FUTURE-PROOFING PLURAL ANTITRUST ENFORCEMENT MODELS: LESSONS FROM THE UNITED STATES AND THE EUROPEAN UNION

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INTRODUCTION

In most antitrust systems, enforcement is based on two pillars: public enforcement by administrative agencies and private enforcement through actions before courts. In the context of public enforcement, the U.S. legal system is defined by a form of federalism in which both federal and state agencies are competent to enforce the antitrust laws. Federalism or decentralization is also present in the EU antitrust system, where the European Commission and national competition authorities (NCAs) are responsible in parallel for the public enforcement of EU antitrust rules. The presence of multiple actors in the enforcement of antitrust laws illustrates what this article will refer to as the plurality or plural nature of antitrust systems. The advantage of plural antitrust enforcement systems is that several enforcers monitor the health of markets. However, they also pose a real dilemma.

On the one hand, the complexity of current markets requires room for antitrust enforcers to experiment and learn which approaches to enforcement achieve the best outcomes for competition and should therefore prevail in the future. Antitrust enforcement is not an exact science and, although enforcers must collect evidence to support their cases, it is hard to predict in advance what the impact of antitrust intervention or the lack thereof will be. Divergences in approaches and outcomes of enforcement actions are therefore not necessarily undesirable in the long term; to the contrary, they may foster learning-by-doing and can be useful to draw lessons for the future.

On the other hand, consistency in the interpretation of antitrust rules and legal certainty for market players are also important values for effective enforcement. The presence of various enforcers can create frictions in the short term regarding the substantive interpretation of antitrust rules and the imposi-

tion of remedies. When one enforcer seeks to impose behavioral remedies to stop certain illegal practices, this could limit the ability of another enforcer to successfully claim in a different case against the same company that a structural remedy is needed to address the identified anticompetitive effects. Thus, diverging approaches between antitrust enforcers for the same matters could risk undermining the effectiveness of the antitrust laws.

Although the U.S. and EU antitrust enforcement systems both incorporate federalist elements, they strike a different balance between entrusting enforcement to a plurality of largely independent enforcers and integrating mechanisms in the system that contribute to coordination. In the European Union, for example, the European Commission retains a strong level of control over the overall interpretation and implementation of EU antitrust law, even though the NCAs in the EU Member States are becoming increasingly active as enforcers. The European Commission can even relieve NCAs of their jurisdiction to apply EU antitrust rules by opening its own antitrust proceedings into a given practice.[1] In contrast, in the United States, individual states and often private parties can enforce federal antitrust laws without the consent of the federal government.[2]

Unlike the European Union, where the European Commission is the dominant central enforcer, U.S. federal antitrust enforcement is spearheaded by both the Federal Trade Commission and the Antitrust Division of the Department of Justice. The U.S. model of dual federal enforcement has led to situations where the two federal agencies expressed conflicting opinions on the same matters.[3]

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[1] Council Regulation 1/2003, art. 11(6), 2003 O.J. (L 1) 1, 11.

[2] *See, e.g.*, California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (holding that California could sue under federal antitrust laws and explaining that "[p]rivate enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition"); 15 U.S.C. § 26 ("Any person, firm, corporation, or association . . . [may] sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws."); 15 U.S.C. § 15c (granting parens patriae standing to state attorneys general).

[3] An example is the intervention by the DOJ as amicus curiae in support of Qualcomm and against the FTC in the latter's monopolization case. *See* Christine P. Bartholomew, *Playing Nicely with Others: How and Why Antitrust Enforcers Should Work Together*, *supra* this issue, 85 ANTITRUST L.J. 241, 256–57 (2023). Likewise, in the FTC's enforcement action against Schering-Plough, when the FTC sought a writ of certiorari in the Supreme Court, the DOJ filed its own brief recommending that the Court deny certiorari. *See id.* at 257. Other examples include the 2008 unilateral-conduct report that the FTC refused to join, despite the common hearings the FTC and DOJ had organized. Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), www.ftc.gov/news-events/news/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under. For further discussion, see DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 44–46 (2011), and see generally Bartholomew, *supra* (addressing additional examples and proposing solutions).

Another distinct feature contributing to the higher degree of plurality of antitrust enforcement in the United States is the more prominent role of private enforcement in both state and federal courts. The initiative for, and the scope of, private actions is largely beyond the control of the antitrust agencies. Moreover, outcomes of private enforcement cases can shape the contours of antitrust law, which in turn can also impact public enforcement. At least historically, however, private actions have played only a minor role in the European Union.

Antitrust enforcement systems, however, are not static. The European Union has seen a rise of private enforcement, and, over time, the European Commission has shown a greater willingness to let NCAs develop their own approaches to novel antitrust issues. At the same time, as this article will show, one can observe a tendency toward a higher degree of coordination between federal and state enforcers in the U.S. enforcement system. These developments raise questions about how to reap the most benefits from plural antitrust enforcement in constantly changing circumstances.

Questions about plural antitrust enforcement systems are of course not new. But they remain relevant and timely in today's environment. For instance, the 2007 report of the U.S. Antitrust Modernization Commission found that it was desirable to concentrate antitrust enforcement in a single federal agency but considered that the costs to implement the required institutional changes at that time outweighed the benefits.[4] This old debate about the institutional structure of federal antitrust enforcement has been put in the spotlight again by the introduction of the One Agency Act by Republican Senator Mike Lee in November 2020.[5]

In the European Union, Regulation 1/2003, which implemented a system of decentralized enforcement by the European Commission and NCAs, will be in force for 20 years beginning in 2024.[6] In addition, the EU Digital Markets Act[7] and similar legislation at the national level (such as in Germany)[8] are

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[4] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 129–30 (2007) [hereinafter AMC REPORT], govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[5] One Agency Act, S. 4918, 116th Cong. (2020). The bill was reintroduced in March 2021 as the One Agency Act, S. 633, 117th Cong. (2021).

[6] Council Regulation 1/2003, *supra* note 1, art. 45 (setting an effective date of May 1, 2004).

[7] Council Regulation 2022/1925, 2022 O.J. (L 265) 1 (amending Directive 2019/1937 and Directive 2020/1828).

[8] The 10th amendment to the German Gesetz gegen Wettbewerbsbeschränkungen (GWB), referred to as the GWB-Digitalisierungsgesetz, was adopted in January 2021. Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Competition Act], Jan. 18, 2021, BGBl I, last amended July 19, 2022, BGBl I, art. 2, www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=BGbl121s0002.pdf. The English version of the amended text of the *GWB* is available at www.gesetze-im-internet.de/englisch_gwb.

complementing antitrust rules by imposing different obligations for particularly powerful digital platforms. These developments will not only revive interest in questions about how to coordinate antitrust enforcement across the various actors involved at the EU and national levels, but they will also provide good occasion to review the experience of coordinating enforcement in the EU antitrust system.

This article compares the plurality of the U.S. and EU antitrust systems using the above-mentioned focal points. By drawing lessons from the U.S. and EU antitrust systems, it reflects on the question of how plural antitrust systems can be made future-proof. The article asserts three main findings: (1) antitrust systems require some degree of federalism or decentralization to allow for experimentation and to ensure consistency of approaches; (2) the extent of federalism mainly depends on how actors exercise their authority in practice, rather than how the system is set out by law (the article illustrates how the European Union and the United States seem to converge on their degree of federalism or decentralization, even though the starting points, as contained in the respective statutes, are quite different); and (3) coordination is needed to keep the degree of experimentation through federalism or decentralization in balance with the degree of consistency through centralization.

After discussing the evolution of the institutional structures of EU and U.S. antitrust enforcement in Part I, this article illustrates in Part II how the EU and U.S. antitrust systems are coming closer to each other in their extent of federalism or decentralization. Part III explores how plural antitrust enforcement models can be made future-proof, also considering the role of private enforcement and the involvement of legislators as ex post evaluators in antitrust matters. The last Part concludes by providing insights on relevant considerations in balancing experimentation and consistency in plural antitrust systems like the EU and U.S. systems.

I. PLURALITY IN THE INSTITUTIONAL MODELS OF EU AND U.S. ANTITRUST ENFORCEMENT

This Part discusses the main features of the EU and U.S. antitrust enforcement models from a plurality perspective, focusing on key features that allow for diversity, the forces that support coordination, and how the balance between them has evolved over time. Even though the law determines the main features of the institutional frameworks, the political and societal context has influenced the plural nature of the two enforcement systems over time as well.

A. The European Union

1. *Centralized Enforcement at the Origin of EU Antitrust Law*

The EU antitrust system was originally established by Regulation 17.[9] This regulation was adopted in 1962 as the first legislative instrument setting out rules for the implementation of the prohibitions on restrictive practices and abuse of dominance contained in the 1957 Treaty of Rome—currently Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), respectively. Regulation 17 designated the European Commission as the main EU antitrust law enforcer. The opening of an antitrust matter by the Commission relieved the Member States of their authority to apply the EU antitrust rules to the case.[10] In addition, Regulation 17 provided the Commission with the exclusive power pursuant to Article 101(3) TFEU to grant exemptions to the prohibition of anticompetitive agreements laid down in Article 101(1) TFEU.[11] Parties seeking an exemption under Article 101(3) TFEU had to notify their respective agreement to the Commission to obtain a decision from the Commission declaring the prohibition of Article 101(1) TFEU inapplicable.[12]

The design of Regulation 17 aimed to create a "competition culture" in Europe.[13] Member States still had limited experience with antitrust enforcement at the time. For example, cartels had been largely deemed an acceptable way of doing business before the Treaty Establishing the European Economic Community introduced antitrust rules in 1957.[14] Centralizing antitrust enforcement at the EU level helped to safeguard a uniform interpretation of the Treaty's antitrust provisions and to raise awareness of antitrust harms in the different Member States.[15]

Centralized enforcement by the Commission was thus a rational choice at the inception of EU antitrust law. Its shortcomings, however, became increasingly apparent as the Commission's caseload continued to increase. This was due to the enlargement of the European Union from 6 to 15 Member States

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[9] Council Regulation 17, First Regulation Implementing Articles 85 and 86 of the Treaty, 1962 O.J. (13) 204. Its adoption was foreseen in the Treaty Establishing the European Economic Community, art. 87, Mar. 25, 1957, 298 U.N.T.S. 49. For a good overview of the background of Regulation 17, see Lorenzo Federico Pace & Katja Seidel, *The Drafting and the Role of Regulation 17: A Hard-Fought Compromise*, *in* THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 54–88 (Kiran Klaus Patel & Heike Schweitzer eds., 2013).

