ANTITRUST ENFORCEMENT: FROM SUNLIGHT TO SHADOWS?

Donald I. Baker[1]

Baker & Miller, PLLC

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Thanks indeed for giving me this esteemed award. And double thanks for selecting me for an award that honors the legacy of my old friend and esteemed Cornell colleague—Fred Kahn. I am grateful for this chance to join some much admired friends on the AAI Honor Roll.

For me, it all started 55 years ago—in the Fall of 1960—when I walked into Don Turner's Antitrust class at Harvard. It was a great class by a professor who brought a thoughtful, clear and pragmatic economics approach to a subject that needed more of this. But my interest and commitment to antitrust really took off the next year when my English wife and I moved back to London, where we felt first-hand what it was like to be young consumers in a much less competitive economy. I thus became persuaded that antitrust was much more than just a very interesting law school course—that it was a still uniquely American public policy which had the potential of making a difference for ordinary folks at home and abroad.[2]

 Mr. Baker wishes to express his special thanks to Michael B. Ferrari (George Washington University J.D. 2015) for his extensive research efforts and to Geoffrey H. Kozen (American Antitrust Institute) for his patient and insightful editing of this paper.

[2] The same year, working with a major firm of British solicitors gave me an up-close vision of European competition law in its infancy. As I struggled to decipher the initial drafts of the European Commission's first major antitrust regulation faxed over from Brussels in French, I could not possibly have imagined that I was being introduced to what, would become the world's most important enforcer against big international monopolies and mergers.

From London it was back to Boston—for the challenge of advising clients on how to conduct their businesses in an era of antitrust expansiveness by the Supreme Court, and the biggest wave of private antitrust litigation in the U.S. courts—the famous *Electrical Equipment* cases following on from the Justice Department (DOJ) prosecution of the notorious GE-Westinghouse price fixing conspiracy.[3]

In 1965, much to my cheerful surprise, President Johnson nominated Don Turner to be the Assistant Attorney General in charge of the Antitrust Division at DOJ. This was a major departure from the past and turned out to be a game changer for the Division. Don became the first in a long succession of AAGs who came to the job with extensive antitrust experience and reputations.

The Turner appointment turned out to be a game changer for me, too. Even though we loved Boston, I could not resist the temptation to join Don's Policy Planning staff in Washington when given a chance to do so in 1966.

It was great fun from the first day at DOJ to work with such a talented team on projects that were often novel, highly visible, and really seemed to matter.[4] Thus I had the chance to work closely with a future Economics Nobel Prize winner (Ollie Williamson) on a major aerospace merger, where we successfully persuaded Don Turner to bring the case, only to be overruled by the Attorney General. Later I also worked closely with future Justice Steve Breyer on the first guidelines ever issued by any antitrust agency (i.e., Don Turner's 1968 Merger Guidelines). I remember thinking one quiet, sunny afternoon that: "This is more fun than I've ever had and they're actually paying me to do it." (Indeed, the government was even paying me quite well—as a GS-13, I was making a bit more than what parsimonious Boston law firms were still paying their mid-level associates in 1966!)

Since arriving at the DOJ almost half a century ago, I have lived through a complete swing of the antitrust enforcement pendulum. Ideologically, we have gone from the "Government always wins" era of unvarnished populism in *Von's Grocery* to an era of economic fundamentalism found in, e.g., *Pacific Bell v. linkLine.* (where any

[3] In 1960, General Electric, Westinghouse, and Allis-Chalmers had pleaded guilty, as had other equipment manufacturers, to fixing prices on a large range of equipment needed by electric utilities. Four individuals were also indicted and for the first time an executive of a major U.S. corporation received a jail sentence under the Sherman Act. Richard Austin Smith, *The Incredible Electrical Conspiracy*, Fortune (Apr. 1961); *See also* Richard Austin Smith, *The Incredible Electrical Conspiracy (Part II)*, Fortune (May 1961).

[4] My first assignment was to brief and later argue what would become the FCC's famous *Carterfone* case*,* resulting in the decision that broke the telephone companies' historic prohibition against customers providing their own telephone equipment. *In the Matter of Use of the Carterfone Device in Message Toll Service***,** 13 FCC 2d 420 (1968).

common law concept of fairness seems to have been abandoned).[5] Globally, we have gone from U.S. antitrust enforcement being the only game that mattered, to today's complicated, multi-polar enforcement world where Brussels and Beijing often seeming to be more activist than we are, thereby sometimes becoming bigger sources of U.S. clients' antitrust concerns than Washington is. These fundamental antitrust trends are so familiar that I won't say more about them today.

The Emergence of a Less Visible Enforcement World

Instead, I want to turn to another broad trend that concerns me but seems to have attracted little comment—namely, how two basic enforcement choices have made U.S. antitrust enforcement less visible to the public and hence less important politically than it was when I was in the Government four decades ago.

Back in the 1970s, most really important antitrust enforcement took place in public before Federal Judges or in FTC hearings, based on previously filed charges by the Antitrust Division or the Commission staff. At DOJ, we didn't negotiate with prospective defendants before serving them with a criminal indictment or major civil complaint.[6] The practical result was that the business community, their legal advisers, the general public, and interested journalists got to see an uncompromised version of what we believed to be illegal in the context of a particular factual context that we had alleged. This was true even when the case was ultimately resolved by consent decree or a criminal plea, without a public trial before a Federal Judge and jury.

