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TOWARD INDEPENDENT COMPETITION ADVOCACY

IN THE MEDITERRANEAN WORLD:

LEARNING FROM THE AAI MODEL

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Toward Independent Competition Advocacy in the Mediterranean World: Learning from the AAI Model

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I. Introduction

In June, 2010, the American Antitrust Institute, known around the world as “AAI”, celebrated its twelfth anniversary as a not-for-profit independent education, research, and advocacy organization. The booklet we created in 2008 to commemorate our first decade of existence summarized our experience as a leading advocate of activist antitrust policy.² For those in the Mediterranean region who might be contemplating the creation of a pro-competition Non-Governmental Organization (“NGO”) in the rapidly developing field of competition policy, we welcome you to review this booklet on our homepage, www.antitrustinstitute.org.

Let us be clear at the outset: we do not claim that the AAI model is appropriate in all circumstances, but something similar to AAI, very much customized to local needs, would seem potentially beneficial in every Mediterranean nation that has adopted a competition policy.

We understand that the audience in the Mediterranean region is mixed.³ We know, for example, that the north of Africa and the Middle East have very different economies than the south of Europe. Similarly, the concept of “competition NGO”—a term generally associated

¹ President, American Antitrust Institute, aa@antitrustinstitute.org. The author is grateful to AAI Research Fellow Ignacio Baron, who adapted this article from an earlier one that appeared in the February 2009 issue of *Boletín Latino-Americano de Competencia*, available at <http://www.antitrustinstitute.org/Archives/BLN.ashx>.

² Recognizing that the rest of the world sometimes tends to speak of “competition policy” rather than “antitrust”, we will nevertheless use the American term frequently in this article.

³ The ten countries of the Euro-Med Partnership are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, The Palestinian Authority, Syria, Tunisia, and Turkey.

with a private independent competition advocacy organization—could be something new and difficult to establish if only because few people have sufficient expertise to participate. In addition, some governments in this region may be less familiar with civil society supervision and the role of private organizations that may take oppositional positions on some issues. Last but not least, the Muslim world and its Islamic law may possibly configure a particular scenario for the incorporation of new competition policy devices, and religious aspects may perhaps influence some of the concepts and rules common to markets and consumers. In this context, potential competition NGOs will have a difficult start.

Our objectives with this article are multiple. Our first objective is to urge the importance of establishing a competition culture, of engaging in pro-consumer advocacy and of fomenting Private Enforcement of Competition Law. Secondly, we intend to inform the Mediterranean countries about the salient features of the AAI and suggest why similar organizations are needed to support an affirmative role for antitrust as a way to maintain competition and thereby benefit consumers and businesses. And thirdly, we will comment on some lessons we have learned that might be useful to new Mediterranean competition NGOs

We are hopeful that our fairly unique experience in focusing directly on policy supervision and improvement, as well as our advocacy of policy matters for the benefit of civil society can guide those NGOs in the Mediterranean world that are moving in a comparable direction.

II. Competition Law and Policy in the Mediterranean Region

Competition law and policy in the Mediterranean countries reflects a mix of the European Union’s administrative civil law approach and the US approach that combines criminal and civil approach under the common law. Whatever the mix or model in a particular country, competition law and policy institutions are expected to play a major role in the North African and the Middle Eastern countries in the context of a free-trade zone that is still in process of construction.⁴ Countries may join the Euro-Med Partnership by ratifying the so-called “Euro-Med Agreements”—or “Association Agreements”—without taking on a commitment to have an EC-compatible domestic competition law. As a result, the Mediterranean Partners have followed different options at the domestic level, but based on such options, these countries have been traditionally divided into different categories.⁵

⁴ See Francois Souty, “Competition Rules in the Euro-Mediterranean Partnership”, (EuroMed Market Programme –Towards the FTA 2009). This work helped us understand the brief history of the Mediterranean integration that has started to take place some decades ago and which are the Mediterranean countries participating (the “Mediterranean Partners”); the competition law enforcement institutions and the institutional organization of the concerned countries; the actual competition law enforcement in the concerned countries; and the content of some commendable recommendations.

