

## **PRIVATE DAMAGES FOR IMMIGRATION VIOLATIONS: A REALITY FOR THE U.S.; A POSSIBILITY FOR THE E.U.**

Host countries have attempted to develop creative ways to address immigration issues in an effort to reach fair and sustainable solutions to the problems posed by large waves of immigration. A variety of party interests affect host countries' decisions in this arena. On one hand, these countries consider the rights of immigrants, even those of undocumented immigrant workers.<sup>1</sup> On the other hand, they consider the rights of nationals who may be economically disadvantaged due to the presence of such undocumented immigrant workers.<sup>2</sup> To address these concerns, the United States has adopted private-party remedies in the form of damages for immigration violations. Private-party damages allow those who have suffered injury as a result of a violation of immigration laws to recover damages from the violator.

The purpose of this Note is to analyze mechanisms for civil remedies in the United States under the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>3</sup> and show that mechanisms already in place under European Union competition law could achieve similar goals in the European Union.<sup>4</sup> Specifically, this comparison entails showing the historical context of how each system developed, evaluating the efficacy and fairness of using private party damages to enforce immigration laws and demonstrating how the American and European systems differ and how each can benefit from one another.

Part II of this Note discusses how RICO is used as an enforcement mechanism in the United States. Part III discusses European competition

---

1. I use the term "undocumented immigrant workers" to describe workers who are not working in a country with government approval because it is clear and politically neutral. The term "illegal immigrant" has a negative connotation while "irregular worker" is ambiguous.

2. It is important to recognize the parties who are affected by immigration policies: (1) undocumented immigrant workers, whose economic livelihood can depend on working in a host country; (2) business owners, who save operating expenses by hiring low-wage undocumented immigrant workers; (3) consumers, who benefit from lower prices as a result of decreased operating expenses; (4) domestic low-wage workers, whose wages can be suppressed with an influx of even lower-wage foreign workers; and (5) documented immigrant workers, whose wages also can be suppressed by lower-wage foreign workers and who may lose employment opportunities because undocumented immigrant workers demand fewer rights than documented workers. Allowing damages to the private parties negatively affected by immigration violations seeks to compensate those affected at the expense of the beneficiaries of the violations.

3. 18 U.S.C. §§ 1961–1968 (2004).

4. *See* Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33, arts 81–82.

law that may allow for private enforcement of immigration laws<sup>5</sup> and how those statutes relate to European Union immigration standards. Part IV evaluates the success of these innovations in light of the goals of immigration policy and the unique legal and policy issues affecting the U.S. and the European Union.

### I. AMERICAN IMMIGRATION ENFORCEMENT

Although the United States prides itself on being a “nation of immigrants,”<sup>6</sup> history shows that the country has restricted the flow of immigration to protect national interests. From the United States’ founding until World War II, there was relatively little restriction on immigration.<sup>7</sup> Even the last twenty years of the Nineteenth Century—the period of the largest surge in immigration in America’s history up to that point—saw only nine million immigrants enter the country.<sup>8</sup> The most notable restriction on immigration in place prior to World War II was a quota system which established a yearly cap on immigration for disfavored races.<sup>9</sup>

The pre-World War II era brought a change in immigration demographics that altered the United States’ immigration policy. During this era, more immigrants came from southern and eastern Europe.<sup>10</sup> In response to racist concerns about this influx of immigrants, Congress passed the Immigration Act of 1924, which capped the number of immigrants that could enter the country in a year, and established the national origin system, which limited the number of people who could enter from each country.<sup>11</sup> In the wake of World War II, Congress enacted

5. See, e.g., Art. 54(1)(d), *Infracciones muy graves*, (B.O.E. 2000, 307); Art. 53(b), *Infracciones graves*, (B.O.E. 2000, 307).

6. See JOHN F. KENNEDY, *NATION OF IMMIGRANTS* (Harper & Row Publishers 1964).

7. Notable restrictions on immigration included the Chinese Exclusion Acts, state laws restricting Irish immigration during the Irish Potato Famine, and the Foran Act of 1885, which prohibited the immigration of contract laborers. ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 3–58 (2004).

8. ENCYCLOPEDIA BRITANNICA, *United States: Immigration in General*, available at <http://www.search.eb.com/eb/article-77801>.

9. The United States Immigration Commission underwent a massive study on immigration in America and concluded that immigrants from certain countries were inferior to the people already present in America. It justified capping the proportion of immigrants from certain countries based on these findings. DANIELS, *supra* note 7, at 45.

10. *Id.*

11. ENCYCLOPEDIA BRITANNICA, *United States: Immigration, The People*, available at <http://www.search.eb.com/eb/article-78004>. Under the national origin system, “quotas were established for each country based on the number of persons of that national origin who were living in

several immigration laws that responded to the problems and security issues stemming from this war and its aftermath.<sup>12</sup>

The Immigration and Nationality Services Act provides the modern foundation for American immigration policies. Among other things, the Act outlaws harboring illegal aliens,<sup>13</sup> assisting illegal aliens in entering the United States,<sup>14</sup> and allowing illegal aliens to enter for immoral purposes.<sup>15</sup> The Act was an attempt to modernize anachronistic immigration policies.<sup>16</sup> Most notably, the Act abolished the quota system in favor of immigration limits per hemisphere.<sup>17</sup> The Act also made it easier for the relatives of immigrants already in the United States to immigrate to the United States.<sup>18</sup>

In 1986, to counteract the wave of immigration caused by the Immigration and Nationality Services Act, Congress passed the Immigration Reform and Control Act,<sup>19</sup> which increased U.S. border protection and allowed the government to monetarily sanction employers who hire undocumented workers.<sup>20</sup>

---

the United States in 1920. The quotas reduced drastically the flow of immigrants from southeastern Europe in favour of the countries of northwestern Europe.” *Id.*

12. Among these laws are the War Brides Act of 1945, which allowed foreign wives of U.S. soldiers to immigrate to the United States; the Displaced Persons Act of 1948, which allowed people who lost their homes as a result of the war to immigrate; and the Internal Security Act of 1950, which barred Communists from admission to the U.S. DANIELS, *supra* note 7, at 94, 106.

13. 8 U.S.C. § 1324 (2004) (“Any person who . . . brings to or attempts to bring to the United States, . . . transports, or moves or attempts to transport or move . . . conceals, harbors, or shields from detection, or attempts to conceal, harbor or shield . . . encourages or induces an alien to come to enter or reside in the United States . . . [or] engages in any conspiracy to commit any of the preceding acts . . . shall be punished . . .”).

14. 8 U.S.C. § 1327 (2004) (“Any person who knowingly aids or assists any alien inadmissible under [federal law] . . . or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined . . . or imprisoned . . . , or both.”).

15. 8 U.S.C. § 1328 (2004) (“The importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose, is forbidden.”).

16. An example of an anachronistic policy is the national origin system, which set race-based quotas. For further discussion of the national origin system, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C.L. REV. 273 (1996).

17. DANIELS, *supra* note 7, at 134.

18. *Id.* at 136.

19. 8 U.S.C. § 1101 (1986).

