

ALEJANDRO LEÓN-VARGAS

Modernization of European Community Competition Law: A Comparative Analysis With
Some Procedural Issues of U.S. Antitrust Law

(Under the Direction of GABRIEL WILNER)

The modernization of EC Competition Law is discussed as a necessity on the European Union. Its counterpart, the U.S. Antitrust Law system followed a different evolution. The legislation, institutions and procedures remark the differences among these advanced systems of market control. The role of the EC Commission, national authorities and national courts of Member States will determine the elements to change. Its American counterpart, the Antitrust Division, the Federal Trade Commission, and the federal courts, developed the most effective and dynamic pathways for antitrust enforcing. The analysis of both frameworks must consider several factors, other than legal factors. The relevance of EC Competition Law must be observed in the context of new issues: EU enlargement, external relationship with third states, extraterritoriality of EC law application, etc.

INDEX WORDS: EC Competition Law, U.S. Antitrust Law, EC Law Modernization,
Competition Procedures, Antitrust Procedure

MODERNIZATION OF EUROPEAN COMMUNITY COMPETITION LAW: A
COMPARATIVE ANALYSIS WITH SOME PROCEDURAL ISSUES OF U.S.
ANTITRUST LAW

by

ALEJANDRO LEÓN-VARGAS

J.D., Instituto Tecnológico Autónomo de México, México, 2000

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial
Fulfillment of the Requirements for the Degree

MASTER OF LAW

ATHENS, GEORGIA

2001

© 2001

Alejandro León-Vargas

All Rights Reserved

MODERNIZATION OF EUROPEAN COMMUNITY COMPETITION LAW: A
COMPARATIVE ANALYSIS WITH SOME PROCEDURAL ISSUES OF U.S.
ANTITRUST LAW

by

ALEJANDRO LEÓN-VARGAS

Approved:

Major Professor: Gabriel Wilner

Committee: Fredrick W. Huszagh

Electronic Version Approved:

Gordhan L. Patel
Dean of the Graduate School
The University of Georgia
December 2001

DEDICATION

A mis padres y mi hermano.

To Prof. Wilner and Gisele.

To my friends in Athens, GA.

To the LL.M. Class 2000.

To that unexpected person that fulfilled my life with joy during this year.

ACKNOWLEDGMENTS

The preparation of this modest document would have never been possible without the support and trust of many people.

My parents and my brother: you are the pillar that gives me support in happiness and sadness;

Prof. Gabriel Wilner and his wife Gisele: thank you for encouraging my academic career and trusting me. I'll never forget every advice, joy and moments shared with you;

My friends in Athens: each one of you taught me a new incredible significance of the word 'friendship';

Last, but not least, the students of the LL.M. Class 2000: every moment spent among you, dear friends, was an unforgettable exchange of experiences with people from different cultures.

TABLE OF CONTENTS

	Page
ACKNOWLEDGMENTS	v
INTRODUCTION	1
CHAPTER	
1 STRUCTURE OF EC COMPETITION LAW AND U.S. ANTITRUST LAW	4
Evolution of EC Competition Law and U.S. Antitrust Law	4
EC Institutions responsible of competition law	17
U.S. Antitrust institutional structure	20
2 PROCEDURAL EFFICIENCY OF EC AND U.S. COMPETITION SYSTEMS.....	28
Relationship between EC Institutions, national authorities, and national courts.....	28
Procedures, decisions, and uniformity of EC Law	38
Relationship between US federal offices and state institutions	45
Procedures in U.S. Antitrust Law	49
3 MODERNIZATION OF EC LAW AS RESPONSE TO NEEDS IN TRADE.....	56
Elements that led to proposals for modernization: why the need for change?.....	56
Analysis of the 1999 White Paper on modernisation of articles 81 and 82.....	64

Parallel structures in US Antitrust Law	72
CONCLUSIONS	80
BIBLIOGRAPHY.....	84

INTRODUCTION

The purpose of this work is to analyze the process of modernization of competition rules in the European Community (EC, hereinafter), through a comparative study of some procedural aspects of the antitrust law in the United States of America (U.S., hereinafter). For the purposes of this study, I will analyze the main substantive and procedural provisions in both legal systems.

The interest for this subject derives from a personal interest in the EC system, as one of the most amazing integration processes in the world. At the same time, the opportunity to analyze in a closer way the U.S. legal antitrust framework, through the attendance of a legal program in the United States, determined my final decision to undertake a comparative study of an extremely dynamic legal system. Analyzing the different competition laws and the interaction among different actors in both legal systems is a challenging task for an individual not belonging to either one of these systems. The results, however, are personally satisfactory, due to the relevance of these frameworks to other regional and national competition systems.

The modernization of EC competition law system is not a novelty. The interest in attaining a dynamic system is just as important to community and national enforcement authorities as it is to community level discussions. The substantive rules are flexible enough to allow different changes for EC competition dynamics; nevertheless, there are several procedural issues that have been raised, particularly in relationship with the capability and performance of the Member State enforcers.

The US antitrust system is not an exception to facing procedural issues. Many significant questions have been raised since the primal moments of the antitrust system. However, the plural composition of this country, the contributions of the states, the development of an efficient cooperation system, and the extensive federal jurisprudence in antitrust law have developed the most sophisticated competition framework in the world today.

With this interest point in mind, this study will examine the following questions:

What are the main differences between EC competition law and U.S. antitrust law from an institutional and procedural perspective, due to their different levels (Community level v. national level, or federal level v. state level)?

What are the main differences between EC competition law enforcement in Member States and U.S. antitrust law enforcement in states (Community courts v. national courts, or federal courts v. state courts)?

How do their correspondent procedures work, according to their policies?

What type of administrative and procedure issues will face EC Competition Law and its Member States given the various efforts of modernization (e.g. legal certainty, legal consistency, and forum shopping through national authorities and national courts)?

What is the significance of the White Paper on Modernization of EC Competition Law?

How have the U.S. solved similar issues in the past (e.g. central authorities, allocation of resources, extraterritoriality) and how will the EC solve them (e.g. use of precedent cases, other jurisprudence model, guidelines, directives, opinions)?

This study will discuss the most relevant procedural issues of competition law in the U.S. and EC systems. The first chapter reviews the basic and most relevant legal provisions that establish the institutions in charge, the substantive elements, and the procedural

criteria of the European Community and the United States of America competition frameworks.

The second chapter examines the main procedural elements of the institutions in both systems. As a means to determine the efficiency of these competition frameworks, an emphasis will be placed on private enforcement within both systems.

The third chapter analyzes the modernization of EC competition law —the core of this study—. In particular, the White Paper on Modernization of EC law is largely discussed. As a precedent to the Commission's modernization proposal, certain elements of U.S. antitrust enforcement are considered.

Finally, personal observations concerning the EC modernization process and the American antitrust framework are presented.

CHAPTER 1

STRUCTURE OF EC COMPETITION LAW AND U.S. ANTITRUST LAW

A comparative analysis must first establish the characteristics of the elements of study. Accordingly, an overview of the legal competition framework of the European Community and the United States of America competition systems will be presented. Analysis will begin with EC competition law, followed by an examination of the U.S. antitrust framework; this choice is purely discretionary.

A. Evolution of EC Competition Law and U.S. Antitrust Law

The antitrust systems in the EC and the U.S. have responded to the needs of their respective societies at different times. Even if the American framework has largely determined the structure of the European system, the evolution of each must be handled separately. Each structure has been determined by several factors: the rise of a new economic order; post-World War II movements; the advent of regional political alliances; increased efforts to develop competition frameworks, etc.

EC competition law must be analyzed by considering the community goals in creating a new European common market and the manner in which competition policy can help achieve these goals.¹ Unlike the U.S. economy, which was largely integrated and continental in scope at the time of the passage of the 1890 Sherman Act, the EC was created in 1957 in order to establish a new European common market and to “promote throughout the Community a harmonious development of economic activities, a

¹ Spencer Weber Waller *Understanding and Appreciating EC Competition Law*, 61 Antitrust L. J. 55, p.55 (1992).

continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.”²

However, there has been a tendency to focus analysis of competition legal structures under the U.S. umbrella. Although the U.S. framework is of great import, the EC phenomenon must not be ignored as an extraordinary and protracted effort to coordinate the competition systems of 15 countries.³

1. European Community competition law

EC competition law and policy is a complex system which not only impacts international business transactions on a daily basis, but also serves as an invaluable source of comparative analysis of competition law.⁴

Although it is widely accepted that EC competition law has its origins in the U.S. occupation of Germany, it is also true that the European liberal thought, which later inspired the EC competition framework, preceded the U.S. occupation. The German and Austrian experiences can be considered the initial framework for the EC competition law.⁵

² *Idem*, at p. 55. Weber comments in this part the importance of article 2 EC Treaty, see *infra* note 12.

³ As Gerber mentions, “The tendency of those who think about competition law to focus predominantly on the U.S. experience frames our enterprise. The U.S. experience tends to dominate though about competition law throughout the world. It is the reference point for thinking about the entire phenomenon. Most scholars and leading officials in competition law know something about that experience and can, therefore, relate their own competition law decisions to it. European experience, on the other hand, tends to be marginalized. Few, particularly in the United States, know much about it. As a result, there is little recognition of its influence and its role. I suggest that this one-dimensional, U.S.-centered pattern of perception impairs our understanding of international competition law today and obscures important factors that are shaping its future development.”, David Gerber *Europe and the Globalization of Antitrust Law*, 14 *Conn. J. Int’l L.* 15, 15 (1999).

⁴ *Supra* Weber, n. 1, p.55.

⁵ For an extensive and deeper introduction to squash the myths about the origins of EC competition law, see *supra* note 2, pp-18-24; also see David J. Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998).

The post-war integration movement in Europe was crystallized in the Treaty establishing the European Coal and Steel Community (hereinafter, ECSC Treaty).⁶ This compromise represented the first European agreement in this crucial economic area that responded to the necessity of competition regulation.

Since the European Economic Community (EEC, hereinafter) Treaty specifically provides for the common market competition policy in its articles,⁷ the scope of this analysis is limited to the successor of the EEC Treaty⁸: the European Community Treaty—neither the ECSC Treaty nor the EURATOM Treaty⁹—. However, the EEC Treaty has justifiably been the departure point of European competition policy for the last 47 years.

a. The fundamental Treaties

The first measure of competition policy adopted on a European basis was incorporated in the Treaty of Paris, which established the European Coal and Steel Community.¹⁰ This gave jurisdiction to a ‘High Authority’ to deal with restraints on competition within member states, whether or not they affected trade between member states.¹¹

⁶ Treaty Establishing the European Coal and Steel Community, signed on April 18, 1951 (also known as the Treaty of Paris). Entered into force on 20 July 1952.

⁷ Articles 85 and 86 of the Treaty of Rome (renumbered later as articles 81 and 82, by the Treaty establishing the European Community).

⁸ The Treaty of Rome refers to the original Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (signed at Rome). This Treaty was signed together with the Treaty establishing the European Atomic Energy Community (both treaties called the Rome Treaties). Entered into force on 1 January 1958.

⁹ It must be mentioned that, due to the special provisions of the EURATOM Treaty, related to nuclear energy, the competition policy previewed by the EEC Treaty, by virtue of Article 232 (2) does not apply to this special sector; see Valentine Korah *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, Oxford, 6th ed., 1997, p. 6.

¹⁰ *Supra* note 6.

¹¹ Nick Gardner *A Guide to United Kingdom and European Union Competition Policy*, MacMillan Press, Ltd. Great Britain, 3rd ed. 2000, p. 139-140. As this author mentions: “[T]he formulation in that treaty of an effects-based system which made prohibited practices void unless exempted by the competition authority, owed a great deal to the outcome of the debate in West Germany which had led to the passing there of the Act Against Restraints of Competition (1957).”

In order to avoid market distortions, Article 2 of the EEC Treaty established the common market and provided for the progressive approximation of the economic policies of the Member States.¹² Article 2 also defined the instruments that the Community had at its disposal for the successful establishment of the common market.¹³

The individual EC Treaty articles are often referred to as ‘primary legislation’. The more detailed principles elaborated by the EC institutions are collectively referred to as ‘secondary legislation’.¹⁴ With regard to competition, the EEC Treaty set out specific relevant principles in Articles 2, 3, and 85 to 94. These rules applied to all areas of economic activity unless other articles of the Treaty expressly provided otherwise. In practice, few sectors of the economy were exempted.¹⁵

According to Article 2 of the EC Treaty, the objective of the Community is to establish a common market and progressively approximate the economic policies of Member States; to promote harmonious development of economic activities; to ensure a continuous and balanced expansion of the Community; to increase regional stability, to promote an

¹² Art. 2, EEC Treaty.

¹³ *Idem*, Art. 3. These instruments were a defined number of common policies, guaranteeing free movement of goods, persons, services and capital between Member States, and exceptional provisions which established common policies in the agricultural and transport sections; however, the most important tool was “[t]he establishment of a system which would ensure undistorted and free competition [...]”, see Rein Wesseling *The Modernisation of EC Antitrust Law*, Hart Publishing, USA, 2000. pp. 15-22.

¹⁴ European Commission *The impact of Community law on the domestic legal systems of the Member States. Competition Law*, Office for Official Publications of the European Communities, Luxembourg, 1998, p. 11.

¹⁵ Notably, the coal and steel sector fell outside the scope of this Treaty, by virtue of specific provisions of Article 232 EC Treaty. As the Commission mentions “[I]n principle, therefore, the coal and steel undertakings escape to the EC competition rules and are subject to the ECSC rules [founded in Articles 65 to 67 of the ECSC Treaty]. This principle is, however, subject to two provisos. Firstly, it follows from the ECSC Treaty that where a coal or steel undertaking deals in products other than those defined in Annex I to the ECSC Treaty, it is not the ECSC Treaty rules which apply but the EC competition rules {Case 1/59 *Macchiorlatti Dalmas v. High Authority* [1959] ECR 199.}. Secondly, upon expiry of the ECSC Treaty [scheduled to expire in 2002], the coal and steel sector is expected to be governed by the EC Treaty rules.” *Idem*, p. 11.

accelerated raising of the standard of living; and to develop closer relations between Member States.¹⁶

Article 3 establishes the different instruments that are to be used by the EEC to achieve the objectives set out in Article 2. Among the different measures, the institution of a system to ensure that competition in the Community is not distorted clearly establishes the position of the Member States toward competition activities, throughout the EEC.¹⁷

This group of Articles was also nominated the “first chapter of the Common Rules”.¹⁸

However, the most significant provisions of the EEC Treaty, relating to the promotion and preservation of competition, are Articles 85¹⁹ and 86²⁰, which relate to anti-competitive arrangements between, and abuses of dominant positions by, undertakings. The first forbids, as incompatible with the common market, collusion that may affect trade between Member States and has the object or effect of restricting competition within the common market. The second forbids the abusive exploitation of a dominant position.²¹ These articles constituted the substantive rules for competition law in the EEC.

¹⁶ D. M. Raybould and Alison Firth *Law of Monopolies. Competition Law and Practice in the USA, EEC, Germany and the UK*, Graham & Trotman, UK, 1991, p. 197.

¹⁷ *Idem*, at p. 198.

¹⁸ See Wesseling, *supra* note 13, at p. 15.

¹⁹ Article 85(1) EEC Treaty provides:

“1. 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 [...]”

Is important to mention that Article 85 and Article 86 were not amended by the Treaty of Maastricht, but the Treaty of Amsterdam renumbered them.

²⁰ Article 86 EEC Treaty provides:

a) “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.”

²¹ See Korah, *supra* note 8, at p. 2.

The framers of the EEC Treaty also established some rules of procedure, in order to enable the application of these substantive rules. However, when the EEC Treaty came into force on 1958, the antitrust rules existed merely in skeletal form.²² Articles 87 to 89 ? also called the ‘procedural provisions’? focused on the enforcement of the EEC Treaty’s antitrust rules, but there was no expressed regulation or directive at that time. Thus, by virtue of Article 88,²³ the charge of the administration fell on the Member States’ authorities²⁴, until the entry into force of the provisions adopted in pursuance of Article 87 EEC.

Article 87²⁵ of the EEC Treaty empowered the Council to adopt regulations and directives required to define in detail the procedures applicable to competition matters, entrusting the application of the same to the Commission. Thus, the Council authorized the Commission to adopt supplementary procedural rules.²⁶ I will later describe in detail the institutions and its respective functions in the EEC competition policy.

The Treaty of Maastricht²⁷, which came into force on 1 November 1993, supplemented the earlier treaties and created a European Union (hereinafter, EU). It added a common

²² See Wesseling, *supra* note 13, at p. 17.

²³ Article 88 established: ‘Until the entry into force of the provisions adopted in pursuance of Art. 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Art. 85, in particular paragraph 3, and or Art. 86.’

²⁴ See Wesseling, *supra* note 13, at p. 16.

²⁵ The original text of Article 87 (1) EEC Treaty was the following:

“1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.”

This article was soon expanded, due to Regulation 17/62, which established clear rules of procedure for competition law. The current text will be reproduced later on.

²⁶ The first piece of secondary legislation to appear pursuant to Article 87 was Council Regulation 17/62 (in force from 13 March 1962). This set out in detail the powers and duties of the Commission in the field of competition. I will examine it later on.

²⁷ Treaty for the European Union, 7 February 1992, C.M.R. 25300.

foreign policy, co-operation in the environmental and social areas, and the aim of achieving a monetary union between the Member States.²⁸ Also, this treaty changed the name of the EEC to the European Community.²⁹

Due to the dynamics on the European integration process, the Treaty of Amsterdam took the major steps towards restructuring the institutions of the European Union, in 1997. An important change brought by the Treaty of Amsterdam was the consolidation of the EC and EU Treaties in two documents that renumbered the former articles of each one.³⁰ Thus, the Competition Rules mentioned before (i.e. the competition articles established in the EEC Treaty) were renumbered: Articles 85, 86, 87 and 88 became Articles 81, 82, 83³¹ and 84 respectively.³² I must state that the present work will be completely based on the renumbered articles and their current text.

b. Regulation and Directives

In addition to the Constitutive Treaties (i.e. EC, ECSC and EURATOM), the Community institutions perform different acts that constitute an important source of law,

²⁸ Craig and de Búrca mention that “[u]ndoubtedly, the popular profile of the Community has been raised more by the ‘Maastricht Treaty’ debate than by any previous development in the Community’s history, even though some content that the Single European Act, with its revival of qualified-majority voting, represented a more significant step for the Community in the process of integration. Perhaps, apart from the detailed commitment to full economic and monetary union, the most obvious feature of the Treaty on European Union was the institutional change it wrought, establishing a ‘three-pillar’ structure for what was hence-forth to be called the European Union, with the Communities as the first of these pillars.”, Paul Craig and Gráinne de Búrca *EC Law. Text, Cases and Materials*, Clarendon Press, Oxford, 1995, p. 27.

