

COOPERATION BETWEEN THE STATES AND THE EUROPEAN COMMUNITY IN ANTITRUST ENFORCEMENT

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With the increase in world trade and the gradual unification of world markets, the issue of international cooperation in antitrust enforcement has come to the forefront of the international dialogue on economic law. One result of this dialogue is that, in the last decade, the United States Attorney General and the Chairman of the FTC signed cooperation agreements on the enforcement of competition laws with the governments of Australia, Brazil, Canada, the European Communities (EC), Israel, Japan and Mexico (agreements existed since 1976 with Germany and since 1982 with Australia).¹ The agreement reached with the European Communities in 1991 was one of the most significant, because of the size of the European Community economy and the recent expansion of its activity in antitrust enforcement. Yet despite the contemporaneous growth in the activity of the State Attorneys General in the enforcement of antitrust laws within the United States, the agreement with the EC, like every other agreement between the US government and foreign governments on antitrust enforcement, fails to provide for a cooperative role for State Attorneys General.

This paper identifies modes of potential cooperation in antitrust and competition law enforcement between the Attorneys General of the States and the European Community antitrust authorities, as well as potential legal barriers that might hinder such cooperation. Ultimately, the discussion explores whether the States could feasibly extend their successful model of “multi-State” litigation to cooperation with overseas law enforcement officials. The analysis begins by setting out the scope of activities that could constitute cooperation between Attorneys General and competition officials of the European Commission in the prosecution of an antitrust defendant. From there, the paper addresses the feasibility of such activity under EC and US law.

I. The Scope of Cooperation

Today, the competition authorities of the member states of the European Community play a limited role in the enforcement of antitrust law.² National authorities participate merely in enforcing EC rules on competition, although national authorities maintain the competence to prosecute unfair trade practices.

¹ United States Department of Justice website,
http://www.usdoj.gov/atr/public/international/int_arrangements.htm

²Valentine Korah, Competition Law of the European Community vol. 2 § 13.01 (Lexis Publishing).

According to the language of Regulation No. 17,³ national antitrust authorities retain jurisdiction over a case only until the moment that the Commission initiates its proceedings.⁴

Therefore, it is with European Community officials that the Attorneys General would most likely cooperate. The constitutional body of the EC that is responsible for the enforcement of competition law is the European Commission. The two most obvious forms of potential cooperation between the Attorneys General and Commission officials are 1) investigatory and 2) remedial.

Investigatory cooperation could include one set of authorities notifying the counterpart authorities of the existence and timetable of an investigation, informing the counterpart authorities of the expected schedule of the investigation, explaining the legal theories on which the investigation is founded, and sharing research, other non-confidential information, and possible subpoenaed evidence. It may also extend, as outlined in the EC/US Cooperation Agreement,⁵ to a discretionary deferral to the other jurisdiction's enforcement mechanism by suspending or postponing one's own investigation.

Remedial cooperation would require each set of authorities to take the interests of the other authorities into consideration in the formulation of a remedy, once the determination of a violation was made. This type of cooperation is quite important, for example, when one authority has voluntarily deferred to the other's enforcement mechanism despite having suffered its own distinct injury. It is also important where the defendant is an economically important actor in one jurisdiction but not in the other, which means that the pain of the remedy would be felt in one jurisdiction but only its benefits would be felt in the other. Remedial cooperation could involve joint negotiation and sharing information about injury and about the impact of proposed remedies in each jurisdiction.

The rest of this section outlines the law defining the powers of European Commission officials that might enable their cooperation with State Attorneys General.

A. Legal Sources

³Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, 1959-62 Spec. Ed. 87, as amended by Regulation No. 59, 1959-62 Spec. Ed. 249; Regulation No. 118/63/EEC 1963-64 Spec. Ed. 55; and Regulation No. 2822/71, 1971 Spec. Ed. (III). (Regulation No. 17)

⁴Valentine Korah, Competition Law of the European Community vol. 2 § 13.01 (Lexis Publishing).

⁵Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95/47, 27.4.95.

The Council of the European Communities adopted Regulation No. 17 on the authority of Articles 81, 82 and 83 of the Treaty of Rome.⁶ Regulation No. 17 lays out the procedural rules for the enforcement of Articles 81 and 82 of the Treaty of Rome concerning competition.⁷ The Commission adopts Notices that explain and clarify the application of EC competition law. Additionally, the annual Competition Reports contain public reporting on the informal practices of issuing comfort letters, settlements, and rejections of complaints.⁸

B. EC Competition Law Enforcement Procedures

The Commission is empowered to investigate cases, to decide whether violations of Article 81 (concerted practices) or 82 (abuse of dominant position) of the Treaty of Rome have occurred and to impose fines upon the violators. The Commission may also grant negative clearance for certain types of agreements, decisions or concerted practices between two or more parties under Article 81 of the Treaty of Rome, as a way of clarifying its enforcement policy. Likewise, the Commission may grant individual exemptions for such actions to the parties, which amount to assurances that the proposed action will not be pursued as a treaty violation. Far more common, however, are comfort letters to the requesting parties, explaining the Commission position on the proposed action, but without legal force.⁹

1. Complaints

Member States and “natural or legal persons who claim a legitimate interest” may apply for injunctive orders against companies that violate EC competition rules.¹⁰ The most common practice is that injured competitors or consumers file such complaints. The US State Attorneys General could read this provision to allow them to bring a complaint on the basis of their common law power as *parens patriae* on behalf of the citizens of their States. The Commission is not required to open a proceeding unless it is in the Community interest to do so. However, the Commission would not be allowed to reject a complaint if it had exclusive jurisdiction to deal with the subject matter or if the rights of the complainant could not otherwise be protected.¹¹

The EC has proved itself open to complaints originating on the other side of the Atlantic. In the past, it has accepted private complaints originating in the US, including a complaint by UPS that led to severe fines and

⁶Id.

⁷Valentine Korah, Competition Law of the European Community vol. 2 § 13.01 (Lexis Publishing).

⁸Valentine Korah, Competition Law of the European Community vol. 2 § 13.02[1] (Lexis Publishing).

⁹Valentine Korah, Competition Law of the European Community vol. 2 § 13.02[1] (Lexis Publishing).

¹⁰Article 3, Regulation No. 17

a restructuring of Deutsche Post.¹² Therefore, the fact that the injured parties are not EU citizens would not be grounds for rejecting a complaint.

If a complaint by a State Attorney General were to be rejected by the Commission, the decision would be reviewed by the European Court of First Instance. If the complaint led to the initiation of proceedings, the complainant would have access to the file.¹³ This access would be a way for the Attorneys General to obtain information on an ongoing Community investigation.