⁵ See Francois Souty, Id. and Damien Geradin, “Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries”, World Bank Working Paper No. 35, 2004. According to the referred papers, there would be four categories of Mediterranean Partners. The first one would be composed of Israel and Turkey which have set up a modern competition regime that shares analogies with the EC competition law regime, but also rely on concepts that appear derived from the U.S. antitrust law (in the case of Israel) and the German competition law (in the case of Turkey). The Israeli competition law, for example, is supposed to be subject to a high degree of enforcement by the Israeli Antitrust Authority, which has adopted a large number of decisions prohibiting anticompetitive practices. Moreover, this authority has played an important role in promoting pro-competitive reforms in a variety of fields, such as telecommunications and natural gas. The second category would include the Maghreb countries (i.e., Algeria, Morocco, and Tunisia). These countries

What is clear is that it has been generally recognized under the frame of the European Neighbourhood Policy and its bilateral Action Plans that any serious intent to implement a free-trade zone in the aforementioned region will require, among other initiatives, progressing in the level of competitiveness “*with a view to achieving sustainable economic growth, in particular, through the development of the private sector and strengthening the socio-economic balance.*”⁶

While we are aware of the correlation between competition law and economic integration in the Euro-Mediterranean Partnership Area, we are also conscious of the important role that public policy can play in the implementation of competition law regimes in the Neighbourhood.

Indeed, in a regional study prepared by the joint World Bank-European Commission Programme on Private Participation in Mediterranean Infrastructure (“PPMI”),⁷ it was suggested as a way to strengthen competition policy in the Mediterranean zone that the Mediterranean Partners, the European Commission and other relevant international organizations in the field of competition law “*inform all stakeholders of the benefits that can be derived from successful implementation of a competition law regime through the involvement of professional organizations as well as consumer organizations.*”⁸

In the same line, the participants of the Final Conference of the EuroMed Market Programme of the European Commission, with an intent to reinvigorate the existing structures at legal and institutional levels, agreed “[to] *reinforce competition advocacy in the Euro-Mediterranean societies.*”⁹

These conclusions seem to confirm what many observers perceive as one of the main problems in the Mediterranean area: the relatively low enforcement level of competition rules in many of the countries. This is a problem attributed to a variety of causes, but more recurrent explanations rest on elements such as the lack of resources—or resource austerity—, the inability of the competition authorities to attract sufficient expertise, weak professional associations and consumer groups, deficient judicial systems, the granting of inadequate powers to the competition authorities, strong opposition to domestic reforms, and insufficient access to business data.

have adopted national competition laws that are patterned on the French model. But given the conceptual proximity between the French model and the EC competition law, some observers consider that the competition laws adopted by the Maghreb countries are in line with EC law. A third category of Mediterranean Partners would be composed of countries that have just not long ago adopted domestic competition legislation. This would be the situation of Jordan and Egypt. Nevertheless, Morocco, Tunisia, Jordan and Egypt would be in a similar level of development of their competition law enforcement. Algeria seems to follow the same pattern of institution building as Tunisia and Morocco, although less developed. Finally, developments would be taking place in Lebanon, Syria and in the Palestinian Authority.

⁶ Francois Souty, Id.

⁷ The PPMI is a joint World Bank–European Commission program based in Brussels. The PPMI’s mandate is to promote infrastructure sector reform and provide expertise to the countries belonging to the Euro-Mediterranean Partnership and to its parent institutions. Its activities focus on the introduction of competition, the modernization of regulatory frameworks, and the creation of an environment conducive to private participation.

⁸ Damien Geradin, Id.

⁹ Final Conclusions, Final Conference of the EuroMed Market Programme, Barcelona, 28-29 April, 2009.