[10] Council Regulation 17, *supra* note 9, arts. 9(2), (3).

[11] Pace & Seidel, *supra* note 9, at 54, 55.

[12] *Id.*

[13] Council Regulation 1/2003, *supra* note 1, ¶ 1.

[14] Pace & Seidel, *supra* note 9, at 54, 59–61.

[15] *Id.* at 54–56.

and the effects of internal market integration, as well as globalization.[16] This led to the adoption of Regulation 1/2003, which replaced Regulation 17 as of May 1, 2004.[17]

2. *Decentralization Under Regulation 1/2003*

Regulation 1/2003 put in place a system of decentralized enforcement by the Commission, NCAs, and national courts, having parallel authority to apply Articles 101 and 102 TFEU.[18] In addition, Regulation 1/2003 replaced the notification and authorization system for exemptions under Article 101(3) TFEU with a system of direct applicability and self-assessment of restrictive practices by "undertakings" (i.e., firm(s) or person(s) engaged in economic activity). Before Regulation 1/2003, parties had to notify the Commission of requests for exemptions from the prohibition of restrictive practices of Article 101(1) TFEU, and the Commission had exclusive authority to authorize such exemptions under Article 101(3) TFEU. Under the new decentralized system, a prior decision of the Commission is no longer needed to exempt agreements from the prohibition of restrictive practices.[19] Based on the Commission's decision-making practice and the case law of the Court of Justice of the European Union (CJEU), firms themselves had to assess whether their agreements or restrictive practices raised concerns under Article 101(1) TFEU and met the conditions laid down in Article 101(3) TFEU.

After a quieter period, NCAs have become increasingly comfortable investigating cases under EU antitrust law, as we will see in Part III below. National courts have also been increasingly confronted with EU antitrust claims. To address the increased risk of divergence and to ensure effective cooperation, the Commission and NCAs created the European Competition Network (ECN) with rules for efficient case allocation and assistance between the different enforcers. The ECN has become a forum to coordinate cases, discuss policy developments, exchange information, and assist each other in investigations.[20] The ECN+ Directive is the latest development in this regard; it aims at harmonizing the resources and powers available to NCAs and at ensuring mutual assistance among NCAs.[21]

Even though the NCAs have become more important actors in the European Union, the Commission is the guardian of the TFEU and is responsible

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[16] *Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, 1999 O.J. (C 132) 14, 20–21.

[17] Council Regulation 1/2003, *supra* note 1, arts. 43, 45.

[18] *Id.* arts. 4–6.

[19] *Id.* art. 1(2).

[20] *See id.* arts. 11, 12, 20, 22; *Commission Notice on Cooperation Within the Network of Competition Authorities*, 2004 O.J. (C 101) 43, ¶ 1 [hereinafter *Commission Notice*].

[21] Directive 2019/1, 2019 O.J. (L 11) 3, ¶¶ 7, 69.

for developing competition policy and safeguarding the consistency of the law.[22] In particular, the Commission has the ability to remove a case from an NCA; once the Commission has initiated proceedings, NCAs lose the power to apply Articles 101 and 102 TFEU in that case, and if an NCA is already working on a case, the Commission can initiate proceedings itself after consulting the respective NCA.[23] In addition, NCAs must run draft decisions applying EU antitrust law by the Commission before adoption.[24] To further ensure the uniform application of EU antitrust rules, Regulation 1/2003 stipulates that NCAs and national courts cannot take decisions running counter to a prior decision adopted by the Commission against the same behavior.[25] The Commission, therefore, is seen as the antitrust law hub[26] that retains a decisive role and dedicates substantial resources to effectively managing its relationships with NCAs.[27]

The CJEU plays a critical role in the EU antitrust system as well by reviewing appeals of Commission decisions and answering questions on the interpretation of EU law referred to it by national courts.[28] With this double role, the CJEU can develop and safeguard unifying principles for the entire EU antitrust system.

As a further mechanism to protect consistency within the EU antitrust enforcement system, Regulation 1/2003 limits the ability of Member States to apply stricter standards in their national antitrust laws than those applicable under EU antitrust law. Article 3(2) of Regulation 1/2003 clarifies that national antitrust laws in the EU Member States cannot prohibit agreements and concerted practices that comply with Article 101 TFEU.[29] By setting a single standard of assessment, the EU legislator has aimed to create a level playing field for agreements and concerted practices across the EU territory.[30]

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[22] *Commission Notice*, *supra* note 20, ¶ 43.

[23] Council Regulation 1/2003, *supra* note 1, art. 11(6); *Commission Notice*, *supra* note 20.

[24] Council Regulation 1/2003, *supra* note 1, art. 11(4); *Commission Notice*, *supra* note 20.

[25] Council Regulation 1/2003, *supra* note 1, art. 16.

[26] Imelda Maher, *Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?*, 31 FORDHAM INT'L L.J. 1713, 1736–37 (2007).

[27] The European Commission has dedicated an entire unit to dealing with NCAs. *See* Directorate-General for Competition Organization Chart, EUR. COMM'N, commission.europa.eu/document/download/a3059746-10a6-42f3-b990-bdc6d6748d7b_en.

[28] *See* Council Regulation 1/2003, *supra* note 1, art. 31; Consolidated Version of the Treaty on the Functioning of the European Union, art. 267, 2012 O.J. (C 326) 47, 164.

[29] Council Regulation 1/2003, *supra* note 1, art. 3(2).

[30] Council Regulation 1/2003, *supra* note 1, ¶ 8. The European Commission referred to Article 3(2) of Regulation 1/2003 as the "convergence rule." *Report on the Functioning of Regulation 1/2003*, ¶ 139, COM (2009) 206 final (Apr. 29, 2009).

This important goal of creating consistency across the European Union did not prevail in unilateral conduct cases, where Member States succeeded in reserving scope for national divergence. Article 3(2) of Regulation 1/2003 explicitly provides that Member States are not precluded from applying stricter standards in unilateral conduct cases than those applicable under Article 102 TFEU.[31] The provision is the result of a compromise made during the adoption of Regulation 1/2003 to address concerns from Member States whose national antitrust laws prohibited types of abuse of dominance not covered by Article 102 TFEU.[32] For instance, several Member States, such as France, Germany, Spain, Greece, and Belgium, have regimes in place to protect against the abuse of relative market power toward economically dependent "undertakings."[33] The objective of these national regimes is to protect businesses in a weaker bargaining position. As a result, there is less consistency, and less predictability, throughout the European Union in unilateral conduct cases.

3. *Private Enforcement*

Beyond public enforcement, private enforcement has assumed a more prominent role in the European Union since the early 2000s. In its 2001 *Courage* judgment, the CJEU established the principle that any individual should be able to claim damages for loss caused by conduct distorting competition.[34] The judgment and ensuing debates about the role of private enforcement resulted in an increase of private actions before national courts. Directive 2014/104 was adopted to facilitate damages actions in the European Union and to harmonize national rules and procedures regarding the private enforcement of EU antitrust law.[35]

In a December 2020 report, the European Commission evaluated the implementation of the Directive and found positive signs of its impact so far, even

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[31] Council Regulation 1/2003, *supra* note 1, art. 3(2).

[32] In the context of the German *Facebook* case, see Wouter P.J. Wils, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the* Facebook *Decision of the* Bundeskartellamt, 3 CONCURRENCES 58, 61 (2019).

[33] *See* Council Regulation 1/2003, *supra* note 1, ¶ 8 ("Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings.").

[34] Case C-453/99, Courage Ltd v. Crehan, 2001 E.C.R. I-6297 (answering affirmatively the question of whether national courts must enforce European Commission law and allow individuals to claim damages for losses due to its violation).

[35] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, art. 3, 2014 O.J. (L 349) 1, 12 [hereinafter Directive 2014/104].

though the Commission acknowledged that there is not yet sufficient operational experience to do a full review of the Directive.[36] As indicators of the increasing relevance of private enforcement of EU antitrust law since the adoption of the Directive, the Commission pointed to the rising number of damages actions before national courts and the increasing number of questions national courts have referred to the CJEU relating to damages actions for infringements of Articles 101 and 102 TFEU.[37]

The Commission, however, also noted that plaintiffs often start damages claims only after an antitrust authority has established a violation.[38] In fact, according to a study referenced in the Commission report, 57% of the in total 239 private enforcement cases reported in the European Union until 2019 were based on an infringement decision of an NCA, 40% followed after a Commission decision, and only 2% were standalone actions.[39] Follow-on actions have a procedural advantage over standalone actions because the plaintiff can rely on the decision of the antitrust authority instead of having the burden of proving an antitrust violation.[40] This illustrates that public enforcement of the antitrust rules is still an important precondition for effective private enforcement in the European Union.

B. THE UNITED STATES

1. *Federal Enforcement*

The most peculiar feature of the U.S. antitrust system, which distinguishes it from the EU model as well as from many other models around the world, is the existence of two federal antitrust agencies. While it is not uncommon for agencies to have overlapping responsibilities, what makes the U.S. situation unique is that Congress provided the DOJ's Antitrust Division and the FTC with the same mission and for the same purpose of protecting competition.[41] For example, the DOJ and the FTC share jurisdiction in the area of merger review, where Section 7 of the Clayton Act prohibits mergers and acquisitions

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[36] Eur. Comm'n, *Commission Staff Working Document on the Implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union*, at 3–4, SWD (2020) 338 final (Dec. 14, 2020).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 7 n.28 (citing Jean-François Laborde, *Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges (2019 Ed.)*, 4-2019 CONCURRENCES 1, 4 (2019)).

