The rise of state enforcement

State antitrust enforcers in the US have for years worked in tandem with federal agencies to help investigate and prosecute breaches of competition law. But it hasn’t always been that way. Ron Knox examines the modern history, criticisms and proponents of state enforcement.

At the antitrust bureau of the Illinois attorney general, a secluded office in the centre of the Loop in downtown Chicago, bureau chief Robert Pratt considers a question about a possible “void” in US federal antitrust enforcement. Have US federal enforcers backed away from cases that the states have decided to take on? Is this how state antitrust enforcers like Pratt decide on which matters to investigate and litigate?

Pratt shakes his head. Maybe years ago, he says. But not any more. Now, Pratt says, the states and the US Federal Trade Commission and Department of Justice often work side by side on enforcement matters, ranging from local hospital mergers to Sherman Act cases against Microsoft. “There is communication, and there is cooperation on investigations,” Pratt says.

The lockstep coordination between the country’s two tiers of government enforcers isn’t unique to Illinois. For years now, the states have often added another layer of enforcement to the US federal system, allowing residents in, say, Illinois or New York to be compensated for antitrust violations.

So, do the states and federal agencies always see eye to eye? Certainly not. And critics of state enforcement continue to censure the role of attorneys general in fighting anti-competitive behaviour that affects the whole country.

But regardless, the relationship between the states and the federal agencies is far stronger today than it was 20 years ago. As with any relationship, though, it hasn’t been without its trials and tribulations — moments that threatened to splinter the US enforcement system and possibly do away with state participation altogether.

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When former California governor Ronald Reagan first stepped into the Oval Office as president of the United States in 1981, he brought with him a firm belief that US companies had been put under undue pressure from the government for too long. The administration’s economic viewpoint dictated that the free market should reign supreme, and government should play as minor a role as possible.

The philosophy enveloped almost every aspect of federal regulation—the environment, civil rights and antitrust enforcement, says Robert Abrams, former attorney general of New York and partner at Stroock & Stroock & Lavan LLP. Abrams, serving at the time as New York’s top law man and a self-described activist, says he watched with concern as the number and quality of federal antitrust cases began to fall.

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“I said it then and I’ll say it now: the watchdog was put to sleep,” Abrams says. There became what state enforcers and other observers called a “void” in federal enforcement, which allowed some potentially anti-competitive mergers and other matters to slip by unchallenged.

“A signal was sent out,” he says. “No one is going to prosecute you.” Abrams, who was also head of the National Association of Attorneys General at the time, says he felt an obligation to reach out to state attorneys general around the country to try to coordinate activity and investigations. It appeared that the lack of federal enforcement had spurred “more and more illegal activity” and victims were beginning to turn to the states for help, he says. “It was really the first stage of multi-state enforcement,” he says.

By 1983, Abrams and other state enforcers in the National Association of Attorneys General (NAAG) had created a multi-state antitrust task force, a kind of information clearing house where state antitrust staffers could organise cross-border cases and coordinate investigations and courtroom duties between jurisdictions. “I said to other states that we can’t turn a blind eye to this,” Abrams says. “We should work together, share resources... we should begin to bring actions.”

A year later, the task force had helped to author collective merger and vertical restraint guidelines for the states—guidelines that were, in part, a rebuttal of DoJ merger guidelines released around the same time. Michael Brockmeyer, partner at Frommer Lawrence & Haug LLP in Washington, DC, and head of the task force during the 1980s, says the guidelines, and the states’ presence in general, were intended to make a statement.

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Along with the guidelines, the states took on two cases that signalled a divergence from federal antitrust interests at the time: a resale price maintenance case, the Minolta Camera Products antitrust litigation, which the federal authorities showed little interest in; and a complex insurance broker collusion case the DoJ flatly turned down. That case ended in the US Supreme Court, with a favourable result for the states.

But even before the Reagan administration took office, the states were better prepared to reclaim a pivotal position in the country’s enforcement landscape than they had been in decades. The Crime Control Act, passed
in 1976, sent sometimes sizeable amounts of seed money to the states to restart their long-stagnant antitrust programmes. Plus, the Hart Scott Rodino Act allowed the states to enforce the Sherman Act by allowing them to sue for damages on behalf of residents.

By the early 1980s most states had revised their antitrust laws and established antitrust bureaux within their attorney general’s offices. By the time the gap in federal enforcement began to emerge, the states were equipped with both the resources and the legal status to fight antitrust battles on their own.

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As the states began to communicate with one another about complaints and cases, the antitrust community’s reaction to the states began to change. “Initially, it was: who are these guys? Who are these new enforcers in town?” Brockmeyer says. But the states quickly showed they had both the resources and the staying power to pursue serious cases on a national level. By the end of the decade, Brockmeyer found he had a place at the enforcers’ roundtable during meetings of the antitrust section of the American Bar Association.

By that time, the contention about the states’ role in the US antitrust landscape had already taken shape.

