A Q&A with Randy Stutz

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Long-time American Antitrust Institute member Randy Stutz has returned with a promotion. The new president of the AAI spoke to GCR USA about his time at the Federal Trade Commission, the fight for additional funding to the US agencies and what to expect from the think tank's next chapter.

You worked for the past year as an attorney advisor to the office of policy planning at the FTC. What did that role encompass?
I was brought in to help with the FTC's competition advocacy programme, which has been around since the Commission's founding but began in earnest in the mid-1970s. It covers a wide variety of activities in which the commission sort of advocates for competition principles in a variety of different contexts. It could be amicus briefs filed in cases where the agency is not a party. It could be comments before legislatures or in regulatory proceedings. It is a historically very

popular programme and helps the agency inform the public on subjects where it might not otherwise have the opportunity. It is also a tool for actually promoting competition in the economy. I was involved in several competition advocacy areas, including many of the categories I mentioned.

What do you consider to be your most valuable contribution to the agency during your year there?
We did a lot of work internally to set up an infrastructure for tracking antitrust cases that might present viable amicus opportunities and sort of creating priorities for improvements in legal doctrine where the agency could look for good amicus opportunities and be more proactive. A team of folks was working on that, but I helped lead a lot of that effort, and I am proud of those results.

I was also involved in a lot of interesting substantive work involving a range of topics, and I had the chance to collaborate with other agencies on several matters. It was a really rewarding, diverse experience, especially because the office of policy planning has a broad remit and can get involved in a lot of different and interesting things.

You spent over 13 years at the AAI, which frequently advocates on behalf of enforcing agencies before courts. Which challenges did you face crossing over to the FTC's side?
Working for the government is something I have always wanted to do. As an antitrust lawyer who follows the agencies so closely, it was very appealing to be on the inside and see how the sausage gets made, so to speak. There was a lot that surprised me both about being inside the agency in general and being inside the agency right now. You know, recently, there has been a lot of debate and discussion in Congress about agency resources. The agencies are staffed at very low levels by historical standards, even compared to decades ago. There is discussion in Congress about increasing agency funding, or in some cases, constricting the agency's exercise of discretion in how it uses its

funding. One thing I think that stood out and that you can see pretty plainly from the inside is how much resource constraints matter. I came away from the experience as a stronger and more committed advocate to fully funding and fully staffing the agencies because I saw how hard they are working and how important resources are to the basic challenge of fulfilling the mission.

I got to work with a number of career staff and front office personnel with a wide variety of different backgrounds and experiences, and I came away extremely impressed with the calibre of the lawyers and economists that are working at the agency. It is incredibly heartening. These are really smart, really serious people who are working very hard. And I think you're starting to see some of that bear fruit. The agencies have had a number of **victories** over the last few months. We've seen an uptick in wins and some **good news** for proponents of strong enforcement. There has been a lot of change at the agency, probably a lot of that predated my arrival, but I found it to be a very collegial place with a lot of really smart people working collaboratively and effectively.

Republican lawmakers criticised FTC chair Lina Khan's leadership and cited losses in courts to justify their arguments against additional funding to the agency. What would you say to them?
There seems to be widespread agreement that we have real problems in this country with decreasing competitiveness and increases in market power, increases in concentration. So, the idea of reducing agency funding or resources during this time does not make a whole lot of sense at an abstract level. I would also say, just look at a lot of these victories that have come down recently. The agencies are bringing and winning good, strong cases.

A lot of people like to sort of count wins and losses by the start date of the presidential administration, beginning on 20 January, when the president is inaugurated. That really does not make sense. Scholars who do empirical studies, looking at cartel trends and things like that,

usually build in a lag period, because when enforcers take office, they obviously inherit a full pipeline of cases brought during the previous administration. It takes time for agencies to develop their own investigations and bring their own cases. I think some of the criticism of the agencies for some of their losses was really premature, and I don't think that criticism holds up very well in light of recent developments.

AAI has often sided with the FTC's ability to bring standalone Section 5 cases alleging unfair methods of competition. What should we expect from the agency in this regard?