2. Investigation

Interested third parties, such as complainants or others, have the opportunity to express their views on the case, and may further request to be heard orally.¹⁴ Regulation No. 17, Article 19(2) provides that

If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

The US State Attorneys General could apply to be heard and express their views on investigation or remedies under this Article, analogous to the American practice of submitting briefs as *amici* of the court. If the Commission granted them this opportunity, they would also obtain the right to have access to information obtained by the Commission in its investigation of the case, other than trade secrets.

The Commission may issue requests for information, conduct on-the-spot investigations and carry out general inquiry in an economic sector without formally opening proceedings.¹⁵ The powers of the Commission are balanced by the rights of defense, including the right to representation, the attorney-client privilege and the right against self-incrimination.

The Commission has broad discretion to request and order the disclosure of information. Where the business entity has its address in the Community, the Commission will forward copies of request letters to the competition authorities of the Member State where it is located. If the business entity does not have an address in the Community, the Commission has authority to effect service outside of the community.¹⁶

¹¹There the possibility that the Commission and the European Court of Justice might interpret this as limited to the rights of EU citizens only.

¹²Philip Butterworth-Hayes, "GE-Honeywell: Confusion Among Regulators," in *Aerospace America*, September, 2001, p. 4.

¹³Valentine Korah, *Competition Law of the European Community* vol. 2 § 13.02[3][a][i, ii] (Lexis Publishing).

¹⁴Art. 19(2) Regulation No. 17.

¹⁵Id. § 13.01[2].

¹⁶Id.

There are, however, limitations on the uses of the information that the Commission obtains in furtherance of an investigation. According to Regulation No. 17, Art. 20(1), the Commission may use it “only for the purpose of the relevant request or investigation.” This requirement protects both the secrecy of the information and the business entity’s right to defense. However, this rule does not bar the Commission from using information obtained in one investigation as the basis for opening a second investigation, although the Commission cannot use information from the first as proof in the second. Additionally, according Article 20(2) of Regulation No. 17 the Commission may not disclose to any third party information that has been acquired during an investigation, if protected by the rules of professional secrecy.¹⁷ However, the EC courts have held that the obligation of secrecy does not keep information from third parties that have the right to be heard under Article 19(2) Regulation No. 17, (with the exception of trade secrets).¹⁸ This aspect of EC law would give the Attorneys General access to information in the possession of the EC if they took this opportunity to act as *amici* or interested third parties in the investigation. It would also give them an opportunity to persuade the EC officials about the illegality or legality of the activity in question.

Whether the Attorneys General could share information they had obtained in response to subpoenas with EC officials is a question of State law. New York, for example, allows the Attorney General to publicly disclose documents obtained by subpoena in an antitrust investigation as long as they not contain business secrets (which may be redacted).¹⁹ By comparison, the California Attorney General has explicit statutory authorization to cooperate with private plaintiffs and provide legal services to or receive them from “any state or federal agency which has brought or intends to bring a similar action.”²⁰ Yet there has not been occasion to determine whether such language would exclude (by omission) such sharing of services with EC authorities, or whether providing “legal services” encompasses the disclosure of subpoenaed documents. Florida statutes protect the confidentiality of subpoenaed materials with an express exception for the disclosure of otherwise-confidential materials to other States or federal authorities in an antitrust investigation, where those jurisdictions provide confidentiality protections similar to Florida’s.²¹ The absence of an express exception in the Florida statute would probably prevent the Florida Attorney General from disclosing such material to the EC authorities or to a State which might disclose it to EC authorities, absent statutory revision. The wide range of rules

¹⁷Id. § 13.01[2][d]; EC Treaty Art. 214.

¹⁸Id.

¹⁹ Ragusa v. New York State Dept. of Law, 578 N.Y.S. 2d 959, 963 (1991).

²⁰ B. & P.C. 16750(e), *cited in* 1 Witkin Sum. Cal. Law Contracts § 583.

²¹ FS § 542.28(9), *cited in* 36 Fla Jur MONOPOLIES AND RESTRAINTS OF TRADE § 34.

regarding disclosure of subpoenaed materials would require a more detailed examination, which is beyond the scope of this paper.

3. Advisory Committee on Restrictive Practices and Monopolies

The Commission is required to consult the Advisory Committee on Restrictive Practices and Monopolies in “close and constant liaison.”²² The Commission uses the Advisory Committee to achieve coordination with the competition authorities of the Member States. Each Member State has one representative on the Committee. This Advisory Committee could provide the Attorneys General with another forum in which to voice their interests in a Community investigation, particularly if they could find a sympathetic Member State government to advance their concerns with the Commission.

4. Remedies

The remedies provided by Regulation No. 17 include both injunctive orders (Art. 3) and fines for intentional or negligent breach of Articles 81 or 82 of the Treaty of Rome (Art. 15(2)). Injunctive orders may be preceded by a recommendation that the business entity voluntarily cease the violation. They may include not only negative injunctions, but may also require that the business entity take certain positive steps to remedy the effects of the infringement.²³

Where the Commission pursues a settlement remedy, interested third parties do not have a *right* to participate in the negotiations,²⁴ but the Commission *may* consult with interested third parties prior to finalizing the settlement.²⁵ Settlements are the most common outcome of cases; however, the Commission usually does not publish them. In important cases, press releases or the annual Reports on Competition Policy may contain documentation of settlements. Settlements have little legal value, since they are not binding upon national courts or third parties. For example, the IBM settlement, by its terms, was not binding upon either the Commission or IBM, stating that the Commission could re-open the procedure against IBM and that, if it did, it would not rely upon violation of the agreement but only upon violation of the Treaty.²⁶

²²Art. 10(2) Regulation No. 17.

²³Valentine Korah, Competition Law of the European Community vol. 2 § 13.02[3][k] (Lexis Publishing).

²⁴BAT and Reynolds v. Commission, 1987 E.C.R. 4487, 4573. See also Matra Hachette v. Commission, 1994 E.C.R. II-595, 608.

²⁵Valentine Korah, Competition Law of the European Community vol. 2 § 13.02[3][f] (Lexis Publishing).

²⁶*Id.* § 13.02[7].

This situation suggests that the Attorneys General could pursue an audience with a receptive Commission to participate in settlement negotiations. Additionally, the fact that the settlements adopted by the Commission are not legally binding helps alleviate concerns about US Constitutional barriers to such an action, as raised in Section III(C) below.

II. International Law Aspects of EC Competition Law

Assuming that the officials of the European Community found that the procedures set forth in above give them the power to cooperate with the Attorneys General in the context of a prosecution of a violation of EC law, there are still several aspects of international law that would come into play before they would consent to such cooperation.