Today the process is fundamentally different. At the DOJ, there are two major areas of enforcement activity—investigating cartels and reviewing mergers. The efforts almost invariably result in a plea bargain (or a "no prosecution" decision) on the criminal side, or some form of consent decree or other agreement to allow the competitively-sensitive merger to go forward subject to some token divestitures. Merger reviews at the FTC are generally resolved in the same way. Of course, most mergers are cleared by DOJ or FTC without any changes.

Now, when the Government investigates a merger or some other potential civil antitrust infringement, the first public result of its closed door negotiations with the target(s) is an agreement and Government press release touting the result, plus a simultaneously-filed complaint covering only the antitrust wrongs that the Government

[5] 555 U.S. 438 (2009). To its great credit, AAI briefed and argued the losing side of this case involving a monopolistic price squeeze.

[6] Normally, we gave counsel for the target(s) in a proposed case the chance to come in and explain to the AAG and/or senior staff what was wrong with our potential case, factually or legally. Sometimes such pitches were successful in talking us out of the case entirely or at least persuading us to narrow or revise our allegations.

alleges are being corrected in a civil consent decree, because a broader claim would call into question the adequacy of the agreed relief. In addition, the DOJ (but not the FTC), has to submit its civil consent decree to a District Judge together with a so-called "Competitive Impact Statement" explaining how the consent decree resolves the competitive violations alleged in the simultaneously-filed complaint. Most District Judges have approved merger settlements on an almost pro forma basis, having little influence of the process and attracting little public notice.[7]

With a criminal investigation, the explanation of the challenged wrongdoing is even more limited. The DOJ files a criminal information in court in support of the accompanying plea agreement, but the information is very short and tells the court and the public almost nothing except that the defendant has violated the Sherman Act. The recommended sentence in the plea agreement is normally less than would be called for under the Sentencing Guidelines; and, if the Judge wants a higher fine or a longer sentence than what is provided in the plea agreement, the Defendant(s) can withdraw prior consent. The judicial hearings on criminal plea bargains also tend to be pro forma (if a Judge rejects the recommended plea, she may be sentencing herself to a long antitrust jury trial!).

In a merger and cartel investigation, the FTC or the DOJ seldom explains why it has decided not to take any enforcement action at all. There is simply no basis for informed public debate over (i) why the Government has allowed a merger between major direct competitors to go ahead with no significant divestitures; or (2) why DOJ did not charge some individuals who seemed central to the conspiracy covered by a corporate plea agreement. These are not new issues, but they have become more immediate and important at a time when the government is relying so heavily on consensual remedies.

By the same unfortunate token, we are generally told nothing when the DOJ or FTC has undertaken a substantial merger investigation that ultimately persuades the parties to abandon the transaction after many months of intensive investigation and press speculation (e.g., Comcast-Time Warner in April 2015). The public and the

[7] While judicial reviews of consent decrees under the Tunney Act are intended to take into account "the public interest," the case law seems to have pretty well established that what is in "the public interest" is to be determined by the agency that is cutting the deal with the settling party. *See, e.g.*, *United States v. Enova Corp*., 107 F. Supp. 2d 10, 17 (D.D.C. 2000); and *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981) ("The court's role in protecting the public interest is one of insuring that the government has not breached its duty in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.")

antitrust community would be well served if DOJ or FTC were to issue a press release or make a speech explaining what the competitive concerns were that caused it to make such a substantial investment of investigational resources in such a high-visibility transaction. This happens now in every such case before the European Commission, where even an approval of a transaction can be appealed by a complainant.

Antitrust enforcement has also become so much less visible since the 1970s because the DOJ and the FTC have largely abandoned monopolization cases against prominent defendants (like IBM and AT&T in the 1970s and Microsoft in the 1990s). These big cases against famous targets always attracted a lot of public interest and press attention.[8] The keen press interest in the recently leaked FTC staff recommendations about a Section 2 case against Google underscores how monopolization claims against a familiar corporate giant can make Government antitrust enforcement a more prominent subject for public and professional interest and dialogue.

Why Did the Shift to Pre-filing Settlements Come About?

Two basic procedural changes that seem to have been the main drivers of the new system: Congressional enactment of a pre-merger notification system in Title II of the Hart Scott Rodino Act in 1976, and the Antitrust Division's adoption of its amnesty program for cartel whistleblowers in 1994. Each of these developments has had practical consequences going way beyond anything that we anticipated at the time they were adopted.

1. The HSR Act Completely Changed the Merger Review Process from: (i) a post-consummation *litigation* program involving a relatively few challenged transactions into (ii) a pre-closing *administrative* program where DOJ and FTC review almost every significant merger and have a lot of enforcement power. Merging parties suddenly had to get their ticket punched by a government agency before they could proceed, and the agency staff were given a license to hold up a merger while it engaged in an elaborate search for evidence. Before 1976, the merging parties' just rushed ahead and tried to close, forcing the Government to try an often-unsuccessful preliminary injunction motion based on a sparse, hurriedly-assembled record. Once the merger has been consummated though, the Government's only positive choice was

[8] Indeed, when *U.S. v Microsoft* was being tried in Washington in the late 1990s, I was asked to give a speech explaining the case to what turned out to be a well-attended lunch of the local Chamber of Commerce in my second hometown of Crested Butte, Colorado!

to go on litigating publically. Thus, the HSR Act gave both sides the incentives and tools to try resolve any competitive problems by negotiation, rather than prolonged negotiation: the private parties could hold time sensitive deals to together and the Government could save resources.

