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Francis G. Jacobs  
*University of London*

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# CIVIL ENFORCEMENT OF EEC ANTITRUST LAW

*Francis G. Jacobs\**

This paper examines whether and to what extent private civil remedies are, as a matter of law, and ought to be, as a matter of policy, available in the courts of the EEC Member States for breach of the antitrust provisions<sup>1</sup> of the Treaty establishing the European Economic Community (the Treaty of Rome). These questions are addressed in Part I. Part II sets the issues in the broader context of the enforcement of the Treaty obligations of Member States. In this way, it is hoped to elucidate the relationship between national law and Community law, and also indirectly to illuminate the similarities and differences between the Community system and a federal system, the exploration of which has been one of Eric Stein's enduring contributions to legal scholarship.

## I. CIVIL REMEDIES IN EEC ANTITRUST LAW

It is now well established that, within certain limits, articles 85 and 86 of the EEC Treaty are directly enforceable in the courts of the Member States.<sup>2</sup> Yet while Member States' courts have frequently applied these provisions during the twenty-odd years since their entry into force, there is not a single case in which a plaintiff has recovered damages. The contrast

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\* Professor of European Law, University of London. — Ed.

1. Following American terminology, this paper refers to the "antitrust provisions" of the EEC Treaty. The expression used in the English text of the Treaty is "rules on competition," and that is the title of pt. 3, tit. 1, ch. 1 of the Treaty (articles 85-94). Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 (1958) [hereinafter cited as EEC Treaty].

2. The text of articles 85 and 86 reads as follows:

### ARTICLE 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:  
— any agreement or category of agreements between undertakings;  
— any decision or category of decisions by associations of undertakings;  
— any concerted practice or category of concerted practices;  
which contributes to improving the production or distribution of goods or to promoting

here between the European Community and the United States is striking, and may be more than puzzling to the external observer, especially to one acquainted with the broad reach of the Treaty provisions.

The Commission of the European Communities has a general duty to ensure the observance of the Community Treaties. In the case of the Treaty obligations of Member States, the Commission has the power to take proceedings for infringement of the Treaty before the Court of Justice of the European Communities. In the field of antitrust law, it also has direct powers of enforcement against individuals and companies within the Member States. It may open investigations, inspect books, make decisions, and impose fines. In the antitrust field, therefore, the Commission is, in effect, a federal agency — even though its decisions are ultimately enforceable only through those means provided by the laws of the Member States.

These powers were conferred upon the Commission, in accordance with article 87 of the EEC Treaty,<sup>3</sup> by regulation 17 of the Council, which entered into force on March 13, 1962.<sup>4</sup> At least since that date, the substantive provisions of articles 85 and 86 have also been directly enforceable in the Member States, so that, for example, national courts may not enforce agreements prohibited by those articles, which thus afford a defense in an action for breach of contract. It is, however, a separate question whether these articles create a cause of action for illegal conduct, and, if so, what remedies are available to a plaintiff who invokes them.

In 1966 the Commission published a study of the topic by experts in the laws of the six original Member States.<sup>5</sup> That study revealed a division within the Six, based on their separate legal traditions, between three countries (France, Belgium, and Luxembourg) where a plaintiff could recover damages for breach of a duty created by statute regardless of whether the

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technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

#### ARTICLE 86

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3. EEC Treaty, *supra* note 1, art. 87.

4. Council Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, [Eng. Special Ed. 1959-62] O.J. EUR. COMM. (No. 62/204) 86 (Feb. 21, 1962).

5. LA COMMISSION DE LA CEE, COLLECTION; ETUDES SERIE CONCURRENCE NO. 1, LA REPARATION DES CONSEQUENCES DOMMAGEABLES D'UNE VIOLATION DES ARTICLES 85 ET 86 DU TRAITE INSTITUANT LA CEE (1966).

duty had been imposed for the benefit of the plaintiff, and two countries (the Federal Republic of Germany and the Netherlands) where the plaintiff could recover damages only if the duty had been imposed for his benefit. (In the sixth country, Italy, views were divided and the position was uncertain.) In 1979 the German Federal Supreme Court held, in an interlocutory judgment in the *BMW* case<sup>6</sup> (where a parallel importer sued the Belgian subsidiary of BMW for refusal to supply), that while article 85 did not itself give rise to a cause of action, it must be regarded as imposing a duty for the benefit of the plaintiff (and so giving rise in principle to a remedy in damages), at least in a case where the restriction on the freedom of competition was aimed directly against the plaintiff. That decision is rightly relied upon by proponents of the private damages claim; but it is to be noted that the existence of a private cause of action is closely linked to the availability of damages under German law. It is, again, a separate question whether any independent claim of this kind exists under Community law.