A. The Reach of EC Competition Law Jurisdiction

The first issue is whether the interests represented by the Attorneys General are within the jurisdiction of the EC competition officials. The question posed is whether EC officials are authorized to take foreign interests into account in prosecuting and punishing competition law violations. Although there is no statutory formulation of such a power, the practice of cooperation with US federal officials indicates that EC officials do have such a power. And as mentioned *supra*, § I(B)(1), the EC has been open to complaints originating outside its territory in the past.

The EC defines its jurisdiction over violations of its competition law slightly differently than the US defines its jurisdiction over antitrust violations. Whereas the United States authorities use an “effects” test to determine whether they have jurisdiction over anti-competitive conduct, the Commission’s jurisdiction has been limited by the European Court of Justice to conduct that is “implemented” in the EC, even if occurring outside the EC.²⁷ But this difference in the formulations of competencies seems insignificant from a practical standpoint. One former EC Commissioner for Competition Policy stated that EC competition policy targets 1) anti-competitive practices outside the EC that destroy companies and competitiveness inside the EC or exploit Community consumers and 2) anti-competitive practices in third markets that prevent EC companies from having access to these markets.²⁸ Thus, the competencies of the EC and the US are essentially the same in practice, despite the fact that there is no explicit assertion of EC jurisdiction over commerce with foreign

²⁷Id. § 14.01[1].

²⁸Id.

nations.²⁹ It does not appear that the scope of jurisdictional competence would prevent the Commission from cooperating with the Attorneys General, as it cooperates currently with the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC).

B. The EC/US Agreement on the Enforcement of Antitrust and Competition Laws

US federal officials and the EC have agreed on procedures to cooperate in the enforcement of their antitrust and competition laws. The question presented here is what effect this agreement might have on cooperation between the Attorneys General of the States and the EC officials.

The EC and the US signed the EC/US Cooperation Agreement in 1991 and adopted it in 1995.³⁰ It allows the exchange of interpretive letters between the EC Commission, the DOJ and the FTC, which aid in its interpretation. The Commission also publishes an annual report to the European Parliament on the application of the EC/US Cooperation Agreement, which includes information about instances of cooperation in specific cases.³¹

The types of matters that are subject to these agreements are, for example, certain mergers subject to US merger law, horizontal and vertical agreements and single firm behavior. The interests that trigger the cooperation agreement include anti-competitive activities being carried out in significant part in the other party's territory; a defendant company being incorporated or organized under the laws of the other party; conduct that is required, encouraged or approved by the other party; and remedies that would require or prohibit conduct in the other party's territory.³²

1. Scope

Article I(2)(A) of the EC/US Agreement states that it applies to Articles 85, 86, 89 and 90 of the EEC Treaty, Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and certain laws of the European Coal and Steel Communities. The US laws covered are the Sherman Act (15 USC §§ 1-7), the Clayton Act (15 USC §§ 12-27), the Wilson Tariff Act (15 USC §§ 8-11) and the Federal Trade Commission Act (15 USC §§ 41-68 except as they relate to consumer protection functions). Notably, 15 USC § 15(c), which

²⁹Id.

³⁰Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95/47, 27.4.95.

³¹Valentine Korah, Competition Law of the European Community vol. 2 § 14.02[1][b] (Lexis Publishing) (The reports are incorporated into the Commissions annual Report on Competition Policy and the 1997 report is available at <http://europa.eu.int/comm/dg04/interna/en/rapport0598.pdf>).

provides for *parens patriae* actions by the State Attorneys General, is included in the scope of the EC/US Agreement. There is the opportunity to expand the application of the agreement to other competition laws by written agreement.

Article I(2)(C) of the EC/US Agreement defines “enforcement activities” as including any application of competition law by way of *investigation* or *proceeding* conducted by the competition authorities.

2. Types of Cooperation Between the EC and the United States

The first method by which the EC and the United States cooperate in antitrust enforcement is by notification. The EC/US Cooperation Agreement provides that notification of non-merger matters be effected with sufficient time for the views of the other party to be taken account in the EC statement of objections, the US complaint or indictment, the EC decision or settlement or the US consent decree.³³ Thus, one sees cooperation both at the point of initiation and at the point of conclusion of an investigation.

The EC and the US may also share any information, except what would be prohibited on the basis of confidentiality laws or what would be incompatible with their interests to share, according to the EC/US Cooperation Agreement. This provision is permissive. The laws of both jurisdictions prohibit, for example, sharing confidential business information such as that submitted by the business entity during an investigation, but allow the sharing of confidential information originating in the agency. Most commonly, the officials exchange information on the fact of a proceeding and the process of the investigation, publicly available information on markets and legal precedents, staff analysis, and ideas on remedies.³⁴

It may be particularly necessary to coordinate investigations that target a market that surpasses national boundaries, where the anti-competitive effects of the behavior may impact the other party, or where a remedy could require action or produce effects in the other market. The business entities subject to investigation also benefit from the coordination of investigations, which reduces their level of uncertainty.³⁵

One provision of the EC/US Cooperation Agreement of 1991 is a “positive comity” provision. The EC and the US entered into a further agreement in 1998 that clarifies the conditions and processes for the

³²Id., § 14.02[2].

³³Id., § 14.02[3].

³⁴Id.

³⁵Id.

invocation of positive comity.³⁶ This agreement provides that the two parties will ordinarily stay their hand with respect to enforcing their laws against anti-competitive practices that take place in the territory of the other party, as long as that party has agreed to investigate the activity under its own laws pursuant to a comity request.³⁷

The special “positive comity” provision of the EC/US Cooperation Agreement is intended to minimize extra-territorial enforcement of the competition laws. When one party’s interests are harmed by activity occurring in the territory of the other, that party may request the other to initiate enforcement activities. However, this only works if the activity is also illegal under the other party’s laws. The Cooperation Agreement does not require the government that receives the request to actually initiate a procedure, nor does it prohibit the government that requests it from initiating its own procedure.

3. Definition of Competition Authorities

Article I(2)(B) defines the “competition authorities” to which the agreement applies. On the European side, it is the Commission of the European Communities. On the United States side, it is the Antitrust Division of the United States Department of Justice and the Federal Trade Commission. There is no mention of competition authorities of the Member States of the European community nor of the States of the United States.

4. Impact on Attorneys General

Since, on its face, the Cooperation Agreement does not identify State Attorneys General as relevant antitrust officials, nor State antitrust laws within its scope, it would not seem to have either a positive or negative impact on the cooperation between State Attorneys General and the EC on matters for which the Attorneys General were empowered to act by State law.

