

International Consumer Advocacy for Competition Policy:

Learning from the AAI Model

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In June, 2008, the American Antitrust Institute, known around the world as “AAI,” celebrated its tenth anniversary as a not-for-profit independent education, research, and advocacy organization. The booklet we created for this event summarizes our decade of experience as a leading advocate of post-Chicago, activist antitrust policy.² For those who might be contemplating the creation of a pro-consumer Non-Governmental Organization (“NGO”) in the rapidly developing field of competition policy, please review this booklet on our homepage, www.antitrustinstitute.org.

We do not claim that the AAI model is appropriate in all circumstances, but something similar to AAI, customized to local needs, would seem beneficial in every nation that has adopted a competition policy. In this paper, we will describe the salient features of AAI, suggest why similar organizations are needed, comment on some lessons we have learned that might be useful to competition NGO’s, and offer our assistance to NGO’s that are moving in a comparable direction.

I. About the AAI

The AAI was founded in 1998 in Washington, D.C.³ At the time, antitrust in the US seemed to be recovering from its capture by what is generally referred to as “the Chicago School,” whose dominance was enthroned by the administration of President Ronald Reagan and continued in slightly milder form during the administration of the first George Bush. By 1998, the Clinton administration was providing a somewhat more progressive variety of antitrust enforcement, as exemplified by the government’s monopolization suit against Microsoft. In other words, the AAI was born at a time of hope that antitrust policy could be re-shaped and re-invigorated to become a more important part of US economic policy, of particular advantage to consumers and independent businesses that would benefit from an open competitive system.

Clearly, the opponents of vigorous antitrust within the US were strong, politically, economically, and legally, in the sense that their views dominated large parts of the government, the courts, and even academia. Moreover, a significant percentage of lawyers and economists with expertise on matters of competition policy are in the private practice of law or economic consulting associated primarily with the defense side of litigation and counselling; while many of these individuals are public-regarding, official institutions (such as the American Bar Association’s Section on Antitrust Law) tend to follow the minimalist antitrust sympathies of large clients. The founders of AAI responded to the perceived need for a rallying point for those who believe in a more activist role for antitrust in order to sustain the movement that was reflected by the Microsoft litigation.

The second Bush administration proved a disappointment from the perspective of AAI, with the government’s acceptance of a weak remedy in the Microsoft case becoming the iconic moment.⁴ Although there were bright spots in the administration which the AAI was pleased to support, including the continued battle against cartels and

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² Recognizing that the rest of the world tends to speak of “competition policy” rather than “antitrust”, we will nevertheless use the American term frequently in this paper. References to “Chicago” or “the Chicago School” pertain to the school of thought popularized by such conservative, neo-classical economists and law professors as George Stigler, Robert Bork, and Richard Posner, who have been closely associated with the University of Chicago.

³ For a detailed history of our first five years, see Albert A. Foer, “The American Antitrust Institute: The First Five Years of a Virtual Public Interest Network,” <http://www.antitrustinstitute.org/Archives/275.ashx>.

⁴ The Microsoft case was successfully prosecuted by the US government, which proved illegal monopolization by Microsoft when it used improper methods to promote its own browser at the expense of the Netscape rival. However, the remedy phase was handled by a different administration and many people believe that the remedy actually arrived at in a settlement was ineffective.

several important cases brought by the Federal Trade Commission, by and large the Chicago School's cramped vision of antitrust policy prevailed—and still prevails in 2008.

A statutory study commission, the Antitrust Modernization Commission (“AMC”), reviewed the state of US antitrust and concluded in April, 2007, that as long as the conservative line is followed, all is essentially well with US antitrust.⁵ The AAI monitored and attempted to influence the work of the AMC by establishing a dozen working groups, which filed public comments with respect to each topic the AMC addressed. The AAI's own answer to the Bush administration and to the AMC has recently been published as “The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President.”⁶

What else does the AAI do besides monitoring study commissions and publishing books on antitrust policy? A lot! Our website, www.antitrustinstitute.org, contains all our work product in its archives section, as well as full background on who is involved and how we are organized.⁷ A research section provides links to a wealth of information about antitrust. In a nutshell, the AAI:

