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Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison

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Barry E. Hawk and Laraine L. Laudati

Abstract

This Article will discuss the historical context in which the competition law enforcement structures of the European Union and United States were created, describe the dual enforcement structures, and explain current efforts to coordinate the two levels of enforcement. It will conclude with observations about the nature of dual enforcement under the two systems. More specifically, it will argue that the European Union should create an enforcement system, which might allow more collaboration and cooperation between the Commission and the European Union Member States.

ARTICLES

ANTITRUST FEDERALISM IN THE UNITED STATES AND DECENTRALIZATION OF COMPETITION LAW ENFORCEMENT IN THE EUROPEAN UNION: A COMPARISON*

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INTRODUCTION

Competition laws in the United States and the European Union are implemented through a dual enforcement system. The split of antitrust enforcement authority between federal and state officials reflects the U.S. Constitution's division of power between federal and state governments. "Antitrust federalism" has come to signify that the state and federal governments play distinct, yet complementary roles in regulating the competitive process.

In contrast, in the European Union, the split of enforcement authority is governed by the principle of subsidiarity, which requires that the Community take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States."¹ In recent years, the Commission, overburdened with notifications under Article 85 and complaints under Articles 85 and 86 of the Treaty Establishing the

* This Article was presented on November 20, 1995, at an International Conference entitled, "Antitrust: Rules, Institutions, and International Relations." The Conference was held at the Autorità Garante della Concorrenza e del Mercato in Rome.

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1. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247, art. 3b [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).

European Community ("EC Treaty"),² has made efforts to effectuate the subsidiarity principle through its project to encourage decentralized enforcement of Community competition law. In this way, subsidiarity forms the basis for the Commission's allocation of tasks between itself and the Member States.

In both jurisdictions, authorities at the two levels continue to make efforts to define and shape their proper roles in the enforcement scheme, to coordinate enforcement, and to utilize scarce enforcement resources in the most efficient manner. State antitrust authorities in the United States have made progress along these lines in recent years through the National Association of Attorneys General ("NAAG"). Perhaps the EU Member States would benefit from establishing a similar organization.

This Article will discuss the historical context in which the two systems were created, describe the dual enforcement structures, and explain current efforts to coordinate the two levels of enforcement. It will conclude with observations about the nature of dual enforcement under the two systems. More specifically, it will argue that the European Union should create an enforcement system which might allow more collaboration and cooperation between the Commission and the EU Member States.

I. HISTORICAL CONTEXT IN WHICH FEDERAL ANTITRUST ENFORCEMENT WAS CREATED

A. United States

Prior to the enactment of the Sherman Antitrust Act ("Sherman Act") in 1890,³ a number of states took the initiative to prosecute the trusts of the day for their restrictive practices. This was done mainly through the use of corporation law and common law restraint of trade principles. The state of Kansas enacted the first antitrust law in 1889,⁴ and at least twelve other states did the same.⁵ Fourteen states and territories adopted constitutional

2. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by TEU, *supra* note 3.

3. 15 U.S.C. §§ 1-8 (1994).

4. Act of March 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389.

5. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY 155-60* (1954); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 658 nn.2, 3 (1993).

prohibitions of monopolies or other anticompetitive business forms before the Sherman Act became law.⁶ However, given the national dimension of the most important trusts, most notoriously the oil and sugar trusts, as well as their ability to restructure in order to evade problematic state laws, state enforcement quickly proved inadequate.

The Sherman Act⁷ was conceived as a means of supplementing state antitrust enforcement, and the states were enthusiastic proponents of the enactment of a federal antitrust law.⁸ Following the enactment of the Sherman Act in 1890 and the Clayton Act in 1914,⁹ federal antitrust enforcement largely dominated state antitrust enforcement. Until the 1980's, state antitrust enforcement played a relatively minor role and focused primarily on local matters, such as bid-rigging on state contracts.

The 1980's marked the period of greatest conflict during the 100 year co-existence of federal and state antitrust enforcement regimes. With the arrival of the Reagan Administration, federal enforcement was greatly reduced and was limited to prohibiting cartels and large horizontal mergers. In response, state antitrust enforcement was re-awakened, and its focus expanded to cover not only local matters, but also matters of multi-state or national scope. The NAAG formed an Antitrust Committee not only to aid enforcement of state antitrust laws, but also to promote state enforcement of federal antitrust laws through the various means available to the states. One area in which the state response was particularly evident was vertical restraints. The states remained vigilant in their enforcement in this area and published their own vertical enforcement guidelines in response to non-enforcement and more relaxed guidelines which had been published by federal enforcers.

With the arrival of the Bush administration, the period of limited federal enforcement came to an end, and federal agencies once again began to enforce federal antitrust laws more strictly. The states have remained active, however, and many states have increased their antitrust enforcement efforts in recent years.¹⁰ Currently, all fifty states and the six territories¹¹

6. THORELLI, *supra* note 5, at 155.

7. 15 U.S.C. §§ 1-8 (1994).

8. Gavil, *supra* note 5, at 660 n.9.

9. 15 U.S.C. §§ 12-27 (1994).

10. Interview with Milton A. Marquis, Senior Counsel to the Assistant Attorney

have either a state antitrust statute or constitutional provisions to enforce antitrust violations. Although most of the states' antitrust provisions are patterned on or are analogous to the Sherman Act,¹² prohibiting unreasonable restraints of trade and monopolization, they nonetheless vary from state-to-state and do not always coincide with federal antitrust law. Twelve states¹³ and Puerto Rico also have merger control statutes analogous to Section 7 of the Clayton Act. Many state statutes provide that they are to be interpreted consistently with federal precedent, and, generally, this is done.¹⁴

B. *European Union*

The history of the relationship between Community and Member State antitrust enforcers differs greatly from the relationship between the U.S. Federal Government and its states. The difference stems from the widely varying histories, cultures, and traditions with respect to economic organization of the fifteen EU Member States and the role of the state in law enforcement. Prior to the formation of the European Community in 1957, France and Germany were the only founding nations to have competition laws. Enforcement of such laws, however, was virtually non-existent. The French and German industrial economy was subject to control by state interventionism, either through nationalism combined with uncontrolled state aid, overregulation of industry, or both. These states did not accept or rely upon the market mechanism as a means of controlling the industrial economy. The Treaty Establishing the European Economic Community ("Treaty of Rome")¹⁵ incorporated this fundamental principle, namely, acceptance and reliance upon the market mechanism as the means of controlling the industrial economy and the substantive rules to control restrictive agree-

General for Antitrust, in Washington, D.C. (Nov. 1, 1995) [hereinafter Interview with Milton A. Marquis].

11. The territories are the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.

12. William J. Milliken & Stewart C. Myers, State Attorneys General and Antitrust Enforcement 2, 4 (1995) (unpublished paper, on file with the authors).

13. The states are Alaska, Hawaii, Louisiana, Maine, Mississippi, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Texas, and Washington.

14. ABA ANTITRUST SECTION: AMERICAN BAR ASSOCIATION, MONOGRAPH NO. 15, ANTITRUST FEDERALISM, THE ROLE OF STATE LAW (1988) [hereinafter ABA MONOGRAPH].

15. EEC Treaty, *supra* note 3.

ments, abuses of dominant position, and state aid incompatible with the common market.

The Treaty of Rome included the achievement of "a system ensuring that competition in the internal market is not distorted"¹⁶ as one of the fundamental objectives of the Community and incorporated basic competition rules envisioned as the means for achieving that objective. Competition was seen as a way to promote market integration, as well as a goal in itself. The Treaty of Rome's basic competition rules were set forth in Articles 85 and 86. The area of competition is one of the few areas where the Treaty of Rome provided the Commission with its own powers to implement the law, rather than requiring it to rely exclusively on the Member States for implementation. The Community adopted its Merger Regulation¹⁷ in 1989, approximately thirty years after the signing of the Treaty of Rome and following many years of negotiation.