[40] According to Articles 9(1) and (2) of Directive 2014/104, a decision by an NCA or a review court is irrebuttable evidence of an infringement before national courts in the same Member State. And a decision adopted in one Member State constitutes at least prima facie evidence of an antitrust law infringement before national courts in other Member States. Directive 2014/104, *supra* note 35, arts. 9(1)–(2).

[41] *See* CRANE, *supra* note 3, at 27–48.

that would "substantially lessen competition."[42] The Scott-Hart-Rodino Act requires merging parties to report large transactions to both agencies.[43] The agencies divide review of reported transactions between them on a case-by-case basis depending on which of the two has more expertise with the industry at stake.[44]

The antitrust responsibilities of the DOJ and FTC do not entirely overlap. The DOJ oversees the criminal enforcement of the Sherman Act, while the FTC cannot apply criminal sanctions. The FTC, in its turn, has the exclusive ability to bring cases under the FTC Act, which was adopted in 1914 by Congress to ban "unfair methods of competition."[45] A ban on "unfair or deceptive acts or practices" was added later to the FTC Act to address concerns of consumer protection.[46] While the FTC Act does not explicitly grant the FTC the authority to enforce the Sherman Act, the Supreme Court made clear that the FTC Act "minimally . . . registers violations of the Clayton and Sherman Acts."[47]

Even though the FTC therefore does not directly enforce the Sherman Act, it can bring cases under the FTC Act involving the same practices as those violating the Sherman Act.[48] At the same time, it has been argued that there is no reason from the perspective of its legislative history to interpret the scope of the FTC Act as being limited to violations already covered by the Sherman Act.[49] As such, the FTC Act may reach conduct that threatens an incipient violation of the Sherman Act or that violates the spirit or objective but not the letter of the Sherman Act.[50] This view has also recently been endorsed by the FTC.[51]

Despite the complementarities between the two agencies, there have also been occasions where the DOJ and the FTC have openly disagreed with each

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[42] 15 U.S.C. § 18.

[43] 15 U.S.C. § 18a.

[44] *See* FED. TRADE COMM'N, *How Mergers Are Reviewed*, www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review.

[45] Federal Trade Commission Act § 5, 38 Stat. 717 (1914).

[46] 15 U.S.C. § 45 (2006).

[47] *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 609 (1953).

[48] For a discussion of the legislative history of the FTC Act and the Supreme Court's interpretation of its scope in this context, see Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 238–40 (1980).

[49] Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 873 (2010).

[50] Averitt, *supra* note 48, at 242–45, 251–59.

[51] *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FED. TRADE COMM'N 3–6 (Nov. 10, 2022), www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

other's positions. An example is the intervention of the DOJ in support of Qualcomm and against the FTC in the context of the 2020 Ninth Circuit Court of Appeals' judgment regarding Qualcomm's alleged anticompetitive licensing of standard essential patents.[52] While it is healthy for the two agencies to keep each other in check, such explicit disagreement can limit the overall impact of both agencies' efforts.[53] For instance, courts may pay less attention to either agency's submission when they contradict each other and may instead rely more on other sources of information.[54]

In a 2007 report, the Antitrust Modernization Commission considered the possibility of abandoning the dual federal agency model.[55] While three commissioners recommended moving responsibility for all antitrust enforcement to the DOJ, the majority concluded that "concentrating enforcement authority in a single agency generally would be a superior institutional structure" but that "the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits."[56] In November 2020, Republican Senator Mike Lee reopened this debate by introducing the One Agency Act, proposing consolidation of antitrust enforcement within the DOJ.[57] In their July 2021 *Agenda for Taking on Big Tech*, House Judiciary Committee Republicans also propose this on the ground that the current dual institutional system has resulted into an "arbitrary division of labor" that is "inefficient and counterproductive."[58] Despite these concerns, the attempts to change the dual agency model have so far not led to any concrete results.

2. *Federal Versus State Enforcement*

Beyond the FTC and the DOJ, state attorneys general in the United States may apply their own state antitrust statutes and are also entitled to enforce federal antitrust law when antitrust violations injure residents of their respective states.[59] State antitrust rules are mostly based on the federal antitrust laws, although some states already had antitrust statutes in place before the Sher-

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[52] *See* Bartholomew, *supra* note 3, at 256–57 (addressing the *Qualcomm* situation) (citing, e.g., Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur at 1, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), ECF No. 86).

[53] *See supra* note 3 and accompanying text.

[54] *See* CRANE, *supra* note 3, at 44–46 (making this argument and giving additional examples of the DOJ and the FTC explicitly taking opposite positions in antitrust cases and policy discussions).

[55] AMC REPORT, *supra* note 4, at iv, 13–14.

[56] *Id.* at 129–30.

[57] One Agency Act, S. 4918, 116th Cong. (2020). The bill was reintroduced in March 2021 as the One Agency Act, S. 633, 117th Cong. (2021).

[58] Press Release, H. Comm. on the Judiciary, The House Judiciary Republican Agenda for Taking on Big Tech, at 2 (July 6, 2021), judiciary.house.gov/media/press-releases/house-judiciary-republicans-release-agenda-for-taking-on-big-tech.

[59] 15 U.S.C. § 15c.

man Act was adopted.[60] With some notable exceptions, the state antitrust rules are similar in scope to their federal equivalents, and their interpretation usually follows the precedent set at the federal level.[61] State attorneys general often coordinate their activities through the National Association of Attorneys General Multistate Task Force (NAAG Multistate Task Force).[62] The U.S. federal antitrust agencies have no formal involvement in the NAAG Multistate Task Force.

To understand the relationship between federal and state antitrust law in the United States, the issue of preemption is relevant as well. Although the Supremacy Clause of the U.S. Constitution provides precedence to federal laws over conflicting state laws,[63] the Supreme Court created a form of antitrust immunity for state regulations in *Parker v. Brown* by exempting a state agricultural proration program from the application of the Sherman Act.[64] Under the state action doctrine from *Parker v. Brown*, U.S. states can override the federal antitrust rules for state or private anticompetitive action when there is a "clearly articulated" policy to displace competition and this policy is "actively supervised by the [s]tate."[65]

3. *Private Enforcement*

Nevertheless, private enforcement is a cornerstone of the U.S. antitrust system. Private enforcement was intended as "an integral part of the congressional plan for protecting competition" in the United States from the very start.[66] The U.S. Congress provided private parties with the ability to seek injunctive relief, three times the amount of their damages (so-called treble damages), and "the cost of suit, including a reasonable attorney's fee."[67] Such remedies are not available to private parties in the European Union. By taking these measures, the U.S. Congress encouraged consumers to act as "private

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[60] *See* Daniel E. Rauch, *Sherman's Missing "Supplement": Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism*, 68 CLEV. ST. L. REV. 172 (2020).

[61] An example of such a notable exception is the California Cartwright Act. For a discussion in this symposium, see George Hay & Thomas Turgeon, *Genius or Chaos: The "Big Tech" Antitrust Cases as a Window into the Complex Procedural Aspects of U.S. Antitrust Law*, *infra* this issue, 85 ANTITRUST L.J. 375, 388 (2023).

[62] For an earlier evaluation of the functioning of the NAAG Multistate Task Force, see generally Michael F. Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST L.J. 215 (1989).

[63] U.S. CONST. art. VI, cl. 2.

[64] 317 U.S. 341, 368 (1943).

[65] Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (cleaned up).

[66] California v. Am. Stores Co., 495 U.S. 271, 284 (1990).

[67] 15 U.S.C. §§ 15(a), 26.

attorneys general"[68] to complement public enforcement by the antitrust agencies.

Over time, private actions have not merely complemented but in fact overtaken government actions and have largely dominated antitrust litigation in the United States.[69] Private enforcement can be said to have attempted to fill gaps and to limit the extent of underenforcement caused by a decline of public enforcement efforts.[70] For instance, private actions can expand the reach of earlier investigations by public enforcers or focus on different issues not taken up under public enforcement.[71]

Due to the importance of private enforcement in the United States, the public enforcers have had less control over antitrust doctrine, which to a large extent has been shaped by private actions. Landmark cases such as *Trinko*,[72] *Leegin*,[73] and *Brooke Group*,[74] decided by the U.S. Supreme Court, stem from private actions, and their outcomes in turn impact the boundaries of public enforcement as well. This also means that a lot of experimentation in U.S. antitrust law has taken place beyond the control and initiative of the public antitrust enforcers. The federal agencies, however, frequently intervene in private litigation, although some argue that these interventions have not always had positive effects on the overall effectiveness of antitrust enforcement.[75]

Even though private enforcement in the United States often concerns follow-on actions as well, standalone private actions occur more frequently in the United States than in the European Union. This difference has consequences for how to safeguard the effectiveness of the EU and U.S. enforcement models as a whole. Standalone actions provide more room for experimentation and thereby also carry a higher risk of divergence. On the one hand, the primacy of public enforcement in the European Union implies that diverging interpretations or experimentation by courts in private actions are less of a concern than in the United States. On the other hand, more active private enforcement (including standalone actions), as occurs in the U.S. system, helps to ensure diversity of enforcement activities and can relieve pressure on antitrust enforcers to take up cases.

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[68] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (cleaned up).

[69] Žygimantas Juška, *The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement*, 62 ANTITRUST BULL. 603, 605 (2017).

[70] Bartholomew, *supra* note 3, at 252–53.

[71] *See id.* at 242.

[72] Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[73] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[74] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[75] For a critical stance towards the DOJ's involvement in private litigation, see Bartholomew, *supra* note 3, at 254.

The balance between public and private enforcement can shift over time. This also means that private actions may get more influence over the development of antitrust law in the European Union as well. This will depend on how prominent private actions will become in the coming years, whether standalone actions will start to occur more often, and the extent to which the European Commission or NCAs will get involved as a third party or amicus curiae to try to control experimentation happening through private litigation. More frequent involvement of the CJEU in private litigation, by way of questions on the interpretation of EU antitrust law raised by national courts, may also steer and impact the room for experimentation.

