Comments on *Warren S. Grimes*: Microsoft: Federalism and Internationalism in Antitrust

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Contents

The various antitrust proceedings against Microsoft Corporation in the U.S.A. so usefully summarised by *Warren Grimes* in this volume[1] reflect the plurality and rich diversity of the 'litigation model'[2] of antitrust enforcement as practiced in the United States distinct from the administrative model heretofore found in the European Communities.[3] Although the EU is poised[4]

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1 See also *Grimes*, The Antitrust Tying Law Schism: A Critique of Microsoft III and A Response to Hylton And Salinger, 70 Antitrust L.J. 199 (2002).

2 See *Jones*, Private Enforcement of Antitrust Law in the EU, UK and USA, 1999, p. 14-20.

3 Id., at p. 23-31, 93-112.

4 See generally, *Ehlermann & Atanasiu* (eds.), European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, 2001; *Ehlermann & Atanasiu* (eds.),

to adopt a successor to the venerable Regulation 17 of 1962 which would substantially revise the limits on Member State competition law enforcement compared to the Commission-centred system of the last forty years, it is still helpful to consider the present scheme as a basis for comparison, taking account of relevant proposed amendments. Moreover, antitrust laws now exist in eighty to ninety countries and the Doha ('Millennium') Round of World Trade Organisation negotiations is expected to take up some form of international antitrust rules in 2003.[5] The U.S.A., the EU, and twelve other countries launched the 'International Competition Network' in October, 2001, and the OECD launched the Global Competition Forum in the same year. Both groups seek to promote cooperation and convergence in international antitrust enforcement among national and regional (e.g., EU) competition authorities. All of these developments make consideration of the value of the 'federalism in antitrust' experience of the U.S.A. and others extremely timely and important.

I. Microsoft: 'Posterboy' for Federalism and Internationalism in Antitrust

The Microsoft case(s) is arguably the most significant U.S. government enforcement action in the last forty to fifty years, in part due to the dominance of its market share and the ubiquity of its products. It is allegedly the inspiration for the otherwise unremarkable 1999 cinematic effort 'Antitrust' depicting software companies as evil, and one is hard put to recall a deeper penetration into the popular consciousness of an antitrust case since John D. Rockefeller's Standard Oil Trust.[6] As such it is atypical but nonetheless exhibits several characteristics which make it suitable as a paradigm for examination of both federalism and internationalism in antitrust.

The federalism component has been covered by *Grimes*' description of the U.S. Department of Justice's (DOJ) 'browser wars' of 1994 and 1998, the participation of twenty U.S. states, the District of Columbia, and private

European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law, 2002.

5 *Jones & Matsushita*, (eds.), Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA, 2002, p. 397-406.

6 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). This was the government's action to break up the infamous Standard Oil Trust. The Standard Oil Trust was depicted in the popular press 'as a menacing octopus with tentacles stretching across the country'. *Peritz*, Competition Policy in America 1888-1992: History, Rhetoric, Law, 1996, p. 9.

litigants. The only significant component of U.S. antitrust pluralism omitted thus far (more episodes may be on the way) has been lack of a criminal prosecution, which is explained by the DOJ's general policy not to file criminal charges in monopolisation cases.[7] The most striking example of antitrust federalism at play in Microsoft is the fact that nine states have refused to accept the settlement negotiated between Microsoft and the DOJ after the Court of Appeals remanded the case for further proceedings. At this writing, the parties and the antitrust communities of the world are awaiting the District Court's ruling on whether to accept the DOJ/settling states' agreement with Microsoft as in the public interest or whether to rule that the nine non-settling states are entitled to relief beyond that agreed to by Microsoft.

Microsoft is also a paradigm for internationalism in antitrust because of its dominant position (in U.S. parlance, monopoly) in a global operating system software market and because its actions have triggered antitrust investigations throughout the world. For example, the EU have issued two 'statements of objections' (the EC's administrative equivalent to commencement of an enforcement action) against Microsoft.[8] In 2000, the Commission alleged that Microsoft abused its dominant position in operating system software (Windows 95-98) by leveraging its position into the server software market through discriminatory licensing and failure to disclose interoperability information to Sun Microsystems and others. In 2001, the Commission added charges that Microsoft also attempted to extend its operating system monopoly (Windows 2000) to the 'low-end server market' and unlawfully tied Windows 2000 to its Media Player, discriminating against vendors on a 'friend-enemy' classification scheme. The Commission did not attack Microsoft's browser activity because it was already the subject of the DOJ proceedings and because complaints received by the Commission dealt with the server and Media Player issues.[9]

However, the U.S.A. and the EU are not alone in dealing with charges against Microsoft. In Japan, the Fair Trade Commission settled a complaint apparently unique to that country in which it was charged that Microsoft unlawfully tied its word processing program (Microsoft Word for Windows)

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7 Once a final injunction is entered, willful violations may be punished by criminal contempt, but the DOJ do not directly seek criminal sanctions except in *per se* offence cases such as price-fixing and bid-rigging (collusive tendering).