Community competition law incorporated strong elements of subsidiarity from the outset, providing the basis for the jurisdictional divide between the Community and the Member States.¹⁸ Community rules were intended to create a level playing field for all enterprises throughout the European Union and to grant only the Commission the tools to review effectively cross-border arrangements. Community-level rules applicable to restrictions of competition and abuses of a dominant position were designed to apply only to situations where an appreciable effect on trade between the Member States could be established. In contrast, national rules would apply in situations where the primary effects were felt in markets within the boundaries of a single Member State. National competition law would also support Community law, helping to create a consciousness of the benefits of competition throughout the European Union. In merger cases, those transactions which satisfied certain threshold requirements would fall within the exclusive jurisdiction of the Commission, while others would be subject to Member State control.

16. EEC Treaty, *supra* note 1, art. 3(g).

17. Council Regulation (EEC) No. 4064/89 (of 21 December 1989 on the control of concentrations between undertakings), O.J. L 395 (December 30, 1989) [hereinafter Merger Regulation].

18. See H. Colin Overbury, *Politics or Policy? The Demystification of EC Merger Control*, in 1992 *FORDHAM CORP. L. INST.* 558 (Barry Hawk ed., 1993).

In the years between the entry into force of the Treaty of Rome in 1957 and the present, each Member State either enacted some form of competition law, or modified already existing laws which had been ineffective, with respect to restrictions of competition and abuses of a dominant position. Today, each of the fifteen Member States has enacted a competition law in these areas, nine of which substantially resemble those of the Community,¹⁹ and only four of which are still based on abuse control.²⁰ Eleven Member States have merger control legislation.²¹

II. CURRENT ENFORCEMENT STRUCTURES

A. *United States*

In the United States, public antitrust enforcement is the responsibility of the Department of Justice Antitrust Division ("Antitrust Division"), the Federal Trade Commission Bureau of Competition ("Bureau of Competition"), and the state attorneys general. Parallel federal and state court structures buttress their enforcement efforts.

1. Federal Enforcement

The Antitrust Division and the Bureau of Competition share responsibility for the enforcement of federal antitrust laws. These two governmental bodies coordinate their enforcement efforts to minimize the potential for duplication of effort on any specific task. In addition, the federal courts have a broad grant of jurisdiction so that they can hear both federal and, if certain requirements are met, state antitrust claims.

a. Antitrust Division

The Department of Justice is the nation's principal law enforcement body. It is headed by the Attorney General. Serving under the Attorney General is an Assistant Attorney General who is in charge of the Antitrust Division. As of 1994, the Antitrust

19. The competition laws of Belgium, Finland, France, Italy, Greece, Ireland, Portugal, Spain, and Sweden resemble the competition laws of the Community.

20. The competition laws in Denmark, Luxembourg, the Netherlands, and the United Kingdom are based on abuse control.

21. These Member States are Austria, Belgium, France, Germany, Greece, Ireland, Italy, Portugal, Spain, Sweden, and the United Kingdom.

Division consisted of a total of 686 employees, including 323 attorneys.²²

The Department of Justice is empowered to prosecute violations of antitrust laws, including the Sherman Act,²³ the Clayton Act,²⁴ and the Robinson Patman Act.²⁵ It holds the sole power to prosecute criminal antitrust violations and all federal antitrust actions in several sectors, including banking, telecommunications, and rail and air transportation. The Antitrust Division is responsible for clarifying its enforcement policies through guidelines and business review letters, participating in proceedings of regulatory agencies, testifying before Congressional committees to advocate competition-oriented solutions to national problems, filing amicus curiae briefs in selected cases, and promoting the notion of competition before professional associations, business groups, and other organizations.²⁶

b. Bureau of Competition

The Bureau of Competition is primarily responsible for enforcing the Federal Trade Commission Act,²⁷ which encompasses the antitrust provisions of the Sherman Act, the Clayton Act, and the Robinson-Patman Act, among others. The Federal Trade Commission ("FTC") may adjudicate complaints that it initiates after both the prosecution and the defense present evidence in an administrative trial.²⁸ The power to adjudicate is not frequently utilized, however, in antitrust cases.

c. Regional Offices of the Federal Enforcement Agencies

The Antitrust Division has seven field offices throughout the United States to facilitate enforcement in matters of regional concern.²⁹ The field offices perform the Antitrust Division's in-

22. *Id.*

23. 15 U.S.C. §§ 1-8 (1994).

24. 15 U.S.C. §§ 12-27 (1994).

25. 15 U.S.C. §§ 13-13b, 21 (1994).

26. Annual Report of the Attorney General 1985, *reprinted in* Trade Reg. Rep. (CCH) ¶ 8522, at 12,516 [hereinafter Annual Report].

27. 15 U.S.C. § 45 (1994).

28. Janet D. Steiger, *Effectively Enforcing Competition Laws: Some Aspects of the U.S. Experience*, in 1991 *FORDHAM CORP. L. INST.* 1, 17 n.48 (Barry Hawk ed., 1992).

29. *Id.* at 17. The field offices of the Antitrust division are located in Atlanta, Georgia; Chicago, Illinois; Cleveland, Ohio; Dallas, Texas; New York, New York; Philadelphia, Pennsylvania; and San Francisco, California. *Id.* at 17 n.46.

vestigatory and litigation functions, within their geographic area of responsibility. The field offices often work in conjunction with the offices of the U.S. Attorney, which are also located throughout the country. They also function as liaisons with state attorneys general and other regional law enforcement agencies.³⁰ Their workload is primarily focused on criminal enforcement, but they also handle some mergers and civil cases.³¹

The FTC maintains ten regional offices.³² The regional offices hold considerable authority to initiate and conduct investigations. They also receive assignments from the FTC's national headquarters in Washington. Matters initiated by the regional offices are subject to the same control procedures as those originating in Washington, i.e., approval of the FTC's national headquarters is required before formal charges can be brought.

The Antitrust Division's field offices and the FTC's regional offices facilitate regional enforcement for several reasons. First, regional offices are more likely to learn of local violations because they receive complaints, read local newspapers, and observe the activities of local businesses. Second, it is less costly for regional offices to investigate local matters, due to savings in travel expenses and time. Third, regional offices help promote more direct contact and cooperation with state officials.³³ The Justice Department's field offices play a crucial role in such cooperation efforts. Its Senior Counsel, responsible for coordination with the states, meets periodically with the field office chiefs and the chiefs of the state antitrust divisions in the field offices' territories.³⁴

d. Coordination Between the Federal Agencies

In 1949, the FTC and Antitrust Division initially developed a liaison mechanism to coordinate their enforcement efforts. This mechanism has been modified on several occasions over the

30. Annual Report, *supra* note 26, at 12,521.

31. *60 Minutes with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 63 ANTITRUST L.J. 323, 325 (1994) [hereinafter *60 Minutes with Bingaman*].

32. Steiger, *supra* note 28, at 17. The FTC's regional offices are located in Atlanta, Georgia; Boston, Massachusetts; Chicago, Illinois; Cleveland, Ohio; Dallas, Texas; Denver, Colorado; Los Angeles, California; New York, New York; San Francisco, California; and Seattle, Washington. *Id.* at 17 n.45.

33. *Id.* at 17.

34. Interview with Milton A. Marquis, *supra* note 10.

years. Under this mechanism, a staff member of either agency wishing to initiate an investigation must contact the liaison office whose clearance is needed before work begins. If both agencies indicate an interest in the same matter, the liaison officer must assign the matter to the agency which has greater expertise in the subject.³⁵ This mechanism has functioned well to prevent duplication of effort, as the two agencies have never considered the same transaction at the same time.³⁶

In recent years, the two agencies have made further efforts to coordinate their activities. One important step has been the issuance of joint guidelines to which both agencies subscribe.³⁷ The two agencies also announced that they will undertake new measures to streamline the pre-merger review required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR").³⁸

e. Federal Courts

In addition to the federal enforcement agencies, federal courts play a vital role in the enforcement of federal antitrust law, as they have exclusive jurisdiction to adjudicate claims under those laws. The federal court system consists of the Federal District Courts, twelve Circuit Courts of Appeals, and the U.S. Supreme Court. Each circuit court has its own precedent interpreting the broadly drafted antitrust statutes. In the absence of a Supreme Court decision, federal circuit courts are bound only by precedent within their circuit. Review by the Supreme Court is essentially discretionary, resulting in many circuit conflicts which persist for years or are never resolved.

