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ABSTRACT

Title: Antitrust Remedies – Selected Bibliography and Annotations

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This paper was prepared as background for the American Antitrust Institute’s Annual Conference in June, 2005, whose topic was Creative Antitrust Remedies. This paper contains a bibliography of general books and annotations of general articles, ABA documents, and governmental statements; followed by annotations of specific topics: monopolization, mergers, cartels, and, finally, OECD materials.

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AAI Working Papers are works in progress that will eventually be revised and published elsewhere. They do not necessarily represent the position of the American Antitrust Institute.
We prepared this selected bibliography for the American Antitrust Institute's Annual Conference in June, 2005, the topic of which was Creative Antitrust Remedies. We have organized the materials as follows: books, articles, bar association reports, fora, and government statements dealing with antitrust remedies generally, then sources specifically dealing with monopolization, mergers, and cartels, and finally, OECD materials. We hope it will be useful for those wishing to conduct further research on the issue of antitrust remedies.

We initially approached the task of surveying the literature on antitrust remedies with a view towards identifying common themes or conclusions. In fact, the body of literature is noteworthy for the extent of general disagreement. For example, on the topic of the Microsoft case, some commentators opined that only a severe structural solution would remedy the monopolization violation, while others believed that robust remedial measures would ultimately harm consumers. Indeed, in an introduction to the 2004 ABA Antitrust Remedies Forum, Richard Steuer wrote “[some critics] have complained that the remedies are too severe, or not severe enough. Some have complained that remedies regulating conduct rather than requiring monetary payments are insufficient or too complex. Others have complained that there are too many enforcers and too many proceedings based on the same allegations.”

Other aspects of the remedies debate are also contentious. For example, at the ABA Antitrust Remedies Forum, panelists agreed not to discuss Illinois Brick, fearing that debate regarding indirect purchaser suits would be so heated as to preempt debate on all other antitrust remedial issues.

This is a work in progress. We welcome suggestions for additional materials that should be included.


Antitrust Remedies Generally

Books

ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (FIFTH), Chaps. VIII D and E (ABA 2002), and supplemental annual reviews.

ABA Section of Antitrust Law, MERGERS AND ACQUISITIONS, UNDERSTANDING THE ANTITRUST ISSUES (SECOND), Chap. 13 (ABA 2004).

ABA Section of Antitrust Law, PROVING ANTITRUST DAMAGES, LEGAL AND ECONOMIC ISSUES (ABA 1996).

Areeda, Philip & Turner, Donald, ANTITRUST LAW, Vol. 2, Chap. 3 (Little, Brown & Co. 1978), and supplements.


Articles

Adams, Walter, *Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust*, 27 IND. L. J. 1 (1951) (analyzing past Section 2 antitrust cases and concluding that while the U.S. Department of Justice held an impressive record of legal victories, the remedial action approved by the courts in most of those cases failed to lessen concentration or restore effective competition).

Balto, David, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113 (2005) (arguing that while the FTC’s broad remedial capabilities are better suited than a federal court to address difficult issues of remedies, the agency has failed to use its full range of remedial powers, and by emphasizing disgorgement and restitution in recent years, the Commission has strayed from its original vision as an administrative agency that focuses on complex antitrust issues and seeks innovative relief, and instead largely duplicates the efforts of private and state enforcers).


Cavanagh, Edward D., *Detrebbling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987) (advocating detrebbling, citing the risk of overdeterrence, unfairness, market distortions, and baseless lawsuits as arguments to abolish or at least limit the applicability of this provision).

Davis, Ronald W., *Indirect Purchaser Litigation: ARC America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375 (1997) (noting the growing tendency toward allowing indirect purchasers to sue for price fixing under state antitrust or consumer protection legislation, and pointing out that this raises serious questions about the fair and efficient administration of justice, as state courts sort out the intricate economic analysis of pass-on among varying levels of indirect purchasers.)
Denger, Michael & Arp, D. Jarrett, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41 (2001) (arguing that the analysis of whether the multi-faceted system of remedies adequately deters cartel behavior should inquire whether it (1) provides compensation to those who are actually injured by cartel behavior; (2) avoids creating windfalls to those who are not injured; (3) generates excessive costs by giving rise to unnecessary legal fees and related expenses and imposing unjustified burdens on the judiciary and the parties through protracted, uncoordinated and duplicative litigation; and (4) furthers the fundamental policy of promoting a more competitive industry structure that furthers consumer welfare).