II. FEDERALISM IN ACTION: INSTITUTIONAL CONVERGENCE?

This Part provides a selective overview of recent developments that offer insights into the relationships between the antitrust enforcers in both systems. The purpose of this Part is not to give a full reflection on how the two antitrust enforcement models fare, but to focus instead on a few recent instances that allow for a comparison of the United States with the European Union.

Recent developments seem to suggest that, despite the different starting points, the two enforcement systems are converging in their balancing of federalism or decentralization. The European Union recently seems to lean more toward federalism or decentralization, with NCAs increasingly experimenting on their own in relation to interests that go beyond their respective jurisdiction. At the same time, there are examples of U.S. federal and state enforcers joining forces to reign in big tech despite the (also-still-present) federalist characteristics of the U.S. system. As a result, one may argue that the levels of federalism or decentralization in current practice in the European Union and the United States seem to be coming closer to each other.

Despite these trends, however, there are differences between the two jurisdictions. A closer comparison of the two systems demonstrates that coordination mechanisms in the EU system are more institutionalized, while the U.S. system is more based on antitrust agencies' informally reaching consensus. This makes convergence in the U.S. system more fragile.

A. THE EUROPEAN UNION

1. *Experimentation in the German Facebook Case Under the Ultimate Control of the Court of Justice*

The idea behind Regulation 1/2003 was for the European Commission to keep its leading role in the ECN. The NCAs, however, have been increasingly active in taking up novel issues under the decentralized system and developing antitrust doctrine without the lead of the European Commission.

Probably the clearest illustration of an NCA addressing new challenges is the 2019 decision of the Bundeskartellamt to hold Facebook liable for infringing the German antitrust rules by imposing unfair terms on users.[76] The novelty of the Bundeskartellamt's reasoning concerned its use of the EU data-protection rules contained in the General Data Protection Regulation (GDPR) as a standard to determine the existence of an abuse of dominance under antitrust law. After German courts reached different outcomes on the legality of the Bundeskartellamt's decision in interim proceedings,[77] the Düsseldorf Higher Regional Court referred the case to the CJEU for a preliminary ruling in April 2021.[78]

While the questions the Düsseldorf Higher Regional Court posed to the CJEU mostly focused on the Bundeskartellamt's interpretation of the GDPR, some of them also sought to clarify the relationship between antitrust and data-protection enforcement. Among other questions, the CJEU was asked whether end-user consent can be considered freely given as required by the GDPR when the data controller holds a dominant position in the sense of domestic antitrust law. Another question was whether the Bundeskartellamt had authority to assess Facebook's compliance with the GDPR for the purposes of examining a possible breach of the prohibition on abuse of dominance in competition law.[79]

Finally, on July 4, 2023, the CJEU held, among other things, that "the Bundeskartellamt may take data protection rules into consideration when weighing interests in decisions under competition law."[80] The CJEU also ruled on the consent issue, holding:

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[76] Bundeskartellamt [BKartA] [Federal Cartel Office] Feb. 6, 2019, B6-22/16 (Ger.), www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 (deciding Facebook's exploitative business terms).

[77] *Compare* Oberlandesgericht Düsseldorf [OLGD] [Higher Regional Court Düsseldorf] Apr. 26, 2019, VI-Kart 1/19 (Ger.), www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2019/Kart_1_19_V_Beschluss_20190826.html (annulling the Bundeskartellamt's decision), *with* Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, Entscheidungen des Bundesgerichtshofes in Karlsruhe [BGHK] KVR 69/19 (Ger.), juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=Bgh&Art=EN&nr=109506&pos=0&anz=1 (confirming the Bundeskartellamt's decision); *see also* Press Release, Bundesgerichtshof, Federal Court of Justice Provisionally Confirms Allegation of Facebook Abusing Dominant Position (June 23, 2020), www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2.

[78] Request for a Preliminary Ruling, Facebook Inc. v. Bundeskartellamt, 2021 O.J. (C 320) 20.

[79] *Id.* Advocate General Rantos' September 2022 opinion in the case broadly supported the approach of the Bundeskartellamt. *See* Opinion of Advocate General Rantos, Case C-252/21, Meta Platforms Inc. v Bundeskartellamt, ECLI:EU:C:2022:704 (Sept. 20, 2022).

[80] *See* Press Release, Bundeskartellamt, CJEU Decision in Facebook Proceeding: Bundeskartellamt May Take Data Protection Rules into Consideration (July 4, 2023), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/04_07_2023_

> [U]sers must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations . . . , which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations.
>
> Moreover, given the scale of the processing of the data in question and the significant impact of that processing on the users of that network as well as the fact that those users cannot reasonably expect data other than those relating to their conduct within the social network to be processed by the operator of that network, . . . [i]t is for the referring court to ascertain whether such a possibility [of consent] exists, in the absence of which the consent of those users to the processing of the off-Facebook data must be presumed not to be freely given.
>
> . . . [I]t is the controller [Meta] who bears the burden of demonstrating that the data subject has consented to the processing of his or her personal data.
>
> . . .
>
> [That Meta] holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent . . . to the processing of their personal data by that operator. This is nevertheless an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove.[81]

The CJEU then remanded to the Düsseldorf Higher Regional Court for further proceedings.[82]

Even though one may disagree on the merits of the assessment of the Bundeskartellamt and the desirability of integrating data-protection aspects into the antitrust analysis, the German *Facebook* case is an example of welcome experimentation. The adoption of the decision by the Bundeskartellamt triggered the opportunity for the CJEU to provide clarity on the relationship between antitrust and data-protection law. This illustrates that not only the European Commission but also the CJEU can play a role in ensuring a uniform interpretation of the EU antitrust rules when NCAs take enforcement actions at the national level.

EuGH.html; Case C-252/21, Meta Platforms Inc. v. Bundeskartellamt, ECLI:EU:C:2023:537, ¶¶ 48–63 (July 4, 2023).

[81] *Meta Platforms*, ¶¶ 150–54.

[82] *Id.* ¶ 155.

2. *Enforcement and National Legislation Against MFN Clauses Across the European Union*

Another relevant example is the assessment of narrow "most favored nation" (MFN) clauses (which typically require a supplier to treat a particular customer no worse than all other customers, and sometimes even better) or wider MFNs requiring price parity on booking platforms. MFNs have attracted considerable attention by enforcers, courts, and legislators in the European Union. After several years of enforcement and policy debate, however, MFNs remain an area without a uniform approach across the European Union. The CJEU could arguably also have played a role in creating consistency in the treatment of MFN clauses under EU antitrust law, but unlike in the German *Facebook* case, it had no opportunity to rule on the matter.

There has been rough consensus that the use of so-called wide MFNs—i.e., those that prohibit suppliers from offering more favorable prices and conditions on any other sales channel, including their own website, other booking platforms and offline sales channels—especially on large hotel booking platforms, can raise competition concerns. This is so because wide MFNs can restrict competition both between existing hotel booking platforms and from new entrants who would then find it difficult to offer hotel rooms at better prices or more favorable conditions.[83]

Outcomes have diverged, however, in relation to MFNs that only prohibit suppliers from offering more favorable prices and conditions on their own websites—so-called narrow MFNs.[84] In April 2015, the French, Italian, and Swedish competition authorities accepted commitments from Booking.com to discontinue its use of wide MFN clauses but agreed that Booking.com could largely keep its narrow MFN clauses in place.[85] The NCAs did not issue fully reasoned decisions, but it appears that they were persuaded that narrow MFNs legitimately addressed concerns about hotels free riding on the services offered by Booking.com.[86] The Swedish Patent and Market Court of Appeals similarly concluded that narrow MFNs can comply with EU competition law; in an action brought by a Swedish hotel association against Booking.com, the

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[83] *See* Amelia Fletcher & Morten Hviid, *Broad Retail Price MFN Clauses: Are They RPM "at Its Worst"?*, 81 ANTITRUST L.J. 65, 68–71 (2016) (reviewing economic literature on the anticompetitive effects of MFN clauses).

[84] The UK Competition & Markets Authority (CMA) concluded in its 2014 final report of its private motor insurance market investigation that any anticompetitive effects of narrow MFN clauses were "unlikely to be significant." COMPETITION & MKTS. AUTH., PRIVATE MOTOR INSURANCE MARKET INVESTIGATION: FINAL REPORT 14 (2014), assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf.

[85] Press Release, Eur. Competition Network, The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com (April 21, 2015).

[86] Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11 EUR. COMPETITION J. 488, 510–15 (2015).

court found that the plaintiffs failed to sufficiently establish the anticompetitive effects of the narrow MFN clauses.[87]

Germany, however, followed a different path. The German competition authority (Bundeskartellamt) already took action against MFNs in its 2013 *HRS* decision, which prohibited the German hotel portal HRS (by then Germany's largest booking platform) from using both wide and narrow MFNs in its agreements with hotels.[88] The Bundeskartellamt reached the same conclusion in its December 2015 *Booking.com* decision.[89] The Düsseldorf Higher Regional Court, however, annulled the Bundeskartellamt's decision in June 2019 and held that Booking.com's narrow MFN clauses did not restrict competition.[90] This brought the German situation temporarily in line again with the outcome reached by the French, Italian, and Swedish competition authorities.

The German Federal Supreme Court, however, overturned the Düsseldorf Higher Regional Court's judgment in May 2021 and sided with the Bundeskartellamt, finding that narrow MFN clauses infringed Article 101.[91] Considering the doubts about how to assess MFNs under the EU antitrust rules and the clear differences between Member States, the German Federal Supreme Court could—and, as a matter of EU law, maybe even should—have asked the CJEU for a preliminary ruling.[92] This would have formed a way to create consistency as to the interpretation under EU antitrust law. The domes-

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[87] Hovrätt Patent- och Marknadsöverdomstolen [HovR] [Court of Patent Appeals] 2019 PMT 7779-18 (Swed.); *see also* Mark-Olivier Mackenrodt, *Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 1131, 1135–41 (2019).