35. Steiger, *supra* note 28, at 22.

36. *Roundtable Discussion with Enforcement Officials*, 63 *ANTITRUST L.J.* 951, 969 (1995) [hereinafter *1995 Roundtable Discussion*].

37. See, e.g., U.S. Dep't of Justice and Federal Trade Comm'n Horizontal Merger Guidelines (1992), *reprinted in* 4 *Trade Reg. Rep. (CCH)* ¶ 13,104; U.S. Dep't of Justice and Federal Trade Comm'n Antitrust Enforcement Policy Statements in the Health Care Area (1993), *reprinted in* 4 *Trade Reg. Rep. (CCH)* ¶ 13,151; U.S. Dep't of Justice and Federal Trade Comm'n Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (1994), *reprinted in* 4 *Trade Reg. Rep. (CCH)* ¶ 13,152; U.S. Dep't of Justice and Federal Trade Comm'n Antitrust Enforcement Guidelines for International Operations (1995), *reprinted in* 4 *Trade Reg. Rep. (CCH)* ¶ 13,107; U.S. Dep't of Justice and Federal Trade Comm'n Antitrust Guidelines for Licensing of Intellectual Property (1995), *reprinted in* 4 *Trade Reg. Rep. (CCH)* ¶ 13,132.

38. National Ass'n of Attorneys General, 22 *ANTITRUST REP.*, March/April 1995, at 14; see Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

Federal courts may have jurisdiction to decide state antitrust claims originally filed in state court if the defendant removes the case to federal court. Federal law allows the removal of “[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States.”³⁹ Under this provision, “pendent” state claims, which are claims made under state antitrust law arising out of the same facts or circumstances as federal claims, may be removed to federal court along with federal law claims.⁴⁰

2. State Enforcement

State enforcement of antitrust laws is carried out by state attorneys general and state courts. Similar to the cooperation between the Antitrust Division and the FTC, the state attorneys general coordinate their respective efforts through the NAAG. In addition, the NAAG exchanges information regarding investigations with representatives from the FTC and the Assistant Attorney General for Antitrust.

a. Enforcement by State Attorneys General

The office of the Attorney General⁴¹ of each of the fifty states has the power to enforce both federal and state antitrust laws. When a state investigates possible antitrust violations, state laws are usually relied upon and typically provide the attorney general with the power to subpoena documents and witnesses prior to the filing of an action. State statutes provide various remedies, including monetary damages, penalties, injunctions, revocation of corporate charters, and, in some cases, criminal fines and imprisonment.⁴² Some states empower attorneys general to bring criminal actions based on state law for antitrust violations.⁴³ As of 1994, approximately twelve states actively utilized

39. 28 U.S.C. § 1441(b) (1994).

40. *Pueblo Int'l, Inc. v. De Cardona*, 725 F.2d 823 (1st Cir. 1984).

41. In 43 states, the Attorney General is popularly elected. In the remaining seven states, he or she is appointed, selected by secret ballot of the legislature or the state supreme court, or appointed by the state's chief executive. *Milliken & Myers*, *supra* note 12, at 2.

42. *Id.* at 4. State Attorneys General may exercise all authority required to protect the public interest, unless the state legislature has deprived the Attorney General of specific powers. *Florida v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

43. *60 Minutes with Laurel A. Price, Chair, National Association of Attorneys General*

criminal enforcement authority.⁴⁴ The criminal laws of each state vary significantly with regard to the types of related offenses which may be charged in conjunction with an antitrust bid-rigging charge.⁴⁵

Statutory or case law in many states is stricter than federal law. The U.S. Constitution and Congress permit this federalist disharmony because the states have concurrent jurisdiction over antitrust matters affecting interstate commerce.⁴⁶ Moreover, although federal law could preempt state laws under the Supremacy Clause of the Constitution, either through express statement by Congress or to the extent that the two conflict, this has rarely occurred in the antitrust field.⁴⁷

Because few state judges are familiar with antitrust law, however, most state antitrust enforcers choose to file lawsuits in federal court and assert state antitrust claims as pendent claims.⁴⁸ There are generally three methods by which a state can assert state antitrust claims in federal court. First, a state has standing to sue under federal law as a private party, for damages or injunction, where the state itself has been injured as a purchaser of the goods or services which are the subject of the antitrust violation.⁴⁹ A state may also bring an action as *parens patriae*, on behalf of natural persons who are citizens of the state and who have been injured as a result of a violation of the Sherman Act,⁵⁰ under sections 4 and 16 of the HSR.⁵¹ Under the Supreme

Multistate Antitrust Task Force, 63 ANTITRUST L.J. 303, 305 (1994) [hereinafter *60 Minutes with Price*].

44. *Id.* at 318.

45. *Id.*

46. ABA MONOGRAPH, *supra* note 14, at 9-11.

47. See Barry E. Hawk & James D. Veltrop, *Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community*, in *PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAW: PROCEEDINGS OF THE LEIDEN EUROPA INSTITUUT SEMINAR ON USER-FRIENDLY COMPETITION LAW 30* (Piet Jan Slot & Alison McDonnell eds., 1993).

48. Interview with Milton A. Marquis, *supra* note 10; see Milliken & Myers, *supra* note 12, at 5. Section 4(c) of the Clayton Act empowers states to enforce federal antitrust law. 15 U.S.C. § 15(c) (1994).

49. See Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15, 26 (1994). A state may not bring an action for damages to the general economy of the state, but it may sue for injunctive relief to cure violations which damage the general economy of the state. Milliken & Myers, *supra* note 12, at 6. States may seek divestiture in merger cases under federal law. *California v. American Stores Co.*, 495 U.S. 271 (1990).

50. A state, however, is not permitted to bring such a claim in merger cases.

51. 15 U.S.C. §§ 1311-1314 (1994).

Court's ruling in *Illinois Brick Co. v. Illinois*,⁵² however, the citizens on behalf of whom such an action is filed cannot be indirect purchasers of the product from the defendant.⁵³ Second, state attorneys general acting collectively can bring a multistate action in federal court. Third, an attorney general can bring an action simultaneously with a federal agency in federal court.

b. Coordination among Attorneys General: NAAG

The NAAG, a trade association of attorneys general, was established in 1907 to promote communication among the chief law enforcement officers of each state and to assist in the delivery of high quality legal services to the states. Its activities include interstate cooperation on legal and law enforcement issues, policy research, and analysis. Enforcement activities are engaged in under the umbrella of the NAAG, but are, in fact, ad hoc enforcement decisions by particular attorneys general, either individually or collectively. The NAAG itself, however, has no authority to make such enforcement decisions.⁵⁴ In addition, the NAAG's coordination efforts among the states have included issuance of joint vertical restraints guidelines,⁵⁵ creation of a computer network among the state antitrust offices to coordinate litigation efforts,⁵⁶ and guidance to the business community through statements of general enforcement policy.

The NAAG Antitrust Committee is composed of nine attorneys general, who study substantive antitrust matters and recommend policy positions to the attorneys general. These positions are often the basis for testimony by attorneys general at Congress-

52. 431 U.S. 720 (1977).

53. Approximately 20 states have enacted statutes known as "Illinois Brick repealers." These statutes provide that indirect purchasers may recover for violations of the state antitrust law where overcharges were passed on to them by the direct purchasers. The Supreme Court upheld the legality of such statutes in *California v. ARC America Corp.*, 490 U.S. 93 (1989). This decision emboldened states to pass such statutes, and many more are expected to do so. *60 Minutes with Robert M. Langer, Chair, National Association of Attorneys General Multistate Task Force*, 61 ANTITRUST L.J. 211, 216 (1992) [hereinafter *60 Minutes with Langer*].

