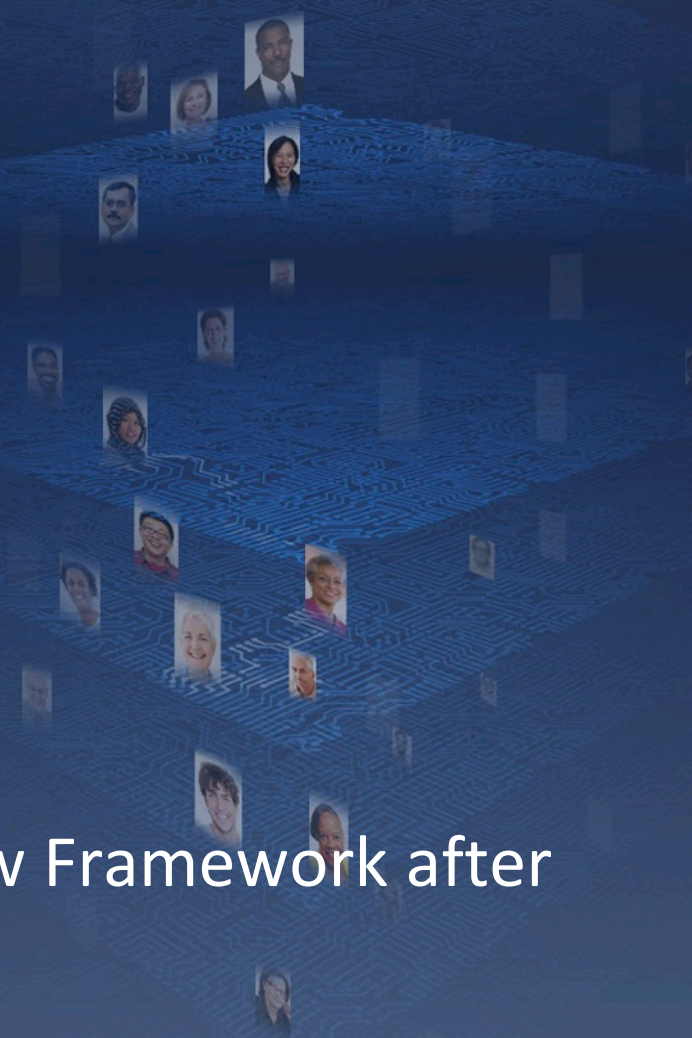


Cartel Damage Actions and Deterrence

Margaret C. Levenstein

Cartel Damages in Europe: The New Framework after
the Directive

MaCCi November 10, 2016



Policy question: Do damage suits increase deterrence?

Three reasons to support private damages

1. State action is not strong enough to deter anti-competitive behavior
2. State action is not consistent enough over time to deter anti-competitive behavior
3. State action doesn't achieve fairness for customers who are harmed

Skeptical about private damages

- Are state-enacted punishments large enough and consistent enough to provide deterrence?
- In the US, probably yes
 - Little evidence of recidivism by firms after punishment
 - 14 recidivists among 2054 firms convicted of collusion, 1961-2013 (Levenstein & Suslow 2016)
- In Europe, probably no
 - Evidence suggests recidivism and strategic manipulation by cartel members
 - 10 recidivists among 510 firms convicted of collusion, 1998-2014 (Marvão 2016)

Are private damages fair?

Yes, but ...

- Indirect customers less likely to be compensated
- Large customers
 - More likely than their smaller competitors to be able to recoup damages
 - Exacerbates differential impact of collusion on large versus small customers
 - Probably hurt less than smaller firms during collusion

Perverse impact of damages

- Large customers who are themselves oligopolists
 - Best informed and best positioned to undermine collusion
 - Limited incentive if cartel undermines competition from smaller or potential competitors
 - Example: Cereal producers during vitamin cartel
- Potential damage compensation reduces their incentive to disrupt cartels

Perverse impact of damages

- Private suits undermine effectiveness of leniency
 - Leniency most effective where 100% immunity is possible
 - Or even a reward (Spagnolo 2008, Marvão and Spagnolo 2016)
 - Damages create risk for whistleblower
 - In US, amnesty includes reduction from treble to single damages
 - No matter what the information sharing regime, the increased risk deters firms from self-reporting

Damage actions don't lead to cartel detection

- Virtually all damage actions follow state action
 - U.S. civil cases that precede convictions still follow announcement of investigation by antitrust authorities
- State can use subpoena and dawn raids
 - Private discovery does not have same power

When are damage actions useful?