8 *European Commission*, Commission initiates additional proceedings against Microsoft, Rapid Press Release IP/01/1232 of 30 August 2001; Commission opens proceedings against Microsoft's alleged discriminatory licensing and refusal to supply software information, Rapid Press Release IP/00/906 of 3 August 2000.

9 Personal interview with Commission officials, Brussels, 30 April, 2002. Notes on file with author.

to its spreadsheet program (Microsoft Excel).[10] In the UK, the Competition Enforcement Division of the Office of Fair Trading resolved a complaint against Microsoft which was peculiar to the UK market.[11] In France, while complaints had been made against Microsoft, no enforcement action had been taken as of May, 2002.[12] It is not known how many other national competition authorities have had complaints or taken action against Microsoft, but it seems quite likely that there are others not yet reported.

It seems that we have already developed pluralistic antitrust enforcement at both the (U.S.) national and international levels. It remains to be seen whether this is productive of dynamism and synergy or conflict and chaos.

II. Theories and Models of 'Antitrust Sovereignty' and Pluralism

The theory of federalism is one of divided sovereignty. In the U.S.A., the federal (national) government is one of delegated powers with the residue of non-delegated powers remaining with the states or the people.[13] However, sovereignty can be divided in more than one way. In this chapter, vertical sovereignty refers to an allocation of competence between two (or more) hierarchical levels of government. For example, the divisions of competence between the federal government of the U.S.A. and the governments of its constituent states and the divisions of competence between the EU (if I dare compare it to a government) and the Member States represent a model of vertical sovereignty.

In contrast, horizontal sovereignty refers to divisions of competence at the same level of government. The horizontal sovereignty model in the U.S.A. is a geographic one in which each state's power is limited by its borders. In the EU, the territories of the Member States provide a horizontal division of sovereignty. In international antitrust, the borders of the nation-states represent a horizontal division of sovereignty. As we consider the role of federalism concepts in international antitrust, we should focus on the key

10 Personal interview with consultant to JFTC, Atlanta, 24 April 2002. Notes on file with author.

11 Interview with official of Competition Enforcement Division, London, 2 May 2002. Notes on file with author.

12 Interview with official of the Conseil de la Concurrence, Paris, 3 May, 2002. Notes on file with author.

13 U.S. Const., Amend. X.

principles as applied to competition and antitrust laws, what I call antitrust sovereignty.

A. The U.S.A.: Weak Antitrust Sovereignty

The U.S.A. is so far perhaps the best model of federalism in antitrust because of what some would consider rampant pluralism in antitrust enforcement. At least four 'agencies' may be said to have powers to enforce one or more antitrust laws: federal enforcement by both the DOJ and the Federal Trade Commission, private plaintiffs, and state enforcement by state Attorneys General.[14] For example, the U.S.A. experiences simultaneously state-federal cooperation in enforcement of the federal antitrust laws, state-state (or multi-state) cooperation in enforcement of federal and state antitrust laws, federal-international cooperation (e.g. with the EU, Canada and Japan, among others), and some would say state-private cooperation, in that Microsoft has asserted that the states (especially the non-settling states) are doing the bidding of Microsoft's competitors (or victims?) who wish to bring private actions.

Nonetheless, the system in the U.S.A. must be categorised as one of weak vertical antitrust sovereignty. The DOJ has no power of exemption, so it cannot prevent either states or private parties from bringing actions under federal or state antitrust law. Private actions exceed DOJ enforcement actions by nearly a ten-to-one margin.[15]

States have their own claims under state law, and while most state antitrust laws generally track the language of the Sherman Act (they are often referred to as 'Little Sherman Acts'), there are some differences. Moreover, states may bring their own claims (except criminal claims) under the Sherman and Clayton Acts as injured 'persons' and as *parens patriae* on behalf of injured citizens of the state.[16] As Grimes notes, some states have done so in the Microsoft litigation. The federal power over interstate commerce does not

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14 See *Jones*, supra n. **Error! Bookmark not defined.**, p. 14-19.

15 *Jones*, A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA, in: *Ehlermann & Atanasiu* (eds.), European Competition Law Annual 2001: Effective Private Enforcement Of EC Antitrust Law, 2002, p. ???. In 1996 to 2000, private actions in the USA averaged 674 per year (858 in 2000, almost certainly due to Microsoft) compared to only 52 criminal cases and 25 civil cases per year filed by the DOJ. In earlier years, the ratio was even higher.