²⁹ See Korah, *supra* note 8, at p. 1. This change was also a recognition of the reality that the activities and competences of the former Economic Community ranged far beyond its original economic goals. See also Christopher Vincenzi *Law of the European Community*, Financial Times Pitman Publishing, 2nd ed., Great Britain, 1996, p. 8.

³⁰ European Union *Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community*, Office for Official Publications of the European Communities, Luxembourg, 1997.

³¹ The text of Article 83(1) (ex Art. 87(1)) now establishes:

“1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.”

³² Article 12 of the Treaty of Amsterdam provided for a complete renumbering of the Maastricht Treaty in accordance with a table of equivalences included in the Treaty’s annex.

according to Article 249 EC Treaty. These acts constitute the EC secondary legislation, which may take one of three forms: regulations³³, directives³⁴ or decisions.³⁵

The power to elaborate and adopt such secondary legislation so as to ensure proper implementation and enforcement of competition policy is set out in Article 83.³⁶ However, much of the detail of EC competition law is set out in a variety of regulations adopted by the Council or by the Commission acting under powers that the Council has delegated to it.³⁷

Notwithstanding the relevance of the tentative debates on interpretation of the basic concepts of EC antitrust law in the initial years, the most important development in the first decade of Community antitrust law was the adoption of the first enforcement regulation: Regulation 17/62 (hereinafter, Regulation 17).³⁸ In this instrument, the Council authorized in 1962 the Commission to undertake investigations and ensure compliance with the Community competition rules, imposing penalties on offenders if necessary.

³³ Regulations are directly applicable in national legal systems and apply throughout the Community in all the Member States. Many have direct effect, conferring rights and duties on individuals who can rely on them in the same way as domestic law in their national courts. Unlike national law, however, they have not been passed by the national legislature. See Inns of Court School of Law *European Community Competition Law in Practice*, Blackstone Press Limited, 2nd ed., Great Britain, 1999, p. 196.

³⁴ Directives are often used for coordinating the laws of Member States, which are obliged to introduce new legislation, redraft, or amend existing national legislation and administrative rules to conform to the objectives of a directive. They may have direct effect in certain circumstances. *Ibid.*, p. 196.

³⁵ Decisions are administrative measures. Sometimes the Community institutions themselves are responsible for implementing the treaties or regulations. They can make decisions binding on individuals, firms or Member States. A decision usually requires the addressee to perform some action or refrain therefrom. It also may confer rights or impose obligations on those to whom it is addressed. *Ibidem*, p. 196.

³⁶ European Commission, *supra* note 14, at p. 13.

³⁷ Examples of these Community regulations are: Regulation 17/62 [1962] OJ 13/204, [1959-62] OJ Spec. Ed. 87, which sets up the means for the implementation of EC competition policy; Regulation 99/63 [1963] OJ 226, O.J. Spec. Ed. 47, which governs the conduct of hearings; various regulations, known as 'block exemption' regulations, which define the conditions in which exemption from the application of Article 81(1) prohibition may be presumed, and cover a variety of commercial arrangements including exclusive distribution agreements, exclusive purchasing agreements and franchising agreements; Regulation 4064/89 on control of concentrations, OJ L 395/1 (corrected version published in OJ L 257/14, 1990). I will only make comments about Regulation 17, due to the procedural nature of this work.

³⁸ EEC Council Regulation 17 of 13 March 1962 [1962] JO 13/204 [1959-62] OJ Spec. Ed. 87.

Thus, the Commission was able to order the termination of restrictive agreements and abuses of dominant position in the common market and prevent their proliferation.³⁹

Later on, in 1989, immediately after the formal establishment of the internal market, the Council adopted the most important legislative act in the antitrust law area after Regulation 17: Council Regulation 4064/89 (hereinafter, Merger Regulation).⁴⁰ This instrument provided the Community with the competence to control corporate mergers and acquisitions (“concentrations”) of a “Community dimension”.⁴¹ The Merger Regulation formalised and completed the Commission’s competence to control the processes by which undertakings merge, wholly or in part.⁴²

2. U.S. Antitrust Law

The antitrust laws of the United States of America are unique in scope of content and rigor of enforcement. They have a background of more than 100 years,⁴³ but they are in permanent evolution.⁴⁴ Their relevance has crossed North American boundaries: since the Second World War many industrial countries – often with American encouragement – have adopted legislation dealing with monopolies and restrictive business agreements, and have begun to develop a body of case-law under their statutes.⁴⁵

³⁹ Luis Ortiz Blanco *EC Competition Procedure*, Clarendon Press, Oxford, 1996, p. 5.

⁴⁰ Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

⁴¹ See Wesseling, *supra* note 13, at p. 45.

⁴² *Idem*, at p. 45.

⁴³ “Dissatisfaction with the common law’s protectionism and, more importantly, rising concern over abusive practices by corporate giants in the second half of the 19th century led to legislation restricting the power of the railroads and “trusts”. See Ernest Gellhorn *Antitrust Law and Economics in a Nutshell*, West Publishing Co., 3rd ed., USA, 1986, p. 15.

⁴⁴ For a detailed analysis of the antitrust laws history, see Hans B. Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955); William Letwin *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act* (1981); Herbert Hovenkamp *Federal Antitrust Policy. The Law of Competition and Its Practice*. West Publishing Co., USA, 1994.

⁴⁵ A.D. Neale and D.G. Goyder *The Antitrust Laws of the United States of America. A Study of Competition Enforced by Law*, Cambridge University Press, 3rd ed., USA 1980, p. 1.

However, the substantive provisions of the antitrust laws are few and brief; they are contained in seven sections taken from three statutes — the Sherman Act of 1890⁴⁶, the Clayton Act⁴⁷, and Federal Trade Commission Act⁴⁸ of 1914. The two latter statutes were amended in important ways by subsequent measures, which will be mentioned below. There are some other minor laws, but these three Acts contain the essentials of the system.⁴⁹

a. Basic laws in the American antitrust system

The general objective of the Sherman Act, enacted in 1890⁵⁰, was the promotion of competition in open markets.⁵¹ This instrument was enacted following a period of rapid industrial development and increasing concentration in many industries—in particular in the petroleum, tobacco, cotton oil, linseed oil and paper industries—.⁵²

Its passage resulted from concern aroused by the “vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used and that combinations known as trusts are being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.”⁵³

⁴⁶ 15 U.S.C.A. §§ 1-7, 26 Stat. 209 (1890) as amended.

⁴⁷ 15 U.S.C.A. §§ 12-27, 38 Stat. 730 (1914) as amended.

⁴⁸ 15 U.S.C.A. §§ 41-58, 38 Stat. 717 (1914) as amended.

⁴⁹ *Idem* at p. 3.

⁵⁰ Although it dates from 1890, it remains the core of the statutory regime. Every subsequent statute has been an effort to expand on or refine its provisions. See John H. Shenefield and Irwin M. Stelzer *The Antitrust Laws. A premier*, The AEI Press, 3rd ed., Washington, D.C., 1998, p. 15.

⁵¹ See Raybould and Firth, *supra* note 16, at p. 11.

⁵² *Idem*, at p. 11.

⁵³ Earl W. Kintner and Mark R. Joelson *An International Antitrust Premier. A Businessman's Guide to the International Aspects of United States Antitrust Law and to Key Foreign Antitrust Laws*, Macmillan Publishing Co., New York, 1974, p. 8.

The Sherman Act can be enforced both in civil and criminal actions.⁵⁴ The possible imposition of criminal penalties for antitrust violations⁵⁵ provides an accurate indicator of the importance of the preservation of free competition in U.S.⁵⁶ However, its two substantive sections, Section 1⁵⁷ and Section 2⁵⁸, reflect its policies in very general terms. Section 1 focuses on restrictive agreements (wrongful purposes or effects) while Section 2 examines the aggrandizement or misuse of monopoly power (exclusionary actions).⁵⁹ The approach adopted by these two sections of the Act towards the monopoly problem is different, but it is clear that the means by which markets are controlled or competition dampened is an indifferent matter.⁶⁰ In the end it is irrelevant whether a trade restraint was accomplished by a contract or by some looser form of agreement, or even by the sheer aggregation of market power.⁶¹

Thus, the U.S. Supreme Court summarized the two provisions of the statute as follows:

⁵⁴ This is an important difference between the US antitrust enforcement system and the EC competition framework: the latter does not prosecute criminally the transgressors of competition rules.

⁵⁵ With the enactment of the Antitrust Procedures and Penalties Act, offenses under the Sherman Act, which had been misdemeanors, became felonies subject to 3 years of imprisonment and fines of up to \$100,000 for individuals and \$1 million for corporations. 88 Stat. 1706 (1974). Gellhorn, *supra* note 43, at p. 21.

⁵⁶ See Kintner and Joelson, *supra* note 53, at p. 13.

⁵⁷ Section 1 provides:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

⁵⁸ Section 2 provides:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

⁵⁹ See Gellhorn, *supra* note 43, at p. 22.

⁶⁰ *Idem*, at p. 23.

⁶¹ *Ibidem*, at p. 23.

“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, at the lowest prices, of the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question the policy unequivocally laid down by the Act is competition.”⁶²

The Clayton Act⁶³ is the second major antitrust statute of the United States, passed by Congress in 1914, twenty-one years after the Sherman Act.⁶⁴ It was enacted by Congress because of the sentiment that certain defects and omissions in the Sherman Act had to be remedied if the competitive system was to retain its effectiveness.⁶⁵ Thus, notwithstanding the sweeping and apparently all-inclusive prohibitions of the Sherman Act, new legislation was thought necessary due to two factors: judicial refusal to find certain conduct violative of the Act, and the recognition of additional anticompetitive conduct that had not been considered detrimental before.⁶⁶

The Act, as amended, is directed at specific practices such as price discrimination, tying arrangements and mergers. In this point, it is distinct from the broad language of the Sherman Act which prohibits conspiracies or agreements in restraint of trade or

⁶² *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 5 (1958).

⁶³ The main amendments to Clayton Act have been the Robinson-Patman Act of 1936, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the Anti-Trust Procedural Improvements Act of 1980. See Raybould and Firth, *supra* note 16, at p. 66.

⁶⁴ *Idem* at p. 66.

⁶⁵ See Kintner and Joelson, *supra* note 53, at p. 16.

⁶⁶ *Idem*, at p. 16.

conspiracies or attempts to monopolise or actual monopolisation.⁶⁷ Fixing certain specific gaps of the Sherman Act, with the passage of this Act, was a reflection of the pragmatic approach that has guided antitrust philosophy in the United States.⁶⁸

The Clayton Act declared four restrictive or monopolistic acts illegal but not criminal: price discrimination —sales of a product at different prices to similarly situated buyers (§2); tying and exclusive dealing contracts —sales on condition that the buyer stop dealing with the seller’s competitors (§3); corporate mergers —acquisitions of competing companies (§7); and interlocking directorates —common board members among competing companies (§8).⁶⁹

The other important instrument, the Federal Trade Commission Act (hereinafter, FTC Act), was passed in September 1914, two months prior to the enactment of the Clayton Act. It is largely concerned with the setting up of the Federal Trade Commission (hereinafter, FTC) and the mechanics of its operation.⁷⁰ The principal antitrust provision is contained in Section 5 (a)(1), which declares: “Unfair methods of competition in or affecting commerce, are declared unlawful.”⁷¹

Furthermore, the FTC Act prohibits unfair methods of competition (including those acts or practices that violate the Clayton or Sherman Act) and unfair or deceptive acts or practices (those acts beyond the reach of the former Acts, that can be reached by the FTC under Section 5 if they have or are likely to have a substantial anticompetitive effect),

⁶⁷ Raybould and Firth, *supra* note 16, at p. 66.

⁶⁸ Kintner and Joelson, *supra* note 53, at p. 16.

⁶⁹ See Gellhorn, *supra* note 43, at p. 30.

⁷⁰ Raybould and Firth, *supra* note 16, at p. 77.

⁷¹ In 1938 the Wheeler-Lea Amendment added the words “unfair or deceptive acts or practices” to Section 5 and the Section was again amended by the Magnusson-Moss-Warrant-Federal Trade Commission Improvement Act of 1975. Under the 1975 provisions, the original provisions relating to unfair or deceptive methods of competition “in commerce” were extended to such activities if they “affect” commerce. Section

which occur in or affect interstate or foreign commerce.⁷² Thus, at the same time that it laid down standards of conduct, the FTC Act created the agency to enforce those standards.⁷³

B. EC Institutions responsible of competition law

The complexity of the structure of EC competition law system, due to the different levels of integration (national and supranational), has originated most of the procedural issues addressed by the modernization proposals. I will not describe in this analysis the specific structure and function of each institution; rather, I will make a brief mention of the EC bodies involved in the enforcement of competition rules and its relationship with national authorities and national courts.⁷⁴

However, it must be noted that both the Commission and the competition authorities of the Member States enforce competition laws in the European Union.⁷⁵ The EC courts, 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, reversible by one or more national tribunals.⁷⁶

18 of the 1914 Act was also extended by the 1975 Act: the Commission is empowered to make rules concerning unfair or deceptive acts or practices in or affecting commerce. *Idem*, at p. 77.

⁷² *Ibidem*, at p. 78.

⁷³ Kintner and Joelson, *supra* note 53, at p. 18. I will mention later the structure and function of the FTC in the US antitrust law enforcement.

⁷⁴ For a precise description of EC Competition Law Institutions, *vid. Korah, supra* note 8.

⁷⁵ “There are two main ways in which the competition rules are enforced. The Commission has been empowered by regulation 17 to decide whether conduct infringes article 85 and 86 and to grant individual exemptions [...] The prohibitions in articles 85 and 86 also give rise to actions in tort in national courts. Moreover article 85 (2) renders agreements that infringe that article void. The prohibition of article 86 may also cause a transaction to become void on the ground that it is illegal.” *Id.* at 21.

⁷⁶ Barry E. Hawk, Laraine E. Laudati *Antitrust Federalism In The United States And Decentralization Of Competition Law Enforcement In The European Union: A Comparison* 20 *Fordham Int'l L. J.* 18, 31 (1996).

1. The Commission: the main enforcer of competition rules

Above all, it must be noted that the enforcement of community competition law is shared between the Commission and the Community Courts (e.g. the European Court of Justice —hereinafter, ECJ— and the European Court of First Instance —hereinafter, CFI).⁷⁷

The Commission has independent powers to ensure application of competition laws, Articles 81 and 82 of the EC Treaty, the Merger Regulation⁷⁸, Regulation 17⁷⁹ and other secondary sources of EC competition law. Its final decisions are reached through a vote of its members (twenty commissioners are the ultimate decision-makers in competition cases). Nevertheless, this decision is reviewable by the CFI and the ECJ. Furthermore, the Commission's competition department —Directorate General IV or DG IV— prepares cases on notifications, complaints or other means of learning of potential violations.⁸⁰

The Commission is empowered by the Council to enact subordinate legislation granting group exemptions from the prohibition of Article 81(1) and providing forms for notifying agreements of when an individual exemption is required. Besides, article 9 of Regulation 17 gives it exclusive right to grant individual exemptions.⁸¹ Moreover, Commission has

⁷⁷ The Competition Department of the Commission (Directorate General IV or DG IV) prepares the cases and renders final decisions on claims, while the community courts can review the Commission decisions. *Id.* at 31.

⁷⁸ *Supra* note 40.

⁷⁹ *Supra* note 38.

⁸⁰ Located in Brussels and composed by 420 functionaries, subdivided into 7 directorates. See Hawk and Laudati, *supra* note 76, at p. 32.

⁸¹ The procedures under Regulation 17 will be discussed later. However, the relevance of exemptions has to be noted: "Not all agreements that perceptibly restrict competition and may affect inter-state trade are prohibited. Some forms of collaboration restrictive of competition may have beneficial effects and are capable of exemption by the Commission. By virtue of article 85(3) [...] the prohibition in article 85(1)

powers to obtain information from firms and to order undertakings to terminate an infringement of Articles 81 and 82 and to impose fines.⁸²

2. European Courts

Originally there was a single Community Court —the ECJ— but in 1989 the Court of First Instance (CFI, hereinafter), called the “Tribunal” in some Member States, started to operate in competition and staff cases.⁸³ Its jurisdiction increased in 1993 and 1994⁸⁴ now includes state aid, dumping, and many other matters. It hears all direct actions save for those brought by or against member states.⁸⁵

The ECJ and the CFI consist of judges appointed collectively by the Member States, but in practice each nominates one judge and the others accept him or her. They also are completely independent of their national governments, although they are appointed for a renewable term of six years. There are now 15 judges in each court.⁸⁶

Under Article 225 EC Treaty, the CFI has unlimited jurisdiction to review competition decisions of the Commission. It may cancel, reduce, or increase fines or penalties that the Commission imposes. By its creation, the EC reduced the workload of the ECJ, although some of its decisions have been appealed.⁸⁷

may be declared inapplicable to any agreements or category of agreements provided that they have certain characteristics. They must contribute to the improvement of the production or distribution of goods, or promote technical or economic progress.”, See Korah, *supra* note 8, at p. 68.

⁸² *Idem*, at 21.

⁸³ The Court of First Instance was created by Council Dec. 88/591/ECSC, EEC and EURATOM, O. J. 1988, L319/1, and took up its duties in October 1989.

⁸⁴ Its general jurisdiction to hear and determine at first instance all direct actions brought by natural and legal persons was established by Council Decs. 93/350, O.J. 1993, L144/21 and 94/149, O.J. 1994, L66/29. In addition, it has received jurisdiction in new areas under Reg. 4064/89 on the control of concentrations (*supra* n. 40); Reg. 40/49 on the Community Trade Mark, O. J. 1994, L11/1; and Reg. 2100/94 on Community Plant Variety Rights, O. J. 1994, L227/1. See Korah, *supra* note 8, at p. 19.

⁸⁵ *Idem*, at 19.

⁸⁶ *Idem*, at 19.

⁸⁷ Nevertheless, the appeal must be confined to points of law. Thus, the CFI “is perhaps intended to be less ‘judicially creative’ than the ECJ.” Robert McPeake *European Community Competition Law in Practice* (Blackstone Press Ltd. 2nd ed. 1999).

Under Article 230 EC Treaty, article 17 of Regulation 17 and article 16 of Merger Regulation, the ECJ is granted with unlimited power for judicial review over the acts of the institutions of the Community and, in particular, decisions of the Commission. According to Article 234 EC Treaty, the ECJ can interpret Community law for the benefit of national courts through a preliminary ruling procedure, on a limited basis: this “Tribunal” merely interprets the law and allows the national court to apply Community law to the facts.⁸⁸

C. US Antitrust institutional structure

The antitrust laws can be enforced in four different ways: by the Antitrust Division of the Department of Justice (hereinafter, Antitrust Division or Division); by the FTC; by the state attorney generals, and by private parties.⁸⁹ Thus, parallel federal and state court structures buttress their enforcement efforts.⁹⁰ I will refer in this part only to the first three enforcers, since the private parties —stricto sensu— are not institutions.⁹¹ It is important to stress that each type of enforcing action has contributed to the development and effectiveness of the antitrust laws. This overlapping enforcement, however, complicates understanding of the role of each enforcer.⁹² I will briefly describe the structure and functioning of these main federal and state enforcers.