2. The successful DOJ amnesty program completely changed criminal antitrust enforcement. DOJ staffs no longer had to painstakingly assemble a price-fixing indictment using grand jury testimony and subpoenaed documents. Since 1994, DOJ's promise of rich rewards to the initial whistleblower (including criminal immunity and reduced private damage exposure) has turned out to be a fertile source of turncoats who have become the source of almost every DOJ investigation of price fixing, bid rigging, or market allocation. Now, armed with an insider's evidence of the conspiracy, the DOJ staff enjoy the proverbial "shooting fish in a barrel" situation vis-à-vis the remaining conspirators, with many fish swimming toward them—trying to get whatever "cooperation" credit they can as "second in" or "third in" via a plea bargain.

Interestingly, these unique U.S. innovations of pre-merger notification and cartel amnesty have been widely copied by almost every other significant antitrust jurisdiction around the world—thus generating some increasing global momentum for pre-complaint settlement of merger and cartel cases.

Going beyond these two main drivers of change, my catalogue of factors that have encouraged the shift to a pre-filing resolution of cases becomes more subjective. Budgetary issues, agency staffs' instincts and tactics, and the defendants' goals all seem to be part of the picture. My diverse list includes the following:

- Agency efficiency. In our growing global economy, the U.S. agencies' responsibilities and enforcement opportunities have been growing while their budget levels seem to have remained stagnant at best. Settlements make it possible for the agency to get somewhat positive enforcement results in more cases.

- Stronger statutory weapons enhanced the pressure on targets to settle early. The 1974 felony statute greatly upgraded the fines and jail sentences that the DOJ could seek and often obtain by negotiation or by

success of trial. The 1974 HSR Act meant that DOJ and FTC could slow down time-sensitive transactions.

- Reduced uncertainty via settlement can often seem safer than "rolling the dice" for a corporate board or CEO as well as for the enforcers.

- Less litigation experience among Government lawyers as a result of fewer litigated cases may well cause agency staffs and their supervisors to be more cautious about recommending trial in close merger cases.

- Concerns about a more conservative Federal judiciary may cause staffs and leaders at DOJ and FTC to worry about whether they can win a PI motion in a merger case that is at all close.[9]

- Embarrassment Avoidance. A corporate criminal defendant may be anxious to avoid a very public flogging that can occur when the company or some employee (or ex-employee) is subjected to a high visibility trial at which eye-catching evidence can be paraded by the prosecution (as is happening right now with the LIBOR criminal trial in the Crown Court in London[10]).

- DOJ reluctance to start de novo grand jury investigations. The traditional targets of antitrust criminal enforcement (contractors, highway pavers, and other service suppliers in local markets) are largely getting an antitrust pass today, while DOJ pursues bigger targets and bigger fines in international cases being turned up by its successful amnesty program. Yet the amnesty program only works if those in a market feel a real risk of being prosecuted; and thus, by largely ignoring local domestic service markets, DOJ remains unlikely to generate amnesty applications from them.

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[9] Even in the old days when the Government was winning all the time in the Supreme Court, District Judges tended to be hostile to Government claims of potential future anticompetitive effects under what they regarded as a strange "may be" anticompetitive effects statute. Indeed, historically private corporate takeover targets that survived standing challenges, apparently had a higher winning percentage than the Government in preliminary injunction actions, perhaps because the adverse *community* effects often tended to be clear. *See* high visibility triumphs for takeover targets in *Marathon Oil v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981); *Grumman Corp. v. LTV Corp*., 665 F.2d 10 (2d Cir. 1981); and *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir. 1989).

[10] Kirstin Ridley, *First Libor defendant faces jury trial in London*, Reuters Business News (May 21, 2015) *available at* http://uk.reuters.com/article/2015/05/21/uk-trial-libor-hayes-idUKKBN0O61TY20150521.

How Could U.S. Enforcement Become More Visible and Effective?

Some thoughtful observers may think the present system of pre-complaint, pre-indictment government antitrust cases is just fine. I don't.

The switch to a pre-filing system of case resolution makes the whole enforcement process a lot less transparent. Antitrust lawyers, business enterprises, the public, and the press no longer have the helpful guidance of seeing yet-uncompromised Government allegations of antitrust infringements, based on actual civil or grand jury investigations, and then being able to see how those claims are won, lost or settled in a courtroom or at the FTC. Instead, the public gets to see the pre-packaged fruits of a non-public negotiation process between the government lawyers and the experienced counsel for those under investigation--without the public knowing what input, if any, the Government had received from third parties seeking stronger Government enforcement action. This has become a secret "uncommon law" regime.

Less visibility necessarily results in less public interest or understanding about what is going on—and less opportunity for timely consideration of possible unintended consequences of the settlement on other stakeholders or the general public. In the old days, the press and the specialized antitrust services would report and sometimes analyze the initial Government complaint or grand jury indictment; then they would continue to report on evidence produced in the Government's trial and/or settlement of the case. Win, lose, or draw, developments in an important pending case would be reported by the press and specialized services. And those of us in the Government would sometimes give speeches or interviews in which we commented on a pending case, in the hope of educating the bar and the business community about our real concerns and interests.

