“Collusion in Plain Sight: Firms’ Use of Public Announcements to Restrain Competition”[1]

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Abstract

This paper identifies three classes of public announcements which facilitate coordination among competitors to restrict competition. Nine episodes of collusion are investigated to understand how this method of communication operates and is effective. An assessment of the conduct of competition authorities and courts in these cases reveals inadequate enforcement. Recommendations are offered for how to more aggressively enforce antitrust law when agreements are reached through public announcements.

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I. Introduction

More aggressive enforcement of competition law will very likely deter some cartels from forming. It could also be the case that some cartels continue to form but coordinate in a manner that, while less effective, is less susceptible to prosecution. One such coordinating practice is to communicate through public announcements. Carefully constructed public announcements could coordinate firms to reduce competition, while making prosecution problematic because there is not an explicit invitation to collude and their public nature provides cover for they could be intended for market participants other than competitors.

The objective of this paper is to examine the use of public announcements by firms for the purpose of coordinating to restrict competition. The paper has several deliverables. First, it categorizes different types of announcements that can embody anticompetitive intent, and populates those categories with reviews of recent cases. Second, it investigates the manner in which these announcements act as a coordinating practice and considers possible procompetitive rationales. When the evidence is available, the efficacy of public announcements in facilitating collusion is also examined. Third, it discusses a socially optimal policy regarding these announcements. Finally, it reviews the current legal treatment and explores how it can be improved to better conform with what is socially optimal while staying within the confines of the law.

Though the use of public announcements has been discussed in some brief policy papers motivated by one or two particular cases,[4] this paper is the first to systematically collect and analyze announcements from an economic and legal perspective. Two primary takeaways of the paper are that, first, public announcements can be an effective method for firms to collude and, second, the current enforcement regime has been inadequate in dealing with them. The handling of public announcements by the courts has been equivocal and deferential, and this study offers a foundation for taking a more decisive and aggressive approach.

II. Defining Anticompetitive Public Announcements

A. *Defining Public Announcements*

A *public announcement* will refer to the conveyance of information by a firm or one of its employees using a medium that is widely accessible to individuals outside of the firm. Firms routinely make public announcements through a variety of media. For a publicly-traded company, its annual report and 10-K

[4] *See, e.g.*, Howard Rosenblatt and Tomas Nilsson, *Analyst Calls and Price Signaling under EU Law,* ANTITRUST SOURCE (June 30, 2012); Chris MacAvoy, *"Are You Talking to Me?" Antitrust Risks and Guidelines for Earnings Calls and Investor Presentations*, LEXOLOGY (Mar. 13, 2015); Peter C. Carstensen, *Information Exchange – An Underappreciated Anticompetitive Strategy*, CPI ANTITRUST CHRON. (Jan. 9, 2020).

provide information to shareholders, financial analysts, and the public at large regarding financial measures, the products and services it offers, corporate strategy, and other information. Earnings calls, typically conducted on a quarterly basis, provide a myriad of financial and market data to analysts and anyone else inclined to listen in, such as competitors. A firm's executives can provide information through speeches and panel discussions at semi-public industry meetings comprising competitors but also analysts, journalists, and other parties, and executives can participate in interviews that are published in trade journals. Most of the media just described are easily accessible to industry insiders such as analysts, journalists, input suppliers, industrial customers, and competitors. A firm can inform the broader public – including consumers – through press releases and interviews carried in the general press as well as advertisements.[5]

There are various audiences for these public announcements, some of whom may be the intended audience and some not. A firm may be interested in informing consumers of a future price change, and for that purpose announces it in the form of a press release, advertisement, or mass email. A speech at an industry meeting about future market demand may be intended for input suppliers so that they can ramp up production. Information about profit margins and sales growth during an earnings call are generally intended for analysts and investors.

As just described, announcements vary in terms of their content and the medium used to convey that content. Subtler than an announcement's content is its meaning. By "meaning," we are referring to "the thing that one intends to convey."[6] Putting aside announcements that a firm is legally obligated to provide (e.g., a 10-K as required by the Securities and Exchange Commission) and accidental announcements (e.g., unintended slips of the tongue at a public gathering), an announcement by a firm (or a firm's executive) is done for the purpose of potentially influencing the conduct of some actors who could affect the firm's future performance. Thus, an announcement has an intended audience and there is a message that the firm would like that intended audience to infer which could affect what they do and consequently the firm's performance.

For example, consider a firm which announces a plan to raise prices at some date in the future. The content is clear but who is the intended audience? It could be consumers with the purpose of allowing them to appropriately adjust their purchases over time. Perhaps the future price increase reflects a future rise in cost and it benefits both the firm and its customers for them to buy now rather than later. Alternatively, the intended audience may be rival firms and the announcement's meaning is an invitation to coordinate on higher prices. In making the announcement, the firm is hoping that rival firms will respond with a similar announcement and then all consummate the price increase at that future date. The proper determination of the meaning of such advance price announcements was the central issue in

[5] We have consciously referred to them as public announcements, rather than communications, because executives are not engaging in a back-and-forth public conversation but rather making one-way announcements.
[6] *Meaning*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meaning (last visited Apr. 13, 2020).

a 1992 case against eight major domestic airlines and the Airline Tariff Publishing Company.[7] The airlines argued that the announcement was intended for their customers and the purpose was to make them better informed. The Antitrust Division of the U.S. Department of Justice (DOJ) argued that the intended audience were other airlines and the purpose was to coordinate on a price increase. In this case, it was accepted by both parties as to who received the announcements and what its content was; what was in dispute was its meaning. Having decided on its future prices, was an airline simply informing consumers? Or was the announcement a proposed price increase that was conditional on rival firms responding in kind; that is, an invitation to collude? There lies the distinction between content and meaning.

From the universe of announcements made by a firm, we will focus on those announcements conveyed using media that are easily accessible by a firm's competitors, which is generally the case with the ones described above, and which contain content relevant to the future state of competition in the market. Relevant content encompasses variables that affect the intensity of competition – such as the prices that are to be charged and how much is to be supplied – and that are the consequence of the intensity of competition – such as market shares and profits. Many of the announcements that satisfy those conditions will be innocent of any anticompetitive intent. One of the primary objectives of this paper is to identify the type of content which can serve as a credible device for coordinating competitors' conduct in a manner that harms consumers.

B. *What is Collusion and What is Required for it to Work*

In order to understand what types of public announcements could facilitate collusion, it is useful to review how collusion operates and what is needed to make it work. At its core, *collusion* is a supracompetitive outcome and a self-enforcing reward-punishment scheme for achieving and sustaining that outcome. The outcome could be some common price for competitors which exceeds what was being achieved under competition, along with the understanding that if firms comply with that price then each firm will continue to price at that level (thus a firm's compliance is *rewarded* by other firms maintaining a high price) but if some firms do not comply then firms will return to setting the competitive price (thus a firm's noncompliance is *punished* by other firms lowering their prices). For collusion to be effective, this understanding or "agreement" needs to be self-enforcing in that each firm finds it in its best interest to abide by it. In the simple scheme just described, it requires that each firm find it optimal to charge the supracompetitive price when there has been compliance, and to charge the competitive price when there has been noncompliance. Containing the typical "if … then" clauses of a contract, collusion can be viewed as a contractual arrangement which includes what each firm is to do and what happens if they do not do what they are supposed to do.[8]

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[7] Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case* (1994), *in* THE ANTITRUST REVOLUTION 233 (John E. Kwoka, Jr. & Lawrence J. White eds., 2004).

[8] For a more developed treatment, see Joseph E. Harrington, Jr., *Developing Competition Law for Collusion by Autonomous Artificial Agents*, 14 J. COMP. L. & ECON. 331, 334-36 (2018).

In practice, collusion can be complex and sophisticated, as has been documented for many cartels that engaged in private express communication.[9] The supracompetitive outcome can encompass an array of prices – which vary across customer types and cartel members – and a market allocation scheme – such as the assigning of sales quotas, customers, or territories across cartel members. Collusion can include a protocol for monitoring for compliance such as the sharing of sales data or having a third party verify the prices that were charged. Punishment can involve transfers among cartel members (with those who deviated paying those who were harmed) or targeting low prices at the customers of the cartel member who did not comply.

Such complexity typically requires extensive communication which is generally infeasible when the communication occurs through public announcements. However, collusion need not require a high level of sophistication and detail in order for it to prove profitable. It can be as simple as firms understanding that they are to set a certain price or to compete less aggressively (as in, for example, not trying to take other firms' customers) with the understanding that there will be a return to lower prices or more aggressive competition should any firm fail to go along. It will be such simple forms of collusion that will be relevant in markets for which firms coordinate their conduct through public announcements.

For public announcements to achieve collusion, they must result in a sufficient degree of mutual understanding among competitors with regards to the collusive arrangement. A collusive arrangement comprises a supracompetitive outcome, what will happen if firms comply (reward), and what will happen if firms do not comply (punishment). Mutual understanding means that each firm is aware of this arrangement and that other firms are aware of it.[10] It is not necessary that an announcement expressly convey all of these elements. It could be sufficient for the announcement to convey the supracompetitive outcome, with it being implicit that the punishment is a return to competition.

Along with a common understanding among firms regarding the collusive arrangement, it is also necessary that the collusive arrangement be self-enforcing. Collusion may fail to materialize, not because the public announcements failed to communicate the collusive scheme, but because it was not in some firms' best interests to go along with it. Our focus will be on the efficacy of public announcements for achieving the required mutual understanding. If they are unable to achieve it then, even if collusion is self-enforcing, it will not occur.

C. *Anticompetitive Public Announcements of Interest*

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[9] *See* Joseph E. Harrington, Jr., *How Do Cartels Operate?*, 2 FOUND. & TRENDS MICROECONOMICS 1, (2006); JOHN M. CONNOR, GLOBAL PRICE FIXING (2d upd. & rev. ed. 2008); and ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS (2012).

[10] In theory, it could require higher levels of beliefs; for example, each firm believes that other firms believe that firms are colluding. However, in practice, what is needed is enough confidence among all firms that they find it optimal to comply with the collusive arrangement.

Let us distinguish between public announcements in which a firm refers only to its own conduct or performance and those in which it refers to the conduct or performance of competitors. The latter may be inclusive of its own conduct or performance as, for example, by referring to "industry" conduct or performance.

A firm could announce some future conduct for itself that would invite or rationalize a response by other firms which could then result in a supracompetitive outcome. An advance price announcement is a case in point. As with the airline case discussed above, a firm is only referring to what its prices will be in the future, without reference to other firms' prices. If a firm's demand is highly sensitive to price – as when firms' offerings are highly similar and consumers tend to purchase from the lowest-price firm – that higher price might only be in its best interests should its rivals match it. In seeking to rationalize the firm's proposed price increase, rival firms could then interpret the announcement as an invitation to coordinate on that higher price.

Or consider this situation in the tobacco industry. Brown & Williamson CEO Thomas Sandefur conveyed to analysts:

> We believe that price cutting or discounting – while still a factor – will be less important than in the past. That's because gaps in the list price have narrowed between premium and V-F-M…brands [value-for-money, an industry term for discount]. … But in the near term, value-for-money brands will need to compete on some basis other than price. <u>And our company fully intends to pursue options other than price for our V-F-M brands</u>.[11]

Sandefur is conveying that it does not intend to rely so much on low prices to compete. It is possible that the intended audience was other tobacco companies, and the purpose was to invite them to similarly shift away from competing so aggressively on price. In other words, he might have been intending to achieve mutual understanding to consummate an industry-wide increase in prices.

While public announcements that refer only to a firm's own conduct and performance are an anticompetitive concern – with advance price announcements being a notable case in point – this paper will not consider such announcements. Our focus will be on a firm's public announcements that reference rival firms' conduct or performance. When an announcement directly or indirectly refers to the conduct of competitors, there is inherently a risk that it could facilitate coordinated, rather than independent, conduct, which is fundamental to unlawful collusion.

D. *Overview*

The first contribution of this paper is to put forth three classes of announcements that could facilitate collusion. First, a firm's announcement which describes how its future conduct is contingent on a rival firm's conduct. Second, a firm's announcement that forecasts future conduct by rival firms or the industry

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[11] Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1308 (11th Cir. 2003) (emphasis in original).

at large. Third, a firm's announcement that recommends how rival firms or the industry at large should behave in the future. The latter category includes commending or criticizing rival firms or the industry at large for past conduct, for one may be implicitly recommending future conduct consistent with that which was commended or contrary to that which was criticized.

The next three sections will, in turn, examine each of these three classes, and each section is composed of three parts. The first part describes the class of announcements and how it can be effective in facilitating collusion. The second part reviews a collection of cases towards concretely examining how these announcements can be used to produce collusion. The third part examines the socially optimal treatment of that class of announcements in terms of whether it is appropriate to have a per se prohibition or a rule of reason and, if it is the latter, how best to implement it. That discussion puts aside existing laws and jurisprudence in that it focuses on what is best. What is feasible, from a legal perspective, is addressed in Section VII.

Before going any further, a qualification is in order. The episodes to be reviewed all involve public announcements that, due to their content and the medium, *could* facilitate collusion. For some of these episodes, the evidence is compelling that collusion was the intent and there is also evidence of effect for a few of them. For some other episodes, it is plausible that the public announcements were made with the goal of coordinating firms' conduct but the evidence is either inconclusive or the matter is still under investigation. In all of the episodes, we can say the public announcements are problematic in that they contain the risk of anticompetitive conduct and thus warrant study as well as the attention of private and public enforcers.

III. A Firm Announces How It Will Behave in Response to Rival Firms' Conduct

A. *Description*

Whether it is on an earnings call, in an interview published in a trade journal, or a remark on a panel at a trade association meeting, consider a firm describing how its future conduct will depend on what competitors do. While such an announcement need not be done to facilitate collusion, it can certainly serve that purpose. As reviewed in the preceding section, collusion is a supracompetitive outcome and a reward-punishment scheme to sustain it. That reward-punishment scheme is a set of contingency plans for how firms will respond to what rivals do. As a result, this class of announcements could embody part or all of that reward-punishment scheme and, should it succeed in producing mutual understanding, could well lead firms to take the actions that would produce a supracompetitive outcome.

Let us begin with some theoretical examples before turning to several actual cases. A firm announces: "As a small player in the market, it is not for us to get us out of this price war. However, if another firm raises price, we will be a good citizen and act likewise." Or consider: "Firms need to restrict supply if price is to rise. If other firms limit their production, we will not try to gain market share and will pull back our supply, too." These announcements describe what could be the "reward" element of a collusive scheme. If the announcement is viewed as credible by a rival firm, it could be incentivized to take the lead knowing that the announcing firm would favorably respond. The result would then be a coordinated rise in price or reduction in output.

Alternatively, a public announcement could convey the "punishment" dimension to a reward-punishment scheme. A firm's executive could state: "Prices have been falling but our firm is intent on reversing course by raising price. However, continuance of our plan will require other firms to follow suit." Or they might say: "With the projected weakening of demand, our firm will take some capacity offline and restrict supply in order to maintain price at its current level. But success in stabilizing price will only work if others are similarly restrained in their output." Now, the announcing firm is taking the lead to move to a supracompetitive outcome and, in doing so, threatening to punish firms that do not similarly compete less aggressively, where the punishment is a retraction of the rise in price or reduction in supply.

Though these announcements leave much unspecified regarding a collusive scheme – certainly far less is said when cartel members engage in private express communication – they could describe enough to make it work. The key is incentivizing one or more firms to take the lead, and the other firms finding it profitable to follow that lead. A firm that announces what it will do – such as raise price – and how it will respond to rival firms' conduct – such as lowering price if they do not raise price – could find it optimal to lead with a price increase because, based on their announcements, it believes other firms will match its price increase. The announcing firm would want to raise price to a level such that if all firms price at that level then all firms' profits would rise. If that were the case, it could be reasonable for the firm to expect other firms would follow along with its price hike. As long as the anticipated time it takes for rival firms to respond is sufficiently short – so the announcing firm is not at a price disadvantage for too long – that firm could be incentivized to take the lead.

Alternatively, a firm could announce it is willing to be a follower. This it can do by announcing what it would do in response to a rival's conduct – such as following another firm's price increase and being content to maintain, rather than add, market share – and that could induce the rival firm to take the lead by raising its price. If all firms are better off from the higher price and the lag in following is sufficiently short, a rival firm could be willing to respond to the announcement by making the first move, and the announcing firm could be willing to follow through on the contingent plan it had announced.