54. *1995 Roundtable Discussion*, *supra* note 36, at 980.

55. The guidelines do not bind individual attorneys general, who may vary or supplement the guidelines in their individual prosecutorial discretion. *National Ass'n of Attorneys General*, 22 ANTITRUST REP., March 1995, at 3.

56. This allows instantaneous circulation of drafts and documents, and eliminates the need for significant amounts of travel that would otherwise be necessary to coordinate prosecution of a single matter. *1995 Roundtable Discussion*, *supra* note 36, at 963.

sional hearings or in letters to Congress. The NAAG's Antitrust Task Force, composed of the principal antitrust attorneys from all fifty states, coordinates proposed joint antitrust actions among the states.⁵⁷ It functions as a loose confederation and the extent to which the states act in relative uniformity is "a tribute to the trust that state attorneys general have in the Task Force as an institution"⁵⁸ The Multistate Task Force, a staff-level group involving each state and territory, meets twice a year to coordinate matters of regional interest. It pursues multistate cases and submits *amicus curiae* briefs in cases before the U.S. Supreme Court.⁵⁹

In addition, an Executive Working Group on Antitrust, consisting of the five Commissioners of the FTC, the Assistant Attorney General for Antitrust, and five representatives of the NAAG, was established in 1989 to serve as a forum for exchanging information about investigations, discussing potential cooperative efforts, sharing resources, and developing stronger working relationships. The group meets two or three times per year to consult and coordinate antitrust enforcement initiatives.⁶⁰ For example, one plan for the group is to have staff-level working groups in areas of joint federal-state interest.⁶¹

c. State Courts

Each state has its own court system, which may include a trial court, an appellate court, and a supreme court. State courts adjudicate antitrust claims based on state law, but are not empowered to adjudicate federal antitrust claims.⁶² Because state courts are inexperienced in adjudicating state antitrust claims, however, parties often file state antitrust claims in federal court.

57. Steiger, *supra* note 28, at 19-20.

58. *60 Minutes with Langer*, *supra* note 53, at 214.

59. *See, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (debating issue of level of state supervision necessary to confer "state action" immunity on private parties).

60. *60 Minutes with Price*, *supra* note 43, at 305 n.3.

61. *Id.* at 305 n.4.

62. *See General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 271 (1922) (holding that right to sue under Sherman Antitrust Act "is to be exercised only in a 'court of the United States.' This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it." (citation omitted)).

B. *European Union*

The Commission and the competition authorities of the Member States enforce competition laws in the European Union. The courts of the Community, as well as the national courts of the Member States, are responsible for reviewing the decisions of the authorities. Likewise, the Member States delegate enforcement of the competition laws to a central body, the national competition authority. The decisions of the authority are, in turn, reviewable by one or more national tribunals.

1. Community Enforcement

Enforcement of Community competition laws is shared between the Commission and the Community Courts. The Commission's competition department prepares cases and renders final decisions on claims. The Community Courts can then review the Commission's decision.

a. The Commission

The Treaty of Rome supplied the Commission with independent powers to ensure the application of the competition laws, including Articles 85, 86, and the Merger Regulation.⁶³ All final decisions in competition cases are reached through a vote of the Commission.⁶⁴ Thus, the twenty Commissioners are the ultimate decision-makers in competition cases.⁶⁵ Their decisions, however, are reviewable by the Court of First Instance and the Court of Justice.

Directorate General IV ("DG IV"), the Commission's competition department, prepares cases based on notifications, complaints, or other means of learning of potential violations. DG IV is subdivided into seven directorates, each of which is headed by a Director. The staff of DG IV consists of 420 "functionnaires"

63. EC Treaty, *supra* note 2, art. 89.

64. Merger Regulation, *supra* note 17; First Reg. implementing arts. 85 and 86, 1959-62 O.J. Eng. Spec. Ed. 87, *amended by* Reg. No. 59, 1959-62 O.J. Eng. Spec. Ed. 249; Reg. No. 118/63/EEC, 1963-64 O.J. Eng. Spec. Ed. 55; and Reg. No. 2822/71, 1971 O.J. Eng. Spec. Ed. (III) 1035 [hereinafter Regulation 17].

65. Commissioners are appointed by their national governments for five-year renewable terms during which they cannot be dismissed. EC Treaty, *supra* note 2, arts. 157, 158. In making the appointments, the national governments consider both internal political concerns and acceptability to the other Member State governments. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 9 (2d ed. 1988).

located in Brussels. Of these 420, fifty percent are professionals, mainly lawyers and economists, and of that fifty percent, approximately half work on traditional antitrust matters⁶⁶ while the other half works on matters related to State Aid and Article 90.⁶⁷ An additional twenty-five professionals work with DG IV on temporary secondment from the competition authorities of the Member States. DG IV also consists of "rapporteurs,"⁶⁸ lawyers and economists who work on traditional antitrust matters. Although the number of rapporteurs was increased in 1989 with the establishment of the Merger Task Force, there has been little increase since then. Furthermore, the number of rapporteurs is unlikely to increase significantly, at least in the short term, due to budgetary constraints. Despite this fact, there will be some limited increase from the accession of new Member States.

Although the staff size of DG IV has remained stable, its workload has increased steadily. The number of new Article 85 and 86 cases increased from 293 in 1981 to 399 in 1992.⁶⁹ It also has a backlog of unresolved cases under these articles which numbered 1231 at the end of 1993.⁷⁰

b. The Community Courts

The Court of First Instance's jurisdiction to review competition decisions of the Commission is unlimited. It may cancel, reduce, or increase fines or penalties that the Commission imposes. The Court of Justice, in turn, may review decisions of the Court of First Instance.⁷¹

66. This includes Articles 85 and 86 of the EC Treaty and the Merger Regulation.

67. EEC Treaty, *supra* note 1, art. 90 at 50. Article 90 discusses the competition rules that apply to public enterprises in the EU Member States. *Id.*

68. OXFORD ENGLISH DICTIONARY (2nd ed. 1989). A rapporteur is "[a] person who prepares an account of the proceedings of a committee, etc. for a higher body." *Id.*

69. House of Lords Select Comm. on the European Communities, Enforcement of Community Competition Rules: Report with Evidence, Session 1993-94, 1st Report (London 1993), Ehlermann testimony, at 110 [hereinafter Lords Report].

70. *Id.*

71. Regulation 17, *supra* note 64, art. 17; Merger Regulation, *supra* note 17, art. 16; TEU, *supra* note 1, arts. 168(a), 173; Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, O.J. L 319/1 (1988). The Court of First Instance was created in 1989 to ease the workload of the Court of Justice. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 63 (3d ed. 1994). The Court of Justice delegates to the Court of First Instance cases having little political or constitutional importance. *Id.* To ensure that the Court of First Instance stayed in line, a right of appeal to the Court of Justice on points of law is granted. *Id.*

2. Member State Enforcement

Each of the Member States has a national competition authority designed to enforce its competition laws. The power of the national authority to enforce Community competition law varies, however, from state-to-state depending upon whether the specific Member State has adopted necessary enabling legislation. The Member States courts may apply Community law if private parties file the case. The current legal structure provides little reason for a national authority to raise claims under Community law.

a. National Authority Enforcement

The national competition authorities of the Member States have the power to investigate, make decisions, and impose sanctions. Their power, however, depends upon their degree of autonomy from political influence in executing these powers. Administrative decisions of the competition authorities are universally subject to review by a national tribunal of competent jurisdiction.

The investigatory powers of the Member States are generally more extensive than those of the Commission in two important respects: many of them may direct their investigatory efforts against individuals and sanction them for failure to cooperate, including imprisonment for failure to obey a court order. They also have police powers, including the possibility to obtain search warrants, which they may use to support their efforts to make on-site inspections.⁷² In contrast, the Commission may not direct its investigatory efforts against individuals or sanction them, nor does it have police powers. It may impose monetary sanctions on undertakings for failure to cooperate, and it may request the assistance of Member State authorities to complete an investigation. In addition, three Member States⁷³ provide

72. LARAINÉ L. LAUDATI, *SURVEYS OF THE MEMBER STATES' POWER TO INVESTIGATE AND SANCTION VIOLATIONS OF NATIONAL COMPETITION LAWS* 6 (1995).