Easterbrook, Frank, *Detrebling Antitrust Damages*, 28 J.L. ECON. 445 (1985) (arguing that the existence of a multiplier should depend on (a) the extent to which the violation is concealable and (b) whether the plaintiff is a business rival of the defendant, and arguing that the amount to be trebled should be limited to the economic injury from monopoly or part of the profit that induces others to violate the law).

Gavil, Andrew, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*. 69 GEO. WASH. L. REV. 860 (2001) (arguing that the case management problems posed by the diffusion of private direct and indirect purchaser litigation among state and federal courts leads to unjustifiable systemic inefficiencies, and proposing a legislative solution that would allow easier removal and consolidation of indirect purchaser suits).

Hovenkamp, Herbert, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990) (arguing that the indirect-purchaser rule is inconsistent with Section 4 of the Clayton Act in that it potentially awards the direct purchaser with greater than three times the damages “by him sustained,” while indirect purchasers receive nothing).

Joskow, Paul L., *Transaction Cost Economics, Antitrust Rules, and Remedies* 18 J. LAW, ECON. & ORG. 95 (2002) (arguing that antitrust rules should be sensitive to the attributes of enforcement institutions, the information and analytical capabilities these institutions possess, the uncertainties they must confront in the diagnosis and mitigation of anticompetitive behavior and market structures, and the associated costs of Type I and Type II errors implied by alternative legal rules and remedies).

Lande, Robert H., *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L. J. 115 (1993) (suggesting that treble damages amount to less than actual damages when factors such as lack of prejudgment interest, the time value of money, failure to account for societal welfare losses or umbrella effects, litigation costs, and tax effects are taken into account), available at http://home.ubalt.edu/ntlaland/TrebleDamages1993.doc.

Landes, William, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. LAW REV. 652 (1983) (demonstrating that to determine optimal deterrence, net harm by antitrust violations must first be calculated, then multiplied by the probability of detecting and proving the violation).

O'Connor, Kevin J., *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (2001) (noting that thirty-six States and District of Columbia, which contain over seventy per cent of the population of the United States, provide for some sort of right of action on behalf of some or all indirect purchasers).

Page, William H., *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999) (surveying class certification decisions in cases that indirect purchasers had filed under state Illinois Brick repealer statutes and similar state laws and concluding that indirect purchasers suits were not effective in providing real compensation to the vast majority of indirect purchasers of price-fixed products).

Pitofsky, Robert, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L. J. 169 (2002) (asserting that the organizing principle of the 1990s, both during the Bush I and Clinton Administrations, was to administer a moderately aggressive antitrust program, but combine it with a sensitivity to the values of preserving efficiencies and encouraging incentives to innovate and a recognition of economic changes resulting from globalization of competition; and arguing that while few, if any, new substantive antitrust rules were adopted during the Clinton years, remedies during the 1990s were expanded and modified, however they still may not be fully adequate).


Posner Richard & Landes William, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (“Unless they are willing to countenance multiple liability, the courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a ‘passing-on defense’ against direct purchaser
plaintiffs. As the Court recognized in *Illinois Brick*, there are only two ways of avoiding unacceptable multiple liability: (1) allow indirect purchasers to sue but overrule *Hanover Shoe* or (2) retain *Hanover Shoe* and preclude indirect purchasers from suing.”


Waller, Spencer W., *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003) (arguing that total punishment in any given antitrust case varies dramatically for offenses with identical or similar status under the law and there is no a priori way to predict punishment levels for a particular case or a particular defendant), available at http://www.abanet.org/antitrust/remedies/waller.pdf.

Werden, Gregory J. & Schwartz, Marius, *Illinois Brick and the Deterrence of Antitrust Violations - An Economic Analysis*, 35 HASTINGS L.J. 629 (1984) (reviewing the rationale in *Illinois Brick*, summarizing the basic issues in the controversy caused by that decision, developing an economic model of private antitrust enforcement and concluding that direct purchasers are more efficient than indirect purchasers at enforcing antitrust laws and should therefore be given maximum incentive to bring antitrust suits).