We no longer see the Government spell out what it regards as illegal in the particular factual circumstances alleged in the complaint and instead we only get to see a narrowed and somewhat oversimplified version of the Government's claims, just enough to justify its proposed civil settlement or criminal plea bargain but often not enough to de-mystify the rationale for the bargain. Even with a large criminal conspiracy, operated over many years, the pro forma criminal information filed with the plea bargain is so sparse as to be almost useless as a guide of what the Government has disclosed.

Today, I think antitrust has become increasingly perceived as a *regulatory silo,* in somewhat the way that securities, banking, or telecommunications regulations are—rather than being seen as some broad and positive public policy enforced by judges in public proceedings in court. In other words, the Antitrust Division now looks more like the SEC on its law enforcement efforts than it used to when I was there. The private

lawyers representing parties involved in Government antitrust investigations seem to be increasingly concentrated in Washington, where much of their expertise is derived from having represented the same and other clients during prior non-public investigations and settlement negotiations. These are the small cadre of people privy to the “uncommon law” of the agencies.

Also, antitrust seems to have less moral force than it used to have when broad public support rested at least in part on the idea that the Sherman Act was a legal tool to "keep the big boys honest," and so today’s enforcement shortcomings in dealing with the LIBOR and foreign exchange traders seem to generate less political indignation they would have done in the 1970s. With less information to write about or discuss, there is simply less basis for rational debate among those interested and committed to the field. These are some of the familiar features of a new, 21st century, form of "regulatory capture."

Look for example at what happened with Antitrust Modernization Commission in 2005-07: an experienced panel of antitrust professionals, selected by the Congress and the President, ended up after two years of study producing a Final Report which seemed to me to be a rather tepid endorsement of the status quo, with just a few narrow proposals for change.[11] (The “enforcement below the radar” issue I am discussing is something that the Commission *could* have devoted some serious attention to, but did not do so.)

The longer-term political consequences of this trend worry me a lot.

The more antitrust is being perceived as just another one of those specialized regulatory regimes in Washington, the more the general public’s interest in and support for antitrust enforcement is likely to be eroded. Less public support is likely to adversely affect funding for DOJ and FTC over the long term, and it may also make it harder to recruit capable professionals who are motivated by a public mission and work hard for less money. Remember—and this is crucial—there is no focused constituency in favor of antitrust as a basic public policy (as there may be when banks, or insurance agents, or telecom companies are involved). The goal of antitrust is to make *a small difference for a lot of people,* and these numerous beneficiaries scarcely notice either the causes or effects involved.

This means that antitrust enforcers and those of us who support antitrust as a good public policy (as I have since 1961-62 in London!) must do more to make sure that the press, the thoughtful public, and the politicians have a reasonable

[11] Antitrust Modernization Commission, *Report and Recommendations* (Apr. 2 2007) *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

understanding of what is going on in the enforcement arena and the courts and why it is significant for them.

That being so, I want to make a few modest suggestions—which I hope will generate more suggestions and reactions from the agencies themselves and thoughtful observers of the antitrust mission.

- Increase the funding for FTC and DOJ antitrust enforcement. This is the most obvious suggestion I could make, but is pie-in-the-sky, given today's anti-government political environment on Capitol Hill. The basic truth is that settlements and plea bargains are frequently the agencies' effort to get at least half a loaf (and maybe more) in as many markets as they can. With more resources, they could sometimes hold out for more relief or higher fines in settlement negotiations, and thereby generate more trials than they feel able to do now.

- Pre-complaint negotiations should shift from being an *almost always* tool to a *sometimes available* alternative. The government's message could be "*if you want to come in fairly early and make us a promising offer to resolve our concerns in a civil case, we will certainly be willing to negotiate some effective relief—but the longer our investigation goes on, the more likely we are to have sufficient evidence of anticompetitive effects to justify a complaint. In such circumstances, further negotiations may still be resumed once we are in court."*

- Tougher bargaining in merger investigations could generate more public litigation or broader relief. The Government should often be seeking broader relief on the theory that the merging parties rather than the investigating agency should bear more of the burden of uncertainty over whether the contemplated relief will be effective. Alas, we all know about sad stories where the Government staff negotiated for an insufficient amount of divestiture and/or the acquirer of the divested assets turned out to be under-capitalized, inexperienced, or just weak kneed.[12]

- Preserving the acquired firm as the enforcers' goal in more investigations will tend to generate more litigated cases and/or more transactions being abandoned. In merger investigations, the Government ought to be more attentive to situations where effective competition may well depend on preserving the acquired company as a going concern, rather than accepting a divestiture package to "solve the clearest competitive

[12] *See* John Kwoka, *Mergers, Merger Control, and Remedies* (2014).

problem(s)". Look at DOJ's huge success—as it has turned out—in blocking the AT&T/T-Mobile merger in 2012. T-Mobile has turned into really dynamic, price-cutting competitor to what clearly would have become the AT&T-Verizon duopoly had the merger not been blocked. Overall, however, I believe that the U.S. enforcers should have been more sensitive to competitive importance of preserving more large and important competitors (such as US Airways or Continental Airlines), rather than permitting them to be chopped as an antitrust settlement in an already concentrated market.

- Fewer plea bargains. There may be less reason to engage in pre-filing negotiations where crimes rather civil infringements are at issue: the Government's interest is in obtaining just punishment for past wrongs, rather than elimination of potential anticompetitive effects in the future.

