COLLUSION IN PLAIN SIGHT: FIRMS' USE OF PUBLIC ANNOUNCEMENTS TO RESTRAIN COMPETITION

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Though collusion is a collective activity, it typically begins with one firm deciding that competition is too intense and that something should be done about it. To act on that state of mind, the firm will need to communicate with its competitors in order to have a common understanding that they are not to compete or are at least to compete less aggressively. The canonical approach is for firms to secretly meet and expressly propose and agree to a collusive plan. Though direct communication is the most effective means for obtaining the requisite mutual understanding, it exposes the firms to almost certain prosecution should evidence of such communications be discovered.

However, private unfettered communication is not the only means by which competitors can reach an agreement. Firms can also communicate through public announcements. Carefully constructed public announcements could enable firms to coordinate to reduce competition, while making prosecution more challenging due to the absence of a nakedly expressed offer to collude. In addition, communicating through a public announcement provides potential cover because it suggests that the message is intended for market participants other than competitors. Compared to private communications, public announcements trade off a lower chance of effectively colluding with a higher chance of escaping detection and conviction if the announcements do result in an agreement to restrain trade.

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While the risk that public announcements could facilitate an unlawful agreement to restrain trade has always existed, the risk has risen in recent years and will likely continue to rise. A recent study found that firms' public disclosures can substitute for private communications to coordinate with competitors.[1] Another found that more effective enforcement against explicit collusion was associated with an increased use in earnings calls of statements that could facilitate coordinated conduct.[2] Given the Department of Justice Antitrust Division's recent enforcement success against the most egregious cartels,[3] firms seeking to undermine the competitive process could well turn to more subtle communication methods than the proverbial smoke-filled room.

The focus of this article is the use of public announcements by firms for the purpose of coordinating to restrict competition.[4] Though the role of public announcements has been discussed in some brief policy papers motivated by a few cases,[5] this article is the first to systematically collect and analyze episodes of collusion based on public announcements. It has two primary objectives. First, it categorizes different types of announcements that can embody anticompetitive intent and populates those categories with recent cases encompassing conduct from 2001 to 2016. Second, it investigates the manner in which these announcements act as a coordinating practice and identifies when one can expect them to be effective. It is my hope that this article will serve as a basis for developing a more effective treatment of this type of collusion by courts and competition authorities.

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[1] John D. Kepler, *Private Communication Among Competitors and Public Disclosure*, 71 J. ACCT. & ECON. 1, 1 (2021).

[2] Thomas Bourveau, Guoman She & Alminas Zaldokas, *Corporate Disclosure as a Tacit Coordination Mechanism: Evidence from Cartel Enforcement Regulations*, 58 J. ACCT. RSCH. 295, 295–96 (2020).

[3] Studies measuring the increased enforcement success of competition authorities in the United States and elsewhere include, for example, Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750, 762 (2009); Ailin Dong, Massimo Massa & Alminas Zaldokas, *The Effects of Global Leniency Programs on Margins and Mergers*, 50 RAND J. ECON. 883, 906 (2019).

[4] For one of the first discussions of the public announcement issue described in this article, see Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1572, 1582–83 (1969) (reasoning that tacit collusion through a public announcement should violate the Sherman Act § 1). *See also* John E. Lopatka & William H. Page, *Posner's Program for the Antitrust Division: A Twenty-Five Year Perspective*, 48 S.M.U. L. REV. 1713, 1717–23 (1995) (discussing Posner's proposal for tacit collusion, and the subsequent history of enforcement of tacit collusion. Richard A. Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971)); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 655 (1962) (arguing that tacit collusion does not violate the Sherman Act § 1).

[5] *See, e.g.*, Howard Rosenblatt & Tomas Nilsson, *Analyst Calls and Price Signaling Under EU Law*, ANTITRUST SOURCE (June 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).

Part I defines public announcements and collusion. The core of the article is Parts II–IV, in which cases are described and analyzed. Part V discusses some enforcement challenges and possible steps forward.

I. ANTICOMPETITIVE PUBLIC ANNOUNCEMENTS

A. DEFINING PUBLIC ANNOUNCEMENTS

In this article, "public announcement" refers to the conveyance of information by a firm or one of its employees using a medium that is widely accessible to individuals outside the firm. Firms routinely make public announcements through a variety of media. For a publicly traded company, its annual report and 10-K provide information to shareholders, financial analysts, and the public at large regarding financial measures, the products and services the company offers, corporate strategy, and other high-level information. Earnings calls, typically conducted on a quarterly basis, provide myriad financial and market data to analysts and anyone else inclined to listen in. The calls often go well beyond reports of earnings to include forecasts of cost and demand, discussions of the status of investment projects, and, in principle, any and all matters pertinent to the company's future performance. A firm's executives can provide information through speeches and panel discussions at semi-public industry meetings that include competitors as well as analysts, journalists, and other parties, and by executives participating in interviews published in trade journals. These venues are often used to assess future industry developments and trends such as entry and exit, innovation, and regulation. 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 through advertisements.

Announcements vary in their content and the medium used to convey that content. Subtler than an announcement's content is its meaning. By "meaning," I refer to "the thing 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 executives 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 both an intended audience as well as a message that the announcing firm would like the audience to infer which could affect the audience's conduct and, consequently, the firm's performance.

[6] *Meaning*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/meaning.

The four primary candidates for the intended audience of a public announcement are customers, suppliers, the capital market, and competitors. Certain announcements are made to better inform a firm's customers, such as when a firm notifies them of a new or improved product or a planned change in prices. A firm may also announce to inform its suppliers. For example, communicating a plan to increase future production informs suppliers to anticipate a rise in demand for the inputs they provide. Announcements that inform a firm's customers or suppliers generally benefit the firm and are integral to the competitive process.[7] The capital market comprises financial analysts, fund managers (e.g., mutual funds, hedge funds, and pension funds), creditors (such as banks), and individual investors. The primary incentive for a firm to inform the capital market is to lower its cost of capital by reducing uncertainty about its future profit stream.[8] Generally, announcements for which the intended audience is customers, suppliers, and the capital market are not an anticompetitive concern. However, that concern is acute when the intended audience is a firm's competitors.

From the universe of announcements made by a firm, this article will focus on those announcements conveyed using media that are easily accessible to a firm's competitors and that 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 those that are the consequence of the intensity of competition—such as market shares and profits. Many of the announcements that satisfy these conditions will be innocent of any anticompetitive intent. One of the primary objectives of this article is to identify the type of content that can serve as a credible device for coordinating competitors' conduct in a manner potentially harmful to consumers.

Toward that end, let us distinguish between public announcements in which a firm refers only to its own conduct or performance and those in which a firm refers to competitors' conduct or performance. The latter may be inclusive of the firm's own conduct or performance by, for example, referring to "industry" conduct or performance. While public announcements that refer only to a firm's own conduct and performance may be an anticompetitive concern—

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[7] It is not universally true that accurately informing customers and suppliers serves the best interests of the firm. For example, a firm may mislead consumers into believing that a new product's arrival is imminent in order to prevent them from purchasing rival firms' products.

[8] For surveys on the role of a firm's disclosures in the capital market, see Robert E. Verrecchia, *Essays on Disclosure*, 32 J. ACCT. & ECON. 97, 97–98 (2001); Anne Beyer et al., *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. ACCT. & ECON. 296, 296 (2010).

with advance price announcements being a case in point[9]—this article will not consider such announcements. Our focus is on *public announcements that reference rival firms' conduct*. When an announcement directly or indirectly refers to the conduct of competitors, there is inherently a risk that the announcement could facilitate coordinated conduct, which is a defining element of unlawful collusion.

B. Collusion and Its Prerequisites

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 that 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 competitors 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. The simple scheme just described requires that each firm finds 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 that includes what each firm is to do and what happens if a firm does not do what it is supposed to.[10]

In practice, collusion can be complex and sophisticated, as has been documented for many (discovered) cartels that engaged in private, express communication.[11] 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 compliance, such as the sharing of sales data or having a third party verify the prices charged. Punishment can involve transfers among cartel members (with

[9] Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case (1994)*, *in* THE ANTITRUST REVOLUTION 233, 233 (John E. Kwoka, Jr. & Lawrence J. White eds., 4th ed. 2004).

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

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

those members who deviated and gained paying those members who were harmed) or targeting low prices at the customers of a cartel member who did not comply.