In these scenarios, the announcement does not need to include the specific supracompetitive outcome; that is left for the leader to determine. The announcement just needs to describe enough of the reward-punishment scheme to incentivize a firm to be a leader and for the other firms to follow. It may turn out that not all firms will infer the message implicit in the announcement or not all will find it profitable to go along. That just says public announcements with anticompetitive intent are not assured of succeeding. For us to be concerned with them, it is sufficient that there is a serious risk of such announcements achieving their goal of producing a supracompetitive outcome.

B. *Cases*

1. Free-standing Newspaper Inserts

Free-standing newspaper inserts (FSI) are multi-page booklets containing discounts from retailers which are placed inside newspapers.[12] At the time of the alleged violation, there were two FSI suppliers: News America and Valassis Communications. As of 2001, each had about 50% of sales and the minimum price was $6 per full page per thousand booklets. In June 2001, Valassis raised its price by 5% to $6.20. News America did not match that price increase and Valassis, after having lost some market share, retracted its price increase in February 2002. Competition subsequently intensified until prices were below $5 by 2004. At the time, Valassis had a publicly announced goal of increasing its market share to 50%.

That history of aggressive competition is relevant background for a Valassis earnings call conducted by President and CEO Alan Schultz. Analysts were listening in and one can expect News America was as well. In both prepared remarks and in answering analysts' questions, Mr. Schultz conveyed an objective to get prices higher.

> [W]e've been in a declining price environment since basically June of 2001. … [T]his is an attempt to change that trendline and create a positive trendline in terms of pricing and reverse that negative trendline.[13]

To do so, Valassis conveyed it would bring price back to the 2001 level of $6 and it would no longer strive to increase its market share.

> As far as our 50% market share goal, I think when you really get to the underlying goal, the underlying goal, our goal has always been to create a long-term more profitable FSI industry to create a long-term more profitable Valassis. … [W]e believe our goal can best be accomplished with no further changes in market share from where we're at today.[14]

Of course, Valassis would not be able to maintain its market share at this higher price if News America continued to undercut that price. Here is where Valassis described how its future conduct would be contingent on what News America did: "[W]e will defend our customers and market share and use whatever pricing is necessary to protect our share."[15] Furthermore, it explicitly stated that it would return to lower prices and reclaim its goal of raising market share should News America continue to be aggressive.

> In the recent past *News America* has been quick to make their intentions known. We don't expect the need to read the tea leaves. We expect that concrete evidence of *News America's* intentions will be available in the marketplace in short order. If *News* continues to pursue our customers and market share then we will go back to our previous strategy.[16]

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[12] The ensuing facts are from Valassis Comm., Inc., 141 F.T.C. 247 (2006).
[13] Q2 2004 Valassis Communications Inc. Earnings Conference Call – Final (July 22, 2004).
[14] *Id.*
[15] *Id.*
[16] *Id.*

In sum, Valassis' CEO announced a collusive arrangement in an earnings call in which the supracompetitive outcome involved a price of $6 and a market allocation scheme fixed at the current market shares. Valassis would take the lead and, should News America not comply, Valassis would punish it by lowering its price.

The FTC noted that while earning calls serve a legitimate purpose, Valassis had abused them in this setting.

> Although the proposal was made in the context of an analyst call, Valassis' statements provided information that would not ordinarily have been disclosed to the securities community, and the company would not have made the statements except in the expectation that its sole competitor would be listening. Far from being normal guidance to its investors or the marketplace with respect to the company's future business plans, Valassis' statements described with precision the terms of its invitation to collude to News America. If the invitation had been accepted by News America, the result likely would have been higher FSI prices and reduced output.[17]

The FTC went on to make the interesting observation: providing a collusive plan in the context of an earnings call imposed a certain level of commitment on Valassis which is not present when conveyed in private.

> Given the obligation under the securities laws not to make false and misleading statements with regard to material facts, Valassis' invitation to collude, made in the context of a conference call with analysts, may have been viewed by News America as even more credible than a private communication.[18]

As there was no evidence that Valassis' proposed agreement was consummated, it was prosecuted as an invitation to collude under Section 5 of the FTC Act. The FTC issued a consent order enjoining Valassis from future unlawful activities.

2. Truck Rental

The market is for one-way truck rentals, where the two largest firms were U-Haul with a market share of 54% and Budget with 15%.[19] Apparently, competition was intense and, from late 2006 to early 2008, there is documented private and public communications that U-Haul was seeking to act as a price leader and conveying to Budget that it should follow U-Haul's lead.

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[17] Analysis of Agreement Containing Consent Order to Aid Public Comment at 3, Valassis Comm., Inc., 141 F.T.C. 247 (2006).
[18] *Id.* at 4.
[19] Liu v. Amerco, 677 F.3d 489, 493 (1st Cir. 2012). U-Haul is a subsidiary of Amerco.

While our focus will be on U-Haul's public announcements, let us review the private communications as they are relevant to this episode. In internal memoranda, U-Haul CEO and Chairman Edward J. (Joe) Schoen[20] conveyed to U-Haul regional managers that U-Haul was to respond to Budget's low rates.

> Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW. Contact a large Budget Dealer and tell them. … My direction is either get up to a fair rate or get down below the competitor. EITHER WAY, LET THEM KNOW.[21]

Notably, they were not to match Budget's rates. Schoen was not interested in keeping prices at these low levels but rather getting them higher. That could be done by pricing above Budget – and conveying to Budget that it was expected to follow – or pricing below Budget – and presumably conveying that U-Haul would continue to do so until Budget raised prices. As Schoen stated in a memo to dealers:

> We are successfully meeting or beating our Budget and Penske competitors. However, their rates are WAY TOO LOW. … [W]e should be able to exercise some price leadership and get a rate that better reflects our costs.[22]

If the regional managers and dealers were communicating with Budget as suggested by Schoen, then there were private communications between competitors intended to coordinate their conduct.

In an earnings call in February 2008, Schoen spoke extensively about U-Haul's efforts to be a price leader.

> [W]e are very, very much trying to function as a price leader and not give away share … I'm trying to exhibit some price leadership because … there are markets that are being priced well below the cost of providing the service. … So we've been trying to force prices.[23]

It is noteworthy that he refers to "trying to force prices." Given that a firm has complete control over its own prices, presumably Schoen is referring to U-Haul's attempt to induce (or "force") Budget to set higher prices. Given the complexity of pricing in this market – prices are specific to the origin and destination of a truck – Schoen notes that it can be difficult to infer U-Haul's pricing strategy from its prices.

> I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut.[24]

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[20] Schoen is also Chairman, President, and Director of Amerco.
[21] Complaint at 3, U-Haul Int'l, Inc., Docket No. C-4294, 2010 F.T.C. LEXIS 61 (2010) (emphasis in original).
[22] *Id.* at 4.
[23] Q3 2008 AMERCO Earnings Conference Call – Final (Feb. 7, 2008).
[24] *Id.*

This difficulty of conveying a pricing strategy through the prices charged could well have made it all the more critical for Schoen to publicly announce its strategy to lead on price.

Along with expressing its role as a price leader, it was also conveyed that U-Haul will be patient in awaiting Budget's response but that ultimately U-Haul would change course if Budget's prices did not rise and U-Haul was losing market share.

> [I]f it starts to affect share I'm going to respond … for the last 90 days I've encouraged everybody who has rate setting authority in the Company to give it more time and see if you can't get it to stabilize.[25]

As with the FSI case, U-Haul was prosecuted under Section 5 of the FTC Act for inviting Budget to collude and a consent order was issued. There was no evidence that Budget responded in a manner that would indicate that it and U-Haul had reached an agreement.

3. Mobile Telecom

This case involves the Dutch mobile telecom market where the suppliers are the mobile network operators KPN, T-Mobile, and Vodafone.[26] KPN conveyed a public announcement through an interview with one of its executives that was published in the May 2009 issue of the trade journal *Telecom Update*. The KPN executive noted that intense competition– as reflected in lower prices and higher expenses for acquiring customers (referred to as subscriber acquisition cost or SAC) and retaining customers (subscriber retention cost or SRC) – had harmed all firms.

> In the past few years, operators have focused too heavily on increasing their market shares by continually raising the SAC/SRC and by reducing prices. Actually, we all have tried to buy ourselves a larger market share. However, all competitors are walking the same path, so we don't make any progress at the end of the day. The industry is a captive of its own model.[27]

He then proposed a new strategy for KPN which involved higher prices and maintaining its current market share.

> KPN has a market share of around 50% … and we are happy with that. … [W]e are following a new strategy. We will carefully start lowering the SAC/SRC and raising prices this year. It is really a paradigm shift. … We have clearly set a new course.[28]

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[25] *Id.*
[26] Facts are from ACM Case 13.0612.53, *Mobiele Operators*, 2014.
[27] *Id.* ¶ 30.
[28] *Id.*

However, implementation of this strategy is conditional on other firms complying: "If we will be punished by the markets and our market share will be immensely under pressure, then we will have to make other plans."[29] As KPN would most likely lose market share unless the other operators similarly raised their prices, this was a clear statement that KPN's higher price was contingent on a coordinated price increase. The public announcement had all of the essential ingredients of a collusive arrangement.

There is also documentary evidence that rival T-Mobile drew the appropriate inference. A T-Mobile employee shared a copy of the interview with senior management, and there was a discussion as reflected in this internal email.

> To summarize: KPN wants to maintain its market shares, but also to improve its profit margin by aiming for value and reducing its commissions. A dilemma for T-Mobile given the growth ambition.[30]

If T-Mobile had only viewed KPN as announcing higher prices, it would have been a golden opportunity to gain market share and thereby satisfy its "growth ambition." However, it instead saw this as a dilemma which is consistent with it being interpreted as an invitation to coordinate on higher prices. T-Mobile was forced to decide whether to forsake its goal of expanding its customer base in exchange for higher margins on existing customers. In other words, it must decide whether to coordinate with KPN and compete less aggressively.

The mobile network operators entered into a commitment (or consent order) with the Dutch competition authority that

> their senior management will not make any oral or written announcements in the public domain about future prices and other commercial conditions for mobile-communication services in the Dutch market that would leave consumers worse off, before the internal decision-making about such future prices and commercial conditions has been finalized and laid down in writing, whereby each of the MNO's individual behavior become dependent on their competitors' reactions.[31]

4. Common elements in FSI, Truck Rental, and Mobile Telecom Cases

While free-standing newspaper inserts, one-way truck rentals, and mobile telecom are highly diverse products and services, the way in which public announcements were used to facilitate collusion is quite similar. Whether through an earnings call or an interview in a trade journal, a firm could be assured that its competitors would receive the information that was conveyed. In all three episodes, a high-ranking company official noted the excessive or intensifying state of competition, whether it was the "declining price environment" in the FSI market, that some truck rental markets are "being priced well below the

[29] *Id.*
[30] *Id.* ¶ 32.
[31] *Id.* ¶ 51.

cost of providing the service," or that suppliers have "focused too heavily on increasing their market shares … by reducing prices" in the mobile telecom market. The point conveyed is that all firms are being hurt and the "industry is a captive of its own model [of competition]."

Having stated the problem, the firm then proposes an anticompetitive solution in the form of inviting its competitors to participate in a collusive arrangement. The arrangement involves the announcing firm taking the lead by raising price with the maintenance of those higher prices being conditional on the other firms raising their prices. The latter "conditional clause" to the agreement could be inferred from their statements that they would change their plan if they lost market share. In these markets with highly similar products or services, a firm would lose market share should its prices substantively exceed rivals' prices. In other words, unless their competitors followed their lead, those competitors could not expect Valassis, U-Haul, or KPN to maintain the higher prices they had recently put in place.

There are also some differences in these cases. There was greater clarity of the public announcement in the FSI and mobile telecom cases compared to the truck rental case. Valassis and KPN were quite precise in their description of the collusive arrangement, while U-Haul spoke in more general terms. However, the truck rental case also involved some private communications between U-Haul and Budget at the level of regional managers and dealers. Thus, public announcements were not the sole means by which U-Haul was seeking to induce Budget to raise its prices, which could explain why U-Haul's CEO believed the content of its public announcement would have been sufficient for coordinating on higher prices.

There is no evidence that these public announcements proved effective in coordinating firms' conduct. Given that the FSI and truck rental cases were pursued by the FTC as an unfair practice in the form of an "invitation to collude," rather than as an unlawful agreement by the DOJ, presumably they did not witness announcements or actions consistent with the invitation to collude having been accepted. However, firms presumably would not have made these announcements without believing there was a reasonable chance of success. Furthermore, a private litigation suit in the truck rental case made the valid point that "attempted" collusion has effect when it involves a firm raising its price. That higher price, even if it is not matched, is harmful to consumers; both those who bought at that price and those who would have bought at the lower price that prevailed prior to the attempt at leading a coordinated price increase.

> A spurned attempt to fix prices standing alone would – because spurned – cause no direct harm to consumers. But here Liu alleged conduct that did not consist merely of unrequited proposals; it included as part of the plan unilateral increases by U-Haul as an indicator of its intentions and a target for increases by competitors. … The very reason for chapter 93A to encompass a failed attempt to fix prices is because of the threat that the attempt could result in price increases. If Liu is correct, the attempt to conspire did result in just such harm. … Liu says that the economic analysis in the study suggests an overcharge of at least 10 percent. This exercise provides some further grounding for Liu's claim that U-Haul's representatives did increase prices in response to Shoen's directive

> and that prices remained at a super-competitive level for a considerable period and until natural market forces compelled U-Haul to roll them back.[32]

5. Airlines and Baggage Fees

This case offers a very clean episode of public announcements inviting collusion and that invitation being accepted. It involves AirTran and Delta Airlines who They controlled 92% of the traffic at Hartsfield-Jackson Atlanta International Airport and dominated route markets which had Atlanta as the origin or destination. [33] Delta was significantly larger than AirTran and was present in 90% of AirTran's routes and all of AirTran's routes to and from Atlanta. AirTran and Delta were close competitors with Delta being the larger firm in terms of routes and revenues.

At the time, it had become commonplace for airlines to charge for certain services that had previously been provided when purchasing a ticket. In particular, many airlines had moved to charging for the first checked bag (in addition to charging for additional checked bags which had been standard). However, as of mid-2008, AirTran and Delta had not yet instituted a first-bag fee.

In its second quarter earnings call on July 16, 2008, Delta was asked whether it would impose a first-bag fee. It replied that it was examining the issue "but [had] no plans to implement it at this point."[34] Three months later during its third quarter earnings call on October 23, 2008, AirTran CEO Robert Fornaro was similarly asked about adopting a first-bag fee. His response was rather detailed.

> We have the programming in place to initiate a first-bag fee. And at this point, we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights, hasn't done it. And I think, we don't want to be in a position to be out there alone with a competitor who – we compete on, has two-thirds of our nonstop flights, and probably 80% to 90% of our revenue – is not doing the same thing. So I'm not saying we won't do it. But at this point, I think we prefer to be a follower in a situation rather than a leader right now.[35]

An analyst followed up by asking whether AirTran would adopt a first-bag fee if Delta did so, to which Fornaro replied he "would strongly consider it, yes."[36]

What we have thus far is AirTran publicly announcing that it would not take the lead on charging for the first-checked bag but it would be very likely to do so if Delta adopted a first-bag fee.

[32] Liu v. Amerco, 677 F.3d 489, 495-96 (1st Cir. 2012). The district court dismissed the case but its decision was vacated and the matter was remanded by the circuit court. The case was settled on January 22, 2013.
[33] Facts are from *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348 (N.D. Ga. 2010).
[34] *Id.* at 1354.
[35] *Id.* at 1356.
[36] *Id.*

Internal Delta documents at the time showed that it was considering the institution of a first-bag fee, as it had conveyed during its earnings call in July 2008. However, the current assessment was that it would be unprofitable.

> Delta continued to study the first-bag fee internally. Revenue management … prepared a "value proposition" analysis of the first-bag fee, which it generally opposed. The PowerPoint deck analyzed the first-bag fee under best-case, worst-case, and mid-range scenarios by taking the estimated revenue of the first-bag fee and offsetting it by the estimated share-shift to other airlines, including AirTran. The latter factor depended in part on the likelihood that other airlines would match Delta's first-bag fee. Initially, Delta predicted there was only a fifty percent probability that AirTran would match, yielding a mid-range estimate of a $46 million loss to Delta.[37]

That analysis was conducted prior to AirTran's earnings call. After Fornaro conveyed AirTran was inclined to follow Delta should it lead, Glen Hauenstein (an executive vice president for Delta) raised the probability from 50% to 90% that AirTran would match a first-bag fee.