20. DANIELS, *supra* note 7, at 224. Other effects of the legislation were amnesty for certain immigrants, the legalization of seasonal agricultural workers, and an annual lottery of 5,000 visas to be distributed to citizens of countries that were negatively affected by the 1965 Immigration and Naturalization Act. *Id.* at 227–28. The prohibition on hiring undocumented workers is used in conjunction with RICO to provide for private damages for parties negatively affected by immigration violations.

After the 1986 Immigration Reform and Control Act, the United States experienced a “furor” regarding what to do about the immigration issue.<sup>21</sup> Despite the 1986 Act’s stringent provisions, increasing numbers of immigrants were entering the United States to work.<sup>22</sup> Current laws were ineffectual at preventing undocumented immigrant workers from crossing the U.S. border. For these reasons, Congress decided to allow private parties to seek damages for violations of immigration law for the first time.

### A. RICO’s Statutory Authorization to Deal with Immigration

Congress enacted the Racketeer Influenced and Corrupt Organizations Act<sup>23</sup> in 1970 to provide law enforcement with an additional tool to combat the ills of organized crime.<sup>24</sup> Congress intended for RICO’s language to be interpreted expansively.<sup>25</sup> The Government has used RICO to prosecute organized crime-related offenses such as insider trading,<sup>26</sup> loansharking,<sup>27</sup> drug trafficking,<sup>28</sup> and weapons offenses.<sup>29</sup> RICO also contains a provision that allows for civil remedies for parties that have been wronged as a result of a violation of the statute.<sup>30</sup> To recover for a RICO violation claim, a plaintiff must prove: (1) a violation of RICO occurred through a pattern of racketeering, (2) that the violation caused injury to business or property, and (3) that the defendant’s violation caused the injury.<sup>31</sup>

21. See *Jordan on US Immigration Policy “Furor,”* 1 MIGRATION NEWS 4 (1994), available at [http://migration.ucdavis.edu/mn/comments.php?id=299\\_0\\_2\\_0](http://migration.ucdavis.edu/mn/comments.php?id=299_0_2_0).

22. DANIELS, *supra* note 7, at 234.

23. 18 U.S.C. §§ 1961–1968 (1970).

24. *United States v. Uni Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981) (“Although the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO’s use to members of organized crime.”).

25. Organized Crime Control Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (“The provisions of this title shall be liberally construed to effectuate its remedial purposes.”).

26. See, e.g., *United States v. Shwayder*, 312 F.3d 1109 (9th Cir. 2002); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742 (2d Cir. 1992).

27. See, e.g., *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003); *United States v. Weiner*, 3 F.3d 17 (1st Cir. 1993).

28. See, e.g., *United States v. Jones*, 455 F.3d 134 (2d Cir. 2006); *De Lisi v. Crosby*, 402 F.3d 1294 (11th Cir. 2005).

29. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987); *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006).

30. 18 U.S.C. § 1964(c) (2004) (“Any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States district court . . .”).

31. *First Nationwide Bank v. Gelt Finding Corp.*, 27 F.3d 763, 767 (2d Cir. 1994).

Despite the difficulties in proving a RICO violation, recovery is well worth the effort for plaintiffs. Because RICO violations result from egregious conduct, plaintiffs can collect treble damages.<sup>32</sup> In addition to damages, the court can order a divestiture of a company, restrictions on who invests in the company, a prohibition of individuals from participating in a similar business, and, finally, a dissolution of the company.<sup>33</sup> These remedies ensure that a violator does not enjoy any competitive advantage over competitors.

In 1996, Congress expanded RICO's scope to include immigration-related offenses<sup>34</sup> as a small part of a greater effort to combat illegal immigration.<sup>35</sup> This expansion of RICO-predicate offenses to include violations of immigration laws has provided private plaintiffs with their first opportunity to recover damages for violations of immigration laws.

### *B. Immigration Case Law Involving RICO*

Since RICO was amended to include immigration violations, courts have struggled to determine when a plaintiff should be awarded damages for such violations.<sup>36</sup> Courts have primarily addressed two types of fact

32. 18 U.S.C. § 1964(c) (“[A plaintiff] shall recover threefold the damages he sustains and the cost of the suit . . .”).

33. 18 U.S.C. § 1964(a) (2004).

34. *See generally* 18 U.S.C. §§ 1961–1968 (2006); 18 U.S.C. § 1961(1)(F) (2004) (“[R]acketeering activity” means . . . any act which is indictable under the Immigration and Nationality Act, section 274 . . . , section 277 . . . , or section 278 . . . if the act indictable under such section of such Act was committed for the purpose of financial gain.”). Note that 8 U.S.C. § 274 is now 8 U.S.C. § 1324, 8 U.S.C. § 277 is now 8 U.S.C. § 1327, and 8 U.S.C. § 278 is now 8 U.S.C. § 1328. Even though this amendment can only apply to parties that violate the Immigration and Nationality Act “for the purpose of financial gain,” the amendment affects parties that may not be violating the Act because enforcement procedures will affect whether employers hire undocumented workers.

35. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009–546 (Sept. 30, 1996). The act that authorized private damages, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sought to:

improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States . . . .

H.R. 2202, 104th Cong. (1996). Accordingly, other provisions in the 1996 Act dealt with border patrol, criminal penalties for “alien smuggling,” deportation, documentary requirements for hiring immigrants, and restrictions on public benefits for undocumented workers.

36. Since the amendment, the United States has used RICO to prosecute criminal cases as well. Although criminal and government civil sanctions have been used in cases involving third party damages, see *Commercial Cleaning Services, L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001). An analysis of criminal and government civil penalties for immigration violations is beyond the scope of this Note.

patterns in RICO cases: (1) businesses suing their competitors for lost profits due to the competitive advantage gained from hiring undocumented workers, and (2) documented workers suing their employers for suppressed wages which were driven down by illegal workers.<sup>37</sup>

### 1. *Competitive Disadvantage*

The court in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.* dealt with one firm having a competitive advantage over another and marked the first successful suit by a plaintiff for an immigration violation under RICO.<sup>38</sup> Commercial Cleaning, a janitorial service, claimed that a competing janitorial service outbid it for service contracts by hiring low-wage undocumented workers and thereby gained illegal competitive advantage.<sup>39</sup> The district court dismissed the claim on the ground that the immigration violations were not the proximate cause of Commercial Cleaning's lost bids.<sup>40</sup> The Second Circuit reversed, holding that proximate cause would exist if Commercial Cleaning showed that "the purpose of the alleged violation . . . , the hiring of illegal alien workers, was to take advantage of [Commercial Cleaning's] diminished bargaining position, so as to employ a cheaper labor force and compete unfairly on the basis of lower costs."<sup>41</sup>

### 2. *Wage Suppression*

*Mendoza v. Zirkle Fruit Co.* marked the first case in which a civil RICO plaintiff alleged wage suppression.<sup>42</sup> In *Mendoza* documented employees and former employees sued two employers under RICO claiming that the employers conspired to suppress the wages of their

37. See *infra* Parts I.B.1 and I.B.2. The possibility that existing E.U. law could be used to provide damages for private plaintiffs will rely on these two common fact patterns. In addition to these two fact patterns, Canyon County, Idaho, unsuccessfully attempted to add a third—suing businesses that hire undocumented immigrant workers for increased county costs for law enforcement, education and social services. The suit was dismissed. *Canyon County v. Sygenta Seeds, Inc.*, No. CV05-306-S-EJL, 2005 WL 3440474 (D. Idaho Dec. 14, 2005). See also American Renaissance, *Idaho Sues Over Immigrant Workers*, AM. RENAISSANCE NEWS, available at [http://www.amren.com/mtnews/archives/2005/07/idaho\\_county\\_su.php](http://www.amren.com/mtnews/archives/2005/07/idaho_county_su.php) (last visited Feb. 13, 2007); Inside Counsel, *Idaho County's RICO Case Fails*, INSIDE COUNSEL MAG., available at <http://www.insidecounsel.com/section/regulatory/326> (last visited Feb. 13, 2007).