- Tougher plea bargains. As a way of reducing its dependence on corporate plea bargains, DOJ could sometimes seek higher corporate fines, assert broader charges in time or scope, carve out more individual executives from the corporate plea deal, while continuing to insist on guilty pleas (as the Antitrust Division generally does). Such action will tend to lead to more public trials, because defendants will have less to lose by taking the risk of a trial.[13]

- Indicting and trying some cartel ringleaders. Ever since I was AAG, I have strongly believed that catching, charging, convicting and punishing individual conspirators is critical to the antitrust mission. These individuals are often self-serving opportunists who seek higher rewards and promotions for themselves by rigging market results. They don't tend to worry about some distant shareholders being socked with large antitrust fines and treble damages.[14] If they worry at all, it is about being caught and punished *themselves*. DOJ could respond to this reality by indicting some ringleaders and then insist on publicly trying at least a few of them,

[11] It has been widely reported that the reason why the recent AU Optronics LCD case went to trial in San Francisco (and produced a "record" $500 million Sherman Act sentence) was because the Antitrust Division had been pressing for a fine of $1 billion in the pre-indictment plea negotiations.

[14] Although shareholders theoretically shoulder the burden for employee-generated wrongs, (a) they are essentially innocent and whatever burden befalls them has almost no deterrent value, except perhaps to encourage management to install better antitrust compliance programs; and (b) too often share prices actually go *up* in the wake of the large plea bargain fine because investors tend to care more about uncertainty than fine levels.

as a way to keep DOJ's anti-cartel message alive and visible among potential wrongdoers and the public at large.[15]

- Start a few de novo grand jury investigations in domestic markets. The traditional targets of antitrust criminal enforcement (contractors, highway pavers, and other service suppliers in local markets) are largely getting a pass today, while DOJ pursues faraway suppliers of industrial components and chemicals that have deeper pockets and are being turned up by DOJ's successful amnesty program. Yet amnesty seekers generally only come forward when they feel a real risk of their conspiracy being prosecuted; thus, by largely ignoring local domestic service markets, DOJ remains unlikely to generate amnesty applications from potential turncoats within them. Beginning a few investigations likely to generate cases against locally visible culprits should expand the geographic frontiers of the amnesty program. Some local criminal prosecutions could make government antitrust enforcement more immediate and relevant to the American public than it now seems to be.[16]

- More public explanations of important enforcement situations where no formal action is ultimately taken. Merger reviews present a good opportunity for clear improvement. When DOJ or FTC undertake a major investigation (complete with a "second request"), but ultimately decide against any enforcement action, they could be required to publish a summary of their reasons for reaching this result (just as the European Commission regularly does with mergers). Similarly, when DOJ or FTC launches a major merger investigation that ultimately causes the merging parties to abandon the transaction (as with recent Comcast-Time Warner proposal), the agency could be encouraged by a Congressional oversight committee to provide an explanation of its initial competitive concerns which caused it to make the serious commitment of agency resources.

My ultimate sense is that public enforcement is essentially different from private litigation. Public policy solidly supports settlement of private litigation because a settlement reduces the burdens on the judiciary as well as on the litigants—and this is

[15] As far as I can determine, no ringleader in a cartel case has been denied access to the leniency program and put on trial, despite the statement in the leniency guidelines that leniency is not available to ringleaders

[16] This is a logical thing for the state attorneys general to do under their own Sherman Act-like laws, but they seldom seem to have wanted to undertake such efforts. By contrast, in Europe, the national competition authorities in the EU have been quite active in prosecuting cartels in local services (transportation, construction, etc.).

why we have an established *settlement privilege* in the United States. *Public enforcement is different,* because we do have a broader*,* common law-based interest in having at least some cases actually tried in public, as a source of deterrence, guidance, and precedents for market participants, while acting as a potential check on possible Government overreaching (e.g., on jurisdiction).

The International Dimensions Have Become Critical

Antitrust has truly gone global. In the past 25 years, more than 100 new antitrust regimes have been created around the world, often with firm encouragement or insistence of the World Bank, the IMF, and European Commission—each of which could make important benefits contingent on a nation adopting a competition law and having an enforcement mechanism. Some of these new regimes are in tiny jurisdictions such as Malta or the Maldives, but others are large and very important countries (with China as the clearly most conspicuous example).

This amazing development in a very short time has made the issues that I have been discussing about public information and access even more important than they would be if antitrust enforcement were still a virtual U.S. monopoly, as it was back in 1960.

Now we regularly have an antitrust agency in one nation making major decisions that critically affect other nations' enterprises and citizens. In cartel enforcement, the U.S. Justice Department that has been bringing almost all of its major criminal prosecutions against Asian and European enterprises and their employees. In anti-monopoly enforcement, the process has worked the other way—with the European Commission imposing record corporate fines against U.S. global leaders that the U.S. has declined to prosecute (such as Intel).