ABA Section of Antitrust Law, Antitrust Remedies Forum (April 2, 2003) (The first roundtable addressed the adequacy of criminal and civil antitrust remedies in deterring cartel behavior; the second addressed non-monetary remedies, including both merger remedies and non-merger remedies; and the third addressed issues of access to courts and procedure), program, roundtable transcripts and papers available at http://www.abanet.org/antitrust/remedies/.


ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2005, Report of the Task Force on the Federal Agencies at 43-45 (proposing remedial harmonization among the antitrust agencies, particularly with respect to the use of buyer up-front remedies by the FTC versus “fix-it first” remedies at the DOJ).

Comments of the American Antitrust Institute Working Group on Remedies, June 17, 2005 (reflecting the consensus of a Working Group chaired by Michael Freed, and consisting of members Joseph Bauer, Patricia Connors, Eugene Crew, Jonathan Cuneo, Albert Foer, Robert Lande, James Langenfeld, Daniel Mogen, Kevin O’Connor and Bernard Persky, on issues including treble damages, prejudgment interest, attorney’s fees, joint and several liability, contribution and claim reductions, remedies available to the federal government, private injunctive relief and indirect purchaser litigation), available at http://www.antitrustinstitute.org/recent2/423.pdf


Report of the ABA Antitrust Law Section Task Force on Legislative Alternatives Concerning Illinois Brick, 46 ANTITRUST L.J. 1137 (1978) (proposing draft legislation based on the principle that to avoid imposing multiple liability on defendants, all claims arising from a given violation, including claims by direct and indirect purchasers or sellers, must be combined into a single forum).
Report of the ABA Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*, 52 ANTITRUST L.J. 841 (1984) (opposing proposed legislation designed to repeal in part *Hanover Shoe* and *Illinois Brick* because such legislation would permit indirect purchaser suits without solving the problems of dilution of the deterrent effect of treble damage recoveries, over-complication of treble damage proceedings, introduction of unwieldy investigations to trace overcharges, and the possibility of double recoveries and inconsistent judgments).

Report of the ABA Section of Antitrust Law Task Force to Review the Supreme Court’s Decision in *California v. ARC America Corp.*, 59 ANTITRUST L.J. 273 (1990) (setting forth an analysis of the legal issues and policy implications raised by *ARC America* and listing some alternatives available to federal and state antitrust policymakers in light of *ARC America*).

Report of the Indirect Purchaser Task Force, 63 ANTITRUST L.J. 993 (1995) (proposing a legislative change to the effect that each state attorney general would be authorized to bring indirect purchaser lawsuits as *parens patriae* for its own residents; such indirect purchaser lawsuits would be the only indirect purchaser lawsuits that could be brought under federal or comparable state law, i.e., *state* statutes would be pre-empted; in both direct and indirect purchaser cases there would be a presumption that any overcharge was passed on to the ultimate indirect purchaser; in both direct and indirect purchaser cases the amount of the overcharge would be calculated as if it occurred at the direct purchaser level; and in both direct and indirect purchaser cases duplicative amounts based on the same overcharge could not be awarded).
Government Statements, Government Officials


FTC Policy Statement on Use of Monetary Remedies in Competition Cases (July 25, 2003) (while disgorgement and restitution can complement more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties, the FTC will generally seek disgorgement and restitution only in exceptional cases: where the underlying violation is clear, where there is a reasonable basis for calculating the amount of a remedial payment and there is value in seeking monetary relief in light of any other remedies available, including private actions and criminal proceedings), available at www.ftc.gov/os/2003/07/disgorgementfrn.htm.


U. S. FEDERAL TRADE COMMISSION, Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies, April 2, 2003 (addressing issues arising in the following areas: (1) the assets to be divested, (2) an acceptable buyer, (3) the divestiture agreement, (4) additional order provisions, (5) orders to hold separate and/or maintain assets, (6) divestiture applications, and (7) timing), available at http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf.