38. 271 F.3d at 75.

39. *Id.* at 378–79.

40. *Id.* at 379.

41. *Id.* at 383.

42. 301 F.3d 1163, 1163 (9th Cir. 2002).

documented workers by hiring low-wage illegal workers.<sup>43</sup> The district court dismissed the complaint on the ground that damages were too speculative to ascertain.<sup>44</sup> The Ninth Circuit reversed, holding that damages were not too speculative by asserting that just because the amount was speculative does not mean that the plaintiff failed to state a claim for damages.<sup>45</sup>

A district court's decision in *Trollinger v. Tyson Foods, Inc.*<sup>46</sup> refines when proximate cause exists for the plaintiff's injury in the context of wage suppression. Former employees sued their employer for RICO violations, claiming that the employer hired low-wage undocumented workers to suppress wages.<sup>47</sup> The district court dismissed the claim, holding that the employees would not be able to show proximate cause because the connection between the injuries and the alleged violation was too speculative.<sup>48</sup> The Sixth Circuit reversed, holding that the speculative nature of a claim could be addressed by the fact-finder at trial.<sup>49</sup>

*Williams v. Mohawk Industries, Inc.* presents another suppression of wages case.<sup>50</sup> In *Williams* the employees of a carpet retailer alleged that their employer hired low-wage workers to suppress their wages.<sup>51</sup> The district court sustained the RICO claims<sup>52</sup> and, on appeal, the Eleventh Circuit applied RICO case law to immigration cases and noted that a plaintiff seeking to recover damages must show both "(1) the requisite injury to business or property and (2) that such injury was by reason of the substantive RICO violation" as well as satisfy the four elements of proof for a RICO claim: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."<sup>53</sup> The Eleventh Circuit upheld the district court's decision, noting that employees had standing to sue under a RICO claim<sup>54</sup> and that the employees had alleged a sufficient proximate cause.<sup>55</sup>

---

43. *Id.*

44. *Id.* at 1167.

45. *Id.* at 1171. The Ninth Circuit applied the antitrust law principle that the chain of causation between the injury and the alleged restraint in the market shows proximate cause. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000).

46. 214 F. Supp. 2d 840 (E.D. Tenn. 2002).

47. *Id.* at 840.

48. *Id.*

49. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 619 (6th Cir. 2004).

50. 411 F.3d 1252 (11th Cir. 2005).

51. *Id.* at 1255. The employees alleged that the employer went so far as to travel to the United States/Mexico border to recruit and accepted fraudulent documentation.

52. *Id.* at 1266.

53. *Id.* at 1256 (citing 18 U.S.C. § 1964(c)) (internal quotations omitted).

54. *But see Baker v. IBP, Inc.*, 357 F.3d 685, 685 (7th Cir. 2004) (holding that only the labor union, and not employees had standing to sue). The Eleventh Circuit in *Mohawk Industries* explained

*Zavala v. Wal-Mart Stores, Inc.* shows the first instance of undocumented workers attempting to sue an employer for RICO violations.<sup>56</sup> Wal-Mart employees and its contractors' employees sued the retailer after federal immigration raids revealed numerous Wal-Mart immigration violations and resulted in the dismissal of the employees.<sup>57</sup> The former employees alleged that Wal-Mart systematically violated immigration laws<sup>58</sup> and exploited them by denying them lawful pay and benefits.<sup>59</sup> The court dismissed the complaint on the ground that the plaintiffs would be unable to prove the necessary predicate offenses for a violation.<sup>60</sup>

Because RICO has only recently been amended to encompass immigration violations, no research exists as to how effective these measures have been in discouraging employers from hiring undocumented workers. Such discouragement ultimately would deter unauthorized border crossings as there would be less demand for undocumented immigrant workers.

## II. EUROPEAN IMMIGRATION

Despite the fact that private recourse for immigration law violations is available in the United States, there are currently no European Union laws that allow for such private actions.

### A. *Immigration Laws in the European Union*

European Union immigration laws focus primarily on preventing undocumented workers from entering the E.U., rather than addressing what to do once undocumented immigrant workers have entered.<sup>61</sup> Because there is free movement within the E.U.'s borders, the E.U. is

---

the discrepancy arose from the Seventh Circuit's insistence that there be a "common purpose" among entities in contrast to the Eleventh Circuit's disregard of that rule. *Mohawk Indus.*, 411 F.3d at 1259.

55. *Id.* at 1261.

56. 393 F. Supp. 2d 295 (D.N.J. 2005).

57. *Id.* at 300–01.

58. *Id.* at 301.

59. *Id.*

60. *Id.* at 305–09. Those predicate offenses are transporting undocumented workers, harboring undocumented workers, and encouraging illegal immigration. Interestingly, the court did not address the issue of whether the plaintiffs would be able to prove an injury.

61. Moreno Fuentes & Francisco Javier, *Immigration Policies in Spain: Between External Constraints and Domestic Demand for Unskilled Labour* (ECPR Joint Sessions of Workshops, Working Paper, 2000), [www.mmo.gr/pdf/library/Spain/ECPR\\_fuentes.pdf](http://www.mmo.gr/pdf/library/Spain/ECPR_fuentes.pdf).



powerless to stop undocumented immigrant workers from traveling throughout the Union once they enter one of the Member States.<sup>62</sup>

In the 1970s and 1980s, Europe shifted from an emigration-based system to an immigration-based system,<sup>63</sup> as Europe became a destination for immigrants rather than a place citizens would leave to seek work abroad. Those immigrants who were working in Europe developed a greater identity with their host countries. For example, in the 1970s, many French immigrants asked for permanent residency. Immigrants planning to stay permanently also immigrated with their families.<sup>64</sup> This shift towards permanency was in part the result of a new openness on the part of host countries to accept foreign labor.<sup>65</sup>

In response to this wave of immigration, the E.U. Member States began cooperatively enforcing immigration policy. In 1985, West Germany, France, Belgium, Luxembourg, and the Netherlands entered the Schengen Agreement, which “aimed to establish a common travel area without internal borders and with common external borders.”<sup>66</sup> The Schengen Agreement led to more standardized visa policies and an exchange of information among the agreeing states.<sup>67</sup>

To combat the lack of binding effect and difficulty of monitoring previous E.U. agreements, the E.U. adopted the *Action Plan of the Council and Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security, and Justice* (the “*Action Plan*”).<sup>68</sup> The *Action Plan*’s measures focused mostly on border control and did not address undocumented workers’ effect on the labor market.<sup>69</sup>

The *Action Plan* still lacked the binding effect necessary to foster a common European immigration policy. The Commission of European Communities recognized the need for a common policy in its November 2000 *Communication from the Commission to the Council and the*

---

62. *Id.* For example, many Latin Americans take advantage of their ability to enter Spain on tourist visas and then move to other countries from there. See Wayne A. Cornelius, *Spain: The Uneasy Transition from Labor Exporter to Labor Importer*, in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 387, 394 (Wayne A. Cornelius et al. eds., 2nd ed. 2004).