> Delta executives soon learned of Fornaro's statements … Revenue management updated the value proposition deck on October 23 and early October 24, 2008, to increase the likelihood that AirTran would match any first-bag fee from fifty percent to seventy-five percent, bringing the estimated annual loss down from $46 million to between $19 and $35 million. Later on October 24 the value proposition was revised to reflect a ninety-percent likelihood that AirTran would match. This change was made at Hauenstein's direction, who made the number up but thought it was a more "realistic" expectation. At that increased likelihood, Delta's mid-range estimate became "slightly positive" for the first time.[38]

The value proposition analysis was presented before the Corporate Leadership Team at their October 27, 2008 meeting, at which time it was decided to institute a first-bag fee.

On November 5, 2008, Delta issued a press release announcing that it would charge $15 for the first checked bag, effective December 5, 2008. One week later on November 12th, AirTran announced it would charge $15 for the first checked bag, effective December 5, 2008.

This is a compelling case in which public announcements were used by competitors to coordinate their prices. To summarize, Delta conveyed during a July 2008 earnings call that it was considering a first-bag fee but had not yet decided to adopt it. AirTran could well have inferred that Delta's reluctance was due to uncertainty over what AirTran would do in response; of particular concern, would AirTran not match a Delta first-bag fee in order to gain a competitive advantage? To relieve such uncertainty, AirTran's October 2008 earnings call stated that it would not lead with a first-bag fee but it was very likely to follow should

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[37] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1354-55 (N.D. Ga. 2017).
[38] *Id.* at 1355.

Delta adopt one. The impact of that announcement is quantified by Delta increasing the probability assigned to AirTran matching a first-bag fee from 50% to 90% which, according to Delta's analysis, would make a first-bag fee profitable. It was only four days after AirTran's earnings call that Delta decided to adopt a first-bag fee and publicly announced it nine days later with it becoming effective in one month. One week after Delta's press release, AirTran publicly announced the adoption of a first-bag fee equal to Delta's with the same effective date. Thus, we have evidence of how AirTran's public announcement affected Delta's beliefs on AirTran's conduct and we have evidence of the ultimate effect on the prices charged by AirTran and Delta.

A private litigation case was pursued under Section 1 of the Sherman Act. The defendants' motion to dismiss was denied by the District Court in March 2010, so collusion was seen as sufficiently plausible to satisfy the Twombly standard. Surprisingly, the District Court ruled in favor of AirTran and Delta on summary judgment, which was affirmed by the Eleventh Circuit Court in March 2018.[39] In sum, the court ruled there was a plausible case for collusion but that one could not rule out the two airlines having independently made the decision to institute a first-bag fee. We will postpone a critique of the court's decision to Section VII.

These four episodes exemplify a general collusive strategy which does not require articulating a specific plan. A firm announces it will act as a leader or as a follower which facilitates mutual understanding among competitors as to who should take the initiative in raising prices. Furthermore, that announcement describes how its actions are contingent on what a rival does. This is immediate in the case that a firm is conveying its intent to be a follower for it is describing that, should the other firm raise price, it will match that price. In the case of a firm announcing its intent to initiate a price increase, it also describes how maintenance of that higher price is contingent on the rival firms raising their prices or, equivalently, it not losing market share. Having used public announcements to coordinate on which firm should lead and the expectation that a rival firm will follow, the primary challenge for the leader is choosing a price that the follower would be willing to match. It is worth emphasizing that this path to supracompetitive prices is far less risky than a firm simply leading on price without an announcement for it is left unclear whether maintaining that higher price is contingent on it being matched. In the presence of such uncertainty, a rival firm may not feel a need to match and, consequently, a firm may be disinclined to ever lead. The point is that public announcements create a level of assurances that a price increase will be matched and that makes it more likely price will be increased and a supracompetitive outcome will emerge and persist.

C. *Treatment*

By announcing how it will respond to future events, a firm may be providing useful information to consumers, input suppliers, and investors. There can be legitimate reasons for it to convey how it will respond to exogenous events in its environment, such as demand fluctuations, cost shocks, and regulatory

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[39] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343 (N.D. Ga. 2017), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018).

changes. That information can inform purchasing decisions by consumers, investment decisions by input suppliers, and the firm's valuation by investors. Announcing how a firm will respond to these events most likely has little risk of facilitating anticompetitive conduct and harming consumers.

The anticompetitive concern arises when the event relates to competitors' conduct; when a firm announces how it will respond to what other firms will do with regards to prices and quantities and other variables intrinsically tied to the state of market competition. Such announcements run a serious risk of producing coordinated conduct. For example, suppose firm 2 says it will respond with action y should firm 1 choose action x, and firm 1 finds it profitable to choose x if it anticipates firm 2 choosing y. If subsequent to that announcement, firm 1 chooses x and firm 2 follows with action y, then the conduct of firms 1 and 2 is no longer independent; it is coordinated because of the "meeting of minds" facilitated by firm 2's public announcement. These are the critical elements of a violation of Section 1 of the Sherman Act – communication and coordinated conduct.

However, before condemning such communications, we must consider any procompetitive rationales for public announcements which convey how a firm's conduct will be contingent on the conduct of competitors. As these public announcements are accessible to actors other than competitors, it is possible that they may benefit from them and thus serve a legitimate purpose. In principle, consumers and input suppliers could benefit from the information that a firm provides. However, in the four episodes examined, that is not the case. Consumers would not be expected to access earnings calls or interviews in trade publications or other industry-related media. It would also be unusual for an input supplier to follow such announcements unless the firm making the announcement made up a substantive share of the supplier's demand. Generally, we do not expect a firm's announcement about how it would respond to competitors' conduct to be received by consumers and input suppliers and, even if they did learn them, it is unlikely to be useful information. While there could be exceptions, they are likely to be rare and should not deter us from drawing some general guidance.

The most natural beneficiary of these public announcements – outside of competitors – is the capital market. The capital market comprises financial analysts, mutual fund managers, hedge fund managers, banks, individual investors, and anyone else who derives value from learning a firm's current financial state and future financial prospects as they pertain to profits, revenues, costs, investments, and the like. More information makes the capital market better informed of where the marginal private return to investment is higher and thus where funds should be directed. Of course, from a social welfare perspective, we would like more funds to go where the marginal *social* return is higher. However, as a general rule, we do not expect there to be a systematic and significant departure between the private and social marginal returns, so if a better informed capital market results in more funds going to where the marginal private return is higher, it is likely to imply more funds going to where the marginal social return is higher.

On those grounds, a firm announcing how its conduct depends on the conduct of competitors allows the capital market to better predict the firm's future choices and, therefore, be better informed about the marginal private return from infusing funds into that firm. In that way, the firm's public announcement, such as through an earnings call, is making the capital market better informed and, by this argument, delivers social value.

While that would seem to offer a procompetitive rationale for these announcements, in fact, it does not. For an exception to the general rule that private and social returns move together is collusion. Collusion raises a firm's private return but lowers its social return, because collusion is welfare-reducing; it destroys more consumer surplus than it creates in industry profit. Thus, one instance in which the procompetitive rationale for a firm better informing the capital market does not apply is when that information pertains to profits earned through anticompetitive conduct.

Thus, if a firm's announcement is informative of higher profits because of anticompetitive conduct, we do not want the capital market to be better informed of those higher profits because it could only cause funds to be attracted to a firm that is lowering, not raising, welfare. Thus, the procompetitive justification that a firm's announcement results in a better-informed capital market is absent.

Summing up, a firm announcing how its conduct will depend on the conduct of competitors runs a serious risk of facilitating coordinated conduct that harms consumers. At the same time, there is no apparent procompetitive benefit to offset that anticompetitive cost. By this argument, it is appropriate to prohibit a firm from making public announcements regarding how its conduct is contingent on rival firms' conduct when it would facilitate coordinated conduct that is harmful to consumers.

Let me comment on this prohibition both in terms of what in principle it is intended to capture and what in practice it may be able to capture. Regarding "in principle," the qualifier "harmful to consumers" is critical. There are announcements as to how a firm's conduct is contingent on rival firms' conduct which facilitates coordinated conduct but is not harmful to consumers, and thus should not be prohibited. For example, two firms may find investing in the development of a new product to be profitable if and only if it were the only one to pursue it. Furthermore, given the current risk and uncertainty, each of them would choose not to invest without assurances that the other was not planning to do so. In that instance, a firm announcing it would invest in a project if a rival firm does not would facilitate the investment. Presuming that the project does not harm consumers then this public announcement would not fall under the prohibition even though it involves an expression of contingent conduct which promotes coordinated conduct.

Now consider the following scenario. Firms 1 and 2 offer the same product or service but operate in different geographic markets. Firm 1 operates in market A and firm 2 in market B. Firm 1 announces that if firm 2 enters market A then it will enter market B. That announcement facilitates coordinating on a market allocation scheme based on exclusive territories - each firm does not enter the other firm's market - and is thereby harmful to consumers. It would fall under this prohibition.

In practice, it may not always be clear when an announcement describes how a firm's conduct is contingent on what a rival firm does. When a firm's public announcement specifically refers to how it will respond to variables that are directly controlled by rival firms, the connection is clear and such announcements should be unlawful per se. The first-bag fee that would be charged by AirTran and Delta is an example. AirTran described how it would respond to Delta charging a price for the first checked bag, and Delta has full control over that price. However, when a firm's public announcement refers to variables that are not directly controlled by rival firms but are still substantively influenced by them then it would be preferable to evaluate them according to a rule of reason.

To see why a rule of reason is appropriate in this situation, suppose the variable is market share and consider a firm announcing that it will raise price but keep it there as long as its market share does not fall and, should it fall, then it will retract the price increase. Where firms' products or services are highly homogeneous and consumers' decisions are largely based on price, there is a clear and direct effect of a firm's price on the firms' market shares. In that situation, a rival firm could reasonably foresee that the announcing firm's market share would decline unless it matched (or came close to matching) the announcing firm's price increase. Thus, the firm is effectively saying that it will maintain the price increase if and only if the rival firm matches it, even though reference is only made to market share. Here, the announcement would reasonably be understood as an unlawful invitation to collude similar to the cases presented above.

Now suppose the products are more heterogeneous and the causal relationship between prices and firms' market shares is not so predictable. Even if the rival firm matches the price increase, the announcing firm's market share might fall, or it might not. Market share movements may be driven by fluctuations in consumer preferences, as much as prices. This has two important consequences. First, it is not clear that the firm's announced plan to make its future prices contingent on its market share is really about making it contingent on rival firms' prices. It could as well be conveying that, should consumers' tastes change so that its market share falls, it would reverse the price increase. Second, this information is of value to the capital market and it is not necessarily attributable to anticompetitive conduct. Perhaps the price sensitivity of a firm's demand is uncertain and, with its announcement, it is communicating that it will raise price but will change course if it should learn that its demand is very sensitive to price, as revealed by a substantive decline in market share. That is legitimate information relevant to assessing the future prospects of this firm which is unrelated to any anticompetitive conduct. Rather it is describing how a firm's prices will respond to learning about its demand.

When a firm's public announcement refers to variables that are not directly controlled by rival firms but are substantively influenced by them, it is clear a rule of reason is appropriate, but exactly what type of rule? Typically, a rule of reason balances procompetitive benefits and anticompetitive costs, along with an assessment of their relative likelihoods. However, that would be inappropriate here. The procompetitive benefit is in providing information to the capital market which is extremely difficult to measure.[40] The benefits from a more informed capital market are speculative because it is difficult to assess how much information is provided and to what extent it leads to better investment decisions. There is not a body of empirical research documenting the value of this information and thus little basis for believing it is significant. On the other hand, anticompetitive harm – such as from higher prices – has been

[40] Keep in mind that an event study using equity share prices is not informative because what is of interest is the value of the announcement itself, rather than the value of the profit stream associated with the announcement. For example, if a pharmaceutical company announces FDA approval of a drug, the movement of the stock price is measuring the value of that approval in terms of the future profit stream; it is not measuring the value of informing the capital market of the approval. The value of the announcement would be the present value of the profit stream with the announcement less the present value of the profit stream without the announcement. That may be effectively immeasurable.

measured in many instances and, in some cases, is significant in magnitude. We then have that any procompetitive benefit is hypothetical and at best speculative, while the anticompetitive harm is real and measurable. As a result, a rule of reason would need to be exercised on grounds other than balancing the benefits and costs.

We propose a rule of reason based on the likelihood of these public announcements creating anticompetitive harm. These announcements should be prohibited when they are highly likely to be effective in producing coordinated conduct which would be harmful to consumers. Application of this rule of reason requires determining whether the public announcements are sufficiently likely to result in coordinated conduct which harms consumers. There are three conditions which need to be satisfied for that conclusion to be drawn. First, rival firms can reasonably infer a firm's contingent conduct from the announcement and, given that inference, there is a direct and reasonably foreseeable effect of rival firms' conduct on the announcing firm's conduct. This step is satisfied when the reference is to a variable that a rival firm fully controls, such as price. A judgment must be made when it refers to a variable such as market share or sales which are influenced by, but not directly controlled by, rival firms. Second, given the anticipated response of the announcing firm, rival firms find it in their best interests to change their conduct. There is no risk of anticompetitive harm if the firm announces how it will respond to a rival firm's conduct which is unlikely to occur. Implicit in the rival firm's conduct being impacted by the announcement is that the rival firm believes the announcing firm will act according to the announcement; otherwise, there is no reason to think that the announcement would affect what is best for the rival firm. Third, the change in conduct attributable to the announcement harms consumers. If these three conditions are satisfied then public announcements pertaining to how a firm's conduct is contingent on rival firms' conduct should be prohibited.

IV. A Firm Announces How Rival Firms Will Behave

A firm announcing a forecast of future industry conduct and performance would seem innocent enough. It is exactly the type of information that is of interest to the capital market because it helps them to predict firms' future profit streams. Input suppliers value demand forecasts as they aid them in making appropriate production decisions. Consumers want to know whether prices are expected to rise or fall and, therefore, whether they should buy now or postpone purchases. Thus, industry forecasts are useful to many parties in their decision making which means these forecasts enhance efficiency. Furthermore, firms in the industry are particularly well informed when it comes to making those forecasts. In practice, these forecasts have been communicated in earnings calls, speeches and panels at industry meetings, press releases, interviews, and other media.

In spite of the many legitimate bases for a firm publicly commenting on future industry conduct and performance, such statements could be done with anticompetitive intent. When a firm announces what it thinks firms will do in the future, it may be less of a forecast and more of a recommendation. The announcement may prove to be accurate only because the announcement itself induced firms to act in the manner described in the announcement. In other words, the forecast is self-fulfilling because it facilitates coordinated conduct.

Consider a situation in which firms have been in the midst of a price war. A firm would like to raise its price to hopefully induce other firms to raise their prices. However, it is concerned of losing sales should rival firms not follow. It then announces: “We believe that prices will be higher as firms come to their senses and end this price war.” Rival firms may interpret this “prediction” as an invitation to end the price war and that the firm is signaling its intent to raise its price, but also that it expects other firms to do so. Note that this announcement could be more informative than a price increase without an announcement because rival firms could attribute a price increase to a rise in the firm’s cost or some other firm-specific factor. However, with the announcement, a firm is predicting *all* firms’ prices will rise, which may only happen if all firms believe it will happen, and the announcement could facilitate them having those common beliefs. In addition, by preceding a price increase with this forecast, a firm could be signaling that its price rise is conditional on the forecast proving accurate, which would require rival firms also raising their prices.

Other forecasts that could prove self-fulfilling because they facilitate coordinated conduct might be:

> “The market has experienced excess supply but we predict firms will begin closing down some capacity to make supply line up better with demand.”
>
> “Firms have learned that pricing below cost is bad business, and we expect prices to rise to more sustainable levels.”

In the second announcement, it is worth noting that the word “expect” can mean “to consider probable or certain” – so it refers to what one thinks others *will* do – but it can also mean “to consider bound in duty or obligated,” in which case it is refers to what one thinks others *should* do.[41] Thus, a firm which announces: “We expect prices to rise over the next few quarters,” could be saying that it is the duty of all firms to raise their prices. The announcement is then not a prediction but rather a call to firms and, only due to the implicit message resulting in a coordinated rise in prices, does the prediction prove accurate.

Though an announcement that disguises a forecast as an invitation to act according to that forecast is plausible, there are no documented cases. Here, we put it forth as a possibility which warrants keeping in mind when a firm makes statements that predict what rival firms or the industry at large will do in the future.