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

Part II identifies three classes of public announcements that refer to rival firms' conduct. First, a firm's announcement may describe how its future conduct is contingent on a rival firm's conduct. Second, a firm's announcement can recommend how rival firms or the industry at large should behave. Third, a firm's announcement might forecast future conduct by rival firms or the industry at large. Parts II–IV examine these three classes of public announcements. Each Part is composed of three sections. The first section describes the class of announcements and how those announcements can be effective in facilitating collusion. The second section reviews a collection of cases that illustrate how these announcements were used to facilitate collusion. The third section examines when anticompetitive intent can be inferred from these announcements and when anticompetitive effects can be expected.

II. 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 made to facilitate collusion, it can certainly serve that purpose. As previously reviewed, 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 hypothetical examples before turning to some 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, that rival could decide 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 of 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, continuing our plan will require other firms to follow suit." Or the executive 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 also 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 than is said when cartel members engage in private, express communication—they could nevertheless describe enough to make collusion succeed. In the first step, one firm decides to take the lead; in the key second step, other firms must find 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 other firms do not follow a price increase—could find it optimal to lead with a price increase because it believes that other firms will match its announced price increase. The announcing firm would want to raise price to a level such that if all firms priced at that level their profits would all rise. 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 make an assessment that it is likely to be profitable to take the lead.

Alternatively, a firm could announce that it is willing to be a follower. For example, it might publicly communicate how it would respond to a rival's conduct—such as following another firm's price increase and being content to maintain, rather than add, market share. This assurance that the announcing firm would follow suit 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 an-

nouncement by making the first move, and the follower firm could be willing to follow through on the contingent plan that it 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 motivate a firm to be a leader and for the other firms to follow.

B. Cases

1. *Freestanding Newspaper Inserts*

Freestanding newspaper inserts (FSI) are multipage booklets containing discounts from retailers that are placed inside newspapers.[12] During the relevant period, there were two FSI suppliers: News America and Valassis Communications. Each firm charged $6 per full page per thousand booklets until Valassis raised its price by 5 percent, to $6.20, in June 2001. News America did not match that price increase and Valassis, after having lost some market share, retracted the 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 percent.

That history of aggressive competition is relevant background for a 2004 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 trend line and create a positive trend line in terms of pricing and reverse that negative trend line."[13] Valassis then conveyed it would bring price back to the 2001 level of $6 and would no longer strive to increase its market share:

> As far as our 50% market share goal . . . our goal, has always been to create a long term, more profitable FSI industry to create a long term, more profitable Valassis. . . . We 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 Schultz described how Valassis's future conduct would be contingent on what News America did: "[W]e will defend our customers and market share and

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[12] The ensuing facts are from the complaint in *Valassis Communications, Inc. See* Complaint, Valassis Commc'ns, Inc., 141 F.T.C. 247 (2006) (No. C-4160) [hereinafter *Valassis* Complaint].

[13] Alan Schultz, CEO, Valassis Commc'ns, Inc., Q2 2004 Earnings Conference Call 18 (July 22, 2004) (attached as Exhibit A to *Valassis* Complaint, *supra* note 12).

[14] *Id.* at 9.

use whatever pricing is necessary to protect our share."[15] Furthermore, Schultz explicitly stated that Valassis 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]

In sum, Valassis's CEO proposed 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 its competitor by lowering its price.

The Federal Trade Commission noted that while earnings 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. . . . 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 note that, "[g]iven 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] Thus, providing a collusive plan as part of an earnings call imposed a certain level of commitment on Valassis that is not present when a plan is conveyed in private.

As there was no evidence that Valassis's proposed agreement was consummated, Valassis was prosecuted for offering an invitation to collude under Section 5 of the FTC Act. The FTC issued a consent order enjoining Valassis from future unlawful activities, including inviting a competitor to collude on the basis of prices or market division.

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[15] *Id.* at 4.
[16] *Id.* (stylistic emphasis omitted).
[17] Valassis Commc'ns, Inc., 141 F.T.C. 279, 282 (2006).
[18] *Id.* at 284.

2. *Truck Rentals*

In the market for one-way truck rentals, the two largest firms in the early 2000s were U-Haul, with a market share of 54 percent, and Budget, with 15 percent.[19] Competition was intense, and from late 2006 to early 2008, there are documented communications that U-Haul was seeking to act as a price leader and conveying to Budget that it should follow U-Haul's lead.

While our focus will be on U-Haul's public announcements, let us first review some intra-company communications that are relevant to this episode. In internal memoranda, U-Haul CEO and Chairman Edward J. (Joe) Shoen[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; Shoen was not interested in keeping prices at these low levels, but rather, in 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 Shoen 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 Shoen, then there were also private communications between competitors that supplemented the public announcements.

In an earnings call in February 2008, Shoen 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. . . .

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[19] Liu v. AMERCO, 677 F.3d 489, 493 (1st Cir. 2012). U-Haul is a subsidiary of AMERCO.

[20] Shoen is also Chairman, President, and Director of AMERCO.

[21] Complaint ¶ 13, U-Haul Int'l, Inc., FTC Docket No. C-4294 (July 14, 2010) [hereinafter *U-Haul* Complaint].

[22] *Id.* ¶ 14 (alteration in original).

> So we've been trying to force prices. . . .[23]

It is noteworthy that Shoen refers to "trying to force prices." Given that a firm has complete control over its own prices, presumably Shoen 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—Shoen 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]

This difficulty of conveying a pricing strategy through the prices charged could well have made it all the more critical for Shoen to publicly announce its strategy to lead on price. Along with expressing U-Haul's role as a price leader, Shoen also conveyed that U-Haul would be patient in awaiting Budget's response, but "if it starts to affect share I'm going to respond."[25]

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

3. *Mobile Telecom*

This case involves the Dutch mobile telecom market, in which 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,

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[23] Joe Shoen, CEO, AMERCO, Q3 2008 AMERCO Earnings Conference Call 7 (Feb. 7, 2008) (attached as Exhibit A to *U-Haul* Complaint, *supra* note 21).

[24] *Id.*

[25] *Id.*

[26] The facts in this section are from Public Decision, Case No. 13.0612.53 (Bd. of the Neth. Auth. of Consumers & Mkts. 2014), www.acm.nl/sites/default/files/old_publication/publicaties/14326_commitment-decision-regarding-mobile-operators.pdf.

> 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]

The KPN executive 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] However, implementation of this strategy was 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] Because 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 collective 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 an 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, the announcement would have represented a golden opportunity to gain market share and thereby satisfy its "growth ambition." That T-Mobile executives viewed KPN's announcement as a "dilemma" is consistent with the message 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 or continue to compete aggressively.

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

> [T]heir 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 writ-

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[27] *Id.* ¶ 30 (stylistic emphasis omitted).

[28] *Id.*

[29] *Id.*

[30] *Id.* ¶ 32.

ing, whereby each of the MNO's individual behavior become dependent on their competitors' reactions.[31]

4. *Common Elements in the FSI, Truck Rentals, and Mobile Telecom Cases*

While FSI, truck rentals, and mobile telecom are very different products and services, the way in which public announcements were used to facilitate collusion is quite similar. This is largely because the fundamental economics behind these announcements is the same. 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,[32] that some truck rentals were "being priced well below the cost of providing the service,"[33] or that suppliers in the mobile telecom market had "focused too heavily on increasing their market shares . . . by reducing prices."[34] The point conveyed is that all firms are being hurt and the "industry is a captive of its own model [of competition]."[35]

Having stated the problem, the firm then proposed a solution in the form of inviting its competitors to participate in a collusive arrangement. The arrangement had the announcing firm taking the lead by raising its own prices, with maintenance of those higher prices being conditional on the other firms following suit. The "conditional clause" to the agreement could be inferred from the announcing firm's statement that it would change its plans if it lost market share. In these markets with highly similar products or services, a firm would lose market share should it raise its prices unilaterally. Only if the rivals followed the leader could they expect Valassis, U-Haul, or KPN to maintain the higher prices they set.

Though there is no evidence that these public announcements proved effective in coordinating the firms' conduct, the firms presumably would not have made these announcements without believing there was a plausible chance of success. But even a failed attempt may prove harmful. As argued in a private litigation suit in the Truck Rentals Case, there is effect as long as a firm raises 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

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[31] *Id.* ¶ 47 (footnotes omitted).

[32] Schultz, *supra* note 13.

[33] Shoen, *supra* note 23.

[34] Public Decision, Case No. 13.0612.53, *supra* note 27.

[35] *Id.*

lower price that prevailed prior to the attempt at leading a coordinated price increase.[36]

5. *Baggage Fees*

This case offers a clean episode of public announcements inviting collusion and that invitation being accepted. AirTran and Delta Air Lines controlled 92 percent of the traffic at Hartsfield-Jackson Atlanta International Airport and dominated route markets which had Atlanta as the origin or destination.[37] AirTran and Delta were close competitors, with Delta being the larger firm as measured by routes and revenues. Delta was present in 90 percent of AirTran's total routes and 100 percent of AirTran's routes to and from Atlanta.