- Testifies before Congress and other legislative bodies;
- Prepares “white papers” on matters under investigation or policy consideration;
- Writes and otherwise generates articles, commentaries and editorials;
- Responds to questions from the media;
- Conducts seminars, symposia, and major conferences;
- Develops educational materials;⁸
- Submits friend-of-the-court briefs to appellate courts;
- Moderates an e-mail listserv for its advisors; and
- Provides speakers for public forums

Our efforts serve not only to provide the public with a more balanced view of competition issues, but also to provide a useful check on the overwhelming pro-business advocacy that legislators, administrative policy-makers, and law enforcers persistently receive from major corporations and their advocates.

We do this with a very low overhead, operating as a *virtual network of experts*. The office, such as it is, is located in the home of the president. Other paid employees (the vice president, the director of legal advocacy, and the director of communications) operate from their own homes and offices, each in a different city. There is a five-person board of directors and an active advisory board of approximately 90 professors of law, economics, and business, as well as practicing lawyers and economists. We communicate almost exclusively via e-mail. There is no strict ideological test to become an Advisory Board member or a loosely-connected supporter of AAI (i.e., a person who chooses to be on our listserv), although our positions on issues tend to draw people who are sympathetic to a centrist but activist orientation. We do not have “members” as such.

The question always arises: how does AAI obtain its funding? First of all, none comes from a federal agency that we may wish to criticize or influence. We have benefited from grants from courts under the doctrine of *cy pres*⁹ and we raise funds through the sponsorship of tables (primarily by law firms and economics consulting firms) at our annual conference. We receive donations to our general treasury from corporations, trade associations, law firms (both plaintiff- and defense-oriented¹⁰), individuals, and individually-directed foundations. So far, we have not received

⁵ Antitrust Modernization Commission, Report and Recommendations, April 2007.

⁶ This 415-page book can be viewed at www.antitrustinstitute.org and is also available for purchase on www.Amazon.com and elsewhere.

⁷ In order to receive periodic e-mail updates on our activities, visit the website and click on the button for “e-bulletin”.

⁸ See our secondary website, www.fairfightfilm.org, which provides enrichment material for the award-winning movie we produced about antitrust. This material is available for use by competition NGO's and others. It includes translations of the transcript of the film into many languages.

⁹ See Working Paper 07-11: Albert A. Foer, Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices, <http://www.antitrustinstitute.org/Archives/WP07-11.ashx>.

¹⁰ In the US, certain lawyers specialize in representing businesses and consumers who allege they have been injured by antitrust violations. Others (a much larger number) tend to specialize in representing businesses that are defending themselves against governmental investigations or private lawsuits. Some law firms and individual lawyers represent both plaintiffs and defendants.

grants from public foundations. We make available on request a list of all contributors of \$1,000 or more, cumulatively from the beginning. The list now contains 145 entities.

In the next section, we summarize some of the conditions that contribute to the design of the AAI model, but which may not necessarily be present in other countries. Each country, we stress, must design its own model.

II. The Need for Similar NGO's World-Wide

The AAI model has proven itself for over a decade in the US context. A virtual network does not require a large paid staff or expensive facilities, so operating costs can be kept low. This is likely to be true in most other countries as well. Funding is available in the US, however, through a variety of sources, without need to rely on the government, whose financial contributions might reduce the independence of the NGO. With a mature antitrust system in place in the US, a large and diverse base of experts is available because—with private enforcement accounting for 90 percent or more of cases-- so many people earn a living in the antitrust industry and so many have a viewpoint that is to a large degree shared. Independent “think tanks” (such as the AAI) are well-established in the US and their role is accepted and even generally appreciated as a part of democratic governance. We are quite aware that these conditions would not apply in all or even most of the other antitrust jurisdictions. It may take many years for comparable conditions to evolve, if ever, in countries with new competition regimes.¹¹ This does not in the least diminish the need for public interest NGO's focused on competition policy; it simply suggests that each one will have to be designed to reflect the local context.