73. These three Member States are Austria, France, and the Netherlands. In Austria, imprisonment and/or criminal fines may be imposed against "members of a cartel, organ, or tacit agent of a cartel or cartel member." All "entrepreneurs" of a cartel are to be held liable for fines jointly with the convicted person. *Kartellgesetznovelle*, §§ 129, 136 (1993). In France, criminal penalties may be imposed against individuals whose acts were crucial to the conception, organization, and implementation of prohibited practices. *Ordonnance du 1 Decembre 1986*, art. 17. In the Netherlands, violation of a

criminal sanctions for restrictive practices and abuses of a dominant position. Member state laws, however, may not be applied if they conflict with Community law regarding cross-border trade.⁷⁴

Article 88 of the Treaty of Rome empowers Member State competition authorities to apply Community competition law. Moreover, under the doctrine of direct effect,⁷⁵ Member State courts are empowered to adjudicate actions by private parties based on violations of Community competition law.⁷⁶ However, this authority is limited. Courts may prohibit restrictive practices and abuses of a dominant position, pursuant to Articles 85(1) and 86, only if the Commission has not opened procedures covering the same offenses.⁷⁷ Member State courts, however, may not grant exemptions for restrictive practices that meet the requirement set forth in Article 85(3). Instead, only the Commission can grant Article 85(3) exemptions.⁷⁸ National enabling legislation is required to allow national authorities to apply Articles 85 and 86 and to establish that national remedies apply. Seven Member States have adopted such enabling legislation,⁷⁹

Royal Decree prohibiting or obliging certain conduct after the Minister of Economic Affairs has found a dominant position to be contrary to the general interest is subject to criminal penalties. *LAUDATI*, *supra* note 72, at 71-73.

74. *Wilhelm v. Bundeskartellamt*, Case No. 14/68, [1969] E.C.R. 1, [1969] 8 C.M.L.R. 100.

75. Under the doctrine of direct effect, Community law imposes obligations and confers rights directly on the rationales of the Member States of the EU. The Court of Justice held:

[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case No. 26/62, [1963] E.C.R. 1, 12, [1963] 2 C.M.L.R. 105.

76. *Id.*

77. See Regulation 17, *supra* note 66, art. 9.

78. EC Treaty, *supra* note 2, art. 85(3) at 627; Regulation 17 *supra* note 66, art. 9. Once a "block exemption" to Article 85(1) has been established by regulation, it is directly applicable. Thus, national authorities may rely upon it.

79. These Member States include Germany, France, Italy, Spain, Belgium, Greece, and Portugal.

while eight have not.⁸⁰ Remedies vary considerably among the Member States based on deeply rooted historical differences and cultural attitudes.⁸¹ Thus, the rights of parties vary depending on the remedies offered by the Member State in which the action is brought.

Currently, in areas where Community law and national law coincide, there is little benefit for a national authority to raise claims under Community law. National provisions can often be applied faster and to greater effect.⁸² The remedies are often the same for both and are those provided by national legislation. Only the Commission can apply fines under the Community's provisions. Community law only provides an advantage when it prohibits acts which national law does not prohibit.⁸³

National authorities are skeptical about initiating proceedings under Article 85(1) because they fear the Commission's power to terminate those proceedings by filing its own action.⁸⁴ Moreover, they fear they will waste time and resources if the Commission can grant an exemption under Article 85(3) after they have found a violation under Article 85(1).⁸⁵

b. Member State Courts

In most Member States, the national competition authority is empowered to issue administrative decisions with respect to competition cases applying Member State law. National competition authorities also may apply Community law, subject to the aforementioned limitations. Such decisions are reviewable by one or more national tribunals. In addition, Member State courts are empowered to apply Community competition law in cases filed by private parties.

80. These nations are Austria, Denmark, Finland, Ireland, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

81. Lords Report, *supra* note 69, Ehlermann testimony, at 132.

82. H. Peter Von Stoephasius, *Enforcement of EC Competition Law by National Authorities*, in *PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAW: PROCEEDINGS OF THE LEIDEN EUROPA INSTITUUT SEMINAR ON USER-FRIENDLY COMPETITION LAW 33* (Piet Jan Slot & Alison McDonnell eds., 1993).

83. See Rainer Bechtold, *Antitrust Law in the European Community and Germany - An Uncoordinated Co-Existence?*, in 1992 *FORDHAM CORP. L. INST.* (Barry Hawk ed., 1993); Joachim Zekoll, *European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective*, 24 *VAND. J. TRANSNAT'L L.* 75 (1991).

84. Von Stoephasius, *supra* note 82, at 34.

85. *Id.*

III. COOPERATION BY ANTITRUST ENFORCERS AT DIFFERENT LEVELS OF GOVERNMENT

The desired end in both the European Union and in the United States is maximizing the use of enforcement resources and obtaining consistent results in the enforcement of similar laws. Each has taken different approaches towards the coordination of the efforts of their central and state authorities. In the United States, coordination has been the result of efforts by both the federal agencies and the states. In contrast, in the European Union, the efforts are driven by the Commission's need to decrease its unwieldy workload.

A. *United States*

In the United States, considerable efforts have been made to improve cooperation and coordination between federal and state antitrust enforcers. As discussed above, during the Reagan era of antitrust non-enforcement at the federal level, the states became active in their own enforcement activities and began to coordinate their activities through the NAAG. Thereafter, when federal enforcement was reactivated, the federal agencies were confronted with the need to coordinate their activities with their state counterparts. The states have not indicated whether they will relinquish the aggressive enforcement posture they developed. Aware of the potential benefits in terms of extending enforcement resources, Antitrust Division Chief James Rill and FTC Chairman Janet Steiger, working with individual states and with the NAAG, took the initiative to expand and improve coordination of federal and state enforcement⁸⁶ and to engage in joint enforcement.⁸⁷ Although such efforts to coordinate their

86. Laurel A. Price, Chair of the NAAG, explained:

When I started doing this some years ago, federal-state cooperation really amounted to various agencies of the United States sending people to state meetings and telling us what they could do for us. We literally understood that to mean, "If you have a good case, send it to us and we'll do something with it." We subsequently came to understand federal-state cooperation to mean, "If you have a good case, send it to us and we'll dismiss it." We have now come to understand federal-state cooperation to mean, "If you have a good case, let's come together and do it right."

Laurel A. Price, Chair, Remarks at the Roundtable Discussion with Enforcement Officials, National Association of Attorneys General, Multistate Antitrust Task Force, 63 ANTITRUST L.J. 951, 965-66 (1995).

87. 60 Minutes with Bingaman, *supra* note 31, at 329.

activities have continued and grown, merger control by states of transactions extending beyond a state's borders has been widely debated and is controversial because it raises difficult enforcement issues not raised in non-merger cases.⁸⁸

Currently, coordination is recognized to promote efficient use of scarce antitrust law enforcement resources and to improve consistency in the application of the federal and various state antitrust laws to the benefit of the business community. These efforts have taken many forms.

First, on several occasions in recent years where both federal and state enforcers have had an interest, they have initiated joint investigations,⁸⁹ joint actions,⁹⁰ and entered joint settlements. In the past year, the Department of Justice and the states have jointly investigated thirty matters, five of which resulted in joint consent decrees and ten of which are still pending.⁹¹ This has occurred primarily in cases involving mergers, horizontal price fixing, and resale price mechanisms ("RPM"). On occasion, cooperation efforts have involved cross-deputization, through which federal or state enforcement officials have been authorized to act in the other's enforcement jurisdiction as its agent.⁹² Federal officials have benefited from state officials' deep knowledge of their local communities to detect violations because it would be virtually impossible for federal agencies to

88. Federal and state governments disagree as to the substantive standards which should be applied to mergers. These differences are apparent from comparing the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992) *reprinted in*, 4 Trade Reg. Rep. (CCH) ¶ 13,104, with Horizontal Merger Guidelines of the National Association of Attorneys general (1993) *reprinted in*, 4 Trade Reg. Rep. ¶ 13,406. For instance, the two sets of guidelines apply different presumptions concerning the likelihood of anticompetitive impact upon the same levels of market concentration. See James P. Rill & Christine S. Chambers, ROBERT SCHUMAN CENTRE ANNUAL ON EUROPEAN COMMUNITY LAW (Claus-Dieter Ehlermann & Laraine Laudati eds., forthcoming 1997).