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."[38] 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.[39]

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[36] "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 . . . ." Liu v. AMERCO, 677 F.3d 489, 496 (1st Cir. 2012). The district court dismissed the case, but its decision was vacated and the matter was remanded by the U.S. Court of Appeals for the First Circuit. The case settled and was dismissed on January 22, 2013. *See* Liu v. AMERCO, No. 1:10-cv-11221-GAO (D. Mass. Jan. 22, 2013), ECF No. 58.

[37] The facts in this section are from *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 733 F. Supp. 2d 1348 (N.D. Ga. 2010).

[38] *Id.* at 1354 (alteration in original).

[39] *Id.* at 1356.

An analyst followed up by asking whether AirTran would adopt a first-bag fee if Delta did so, to which Fornaro replied that he "would strongly consider it, yes."[40] What we have thus far is AirTran publicly announcing that it would not take the lead on charging for the first checked bag, but that it would be very likely to implement a first bag fee if Delta moved first.

Internal Delta documents at the time showed that Delta 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. . . . 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.[41]

That analysis was conducted prior to AirTran's earnings call. After Fornaro conveyed that AirTran was inclined to follow Delta's lead, Glen Hauenstein, an executive vice president for Delta, raised the probability from 50 percent to 90 percent that AirTran would match a first-bag fee and "[a]t that increased likelihood, Delta's mid-range estimate became 'slightly positive' for the first time."[42] The revised value proposition analysis was presented to Delta's Corporate Leadership Team at its October 27, 2008 meeting, where 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 12, AirTran announced that it, too, 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. To summarize, Delta conveyed during an earnings call that it was considering a first-bag fee but had not yet decided to adopt the fee. AirTran could well have inferred that Delta's reluctance was due to uncertainty over what AirTran would do in response. Reducing that uncertainty, AirTran stated in an earnings call that it would not lead with a first-bag fee but was very likely to follow should Delta adopt one. The impact of that announcement was quantified by Delta increasing the probability assigned to AirTran matching a first-bag fee from 50 percent to 90 percent which, according to Delta's analysis, would make a first-bag fee profitable. It was only four

[40] *Id.*

[41] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1354–55 (N.D. Ga. 2017), *aff'd per curiam sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018).

[42] *Id.* at 1355.

days after AirTran's earnings call that Delta decided to adopt a first-bag fee, and then 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, there are communications to facilitate an agreement between AirTran and Delta to adopt a first bag-fee, and evidence of effect in that they both did adopt a first-bag fee.

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, indicating that the court viewed collusion as sufficiently plausible to satisfy the *Twombly* standard.[43] The district court ruled in favor of AirTran and Delta on summary judgment, which was affirmed by the Eleventh Circuit in March 2018.[44] The court concluded that 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. The evidence summarized here leads me to disagree with that conclusion.

6. *Synthesis*

These four episodes—FSI, Truck Rentals, Mobile Telecom, and Baggage Fees—exemplify a general collusive strategy that does not require articulating a detailed plan. A firm announces it will act as a leader or as a follower on a certain competitive element (e.g., price or baggage fee), which facilitates mutual understanding among competitors as to who should take the initiative (e.g., in raising prices). Furthermore, a rival firm can infer from that announcement how the announcing firm's actions are contingent on what the rival firm does. This inference is immediate when 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 rival firms will follow, the primary challenge for the leader is choosing a price that the followers would be willing to match.

C. Analysis

Consider a firm publicly announcing that it will raise its price (or reduce its supply) but will retract this change should competitors fail to similarly raise

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[43] To survive a motion to dismiss, a plaintiff must present "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[44] *In re Delta/AirTran*, 245 F. Supp. 3d at 1343; *Siegel*, 714 F. App'x at 987.

price (or reduce supply). With such an announcement, a firm is communicating that it will act as a leader. Or suppose a firm announces that it will not raise price (or reduce supply) but, should another firm do so, it will match that higher price (or reduced supply). That firm is communicating that it will act as a follower. These announcements facilitate the formation of an agreement between firms to have a leader-follower arrangement which, if consummated, would result in higher prices or lower supply and thereby restrain trade. The objective of this section is to examine when it is reasonable to infer anticompetitive intent from announcements that describe how a firm will respond to a rival firm's conduct and when we can expect such announcements to have an anticompetitive effect.

In determining anticompetitive intent, I propose in this article that an announcement is an invitation to collude when it refers to how a firm's conduct is contingent on variables predictably influenced by a competitor—so that firms could reasonably foresee the consequences of their conduct—and the implied conduct would restrain trade. An announcement's implied conduct refers to firms acting in their best interests under the assumption that the announcing firm will act as it claimed it would. When a firm announces it will be a leader, the implied conduct comprises the announcing firm acting as it announced and the non-announcing firm optimally responding to the announcing firm's action. When a firm announces it will be a follower, the implied conduct comprises the non-announcing firm choosing an optimal action with the assumption that the announcing firm will respond as it announced, and the announcing firm acting as it announced.

This definition obviously encompasses announcements pertaining to a firm's price or output, because a firm controls those variables and thus predictably influences them. It also includes announcements pertaining to the customers or markets that a firm serves. For example, suppose two firms 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 Firm 1 will enter Market B. Or consider a firm announcing that it will not poach a rival firm's customers as long as the rival firm does not approach its customers. These announcements are an invitation to coordinate on allocating markets or customers.

Announcements referring to market shares require some judgment as to whether a firm predictably influences the market share such that the firm could reasonably foresee the effect of its conduct. Consider a firm announcing that it will raise price but will retract the price hike should its market share decline. Market shares are determined by consumers' purchasing decisions, although constrained by firms' output decisions, and influenced by firms' pricing decisions (as well as brand loyalty, switching costs, and other factors). Where firms' products or services are nearly identical, and thereby consum-

ers' decisions are highly sensitive to firms' prices, there is a clear and direct effect of a firm's price on all firms' market shares. In that situation, a rival firm could reasonably foresee that the announcing firm's market share would decline unless the rival matched (or came close to matching) the announcing firm's price increase. The announcing firm is then effectively saying that it will maintain the price increase if and only if the rival firm matches that increase, even though reference is made to its market share not declining. In those circumstances, such an announcement would be understood as an invitation to collude.

That an announcement may be heard by and inform other parties—such as customers and the capital market—does not alter an assessment that the announcement is an invitation to collude. One firm is communicating to a rival firm how it will respond to that rival firm's conduct and thus directly encouraging the coordination of the two firms' actions. Internal documents show that Delta Airlines instituted a baggage fee because it knew AirTran would match that baggage fee, and Delta knew that because AirTran had publicly said so. Because it is a reasonable presumption that AirTran knew Delta would receive this information and that the information would potentially affect Delta's conduct, it is appropriate to conclude that AirTran made this announcement while recognizing that it could have anticompetitive effect. It is then appropriate to conclude that AirTran had anticompetitive intent, even if its announcement was also useful to other parties.

Of course, just because a firm invites another firm to collude, it does not mean that a collusive outcome necessarily will ensue. For these announcements to have anticompetitive effect, the firms must achieve mutual understanding of the collusive outcome and, furthermore, the adoption of that collusive outcome must be in firms' mutual interest.

There are two challenges with announcements delivering the requisite mutual understanding. First, because they are public announcements, the firm receiving the invitation to collude must recognize that the announcement is intended for firms to coordinate their conduct. As these announcements explicitly reference how a firm's conduct is contingent on what other firms do (and thus describes how their conduct is to be coordinated) and are made using media for which one can be assured that rival firms will learn of the announcement, satisfaction of this first criterion is reasonably assured. Second, it must be sufficiently clear from the announcement what a firm is supposed to do. When a firm announces it will lead, it must then be clear what it means for a firm to follow; and when a firm announces it will follow, it must then be clear what it means for a firm to lead. Satisfaction of this condition will depend on the particular case, but it would surely be met when an announcement refers to matching a price increase or the introduction of a surcharge (like a baggage fee). When the collusive outcome is a leader-fol-

lower relationship with matching behavior, it is transparent that these announcements should reliably achieve mutual understanding of that collusive outcome.