In 1974 the Court of Justice of the European Communities held in *Belgische Radio en Televisie v. SV SABAM*<sup>7</sup> that, "[a]s the prohibitions of articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard."<sup>8</sup> Encouraged by that proposition, Lord Denning, Master of the Rolls, suggested in a dictum in *Application des Gaz S.A. v. Falks Veritas Ltd.*<sup>9</sup> (which was not a claim for damages) that articles 85 and 86 created new commercial torts. The other members of the court expressed no opinion on the point, however, and in *Valor International Ltd. v. Application des Gaz S.A.*,<sup>10</sup> Lord Justice Roskill cast doubt on Lord Denning's dictum, saying that many questions would have to be argued, in English courts or in Luxembourg, before it could be stated that articles 85 and 86 created new torts.<sup>11</sup> Nevertheless, the availability in principle of a claim for damages in English law seems to be put beyond doubt by the recent case of *Garden Cottage Foods Ltd. v. Milk Marketing Board*.<sup>12</sup> In this case, the House of Lords considered it beyond doubt that if contravention of article 86 gives rise to a cause of action, it must (as a matter of English law) give rise to a remedy in damages.<sup>13</sup>

While some writers have advocated such a remedy,<sup>14</sup> the arguments on whether this development is desirable as a matter of policy have not been

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6. Judgment of Oct. 23, 1979, Bundesgerichtshof, 1980 ECC 213 (W. Ger.).

7. (Case No. 127/73), 1974 E. Comm. Ct. J. Rep. 51.

8. 1974 E. Comm. Ct. J. Rep. at 62.

9. [1974] 1 Ch. 381, 393-94, 14 Common Mkt. L. Repts. 75, 82-83 (C.A.).

10. 1979 R.P.D. & T.M. Cas. 281, 298-99 (1978), 23 Common Mkt. L. Repts. 87, 98-99 (1978).

11. Damages might, however, be recoverable independently of tort. For a full survey of the position under English law, see C. KERSE, *EEC ANTITRUST PROCEDURE 266-77* (1981).

12. 1984 A.C. 130 (1983), 38 Common Mkt. L. Repts. 43 (1983).

13. A.C. at 141. Common Mkt. L. Repts. at 50.

14. See, e.g., Lang, *Community Antitrust Law — Compliance and Enforcement*, COMMON MKT. L. REV. 335 (1981); cf. SYMPOSIUM ON ENTERPRISE LAW OF THE 80'S, LUXEMBOURG, BRUSSELS AND LONDON, 1979, 231-35 (F. Rowe, F. Jacobs & M. Joelson eds. 1980) (comments of J.P. Warner).

much debated, and many unresolved doubts remain. To begin, there are two points of overlap and potential conflict: first, that of overlapping enforcement by national and Community authorities of the Community provisions; and second, that of overlapping enforcement by national courts of two separate systems of antitrust law — the Community system and, where it exists, the national system. Nonetheless, the difficulties of overlap are probably not of decisive importance and, in any event, cannot be adequately dealt with in the limited space available here. They will, however, be referred to from time to time.

The principal argument in support of private damage claims is that they will lead to more effective enforcement of the antitrust provisions. While a powerful deterrent already exists in the heavy fines currently imposed by the Commission, that deterrent is lessened by the selective nature of enforcement by the Commission, whose resources are notoriously overstretched. The prospect of civil claims in the national courts might reinforce the interest in compliance. As long ago as 1973 the Commission went on record as stating, in response to a question in the European Parliament, that claims for damages could provide useful support for enforcement action by the Commission.<sup>15</sup>

One of the considerations, explicit or implicit, underlying this view is that private actions in national courts could ensure the effective enforcement of the antitrust provisions in the same way that private actions in national courts against national authorities have served to secure the respect of the Member States for their Community obligations.<sup>16</sup> Whether or not that analogy is valid — and in the next section of this paper some reasons will be given for suggesting that it is not — it seems doubtful that the lack of resources at the Community level is itself a sufficient, or even a relevant, reason for settling a major issue of principle.