63. Fuentes & Javier, *supra* note 61, at 8. This shift was the result of “growing economic development, political stability, and participation in the process of European integration . . . .”

64. Jeremy Hein, *France: The Melting Pot of Europe*, in MIGRATION AND IMMIGRATION: A GLOBAL VIEW 67, 72 (Maura I. Toro-Morn & Marixsa Alicea eds., 2004).

65. *Id.*

66. Aristides Díaz-Pedrosa, *A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union*, 37 CORNELL INT’L L.J. 431, 466 (2004).

67. Fuentes & Javier, *supra* note 61, at 4.

68. 1999 O.J. (C 19) 1 [hereinafter the *Action Plan*].

69. Díaz-Pedrosa, *supra* note 66, at 469.

*European Parliament on a Community Immigration Policy.*<sup>70</sup> The 2001 *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration* recommended that the E.U. focus its attention on the employment of undocumented workers because employment opportunities entice immigrants to enter the E.U. illegally.<sup>71</sup> This communication addressed attacking the financial incentives host countries have for employing undocumented workers.<sup>72</sup>

### *B. Immigration Laws and Policy in E.U. Member States*

The fact that the E.U. is comprised of many nations, each facing unique immigration problems, and each having distinct mechanisms for dealing with these problems, complicates the development of E.U. immigration policies. Explaining the history of immigration in several key member states will illustrate this conflict.

#### *1. Spain*

The 1980s European immigration wave did not bypass Spain. Spain was an especially attractive destination for some immigrants because of its proximity to emigrant countries and its relatively robust economy.<sup>73</sup> Before this wave, Spain had not needed strict immigration policy.<sup>74</sup> Until the 1980s, most foreigners living in Spain were well-off, retired Europeans who came to take advantage of the warm climate.<sup>75</sup> In 1995, 49% of foreigners living in Spain were non-European.<sup>76</sup> By 2003, 65% of foreigners living in Spain were non-European.<sup>77</sup>

70. *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy*, COM (2000) 757 final (Nov. 11, 2000) (“[T]o reduce illegal immigration, the EU needs to adopt a co-ordinated approach which takes into account all the various interlinked aspects of the migratory system . . .”).

71. *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, COM (2001) 672 final (Nov. 15, 2001). This Communication also suggested making employers liable for the cost of returning illegal workers to their countries of origin.

72. *Id.* Some of these arguments arose in the context of ensuring fair competition. Possible enforcement mechanisms included fines in proportion to the amount of money an employer saved by hiring undocumented workers, forcing employers to pay the deportation costs of their employees and providing social services for employees until they are deported.

73. Fuentes & Javier, *supra* note 61, at 8.

74. *Id.* at 9–10.

75. Cornelius, *supra* note 62, at 388.

76. *Id.* at 389.

77. *Id.* at 388.

In 1985, the Spanish parliament passed its first detailed immigration law, *La Ley Orgánica 7/1985 sobre derechos y libertades de los extranjeros en España* (the “*Ley*”).<sup>78</sup> In light of these new immigration policies, Spain began to increase restrictions on obtaining a visa<sup>79</sup> and placed quotas on the number of visas granted.<sup>80</sup> This first attempt at a comprehensive system for regulating immigration was criticized for its focus on border protection as opposed to economic regulation and for not recognizing immigrants’ rights.<sup>81</sup> Another criticism of this *Ley* was that it was vaguely worded, culminating in regional and provisional authorities being chiefly responsible for the *Ley*’s interpretation.<sup>82</sup>

After reforms of *La Ley Orgánica* in 1991 and 1996,<sup>83</sup> the Spanish parliament enacted a new *Ley Orgánica*. The 1999 *Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social* called for an amnesty program for immigrants who had been in Spain for at least two years, renewed work permits for unemployed immigrants who had previously been employed, and granted the right to join a labor union to both legal and undocumented immigrant workers.<sup>84</sup>

Despite the *Leys*’ restrictions, Spanish policy makers still recognized that Spain needed workers from abroad, and this was reflected in the 1985 *Ley* and its subsequent amendments.<sup>85</sup> Spain’s population demographics could not and still cannot sustain the demand for labor that has resulted

---

78. The law’s title in English is “The Law Regarding the Rights and Liberties of Foreigners in Spain” (translation by the author).

79. *Id.* at 14, 16–17. In 1991, when its reciprocity agreements with Morocco and Tunisia expired, Spain reintroduced its requirement that citizens of Maghreb countries (Morocco, Algeria, Tunisia, and Libya) have visas. Additionally, Spain denounced many of the immigration agreements that it had shared with Latin American countries.

80. JULIE R. WATTS, IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION: UNIONS AND EMPLOYERS IN UNLIKELY ALLIANCE 26 (2002).

81. Fuentes & Javier, *supra* note 61, at 10–12. Given Spain’s close proximity to northern Africa, this insistence on border protection is understandable. Some of the human rights criticisms of the *Ley* include its lack of recognition of family reunification rights, its implementation of strict policies for gaining residency permission, and its failure to address immigrants’ need for social services.

82. *Id.* at 25.

83. *Id.* at 30–31. The 1991 reforms sought to improve the quota system for foreign workers, to reduce the illegal employment of foreign workers, and to reduce immigration to Spain by improving conditions in emigrant countries. The 1996 reforms made it easier for separated families to reunify in Spain and made it possible for the spouses of immigrants to obtain work permits.

84. *Id.* at 32.

85. Fuentes & Javier, *supra* note 61, at 26–27. Reasons for the need for workers from abroad include Spain’s negative birth rate and the need for low production costs for agriculture and other industries. Because of these national needs, the Spanish government took a lackadaisical approach to immigration enforcement and did not attack the “black economy” supported by undocumented workers that was prevalent in many parts of the country.

from its economic growth.<sup>86</sup> Thus, while Spain has had a history of shutting out undocumented immigrant workers, Spain's economy relied and continues to rely heavily on such workers.