Nevertheless, the idea that “*competition authorities in the MPs should devote resources to competition advocacy, which can be a very effective mode of intervention in developing economies*” has been widely promoted in this part of the world.¹⁰

III. Benefits of Competition Culture

In AAI we strongly endorse the idea that establishing a competition culture founded on sound economic principles benefits each society. The aforesaid is even truer with respect to countries that have just not long ago adopted market-based principles and/or competition-based economic systems. This is because competition culture and competition enforcement actions help consumers—and the public at large—to become aware of, and therefore demand, the gains and benefits of competitive markets.

As nations create market institutions, they almost universally recognize that the government must set some rules for how competition should operate within a free market and must have the ability to intervene from time to time to assure that markets are operating as intended. Cartels apparently occur everywhere where they can be formed and maintained without effective government intervention and they inevitably have the effect of taking money from the consumer’s pocket and transferring it to companies that are acting anticompetitively. Private monopoly is common in nations around the world. Sometimes monopoly is the necessary structure in a small economy or the result of uncommonly large economies of scale. Every so often monopoly is the creation of privatization that transfers public monopoly power to private hands. Monopoly usually leads to higher prices and less innovation than would be found in a more competitive structure. Governments themselves regularly (sometimes knowingly, sometimes unintentionally) create anticompetitive situations that end up harming both small and medium-sized businesses and consumers. Recurrently, it is the poorest and least powerful members of a community who are most disadvantaged by anticompetitive activity. A well-run antitrust regime should bring four values to any market-oriented economy: (i) lower prices, (ii) better service, (iii) more choice, and (iv) innovation leading to growth in the economy.¹¹

Nonetheless, given the differences in laws, politics, cultures and economic systems in the Mediterranean region, it is unrealistic to expect that all the countries involved in this endeavor will evolve identical competition programs. However, some convergence may be possible.

In fact, international initiatives devoted to competition law enforcement—such as the International Competition Network (“ICN”)—encourage, voluntary actions toward convergence. The ICN, for instance, generates and disseminates “best practices,” promotes the advocacy role of antitrust agencies, and seeks to facilitate international cooperation. The ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy

¹⁰ See Damien Geradin, Id. Israel’s competition program appears to be the most highly developed in the region. For a study of the particular antitrust concerns of smaller economies, see Mical Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003).

¹¹ See the introductory chapter of the AAI’s report, “The Next Antitrust Agenda”, at www.antitrustinstitute.org for further discussion on the value of competition and antitrust.

principles across the global antitrust community.¹² Six of the ten Euro-Med Partners are currently members of the ICN.¹³

The ICN's members are the competition authorities of approximately 100 nations. But competition policy cannot rest on the competition authorities by themselves. If consumers and civil society do not really recognize and comprehend what competition is and why it is beneficial not only to the economy in general but to citizens in their role as consumers, any effort made by the authority to stimulate competition, consensus and convergence will probably be unsuccessful in the long run. In this regard, involvement of civil society is crucial.

This point has increasingly been recognized by the ICN. As stated in a 2003 working paper: *“consumers [...] and civil society at large are not directly engaged or involved in the competition enforcement process”* due to the fact that *“consumers generally do not fully understand the implications of competition enforcement, tend to be poorly informed and are unaware of their rights”*. This is particularly true in connection with transition economies *“where a long tradition of government intervention in the economy, price fixing by inefficient entrepreneurs, lack of effective individual rights-based enforcement and absence of a consumer empowerment culture pose a cultural challenge to effective competition law and policy implementation.”*¹⁴

Fortunately, it can be noted that some countries in the region have been very proactive in strengthening competition culture, advocacy work and the formulation of pro-competitive reforms.¹⁵

¹² See International Competition Network webpage at <http://www.internationalcompetitionnetwork.org>.

¹³ Six of the ten are members of the International Competition Network: Egypt, Israel, Jordan, Morocco, Tunisia, and Turkey.

¹⁴ Beatriz Boza, “The Standing of Competition Authorities vis-à-vis Civil Society”, Merida ICN, June 2003.