A second reason that might be given for favoring private damage claims is that fairness requires that one who has been unlawfully injured and has suffered loss should have a remedy in damages. At present, such a claim may be brought only in national courts, independent of any proceedings taken by the Commission. While the victim of an infringement of the antitrust provisions may lodge a complaint with the Commission, and the Commission may, at the outcome of its proceedings, impose a fine, it has no jurisdiction to compensate the victim.

Here it must be observed, however, that the same is generally true of the several laws of the Member States: a breach of national antitrust law does not usually give rise to a private claim for damages. In the United Kingdom, for example, a complaint may be made to the Office of Fair Trading, but only in very limited and exceptional circumstances would a plaintiff have a remedy in damages in the courts. In the other Member States, while such a remedy may in principle be more widely available, the fact that there is no case where damages have been awarded for breach of the Treaty provisions suggests that the existence of such a remedy for breach of national law is largely theoretical.

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15. Commission Answer to Question No. 519/72, 16 O.J. EUR. COMM. (No. C 67) 54 (Apr. 10, 1973).

16. See SYMPOSIUM, *supra* note 14, at 233 (comments of J.P. Warner).

Moreover, national law is decisive in this respect, for the question of remedies is one on which Community law simply refers back to national law: where rights are conferred by Community law, those rights are to be enforced by national courts, and the remedies are to be governed by national law. Deference to the national system is subject only to two qualifications, which the Court of Justice has laid down in a different context: first, the national rules must not be less favorable than those governing the same right of action in a purely internal matter; and second, the national rules must not render impossible in practice the exercise of the Community rights.<sup>17</sup> The first qualification is relevant only in the exceptional case where national law gives a right to damages for violation of corresponding provisions of national law. As to the second qualification, it may well be that the requirement is satisfied if the national courts are prepared, in an appropriate case, to grant an injunction or other interim relief to prevent injury to the plaintiff. This is a function for which the national courts are, it will be suggested below, better equipped.

Given, then, that the existence of a private remedy in damages is theoretically possible, what are the objections to the grant of such a remedy, and the resolution of disputes, in the national courts? Within the confines of this paper, it is possible only to outline some of the principal difficulties. Here I mention five objections of a practical nature (others will be mentioned in Part II below). It will be apparent that each objection would require in-depth examination before any final conclusion could be reached, but the cumulative force of the objections seems, on a preliminary view, substantial.

1. The first objection is that it is very doubtful whether courts are the appropriate agencies to resolve the complex issues of fact and policy raised in the field of competition: courts simply do not have, and cannot readily acquire, the necessary expertise. Even in a relatively straightforward case of refusal to supply, as in *BMW*<sup>18</sup> or *Garden Cottage Foods*,<sup>19</sup> which may fall within either article 85 or article 86 of the Treaty, the difficulties may be formidable. Article 85 may require an analysis of a whole network of agreements, many of which may be with parties in other Member States. A finding of a dominant position under article 86 requires determination of the relevant market, itself often a complex matter, and one which may again require an analysis extending to the entire Common Market. Even more difficult may be the question, crucial in such cases under both articles, of the anticompetitive effects of, for example, a particular selective distribution policy.

There is no lack of evidence of the unsuitability of the courts as the primary agencies for the resolution of competition matters, and of the inappropriateness of adversarial procedures.<sup>20</sup> A European consensus on the

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17. See, e.g., *Express Dairy Foods Ltd. v. Intervention Bd. for Agricultural Produce* (Case No. 130/79), 1980 E. Comm. Ct. J. Rep. 1887, 1902.

18. Judgment of Oct. 23, 1979, Bundesgerichtshof, 1980 ECC 213 (W. Ger.); see note 6 *supra* and accompanying text.

19. 1984 A.C. 130 (1983), 38 Common Mkt. L. Reps. 43 (1983); see notes 12-13 *supra* and accompanying text.

20. See, e.g., R. STEVENS & B. YAMEY, *THE RESTRICTIVE PRACTICES COURT* 144 (1965)

point is reflected in the fact that the primary responsibility for competition matters is entrusted to administrative agencies, such as the Bundeskartellamt in the Federal Republic of Germany, and the Office of Fair Trading and the Monopolies and Mergers Commission in the United Kingdom. It is not surprising that a similar method was adopted at the Community level, where competition policy has been entrusted to the Commission. Of course, the findings of such agencies may be subject to judicial review; but such review is a very different function from that of primary resolution of disputes between individuals, and in any event is generally confined to questions of legality as distinct from questions of policy.