Today's example is Google, where the FTC had decided against prosecution back in 2012,[17] while the European Commission is moving ahead full steam.[18] On

[17] The FTC staff recommendation that the Commission bring a monopolization case against Google, dated August 8, 2012, is one of the most interesting antitrust documents that I have seen in years. This detailed analysis of both facts and law (in 160 pages) inadvertently fell into the hands of the Wall Street Journal, which has recently made it publicly available. FTC Memorandum on Google (Aug. 8, 2012), *available at* http://graphics.wsj.com/google-ftc-report/img/ftc-ocr-watermark.pdf. The version that the Journal obtained only has *even numbered pages,* but these are more than sufficient to give one a pretty clear picture of the proposed case and the staff's conclusion that Google's "conduct has resulted—and will result—in real harm to consumers and to innovation in the online search and advertising markets." Whether the release of this internal FTC document will induce the Commission or some participating Commissioner(s) to explain further the considerations that went into an apparently unanimous

merger enforcement, the cross-border in-roads have been less dramatic—but it seems that the agencies in Brussels and Beijing may be more willing to block foreign companies' mergers based on domestic market concerns compared to Washington. The European Commission's prohibition of the *GE-Honeywell* merger back in 2001 is the most famous example.

By raising the stakes so dramatically, the globalization of antitrust enforcement has spotlighted the transparency and rule of law issues which I have been discussing. As I have noted, the two big U.S. procedural innovations (premerger notification and amnesty) have been copied almost everywhere; this is gradually leading to more agency efforts to resolve an antitrust investigation by consent agreement prior to issuing a statement of objections.[19]

Fortunately, there is a lot of effective cooperation among the antitrust agencies around the world—both on individual investigations and more broadly on policies. To facilitate this process, the leading agencies have helped create a very useful membership organization, the International Competition Network, to foster dialogue, encourage harmonization and provide a forum for national leaders and their senior staffs to get to know their counterparts elsewhere. Encouraging enforcement agencies not to favor their own national enterprises over foreign ones is certainly a central theme.[20]

Criminal enforcement against foreign companies engaged in international cartels has become the staple for the U.S. Justice Department. The DOJ amnesty

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Commission decision not to proceed with the proposed case is unclear. *Cf.* FTC, Statement of Chairwoman Edith Ramirez, and Commissioners Julie Brill and Maureen K. Ohlhausen regarding the Google Investigation (May 25, 2015) *available at* https://www.ftc.gov/news-events/press-releases/2015/03/statement-chairwoman-edith-ramirez-commissioners-julie-brill (""Today's Wall Street Journal article "Google Makes Most of Close Ties to White House" makes a number of misleading inferences and suggestions about the integrity of the FTC's investigation. The article suggests that a series of disparate and unrelated meetings involving FTC officials and executive branch officials or Google representatives somehow affected the Commission's decision to close the search investigation in early 2013. Not a single fact is offered to substantiate this misleading narrative").

[18] The prolonged EU discussions with Google over possible changes in its business operations were widely reported and went on for several years before the new Competition Commissioner decided to bring the Commission's recent statement of objections.

[19] In the EU, the Commission generally promises a 10% fine reduction in return for an agreement to a consensual resolution an Article 101-102 case.

[20] I am fortunate to have been invited to ICN's annual meetings for 7-8 years. I have much enjoyed the chance to work closely some impressive foreign government officials as a result of being involved in some constructive ICN projects at and between the annual meetings.

program has apparently produced a continuous stream of foreigners willing to turn in other foreigners in order to avoid the risk of U.S. jails and big dollar corporate fines.

Two months ago, the DOJ issued its latest version of a document entitled *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More.*[21] There are 123 cases on this very interesting list. The top 22 (with fines of $100-500 million) are all foreign companies engaged in "international" markets; and there are only 16 U.S. companies on the list at all. Almost all these fines have resulted from plea bargains rather jury verdicts after trial. The same is true of the impressive numbers of increasingly long jail sentences which DOJ has been able to secure for Sherman Act violations: the great majority involved foreigners and were also secured by plea bargains.

All this brings into regrettably clearer focus the current furor over the conspiratorial manipulations of the LIBOR and Foreign Exchange markets by traders at major banks. As everyone here knows, the Justice Department has just entered plea bargains with five leading international banks (including JP Morgan Chase and Citicorp) to pay $5.6 billion in U.S. corporate fines for rigging the FOREX market.

This comes on top of the LIBOR scandal that surfaced at least three years ago. In December 2012, DOJ's Criminal Division secured a non-prosecution agreement with one the same Swiss too-big-to-fail banks (but none of the U.S. ones) in which the bank agreed to pay $1.5 billion in U.S. corporate fines for rigging the LIBOR markets. This was a Criminal Division case based on fraud claims, although DAAG Scott Hammond of the Antitrust Division was present at the press conference. Meanwhile, in 2013 and 2014, the European Commission charged JP Morgan Chase and Citibank with antitrust cartel violations based on LIBOR and fined them a total of 222 million Euros.[22] In April this year, DOJ announced a non-antitrust plea bargain with Deutsche Bank and a fine

[21] DOJ Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, Apr. 22, 2015, *available at* http://www.justice.gov/atr/public/criminal/sherman10.pdf.
[22] In December 2013, JP Morgan Chase and Citibank were fined a total of149.8 million Euros combined for manipulation of the Yen LIBOR rate. Alex Barket et al., *EU Fines Six Groups Including Deutsche and SocGen for Rate-Fixing*, Financial Times (Dec. 4, 2013), *available at* http://www.ft.com/intl/cms/s/0/6fbee1d8-5ccb-11e3-a558-00144feabdc0.html.
In October 2014, JP Morgan, but not Citi, was find an additional 72.2 million Euros in connection with manipulation of the Swiss Libor. Aoife White & Gaspard Sebag, *JPMorgan Gets $92 Million EU Fine in Swiss Franc Probes*, Bloomberg Business (Oct. 21, 2014), *available at* http://www.bloomberg.com/news/articles/2014-10-21/jpmorgan-gets-92-million-eu-fine-in-swiss-franc-probes.