There is a second manner in which forecasts can facilitate collusion. Other communications, either private or public, may have invited firms to coordinate their conduct, and the publicly announced forecast affirms the intent of those communications. Suppose firms privately communicated and all agreed to raise their prices. A firm may subsequently announce a forecast of rising prices as a way in which to remind firms of their plan or convey evidence that firms are going through with that plan. While this affirmation could also have been done through private communications, firms recognize the risk from any private contact and thus may choose to minimize them. For example, firms may have privately met while attending a legitimate trade association meeting and, at that time, agreed to a price increase in six weeks. One month

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[41] *Expect*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meaning (last visited June 12, 2020)

later, a firm announces that it predicts rising prices in order to provide affirmation of the plan. Given the lack of opportunity at that time to meet privately, this public announcement is less risky and may still be effective.

Rather than use private communications to initially coordinate, as just described, firms may coordinate through recommendations made in public announcements and then use forecasts to provide affirmation of that plan. In the next section, we will review public announcements in which a firm expresses what other firms *should* do ("recommendation") rather than what they *will* do ("forecast"). We will review several cases for which there is evidence of public announcements that expressly recommend along with forecasts that affirm.

In the remainder of this section, let us discuss how to treat forecasts which serve the first purpose of expressing conduct or an outcome which firms should adopt or implement, as opposed to providing affirmation of a previously conveyed plan.

A forecast may create anticompetitive harm when it is an implicit recommendation to coordinate conduct to yield the outcome predicted by the forecast. For the forecast to have that intent and effect, two conditions need to hold. First, before announcing the forecast, firms would not have acted according to the forecast. Second, after announcing the forecast, firms are induced to act according to the forecast. Thus, conduct is affected by the announcement which then makes the forecast self-fulfilling. For example, a firm announces: "We are predicting rising prices and margins in the industry due to tightening capacity constraints." This "forecast" may be inviting firms to take capacity offline in order to cause those higher prices. Contrast it with a firm announcing: "We expect margins to rise throughout the industry due to falling input prices." As input prices are likely to be outside of the control of firms, the forecast pertains to an event which will occur irrespective of the announcement. That it would imply higher margins is a natural implication of falling costs.

The fundamental challenge is determining when conduct subsequent to an announcement would not have occurred but for the announcement. It is not clear how one would perform a counterfactual for what would have happened – for example, how firms would have priced – if a firm had not made a forecast. Obviously, one cannot conclude from prices rising after the announcement that the latter caused the former, for the announcement was put forth as a forecast and it is not a crime to make accurate forecasts. It appears extremely difficult to empirically distinguish between an accurate forecast and a self-fulfilling forecast.

While an ex post analysis looks problematic, one can consider an ex ante prohibition on certain announcements. Of course, a firm must be permitted to publicly prognosticate on its own plans and prospects. The capital market benefits from such information and, to some degree, a firm is obligated to do so under securities law. However, that argument does not carry over to when a firm's forecast concerns the conduct and performance of *other* firms or the industry at large. While such information may still be relevant to certain parties, such as investors, the best source of what firm B will do is firm B, not firm A. We do not believe there is a credible procompetitive rationale for a firm publicly issuing forecasts pertaining to rival firms.

In practice, there could be a murky line between legitimate forecasts and those about rival firms' conduct intended to influence that conduct. For example, a firm may forecast a rise in firms' prices due to an anticipated strengthening in demand. Providing a forecast on demand is certainly legitimate and it is not obviously inappropriate to then mention some implications should that forecast prove accurate. This also means it could be easy for a firm to shroud an invitation to collude in a cloak of legitimacy by properly packaging it with other information.

A general prohibition on a firm publicly making predictive statements about the conduct and performance of rival firms would not then appear appropriate. Nevertheless, such statements should be viewed with suspicion by competition authorities because they do risk facilitating coordinated conduct and are often unnecessary. In many instances, the forecast about rival firms' conduct can be delivered by the rival firms themselves which would generally be superior information for the capital market and have a reduced risk of promoting coordinated conduct.

V. A Firm Announces How Rival Firms Should Behave

A. *Description*

When a firm's public announcement communicates to competitors how they should behave, a risk of coordinated conduct and anticompetitive harm is high. There are two classes of such announcements. The first class encompasses announcements that expressly recommend how competitors or the industry at large should behave. Examples include:

> "We should stop this price war and return to pricing at rational levels."
>
> "I intend to focus on increasing price-cost margins while being content with my market share and I encourage other firms to do so, too."
>
> "The industry runs the risk of too much supply chasing too little demand. We should all limit how much capacity we are operating."

These are all invitations to coordinate conduct in order to reduce the intensity of competition.

Announcements in the second class involve commenting on past conduct by competitors or the industry at large. A firm may commend competitors or the industry at large for certain past conduct and thereby implicitly recommend continuation of that conduct, or it may criticize past conduct and thereby implicitly recommend discontinuation of that conduct. As examples:

> "All firms in the industry have shown a level of restraint when it comes to supply, and we have all benefitted as a result."
>
> "Prices have been rising in recent quarters and I am grateful that my rivals have focused on margins, not volume."
>
> "My competitors have priced at insanely low levels which is a path to destroying profitability."

> "As soon as demand returned to reasonable levels, all the industry could think about was expanding capacity and supply. As a result, prices did not rise and we squandered an opportunity for higher profits."

Though these are not as explicit an invitation as the first class, the message is no less clear in conveying either a continuation of constrained competition or a discontinuation of aggressive competition. While converting these announcements into anticompetitive conduct is not immediate, that they would facilitate doing so is clear.

B. *Cases*

1. Broiler Chicken[42]

The defendants are industrial producers of chicken meat who supplied 88% of the market for broiler chickens. Plaintiffs accused them of coordinating supply reductions over 2008 to 2016. Their evidence is of three sorts. First, public announcements facilitating such supply reductions. Second, the sharing of confidential supply data with a third party, Agri Stats. Third, evidence of parallel supply cuts. We will not evaluate the validity of this complaint and instead focus on assessing how the public announcements could serve to facilitate collusion.[43]

The International Poultry Expo took place over January 23-25, 2008 which, according to the plaintiffs, was attended by executives of several chicken suppliers.

> After that meeting, executives from Tyson, Pilgrim's, and Sanderson made statements that their companies would raise prices or cut production in response to market prices that were below the cost of production. Pilgrim's CFO stated that "the rest of the market is going to have to pick-up a fair share." And Sanderson's CEO stated that he expected the industry to make production cuts. … Additionally, Sanderson's CEO stated at a conference presentation, "I know some companies have cut back and have not announced."[44]

With this public announcement, Pilgrim's CFO was inviting its rivals to cut their supply and the other announcements suggest it may have been part of an industry plan. We can only speculate what might have been discussed at the International Poultry Expo which led to these announcements.

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[42] Facts are based on *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 798 (N.D. Ill. 2017). In this decision, the defendants' motion to dismiss was denied: "Plaintiffs plausibly alleged an injury in fact by alleging that they paid inflated prices, which could be fairly traced to defendants' price-fixing scheme, and which could be redressed by a favorable judicial decision."

[43] For a discussion of the broiler chicken and pork cases (the latter will be covered next), *see* Carstensen, *supra* note 3.

[44] *In re Broiler Chicken*, 290 F. Supp. 3d at 782.

In spite of the *Wall Street Journal* reporting production cuts and rising prices in May 2008, Pilgrim's CEO "called for additional production cuts because 'there is still too much breast meat available to drive market pricing significantly higher.'" About one month later, Peco's CEO publicly commented that "the poultry industry is entering a second phase of production cutbacks . . . . We are hearing talk that this was not nearly enough, so liquidation is in round two."[45] Notable is Peco's reference to cuts by the "industry" and not just to its own supply.

Over January to June of 2008, high-level executives of Peco, Pilgrim's, and Sanderson Farms all made public announcements which encouraged their competitors to reduce supply and conveyed the expectation that they would do so. Complementing these communications was a private announcement by Agri Stats to the firms: "Those who have announced cutbacks indicated they will continue until margins normalize. At this time we expect to see the declines continue until at least late 2009, and cuts could be deeper than now projected."[46] There is some evidence that output did fall and prices did rise.

> [I]n September 2008, an industry publication reported that "most U.S. broiler integrators had announced plans to close small operations, consolidate complexes and further processing plants and to reduce output by 3 percent to 5 percent." … The production cuts of 2007-09 had the effect of increasing Broiler prices "through mid to late 2008, staying at or near all-time highs until late 2009."[47]

During an earnings call in April 2012, Pilgrim's CEO commented that "the die is cast for 2012," and "we're comfortable that the industry is going to remain constrained."[48] Here we see reference to what the suppliers *will* do ("the industry is going to remain constrained") which could have served as affirming other communications as to what they *should* do.

In this case, the plaintiffs claim there was private communications supplementing these public announcements. That is speculative though perhaps it will be found through discovery. What is clear is the potential role of Agri Stats in a collusive scheme.

> Agri Stats … produces subscription reports about the Broiler industry. Agri Stats collects data directly from Defendants' Broiler production facilities. Only Broiler producers that supply data to Agri Stats are permitted to receive the Agri Stats reports. … Although the reports do not identify the Broiler producers by name, the reports are so detailed that a reasonably informed producer can discern the other producers' identities, and it is common knowledge among producers that this is possible. … Defendants have publicly stated that Agri Stats reports provide them knowledge of their competitors' production plans, and that they rely on this information to plan their own production.[49]

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[45] *Id.*
[46] *Id.*
[47] *Id.* at 783.
[48] *Id.*
[49] *Id.* at 781.

Even without private communications, public announcements supporting industry-wide supply restrictions, along with the monitoring of firms' outputs through Agri Stats in order to assess compliance with that plan, could prove effective in implementing and sustaining higher prices.

2. Pork

The case involving the "other white meat"[50] is strikingly similar to broiler chicken. Suppliers engaged in public announcements recommending output reductions, they shared confidential information through Agri Stats, and there is evidence of reduced industry supply. Even though the public announcements were more egregious in the pork case, the Court concluded that the plaintiffs' claim failed to meet the Twombly standard of plausibility because of lack of evidence of parallel supply cuts by producers.[51] Subsequently, the plaintiffs filed an amended complaint. In Section VII, we will offer a critique of this judicial decision. For now, the focus is on the role of public announcements in facilitating collusion.

The four largest defendants – Smithfield, Tyson, JBS USA, and Hormel – made up almost 70% of pork sales. The plaintiffs alleged a conspiracy that had two parts to it.

> First, Defendants aimed public statements at one another emphasizing the need to cut production, which also served to signal each Defendants' continued adherence to the overall conspiracy. Second, as a means of enforcement and oversight, "Defendants exchanged detailed, competitively sensitive, and closely guarded non-public information about prices, capacity, sales volume, and demand through their co-conspirator, Defendant Agri Stats."[52]

Some of the pork producers began reducing supply and calling on others to follow their lead. In May 2009, the CEO of Smithfield Foods conveyed at the BMO Capital Markets Agriculture, Protein & Fertilizer Conference:

> We made the decision with the over-supply of livestock to take the leadership position and start reducing our sow herds because we saw the overproduction and the oversupplies of the hogs into the market, which was driving our hog market down.[53]

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[50] "Pork. The Other White Meat." was an advertising slogan developed in 1987 for the National Pork Board.
[51] Facts are based on *In re* Pork Antitrust Litig., No. 18-1776, 2019 U.S. Dist. LEXIS 133165, 2019 WL 3752497, at *22-25 (D. Minn., Feb. 7, 2019).
[52] *Id.* at *7.
[53] Direct Purchaser Plaintiffs' Third Amended and Consolidated Class Action Complaint ¶ 138, *In re* Pork Antitrust Litig., No. 18-1776, 2019 U.S. Dist. LEXIS 133165, 2019 WL 3752497 (D. Minn., Feb. 7, 2019) [hereinafter Third Amended Complaint]; Smithfield Foods at BMO Capital Markets Agriculture, Protein & Fertilizer Conference – Final (May 13, 2009).

Referring to Smithfield cutting supply by 10% and then 3%, he noted in an earnings call one month later that "our 3% will not fix the hog industry. … Somebody else has got to do something. We cut 13%. The first 10% didn't fix it."[54] The point was iterated yet again in the next quarter's earning call.

> We can't solve the problem. … I have had conversations with several … very large producers, and I would tell you they are doing some liquidation. But again, I don't think they can solve it. I think this industry has got to solve it collectively. … there are others cutting back. We're not the only one.[55]

And the next quarter's as well.

> We continue to take a leadership role there and we have continued to take sow reductions and liquidation in our own herds … I think we've certainly done more than our fair share in terms of what this industry needs … I have not seen the significant Midwest reduction that would probably be needed to put this industry back in balance. [56]

That other producers must do their part in reducing supply was even expressed in Smithfield Foods 2009 Annual Report.

> I strongly believe that that the hog production industry has reached an inflection point where, due to deep and extended losses, liquidation is now a recognized reality by all in the industry. To date, Smithfield has already reduced the size of its U.S. herd by two million market hogs annually, and we are initiating a further reduction of 3% of our U.S. sow herd, effective immediately. This reduction, combined with the additional cuts by our fellow producers, should shrink supply to a point where the industry can return to profitability. This liquidation is long overdue. [57]

The CEO of Smithfield Foods could not be clearer when publicly announcing that the "industry has got to solve it collectively," that Smithfield had done its "fair share," and that "somebody else has got to do something" such as "additional cuts by our fellow producers." The message to Smithfield's competitors was unambiguous: coordinate on reducing supply by following the lead of Smithfield.

Some of the other pork producers were also restricting supply including Tyson, with cuts of over 25% during 2008-09, and Hormel.[58] In an earnings call, Hormel's CEO said that Hormel would "certainly look for opportunities particularly in January where we could reduce the number [of hogs] that we had going through."[59]

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[54] Third Amended Complaint, ¶ 140; Q4 2009 Smithfield Foods Earnings Conference Call – Final (June 16, 2009).
[55] Third Amended Complaint, ¶ 145; Q1 2010 Smithfield Foods Earnings Conference Call – Final (Sept. 8, 2009).
[56] Third Amended Complaint, ¶ 146; Q2 2010 Smithfield Foods Earnings Conference Call – Final (Dec. 10, 2009).
[57] Third Amended Complaint, ¶ 141.
[58] *Id.* ¶ 126, 128.
[59] *Id.* ¶ 128; Q1 2009 Hormel Foods Corporation Earnings Conference Call – Final (Feb. 19, 2009).

Complementing Smithfield's request to competitors that they cut supply, some of those competitors subsequently made announcements consistent with affirmation of that plan as, during earnings calls, they forecast diminishing supply and consequently rising profits. Hormel's CEO "expected to see a 3% reduction in overall pork supply in 2009"[60] and the Chief Operating Officer for Tyson Foods noted: "We do expect to see liquidation accelerate and pork production decrease into 2010 and beyond to improve producer profitability."[61] That forecast was also presented in Tyson Foods' 2009 10K Report: "We expect to see a gradual decline in hog supplies through the first half of fiscal 2010, which will accelerate into the second half of fiscal 2010."[62]

Through earnings calls and public statements at conferences, Smithfield Foods communicated to its competitors that it had done its part to reduce industry supply and that others needed to contribute if industry performance was to improve. This was an invitation to coordinate conduct for anticompetitive purposes. As confirmation of this plan, some of the pork producers, including Hormel and Tyson Foods, communicated their belief that industry supply would decline.

As in the broiler chicken case, the plaintiffs argued that Agri Stats was integral to monitoring pork producers' production and prices for compliance.

> [W]hile nominally anonymous, Agri Stats' monthly reports allow each Defendant to see critical commercial information from each of the other Agri Stats users. Accordingly, not only can the market participants see "the data necessary to coordinate production limitations and manipulate prices," they also have a mechanism by which to enforce compliance with the overall conspiracy. In this way, Agri Stats is critical to the alleged conspiracy because its reports "serve as an indispensable monitoring function, allowing each member of the cartel to police each other's production figures . . . for signs of cheating."[63]

Plaintiffs await to learn whether their amended complaint will survive defendants' motion to dismiss.

3. Generic Pharmaceuticals

More than 15 manufacturers are being investigated by public and private enforcers for colluding on the prices of many generic pharmaceuticals. The state of Connecticut began an investigation in 2014, the first criminal charges were brought by the DOJ in December 2016, and there are on-going civil suits by dozens of states and private litigants. The complaints claim there was private communications among the

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[60] Third Amended Complaint, ¶ 135; Q4 2008 Hormel Foods Corporation Earnings Conference Call – Final (Nov. 25, 2008).

[61] Third Amended Complaint, ¶ 142; Q3 2009 Tyson Foods Earnings Conference Call – Final (Aug. 3, 2009).

[62] Third Amended Complaint, ¶ 143.