2. Second, a fundamental objection arises from the coexistence of two separate systems of antitrust law, Community law and national law. Sometimes the same course of conduct will offend both systems, but in other cases only national law will apply because application of Community law requires an effect, actual or potential, on trade between Member States. That requirement can readily be understood in the light of the fact that the overriding goal of Community competition policy, as of all Community policies, is economic integration and the attainment of a single market. As the European Court of Justice has said:

The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition which is to define, in the context of the laws governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.<sup>21</sup>

Yet the practical application of the requirement of effect on interstate trade involves somewhat nebulous distinctions. As the Court has put it in the context of article 85:

It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>22</sup>

While this test of effect on interstate trade, however difficult to apply in practice, may make good sense in the context of the objectives of the Community, it seems to make nonsense of the assertion of a claim to damages in national courts in cases where there would be no such claim for breach of the domestic antitrust law. It would seem arbitrary in the extreme to hold that there was no right to damages in the standard case of, say, abuse of a

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("The adversary procedure, as embodied in the traditional judicial process, could scarcely be a less convenient method of handling naked issues of policy.")

21. *Hugin Kassaregister AB v. Commission* (Case No. 22/78), 1979 E. Comm. Ct. J. Rep. 1869, 1899.

22. *Société Technique Minière v. Maschinenbau Uln GmbH* (Case No. 56/65), 1966 E. Comm. Ct. J. Rep. 235, 249 [Authors translation — Ed.].

dominant position where such conduct was prohibited by national law, yet that there was such a right in the marginal case where some effect on interstate trade, actual or potential, could be made out. It would make a very substantial issue dependent on a relatively insignificant criterion.

3. While it may not usually be difficult for a plaintiff to prove a sufficient effect on interstate trade, the burden of proof in relation to other issues is often likely to be difficult to discharge. Quite apart from the difficulty of satisfying the court on complex economic issues, one obstacle facing a potential plaintiff concerns the discovery of documents. In English law, at any rate, the plaintiff's right to discovery is limited by the defendant's privilege against self-incrimination; the House of Lords has held that this privilege extends to the discovery of documents that might expose a defendant to the risk of a fine by the Commission.<sup>23</sup> A complainant to the Commission, by contrast, can rely on the Commission's wide powers of discovery under articles 11 and 14 of regulation 17, unhampered by the restrictions of national law.<sup>24</sup> Since application of the English rule against self-incrimination could clearly frustrate a civil enforcement action, it is open to argument whether Community law would override such a domestic privilege. In the present state of the law, the rights of the potential claimant are, at best, doubtful.

4. A further unresolved question is that of who has the necessary standing to sue: is it, for example, the competitor, the customer, or the ultimate consumer? The rules on standing are different in different states. Even if those rules were to be harmonized (and again such a solution would lead to anomalies if it were limited to suits based on Community law), harmonization would not obviate the possibility of multiple actions by different plaintiffs in different states, with the risk of conflicting decisions on the same facts and with no means available by which such conflicts could be resolved.

5. Even in the case of a single plaintiff, there will be risks of "forum shopping" — that is, the plaintiff will have a choice of jurisdictions in which to sue, and will choose to sue in the jurisdiction where the prospects of success, and the potential damage award, are highest. The risks are increased rather than lessened by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,<sup>25</sup> concluded pursuant to article 220 of the EEC Treaty. That Convention lays down uniform rules of jurisdiction and seeks to ensure that a judgment rendered in one state will be enforceable in any other state that is a party to the Convention. Under the Convention, a defendant could be sued for a breach of antitrust law not only where the tort was committed, but also in the courts of "the place where the harmful event occurred" — an expression interpreted by the European Court of Justice as meaning that the defendant may be sued, at the option of the plaintiff, either in the courts of the place

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23. *Rio Tinto Zinc v. Westinghouse Elec.*, 1978 A.C. 547 (1977).

24. The Commission's powers must, however, be exercised subject to principles common to the laws of the Member States, including, in certain circumstances, the protection of the confidentiality of written communications between lawyer and client. *See AM & S Europe Ltd. v. Commission* (Case No. 155/79), 1982 E. Comm. Ct. J. Rep. 1575, 1583-85.