Even with mutual understanding of the collusive outcome, there is no guarantee that the intended behavior will be adopted. The firm that is invited to lead may prefer not to lead, or the firm that is invited to follow may prefer not to follow. Nevertheless, consummation is quite plausible because, in most instances, there will exist actions that are mutually beneficial, whether this means a price increase by a leader that a follower would find profitable to match, or the joint adoption of a surcharge that would raise both firms' profit. As long as such actions exist and the leader is aware of them, it is likely the leader will choose an action that is mutually beneficial and, consequently, there could well be anticompetitive effects.

While the discussion has focused on when matching is a feature of the collusive outcome, matching is not a necessary condition for anticompetitive effect. If the communication results in one firm leading on price and the other firm following, that the follower matches the price (or price increase) of the leader is not necessary for both firms to benefit. All that is required is that the follower raises its price enough so that all firms' profits are higher, which could occur even if the follower (modestly) undercuts the leader's price or price increase.[45]

In sum, announcements about how a firm will behave in response to a rival firm's conduct have a dangerous probability of success when they convey a leader-follower arrangement because the outcome is simple to communicate and its implementation relies solely on the leader choosing an action that provides room for the follower to respond so as to make the outcome mutually beneficial.

III. A FIRM ANNOUNCES HOW RIVAL FIRMS SHOULD BEHAVE

A. Description

When a firm's public announcement communicates to competitors how they should behave, the 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. Here are some hypothetical examples:

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[45] Economic theory tells us that prices are higher when firms price in a sequential manner—one leading and the other following with its optimal response (which generally means undercutting the leader's price)—than when they price without a leader (i.e., simultaneously choose prices). *See, e.g.*, Eric van Damme & Sjaak Hurkens, *Endogenous Price Leadership*, 47 GAMES & ECON. BEHAV. 404 (2004).

> "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, thereby implicitly recommending continuation of that conduct. Or a firm 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 benefited 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 statements 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[46]

The defendants are industrial producers of chicken meat, supplying 88 percent of the market for broiler chickens. The plaintiffs accused them of coordinating supply reductions over 2008 to 2016. Their evidence is of three sorts: (1) public announcements facilitating such supply reductions; (2) the sharing of confidential supply data with a third party, Agri Stats; and (3) evidence of parallel supply cuts. I will not evaluate the validity of this complaint, but

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[46] I am working as a consulting expert for certain plaintiffs in this case. The facts in this section are based on *In re Broiler Chicken Antitrust Litigation*, 290 F. Supp. 3d 772, 809–10 (N.D. Ill. 2017). In this decision, the defendants' motion to dismiss was denied: "Plaintiffs plausibly allege an injury in fact by alleging that they paid inflated prices, which can be fairly traced to Defendants' price-fixing scheme, and which could be redressed by a favorable judicial decision." *Id.*

instead will focus on assessing how the companies' public announcements could serve to facilitate collusion.[47]

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."[48]

With this public announcement, Pilgrim's CFO was inviting its rivals to cut their supply. The additional statements about what "some companies" have done 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.

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.'"[49] 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."[50] Notable is Peco's reference to cuts by the "industry" and not just to its own supply.

From January to June 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 de-

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[47] Since the filing of the plaintiffs' complaint, evidence has been put forward of private communications between the defendants starting in 2012. *See* Superseding Indictment, United States v. Penn, No. 1:20-cr-00152-PAB (D. Colo. Oct. 6, 2020), ECF No. 101.

[48] *In re Broiler Chicken*, 290 F. Supp. 3d at 782 (quoting Direct Purchaser Plaintiffs' Second Amended and Consolidated Class Action Complaint ¶¶ 147, 151E, *In re Broiler Chicken*, No. 1:16-cv-08637 (N.D. Ill. Nov. 23, 2016), ECF No. 212 [hereinafter *Broiler Chicken* Complaint]).

[49] *Id.* (quoting *Broiler Chicken* Complaint, *supra* note 48, ¶ 160).

[50] *Id.* (alteration in original) (quoting *Broiler Chicken* Complaint, *supra* note 48, ¶ 161).

clines continue until at least late 2009, and cuts could be deeper than now projected."[51] 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."[52]

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."[53] Here we see reference to what the suppliers *will* do ("the industry is going to remain constrained"), which is affirming other communications as to what they *should* do. I will discuss such "forecasts" in Part IV.[54]

2. Pork[55]

The case involving the "other white meat"[56] is strikingly similar to that of the 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' initial complaints failed to meet the *Twombly* standard of plausibility because of a lack of evidence of parallel supply cuts by producers. Amended complaints filed since then have largely survived the defendants' motions to dismiss.[57] Thus far, one of the defendants has settled for $24.5 million.[58]

The four largest defendants—Smithfield Foods, Tyson, JBS USA, and Hormel—made up almost 70 percent of pork sales. In 2009, some of the pork

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[51] *Id.* (quoting *Broiler Chicken* Complaint, *supra* note 48, ¶ 162).

[52] *Id.* at 783 (quoting *Broiler Chicken* Complaint, *supra* note 48, ¶¶ 173 & 192).

[53] *Id.* (quoting *Broiler Chicken* Complaint, *supra* note 48, ¶ 229).

[54] For a discussion of the *Broiler Chicken* and *Pork* cases (the latter will be covered next), see Carstensen, *supra* note 5.

[55] I am working as a testifying expert for certain plaintiffs in a related case involving pork suppliers and Agri Stats as defendants. The facts in this section are from *In re Pork Antitrust Litigation*, No. 0:18-cv-1776-JRT-HB, 2019 WL 3752497, at *7–9 (D. Minn. Aug. 8, 2019).

[56] "Pork. The Other White Meat." was an advertising slogan developed in 1987 for the National Pork Producers Council. *See* Philip H. Dougherty, *Advertising; Dressing Pork for Success*, N.Y. TIMES, Jan. 15, 1987, at D27.

[57] *In re* Pork Antitrust Litig., 495 F. Supp. 3d 753, 802 (D. Minn. Oct. 20, 2020) (denying the defendants' joint motion to dismiss the federal law claims).

[58] Christopher Cole, *Pork Buyers Win Initial Approval of $24.5M Deal with JBS*, LAW360 (Jan. 14, 2021).

producers began reducing supply and calling on others to follow their lead. In May 2009, at the BMO Capital Markets Agriculture, Protein & Fertilizer Conference, the CEO of Smithfield Foods said, "[W]e 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."[59]

Referring to Smithfield cutting supply by 10 percent and then 3 percent, the CEO 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."[60] The point was iterated yet again in the next quarter's earnings call: "I think this industry has got to solve it collectively. . . . [T]here are others cutting back. We're not the only one."[61] And the next quarter's as well: "I think we've certainly done more than our fair share . . . [but] I have not seen the significant Midwest reduction that would probably be needed to put this industry back in balance."[62]

The CEO of Smithfield Foods could not have been clearer when publicly announcing that the "industry has got to solve it collectively,"[63] that Smithfield had done its "fair share," and that "[s]omebody else has got to do something."[64] 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, which made cuts of over 25 percent from 2008 to 2009, and Hormel.[65] In an earnings call, Hormel's CEO said that Hormel would "certainly look for opportunities particularly in January where we could reduce the numbers [of hogs] that we had going through."[66]

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[59] Direct Purchaser Plaintiffs' Third Amended and Consolidated Class Action Complaint ¶ 138, *In re* Pork Antitrust Litigation, No. 0:18-cv-1776-JRT-HB (D. Minn. Jan. 15, 2020), ECF No. 431 (emphasis omitted) (quoting Larry Pope, CEO, Smithfield Foods, Inc., Remarks at the BMO Capital Markets Agriculture, Protein & Fertilizer Conference (May 13, 2009)).

[60] *Id.* ¶ 140 (emphasis omitted) (quoting Smithfield Foods, Inc., Q4 2009 Earnings Conference Call (June 16, 2009)).

[61] *Id.* ¶ 145 (emphasis omitted) (quoting Smithfield Foods, Inc., Q1 2010 Earnings Conference Call (Sept. 8, 2009)).

[62] *Id.* ¶ 146 (quoting Smithfield Foods, Inc., Q2 2010 Earnings Conference Call (Dec. 10, 2009)).

[63] *Id.* ¶ 145 (emphasis omitted) (quoting Smithfield Foods, Inc., Q1 2010 Earnings Conference Call (Sept. 8, 2009)).

[64] *Id.* ¶¶ 140, 145 & 146 (emphasis omitted) (quoting Smithfield Foods, Inc., Q4 2009 Earnings Conference Call (June 16, 2009); Smithfield Foods, Inc., Q1 2010 Earnings Conference Call (Sept. 8, 2009); and Smithfield Foods, Inc., Q2 2010 Earnings Conference Call (Dec. 10, 2009)).