When we created the AAI, our focus was strictly domestic. It did not take long, however, to realize that the antitrust field was so tied to globalization that we had to become knowledgeable about how other jurisdictions were enforcing (or not enforcing) competition policies. We began to recruit international experts to our Advisory Board and to reach out to an increasingly international network, including having foreign experts participate in our programs and our traveling abroad to speak face-to-face with competition officials and experts. As a result of all of this, we have become convinced that something like the AAI model would be beneficial in every nation that has adopted antitrust laws. Why?

As nations create market institutions, they typically and now almost universally recognize that the government must set some rules for how competition should operate within a free market and must have the ability to intervene from time to time to assure that markets are operating as intended. Cartels occur everywhere where they can be formed and maintained without effective government intervention and they inevitably have the effect of taking money from the consumer's pocket and transferring it to companies that are acting anticompetitively. Private monopoly is common in nations around the world. Sometimes monopoly is the necessary structure in a small economy or the result of uncommonly large economies of scale. Sometimes monopoly is the creation of privatization that transfers public monopoly power to private hands. Monopoly usually leads to higher prices and less innovation than would be found in a more competitive structure. Governments themselves often create anticompetitive situations that end up harming both small and medium-sized businesses and consumers. Often, it is the poorest and least powerful members of a community who are most disadvantaged by anticompetitive activity. A well-run antitrust regime should bring three values any market-oriented economy: lower prices, better service, more choice, and innovation leading to growth in the economy.¹²

In most of the hundred or more competition policy jurisdictions, antitrust is still a fairly new idea. The basic institutions are in the process of being molded. The number of experts is limited. Enforcement efforts may be feeble, garnering little attention or support from the public. The public at large has minimal understanding of and perhaps little natural sympathy for this somewhat arcane concept. Even in mature market economies, institutions continue to evolve. (In the US, with all of its educational advantages, few members of the public have a sophisticated understanding of basic economics, much less antitrust.) Those who support antitrust will need to work together to

¹¹ There is a chicken-and-egg problem here. Having a mature antitrust regime may be a condition precedent for developing a sturdy antitrust NGO. But a sturdy antitrust NGO may be necessary to facilitate development of a sturdy antitrust regime. Both need to be brought into being conjunctively and they can be expected to grow and evolve conjunctively. Without effective enforcement of competition laws that are on the books, it is likely to be especially difficult to motivate people to participate in or fund a competition NGO. It may take the active participation of a strong current or former enforcement official to jump-start a nation's first competition NGO.

¹² See the introductory chapter of the AAI's report, *The Next Antitrust Agenda*, at www.antitrustinstitute.org for further discussion on the value of competition and antitrust.

educate the public at large and to increase the sophistication of the emerging antitrust community, we suggest three inter-related tasks for the new competition NGO.

The initial mission of a competition NGO should be to identify and bring together self-identifying antitrust communities which can provide part of the infrastructure for making antitrust succeed. Where does one start? The central characters in “the antitrust community” will likely include the following: high enforcement officials and staffers at the competition authority; lawyers and economists who practice in the field; professors who teach competition policy; journalists who cover business and legal developments; consumer and public interest advocacy organizations (the NGO’s we are addressing); legislators and their staffs who have oversight responsibility or general interest in competition policy; and businesses and trade associations that can benefit from enforcement or recognize the strategic benefit to themselves of high quality professional enforcement.

A second mission is strengthening the local antitrust enterprise. In particular, private enforcement of competition law is at best severely limited in most countries. The lack of treble damages removes a strong incentive for gifted trial advocates to develop a specialization in competition law, and the “English Rule” requiring losing plaintiffs to pay attorneys’ fees provides a strong deterrent to action. Thus, the pro-corporate bias of the private bar is likely to be even more pronounced outside of the US. Developing a workable private enforcement component would seem to be a high priority.

