Spring 1994

United States Antitrust Law in the Global Market

Diane P. Wood
University of Chicago Law School

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Antitrust and Trade Regulation Commons, and the International Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol1/iss2/7
United States Antitrust Law in the Global Market

DIANE P. WOOD* 

There has never been a time when domestic U.S. antitrust law was not affected by the global market. From the beginning, while the Sherman Act was being drafted, Congress recognized the close relationship between tariff levels and the effectiveness of internal U.S. laws against restraint of trade.\(^1\) Other things being equal, high tariffs meant greater power for the huge businesses that were arising in the late nineteenth century. Thus, there was a greater need for regulation of monopolistic practices. In addition, a principal reason why the language of the 1890 Sherman Act prohibited restraints in both interstate and foreign commerce was the drafters' awareness that circumvention of the new law would be easy if cartels or monopolies could evade its scope simply by relocating to Canada or Mexico or Europe, and exporting products back into the United States.\(^2\) The development of the U.S. doctrine on extraterritorial jurisdiction began because of the undeniable links between domestic and foreign markets. This often controversial doctrine holds that economic activity abroad may be regulated by U.S. law if it has a sufficient effect in the United States.\(^3\)

The topic of this paper is not the application of the U.S. antitrust laws to various foreign transactions, but rather, the ways in which the existence of a global market is affecting the theory and application of these laws within the United States. Some of those effects are already present: the question of how to properly account for foreign competition in the definition of relevant markets has been explored in the literature for years;\(^4\) the existence of foreign competition as a factor justifying joint operations

---

* Harold J. and Marion F. Green Professor of International Legal Studies, The University of Chicago Law School. I gratefully acknowledge the assistance of the Sonnenschein Faculty Research Fund and the Arnold and Frieda Shure Research Fund in making this work possible.


2. 21 CONG. REC. 1766 (1890)(statement of Sen. George); BREWSTER, supra note 1, at 21.

3. This theme is developed more extensively in Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 U. CHI. LEGAL F. 277.

between or among U.S. competitors has been debated and has now resulted in the passage of new legislation; and even the broad question of whether a domestic antitrust law is still justified now that there is a global economy has been examined.

Without in any way diminishing the importance of any of those questions, this paper takes a different approach, emphasizing instead the implications of globalization on the procedural structure of the U.S. antitrust laws. What are the costs, and the consequences, of the fragmented enforcement structure characteristic of U.S. law? Does the *Parker v. Brown* doctrine of "antitrust federalism" continue to make sense (if, indeed, it ever did)? Should the various industry exemptions from antitrust law be reexamined, such as the McCarran-Ferguson Act (insurance), the Capper-Volstead Act (agriculture), the labor exemption, and the special

---


6. For example H.R. 1450, 103rd Cong., 1st Sess., (introduced March 24, 1993) is entitled the Fundamental Competitiveness Act of 1993. Title III of that bill, which deals with cooperative enterprise, begins with the following:

The Congress finds that—

(1) the globalization of the economy makes antitrust law much less relevant today, and even counterproductive, than when it was developed;

(2) rapid technological change makes the creation of monopolies unlikely as the pace of product and process innovation accelerates;

(3) cooperative efforts in today's world are predominantly pro-competitive rather than anticompetitive; and

(4) changing the United States antitrust laws to mirror the realities of the way in which other countries enforce anticompetitive statutes would make United States industries more competitive internationally.

H.R. 1450, § 301. Antitrust is not the villain that bills such as this accuse it of being. See Commentary: *Antitrust and International Competitiveness in the 1990s*, 58 ANTITRUST L. J. 591, 592-603 (1989). Nonetheless, opinion on the other side has been persistent. For an earlier expression of the views reflected in H.R. 1450, see Baldridge, *Luncheon Address*, 53 ANTITRUST L. J. 397 (1984).


10. Clayton Act, ch. 323 § 6, 38 Stat. 730, 731 (1914) (Current version at 15 U.S.C. § 17 (1988)) (Hereinafter Clayton Act (using only U.S. Code provisions)), provides that "the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . ." Clayton Act, 15 U.S.C. § 52 (1988), forbids certain federal injunctions against strikes, boycotts, or picketing. It was strengthened by the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 107 (1988), which deprives the federal courts of jurisdiction to issue labor injunctions in most circumstances. In addition to these statutory labor exemptions, the courts have developed a nonstatutory exemption that governs concerted activities and agreements between
rules governing competition in sectors such as banking11 and telecommunications?12 Finally, can the United States and other countries continue to review and regulate mergers and acquisitions from a competitive standpoint, each under its own particularized rules, when a great number of notified transactions in the United States today involve foreign parties or assets, and the international dimension is equally plain elsewhere?13 These are the areas where unilateral domestic law reform is most seriously needed in response to the globalization of economic markets. With the appropriate modifications, U.S. antitrust law can continue to preserve the important benefits of open and competitive markets at home, as it adjusts to the twenty-first century.