[63] *In re* Pork Antitrust Litig., No. 18-1776, 2019 U.S. Dist. LEXIS 133165, 2019 WL 3752497, at *12-13 (D. Minn., Feb. 7, 2019).

defendants which resulted in coordinated price increases and adoption of a market allocation scheme.[64] What we do know is that there have been massive price increases.

> [T]he prices for a large number of generic pharmaceutical drugs skyrocketed throughout at least 2013 and 2014. According to one report, "[t]he prices of more than 1,200 generic medications increased an average of 448 percent between July 2013 and July 2014."[65]
>
> A January 2014 survey of 1,000 members of the National Community Pharmacists Association ("NCPA") found that more than 75% of the pharmacists surveyed reported higher prices on more than 25 generic drugs, with the prices spiking by 600% to 2,000% in some cases.[66]
>
> [T]he results of the conspiracy alleged in this Complaint were severe and resulted in unprecedented increases in the price of the drugs subject to this Complaint …, such as: (1) 2,400% for Amitriptyline; (2) 600% for Baclofen; (3) 400% for Benazepril; (4) 1,800% for Clobetasol; (5) 2,600% for Clomipramine; (6) 630% for Digoxin; (7) 700% for Divalproex; (8) 8,000% for some forms of Doxycycline; (9) 1,300% for Leflunomide; (10) 230% for Levothyroxine; (11) 300% for some forms Lidocaine; (12) 100% for Nystatin; (13) 500% for Pravastain; (14) 1,000% for Propranolol; (15) 1,000% for Ursodiol; and (16) 100% for Verapamil.[67]
>
> Fideres Partners LLP … reported "anomalous pricing patterns" in scores of generic drugs sold in the U.S. from 2013 to 2016. It identified 90 medicines whose prices rose at least 250 percent over the three-year period and were increased by at least two drug companies around the same time, even though there was no obvious market reason for the increases. The average price jump among the 90 drugs was 1,350 percent.[68]

Our interest is not in any private communications but rather in the public announcements made by one of the defendants, Lannett Company. Largely conducted through earnings calls, these messages may have served to shore up an agreement made through private communications. Whether or not that is true, they exemplify the types of public announcements that could facilitate coordinated conduct.

Lannett's CEO Arthur Bedrosian is the communicant. On August 23, 2016, Bedrosian criticized intense price competition and those companies that engage in it.

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[64] *See, e.g.,* Plaintiff States' Consolidated Amended Complaint, *In re* Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404 (E.D. Pa. 2018); Complaint, Humana Inc. v. Actavis Elizabeth, LLC, No. 2:18-cv-03299 (E.D. Pa. Aug. 3, 2018).
[65] Plaintiff States' Consolidated Amended Complaint ¶ 110, *In re* Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404 (E.D. Pa. 2018).
[66] *Id.* ¶ 111.
[67] Complaint ¶ 9, Humana Inc. v. Actavis Elizabeth, LLC., No. 2:18-cv-03299 (E.D. Pa. Aug. 3, 2018).
[68] *Id.* ¶ 230.

> Bedrosian summarized that price competition "usually doesn't get you to results you want. So, I think a lot of people have learned that lesson by now." He described a problem that "some of the dumber newer companies [that] continue to go down that path" of competing on price.[69]

Less than three weeks later, he announced a path towards higher prices: Lannett would be a price leader and competitors would follow its price increases.

> On a September 10, 2013 earnings call, Bedrosian stated: "We're not a price follower. We tend to be a price leader on price increasing and the credit goes to my sales vice president. … With 1 or 2 exceptions, we've tended to lead in the way of price increases. We believe that these prices are important. We need to try raising them. Sometimes, it doesn't stick and we have to go back and reduce our price, and other times it does. I am finding a climate out there has changed dramatically and I see more price increases coming from our competing – competitors than I've seen in the past. And we're going to continue to lead. We have more price increases planned for this year within our budget. And hopefully, our competitors will follow suit. If they don't, that's their issue."[70]

Mentioning that some price increases were retracted because they did not "stick" and that competitors were expected to "follow suit" suggests that those competitors should expect Lannett to return to lower prices if they did not raise their prices. In other words, Lannett was conveying a plan for a coordinated price increase.

Bedrosian didn't just criticize competitors for aggressive pricing but also commended them for raising their prices.

> Bedrosian was asked for a reaction to a competitor's recent and significant price increase on Levothyroxine. Bedrosian joked "[y]ou mean after I sent them the thank you note." … "I'm always grateful to see responsible generic drug companies realize that our cost of doing business is going up as well…So whenever people start acting responsibly and raise prices as opposed to the typical spiral down of generic drug prices, I'm grateful."[71]

In a public announcement in November 2014, he attributed an objective of raising profit, rather than market share, not only to Lannett but also to its competitors. In doing so, Bedrosian was implicitly conveying what he thinks other firms should be doing, which is to not aggressively compete in terms of price.

> Bedrosian described one of Lannett's "rational" competitors as one that would not do "anything crazy" such as "just going out and trying to grab market share." He continued: "So, from my perspective, what we're seeing here is an opportunity to raise prices

[69] *Id.* ¶ 212.
[70] *Id.* ¶ 200.
[71] Id. ¶ 212; Q4 2013 Lannett Company Inc Earnings Conference Call – Final (Sept. 10, 2013).

> because everybody has accepted the fact that our costs are going up dramatically and less concerned about grabbing market share. We're all interested in making a profit, not how many units we sell."[72]

Describing a plan of coordinated price increases during the fall of 2014, Bedrosian provided affirmation of that plan in a February 2015 earnings call by predicting that prices will not decline.

> If you're saying that the price increases that we've had in place, are they sustainable, and are they maintaining? My answer would be yes, they continue to hold up. … I think you're going to find more capital pricing, more – I'll say less competition, in a sense. You won't have price wars. You are still going to have competition, because there's a lot of generic companies in the market. I just don't see the prices eroding like they did in the past.[73]

These public announcements are explicit in calling for less price competition and encouraging competitors to follow Lannett's price increases. Irrespective of what evidence is found of private communications, these public messages could have been sufficient to result in supracompetitive prices.

4. Steel

The steel industry consolidated over 2000-04 with a series of bankruptcies, mergers, and acquisitions which left ArcelorMittal, Nucor, and U.S. Steel with 55% of domestic steel capacity. Building on the reduction in competition from this consolidation, public announcements were made at industry meetings to engage in "supply discipline" in order to maintain price levels. Private litigation was pursued that survived defendants' motion to dismiss[74] and ended with a settlement of $193.9 million.[75] The evidence described below is compelling that several steel producers publicly announced a plan to limit output and capacity for the purpose of raising prices, and that it was effective in doing so.

From March to June of 2005, senior executives at Mittal conveyed a message that the history of the industry is one of excessive competition, and then put forth a proposal for all producers to "manage" supply and capacity so as to achieve "fair" prices. These announcements are clearly intended to coordinate the output of competitors for the purpose of producing supracompetitive prices.

At a steel industry meeting in Chicago on March 1, 2005, Mittal executive Louis Schorsch criticized the traditional mode of conduct which "ensured that most producers would cut price before reducing

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[72] Complaint ¶ 206, Humana Inc. v. Actavis Elizabeth, LLC, No. 2:18-cv-03299 (E.D. Pa. Aug. 3, 2018).
[73] *Id.* ¶ 208, 209.
[74] Std. Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 896-97 (N.D. Ill. 2009) ("It is certainly plausible that absent coordination and agreement by each producer to give its 'pint of blood,' no Defendant would have sacrificed profitable production. But all eight Defendants made that sacrifice, and did so on multiple occasions. This, I find plausibly suggests agreement.").
[75] Diana Novak Jones, *Steel Buyers' $30M Deal Approved, Ending Antitrust Row*, LAW360 (Feb. 16, 2017).

volume."[76] In order to prevent "an inevitable race to the bottom,"[77] he then described what Mittal and its competitors needed to do.

> [I]f we are going to see improved conduct and thus improved performance, it will only be because the consolidation we have undergone encourages a change in behavior to match the industry structure. This means an emphasis on value instead of just cost, a focus on profits rather than on tons, and an ability to manage strategically rather than just for the short term.[78]

Two months later, Mittal Chief Operating Officer Malay Mukherjee provided a similar message at a meeting of the Association for Iron and Steel Technology.

> What is needed from the industry is a disciplined approach to bringing on supply and managing capacity. A better collective understanding of the microeconomics of our industry, meaning the cost structure and other aspects of the supply side, the likely scenarios for demand growth and what these imply for fair, long run prices will help ensure that we achieve a better match of supply with demand, more stable price levels and a financially healthier industry overall.[79]

Key here was calling for a "collective" industry effort to control supply in order to maintain price levels. In attendance were CEOs from U.S. Steel, Nucor, Steel Dynamics, Gerdau, and Commercial Metals. In a meeting in June 2007 with at least six CEOs present, Schorsch was more specific in calling for them "to adjust their production rates so the price of steel doesn't drop,"[80] which led others to voice that "they all need to work together to keep the prices high regardless of the flexibility in the marketplace."[81]

This invitation to jointly limit supply was, according to industry analysts, followed with supply reductions.

> An experienced market analyst surveyed the industry's mid-2005 downtime and reported having "never seen such a rapid drop in output corresponding to a rapid drop in demand and pricing . . . clearly this is unprecedented in our 30-year history analyzing this sector." Steel industry consultant Michelle Applebaum explained that in the spring of 2005, when global demand showed signs of weakness, "the industry in effect acted in concert to cut output and stiffen prices."[82]

The success in implementing this industry plan was subsequently affirmed by public announcements that commended competitors for their restraint with respect to supply.

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[76] *Arcelormittal*, 639 F. Supp. 2d at 884.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 884-85.
[80] *Id.* at 892.
[81] *Id.*
[82] *Id.* at 887.

> Steel Dynamics CEO Keith Busse summarized the industry's unprecedented collective action: "I've been around the industry for 20 years. And I haven't seen this kind of discipline. And it's to be applauded. … historically there wasn't any discipline. It was, as I said earlier, the desperate acts of dying men . . . everybody is, to some degree, giving that pint of blood. And there has been a better discipline."[83]
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> In a February 23, 2006 interview with Financial Times, Lakshmi Mittal looked back on the past few good years and commented, "[t]he industry has changed immensely. . . . On top of this [consolidation] there is a new discipline in the industry which means when demand is soft, as happened in the second quarter of 2005, companies cut production to better manage supply/demand."[84]
>
> In mid-2007, at the Steel Success Strategies conference, Lakshmi Mittal called on his audience – "the most influential stakeholders in the steel industry today" – to "all take a moment to enjoy. We have successfully made considerable progress in consolidation. We have successfully demonstrated the benefits that a more consolidated industry creates. We have successfully demonstrated our ability to better manage supply and demand."[85]

That the industry was following a collective plan to limit output was perceived by industry observers. In mid-2005, the trade press reported that "U.S. steel producers appear to be sticking to their pledges to reduce production,"[86] and, at a Steel Manufacturers Association meeting in mid-2007, an industry analyst encouraged them to "maintain focus on SUPPLY DISCIPLINE."[87]

In sum, these public announcements are a blatant call for competitors to be part of a coordinated plan to limit supply for the objective of resulting in higher prices than would have occurred but for implementation of this plan.

5. Airlines

A series of mergers and acquisitions led to a substantial decline in the number of airlines serving routes throughout the United States. Delta and Northwest merged in 2008, Southwest acquired AirTran in 2010, Continental merged with United in 2010, and American Airlines joined with US Airways in 2015. This increased concentration is a contributing factor to the collusion we'll describe. The collusive plan is built around a reduction in industry capacity which, by reducing the number of available seats, would allow airlines to implement and sustain higher fares.

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[83] *Id.* at 888.
[84] *Id.*
[85] *Id.* at 891.
[86] Complaint ¶ 86, Std. Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 896-97 (N.D. Ill. 2009).
[87] *Arcelormittal*, 639 F. Supp. 2d at 891.

The earliest documented public communications regarding capacity restrictions are found in some 2008 earnings calls by AirTran and Delta. In an earnings call, AirTran Vice President of Finance Arne Haak commented that "the elimination of inefficient and redundant domestic capacity is long overdue"[88] and "[w]hile several airlines have announced modest adjustments to their capacity, we strongly believe that more industry capacity needs to be removed."[89] During that same call, CEO Robert Fornaro made clear that this tactic was needed if prices were to rise.

> Just raising prices, without reductions in capacity is not going to raise the average fare. And so, in order to support the price increases, the capacity has to drop. … The only certain way to get the average prices up is to accompany it with capacity adjustments. Those two things have to occur simultaneously.[90]

Such a strategy only makes sense if *industry* capacity was curtailed, not just AirTran's capacity. For if AirTran raised its fares, it would be imperative that customers could not find available seats at lower fares with other airlines.

A day after AirTran's earnings call, Delta commented during its earnings call that, while it was willing to reduce capacity, its competitors had to join the effort if the desired effect was to be realized.

> Bill Green, Analyst, Morgan Stanley: "If you priced the product such that you could be profitable, how much capacity would you actually need to take out?" Glen Hauenstein, EVP of Network and Revenue Management, Delta Air lines, Inc.: "I think Delta can't do it alone. We have to do it in conjunction with the other carriers because certainly the capacity cuts that we can do on our own, while they will help us, will not remedy the industry's woes. So, as we look forward, we're hopeful that the other carriers act responsibly and look at the demand profiles as we move into the fall. And I would say if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we'd be in pretty shape, given today's fuel environment."[91]

Offering a specific recommendation of a 10% reduction would surely facilitate adoption of a common plan.

Two months later at the Merrill Lynch Transportation Conference, Delta's President Ed Bastian conveyed a similar message.

> I said no in terms of has enough capacity been cut. … So I think everyone while they've made some fairly significant announcements, everybody is watching each other in terms of how the capacity coming over and exactly what's coming out."[92]

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[88] Q1 2008 AirTran Holdings, Inc. Earnings Conference Call – Final (Apr. 22, 2008).
[89] *Id.* at 4.
[90] *Id.* at 7.
[91] Q1 2008 Delta Airlines, Inc. Earnings Conference Call – Final (Apr. 23, 2008).
[92] *In re* Delta/Air Tran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1353 (N.D. Ga. 2010).

This point was reiterated by Delta executive Glen Hausenstein a month later during an earnings call.

> Do we have to move back on some markets or should we take capacity out? And that's the process we're in right now and that's why I think we're not doing more capacity cuts right now. We're waiting to see essentially where this equilibrium goes and how, when we fine tune it, what more we get out and as the industry starts to come to the party in the fall what the implication of that is.[93]

Reference to "everybody is watching" and "waiting to see" conveys the necessity of coordinated cuts in capacity, and that Delta would continue only if other airlines were to act in a similar manner by reducing their capacities.

AirTran and Delta were articulating an industry-wide "capacity discipline" plan that involved reducing capacity in order to increase prices. In response to a question from an analyst during an earnings call, Delta CEO Richard Anderson defined "discipline" as: "you keep up with demand, don't worry about chasing share, but instead focus on … what is going to increase the operating margin of the Company."[94] While it is fine for a firm to express that it will exercise "discipline," when it calls upon competitors to do so as well, coordinated anticompetitive conduct is the likely intent.

Evidence of success in implementing industry-wide capacity discipline was expressed by United President John Tague during a third quarter earnings call in 2009:

> [W]ithout the level of capacity discipline that we have led and most people in the industry have participated in, this would be a very, very dire time. So we're going to have to keep our lid on capacity going forward, and we certainly maintain our commitment to be extremely responsible in that area.[95]

Subsequent public announcements conveyed that the plan was working, encouraged competitors to comply with it, and foresaw that airlines would do so. These announcements were made during various industry conferences in 2010.

> Kathryn Mikells (United, Senior Vice President and CFO): "What we have seen so far is I think very good overall behavior in terms of capacity discipline on the part of the industry. … We've been clearly an industry leader and have long been preaching the need across the industry for capacity discipline."[96]

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[93] Q2 2008 Delta Air Lines, Inc. Earnings Conference Call – Final (July 16, 2008).

[94] Q3 2010 Delta Air Lines, Inc. Earnings Conference Call – Final (Oct. 20, 2010).

[95] Q3 2009 UAL Corporation Earnings Conference Call – Final (Oct. 20, 2009); Consolidated Amended Class Action Complaint ¶ 88, *In re* Domestic Airline Travel Antitrust Litig., No. 1:15-mc-01404 (D.D.C. Oct. 13, 2015) [hereinafter Consolidated Complaint].

[96] *Id.* ¶ 88, 91.