One domestic role a competition NGO can play is to help overcome regulatory capture, a problem that might be even more important in developing countries. By providing a voice for consumers-- a task which normally would be that of the antitrust authority, but which benefits from external support --the NGO can help curb anticompetitive political influences, both directly and indirectly (for example, by educating a large consumer body who are also voters).¹³

If the first mission of self-identification and the second mission of enhancing the domestic antitrust effort are local in nature, the third mission is international. International developments will be moving during the next period of time toward consensus on best practices and eventually toward new institutions for harmonizing the different national approaches to both substantive and procedural law. NGO’s can learn from each other and can work together both to improve their national systems and to influence the consensus that will drive international developments. Right now at the International Competition Network (“ICN”), where much of the informal harmonization work is proceeding, the players are the national competition authorities and a group of defense-oriented lawyers, mostly from the US. The national competition authorities must hear from consumer and public interest advocates as well, or the consensus that emerges will be driven by the well-funded defense lawyers and their large multinational clients, without the counterweight of consumer concerns.¹⁴ The second mission, therefore, should be to assure that both in domestic and international policy-making, the voice of proponents of vigorous antitrust policies is heard.

We are not aware of many NGO’s similar to the AAI. The leading example may be the Consumers Unity Trust (“CUTS”) in India, a consumer advocacy organization that pays much attention to antitrust issues, not limited to India.¹⁵ IBRAC is an independent NGO in Brazil that does not deal with current cases, but has a journal, conducts workshops and an annual international event.¹⁶ The Consumers Association, UK, which trades as *Which?* (the name of the consumer magazine it publishes, which helps subsidize consumer protection activities), has frequently intervened in European antitrust matters¹⁷, just as several consumers organizations in the US have advocated their own antitrust positions in US courts and agencies.¹⁸ A recent entry on the scene is StopCartel, a Greek NGO¹⁹.

¹³ It might be useful if the NGO be granted official standing in regulatory bodies. In Israel, for example, the consumer association has such standing in antitrust matters.

¹⁴ Donors both multilateral and bilateral have funded ICN participation of officials (including NGOs) from developing countries but the point remains that such funding has been sporadic and not sufficient.

¹⁵ See <http://www.cuts-ccier.org/>.

¹⁶ See <http://www.ibrac.org.br>.

¹⁷ See http://en.wikipedia.org/wiki/Consumers%27_Association.

¹⁸ The author is informed that the Dutch, Danish, French, Polish, Slovene, Italian consumer protection organisations (among others) have all had domestic influence in competition discussions. BEUC, the European Consumers Organisation, <http://www.beuc.org>, has sporadically intervened in European competition cases. Thus a European model may be said to exist, in which established consumers organizations to a greater or lesser degree become involved in competition policy issues as an extension of their consumer protection focus. Often the activities of these organizations are funded by governments.

¹⁹ See <http://www.stopcartel.org/>.

Various universities have created centers that focus on antitrust but are academic rather than advocacy organizations (notably, Loyola University Chicago Institute for Consumer Antitrust Studies; the Competition Policy Center at University of California, Berkeley²⁰; George Washington University's new Competition Law Center; the Centre for Competition Policy at East Anglia University; and the British Institute for International Comparative Law's Competition Law Forum). Another model that is developing is that of the FIPRA Group, an international but Brussels-based independent for-profit network of senior public policy and regulatory affairs advisors specializing in strategic government relations.²¹ FIPRA employs several well-known consumer advocates and increasingly represents corporate interests within the European Union that coincide with consumer interests. The American Bar Association's Antitrust Section is yet another model, and a highly successful one at that.²²

The AAI model is distinct from these other models in that it is not-for-profit and focuses solely on antitrust and competition policy issues, always from a consumer-driven perspective. Competition regimes will vary by objectives, maturity, budget, staffing, cultural attitudes toward markets and government, and in many other ways. We do not suggest that the AAI model is superior to or should be adopted ahead of alternative models, especially where competition policy is relatively new and it is deemed more important to develop an initial sense community among its supporters than to espouse a particular perspective on how policy should be directed.

Our purpose, rather, is to encourage the development of NGO's in each nation with an antitrust regime, as an initial step. Secondly, we urge the linkage of such NGO's in some fashion so that they will communicate with each other and eventually work cooperatively in support of common goals. A start has been made by the International Network of Civil Society Organisations ("INCSOC"),²³ whose driving force has been Pradeep Mehta of CUTS International and Alan Asher of EnergyWatch, U.K.. Although INCSOC has individual members in a number of countries who have met several times in Geneva and elsewhere, the organization has been hampered by the difficulty in finding funds and seems to be languishing at the moment.²⁴

III. Some Foreseeable Questions and Our Responses

How large an office and staff are needed?