However, the EC/US Cooperation Agreement, by its terms, covers 15 USC § 15(c), the provision that provides for actions by State Attorneys General in the enforcement of federal antitrust laws. One might argue that the parties have agreed to allow cooperation on the enforcement of the federal competition *only* between the EC and the federal antitrust officials that are identified in the agreement. This conclusion requires accepting first, that by not mentioning the State Attorneys General the parties to the Cooperation Agreement *intended to*

³⁶Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws, 4 June 1998, 1998 O.J. L 173/26 (EC/US Agreement on Comity Principles).

³⁷Valentine Korah, Competition Law of the European Community vol. 2 § 14.02[1][c] (Lexis Publishing).

exclude them, and second, that the parties to the agreement have the power to exclude them, despite the Congress's express grant of power to the State Attorneys General to enforce these laws. Whether this second premise is valid turns on the interpretation of the division of power between the branches of the federal government. The argument for the primacy of the Congress in this division of power is supported by the express Constitutional grant of power to the Congress to regulate commerce with foreign Nations and among the several States.³⁸ The argument for the primacy of the Executive in this division of power is supported by the fact that the Constitution places the power to execute the laws in the hands of the President.³⁹ It is beyond the scope of this paper to explore the strengths and weaknesses of each position.

E. Other International Legal Principles Likely to Impact EC Receptivity to Cooperation

European courts generally consider principles of international law in their handling of international affairs. This section describes a few of the principles that have been evoked in opposition to and in favor of international enforcement of competition law.

1. The International Law Principle of Non-Interference

The international law principle of non-interference holds that in general, a government must abstain from exercising legal jurisdiction over the internal policies of another. Despite adherence to this principle, the European Court of Justice has held that the EC has jurisdiction over firms located outside of the community even if they have been granted immunity from their own national competition laws. In the Wood Pulp case of 1988, a producer of wood pulp that had no branches or subsidiaries in the EC argued that, in addition to lacking territorial jurisdiction, the EC was violating the international rule against non-interference. It claimed that because the US Government had exempted it from US antitrust laws in furtherance of a policy of export promotion, it was immune to the EC procedure. The Court rejected that argument by holding that the exemption only extended to the United States and its laws, not to the European Union.⁴⁰

It is on this basis that the European Community has prosecuted American firms under its own competition laws despite the legality of their actions under United States laws. In well-publicized cases, the EC has refused to provide pre-merger approval to American companies that the US government had already

³⁸Constitution Art. 1 § 8(3).

³⁹Constitution Art. II § 3.

⁴⁰*Id.* § 14.01[2].

approved.⁴¹ The fact that the EC does not give much practical weight to the concept of non-interference suggests that it would be open to cooperation with the State Attorneys General even in the face of disagreement with federal policy, at least on matters arising under EC competition law. It is not at all clear, however, how it would view cooperation on matters arising under the laws of the United States.

2. The Comity Principle

Comity is a principle of law that urges restraint in the extraterritorial application of laws. The Organization for Economic Cooperation and Development (OECD) has incorporated the principle in its guidelines on international cooperation in the field of anti-competitive practices.⁴² Both the EU and the US are OECD Members and thereby are subject to the OECD recommendation.⁴³ The OECD suggests that members notify each other of important interests affected by the others' enforcement action, share information and consult, coordinate parallel investigations if appropriate, assist each other in obtaining information, and exercise positive comity. This last item entails addressing anti-competitive conduct affecting its important interests but occurring outside its territory by requesting the authorities of the country where the conduct occurs to take action.⁴⁴

Although the EC adheres to these recommendations, the Commission has concluded that the comity principle does not restrict it from exercising jurisdiction over foreign business entities where doing so would:

not require any of the undertakings concerned to act in any way contrary to the requirements of their domestic laws, nor would the application of Community law adversely affect important interests of a non-member State. Such an interest would have to be so important as to prevail over the fundamental interest of the Community that competition within the common market is not distorted.⁴⁵

⁴¹The EC imposed several conditions upon the merger of Boeing and McDonnell Douglas before it would approve it. See Ilene Knable Gotts and Phillip A. Proger, "Multijurisdictional Review: A Societal Cost That Must Be Streamlined" in *The M&A Lawyer*, October 2001, vol. 5, no. 5, p. 7. The EC blocked the proposed merger of GE and Honeywell. See Philip Butterworth-Hayes, "GE-Honeywell: Confusion Among Regulators," in *Aerospace America*, September, 2001, p. 4.

⁴²Supplementary Protocol No. 1 to the Convention on the Organization for Economic Cooperation and Development, December 14, 1960, available at <http://www.oecd.org/about/origins/convention/oecd-p01.htm>.

⁴³Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting international Trade, OECD Doc. No. C (95) 130 (Final) (July 27-28, 1995), available at <http://www.oecd.org/daf/ccp/rec8com.htm>.

⁴⁴Valentine Korah, *Competition Law of the European Community* vol. 2 § 14.02[1][a] (Lexis Publishing).

⁴⁵*Aluminum Imports from Eastern Europe*, 1985 O.J. L 92/1, 48, quoted in Valentine Korah, *Competition Law of the European Community* vol. 2 § 14.01[4] (Lexis Publishing).

The European Court of Justice has also rejected the argument of international comity, both in the IBM case, when the US Assistant Attorney General in charge of the Antitrust Division requested that the Commission refrain from imposing certain remedial measures,⁴⁶ and in the Wood Pulp case.

The Commission sometimes respects comity considerations by considering the views expressed by the US Government. For example, in the Boeing case, the Commission limited its investigation to civil aircraft and did not consider the divestiture of Douglas Aircraft as a remedy to resolve the competition problems created by the concentration.⁴⁷ Furthermore, the EC and the US have successfully cooperated in some past merger investigations, including MCI-Worldcom, Case Mexico-SA de CV, and Guinness-Grand Metropolitan-Diageo.⁴⁸

Despite some cooperative success and the EC/US Agreement on Comity Principles,⁴⁹ the comity principle is not very restrictive of EC action. The requirement of an interest “so important as to prevail over the fundamental interest of the Community that competition within the common market is not distorted,” seems to raise a high bar to be passed before for the comity principle might prevent EC enforcement action.

While the EC/US Agreement on Comity Principles obliges the EC to take the concerns expressed by the federal government of the US into account in its enforcement actions, it does not bind the EC to any particular course of action. The potential reaction of the Commission to contradictory signals from the federal government and the States would hinge upon its receptivity to the sovereignty of the States or upon its view of the Attorneys General as representatives *parens patriae* of their citizens as interested third parties. The EC has already shown its willingness to act contradictory to the express desires of the US government when there are no Attorneys General advocating against a federal position, so the mere addition of such voices would probably not change that attitude.

