

2000

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### Recommended Citation

W. D. Braun, *Commentary on Professor Spencer Weber Waller, Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 Loy. U. Chi. L. J. 149 (2000).  
Available at: <http://lawcommons.luc.edu/lucj/vol32/iss1/6>

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## Commentary on Professor Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*

W. David Braun\*

I am honored to have the opportunity to participate in this gathering to give my brief comments on Professor Waller's article and speech. It is a particular honor because I have known Professor Waller for almost two decades. I am convinced that he will bring the highest level of intellectual honesty, insight, and analysis, based upon his rich professional and academic experience, to this fine educational institution.

Professor Waller points out that America needs to begin to study and analyze the developments of more than eighty foreign systems of competition or antitrust law for lessons that America can learn to reform our system of antitrust law.<sup>1</sup> The United States no longer has a monopoly on antitrust wisdom. The European Union's competition rules entered into force in 1958, and for at least the past twenty years have been a mature system of antitrust law. That maturity has accelerated over the past ten years as the European enforcement agency, the Directorate-General for Competition, based in Brussels, Belgium, has more vigorously enforced the European competition rules against both state and private enterprises with increasing commitment and enforcement impact in the form of very substantial fines. In one recent case against Volkswagen, the fines imposed amounted to over \$100 million.<sup>2</sup>

We can learn much from the European experience in two critical areas: their treatment of state influenced commerce and their

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1. See Spencer Weber Waller, *Bringing Globalization Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L. J. 113 (2000).

2. See Commission Decision 98/273, art. 85, 1998 O.J. (L 124) 60, 94 (imposing a fine of ECU 102 million).

resolution of antitrust disputes. In handling state owned or influenced enterprises, for instance, Europe applies its competition law more aggressively to publicly owned or governmentally influenced enterprises than we do in the United States. This should be no surprise as many European economies are subject to much heavier governmental regulation and influence than the American economy. Many of the major European enterprises – airlines, automobile producers, banks and others – were partly or wholly state owned or controlled. This direct or indirect blurring of private and public enterprises and governmental influence over the commercial conduct of such enterprises made it necessary for Europe to develop an entire body of European competition law that applies to state monopolies, state owned businesses and state influenced firms. By contrast, the United States’ “state action” doctrine is a modestly developed and relatively non-aggressive doctrine that protects against the application of our antitrust laws to governmental decision making that may suppress competition and impair consumer welfare.

The two standards for antitrust immunity under America’s so-called “state action” doctrine are merely that: (1) the challenged restraint must be one that clearly articulates and affirmatively expresses the state policy, and (2) the policy must be actively supervised by the state itself.<sup>3</sup> The Europeans, on the other hand, have gone several steps further. Not wanting to leave to Member States the ultimate discretion as to what measures may be undertaken that distort or reduce competition, they have included several special provisions in the European Union Treaty. Article 86(2), formerly Article 90(2), of the European Union Treaty exempts firms “entrusted with the operation of services of a general economic interest” and “revenue-producing monopol[ies]” from the competition rules only to the extent that: (1) “the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them,” and (2) the “development of trade [is] not . . . affected to such an extent as would be contrary to the interests of the Community.”<sup>4</sup> These two strict qualifications to the European “state action” exemption are interesting. This provision covers public service industries, public

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3. See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

4. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, O.J. (C 340) 1 (1997), 37 I.L.M. 56.

utilities and, to a certain extent, the transport sector. In addition, Article 86(1), formerly Article 90(1), prohibits Member States from introducing or maintaining in force any measure in relation to government owned or controlled enterprises or to private enterprises granted special or exclusive rights that is contrary to the rules of the European Union Treaty, in particular the rules on competition and on non-discrimination.<sup>5</sup> Finally, the Court of Justice has recognized that compensation must be paid if a Member State breaches these rules.<sup>6</sup>

No doubt there are logical reasons why the United States' "state action" doctrine does not contemplate such a European-style, wide-ranging inquiry by the United States' courts into the appropriateness of state conduct that restrains competition. One reason may be that the vast majority of the competitive conduct by firms in our economy is relatively unfettered by federal, state or local government rules and regulations. Therefore, it is not necessary to make an extensive, almost policy-oriented inquiry. However, I suspect no less a reason is the fact that our antitrust litigation system, to put it bluntly in the words that a European would be likely to use, is an abomination.