1. Federal institutions

The Antitrust Division and the FTC share responsibility for the enforcement of federal antitrust laws. These two governmental bodies coordinate their enforcement

⁸⁸ According to McPeake, “[t]his has disadvantages as a court that does not apply the law may not realise how impractical some of its rulings are.” *Idem*, at 20.

⁸⁹ See Shenefield and Stelzer, *supra* note 50, at p. 24.

⁹⁰ See Hawk and Laudati, *supra* note 76, at p. 23.

⁹¹ For a detailed description and dynamics of private parties as enforcers of antitrust laws, see Hovenkamp, *supra* note 44, pp. 541-583.

⁹² See Kintner and Joelson, *supra* note 53, at p. 19.

efforts to minimize the potential of duplication of 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.⁹³

As the Antitrust Division is a division of the executive arm of the Federal Government and the Federal Trade Commission is an administrative agency set up for specific purposes, the two agencies naturally differ in their procedures and methods.⁹⁴

Nevertheless, the risk of overlapping functions derives from the law itself: technically, only the Division has authority to engage in public enforcement of the Sherman Act.⁹⁵

But at the same time, the FTC may bring actions challenging unfair methods of competition under §5 of the FTC Act, which has been interpreted to include everything in the Sherman Act, plus a few practices that are not covered by this Act.⁹⁶ Furthermore, the Division and the FTC have concurrent authority to enforce the Clayton Act.⁹⁷

Both agencies have established effective means to solve these barriers to enforcement. Since 1949, there are well-established liaison arrangements between the Division and the FTC to ensure that the concurrent jurisdiction of the two bodies runs smoothly and duplication is avoided.⁹⁸

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.⁹⁹ In this clearance procedure, if both agencies are found to be pursuing the same inquiry, they must decide which will handle it based generally on considerations of

⁹³ Hawk and Laudati, *supra* note 76, at p. 23.

⁹⁴ See Neale and Goyder, *supra* note 45, at p. 373.

⁹⁵ See Hovenkamp, *supra* note 44, p. 533.

⁹⁶ *Idem*, at p. 533. The US Supreme Court issued, on this concern, important criteria on *FTC v. Cement Institute*, 333 U.S. 683, 694, 68 S.Ct. 793, 800 (1948).

⁹⁷ Hovenkamp, *supra* note 44, at p. 533.

⁹⁸ Neale and Goyder, *supra* note 45, at p. 373.

expertise, staff availability, etc.¹⁰⁰ However, if the matter involves likely criminal activity it will generally be referred to the Division, since the FTC does not have criminal jurisdiction.¹⁰¹

Also, as a manner of determining the adequate procedures and to suggest certain ways of actuation, either for lawyers, private parties, federal or state officers, both the Division and the FTC occasionally issue written Guidelines, outlining their enforcement position on various matters.¹⁰²

The Department of Justice is the nation's principal law enforcement body. An Assistant Attorney General who has responsibility for the overall policy of the Division heads this office in charge of antitrust enforcement.¹⁰³ He serves directly under the Attorney General.¹⁰⁴

Within the Division there are three main groups: (a) trial sections based in Washington, dealing with particular investigations, Grand Jury hearings, court cases, and the enforcement of judgments; (b) seven field offices across the United States performing the same functions on a regional basis;¹⁰⁵ and (c) specialists in Washington carrying out technical functions essential to the general working of the Division.¹⁰⁶

⁹⁹ See Hawk and Laudati, *supra* note 76, at p. 26.

¹⁰⁰ Hovenkamp, *supra* note 44, at p. 533.

¹⁰¹ *Idem*, at p. 533.

¹⁰² *Ibidem*, at p. 533. The most prominent of these is the 1992 Horizontal Merger Guidelines, issued jointly by the Division and the FTC.

¹⁰³ Neale and Goyder, *supra* note 45, at p. 373.

¹⁰⁴ Hawk and Laudati, *supra* note 76, at p. 23.

¹⁰⁵ 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. 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. ABA Antitrust Section: American Bar Associations, Monograph No. 15, Antitrust Federalism, *The Role of State Law* (1988), p. 17.

¹⁰⁶ For an extensive description, see Neale and Goyder, *supra* note 45, at p. 373.

The main activity of the Division is the enforcement of the Sherman, Clayton, Webb-Pomerene, Robinson-Patman, and the relevant portions of the Wilson Tariff Acts. However, the Division also performs other important activities on antitrust enforcement: issuance of guidelines for international operations and other issues¹⁰⁷; issuance of Business Review Letters evaluating conduct contemplated by private parties; and participation as amicus curiae in behalf of defendants.¹⁰⁸

Thus, the Antitrust Division's enforcement is through the launching of investigations and, if necessary, the subsequent pursuit of criminal or civil litigation.¹⁰⁹ 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.¹¹⁰ The Division generally files criminal actions only for clear, intentional violations of the law.¹¹¹ For civil investigations, it commonly issues Civil Investigative Demands, which are subpoenas that can be issued to any person believed to have information pertaining to the investigation and compels documents, oral testimony, or answers to interrogatories.¹¹² The FTC consists of five Commissioners appointed by the President, subject to Senate confirmation for seven-year terms. The FTC has —amongst other responsibilities— authority to enforce the substance of all the antitrust laws. However, it is the only agency entitled to enforce the provisions of the Federal Trade Commission Act, which is wholly

¹⁰⁷ Antitrust Enforcement Guidelines for International Operations (1988), 4 Trade Reg. Rep. (CCH) ¶ 13,109; Antitrust Guide Concerning Research Joint Ventures (1980), 4 Trade Reg. Rep. (CCH) §13, 120; Sentencing in Antitrust Felony Cases (1977), 4 Trade Reg. Rep. (CCH) ¶ 13, 115; Vertical Restraint Guidelines (1985), 4 Trade Reg. Rep. (CCH) ¶ 13, 105.

¹⁰⁸ See Interview with William F. Baxter, Assistant Attorney General, Antitrust Division, 51 Antitrust L.J. 23 (1982).

¹⁰⁹ Hovenkamp, *supra* note 44, at p. 534. Investigations are initiated as a result of private complaints, inquiries conducted at the initiation of the Division itself, or as a result of private reporting, such as premerger notification (15 U.S.C.A. §18(a)).

¹¹⁰ Hawk and Laudati, *supra* note 76, at p. 24.

civil in nature.¹¹³ With respect to the Sherman Act, the FTC has no direct enforcement authority, but its authority to challenge “unfair methods of competition” under §5 of the FTC Act¹¹⁴ is interpreted to include all practices condemned under the Sherman Act.¹¹⁵

Despite the large number of complaints that the FTC receives, it has discretion to initiate any proceeding. In this sense, the FTC has its own procedures for collecting and presenting evidence, generally governed by Section 5(b) of the FTC Act¹¹⁶ and the Federal Administrative Procedure Act.¹¹⁷

The structure of the FTC allows it to develop deep economic analysis and long-range policy planning. It includes an Office of General Counsel¹¹⁸, the Bureau of Competition¹¹⁹, and a number of Administrative Law Judges.¹²⁰ Although the FTC embodies a judicial arm for dealing with alleged breaches of the law subject to appellate review by the federal courts, its primary task is to protect the consumer against unfair business practices of all kind.¹²¹

Besides the federal agencies, the role of the federal courts is vital in U.S. antitrust law enforcement. These courts have the last word in antitrust cases, sustaining or rejecting a

¹¹¹ Hovenkamp, *supra* note 44, at p. 534. The great majority of these are for explicit price fixing or bid rigging.

¹¹² See Antitrust Civil Process Act, 15 U.S.C.A. §§ 1311-1314.

¹¹³ See Kintner and Joelson, *supra* note 53, at p. 19.

¹¹⁴ 15 U.S.C.A. §45.

¹¹⁵ Hovenkamp, *supra* note 44, at p. 536.

¹¹⁶ 15 U.S.C.A. §45(l) & (m).

¹¹⁷ 5 U.S.C.A. §554.

¹¹⁸ This Office advises the Commission on all legal matters including the cases coming to it in its judicial capacity and also represents the FTC at an appellate level. See Neale and Goyder, *supra* note 45, at p. 382.

¹¹⁹ Which has sections of lawyers based on Washington and field officers around the country; it is primarily responsible for enforcing the FTC Act. *Idem*, at p. 383.

¹²⁰ Although these judges are found within the structure of the FTC, they are entirely independent from all other sections. Their responsibility is to act as initial judges on complaints made by the Bureau of Competition. *Ibidem*, at p. 383.

¹²¹ *Id.* at p. 382.

decision from the federal agencies: they have exclusive jurisdiction to adjudicate claims under federal antitrust laws.¹²²

The federal court system is composed of the Federal District Courts, twelve Circuit Courts of Appeals, and the U.S. Supreme Court. Each circuit has its own precedent interpreting antitrust statutes; in the absence of a Supreme Court decision, only precedent within their own circuit binds federal circuit courts.¹²³

Still, in a different situation, Federal Courts may have jurisdiction to decide antitrust state claims originally filed in state court, if the defendant removes the case to federal court, as allowed by federal laws.¹²⁴ Thus, 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.¹²⁵

2. State institutions

State enforcement can be observed from two standpoints: enforcement of federal laws and enforcement of state laws. Here, the Supremacy Clause of the Federal Constitution is observed, but it must be remarked that nothing in the federal antitrust laws even hints that Congress intended to preempt state and local law simply because that law interferes with competitive markets (e.g. a state law inconsistent with federal antitrust policy).¹²⁶

¹²² Hawk and Laudati, *supra* note 76, at p. 26.

¹²³ *Idem*, at p. 26.

¹²⁴ It is permitted to remove “any 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”, 28 U.S.C. 1441 (b) (1994).

¹²⁵ Hawk and Laudati, *supra* note 76, at p. 27.

¹²⁶ U.S. Const. Art. VI, §2. Under the doctrine of preemption, even if individual states and local governments can make regulatory policy, and even if the government has the power to preempt much of this regulation, there is no expressed preemption clause in favor of federal antitrust statutes. See Hovenkamp, *supra* note 44, at pp. 670-676.

Hence, in addition to the public agencies, states attorneys general have authority to enforce federal antitrust laws, and at the same time, are empowered to enforce their own state antitrust laws, most of which are similar to the federal statutes.¹²⁷ At this point, it is also important to remark that similar to the cooperation between the Antitrust Division and the FTC, since 1907, the state attorneys general coordinate their respective efforts through the National Association of Attorneys General (hereinafter, NAAG).¹²⁸

The NAAG Antitrust Committee is composed of nine attorneys general who study substantive antitrust matters and recommend policy positions to the attorneys general. Another department of the NAAG, the Antitrust Task Force, created in 1983, is composed of the principal antitrust attorneys from all fifty states; it coordinates proposed joint antitrust actions among the states.¹²⁹

In addition, in 1989 Congress established the 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. Its main function is to serve as a forum for exchanging information about investigations, discussing cooperative efforts, sharing resources, and developing stronger working relationships federal and state levels.¹³⁰

Last, it must be mentioned that each state has its own court system (trial court, appellate court and supreme court), in which state courts adjudicate antitrust claims based on state law, but are not empowered to adjudicate federal antitrust claims.¹³¹ Thus, because few state judges are familiar with antitrust law, most state antitrust enforcers and private

¹²⁷ However, states are considered private persons when they seek enforcement of the federal antitrust laws. See *California v. American Stores*, 495 U.S. 271, 110 S.Ct. 1853 (1990), in which a state is treated as a private citizen for the purpose of interpreting the right to divestiture in merger challenge.

¹²⁸ Hawk and Laudati, *supra* note 76, at p. 29-30.

¹²⁹ *Idem*, at p. 30

¹³⁰ *Ibidem*, at p. 30.

parties choose to file lawsuits in federal court and to assert state antitrust claims as pendent claims.¹³²

¹³¹ *General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 271 (1922), which stated that the right to sue under Sherman Antitrust Act “is to be exercised only in a ‘court of the United States’ ”.

¹³² Hawk and Laudati, *supra* note 76, at p. 28. There are three methods by which a state can assert state antitrust claims in federal court:

- a) “a state has standing to sue under federal law as a private party, for damages, injunctions, where the state itself has been injured as a purchaser of the goods or services which are the subject of the antitrust violation (§§ 4 and 6 Clayton Act), or as *parens patriae* on behalf of one of its citizen injured as result of a violation of the Sherman Act;
- b) state attorneys general acting collectively can bring a multistate action in federal court;
- c) an attorney general can bring an action simultaneously with a federal agency in federal court.”

CHAPTER 2

PROCEDURAL EFFICIENCY OF EC AND US COMPETITION SYSTEMS

A. Relationship between EC Institutions, national authorities, and national courts

The debate on the procedural efficiency has different perspectives, depending on the legal framework we are discussing. On one hand, the efficiency of the EC competition law rules is determined by principles that guide the application of substantive rules, either at community level or at state level (e.g. supranationality and subsidiarity). On the other hand, the application of U.S. antitrust system is neither centralized nor monopolized by a single judicial or administrative authority, but is comprised by a series of inter-level cooperation forms among federal and state courts and authorities.

Due to the nature of the EC, the dynamics of competition law enforcement are unique and dependent on several non-legal factors. The importance of both community and national levels must be observed at every moment. Thus, there are two points of view to be considered: that of the EC, and that of every Member State. Based on the principle of supremacy of Community law, the EC has always taken the view that its law (e.g. competition rules) takes precedence over any conflicting national law, whether or not the national law is precedent in time.¹³³ At the same time, the Commission recognizes that the Member Countries are better equipped to apply both their national competition law

¹³³ Supra Inns of Court School of Law, note 33, pp. 204-205. The doctrine of Community primacy was first clarified by the ECJ in a preliminary ruling on a reference from a Milan Justice of the Peace in *Costa v. ENEL* (6/64) [1964] ECR 585.

and that of the Community; this ensures more active participation by the national judicial and administrative authorities.¹³⁴

Furthermore, the importance of the national level is stressed by the principle of direct effect. Under this guideline, established by Article 189 EC Treaty, regulations are directly applicable in the Member States, and no other type of community legislation is described this way.¹³⁵ The ECJ held on this subject that individuals may use, in national courts, Community laws that meet certain criteria. Thus, sometimes such laws may only be used against the State (e.g. they impose no obligation on individuals), or may be used by one individual to sue another or as defense to litigation (e.g.. they proscribe certain conduct).¹³⁶

The importance of the subsidiarity principle has accelerated the Commission's plan to decentralize application of competition rules. This issue is not strange or harmful to the notion of consistency of EC law; the division of competences on competition rules enforcement is inherent to the nature of Articles 81 and 82. These provisions are applicable only if agreements and restrictive practices have, or are liable to have, an appreciable effect on trade between Member States.¹³⁷

Nowadays, the Commission is trying to secure the full involvement of national courts and national competition authorities in the application of EC antitrust law. To that end, the Commission has published a notice on co-operation between national courts and the

¹³⁴ *Supra* Ortiz Blanco, note 39, pp. 11-12.

¹³⁵ *Supra* Inns of Court School of Law, note 33, p. 201.

¹³⁶ *Idem*, p. 201.

¹³⁷ The ECJ held the notion of effect between Member States in Case 56/55 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, [1966] CMLR 357, CCH para 8047.

Commission,¹³⁸ and is extending its contacts with the national authorities of the Member States.

1. Commission's role in competition procedures

The Commission has been called 'the guardian of the Treaty', according to the provision of article 211 of the EC Treaty. This article entrusts the Commission with the task of ensuring that provisions of the Treaty, and measures adopted by the Community institutions for their implementation are observed.¹³⁹

According to national powers courts and authorities, the Commission, except as regards Article 81 (3), does not enjoy a monopoly over enforcement of the Community competition rules. However, since the 1960's, the Commission, and specifically the Directorate General for Competition (DG IV) has devoted considerable effort to this activity. The result of this dynamic has been the generally recognized pre-eminence of the Commission in this field, considering it as the guiding hand on Community competition law.¹⁴⁰

Article 211 also provides the capability of the Commission to "have its own power of decision" and to "exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter". Through this article, the Commission is able to adopt decisions under Regulation 17, to ensure compliance with the competition rules of the Treaty. The drafting of individual decisions, block exemptions, regulations, and preparatory work for notices, are the main activities of the Commission on EC competition policy. Nevertheless, the procedure of deciding whether

¹³⁸ Notice on cooperation between national courts and the Commission in applying Arts. 85 and 86 of the EEC Treaty, O.J. 1993 C39, p. 6 [1993] 5 CMLR 95.

¹³⁹ *Supra* Office for Official Publications of the European Communities, note 30, art. 211.

¹⁴⁰ *Supra* Ortiz Blanco, note 39, p. 34.

or not an undertaking infringed community competition rules is perhaps the most controversial task of the Commission, due to the substantial amount of human and material resources devoted to this activity and due to the resentments of undertakings whose interests may be affected.¹⁴¹

In addition to this, the Commission is required to exercise its powers “in close and constant liaison with the competent authorities of the Member States”.¹⁴² The scope of this obligation is to allow the national courts and authorities to be informed of the main documents that are contained in the Commission’s files, concerning complaints, applications in respect of agreements, requests for information, statements of objections and replied from undertakings, administrative letters, etc.¹⁴³

The Commission also has the duty to advise or consult the authorities in the Member States when it intends to carry out investigations in their territory; the national authorities are obligated to assist the Commission during such investigations. Although the Commission develops the investigation and procedures, the national authorities may be called on to co-operate in the enforcement of decisions imposing fines.¹⁴⁴

Similarly, as means of communication between the Commission and the national authorities, the Advisory Committee on Restrictive Practices and Dominant Positions (the Advisory Committee, hereinafter) was created. This important body allows the Member

¹⁴¹ *Idem*, p. 35. The term “undertaking” will be used in this analysis. As a term-of-art used in EC competition law, it does not have the significance given by U.S. law. In practice, any form of entity which engages in economic activity will be considered by the Commission and the European Courts to be an “undertaking”.

¹⁴² *Supra* EEC Council Regulation 17, note 38, art. 10(2).

¹⁴³ The Commission forwards a copy of this information to the national authorities or courts in order to inform Member States of Community proceedings affecting undertakings established in their territory and to enable the Commission to compare its own information with any details forwarded to it by Member States. *Supra* Ortiz Blanco, note 2, p. 30. See also the doctrine of the ECJ in Case C-67/91 *Dirección General de Defensa de la Competencia (DGDC) v. Asociación Española de Banca Privada (AEB) and others* [1992] ECR I-4785, at paras. 11 and 12.