25. *Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments*, Sept. 27, 1968, reprinted in *BULL. EUR. COMM.*, Supp. 2/69 at 17.

where the damage occurred or in the courts of the place where the event occurred that gave rise to and was at the origin of that damage.<sup>26</sup>

It will be seen that the five difficulties outlined above have a dual source: in part they are inherent in the peculiar subject matter of antitrust law, comprising as it does a unique blend of law, policy, and economics; and in part they stem from the very nature of the Community system. The structure of the Community system is very different from that of a federal system, and it is doubtful whether the national courts can play, in this area at least, a federal role; the position might be different if there were federal courts of the Community within the Member States.

Comparisons will inevitably be made with the United States where, it is generally agreed, the existence or threat of private suits is a powerful motive for compliance with U.S. antitrust law. Such comparisons may be dangerous if they overlook deep-seated differences. Taking a broad view, the observer detects in the United States a powerful ideological influence that favors private enforcement rather than action through the public authorities. By contrast, in the Community a combination of legal and other factors exists that might discourage private enforcement, even if the law were more firmly established. These factors, although present in varying degrees, are deeply rooted in the legal and commercial traditions of many of the Member States of the Community. Such factors, at a level of broad generalization, include:

- (a) In the place of a jury trial, a skeptical judicial approach to damage claims, particularly where such claims are based predominantly on Community law.
- (b) In the place of class actions, contingency fees, and treble damages, all of which encourage private damage claims, an unsuccessful plaintiff may be liable to pay the defendant's as well as his own costs.
- (c) A pervasive disinclination, independent of financial considerations, to resolve commercial disputes by litigation.

Moreover, to a considerable extent, these factors interact with and reinforce each other. For example, a prospective plaintiff may weigh the social and commercial costs of litigation together with the financial costs; in the absence of class actions and treble damages, the damages that an individual plaintiff might reckon to recover if he succeeded might often not justify the total risks of litigation.

For all these reasons, there may be doubts about the effectiveness in Europe of private enforcement actions, at least without fundamental changes in law, practice, and attitudes among the Member States.

## II. THE ANALOGY TO ENFORCEMENT ACTIONS AGAINST MEMBER STATES

It has been suggested above that some advocates of private enforcement of EEC antitrust law have been influenced by the way in which compliance by Member States with their Community obligations has been secured by private actions brought in the States' own courts. But is there a valid anal-

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26. *Handelswekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.* (Case No. 21/76), 1976 E. Comm. Ct. J. Rep. 1735.

ogy here? That question will be examined in the remaining part of this paper. Before it is addressed, a brief historical excursion is required.

The self-executing character of the EEC Treaty came before the European Court of Justice for the first time in the 1963 case *Van Gend en Loos*,<sup>27</sup> a reference by a Dutch court to the Court of Justice for a preliminary ruling under article 177 of the EEC Treaty. In the Dutch court the plaintiff was challenging the reclassification of a certain product under the Netherlands customs tariff that resulted in an increase in the duty payable on that product, imported by the plaintiff from the Federal Republic of Germany. At that time customs duties on trade between Member States had not yet been completely abolished, but the plaintiff relied on article 12 of the EEC Treaty which provided that "Member States shall refrain from introducing between themselves any new customs duties on imports or exports . . . and from increasing those which they already apply in their trade with each other."<sup>28</sup> The Dutch court asked the Court of Justice, first, "[w]hether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such State can, on the basis of the Article in question, lay claim to individual rights which the court must protect;"<sup>29</sup> and second, in the event of an affirmative reply to the first question, whether the application of the import duty in issue represented an unlawful increase within the meaning of article 12 of the Treaty.<sup>30</sup>

The three Member States which submitted observations to the Court all contended that article 12 only imposed obligations on states and did not confer rights on individuals enforceable in the national courts. In rejecting the Member States' contentions, the Court ruled that

[t]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.<sup>31</sup>

Among other arguments, the Member States invoked articles 169 and 170 of the Treaty which, in the event of a Treaty infringement by a Member State, enable the Commission and other Member States, respectively, to refer the matter directly to the Court of Justice in proceedings which resemble traditional international proceedings. The Court rejected that argument as misconceived. "The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has

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27. N.V. Alegemene Transport-en Expeditie. *Ondememing Van Gend & Loos v. Nederlandse Administratie der belastingen* (Case No. 26/62), 1963 E. Comm. Ct. J. Rep. 1.