[65] *Id.* ¶¶ 126, 128.

[66] *Id.* ¶ 128 (alteration in original) (quoting Hormel Foods Corp., Q1 2009 Earnings Conference Call (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. For example, during earnings calls, some competitors forecast diminishing supply and, consequently, rising profits. Hormel's CEO "expected to see a 3% reduction in overall pork supply in 2009,"[67] 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."[68] That forecast was also in Tyson's 2009 10-K 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. . . ."[69]

Through earnings calls and public statements at conferences, Smithfield 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, communicated their belief that industry supply would decline.

3. *Generic Pharmaceuticals*

As of the writing of this article, more than 15 manufacturers are being prosecuted and privately sued for colluding on the prices of many generic pharmaceuticals. The State of Connecticut began an investigation in 2014, the DOJ brought the first criminal charges in December 2016, and there are ongoing civil suits by dozens of states and private litigants. The complaints claim there were private communications among the defendants which resulted in coordinated price increases and adoption of a market allocation scheme.[70] Although there are many details yet to be brought to light, what we do know is that there were massive price increases.[71]

My focus is not on any private communications, but rather, on the public announcements made by one of the defendants, Lannett Company. Largely conducted through earnings calls, these messages may have served to shore up

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[67] *Id.* ¶ 135 (citing Hormel Foods Corp., Q4 2008 Earnings Conference Call (Nov. 25, 2008)).

[68] *Id.* ¶ 142 (emphasis omitted) (quoting Tyson Foods, Q3 2009 Earnings Conference Call (June 26, 2009)).

[69] *Id.* ¶ 143.

[70] *E.g.*, *In re* Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404, 411 (E.D. Pa. 2018); Complaint, Humana Inc. v. Actavis Elizabeth, LLC, No. 2:18-cv-03299-CMR (E.D. Pa. Aug. 3, 2018) [hereinafter *Humana* Complaint].

[71] "[T]he prices for a large number of generic pharmaceutical drugs skyrocketed throughout at least 2013 and 2014. According to one report, "The prices of more than 1,200 generic medications increased an average of 448 percent between July 2013 and July 2014." Plaintiff States' Consolidated Amended Complaint ¶ 110, *In re* Generic Pharmaceuticals, No. 2:17-cv-3768-CMR (E.D. Pa. June 18, 2018), ECF No. 14 (alteration in original).

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 was the communicator. On August 23, 2016, Bedrosian commented 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."[72] Less than three weeks later during an earnings call, he announced a path toward higher prices—Lannett would be a price leader and competitors would follow its price increases:

> We're not a price follower. We tend to be a price leader . . . . 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 . . . competitors than I've seen in the past. . . . We have more price increases planned for this year within our budget. And hopefully, our competitors will follow suit.[73]

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 the competitors did not raise their prices. In other words, Bedrosian was conveying a plan for an industry-wide price increase. Bedrosian didn't just criticize competitors for aggressive pricing; he also commended them for raising their prices: "So whenever people start acting responsibly and raise prices as opposed to the typical spiral down of generic drug prices, I'm grateful. . . ."[74]

Having described a plan of coordinated price increases in the fall of 2014, Bedrosian provided affirmation of that plan in a February 2015 earnings call by predicting that prices would 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 . . . 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.[75]

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[72] *Humana* Complaint, *supra* note 70, ¶ 212 (quoting Lannett Co., Inc., Q4 2016 Earnings Conference Call (Aug. 23, 2016)).

[73] *Id.* ¶ 200 (quoting Lannett Co., Inc., Q4 2013 Earnings Conference Call (Sept. 10, 2013)).

[74] *Id.* ¶ 201 (quoting Lannett Co., Inc., Q4 2013 Earnings Conference Call (Sept. 10, 2013)).

[75] *Id.* ¶¶ 208–09 (quoting Lannett Co., Inc., Q2 2015 Earnings Conference Call (Feb. 4, 2015)).

These public announcements are explicit in calling for less price competition and encouraging competitors to follow Lannett's price increases. Regardless 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 from 2000 to 2004 with a series of bankruptcies, mergers, and acquisitions that left ArcelorMittal, Nucor, and U.S. Steel with 55 percent of domestic steel capacity. Building on the reduction in competition resulting from this consolidation, the steel producers made public announcements at industry meetings of their intent to engage in "supply discipline" to maintain price levels. Private litigation was pursued that survived the defendants' motion to dismiss[76] and ended with a settlement of $193.9 million.[77] 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 the announcements were 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 were 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 volume."[78] In order to prevent "an inevitable race to the bottom,"[79] 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 . . . .[80]

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[76] Standard 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.").

[77] Diana Novak Jones, *Steel Buyers' $30M Deal Approved, Ending Antitrust Row*, LAW360 (Feb. 16, 2017).

[78] *ArcelorMittal*, 639 F. Supp. 2d at 884.

[79] *Id.*

[80] *Id.*

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

> [W]hat 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 . . . will help ensure that we achieve a better match of supply with demand, more stable price levels and a financially healthier industry overall.[81]

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 even more specific in calling for the companies "to adjust their production rates so the price of steel doesn't drop,"[82] which led others to voice that "they all need to work together to keep the prices high regardless of the flexibility in the marketplace."[83]

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.'"[84] The success in implementing this industry plan was subsequently affirmed by public announcements that commended competitors for their supply restraint. 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. . . . [E]verybody is, to some degree, giving that pint of blood."[85] In a February 23, 2006 interview with the *Financial Times*, Lakshmi Mittal looked back on the past few good years and commented, "The 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."[86]

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 produc-

[81] *Id.* at 884–85.
[82] *Id.* at 892.
[83] *Id.*
[84] *Id.* at 887 (alteration in original).
[85] *Id.* at 888.
[86] *Id.* (alterations in original).

tion,"[87] and at a Steel Manufacturers Association meeting in mid-2007, an industry analyst encouraged attendees to "maintain focus on SUPPLY DISCIPLINE."[88]

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 achieving higher prices.

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. As with the steel industry example, this increased concentration was a contributing factor to the collusion I describe below. The collusive plan was built around a reduction in industry capacity that, by reducing the number of available seats, would allow airlines to implement and sustain higher fares.

The earliest documented public communications regarding capacity restrictions are found in 2008 earnings calls by AirTran and Delta. In one of those calls, AirTran Vice President of Finance Arne Haak commented that "the elimination of inefficient and redundant domestic capacity is long overdue."[89] During that same call, CEO Robert Fornaro noted, "Just raising prices, without reductions in capacity is not going to raise the average fare. In order to support the price increases the capacity has to drop."[90] Such a strategy only makes sense if industry capacity was curtailed, not just AirTran's capacity. 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 – Morgan Stanley, Analyst]: If you priced the product such that you could be profitable, how much capacity would you actually need to take out?
>
> . . . .
>
> [Glen Hauenstein – Delta Air Lines, Inc., EVP of Network and Revenue Management]: 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

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[87] Class Action Complaint ¶ 86, *ArcelorMittal*, No. 1:08-cv-5214 (N.D. Ill. Sept. 12, 2008).
[88] *ArcelorMittal*, 639 F. Supp. 2d at 891.
[89] AirTran Holdings, Inc., Q1 2008 Earnings Conference Call (Apr. 22, 2008).
[90] *Id.*

> woes. . . . 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 . . . .[91]

Offering a specific recommendation of a 10 percent 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 [is] coming over, and exactly what's coming out."[92] This point was reiterated by Glen Hauenstein a month later during an earnings call: "[W]e're not doing more capacity cuts right now. We're waiting to see essentially where this equilibrium goes and how, when we finetune 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 implies that Delta would continue only if other airlines were to act in a similar manner by reducing their capacities.

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 . . . ."[94]

Public announcements made in 2010 at industry conferences conveyed that the plan was working, encouraged competitors to comply with it, and foresaw that airlines would do so. Kathryn Mikells, United's Chief Financial Officer, said, "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."[95]

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[91] Delta Air Lines, Inc., Q1 2008 Earnings Conference Call (Apr. 23, 2008).

[92] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1353 (N.D. Ga. 2010).

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

[94] Consolidated Amended Class Action Complaint ¶ 88, *In re* Domestic Airline Travel Antitrust Litig., No. 1:15-mc-1404-CKK (D.D.C. Mar. 25, 2016), ECF No. 91 [hereinafter *Domestic Airline Travel* Complaint] (emphasis omitted) (quoting UAL Corp., Q3 2009 Earnings Call (Oct. 20, 2009)).