III. US Constitutional Aspects of Cooperation Between State Attorneys General and the EC

Now that the procedural opportunities for cooperation between the US and the EC have been laid out, it is necessary to examine whether such cooperation would survive United States Constitutional review. This

⁴⁶Critics See Impropriety in European Lobbying by Antitrust Chief, Wall Street Journal, Mar. 31 1982 at A1, cited in Valentine Korah, Competition Law of the European Community vol. 2 § 14.01[4] (Lexis Publishing).

⁴⁷Boeing/McDonnell Douglas, (IV/M.877), 1997 O.J. L 336/16, paras. 11-12, quoted in Valentine Korah, Competition Law of the European Community vol. 2 § 14.01[4] (Lexis Publishing).

⁴⁸Ilene Knable Gotts and Phillip A. Proger, “Multijurisdictional Review: A Societal Cost That Must Be Streamlined” in The M&A Lawyer, October 2001, vol. 5, no. 5, p. 7, fn. 12.

section will discuss possible arguments that may be advanced against the permissibility of such cooperation, but will ultimately find that none of them set out a clear prohibition of cooperation between the State Attorneys General and EC antitrust authorities.

A. The Commerce Clause And the Preemption Doctrine

The Constitution grants the power to regulate commerce between the States and with foreign countries to Congress.⁵⁰ Two questions must be answered: 1) is the enforcement of antitrust law the regulation of commerce and 2) if so, what is the extent of preclusion of the corresponding State power?

The US could be estopped from arguing that the enforcement of antitrust laws is the regulation of commerce. In a dispute before a Dispute Settlement Body panel of the World Trade Organization, the United States maintained that its Antidumping Act of 1916 was in fact a domestic antitrust law, and thus did not regulate international trade nor violate the United States' obligations under the World Trade Organization Agreements.⁵¹ The Dispute Settlement Panel did not accept this argument because the law applies only to importers. But if the United States maintains the basic premise that enforcing domestic antitrust law is not a regulation of international trade, then it could not on that basis object to the Attorneys General of the States enforcing their antitrust or unfair competition laws against foreign actors.

Assuming that the argument above were rejected, one would have to determine to what extent federal antitrust enforcement precludes State antitrust enforcement. The extent of preclusion in regulation of international commerce would probably be analyzed along the same lines as the analysis of regulation affecting interstate commerce.⁵² Both powers are in the same clause of Article I § 8 of the Constitution, which grants Congress the power "to regulate Commerce with foreign Nations, and among the several States . . ." Also, because the States are free to enforce their antitrust laws against domestic actors and in domestic fora without contravening the domestic Commerce Clause, it would be illogical to apply a different standard of analysis to any international enforcement actions on the basis of the international Commerce Clause.

Under the domestic Commerce Clause, the grant of power to Congress does not mean that the States may not pass any law or regulation at all that has some effect on interstate commerce, but it does limit this

⁴⁹Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws, 4 June 1998, 1998 O.J. L 173/26.

⁵⁰US Constitution, Art. 1 § 8.

⁵¹United States--Antidumping Act of 1916, World Trade Organization WT/DS136/R, 21 March 2000.

⁵²"Some of the cases that defined what the Commerce Clause required of the states in fact involved foreign commerce." Henkin, at 432, n. 52 (citing cases).

power severely.⁵³ Modern dormant Commerce Clause cases are analyzed with a balancing test, described in

Pike v. Bruce Church,⁵⁴ a 1970 case that held:

Where the Statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Of course, such a balancing test is easier to formulate than to apply.

It seems that the question at issue in State antitrust enforcement is not actually whether the fact of State enforcement itself violates the Commerce Clause, as this fact has already withstood that Constitutional challenge.⁵⁵ It seems that the challenge of prosecutorial decisions, settlements or court judgments protecting State interests must be based in some other theory, because the State antitrust laws and State Attorney General enforcement under the Hart Scott Rodino Act have already been found constitutional.

B. Preemption by the EC/US Cooperation Agreement⁵⁶

One place that one could find the preemption of the powers of the State Attorneys General to cooperate with the EC in enforcement of antitrust laws is in the terms of the EC/US Cooperation Agreement. But the problem with this argument is that the EC/US Cooperation Agreement is neither a treaty nor a statute, so it does not necessarily benefit from the Supremacy Clause.

Were the EC/US Cooperation Agreement a treaty of the United States, it would be considered part of the supreme law of the land, which would supersede any inconsistent State law. Therefore, if it could preempt enforcement activities of State law, one would conclude that it would only do so to the extent that those enforcement activities are inconsistent with federal law. In Rice v. Santa Fe Elevator Corp.,⁵⁷ the Supreme Court held that “the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . .” or “in which the federal interest is so dominant that

⁵³Id., at 160.

⁵⁴Pike v. Bruce Church, Inc., 397 US 137, *quoted in* Henkin, at 160.

⁵⁵Re Montgomery County Real Estate Antitrust Litigation (1978 DC Md) 452 F. Supp 54, 1978-1 CCH Trade Cases P 62070, *cited in* 15 USCS 15c Interpretive Notes and Decisions n. 3 (Action by a State Attorney General enforcing US antitrust laws under the Hart-Scott-Rodino Act, 15 USC 15c, does not violate the Constitution, Article III § 2 requiring a case or controversy between plaintiffs because Congress may appoint the state as advocate for wrongs against its citizenry.)

⁵⁶Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95/47, 27.4.95.

the federal system will be assumed to preclude enforcement of State laws on the same subject.” However, it is recognized that federal antitrust laws do not preempt State unfair competition laws, and in fact the Hart Scott Rodino Act gives State Attorneys General the right to bring enforcement suits based on the federal antitrust laws.⁵⁸ Thus, preemption on the theory of pervasive regulation falls through.

A few particular aspects of the EC/US Agreement indicate that the obligations of the United States under the agreement apply only to the federal government. Most obvious is the limitation of the scope of the agreement to federal law. Secondly, the only authorities under obligation of the agreement are the federal antitrust authorities. Finally, only federal agency proceedings in which these authorities intervene or participate need be notified.⁵⁹ Yet neither the language nor the logic of the Agreement seems to exclude the possibility that State authorities could participate in similar types of cooperation with the EC.