[88] Press Release, Bundeskartellamt, Online Hotel Portal HRS's 'Best Price' Clause Violates Competition Law –Proceedings Also Initiated Against Other Hotel Portals (Dec. 20, 2013), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html. The Bundeskartellamt's decision was upheld by the Düsseldorf Higher Regional Court in January 2015. Press Release, Bundeskartellamt, HRS's 'Best Price' Clauses Violate German and European Competition Law – Düsseldorf Higher Regional Court Confirms Bundeskartellamt's Prohibition Decision (Jan. 9, 2015), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html.

[89] Press Release, Bundeskartellamt, Narrow 'Best Price' Clauses of Booking Also Anticompetitive (Dec. 23, 2015), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568.

[90] OLG Düsseldorf [Higher Regional Court Düsseldorf], June 4, 2019, VI-Kart 2/16 (V), WuW 2019, 386 (Ger.).

[91] Bundesgerichtshof [BGH] [Federal Court of Justice] May 18, 2021, Case KVR 54/20. Press Release, Bundesgerichtshof, Bundesgerichtshof Bestätigt Unzulässigkeit der "Engen Bestpreisklauseln" von Booking.com (May 18, 2021), www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html.

[92] Article 267 TFEU requires Member States courts against whose decisions there is no judicial remedy under national law to bring matters on the interpretation of the EU treaties before the Court of Justice.

tic court, however, refused to do so, thus in a way protecting the German approach against EU interference.[93]

Following the Supreme Court's affirmance of the decisions of the Bundeskartellamt, Germany is today the only Member State in which narrow MFN clauses are prohibited on antitrust law grounds. In addition, from 2015 to 2018, France, Austria, Italy, and Belgium adopted legislation prohibiting wide and narrow MFN clauses in the online hotel booking sector altogether, thereby bypassing an assessment under antitrust law.[94]

It is not clear why the European Commission has not intervened more proactively. One possible explanation is that the Commission welcomed the experimentation by the NCAs and took the conscious choice to let them go ahead in the absence of expert consensus on what the best approach toward this issue was. The Commission participated in a monitoring exercise of the online hotel booking sector together with ten other EU antitrust authorities in 2016,[95] but the only conclusion of this exercise was to keep reviewing the online hotel booking sector without any attempt to converge toward one common position.[96]

In the 2022 Vertical Block Exemption Regulation (VBER), the Commission excludes only wide MFN clauses from the scope of the block exemption.[97] In contrast, narrow MFNs benefit from the VBER, although the benefit of the block exemption for narrow MFN clauses may be withdrawn where the relevant market is highly concentrated and competition is restricted by the cumulative effect of parallel networks of similar agreements containing narrow MFN clauses.[98]

So far, however, the Commission has failed to prevent divergence among Member States, with the route to the CJEU in future cases left as a final

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[93] *See* KVR 54/20, at 36–37.

[94] France adopted the *Loi Macron* in August 2015; Austria and Italy amended their national antitrust rules in November 2016 and August 2017, respectively; Belgium adopted a law in July 2018 restricting the pricing freedom in the online hotel booking sector. *See* Ingrid Vandenborre & Caroline Janssens, *MFN Clauses and Antitrust Enforcement: On a Slow Path to Convergence?*, CPI ANTITRUST CHRON., Sept. 9, 2019, at 8, 10.

[95] *See generally* Eur. Comm'n, *Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016* (2017), ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

[96] *See also* Giorgio Monti & Bernardo Rangoni, *Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism*, 60 J. COMMON MKT. STUD. 1106, 1114–15 (2022) (arguing that the NCAs were "stumbling into experimentalism and then back into hierarchy" by asking guidance from the Commission after having run their own cases and having diverged in their approaches) (sentence capitalization added).

[97] Commission Regulation 2022/720, 2022 O.J. (L 134/4), art. 5(1)(d).

[98] *Id.* art. 6(1); *see also Communication from the Commission: Guidelines on Vertical Restraints*, 2022 O.J. (C 248) 1, ¶¶ 356–75 (June 30, 2022).

option to eventually create consistency. The MFN saga illustrates how the decentralized EU antitrust system introduced by Regulation 1/2003 can lead to divergences across the European Union when NCAs, national courts, and even national legislators become involved in antitrust matters.

3. *Sustainability and EU Competition Policy*

As compared to the MFN saga, the European Commission intervened more proactively in the discussion about how to assess sustainability agreements under EU antitrust law.[99] This, however, has not yet led to a consistent approach across the European Union and its Member States.

The Netherlands Authority for Consumers and Markets (ACM) was the first authority to publish relatively permissive guidelines for the evaluation of sustainability agreements, pushing for a more lenient assessment of certain sustainability agreements under EU antitrust law.[100] In particular, the ACM proposes to consider in the antitrust assessment not only benefits for the affected consumers in the relevant market (for instance, lower energy costs), but also collective benefits for existing and future generations (so-called out-of-market efficiencies; for instance, in the form of less pollution due to the lower energy consumption).[101] This is a controversial position because it has been questioned from an economic perspective whether collaboration indeed trumps competition for achieving sustainability goals.[102]

Soon thereafter, the European Commission released a May 2021 working document pointing out the need for clearer guidance regarding the assessment of sustainability agreements under EU antitrust law.[103] Subsequently, the Austrian Cartel Act was amended in September 2021 to acknowledge that consumers are "deemed to enjoy a fair share of the benefits . . . if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy."[104] In October 2022, the Hellenic Competition Commission in turn

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[99] From a U.S. perspective, the European Union's sustainability debate can be seen as largely equivalent to the ESG (environmental, social, and governance) debate in the United States.

[100] *See generally* AUTORITEIT CONSUMENT & MARKT, DRAFT GUIDELINES ON SUSTAINABILITY AGREEMENTS: OPPORTUNITIES WITHIN COMPETITION LAW (2020), www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf; AUTORITEIT CONSUMENT & MARKT, SECOND DRAFT GUIDELINES ON SUSTAINABILITY AGREEMENTS: OPPORTUNITIES WITHIN COMPETITION LAW (2021), www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

[101] *See* Giorgio Monti, *Four Options for a Greener Competition Law*, 11 J. EUR. COMPETITION L. & PRAC. 124, 125–26, 128–29 (2020).

[102] *See generally* Maarten Pieter Schinkel & Yossi Spiegel, *Can Collusion Promote Sustainable Consumption and Production?*, 53 INT'L J. INDUS. ORG. 371 (2017).

[103] *Commission Staff Working Document: Evaluation of the Horizontal Block Exemption Regulations*, at 19, 26, SWD (2021) 104 final (May 6, 2021).

[104] Bundesgesetz Gegen Kartelle und Andere Wettbewerbsbeschränkungen [Kartellgesetz 2005 – KartG 2005] [Federal Act Against Cartels and Other Restrictions of Competition]

launched a sustainability sandbox to let the Greek industry experiment with new ways to cooperate to realize sustainability goals.[105] While acknowledging the work at the national level, the Commission has not been willing to go as far in its own attitude toward sustainability; at least as of its 2023 horizontal guidelines, the Commission remains more cautious and largely sticks to the principle that sustainability benefits must primarily benefit consumers of the products covered by the agreements.[106]

Due to the differences in the proposed assessments of sustainability agreements, it remains to be seen whether divergences in actual cases will eventually occur or whether the Commission will intervene to prevent NCAs from implementing more far-reaching approaches.

B. THE UNITED STATES

1. *How States Can Complement Federal Antitrust Enforcement*

While the involvement of NCAs in EU antitrust enforcement is well-accepted and inherent in the decentralization introduced by Regulation 1/2003, there is little consensus on the other side of the Atlantic on the desirability of state involvement in the enforcement of federal antitrust rules. Some argue that the involvement of states in federal antitrust litigation is of little use and results in nothing more than states free riding on the efforts of the federal agencies.[107] Others, however, urge that states can fill gaps left by the federal agencies by representing local interests and offering additional expertise.[108]

BUNDESGESETZBLATT [BGBL] I No. 61/2005, as amended Sept. 10, 2021, § 2 ¶ 1, www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf (Austria). On June 1, 2022, the Austrian Federal Competition Authority published draft sustainability guidelines to provide guidance on how it interprets and intends to apply the provision. Press Release, Fed. Competition Auth., AFCA Publishes Draft Guidelines on the Application Sustainability-Agreements, Asking for Comments (June 1, 2022), www.bwb.gv.at/en/news/news-2022/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments.

[105] *The Official Launch of the HCC's Sustainability Sandbox*, HELLENIC COMPETITION COMM'N (Oct. 2022), www.epant.gr/en/enimerosi/publications/media/item/2381-the-official-launch-of-the-hcc-s-sustainability-sandbox.html; *see also* HELLENIC COMPETITION COMM'N, COMPETITION LAW & SUSTAINABILITY: DRAFT STAFF DISCUSSION PAPER ON SUSTAINABILITY ISSUES AND COMPETITION LAW 47 (2020), www.epant.gr/files/2020/Staff_Discussion_paper.pdf.

[106] *Communication from the Commission: Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements*, 2023 O.J. (C 259) 1, ¶¶ 569–91 (July 21, 2023).

[107] See, for instance, the critical views expressed by Judge Richard Posner, as discussed in Hay & Turgeon, *supra* note 61, at 401–02 (citing RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001) and Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001)).

[108] *See, e.g.*, Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 319–22 (2004); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation*, 30 NW. J. INT'L L. & BUS. 285, 336–37 (2010).

A prominent example of states going beyond the actions of federal enforcers is in the context of the remedies sought in the *Microsoft* case. Nine states and the District of Columbia decided to seek their own remedy instead of joining the settlement between Microsoft, the DOJ, and other states in November 2001.[109] On the one hand, such a situation can lead to undesirable divergences in the same antitrust case. On the other hand, all state and federal interests may not necessarily be aligned such that different remedies are appropriate. This is a difference with the European Union, where any outcome achieved by the Commission based on EU antitrust law also applies across all Member States.