U.S. FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION, A Study of the Commission’s Divestiture Process (1999) (systematically reviewing orders requiring divestiture to determine how well buyers of divested assets have fared operating the assets they acquired, and recommending that the Commission include a variety of order provisions and divestiture procedures to correct informational and bargaining imbalances between respondents on the one hand and the staff and the buyers of divested assets on the other hand, particularly where the buyers have never operated in the industry and never operated the to-be divested business), available at http://www.ftc.gov/os/1999/08/divestiture.pdf.


Monopolization

Ayres, Ian & Nalebuff, Barry, Going Soft on Microsoft? The EU’s Antitrust Case and Remedy, 2 THE ECONOMIST’S VOICE, art. 4 (2005) (arguing that the Commission’s unbundling remedy was desirable, but a preferable remedy would have required, in addition to unbundling, a separate version of Windows with three competing media players as well as Windows Media Player built in), available at http://www.bepress.com/cgi/viewcontent.cgi?article=1045&context=ev.

Bresnahan, Timothy F., A Remedy that Falls Short of Restoring Competition, 16 ANTITRUST 67 (Fall 2001) (arguing that on the government’s theory of the Microsoft case, the settlement fell far short of providing a remedy proportionate to the problem - it did not lower the entry barriers that protected the Windows monopoly, as was required to vindicate the problem that the government successfully demonstrated in court), available at http://www.stanford.edu/~tbres/Microsoft/anti-bre.pdf.

Cartensen, Peter C., Remedying the Microsoft Monopoly: Monopoly Law, the Rights of Buyers and the Enclosure Movement in Intellectual Property, 44 ANTITRUST BULL. 577 (1999) (arguing that Microsoft intellectual property laws that tend to over-reward innovation have contributed to Microsoft's obtaining and retaining its monopoly status, and arguing that creative antitrust remedies may provide a suitable solution to such IP protection).

Comanor, William S., The Problem of Remedy in Monopolization Cases: The Microsoft Case as an Example, 46 ANTITRUST BULL. 115 (2001) (arguing that an effective remedy in the Microsoft case required the “formation of competitive structure at the operating system level, where Microsoft's monopoly position was grounded,” however, misplaced concerns about consumer welfare prevented the court from adopting remedies comprehensive enough to achieve this goal).

Crandall, Robert W., The Failure of Structural Remedies in Sherman Act Monopolization Cases, AEI-Brookings, Working Paper No. 01-05, 2001 (examining the frequency and effectiveness of divestiture relief in over a century of monopolization cases, and concluding that, with the exception of the break-up of AT&T in 1984, such relief has not been successful at increasing competition, raising industry output or reducing prices to consumers), available at http://www.criterioneconomics.com/docs/crandal_2.pdf.

Elzinga, Kenneth, et al., United States v. Microsoft: Remedy or Malady?, 9 GEO. MASON L. REV. 633 (2001) (chronicling the Microsoft investigation and lawsuit, and concluding that the break-up remedy adopted by the district court is out of proportion to the court’s findings of minimal consumer harm, will result in higher prices for consumers and may deter innovation, and is a remedy long sought by Microsoft's competitors and the one that benefits them most).
First, Harry, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001) (emphasizing the importance of state antitrust enforcement and arguing that state enforcers have some important advantages, including greater local knowledge and different policy perspectives).

Forrester, Ian S., *Article 82: Remedies in Search of Theories?*, in *INTERNATIONAL ANTITRUST LAW & POLICY*, 2004 FORDHAM CORP. L. INST. 167 (B. Hawk, Ed. 2005) (arguing that over the last several years, remedies in Article 82 cases appear to be “looking forward at the desired conduct rather than looking backward and ensuring the discontinuation of the abuse,” and that such remedies do more to further industrial policy and political goals rather than address pure competition concerns).