of $775m; and it apparently confirmed that its LIBOR investigation reportedly continues vis-à-vis U.S. participants (presumably in search of a plea bargain).[23]

Last month's FOREX plea bargains represent serious improvement. This time DOJ included Sherman Act charges, charged U.S. as well as foreign banks, secured record Sherman Act fines, and insisted on criminal guilty pleas (rather than just accepting non-prosecution agreements). Bravo to the new Attorney General and AAG Bill Baer!

But the FOREX plea bargain story has one clearly troublesome dimension. *No individual traders or supervisors have been charged,* the way they routinely are in antitrust cases. The sad irony of this situation is underscored by a DOJ press statement released the very next day announcing the that a grand jury had just indicted two former executives of the Japanese auto components company NGK Spark Plug Co. Ltd. The headline in the press release said it all: "*Current and Former Executives of an Automotive Parts Manufacturer Indicted for Roles in Conspiracy to Fix Prices—Investigation Has Resulted in Charges against 90 Individuals and Corporations."*

How could the front page FOREX cases have been brought without indicting the obvious conspirators who carried out the crimes which are being charged as felonies by their employing institutions? Juxtaposed against the *Asian Auto Parts* prosecutorial bonanza, the FOREX situation regrettably echoes Anatole France's famous line about, "The even handed majesty of French justice that denies both rich and poor the right to sleep under the bridges of Paris." But in fact the FOREX comparison is even worse—when many smaller, distant *Asian Auto Parts* culprits are being charged and jailed, not a single one of the cocky participants in the notorious FOREX "cartel" chatroom are being indicted under the Sherman Act for having conspired on a much grander scale.[24]

The LIBOR and FOREX cases turn out to be particularly appropriate opportunities to prosecute individual wrongdoers. I believe that the well-compensated traders down there in the electronic pit tend to be high testosterone opportunists with

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[23] DOJ, *Deutsche Bank's London Subsidiary Agrees To Plead Guilty In Connection With Long-Running Manipulation of LIBOR*, (Apr. 23, 2015), *available at http://www.justice.gov/atr/public/press_releases/2015/313356.pdf.*

[24] The chatroom participants have absolutely no claims to public sympathy. For example, they made damning statements like "FYI I am receiving 3mL on 5.5 Bn of the April 12 fixing so a higher 3m Libor on Wed morning would help me" or "could we pls have a low 6mth fix today old bean?" while referring to themselves by such colorful titles as "The Cartel" and "The Mafia." New York State Dept. of Financial Services, Consent Order, In the Matter of Deutsche Bank (Apr. 23, 2015); Lorcan Rosche Kelly and Suzie Ring, *The Most Cringeworthy Chat Messages From the Deutsche Bank Libor Transcripts*, Bloomberg Business News (Apr. 23, 2015); Geoffrey Smith, *Free money, numptys and mangling - the forex scandal in its own words*, Fortune (Nov. 12, 2014).

strong incentives to earn more money by making some key trading results at least a few basis points better than they would have been in a free market, and each participant shares a common interest with his counterparts in competing institutions, who are equally interested in higher bonuses and bigger promotions. As long as the traders are making lots of money along the way for themselves and profits for their institutions, the game is likely to go on (sometimes with new traders), because the large corporate fines they generate are still not large in relation to the total size of their employing institutions (which have been wards of the Fed or other central banks since 2008). To deter the well-compensated traders, the governments must be willing and able to create a serious apprehension for traders that they face *a clear probability* of actually being caught and then subjected to major, personally painful sanctions.[25]

To make the situation more embarrassing for DOJ, we can see the U.K. Serious Frauds Office now doing what we are not doing over here. At the end of May, the SFO began its criminal trial of an apparent ringleader of the LIBOR conspiracy in the Crown Court in London under a non-antitrust statute. The result has been eye-catching headlines in the British press about opportunism and greed in full color. The trial is also receiving decent coverage here in the U.S. business press.

The key point is that British prosecutors are dramatizing the evils involved and personal risks for future evil-doers in a way that the U.S. is falling down on. If the Attorney General can devote substantial prosecutorial resources to a much-praised effort to police world soccer, how can we give a pass to greedy conspirators engaged in even bigger frauds that more directly affect the United States?

For the Antitrust Division, the LIBOR and FOREX cases so far represent a huge lost opportunity to dramatize the *moral dimension* of antitrust which remains important to the political support for antitrust enforcement among the general public. This moral dimension is so clear in these cases. It really is about what my kids, back when I was at DOJ, would have described as "punishing bad guys for doing bad things."