An example where state antitrust law has diverged from the federal antitrust rules is the issue of resale price maintenance. In *Leegin*, the Supreme Court ruled that vertical price restraints are not per se illegal under Section 1 of the Sherman Act but need to be assessed under the rule of reason approach.[110] State antitrust statutes in California and Maryland, however, treat resale price maintenance as per se illegal.[111] These state laws complement federal antitrust law, with their parallel existence resulting in market players being bound by different obligations depending on antitrust law choices made at the state level.

2. *How the Federal and State Antitrust Enforcers Are Joining Forces Against Big Tech*

Although there are instances where states have deviated from federal antitrust law both through legislation and enforcement efforts, federal and state antitrust enforcers often do support each other in antitrust cases. The antitrust cases launched against Google and Facebook in 2020 are the most recent examples of this phenomenon.

In October 2020, the DOJ along with eleven state attorneys general filed an antitrust lawsuit against Google.[112] The lawsuit alleges that Google violated

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[109] Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 37 & n.2 (2002) (discussing "[t]he decision by nine States and the District of Columbia to seek their own remedy[,] rather than to accept the proposed settlement reached in November 2001 between Microsoft, the [DOJ], and nine of the other state plaintiffs").

[110] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

[111] MD. CODE ANN., COM. LAW § 11-204(a)(1), (b); CAL. BUS. & PROF. CODE § 16720; Mailand v. Burckle, 20 Cal. 3d 367 (1978) (holding that resale price maintenance is per se illegal under § 16720); Alsheikh v. Superior Ct., No. B249822, 2013 WL 5530508, at *3 (Cal. Ct. App. Oct. 7, 2013) ("[I]f there were vertical price fixing, that would, under *Mailand v. Burckle*, *supra*, 20 Cal.3d 367, be a per se violation under the Cartwright Act, notwithstanding a change of law under the Sherman Antitrust Act.").

[112] Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

Section 2 of the Sherman Act by "unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices."[113] According to the DOJ and the states, Google's conduct impeded innovation, lessened consumer choice in the market, and reduced the quality of general search services, including in terms of privacy and the use of consumer data. By impeding competition, Google is also alleged to have the power to charge advertisers more than it could in a competitive market.[114]

In December 2020, the FTC announced that, alongside 46 states, it filed a lawsuit accusing Facebook of anticompetitive practices aimed at preserving its monopolistic power to suppress, neutralize, and deter serious competitive threats.[115] According to the FTC and the states, Facebook has been illegally maintaining a monopoly in personal social networking through a course of anticompetitive conduct, including the 2012 acquisition of Instagram and the 2014 acquisition of WhatsApp.[116] This course of conduct is alleged to harm competition, reduce consumer choice in personal social networks, and deprive advertisers of the benefits of competition. To restore competition, the FTC is seeking a permanent injunction that could include divesture of assets, divesture or reconstruction of businesses (including Instagram and WhatsApp), and an order restraining Facebook from making further acquisitions valued at or in excess of $10 million without advance notification to the agency.[117]

A third antitrust case in the tech sector was filed in December 2020. The state of Texas together with other states launched a lawsuit accusing Google of illegally acquiring and maintaining monopolies in online advertising markets, taking advantage of its control at each step of the advertising chain.[118] The complaint claims that Google adopted a strategy to foreclose competition since its acquisition of DoubleClick in 2008 in violation of Section 2 of the Sherman Act.[119] The complaint also alleged that Google breached Section 1 of

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[113] Complaint at 2, United States v. Google LLC, No. 20-cv-03010 (D.D.C. Oct. 20, 2020), ECF No. 1.

[114] *Id.* at 52–54.

[115] Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[116] Complaint for Injunctive and Other Equitable Relief at 2, FTC v. Facebook, Inc., No. 20-cv-03590 (Jan. 13, 2021), ECF No. 51 [hereinafter FTC Facebook Complaint]; Complaint at 6–9, New York v. Facebook, Inc., No. 20-cv-3589 (D.D.C. Dec. 9, 2020), ECF No. 4.

[117] FTC Facebook Complaint, *supra* note 116, at 51–52.

[118] Press Release, Tex. Att'y Gen., AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations (Dec. 16, 2020), www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive.

[119] Complaint at 38–39, Texas v. Google LLC, No. 20-cv-00957 (E.D. Tex. Dec. 16, 2020), ECF No. 1.

the Sherman Act by entering into an agreement with Facebook giving the company priority in ad auctions in exchange for promising not to support a competing ad system, but this claim was dismissed by a federal court in September 2022.[120]

These cases show how federal and state enforcers have recently supported each other in a joint effort to tackle antitrust concerns in relation to the big tech. It remains to be seen whether the respective federal and state enforcers will agree on the outcome of the cases in which they are involved or whether there will be divergences, as was the case in the remedies phase of the 2001 *Microsoft* case.

Beyond this, coordination among the different cases is desirable to spread enforcement resources in the most efficient way. It is not clear whether such alignment took place between the DOJ, the FTC, and the state of Texas. One wonders if the teams collaborated and decided to divide their efforts in the way they did, or if there was no such conscious diversification resulting in the launch of these three antitrust cases. Having a formal or informal procedure in place to agree on a division of labor in parallel cases targeting the same industry or similar practices would help make joint efforts among federal and state antitrust enforcers more effective.

III. EVALUATING FEDERALISM IN ANTITRUST ENFORCEMENT

The previous Part has demonstrated that federalism or decentralization is a feature of both the U.S. and EU antitrust systems. While the U.S. antitrust system is federalist by design, enforcement of EU antitrust law has arguably started to become more federalist or decentralized due to the proactive attitude of NCAs. Because the European Commission is unlikely to be able to handle all the current complexities of markets and the extent of competition concerns on its own, some degree of federalism or decentralization will continue to characterize future EU antitrust law in practice. The extent of federalism or decentralization will mainly depend on the attitude of the Commission and the NCAs within the parameters of Regulation 1/2003. The same can be said about the U.S. antitrust system, where federal and state enforcers sometimes complement and support each other's efforts, but where divergence can also happen depending on whether the actors agree on their approach in a particular case or for a particular issue.

For the evaluation of the two systems, our starting point is that some extent of federalism or decentralization is to be welcomed in antitrust systems, as it allows for learning-by-doing when antitrust enforcers reach different out-

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[120] *In re* Google Digit. Advert. Antitrust Litig., 627 F.Supp.3d 346, 370–78 (S.D.N.Y. 2022).

comes, and the impacts can be compared.[121] The enforcement of antitrust law inherently carries an element of experimentation because one can never predict what exactly the competitive effects of an intervention or the lack thereof will be on the market.[122] Experimentation is needed so that antitrust enforcers can achieve a policy equilibrium over time "by periodically expanding and contracting the zone of enforcement."[123] The need for some degree of experimentation in antitrust stems not only from the uncertainty about the future competitive impact of a decision to intervene or not, but also from the evolutionary character of relevant economic insights and the progressive understanding of how complex markets function.[124]

To reap the benefits of experimentation by different actors without disproportionately harming the overall consistency of outcomes and legal certainty, coordination is needed to let the learning happen on a structural instead of a merely ad hoc basis. This Part discusses such coordination, which can be either ex ante or ex post in nature depending on whether it takes place before or after a particular antitrust decision is taken.

In the EU context, scholars refer to the concept of experimentalist governance to characterize the multi-level enforcement of different areas of law, including competition policy.[125] They describe experimentalist governance as having four elements that are repeated in an iterative cycle: (1) joint formulation by EU institutions and Member State authorities of broad goals and performance indicators (for instance, as laid down in legislation); (2) provision of discretion and freedom to lower-level actors (national ministries and regulatory authorities) to pursue these goals; (3) reporting by lower-level actors on their performance using the agreed indicators and participating in peer review in which their results are compared with those of others using different approaches to achieve the same broad goals; and (4) periodic revision of the broad goals and performance indicators to incorporate findings from the review process.[126] The concept of experimentalist governance recognizes the autonomy of lower-level enforcers to act within the broader parameters set by a

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[121] *See* Himes, *supra* note 109, at 63.

[122] Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* ARC America Corp., 68 ANTITRUST L.J. 29, 44 (2000).

[123] William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 472 (2003).

[124] William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 845 (2001).

[125] *See* Monti & Rangoni, *supra* note 96, at 1108–09 (discussing the extent to which the decentralization of EU antitrust enforcement in Regulation 1/2003 has led to stronger experimentalist governance in competition policy).

[126] Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 273–74 (2008).

jointly designed regulatory framework. For this reason, experimentalist governance can be a helpful tool to balance experimentation and coordination in plural antitrust systems.[127]

A. EX ANTE COORDINATION OF ENFORCEMENT ACTIONS BY ANTITRUST ENFORCERS

The ex ante coordination that this article wishes to promote focuses on the alignment of antitrust enforcers' strategies. Following the four elements of experimentalist governance mentioned above, the objectives laid down in legislation are the starting point to ensure coordination. However, the objectives of antitrust law are quite broad, and antitrust rules are framed in open terms so that further specification is needed to create a minimum level of consistency of interpretations across the antitrust system.

While this is an iterative process between the various actors, the federal/central antitrust enforcers seem best placed to coordinate the enforcement activity within their systems. Such coordination by federal/central antitrust enforcers could entail both providing guidance to state/national enforcers on how to interpret the antitrust rules in a particular area as well as ensuring a proper spread of enforcement priorities based on the type of behavior or industry involved. This would help to share resources and cover a wider variety of concerns to the benefit of the overall effectiveness of the antitrust system.