## 2. Italy

Unlike Spain, Italy has a long history of utilizing labor from undocumented workers. The strength of Italy's underground economy and the underground economy's reliance on undocumented labor has made it difficult for authorities to implement and enforce immigration laws.<sup>87</sup> As both employers and laborers benefit from underground labor, the government has been hesitant to stifle the underground economy.<sup>88</sup> Amnesties in the late 1970s and early 1980s lessened the restrictive effects of Italy's historically burdensome, but unenforced, immigration policy. These amnesties had the unintended effect of encouraging even further illegal immigration.<sup>89</sup>

Until the 1980s, immigration policy in Italy was dictated primarily by government administrators.<sup>90</sup> The Italian parliament addressed this problem with its first immigration legislation, the 1986 Foreign Workers and the Control of Illegal Immigration Law (the "Foreign Workers Law").<sup>91</sup> The Foreign Workers law provided sanctions for employers for violations of immigration law and implemented a legalization process for undocumented residents.<sup>92</sup> In 1990, the Italian parliament responded to the

86. This was especially true in the late 1980s and early 1990s, when droves of immigrants worked on construction for facilities for the 1992 Olympics, Expo '92, and a new airport in Barcelona. Cornelius, *supra* note 62, at 396–97. Even though Spain has traditionally had high unemployment rates, it still accepts labor from abroad because many native workers refuse to take low-wage, unskilled jobs. *Id.* at 400–01.

87. WATTS, *supra* note 80, at 33–35.

88. *Id.* at 35.

89. *Id.* For example, anyone entering the country was required to register with the police within three days of arrival until the 1980s.

90. Kitty Calavita, *Italy: Economic Realities, Political Fictions, and Policy Failures*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 345, 366–67 (Wayne A. Cornelius et al. eds., 2004).

91. *Id.* at 367.

92. *Id.* The Italian government was criticized for not enforcing sanctions against employers and because the law was ineffective in encouraging employers to apply on their employees' behalf. A main problem with Italian immigration law is that procedures that are in place are rarely enforced. *Id.* at 368. One commentator described the Italian government's attitude:

Rome seemed far less interested in the early 1990s in enforcing employer sanctions than in arresting and repatriating Brazilian prostitutes . . . . When asked how many employer sanctions fines had been levied, a senior official from the Ministry of Labor smiled and responded, "What shall I say?" . . . In addition to this bureaucratic confusion is the difficulty

problems of the Foreign Workers law by implementing the Martelli Law, which introduced a quota system for determining when to grant visas and allowed immigrants themselves to apply for legalization rather than requiring employers to apply.<sup>93</sup> Law No. 40, passed in 1990, modified the quota system by allowing more employer influence in government immigration decision-making, creating a permanent legal resident status for foreigners and declaring rights for immigrants in Italy. These rights include the right to equal treatment for Italian workers, the right to access the public health system for documented workers, the right to emergency medical care for documented workers, and, finally, the right to attend public school for undocumented workers.<sup>94</sup> In sum, these laws illuminate Italy's attempts to balance employer interests with undocumented immigrant workers' rights.

### 3. France

France's history of immigration has gone through cycles of open immigration policies followed by restrictive policies. In contrast to Italy and Spain, France encouraged immigration in large numbers immediately after World War II.<sup>95</sup> However, slow economic growth as a result of the oil crisis of 1973 decreased demand for foreign labor and caused France to reconsider its laissez-faire attitude regarding immigration policies.<sup>96</sup> New legislation adopted in 1974 gave the government the broad discretionary power to deport any non-citizen for any violation of immigration laws, including entering or remaining illegally.<sup>97</sup> Also, the French government

---

of regulating employers in the submerged economy, where illegal immigrants and their employees are, by definition, beyond the pale of government regulation.

*Id.*

93. *Id.* at 368–69. This legalization system was much more successful than that requiring employers to apply.

94. *Id.* at 370–371. These provisions, like other Italian immigration laws, suffer from a lack of enforcement.

95. Virginie Guiraudon, *Immigration Policy in France*, BROOKINGS INSTITUTION, Jan. 1, 2002, [http://www.brookings.edu/article/2002/0101france\\_guiraudon.aspx](http://www.brookings.edu/article/2002/0101france_guiraudon.aspx).

96. WATTS, *supra* note 80, at 43. Even though the French government did not make a great effort to exclude immigrants, it should be noted that immigrants enjoyed few official rights and could be deported virtually without cause. Because the French government had made it a practice to interpret some immigration laws in favor of immigrants and to ignore others, French courts sided with immigrants after the government began attempting to restrict visa access after the economic conditions worsened in the 1970s. A.C. Evans, *Immigration Law Reform in France*, 32 INT'L & COMP. L.Q. 516, 516–18 (1983).

97. *Id.* at 519. Immigrants could be deported when “such action is deemed conducive to the public good.” *Id.*

began to focus on assimilating immigrants who had lived in France for some time.<sup>98</sup>

The election of Jacques Chirac's conservative government marked another shift towards restrictive immigration policies. Chirac focused on social problems that he claimed stemmed from the presence of undocumented immigrant workers as he argued that open immigration policies would threaten the French social order.<sup>99</sup> François Mitterand furthered Chirac's conservative agenda by restricting family reunification, denying immigrants access to some government benefits, and taking away the automatic right to citizenship of second generation immigrants.<sup>100</sup> However, Mitterand's administration also granted amnesty to over 140,000 immigrants from 1981 through 1983 who were able to prove that they were already working in France.<sup>101</sup>

Upon the election of Lionel Jospin's socialist administration in 1997, immigration laws became less restrictive. Jospin proposed a policy that balanced France's economic needs with its desire for cultural stability and offered a four-pronged policy:

[F]irst, laws to welcome immigrants but combat illegal immigration and black labor markets; second, cooperation with sending states to help control immigration at its source; third, a comprehensive review of immigration and nationality law by an interministerial task force; and fourth, reviewing the situation of undocumented immigrants on a case-by-case basis.<sup>102</sup>

This progressive stance on immigration led to the Chevènement Law, which relaxed immigration policies and was to be interpreted in the "spirit of openness."<sup>103</sup> Thus, French immigration policy seems to value openness and the rights of illegal workers.

98. WATTS, *supra* note 80, at 45.

99. *Id.* at 47.

100. *Id.* Second generation immigrants were required to apply for naturalization and take an oath of allegiance to France.

101. *Id.* at 46.

102. *Id.* at 48. The purported goal of the task force was to find common ground for policy between conservatives and progressives. *Id.* at 49.

103. Mirielle Rosello, *Fortress Europe and Its Metaphors: Immigration and the Law* 10 (Working Paper Series in European Studies, Vol. 3, No. 1, 1999), available at <http://uw-madison-ces.org/papers/rosello.pdf>.

#### 4. *Summary of the Spanish, Italian, and French Approaches to Immigration*

The fact that Spain, Italy, France, and the other nations that comprise the E.U. may have similar goals for their immigration policy does not mean that the nations have the same immigration policies, nor does it mean that their policies can even co-exist. The fact remains that the immigration laws of each nation serve that nation's self-interest, and that undocumented immigrant workers can easily cross national borders once they are in the E.U.<sup>104</sup> Even though the E.U. has expressed a desire to form a common immigration policy,<sup>105</sup> the E.U.'s limited resources have prevented it from accomplishing this. In the United States, allowing private parties to collect damages for violations of immigration policy under RICO has proven to be an effective way to compensate parties while not diminishing limited government resources.<sup>106</sup>

A similar scheme allowing for private damages for violations of immigration law is possible for the E.U. This brand of regulation could help standardize immigration policy, while still allowing Member States to develop policies that reflect their particular interests. It would definitely behoove the E.U. and its Member States to adopt the American approach, which allows compensation for those who are harmed by immigration violations.