¹⁵ For example, the Egyptian competition authority responsible for the enforcement of competition laws (“ECA”) has an explicit legal mandate to “organize training and educational programs with a view to creating awareness about the provisions of the Competition Law and free market principles in general”. In the case of Israel, Professor Francois Souty remarks that IAA, the Israeli Antitrust Agency, has long been playing an active role—both formally and through advocacy work—in shaping and facilitating pro-competitive government reforms and privatizations. In the case of Jordan, the same author highlights Competition Directorate’s mission of preparing an “annual report” on its activities and on the state of competition in the country. This report is intended to comply with several objectives, such as introducing the provisions of the law, spreading the culture of competition and the awareness thereof, and informing the public of the various facets of its activities and of the complaints, consultations and other cases presented to it. The publication and dissemination of this report also provides a mechanism for the publication of the decisions, placing them at the disposal of researchers and reviewers—and Arab and international organizations seeking to avail themselves of the Jordanian experience in view of its precedence in the region. The report is published and distributed through the various communities that are concerned by competition law enforcement. Finally, it is worth noting the conclusions arrived at in the Final Conference of the EuroMed Market Programme with respect to competition advocacy in the Euro-Mediterranean region, principally, the suggestion of publishing a Mediterranean Competition Bulletin—half-yearly or at least periodically—, ensuring the Arabic edition of this bulletin—thanks to financial support that could be sought from a regional or international donator and the technical support proposed inter alia by the Egyptian and Moroccan Competition Authorities—, and organizing every year a Mediterranean Competition Day following the model of the European Competition Day.

IV. The Vital Role of NGOs in Shaping National Competition Policy

By competition policy we refer to a national commitment to relatively free, decentralized private markets working within a framework of some economic regulation of key sectors or natural monopolies and subject generally to restrictions on abuse of a dominant position, collusion, and anticompetitive mergers. Even in countries with deep cultural commitments to the entrepreneurial spirit, today's dominant pattern of mixed economies does not have much tradition behind it.

To generalize, the popular political support tends to be small, with only a small portion of the citizenry understanding why these policies exist or caring how they are administered. On the other hand, the opposition to such policies typically consists of the strongest economic entities, that is, those who are most threatened by government intervention. With their vast financial resources and intense interest in specific interventions, they can usually direct substantial legal, economic, and public relations expertise to gain outcomes favorable to their interests.

These generalizations also apply to the United States, where the tradition of antitrust goes back even before the passage of the Sherman Act in 1890. When AAI was founded in 1998, the first thing we did was to make visits to the head of our Justice Department Antitrust Division and the chairman of our Federal Trade Commission. We told them that in our opinion they needed a group outside of government that could criticize them for not doing enough and could provide support for them to be more aggressive in the public interest. Why would this be in their interest? Because they are continually under pressure from critics—i.e., much of the business community—to do less rather than more.

Accordingly, pressure from a competition NGO to do more would allow them greater latitude to do what in their independent expert judgment ought to be done. It would help level the political playing field. Their reactions were nearly identical: that this would be very welcome -- but they also predicted with pessimistic certainty that we would never find the funding to make it happen. As we will see shortly, the AAI has found the funding. They were right, however, that developing a successful business model would be critical to any competition NGO's capacity to make a difference.

Education, Research and Advocacy as Vital Elements for a Competition NGO

In our view, a competition NGO should be an entrepreneurial proponent of the position that competition serves the most vital interests of the public at large by (i) assuring competitive prices, (ii) fostering innovation and efficiency, so that consumers get the choices that a free market should provide to them, (iii) protecting opportunities for small and medium-size businesses to compete on the merits in ways that do not undermine efficiently operating markets, and (iv) promoting growth of the economy so that there will be a larger pie that can be distributed to citizens. To achieve this mission, a competition NGO should:

- Educate the public about the benefits of competition and the ways in which fair and effective competition can be enhanced in the interest of consumers;
- Generate and facilitate research and multidisciplinary approaches to a national and international competition agenda; and,
- Advocate competition-oriented policies in all the branches or sectors of government, and internationally, as an essential element of civil society.

