



The American Antitrust Institute

August 12, 2009

President Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Obama:

We are writing to request your support for an important international economic initiative: that United States competition authorities join with their counterparts in Europe and elsewhere around the world to rally public support for strong competition policy even in a time of deep recession.

There is no more important time to stand up for consumers and competition than during an economic crisis, when the forces of consolidation, cartelization, and constraints on international trade threaten to push antitrust concerns to the side and undermine the world's future economic growth.

At a recent conference sponsored by the American Antitrust Institute (AAI), Mario Monti, the distinguished former European Commissioner for Competition, proposed that the world's leading competition authorities issue a strong but simple joint pronouncement explaining why continued, steady competition enforcement is crucial during the global economic crisis. We urge you to enlist your economic team, the Antitrust Division of Justice Department, and the Federal Trade Commission to implement Mr. Monti's proposal. As part of this effort, the U.S. should also take the lead in establishing an International Competition Day during which antitrust authorities around the world, supported by political leaders at every level, would educate the public about the benefits to consumers, world economic growth, and democratic values of competitive markets maintained through vigorous enforcement of the competition laws.

In his speech at the AAI conference, a transcript of which is attached, Mr. Monti emphasized that the economic crisis has undermined support in Europe and elsewhere for the market economy and competition law, which is one of its key pillars. In particular, state aids and government-supported consolidation in the financial sector have put severe stress on traditional principles of competitive markets. It is important to be aware of Mr. Monti's perception that confidence in the market economy has been particularly shaken, because such measures were introduced first in the United States, its leading advocate worldwide.

A joint statement by the world's key competition authorities in support of strong antitrust enforcement, endorsed by the White House, would help reinforce the Administration's global message that the government's current extraordinary role in various sectors of the economy is a temporary deviation from market principles, that stricter regulation of financial markets is not inconsistent with market principles, and that competition enforcement is critical to recovery and long-term economic growth. As FTC Chairman Jon Leibowitz has noted, "Even in 'down

markets,” it is important to “hold the line against industry consolidation that may threaten competitive markets far into the future.”

Assistant Attorney General Christine Varney has cogently explained in a recent speech why history teaches that the economic crisis requires increased antitrust vigilance. Not surprisingly, economic distress brings calls for government-supported cartelization, consolidation, and constraints on international trade, as it did in the Great Depression. But the lesson of the Depression-era experience with the relaxation of the antitrust laws (in particular, the National Industrial Recovery Act’s industrial codes) is that suspending competition does not foster economic growth or recovery; to the contrary, as Varney explained, it was “Thurman Arnold’s legacy of vigorous antitrust enforcement [that was] a cornerstone of the New Deal’s economic agenda [starting in 1938] and a part of that era’s legacy for modern economic policy.” Moreover, inadequate attention to antitrust concerns (not just by antitrust enforcers) during the recent past helped create financial entities that are too big to fail, which contributed to the current conditions. We agree wholeheartedly with Assistant Attorney General Varney’s conclusion that “Antitrust must be among the frontline issues in the Government’s broader response to the distressed economy.”

The benefits of competition enforcement are not always appreciated even when the economy is not in recession – lower prices for consumers, better products and services through increased productivity and innovation, openness of markets to entrepreneurs, and political support for the market economy and democratic institutions.

As you stated during the campaign, “Antitrust is the American way to make capitalism work for consumers.” Thus, even in ordinary economic times, a “National Competition Day,” which our government could declare, would be an important manifestation of national policy. An “International Competition Day,” developed in conjunction with other national competition authorities, would be helpful in generating public support for this underappreciated “American” institution across the globe. However, the need for such support is even more critical now when private economic forces and political currents across the globe would supplant competitive markets as the guiding force of the world economy and suspend antitrust enforcement as a hindrance to economic stability. We urge the Administration to stand with political leaders in the advanced and emerging economies to articulate the benefits of maintaining competitive markets through strong competition enforcement.

Sincerely,



Albert A. Foer
President
American Antitrust Institute

cc: Christine Varney
Jon Leibowitz
Lawrence Summers
Austan Goolsbee
Cass Sunstein

“COMPETITION AUTHORITIES OF THE WORLD, UNITE!”