### III. COMPETITION LAW: PRIVATIZATION OF ENFORCEMENT AS A STEP TOWARD UNIFORM ENFORCEMENT

To date, the E.U. has not implemented an E.U.-wide statute that would allow civil damages for immigration violations. However, the E.U. could utilize a portion of its existing, unrelated law to allow for the private enforcement of immigration violations. Rather than expanding a current law as the United States did with RICO, the E.U. could apply its competition laws<sup>107</sup> as they are currently written to allow private party damages for these violations.

---

104. See *supra* Part II.A.

105. Watts, *supra* note 80, at 130 ("The European Council's plans to harmonize member state immigration policies mark a new step in the European Union after the common market, common currency and Schengen." (citing Romano Prodi, Speech at the European Council Summit, Tampere, Finland, Oct. 16, 1999).

106. See *supra* Part I.

107. "Competition law" refers to what Americans call "antitrust law." For the purposes of this Note, the terms are synonymous. To respect the nomenclature favored in both jurisdictions, this Note uses "competition law" when referring to European law and "antitrust law" when referring to

### A. Applying Competition Law to Immigration Violations

Articles 81 and 82 of the E.C. Treaty<sup>108</sup> provide the foundation for European competition law. Article 81 prohibits unfair competitive advantages including agreements to fix prices, limit production, apply dissimilar conditions to equivalent transactions, and tie products that have little or no connection to each other.<sup>109</sup> The prohibition against “agreements” and “concerted practices” that may affect trade between Member States and which “fix purchase or selling prices or any other trading conditions”<sup>110</sup> could be used to allow private parties to seek damages for immigration violations.<sup>111</sup>

Article 82 prohibits firms in a dominant position from using that position to impose unfair trading conditions on their competitors.<sup>112</sup> Smaller firms that are at a competitive disadvantage because a dominant competitor has utilized cheaper undocumented workers could recover damages under Article 82.

American law. For a discussion of the history of European competition law as it relates to German competition law, see Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT’L L. 474 (2005).

108. Article 81 was formerly known as Article 85. Article 82 was formerly known as Article 86. This Note refers to the Articles by their new designated numbers.

109. Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33, art. 81–81(1)(d) [hereinafter E.C. Treaty] (“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which . . . apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage . . .”). The prohibition against “concerted practices which may affect trade between Member States” would be the clause that would most often be used to justify private party claims. “Agreements between undertakings” and “decisions by associations of undertakings” could be used in limited circumstances, such as when firms in an industry collude to hire cheaper undocumented workers to suppress wages. Article 81(2) voids any agreement that falls under Article 81(1). Article 81(3) provides for limited exemptions from 81(1).

110. E.C. Treaty art. 81(a).

111. This would be most effectively used by injured competitors who compete in industries, such as farming, that primarily rely on cheap labor from undocumented workers. A private plaintiff who uses only documented laborers would sue competitors for any business the plaintiff has lost from his competitive disadvantage. This remedy addresses the injury to competitors due to a competitive disadvantage seen in *Commercial Cleaning Services, L.L.C. v. Colin Serv. Syst.*, 271 F.3d 374, 382 (2d Cir. 2001).

112. E.C. Treaty art. 82(a). (“Any abuse by one or more undertakings of a dominant position . . . shall be prohibited . . . in so far as it may affect trade between Member States. Such abuse may, in particular consist in: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.”). Article 82(a) is the only provision in Article 82 that could be used to impose private party claims for competition violations for immigration violations.



European Court of Justice (E.C.J.) decisions provide further guidance for interpreting Articles 81 and 82 in this manner. *Etablissements Consten, S.A.R.L. v. Commission* shows that the Articles should be construed broadly when analyzing whether or not an action threatens competition.<sup>113</sup> The mere ability to threaten competition is enough for an act to be incompatible with the common market.<sup>114</sup>

### *B. Potential Problems Applying Competition Law to Immigration Violations*

There are several provisions of competition law that would limit when a plaintiff could bring a suit based on competition law.

To raise a claim under Article 81, there must be an “agreement[] between undertakings,” a “decision[] by associations of undertakings,” or a “concerted practice[].”<sup>115</sup>

E.U. law has not specifically defined whether or not an employment agreement qualifies as an “agreement.” Neither has the E.C.J. addressed the issue, since most of its cases involve agreements between firms.<sup>116</sup> If one party maintains all power in what poses as an agreement, no agreement exists, and Article 81 does not apply.<sup>117</sup> Therefore, for a wage suppression suit, a group of employees who are hired illegally would need to have sufficient negotiating power to make the employment agreement bilateral for a third party to sue. Also, the agreement must be between undertakings. All juristic persons involved in economic activity are encompassed within an “undertaking.”<sup>118</sup> “Decisions by associations of undertakings” would be subject to the same definitional standards as “agreements between undertakings.” The “concerted practice” framework would probably not apply to most situations involving immigration

---

113. Joined Cases 56 & 58/64, *Etablissements Consten, S.A.R.L. v. Comm'n*, 1966 E.C.R. 299 (“[W]hat is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.”).

114. *See id.*; Case 22/78, *Hugin v. Comm'n* 1979 E.C.R. 1869; Case 193/83, *Windsurfing v. Comm'n* 1986 E.C.R. 611.

115. E.C. Treaty art. 81.

116. *See, e.g.*, Commission Decision of 8 February 1980, *Bundesverband Deutscher Stahlhandel*, 1980 O.J., L 62/28.

117. Silke Brammer, *Joined Cases C-2/01 P and C-3/01 P. Bundesverband der Arzneimittel-Importeure e.V. and Commission v. Bayer AG (E.C.J. January 6, 2004)*, 11 COLUM. J. EUR. L. 437, 445 (2005) (explaining that an agreement exists in a unilateral situation if the weaker party consents to the agreement, but that continuance of a relationship does not imply consent).

118. Alexander J. Black, *European Law and Public Utility Open Access*, 10 FLA. J. INT'L L. 117, 164 (1995).

violations since concerted practices involve coordination between competing firms.<sup>119</sup>

A firm must be in a “dominant position” to violate Article 82.<sup>120</sup> Additionally, the firm’s conduct must extend beyond national borders for Article 82 to apply. Together, these provisions mean that only plaintiffs who are harmed by large corporations’ immigration violations could sue for private damages under Article 82. Although this certainly limits the pool of potential plaintiffs, it both provides a remedy for harms caused and acts as a powerful deterrent to those firms that are in the best position to benefit from the use of illegal workers—large corporations.

### *C. Damages for Competition Law Violations*

When the E.C. Treaty came into effect in 1958, there was confusion regarding how, and by whom, these provisions would be interpreted.<sup>121</sup> Regulation 17 responded to this confusion by determining when the Commission could enforce Articles 81 and 82.<sup>122</sup> In effect, Regulation 17 made it possible for the Commission to enforce the Articles’ provisions.<sup>123</sup> Although parts of Regulation 17’s provisions have been amended, the

119. A concerted practice is a “form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.” Case 48/69, *Imperial Chem. Indus. v. Comm’n*, 1972 E.C.R. 619.