[95] *Id.* ¶¶ 91–92 (emphasis omitted) (first quoting Kathryn Mikells, CFO, United Airlines, Inc., Remarks at Reuters Travel and Leisure Summit (Feb. 23, 2010); and then quoting Kathryn Mikells, CFO, United Airlines, Inc., Remarks at J.P. Morgan Aviation, Transportation & Defense Conference (Mar. 9, 2010)).

Gerard Arpey, CEO of American Airlines, noted that "[t]here 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."[96]

Ed Bastian stated, "[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."[97]

Scott Kirby, President of US Airways, said, "I don't think rapid capacity growth is going to become a problem in this industry, at least for the foreseeable future."[98]

That there was a coordinated plan to reduce capacity was never stated as clearly as it was during an episode in 2015. Southwest had announced a capacity increase of 7 to 8 percent, and the response of John Rainey, United's CEO, was, "[W]e 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."[99]

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, CFO at American, commented, "[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 domestic capacity for the network carriers was down a whopping 14.5%."[100] However, we do not need to rely exclusively on such claims of effect. A recent empirical analysis found that when all legacy airlines on a route mentioned phrases related to "capacity discipline" in their earnings calls, capacity fell by an economically and statistically significant amount in the ensuing quarter.[101]

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[96] *In re* Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 62 (D.D.C. 2016) (alterations omitted) (quoting *Domestic Airline Travel* Complaint, *supra* note 94, ¶ 89).

[97] *Domestic Airline Travel* Complaint, *supra* note 94, ¶ 94 (emphasis omitted) (quoting Edward Bastian, CEO, Delta Air Lines, Inc., Remarks at Bank of America Merrill Lynch Investor Conference (June 15, 2010)).

[98] *Id.* ¶ 89 (emphasis omitted).

[99] *Id.* ¶ 109 (emphasis omitted) (quoting John Rainey, CEO, United Airlines, Inc., Remarks at Wolfe Research Transportation and Industrials Conference (May 19, 2015)).

[100] *Id.* ¶ 92 (emphasis omitted) (quoting Thomas Horton, CFO, American Airlines, Inc., Remarks at J.P. Morgan Aviation, Transportation & Defense Conference (Mar. 9, 2010)).

[101] Gaurab Aryal, Federico Ciliberto & Benjamin T. Leyden, *Coordinated Capacity Reductions and Public Communication in the Airline Industry* 4 (CESifo, Working Paper No. 8115, 2020), papers.ssrn.com/sol3/papers.cfm?abstract_id=3544501.

In light of the egregious public announcements designed to coordinate capacity reductions among competitors and the associated evidence showing effect, it is dismaying how ineffective public and private enforcement have been. The DOJ opened an investigation in July 2015, which it closed in January 2017.[102] Private litigation did manage to surmount the *Twombly* hurdle:

> [T]hese statements upon which Plaintiffs rely demonstrate two points that support the plausibility of . . . 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.[103]

In May 2019, the court approved a settlement between the plaintiffs and American for $45 million and with Southwest for $15 million.[104] In light of the substantial industry profits earned during this time period, these are very modest sums. Delta and United have yet to settle.

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 that resulted in a market structure more conducive to lessened competition. Indeed, firms saw this connection; they commented that "the consolidation we have undergone encourages a change in behavior to match the industry structure."[105] Some executives criticized past conduct in which "producers would cut price before reducing volume"[106] and stressed the need to "focus on profits rather than on [volume]"[107] and not 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

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[102] It is possible 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).

[103] *In re* Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 62–63 (D.D.C. 2016).

[104] *In re* Domestic Airline Travel Antitrust Litig., No. 1:15-mc-01404-CKK (D.D.C. May 9, 2019), ECF No. 373 (order approving settlement).

[105] Standard Iron Works v. ArcelorMittal, 639 F. Supp. 2d 877, 884 (N.D. Ill. 2009).

[106] *Id.*

[107] *See id.*

needs to have . . . discipline." And when firms succeeded in reducing capacity, executives provided affirmation and support as they noted that "everybody is, to some degree, giving that pint of blood."[108] In short, they expressed and implemented a plan to coordinate capacity reduction in order to reduce supply and thereby cause higher prices.

C. Analysis

If a firm privately communicated to its competitors that they should all raise their prices (or reduce their output, or take some capacity offline, or engage in some other joint action that would restrain trade), anticompetitive intent would indisputably be present. How should such communications be perceived if the firm instead publicly communicated this plan? As is explained below, public announcements about how competitors should behave ought to be perceived (and thereby treated) as if they were made privately.

Consider a firm publicly announcing how rival firms or the industry at large should price or produce. The only possible avenue for finding that such a public announcement does not have anticompetitive intent is that it is expressed for the benefit of parties other than competitors. If those announcements were informative to third parties without affecting rival firms' conduct, then that would provide an alternative justification for them and thereby complicate any inference that the announcements were an invitation to collude. However, that is not the case here; these announcements are informative only if they affect firms' conduct. All parties—customers, input suppliers, the capital market—know that a firm would prefer its competitors to price higher or supply less, and a firm announcing that they should do so provides no new information about future conduct and performance unless that statement is viewed as making it more likely that they will price higher or supply less. In other words, it is only when announcements are intended to restrain competition that they are informative, and it is only when they are informative that they could be of value to other parties.

The implication is that making these communications public does not provide another rationale for the communications, but rather, provides only an ancillary effect. Privately inviting firms to price higher or supply less is done with the intent of causing firms to price higher or supply less. Making that invitation public does nothing more than inform other parties of the proposed plan to restrain competition. In evaluating public announcements in which a firm states how other firms or the industry at large should behave, those announcements should be treated "as if" they were made privately. Consequently, such announcements come with clear anticompetitive intent.

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[108] *See id.* at 888.

A general assessment of anticompetitive effect is a more challenging task. If the lysine cartel, with its detailed communications regarding the exact price to be charged and the exact maximum that each firm was to sell, had instead publicly broadcast that information during earnings calls rather than having kept it within the confines of a hotel room, such public announcements would still be expected to have had anticompetitive effect.[109] However, firms that deploy public announcements tend not to be so specific in their statements. They commonly speak in vague terms, as exemplified by these quotations from some of the cases covered in Part IV.B, *supra*:

> Smithfield Foods CEO: "[O]ur 3% [cut in output] will not fix the hog industry. . . . Somebody else has got to do something. . . . I think this industry has got to solve it collectively."[110]
>
> Mittal COO: "What is needed from the industry is a disciplined approach to bringing on supply and managing capacity."[111]
>
> United CEO: "[W]e 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."[112]

These announcements are referring to a collusive outcome that is no more finely described than that firms should cut production or limit capacity. While these announcements are likely to be perceived as an invitation to collectively reduce supply in order to raise prices, that perception does not imply mutual understanding as to how much to reduce supply. The absence of that specific understanding is pertinent to effect. A firm will reduce its supply only if it expects other firms to sufficiently reduce their supply so as to cause that firm's profit to rise. Given that cutting its sales will reduce the firm's profit, that loss must be compensated by a sufficient rise in price, and that rise will only occur if rival firms sufficiently cut their sales. Uncertainty about the supply decisions of other firms will make a firm wary about significantly reducing its supply out of concern that other firms will not do likewise and leave the firm's profit lower. Though this lack of mutual understanding about the outcome upon which firms are to coordinate may reduce the efficacy of collusion, it need not eviscerate it. What it is likely to mean is that firms will

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[109] A rich description of the meetings of the lysine cartel can be found in KURT EICHENWALD, THE INFORMANT: A TRUE STORY (2000).

[110] Direct Purchaser Plaintiffs' Third Amended and Consolidated Class Action Complaint ¶ 145, *In re* Pork Antitrust Litigation, No. 0:18-cv-1776-JRT-HB (D. Minn. Jan. 15, 2020), ECF No. 431 (emphasis omitted) (quoting Smithfield Foods, Inc., Q1 2010 Earnings Conference Call (Sept. 8, 2009)).

[111] Standard Iron Works v. ArcelorMittal, 639 F. Supp. 2d 877, 884–85 (N.D. Ill. 2009).

[112] *Domestic Airline Travel* Complaint, *supra* note 94, ¶ 94 (emphasis omitted) (quoting John Rainey, CEO, United Airlines, Inc., Remarks at Wolfe Research Transportation and Industrials Conference (May 19, 2015)).

be gradual and cautious in their actions by, for example, making modest production cuts and maintaining or increasing their magnitude only upon learning that other firms have acted in a comparable manner.