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

V. Learning from the AAI's Model

i) AAI today

Perhaps it is useful to say what it is that the AAI actually does, to provide a better picture of what we mean by the term “competition NGO.” We call ourselves an “education, research, and advocacy” organization. We are not-for-profit and independent. We do not have members as such. We have four professionals on payroll, scattered around the country and working from their own homes and offices. Our decision-making governing board consists of five directors, whose combined experience includes private law practice, former government positions, economics, academics, consumer advocacy, and business management. We rely heavily on an advisory board now numbering more than 110. We communicate almost exclusively via e-mail. Indeed, we describe ourselves as a “virtual network of experts”, the experts being principally lawyers and economists, both practitioners and academics. There is no strict ideological test to become an Advisory Board member or a loosely-connected supporter of AAI—i.e., a person who chooses to be on our email list—, although our positions on issues tend to draw people who are sympathetic to a centrist but activist orientation.

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

ii) Education, Research and Advocacy at AAI

In the area of education, we post a great many materials on our website; we talk to the media about competition issues, and respond to their questions; we conduct seminars, symposia and major conferences, and provide speakers for public forums; and we have even produced a high-grade movie, called “Fair Fight in the Marketplace,” which showed on public television and won two national awards.¹⁶

In the area of research, we have generated a large number of papers and articles, usually published in law review articles and often deriving from our conferences. We have also edited three books, “Network Access: Regulation and Antitrust,” “The Next Antitrust Agenda,” and the forthcoming “International Handbook of Private Enforcement of Competition Law.”

Finally, in the area of advocacy, we publish so-called White Papers and Commentaries taking positions with respect to on-going investigations and policy issues; we produce formal

¹⁶ See our secondary website, www.fairfightfilm.org, which provides enrichment material for the award-winning movie we produced about antitrust. This material is available for use by competition NGOs and others. It includes translations of the transcript of the film into many languages.

public comments to agencies on various regulatory issues; we speak with or testify before members of Congress and their staffs, as well as officials at the agencies; and we write amicus briefs as friends of the court in appellate decisions.¹⁷

Our website, www.antitrustinstitute.org, contains our easily researchable entire work product, as well as full background on who is involved and how we are organized.¹⁸ Additionally, a research section provides links to a wealth of information about antitrust.

iii) Funding

The question always arises: how does AAI obtain its funding? First of all, none comes from a federal agency that we may wish to criticize or influence. Interestingly, we have benefitted substantially from grants from courts under the doctrine of cy pres.¹⁹ Cy pres grants are distributions of funds left over in class actions, where the members of the class who have filed qualified claims have already received payments, or where it is not feasible to distribute funds in another way. This is something that can only happen where there are consumer class actions.

We also raise funds through the sponsorship of tables—primarily by law firms and economics consulting firms—at our annual conference.²⁰ We receive donations to our general treasury from corporations, trade associations, law firms—both plaintiff- and defense-oriented—,²¹ individuals, and individually-directed foundations. So far, we have not received grants from public foundations. We make available on request a list of all contributors of \$1,000 or more, cumulatively from the beginning. The list now contains over 150 separate entities.

VI. The Need for Similar NGOs World-Wide

The AAI model has proven itself for over a dozen years in the US context. A virtual network does not require a large paid staff or expensive facilities, so operating costs can be kept low. This is likely to be true in most Mediterranean countries as well, provided there is widespread use of the Internet within the antitrust community. Funding is possibly more easily available in the US, however, through a variety of sources, without need to rely on the government, whose financial contributions might reduce the independence of the NGO. With a mature antitrust system in place in the US, a large and diverse base of experts is available because—with private enforcement accounting for 90 percent or more of cases—so many people earn a living in the antitrust industry and so many have a viewpoint that is to a large degree shared. Independent “think tanks”—of which the AAI is one example—are well-

¹⁷ Nevertheless, it is possible for a competition NGO to limit its advocacy to the more general level, staying out of particularistic controversies. This is the route to a larger following and may be especially important in the Mediterranean countries where the antitrust community is small and the laws new.