MARIO MONTI

President of Bocconi University
Former European Commissioner for Competition

Keynote address to the American Antitrust Institute Conference “Antitrust In A World Without A Center”

National Press Club, Washington, DC

June 18, 2009*

I wish to thank the American Antitrust Institute and its President Bert Foer for inviting me to open this important conference. I always enjoy being back within the competition community.

The AAI and Bert deserve the praise of the global antitrust family. The task they have set out for themselves is at the same time simple and tremendously difficult: to educate the public about the benefits of competition. Under Bert’s leadership, the AAI carries out that task with vision, determination and effectiveness.

If I may add a personal note, there were occasions, during my term of office as European Commissioner, when I have particularly appreciated the work of the AAI. There had been, as many of you will remember, rare but widely publicized cases of transatlantic divergences in antitrust decisions, to which I will refer below. Some US political circles and media were quick to portray the Commission as “paleo-socialist” or driven by EU trade interests (or even by “European imperialism”!). In those days, the competent and articulated positions quietly issued by the AAI helped the American public opinion understand that an enforcement policy like the one applied in Europe, although more vigorous than the one applied by the George W. Bush Administration, was not departing from correct antitrust principles. In the process, those pronouncements contributed to reassuring us in Brussels that perhaps we were not entirely off the mark.

When preparing my remarks for this conference, I was thinking of the last occasion I had to take the floor in Washington on competition policy matters. That was little more than a year ago, at the 2008 Spring meetings of the American Bar Association’s Antitrust Section. I was on a panel with former heads of the Justice Department’s Antitrust Division and of the Federal Trade Commission. My American colleagues and I were asked to offer antitrust advice to the future U.S. Administration.

At the time, we shared two concerns. One was a recurrent concern in these discussions, i.e. how to overcome divergences in antitrust. The other was more related to the specific economic context that was already looming large, i.e. the new challenges that the crisis might have posed to competition policy.

In retrospect, I would say that the past year has brought about more progress than expected, in terms of convergence. But it has also been confronting competition policy with much greater challenges than were expected, as regards both the seriousness and, most unexpectedly, the origin of

*The author has made edits to the original text.

the threats. In fact, the threats have not come so much from those who traditionally have been challenging the principles of the market economy, but rather from within the latter. In fact, there has been a huge loss of credibility of the market economy itself, of which competition policy is part and parcel.

Linking my two topics, I will conclude that we are fortunate to experience a phase of particularly promising convergence among the competition authorities. For it will be more important than ever for the authorities to be united and to be seen united. At the end of my remarks, I will submit a modest proposal to that effect.

When we discuss convergence in antitrust, we have to take two basic factors into account: structural trends and cyclical movements.

There are long term evolutions about the thinking on antitrust and we have witnessed in the last 10 or 20 years a structural evolution of that nature, more or less everywhere though at different speeds, with an increasing focus on consumer welfare.

But there are also cyclical elements. And the beauty of it is that cycles in antitrust do not manifest themselves to the same extent in all jurisdictions. There are systems that, by their very nature, are less prone to cycles, political cycles in particular. And there are jurisdictions in which antitrust is more proximate to the political process, thus more exposed to political cycles.

At the ABA meeting last year, I observed that the U.S. antitrust system is inherently more liable to political cycles than, for example, the EU system. Competition policy in the EU, entrusted to the European Commission, is much more removed from electoral and political processes than is the case in the U.S.

The *Microsoft* case is an example in point. Often mentioned as an illustration of transatlantic divergences – no doubt there were some – that case exposed even more vividly the magnitude of domestic divergences within the U.S. These have been quite noticeable both over time, comparing the stances taken on the case by the Clinton and the Bush Justice Departments, and over space, looking at the different positions long held by the Justice Department on one hand and a number of State Attorneys General, on the other.