States to be consulted prior to the adoption of final decisions on Article 81 and 82 cases or of decisions imposing pecuniary penalties.¹⁴⁵ The Advisory Committee is also consulted about both the adoption of block exemption regulations and general competition policy documents. The Advisory Committee is composed by officials from the various national authorities responsible for applying national and Community competition law; each Member State designates an official to represent it.¹⁴⁶ Failure to consult the Advisory Committee may constitute an infringement of a procedural requirement in the application of the competition rules.¹⁴⁷

It is important to note that the Commission is an administrative authority that should not be regarded as a tribunal: it is only an administrative body responsible for ensuring compliance with certain rules in the public interest of the Community. The procedures held by the Commission have different characteristics, and although they are administrative in nature, they incorporate safeguards similar to those available in judicial proceedings.¹⁴⁸ The general characteristics of some of the Commission's proceedings in competition matters and their correspondent decisions will be explained ahead.

2. National Authorities' role in EC and national competition law

The national competition authorities of the Member States have the power to investigate, make decisions, and impose sanctions. The national competition law rules of each state are their main element of work, since its main task is to protect the internal

¹⁴⁴ *Supra* EC Treaty, note 30, art. 256.

¹⁴⁵ *Supra* Regulation 17, note 38, art. 10(3) in conjunction with art. 10(1).

¹⁴⁶ *Supra* Ortiz Blanco, note 39, p. 32.

¹⁴⁷ However, this situation cannot be considered as undermining the fundamental rights of undertakings or the rights of their defense. See Case T-19/91 *Vichy v. Commission* [1992] ECR II-415, para. 38.

¹⁴⁸ *Supra* Ortiz Blanco, note 39, p. 43.

national market of every country in the EU.¹⁴⁹ Their power, however, depends upon their degree of autonomy from political influence.¹⁵⁰

The investigatory powers of Member States are more effective than those of the Commission, due to practical factors: they can direct investigations against individuals and sanction them for failure to cooperate; some of them can include imprisonment for disobeying a court order; they have police powers, including the possibility to obtain search warrants and three of them provide criminal sanctions for restrictive practices and abuses of a dominant position.¹⁵¹ The national competition authorities, in connection with national judiciary bodies, are in charge of all criminal and non-criminal procedures.

Under Article 84 of the EC Treaty, the national authorities are empowered to apply Community competition rules, but only until such time as the Commission decides to initiate a procedure.¹⁵² They are also obligated to demand their national legislative bodies to enable legislation allowing them to apply Articles 81 and 82 and to establish which national remedies apply.¹⁵³

¹⁴⁹ As we will see ahead, the initiation of a procedure by the Commission can preempt a national authority to perform this action. However, not every procedure initiated prevents authorities from applying their own competition rules, where they differ from Community rules. EC Treaty Articles 81 and 82 are seen as mainly concerned with restrictive practices from a perspective of the potential barriers to trade between Member States arising from them; national authorities are concerned with restrictive practices solely within their own national context. Nevertheless, the application of national law must not prejudice the uniform application of Community competition law throughout the territory of the EC, or the full effectiveness of the measures adopted for the implementation of the Community rules. The ECJ cases mentioned in note 11 are considered as strict guidelines in this issue.

¹⁵⁰ *Supra* Hawk and Laudati, note 76, p. 33.

¹⁵¹ These three countries are Austria, France, and the Netherlands. Their laws (Kartellgesetznovelle 129-136 [1993], Ordonnance du 1 Decembre 1986 [art. 17], and violation of a Royal Decree prohibiting or obliging certain conduct after the Minister of Economic Affairs has found a contrary position to the general position, respectively) allow them to prosecute criminally competition law infringements.

¹⁵² According to article 9(3) of Reg. 17, “[a]s long as the Commission has not initiated any procedure under Articles 2, 3 or 6 (negative clearance, infringement or individual exemption), the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty...” (parentheses added).

¹⁵³ *Supra* Hawk and Laudati, note 76, p. 34. Remedies vary considerably among Member States based on deeply rooted historical differences and cultural attitudes.

However, national authorities are skeptical about the benefits that Community competition rules can bring to any procedure initiated in Member States. In fact, national provisions can often be applied faster and to greater effect.¹⁵⁴ Besides, due to the capability of the Commission to terminate any previous proceeding by filing its own action, the national authorities are reluctant to initiate a proceeding under Article 81(1). Moreover, they fear they will waste time and resources if the Commission can grant an exemption under Article 81(3) after they have found a violation under Article 81(1).¹⁵⁵ Even if the Commission has been considering delegating its power over those agreements that affect mainly a single Member State to national competition authorities, at the moment there is little incentive for national authorities to perform the Commission tasks. These authorities do not have power to grant exemptions and, as mentioned, they lose their competence if the Commission opens proceedings.¹⁵⁶ Having noted this situation, the Commission has been prompted to study new forms of co-operation with the administration of Member States. Among the suggestions of some Member States, the ‘consensus procedure’ has been proposed as a way of agreement between the Commission and national authorities: as soon as the procedure is initiated by the opening of the file, the Commission and the authorities should reach agreement as to whether the case should be investigated and adjudicated by the Commission or by a national competition authority.¹⁵⁷

¹⁵⁴ H. Peter Von Stoephasius *Enforcement of EC Competition Law by National Authorities*, in Piet Jan Slot and Allison McDonnell (eds.) *Procedure and Enforcement in E.C. and U.S. Competition Law: Proceedings of the Leiden Europa Instituut Seminar on User-Friendly Competition Law*, 1993, p. 33.

¹⁵⁵ *Idem*.

¹⁵⁶ *Supra* Korah, note 9, pp. 23-24.

¹⁵⁷ *Supra* Ortiz Blanco, note 39, p. 33.

The Commission has raised a different proposal. It suggested a consultation network to fill in the gaps on information exchange between this Community institution and Member States. By establishing machinery that enables both parties to consult each other and deciding which authority will follow the procedure, whenever conflicts of jurisdiction are liable to arise in dealing with certain Article 81 cases, the uniformity of Community law application is safe. The proposal of this ‘who goes first’ procedure has been widely accepted, but not yet implemented.¹⁵⁸

3. National Courts’ role in competition law enforcement

The powers of the Commission differ from those national courts in their objective and content, but also in the ways in which they are exercised: the Commission exercises its powers pursuant to the procedural rules laid down by Regulation 17, while national courts follow national procedural law.¹⁵⁹ The Commission has tried to establish parameters for the national courts on the application of Community competition rules, but above all, it has been the case law of the ECJ that has determined the principles conducive to the avoidance of conflicting decisions.

Although the application of Article 81(3) is not open to national courts, they are empowered to apply Articles 81(1), 81(2) and 82 of the EC Treaty, by virtue of the direct applicability of those provisions.¹⁶⁰ Furthermore, national courts are also able to apply the

¹⁵⁸ *Idem*, p. 33. This proposal, made by Sir Leon Brittain in a two-lecture conference on 2 July and 7 Dec. 1992, to the London Common Law and Commercial Bar Association and the Brussels Centre for European Policy Studies, respectively, stated that this procedure would apply to cases brought against restrictive agreements that were notified and did not qualify for an exemption.

¹⁵⁹ *Supra* Notice on Co-operation between national courts and the Commission, *supra* note 138, para. 9.

¹⁶⁰ Both Articles 81 and 82 have been held to be directly effective and therefore capable of use in the national courts of Member States. See Case 127/73 *BRT v SV SABAM* [1974] ECR 51, paras 14-16, 21 and 22.

decisions and regulations adopted by the Commission related to authorization of restrictive agreements.¹⁶¹

Hence, the extent to which national courts make use of Articles 81 and 82 varies from Member State to Member State. Agreements that infringe the competition rules are prohibited, and the highest courts in several large Member States have held that damages lie for infringing Articles 81 and 82.

The first and decisive action of national courts on competition law enforcement is the analysis of the nullity of an agreement. It is a given that national courts must enforce lawful agreements, but the EC Treaty provides, in Article 81(2), that any agreement that infringes Article 81(1) is automatically void. Thus, the nullity and, therefore, the inapplicability of agreements is a matter primarily for the national courts, which are under an obligation to apply a sanction.¹⁶² Provisions in contracts that infringe Article 81 are void pro tanto and national courts should not enforce them. It is not easy, though, to determine whether a provision infringes Article 81 or may be enforced. Sometimes national courts will have to adjourn to enable the Commission to decide whether to exempt the agreement.¹⁶³

Among the different tasks that national courts perform in EC competition law system, the capability to recognize their jurisdiction and the cooperation with the Commission are the most relevant on any procedure. As I mentioned, the first problem facing national courts is whether the agreements or practices at issue are in breach of the prohibitions laid down

¹⁶¹ *Supra* Ortiz Blanco, note 39, p. 17.

¹⁶² See Case T-24/90 *Automec v. Commission II* [1992] ECR I-2223, [1992] 5 CMLR 431 para. 93, in which the CFI stated that “the Treaty supposes that national law gives the national courts the power to safeguard the rights of undertakings which have been subjected to anti-competitive practices”.

¹⁶³ *Supra* Korah, note 9, p. 23. The core cases on this issue are *Société la Technique Minière v. Maschinenbau Ulm* (*supra* note 137) and *Delimitis v. Henninger Bräu* (C-234/89) [1991] ECR I-935, [1992] 5 CMLR 210.

in articles 81(1) and 82. The courses of action available to national courts to determine this situation are various and complex.¹⁶⁴

First, national courts must be able to ascertain that neither the Commission nor the national competition authorities have taken a decision or a less formal measure concerning the contested agreement or practice. Since any formal decision brings an end to procedures, national courts are bound by them and must observe them. An exception to this issue is the ending of a procedure by a comfort letter or any other informal decision: they are not binding but must be taken into account.¹⁶⁵

A different situation arises if the Commission has not expressed a view on the actual agreement or practice. In this case, national courts may refer to the case law of the ECJ and decisions and general notices of the Commission, in order to establish whether the Court or the Commission has already dealt with similar agreements or practices. If these principles are insufficient, the courts may either request assistance from the Commission and stay proceedings to await the decision of the Commission, or decide to defer judgment where the Commission has initiated a procedure in the case before them or in a similar case.¹⁶⁶

Last, national courts may stay the proceedings and refer a question to the ECJ for a preliminary ruling under Article 234 EC Treaty. This consultation process is recognized by the Commission as the best way to clarify the criteria for the application of competition rules, due to their complexity and inadequacy. The importance of this principle is paramount because once the courts have established whether a restrictive agreement infringes Article 81(1), they must also decide if the agreements may qualify

¹⁶⁴ *Supra* Ortiz Blanco, note 39, pp. 22-25.

¹⁶⁵ *Supra* Notice on Co-operation between national courts and the Commission, note 138, para. 20.

for an exemption under Article 81(3). Only then can they determine that the contested agreements are contrary to Community competition law and adopt the appropriate measures.¹⁶⁷

B. Procedures, decisions, and uniformity of EC Law

As described above, the existing difference among the bodies interacting on the application of EC competition law makes the importance of Commission evident. Its tasks and efforts aim towards the consistency and coherence of the EC competition system. This action is sometimes jeopardized, but the support of the ECJ preserves the integrity on the European system. However, the procedures that make possible the continuity of the community antitrust rules are complex and dependant, in certain situations, of national policies. This is the situation that the Commission tries to avoid at any cost, without interfering with national standards or particular interests of Member States.

The main provision on competition law procedure, which establishes the basic procedures for the Commission's actions, is Regulation 17.¹⁶⁸ However, since the Commission, national authorities, and national courts are part of different procedures in their own jurisdiction, I will only mention those procedures that allow the Commission to preserve the integrity of the Community competition system. Notwithstanding that, it is important to mention that the analysis of suspected infringement of EC competition rules may start

¹⁶⁶ *Idem*, paras. 21 and 22.

¹⁶⁷ *Supra* Ortiz Blanco, note 39, p. 23. The possibility to ask for a preliminary ruling becomes an obligation where the court or tribunal must dispose of a question of interpretation of the Treaty at last instance, and no appeal lies against its decision.

¹⁶⁸ *Supra* note 38.

by the Commission's own initiative, on application by a Member State,¹⁶⁹ or by applications made by 'natural or legal persons who claim a legitimate interest'.¹⁷⁰

1. Scope of Commission's exclusive authority

The importance of the knowledge of procedures in EC competition law is paramount for individuals, undertakings, and foreigners to the European system. The capability of the Commission to determine different actions, adopt decisions, issue recommendations, grant exemptions, or adopt interim measures, has resulted in a large amount of doctrine and case law. Even if the parties try to avoid some of these procedures before the Commission, in order to continue their illegal activity, or to hide their results in order to avoid any investigation, the Commission has enough resources to initiate and culminate important procedures to preserve Community trade balance.

The Commission is not an impartial or neutral civil authority in proceedings inter partes, adopting its decision in favor or what it considers to be the more legitimate of two opposing positions put to it. Its conduct of proceedings is governed by the principle audi alteram partem and by the aim of establishing the objective truth by means of an inquisitorial procedure.¹⁷¹

The proceedings to analyze possible infringements are laid down by Regulation 17. This provision establishes two successive but clearly separated procedures. The first one is a preparatory investigation procedure, whose purpose is to enable the Commission to obtain the information necessary to check the actual existence and scope of a specific

¹⁶⁹ *Supra* EC Treaty, note 30, article 85.

¹⁷⁰ *Supra* Regulation 17, note 38, article 3(2)(b).

¹⁷¹ *Supra* Ortiz Blanco, note 39, p. 43.

factual and real situation, and which includes the possibility of requesting information and carrying out inspections at the premises of the undertakings.¹⁷²

On a second procedure, the Commission and the interested parties are involved in a statement of the objections to the competition practice of the undertaking. The Commission sends this statement to the undertakings when it has sufficient evidence of an infringement.¹⁷³ In this procedure, the undertakings have an opportunity to submit written and oral observations on the objections made against them. This procedure, which culminates with the adoption of a decision by the Commission, only after being aware of the views of the parties, can be known as 'procedure for the adoption of a decision'.¹⁷⁴

In broad terms, the Commission can be involved in different types of procedures. They depend of certain factors: the form in which an investigation is initiated (infringement procedures and recommendations); the interests of the undertaking (procedures for negative clearance and individual exemptions); the cooperation of the latter or the needings of the Commission to continue its activities (voluntary adjustments or procedures concluded without a formal decision), and necessary measures for the Commission's activities (adoption of interim measures on an urgent basis).¹⁷⁵

Finally, the culmination of the procedure is a decision issued by the Commission. Various types of decisions can be adopted which are binding in all respects on their addressees.¹⁷⁶ Among the numerous characteristics of the Commission's decisions are: their importance as result of application of Community competition rules in a specific

¹⁷² *Supra*, Regulation 17, note 38, art. 14.

¹⁷³ *Supra* Regulation 17, note 38, art. 19, and Commission Regulation on Hearings 99/63 [1963] O.J. Spec. Ed., 47.

¹⁷⁴ *Supra* Ortiz Blanco, note 39, p. 44.

¹⁷⁵ *Idem*, note 39, pp. 48-51. See also Korah, note 9, pp. 126-149.

¹⁷⁶ *Supra* EC Treaty, note 30, article 249.

manner to specific cases; the possibility of being considered as precedent for the future, due to the relevance of the case for community purposes; their necessity of stating the reasons on which they are based and the clearly and unequivocal reasoning followed for their adoption; and the possibility of being contested before the ECJ under Article 230 EC Treaty.¹⁷⁷

Thus, the decisions of the Commission can be classified as formal and non-formal decisions. The formal decisions are divided into substantive decisions (whose legislative basis are Articles 81 and 82 of the EC Treaty) and procedural decisions which are based on the procedural regulations and help to the adoption of substantive decisions.

On their side, non-formal decisions are not a single document, but a series of administrative letters¹⁷⁸ used by the Commission to indicate the undertakings the Commission's preliminary views about certain conduct, or to persuade the former to adjust their possible conduct to avoid a breach of competition rules. These letters form part of a series of informal contacts between the Commission and the undertakings, and do not bind the Commission or confer to the undertakings the right to be heard under article 19(1) of Regulation 17.

These non-formal decisions are divided as follows: letters closing the file (they inform undertakings that their cases are to be closed), discomfort letters (after receiving a notification, the Commission considers that the case is of insufficient significance to deal with by a decision, but the agreements examined nevertheless contain manifestly restrictive clauses which it is desirable to remove) and comfort letters (being the most

¹⁷⁷ Ortiz Blanco, note 39, pp. 55-57.

¹⁷⁸ These administrative letters cannot be regarded as decisions, The ECJ held that they are simply letters providing information in which the Commission informs undertakings of its views of the agreements

frequently used, they are the equivalent to an informal negative clearance or individual exemption, but without the legal certainty given by a formal decision).¹⁷⁹

2. Rights of parties in competition law procedures

The relevance of national courts in competition law enforcement goes beyond declaring the nullity in certain agreements. Since the prohibitions laid down by Articles 81(1) and 82 are capable of producing direct effects between individuals, those articles create rights in favor of the persons concerned which the national courts must uphold.¹⁸⁰ An alleged victim of anti-competitive behavior that contravenes either Article 81(1) or Article 82 may bring an action in the appropriate national court. Nevertheless, the procedural rules which apply and the remedies that are available vary from one Member State to another.¹⁸¹

Furthermore, a complainant is entitled to certain rights: to be kept informed of the acceptance or rejection of the complaint; to be told of the Commission's preliminary findings; to apply to be heard by the Commission (in writing or orally) in the course of any investigation; and to challenge the final decision of the Commission at the ECJ.¹⁸² Nevertheless, the complainant does not have the same degree of access to the Commission's file on the investigations as does the undertaking being investigated; even more importantly, a complainant cannot force the Commission to investigate a complaint.

notified. See Joined Cases 253/78 and 1-3/79 *Procureur de la République v. Guerlain* [1980] ECR 2327, [1981] 2 CMLR 99, 9712 at paras 11 and 12 (Case 253/78).

¹⁷⁹ *Supra* Ortiz Blanco, note 39, pp. 270-275.

¹⁸⁰ *Supra* Ortiz Blanco, note 39, p. 20. As the author mentions: “[I]n the case of abuses of a dominant position, since the prohibition laid down by article 82d is not subject to exceptions —there are no grounds for authorizing abuses— the national courts may adopt measures immediately, without having to take their investigation any further than a finding that that article applies”.

¹⁸¹ *Supra* Inns of Court School of Law, note 33, p. 81.

¹⁸² *Supra* EC Treaty, note 30, article 230.