¹⁸ In order to receive periodic e-mail updates on our activities, visit the website and click on the button for “e-bulletin”.

¹⁹ See Working Paper 07-11: Albert A. Foer, Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices, <http://www.antitrustinstitute.org/Archives/WP07-11.ashx>.

²⁰ See fn 43 below for more on “selling tables”.

²¹ In the US, certain lawyers specialize in representing businesses and consumers who allege they have been injured by antitrust violations. Others (a much larger number) tend to specialize in representing businesses that are defending themselves against governmental investigations or private lawsuits. Some law firms and individual lawyers represent both plaintiffs and defendants.

established in the US and their role is accepted and even generally appreciated as a part of democratic governance. We are quite aware that these conditions would not apply in all or even most of the Mediterranean countries. It may take many years for comparable conditions to evolve, if ever, in countries with new competition regimes.²² This does not in the least diminish the need for public interest NGOs focused on competition policy; it simply suggests that each one will have to be designed to reflect the local context.

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

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

VII. Range of Possible Competition NGOs

Perhaps the most common type of competition NGO is the grouping of antitrust specialists, both practitioners and in-house counsel, within a bar association. In the US, the American Bar Association's Antitrust Section—which, by the way, includes economists—plays a huge role in supporting the antitrust enterprise, through a variety of conferences, journals, books, telephonic brown-bag lunches where recent cases are discussed, and formal public comments on various pending legislative and regulatory events.²³ In the US and elsewhere, defense-oriented lawyers are likely to dominate the bar associations, giving the pro-antitrust organization a pro-defendant perspective. While in AAI we don't consider an antitrust bar organization to be sufficient, we think it is a good starting point.

A second category of NGOs includes the organized consumer groups, such as, in the US, the Consumers Federation of America, the Consumers Union, and the National Consumer League. These often have a pro-labor, pro-regulation perspective, but can sometimes be

²² There is a chicken-and-egg problem here. Having a mature antitrust regime may be a condition precedent for developing a sturdy competition NGO. But a sturdy competition NGO may be necessary to facilitate development of a sturdy antitrust regime. Both need to be brought into being conjunctively and they can be expected to grow and evolve conjunctively. Without effective enforcement of competition laws that are on the books, it is likely to be especially difficult to motivate people to participate in or fund a competition NGO. It may take the active participation of a strong current or former enforcement official to jump-start a nation's first competition NGO.

²³ See <http://www.abanet.org/antitrust>.

counted on to be active in antitrust cases where the consumer benefit or harm is clear.²⁴ The Consumer Association, UK, now known as Which?, has frequently intervened in European antitrust matters,²⁵ just as several consumer organizations in the US have advocated their own antitrust positions in US courts and agencies.²⁶

A third category consists of centers and institutes affiliated with universities. But, even though they are generally supportive of antitrust, they are typically more oriented toward academic research than to issue advocacy.²⁷

We are not aware of many NGOs similar to the AAI. The leading example may be the Consumer Unity & Trust Society (“CUTS”), an economic policy research, advocacy and networking organization established in India—but not limited exclusively to India or to antitrust. Of particular interest is its Institute for Regulation & Competition (CUTS “CIRC”) together with its Centre for Consumer Action, Research & Training (CUTS “CART”).²⁸ IBRAC is an independent NGO in Brazil that does not deal with current cases, but has a journal, conducts workshops and an annual international event.²⁹ A recent entry on the scene is StopCartel, a Greek NGO.³⁰ Another non-governmental model that is developing is that of the FIPRA Group, an international but Brussels-based independent for-profit network of senior public policy and regulatory affairs advisors specializing in strategic government relations.³¹ FIPRA employs several well-known consumer advocates and increasingly represents corporate interests within the European Union that coincide with consumer interests.