In other words, cooperation between State Attorneys General and the EC would not be *inconsistent* with cooperation between the federal authorities and the EC. The scope of the cooperation includes notification (Article II), exchange of information on current enforcement activities and economic sectors of common interest (Article III), cooperation and coordination in enforcement activities in so far as possible for both Parties to achieve their objectives (Article IV), cooperation as to activity in the other party’s territory (Article V), the avoidance of conflicts over enforcement activities (Article VI) and consultation (Article VII). Similar cooperation on the part of State Attorneys General would not seem to contradict the purpose of the EC/US Cooperation agreement.

The one situation where it might contradict the purpose of the EC/US Cooperation Agreement, however, is when there is disagreement between the States and the United States federal government on enforcement policy. In such a case, the EC would receive conflicting requests from federal and State authorities to be considered by the EC in seeking to accommodate “competing interests” under Article VI (3). But Article VI also notes that the parties will not be limited to taking account of the listed factors, and may consider “any other factors that appear relevant in the circumstances.” (Art. VI(3)). As discussed above, the EC has not felt bound by the wishes of US federal authorities in the past, and while the federal authorities might not welcome additional evidence being brought to the attention of EC authorities that might counter their position, the EC authorities are entirely free to consider it.

⁵⁷331 US 218, 230 (1947), *quoted in* Henkin, at 158.

⁵⁸15 USC § 15(c).

⁵⁹Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95/47, 27.4.95.

Finally, Article IX of the agreement says that nothing in the Agreement shall be interpreted to require a change in the laws “of the United States of America or the European Communities or of their respective States or Member States.” This may be interpreted to mean that any pre-existing law regarding the implicit power of the States (or lack thereof) to cooperate with the officials of the EC would not be affected by the entry into force of the treaty.

The ultimate question that US courts will examine is whether Congress intended to preempt State regulation. The Congress did not speak in the writing of the EC/US Agreement, which was concluded by members of the Executive branch. Yet it did speak in forceful language in the Hart-Scott-Rodino Act in granting State Attorneys General the power to bring civil actions under federal antitrust law, and providing mandatory triple relief in such suits.⁶⁰ One could argue that implicit in this express grant of power is the implied power to conduct investigations and participate in negotiations to the extent and in the manner that is lawful and necessary.

C. Infringement Upon Presidential Authority

The necessary coordination between the State and EC authorities would require communication by telephone or letter, or meetings in person. It is at this stage that activity may raise the issue of the Constitutional power delegated expressly to the President. For it is the President who “shall appoint Ambassadors”⁶¹ and who “shall receive Ambassadors and other public Ministers.”⁶² Furthermore, the States are expressly prohibited from entering “into any Treaty, alliance, or Confederation” or “without the Consent of the Congress . . . into any Agreement or Compact with another State, or with a foreign Power.”⁶³

Two questions are presented by these Constitutional provisions. The first is whether the meetings and communication involved in the enforcement of antitrust and related laws would rise to the level of the Attorneys General appointing themselves “ambassadors” or receiving “ambassadors.” At first glance, the argument appears powerful that an Attorney General would be taking on the prohibited role if she approached the EC as a representative of her State. But when the Constitution is taken as a whole, it seems to conceive of the concept of “ambassador” quite narrowly. If States may negotiate compacts or agreements with foreign sovereigns with the consent of Congress under Article I § 10, and yet only the President is permitted to appoint an ambassador,

⁶⁰15 USC § 15(c)

⁶¹Constitution, Art. II § 2.

⁶²Constitution, Art. II § 3.

⁶³Constitution, Art. I § 10.

the intense interaction necessary to negotiate such an agreement must not rise to the level of ambassadorship. This suggests that the exclusive grant of the power to appoint ambassadors to the President would not pose an independent limitation on the power of the States to cooperate with the EC in antitrust enforcement.

The second question posed with respect to Presidential power is whether a State, by cooperating or entering into settlement agreements with the EC, would be entering into a “Treaty, alliance,” or into a “Confederation ... Agreement or Compact” that would require the consent of Congress. It seems at first glance that the particular type of cooperation of signing a settlement agreement with the authorities of another country would violate this provisions. One very powerful argument that this would not be the case is that this provision applies *between the States* as well, yet thus far, there has been no challenge on these grounds to the settlement agreements that have been signed by the Attorneys General of the States in past multi-state litigation. As for the possibility that a settlement agreement would be an “Agreement or Compact,” one might find that the necessary consent of Congress is implied by the Hart-Scott-Rodino Act’s grant of power to the Attorneys General to bring enforcement suits.

Another limitation on the scope of the Article I § 10 prohibitions is that they only apply to binding treaties, compacts and agreements. As for non-binding arrangements, the US Department of State has approved of such arrangements between States and foreign countries, for example in the area of child support.⁶⁴ When asked for advice before the fact, the State Department discouraged California from concluding an arrangement with Mexico with regard to auto registration, and Florida from concluding an agreement with Cuba to promote trade.⁶⁵ No such arrangement actually concluded has been successfully challenged (although Professor Henkin suggests that were a State to be so indiscreet as to call such an agreement a treaty, this would be enough to doom it).⁶⁶

The Supreme Court has addressed only once the question of what rises to the level of an “Agreement or Compact” between a State and a foreign power. The case was Holmes v. Jennison, decided in 1840.⁶⁷ The Governor of Vermont signed a warrant for Holmes’s extradition to Canada, where he had been indicted for murder, despite the absence of an extradition treaty. The Supreme Court dismissed Holmes’s appeal on *habeas corpus*, but the court was evenly divided. The justices who opposed the extradition argued for an “extended signification” of the word “Agreement,” including such verbal, informal or implied agreements as implied in an

⁶⁴Id., at 152.

⁶⁵Id., at 427 n. 30

⁶⁶Id., at 152.

⁶⁷39 U.S. (14 Pet.) 540 (1840), *quoted in* Henkin, at 153-154.

extradition. All of the Justices agreed that a *clear* compact or agreement between Vermont and Canada would have required Congressional consent.⁶⁸

When interpreting the provision in 1893 with regard to *interstate* compacts in Virginia v. Tennessee, the Supreme Court clarified that Congressional consent is only required where the compact tends “to the increase of political power of the States, which may encroach upon or interfere with the just supremacy of the United States.”⁶⁹ Arrangements to adjust State boundary-lines did not meet this requirement unless the subsequently established boundary would result in an important change increasing the political power of the enlarged State.

Despite the seemingly restrictive language of these decisions, States have continued to enter into agreements and arrangements without seeking the consent of Congress. Examples include arrangements between New York and the United Nations regarding its headquarters and personnel and interstate compacts regarding interpleader in judicial proceedings.⁷⁰

Congress has also expressly given its consent to several agreements between States and foreign governments as required by Article I § 10. These included an agreement between New York and Canada to establish a port authority at Niagara Falls, an agreement between Minnesota and the Province of Manitoba on highways, an agreement between several States and their contiguous Canadian provinces on forest fire protection, and Congress’s grant of power to the Civil Defense Administrator during the Second World War to authorize civil defense aid agreements between border States and neighboring countries.

