

THE US OR THE EU – WHICH FEDERAL SYSTEM OFFERS BETTER ANTITRUST ENFORCEMENT INSTITUTIONS?

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Key Issue

- ❑ What is the appropriate division of antitrust enforcement responsibilities between the E.U. and its member states?
- ❑ Fox – The E.U. has it (more or less) right –
 - Federalism trumps the member states – Member State competition authorities have a duty to take on State laws that run counter to the interests of the Union.
 - See “State Action in Comparative Context” and “Antitrust and Regulatory Federalism”
- ❑ The U.S. gives too much weight to State sovereignty (the Eleventh Amendment prohibits suits in federal courts by citizens against states). The Federal government should have greater authority to intercede when state actions affect national interests.
- ❑ My pushback: With one statutory intervention, the U.S. system can do better, and perhaps even better than the E.U.

U.S. Regulatory Federalism: The State Action Exemption Doctrine

- ▣ U.S. regulatory federalism – the State Action Exemption Doctrine
 - Requires “clear articulation” and “active supervision”
 - Key decision: *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (1980).
 - What is missing: Efficiency losses because there is no explicit treatment of externalities. If *Parker v. Brown* accounted for external effects of raisin cartel, the Court would have ruled differently.

E.U. Regulatory Federalism

- No Eleventh Amendment
- Articles 28 and 29 prohibit state measures that restrain imports or exports – suggestive of a “no externality” rule
- Article 10 – member states “shall facilitate the achievement of the Community’s tasks” – not reduce the effectiveness of EC competition law.
- What is missing? An accounting of the political economy of member state regulatory politics – an appreciation of the benefits of local political participation – a reflection of the values of local cultures and local political and economic interests

The Importance of Political Participation

- Preferences of local cultures and politics are revealed
- Citizen influence is potentially increased
- Citizens can monitor state and local officials
- Decentralization lifts the veil of voter ignorance and provides easier access to channels of reform.
- Participation increases as responsibilities are decentralized
- There are limits – regulatory oversight will be required – most interest groups must actively participate; their interests must be taken into account

How to Strengthen the U.S. System: Two Questions

- Does the state regulation create an interjurisdictional monopoly spillover with the potential to significantly harm customers outside the state?
- Can use the Horizontal Merger Guidelines methodology - E.g., will the regulation raise prices outside the state by 5 percent?
- If so, was the state regulation decided without the effective political participation of the affected customers residing outside the regulating state?
- If yes to both, the regulation will fail a monopoly spillover test and support a Sherman Act review appropriate.
- Statutory reforms of this type are doable in the U.S.

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Is the EU Ideal Attainable?

- The E.U. relies heavily on a model of cooperative federalism – a model that is breaking down as member state interests are beginning to trump federal interests – Brexit and Greece are two recent examples
- The agenda-setting powers of the Council of Ministers is limited and universalism (member states acting in their self-interest rather than the federal interest) characterizes the behavior of the expanded European Parliament
- A more ideal model – democratic (decentralized) federalism, which incorporates the principle of subsidiarity and a stronger system of E.U. governance seems less and less attainable.

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