The contention hinged on two main issues, much as it does today. First, during the 1980s, the states took on a more active role in merger enforcement, triggering fears that states would block or alter national – or even global – mergers because of local issues that could otherwise be resolved. That spoke to the second fear: that activist states would create bad case law or set precedents that would confuse businesses and jam the courts with unnecessary litigation and challenges.

Brockmeyer says it didn’t help that, aside from the occasional pointed letter or quip, communication between state and federal enforcers didn’t exist. Through the late 1980s, the states handled their multi-state cases on their own, while the federal agencies pursued their own agenda.

But once Reagan left office in 1989, the tone of interactions between state and federal enforcers began to change, Brockmeyer says. Janet Steiger became chairman of the FTC and James Rill, current co-chair of the antitrust practice at Howrey LLP, took over at the antitrust division of the DoJ, and Brockmeyer says things began to change immediately. “You really had a dramatic change at that point,” he says. “It ushered in the kind of cooperation that has existed ever since.”

Rill agrees, saying that “relations with the states were quite poor” when he took office. “I was concerned that uncoordinated, indeed non-communicative, relations between the states and the federal agencies would send mixed signals and produce sometimes undesirable results,” he says. Over the next few years, Rill, Abrams, Massachusetts attorney general Jim Shannon and others worked together to establish a working group including the DoJ, the FTC and state trustbusters to hammer out joint guidelines and coordinate investigations.

During former president Bill Clinton’s first term, aggressive enforcement at the federal level returned and quickly shaped the FTC and the DoJ as two of the world’s most feared antitrust agencies. If any void remained from the decade past, the rejuvenated federal enforcers quickly filled it.

But even with the DoJ and FTC taking on cases and challenging mergers again, the states remained a part of the national scene. The Crime Control Act monies had created a funding stream for state antitrust enforcement units and the activist attorneys general were ready and willing to bring cases. Plus, Brockmeyer says, the reluctance of federal enforcement in the 1980s “galvanised the states”, and institutionalised the NAAG task force.

“It is now a group that has expectations,” he says. “You truly had by that time the mechanism by which the states continued to bring cases” even though the positions of the states and the federal authorities had grown closer.

By this time, the states had already established a record of bringing seminal antitrust cases, many of which wound their way to the country’s highest court. Along with California v American Stores, which allowed private parties to request divestiture in merger challenges, and Arizona v Maricopa County Medical Society, which confirmed that price fixing is per se illegal in the health care industry, Illinois in 1977 brought a treble damage claim against a masonry company called Illinois Brick, which was accused of price fixing in the industry.

Illinois state had attempted to collect damages on behalf of indirect purchasers – namely, consumers at the opposite end of the supply chain.

By the time the case left the hands of the US Supreme Court, indirect purchasers had lost their right to collect damages from cartelists under federal law. Although California v ARC America Corp clarified the issue slightly, Illinois Brick set the stage for the legal wrangling and legislative debate that continues to this day.

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During the mid-1990s, the DoJ as well as almost 20 state attorneys general had begun investigating Microsoft for allegedly abusing its dominant position in the US software market. While state enforcement critics spoke up against the local enforcers – why should states be investigating a national, even global, antitrust case? – the federal
authorities worked in tandem with the states to both construct and litigate the case, again setting a new precedent for cooperation in the US system.

Then, in 2001, the administration of George W Bush took over the case and, at the urging of the courts, spent five weeks working out a settlement agreement with Microsoft and nine of the involved states. Nine other states, including the District of Columbia, declined to join in – instead holding out for what they considered to be a more favourable settlement for their residents.

In a 2003 speech, former FTC chairman Deborah Majoras, then a deputy assistant attorney general at the DoJ, said that many believed the divergent states stepped in after deciding that the federal government had not properly enforced the antitrust laws.

“The rhetoric from their supporters was deafening,” Majoras said at the time. Some state enforcers believed the Microsoft case was a prime example of the void that can exist in federal enforcement, and the states’ obligation to fill it.

Patricia Conners, head of antitrust for the Florida attorney general’s office and former chair of the multi-state task force, told an American Bar Association audience in 2006 that the DoJ originally hesitated to take on Microsoft. “We had contacted them,” Conners said. “We had voiced our concerns.”

Conners said there had been a recent result in a prior Microsoft case that the Department of Justice was concerned about, and “they were concerned about losing going forward if they took on Microsoft again, quite frankly”.

Regardless, the federal agencies and the states drafted a joint complaint, shared information and performed in tandem in a single courtroom. Proponents say those positives should have outweighed the controversy the states’ rejection of the DoJ’s deal eventually created.

And as for the divergence itself, Conners described it as standard operating procedure in cases with dozens of plaintiffs, rather than “exhibit A” in the case against state antitrust enforcement. “The reality is that when you have multiple plaintiffs in litigation, it happens every day,” she said. “Some plaintiffs decide not to participate in the first settlement that comes down the pike.”

Still, the pall the Microsoft case cast on state enforcers remained – and may still remain to this day. In critics’ minds, the divergence reinforced negative perceptions of state trustbusting: it’s a rogue, incoherent practice that muddies the water of US enforcement and costs courts and companies unnecessary time and money.