28. EEC Treaty, *supra* note 1, art. 12.

29. 1963 E. Comm. Ct. J. Rep. at 3.

30. 1963 E. Comm. Ct. J. Rep. at 3.

31. 1963 E. Comm. Ct. J. Rep. at 12.

not fulfilled its obligations does not mean that individuals cannot plead those obligations, should the occasion arise, before a national court. . . ."<sup>32</sup> A restriction of the guarantees against an infringement of article 12 by Member States to the procedures under articles 169 and 170 would remove all direct legal protection of individual rights. There was also the risk that recourse to the procedure under those articles would be ineffective if it were to occur *after* the implementation of a national decision taken contrary to the provisions of the Treaty, because a ruling by the Court in such proceedings, while perhaps effective for the future, might not give the individual a remedy in the instant case.

The judgment in *Van Gend en Loos* can be regarded as the single most significant step in the legal integration of the European Community. It sets up the nation's own courts as instruments for securing compliance by the state with its Community obligations. When an individual challenges a national measure as being contrary to the Treaty or Community legislation, he may, so long as the provisions in question have direct effect (a matter that will be determined by the Court of Justice), pursue proceedings in the nation's own courts. Further, while the Court of Justice may be asked pursuant to article 177 of the Treaty to rule on the interpretation of the Community provisions in issue, the final decision will be taken by the national court. In this way compliance with Community law can be enforced effectively, possibly more effectively, through individual suits than by a judgment of the Court of Justice on the international plane. That was expressly recognized by the Court when it declared in *Van Gend en Loos* that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."<sup>33</sup>

May similar arguments be used to justify enforcement of the antitrust provisions against undertakings in the Member States? In some respects the analogy may seem valid. The Commission's powers to enforce the antitrust provisions under regulation 17 are without prejudice to the rights that individuals have to secure the protection of their interests in the national courts, just as in *Van Gend en Loos*. Thus it could be said in relation to the obligations of undertakings in the antitrust area that the vigilance of individuals in protecting their rights serves the Community interest by providing an effective additional means of enforcement. In *Van Gend en Loos* itself, the Court referred expressly not only to states' obligations, but also to the obligations of individuals and to actions between individuals before a national court. And in *Belgische Radio en Televisie v. SV SABAM*, as we have seen, the Court held that articles 85(1) and 86 "create direct rights in respect of the individuals concerned which the national courts must safeguard."<sup>34</sup>

Yet I suggest that serious doubts must persist about the analogy. In suggesting this, I leave aside doubts that have arisen in recent years about the appropriateness of private actions even in the case of state infringements: doubts that have led the Commission, in some cases, to take proceedings against a Member State under article 169 even when the very same

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32. 1963 E. Comm. Ct. J. Rep. at 13.

33. 1963 E. Comm. Ct. J. Rep. at 13.

34. See text at note 7 *supra*.

issues were already before the Court of Justice under article 177 in proceedings brought by individuals against the national authorities in the national court. Doubts about the analogy arise, I believe, for the following reasons.

In the case of an alleged breach of a Member State, the question at issue is usually clear cut. Usually there is no dispute about the facts: the question whether the state measure infringes Community law characteristically turns solely on the proper construction of Community law. That question of construction, moreover, can usually be resolved by the Court of Justice, and can be resolved in a way that effectively determines the issues before the national court. Thus, the substantive issues in the case are effectively determined by the Court of Justice with the benefit of arguments by the parties, by the Commission and, if they so desire, by other Member States. Moreover, these issues may also be determined in a way that has uniform effects throughout the Community.

It is very different with an antitrust suit. The questions at issue will characteristically be complex questions of fact and policy that national courts will have to resolve for themselves. Questions of the interpretation of articles 85 and 86 may indeed arise and be referred to the Court of Justice, but these are likely to be preliminary questions to be answered before the facts are established, and thus to be questions on which the Court of Justice can only give the most general guidance. The questions of fact and most questions of policy will have to be resolved, as well as possible, by the national courts themselves. The factual questions are likely to be complex and to admit of no straightforward answer. Policy questions, which are essentially a matter for the Commission, will have to be resolved without guidance from the Commission, since it is unlikely that the Commission would consider itself entitled (even if the national court's procedure so permitted) to intervene in the national proceedings. The courts would have to be guided, at best, by past decisions and general policy pronouncements of the Commission. Nor would there be any means of correcting what the Commission regarded as mistaken decisions by the national courts. If, for example, a court found no violation and the Commission thought otherwise, a subsequent Commission decision to initiate its own proceedings would defeat the whole purpose of the exercise, as well as exposing undertakings to double jeopardy. The position would be even more difficult if a court condemned a practice that the Commission believed should be allowed or encouraged in the Community interest: compare the vexed question whether *national* law may condemn an agreement on which the Commission has conferred an exemption.<sup>35</sup>