The AAI model is distinct from these other models in that it is not-for-profit and focuses solely on antitrust and competition policy issues, always from a consumer-driven perspective. Competition regimes will vary by objectives, maturity, budget, staffing, cultural attitudes toward markets and government, and in many other ways. We do not suggest that the AAI

²⁴ In some Mediterranean countries consumers associations have the ability to activate the intervention of the competition authorities. In Tunisia, for example, consumers associations may consult the Competition Council on competition issues. Similarly, in Algeria, the Competition Council can act upon consumer associations’ request. In Israel, the Antitrust Tribunal is able to hear cases brought by consumer organizations. And in Morocco, the Competition Council can be consulted by consumers associations for matters relating to competition.

²⁵ See http://en.wikipedia.org/wiki/Consumers%27_Association.

²⁶ The author is informed that the Dutch, Danish, French, Polish, Slovene, Italian consumer protection organizations—among others—have all had domestic influence in competition discussions. BEUC, the European Consumers Organization, <http://www.beuc.org>, has sporadically intervened in European competition cases. Thus a European model may be said to exist, in which established consumers organizations to a greater or lesser degree become involved in competition policy issues as an extension of their consumer protection focus. Often, the activities of these organizations are funded by governments.

²⁷ Some notable examples: Loyola University Chicago Institute for Consumer Antitrust Studies; the Competition Policy Center at University of California, Berkeley; George Washington University’s Competition Law Center; the Centre for Competition Law and Policy at University of Oxford; the Jevons Institute for Competition Law and Economics at University College London; the Centre for Competition Policy at East Anglia University; the British Institute for International Comparative Law’s Competition Law Forum; College of Europe’s Global Competition Law Centre; the Center for Laws of Innovation, Competition and Regulation at Korea University; Centro de Libre Competencia at Catholic University of Chile; and the Competition Law Research Centre at Pázmány Péter Catholic University–Hungary.

²⁸ See <http://www.cuts-international.org>; <http://www.cuts-ccier.org>; and <http://www.cuts-international.org/cart/>.

²⁹ See <http://www.ibrac.org.br>.

³⁰ See <http://www.stopcartel.org>.

³¹ See <http://www.fipra.com>.

model is superior to or should be adopted ahead of alternative models, especially where competition policy is relatively new and it is deemed more important to develop an initial sense of community among its supporters than to espouse a particular perspective on how policy should be directed. The AAI is an example, but only one example and not one that would be easy or necessarily desirable to replicate.

Our purpose, rather, is to encourage the development of competition NGOs in each nation with an antitrust regime, as an initial step. Secondly, we urge the linkage of such NGOs in some fashion so that they will communicate with each other and eventually work cooperatively in support of common goals. A start has been made by the International Network of Civil Society Organizations (“INCSOC”),³² whose driving force has been Pradeep Mehta of CUTS and Alan Asher of EnergyWatch, UK. Although INCSOC has individual members in a number of countries who have met several times in Geneva and elsewhere, the organization has been hampered by the difficulty in finding funds and seems to be languishing at the moment.³³

This is the stuff out of which a community can be built by one or more competition NGOs within a nation.

VIII. Actions and Proposals

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

A second mission is strengthening the local antitrust enterprise. In particular, private enforcement of competition law is at best severely limited in most countries. The lack of treble damages removes a strong incentive for gifted trial advocates to develop a specialization in competition law, and the “English Rule” requiring losing plaintiffs to pay attorneys’ fees provides a strong deterrent to action. Thus, the pro-corporate bias of the private bar is likely to be even more pronounced outside of the US. Developing a workable private enforcement component would seem to be a high priority. Similarly, it may be appropriate to support larger budgets for the antitrust authorities, more stringent fines and other sanctions for violators, and perhaps criminalization of certain hard-core cartel activities.

One domestic role a competition NGO can play is to help overcome *regulatory capture*, a problem that might be even more important in developing economies. Regulatory capture refers to the not uncommon situation where the industry being regulated gains effective

³² See <http://www.cuts-international.org/incsoc.htm>.