> Gerard Arpey (American Airlines, CEO): "There are ... hopeful signs that the industry has learned its lesson about keeping capacity growth in line with demand – and will continue to apply that lesson even as the economy comes back." [97]
>
> Ed Bastian (Delta, President): "[W]e are doing our share at maintaining the overall discipline across our structure and we would expect our competitors hopefully to do the same."[98]
>
> Scott Kirby (US Airways, President): "The industry, by and large, has CEOs with different views than the CEOs of yesteryear .... They are much more focused on returns and financial performance than they are on empire building, 'how big is my airline, what is my market share, how many cities do I fly to,' etc. things can change in a hurry, but I don't think rapid capacity growth is going to become a problem in this industry, at least for the foreseeable future."[99]

At the 2011 Citigroup North American Credit Conference, Derrick Kerr (US Airways, CFO) stated to the conference attendees, which included executives from Delta and United:

> I think there are 3 main reasons why the industry is doing well. The consolidation that has happened over the last 5 years, capacity discipline and also, the a la carte revenues that have been put in place [ie bag and reservation fees] … the question I get all the time, are people going to keep the capacity discipline that is in place today? … And every announcement I have seen from a capacity perspective is down or minimal growth in 2012, which is key for the industry that everybody is keeping the capacity discipline that we need to continue to make the industry profitable … we're going to maintain that capacity discipline that looks through 2012.[100]

That capacity discipline has benefitted the industry was emphasized in remarks by United CEO Jeff Smisek at the JPMorgan Aviation, Transportation and Defense Conference in March 2013. In attendance were senior executives from American, Delta, and Southwest.

> This is also an industry that has learned the benefits of capacity discipline. Capacity discipline has been very, very good for this business. I think we've learned from it. Certainly, at United, we've learned from it and we intend to continue our capacity discipline.[101]

As the preceding statements reveal, the same message was regularly repeated by multiple airline executives at various industry venues: control capacity, focus on profits and not market share. That the

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[97] *In re* Domestic Airline Travel Antitrust Litig., 221 F.Supp.3d 46, 62 (D.D.C. 2016).
[98] Consolidated Complaint, ¶ 94.
[99] *Id.* ¶ 60.
[100] *Id.* ¶ 67.
[101] *Id.* ¶ 62.

plan was a coordinated one was never stated as clearly as an episode in 2015. Southwest had announced a capacity increase of 7 to 8 percent at the Wolfe Research Transport Conference, and the response of John Rainey (United, CEO) was:

> [A]t United we are very focused on capacity discipline, but we're not going to do it at the expense of United and to the benefit of others. The whole industry needs to have that level of discipline.[102]

Over the period of 2008 to 2015, airline executives repeatedly used earnings calls and statements at industry conferences to lay out and solicit support for an industry plan to limit capacity. By their own admission, this plan was effective.

> Tom Horton (American, CFO): "[W]e have been the industry leader in exercising capacity discipline [and] much of the industry followed our lead … All told, when measured against 2007, 2009 mainline capacity for the network carriers was down a whopping 14.5%."[103]

However, we do not need to rely exclusively on such claims for there has been an empirical analysis providing convincing evidence that the announcements had a causal effect on capacities.

Aryal, Ciliberto, and Leyden (2020) collected earnings call transcripts from the second quarter of 2002 to the fourth quarter of 2016 for the seven legacy airlines: Alaska Airlines, American Airlines, Continental Airlines, Delta Airlines, Northwest Airlines, United Airlines, and US Airways.[104] Using Natural Language Processing techniques and manual review, earnings calls were identified which used the phrase "capacity discipline" or the word "capacity" in conjunction with other relevant terms such as "demand" and "GDP." An earnings call so codified was said to have "mentioned capacity discipline." That was the case with about half of the earnings calls. The maintained hypothesis is that airlines "communicated a reduction in capacity" when all airlines serving a route had earnings calls in the same quarter which "mentioned capacity discipline." Controlling for other factors, it was estimated that capacity on a route fell by 1.79% in the quarter following when airlines "communicated a reduction in capacity." Given that the average change in capacity was 3.78% per quarter over the entire time period, this communication resulted in a change in capacity that was 48% greater than normal. This study provides some evidence of a causal effect of public announcements (specifically, earnings calls referring to capacity discipline) on conduct (specifically, a reduction in capacities).

In light of the egregious public announcements designed to coordinate capacity reductions among competitors and the associated empirical evidence showing effect, it is dismaying how ineffective both

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[102] *Id.* ¶ 65.
[103] *Id.* ¶ 92.
[104] The authors collected earnings call transcripts for four other airlines but performed the empirical analysis using only the legacy airlines.

public and private enforcement has been. The DOJ opened an investigation in July 2015 which it closed in January 2017.[105] Private litigation did manage to surmount the Twombly hurdle, as the court concluded:

> Indeed, these statements upon which Plaintiffs rely demonstrate two points that support the plausibility of their claim and, more specifically, the inference that Defendants' conduct was the result of an agreement. First, Defendants made public statements about their own commitment to capacity discipline as well as the importance of maintaining the capacity discipline within the industry. … Second, Defendants' statements concerning the focus on exercising capacity discipline commenced in 2009 and were a deviation from past business practices.[106]

In May 2019, final approval was given to a settlement with American for $45 million and Southwest for $15 million. Delta and United are yet to settle. In light of the substantial industry profits earned during this time period, these are paltry sums. The airlines' capacity discipline case is a primary exhibit that the courts and competition authorities have been inadequate in enforcing Section 1 of the Sherman Act when it comes to public announcements. They seem to be under the misperception that colluding in public gives it a veneer of legitimacy. It does not, and that is an issue to which we'll return in Section VII.

6. Common Elements in Airlines and Steel Regarding Capacity Discipline

The episodes in the airline and steel industries have very similar features. Both industries experienced consolidation which resulted in a market structure more conducive to lessened competition. Indeed, firms saw this connection as they commented that "the consolidation we have undergone encourages a change in behavior to match the industry structure." Some executives criticized past conduct in which "producers would cut price before reducing volume" and stressed the need to "focus on profits rather than [volume]" or "empire building." They used earnings calls and statements at industry meetings to convey a plan to reduce competition. To enhance profits, they expressed a need for "the elimination of inefficient and redundant domestic capacity" and a plan for "capacity discipline … to make the industry profitable." A coordinated industry effort was critical because a firm is "not going to do it at [its own] expense … and to the benefit of others. The whole industry needs to have ... discipline." And when they succeeded, executives provided affirmation and support as they noted that "everybody is, to some degree, giving that

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[105] It is possible that the DOJ had hoped to find evidence of private communications. The case was closed just prior to the end of the Obama administration and may have reflected the reality of the case not continuing under the Trump administration. On the closing of the investigation, law professor Stephen Calkins opined: "Successor enforcers, particularly ones less aggressive than their predecessors, are unlikely to prioritize predecessors' envelope-pushing investigations." Brent Kendall & Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WALL ST. J., Jan. 11, 2017, https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.

[106] *In re Domestic Airline Travel Antitrust Litig.*, 221 F.Supp.3d at 62-63.

pint of blood." In short, they expressed and implemented a plan to coordinate capacity reduction in order to reduce supply and thereby cause higher prices.

C. *Treatment*

These public announcements involve putting forth an industry plan to raise prices or reduce supply or capacity with the subsequent effect of higher prices. Firms' executives are recommending that competitors should compete less aggressively for the purpose of making the industry more profitable. Past conduct is criticized when it was too aggressive, and is commended when competition is restrained. There is no credible procompetitive rationale for public announcements which describe a plan to reduce competition and encourage competitors to adhere to it. Just as much as these communications are per se prohibited when they are private, the same should be true when they are public. Making them public does not create an offsetting procompetitive rationale, nor do they reduce their efficacy as a coordination device to a point that we should no longer be concerned. In short, public announcements that prescribe what competitors and the industry at large should do and consumers would be harmed as a result should be subject to a per se prohibition. The more interesting question is why they are not.

It is generally understood by executives that it is a per se violation of the law to privately meet and discuss coordinating a rise in price or a reduction in supply. It should be equally clear that the following statement is inappropriate.

> Andrew "Twiggy" Forrest has called on the world's big iron ore companies to announce publicly a cap on production in a bid to arrest declining prices, which have slumped more than 50 per cent over the past year. At a business dinner in Shanghai on Tuesday night, Mr. Forrest, founder of the fourth biggest iron ore exporter, Fortescue Metals Group, said he was "absolutely happy to cap my production right now" at 180 million tonnes. He said the other major players, Rio Tinto, BHP Billiton and Brazil's Vale should also cap their production "and we'll find the iron ore price goes straight back up to US$70, US$80, US$90." "I'm happy to put that challenge out there, let's cap our production right here and start acting like grown-ups," he said.[107]

[107] Lisa Murray, *Fortescue's Andrew Forrest calls for iron ore production cap*, AUSTL. FIN. REV., Mar. 25, 2015, http://www.afr.com/news/world/fortescues-andrew-forrest-calls-for-iron-ore-production-cap-20150324-1m6xlk. In choosing not to take legal action, the chairman of the Australian Competition and Consumer Commission stated it was because "Mr. Forrest's comments were made 'off-the-cuff' in response to audience questions ... [and the comments] were hypothetical and intended to encourage a policy debate about the long-term future of the iron ore industry." Simon Frazer, AC*CC will 'not take further action' over Andrew Forrest Comments to Drive Up Iron Ore Prices*, ABC NEWS, Apr. 30, 2015, http://www.abc.net.au/news/2015-04-30/accc-to-not-take-further-action-over-andrew-forrest-comments/6435404.

For executives to understand that such announcements will not be tolerated, they should be treated as a per se violation.

VI. Assessment of Collusion Using Public Announcements

Here we offer some thoughts on two central questions: How frequent are public announcements used to facilitate collusion? How effective are public announcements in facilitating collusion? Our answers are necessarily tentative in light of the limited number of cases reviewed.

After conducting a comprehensive search, the cases contained here are all known U.S. cases. Focusing on those cases which exclusively or primarily used public announcements (so generic pharmaceuticals is excluded because public announcements appear to have been a supplement to private communications) and excluding the one foreign case (mobile telecom), we have two "invitation to collude" cases (free-standing newspaper inserts and one-way truck rentals) and five possible collusion cases (airline baggage fees, airlines and capacity, broiler chicken, pork, and steel).[108] Given that these episodes span about 15 years, there is one documented episode about every other year in the U.S.

Though the number of documented episodes of collusion or attempted collusion using public announcements is low, there are still reasons to be concerned with this brand of collusion, both now and moving forward. First, there are likely to be more episodes than we've discovered. As our search strategy was based on litigation, any unlitigated episodes are excluded. Even though public announcements are, by their nature, detectable, private and public enforcers may not bring a case because of the difficulty in prosecuting them. Supporting this claim, four of the five Section 1 cases (airlines baggage fee, steel, broiler chicken, and pork) were only pursued by private litigants.[109] Even though these four cases are national in scope, public enforcers presumably found them sufficiently challenging so as not to warrant the allocation of resources. We believe this difficulty is largely due to the disinclination of the courts to deploy the per se rule with public announcements, which is a point we'll return to in the next section. Regardless of the reason, the record on litigating cases lacking private communications could well deter their prosecution and result in undercounting the number of episodes.

Second, public announcements to coordinate conduct among competitors are likely to be increasingly used because of enhanced effectiveness in detecting and prosecuting collusion involving private communications. With the revision of the U.S. Corporate Leniency Program in 1993, an increase in the maximum fines and prison sentences, and a series of high-profile convictions, the DOJ is rightly perceived as a formidable enforcer when it comes to explicit collusion. By explicit collusion, we are referring to that which is per se unlawful and provides a firm with the type of evidence that, as part of a leniency

[108] A case is classified as "invitation to collude" when only one firm made public announcements and there is no evidence of effect. The absence of announcements or actions by a rival firm consistent with a collusive scheme implies there is no evidence that the invitation was accepted.

[109] In the airlines case involving capacity discipline, the DOJ opened an investigation in July 2015 and private litigation was filed August 2015. Private litigation continued after the DOJ closed its case in January 2017.

application, would bring them amnesty regarding government penalties (as well as liability for single rather than treble damages). If firms desiring reduced competition find explicit collusion comes with a heightened risk, they may turn to more tacit means such as public announcements. Based on casual observation, we would also claim that the DOJ is pursuing fewer cases of tacit collusion than they have done in the past, perhaps due to focusing on cases with a leniency awardee. Notably, the DOJ chose not to open investigations into the airline first-bag fee and steel episodes even though the publicly available evidence was strong. With more effective prosecution of explicit collusion and less attention given to tacit collusion by the DOJ, the use of public announcements to collude becomes more attractive because it is less likely to result in a conviction with the associated fines, damages, and incarceration. And though they may be more constrained in their content than private communications, and thereby less effective in achieving a supracompetitive outcome, public statements about conduct may be more credible because a firm feels bound to follow through out of concern of litigation for making false or misleading statements.

Turning to efficacy, the executives in the airlines and steel industries expressed their belief that firms had succeeded in collectively reducing their capacities, which is consistent with the public announcements that multiple firms had made. Of course, the purpose of "capacity discipline" was to tighten supply and thereby raise prices. Supportive of there being an effect on steel prices is a settlement with customers of almost $200 million. Though the settlement negotiated thus far in airlines is vastly lower, Aryal, Ciliberto, and Leyden (2020) established an effect of announcements made in earnings calls on the number of available seats (capacity). Given that fares and profits were historically high during this time period, it is quite possible that the capacity reductions had an effect on fares. The cleanest case for the effect of public announcements on prices is the coordination on baggage fees by AirTran and Delta. AirTran's announcement during an earnings call that it would not lead on instituting a first-bag fee, but it would be likely to follow, was soon followed by Delta's announcement of a baggage fee and subsequently AirTran's announcement of a baggage fee of the same amount with the same start date. In sum, the available evidence supports public announcements successfully leading to higher coordinated prices in the airlines and steel industries. Their possible effect in the markets for broiler chicken and pork remains an open question that may be answered with the resolution of pending litigation.

Putting aside this evidence that relates announcements to capacities and prices, it is natural to ask: How credible is it that public announcements could be effective? In these cases, firms are not expressly conveying a detailed collusive plan. In contrast, the more standard cartel involving private communications would have firms discussing and agreeing to the exact price to be charged and perhaps a market allocation scheme specifying sales or market shares for firms.[110] Negotiation with respect to such details of the collusive scheme is absent with public announcements. So how is it that public announcements could be an effective method for coordinating conduct?

One effective strategy is to use public announcements to coordinate on identifying a firm to lead along with the understanding that other firms are to match the leader's actions. In that case, the announcements are not necessarily used to outline a collusive plan but the plan is instead left to the leader

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[110] For many examples, see *supra* note 7.

to select. The primary challenge for the leader is choosing a price which will prove suitable to the other firms to match. That strategy worked in the airlines baggage fee case and was initiated (though not consummated) in the markets for free-standing newspaper inserts, truck rental, and mobile telecom. In some of those cases, public announcements also comprised the rudiments of a plan such as a price level and maintaining market shares (which would be the market allocation scheme). Even without those details, public announcements can result in firms coordinating on a firm to be the leader who then selects a collusive outcome. That approach is simple and likely to be effective.

What is a bit more challenging is understanding the apparent efficacy of public announcements associated with capacity discipline in the airline and steel industries. On one level, it seems appropriate as a coordinating practice: Firms convey an industry plan to reduce capacity. However, it lacks specificity. These public announcements may lead to mutual understanding among firms to reduce their capacities, but by how much? In a cartel with private communications, it would be negotiated and clearly expressed how much each firm is to reduce its capacity or supply or raise its price. Such details are lacking with announcements of the sort: "[w]hat is needed from the industry is a disciplined approach to bringing on supply and managing capacity"[111] or "[t]he only certain way to get the average prices up is to accompany it with capacity adjustments."[112] We believe the evidence shows that these announcements were indeed effective as reflected in lower capacities and likely higher prices. What is to be explained is exactly how they were effective. That is a topic for further study.

VII. Legal Treatment of Public Announcements

Existing legal frameworks have failed to adequately deal with collusion facilitated by public announcements. Section 5 of the FTC Act has the broadest jurisdiction for addressing anticompetitive statements made publicly, but the statute provides little deterrent effect due to its limited remedies. The threat of Sherman Act action is considerably greater, but neither Section 1 nor Section 2 have been able to tackle the problem of anticompetitive behavior in non-monopolistic markets in the absence of evidence of an express agreement among firms. Therefore, to address collusive behavior facilitated by public announcements, new legal approaches are needed.