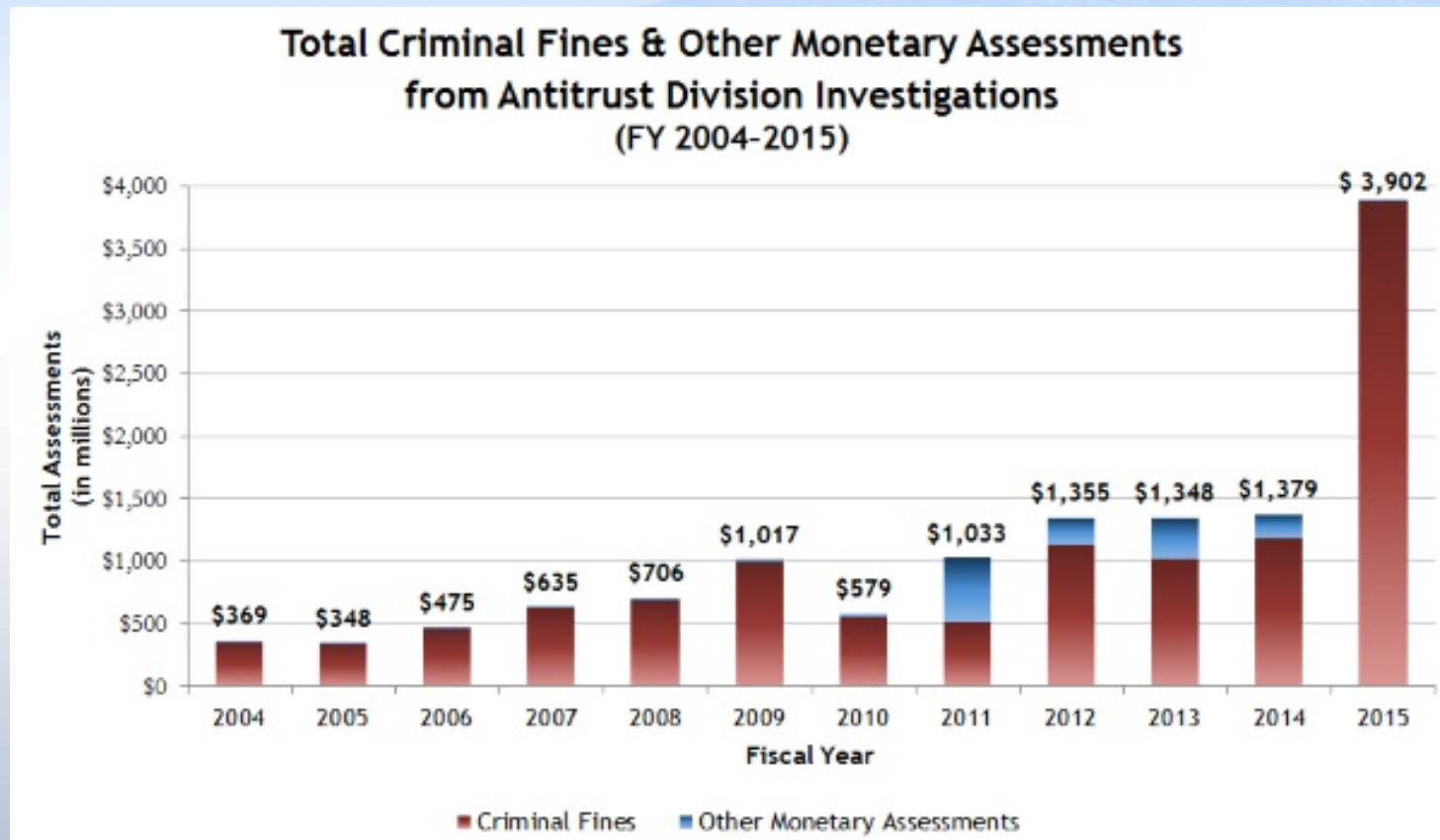
When the state fails

- Damage actions provide a “safety net” to assure minimal antitrust enforcement when the state lacks the will or the resources
 - Class action suits help to overcome free rider problem
 - State exists to overcome free rider problem