120. The E.C.J. has defined a “dominant position” as a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.” Case 85/76, *Hoffmann La Roche v. Comm’n*, 1979 E.C.R. 461.

121. REIN WESSELING, *THE MODERNISATION OF E.C. ANTITRUST LAW 17* (Hart 2000).

122. Council Regulation 17/62, 1959–1962 O.J. SPEC. ED. 87 (EC). Regulation 17 allows the Commission to grant firms negative clearance for antitrust violations, and to determine infringement of Article 81 and Article 82 and its exemptions to violations as espoused in Article 81(3). Regulation 1/2003, adopted in December 2002, abandoned negative clearance requirements and allowed national courts to determine block exemptions under Article 81(3), which encouraged private litigation. Council Regulation 1/2003, *On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, art. 29, 2003 O.J. (L 1) 1.20. *But see* Michael Van Hoof, *Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison*, 19 *CONN. J. INT’L L.* 659, 667 (2004) (arguing that “obstacles not addressed by the new regulations” and “[s]ubstantive, procedural, cultural and economic factors” may provide a disincentive for private parties to seek damages). For further discussion on the implications of Regulation 1/2003, see Donncahd Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 *LOY. CONSUMER L. REV.* 431, 433 (2004) and Corinne Bergen, Note, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 *J. INT’L BUS. & L.* 203, 217 (2006).

123. *See also* Van Hoof, *supra* note 122, at 662 (noting that Regulation 17 deters antitrust violations through its notification requirements and by allowing private party claims).

Regulation is still important because it made it clear that the Commission could enforce Articles 81 and 82.

In *Courage Ltd. v. Crehan*, the E.C.J. made it clear that private parties could seek damages for competition claims.<sup>124</sup> In *Crehan*, in an agreement incidental to a merger, all pubs that were tenants were required to purchase their beer from Courage.<sup>125</sup> When Crehan's lease expired in 1991, his new lease with Courage required that he purchase a minimum amount of beer from Courage.<sup>126</sup> Crehan sued, contending that the beer tie was contrary to Article 81, and claimed that Courage charged significantly lower prices to pubs that were not contractually bound to purchase beer.<sup>127</sup> The court held that "[t]he full effectiveness of [Article 81] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."<sup>128</sup>

However, this right to claim damages may seem illusory to many plaintiffs because of the difficulty they face in bringing a claim. Current E.U. law strikes an inefficient balance between the Community's rights and responsibilities and national rights and responsibilities. Under current law, the Commission only has the injunctive power to force a party to cease its infringement of Commission law.<sup>129</sup> European courts have also upheld an individual's rights to sue under Articles 81 and 82.<sup>130</sup>

The Commission still lacks a power that will be essential if private parties are allowed to sue for violations of immigration laws: the power to assign damages.<sup>131</sup> After winning the right to a judgment in E.U. courts, parties that seek damages must raise that issue with the national court in

---

124. Case C-453/99, *Courage Ltd. v. Crehan*, 2002 E.C.R. 457, ¶ 37(1).

125. *Id.* ¶ 3.

126. *Id.* ¶ 5.

127. *Id.* ¶¶ 6–7. The suit was originally filed in the U.K. English law does not allow for private damages for such a claim. *Id.* ¶ 11.

128. *Id.* ¶ 26.

129. VALENTINE KORAH, *E.C. COMPETITION LAW AND PRACTICE*, 153 (6th ed. 1997).

130. See Case 127/73, *Belgische Radio en Televisie v. SV SABAM* 1974 E.C.R. 51 (Article 81 "create[s] direct rights in respect of the individuals concerned which the national courts must safeguard.").

131. Woods explains why the issue of damages is left to the national courts:

The issue of private enforcement of Community competition law is one of protecting Community law rights through adequate remedies and proceedings in the courts of the Member States. The division between rights on the one hand, commonly an area of Community legal competence, and remedies and procedural conditions, on the other hand, which are mostly left to national law, is fundamental to the structure of Community law. Given this distinction, the European Court of Justice ("ECJ") has stipulated that remedies and procedures for breach of Community law must be provided by the courts of the Member States.

Woods, *supra* note 122, at 434.

their jurisdiction.<sup>132</sup> When this situation arises, national laws determine procedural rules for interpreting E.U. law.<sup>133</sup>

In *Crehan*, the court made it clear that it is up to national courts to determine whether damages will be allocated.<sup>134</sup> Rather than mandating that national courts determine damages, *Crehan* merely permits them to do so.<sup>135</sup>

The fact that the E.U. at least allows private damages for competition violations provides a necessary foundation for damages for immigration violations. The E.U. is hesitantly heading in the direction of explicitly allowing private party damages for competition law violations. In 2005, the Commission released the *Green Paper: Damages Actions for Breach of the E.C. Antitrust Rules*, which aimed to “identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions . . . and for stand-alone actions . . . .”<sup>136</sup> The Green Paper addresses issues such as what evidence defendants should be forced to present, fault requirements for antitrust claims, damages, and the role of class action lawsuits.<sup>137</sup> While it addresses these issues within the context of what the law should be, the Commission makes it clear that E.U. courts currently cannot assign damages for private antitrust claims.<sup>138</sup> The Green

132. *Id.*

133. Georg Berrisch, Eve Jordan & Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT'L L. & BUS. 585, 587 (2004).

134. Case C-453/99, *Courage Ltd. v. Crehan*, 2002 E.C.R. 457, ¶ 30 (“Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.”); *id.* ¶ 33 (“[I]t is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.”).

135. *Id.* ¶¶ 27–28.

136. Commission Green Paper on Damages Actions for Breach of the E.C. Antitrust Rules, at 4, COM (2005) 672 final (Dec. 12, 2005). The Green Paper identifies its ultimate goal as protecting consumer interests and providing jobs. *Id.* at 3. The Green Paper is not binding law. *Id.* at 12. Rather, it acts as a solicitation of ideas from academics and practicing attorneys regarding what binding law should be. Research obtained as a result of the Green Paper could either inform the E.U. how it could implement private damages or it could inform Member States how best to address private damages in their courts.

137. *Id.* at 3–4.

138. *Id.* at 4.

The [European Court of Justice] has ruled that, in the absence of Community rules on the matter, it is for the legal systems of the Member States to provide for detailed rules for bringing damages actions. As the Community courts have no jurisdiction in the matter . . . , the courts of the Member States will generally hear these cases.

*Id.*

Paper does not recommend whether it would be better to force the national courts to assign private damages or allow E.U. courts to assign damages.

Because the Commission lacks the power to assign damages, national courts make this determination, causing confusion for plaintiffs.<sup>139</sup> Although they are authorized to enforce E.U. law,<sup>140</sup> national courts have played a minimal role in the enforcement of E.U. competition laws<sup>141</sup> because E.U. resources would otherwise be used for enforcement.<sup>142</sup> Because it lacks sufficient resources to deal with all competition law in Europe, the Commission has declared that national courts are the proper forum for competition cases despite the fact that national courts face many difficulties when attempting to deter such violation of competition law.<sup>143</sup>

National courts assigning jurisdiction to E.U. courts would be advantageous because E.U. courts would be better able to analyze dense antitrust law, and damage awards would likely be more consistent. However, it is unlikely that Member States would allow this since it would take away some of their judicial power.