Given the availability of the Internet, it should not be necessary to invest very much in overhead. A physical office outside of the home of the organization's coordinator should not be necessary. Staffing can begin with one person on a part-time basis, although full-time is better. Additional staff can be added as funding increases. A written publication such as a mailed newsletter is probably not needed; reliance on the Internet and email, together with a telephone, should provide the necessary communications infrastructure.

What qualifications are needed for staffing?

At AAI, we have emphasized quality of antitrust experience, relying on a balanced mixture of legal and economic experts, with a variety of experiences within the antitrust community. If the staff is to be limited to a single individual, it should probably be an attorney or industrial organization economist, preferably with some experience in a competition policy agency.

It is important that the head of the competition NGO and the Board of Directors be largely impartial. Otherwise, the NGO might be viewed as yet another body representing a special interest and not the general public.

How can experts be enticed to participate?

Personal contacts are extremely important and one leads to another. We try to make participation in the AAI a social experience as well as a satisfying professional experience that adds to one's knowledge of antitrust on a continuing basis. This is accomplished in a variety of ways, including having a listserv for our Advisory Board, on which they

²⁰ See <http://iber.berkeley.edu/cpc/>.

²¹ See <http://www.fipra.com/>.

²² See <http://www.abanet.org/antitrust/>.

²³ See <http://www.cuts-international.org/incsoc.htm>.

²⁴ The author takes some responsibility for this as co-chair of INCSOC's capacity building committee, which has thus far failed in its efforts to raise funds for additional international meetings.

are encouraged to present information and discuss current events, out of which AAI determines its public positions. We also provide an annual luncheon at the time of the spring antitrust meeting of the American Bar Association in Washington and a barbecue at the time of our annual conference, also in Washington.

We have intentionally kept our Board of Directors small and nimble – able to make decisions quickly. The Directors make decisions but rely on the Advisory Board, which has grown to nearly one hundred members. Others might fashion a much tighter leadership group, or, indeed, a more widespread membership organization.

The AAI has designated certain of its advisors as Senior Fellows, based on their commitment of time and energy. Another title we bestow is Research Fellow for various lesser or briefer commitments of pro bono effort.

How much advocacy should the organization undertake?

A first question is whether the organization should engage in advocacy with respect to (a) policy matters, (b) policy matters and specific cases and investigations, or (c) should merely be a clearinghouse for the exchange of information, i.e. research and education without advocacy. AAI has found that the advocacy function helps differentiate it and responds to the media's desire for opinionated exposition and commentary. We also have found that we learn more about current thinking and current issues by directing a portion of our activity to cases and investigations that are on-going. Our role is that of an independent commentator rather than as a litigant, consultant, or representative of a party. Finally, it is important to our funding that we take positions, in that corporations and associations that agree with our positions will sometimes make contributions.

Nevertheless, taking positions in on-going investigations and cases has its negatives. First, it creates enemies, as well as friends. Second, it can keep certain members of the antitrust community from participating because of actual conflicts of interest or the perception that their clients will feel threatened by such an affiliation. Third, the taking of positions requires the development of an organizational ideology, and this is likely to repel some potential supporters. And fourth, because we accept contributions from corporations and others with a direct financial or perhaps ideological interest in matters at hand, there is a risk that our role will not be perceived as independent. We are very sensitive to this possibility and have taken steps in our internal governance to minimize this risk.

A decision on the role of advocacy needs to be developed at the outset, as its communication to potential supporters will help determine whether and how they will participate. It may also affect funding possibilities.

A related concern is whether to include enforcement officials within the membership. Having them as members adds to the prestige and to the knowledge base, but makes it very difficult to take positions with respect to governmental policies and decisions. The AAI excludes federal officials, but includes several state officials, in that we rarely if ever take positions before state agencies. If enforcement officials are excluded, the NGO should nonetheless be diligent about maintaining cordial and, to the extent possible, supportive relationships with them.

Should there be an ideological test for members/supporters?

Presumably, all members and supporters will agree that antitrust is an important part of the national economic structure, which itself may be considered an ideological test. There would be no point, for example, in trying to attract people who oppose in principle either markets or government intervention via antitrust.