It is important to point out that there are important areas of widespread agreement just about the fact that standalone section five authority exists and what it is designed to accomplish. There has been a lot of talk about the **policy statement** the FTC published in November 2022 on its standalone unfair methods authority. There are areas of overlap between that statement and the 2015 statement. Both of them recognize, for example, that standalone authority reaches incipiency violations and gaps in coverage of the existing antitrust statutes. Because that authority has been dormant for so long, there is invariably going to be a trial period, as the agencies look to revive it. I think that's natural, normal and healthy.

It is not just standalone unfairness authority that is an issue. Commissioner Bedoya and others have highlighted the desire to start enforcing the **Robinson Patman** Act again. I think we are starting to sort of grapple with what FRAND [Fair, Reasonable, And Non-Discriminatory] competition might look like. We have been in a regime that has been focused very heavily on reasonableness, the rule of reason, but bringing in other concepts like fairness and non-discrimination is a process that is going to have to play out. It will unfold over time.

In 2018, you expressed concerns that standards for plaintiffs to win predatory pricing cases against major platforms like Amazon became "ridiculously high and too hard". Is this still your view? And how can enforcers encircle this issue to bring these cases?

I think it is a good indicator that a standard is too high when you stop seeing almost any attempts to even bring cases, which is largely what we have seen with predatory pricing since ***Brooke Group v Brown & Williamson Tobacco.*** There are a lot of areas of legal doctrine where reform is badly needed, where there are a lot of assumptions about firm incentives and efficiency that are sort of baked into doctrine in a way that is not justified empirically. Fact-based analysis that is neutral should be what controls. Predatory pricing is one strong example of that problem. We're also seeing expansive interpretations of *Verizon Communications v Law Offices of Curtis v Trinko*, sort of outside the traditional refusal to deal context where it should not have the same force. I worry about expansive and problematic applications of ***Ohio v American Express***, in merger cases and other cases involving two-sided markets.

As a general matter, we need to move antitrust doctrine under the rule of reason out of a domain where it is so heavily influenced by assumptions about efficiency that are baked into standards of proof and standards of liability. We do not have a very balanced system right now. Empirically and statistically, the rate at which plaintiffs prevail in litigation under the rule of reason backs up that claim.

You worked closely with Diana Moss for several years at the AAI. What did you accomplish the most together? Can you tell us a bit more about your partnership?

Diana is a fantastic person and a fantastic leader who gave all of herself to AAI, not just when she was the president but going back, more than a decade before that. We worked well together, we worked hand in

hand on a variety of subjects, bringing legal and economic expertise to bear. She is a good friend and she has created quite a legacy that I hope to sort of carry on and continue.

One of the things Diana and I always believed very strongly is that what makes AAI's voice valuable, and what separates it from a lot of other advocates on both sides of competition policy debates, is that we operate independently at the forefront of sophisticated legal and economic analysis with the help of an advisory board comprised of many of the leading legal and economic scholars in the United States.

The goal of the organisation has always been to sort of converse at the same high level as the government and the top law firms and consulting firms that are out there and to sort of be a participant at that level of discourse, whether in court or in legal and regulatory proceedings or elsewhere. And so that is something both Diana always strongly believed in and that I believe in as well.

The DOJ signalled it would continue to bring labour lawsuits in the future. Why, in your opinion, did the Antitrust Division lose those no-poach cases and what would it need to adjust?

What struck me is that whenever the fact finder or the decision maker had to explain itself, the DOJ almost always won. When bench memoranda and opinions were issued, the DOJ was almost uniformly victorious. It lost some trials which are something of a black box. I would love to be inside the minds of the jurors, I was not in the courtroom. And, obviously, there are a lot of talented lawyers out there on both sides. Maybe others who have first-hand exposure to some of those trials have a more informed opinion than I do.

But, suffice it to say, as a legal matter and as an economic matter, there is no principled basis for distinguishing between a naked horizontal no-poach agreement and a naked horizontal price-fixing agreement. And I

think that is a bipartisan view that is largely uncontroversial, no matter where you stand on the antitrust spectrum.