This points, incidentally, to another – less discussed - feature of structural divergence between the U.S. and Europe. Like the whole world, the EU is greatly indebted to the U.S., the country which historically showed the way of antitrust and has long been a model in developing its principles and techniques. However, the U.S. – although it has been a federal entity for more than two centuries – does not yet seem to have resolved the issue of a rational and effective architecture for the antitrust institutions. Two federal agencies plus 50 State Attorneys General, without clear rules for competence allocation and conflict prevention, can hardly be regarded as an optimal structure. This explains the growing interest with which the American antitrust community looks at the system which exists in the EU, particularly after the “Modernization” reform introduced by Regulation 1/2003 and the creation of the European Competition Network.

Going back to the issue of convergence in antitrust doctrine and enforcement, the year or so since the 2008 ABA Spring Meetings has seen - within the U.S. or, to be more precise, within this city – unprecedented developments: first, an explosion of divergence, quickly followed by a policy shift

that augurs well for greater convergence on a broad spectrum: within and between the two U.S. federal agencies, between the U.S. and the EU, and at the global level.

The “explosion”, first. In September 2008 the Department of Justice issued a report on “Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act”. In an unusual manifestation of dissent, three of the five Commissioners of the Federal Trade Commission publicly criticized the DOJ report.

But only a few months later Christine Varney, the new Assistant Attorney General for Antitrust, appointed by President Barack Obama, introduced a remarkable policy change. In a speech on 11 May 2009, AAG Varney underlined that the September 2008 Section 2 Report, reflecting the practice of the DOJ during the Bush Administration, “advocates extreme hesitancy in the face of potential abuses by monopoly firms. We must change course and take a new tack. For these reasons, I hereby withdraw the Section 2 Report by the Department of Justice. [...] The Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community”.

Seen from Europe, this is a very important development. The doctrine that has now been revoked was in fact at the roots of some divergences observed between the U.S. agencies and the European Commission in the area of unilateral conduct (or abuse of dominant position, in EU terminology), as in the *Microsoft* or *Intel* cases. The new approach by the DOJ should facilitate the long-overdue convergence between these two key jurisdictions. In turn, that is likely to have a positive impact in terms of convergence worldwide via the International Competition Network (ICN).

It has to be said that convergence between the U.S. and the EU might turn out to be less straightforward, if one takes into account the crucial role of the respective Courts, whose orientation in this area is usually less interventionist in the U.S. and more formalistic in the EU. But the agencies have shown a willingness to depart from the current rather extreme positions of the Courts towards a more central stance. The Commission, under the leadership of Commissioner Neelie Kroes, has adopted in its “Guidance on enforcement priorities in applying article 82 on abuse of a dominant market position” (December 2008) a more effects-based approach than the one followed by the EU Court of Justice. The Justice Department, at the initiative of AAG Christine Varney as mentioned above, has withdrawn the Section 2 Report with its remarkably non-interventionist stance.

While every step towards greater convergence is to be praised, we must be aware that, in a world of multiple jurisdictions, perfect convergence in each and every enforcement decision will never be assured. Hence, the key importance of what I regard as a crucial chapter in any “dream book towards perfect convergence”: the appropriate handling of divergences, whenever they unfortunately do occur. In the jargon of economists, I would say that any divergence, besides its consequences in the specific case where it occurs, also generates “externalities”, or spillover effects on the broader pattern of inter-agency cooperation. While the net external effect will tend to be negative, a constructive handling of the divergence can, first, minimize the size of the negative component of the external effect by keeping to a minimum the psychological and political tensions triggered by the divergence; and, secondly, generate some positive externalities as well, in particular by stepping up cooperation efforts and, to begin with, a joint analysis - in a non confrontational spirit - of the factors that may explain that specific divergence and how to avoid that in the future.

I believe that in the round-table chaired by Eleanor Fox this afternoon on “Antitrust in a World without a Center”, we should also discuss this aspect, i.e. how to handle divergences. During my years in office, I was fortunate enough to be among the actors of an unprecedented movement of convergence, not only bilaterally between the U.S. and the EU, but also multilaterally with the creation of the International Competition Network. At the same time, I could not avoid being deeply involved in two cases of transatlantically divergent outcomes. So I had the opportunity to reflect in depth – from within, I should say – on better and worse styles in handling divergences. Of course I cannot pretend to be a neutral observer in this respect, but I would be inclined to say that - if we look at the two main divergences, on *GE/Honeywell* in 2001 and on *Microsoft* in 2004 - there has been a learning process, probably on both sides, as regards the smooth handling of divergences.

