the GC annulled the prohibition decision. MyTravel then initiated proceedings at the GC pursuant to which it claimed compensation from the Commission for the damage it alleged to have suffered as a result of the overturned decision.

In its judgment, the GC recalled that "[w]here the unlawfulness of a legal measure is relied on as a legal basis for action for damages, that measure, in order to be capable of causing the Community to incur non-contractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals."²⁹⁸ In this respect, the GC stated that the annulment of the *Airtours* decision of the Commission due to a series of errors of assessment could not be equated without further analysis with a "sufficiently serious breach" of a rule of law.²⁹⁹ Otherwise this "would risk compromising the capacity of the Commission fully to function as regulator of competition, a task entrusted to it by the EC Treaty [now the TFEU], as a result of the inhibiting effect that the risk of having to bear the losses alleged by the undertakings concerned might have

295. The ECJ, however, partly annulled the judgment of the GC on this point. It upheld the CFI's order in respect to (i) above and annulled its order in respect to (ii). The ECJ ruled that the reduction in the transfer price for Legrand was not a direct result of the Commission's procedural irregularity. See E.C.J., case C-440/07 P, not yet reported.

296. See § 129.

297. *Id.*

298. *Id.* at § 37.

299. *Id.* at §§ 41-42.

on the control of concentrations.”³⁰⁰ The right to compensation for damage resulting from the conduct of an institution would only become available “when such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, are objectively subject.”³⁰¹ In light of the facts of the case, the GC concluded that the various errors it established in its judgment annulling the *Airtours* decision of the Commission were not sufficiently serious to give rise to the non-contractual liability of the Community.

The GC nevertheless recognized and somewhat developed the position it had adopted in *Schneider* that “[i]n the field of non-contractual liability, the possibility cannot be ruled out in principle that manifest and grave defects affecting the economic analysis which underlies [merger control decisions] could constitute breaches that are sufficiently serious to give rise to the non-contractual liability of the Community for the purposes of the case-law”.³⁰² The GC, however, noted that economic analysis in competition cases involved generally “complex and difficult intellectual exercises, which inadvertently contain some inadequacies, such as approximations, inconsistencies, or indeed certain omissions.”³⁰³ These inadequacies were “all the more likely to occur where, as in the case of the control of concentrations, the analysis has a prospective element.”³⁰⁴ The Court also recalled that the Commission enjoys a broad discretion in maintaining control over EU competition policy and that it included the choice of the analytical tools it would use in a given matter.³⁰⁵ The GC then observed that the factors described above had to be taken into account in assessing whether the Commission committed a sufficiently serious breach in analyzing the effects of the *Airtours/First Choice* merger.³⁰⁶

The GC’s dismissal of MyTravel’s claim is not entirely surprising as the GC probably wanted to avoid that the Commission be frightened in the future to prohibit a problematic merger due to the risk of liability and damages in case its decision was subsequently struck down as illegal. This would obviously damage the Commission’s ability to control mergers with negative consequences resulting for consumers. Now, given the wide latitude left to the Commission by the GC, the circumstances where the prohibition by the Commission of a merger that is subsequently annulled due to the fact its draw the wrong conclusion on the merits of the case will lead to a successful action for damages on the part of the affected parties are likely to be very limited. As illustrated by the GC’s decision in *Schneider*, claims for indemnity are more likely to succeed for blatant infringement procedural or basic due process requirements.

300. Id. at § 42.

301. Id. at § 43.

302. Id. at § 80.

303. Id. at § 81.

304. Id. at § 82.

305. Id. at § 83.

306. Id. at § 84.

iv. Limits on EU Competition Law

(1) *Application of EU Competition Law to Public Entities.* EU competition law applies *ratione personae* to all “undertakings,” regardless of their legal status. As long as an entity is engaged into an economic activity, i.e. the offering of goods and services on a given market, it falls within the scope of Article 101 and 102. Thus, public entities may be found liable of a violation of EU competition law provided they carry out an economic activity. A public employment agency was, for instance, found violating Article 102 in *Höfner and Elser*.³⁰⁷ On the other hand, a public entity that confines itself to the exercise of noneconomic activities (such as, for instance, the control and supervision of air space in *Eurocontrol*) does not fall within the scope of EU competition law.³⁰⁸

(2) *State Compulsion Defense.* A distinct situation arises, however, when a Member State uses its legislative or regulatory powers in such a way that it leads firms to infringe EU competition rules. This can be the case, for instance, when public authorities impose the conclusion of a price agreement to firms operating in a given sector. In such situations, the ECJ has ruled that these firms will only escape a finding of a violation of Article 101 if State intervention effectively required companies to act in a particular manner and left them no “breathing space” for competing in the market.³⁰⁹ In sum, the possibility for firms to escape the application of Article 101 by invoking the state compulsion defense is a narrow one. They have to prove that the state intervention left them absolutely no margin of maneuver on the market.