Goldman, Calvin et al., *A Canadian Perspective on Intellectual Property Rights and Competition Policy: Striving for Balance and Related Comity Considerations*, in *INTERNATIONAL ANTITRUST LAW & POLICY*, 2004 FORDHAM CORP. L. INST. 195 (B. Hawk, Ed. 2005) (arguing that in cases where competition policy issues arise from intellectual property rights, competition policy norms should require the least interventionist remedies that: (i) facilitate the realization of dynamic efficiencies, (ii) promote the process of competition rather than individual competitors, (iii) respect fundamental intellectual property rights, and (iv) minimize the potential to chill innovation while ensuring that intellectual property rights are not being used to leverage monopoly power beyond the scope of the particular property right; and underscoring the importance of comity principles in trans-border cases involving markets characterized by innovation and rapid technological advances).


James, Charles A., *The Real Microsoft Case and Settlement*, 16 ANTITRUST 58 (Fall 2001) (examining the legal allegations charged in the complaint and how those allegations were resolved in the courts, and defending the effectiveness of the remedies in the proposed Final Judgment).

Kovacic, William E., *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285 (1999) (emphasizing the importance of remedies in antitrust cases, asserting that examining the effectiveness of past enforcement is essential to shed light on appropriate future solutions, and questioning the adequacy of traditional antitrust institutions to intervene in sectors defined by rapid technological or organizational change).

Lande, Robert H., *Why Are We So Reluctant to 'Execute' Microsoft?*, 1 ANTITRUST SOURCE 1 (November 2001) (arguing that although courts are reluctant to impose structural remedies, divestiture should not be a remedy of last resort, rather, it should be a viable option that is considered logically on its legal, administrative and economic merits), available at http://www.abanet.org/antitrust/source/11-01/microsoft.pdf.

Lenard, Thomas M., *Creating Competition in the Market for Operating Systems: Alternative Structural Remedies in the Microsoft Case*, 9 GEO. MASON L. REV. 803 (2001) (arguing in favor of a “hybrid” structural remedy (i.e., one that would separate Microsoft into an Applications company and three equally subdivided Operating System companies) on the basis that such a remedy would immediately introduce competition into the personal computer Operating Systems market, and it would minimize ongoing government scrutiny of Microsoft's business and technical activities).

Lévêque, François, *The Controversial Choice of Remedies to Cope with the Anticompetitive Behavior of Microsoft*, Paper presented to the Law and Economics Workshop, Boalt School of Law, University of California at Berkeley, 6 November 2000 (arguing that, with respect to the question of remedies in the Microsoft case, the key economic distinction is between economic remedies based on incentives and command-and-control remedies rather than between behavioral and structural remedies), available at http://www.cerna.ensmp.fr/Documents/FL-MSBerkeley.pdf.

Levinson, Robert J. et al., *The Flawed Fragmentation Critique of Structural Remedies in the Microsoft Case*, 46 ANTITRUST BULL. 135 (2001) (arguing that fears of fragmentation and high porting costs resulting from structural remedies are unwarranted).

Lopatka, John E. & Page, William H., *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829 (2001) (arguing that consumers, computer manufacturers, and competitors will face obstacles in proving that Microsoft’s offenses caused them antitrust injury, because damages resulting from harms to innovation are difficult to quantify, and even if one could find some price effects from Microsoft's actions, these would be too difficult to disentangle from Microsoft's legitimate business practices).

Lopatka, John E., *Devising a Microsoft Remedy that Serves Consumers*, 9 GEO. MASON L. REV. 691 (2001) (asserting that a structural remedy in Microsoft would destroy...
efficiencies and harm consumer welfare, and that conduct remedies may be a preferable solution).


Sullivan, E. Thomas, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565 (2002) (arguing that courts should exercise caution when considering divestiture remedies in technologically dynamic markets, and instead “should consider alternative, conduct-based remedies that will both remedy the antitrust harm and will promote the competitive process” because “the cost of correcting the market failure [should] not exceed the anticompetitive injury visited on consumers.”)


Zittrain, Jonathan, *The Un-Microsoft Un-Remedy: Law Can Prevent the Problem That it Can't Patch Later*, 31 CONN. L. REV. 1361 (1999) (identifying government action in granting excessive copyright protection as the problem and suggesting slashing the term of copyright for computer software from 95 years to five or ten years).
Mergers

Baer, William & Redcay, Ronald C., *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*, 69 Geo. Wash. L. Rev. 915 (2001) (examining divestiture policies of the enforcement agencies, and in particular, the FTC’s preference for “up-front” acceptable buyers, for “as is” sales of an entire business, and for the inclusion of contingent requirements for divestiture of “crown jewel” assets as an incentive for completion of divestiture programs), available at http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueMetR/Baer.pdf.