I. THE POWER TO ENFORCE

A. Present U.S. Law: A Decentralized System

Although it is well known that the system of antitrust enforcement in the United States is highly decentralized, it is useful to review precisely how fragmented it is. In terms of the right to initiate proceedings, it could hardly be more so; in terms of ultimate formulation of policy, coherence emerges only to the extent that the federal courts are able to provide it. These allocations of decision-making responsibility have a profound effect on the ability of U.S. policymakers to take steps that would integrate U.S. antitrust law more smoothly into a global system.

---

11. There are a number of statutes that affect competition in the banking industry. See generally the discussion of financial markets and institutions in ANTITRUST LAW DEVELOPMENTS (A.B.A. Section of Antitrust Law, 3d ed., 1992). For a specific example, see the Bank Merger Act of 1960, 12 U.S.C. § 1828 (1988).


13. One measure of the importance of the problem is the fact that the Organisation for Economic Co-operation and Development has commissioned a study on the problems of transnational mergers, which was undertaken by Professor Richard Whish, of King's College, London, and myself. See also Rill and Metallo, The Next Step: Convergence of Procedure and Enforcement, in 1992 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 15-39 (1993).
1. The Department of Justice Antitrust Division

First among the U.S. enforcers, both by virtue of breadth of powers and by virtue of history, is the U.S. Department of Justice (DOJ), which since 1933 has acted through its Antitrust Division to carry out its manifold responsibilities. The Department is the only entity entitled to seek criminal sanctions for antitrust violations, and it has used that authority aggressively. It is also entitled to seek civil injunctions against conduct violating any of the antitrust laws; to sue for treble damages on behalf of the United States; to review mergers and acquisitions meeting statutory size-of-person and size-of-transaction tests under the Hart-Scott-Rodino premerger notification procedures; and to engage in competition advocacy within the executive branch of the government and, through amicus curiae briefs, in the courts. Together with the Federal Trade Commission (FTC), the DOJ represents the interests of the United States in competition law matters in international fora, such as the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, and many bilateral arrangements.

---

14. ANTITRUST DIVISION MANUAL I-17 (2d ed. 1987). In 1903, the Attorney General appointed an assistant whose responsibilities included matters relating to interstate commerce and the antitrust laws. Id.

15. Initially, it was a misdemeanor to violate Sherman Act §§ 1 and 2, which prohibit respectively agreements to restrain trade and monopolization. The penalties were a fine not exceeding $5,000, or imprisonment not exceeding one year, or both. Act of July 2, 1890, ch. 647, §§ 1, 2, 26 Stat. 209 (1890). In 1955, Congress increased the maximum fine to $50,000. Act of July 7, 1955, ch. 281, 69 Stat. 282 (1955). In 1974, Congress amended the statute to upgrade the offenses to felonies, with a maximum fine of $1,000,000 for a corporation, or $100,000 for any other person, or imprisonment of not more than three years, or both. Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974). In 1990, those figures were again increased, to $10,000,000 for corporations and $350,000 for individuals, with no changes to the imprisonment term. Pub. L. No. 101-588, § 4(a), 104 Stat. 2880 (1990). In addition, the sentencing guidelines for U.S. Courts address the specific offenses of bid-rigging, price-fixing, or market-allocation agreements between competitors in Part R, which governs how these figures are translated in practice, especially in multiple count cases. See 18 U.S.C.S. app. § 2R1.1 (1993).

19. For a description of these activities, see Wood, supra note 3, at 288-97.
2. The Federal Trade Commission

In almost every respect, except for criminal jurisdiction, the FTC shares the responsibility at the federal level to enforce the antitrust laws with the DOJ. Through its jurisdiction over "unfair methods of competition" pursuant to § 5 of the FTC Act, the FTC may condemn any practices that are either actually or potentially harmful to competition, whether or not they literally fall under one of the other antitrust laws.\(^ {20} \) In addition, the Clayton Act directly authorizes FTC enforcement of its provisions relating to price discrimination, tying arrangements, mergers and acquisitions, and interlocking directorates.\(^ {21} \) Unlike the DOJ, the FTC does not seek monetary fines. Its typical sanction is the "cease and desist" order or, in a merger case, an injunction or an order to divest—in general, equitable measures.

3. State Attorneys General

State attorneys general have always had some power to enforce the federal antitrust laws, yet it was not until the 1980s that they became both highly visible and far more active. Prior to that time, the states could sue for recovery of damages to the state itself, or they could sue on behalf of a class of political subdivisions where state law permitted. Suits on a *parens patriae* theory were difficult, as the Supreme Court confirmed in *Hawaii v. Standard Oil Co.*,\(^ {22} \) where it held that the state could not seek damages for injury to its "general economy."\(^ {23} \) However, similar suits for injunctive relief were and are permissible.\(^ {24} \) Two key developments combined to invigorate state enforcement efforts. The first was the addition of sections 4c through 4h to the Clayton Act in 1976, which permit a state attorney general to bring a *parens patriae* action for injuries to the property of natural persons residing in the state.\(^ {25} \) The second was the Reagan


\(^{22}\) 405 U.S. 251, 265 (1972).