89. Joint investigations would be possible in the European Union. In fact, Article 14 of Regulation 17, Regulation 17, *supra* note 64, art. 14, 1959-62 O.J. Eng. Spec. Ed. 91, provides that national authorities may assist the Commission in carrying out an investigation and must assist when an undertaking opposes an investigation.

90. Joint filings would not be possible in the European Union because the Community has no power to enforce national law and, once the Commission initiates proceedings in a matter, national authorities would have no power to enforce Community law. Cooperation in parallel proceedings would be possible, but until now, has been virtually non-existent.

91. Interview with Milton A. Marquis, *supra* note 10.

92. Milliken and Myers, *supra* note 12, at 12.

monitor compliance of firms with the antitrust laws in a country as large as the United States.⁹³ In turn, federal officials have assisted the states in their enforcement efforts, particularly by providing the expertise of economists, the resource the states lack most.⁹⁴ Complex market definition and market power issues, often requiring many witnesses, would be difficult for a state to handle on its own.⁹⁵ These efforts have improved the consistency of the law's enforcement and have created partnerships between federal and state officials. The following are some examples of the most significant joint actions:

- * In 1995, the Department of Justice and the state of Pennsylvania jointly investigated, then filed parallel settlements with Playmobil toy company for violations involving RPM.⁹⁶
- * In 1994, the FTC and all fifty states jointly settled one case involving price fixing in the athletic footwear market in violation of federal and state law against Reebok⁹⁷ and a second case involving a resale price maintenance scheme involving Keds in the women's casual footwear market.⁹⁸
- * In 1994, the Antitrust Division and the Florida Attorney General jointly investigated and filed the first joint complaint in the Morton Plant/Meese Hospital merger.⁹⁹ A second joint action in a merger case between the Antitrust Division and the states of Maryland and Florida occurred in the BFI/Atwood case.¹⁰⁰
- * In 1994, the Antitrust Division and the state of Utah coordinated their prosecutions regarding price fixing by hospitals of their compensation levels for nurses. Utah completed its portion of the matter in state court at the same time that the Division's consent decrees were filed in federal court. It was the first example of the Antitrust Division deferring a

93. For instance, states are closer to health care markets than the Federal Government. The knowledge and expertise of state regulators regarding health care markets exceeds that of federal regulators. *60 Minutes with Bingaman*, *supra* note 31, at 330-31.

94. *1995 Roundtable Discussion*, *supra* note 36, at 968.

95. *Remarks of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 63 *ANTITRUST L.J.* 951, 968 (1995) [hereinafter *Remarks of Bingaman*].

96. National Ass'n of Attorneys General, 22 *ANTITRUST REPORT*, May/June 1995, at 18-19.

97. *Id.* at 1-2.

98. *Keds Corp.*, No. C-3490, 5 Trade Reg. Rep. (CCH) ¶ 23,463 (Apr. 1, 1994).

99. *United States v. Morton Plant Health Sys., Inc.*, No. 94-748-CIV-T-23E, 1994 WL 655199, at *1 (M.D. Fla. Sept. 29, 1994).

100. *1995 Roundtable Discussion*, *supra* note 36, at 978.

portion of the resolution of a matter to a state, thus, encouraging active state enforcement.¹⁰¹

- * In 1993, forty-five states and the District of Columbia filed suit jointly regarding program distribution practices in the cable industry. The five-year multistate investigation and filing of the suit were coordinated with the Antitrust Division. Consent decrees were filed simultaneously by the Antitrust Division in federal court.
- * The FTC and the states reached a simultaneous resolution in the Nintendo case.¹⁰²

As of 1995, the Antitrust Division had twelve ongoing civil investigations with state attorneys general and four criminal investigations.¹⁰³

Second, efforts have been made to increase information sharing between federal and state agencies. In the area of merger enforcement, where state enforcement has been challenged as inappropriate based on the unique timing, financial, and interstate commerce interests associated with mergers, the need for coordination was especially acute. In 1988, forty-five states executed the NAAG Voluntary Pre-Merger Disclosure Compact ("Compact"). It was designed to provide an incentive for merging parties to voluntarily provide the states with copies of their HSR filings and other materials which they provide to federal agencies.¹⁰⁴ In return, states would waive the right to utilize compulsory process to seek information regarding the transaction prior to the termination of the HSR review process.

The Compact was utilized little until the U.S. Supreme Court ruled that states have the right to obtain divestiture as a remedy in a merger case under Section 7 of the Clayton Act.¹⁰⁵ Thereafter, the members of the NAAG's Executive Working Group for Antitrust developed an Information Sharing Protocol ("Protocol")¹⁰⁶ under which the states could obtain access to HSR filings with the consent of the merging parties.¹⁰⁷ The fed-

101. *60 Minutes with Price*, *supra* note 43, at 306.

102. *60 Minutes with Langer*, *supra* note 53, at 215.

103. *Remarks of Bingaman*, *supra* note 95, at 957.

104. The Compact was revised subsequently to permit states to request supplemental materials. *60 Minutes with Price*, *supra* note 43, at 309-310.

105. *California v. American Stores Co.*, 495 U.S. at 271 (1990).

106. *62 Antitrust & Trade Reg. Rep.* (BNA) 338 (Mar. 12, 1992).

107. *60 Minutes with Langer*, *supra* note 53, at 214-15.

eral agencies implemented the Protocol.¹⁰⁸ NAAG representatives believed that the underutilized compact would become more popular due to the Protocol because the Protocol would increase business' awareness that it is in their interest to comply voluntarily.

Thereafter, the FTC ruled that states were no longer entitled to access materials which had not been filed in conjunction with a Hart-Scott-Rodino merger notification relating to mergers from its files under the traditional provisions of Section 6(f) of the Federal Trade Commission Act, as the protocol was intended to provide the exclusive means by which the states could obtain information from the Commission. The NAAG disagreed with this interpretation.¹⁰⁹

In 1995, the FTC and the Department of Justice announced a new policy to increase the sharing of information regarding mergers. It provided that states may receive information obtained from third parties, without revealing their identity, and staff analytic memoranda after the FTC has decided whether it will challenge the merger.¹¹⁰ The Compact and the Protocol are expected to diminish the risk of inconsistent enforcement by the states and federal Government by permitting communication and coordination of state and federal antitrust enforcers at the earliest stages of an investigation.¹¹¹

Third, federal and state agencies have referred complaints and investigation leads to their state or federal counterparts. For instance, the FTC has referred some matters in the health care field and the real estate listing field to the states. In turn, the states have referred cases which they did not have the resources to handle or that are more appropriately handled at the federal level.¹¹²

Fourth, new institutional structures have been created to promote federal-state coordination, such as the NAAG Executive

108. Program for Federal-State Cooperation in Merger Enforcement, 57 Fed. Reg. 8127 (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,212.

109. *60 Minutes with Bingaman*, supra note 31, at 339-40.

110. FTC News, Press Release, 21.6.95; National Ass'n of Attorneys General, 22 ANTITRUST REPORT, May/June 1995, at 2-3.

111. *60 Minutes with Langer*, supra note 53, at 215.

112. *60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission*, 61 ANTITRUST L.J. 187, 205 (1992) [hereinafter *60 Minutes with Steiger*].