Moreover, private litigants have brought actions against Member States on several occasions. Sometimes the plaintiff is a national of that State,¹⁸³ on other occasions the plaintiff is a foreign national.¹⁸⁴ All Member States of the EU are under an enforceable obligation to abide by the EC Treaty and implement such measures, as they are required to, as part of their national laws. Failure to act on the part of the Member State may result in liability; similarly, acting in contradiction of EC law may result in liability.¹⁸⁵

3. Remedies on competition procedures

Remedies offer to the parties the possibility to reduce harm caused to them either by wrongful action of an accused entity, or by misapplication of EC competition rules.¹⁸⁶ These remedies have their basis on actions for non-contractual liability in national courts, since infringements violate conducts prohibited by Community law, which is directly applicable in Member States.

During the 1990's, the ECJ held that national courts must provide adequate remedies for breach of Community law, although most of the cases have been against governments. The ECJ has frequently made reference to the obligation of the national courts to protect rights conferred under Community law, an obligation which derives from Article 10 EC Treaty.¹⁸⁷ It is for national law to establish procedural rules such as which court has jurisdiction, but the remedy must be efficacious and no worse than that available for infringement of national law.¹⁸⁸ The common remedies used in courts by the parties are damages, injunctions and declarations.

¹⁸³ See *Francovich and others v. Italian Republic* (C-6/90 and 9/90) [1991] ECR I-5357.

¹⁸⁴ See *R. v. Secretary of State for Transport, ex parte Factortame Ltd* (No.4) [1986] 2 WLR 506.

¹⁸⁵ *Supra* Inns of Court School of Law, note 33, p. 134.

¹⁸⁶ For a complete explanation of the application of EC law and remedies in national courts, see *supra* Craig and de Búrca, note 28, p. 200-239.

¹⁸⁷ *Supra* *Francovich and others v. Italy*, note 183, paras. 33-37 and 41-42.

¹⁸⁸ *Supra* Korah, note 9, p. 153.

Damages are often a remedy desired by the parties. It is beyond doubt that they should be available to compensate those harmed by and infringement of the EC competition rules. The ECJ has recognized in cases such as *Brasserie du Pêcheur v. Germany* the right of individuals to recover damages against other individuals (and not just Member States) for breaches of Community Law.¹⁸⁹ Also, the Commission has set out its view about the right of the parties to recover compensation for the “damage suffered as result of infringements, where such remedies are available in proceedings relating to similar national law”.¹⁹⁰

An injunction is a remedy that can be granted after a deep analysis of the infringement. Sometimes, an injunction is granted instead of damages, if these are not an adequate remedy for the plaintiff;¹⁹¹ to this end, the plaintiff must quantify the damages it has suffered. On the other hand if the applicant for injunction fails to demonstrate a serious question to be tried, no interlocutory injunction will be granted. Moreover, if the evidence on the trial is outside the jurisdiction of the national court being asked to grant relief, there may be no jurisdiction over the defendant.¹⁹² The ECJ also held that the enforcement of a Parliamentary Act could be suspended by means of an interlocutory injunction notwithstanding a long-settled rule that prohibited such relief.¹⁹³

Finally, a declaration is perhaps the most used remedy, when the party relying upon EC competition law is a party to a contract and wishes that contract to continue, notwithstanding that one or more clauses in the contract are void for infringement of

¹⁸⁹ *Supra* *Inns of Court*, note 33, p. 131.

¹⁹⁰ *Supra* Notice on Co-operation between the Commission and the National Courts, note 138, para. 11.

¹⁹¹ The core case stating that an infringement of Articles 81 and 82 can be pleaded in national courts as “breach of statutory duty” is *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] 1 AC 130 (HL).

¹⁹² *Supra* *Inns of Court*, note 33, p. 132.

¹⁹³ See *R. v. Secretary of State for Transport, ex parte Factortame* (C-213/89) [1990] ECR I-2433.

Article 81(1) or 82. However, an application for severance will normally accompany a declaration in such circumstances.¹⁹⁴

C. Relationship between U.S. federal offices and state institutions

The analysis of the interaction among the different U.S. antitrust enforcement actors will give a different perspective from that of the European Union. The operation of antitrust policy reflects pretty well the balance of opinion among the different sectors in the U.S. The antitrust policy stems from two basic propositions: first, that private, unaccountable persons should not wield significant amounts of economic power; second, that should they seek to do so, they should be monitored by a rule of law.¹⁹⁵

As mentioned before, the American antitrust laws can be enforced in different ways: by the Antitrust Division of the Department of Justice, which may bring civil or criminal cases against corporations or individuals before federal courts; by the Attorney Generals enforcing state (and, in certain circumstances, federal) antitrust laws; and by private parties, entitled to sue in federal court for an injunction and for treble damages if they believe they have been harmed by a violation of the antitrust laws.¹⁹⁶

The U.S. antitrust bodies play an important role in the procedural efficiency of this system. The effectiveness of this framework grants legal certainty to the parties, measured by the large participation of private individuals in different procedures, and the government participation through follow-on actions. However, an important difference between the U.S. antitrust system and Community rules is that decentralization in the latter involves only administrative decisions, made by the national competition

¹⁹⁴ *Supra* Inns of Court, note 33, p. 132.

¹⁹⁵ *Supra* Neale and Goyder, note 45, p. 470.

¹⁹⁶ Pierre-Emmanuel Noel *Efficiency Considerations in the Assessment of Horizontal Mergers Under European and U.S. Antitrust Law*, Eur. Competition L. Rev. 1997, 18(8), 498-519, p. 498.

authorities, with small involvement of courts in the process. Broadly speaking, the U.S. antitrust system also encourages and assists private plaintiffs, through public enforcement.¹⁹⁷

Hence, the desired end in both the EU and in the U.S. 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 U.S., coordination is the result of efforts by both the federal agencies and the states. Furthermore, coordination is currently recognized as promoting efficient use of scarce antitrust law enforcement resources and improving consistency in the application of the federal and various state antitrust laws to the benefit of the business community.¹⁹⁸ These efforts have taken many forms that will be discussed throughout this section.

1. Cooperation within U.S. antitrust enforcement

Antitrust enforcement has crossed different periods in U.S. legal history. The shift from a passive enforcement attitude of federal officers, concentrated merely on promoting fair competition, to a vigorous and enthusiastic antitrust enforcement is a relative newcomer to the judicial battleground.¹⁹⁹

On several occasions, in recent years where both federal and state enforcers have had an interest, they have initiated joint investigations and actions. Also, cooperation efforts have involved cross-deputization, through which federal or state enforcement officials are authorized to act in the other's enforcement jurisdiction as its agent.²⁰⁰ Federal officials

¹⁹⁷ *Idem*, p. 587.

¹⁹⁸ *Supra* Hawk and Laudati, note 76, p. 36.

¹⁹⁹ *Supra* Gellhorn, note 43, p. 40.

²⁰⁰ *Supra* Hawk and Laudati, note 76, p. 37.

benefit from state officials' deep knowledge of their local communities to detect violations, for it would be virtually impossible for federal agencies to monitor compliance of firms with the antitrust laws in a country as large as the United States.

Furthermore, efforts have been made to increase information sharing between federal and state agencies in areas such as merger enforcement. The issuing of the Information Sharing Protocol,²⁰¹ developed by the NAAG's Executive Working Group, in 1992, is proof of consistency between the two enforcement levels, allowing antitrust enforcers to coordinate and share communication at the earliest stages of an investigation.

2. The "State action" doctrine in U.S. antitrust enforcement and the Supremacy Clause

The "State Action" doctrine²⁰² exempts qualifying state and local government regulation from federal antitrust enforcement, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws. Due to the doctrine of preemption, the federal antitrust structure stands in a strong position in front of state law. However, no serious argument has been made in favor of Congress' intention to use the Sherman Act to displace all forms of state and local regulation related to competition.²⁰³ This doctrine has an exemption that stands for the proposition that federal antitrust should not be used to intrude too deeply into state regulatory process.²⁰⁴

Thus, in the absence of federal preemption, action by a state, through legislation or regulation, is immune, irrespective of the anticompetitive effect. The state may, in short,

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

²⁰² This doctrine was first recognized by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943).

²⁰³ *Supra* Hovenkamp, note 44, p. 673.

²⁰⁴ This exemption was necessary because of the decision of the Supreme Court, only one year before *Parker*, in *Wickard v. Filburn* 317 U.S. 111, 63 S.Ct. 82 (1942). Since the Supreme Court held in this case that Congressional authority extends to all economic matters in or affecting interstate commerce, and thus, application of federal antitrust regulation to such local matters, the result could have been that federal antitrust laws would be used to undermine all state economic regulation.

replace the federal scheme with its own judgment.²⁰⁵ This matter has been a recurrent subject of litigation; courts have been asked to decide the degree of state involvement needed to immunize an anticompetitive practice.²⁰⁶

The Supreme Court implied in *Goldfarb* that antitrust conduct is only immunized when the state, through its sovereign power, requires the practice under question and actually supervises it.²⁰⁷ Thus, not every act of the state or its subdivisions automatically comes within the immunity of state action.

In a subsequent decision, the Ninth Circuit set out three conditions under which the immunity established in *Parker* is to be applied.²⁰⁸ The first condition provides that, where the circumstances point to a state policy to replace competition with regulation in a certain industry or activity, the entity claiming immunity only needs to show that it is authorized by the state to ‘do business’, since the decrease in competition is foreseeable result in those cases. As a second condition, the Ninth Court mentions that, where there are “abundant indications that a state’s policy is to support competition, a subordinate state entity must do more than merely produce an authorization to ‘do business’ to show that the state’s policy is to displace competition”.²⁰⁹ The third condition will exist where the state has a general policy to increase competition yet allows for a specific anticompetitive activity.²¹⁰

²⁰⁵ See Hovenkamp and MacKerron *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719 (1985).

²⁰⁶ E.Thomas Sullivan and Jeffrey L. Harrison *Understanding Antitrust and Its Economical Implications*, Matthew Bender and Co., 3rd ed., USA, 1998, pp. 90-91.

²⁰⁷ *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975), 791.

²⁰⁸ *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), cert denied, 502 U.S. 1094 (1992).

²⁰⁹ *Idem*, p. 403.

²¹⁰ *Idem*.

An undeniable problem that courts have faced, is that has been necessary to decide about the conflicts between federal antitrust and state regulation. A variety of approaches to this issue have been proposed. One approach is an efficiency test (efficient, or competitive state or local regulation should be permitted, but harmful regulation should be found inconsistent with federal antitrust policy). A second approach is jurisdictional (if the state regulates a purely intrastate market, its regulation is exempted from antitrust scrutiny, but if the market has substantial interstate spillovers, then federal antitrust scrutiny is appropriate). A third approach would be to conceive of the federal antitrust laws as means of combating regulatory “capture” at the state or local level (instead of creating regulatory programs at the behest of producers or small producers, which prevent new entries in their market, an anticapture system would use federal antitrust laws to distinguish between pro-consumer and captured regulatory regimes). A fourth approach would consider whether the relevant decision maker is financially interested in the outcome of a regulatory decision (the ‘active supervision’ prong of the ‘state action’ test is reflected in this intent).²¹¹

D. Procedures in U.S. Antitrust Law

The initiation of procedures in U.S. antitrust law is dependant on the provision pursuing the enforcement of competition rules. As I mentioned, the main laws that encompass antitrust rules are the Sherman Act, the Clayton Act, and the FTC Act, and each one establishes their own jurisdictional requirements.

Thus, under Section 1 of the Sherman Act, the restraint of trade must be shown to have occurred in “trade or commerce among the several States, or with foreign nations”.

²¹¹ *Supra* Hovenkamp, note 44, p. 674-676. See also Dirk Ehle *State Regulation under the U.S. Antitrust State Action Doctrine and Under E.C. Competition Law: A Comparative Analysis*, Eur. Competition L.

Where the restraint does not occur in the flow of interstate commerce there must be a showing of a substantial effect on interstate or foreign commerce.²¹²

Under Section 3 of the Clayton Act, the activity challenged must be conducted by a person engaged in interstate or foreign commerce and must occur in the course of interstate or foreign commerce. Moreover, Section 3 applies only to sales or leases of goods or commodities and it has no application to export sales.²¹³

The FTC Act contains no such limitations: provided the activity challenged occurs in or affects commerce, jurisdiction will arise. There is no requirement to demonstrate that the effect is substantial. Neither is there any limitation to a particular kind of transaction (such as sales or leases) nor to particular subjects of the transaction (goods or commodities). The Commission is “empowered and directed” under Section 5(a)(2) of the Act to prevent individuals or corporations from engaging in the activities prescribed in Section 5(a)(1) and is for that purpose empowered to hold hearings. No provision is made for private suits to be brought under the Act.²¹⁴

In choosing cases to prosecute, each agency has the power to investigate by compelling the production of documents or testimony. The investigative phase will reveal with substantial precision the context, and therefore the competitive significance, of the conduct at issue. In deciding whether to prosecute, the agency will often have the benefit of explanations or arguments presented by the party whose conduct may be challenged.

Rev. 1998, 19(6), 380-396.

²¹² *Supra* 15 U.S.C.A. §§ 1-7, note 46, p. 19 et seq.

²¹³ *Supra* 15 U.S.C.A. §§ 12-27, note 47, p. 67 et seq.

²¹⁴ *Supra* 15 U.S.C.A. §§ 41-58, note 48. See also Raybould and Firth, *supra* note 16, pp. 78-79.

The meetings in which these explanations take place are highly appreciated by lawyers and counselors, proving to be extremely fruitful in avoiding any civil prosecution.²¹⁵

An important feature of one of the federal agencies, the Antitrust Division, is its capability to opt for a criminal prosecution under Sherman Act violations. The Division frequently does so with respect to those violations identified as per se unlawful. In addition, the division uses other criminal statutes—including those dealing with wire and mail fraud, false claims, perjury, and obstruction of justice—in its antitrust enforcement efforts. Furthermore, the Division will seek to impanel a grand jury to investigate information indicating the existence of criminal violations. If criminal prosecution is pursued, the Federal Bureau of Investigation or special investigators may be employed, with their expert methods of criminal detection, investigation, and surveillance. If indictments are eventually sought, an arrest may follow.²¹⁶

For its part, the FTC brings its cases before an administrative law judge, with procedures quite similar to federal court litigation, or in certain circumstances, directly in federal court. Both kinds of FTC cases may ultimately be appealed to a federal appellate court.²¹⁷

When, as a result of complaints or after investigation, it is believed that some breach of Section 5 of the FTC Act or of the sections of the Clayton Act under the Commission's jurisdiction, has occurred, the Commission may issue a formal complaint. Under Section 5 of the FTC Act, the Commission must have reason to believe not only that some unfair method of competition is being used but also that “a proceeding by it in respect thereto

²¹⁵ *Supra* Shenefield and Stelzer, note 50, p. 26.

²¹⁶ *Idem*, p. 27.

²¹⁷ *Ibidem*, p. 28.

would be to the interest of the public”, meaning that it has a statutory limitation not to proceed against every known offence.²¹⁸

1. Private actions as the primary force to initiating antitrust procedures

The third major enforcement ‘agency’ (after the Antitrust Division and the FTC) is the private plaintiff who brings actions in the U.S. District Courts. The number of private enforcement actions pending has fluctuated greatly, from about 1400 in the late 1970’s to about 750 in the mid to late 1980’s, but private actions continue to represent at least 90 per cent of all Federal antitrust cases.²¹⁹

Private civil enforcement can be commenced by “any person who [is] injured in his business or property”²²⁰ by reason of a violation of “anything forbidden in the antitrust laws”. The action can be either for treble damages²²¹ or injunctive relief.²²² Reasonable attorneys’ fees and costs are permitted under either a damage award or injunctive relief.

According to the Clayton Act, Section 4, a plaintiff must be a ‘person’, which includes natural persons, corporations, and unincorporated associations recognized by federal, state, or foreign law. Municipalities, states, and foreign governments are all permissible plaintiffs. Above all, section 4 is designed to redress market injuries that occur to market participants when the market becomes less competitive. Further, the claim of injury must

²¹⁸ *Supra* Neale and Goyder, note 45, p. 385.

²¹⁹ Clifford A. Jones *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, Great Britain, 1999, pp. 16 and chapters 7, 14, 17.

²²⁰ 15 U.S.C. §§ 15c, 15h.

²²¹ *Idem.*

²²² 15 U.S.C. § 26.

not be so tenuous that damages will be extremely difficult to prove, or that it will simply be “duplicative” of the injury suffered by others.²²³

As mentioned, treble-damages are a powerful and growing factor in the effectiveness of antitrust enforcement.²²⁴ These actions, under the Sherman and Clayton Acts, must be brought in the federal courts and are governed by the Federal Rules of Civil Procedure. An action is to be served on the defendant company in one of the district courts, and as the trade of sizeable companies extends over a wide area, a plaintiff will often have a wide choice of courts in which bring the action.²²⁵

Once the case has been filed, it is assigned to an individual district court judge, and he or she remains responsible for all procedural hearings arising in the course of the case, as well as for its ultimate trial and decision. After the substantive trial it is open to either party, if dissatisfied with the outcome, to appeal to the relevant Circuit Court of Appeals.²²⁶

2. Remedies available for the parties on antitrust procedures

A comparative analysis of U.S. antitrust law must stress the results of the procedures in this framework for those who break it. The Government’s choice between criminal and civil proceedings cannot be guided simply by the gravity of supposed offences and is to some extent artificial. More than criminal proceedings based on Sherman Act violations, U.S. Government seeks to enforce antitrust compliance through

²²³ *Supra* Hovenkamp, note 44, p. 554.

²²⁴ For an interesting comment about treble damages convenience, see *supra* Shenefield and Stelzer, note 50, pp. 98-100, and also *supra* Sullivan and Harrison, note 197, pp. 38-41.

²²⁵ *Supra* Neale and Goyder, note 45, p. 421.

²²⁶ *Idem.*

high fines. Criminal enforcement is rarely sought, limited in practice to outrageous and clearly illegal conduct.²²⁷

On the other hand, remedies for civil violations can include injunctions, as well as dissolutions or divestiture for illegal mergers or occasionally monopolization. As any private plaintiff, the U.S. Government is entitled to recover treble damages for injuries it suffers as result of an antitrust violation.²²⁸

The FTC, being an regulatory agency which is more specialized than courts and not as bound by strict rules of procedure and evidence, counts on a “cease and desist” order as its general remedy; this may amount to forced dissolution or divestiture in the case of a merger. Furthermore, findings of violations of the FTC Act that are not also antitrust violations will not support subsequent private actions for treble damages.

Since state antitrust laws often parallel the federal acts and rely on their interpretation, the activity of State Attorneys General is based on these federal guidelines. These public employees were granted the right in 1976 to sue in their sovereign capacity as ‘parens patriae’ for treble damages for injuries to their general economy under the antitrust laws.²²⁹ In federal courts a state will sue to collect damages that it suffered in its capacity as the direct purchaser of the product at issue.

However, is important to stress that the approach followed in U.S. courts begins with the premise that plaintiffs are required to establish the fact of their injury by reason of the defendant’s antitrust violation ant then to establish the amount of the damages

²²⁷ *Supra* Gellhorn, note 43, p. 42.