First, public invitations to collude should be treated as explicit violations of Section 5, permitting the FTC to assess civil penalties without a prior cease and desist order. Public statements inviting coordination among rivals are easily recognizable in earnings calls, trade meetings, and other public media. These include statements by a firm on how it will respond to a rival's conduct, how its rival *should* behave, or how its rival *will* behave. Firms should know that such invitations to collude, which lack any procompetitive justification, will not be tolerated and will result in financial penalties.

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[111] Std. Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 884 (N.D. Ill. 2009).
[112] Q1 2008 AirTran Holdings, Inc. Earnings Conference Call – Final (Apr. 22, 2008).

Second, courts should recognize that such public anticompetitive statements, together with anticompetitive effect, are highly indicative of an underlying agreement among competitors and, accordingly, permit discovery as to the issue of an agreement where these elements are at work. Furthermore, courts should recognize that a conspiracy in violation of Section 1 can be initiated, accepted, and maintained by public statements alone where an announcing firm's rivals receive an invitation and either respond verbally or behave in accordance with the announcing firm's proposed action. In either event, the per se rule should be applied to Section 1 violations conducted publicly or facilitated by public statements.

In all of these situations, it should be clear that the firms' conduct amounts to more than run-of-the-mill interdependent oligopolistic behavior, or what is commonly referred to as "tacit collusion" or "parallelism." Coordination that is unlawful when done in private should not be allowed simply because it is done publicly.

A. *Public Statements Are Not Immune from Antitrust Enforcement*

It is worth noting at the onset that public announcements are not immune from antitrust liability due to any conflict with securities law regulation. The securities-antitrust implied immunity doctrine provides that where the securities laws are incompatible with antitrust laws, actors regulated by securities laws may be impliedly immune from antitrust liability where the two systems are incompatible. In *Billing*, the Supreme Court articulated a four-factor analysis for determining within a given context whether the securities laws are sufficiently incompatible with the application of the antitrust laws such that the former can be said to preclude the latter: (1) whether the challenged practices lie squarely within an area of financial market activity that the securities laws seek to regulate; (2) the existence of regulatory authority under the securities laws to supervise the activities in question; (3) ongoing SEC regulation; and (4) a resulting risk that the securities laws and antitrust laws, if both applicable, would conflict.[113]

In a handful of cases, courts have applied the four *Billing* factors to conclude that securities laws impliedly precluded the application of antitrust laws. In *Billing* itself, the Supreme Court applied preclusion to an antitrust lawsuit brought against securities underwriters that marketed and distributed securities.[114] In *Short Sale*, the Second Circuit applied preclusion to an antitrust lawsuit alleging that securities brokers conspired to fix the prices of certain securities.[115]

Commentators had previously hypothesized that public companies' disclosures would be immune from antitrust attack under the implied preclusion doctrine, so long as the statements are not "uniquely unequivocal" and "unambiguous" in terms of both the specificity of the offer and its anticompetitive

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[113] Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 285 (2007).
[114] *Id.*
[115] Elec. Trading Group, LLC v. Banc of Am. Sec. LLC ("*Short Sale*"), 588 F.3d 128 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3276 (2010).

import.[116] However, the only caselaw addressing whether defendants are immunized from antitrust liability based on statements made on earnings calls or other public outlets has concluded that antitrust laws are not impliedly precluded in such contexts.

In *In re Domestic Airline Travel Antitrust Litig.*, defendant AirTran was accused of inviting Delta to collude through a series of earnings calls with industry analysts and speeches and break-out sessions at industry conferences.[117] Defendants argued that the legal doctrine of implied preclusion should bar Plaintiffs' antitrust claims. In particular, Defendants argued that because the securities laws encourage truthful statements to the investor community, including information about a company's future plans and expectations, imposing antitrust liability here would undermine that core SEC objective. Relying on the four *Billing* factors, the court rejected the Defendants' implied-preclusion arguments, reasoning that:[118]

- Plaintiffs' complaint alleges that Defendants went well beyond disclosing the type of financial information that companies must legitimately convey to their shareholders pursuant to SEC regulations;

- Defendants did not cite to any SEC regulation that clearly regulates the unlawful conduct alleged in this case;

- There is no SEC authority that would prevent anticompetitive collusion or coordination via earnings calls and industry conferences;

- No cause of action exists for Plaintiffs under the securities laws for the conduct alleged; and

- If implied preclusion of antitrust liability were to exist in this case, businesses would essentially be given a "free pass to collude in public forums and leave consumers who are harmed by such anticompetitive conduct no remedy."

The District Court's decision was affirmed by the Eleventh Circuit and the Supreme Court denied certiorari.[119] In sum, firms that use public statements to unlawfully coordinate with competitors can be found to have violated antitrust laws.

B. *Section 1 Enforcement*

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[116] Richard M. Steuer, John Roberti & Daniel Jones, *The Application of Antitrust to Public Companies' Disclosures*, 63 ADMIN. L. REV. 159, 177-78 (2011).
[117] In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1352 (N.D. Ga., Aug. 2, 2010).
[118] *Id.* at 1363-65. See also In re Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1369-70 (N.D. Ga. 2017), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019).

[119] Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019).

The most fitting statutory basis for condemning collusion facilitated by public announcements is Section 1 of the Sherman Act. Section 1 proscribes every contract, combination, or conspiracy (i.e., agreement) in restraint of trade.[120] Under the Sherman Act, concerted action is judged more harshly than unilateral behavior.[121] This is because "[c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assume and demands."[122] For this reason, courts impose a stricter standard on the conduct of concerted activity. Section 1 condemns any agreement in restraint of trade that is "unreasonable."[123]

Horizontal price fixing[124] and market allocation agreements,[125] among others, are "conclusively presumed to be unreasonable,"[126] and are per se unlawful. Therefore, plaintiffs alleging a Section 1 violation need prove only that an unlawful agreement existed among the defendants. It is not necessary to demonstrate market power, anticompetitive effect, or any other element that might otherwise be required under a rule of reason analysis.[127]

While per se illegality lowers some of the burden on plaintiffs in Section 1 cases, courts have imposed two additional hurdles: the agreement requirement and the *Twombly* "plausibility" standard.

1. The Agreement Requirement

Section 1's prohibition of contracts, combinations, and conspiracies is generally understood to require that an agreement exist among the defendants.[128] In particular, courts will ask "whether the challenged anticompetitive conduct stems from independent decision or from an agreement."[129] "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or

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[120] 15 U.S.C. § 1.
[121] Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) ("[T]he Sherman Act treats concerted action more harshly than unilateral behavior. …"); Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 677 (S.D.N.Y. 1987) ("This distinction imposes a stricter standard on the conduct of concerted activity.").
[122] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984).
[123] *Copperweld*, 467 U.S. at 768.
[124] Price fixing refers to the manipulation of prices through any means, including the restriction of capacity. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) ("An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.").
[125] United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories to minimize competition.").
[126] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956).
[127] *McKesson*, 351 U.S. at 310 ("It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; … or whether the effect…is to raise or decrease prices.").
[128] 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1403 (4th ed. 2013).
[129] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007) (internal quotation marks, citation, and alteration omitted).

a conscious commitment to a common scheme."[130] Without evidence of an express agreement, courts will not find that Section 1 has been violated.

The most unequivocal way of proving an agreement is through direct evidence. Direct evidence is that which is "explicit and requires no inferences to establish the proposition or conclusion being asserted."[131] This might include written agreements, meeting recordings, testimony, or admissions of offer and acceptance among the defendants.[132] But because of per se illegality and the risk of serious penalties, including criminal sanctions and treble damages, conspirators are extremely unlikely to coordinate in ways that will leave behind traces of their agreement. Instead, they will rely on more subtle and indirect tactics to fix prices. This leaves plaintiffs often relying on circumstantial evidence to prove the existence of an agreement.

In the absence of direct evidence, plaintiffs can demonstrate the existence of an agreement on the basis of conscious parallelism, but only "when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices."[133] Courts find most convincing evidence that defendants acted in a manner contrary to their economic interest when undertaken independently, but in their interest if undertaken jointly.[134] In *In re Domestic Airline Travel Antitrust Litig.*, the court observed that "collusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways."[135]

Of course, an agreement can only exist if there is a "meeting of the minds" between at least two parties. Even with public statements, evidence of acceptance of an offer is required to conclude that there is a qualifying agreement under Section 1. Rival firms who merely receive or even contemplate an invitation to collude are simply acting as any prudent firm would by being informed about the competitive landscape.[136] Therefore, a rival firm should *not* be assumed to have accepted an announcing firm's invitation unless there is (a) an announcement by the rival that can be interpreted as acceptance, or (b)

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[130] W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010).
[131] County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999).
[132] 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1410a, at 69 (4th ed. 2013).
[133] Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001). *See also* Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) ("this Court has never held that proof of parallel business behavior…itself constitutes a Sherman Act offense.").
[134] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). *See also* City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998) ("[A] showing that the defendant acted contrary to its legitimate economic self-interest…is sufficient to satisfy the requirement that the plaintiff show 'plus factors' beyond mere consciously parallel action. Other 'plus factors,' however, may also exist.").
[135] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010).
[136] *In re* Text Messaging Antitrust Litig., 782 F.3d 867, 875 (7th Cir. 2015) ("Competitors in concentrated markets watch each other like hawks," even when they are not violating antitrust law).

evidence that the rival altered its behavior to act in accordance with the announcing firm's proposed plan of action.[137]

For example, in *Airlines*, AirTran announced during an earnings call that it believes "industry capacity needs to be removed" and that "the elimination of inefficient and redundant domestic capacity is long overdue." The very next day, Delta stated that it was willing to reduce capacity, but that it would only do so "in conjunction with the other carriers." "[I]f the [airline] industry could achieve a 10% reduction in capacity year-over-year," Delta's Executive Vice President continued, "we'd be in pretty shape." In subsequent public announcements over the next seven years, several U.S. airlines repeatedly lauded the following reduction in capacity, and urged the industry to maintain that level of capacity discipline.

In *Steel*, Mittal called for a "collective" industry effort to control supply in order to maintain price levels. At an industry meeting, Mittal executive Louis Schorsch was explicit in calling for at least five other firms in the industry to "adjust their production rates so the price of steel doesn't drop." That this statement was met with both an "unprecedented" reduction of output by domestic steel producers, and public statements by competitors welcoming the discipline shown, is indicative of an acceptance of Mittal's offer.[138]

In each of these examples, the initial invitations extended by AirTran and Mittal could not be independently condemned as agreements in restraint of trade. However, both the subsequent statements by competitors indicating approval of the proposed plans, and the ensuing reductions in capacity, take these cases beyond the realm of mere invitations to collude and into Section 1 territory. Such cases of public offers together with acceptance via public communication and/or conduct should be taken as direct evidence of an agreement and be subject to the per se rule as discussed below.

2. The Twombly "Plausibility" Standard

In *Matsushita*,[139] the Supreme Court increased the burden on plaintiffs attempting to prove collusion in cases where there is no direct proof of price fixing. Under that decision, unless evidence is presented which "tend[s] to exclude the possibility" that defendants were acting independently, defendants will be

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[137] In Foley, defendant real estate agent Foley announced a plan to raise his commission rate from 6% to 7% and suggested that his competitors do the same. While verbal acceptance of this proposal by the other agents was disputed, the Fourth Circuit found convincing evidence that the other defendants all "substantially adopted a [7%] commission rate" in the following months. United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980).

[138] Standard Iron Works, 639 F. Supp. 2d 877, 892-96 (N.D. Ill. 2009) ("While there may be valid non-collusive purposes to each of the [public statements about output reduction] alleged, the direct, in-person communications at trade meetings between executives at least supply a plus factor in support of the plausible inference that Defendants reached a meeting of the minds on industry-wide productions cuts.").

[139] 475 U.S. 574 (1986).

entitled to summary judgment.[140] In *Twombly*,[141] the Court extended *Matsushita*'s plausibility screen to evaluate motions to dismiss at the pleading stage. Plaintiffs must present "enough facts to state a claim to relief that is plausible on its face," or to warrant an inference of conspiracy.[142] Plaintiffs need not "plead facts that, if true, definitely rule out all possible innocent explanations."[143] What is required is that the Plaintiff "state enough facts to 'raise a reasonable expectation that discovery will reveal evidence of illegal agreement' even if the court believes such proof is improbable."[144] Of course, allegations of direct evidence of an agreement is independently sufficient to plead a claim under Section 1.

While the *Twombly* plausibility standard has merit in avoiding costly discovery for merely speculative allegations, it can be unduly harsh on plaintiffs who, at the pleading stage, do not yet have access to important evidence in the hands of the defendants. Often, it is only through discovery that direct evidence of private communications may be uncovered.

C. *Public Announcements as Evidence of a Conspiracy*

Courts of course may find that public statements made by defendants suffice as direct evidence of a qualifying agreement in violation of Section 1. In such cases, allegations of direct evidence of an agreement—offer and acceptance—are enough to survive any motions to dismiss on their own.[145]

But *Twombly*'s heightened pleading standard requires Section 1 plaintiffs relying on circumstantial evidence to show the existence of "plus factors" in addition to evidence of parallel behavior to survive a motion to dismiss. Public announcements encouraging rival or industry anticompetitive behavior ought to be regarded by the courts as highly suggestive of collusion. Limited discovery on the agreement issue should be permitted where a plaintiff alleges both (1) parallel conduct and (2) public statements suggesting rivals abide by the alleged conduct. Together with other plus factors, public announcements encouraging welfare-diminishing behaviors should easily be found to meet the plausibility standard.

The fact that such statements are made in public does not exempt them from antitrust scrutiny. In *Petroleum Products*, the Ninth Circuit noted that

> '[T]he form of the exchange—whether through a trade association, through private exchange…, or through public announcements of price changes—should not be determinative of its legality.' …The fact that it is feasible…to communicate the necessary price information through press releases does not 'immunize the exchange of price

[140] Id. at 597.
[141] 550 U.S. 544 (2007).
[142] *Id.* at 570.
[143] *In re* Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014).
[144] SigmaPharm, Inc. v. Mut. Pharm. Co., 772 F. Supp. 2d 660, 669 (E.D. Pa. 2011) (quoting *Twombly*, 550 U.S. at 556), *aff'd* 454 F. App'x 64 (3d Cir. 2011).
[145] *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323-24 (2010) ("Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.").

> information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing.'[146]

Furthermore, that the communications may be intended for or of value to other parties, such as investors or market analysts, is not determinative of their legality.

> Defendants also argue that the public statements on which Plaintiffs rely 'had purposes wholly apart from conspiracy,' such as responses to questions from shareholders and the press. But this argument merely notes the circumstances in which the statements were made. It is certainly possible for a statement to have multiple purposes or meanings directed at different audiences. For purposes of evaluating Plaintiffs' conspiracy claims, what is important to the Court's analysis is not so much the immediate context in which the statements were made, but the larger context of the market and industry actions.[147]

Through discovery, plaintiffs may find that the public statements were in fact supplemented by private communications between defendants, providing direct evidence of collusion and obviating the need to rely on circumstantial evidence at all. Even where direct evidence is not uncovered, discovery may lead to additional circumstantial evidence that points to the existence of an agreement facilitated by the public statements. Examples may include finding internal memoranda of the announcing firm which illustrate that the intent of the announcement was to coordinate the conduct of competitors, or internal memoranda of the receiving firm demonstrating an understanding that the announcement was an invitation or plan to coordinate conduct. Discovering evidence of the announcement being the cause of consciously parallel behavior—such as cutting capacity or raising prices—is also possible.

1. Evidence of Anticompetitive Intent

In *Truck Rentals*, U-Haul's Chairman and CEO Edward Shoen mentioned publicly during an earnings call that U-Haul is "trying to exhibit some price leadership" and "to force prices" up in the one-way truck rental market dominated by U-Haul and Budget. On that call, Shoen announced a price increase conditioned on Budget responding in kind with rates that were "within 3 to 5 percent of U-Haul's." Internal memoranda were also uncovered in which Shoen told regional managers to "contact" their local Budget and Penske competitors and "LET THEM KNOW" that either they get "up to a fair rate" or else U-Haul will undercut their prices. While the First Circuit found no Section 1 violation due to U-Haul's proposal to fix prices having not been accepted, this case illustrates how public announcements may be indicative of underlying intent to collude.