Working Group for Antitrust.¹¹³ In 1994, the Antitrust Division appointed Milton A. Marquis to be Senior Counsel to the Assistant Attorney General. As such, Milton A. Marquis served as a liaison with state authorities in hopes of increasing communication and understanding between the Division and the states.¹¹⁴ Marquis has worked extensively with the NAAG Antitrust Task Force to coordinate federal and state enforcement efforts, as well as with individual state attorney general's offices.

Fifth, the states have submitted briefs as *amicus curiae* in support of the federal government's position in cases. Sixth, conferences are held regularly in which state enforcers meet with federal enforcers, during which they discuss a broad range of antitrust issues. They also hold joint training programs in a number of specific areas, including health care, telecommunications, cross-examination of experts, and the use of demonstrative evidence.¹¹⁵

Seventh, Assistant Attorney General Bingaman proposed that the states should have a right of first refusal for the criminal prosecution of matters of primarily local interest.¹¹⁶ Accordingly, states would have the right to prosecute violations of antitrust laws having primarily local impact, such as localized bid-rigging and price fixing in local markets.¹¹⁷ This proposal is currently being discussed. The comparative advantages of federal and state laws will be prime considerations in making case-by-case determinations. Finally, the federal agencies have provided the states with the opportunity to review and comment on their health care guidelines while in their formative stages.¹¹⁸

In addition to coordinating efforts directly with federal enforcers, states have taken the initiative to express their views directly to Congress regarding federal antitrust legislation initiatives. For instance, twenty-four attorneys general submitted a letter to Congress regarding legislation seeking to deregulate the telecommunications industry.¹¹⁹ They requested that Congress

113. See *supra* notes 54-61 and accompanying text.

114. Antitrust Division Annual Report for Fiscal Year 1994, at 23.

115. *Remarks of Bingaman*, *supra* note 95, at 957.

116. *Id.*

117. *60 Minutes with Price*, *supra* note 43, at 305.

118. *Id.* at 306-07.

119. National Ass'n of Attorneys General, 22 ANTITRUST REPORT, May/June 1995, at 3-4.

incorporate "basic antitrust principles and recognize the essential role of the states in ensuring that citizens have universal and affordable access to the telecommunications network."¹²⁰

Both federal and state enforcers recognize that they will not always reach agreement with respect to matters of mutual interest. However, they do not view this as inconsistent with or detrimental to their efforts at coordination. Several examples of areas where disagreement has occurred follow:

- * The most dramatic example pertains to enforcement policy with respect to vertical restraints. In the early 1980's, during the Reagan years, the Department of Justice did not challenge vertical restraints. In January 1985, the Department of Justice issued its vertical restraints guidelines, which expressed a policy of leniency with respect to such restraints. These guidelines were strongly criticized by many parties, including Congress. They were not adopted by the FTC and they were largely ignored by the federal judiciary. The NAAG opposed the policy expressed in the guidelines, and viewed it as "a 'political' document, designed to move the law in a particular direction."¹²¹ In December 1985, the NAAG issued its own vertical restraints guidelines, which it revised in 1987, in an attempt to state the law as the NAAG understood it at the time.¹²² The NAAG guidelines announced a much stronger enforcement position against vertical restraints.

Thereafter, the NAAG sought the withdrawal of the federal vertical restraints guidelines. This was realized in 1993 with an announcement to that effect by Bingaman, followed by an increase in enforcement efforts against vertical restraints by federal enforcers. In response, the NAAG established a working group to revise its vertical restraints guidelines, at least to decrease the rhetorical level.¹²³ On March 27, 1995, a plenary session of the attorneys general approved the revised guidelines.¹²⁴

120. *Id.*

121. National Association of Attorneys General, 22 *ANTITRUST REPORT*, March/April 1995, at 8.

122. *Id.*

123. *60 Minutes with Price*, *supra* note 43, at 306.

124. National Ass'n of Attorneys General, 22 *ANTITRUST REPORT*, March/April 1995, at 2. The major modification was a "market power screen," such that if the restraint occurs in a market where none of the parties have more than 10% of the relevant market it is extremely unlikely that the restraint will be challenged by an attorney general.

The revised guidelines do not mention the Justice Department guidelines as references to the guidelines present in the NAAG's earlier versions have been removed. The NAAG asserts, "the [NAAG] Guidelines are a significant reaffirmation of the primacy of the role of the states in the area of vertical restraints and will serve as a constant reminder that any risk assessment involves consideration of how a particular state Attorney General will evaluate the matter."¹²⁵

- * The NAAG submitted comments regarding the Department of Justice/FTC Joint Horizontal Merger Guidelines, some of which were accepted regarding merger analysis.¹²⁶ The NAAG thereafter revised its own Horizontal Merger Guidelines,¹²⁷ in order to maximize harmonization with the federal guidelines. With respect to the merger compact and protocol, FTC Chairman Steiger stated that cooperation between the FTC and the NAAG was not dependent upon the degree to which the NAAG followed the new Horizontal Merger Guidelines issued jointly by the two federal agencies.¹²⁸ She noted:

as the compact is invoked and used, it may be an important tool for increasing convergence in merger analysis, particularly important now with the new Guidelines. If we do assist the states in their merger analysis, and they are able to observe our analysis, I think over time what we are doing will become more understandable. In turn, that, I believe, will lead us to greater convergence in how we go about our work.¹²⁹

- * In the states' amicus curiae brief program, federal and state disagreement is frequently evident. For instance, in *Image Technical Services Inc. v. Eastman Kodak Co.*,¹³⁰ twenty-nine states filed an amicus brief taking a position regarding market power at odds with the Federal Government's position. Several states also filed an amicus brief taking a position different from both the federal position and the position taken in another amicus brief filed by a different group of

125. *Id.* at 4.

126. *60 Minutes with Langer*, *supra* note 53, at 219.

127. National Ass'n of Attorneys General, Horizontal Merger Guidelines (March 30, 1993), *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) No. 1608, Special Supplement (Apr. 1, 1993).

128. *60 Minutes with Steiger*, *supra* note 112, at 205.

129. *Id.*

130. 903 F.2d 612 (9th Cir. 1990), *aff'd*, 504 U.S. 451 (1992).

states, in *FTC v. Ticor Title Insurance Co.*¹³¹ States' amicus briefs which take positions differing from the federal position have also been filed in the areas of vertical restraints and the state action immunity doctrine.¹³² Federal-state disagreement is evident not only in the enforcement policies of the agencies, but also in the states' reactions to federal court decisions, such as the *Illinois Brick* decision.¹³³

B. *European Union*

The coordination and cooperation efforts which have been made in the United States in recent years have no parallel in the European Union. Instead, the relationship between the Commission and Member State enforcement authorities is focused on the Commission's recent efforts to "decentralize" enforcement of Community competition law. The long-term goal of the project is to have one Community competition statute applied throughout the Community by a network of DG IV, national competition authorities, and national courts. Each Member State would also be free to impose additional requirements for purely local phenomena. Although this decentralization effort is partially motivated by the subsidiarity principle, the main motivation is to expand the resources utilized to enforce Community rules, given DG IV's limited resources and extensive caseload resulting from its notification system. The Commission believes that the national authorities could greatly expand the detection and prosecution of violations of Articles 85(1) and 86 affecting markets within their jurisdiction.

An essential aspect of the Commission's decentralization effort is its belief that it, and the Member States, should apply the same competition rules to increase legal certainty for companies, create a level playing field, and eliminate forum shopping. Moreover, the Commission believes that multiple controls at the Community and Member State levels for the same conduct should be eliminated because they waste enforcement resources, risk divergent decisions, and unjustifiably raise costs to companies. Thus, the Commission urges that either it should exercise control on its own or a Member State authority should exercise

131. 922 F.2d 1122 (3d Cir. 1991), *rev'd*, 504 U.S. 621 (1992).

132. *60 Minutes with Langer*, *supra* note 53, at 212.

133. *See supra* note 53 and accompanying text.

control. Both should refrain from sharing control unless the circumstances merit joint prosecution.