In spite of the lack of specificity of these general calls for restraining competition, there are several reasons for believing that anticompetitive effect is sufficiently likely and substantial to create antitrust concerns. First, firms suffering from low profits due to excessive supply or aggressive pricing and having publicly expressed a desire to do something about it will be motivated to increase profits by figuring out how to enact a collective output reduction or price increase. As the old adage says, where there's a will, there's a way. Second, that firms have consciously chosen to make public announcements calling for collective action reveals that they think there is a reasonable chance of success. A firm would be unwise to broadcast that it is reducing its supply as part of a proposed industry-wide output cut unless it believed that rival firms would contract their supply rather than exploit the firm's reduced sales by expanding their own. Third, there is evidence that these types of public announcements do have an effect, as found in the airlines and steel cases.

Public announcements in which a firm encourages other firms to reduce supply, limit capacity, raise price, or adopt some other form of joint conduct that would restrain trade unambiguously have anticompetitive intent. Furthermore, there are good reasons to believe such announcements are likely to have anticompetitive effect.

IV. A FIRM ANNOUNCES HOW RIVAL FIRMS WILL BEHAVE

A. Description

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 participants in the capital market 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 and this enhances efficiency. Furthermore, firms in the industry are particularly well informed when it comes to making industry forecasts (though firms may have an incentive to suppress those forecasts that would harm the firm or its management). In practice, these forecasts are 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 prognosticating on future industry conduct and performance, such statements could be made with

anticompetitive intent. When a firm announces what it thinks rival firms will do in the future, the announcement may be less of a forecast and more of a recommendation. While the announcement may prove to be accurate, that may be so only because the announcement itself induced firms to act in the manner that was foretold. In other words, the forecast is self-fulfilling because it facilitates coordinated conduct.

To illustrate the anticompetitive concerns, suppose firms are in the midst of a price war and a firm is considering raising its price in the hope that the move will induce other firms to raise their prices. However, the firm is concerned about losing sales should rival firms not follow, so it precedes the price increase by announcing, "We believe that prices will be higher as firms come to their senses and end this price war." This announcement is making clear that the firm's price is higher not because, say, its cost is higher, but rather, because it is anticipating that other firms will raise their prices. However, the firm's prediction that all firms will raise their prices may only happen if all firms believe that the price increase will happen, and the public forecast is the device to facilitate that common belief. As a result, rival firms may interpret this "prediction" as an invitation to end the price war. Forecasts can then be perilously close to espousing what firms *should* do rather than what they *will* do.

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 refers to what one thinks others *should* do.[113] Thus, a firm that 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. Such an inference is more likely when the announcement follows on the heels of statements lamenting low prices. The announcement is then not a prediction, but rather, a call to firms, and the prediction proves accurate only due to the implicit message resulting in a coordinated rise in prices.

Though it is plausible that an announcement could disguise a forecast as an invitation to act according to that forecast, there are no documented cases to

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[113] *Expect*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/expect.

my knowledge. It is put forth here as a possibility to keep 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 purpose of the publicly announced forecast is to affirm 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 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 agreed to a price increase in six weeks. One month later, a firm announces that it predicts rising prices in order to provide affirmation of the plan. Given the lack of a natural opportunity at that time to meet privately, this public announcement comes with less risk and may be effective in shoring up the agreement.

Rather than use private communications to initially coordinate, as just described, firms may coordinate through recommendations (what firms should do) in public announcements and then use forecasts (what firms will do) to provide affirmation of that plan. The Pork case exemplifies this use of forecasts. Some time after the Smithfield Foods CEO called for the industry to "collectively" solve the oversupply problem, top executives of Hormel and Tyson's Foods expressed that they "expected" to see supply reductions. Thus, publicly revealed forecasts can complement other communications intended to facilitate collusion.

B. Analysis

To begin, only forecasts that pertain to future firm conduct—such as what prices are to be charged and how much output is to be produced—could possibly have anticompetitive intent. The challenge is distinguishing them from legitimate forecasts. A legitimate forecast about, say, rising prices would be one based on some largely exogenous factors such as stronger demand, an increase in input prices, or limited supply due, for example, to capacity being taken offline for maintenance. An anticompetitive forecast is one for which such factors are absent (or are not the main driver) and the public announcement that prices are expected to rise or industry supply to contract is the actual cause of that conduct.

Identifying forecasts that have anticompetitive intent is a difficult task, but there are some conditions to watch for. One condition is that the forecast fails

to credibly attribute the predicted conduct to some exogenous factor. That is, there does not appear to be a change in the firms' environment to rationalize their future behavior. A concern is that a firm with anticompetitive intent could always falsely claim the predicted rise in firms' prices is due to, say, a rise in demand or cost. However, such a claim is not made without legal risks. A firm that does not truly expect demand or cost to rise but forecasts that it will, opens itself up to litigation.[114] Another condition associated with a forecast that has anticompetitive intent is that it would not be in the self-interest of a firm to act according to the forecast unless other firms did so, too.[115] For example, even if there is a predicted rise in demand, if there is sufficient excess capacity to handle it, a firm would not be inclined to raise price unless it expected other firms to do so. The public announcement of a prediction of rising prices may create a self-fulfilling expectation by coordinating firms to raise their prices.

A class of forecasts that is particularly challenging to assess are those that predict that an exogenous event will raise price or reduce supply when that outcome is a possible but not necessary consequence. The forecast could increase the likelihood of higher prices if it contributes to firms believing their rivals will raise prices. An example of such an event and forecast is, "The industry consolidation resulting from recent mergers is expected to reduce competition and result in higher prices and margins." Many empirical studies have shown that a reduction in the number of competitors—such as through a merger—might do exactly as this forecast predicts. However, there is a range of possible price effects depending on whether the post-consolidation market is characterized by competition or collusion.[116] The potential concern with this forecast is that it may facilitate a mutual understanding to compete less aggressively, beyond that which is a necessary implication of the market having fewer firms. In the Steel case, a Mittal executive made clear that the industry's recent consolidation "encourages a change in behavior to match the in-

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[114] *See, e.g.*, 17 C.F.R. § 240.10b-5(a) to (c) (making it unlawful to "employ any device, scheme, or artifice to defraud," to "make any untrue statement of a material fact," or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security").

[115] This condition is a commonly used plus factor: "[I]f the defendants have engaged in conduct that would further the interests of a conspiracy but would be against each defendant's interests if it were acting separately, the actions taken by the defendants are circumstantial proof of conspiracy." ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 70 (1st ed. 2010).

[116] A merger among competitors may result in higher prices because of unilateral effects (firms continue to compete but competition is weakened with fewer firms) or coordinated effects (fewer firms, especially the elimination of a maverick firm, may cause a shift from competition to collusion). The price rise will be greater when there are coordinated effects. *See* W. KIP VISCUSI, JOSEPH E. HARRINGTON JR. & DAVID E.M. SAPPINGTON, ECONOMICS OF REGULATION AND ANTITRUST ch. 6 (5th ed. 2018).

dustry structure."[117] Whatever was the imagined "change in behavior," it was not seen as an immediate implication of the structural change and thus had to be "encouraged." There, the encouragement took the form of a recommendation, but it could as well have been a forecast.

This difficulty in distinguishing a legitimate forecast from one with anticompetitive intent could also imply that the firms themselves may be unsure whether a firm's public announcement is an invitation to collude. However, as firms are better informed about the market—and thus whether a prediction of falling supply or rising prices is justified by exogenous factors—they are well placed to make such an assessment. For example, if firms have been mired in a price war and one firm predicts its end without any compelling justification, it would be reasonable for firms to infer that this is an invitation for firms to coordinate on being less aggressive.

Given the lack of clarity regarding how effective these announcements are in delivering mutual understanding to raise prices or restrict supply, it is difficult to draw conclusions on the likelihood of anticompetitive effect, especially in light of the absence of cases to guide us. But two points related to effect are notable. In principle, a firm's forecast could provide the precision that would be instrumental in coordinating a price hike or output cut. A firm that publicly announces that it expects prices to rise by 5 percent in the next quarter or industry supply to fall by 10 percent in the remainder of the year would deliver a clear target for firms to coordinate their conduct if enough of them were to interpret the announcement as an invitation to collude. The second point is that these forecasts can be effective in conjunction with public announcements regarding what firms should do, as was reviewed in the Airlines, Pork, and Steel cases. Saying what firms will do underscores what they are supposed to do, which makes effect more likely.

V. ENFORCEMENT CHALLENGES

A firm publicly communicating how it would respond to a rival firm's price or output or what prices or output rival firms should choose is not part of the normal competitive process. In a competitive environment, a firm independently chooses what price to set and how much to produce for the purpose of maximizing its own profit, regardless of what those decisions mean for other firms' sales and profits. Contrary to that description, the aforementioned public announcements directly encourage coordinated conduct among firms that is intended to cause consumers to pay higher prices for the collective benefit of suppliers.