Beyond this, the question is how narrow or broad an ideological test is appropriate? The AAI welcomes onto its Advisory Board a wide range of perspectives, although all are of a self-identified "post-Chicago" sensibility. "A broad umbrella" provides the selection metaphor for an organization that will not function as an advocate. Advocacy requires a narrower mission statement, in order to give predictability to policy positions being advocated.

If possible, a competition NGO should function on a non-partisan basis, neither the cheerleader for the party in power nor for an opposition. It should focus on competition policy in an objective manner.

The AAI has raised several millions of dollars over a ten-year period. But how can we raise money in our country?

This is not going to be easy. Once one has identified an antitrust community, he or she will have identified most of those with a self-recognized stake in making antitrust succeed. Some will likely be willing and able to make annual

financial contributions. Others will have client interests that they will need to protect, but they may be willing to buy a table²⁵ at an essentially academic event, even if unable to be a sponsor of the organization itself.

A starting place could be the Internet. Every advocacy group needs a website to provide a focal point for activities, archives of the group's work products, and an attraction to supporters. Once an audience is attracted, it may be possible to sell ads on the website, as a funding source. The AAI has not attempted this, but the various law firms and others who stand to benefit if there is an active antitrust practice might pay to be listed. The downside is that this might cause the NGO to be viewed as biased.

If there is a private right of recovery of damages in your jurisdiction, there will likely be a private bar that has a financial interest in being supportive. It may be possible to create a *cy pres* tradition within the context of class actions, such that an antitrust NGO can seek this source of funding.

An organization can charge a fee for symposia and conferences, but these also have expenses, and making a net profit on events can be difficult. We have found it useful to charge more for private lawyers and others who can afford it; less for government officials and academics; and to offer scholarships as necessary.

While the AAI has avoided seeking government funding (which may not be available anyway), other jurisdictions may have different traditions, in which such funding is expected and not considered undesirable. In addition to national governments (e.g., USAID, the EU, Japan), there are intergovernmental groups (e.g., The World Bank, OECD, UNCTAD, the Asian Development Bank, the Inter American Bank) that are, at least in theory, potential donors to well-conceived projects. In Europe, it is not uncommon for consumers' organizations to be government-funded. In developing countries, funding often tends to be donor/project specific and there may be an important funding role for individuals who have a full-time job.

Foundations that are interested in economic liberalization could be another possible resource.²⁶ Universities that offer courses in competition policy may be approachable to create centers for competition policy that could perform at least some of the functions served by AAI.

It is possible to self-organize as a membership organization, charging an annual membership fee. This has some drawbacks. First, the transaction costs can be high, especially if the annual fee is low. Second, a membership organization generally must provide voting rights, which can put the continuing leadership and management into question. AAI avoided being a membership organization for these reasons. We do, however, consider our mailing list to be a compilation of "friends of AAI" and we solicit these friends (albeit with very limited success) for voluntary contributions.

IV. The AAI and International Competition NGO's

The AAI has created an international outreach committee for the purpose of working with international competition NGO's that seek our assistance.²⁷ At this point in time, such assistance is limited to information and advice via our website and e-mail. Alas, we have no funding to offer. We would be pleased to provide links from our website to others' sites and we are prepared to participate in the future to help coordinate linkages between international competition NGO's. Individual committee members may be identified who will be able to be responsive to a particular NGO.

We look forward to the day when there is at least one competition NGO in each nation and to when they will all come together in a loose confederation tied through the Internet and even occasional global conventions. Is this too much of a dream?

²⁵ The AAI "sells" tables as well as individual tickets to its annual conference. A table sponsor, most often a law firm, receives 10 seats for the full conference, including a gala luncheon, coffee and snacks, invitations to an informal barbecue, and bound papers and materials associated with Continuing Legal Education credits.

²⁶ Our experience in the US was that foundations were unlikely to donate capital funds or start-up operating funds, but were more willing to consider funding specific projects in specific industrial sectors, depending of course on the programmatic interests of the foundation.

²⁷ Communications may be directed to aai@antitrustinstitute.org.