²²⁸ *Supra* 15 U.S.C.A. §45, note 48. See also Hovenkamp, note 44, p. 536.

²²⁹ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383, 1394, 15 U.S.C.A. §§ 15c-15h. See also *Hawaii v. Standard oil of Calif.*, 405 U.S. 251 (1972).

sustained.²³⁰ In broad terms, the types of damages which are recoverable in a U.S. antitrust action will vary greatly according to the precise conduct in the case, the nature of the business or industry concerned, and the nature of the violation.

Nonetheless, except for price discrimination claims, there are three varieties of damages. The first type, overcharge damages, search for recovering when the plaintiff may have paid too much or been paid too little for a product due to actions of the seller which violates antitrust laws; the second type, amount past lost profits, is recoverable when a plaintiff's business was damaged or incurred losses due to conduct violating the antitrust laws; thirdly, when the defendant's unlawful conduct may have destroyed the plaintiff's business or otherwise impaired its future earnings capacity (in such cases, the plaintiff may recover the future loss of anticipated profits or the present loss of going concern value, but not both).²³¹

²³⁰ *Supra* Jones, note 219, p. 202.

²³¹ *Idem*, p. 201.

CHAPTER 3

MODERNIZATION OF EC LAW AS RESPONSE TO NEEDS IN TRADE

A. Elements that led to proposals for modernization: why the need for change?

The evolution on trade and commercial exchange in Europe, and particularly, in its western countries, has led to the development of competition rules. Reform and decentralization of enforcement of competition law in the Community²³² have in recent years become the central plan of the academic and political debate in EC antitrust law.²³³ It is a well-known fact that the Commission as the central body enforcing the EC rules on competition has for a long time been unable to cope with the increasing workload.²³⁴ Some of the most important scholars have pointed out as unsatisfactory the present system of implementing Articles 81 and 82 of the EC Treaty.²³⁵ Nowadays, the major shortcomings of the current system are its inefficiency and the insufficient involvement of national authorities and courts in the enforcement of the European Community²³⁶. Both aspects have a negative impact on the effective protection of competition in the EC. The Commission's exemption monopoly blocks the appropriate participation of national authorities and national courts in the enforcement of EC

²³² Alexander Schaub *EC Competition System – Proposals for reform* 22 Fordham Int'l L.J. 853 (1999).

²³³ Tim Wißmann *Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999* 23 (2) Journal of World Competition 123, 123-154 (2000).

²³⁴ *Idem*, at p. 127.

²³⁵ Mario Siragusa *A critical review of the White Paper on the reform of the EC Competition Law enforcement rules* 23 Fordham Int'l L.J. 1089, 1090 (2000). As I mentioned before, articles 81 and 82 are procedurally implemented by Regulation 17, which, since its inception in 1962 has remained unchanged.

²³⁶ Alexander Schaub *Modernization of EC Competition Law: Reform of Regulation 17* 23 Fordham Int'l L.J. 752, 753 (2000).

competition rules. So far, authorities and courts have improved in last decades, and it is possible now to have more EC competition cases decided by national bodies.²³⁷

However, is important to understand that the principal motivation behind the reform project of the Commission (i.e. the White Paper on modernization of EC competition law) is not the workload as such that the notification system creates for the EC main competition body. It is rather the fact that a substantial part of the Commission's resources is tied up in a notification procedure that does not essentially contribute to the protection of competition²³⁸: it is now imperative to observe efficiency considerations for reform.²³⁹

A further issue must be considered: the very elaborated procedures of Regulation 17 — especially the appropriate investigative measures, the need for every formal decisions to be announced in advance in all official languages in the Official Journals, and the consultation of the Advisory Committee on the draft decision— seem appropriate only to large important cases which do not need to be decided quickly.²⁴⁰

1. Regulation 17/62 implementing Articles 81 and 82 of the EC Treaty

The wording of competition rules in the EC Treaty is vague on its first reading. This situation left the door open for imprecision and considerable discretion on the enforcement of Articles 81 and 82.²⁴¹ Therefore, in 1962, the Commission obtained various powers from the Council —through Regulation 17— to enforce the competition

²³⁷ Thus, decentralisation is primarily not a means to decrease the workload but to share the burden of the enforcement of EC competition law. *Supra* Wißmann, note 233, at p. 130.

²³⁸ *Supra* Schaub, note 236, at p. 753.

²³⁹ A highly centralized notification and authorization system that was useful in early years of EC (6 member countries, 170 millions of inhabitants and 4 languages) is no longer efficient (15 countries, 380 millions of inhabitants and 11 official languages). *Idem*, at p. 754.

²⁴⁰ *Supra* Wißmann, note 233, at p. 128.

²⁴¹ *Supra* Korah, note 9, p. 125.

rules and also to have exclusive competence to grant exemptions.²⁴² The procedure under Regulation 17 is complex; it was hoped that the centralization established by it would lead to uniform interpretation and application, despite the various national attitudes.

Commission proceedings may start in different ways: a complaint filed by a person entitled with a sufficient interest²⁴³, by the Commission's own initiative²⁴⁴, a parliamentary question, or from notifications.²⁴⁵ Moreover, based on articles 11 to 14 of Regulation 17, the Commission is entitled to obtain information concerning parties to an agreement in different ways²⁴⁶. However, the Commission finds much of the information it requires in its files of notifications (those coming from A/B type notifications, as established in Regulation 3385/94), which sometimes contain vast information about the structure of the market. Finally, under article 19, the parties are given an opportunity of

²⁴² *Idem*, at p. 68.

²⁴³ This person as well as the parties to an agreement have a right under Regulation 99/63 to be heard before the Commission makes a decision of exemption. A complainant, however, is not entitled to a formal final decision. Instead of granting an exemption, the Commission sometimes dismisses the complaint and sends a comfort letter. *Supra* Korah, note 9, at p. 127. See also *Métropole Télévision SA and others v. Commission* (T-528, 542, 543 & 546/93) [1996] E.C.R. II-649.

²⁴⁴ The Commission locates particular officials to read newspapers and trade journals regularly, so as to detect infringements. *Supra* Korah, note 9, at p. 128.

²⁴⁵ A system of notification was established under articles 4 and 5 of Regulation 17. Article 4 applies to "new agreements" (made after the Regulation came into force on 6 February 1962) and article 5 to "old agreements" (those made before). "Accession agreements" are those subject to article 81 only because of the accession of new Member States. Both articles provide that an agreement must be notified if it is the parties wish to be exempted on a certain practice. There is no duty to notify, but the possibility of exemption or comfort letter is one incentive and freedom from fines under article 15(5) is another. Furthermore, certain formalities must be accomplished when notifying an agreement; over the years, the Commission has been requiring more information to be given in a notification. Regulation 27 has been replaced by Regulation 3385/94 (Commission Regulation 3384/94 – Notification, time limits and hearings, O.J. 1994, L377/28, [1995] 5 C.M.L.R. 507) and requires a great deal of information, not merely about the transaction and parties, but also about the structure of the market(s) it may affect. *Supra* Korah, note 9, pp. 126-129.

²⁴⁶ The Commission may receive replies to informal inquiries, complaints from Members of the European Parliament, or may read the information in the press. It has also three ways in which it may obtain information under Regulation 17: request for information (according to article 11), inspections (according to article 14), and sector inquiries (according to article 12). *Supra* Korah, note 9, pp. 130-136.

presenting their view before the Commission makes a decision on the merits: one that clears, prohibits or exempts an agreement or imposes fines.²⁴⁷

In Section 2 of this chapter I will deal with the major issues that EC competition law has dealt with lately. Moreover, a review of the most important proposals for reform of this framework will be made, as an attempt to stress on the necessity and importance of this change. Furthermore, I will mention some of the criticisms made of this proposal by important authors.

2. Secondary legislation in other sectors

It is important to mention that the Commission early on noticed that the provision of Article 81(3), which granted exemption to certain undertakings, was limited in its scope. In order to broaden the spectrum of different fields of industry that directly affected competition law in the common market, the Commission issued different block exemptions. These rules were created due to the Commission's expertise to standardize its review process and to set forth general standards for the exemption of certain types of agreements that were unlikely to restrict competition within the Community.²⁴⁸ This analysis will not deal with the reforms on specific sectors, but rather mention the most important provisions of some sectors.

These block exemptions were highly appreciated by the enterprises, due to the opportunity offered to create an exemption under Article 81(3) for entire categories of

²⁴⁷ *Idem*, at p. 137. This right is further protected by hearing Regulation No. 99/63 (*supra* note 173). It has become a matter that has raised important issues concerning the rights of the defense, related to article 6 of the European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950).

²⁴⁸ *Supra* Weber, note 1, p. 62.

agreements and to exempt such agreements from notification and individualized review.²⁴⁹ The principal block exemptions cover agreements related to:

- a) exclusive distribution;²⁵⁰
- b) exclusive purchasing;²⁵¹
- c) patent licensing;²⁵²
- d) know-how licensing;²⁵³
- e) franchising;²⁵⁴
- f) specialization; and²⁵⁵
- g) research and development.²⁵⁶

Furthermore, the Council and the Commission noted the necessity to regulate certain sectors in specific ways, due to economic or political importance of these areas. Certain regulations and directives had to be established in order to expand the control of EC Competition policy, excluding, at the same time, the application of Regulation 17 on some of these sectors. Thus, fields such as provision of transport of services²⁵⁷ (land,²⁵⁸

²⁴⁹ *Idem*, at p. 62.

²⁵⁰ Regulation 1983/83 on Block Exemption of Exclusive Distribution Agreements, 1983 O.J. (L173) 1.

²⁵¹ Regulation 1984/83 on Block Exemption of Exclusive Purchasing Agreements, 1983 O.J. (L 173) 5.

²⁵² Regulation 123/85 on Block Exemption of Motor Vehicle Distribution and Service Agreements, 1985 O.J. (L 15) 16.

²⁵³ Regulation 556/89 on Block Exemption of Know-How Licensing Agreements, 1984 O.J. (L 61) 1.

²⁵⁴ Regulation 4087/88 on Block Exemption of Franchising Agreements, 1988 O.J. (L 61) 1.

²⁵⁵ Regulation 417/85 on Block Exemption of Specialization Agreements, 1985 O.J. (L 53) 1.

²⁵⁶ Regulation 418/85 on Block Exemption of Research and Development Agreements, 1985 O.J. (L 53) 5.

²⁵⁷ Regulation 141/62 of the Council of 26 Nov. 1962 exempting transport from the application of Council Regulation 17, amended by Regs. 165/65/EEC and 1002/67/EEC. Original version published in J.O. No. 124 of 28 Nov. 1962, p. 2753 (English Special Edition 1959-62, p. 291), and amendments in J.O. No. 210 of 11 Dec. 1965, p. 314 and No. 306 of 16 Dec. 1967, p. 1.

²⁵⁸ EEC Regulation 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, J.O. L 175 of 23 July 1968, p. 1 (English Special Edition 1968 (I), p. 302).

sea,²⁵⁹ and air²⁶⁰), banking and insurance,²⁶¹ and communications²⁶² were considered as important competition fields that needed to be specifically regulated.

In 1990, the Merger Regulation was enacted to cover mergers falling outside the reach of Articles 81 and 82 as the “only instrument” applicable to concentrations at the Community-wide-level. Under the Merger Regulation, the Commission is given the power to prevent the creation of any concentration of undertakings that either creates or empowers a dominant position in the EU.²⁶³

The Council and the Commission have noticed that certain sectors, such as those mentioned before, must be carefully analyzed, but not prevented from their proper development. The use of economical analysis has proved to be effective and necessary, before applying competition rules in certain areas. A result of this criterion is that the Commission proposed and issued a Regulation on Vertical Agreements²⁶⁴ that, virtually, constitutes broad single legislation for vertical distribution agreements. Its purpose is to

²⁵⁹ Council Regulation (EEC) 4056/86 of 22 Dec. 1986 laying down detailed rules for the application of Arts. 85 and 86 of the Treaty to maritime transport, O.J. 1986 L 378, p. 4.

²⁶⁰ Council Regulation (EEC) 3975/87 of 14 Dec. 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, O.J. 1987 L 374, p. 1.

²⁶¹ Second Council Directive (EEC) 89/646 of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive (EEC) 77/780 [1989] O.J. L 386/1; Council Directive (EEC) 92/96 of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives (EEC) 79/267 and (EEC) 90/619 (third life insurance Directive) [1992] O.J. L 360/1; Council Directive (EEC) 92/49 of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives (EEC) 73/239 and (EEC) 88/357 (third non-life insurance Directive) [1992] O.J. L 228/1. In the insurance sector, there is a block exemption granted by Commission Regulation (EEC) 3932/92 of 21 December 1992 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1992] O.J. L 398/7, enabled through Council Regulation (EEC) 1534/91 of 31 May 1991 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1991] O.J. L 143/1.

²⁶² For a detailed and precise description of competition policy in this important sector, see Kevin Coates and Linsey McCallum “Communications (Telecoms, Media and Internet)”, in Jonathan Faull and Ali Nikpay (eds.) *The EC Law of Competition*, Oxford University Press, Great Britain, 1999.

²⁶³ Rebecca Schoenfeldt *Competition Laws of the European Union in the face of the new single currency market*, 33 J. Marshall L. Rev. 715, pp. 726-727 (2000).

provide a more economic approach by imposing ceilings of market share at various levels, instead of separate parameters on market distributions. This provision will not eliminate individual exemptions, but rather use a less formalistic approach towards agreements in certain areas and reduce the burden of notification and monitoring such agreements.

3. How U.S. Antitrust Law has faced procedural issues

Nowadays, the EC competition law framework has demonstrated a clear purpose to evolve according to economic parameters. However, the notions concerning market importance have been present in US Antitrust law structure for a long time. The concept of efficiency has determined the drafting and, later on, approval of important U.S. antitrust provisions. Besides, the institutional structure, as we mentioned before, has played an extremely important role in the evolution of different procedures of this area of law in that country.

The political issues in U.S. antitrust law have not determined largely the structure of this framework, as happened in the European system. The most important feature in the American system is the role that federal courts play in the establishment of key decisions, cases, which results in a dynamic and almost case-by case evolution of antitrust law.

Furthermore, the importance of individual suits in U.S. courts has proved to be a relevant characteristic of this system: the increased individual awareness of the existence, impact, and effectiveness of antitrust rules enhances the development of decentralized enforcement in the US. In essence, a significant difference between the U.S. and the EC is that the decentralization envisioned by the latter involves only administrative decision

²⁶⁴ Commission Reg. 2790/99 on the application of Art. 81(3) to categories of vertical agreements and concerted practices [1999] O.J. L 336/21.

making by the Members National Competition Authorities, with no substantive involvement of courts in the process, while the former involves an active participation of federal and, sometimes, state courts.²⁶⁵

The use of strict economic criteria in U.S. courts resulted in clear and radical differences with EC competition system. While U.S. basic laws such as the Sherman Act establish unconditional prohibitions of all contracts and conspiracies in restraint of trade — including the so-called “rule of reason”²⁶⁶— the prohibition of restrictive agreements in Article 81(1) of the EC Treaty is expressly made inapplicable in 81(3) to agreements which promote economic progress, subject to further conditions about undue effects on competition.²⁶⁷ A result of this difference is that the enforcement process is affected, because no agreements can be characterized in a strict sense illegal per se in the European framework.²⁶⁸

In broad terms, two advantages of the U.S. antitrust model can be found in comparison with its EC counterpart: first, with its exceptionless prohibitions of restrictive arrangements, this system ensures that the law will be enforced by lawyers advising businesses, and the bulk of the enforcement problem is overcome in this way; second, clear and easily understood prohibitions are fair to the business community, who knows where the law stands and what are the limits which must not be overstepped.²⁶⁹

²⁶⁵ Barry J. Rodger and Angus MacCulloch *Community Competition Law, Enforcement Deregulation and Re-regulation: the Commission, National Authorities and Private Enforcement*, 4 Colum. J. Eur. L. 579, 587-588 (1998).

²⁶⁶ This criterion of analysis will be discussed ahead.

²⁶⁷ *Supra* Neale and Goyder, note 45, p. 476.

²⁶⁸ *Idem*.

²⁶⁹ *Ibidem*, p. 497.

B. Analysis of the 1999 White Paper on modernisation of rules implementing articles 81 and 82

The White Paper²⁷⁰ recalls the historic circumstances in which the EC regime of control of undertakings, organized by Regulation 17, was conceived. It manifests the problems that the architects of the EC competition law system faced at the moment of deciding between an authorization regime and a legal exception regime.²⁷¹ In the end, the EC opted for the authorization system, in which the Commission was competent to declare non-applicable the dispositions of Article 81(3) to an undertaking, under the condition of being previously notified to Commission.²⁷² The choice for this system is explained by the Commission as lack of enough market knowledge, undertakings nature, other restrictive practices by competent authorities, and also, by the relative inexperience of national jurisdictions on European competition law.²⁷³

The movement for modernization of EC competition rules, initiated by the Commission, has three fundamental objectives: (1) to reduce the Commission's workload, (2) to increase legal certainty for business, and (3) to maintain consistency in the application of EC competition rules.²⁷⁴

1. Options for modernization

²⁷⁰ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, O.J. C 132/1 (1999) [hereinafter White Paper]. For the purpose of this work, I will use the renumbered version of the EC Treaty, as amended by the Treaty of Amsterdam.

²⁷¹ Jean-François Bellis *Le "Livre blanc" sur la modernisation des règles d'application des articles 81 et 82 du Traité C.E. Un pas décisif vers le démantèlement d'un particularisme européen* [The White Paper on modernisation of arts. 81 and 82: a decisive step] 70 *Journal des Tribunaux - Droit Européen* 129, 129-134 (2000).

²⁷² *Idem*, at 129.

²⁷³ *Idem*, at 129.

²⁷⁴ *Supra* Siragusa, note 235, at p. 1092.

In the White Paper, the Commission established five proposals for reform. The fifth one is the proposal selected by the Commission as its alternative, which consists of making Article 81(3) directly applicable without the need for exemption (either individual or under a block exemption regulation) and decentralizing to national competition authorities the power to investigate complaints.²⁷⁵ The other four options are not examined in detail in the White Paper and the impression is that the options have been put forward for completeness.²⁷⁶ Nevertheless, it is important to briefly mention its contents, to obtain a wider perspective of the Commission's purposes.

The initial four proposals are: (1) introduction of a "Rule of Reason" to modify the interpretation of Article 81²⁷⁷, (2) decentralization of the current system of application of Article 81(3)²⁷⁸, (3) broadening of the scope of article 4(2) of Regulation 17/62²⁷⁹, and (4) procedural simplifications.²⁸⁰

a. "Rule of Reason"

The first option would decrease the number of cases brought before the Commission, in need of an evaluation of the conditions laid down in 81(3) of the EC Treaty. Thus, decrease the number of cases overall as a full competitive balance would be already made in the context of Article 81(1) EC. However, the Commission rejected this option, because a restriction of Article 81 could only be achieved by a Treaty amendment.²⁸¹

²⁷⁵ Katherine Holmes *The EC White Paper on Modernisation* Journal of World Competition 23 (4) Journal of World Competition 55, 51-79 (2000). This proposal will be discussed in section 2(b) of the current chapter.