While the topic of convergence or divergence among jurisdictions is always, and rightly, very much discussed within the competition community, today that topic is dwarfed by another issue to which I will now briefly turn. I refer to the threats that the current economic and financial crisis poses to competition enforcement but perhaps also, more broadly and deeply, to the perception of “competition” as a value by public opinion and political circles.

Vigorous enforcement has never been an easy or popular task. Nor has competition as such ever been acclaimed by the crowds as their loudest request to governments. But since the days, after World War II, when antitrust began its journey from the U.S. to be gradually introduced around the world, never was there a time when the threats to competition had been as severe as today. This is due not only to the seriousness of the threats, but also to their unexpected origin.

My impression is that we are not just facing a very serious crisis. This crisis changes the nature of the challenges to competition policy. We all remember many conferences over the years, at the OECD and elsewhere, on the pressures exercised on competition policy by other policy objectives, in particular industrial policy; on how other legitimate policy objectives could be pursued while respecting competition policy; on the never-ending need for competition advocacy, also to protect the integrity of the competitive process from alien incursions. These were a few, well identified, circumscribed challenges to competition policy.

But now, at least in my reading, it is the very principle of the market economy that is profoundly challenged. I am aware that many would not subscribe to this bleak view. After all, they say, since the fall of the Berlin wall there is no structured system that could provide an alternative to the market economy. There may be diverse manifestations of the market economy, but there is no realistic alternative to it.

I do not agree with this flexible and optimistic view. Perhaps I am too demanding, when it comes to the definition of a market economy. But I am not sure that an economy where – due to massive and rather chaotic interventions by governments in response to the crisis - there is considerable blurring of borderlines and responsibilities between the State and the market, between government and companies, still qualifies as a market economy.

The confidence in the market economy has been shaken by the crisis. The loss of credibility has been compounded by the fact that the departure from the principles of the market economy has been particularly abrupt and massive in the U.S., the leading advocate of that economy.

Those who, say in Europe, have the task of keeping the behavior of companies and even of national governments in line with the rules of the market economy, including competition, always found it useful in the past to point to the U.S. as a key reference. The U.S. and the EU may have had occasional divergences, but European policymakers, including at the national level, have always been keen on not being seen to depart too much from the good practices of the market economy for which the U.S. was the guiding star.

Compare that situation with the one that intervened in the Summer of 2008 in response to the crisis. Well, I am afraid there was something well founded in the editorial of the U.S. edition of “Time Magazine” of 21 September 2008, ironically entitled “How we became the United States of France.” It said, amongst others, that what had been done in the U.S. in the previous weeks, in terms of socializing the economy, was many times bigger than what President Mitterand did in France in 1981-82, which elicited loud criticisms by the U.S. at the time.

If even the U.S. felt free, or compelled, to do what it did!... so goes the argument increasingly used in Europe and elsewhere. The new situation of the past year or so is - in the minds of many European politicians, businessmen and organized interests - a whistle signal for the beginning of a re-creation, away from a well established and rigorous order. And it is perhaps no coincidence if the government of the most “Anglo-Saxon” country in the E.U. and traditionally the most adamant about rigorous and non-political competition enforcement, the U.K., made a wild departure from that line in the *Lloyds-TSB/HBOS* merger case, by simply invoking the national interest, over and above any competition concern.

It would be a paradox if, after so many fruitful efforts to converge on a standard of consumer welfare, public opinion and politicians forced a shift in competition policy towards a sort of *producer-welfare* standard, whereby in emergency conditions the interests of firms and their workers take priority. Should this trend goes on, it would represent a major setback for competition policy.

May I note another paradox, if we move to the global dimension of competition policy. Over time, the community of antitrust agencies has achieved substantial progress not only in terms of bilateral cooperation but also, mainly through the ICN, in terms of multilateral cooperation. I am delighted that we have with us at this conference John Fingleton, chairman of the ICN, and I am proud to have conceived and set in motion the ICN at the beginning of this decade, working closely with our U.S. colleagues. If we look back, we can say that there has been indeed, in the area of competition policy, a very early movement towards forms of soft coordination.