The FTC and DOJ have tried unsuccessfully to agree on how they divide their attention.[128] Such coordination of enforcement efforts also does not yet really exist between the federal/central and state/national enforcers in the United States and the European Union. Stronger coordination with the enforcement efforts of the federal/central enforcers would not require state/national enforcers to give up all their control over enforcement. Such coordination could in fact form a recognition of the value of independent actions by state/national enforcers for the purposes of experimentation and learning, even though the outcomes of their enforcement actions formally only apply in their respective territories—either the state they represent in the United States or the Member State at issue in the European Union.

In the United States, the DOJ or the FTC are sometimes also joined by states in antitrust lawsuits, as seen in the recent litigation referenced above against Facebook and Google. Such joint action in which enforcers collabo-

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[127] For a detailed discussion, see YANE SVETIEV, EXPERIMENTALIST COMPETITION LAW AND THE REGULATION OF MARKETS 113–23 (2020).

[128] *See* AMC REPORT, *supra* note 4, at 133 (addressing the agencies' 2002 "Clearance Agreement" and their withdrawal from that agreement two months after its announcement); *see generally* Lauren K. Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307 (2007).

rate can be seen as a prime example of ex ante coordination. In the European Union, the *Commission Notice on Cooperation Within the Network of Competition Authorities* expressly provides that parallel action by two or three NCAs is appropriate where the effects of an anticompetitive practice are felt in their territories and action of one NCA alone would not be sufficient to stop it.[129] Where parallel action is undertaken, one NCA can be designated as lead authority while each other NCA remains responsible for conducting its own proceedings.[130] An example of parallel action is the MFN saga, discussed in Part III.A, where the French, Italian, and Swedish competition authorities jointly investigated Booking.com's practices and obtained joint commitments to address their concerns.[131]

The U.S. approach of letting federal and state antitrust enforcers join forces and share resources in one and the same case seems effective—especially in large and complex cases. Nevertheless, one may wonder to what extent it is necessary for states to be involved in a lawsuit when the DOJ or the FTC is already involved as federal antitrust enforcer. The question could be asked whether it would be more effective if state attorneys general focus their resources on other cases that are not yet picked up at the federal level or on local cases for which they have a stronger expertise.

The cases against big tech may turn out to be an exception in this regard. In the first decades of U.S. antitrust enforcement, joint cases by federal and state actors were in fact rare. Instead, the enforcement approach at the time resembled the EU decentralized model. While the U.S. federal agencies focused on practices affecting interstate commerce, states devoted their efforts toward addressing local antitrust issues.[132] This approach prevents duplication of state resources on matters that the federal antitrust agencies can pick up. At the same time, however, that enforcement by state actors can prevent underenforcement of federal antitrust law across the United States during times of less proactive enforcement at the federal level.

Unlike the United States, in the European Union, parallel action is formally only seen in the form of NCAs collaborating among each other at the Member State level. But as soon as the European Commission takes up a case, Article 11(6) of Regulation 1/2003 relieves NCAs of their authority to apply the EU antitrust rules. Examples where this happened include the *e-books* investigation that was closed by the UK Office of Fair Trading in December 2011 and

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[129] *Commission Notice*, *supra* note 20, ¶ 12.

[130] *Id.* ¶ 13.

[131] *See also* Claudio Lombardi, *Antitrust Authorities of Italy, France and Sweden Accept Booking.com's Commitments*, ANTITRUST OBSERVATORY (Apr. 22, 2015), www.osservatorioantitrust.eu/en/antitrust-authorities-of-italy-france-and-sweden-accept-booking-coms-commitments.

[132] Hay & Turgeon, *supra* note 61, at 395.

then taken up by the Commission[133] and the closure of the *Aspen* investigation into excessive pricing by the Spanish National Authority for Markets and Competition in July 2017 after the Commission opened its investigation.[134] However, despite the NCAs' increasing activity, the Commission lately does not seem to be eager to use the mechanism of Article 11(6) of Regulation 1/2003.

This cautious approach is well illustrated by the Commission's decision to exclude Italy from its 2020 investigation into Amazon's e-commerce business practices after "[t]he Italian Competition Authority started to investigate partially similar concerns . . . with a particular focus on the Italian market."[135] When Amazon appealed this carve-out decision, the General Court did not assess the merits of Amazon's claim because in its view the Commission's decision merely constituted a preparatory act that could not be challenged.[136] The General Court also recognized that the parallel application of the EU antitrust rules by an NCA and the Commission "cannot be at the expense of undertakings" and that "[n]ational . . . authorities being relieved of their [authority] makes it possible to protect the undertakings from parallel proceedings brought by those authorities and the Commission."[137] However, the General Court also stated that the protection against parallel proceedings does not imply a right of an undertaking "to have a case dealt with in its entirety by the Commission."[138] In the view of the General Court, the protective effect of Article 11(6) of Regulation 1/2003 "does not imply that the Commission is obliged to initiate proceedings in order to deprive the national competition authorities of their [authority] to apply Articles 101 and 102 TFEU."[139] The CJEU agreed,[140] holding that the Commission has the authority to act on Arti-

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[133] Press Release, UK Off. of Fair Trading, E-Books: Investigation into Anti-Competitive Arrangements Between Some Publishers and Retailers (Dec. 1, 2011), www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers; Press Release. Eur. Comm'n, Antitrust: Commission Opens Formal Proceedings to Investigate Sales of E-Books (Dec. 6, 2011), ec.europa.eu/commission/presscorner/detail/en/IP_11_1509.

[134] Press Release, Eur. Comm'n, Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines (May 15, 2017), ec.europa.eu/commission/presscorner/detail/en/IP_17_1323; Resolution of the Comisión Nacional de los Mercados y la Competencia [National Commission of Markets and Competition], Case S/DC/0601/16, Laboratorios Aspen (July 20, 2017) (Spain), www.cnmc.es/sites/default/files/1791256_7.pdf.

[135] Press Release, Eur. Comm'n, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices (Nov. 10, 2020), ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

[136] Case T-19/21, Amazon, Inc. v. Eur. Comm'n, ECLI:EU:T:2021:730 (Oct. 14, 2021).

[137] Case C-857/19, Slovak Telekom a.s. v. Protimonopolny úrad Slovenskej Republiky, ECLI:EU:C:2021:139, ¶¶ 32, 41 (Feb. 25, 2021).

[138] Case T-19/21, ¶ 45.

[139] *Id.* ¶ 49.

[140] Case C-815/21 P, Amazon Inc. v. Eur. Comm'n, ECLI:EU:C:2023:308, ¶ 34 (Apr. 20, 2023) ("[S]ince the territorial scope of the proceedings initiated in accordance with the decision

cle 11(6) of Regulation 1/2003 at its discretion. To improve ex ante coordination in the European Union, this tool could be applied more proactively to prevent an NCA from investigating behavior that the European Commission is also scrutinizing.

While NCAs are intervening on their own initiative more often, the EU antitrust system remains more centralized than the U.S. system. Compared to the United States, stronger coordination occurs in the European Union at the first and second stage of experimentalist governance. Beyond this, a difference in the European Union is that the European Commission, as the sole EU antitrust authority, does not lose time in having to align its approach with or react to the actions of another central authority—as the DOJ and the FTC inevitably must do. And compared to the United States, private enforcement has thus far been much less prominent in the European Union, so that there is no real need yet for the European Commission to spend time and resources on acting as a third party in private litigation—as the DOJ and the FTC sometimes do. Because this situation may change, the balance between the primacy of the European Commission and NCAs may be calibrated differently in the future. Should private enforcement and, in particular, standalone private actions, become more pronounced in the European Union, experimentation could also occur in private enforcement.

B. Ex Post Coordination Across All Actors in the Antitrust System

Regarding ex post evaluations of antitrust decisions, extensive commentary is available explaining different modalities and methodologies to improve competition policy by drawing insights from past experiences.[141] This article's focus here is more specific, namely, how to ensure coordination within plural antitrust systems where federal/central and state/national enforcers have taken diverging stances toward the legality of certain practices. Such a form of ex post coordination can take different shapes, as illustrated below.

1. *Ex Post Review of Antitrust Enforcement by Courts and Legislators*

The first ex post coordination mechanism is the review by courts of actions by antitrust enforcers or private claimants.[142] The outcome of the judgments

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at issue did not include Italy, the protection against parallel proceedings provided for in Article 11(6) of Regulation No 1/2003 could not apply.").

[141] *See generally* Org. for Econ. Coop. Dev., Reference Guide on Ex-Post Evaluation of Competition Agencies' Enforcement Decisions (2016), www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf; Ex Post Economic Evaluation of Competition Policy: The EU Experience (Fabienne Ilzkovitz & Adriaan Dierx eds., 2020).

[142] Note that there is an important difference between public enforcement of antitrust law in the United States and the European Union. While EU antitrust authorities make decisions in an

and the reasoning of the courts (in public as well as private enforcement of the antitrust laws) direct future actions in both pillars. In the EU antitrust system, the CJEU plays a key role by using appeals from Commission decisions and questions referred to it by national courts to shape the direction of enforcement.

Beyond this, the legislature can intervene to adopt legislation pursuing policy objectives beyond antitrust or overriding existing outcomes of antitrust enforcement. Legislation by its nature leaves room for interpretation by antitrust enforcers and courts, but the legislature can step in again to correct a current interpretation or to pursue other policy objectives beyond those considered up to that point. As such, the presence of proactive legislation in antitrust matters is indeed vital.

One example of legislative intervention is the adoption of national legislation in France, Austria, Italy, and Belgium to ban wide as well as narrow MFN clauses in the online hotel booking sector.[143] The national legislators have halted experimentation by antitrust enforcers in this area, even though the outcomes of their decisions were either not yet final or had not yet been evaluated.