²⁷⁶ *Idem*, at 57. See also *supra* Wißmann, note 233, at pp. 149-151, and *supra* Bellis, note 271, at p. 130.

²⁷⁷ *Supra* White Paper, note 270, at para. 55 et seq.

²⁷⁸ *Idem*, at para. 58 et seq.

²⁷⁹ *Ibid*, at para. 63 et seq.

²⁸⁰ *Ibidem* note 270, at para. 66 et seq.

²⁸¹ *Supra* Wißmann, note 233, at p. 150.

b. Article 81(3) decentralization

The second option —granting national competition authorities the power to apply Article 81(3) and to adopt constitutive exemption decisions— would function on the allocation of cases between authorities under a “center of gravity test”.²⁸² This option was rejected on the basis that it would not itself reduce the total number of notifications, but merely redistribute the cases between the Commission and the national competition authorities.²⁸³

c. Broadening article 4(2) of Regulation 17/62

As the third option, the White Paper discusses a widening option of the scope of article 4(2) of Regulation 17, the provision that, with article 6, allows an exemption decision under Article 81(3) to take effect from a date earlier than the date of notification in certain cases.²⁸⁴ Through this option, even in the event of late notifications, the Commission could adopt an exemption decision that would still be effective *ex post*. However, this option was rejected, because the Commission wanted to maintain its monopoly to grant exemptions.²⁸⁵ Thus, the system will remain unchanged.

d. Procedural simplifications

²⁸² “The Member State where the anticompetitive effects of the agreement would be felt most strongly would have competence to grant or to refuse to grant an exemption, whilst the Commission would retain competence for cases involving new legal issues or which affected more than one Member State and also those cases involving public undertakings under article 86[...]”. *Supra* Holmes, note 275, at p. 55. This option has been promoted by the German National Competition Authority (Bundeskartellamt).

²⁸³ *Supra* White Paper, note 270, at para. 60.

²⁸⁴ *Supra* Holmes, note 275, at p. 56.

²⁸⁵ *Supra* White Paper, note 270, at para. 65.

The fourth option was the least attractive of all, at least if considered alone, and not in combination with other reforms.²⁸⁶ Although simplification of procedure rules, such as abolishing the requirement for translation decisions into all Community languages, simplifying Advisory Committee procedures, etc., may result in a more efficient use of the Commission's resources, the problem of centralization remains unsolved.²⁸⁷

2. The option selected by the Commission

The option preferred by the Commission in the White Paper proposal can be explained in the following terms: Article 81(3) would become directly applicable²⁸⁸ across the European Union and the notification system will be abolished, thus moving from an administrative exemption system to a "legal exception" system.²⁸⁹ This means that an agreement will not breach Article 81 taken as a whole if the criteria contained in Article 81(3) are satisfied.²⁹⁰

Under this system with no prima facie invalidity, no prior authorization is needed if the undertakings concerned believe their practices fulfilled the criteria of exception, and no notification is necessary either.²⁹¹ This reform would allow national competition authorities and national courts, to apply Article 81 as a whole, besides the Commission.²⁹² However, the ECJ and the CFI will provide guidance for national authorities and national courts, through decisions on whether an agreement falls within

²⁸⁶ *Supra* Wißmann, note 233, at p. 151.

²⁸⁷ *Supra* White Paper, note 270, at para. 66.

²⁸⁸ *Idem* note 270, at paras 69 and 76 et seq.

²⁸⁹ *Supra* Holmes, note 275, at p. 57.

²⁹⁰ *Idem*, at p. 57.

²⁹¹ *Supra* Wißmann, note 233, at p. 138.

²⁹² *Supra* Holmes, at p. 57.

Article 81. The same guidance will be provided through formal decisions of the Commission, block exemptions and other policy documents issued by the Commission.²⁹³

a. Advantages

This proposal has two main elements that must be positively considered: only national courts would have jurisdiction to apply Article 81(3) by declaring that an agreement satisfied the tests in that article and was exempted from the prohibition; and investigations of alleged cartels and anticompetitive agreements would as far as possible be decentralized to the national competition authorities.²⁹⁴

Furthermore, these points can also be seen as particular advantages, in addition to make more effective use of the Commission's resources: the rule of primacy of Community law over national law would be strengthened as a result of the direct application of Article 81(3), and the enforceability of agreements would be improved as defendants would be able to rely on the direct applicability of Article 81(3) and therefore artificial claims of infringement of the Treaty would be reduced.²⁹⁵

b. New roles of the Commission, national authorities, and national courts

The most important matters will be the new roles that the Commission, national competition authorities, and national courts will play in this directly applicable and self-executing system.²⁹⁶ The Commission hopes to be in a position which enables it to concentrate on the most important cases, these being cases which involve especially

²⁹³ *Idem*, at p. 57.

²⁹⁴ *Ibid*, at p. 57.

²⁹⁵ *Supra* Holmes, note 275, at p. 58.

²⁹⁶ Cfr. Ian Forrester *Modernization of EC Competition Law* 23 Fordham Int'l L.J. 1028 (2000).

serious restrictions of the competitive structure or which raise new issues of law.²⁹⁷ However, the Commission, in such a new division of responsibilities, remains the sole body to determine the competition policy at Community level.²⁹⁸ Apparently, the Commission is willing to give up its monopoly with regard to Article 81(3) EC Treaty, but not at the cost of any decrease as to its overall power.²⁹⁹

On a system with direct applicability of Article 81(3), national competition authorities will have the full power to enforce the EC competition rules and to assess whether or not a restrictive practice meets the requirements for exceptions as laid down in the Treaty.³⁰⁰ However, the concept of “network of authorities”³⁰¹ has been largely discussed, as means to ensure communication among national authorities, to ensure consistency in application of EC law.³⁰² It is necessary that the national authorities are legally as well as factually equipped with sufficient means to effectively enforce the competition rules. One should remember that the situation (national legislation, economic and human resources) of these authorities is not the same in every EC Member State.³⁰³

Last, but not least, the role of national courts in competition law enforcement will be decisive. The White Paper envisages an “enhanced role” for the national courts in the application of the competition rules under the new directly applicable system.³⁰⁴ An

²⁹⁷ *Supra* White Paper, note 270, at para. 87.

²⁹⁸ *Idem*, at para 83 et seq.

²⁹⁹ *Supra* Wißmann, note 233, at p. 141.

³⁰⁰ *Supra* White Paper, note 270, at para. 93.

³⁰¹ *Supra* Wißmann, note 233, at p. 143. This must be a “workable scheme of exchange of information and evidence”.

³⁰² However, according to Bellis, “[t]he current configuration of national competition laws already permits the Commission and Member States to act ‘at network level’, which constitutes an objective of the White Paper, through the convergence of each national authority on the cases it is best prepared to deal with. From this perspective, it has to be noticed that the White Paper does not innovate in a real form, and thus, it is unfair to blame it of organizing a ‘renationalisation’ of community competition laws”. *Supra* Bellis, note 271, at p. 133.

³⁰³ *Supra* Forrester, note 296, at p. 1047.

³⁰⁴ *Supra* White Paper, note 270, at para. 99 et seq.

important matter will be the necessity to recognize any judgment that has become res judicata on any court of another Member State, under the Brussels³⁰⁵ and Lugano³⁰⁶ Conventions. It has been mentioned that national courts must be trusted to apply EC law competently in the field of competition, and that confidence will grow as competition principles and common sense draw together.³⁰⁷ However, a new approach towards competition issues, based on economic analysis, will make the application of competition rules more difficult for national courts, because most of them are not used to this type of speculative analysis.³⁰⁸

c. Difficulties with legal certainty and consistency

The proposal to make Article 81(3) directly applicable raises a number of problems. Two main areas of concern are legal certainty and consistent application of EC law across the European Union.³⁰⁹

The concerns for legal certainty center around the perception that abandoning the notification system, and the guarantees for business that it provides, will result in a loss of certainty for business, with the economic and legal consequences that will entail.³¹⁰

The Commission considers decisions of national competition authorities to be binding only within their respective Member States, and it would be for each Member State to decide whether its national competition authority decisions would bind a national court.³¹¹ In order to avoid this matter, the Commission has proposed that it might take

³⁰⁵ Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters, O.J. L304, (1978) p. 36, as amended by the 1997 Accession Convention, O.J. C15, (1997).

³⁰⁶ Lugano Convention on jurisdiction and enforcement of judgements in civil and commercial matters, O.J. L319 (1988), p.9.

³⁰⁷ *Supra* Forrester, note 296, at p. 1049.

³⁰⁸ *Supra* Bellis, note 271, at p. 133.

³⁰⁹ *Supra* Holmes, note 275, at p. 58.

³¹⁰ *Idem*, at p. 59.

³¹¹ *Ibid*, at p. 59.

non-infringement decisions in cases where it is in the public interest to do so. On the other side, national competition authorities would not take decisions when either found that an agreement did not fall within Article 81 or found that the conditions of Article 81(3) were satisfied.³¹²

Another serious issue related to certainty is the court actions in the Member States, or 'double jeopardy'. The Commission's current position is that court decisions in one Member State will not be recognized in other Member States except when required in accordance with the Brussels and Lugano Conventions.³¹³ This means that only a decision on the same subject matter between the same parties will be recognized in another Member State.

In terms of national competition authorities, the Commission has proposed developing a complex net of communication and information exchange³¹⁴ as a solution for this matter. Another proposal is developing a convention under Article 293 EC Treaty, which would provide that decisions of one national competition authority should be recognized by national competition authorities (and courts) of other Member States.³¹⁵

Finally, forum shopping is another matter that has to be dealt with under the new system proposed. A party proceeding on the basis of a tortious claim has a choice of jurisdiction between the courts of his Member State or the courts of the Member State where the harmful effect occurred.³¹⁶

The problem relating to consistency centers on the issue of the coherent application of EC competition law across the European Union. The concern is that as the application of

³¹² *Ibidem*, at p. 59.

³¹³ *Id.*, at p. 61.

³¹⁴ *Supra* Holmes, note 275, at p. 61.

³¹⁵ *Idem*, at p. 61.

Articles 81 and 82 is devolved to national competition authorities and the national courts, variations in the application of the law will evolve, depending on the approaches taken by courts or authorities.³¹⁷

In order to solve this issue, the Commission has proposed some competition policy instruments and specific measures to ensure a harmonised development of EC competition law: it wishes to be involved (as amicus curiae) in court actions brought under Article 81 in order to ensure consistency of decisions. Also, it proposed the establishment of a network between the various national authorities and the Commission itself, which through a constant flow of information will serve to ensure that cases are properly allocated between members of the network and are decided in a cohesive and consistent manner.³¹⁸ However, it proposed a right referral to the CFI for a binding decision as the most suitable mechanism for ensuring consistency of court decisions.³¹⁹

C. Parallel structures in U.S. Antitrust Law

Unlike the situation in the EU Member States, the antitrust tradition in the U.S. is well developed, based on common cultural and economic foundations. Thus, even if we can find similarities between the two competition frameworks, their process of creation and evolution purport, in most of the cases, similar structures that are not simply a variation of its counterpart. Overall, this procedure structures answers to different needs, and new features of the market can finally influence its evolution or modernization.

However, the complexity of the U.S. federal and state system has largely determined the dynamics of the antitrust system. The existence of useful elements to determine the

³¹⁶ *Ibidem*, at p. 62.

³¹⁷ *Id.*, at p. 69.

³¹⁸ *Supra* Holmes, note 275, at pp. 70-71.

³¹⁹ *Idem*, at p. 73.

violation or exemption on competition rules, such as per se rule, rule of reason, guidelines, or intense exchange of information among antitrust enforcers, has proved to be effective in implementing antitrust laws.

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 enforcers³²⁰. 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.³²¹

Thus, variations on decisions have been the motor of U.S. antitrust law evolution, instead of been considered radical differences that can undermine the framework. Nevertheless, the Supreme Court has provided the unity in the American system: it has played a decisive role on the harmonisation and clarification of federal antitrust law.

Furthermore, some procedural aspects that the EC discussed in its modernization proposal have already been working in the U.S. system for a long time ago. Elements such as exemption, decentralization, “rule of reason” application, elimination of certain procedures, and direct applicability have been a natural step in U.S. antitrust enforcement. Again, we must not forget the essential differences between U.S. and EC structures, but it can be affirmed that the modernization of the latter, considering American procedure elements, was an unavoidable step. I will comment on some of these procedure elements in the US framework..

³²⁰ *Supra* Hawk and Laudati, note 76, p. 48.

³²¹ *Idem*.

1. The Rule of Reason and the Per Se Rule

Since the inception of the Sherman Act, it has been necessary to determine the real content of its provisions; the courts have established a line when conflicting considerations have arisen. This law declares in its Section 1 that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal”.³²² Thus, a test to prove violation of antitrust laws will be a simple declaration of illegality. If this would be the case, upon the face meaning of these words, every contract for purchase or sale, every partnership, every merger, every joint venture arrangement, and the vast majority of everyday commercial contracts would be unlawful, since they all involve some restraints of trade.³²³ At this point, the courts have made the proper distinctions drawing the lines by which the generality of the term “restraint of trade” is tamed to an infinite variety of particular facts.

Also, great importance has been paid to the interpretation of the phrase of the Clayton Act that forbids any price discrimination whose effect “[m]ay be substantially to lessen competition [...]”.³²⁴ Furthermore, the FTC is vague too when it refers to “[u]nfair methods of competition [...]”.³²⁵ To this end, it has been necessary to establish certain legal principles and rules of interpretation, which the courts apply to these problems; these two principles are so-called rule of reason and per se rules.

³²² *Supra* 15 U.S.C.A. § 1, note 46.

³²³ *Supra* Raybould and Firth, note 16, p. 24.

³²⁴ *Supra* 15 U.S.C.A. § 13, note 47.

³²⁵ *Supra* 15 U.S.C.A. § 45, note 48.

The debate to establish clear differences between these two criteria has been large and prolific, particularly at the judiciary level. Both courts and commentators often say that most practices analyzed as antitrust violations are considered under a “rule of reason”, while per se rules apply only to a limited number of them.³²⁶

In first place, the Supreme Court determined that a literal interpretation of Section 1 of the Sherman Act was highly inconvenient. By establishing the rule of reason, the Supreme Court determined that the meaning of “every” on this part of the law meant “every unreasonable restraint of trade”.³²⁷ The clearest statement of this rule, though, is found in the 1918 Supreme Court decision:

“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, and all relevant factors. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.”³²⁸

³²⁶ *Supra* Hovenkamp, note 44, pp. 227-228.

³²⁷ *Standard Oil Co. of New Jersey v. U.S.* 221 U.S. 1.

³²⁸ Justice Brandeis in *Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238, 38 S.Ct. 242, 244 (1918).

From the rule of reason, which is essentially a rule of construction of elements, the U.S. antitrust system turned to per se rules, which are rules of evidence.³²⁹ These rules say that once a certain amount of information is known about a practice, a judgment about its legality can be passed without further inquiry. However, the difference between a per se rule and a rule of reason standard lies in how much is needed to know before a decision can be made.³³⁰ Since the significance of judicial rulings is that certain restrictive practices are illegal per se is evidentiary, the prosecution has only to prove as a matter of fact that price fixing has occurred and judgment must follow.³³¹

Thus, the per se rule can be defined as an empirical rule, whose application is subject to continual testing. In broad terms, labeling something illegal as per se implies two concepts: first, the legality of a practice can be determined without inquiring into the market structure or the market power of those engaged in the practice; second, this labeling entails that certain justifications or defenses will not be permitted.³³²

Last, it is important to notice that the evolution of both illegality tests has been determined by the particular practices of courts. Thus, the adoption of a per se test for price-fixing agreements, and its subsequent application to other market-rigging arrangements, focuses attention on the use of per se rules as an enforcement device. Until the recent swing away from per se rules, it was not uncommon for antitrust courts to adopt rules for automatically condemning certain practices after first studying them under the rule of reason.³³³

³²⁹ See Neale and Goyder, *supra* note 45, p. 30.

³³⁰ See Hovenkamp, *supra* note 44, p. 228.

³³¹ See Neale and Goyder, *supra* note 45, p. 30.

³³² See Hovenkamp, *supra* note 44, p. 229-230.

³³³ *Supra* Gellhorn, note 43, p. 196-197.

2. U.S. antitrust federal system: a developed structure of administrative and legal principles

Courts play an important role in U.S. antitrust law enforcement. The cases decided by the different courts allowed this framework to become a set of rules which balance economical and legal principles. However, the administrative part of this system became, virtually, the link among the different actors on this legal area.

Both the Department of Justice and the Federal Trade Commission have a variety of roles in antitrust enforcement and competition policy in addition to prosecuting violations. Each has an advisory opinion procedure that permits any business to inquire whether a contemplated activity is acceptable under the antitrust laws.³³⁴

Furthermore, the U.S. system allows private entities to avoid the costs and risks of a trial, by means of different elements of previous evaluation. Both the Antitrust Division and the FTC have issued guidelines that give specific directions on how particular commercial arrangements, such as mergers, licensing of intellectual property, foreign business conduct, or practices in the health care field, will be analyzed.³³⁵

One of the main procedures that enable private parties to enter into negotiation with these administrative offices is the consent decree. This operation is the equivalent of a civil action of pleading nolo contendere. When the Department of Justice has stated a complaint to the court and asked for equity relief, it is open to the respondent companies to seek the Department's agreement to settle the case by means of a decree giving the Government the relief it considers necessary without going through the expensive process of trial. When the terms of a consent decree have been agreed, the Department of Justice

³³⁴ *Supra* Shenefield and Stelzer, note 50, p. 24-25.

³³⁵ *Idem*, p. 25.

has to fill a ‘statement of competitive impact’, along with the proposed decree, which is published in the federal register and nominated newspapers.³³⁶

In other situations, the Department is willing in suitable cases to examine a proposed course of action by a company or industry and has established a formal Business Review Letter procedure for this purpose. In particular, it will state that it has no present intention to institute criminal proceedings in respect to the scheme. Besides, the Department for the guidance of the legal and business communities normally publishes the text of the Business Review Letter.³³⁷

Similar to the Antitrust Division, the FTC has procedures for settling cases without litigation. The equivalent to the consent decree is the so-called ‘consent order’ which the Commission may negotiate. It has the power to negotiate with a party before a complaint is formally issued against the latter. However, nowadays, the FTC is more inclined to issue a complaint first and only then enter into talks about a settlement if the respondent company is willing to do so.³³⁸

On account of this, the Commission has three main ways to give advice to the business community:³³⁹

- a) Industry Guides covering both consumer protection and antitrust matters: these are administrative interpretations of the legal rules and may relate to the practices

³³⁶ *Supra* Neale and Goyder, note 45, p. 380.