(3) *Act of State Offense?* Under EU law, the Commission may challenge Member States’ actions violating the purpose and impeding the effectiveness of TFEU³¹⁰ In the field of competition law, the Commission has not yet challenged States’ measures frustrating the “*effet utile*” (in other words, the effectiveness) of Articles 101 and 102.³¹¹ The reluctance of the Commission may be explained by political reasons. In addition to being in charge of implementing EU competition rules, the Commission is also a political institution proposing EU legislation in a wide number of sectors. However, this legislation has to be approved by the Council (and in some cases by the European Parliament) to become binding law. The Commission is thus always cautious when it deals with Member States because aggressive legal actions against their measures could be subject to retaliation within the legislative process.

The ECJ recently gave a strong impetus for the eradication of public restrictions on competition in the *Conorzio Industrie Fiammiferi* case.³¹²

307. See ECJ, C-41/90, *Höfner and Elser v. Macrotron GmbH*, [1991] ECR I-1979.

308. See ECJ, C-364/92, *SAT Fluggesellschaft mbH v. Eurocontrol*, [1994] ECR I-43.

309. See D. Goyder, *EC Competition Law*, 4th ed., at p. 479. See ECJ, 240-242, 260-262, 268-269/82, *Stichting Sigarettenindustrie and others v. Commission*, [1985] ECR 3831.

310. Through the initiation of infringements proceedings pursuant to Article 226 on the basis of Article 10 of the Treaty (duty of loyal cooperation of Member States) combined with either Article 81 or 82.

311. The only case in which the Commission acted on this basis being: ECJ, C-35/96, *Commission v. Italy*, ECR [1998] I-3851.

312. See ECJ, C-198/01, *Conorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055.

The Court concluded that the application of the then Article 10 of the EC Treaty (now repealed) combined with Article 101 or 102 required NCAs to declare inapplicable any piece of national legislation contrary to EU competition law. As a result, market operators facing legislation likely to violate EC competition law may turn to their NCA to obtain confirmation that it is indeed contrary to Article 101 or 102 and thus should not be applied.

(4) *Limited Application of Competition Rules in Specific Sectors*

a. **AGRICULTURAL SECTOR AND COMMON AGRICULTURAL POLICY.** The first sector that falls only partly under EU competition rules is agriculture. The belief that the agricultural sector fulfills special social and cultural functions in Europe led the drafters of the now defunct EC Treaty to include Article 36 [now Article 42 TFEU] pursuant to which: “The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council.”

In accordance with Article 36 [now Article 42 TFEU], the Council adopted Regulation 26/62, which made Articles 101 and 102 applicable to a large number of agricultural products. However, this Regulation provided that Article 101 would be inapplicable to agreements, decisions and practices that:

“form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, *unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised.*”³¹³

The Commission enjoys exclusive jurisdiction to decide which agreements, decisions and practices benefit from the above exception.³¹⁴ Article 102 and the EU Merger Regulation, however, apply in full to markets for agricultural products.

b. **TRANSPORT.** The fact that Title V of the now defunct EC Treaty laid down a “Common Transport Policy” did not prevent the ECJ, in the seminal *Asjes* case, from holding that absent explicit provisions enacting a specific competition regime for the transport sector, the competition rules of the Treaty could apply as such.³¹⁵ However, as far as competition rules

^{313.} See Council Regulation 26 applying certain rules of competition to production of and trade in agricultural products, O.J. 1962, p. 993.

^{314.} *Id.* at Article 2(2) (emphasis added).

^{315.} See ECJ, Joined cases 209 to 213/84, *Criminal proceedings against Lucas Asjes and others, Andrew Gray and others, Andrew Gray and others, Jacques Maillot and others and Léo Ludwig and others*, [1986] ECR-1425. Note that Regulation 1/2003 at Recital 36 repealed Council Regulation 141 of 26 November 1962 exempting transport from the application of Regulation 17/62, and led to the revision of the various procedural specificities laid down by

are concerned, the transport sector has two distinctive features. First, Regulation 1/2003 does not apply to:

“(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation 4056/86; (b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation 4056/86; (c) air transport between Community airports and third countries.”