D. The Theory of the Sovereignty of the Individual States

One angle from which to examine this problem is to consider whether the States as independent entities have the power to cooperate in international law enforcement. It is assumed in practice that the States do not have international sovereignty. Yet as Professor Henkin points out, the Constitution is full of gaps regarding the sovereign powers of the federal government.⁷¹ In a government of enumerated powers, this may be significant in leaving many non-enumerated powers to the States.

The Constitution does not delegate a ‘power to conduct foreign relations’ to the United States or to the federal government, or confer it upon any of its branches. Congress is given power to regulate commerce with foreign nations, to define offenses against the law of nations, to declare war; and the

⁶⁸Henkin, at 154-155.

⁶⁹Virginia v. Tennessee, 148 U.S. 503, 519 (1893), *cited in* Henkin, at 155 and 426 n. 25.

⁷⁰Henkin, at 155.

⁷¹Louis Henkin, Foreign Affairs and the US Constitution, 14 (1996).

President is given the power to make treaties and is authorized to send and receive ambassadors, but these hardly add up to full power to conduct foreign relations.⁷²

Professor Henkin recognizes that even if the States do not have “sovereignty” in the sense of dealing as entities with other national governments, they cannot avoid dealing in substantive foreign affairs continuously, as “foreign nationals live or do business in a state pursuant to its laws and seek the aid of its courts, and citizens bring transnational affairs within its jurisdiction.”⁷³ He points out the impracticality of bringing all such “international affairs” under the control of federal law. According to him, some foreign affairs are just affairs with transnational impact. The practical fact is that “the lives and affairs of foreign nationals and the transnational business of citizens remain largely subject to state laws and legal institutions.”⁷⁴

Within the federal structure, the States have long been attributed sovereign power to enforce their own criminal laws despite simultaneous enforcement of federal laws against the same acts. The jurisprudence of the Double Jeopardy Clause holds that simultaneous or successive State and federal prosecution of the same offense is rooted in the sovereignty of the States. In Heath v. Alabama, the Supreme Court held that “the States are separate sovereigns with respect to the Federal Government because each State’s power to prosecute is derived from its own ‘inherent sovereignty,’ not from the Federal Government [citation omitted].”⁷⁵ The Supreme Court recognizes in the Double Jeopardy context that “it would be inappropriate--in the absence of a specific congressional intent to preempt state action pursuant to the Supremacy Clause--to allow a federal prosecution to preclude state authorities from vindicating the historic right and obligation of the States to maintain peace and order within their confines.”⁷⁶

This reasoning in Heath v. Alabama carries over to the enforcement of State antitrust law as well, whether in criminal or civil actions. If the conclusion above is correct that there was no intent on the part of Congress to preclude such enforcement, then the interest of a State in enforcing its own laws should prevail.

E. The Special Question of Joint Settlement Negotiations Between the States and the EC

The supremacy of the federal government may effectively deny the benefits of one aspect of possible cooperation between States and the EC, a joint settlement. This would be the case if the federal government’s

⁷²Id., at 14.

⁷³Henkin, at 150.

⁷⁴Id.

⁷⁵Heath v. Alabama, 474 U.S. 82 (1985).

⁷⁶Id. (Marshall, dissenting on the grounds that successive prosecutions by two different States did not implicate the same interest.)

settlement with a defendant were interpreted to preclude a harsher settlement (or a separate court judgment) on behalf of the States. The question of whether the States can pursue a harsher remedy than the federal government desires will be determined by the outcome of the Microsoft remedy hearings and concurrent Tunney Act proceedings.⁷⁷ While a negative outcome might force the States to accept the settlement agreed to by the federal government, it will clearly not prohibit the EC from pursuing its own remedy or settlement against Microsoft. It would simply reduce the value for the States of cooperation between State and EC officials on settlement negotiations in future cases where the EC is seeking a tougher remedy than has already been agreed to by the federal government.

What are the chances that the States will be allowed to pursue a harsher remedy independent of the federal antitrust authorities? In Rice, *supra*, the Supreme Court stated that federal regulation may exclude consistent State regulation where “the state policy may produce a result inconsistent with the objective of the federal statute.” It seems likely that a harsher punishment could be just such an inconsistent objective. Yet the Hart-Scott-Rodino Act provides that “the court *shall* award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the costs of suit, including a reasonable attorney’s fee.”⁷⁸ The apparent objective of *this* federal statute is to give the States a right of action and a right to remedies independent of what the federal antitrust authorities may pursue.

There are two bases on which the States might prevail in their arguments that they must be permitted to pursue their own, harsher remedies, which would leave open the possibility of their cooperation with EC officials. The first is that to deny the States the right to enforce their own antitrust laws as they see fit would be in violation of the Full Faith and Credit clause of Article IV § 1 of the Constitution. In Baker v. Carr, the court indicated that such a question would not be decided by a court if deemed to be a political question. Such a political question arises if there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” barring which, the Supreme Court is the “ultimate interpreter of the Constitution.” However, the opinion held as well that the Courts should not address the issue if it would be impossible to do so “without an initial policy determination of a kind clearly for non-judicial discretion.”⁷⁹ It may well be politically convenient for the court in the Microsoft case to decide that the question of federal-States cooperation (and lack thereof) in the settlement of federal antitrust laws should be left to the Executive

⁷⁷15 USCS § 16.

⁷⁸15 USCS § 15c(a)(2).

⁷⁹Baker v. Carr, 369 U.S. 186 (1962).

branch, deferring to the Executive decision to override the States' wishes to enforce the federal laws more harshly.

The second Constitutional basis for a State right to enforce antitrust law independently of the federal government is that to deny the States the right to enforce their laws as they see fit might violate the Constitution's Article IV § 4, which requires the United States to "guarantee to every State in this Union a Republican Form of Government." In New York v. United States, Justice O'Connor's opinion for the majority indicated in dictum that perhaps the court would not try to avoid a question of the guarantee of a Republican form of Government by calling it a non-justiciable political question, although she did not find it immediately necessary to address the scope of that guarantee.⁸⁰

But even the Microsoft case is resolved on the basis that the political question principle prohibits the non-settling States from pursuing a remedy for the violation of federal antitrust law violation harsher the settlement agreed to by the federal government, this would not prevent States from pursuing such harsher remedies on the basis of State laws in their own courts. Were this possible, presumably the opportunity for cooperation on a joint settlement with EC officials would remain open.