\(^{23}\) FTC v. Sperry & Hutchinson Co., *supra* note 20, at 264.


Administration’s minimalist antitrust enforcement strategy, which collided head-on with the more aggressive philosophy that prevailed in most of the states (often without regard to which political party was in office). Armed in part with their new powers under the 1976 legislation, and in part with the coordination provided by the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG), the states began to file some of the most innovative and far-reaching antitrust actions of the 1980s. At the same time, the states increased their participation in the policy-making debate through the devices of combined *amicus* briefs, which occurred in cases such as *Monsanto Co. v. Spray-Rite Service Corp.* (forty-six states) and *Eastman Kodak Co. v. Image Technical Services, Inc.* (twenty-nine states), and the issuance of NAAG Guidelines on Vertical Restraints and Merger Enforcement.

Thus, even putting aside entirely the fact that most states have state-level antitrust laws, under which companies may also be liable, they both have and exercise significant power to enforce all of the federal laws. Moreover, at times their priorities have been at odds with those of the federal authorities, as has their understanding of the scope of the laws' prohibitions.

4. *Private Parties*

Finally, there is the well known provision of U.S. antitrust law that permits private parties to sue for treble damages or for injunctive relief to enforce any of the antitrust laws. The device of the "private attorney..."
general" is a central part of the enforcement structure. For private plaintiffs, monetary penalties serve an important compensatory function as well as the more traditional deterrence function. The sheer number of persons with an incentive to detect and prosecute antitrust offenses changes the entire character of the U.S. law, especially as compared with virtually all other systems, in which private enforcement plays a minor role or no role at all. The existence of private parties makes it more difficult for government policymakers to control developments in antitrust law through the exercise of prosecutorial discretion, since the courts perform deal with the full range of issues.\textsuperscript{31} Therefore, it is the judiciary that has the greatest influence on antitrust policymaking, not the administrators of the laws.\textsuperscript{32}

\textbf{B. The Global Perspective}

Whatever benefits Americans may see in the decentralized system of antitrust enforcement briefly described above, it is clear that the system imposes certain costs and disadvantages on those subject to the system (both Americans and foreigners coming within the jurisdiction of the U.S. laws).\textsuperscript{33} In part, these are the inevitable costs of federalism, but on a larger scale they reflect a conscious decision to foster competition in the enforcement process itself. No matter what the priorities of any particular enforcer—federal agency, state, or private—another one is likely to be able

\begin{quote}
provides that "any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws," and that "[i]n any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."
\end{quote}

\textsuperscript{31} The fate of the Robinson-Patman Act, 15 U.S.C. § 13 (1988), is a telling example of this point. It is fair to say that Robinson-Patman enforcement has been of minimal importance to both the FTC and the DOJ for many years. Nonetheless, private plaintiffs have kept it alive, and the Supreme Court has rendered a number of important Robinson-Patman decisions throughout the period of government inaction. \textit{See, e.g.}, Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (adopting narrow view of recoverable damages).

\textsuperscript{32} Naturally, Congress both can and often has enacted particular or general amendments to the antitrust laws. The discussion in text is not intended to imply that legislative changes are not important. It is meant only to contrast the executive or administrative model of competition law development with the judicial model.

\textsuperscript{33} The extraterritorial reach of the U.S. antitrust laws has been controversial since the U.S. Supreme Court abandoned the narrow, strictly territorial approach of American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), which it did almost immediately in cases such as United States v. Pacific & Arctic Railway & Navig. Co., 228 U.S. 87 (1913) and United States v. Sisal Sales Corp., 274 U.S. 268 (1927). For a thorough discussion of the extraterritorial application of the laws, see J. \textsc{ATWOOD} \& K. \textsc{BREWSTER}, \textsc{antitrust and american business abroad} ch. 6 (2d ed. 1981 and Supp. 1992).
to present key issues of competition policy to the courts and to ensure that the laws are not ignored.

1. Lack of Centralized Antitrust Policy

The multiplicity of authorized enforcers of the law noted above has made the federal judiciary the only locus for the definitive coordination of substantive antitrust policy. By contrast, in systems where antitrust laws are the exclusive responsibility of a government agency, policy coordination takes place both in the form of prosecutorial decisionmaking and through appropriate judicial tribunals.