Some Member States, such as Germany, have argued that national authorities should have the power to grant Article 85(3) exemptions, tempered by appropriate procedures, so as to determine competence and ensure uniform application of the law.¹³⁴ DG IV is not willing, however, to share its authority for the granting of exemptions under Article 85(3). This power "forms the very heart of the Community's competition policy," and its exercise requires a "qualified judgment as to the interests of the Community as a whole."¹³⁵ In applying Article 85(3), DG IV takes the position that it is able to "ensure that the core of Community competition policy remains identical throughout the Community," thus preventing "forum shopping and thus artificial distortions of capital flows."¹³⁶ Moreover, if the Member States had this power, an exemption granted by one national court or national authority would have to be respected by all other national courts and authorities.

In recent years, the Commission has urged national courts and national competition authorities to increase their enforcement of Community competition law. Specifically, it has encouraged them to bring actions against agreements and practices that affect trade between the Member States, and, therefore, have an impact on the Community as a whole. However, such efforts are unlikely to result in a substantial increase in national enforcement so long as the Commission retains the exclusive power to grant exemptions under Article 85(3).

1. National Courts

In 1992, the Court of First Instance affirmed the right of the Commission to decline complaints by private parties that raise no significant Community interest and where adequate redress is available at the national level.¹³⁷ Pursuant to this decision, DG IV now rejects such complaints, a policy which is expected to lead to a significant increase in the number of Community com-

134. Lords Report, *supra* note 69, Memorandum of the Federal Cartel Office, at 198, para. 4(a).

135. *Id.* Ehlermann testimony, at 116.

136. *Id.* at 116-17.

137. *Automec S.r.l. v. E.C. Commission*, Joined Cases T-24/90 & T-28/90, [1992] E.C.R. 2223, [1992] 5 C.M.L.R. 431 (Ct. First Instance).

petition law actions filed by private parties in national courts.¹³⁸ Accordingly, in 1993, DG IV issued its "Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty," ("Notice")¹³⁹ to aid national courts in dealing with such cases. A DG IV working group developed the Notice and the Member State Advisory Committee reviewed it. It sets forth a procedure to guide national courts in applying Community competition law.

The notice recognizes that national courts hold concurrent power with the Commission to apply Articles 85(1), 85(2) and 86 through the doctrine of direct effect. National courts are required to respect the exemption decisions taken by the Commission. National courts may also apply the substantive provisions of block exemptions, but may not themselves grant exemptions. Thus, the notice states that "individuals and companies have access to all procedural remedies provided for by national law on the same conditions as would apply if a comparable breach of national law were involved," including provisional remedies, injunctions, and damages.¹⁴⁰ Such relief is not available under Community law, which provides for only the imposition of fines.

2. National Competition Authorities

DG IV established a working group to explore ways in which national authorities could play a greater role in enforcing Community competition law. The members of the working group were personal appointees of the Directors-General of each of the national competition authorities and of the Director-General of DG IV. Its mission was to increase efficiency in the implementation of Articles 85 and 86, to determine whether decentralized enforcement is necessary and desirable to this end, and, if so, to establish the means for decentralized enforcement. The working group submitted a report to the Director-General of DG IV in September 1994, which contained various non-operational general conclusions. The report was not published, however, because it discussed many issues not yet resolved among the Member States.

138. Lords Report, *supra* note 69, Ehlermann testimony, at 114.

139. Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, O.J. C 39/5 (1993).

140. *Id.* at ¶ 11.

The most controversial issue before the working group related to the power to grant exemptions under Article 85(3). Another problem related to differences in discovery powers among the Member States and vis-a-vis the Community. The effort to resolve such issues is expected to lead to a communication on cooperation with the national competition authorities.

CONCLUSION

The dual competition law enforcement systems in the United States and in the European Union can be traced to vastly different historical roots. The future coexistence of competition enforcers at the two levels of government in the two systems is likely to develop along different lines.

In the European Union, the decentralization movement is motivated by the need to find solutions to the excessive caseload of DG IV, generated in large measure by its notification system, which its own machinery cannot handle. The Commission views decentralized enforcement by national authorities and the courts as a way to cope with the problem. But at the same time, the Commission encourages decentralized enforcement. It seeks to maintain a high degree of centralized control over the system because it believes this will best promote uniformity. Thus, the Commission argues that it must retain its authority over the granting of exemptions under Article 85(3). To do otherwise would result in national competition authorities rendering inconsistent decisions which would, thus, lead to forum shopping and the absence of a level playing field.

It is unlikely, however, that decentralized enforcement can be accomplished under current conditions. Most Member States lack a strong antitrust tradition. Instead, national competition authorities prefer to enforce national law because it is consistent with their cultural and economic background and with their experience and may allow greater freedom in their decision-making. Moreover, they gain no advantage from relying on Community law rather than national law in prosecuting competition law violations unless the acts at issue violate community law but not national law. Community law provides no separate remedies; the remedies which apply are those provided under national law. Most Member States have not even enacted enabling legislation

which would allow them to rely on Community law. Those that have enacted enabling legislation have made little use of it.

The disincentives to national authorities regarding enforcing Community law under such circumstances are considerable. While they are not able to grant exemptions under Article 85(3), they could decide that a violation exists under Article 85(1) only to find that it is later undermined if the Commission grants an exemption under Article 85(3).¹⁴¹ The Commission could initiate a proceeding in the same matter at any time, which would curtail the national authority's proceedings under Community law.

Unlike the situation in the EU Member States, the antitrust tradition in the U.S. states is well developed, based on common cultural and economic foundations and a shared national history. Conflicts between state and federal enforcers have been based on policy differences and the antitrust tradition in the states has proved to be a strong force during the Reagan years of federal non-enforcement. While state antitrust laws may differ in their particular provisions, they share a common core which is sufficiently well-defined, allowing states to identify and pursue their interests as a group, even when they are at odds with federal enforcers.

Moreover, the incentives to the states to enforce federal antitrust law are strong. Prosecuting violations of federal law allows them to file actions in federal courts, where federal antitrust precedent is binding and judges are experienced in handling complex antitrust cases. Once they satisfy the jurisdictional requirements, they are free to prosecute their claims with the benefits that federal law provides. They may pursue remedies provided under federal law, such as treble damages and divestiture.

The U.S. system, however, does create the problem of overlapping jurisdiction between federal and state antitrust law. Inconsistent results are not considered to be threatening, with the possible exception of mergers, because interpretation of state law often relies on federal precedent. In addition, arguments in antitrust cases are based on economic considerations, which are equivocal, whether made in federal or state court, under federal or state law.

141. Of course, the grant of an exemption would also nullify a ruling under Member State law which comes to an inconsistent conclusion.

Although resource limitations in the United States constrain federal enforcers from accomplishing all that they would like, federal enforcers have never viewed enforcement of federal law by state attorneys general as the solution to this problem. Rather, they have relied upon their own resources in the Washington headquarters, their field offices throughout the United States, and the offices of the U.S. attorneys. Moreover, they are better able to set priorities than their EU counterparts because they are not burdened with a notification system which generates countless hours of fruitless labor.

Federal officials view as desirable collaboration and coordination with state attorneys general because it results in a more efficient use of enforcement resources, increases the likelihood of consistent results, and benefits the business community. Through the efforts of the NAAG and federal enforcers, collaboration efforts have grown and taken new forms. In recent years, joint investigations, joint filings, new systems for sharing information, institutional innovations, and amicus brief programs all evidence a new era of federal-state cooperation.

The EU Member States could reap similar benefits from forming their own association of heads of national competition authorities. Rather than always reacting to proposals from the Commission, it would provide them with a forum for developing their own proposals. It would allow them to identify areas of common interest which do not involve the Commission, such as sharing information in merger and other cases within their jurisdiction. It would also allow them to work towards common positions in resolving issues with the Commission. Such an organization could greatly aid the development of a stronger competition enforcement orientation among all of the Member States. Finally, the European Union should consider the creation of a regional court system which would have jurisdiction to consider not only competition cases brought under Community law, but also those brought under national law, through a mechanism such as removal jurisdiction.