Second, the enforcement of the EU competition rules in the transport sector is shared between DG COMP and the Directorate General for Transport of the Commission. This, on some occasions, led to internal conflicts.

c. DEFENSE INDUSTRY. In principle, EU competition rules apply to the defense industry. However, Article 346 TFEU allows Member States to refuse to disclose information if that disclosure could run “contrary to the essential interests of [their] security.” In addition, Member States may take measures that are considered “necessary for the protection of the essential interests of [their] security which are connected with the production of or trade in arms, munitions and war material.” This provision thus allows Member States to limit the application of EU competition rules when they establish that it prejudices their security interests. Article TFEU insists nonetheless on the fact that these exceptions shall be strictly limited to products that are intended for “specifically military purposes”.³¹⁶

In practice, this provision has only rarely been invoked by the Member States. In the context of the *Matra/Aérospatiale* merger, the French authorities enjoined the parties to abstain from notifying the aspects of the transaction relating to missiles and missiles system.³¹⁷ The Commission checked whether the conditions of Article 346 were fulfilled. It came to the conclusion that the measures taken by the French authorities were necessary for the protection of the essential interests of its security and that they did not encroach upon non military product markets.³¹⁸

(5) *Effect on Trade Between Member States.* EU competition provisions will only apply provided the agreement or abuse at hand “may affect trade between Member States.” The purpose of this condition is to set out a jurisdictional threshold for the prohibitions contained in Articles 101 and 102 to apply.³¹⁹ Only those anticompetitive practices that are likely to produce a cross-border effect fall within the scope of the TFEU. Absent an effect on intermember trade, the practice is not necessarily left unchecked, as it may fall within the jurisdiction of a national competition legislation.

and Regulations 1017/68 (rail, road and inland waterways), 4056/86 (maritime transport) and 3975/87 (air transport).

316. See Article 306 TFEU: “[...] such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.”

317. See Commission Decision *Matra/Aérospatiale* of 28 April 1999, IV/M.1309.

318. *Id.* at § 16.

319. A similar effect is achieved, in the field of Merger Control, with the turnover thresholds established by Regulation 139/2004 at Article 1(2) and 1(3).

Pursuant to Regulation 1/2003, the finding that a practice has an effect on trade between member states produces important legal consequences on NCAs and national courts as they are obliged to apply, in addition to national competition law, Articles 101 and 102 of the Treaty to agreements and practices which may affect trade between Member States.³²⁰ Absent such a solution, NCAs and national courts could apply national law to cross-border matters and stray from EU competition law.

The case-law of the Court of Justice as well as the Commission “Guidelines on the effect on trade concept” clarify how to assess whether a given practice affects trade between Member States within the meaning of Article 101 and 102 of the TFEU. Traditionally, the ECJ has broadly interpreted this requirement, requiring only that “it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.”³²¹ The ECJ has accordingly concluded that agreements between firms operating in the same Member States satisfy this test if they have an impact, however remote, on intra-Community trade.³²² Moreover, even an agreement that increases trade between Member States can nevertheless fall within the scope of Article 101(1) as what the ECJ considers determinative is not so much whether the agreement in question increases or decreases the flows of goods or services between Member States, but whether it can “distort” trade between Member States in the sense that it affects what would have been the normal pattern of trade absent such an agreement.³²³ Recent ECJ cases may signal a narrower approach to the definition of the notion of impact on trade,³²⁴ but it remains true that in the vast majority of cases the condition of impact on trade between Member States is not likely to be a major obstacle to the application of EU competition law.

3. A BRIEF OVERVIEW OF ANTITRUST LAWS AND REMEDIES IN OTHER NATIONS

Over 100 nations currently have antitrust laws—many adopted in the 1990s—and others are in the process of drafting their laws. Some nations have a single agency with both investigative and adjudicative powers, whereas other split that task between multiple government bodies. These agencies generally have authority to investigate and obtain injunctions and often fines. Many nations also impose criminal imprisonment for some

320. See Recital 8 and Article 3 of Regulation 1/2003, *supra* note 229.

321. Case 56/65, *Société La Technique Minière Ulm v. Maschinenbau*, [1966] ECR 235, 249.

322. Case 322/81, *Michelin v. Commission*, [1983] ECR 3461.

323. Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission*, [1966] ECR 299 at 341–42.