Further complications arise because the federal courts treat the antitrust laws as a quasi-common law topic. Thus, it is difficult (especially for foreign parties) to obtain the kind of guidance that expressly articulated statutory or regulatory norms can provide. It is not uncommon for the U.S. Supreme Court to decide antitrust cases (like others) in closely divided opinions. In other instances, it can take years before the Supreme Court resolves conflicting approaches in the courts of appeals. The complications are detrimental from a global perspective because they tend

34. The DOJ, the state attorneys general, and private parties commence antitrust actions by filing suit in a federal district court. The FTC, as an administrative agency, conducts its own trial-level proceedings, but appeals from its decisions go to the appropriate federal court of appeals.


36. For example, the Court's recent decision in Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891 (1993), had a majority of five Justices on one key issue (international jurisdiction and comity), and a different majority of five Justices on another key issue (the definition of a boycott for purposes of the McCarran-Ferguson Act). Further complicating the matter, one participant, Justice White, retired from the Court at the end of the 1993 term. This phenomenon is not limited to antitrust, of course, but is especially difficult in a field where judicial decisions are of such central importance to the development of the law.

37. The most notorious example recently was the standard for finding an attempt to monopolize under the Sherman Act § 2. For many years, the Ninth Circuit had permitted certain inferences to be made from a factual finding of anticompetitive conduct. Other circuits required express findings of specific intent to monopolize a defined relevant market. The Supreme Court allowed this circuit split to endure from 1964, when the Ninth Circuit first announced its test in Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), cert. denied, 377 U.S. 993 (1964), until 1993, when the Court rejected the Lessig test in Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884 (1993).
to create transaction costs within the U.S. market, due to the need to conform behavior to differing, and often shifting, legal criteria.

2. Lack of Finality in Legal Proceedings

Since there is no claim preclusion effect when one authorized entity (such as the DOJ) concludes a proceeding, vis à vis other authorized entities (such as a state or a private party), U.S. firms are at a disadvantage relative to their foreign counterparts who function in a more certain system. Indeed, a U.S. government judgment is expressly held to be *prima facie* evidence of a violation for a later private suit. In addition, the statute of limitations is tolled pending the government proceeding, thus encouraging follow-on litigation. The only coordination that exists is done informally between the Antitrust Division and the FTC and is described more fully below.

3. Implications for Broader Economic Policymaking

Important though they are, the antitrust laws are not the only ones that affect the nation's economic policy. Increasingly, the laws regulating international trade have been recognized as equally important for the nation's economic health and the effective functioning of both the national and the world markets. The task of creating an internally consistent set of rules governing the international dimensions of competition, with particular emphasis on the relationship between the antitrust laws and the laws regulating international trade, is necessarily complicated when neither legislative guidance nor a final arbiter outside the judiciary is available.

38. The international trade laws include the antidumping laws, Trade Act of 1930 § 731 (current version at 19 U.S.C. § 1673 (1988); and the countervailing duty laws, Tariff Act of 1930 §§ 303, 701 (current version at 19 U.S.C. §§ 1303, 1671 (1988)); Section 337 of the Tariff Act of 1930, (current version at 19 U.S.C. § 1337 (1988)), which governs unfair practices in international trade; Section 301 of the Trade Act of 1974 (current version at 19 U.S.C. § 2411 (1988)), which is a broad-based statute that also governs unfair practices that violate international agreements or that otherwise unreasonably burden or discriminate against U.S. commerce; and Section 201 of the Trade Act of 1974 (current version at 19 U.S.C. §§ 2251-54 (1988)), which provides safeguard protection against fairly traded foreign goods that are imposing serious injury on a U.S. industry.
C. Reform Possibilities

1. Proposals in the United States

Before considering whether the global dimension of antitrust policy requires reforms within the United States, it is important to decide how serious the various disadvantages outlined above are and to weigh them against the benefits of the present system. Plainly, if those benefits cannot be achieved in other ways that are more sensitive to the international dimension, then changes would be inadvisable. On the other hand, if the same disadvantages that place pressure on international enforcement are more generally problematic, then the case for reform becomes stronger.

In fact, the record suggests that the latter hypothesis is closer to the truth. General efforts have already begun in the United States to address the difficulties of the existing system, for reasons having little to do with internationalization. However, it is vitally important that those making these efforts be informed about the issues arising from internationalization as well, so that the resulting system will be better suited to the economy of the future.

With respect to the problems arising from the multiplicity of authorized antitrust enforcers, perhaps the most important recent development has been the increasing formalization of efforts to coordinate state enforcement with federal efforts. In 1992, both the Antitrust Division and the FTC signed protocols with the state attorneys general to facilitate coordination between the two sides in merger investigations. Efforts to keep communication lines open between the federal agencies and the states have intensified. Much more could still be done in this area, but the signs are encouraging.

Coordination between the Antitrust Division and the FTC remains informal. In the case of merger investigations, the agencies decide on a case-by-case basis which agency will be responsible for the transaction (although traditional industry expertise and similar factors provide some predictability to the process). With respect to other civil matters, coordination appears to be even more ad hoc. The wisdom of the dual

---

federal enforcement structure has been studied on numerous occasions, and is a subject whose implications go well beyond this article. Nevertheless, from the standpoint of the coherence of the U.S. antitrust laws at the global level, the more that can be done to clarify the process allocating responsibility and the division of jurisdiction between the DOJ and FTC, the better the situation will be.