Some of the most severe criticism – indeed, the main voice fuelling most of the debate over states’ roles in antitrust enforcement – came from federal appeals court Judge Richard Posner, who in 2001 wrote a scathing recommendation that states be stripped of their ability to bring antitrust suits. After his time as a mediator during the settlement process, Posner wrote that states should only act as private litigants, leaving the enforcement of the Sherman and Clayton acts solely in the hands of the federal authorities.

Posner’s criticisms of state enforcement reverberated with proponents of a single, federal US antitrust voice. That state attorneys general launched “cluster bomb” lawsuits riding the coattails of federal agencies; that the states complicated litigation; and that elected enforcers were too susceptible to the influence of interest groups who may represent a defendant’s competitors.

Terry Calvani, partner at Freshfields Bruckhaus Deringer in Washington, DC, voices another long-held criticism of state enforcers. The cases the states should be bringing – local, intrastate or regional cases – are often off-limits to attorneys general, he says, because they may target would-be campaign donors or, at the very least, voters in their constituencies. Instead, state enforcers bring mainly resale price maintenance settlements and federal piggyback cases that will keep their profiles high, fostering their political ambitions and ensuring the financial support for their antitrust programmes remains intact, Calvani says.

But state enforcers disagree. Statistics show states are bringing their own cases, at least some of which are local or regional in scope. NAAG statistics show that of the 80 documented behavioural cases states brought without federal assistance since 1990, 64 appeared to involve local or regional conduct or markets.

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Illinois alone has brought at least two recent cases that involved only a handful of Midwest states, Pratt from the Illinois Attorney General’s office says. One involved
a merger investigation of two rival school bus companies – a merger that only gave rise to competitive problems in a handful of states, including Illinois. Illinois also challenged another merger involving coal plants in the Wyoming Powder River Basin, in which six affected states and the FTC challenged the deal in court. Plus, Illinois and two other states took the lead in challenging furniture maker Herman Miller’s alleged use of resale price maintenance, an issue the federal authorities shied away from.

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Still, Posner’s criticism and indeed all of the controversy surrounding the Microsoft decision would soon come to a head. Just one year after Posner levelled his criticism against state enforcement, Congress passed a law creating the Antitrust Modernization Commission (AMC), a 12-person body urged, among other things, to review the role of state enforcement in the US and recommend to lawmakers and the president if and how enforcement in the US should change.

Opponents of the state system, including Michael E DeBow, a professor at Samford University’s law school and former adviser and assistant at the FTC and DoJ during the mid-1980s, testified to the commission that the state’s power should be drastically limited or superseded by federal authority, if not ended altogether. Several state enforcers and proponents testified in favour of maintaining the current US system, with states having the power to both enforce federal antitrust laws and collect treble damages on behalf of residents.

By 2007, the commission had tallied initial votes on what recommendations they would make to lawmakers regarding the states’ role in the US system. The voting showed a “significant number of commissioners were inclined to propose limiting state authority to conduct merger enforcement under federal antitrust law”, wrote Robert Hubbard, director of litigation in the antitrust bureau of the New York attorney general’s office and current chair of the multi-state task force.

Finally, in the summer of 2007, the commission released its report. In it, its recommendations for the most part mirrored the position of the states. The commission declined to recommend that federal enforcers should be able to preempt state law or that there should be limits on state actions under federal law – two actions several critics suggested the commission should recommend. Aside from some criticisms of Illinois Brick, the commission’s chief recommendation focused on states working with one another and the DoJ and FTC to create a more uniform enforcement environment – something that all sides appear to be in favour of.

While the commission’s ruling won’t likely settle the matter – state enforcement will always have its critics – current and former state antitrust officials say that the seismic shift in attitudes towards one another that occurred in the late 1980s will likely never be overturned. So long as states continue to bring the right cases, the balance of power between the two enforcement branches will remain stable.

Plus, sources say that in many cases, the federal agencies are happy to have the state’s assistance and presence in the courtroom. This can be especially true when going after companies with strong local ties – challenging hospital mergers, for instance. Having the local guys alongside the big shots from DC can often help avoid getting “home cooked” in a state court.

While there is some anecdotal evidence that states are again beginning to take on cases the FTC and the DoJ have declined or been slow to pursue, the antitrust specialists who helped shape state enforcement say the lax federal agencies that helped create modern state enforcement will never return. Hopefully.

“I think there is concern about the lack of vigour of enforcement by the federal government in antitrust,” former New York attorney general Abrams says. “But over the past 25 years, the states have re-emerged as genuine leaders on antitrust issues.”

But even if federal enforcement continues at its current pace – and no one is suggesting it is anywhere near the depressing levels of the 1980s – the opportunities for state and federal cooperation appear to be growing. NAAG records show that since 1990, 85 per cent of state merger investigations were conducted in tandem with federal officials. Plus, half of all behavioural investigations included federal assistance or direction at some point – a level that would have been unheard of 20 years ago.

As Pratt from the Illinois attorney general’s office says, the “void” in federal enforcement that existed two decades ago is far from returning.

“In my perception,” Pratt says, “that was then, and this is now.”