The existence of national competition laws creates another complication in the enforcement of Community-wide competition law. National and E.U. laws exist concurrently,<sup>144</sup> meaning that an act must satisfy both national and E.U. requirements to be valid.<sup>145</sup> Nations can minimize this conflict by adopting legislation that encompasses E.U.

---

139. See Janet L. McDavid & Howard Weber, *E.U. Private Actions*, THE NATIONAL L.J., Apr. 25, 2005, at 2, available at [http://www.hhlaw.com/files/Publication/fb9a11e2-8ac3-41b4-a56d-144544c52ae5/Presentation/PublicationAttachment/a319a022-42c6-4bad-9124-ed777ea1bf44/1835\\_EU%20Private%20Actions.pdf](http://www.hhlaw.com/files/Publication/fb9a11e2-8ac3-41b4-a56d-144544c52ae5/Presentation/PublicationAttachment/a319a022-42c6-4bad-9124-ed777ea1bf44/1835_EU%20Private%20Actions.pdf). E.U. courts “do not provide for a private right of action. Instead, those questions are left to national law, which means that potential plaintiffs are left with little or no legal guidance in many jurisdictions. Only 12 member states (out of 25) appear to expressly permit private damages actions based on competition law, and only three expressly permit the enforcement of articles 81 and 82.” *Id.*

140. Case 14/68, *Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1.

141. For an analysis of how each national court deals with antitrust law, see European Commission, *The Application of Articles 85 & 86 of the EC Treaty by National Courts in the Member States (1997)*, available at [http://ec.europa.eu/comm/competition/publications/art8586\\_en.pdf](http://ec.europa.eu/comm/competition/publications/art8586_en.pdf). In this document, the E.U. contends that it retains the power in determining whether a situation qualifies for an exemption under Article 81(3) and that all other power rests with the member state courts. This document does not appear to contemplate E.U. courts allotting damages for antitrust violations.

142. KORAH, *supra* note 129, at 24 (noting that national courts also cannot grant exceptions under Article 81(3) and that national courts lose jurisdictional power when a Community proceeding begins under Articles 81 and 82).

143. *Id.* at 153–54 (discussing why it is unlikely that national courts will undertake many competition cases from Community courts).

144. *Cf. Wilhelm*, 1969 E.C.R. 1, ¶ 11. Nations may enact their own competition laws to protect competition within that nation. Obviously, these goals will sometimes conflict with Community-wide competition goals.

145. See WESSELING, *supra* note 121, at 120–21 (discussing the effects of this “double-barrier” system on antitrust enforcement and businesses).

antitrust law, but this national legislation will not supersede any applicable E.U. law. A major conflict can exist when a national law prohibits an action, but that action falls under an exception under Article 81(3). Thus, a major problem with utilizing competition law for the purpose of immigration regulation is the requirement that there be an agreement or collusion for Articles 81 and 82 to apply.<sup>146</sup>

#### IV. CONCLUSION

There are two main benefits to allowing private parties to seek damages for immigration violations. First, the parties who are injured by such violations are able to recover for their injuries. Allowing this tort claim puts the injured party in a similar or better position than it would have been in without the infraction. Second, it removes the economic incentive for hiring undocumented immigrant workers. Companies save so much money by hiring undocumented immigrant workers that the potential for criminal liability does not outweigh the economic incentive to hire them. This economic incentive is neutralized in the United States, where plaintiffs can recover triple their damages for immigration violations.<sup>147</sup>

A major issue with allowing private parties to seek damages for immigration violations is that it results in inconsistent enforcement of immigration laws. Whether or not a violator is punished depends on whether or not potential plaintiffs bring a lawsuit. A plaintiff's decision to sue hinges on financial factors, such as how many undocumented immigrant workers work for an employer and how much those workers are paid. That these factors will determine whether a suit is brought may lead potential violators to violate only when they can be assured that they will not be sued for their violations.<sup>148</sup>

Overall, allowing for private damages for immigration violations makes sense because it relaxes the burden on government to enforce rules, provides recovery for injured parties, and encourages plaintiffs to punish employers, not the undocumented immigrant workers themselves.

146. See E.C. Treaty art. 81(1) ("agreements between undertakings, decisions by associations of undertakings and concerted practices . . ."). See also EC Treaty art. 82 ("[a]ny abuse by one or more undertakings . . ."). See also KOVAH, *supra* note 129, at 154.

147. 18 U.S.C. § 1964(c).

148. Employers could possibly immunize themselves by waiver, by selecting employees who would be unlikely to sue, or by entering into fields in which it would be unlikely for a competitor to prove damages.

In the United States, allowing private parties to sue for immigration violations does not preclude enforcement of immigration laws if a potential plaintiff elects not to sue. Many RICO immigration cases have arisen after the defendant was charged with, or investigated for, criminal immigration violations.<sup>149</sup> In these instances, violations would not go unpunished if private plaintiffs declined to sue since the employer might have already been punished under criminal law.

It seems that using European antitrust law to allow for damages for immigration violations could be advantageous. However, there are still many obstacles that could prevent applying antitrust law to immigration fact scenarios.<sup>150</sup>

Perhaps the issue of a lack of agreement between entities<sup>151</sup> could be overcome by creatively interpreting the word “agreement.” An agreement between undertakings need not only be an agreement between two businesses. An employment agreement between an employer who hires workers illegally and the employee could suffice as an “agreement between undertakings.”

Another issue that arises when attempting to apply European antitrust law to allow for private damages for immigration violations is that Article 82 only applies to firms in a “dominant position.”<sup>152</sup> It seems that those firms that do not enjoy a dominant position would not fall under the auspices of Article 82. While this means that not all firms that hire immigrants illegally would be liable, the larger firms that use the lower wages undocumented immigrant workers are paid to obtain a competitive advantage could still be liable. Clearly, this loophole would probably do little to discourage smaller firms from violating antitrust laws.

The U.S. Congress came up with the best solution for allowing for private damages for immigration violations when it inserted the applicable language into the RICO statute specifically allowing for such damages. Any mechanism allowing for a private right of action short of a specific Commission or E.C.J. mandate will be inferior to RICO’s statutory mandate. Statutory provisions remove elements of doubt that lurk when

---

149. *See, e.g.*, *Commercial Cleaning Services, L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 379 (2d Cir. 2001); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d at 1163, 1167 (9th Cir. 2002); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 300 (D.N.J. 2005).

150. *See supra* Part III.

151. *See id.* Article 81 states in part, “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States . . . .” E.C. Treaty art. 81.

152. *See* E.C. Treaty art. 82.

attempting to fuse together disparate aspects of the law. If the E.U. is interested in utilizing this effective tool not only to dissuade companies from hiring undocumented immigrant workers, but also to provide compensation for those who have suffered financially because of immigration violations, it would do well to pass legislation specifically authorizing private party damages.

*Bryan Boyle\**

---

\* J.D. (2008), Washington University School of Law; B.A. (2001), Marquette University. I would like to thank Mom, Dad, Mary Ann, Jean, Shannon, Mark, and Lauren for their support.