F. General Constitutional Principles

An independent argument might be raised against cooperation between State officials and the EC, based on a general structural principle of the Constitution prohibiting State intrusion in foreign affairs. Before 1968, in the absence of preemptive federal law or unconstitutional provisions, the States could apply State law and policy in deciding conflict of laws questions; whether to give effect to foreign states' acts of taxation, criminal penalty, and confiscation of property; and whether to enforce the judgments of foreign courts. But an unprecedented 1968 case, Zschernig v. Miller, found a Constitutional exclusion of the states from the realm of foreign affairs even where the federal government had not acted, and even though the Department of Justice submitted an *amicus curiae* brief stating that it "does not contend that the application of the Oregon escheat statute . . . unduly interferes with the United States' conduct of foreign relations."⁸¹ In Zschernig, the activity that was considered interference in the realm of foreign affairs was the application of the inheritance law of Oregon to permit the escheat of an estate to the State rather than let it fall into the hands of a citizen of the

⁸⁰505 U.S. 144, 156 (1992).

⁸¹Zschernig v. Miller, 3889 U.S. 429, 434 (1968), *quoted in* Henkin, at 163.

former German Democratic Republic. The reasoning for the decision was that the claimant could not establish that he could in fact inherit an estate in that country “without confiscation, in whole or in part.”⁸²

This was the only time that the Supreme Court had occasion to apply this newly created doctrine. Despite the Zschernig doctrine, State and municipal governments enacted sanctions against South Africa during the years of apartheid that survived challenge in court and escaped Congressional preemption, even when Congress decided to enact its own Anti-Apartheid Act in 1986.⁸³

The New York Court of Appeals has also applied the Zschernig doctrine, striking down a decision of the New York City Commission on Human Rights that found the New York Times guilty for advertising South African employment opportunities. Its opinion was that:

Each locality in each State may not adopt its own foreign policy. This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even relevant as to national policy determined by the Federal Government at Washington.⁸⁴

The Zschernig doctrine is uniquely narrow in that it only applies when the federal government’s political branches have not acted.⁸⁵ This is because the federal courts may not substitute their own judgment for that of the political branches. The impact of this little-used doctrine on the potential for State Attorneys General to cooperate with the EC is potentially quite large. Because the doctrine has no textual basis in the Constitution, but is rather based on a general principle, its scope is hard to define or predict.

The single protection available to the States against the application of the Zschernig doctrine would be to assert that the political branches have not been silent in the area of antitrust law enforcement by the States. They would argue that Congress has both explicitly recognized and consented to the right of the State Attorneys General to enforce these laws. To draw bright lines around the manner in which this is done would artificially restrict this power.

G. Sovereign Immunity of the States

Finally, even without finding the express power in the Constitution or in statute, a State may decide to cooperate with EC authorities in the enforcement of antitrust law. Were this done, the antitrust defendant might

⁸²Id.

⁸³Henkin, at 438-39 n. 69.

⁸⁴New York Times Co. v. City of New York Commission on Human Rights, 41 N.Y.2d 345 (1977), *quoted in* Henkin, at 439 n. 69.

⁸⁵Henkin, at 164.

seek to sue the State for damages. In this situation, the State could attempt to use the sovereign immunity protection of the 11th Amendment to the Constitution to defend its exercise of State power.

This use of the Eleventh Amendment would be novel. Past interpretations have focused on Federal statutes that create a right of action against a State. It has been held in the domestic context that the federal government cannot “destroy the [State] nor curtail in any substantial manner the exercise of its powers,”⁸⁶ nor may congress co-opt State officials to do federal bidding.⁸⁷ Prior cases that limited the scope of this amendment involved the creation of a right of action against a State by a federal statute. Since this is not at issue here, perhaps the Amendment may function to protect States from suit for cooperating in antitrust enforcement with EC officials. A defendant who wanted to sue the State for having cooperated in an EC investigation would have to fall back on common law principles in suing the State, which would most likely be barred by the sovereign immunity doctrine.

If, however, a court found that a State Attorney General acting as an individual violated some constitutional right of the defendant by cooperating with the EC in an investigation, the individual would not be protected by the sovereign immunity doctrine.⁸⁸ The most obvious grounds for such a Constitutional claim would be the 14th Amendment guarantee of Due Process of Law, but the discussion of this possibility is beyond the scope of this paper.

IV. Conclusion

The procedural law of the European Communities in antitrust enforcement presents many opportunities for intervention by the State Attorneys General of the United States. If any limitations exist on the possibility for cooperation between the Attorneys General and the Commission, they are to be found in the Constitution of the United States. Traditional doctrines of preemption and separation of powers do not seem to impose serious limits upon the States’ ability to cooperate with the EC in antitrust enforcement. And the acquiescence of the federal government in a history of State participation in acts of international cooperation lends further support to the argument that Attorneys General are empowered to do so. Additionally, the sovereignty of the States and their interest in enforcing their own laws to preserve law and order within their borders have been held to be independent of federal interests in law enforcement.

⁸⁶Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523-4 (1926), *quoted in* Henkin, at 166.

⁸⁷New York v. United States, 505 U.S. 114 (1992), *cited in* Henkin, at 167. *See also* National League of Cities v. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); F.E.R.C. v. Mississippi, 456 U.S. 742 (1982), *cited in* Henkin, at 440 n. 78.

The potential legal barriers that remain are vague and rarely used, but perhaps thereby more potentially restrictive. The States may be limited in their power to pursue settlements by the decision of the federal enforcement officials, under a political question doctrine. In the area of cooperation generally, courts may find that a general principle of State non-interference in foreign affairs precludes them from exercising their law enforcement powers in certain ways. But clearly, none of these principles will be clarified until a court is given an opportunity to address the issue after the fact. In such a situation, the State can be expected to claim sovereign immunity for its actions.

What remains unaddressed by these legal considerations are the very real political hindrances to cooperation between the State Attorneys General and the EC. The very reason that the EC might seek to cooperate with the States, to find political cover for its disagreement with the US federal government on enforcement policy, is precisely the reason that would provoke a political backlash against the State Attorneys General for the practice. Were Congress sufficiently affronted by cooperation between the State Attorneys General and the EC in this arena and even if the courts accepted it under present law, Congress has the power to change the antitrust laws to preempt or forbid it in the future. Thus, if the State Attorneys General did wish to act in the area of international antitrust enforcement, it would be pragmatic to do so only in areas in which the federal authorities and Congress have little interest or have coinciding interests.

⁸⁸Ex parte Young 209 U.S. 123 (1906).