With respect to private enforcement, it is important first to distinguish the areas of antitrust that have come to resemble administrative law (in particular, mergers and acquisitions, but also research and development and production joint ventures) from those that follow the classic litigation model. The “administrative” branches of antitrust law are characterized by various forms of pre-transaction notification procedures, which result in added confidence that the federal government will not challenge the transaction. The “litigation” model still prevails for virtually everything else. The federal agencies have enormous influence over the development of antitrust policy in the administrative areas, since the courts will never see most cases. Thus, in those areas it is easier to create the consistency and predictability that are helpful from the international standpoint. Although prosecutorial discretion also plays a role in the litigation area, its importance is less because of the existence of the alternative enforcers.

The private antitrust enforcer has always played an important part in the U.S. antitrust tradition, both because it has added resources for antitrust enforcement that the government would not have had, and because it acknowledges the importance of compensating the victims of antitrust violations. No matter what the inconveniences from an international


41. In each case, the administrative process does not provide an absolute assurance of immunity. For mergers and acquisitions, at the end of the review process that applies to qualifying transactions under the Hart-Scott-Rodino Act, the parties learn only that the federal agency will not attempt to stop the deal (or, of course, that it will take some action). For joint ventures reported pursuant to the National Cooperative Research Act or the new National Cooperative Research and Production Act, the parties gain only the assurance that treble damages will not be assessed in the event of a private lawsuit. National Cooperative Research Act, 15 U.S.C. §§ 4301-05 (1984); National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-06 (1993). In theory, the government could still bring an action. However, well advised companies will have made sure that their filing will not attract this kind of undesired attention. For a general discussion of the transformation of the Antitrust Division into an administrative agency, see Thomas E. Sullivan, The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition, 64 WASH. U. L.Q. 997 (1986).
viewpoint that arise due to private enforcement, it is a vital part of the entire U.S. system. Thus, the question here is how to reap the greatest benefits from private enforcement while at the same time minimizing international costs.

In the administrative areas, this process has already begun for joint ventures: notified production and R&D joint ventures enjoy immunity from treble damages, but injured private parties can still sue for actual damages and attorneys' fees. Coordination mechanisms of this type could also be imagined for mergers; for example, one might impose a higher burden of persuasion on a party challenging a merger if the federal agency has provided a written justification for a decision not to bring a suit. Note in this context that the Tunney Act already requires a competitive impact statement for cases that the government wants to resolve by consent decree. For noncriminal court suits, the government is already able to participate amicus curiae in private suits. These mechanisms help to alert the courts to the potential broader implications of a private action. They have proven especially useful in cases with foreign implications.

2. Examples from Other Countries

Other countries with federal structures, and the European Community (EC) with its analogous relationship between Community institutions and Member State institutions, have faced similar issues to those outlined above. For example, the drafters of the EC's merger regulation went to considerable effort to produce a “one-stop shopping” system, so that parties would always know whether the Commission or the various Member States would be competent. It is (almost) never the case that the Commission would share responsibility with the Member States, as the federal authorities in the U.S. can share responsibility with the states. The Commission has

42. The Tunney Act, more formally known as the Antitrust Penalties and Procedures Act of 1976, established formal procedures that had to be followed whenever the Antitrust Division entered into a consent decree in federal court. It requires publication of the decree, a period of time for public comments, and the preparation of a competitive impact statement for public scrutiny. Only if the federal judge determines that entry of the decree would be in the public interest may the case be concluded in that fashion. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528 (1974), (current version at 15 U.S.C. § 16(b) (1984)).

43. See Council Regulation 4064/89 O.J. (L 395) 1, as amended by 1990 O.J. (L 257) 15, establishing a system of merger control in the European Community.

44. I say “almost” because Art. 21.3 reserves the right of Member States to take measures to
recently taken steps to create the same kind of certainty for enforcement efforts under Article 85(3), under which it is entitled to exempt qualifying arrangements or groups of arrangements that would otherwise violate Article 85(1).

More generally, the Community has been developing the principle of subsidiarity, pursuant to which enforcement efforts best undertaken at the Member State level will remain there, while the Commission concentrates on cases of general Community significance.

II. FEDERALISM AND THE ANTITRUST LAWS

A. The Parker Doctrine

The *Parker v. Brown* doctrine is often known as the state-action exemption to the federal antitrust laws. In fact, it evolved from a decision of the Supreme Court holding that the 1890 Congress did not intend to subject the states in their sovereign capacity to the Sherman Act, and thus, the Sherman Act simply did not cover a California action that essentially created a raisin growers' cartel. By emphasizing noncoverage, the *Parker* Court avoided the necessity of deciding whether a state law that conflicted with the Sherman Act would be preempted according to normal principles of federal supremacy.