16 Jones, *supra* note 2, p. 16.

invalidate state antitrust laws,[17] and states may even provide treble damage recovery for indirect purchaser suits where the Sherman Act would deny such relief. Some fourteen states have such '*Illinois Brick*[18] repealer' statutes, and the Supreme Court has found them compatible with federal law.[19] Moreover, states and private parties can challenge mergers which have not been contested by the FTC or the DOJ.

The current wave of state antitrust enforcement activity has been traced to discontent by state Attorneys General with the minimalist antitrust enforcement policies followed in the Reagan Administration (1981-89), although it was present much earlier. State enforcement activity has continued to grow and for the most part the federal-state hostility of the early Reagan years has evolved into substantial federal-state cooperation,[20] as the Microsoft litigation evidences. The inability of the state plaintiffs in the Microsoft litigation to agree among themselves or with the DOJ as to the appropriate remedy has contributed to criticism (in some circles, especially pro-Microsoft) of the role of states in antitrust enforcement.[21]

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17 It remains possible that if a state antitrust statute were found to substantially burden interstate commerce, it could be declared unconstitutional, but no such finding has yet occurred.

18 *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). For a discussion of *Illinois Brick* and passing-on issues, see *Jones*, supra n. 2, chapter 15.

19 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

20 *Greene & Hubbard*, State Antitrust Enforcement, (2002) 1290 *PLI/Corp* 1175. See also *First*, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Washington Law Review 1004 (2001).

21 See e.g. *Posner*, Antitrust Law, 2001, p. 281 et seq.; *Posner*, Antitrust in the New Economy, 68 Antitrust L.J. 925, 940 et seq. (2001); *Hahn & Layne-Farrar*, Federalism in Antitrust, 2002, Working Paper 02-9, (http://www.aei.brookings.org). These writings should not be uncritically accepted. *Hahn* is a paid Microsoft consultant whose 'theoretical' critique of the role of the states in the Microsoft litigation focuses on the complaint that the nonsettling states sought relief that might cost Microsoft money or reduce its profits. This is hardly a compelling rationale. *Posner*, a noted Chicago school adherent and former professor, failed in his attempts to mediate a settlement between Microsoft and the DOJ and blamed the failure on the intervention of the states. His solution: strip the states of antitrust enforcement power. *Posner*'s arguments are ably rebutted in *First*, supra note 21.

B. The EU: Strong Antitrust Sovereignty

In contrast, vertical antitrust sovereignty is strong in the EU. While overall levels of enforcement, especially private enforcement, are substantially lower than in the U.S.A., the Commission historically has had a level of enforcement policy control that the DOJ can only dream about. This control may be quickly summarised: At the time the EEC came into existence in 1958, only Germany of the original six Member States even had a competition law worth talking about. Even today, only about half of the fifteen Member States have authority to enforce the competition rules (primarily Articles 81 and 82, ex 85 and 86) of the EC Treaty. Since 1962, the Commission has had the exclusive power to grant exemptions from the Treaty rules to the exclusion of national courts and national competition authorities. The Commission on a few occasions (e.g., the *Ford/Volkswagen* joint venture) granted an exemption in order to prevent a Member State (Germany, in the event) from prohibiting an arrangement.[22] The prospect of commencing proceedings by national authorities or in national courts only to have the Commission exempt the challenged conduct has been a disincentive to enforcement,[23] even though it is rare in practice. The Commission's block exemptions further narrow the areas in which national competition authorities or private litigants may enforce the competition rules. Any national law or court ruling of a Member State which conflicts with a Commission determination is nullified by the supremacy of EC law over national law.

The fact that the Commission maintains a monopoly over the exemption process and a separate power to divest national authorities of the power to proceed in a case by opening its own proceeding has meant that enforcement federalism and pluralism are very much undeveloped in Europe in comparison to the U.S.A.

Under the proposed amendments to Regulation 17, the monopoly of the Commission on granting individual exemptions will be abolished, allowing national courts and national authorities to find non-infringement where the Treaty conditions (Art. 81(3) EC) are satisfied. However, the Commission retains the ability to divest national authorities of the jurisdiction to act by opening its own proceeding.[24] Assuming the amendments are adopted, vertical antitrust sovereignty will be weakened but will remain strong compared to the U.S.A.

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22 *von Stoephasius*, Enforcement of EC Competition Law By National Authorities, in: *Slot & McDonnell* (eds.), Procedure and Enforcement in EC and U.S. Competition Law, 1993, p. 33 et seq.

23 *Jones*, supra n. **Error! Bookmark not defined.**, p. 96 et seq.