324. Joined cases C–215/96 and C–216/96, *Carlo Bagnasco and Others v. Banca Popolare di Novara soc. coop. arl. (BNP) and Cassa di Risparmio di Genova e Imperia SpA (Carige)*, [1999] ECR I–135.

antitrust violations, including Canada, India, Indonesia, Israel, Japan, Russia, South Africa, South Korea, Taiwan, and Thailand.³²⁵

Many nations also explicitly provide for private antitrust enforcement, but often limit it in various ways. Canada authorizes (1) private damage suits for criminal antitrust violations and (2) private injunctive suits against noncriminal violations if the Canada Competition Bureau is not investigating and the Competition Tribunal grants leave to sue.³²⁶ Japan allows private parties to bring (1) antitrust damage suits after the JFTC has found an antitrust violation, (2) antitrust suits for injunctive relief, or (3) tort suits for damages caused by antitrust violations.³²⁷ Chile, India, Mexico, Peru, Singapore, South Africa, and Turkey allow private actions for damages from violations established in a prior agency proceeding.³²⁸ Without requiring any agency finding or approval, Australia, Brazil, China, and Taiwan allow private actions for both damages and injunctions, while Saudi Arabia and South Korea do so for damages but not injunctions.³²⁹ Even when nations do not provide for direct private enforcement of their antitrust statute, they often allow private suits based on a theory that a violation of antitrust law that injures others constitutes a tort.³³⁰

No other nation appears to automatically treble damages for all antitrust violations like the U.S. does. However, a discretion to impose treble damages can be exercised by the India Competition Commission for cartel violations, by Taiwan courts for intentional violations, and by Turkey courts for illegal agreements or gross negligence.³³¹ Several nations have enacted clawback statutes authorizing actions to recover any excess over single damages paid because of a foreign judgment for multiple damages.³³²

325. Canada Competition Act Part VI; India Competition Act Chapter VI; Indonesia Competition Law Art. 47–49; Israel Restrictive Trade Practices Law § 47; Japan Antimonopoly Act §§ 89–98 (2009); Russia Criminal Code § 178(1); South Africa Competition Act Chapter 7; South Korea Fair Trade Act Chapter XIV; Taiwan Fair Trade Act Chpt. VI; Thailand Trade Competition Act § 51.

326. Canada Competition Act §§ 36(1), 103.1.

327. Japan Antimonopoly Act §§ 24–26 (2009); Japan Civil Code § 709. Unlike in the U.S., indirect purchasers can bring claims for damages in Japan. *See* Tokyo Toyu, 41 Minshu No. 5, 785 (Japan Supreme Court July 2, 1987).

328. OECD, *Competition Law and Policy in Latin America* 210 (2006) (Chile); India Competition Act § 53N; Mexico Federal Economic Competition Law Art. 38; Peru Competition Law 1034, Art. 49; Singapore Competition Act § 86; South Africa Competition Act § 65; Turkey Competition Law Arts. 57–58; Turkey 19th Chamber of Supreme Court of Appeals, Decision 2007/10677.

329. Australia Trade Practices Act §§ 80–82; Brazil Antitrust Law 8884/94, Art.29; China Anti-Monopoly Law Art. 50; Taiwan Fair Trade Act Chpt. V; Saudi Arabia Competition Law Art. 18; South Korea Fair Trade Act Art. 56 (allowing private damages); Case No. 2001 Gahap 60373, Seoul Central District Court Judgment, August 1, 2003 (disallowing private injunctive relief). *See also* Argentina Competition Law Art. 51 (allowing private damages for cartel violations).

330. *See, e.g.*, Israel Restrictive Trade Practices Law § 50; Egypt Civil Code Art. 163.

331. India Competition Act § 27(b); Taiwan Fair Trade Act Art. 32; Turkey Competition Law Art. 58.

332. *See* Chapter 8.

Class actions have so far been relatively rare in other nations, but China and Israel authorize them, as do many Canadian provinces.³³³

Questions on Remedies

1. Should people go to prison for antitrust violations? Why can't they be sufficiently deterred by damage claims? Is prison more likely to effectively deter corporate managers?

2. Should antitrust laws be enforced by private rights of actions? By class actions? Why wouldn't government enforcement to protect markets suffice? Do government enforcers have sufficient incentives? Are they likely to know about all the violations private parties would know about? Do injured private parties have enough incentives to complain without the prospect of damages?

3. Should treble damages be used? If only single damages are imposed, wouldn't it be tempting to engage in anticompetitive conduct because you can keep the supracompetitive profits if you don't get caught and just pay successful litigants out of those profits if you do? If the odds of an antitrust violation being detected and successfully proven are 33%, aren't treble damages necessary to deter those violations? On the other hand, won't treble damages deter conduct that might mistakenly be judged anticompetitive but actually constitutes desirable aggressive competition?

333. See China Civil Procedure Law Art. 54–55; ISRAEL RESTRICTIVE TRADE PRACTICES LAW § 46A; ABA, COMPETITION LAWS OUTSIDE THE UNITED STATES at Canada 25 (First Supp. 2005). Some European nations use forms of aggregate litigation that could be used in antitrust cases. See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1. 21–25 (2009) (Denmark, England, Finland, France, Italy, Norway and Sweden).