Later cases lost sight of this distinction, and applied *Parker* to the very different situation of private conduct that was inconsistent with federal

---

45. Treaty on European Union, Feb. 7, 1992, 1 C.M.L.R. 719 (entered into force Nov. 1, 1988) [hereinafter Maastricht Treaty]. The Treaty will add a new Article 3b to the Treaty of Rome, which provides:

> [I]n areas which do not fall within its exclusive competence, the Commission shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

While the meaning of this principle is still being elaborated, its purpose is to delineate more clearly the appropriate field for Community action, and to discourage what might be called creeping federalism.


antitrust principles, when it was undertaken pursuant to a state statute that (1) expressly authorized the private conduct, and (2) actively supervised the state regulatory scheme.\textsuperscript{48} The second factor was not required when the entity undertaking the anticompetitive activity, or creating the anticompetitive regulations, was a municipality (or other subdivision of the state government). To say that a state could carve out an area of economic activity that had been subject to the federal antitrust laws, and create an exemption, was to adopt a peculiar kind of reverse supremacy principle. Nonetheless, because the Court was concerned that full application of the antitrust laws to state regulations would effectively destroy the states as sovereign entities, it took this approach.\textsuperscript{49}

The result of the \textit{Parker} doctrine in its present form is that there is no uniform federal-competition policy, which establishes the boundaries between free competition and regulatory regimes throughout the country. One state might regulate the trucking industry, and obtain exemptions for it; another state might regulate the provision of waste disposal services, and thus weaken antitrust rules in that sector. A third state might have several cities that do not permit competition among taxicab services or the provision of ambulance services. For industries with purely local impact, the consequences of this regime are unimportant. However, many affected industries have substantial interstate, and even international, dimensions. In these cases, the "reverse preemption" effects of \textit{Parker} are undesirable. If the \textit{Parker} doctrine were reconceptualized (or, some would argue, returned accurately to its roots) as a preemption doctrine, antitrust federalism would be rationalized in a manner both more consistent with the basic U.S. constitutional structure and more appropriate to the global situation.

\textbf{B. The Consequences of Parker in the Global Market}

The first notable consequence of \textit{Parker} for the global market is its effect on the competitiveness of various U.S. sectors. To the extent that the various state and local regulatory schemes both derogate from the competition principle in the service of other public goals and affect interstate and/or foreign commerce, they will impose the same policy choice on the nation as a whole. Other state regulatory systems might be designed to

\textsuperscript{49} \textit{Parker}, 317 U.S. at 362-63; \textit{Ticor Title}, 112 S.Ct. at 2176-77.
address market failures, and thus may have a negligible or a benign effect on international competitiveness. It is exceedingly difficult to distinguish the former from the latter. In general, however, a state rule that assured at least as much competition as federal law would not pose any serious conflict with the antitrust laws; thus, the concern here is only with state laws that reduce competition.

A second consequence of *Parker* is more external in nature. The ability of U.S. trade negotiators to open foreign markets for U.S. producers is hampered by the network of state and local regulations that are inconsistent with federal competition laws, such as "Buy America" laws that permit boycotts against foreign producers, and local monopolies. It is difficult, often impossible, for the trade negotiators to persuade foreign governments that operate their own (often extensive) monopolies to allow access for U.S. firms, when the foreign governments can point to the state and local restrictions in the U.S. as equivalent barriers.

C. Reform

Here again, the EC may have a system worth studying and adapting to U.S. circumstances. Article 90 of the Treaty of Rome recognizes that Member States may grant to public or private companies certain special or exclusive rights, but Member States are not to enact nor maintain in force any measure that contradicts the Treaty's competition rules. If a company has been, as Article 90 says, "entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly," it must be subject to the rules of the Treaty, including the competition rules, except insofar as the rules would obstruct the performance

50. The various "Buy America" laws passed by the federal, state, and local governments in the United States normally require the purchase of U.S. goods for certain kinds of projects (e.g., purchase of airplane tickets, subway cars, etc.), or they reserve a certain amount of purchases for local suppliers. This practice is regulated at the international level by the Procurement Code administered by the General Agreement on Tariffs and Trade. See General Agreement on Tariffs and Trade Multilateral Negotiations: Agreement on Government Procurement, GATT Doc. MTN/NTM/W/211, Apr. 11, 1979, 18 I.L.M. 1052.