2. *Legislators Complementing Antitrust Enforcement*

Another example entails initiatives to complement antitrust enforcement in digital markets by legislation providing for ex ante obligations. This approach is illustrated by the EU Digital Markets Act,[144] the tenth amendment to the German Competition Act (referred to as the "*GWB-Digitalisierungsgesetz*," with *GWB* standing for "*Gesetz gegen Wettbewerbsbeschränkungen*," i.e., the Act Against Restraints of Competition),[145] several U.S. bills (including the Platform Competition and Opportunity Act,[146] the Ending Platform Monopolies Act,[147] the American Innovation and Choice Online Act,[148] the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act,[149] and the Open App Markets Act[150]), and the 2021 introduc-

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administrative procedure that is subject to appeal before the courts, U.S. antitrust enforcers can only intervene once they have convinced the courts of the existence of an antitrust violation. In this regard, the courts are stronger gatekeepers of the antitrust system in the United States than in the European Union.

[143] *See* Vandenborre & Janssens, *supra* note 94, at 10 (describing the legislation).

[144] Council Regulation 2022/1925, *supra* note 7.

[145] *See supra* note 8.

[146] Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021).

[147] Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

[148] American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2021).

[149] Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H.R. 3849, 117th Cong. (2021).

[150] Open App Markets Act, S. 2710, 117th Cong. (2022).

tion of various bills in New York proposing far-reaching changes to the state's antitrust rules contained in the Donnelly Act.[151]

While it is perfectly justifiable for legislation to impose stricter rules beyond current antitrust enforcement, these legislative initiatives do limit the room for experimentation under antitrust law when it comes to assessing the behavior of market players that is also captured by the legislation. There is no longer as much discretion for antitrust enforcers to assess whether such behavior of market players would otherwise have met the conditions for antitrust liability under existing law or whether it would have generated procompetitive effects outweighing any anticompetitive effects.[152]

3. *Coordination Among Federal/Central and State/National Enforcers*

Plural antitrust models give each entity—be it an antitrust authority, a court, or a legislature—its own role and responsibility.[153] The overall effectiveness of the antitrust system therefore also depends on how well the different actors react to each other and make use of the available checks and balances to control each other's actions. This also implies that an issue of ineffectiveness is typically not caused by one incident alone.[154] There is, however, a collective responsibility to engage in mutual learning. To enhance such mutual learning and extend it beyond the current informal and ad hoc processes, more structural coordination is desirable.

To reap the full benefits of the enforcement actions of state/national enforcers, their learnings would therefore need to be transformed into lessons for the overall antitrust system by way of a proper review of their enforcement outcomes—as foreseen in the third stage of experimentalist governance. This would include a determination not only of what went well, but also of what

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[151] Sections 340 through 347 of New York's General Business Law are known as the Donnelly Act, adopted in 1899. *See* N.Y. GEN. BUS. L. §§ 340–47. The Twenty-First Century Antitrust Act would, among other changes, create an EU-style abuse of dominance offense under the rule-making power of the New York Attorney General. *See* S. 8700, 2019–2020 Leg. Sess. (N.Y. 2020). The other bills, A3399 and A1812A, would complement this by barring mergers in parallel with Section 7 of the Clayton Act and imposing on the merging parties the burden of proving that the procompetitive benefits of the transaction outweigh its anticompetitive effects—going against the standard under U.S. federal law that requires the challenger to prove that the transaction may substantially lessen competition. A3399, 2021–2022 Leg. Sess. (N.Y. 2021); A1812A, 2021–2022 Leg. Sess. (N.Y. 2021).

[152] For a discussion of the impact of the Digital Markets Act on innovation, see Pierre Larouche & Alexandre de Streel, *Will the Digital Markets Act Kill Innovation in Europe?*, COMPETITION POL'Y INT'L (May 19, 2021), www.pymnts.com/cpi_posts/will-the-digital-markets-act-kill-innovation-in-europe.

[153] *See* Bartholomew, *supra* note 3, at 284 ("[T]he judicial, legislative, and executive branches collectively define antitrust policy gradually, over time, with influence from all enforcers.").

[154] *See* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, *infra* this issue, 85 ANTITRUST L.J. 441, 448–49 (2023) (discussing the downward trend in enforcement).

went wrong. This also requires a common understanding of policy goals to conduct these evaluations in line with the cycles of experimentation.

Such a form of ex post review does already exist to a certain extent in the European Union, where the NCAs and the European Commission cooperate and exchange insights in the ECN—even though no ex post coordination took place in the case of the MFN saga, where it is fair to conclude that the review cycle was not completed. The European Commission and a selected number of NCAs did conduct a joint monitoring exercise,[155] but they drew no conclusions, as would be envisaged in the fourth stage of experimentalist governance—to revise and align the conditions under which MFN clauses should be considered lawful under EU antitrust law.

In the United States, the NAAG Multistate Task Force brings state attorneys general, but not the federal antitrust agencies, together for coordination. A coordination mechanism among the federal/central and state/national enforcers, similar to the ECN, would also be desirable in the United States to organize enforcement actions and exchange learnings among the federal and state antitrust agencies.[156]

4. *Involvement of Other Stakeholders*

Beyond the enforcers, one could also imagine involvement of other stakeholders in the review process to broaden the perspectives and create more transparency to the outside world. Different mechanisms are conceivable. One could consider establishing thematic expert groups with a mixed composition of academics, practitioners, and industry representatives for continuously monitoring the implementation of key policy concerns, for instance, sustainability or digitization, or cross-cutting issues such as antitrust procedures, investigation methods, or agency design. The European Commission regularly establishes expert groups to provide "high-level input from a wide range of sources and stakeholders that take[ ] the form of opinions, recommendations and reports," which the Commission considers when proposing new policies and measures.[157] One could also envisage such expert groups being set up for the purpose of reviewing the application of particular antitrust rules.

Another possibility is the introduction of regular cycles of public consultation with open calls for responses from stakeholders to certain predefined issues regarding the implementation of competition policy. Both the United States and European Union have experience with such mechanisms, but

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[155] Eur. Comm'n, *supra* note 95.

[156] *See* Bartholomew, *supra* note 70, at 292–93.

[157] *Expert Groups Explained*, EUR. COMM'N, ec.europa.eu/transparency/expert-groups-register/screen/expert-groups-explained?lang=EN (explaining the role of European Commission expert groups).

mostly in the context of legislative or rule-making proposals instead of reviewing past enforcement.[158]

None of these mechanisms is perfect, and there will always be risks of unequal representation or groups of stakeholders dominating the outcomes. However, structural involvement of other stakeholders can help to force enforcers to engage in a more regular review of their enforcement outcomes. The responsibility to translate the output of any ex post review mechanisms into new guidance or enforcement priorities would lie with the federal/central antitrust enforcers, under the ultimate control of the legislature who can step in to change course.

Due to the existence of two federal antitrust enforcers, mutual learning and revision of approaches is more difficult—but still possible—to achieve in the United States than in the European Union, where the European Commission at least formally holds the ultimate and sole responsibility for public enforcement of EU antitrust rules. Proper alignment between the FTC and DOJ therefore remains a key area of attention in the U.S. antitrust system.

CONCLUSION

Despite the different starting points as set out in their respective legal frameworks, this article illustrates how the EU and U.S. antitrust systems seem to be converging in their efforts to balance federalism/decentralization and coordination. Due to the proactive attitude of NCAs, the European Commission is arguably no longer the key or only trendsetter in EU antitrust enforcement, considering that experimentation is now also taking place at the national level. While the U.S. antitrust system is federalist by design, recent enforcement actions against tech companies show how federal and state enforcers can join forces in a common effort toward addressing antitrust concerns. It remains to be seen, though, whether this is an exception or the start of a longer trend.

Beyond enforcement by antitrust enforcers, private litigation and legislation constitute other relevant pillars in the two antitrust systems. While the functioning of these pillars is beyond the control of the antitrust enforcers, private enforcement and legislation also impact how antitrust law evolves. There are clear indications of growing federalism or decentralization in the legislative efforts by states and national governments in the United States and European Union, respectively. State/national deviations from the central antitrust frame-

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[158] For an overview of matters currently open for consultation by the FTC, see *Search Results*, REGULATIONS.GOV, www.regulations.gov/search?agencyIds=FTC&sortBy=CommentEndDate&sortDirection=Desc&withinCommentPeriod. For an overview of matters currently open for consultation by the European Commission, see *Public Consultations*, EUR. COMM'N, ec.europa.eu/competition-policy/public-consultations_en.

work are not necessarily undesirable, provided that they pursue other interests that are not protected by the U.S. or EU antitrust rules and that any learnings—positive or negative—are subsequently incorporated into the antitrust systems.

Private enforcement is also to a large extent beyond the control of public antitrust enforcers, who can nevertheless usually intervene in private cases as third parties. The additional experimentation resulting from private enforcement can benefit the overall antirust system's effectiveness. The U.S. experience can offer lessons for the European Union in this regard, as private enforcement may become a more prominent part of the EU antitrust system in the future as well.

Instead of determining what the optimal antitrust system is, this article aims at comparing the EU and U.S. enforcement models to draw insights for improving their effectiveness based on current practice. This article's premise is that some degree of federalism or decentralization is welcome when it allows for experimentation and learning. To reap the full potential of these benefits, coordination is desirable. Although both jurisdictions already coordinate learnings from past experiences to some extent, this largely seems to happen on a more ad hoc basis. This article suggests making the experimentation and learning more structural through improved ex ante coordination among enforcers and ex post coordination across all actors in antitrust enforcement.

Balancing experimentation and consistency is a constant exercise. While the applicable considerations are largely similar across different plural antitrust enforcement models, including the U.S. and the EU models, each system has its own equilibrium depending on the starting points laid down by law and on current practice. It is likely impossible to find the perfect equilibrium at one moment in time, but it does seem feasible to determine the direction in which a system should move to bring the state of play closer to this equilibrium.

Ultimately, this exercise is a collective responsibility of all actors in antitrust enforcement. Nevertheless, the federal/central enforcers are best placed to take the lead in revising the goals and priorities based on the learnings gained from their own enforcement, state/national enforcement, and private litigation, as well as input from other stakeholders such as academics, practitioners, and industry representatives. Such a revision of goals and priorities will conclude the review cycle and launch a next round of experimentation. It is through these continuous feedback loops that antitrust law can keep developing in line with market realities and the demands of an increasingly complex society.