24 See *Jones*, supra n. 16.

C. Horizontal Antitrust Sovereignty and Internationalism

There is of course no role for the application of vertical sovereignty in international antitrust for the obvious reason that there is no overarching sovereign on the international plane (outside the supranational rules of the EC Treaty). Accordingly, when we talk about a model of federalism for international antitrust, we are of necessity talking about horizontal antitrust sovereignty. Even if the move toward consistent international competition rules being discussed in fora such as the WTO, OECD-GCF, or ICN bears fruit, these rules would not create vertical antitrust sovereignty. There are a number of ways forward in international antitrust enforcement cooperation, and we are going to need all of them in the short and long term.[25]

III. The Weak Antitrust Sovereignty Model and the Politics of Antitrust

The view that pluralistic antitrust enforcement is desirable is not one that commands unanimity.[26] The revival of state enforcement activity in the U.S.A. which began in the 1970s and accelerated during the Reagan Administration reflected a fundamental divergence in philosophy between the DOJ and the states on such issues as resale price maintenance and other vertical restrictions. A similar gulf sometimes exists between the views of federal enforcers and private litigants, yet there is value in such divergence even if it is inconvenient to some:

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[25] *Jones & Matsushita*, Global Antitrust in the Millennium Round: The Ways Forward, in: *Jones & Matsushita* (eds.), Global Competition Policy in the World Trading System, 2002, p. 397.

[26] *Slot*, Is Decentralization of Competition Law Enforcement Dangerous? Drawing Lessons From the US Experience, in: *Hawk* (ed.), Proceedings of the Twenty-eighth Annual Conference of the Fordham Corporate Law Institute, 2002, p. 101.

> [P]rivate enforcement also performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitude of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature.[27]

The result of the conflicting views of the non-settling states and the DOJ as to appropriate remedies in the Microsoft litigation has been the entirely appropriate one that the Court decides based on the evidence which view is in the public interest. This is no bad thing. The American system will survive what is after all a relatively small glitch in a major antitrust case whichever way it turns out. The states and the DOJ will be able to cooperate on other cases to the public benefit. The cooperation between the U.S.A. and the EU will also survive the disagreement over the GE/Honeywell merger.

Ironically, the move toward decentralisation in the EU echoes themes of healthy divergence. The Commission has long sought to encourage Member State and private enforcement in the EU for a variety of reasons which have been described elsewhere.[28] *Wils* identifies three reasons for the proposed amendments to Regulation 17:

> The first reason is one of resources. By adding those of the competition authorities of the Member States, substantially more resources can be devoted to the detection and punishment of violations of Article 81 and 82. … The second is that for cases where the relevant markets are local, national, or regional, the competition authority or authorities concerned are likely to have better access to the relevant information than the Commission.

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27 *Coffee*, Rescuing The Private Attorney General: Why The Model of The Lawyer As Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 217 (1983).

28 See generally, *Jones*, supra n. 2; *Ehlermann & Atanasiu* [2001 or 2002?], supra n. 4.

> The third and most profound reason is that multiple enforcement is likely to lead to more innovation in the interpretation and application of the law. Enforcement by several authorities is likely to be more creative, innovative, and adaptive to change than enforcement by a monopolist authority.[29]

Critics of state enforcement in Microsoft such as *Posner* and *Hahn* have placed great weight on perceptions that state enforcement reflects the politics of protecting local (state) businesses. They point to the fact that California is a plaintiff (home to Sun and other Microsoft rivals), as is Utah (home to Novell, a rival), while Washington (home to Microsoft) is not. Left unexplained is that the lead named state plaintiff is New York, which is not home to any similar rival of which I am aware. The fact that two states out of the original twenty were bases for Microsoft rivals is hardly compelling. Thirty states did not participate: Microsoft was not based in all of them. Some states are more active than others and politics is at best an incomplete and overly simplistic and cynical explanation.

More importantly, the states actively participated and helped win the lawsuit. The fact that the lawsuit was won suggests it was not motivated solely by politics. While evaluation of the wisdom of the Microsoft-DOJ settlement compared to those remedies sought by the non-settling states is beyond the scope of this work, it is clear that reasonable minds can differ about the correct solution. Even if the Court approves the DOJ settlement and grants no further relief, this is no basis to conclude that the non-settling states were politically motivated in seeking more.

The application of the weak antitrust sovereignty model to international antitrust is at heart the creation and application of modes of international enforcement cooperation.[30] The perceived success of cooperation between the U.S.A. and the EU in bilateral agreements has gradually led to multilateral negotiations in the WTO and competition culture-building in the GCF and ICN. Second-generation bilateral agreements incorporating positive comity concerns are already in place in some cases. The analogy here is to the cooperative investigations between states in the U.S.A. with each other, and the impending formalisation of the network of national competition authorities within the EU. By design and by necessity, these will be the models for multilateral cooperation between antitrust enforcers of sovereign nations.

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29 *Wils*, The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics, 2002, p. 142.

30 See generally *Jones & Matsushita*, supra n. 25.