With the financial and economic crisis, the world has belatedly realized that there is a need for global governance, with appropriate principles, instruments and practices. There has been a flourishing of coordination initiatives in the context of the G-8, the G-20 and other fora. Unless I am wrong, however, one cannot find in those texts a single word on antitrust or competition. Is that a bad or a good thing? To me, the answer is not clear.

Perhaps that is a good thing. If one has a vision of the competition authorities as being, of course, subservient to the public interest, but not submitted directly – in their decision making - to the authority of national governments, then it is appropriate for the agencies to go on with parallel, like-minded forms of cooperation like the ICN, without being encapsulated in a more organic framework of structured intergovernmental cooperation.

That, however, brings with it a major risk: that the voice of the competition authorities might not be heard, let alone listened to, as much as it would be necessary in the present circumstances.

The current crisis has shown the need for more effective regulation of markets and, in particular, for more vigorous enforcement of existing rules by authorities willing and able to resist regulatory capture. It would be a paradox if the most established form of market regulation, competition policy, were to emerge from the crisis weakened. But the risk is there and calls for joint action by the world's key competition authorities.

In the U.S., Europe and elsewhere, governments' response to the crisis has put severe stress on traditional principles of competitive markets. State aids, government-supported consolidation in the financial sector, derogations to normal merger control rules, have been the most visible manifestations. In addition, there are calls to push usual antitrust concerns to the side, as if competition were a luxury, unaffordable in times of crisis.

So far, competition authorities have not given in to such pressures. In the EU in particular, Competition Commissioner Neelie Kroes has consistently enforced antitrust and state aid rules (only in the EU do the latter exist and form a key part of the competition authority's mandate). While showing some flexibility on government support in emergency situations, Ms Kroes is determined to exercise strong control when it comes to restructuring so as to minimize the distortions to competition caused by state aid.

Yet, as the economic and social consequences of the crisis unfold, the calls for a suspension or weakening of antitrust enforcement are likely to become stronger everywhere. Such arguments might appear altogether reasonable to the public, and it is precisely here that the danger lies. In fact, this would be misguided economic policy. Not only would consumers be penalized, but the longer-term prospects for economic growth and employment would also be compromised. Joseph Schumpeter's process of "creative destruction", conducive to innovation and development, would be turned into its opposite: "destructive conservation". Social policies, not a suspension of competition policy, must ease the transition.

The lessons from the Great Depression are clear. The suspension of antitrust enforcement contributed to the depth and duration of the crisis. The return to vigorous enforcement in 1938 was a cornerstone of the New Deal. The new heads of the U.S. antitrust agencies, Christine Varney at the DoJ and Jon Leibowitz at the FTC, have stressed the importance of this historical precedent and the need to avoid new policy mistakes.

There is a need for an intensive campaign of education and advocacy, aimed at the public opinion and politicians alike. In their respective jurisdictions, the competition authorities are showing perseverance in this effort. But their message does not seem to be coming across with the strength and cohesion necessary to have a significant impact on the international debate. At a time when new principles, institutions and mechanisms for global governance are being designed, the global voice of the competition community needs to be heard.

The world's key competition authorities should issue a simple but strong joint pronouncement explaining why continued, vigorous competition enforcement is crucial during the global economic crisis. The EU and U.S. authorities should take the lead, in an open initiative that could then involve

the ICN. Its Chairman John Fingleton is an active promoter of competition advocacy and would no doubt appreciate the urgency of the current situation.

Such an initiative would be facilitated by, and give added visibility to, the convergence process among competition authorities, described above.

A joint statement in support of strong antitrust enforcement, issued by the leading competition agencies, would be helpful in itself. If, in addition, it were endorsed by the U.S. Administration, a message would come from Washington that the government's current extraordinary role in various sectors of the economy is temporary; that stricter regulation of financial markets is not inconsistent with market principles; and that competition enforcement is part of the solution to the crisis.

The American Antitrust Institute, as part of its relentless advocacy in favor of competition, might wish to consider how it could best contribute to promoting such a collective effort.