DG COMPETITION, EUROPEAN COMMISSION, *Merger Remedies Study* (October 2005) (consisting of an *ex post* evaluation by the European Commission of remedies offered and accepted by the Commission in past merger cases and identifying what factors and/or processes positively or negatively influenced the effective design and implementation of such remedies, and identifying where further improvements to the Commission’s merger remedies policy and procedures are possible), available at http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf.

Elzinga, Kenneth, *The Antimerger Law: Pyrrhic Victories?*, 12 J. Law & Econ. 43 (1969) (surveying the remedies imposed in a sample of thirty-nine merger cases, and concluding that they were ineffective because they were too timid and not sufficiently structural, and arguing that complete divestiture and reestablishment of the acquired firm was necessary).


Loftis, James R. III & Moskowitz, Danielle K, *United States Federal Antitrust Merger “Solutions,” Not “Remedies”,* in INTERNATIONAL ANTITRUST LAW & POLICY, 2004 FORDHAM CORP. L. INST. 387 (B. Hawk, Ed. 2005) (arguing that consent decrees should be grounded in the analytical merits of a transaction, allow the merged firm to achieve its promised integrative efficiencies, not be arbitrary compromises solely to end litigation or the threat thereof, be limited in time, be
modified for changed conditions, not replace competition with regulation, and be negotiated quickly).


Sims, Joe & McFalls, Michael, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932 (2001) (arguing that the HSR framework for negotiation of remedies to address perceived competitive problems in proposed mergers often does not produce optimal remedial packages).

Baker, Donald, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693 (2001) (reviewing the history of criminal enforcement in the U.S. against both corporate and individual defendants and highlighting the large increase in fines and jail time imposed in the few years since the adoption of the 1991 Sentencing Guidelines; contrasting the present U.S. regime with that of the EU and Canada, whose only large fines appear to have occurred in cases that followed on successful American prosecutions; arguing that the effectiveness of the U.S. system flows in large part from its unique emphasis on individual, in addition to corporate, liability).

Bloom, Margaret, *A Significant Step Forward, the UK Criminalization Initiative*, 17 Antitrust (Fall 2002) (Arguing that (1) the UK criminalization initiative will survive European Union paramounty concerns, (2) concurrent jurisdiction is administratively workable, (3) the UK can and will prosecute non-UK subjects, (4) leniency, plea-bargaining, and other complexities will not stand in the way of effective enforcement, and (5) the initiative will not be hindered by the piling on of criminal, administrative, and civil damage actions against international cartel participants).

Camilli, Enrico Leonardo, *Optimal and Actual Fines in Cartel Cases: The European Challenge*, Paper presented at the Amsterdam Center for Law and Economics Conference Remedies and Sanctions in Competition Policy, Amsterdam, 17-18 February 2005 (arguing in favor of an approach emphasizing deterrence rather than punishment in cartel enforcement, and arguing that optimum enforcement takes into account the amount earned by cartel participants, the most efficient use of available investigative tools, and applies the basic formula by which the nominal fine is equal to net gains divided by the probability of detection).


Connor, John M., *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels*, Staff Paper 04-08, Department of Agricultural Economics,
Purdue University (April 2004) (arguing in favor of extraterritorial expansion of U.S. antitrust law in cartel cases on the basis that: (1) conduct relating to “wholly foreign” purchases necessarily affects domestic commerce, and (2) extraterritorial expansion will increase the probability of discovery of clandestine cartels and increase the overall level of deterrence).

Connor, John M., *Optimal Deterrence and Private International Cartels*, Draft, May 2, 2005 (reviewing international cartels that have been uncovered by one or more antitrust authorities since January 1990 and concluding that total financial sanctions in all geographic regions should be four times the expected global cartel profits in order to ensure absolute deterrence of cartel “leaders” and eight times the expected global cartel profits in order to ensure absolute deterrence of “followers”), available at http://www.aae.wisc.edu/fsrg/web/FSRG%20papers/05%20Connor.pdf.