51. For example, the market for the provision of legal services would presumptively operate more competitively if lawyers licensed in one state were permitted to offer their services, or to open an office, in another state, without the need for separate bar admission. A simple registration system would be sufficient to serve ethical and prudential requirements.

of the special function. The EC Commission and the European Court of Justice have interpreted the exception narrowly, and thereby have made Article 90 a powerful tool against Member State laws that conflict unduly with EC competition rules.\textsuperscript{53} The EC competition rules are, according to the Court of Justice, directly applicable in Member States, and there is a general supremacy principle for EC law similar to the one found in the U.S. Constitution.\textsuperscript{54}

In addition, Article 5 of the Treaty of Rome imposes both affirmative and negative obligations on Member States to ensure the achievement of the goals of the Treaty.\textsuperscript{55} One of those goals is found in Article 3(f), which calls for "the institution of a system ensuring that competition in the common market is not distorted."\textsuperscript{56} Article 5 then provides that:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. . . . They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.\textsuperscript{57}

Needless to say, the European Community has not gone so far as to define any Member State law that replaces competitive markets with a regulatory scheme as being inconsistent with the objectives of the Treaty, nor will it ever do so. As the U.S. Supreme Court correctly recognized, such a sweeping doctrine would mean the end of Member State authority over local economic regulation.\textsuperscript{58} On the contrary, a "sufficient" effect on trade between Member States is a prerequisite for application of the EC competition rules. It is interesting to speculate whether the required effect is \textit{de facto} greater when the question is one of conflict with a Member State


\textsuperscript{54} See G. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 192-203 (1993).

\textsuperscript{55} EEC Treaty, \textit{supra} note 52, art. 5.

\textsuperscript{56} \textit{Id.} art. 3(f).

\textsuperscript{57} \textit{Id.} art. 5.

\textsuperscript{58} \textit{Parker}, 317 U.S. at 362-63; \textit{Ticor Title}, 112 S.Ct. at 2176-77.
law, rather than one of assessing private conduct that does not claim such protection. It is also interesting to consider if and how this type of test for effects on interstate commerce might be developed in the United States. Such a test would distinguish actions undertaken at the behest of a state, which would be preempted by the federal antitrust law only if the interstate effects were significant, while other actions would continue to be subject to the \textit{de minimus} test for interstate commerce that has been developed.

The critical point to note here is the pressure both systems feel from the increasing internationalization of world markets. Given the choice, business actors would rather cope with two or three widely applicable sets of law, rather than fifty-one in the United States, and twelve (or more, when the Community expands) in Europe. Multiple legal systems give rise to transaction costs and carry with them the risks of protectionist measures. Changes will come only as quickly as the individual nations and regions want them. However, when it comes, I predict that internationalization will have the effect of diminishing the role of local governments and enhancing that of central governments. In other words, the need for action at the national level (for the United States) or the Community level, for the reasons of efficiency and effectiveness identified in the subsidiarity principle, is quite likely to increase over time.

III. FEDERAL INDUSTRY EXEMPTIONS

In the United States, as elsewhere, there are a number of federal exemptions from the antitrust laws. Indeed, the pressure to enact additional exemptions appears to be building, as different industries and interest groups attempt to persuade Congress that they can survive only if they need not face the rigors of competition. The effect of this network of exemptions is similar to the general federalism exemption discussed above: it creates different legal regimes for each industry, thereby increasing transaction costs and risking inefficiency. However, the federal exemptions often go hand-in-hand with other federal programs that protect the industries in question from foreign competition. As such, they are doubly suspect from the standpoint of efficiency.

The major areas that are expressly exempt from the antitrust laws due to particular rules of federal law include the following:
The government motivations that lie behind these exemptions are varied. In the case of agricultural cooperatives, Congress apparently believed that farmers needed to be able to organize so that their bargaining power would equal that of the middlemen to whom they sold. In the case of labor unions, the idea of countervailing power was also crucial, although social and political factors relating to the autonomy of individuals over their own labor also played a part. The insurance and banking exemptions reflected a preference for state regulation over federal. Telecommunications was a sector (until very recently) subject to a comprehensive regulatory scheme, rather than general antitrust principles. Finally, the export trade exemptions were based in part on a desire to encourage U.S. exports, and in part on the idea that U.S. law does not normally regulate anticompetitive effects outside the United States. These exemptions reflected a variety of motives, many of which are not squarely based on market failures. Additional examples are

61. See McCarran-Ferguson Act, 15 U.S.C. §§ 1011-13 (1988), stating that the antitrust laws are “only applicable to the business of insurance to the extent that such business is not regulated by State law,” but noting that federal antitrust law remains fully applicable to insurance boycotts. (Some have argued that this does expressly by statute what the Parker doctrine now does for other areas.)
63. Although the principal source of the modifications of the antitrust laws for this industry is found in the Modified Final Judgment in the AT&T litigation, rather than a federal statute, the judgment has had a profound effect on competition within this industry for a decade, and as such, deserves mention here. See United States v. American Telephone & Telegraph Co., supra note 12, at 131.
even more particularized, such as those for certain professional sports, soft drink bottlers, and newspapers.