³³⁷ *Idem*, p. 382.

³³⁸ *Ibidem*, p. 390.

³³⁹ *Supra* Neale and Goyder, note 45, p. 390-391. The Department of Justice or the FTC itself will not issue an advisory opinion if the party requesting it is under investigation. Normally, the FTC has discretion to issue an advisory opinion, provided that it raises a novel or substantial question of practical law and there is no clear precedent available; the matter of the inquiry must be of general interest. Outside these requirements, the Commission may grant an informal “staff opinion letter”, which does not bind it in the same way as an advisory opinion.

of one industry or to those common to several industries. They are not legally binding on the Commission;

- b) Publication of trade regulation rules: in a more formal practice, the FTC, through lengthy and full procedures of publication and consultation, publishes rules. The Commission in complaints against individual defendants, who alleged to have adopted unfair trading practices, heavily relies on these rules. They can be either limited to particular industries or have general application. They are similar to the issue of delegated legislation; and
- c) Advisory opinions: These are formal written statements issued on behalf of the Commission in response to a request for guidance as to the legality of a prospective course of action; it cannot be used to ask for advice on the legality of a practice already adopted. The opinions will be binding upon the Commission provided all relevant factors have been notified to it until or unless it is rescinded. Even if rescinded, no proceedings will be instituted in respect of actions prior to that time which relied on the advisory opinion.

Furthermore, like every government agency, the FTC and the Antitrust Division issue statements and press releases and their leadership finds occasions to give numerous, frequently revealing speeches to lawyers or to industry groups. In addition to the case law and the statutes themselves, these sources form part of the antitrust administrative and legal background that every antitrust lawyer must be aware before advising his or her client.³⁴⁰

³⁴⁰ *Supra* Shenefield and Stelzer, note 50, p. 25.

CONCLUSIONS

The duality in the analyzed systems as means to enforce antitrust rules is traceable 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. Despite the pronounced differences between legal systems in the US and the EC, the U.S. system for the enforcement of federal antitrust law is the paradigm of antitrust enforcement.

Both systems have developed as the most advanced competition frameworks despite their complexity. Nevertheless, the significant differences between these two systems render them unique and yet compatible. The legal certainty in the U.S. system, with non-exception legal criteria to determine violations, provides a strong incentive for its actors to rely in the effectiveness of this framework. On the other hand, the impact analysis and exemptions system in the European Community system, based on social, cultural and political criteria, in addition to the economic parameters, shows a clear interest in achieving a harmonised common market. However, the lack of a strong antitrust tradition in most EC Member States often results in the refusal of national competition authorities to enforce Community law: they consider that their cultural and economic guidelines allow them greater freedom in their decision-making.

Unlike the European Community, the antitrust tradition in the U.S. is well developed, based fundamentally on numerous federal experiences of antitrust enforcement. While antitrust laws may differ from state to state in their particular provisions, their relevance on antitrust enforcement is minor, vis-à-vis the relationship between the Community

bodies and the national authorities. Nevertheless, there are clearly defined guidelines that allow states to identify and pursue their interest as a group, even when they are at odds with the actors at federal level. Thus, the relationship between EC level and national level must be observed differently than the relationship between federal and state level in U.S.: the first relies on the preemption of the Commission to act, but the national authorities still have a large amount of independence and reliability on their national systems; the second adopts preemption in most of the cases, with rare intervention of state authorities, due to the importance of regulating interstate trade. Even if state antitrust laws in U.S. have been important in history, their relevance for federal activity on antitrust enforcement at the present time is limited.

However, Europe has pursued for a long time the efficiency in its procedures. In the last years, decentralization has been the main topic of discussion in competition documents the Commission has prepared. This approach has been motivated by the need to find solutions to the excessive caseload of the competition Directorate General (DG IV), generated in large measure by its notification system. Thus, the Commission views decentralized enforcement by national authorities and the courts as a way to cope with the problem. In fact, the White Paper on Modernization of EC competition law is considered by many scholars the most concrete document at this moment, and reflects clearly the needs of the European system.

The exchange of information among the different authorities in the U.S. system has proved to be effective enough to attain positive results in the enforcement of competition. Since legal certainty has been a core element in U.S. antitrust dynamics, information exchange avoids the risk to reduce the rights of the parties during the procedures. At this

point, is desirable for the EC to increase its efforts in constructing an effective system for the exchange of information, between Community and the national competition authorities. The creation of offices of the Commission in each country, or the use of national authorities as such bodies, will render the process much more effective at the Community level.

Furthermore, the EC can promote collaboration efforts between the Commission and national enforcers, in a similar way the NAAG and the federal enforcers in the U.S. system interact. Joint investigations, joint filings, new systems for sharing information, and institutional innovations will provide a new era of cooperation between the two levels of Community law enforcement. The creation of an association of heads of national competition authorities will provide the EC with a forum for developing important proposals, and identifying areas of common interest, which do not involve the Commission. Furthermore, the creation of a regional court system could provide the capability to consider not only competition cases brought under Community law, but also those brought under national law. These regional courts would be judiciary bodies resembling in structure and functioning to the ECJ and CFI, with Community level authority to hear, decide and enforce competition law cases with Community interest.

The modernization process in EC competition law is one of the most important tasks, among several others, that the Community will face in the short term. The interdependence of the various issues with the accomplishment of the Common Market makes the competition modernization a necessity. Among the numerous EC common policies, such as enlargement of the EU, the single European currency, regional development and support, and external relations with third countries, competition

regulation represents nowadays more than a common policy to attain certain purposes: it has become a fundamental end and no longer a means for the EC, due to the importance of interstate trade among Member States.

Finally, if the EC has the intention and possibility of extending the reach of its competition policy to third countries, under the “Community effect” principle, it must strengthen its institutions and procedures. Even if the extraterritorial application of Community competition law is a necessity nowadays for the EC Member States, there are elements restraining this purpose. The lack of identification as part of a Community enforcement system inside the EC Member States can be a contradiction with Community goals that must be avoided gradually and definitely.

BIBLIOGRAPHY

Books

A.D. Neale and D.G. Goyder *The Antitrust Laws of the United States of America. A Study of Competition Enforced by Law*, Cambridge University Press, 3rd ed., USA, 1980.

Christopher Vincenzi *Law of the European Community*, Financial Times Pitman Publishing, 2nd ed., Great Britain, 1996.

Clifford A. Jones *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, Great Britain, 1999.

D. M. Raybould and Alison Firth *Law of Monopolies. Competition Law and Practice in the USA, EEC, Germany and the UK*, Graham & Trotman, UK, 1991.

David J. Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, 1998.

E.Thomas Sullivan and Jeffrey L. Harrison *Understanding Antitrust and Its Economical Implications*, Matthew Bender and Co., 3rd ed., USA, 1998.

Earl W. Kintner and Mark R. Joelson *An International Antitrust Premier. A Businessman's Guide to the International Aspects of United States Antitrust Law and to Key Foreign Antitrust Laws*, Macmillan Publishing Co., New York, 1974.

Nick Gardner *A Guide to United Kingdom and European Union Competition Policy*, MacMillan Press, Ltd. Great Britain, 3rd. ed., 2000.

Ernest Gellhorn *Antitrust Law and Economics in a Nutshell*, West Publishing Co., 3rd ed., USA, 1986.

European Commission *The impact of Community law on the domestic legal systems of the Member States. Competition Law*, Office for Official Publications of the European Communities, Luxembourg, 1998.

European Union *Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community*, Office for Official Publications of the European Communities, Luxembourg, 1997.

Hans B. Thorelli *The Federal Antitrust Policy: Origination of an American Tradition*, 1955.

Herbert Hovenkamp *Federal Antitrust Policy. The Law of Competition and Its Practice*. West Publishing Co., USA, 1994.

Inns of Court School of Law *European Community Competition Law in Practice*, Blackstone Press Limited, 2nd ed., Great Britain, 1999.

John H. Shenefield and Irwin M. Stelzer *The Antitrust Laws. A premier*, The AEI Press, 3rd ed., Washington, D.C., 1998.

Jonathan Faull and Ali Nikpay (eds.) *The EC Law of Competition*, Oxford University Press, Great Britain, 1999.

Julian Maitland-Walker (ed.) *International Anti-trusts Law. A Review of National Laws*. Volume 1, ESC Publishing Limited, Oxford, 1984.

Luis Ortiz Blanco *EC Competition Law Procedure*, Clarendon Press, Oxford, 1996.

Paul Craig and Gráinne de Búrca *EC Law. Text, Cases and Materials*, Clarendon Press, Oxford, 1995.

Piet Jan Slot and Allison McDonnell (eds.) *Procedure and Enforcement in E.C. and U.S. Competition Law: Proceedings of the Leiden Europa Instituut Seminar on User-Friendly Competition Law*, Sweet and Maxwell, London, 1993.

Rein Wesseling *The Modernisation of EC Antitrust Law*, Hart Publishing, USA, 2000.

René Joliet *The Rule of Reason in Antitrust Law. American, German and Common Market Laws in Comparative Perspective*, Collection Scientifique de la Faculté de Droit de l'Université de Liège, Martinus Nijhoff, La Haie, 1967.

Robert McPeake *European Community Competition Law in Practice*, Blackstone Press Ltd. 2nd ed., 1999.

Valentine Korah *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, Oxford, 6th ed., 1997.

William Letwin *Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act*, 1981.

Articles

Alexander Schaub *EC Competition System – Proposals for reform* 22 Fordham Int'l L.J. 853 (1999).

Alexander Schaub *Modernization of EC Competition Law: Reform of Regulation 17* 23 Fordham Int'l L.J. 752, 753 (2000).

Barry E. Hawk, Laraine E. Laudati *Antitrust Federalism in the United States and decentralization of competition law enforcement in the European Union: a comparison*, 20 Fordham Int'l L. J. 18, 31 (1996).

Barry J. Rodger and Angus MacCulloch *Community Competition Law, Enforcement Deregulation and Re-regulation: the Commission, National Authorities and Private Enforcement*, 4 Colum. J. Eur. L. 579, 587-588 (1998).

David Gerber *Europe and the Globalization of Antitrust Law*, 14 Conn. J. Int'l L. 15 (1999).

Dirk Ehle *State Regulation under the U.S. Antitrust State Action Doctrine and Under E.C. Competition Law: A Comparative Analysis*, Eur. Competition L. Rev. 1998, 19(6), 380-396.

Hovenkamp and MacKerron *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719 (1985).

Ian Forrester *Modernization of EC Competition Law* 23 Fordham Int'l L.J. 1028 (2000).

Jean-François Bellis *Le "Livre blanc" sur la modernisation des règles d'application des articles 81 et 82 du Traité C.E. Un pas décisif vers le démantèlement d'un particularisme européen* [The White Paper on modernisation of arts. 81 and 82: a decisive step] 70 Journal des Tribunaux - Droit Européen 129 (2000).

Katherine Holmes *The EC White Paper on Modernisation* Journal of World Competition 23 (4) Journal of World Competition 55 (2000).

Mario Siragusa *A critical review of the White Paper on the reform of the EC Competition Law enforcement rules* 23 Fordham Int'l L.J. 1089 (2000).

Pierre-Emmanuel Noel *Efficiency Considerations in the Assessment of Horizontal Mergers Under European and U.S. Antitrust Law*, Eur. Competition L. Rev. 1997, 18(8), 498-519.

Rebecca Schoenfeldt *Competition Laws of the European Union in the face of the new single currency market*, 33 J. Marshall L. Rev. 715 (2000).

Spencer Weber Waller *Understanding and Appreciating EC Competition Law*, 61 Antitrust L. J. 55 (1992).

Tim Wißmann *Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999*, 23 (2) Journal of World Competition 123 (2000).

EC Legislation, documents and cases

Treaty Establishing the European Coal and Steel Community, signed on April 18, 1951.
Entered into force on 20 July 1952.

Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11

Treaty establishing the European Atomic Energy Community. Entered into force on 1 January 1958.

Treaty for the European Union, 7 February 1992, C.M.R. 25300.

Office for Official Publications of the European Communities, *Consolidated version of the Treaty establishing the European Community*, Luxembourg, 1997.

European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950).

Lugano Convention on jurisdiction and enforcement of judgements in civil and commercial matters, O.J. L319 (1988).

Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters, O.J. L304, (1978) p. 36, as amended by the 1997 Accession Convention, O.J. C15, (1997).

Commission Regulation No. 99/63 (Hearings, [1963] O.J. Spec. Ed. 47).

Commission Reg. (EEC) 3932/92 of 21 December 1992 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1992] O.J. L 398/7, enabled through Council Regulation (EEC) 1534/91 of 31 May 1991 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1991] O.J. L 143/1.

Comission Reg. 3385/94 on Notification, time limits and hearings, O.J. 1994, L377/28, [1995] 5 C.M.L.R. 507.

Commission Reg. 2790/99 on the application of Art. 81 (3) to categories of vertical agreements and concerted practices [1999] O.J. L 336/21.

EEC Council Regulation 17 of 13 March 1962 [1962] JO 13/204 [1959-62] OJ Spec. Ed. 87.

Council Regulation 141/62 of 26 Nov. 1962 exempting transport from the application of Council Regulation 17, amended by Regs. 165/65/EEC and 1002/67/EEC. Original version published in J.O. No. 124 of 28 Nov. 1962, p. 2753 (English Special Edition 1959-62, p. 291), and amendments in J.O. No. 210 of 11 Dec. 1965, p. 314 and No. 306 of 16 Dec. 1967.

Council Regulation (EEC) 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, J.O. L 175 of 23 July 1968 (English Special Edition 1968 (I)).

Regulation 1983/83 on Block Exemption of Exclusive Distribution Agreements, 1983 O.J. (L173) 1.

Regulation 1984/83 on Block Exemption of Exclusive Purchasing Agreements, 1983 O.J. (L 173) 5.

Regulation 123/85 on Block Exemption of Motor Vehicle Distribution and Service Agreements, 1985 O.J. (L 15) 16.

Regulation 417/85 on Block Exemption of Specialization Agreements, 1985 O.J. (L 53) 1.

Regulation 418/85 on Block Exemption of Research and Development Agreements, 1985 O.J. (L 53) 5.

Council Regulation (EEC) 4056/86 of 22 Dec. 1986 laying down detailed rules for the application of Arts. 85 and 86 of the Treaty to maritime transport, O.J. 1986 L 378.

Council Regulation (EEC) 3975/87 of 14 Dec. 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, O.J. 1987 L 374.

Regulation 4087/88 on Block Exemption of Franchising Agreements, 1988 O.J. (L 61) 1.

Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

Regulation 556/89 on Block Exemption of Know-How Licensing Agreements, 1984 O.J. (L 61) 1.

Reg. 40/94 on the Community Trade Mark, O. J. 1994, L11/1.

Reg. 2100/94 on Community Plant Variety Rights, O. J. 1994, L227/1

Second Council Directive (EEC) 89/646 of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive (EEC) 77/780 [1989] O.J. L 386/1.

Council Directive (EEC) 92/49 of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and

amending Directives (EEC) 73/239 and (EEC) 88/357 (third non-life insurance Directive) [1992] O.J. L 228/1.

Council Directive (EEC) 92/96 of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives (EEC) 79/267 and (EEC) 90/619 (third life insurance Directive) [1992] O.J. L 360/1.

Council Dec. 88/591/ECSC, EEC and EURATOM, O. J. 1988, L319/1

Council Dec. 93/350, O.J. 1993, L144/21.

Council Dec. 94/149, O.J. 1994, L66/29.

Commission Rules of Procedure of 17 Feb. 1993, OJ 1993 L 230.

White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, O.J. C 132/1 (1999).

Notice on cooperation between national courts and the Commission in applying Arts. 85 and 86 of the EEC Treaty, O.J. 1993 C39, p. 6 [1993] 5 CMLR 95.

Costa v. ENEL (6/64) [1964] ECR 585.

Société Technique Minière v. Maschinenbau Ulm (56/55) [1966] ECR 235, [1966] CMLR 357

BRT v SV SABAM (127/73) [1974] ECR 51.

Procureur de la République v. Guerlain (Joined Cases 253/78 and 1-3/79) [1980] ECR 2327, [1981] 2 CMLR 99.

R. v. Secretary of State for Transport, ex parte Factortame (C-213/89) [1990] ECR I-2433.

Franovich and others v. Italian Republic (C-6/90 and 9/90) [1991] ECR I-5357, [1993] 2 C.M.L.R. 66.

Delimitis v. Henninger Bräu (C-234/89) [1991] ECR I-935, [1992] 5 CMLR 210.

Vichy v. Commission (Case T-19/91) [1992] ECR II-415.

Dirección General de Defensa de la Competencia (DGDC) v. Asociación Española de Banca Privada (AEB) and others (Case C-67/91) [1992] ECR I-4785.

Automec v. Commission II (Case T-24/90) [1992] ECR I-2223, [1992] 5 CMLR 431.

Métropole Télévision SA and others v. Commission (T-528, 542, 543 & 546/93) [1996]
E.C.R. II-649.

U.K. Cases

Garden Cottage Foods Ltd v. Milk Marketing Board [1984] 1 AC 130 (HL).

R. v. Secretary of State for Transport, ex parte Factortame Ltd (No.4) [1986] 2 WLR
506.

US Legislation, documents and cases

U.S. Const. Art. VI, § 2

Federal Administrative Procedure Act 5 U.S.C.A. § 554.

15 U.S.C.A. §§ 1-7, 26 Stat. 209 (1890) as amended.

15 U.S.C.A. §§ 12-27, 38 Stat. 730 (1914) as amended.

15 U.S.C.A. §§ 41-58, 38 Stat. 717 (1914) as amended.

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383, 15 U.S.C.A. §§
15c-15h.

Antitrust Civil Process Act, 15 U.S.C.A. §§ 1311-1314

28 U.S.C. 1441 (b) (1994).

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

Board of Trade of City of Chicago v. U.S., 246 U.S. 231, 238, 38 S.Ct. 242, 244 (1918).

General Inv. Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261, 271 (1922).

Wickard v. Filburn 317 U.S. 111, 63 S.Ct. 82 (1942).

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943).

FTC v. Cement Institute, 333 U.S. 683, 694, 68 S.Ct. 793, 800 (1948).

Northern Pacific Railway v. U.S., 356 U.S. 1, 5 (1958).

Hawaii v. Standard oil of Calif., 405 U.S. 251 (1972).

Goldfarb v. Virginia State Bar 421 U.S. 773 (1975).

California v. American Stores, 495 U.S. 271, 110 S.Ct. 1853 (1990).

Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991),
cert denied, 502 U.S. 1094 (1992).

Standard Oil Co. of New Jersey v. U.S. 221 U.S. 1.