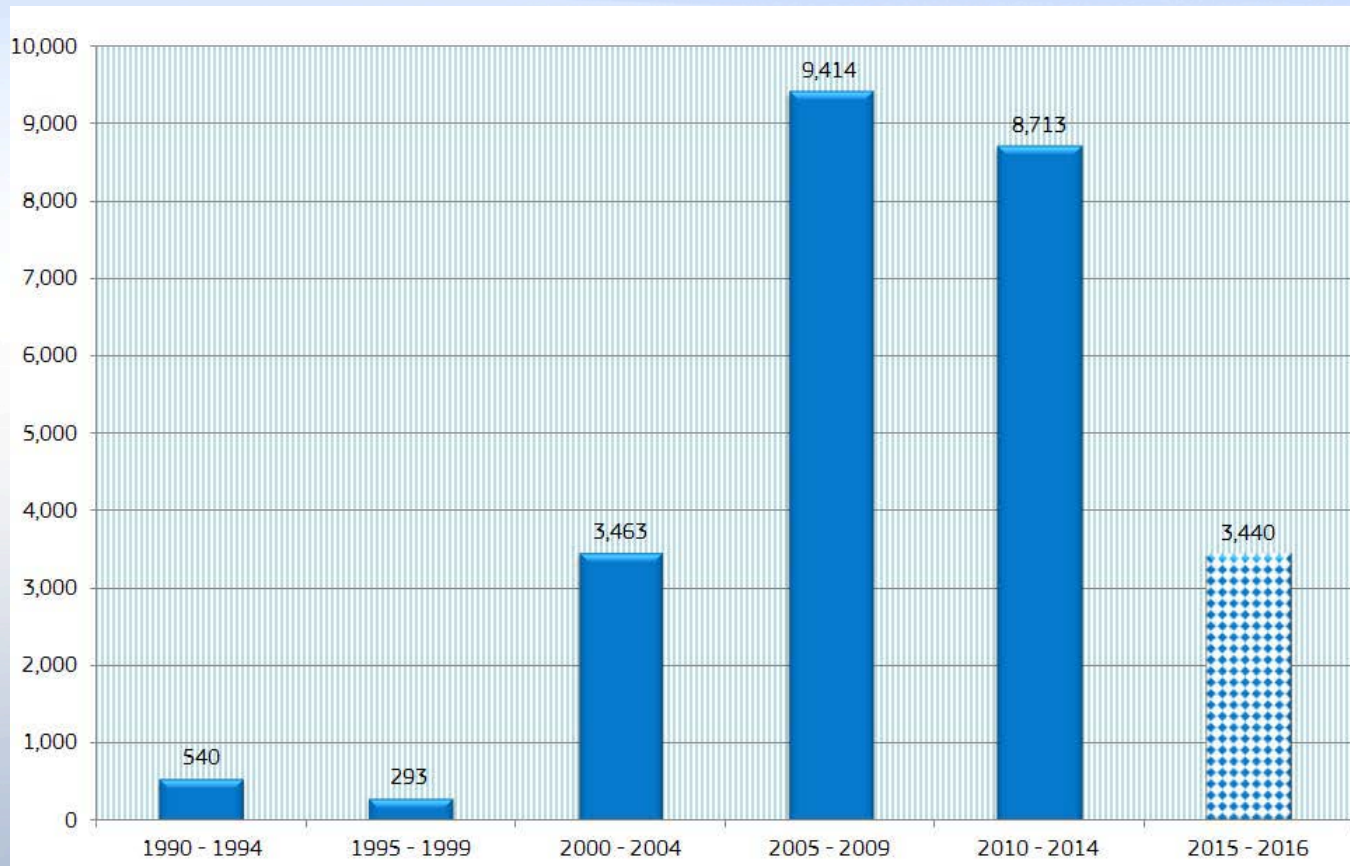
Damages increase deterrence?