As noted above, the risk of continuing with these special regimes includes the inefficiency that lack of competition brings, as well as the risk of bringing on protective international trade regimes. To the extent that important social interests are served by exemptions from competition, U.S. businesses and individuals should expect to find similar exemptions, or at least similarly justified exemptions, in overseas markets. However, if these exemptions are not gradually reduced over time, the process of globalization itself may slow down or be arrested, as the barriers to international commerce become more difficult to surmount.

IV. MERGER REGULATION

The internationalization of the merger and acquisition markets is proceeding apace. For example, a great percentage of the mandatory premerger notifications in the United States made pursuant to the Hart-Scott-Rodino Act (perhaps as many as one-third) involve either foreign parties or significant foreign assets. The world-wide nature of these markets has led in many cases to the need to seek regulatory approval from several different authorities, even when the merging companies might not expect this.

The reason for the unexpected scope of foreign-merger review authority might be termed the "victory" of extraterritoriality. For years the United States took the position that actions abroad with significant (that is, direct, substantial, and reasonably foreseeable) effects could be regulated by U.S. law. Other countries are increasingly following this lead. For example, some version of extraterritorial regulation of mergers exist in the European Community, Canada, and Germany. The EC will regulate a merger if the anticompetitive aspects of the agreement are "implemented" within the Common Market. Implementation means only that the products are sold at a fixed (or enhanced) price.

The result is that transactions that once might have been subject to only one country's review processes are now being investigated by two, three, or even more authorities. For example, the 1989 Gillette/Wilkinson acquisition

was reviewed (either formally or informally) by the following agencies: the Australian Trade Practices Commission, the Brazilian Conselho Administratino de Defesa Economica (CADE), the Canadian Bureau of Competition Policy, the European Commission, the French Conseil de la Concurrence, the German Federal Cartel Office, the Irish Fair Trade Commission, the South African Competition Board, the Spanish Department for the Defense of Competition, the Swedish Office of the Competition Ombudsman, the Swiss Cartel Commission, the U.K. Office of Fair Trade and the Monopolies and Mergers Commission, the United States Department of Justice, and the New Zealand Commerce Commission.66

Both firms and the public suffer because of the transaction costs that result from multiple reviews. To obtain approval for one transaction, which far more often than not will be at least competitively neutral if not positively desirable, parties must complete each agency's unique form and furnish different sets of information according to different timetables designed to meet a wide variety of substantive standards. Each regulating jurisdiction will be working to serve the broader interest of "competition," as well as any other statutory criteria that are relevant under local law. Agencies also suffer from multiple reviews since they may be played off against one another. For instance, it is difficult for one agency to take advantage of another's basic background work on market definition.

The Organisation for Economic Co-operation and Development is currently studying reform, through a project studying particular cases undertaken by Prof. Richard Whish and myself.67 Specifically, we were charged to review procedures employed by the Member Countries, to identify the areas of procedural difference that impede cooperation and add unnecessary regulatory costs, and to suggest potential areas of regulatory convergence and cooperation. In the absence of substantive convergence, there are limits on the usefulness of procedural measures that can be taken. For example, merger filing forms require information that is relevant to each authority's governing substantive law, and the scope of the forms is a direct result of the timetable for action that the agency must respect.

66. This information will be published when the OECD Merger Process Convergence Project Report is available. The author was one of the consultants for the project and may be consulted for a copy of the report.
67. Richard Whish is Professor of Law at King's College, London. The study described in the text will be available from the OECD in Paris, France, in mid-1994.
Confidentiality rules in virtually every country impose significant limitations on the amount of interagency cooperation that can occur in the absence of a formal legal assistance treaty.

Nevertheless, the project makes clear the importance of further progress on these matters, for the simple reason that more and more transactions will be affecting two or more countries. National boundaries have disappeared for major business transactions, and the legal systems have no choice but to catch up.

V. Conclusion

The globalization of law, politics, and markets has already had an effect on U.S. antitrust law and on the antitrust or competition laws of other countries. In some instances, that effect has plainly reflected the demands of internationalization. This explains the long-standing efforts in the United States to enforce the laws against foreign parties when their actions affect U.S. markets and the increasing need to coordinate antitrust policy with international trade rules. In other instances, the effect is more subtle. For example, as merger filing forms are reviewed, the global nature of mergers and acquisitions will affect the kinds of questions that are asked and the degree of cooperation that is sought with foreign agencies. Antitrust exemptions are already being reviewed with an eye toward implications on international competitiveness; the risk is that the false assumption will be made that antitrust is incompatible with strong U.S. industries. In fact, the contrary is true. Global welfare as a whole will be enhanced as more and more countries work to assure open and competitive markets.

Domestic law reforms cannot be undertaken at the expense of the fundamental principles of competition that underlie the antitrust laws and their counterparts elsewhere. The direction of reform must be clearly pointed toward more scope for competition, protection of the competitive process, and concern for consumer welfare. Technology has assured that globalization is here to stay. Sensible domestic law adjustments can assure that its benefits will be realized by as many people as possible.