Accordingly, in proceedings against Member States, action in the national courts, with a reference to the Court of Justice, will generally lead to a uniform solution, taking account of the Community interest. In antitrust cases, on the other hand, such a result can only be achieved by Commission proceedings, with consultation with the representatives of the Member States, and with the possibility of full review of the case by the Court of Justice.

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35. See *Walt Wilhelm v. Bundeskartellamt* (Case No. 14/68), 1969 E. Comm. Ct. J. Rep. 1, 13-15; COMMISSION OF THE EUROPEAN COMMUNITIES, *FOURTH REPORT ON COMPETITION POLICY* pts. 43-47 (1975); cf. C. KERSE *supra* note 11, at 280-82.

There are other differences which may cast doubt on the analogy. I will mention, briefly, four.

1. In actions brought against the national authorities in the national courts, there is no problem about jurisdiction: the national authorities may be sued only in the courts of that nation. The Court of Justice may decline to rule on the legality of a state's conduct in proceedings brought in the courts of another state. By contrast, jurisdiction is often a major issue in antitrust cases.

2. An advantage of proceedings brought against national authorities in national courts is that they obviate problems of compliance. Member States have occasionally been reluctant to comply swiftly with rulings of the Court of Justice, which in such cases are unsupported by sanctions; judgments of the state's courts may be more effective. There is, in contrast, no problem about enforcement of the Commission's antitrust decisions, which are directly enforceable in all Member States.

3. There is little difficulty, in proceedings against national authorities, about differing remedies. Admittedly, the remedy may vary in different nations, for example, on the issue whether damages are recoverable; but the principal object of the proceedings is usually to secure compliance rather than to recover damages, and the harmonization of remedies, while it may be desirable, is not essential.<sup>36</sup> In antitrust cases, however, it would lead to great anomalies, and very uneven enforcement of the law, if damages were recoverable in some states but not in others, or even if the principles governing the award of damages differed significantly in different states.

4. Finally, antitrust suits raise the difficulty, noted above, of overlapping national and Community provisions, which are likely to lead to intolerable anomalies. No such problem arises in relation to actions against national authorities: the result is likely to be, for example, that a particular tax or charge may not be levied in trade between Member States although it might remain lawful in trade with third countries. Properly understood, this is not an anomaly but a consequence of the very nature of the Community.

#### CONCLUSIONS

It may readily be accepted that within certain limits the antitrust provisions of the EEC Treaty are, and ought to be, enforceable in national courts. Since the Treaty prohibits certain forms of conduct as unlawful, an injunction should be available to restrain them. The national courts are particularly well placed to grant interim or interlocutory injunctions. While the Commission has been held to have the power itself to adopt interim measures, the procedures of the national courts are better suited for this purpose. Moreover, such decisions of the national courts are, by their very nature, provisional, and do not require any final determination of the issue.

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36. The harmonization of remedies seems particularly desirable (if not essential) where the plaintiff seeks to recover from the state authorities some tax or other payment exacted from him which has been held contrary to Community law. The very wide disparities among State laws on the recoverability of such payments entails a degree of discrimination scarcely compatible with Community law. This remains, however, an exceptional case.

An injunction may well be appropriate, in particular, to preserve the status quo pending the outcome of an investigation by the Commission.

It will rarely be appropriate, however, for national courts to take a final decision leading to an award of damages. It cannot be suggested that such a course is never appropriate: it may be, for example, in a clear case, and one in which national law affords an equivalent remedy. One example might be a case where the Commission has already found the existence of a breach. However, national courts should proceed with caution. Serious anomalies will otherwise arise in the enforcement of Community law, and it is idle to pretend that such anomalies can be ironed out by measures of harmonization. A preferable solution may be to increase the resources of the Commission.