No better opportunity has recently existed to recognize morality as important in circumstances where it is entirely consistent with sound economics. The brazen disregard for law among the traders, the huge scale of the economic consequences in markets dependent on these indexes, and their employers' reputations in the wake of the 2008-09 crash and government bail outs make this the right case to insist on a public trial of some wrongdoer(s). Moreover, the U.S. may well be the only major country with the clear legal and institutional capability to use its criminal *antitrust* laws

[25] *See* Douglas H. Ginsburg et al., *DOJ Has the Power to Crush Price-Fixers*, USA Today (May 27, 2015), *available at* http://www.usatoday.com/story/opinion/2015/05/27/currency-manipulation-cartels-doj-antitrust-column/27920795/.

to cause prompt alarm among this arrogant gang of free market opportunists on a serious scale. We alone seem able to use competition law to publicly lock up numerous cartel culprits on a continuous basis if we can just identify and catch them.[26] (Other countries may be able to use their anti-fraud laws for this purpose, as the U.K. is doing its current LIBOR conspirator's trial in London.)

At this point, it is still not too late for DOJ to take affirmative action vis-à-vis the FOREX ring-leaders by seeking grand jury indictments and making public requests to the British Government for extradition of FOREX traders still present in the U.K. I truly believe that such an active and visible campaign would do much to enhance public and political support for DOJ antitrust enforcement going forward.

Conclusion: My Own Goals and Hopes

Looking back at half-a-century in this field in which I have been so fortunate to be able work and teach, I now realize how deeply I am indebted not only to Don Turner, but to three of his Harvard Law faculty colleagues whom I never studied with while there—Derek Bok, Phil Areeda, and Kingman Brewster. Professors Turner, Areeda, and Bok all realized and articulately explained that antitrust law must be economically rational in the goals that it pursued, while also being based on rules that would be effectively administrable in the context of our legal system.[27] Professor Brewster anticipated how importantly competition law would become internationally and wrote the seminal treatise on international application of U.S. antitrust law.

Today, I continue to believe that a competitive market will almost always provide the best results for the most people because it encourages innovation, intelligent risk-taking, and efficiency in operations. But, unlike the market fundamentalists, I believe that a rule of law is essential to the effectiveness of competitive markets, just as rules are essential in competitive sports.[28] Otherwise, there are simply too many economic incentives for opportunist market participants to game the system and exploit others

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[26] The U.K. and Ireland have criminal competition law provisions that could apparently be employed against the LIBOR and FOREX traders, but neither county yet has a cadre of prosecutors or judges with experience prosecuting such claims or a record of sentences for those found guilty under them.

[27] I am particularly fond of Derek Bok's insightful discussion about the recently amended merger law—an article that came out while I was still at Harvard. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (Dec. 1960).

[28] This is doubly true in the financial sector, as we found in 2008-09. Competitive incentives can encourage too many institutions to accumulate excessive risks, because riskier investments tend to be more profitable in the short run, especially if combined with corner-cutting on capital. *See* Thomas H. Stannton, *99 Why Some Firms Thrive While Others Fail: Governance and Management Lessons from the Crisis* (2012).

(as Adam Smith famously warned over a century prior to the adoption of the Sherman Act).

Saying that markets need rules is not to say *any rules* will do. I want antitrust rules that are economically rational—rules that can deter clear wrongdoing, while not unnecessarily deterring innovation and imagination in markets. I also think that the rules need to be sufficiently clear that they can be fairly adjudicated by ordinary legally-trained mortals who are neither economic scholars nor antitrust gurus; and that the rules can enable well-intentioned, well-advised business executives to reasonably predict the likely antitrust consequences of the business choices they have to make.

The antitrust enforcement agencies have an important opportunity and responsibility to help judges and legislators articulate and apply workable competition rules that can respond to rapidly changing technology and entrepreneurial visions, especially in new and declining sectors of an economy. What happens when some technical innovation or operational discovery is fundamentally changing the scale necessary to compete effectively in an ever-more interconnected economy, either at home or globally?

The enforcement agencies have the opportunity to lead in what they *actually do* (particularly with respect to mergers, joint ventures, and monopolies). But they can also be influential with what they *say officially*—to courts, to sectoral regulators, or to parliamentary bodies. Finally, they can be helpful to the interested public, the bar, and the business community by offering *practical explanations* of their policies and actions in press releases, speeches, papers, and guidelines—*provided that* these explanations are consistent with what they actually do in making decisions on whether to bring cases or not.[29] Given that there is no organized political constituency championing competition as a public policy, the agency's skill in explaining its policy and its enforcement mission can be very important politically (and much noticed when it is lacking).

At the end of the day, we want outcomes that citizens and their elected representatives can regard as fair, reasonable, and relevant to their lives. In this connection, I feel indebted to our common law legacy of pragmatism combined with a basic sense of fairness. Vague populism has been replaced by enforcement informed by economics, which can make investigations and outcomes more complex and uncertain. But undue concerns for efficient enforcement have driven public enforcement processes underground, out of the public's view. This in my view has drained antitrust of much of its moral force as public policy. It is not too late to move

[29] Incidentally, this was very much Don Turner's vision when he became the chief antitrust enforcer exactly half a century ago.

antitrust back into the public conversation. Indeed, it is the very dynamism of antitrust that has fostered reform, as well as periods of what I regard as ill-advised retrenchment. And I might add that it is the dynamism of antitrust that has brought me so many joys and frustrations as I have been privileged to work on so many interesting projects. What I want and hope for in this ever-evolving area is a more purposeful re-engagement of the sort of public conversation that was prominent in an earlier era.

So I accept this honor not only with gratitude for the honor itself, but with admiration for a unique organization that has worked so hard to articulate and publically advocate antitrust goals which need effective champions if they are to remain vibrant in the 21st Century.