Similarly, in *Mobile Telecom*, mobile network operator KPN announced in a publicly available interview that it was "happy with" its current market share and that it would start raising prices. But the KPN

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[146] *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 (quoting RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 146-47 (1976)).
[147] *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 799 (N.D. Ill. 2017).

executive noted that it would stick to this plan only if KPN is not "punished by the markets." In an internal email, rival T-Mobile confirmed that it understood the announcement as an invitation to coordinate on higher prices: "KPN wants to maintain its market shares, but also to improve its profit margin by aiming for value and reducing its commissions. A dilemma for T-Mobile given the growth ambition." If T-Mobile had only viewed KPN as announcing higher prices, it would have been the perfect opportunity to gain market share and thereby satisfy its "growth ambition."

And in *Baggage Fees*, an executive vice president for Delta raised the probability from 50% to 90% that AirTran would match if Delta imposed a first-bag fee after AirTran announced during an earnings call that it has not yet initiated a first-bag fee because "our largest competitor [Delta]…hasn't done it" and that AirTran would "prefer to be a follower…than a leader right now."

These three cases show that public announcements are used to coordinate with rivals, but even more importantly that internal documents can help illustrate the role that these statements were intended to play in facilitating the coordination. Such evidence of the announcing firm's intention and the receiving firm's understanding—both instructive as to the existence of an agreement—are typically available to plaintiffs only through discovery.

2. Evidence of Anticompetitive Effect

Evidence of an announcement's direct effect on market conditions, such as price or output, would also be useful to a court's assessment of whether the firms had an agreement. Industry-level data indicating parallel behavior and its anticompetitive effects may be publicly available. For example, in the Aryal et al. study, the researchers found that "when all legacy carriers operating in an airport-pair market communicate about capacity in a given quarter, the average number of seas offered in that market decreases by 1.79% in the subsequent quarter."[148] However, data that confirms the announcement's effect on firm-level decision making may only be obtained through discovery.

In *Pork*, plaintiffs alleged that eight of the leading domestic pork producers conspired to limit the supply of pork in order to fix prices. Some of the defendants began reducing supply and encouraging others in the industry to do the same publicly with statements like that of Smithfield Foods that the "industry has got to solve [the problem of low prices] collectively." These announcements were met with "forecasts" of lower supply by competitors including Hormel. The United States District Court for the District of Minnesota misguidedly determined that the plaintiffs failed to meet the plausibility standard. This was largely because plaintiffs relied "exclusively on industry-wide data" and asking the court "to infer that individual Defendants all contributed to the decreased production."[149] "Plaintiffs do not plead with any

[148] Gaurab Aryal, Federico Ciliberto & Benjamin T. Leyden, *Coordinated Capacity Reductions and Public Communication in the Airline Industry* 4 (CESifo Working Paper Series No. 8115), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544501.
[149] *In re Pork Antitrust Litig.*, 2019 U.S. Dist. LEXIS 133165 at *24.

specificity which Defendants reduced production during which years."[150] While the court acknowledged that the public statements should be viewed as plus factors, it concluded that there was insufficient evidence of parallel conduct.[151] The court was misguided in granting defendants' joint motion to dismiss. This case illustrates a situation where public statements unequivocally point to the defendants' involvement in a price fixing scheme, but where discovery is needed to uncover details as to each defendant's specific role and conduct.

D. *Monopolization and Invitations to Collude*

For public statements to be condemned under Section 1, an agreement, including acceptance, is required. In other words, Section 1 requires group behavior. Unilateral statements inviting coordination which are not accepted by competitors—through reciprocal statements or parallel action—cannot be dealt with via Section 1. Instead, enforcement will have to come under Section 2 of the Sherman Act or Section 5 of the FTC Act.

1. Section 2 Attempted Monopolization

Unilateral anticompetitive conduct is condemnable under Section 2 of the Sherman Act. Section 2 makes it unlawful to "attempt to monopolize, or…conspire…to monopolize…."[152] In *American Airlines*,[153] American and Braniff together had a market share of 76% of monthly enplanements at Dallas/Fort Worth International Airport, including more than 90% of the passengers on non-stop flights between DFW and eight major cities. For years, the two airlines competed fiercely "for passengers flying to, from and through DFW, by offering lower fares and better service."[154] But in February 1982, American's President Robert Crandall said to Braniff's president during a telephone conversation "there's no reason that I can see to put both companies out of business. … Raise your goddamn fares twenty percent. I'll raise mine the next morning." While Braniff did not raise its fares in response to Crandall's proposal, the Fifth Circuit Court of Appeals held that "an agreement is not an absolute prerequisite for the offense of attempted joint monopolization."[155]

Although neither an agreement nor successful monopolization is needed, the attempted monopolization offense does require proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[156]

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[150] *Id.* at *25.
[151] *Id.* ("Plaintiffs are correct that public statements are often considered relevant in determining whether a conspiracy was adequately alleged…as 'plus factors.'").
[152] 15 U.S.C. § 2.
[153] United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).
[154] *Id.* at 1116.
[155] *Id.* at 1122.
[156] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The “dangerous probability” requirement can only be met where the defendant has a certain amount of market power, though the threshold may be lower for attempt cases. This requires that plaintiffs define a relevant product and geographic market in which the defendant has enough market share such that the attempt is likely to succeed.

The market power requirement of Section 2 confines its application in addressing public invitations to collude to highly concentrated markets. However, where an announcing firm and its invitees together control a significant share of the market, regulatory agencies may find success in targeting public invitations via attempted joint monopolization actions similar to the case against Crandall in *American Airlines*. Where applicable, Section 2 enforcement has greater deterrent potential than Section 5 due to the threat of criminal penalties including substantial fines both for corporations and individuals.

2. Section 5 Invitations to Collude

Like Section 2, Section 5 of the Federal Trade Commission (FTC) Act does not require proof of an agreement before condemning anticompetitive conduct among firms and allows the Commission to pursue other facilitating practices that yield collusion-like results. Section 5 condemns, *inter alia*, “unfair methods of competition,”[157] which includes, but is not limited to, antitrust violations under the Sherman or Clayton Acts. Remedies under the FTC Act are typically limited to injunctive relief, consisting of a “cease and desist” order instructing the defendant to stop engaging in a certain practice.

Section 5 can only be enforced by the Commission itself using either judicial or administrative processes, but even administrative adjudications are subject to judicial review by United States courts of appeals. Where there is no evidence of an agreement, courts have required the Commission to prove either (1) evidence of anticompetitive intent or purpose, or (2) the absence of any competitive justification for the challenged practices.[158]

In *Free-Standing Newspaper Inserts*, Valassis announced that it would seek to maintain its existing market share while raising its minimum price of inserts to $6 per full page per thousand booklets. Of course, this would only be possible if Valassis’ competitors were to not undercut its $6 price point. Valassis made the conditionality of this strategy clear to its only competitor, News America, during an earnings call: “We don’t expect the need to read the tea leaves. We expect that concrete evidence of News America’s intentions will be available in the marketplace in short order. If *News* continues to pursue our customers and market share, then we will go back to our previous strategy.”

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[157] 15 U.S.C. § 45.

[158] E.I. du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984) (vacating the FTC’s order condemning the use of advance price change announcements, uniform delivered prices, and most-favored-nation clauses in the highly concentrated market for lead antiknock compounds for gasoline); Boise Cascade Corp. v. Federal Trade Com., 637 F.2d 573, 577 (holding that “in the absence of evidence of overt agreement,” the Commission must demonstrate that the non-collusive practices had a measurable anticompetitive effect).

Similarly, in *Truck Rentals*, U-Haul CEO and Chairman Joe Schoen expressed his desire for U-Haul to "function as a price leader and not give away share." Furthermore, Schoen shared during an earnings call that U-Haul has "been trying to force prices." In internal memoranda, he directed U-Haul regional managers to contact their local competitors (i.e., Budget and Penske) to let them know that U-Haul will undercut their prices if they did not raise their rates.

In both Free-*Standing Newspaper Inserts* and *Truck Rentals*, there was no evidence that the receiving firms—News America and Budget—ever responded in a manner that would indicate that they had an agreement with the announcing firm. They never made any public statements expressing such agreement, nor did they act in accordance with the proposed plan. As such, these cases were prosecuted under Section 5 and resulted in consent orders enjoining Valassis and U-Haul from future unlawful behaviors.

As the above examples show, Section 5 is an apt tool for regulating invitations to collude via public announcements for several reasons. First, an agreement may have not yet formed to permit prosecution under Section 1. Given the invitation is public, detection may occur prior to any rival firm having the opportunity to express acceptance in its announcements or conduct. Second, the announcing firm and its rival(s) may have arrived at an agreement, but evidence of agreement may be insufficient to sustain a Section 1 claim. Competitors may be disinclined to explicitly voice their acceptance where an invitation to collude is extended publicly. In such cases, prosecutors must rely heavily on circumstantial evidence, including parallel conduct, but courts may not always find existing evidence sufficient to survive a motion to dismiss or summary judgment. Finally, Section 5 provides the FTC an enforcement mechanism where no agreement exists at all. Section 5 allows the Commission to condemn firms' unilateral announcements inviting coordination similar to Section 2, but without Section 2's requirements of a specific intent to monopolize and a dangerous probability of doing so. In all these situations, FTCA § 5 is the only basis under which regulators can go after firms inviting others to conspire to fix prices.

While the scope of Section 5 is broad, its deterrent effect is diminished due to the limited remedies available to the Commission. In both *Free-Standing Newspaper Inserts* and *Truck Rentals*, the infringing firms were simply ordered to "cease and desist," the remedy most frequently used by the FTC. Typically, only after an order is violated does the Commission seek to assess civil penalties against an infringing firm.[159]

Our overall assessment is that enforcement has been inadequate when it comes to collusion involving public announcements. First, there is effectively a "no harm, no foul" policy with respect to invitations to collude. A firm which publicly invites a competitor to coordinate their prices can expect, at worst, a cease and desist order with no financial penalty. As the ultimate goal of enforcement is to deter misconduct, a "free pass" for attempts to collude is disconcerting. Second, while the DOJ is the primary enforcer when

[159] *See* 15 U.S.C. 45(l), 45(m)(1)(B). Although the FTC does have the authority to assess the same penalties against firms for explicit violations of Section 5, where the firm acts "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is…prohibited by such rule." *See* 15 U.S.C. 45(m)(1)(A).

it comes to collusion, its record reveals a disinclination to take on cases for which communications are exclusively public. The only invitation to collude case prosecuted under Section 2 involved private communications. The only Section 1 case with public communications was subsequently dropped, even though private litigation continued. (Perhaps the DOJ required evidence of private communications and, not having found it through discovery, then closed the investigation.) Third, the courts have been too deferential to firms when it comes to public announcements. In *Baggage Fees* there was evidence of communication to coordinate and evidence linking that communication to higher prices, but the court accepted the firms' claims that the effect was not the result of the public announcements. In *Pork*, public announcements by themselves could have been sufficient to form an agreement, yet the court required clear evidence of effect at the pleading stage. Such a decision is far too dismissive of the anticompetitive risk associated with firms discussing the conduct of rival firms in their public announcements.

VIII. Summary and Concluding Remarks

A public announcement refers to the conveyance of information by a firm using a medium that is widely accessible to individuals outside of the firm. Our attention has been on announcements with content pertaining to rival firms' conduct. The media used for these public announcements includes annual reports (pork), interviews in trade publications (mobile telecom), speeches and panel discussions at semi-public industry meetings (airlines, broiler chicken, pork, steel), and, most commonly, earnings calls (all eight U.S. cases).

We identified three types of messages about a rival firm's conduct which have the potential of coordinating firms' behavior. First, a firm describes how its future conduct is contingent on a rival firm's conduct. Second, a firm forecasts future conduct by rival firms or the industry at large. Third, a firm prescribes how rival firms or the industry at large should behave in the future. The latter category includes commending or criticizing rival firms or the industry for past conduct, as that could be an implicit recommendation that future conduct should be consistent with that which was commended or contrary to that which was criticized.

Regarding a firm's announcement as to how its future conduct will be contingent on a rival firm's conduct, there were three cases in which the firm's message cast it as a leader to be followed – FSI, truck rental, and mobile telecom – and one in which the firm's message described how it would act as a follower – airlines' first-bag fee case. The episodes in FSI, truck rental, and mobile telecom all involved a high-ranking company official publicly commenting that competition is "excessive." Having stated the problem, they then went on to propose a solution in which the announcing firm would lead by raising price where the maintenance of that higher price would be conditional on other firms raising their prices. With the first-bag fee case, it began with a firm stating its willingness to be a follower in response to a price increase. That then led to its rival raising price which the follower did indeed match as it said it would. With these four episodes, public announcements are not used to coordinate on a *price* but rather to coordinate on a *price leader* with the understanding that a price increase would be matched by the other firms. This is a simple strategy that could plausibly be implemented using public announcements.

Only one possible procompetitive rationale was identified which is that, by announcing how its conduct depends on the conduct of competitors, the capital market can better predict a firm's future choices and, therefore, be better informed about the firm's prospects. However, if a firm's announcement is informative of anticompetitive conduct, we do not want funds to be attracted to a firm that is lowering, not raising, welfare. Thus, the procompetitive justification that a firm's announcement results in a better-informed capital market is absent.

Based on the preceding reasoning, it is desirable to prohibit a firm from making public announcements regarding how its conduct is contingent on rival firms' conduct when it would facilitate coordinated conduct that is harmful to consumers. In operationalizing this prohibition, it may not always be clear when an announcement describes how a firm's conduct is contingent on what a rival firm does. When a firm's public announcement specifically refers to how it will respond to variables that are directly controlled by rival firms – such as price - the connection is clear and such announcements should be unlawful per se. However, when a firm's public announcement refers to variables that are not directly controlled by rival firms but are still substantively influenced by them – such as a firm's market share - then it is appropriate to evaluate them according to a rule of reason.

The second class of public announcements involves forecasting future conduct by rival firms or the industry at large. While there are many legitimate bases for a firm publicly commenting on future industry conduct and performance, such statements could be done with anticompetitive intent. When a firm announces what it thinks firms will do in the future, it may be intended as a recommendation and thus be a forecast only by virtue of being self-fulfilling. In practice, there could be a murky line between legitimate forecasts and recommendations about what rival firms should do. A general prohibition on a firm publicly making predictive statements about the conduct and performance of rival firms is then inappropriate. Nevertheless, such statements should not be ignored by competition authorities because they could facilitate coordinated conduct.

Finally, we considered the most egregious public announcements which are those in which a firm tells rival firms how they should behave. In both the broiler chicken and pork episodes, firms engaged in public announcements recommending output reductions, they shared confidential information through a third party, and there is evidence of reduced industry supply. The episodes in the airline and steel industries are also similar though in their own way. Both industries experienced consolidation which resulted in a market structure more conducive to lessened competition. Through earnings calls and statements at industry meetings, senior executives criticized past conduct as having been too aggressive and put forth a plan to reduce capacity and supply. Those announcements underscored the importance of a coordinated industry response. There is some evidence of subsequent reductions in capacities.

In those four cases, public announcements described an industry plan to raise prices or reduce supply with the anticipated effect of higher prices. Firms' executives recommended that competitors should compete less aggressively for the purpose of making the industry more profitable. Past conduct was criticized when it was too aggressive, and was commended when competition was restrained. Just as much as these communications are per se prohibited when they are private, the same should be true when they are public. Making them public does not create an offsetting procompetitive rationale, nor is there any reason to believe that they are ineffective as a coordination device. Public announcements that prescribe what competitors and the industry at large should do, and consumers would be harmed should those recommendations be adopted, ought to be subject to a per se prohibition.

We conclude with a few recommendations to competition authorities and the courts. The FTC should treat public invitations to collude as explicit violations of Section 5 of the FTC Act, permitting it to assess civil penalties without a prior cease and desist order. The DOJ should be more willing to take on cases involving public announcements. Invitation to collude cases should be prosecuted under Section 2 of the Sherman Act which provides for more severe penalties than Section 5. Under Section 1, the DOJ should prosecute cases involving public announcements with the same vigor that they have shown when firms engage in private communications. Courts should be less deferential to firms. A firm publicly talking about the conduct of its competitors is *not* a part of the competitive process. Public announcements should be given considerable weight in deciding to move to discovery and the per se rule should be applied to Section 1 violations conducted publicly or facilitated by public statements. Finally, the competition authorities and the courts should work to deliver clear guidance to firms regarding what they should not put in their public announcements. It is disturbing that firms' executives find it appropriate to publicly instruct their competitors how to price and how much to supply. However, it is hardly surprising that they do given most of these episodes escape public prosecution and, when they are privately litigated, the courts do not apply the per se rule. Just as much as most executives know not to communicate with competitors about prices and outputs in private, they should know not to do so in public. Toughness in enforcing the law can bring clarity that serves both consumers and firms.

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