Quite apart from the "state action" doctrine, the United States' antitrust litigation system is, at best, a unique, expensive, and unduly burdensome one when compared to the European system. Several of the key differences between the European and American antitrust litigation systems should cause us to reassess our approach to antitrust litigation. Consider the following:

1. *Treble Damages.* The United States is the only major antitrust system in the world that imposes treble damages for violation of its competition rules. Particularly in those cases that do not involve per se violations where we apply the "Rule of Reason," there is, in my humble opinion, little value and even less logic to imposing such a multiple damages penalty that is not proportionate to the injury suffered.<sup>7</sup> The concept of de-trebling damages in United States antitrust litigation in respect to "Rule of

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5. *See id.* art. 86(1).

6. *See* Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1993).

7. The "Rule of Reason" requires an evaluation of the purposes and effects of the arrangement, whereas the per se rule does not permit such an inquiry. *See* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979) (discussing application of the per se rule); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (noting that "the legality of an agreement . . . cannot be determined by so simple a test").

Reason" claims has been advocated by responsible commentators for some time and should be adopted.

2. *Wide-Ranging Discovery.* No other legal system in the world permits unbridled discovery based upon mere good faith allegations in a complaint. Many foreign systems permit only limited discovery under the discretion of the judge. This is typical of continental European legal systems. Any sensible litigation system requires adequate judicial supervision over the litigation process. Some courts in the United States are very effective in this regard. An example is the "Rocket Docket" in the Federal District Court for the Eastern District of Virginia, which strictly limits the scope and duration of discovery. Many civil courts in our country, however, take a much too relaxed approach, thereby allowing discovery to become a fishing expedition. Discovery should be a means of discovering relevant facts, not a means of delay, imposing undue costs or unfair burdens on another party.

3. *Juries.* Unlike the United States, no other major legal system in the world permits juries to decide competition law cases. Instead, many systems employ an administrative mechanism combined with the right to appeal to a court of law. Moreover, some countries employ specialized courts or courts of limited jurisdiction, such as commercial courts, that have far greater familiarity with the competition rules. While I am hardly sure a system of specialized courts would work in the United States, I am quite certain that the process would be far more efficient, predictable and fair if a single judge or a panel of judges, rather than a jury, would hear civil antitrust cases.

4. *Attorneys' Fees.* In many foreign jurisdictions, the losing party must pay the costs and attorneys' fees of the winning party. This is one of the strongest deterrents to bringing frivolous lawsuits. Resort to the courts to resolve an antitrust dispute should not be discouraged, but there should be consequences to the party that loses, even if it is the plaintiff.

5. *Criminalization.* No other major jurisdiction in the world pursues hard-core antitrust violations as a criminal offense with the vigor or frequency of the United States Department of Justice. The European Community imposes very severe administrative fines that may rise to 10% of a company's total sales, but the individuals concerned do not go to jail. Fines imposed rarely have risen to even 5% of total sales in practice, but the fine amounting to roughly \$100 million against Volkswagen indicates that the impact

can be a significant burden to violators. The criminalization of per se United States antitrust violations is a real bone of contention with our trading partners around the world, who view antitrust law as an economic regulatory system that calls only for high administrative fines or injunctive relief, but not criminalization. As long as this difference exists, lively international debate will continue. Here, I think the United States has the better argument. Jurisdictions that are serious about deterring hard-core antitrust violations, such as price fixing, market allocation, bid rigging and the like, will be most effective when the individual perpetrators of these serious violations must face severe personal consequences, namely the threat of imprisonment and the stigma that is attached to being charged with a criminal law violation. A heavy fine against the company alone can never equal the deterrence value of criminalization.

Where does this lead us? Hopefully, it will lead America to a productive dialogue with our major trading partners regarding modernizing and reforming certain aspects of the American antitrust tradition. While I am skeptical that such a dialogue and reform of our system would bring us toward a real convergence of our systems, I submit that convergence is not the real point. Advancing the American antitrust system by achieving a fairer, more effective and predictable legal system for deterring anti-competitive conduct – whether or not it crosses international boundaries – is itself a valuable objective. The world does not need uniformity in antitrust legal systems. Each system has its own legal tradition, economic fundamentals, and overall regulatory environment shaped by its own democratic process. After all, maintaining some competitive rivalry between various national and multinational systems of antitrust law is as desirable as preserving the competitive markets that these laws are designed to protect.