Joshua, Julian M. & Klawiter, Donald C., *The UK “Criminalization” Initiative: Step Forward or Another Complication?*, 17 *Antitrust* (Fall 2002) (arguing that the UK's Enterprise Bill proposing criminal penalties for individuals involved in antitrust cartel agreements will face several obstacles, including the concurrent jurisdiction of the EC through its administrative proceedings and the UK's dual enforcement responsibilities in EC law and UK criminal law, the possibility of prosecuting criminally non-UK citizens for cartel offenses, the impact on enforcement activities by other jurisdictions, specifically, the impact on the U.S. and other jurisdictions' leniency policies, and the piling on effect of yet another serious antitrust sanction beyond the present multiple jurisdictional enforcement and more aggressive civil enforcement), available at http://www.morganlewis.com/pubs/02E7FE2A-466A-410CB488015B2DEAE8C_Publication.pdf.

Klawiter, Donald C., *After The Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in The Age of International Cartel Enforcement*, 69 Geo. Wash. L. Rev. 745 (2001) (arguing that the level of deterrence in international cartel cases has substantially increased since 1996 due to the combination of blockbuster fines, serious jail sentences, aggressive private damage actions (i.e. direct action, class action, and indirect purchaser), aggressive enforcement actions by other jurisdictions, shareholder actions, and corporate governance consequences for corporate executives).
Kobayashi, Bruce, Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations, 69 GEO. WASH. L. REV. 715 (2001) (reviewing economic literature relating to price-fixing gains and arguing that arbitrarily large fines may be less than optimal if firms and individuals make costly expenditures or avoid productive activities because of fear of being held liable).

Kovacic, William E., Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels, 69 GEO. WASH. L. REV. 766 (2001) (proposing incentives such as a “whistleblower” or qui tam statutes, which would allow individuals reporting clandestine cartel activity to obtain a portion of any fines collected by the Department of Justice).

Schoneveld, Frank, Cartel Sanctions and International Competition Policy: Cross-Border Cooperation and Appropriate Forums for Cooperation, WORLD COMPETITION LAW & ECONOMICS REVIEW, 2003-9, vol. 26, issue 3, p 433 (2003) (arguing that international cooperation with respect to sanctions in cartel enforcement raises difficult and complex issues, and concluding that the WTO should establish competition policy rules and provide a dispute settlement mechanism, while the ICN should set benchmarks for compliance with WTO competition rules).

Spagnolo, Giancarlo, Self-Defeating Antitrust Laws: How Leniency Programs Solve Bertrand’s Paradox and Enforce Collusion in Auctions, Fondazione Eni Enrico Mattei, Milan, Working Paper No. 52.2000 (arguing that because the existing sanctions are too low to deter price-fixing and comparable hard-core violations, leniency programs may actually be counterproductive in that they may provide cartel members with an otherwise missing credible threat to punish cheaters).

Wils, Wouter, P.J., Is Criminalization of EU Competition Law the Answer?, Paper presented at the Amsterdam Center for Law and Economics Conference Remedies and Sanctions in Competition Policy, Amsterdam, 17-18 February 2005 (addressing the issue of whether criminal antitrust enforcement, more specifically imprisonment, is desirable, whether such criminalization should occur at the EU Member State level without parallel criminalization at the level of the EU institutions or without EU harmonization, and whether it would be legally possible to criminalize antitrust enforcement at the level of the EU institutions, or to harmonize criminal antitrust enforcement among EU Member States).
OECD Directorate For Financial, Fiscal And Enterprise Affairs, Competition Committee, *Cartels: Sanctions Against Individuals*, DAF/COMP(2004)39 (arguing that sanctions against individuals, in addition to corporate fines, provide a more effective remedy against hard-core cartels and strengthen the incentives in leniency programs; and arguing that while international law does not recognize the principle of double jeopardy that would prevent authorities in different countries from prosecuting the same person for participation in the same cartel, authorities in different countries nonetheless may benefit from cooperation such that only one jurisdiction prosecutes the individual), available at http://www.oecd.org/dataoecd/61/46/34306028.pdf.