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[117] Standard Iron Works v. ArcelorMittal, 639 F. Supp. 2d 877, 884 (N.D. Ill. 2009).

Though these public announcements may not be part of the competitive process, antitrust law does not require firms to compete, only not to agree not to compete. Tacit collusion in the form of one firm raising its price with the intent to signal to a rival firm to match that price increase is contrary to competition but may not be an unlawful agreement. However, what distinguishes collusion through public announcements from price signaling is that the former entails an overt act of communication which, in principle, offers a remedy in the form of the prohibition of such announcements.

Courts have recognized that public announcements can be the basis for firms forming an agreement if certain conditions are satisfied. In *In re Domestic Airline Travel Antitrust Litigation*, 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."[118] And courts have noted that the fact that statements are made in public does not exempt them from antitrust scrutiny. In *Petroleum Products*, the Ninth Circuit commented:

> "[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 information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing."[119]

Though there is a recognition that an illegal agreement can be achieved using public announcements, enforcement has been weak. With *In re Domestic Airline Travel Antitrust Litigation*, courts have set a high bar for an agreement to be attributable to public communications. Consistent with this perspective of the courts, the DOJ is not inclined to bring cases unless there are private communications. Consequently, these cases are left to private litigants who have had, at best, modest success in obtaining appropriate settlements. While the FTC has brought several invitation-to-collude cases under Section 5, those cases have not led to penalties. It is fair to say that the track record on cases based on public announcements does not strike fear in the hearts of cartelists.

My primary concern is that competition authorities and courts have created a loophole for collusion in the form of public announcements that solicit coor-

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[118] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010).

[119] *In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 (9th Cir. 1990) (second alteration in original) (quoting RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 146–47 (1976)).

dinated conduct to restrain trade. Making announcements public does not strip them of anticompetitive intent and effect. At the same time, courts are right to be concerned with chilling legitimate competitive processes by penalizing firms for their public statements. Here, I briefly discuss some issues relevant to developing a more effective enforcement regime.

The central challenge is determining whether firms have an agreement in violation of Section 1 of the Sherman Act when there is only evidence of public communications. Towards that end, it would be useful to determine when public announcements can be treated as if they were privately communicated between firms.[120] The value to making that equivalence is that there is a considerable body of jurisprudence regarding the content of private communications that facilitate and form an agreement. As this article has shown, it is possible to identify certain classes of announcements for which the only credible intended audience is rival firms and, therefore, the unambiguous purpose is to coordinate conduct among competitors for the purpose of restraining trade. Such public announcements are candidates for being treated the same as private communications.

Even if a public announcement is interpreted as an invitation to collude, there is the matter of assessing whether some rival firms have accepted that invitation so that there is an agreement. Possible evidence for making that determination includes rival firms making similar or affirming announcements and evidence that rival firms have acted in the manner prescribed in the public announcements. The Airlines case is illustrative in that American, Delta, United, and US Airways, among others, all made public calls for industry-wide capacity discipline and broadcast affirming messages that airlines had acted to restrain capacity. There are also announcements made by airline executives regarding effect and an economic study showing that capacity reductions occurred shortly after earnings calls referring to capacity discipline. While it would then appear that collusion with public announcements can deliver evidence of communication that facilitated an agreement and evidence of effect that an agreement was achieved, jurisprudence is needed to develop evidentiary standards.

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[120] As Richard Posner wrote,

> If someone advertises in a newspaper that he will pay $10 to the person who finds and returns his dog, anyone who meets the condition has an enforceable claim against him for the promised reward. The finder's action in complying with the specified condition is all the indication of assent that the law requires for a binding contract. Tacit collusion by oligopolists is at least analogous. A seller communicates his "offer" by restricting output, and the offer is "accepted" by the actions of his rivals in restricting their outputs as well.

Posner, *supra* note 4, at 1576.

By its nature, a public announcement that seeks to coordinate firms' conduct is more easily detected than a private invitation, and that opens up the possibility of prosecution prior to an agreement having been formed. There is considerable value to such a prosecution, as it may shut down collusion before the announcement creates harm. Moreover, effective prosecution and penalization at the invitation stage would aid in deterring such attempts. Unless the FTC pursues civil penalties for violating an FTC order, prosecution of invitations to collude under Section 5 of the FTC Act does not deliver that deterrent. Worthy of consideration is the use of Section 2 of the Sherman Act. As the Supreme Court explained in *Standard Oil*, the role of Section 2 is "to make the prohibitions of the [Sherman Act] all the more complete and perfect by embracing all attempts to reach the end prohibited by [Section 1], that is, restraints of trade, by any attempt to monopolize."[121] The *American Airlines*[122] case illustrates how Section 2 may be triggered by invitations to collude, though that case concerned a private invitation that the CEO of American Airlines conveyed to Braniff Airlines' CEO. The U.S. Court of Appeals for the Fifth Circuit noted that "an agreement is not an absolute prerequisite for the offense of attempted joint monopolization."[123] Where evidence is insufficient for proving a Section 1 violation, prosecution under Section 2 is an unexplored avenue for cases with public announcements.

Effective enforcement requires that firms know what is potentially in conflict with the law. Currently, firms lack adequate guidance regarding what is inappropriate to put in their earnings calls, press releases, statements at industry meetings, and other public announcements. It would be instructive for the DOJ to make clear that announcements referencing rival firms' future conduct with regard to price or output can facilitate coordinated conduct and thus firms risk entering into an unlawful agreement. Examples of concern include a firm adopting a surcharge after another firm announces that it will do so if its competitor does, a firm calling for an industry-wide supply cut, and a firm announcing a price increase that is contingent on rival firms following it or the firm not losing market share. The development of guidelines would help firms avoid entering into litigious territory and provide guidance to the courts for adjudicating these cases.

VI. SUMMARY AND CONCLUSION

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. The focus of this article has been on announcements with content pertaining

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[121] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61 (1910).
[122] United States v. Am. Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).
[123] *Id.* at 1122.

to rival firms' conduct. The media used for these public announcements includes annual reports (the Pork case), interviews in trade publications (the Mobile Telecom cases), speeches and panel discussions at semi-public industry meetings (the Airlines, Broiler Chicken, Pork, and Steel cases), and, most commonly, earnings calls (all eight U.S. cases).

This article has identified three types of messages about a rival firm's conduct that 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 prescribes how rival firms or the industry at large should behave in the future. This 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 conduct that was commended or contrary to conduct that was criticized. Third, a firm describes how rival firms or the industry at large will behave in the future. This forecast could be an invitation to firms to act consistent with that forecast.

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 Rentals, and Mobile Telecom—and one in which the firm's message described how it would act as a follower—Baggage Fees. The first three episodes all had a high-ranking company official publicly comment that competition was "excessive." Having stated the problem, the executive then went on to propose a solution by announcing that it would raise prices, with the continuance of the higher prices conditional on other firms raising their prices. In the Baggage Fees case, a firm stated its willingness to be a follower in response to the adoption of a first-bag fee. That announcement then led its rival to adopt the fee, which the follower did indeed match as it said it would. With these four episodes, public announcements were 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. These announcements facilitate the formation of an agreement between firms to have a leader-follower arrangement which would have the effect of raising prices.

Next, announcements were considered in which a firm publicly conveys how rival firms should behave. In both the Broiler Chicken and Pork cases, 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 similar 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 impor-

tance of a coordinated industry response. There is 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. If these communications had been made privately, they would have been condemned by courts. Making them in public should not change their treatment, as they are informative to parties other than competitors only if they affect firms' conduct, which implies they come with anticompetitive intent. These public announcements should be treated as if they were made privately between competitors.

The final 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 prognosticating about future conduct and performance, such statements can be made with anticompetitive intent. When a firm announces what it thinks other firms will do in the future, the announcement may be intended as a recommendation for what firms should do. The proposal is to interpret a forecast as an invitation to collude when it fails to credibly attribute the forecasted conduct to some exogenous factor, such as a change in cost or demand; when the predicted conduct would restrain trade (as is the case with higher prices or reduced output); and when it would not be in the self-interest of a firm to act according to the forecast unless other firms did so, too.

In concluding, it is disturbing that firms' executives find it appropriate to publicly instruct their competitors on what price to set and how much to supply. However, it is hardly surprising that they do so, given that most of these episodes escape public prosecution and, when they are privately litigated, the courts hesitate to find an unlawful agreement. 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 either. Savviness in enforcing the law can bring clarity that serves both consumers and firms.