- If fines are insufficient to deter, state should increase them
 - Limit on size of fines, since we want to maintain firms as viable competitors
 - Damages cannot increase deterrence if fines are already limited by economic viability of cartel members
 - Fines reduced by EC during Great Recession

Increasing fines: we can do it!



Increasing fines: we can do it!



How to deter collusion

- Ongoing surveillance
 - Industry bans for individuals
 - Increased scrutiny of post-cartel mergers
 - Screening in “cartel-prone” industries
 - Chemicals, construction, transportation
 - Everyone
 - Everyone who hasn’t been prosecuted already

Who colludes?

| Industry | U.S. | | EU | |
|---|------------|-----------|------------|-----------|
| | Start year | | Start year | |
| | 1961-1992 | 1993-2013 | 1969-1997 | 1998-2010 |
| Non-manufacturing | | | | |
| Agriculture, Forestry, Fishing | 0.0% | 0.0% | 0% | 6.7% |
| Mining, Quarrying, and Oil and Gas Extraction | 2.3% | 0.0% | 0.0% | 0.0% |
| Water supply, sewerage, waste management | 0.9% | 2.8% | 1.4% | 0% |
| Construction | 10.4% | 14.9% | 0% | 2.2% |
| Wholesale and Retail Trade | 6.8% | 9.5% | 1.4% | 4.4% |
| Transportation and Warehousing | 3.6% | 8.1% | 4.2% | 13.3% |
| Accommodation and Food Services | 0.6% | 1.4% | 0.0% | 0.0% |
| Information, Finance, Real Estate | 4.8% | 12.3% | 2.8% | 6.7% |
| Public Administration | 2.3% | 1.4% | 0.0% | 0.0% |
| Other Services (Except Public Administration) | 0.3% | 1.4% | 0.0% | 0.0% |
| Health and Social Assistance | 0.3% | 0.0% | 0.0% | 0.0% |
| Arts, entertainment and recreation | 0.3% | 0.0% | 1.4% | 0% |
| Manufacturing | | | | |
| Food, Beverage and tobacco product | 24.4% | 2.8% | 9.9% | 0% |
| Textiles, apparel, leather and related | 2.9% | 2.8% | 2.8% | 11.1% |
| Wood and paper products and printing | 2.6% | 0.0% | 1.4% | 2.2% |
| Petroleum and coal products | 2.6% | 0.0% | 2.8% | 0% |
| Chemicals and Pharmaceuticals | 13.7% | 17.6% | 39.5% | 8.9% |
| Plastics and rubber products | 1.0% | 2.7% | 7.0% | 4.4% |
| Primary metal | 6.2% | 1.4% | 5.6% | 4.4% |
| Computer and electronic product | 1.3% | 5.4% | 2.8% | 8.9% |
| Electrical equipment and component | 2.9% | 5.4% | 2.8% | 8.9% |
| Machinery | 1.0% | 6.8% | 9.9% | 4.4% |
| Transportation equipment | 2.9% | 1.4% | 0% | 13.3% |
| Fabricated metal, furniture and related product | 5.5% | 2.7% | 0.0% | 0.0% |
| Other manufacturing | 1.3% | 0.0% | 4.2% | 4.4% |
| Total number of prosecuted cartels formed during period | 308 | 74 | 71 | 45 |

How to deter collusion

- Non-monetary punishments
 - Incarceration
- Scrutiny of vertical restraints
 - 25% of cartels in international cartel sample used vertical restrictions (L&S 2014)

How to deter collusion

- Structural policies that limit excessive concentration
 - Two-thirds of international cartels were in markets with global C4 > 75% (L&S 2011)
 - Pay attention to highly concentrated intermediate goods markets!

How to deter collusion: Constant vigilance!

- Not just relying on leniency applications to walk in the front door
- Change incentives and resources for competition authorities
 - Rewards for deterrence, not decisions
 - Redacting names of individuals protects reputations of those who engage in criminal activity

How to deter collusion: Constant vigilance!

- Enforcement makes a difference
- Must be consistent
- Political economy problem
 - Defining jurisdiction
 - Example: Municipal bonds

Conclusion

- Damages has emotional appeal
 - Lots of economic incentive to create damage compensation policies
- Goal should be to promote competition
 - Not privatize antitrust enforcement