³³ The author takes some responsibility for this as co-chair of INCSOC’s capacity building committee, which has thus far failed in its efforts to raise funds for additional international meetings.

control or undue influence over the government agency assigned to do the regulating. By providing a voice for consumers—a task which normally would be that of the antitrust authority, but which benefits from external support—the NGO can help curb anticompetitive political influences, both directly and indirectly—for example, by educating a large consumer body who are also voters.³⁴

If the first mission of self-identification and the second mission of enhancing the domestic antitrust effort are both local in nature, the third mission is international. International developments will be moving ahead during the next period of time toward consensus on best practices and eventually, perhaps, toward new institutions for harmonizing the different national approaches to both substantive and procedural law. NGOs can learn from each other and can work together both to improve their national systems and to influence the consensus that will drive international developments. At the ICN, where much of the informal harmonization work is proceeding, the principal players have been the national competition authorities and a group of defense-oriented lawyers, mostly from the US. The ICN is now reaching out to find Non-Governmental Advisors who represent a broader constituency. The national competition authorities must hear from consumer and public interest advocates as well, or the consensus that emerges will be overly-influenced by the well-funded defense lawyers and their large multinational clients, without the counterweight of consumer concerns.³⁵ The third mission, therefore, should be to assure that both in domestic and international policy-making, the voice of civil society proponents of vigorous antitrust policies is heard.

Benefits of Private Enforcement of Competition Law

If national law makes certain anticompetitive acts illegal, it seems to follow logically and as a matter of justice that individuals who are injured by illegal anticompetitive acts should have a right to be remedied. This is currently a hot issue in Europe, where the EU has been attempting to establish minimal standards for member states in the provision of antitrust remedies. We see private enforcement as a very important issue for competition NGO's.³⁶

First, to help citizens understand the value of antitrust in their own lives, it is not enough that anticompetitive behavior is prosecuted by the government; there also should be a remedy for people and businesses injured by such behavior. A remedy that victims can put into a wallet is a concrete proof that competition is not just a vague idea or some economist's ideology but a civil right worth supporting.

Second, governmental resources directed against cartels and other anticompetitive activities that harm the public are rarely adequate to achieve optimal levels of deterrence.

³⁴ It might be useful if the NGO be granted official standing in regulatory bodies. In Israel, for example, the consumers have such standing in antitrust matters. In fact, the Competition Matters Committee (“CMC”), an advisory body set up to give opinion to the Minister of Industry and Trade, includes a representative of the consumers—currently the President of the Consumer Protection Association. And one of CMC's most important functions is “the assessment of the role of the Business community, Consumers' associations, professional and Unions associations.”

³⁵ Donors both multilateral and bilateral have funded ICN participation of officials—including NGOs—from developing countries but such funding has been sporadic and not sufficient.

³⁶ See the forthcoming AAI volume, Albert Foer and Jonathan Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law* (Edward Elgar Publisher, 2010). The chapter on Israel describes a Middle Eastern system that has made large strides toward creating effective private remedies.

When corporate decision-makers contemplating a course of behavior have to consider –in addition to corporate fines and other sanctions by the government, if they are caught—that they may be held liable for private remedies, this increases the likelihood that they will not undertake the legally dubious course of action.

Third, there needs to be a community of experts who have a personal stake in antitrust. In the US, for example, which some people think has too much litigation, the private antitrust cases outnumber the public ones by at least 10 to 1. This means that there are a lot of lawyers and economists on both the plaintiffs' and the defendants' side, and these individuals and their firms can carry a lot of political weight in support of the institutions and laws. Thus, private enforcement helps build a constituency for competition policy. At the same time, it may make possible a funding source for competition NGOs. Thus, there seems to be a kind of chicken-and-egg problem: while competition NGOs may have a stake in the creation of private enforcement, without private enforcement it is very difficult to find the funding sources that will sustain competition NGOs.

Fourth, to the extent that a competition NGO has a role in providing remedies to consumers, its own salience and relevance to the society will be increased. In some nations, where there is pressure to not adopt the device of the consumer class action generally, there is movement toward allowing certified consumer organizations to bring private suits on behalf of their members.

The AAI has created an international outreach committee for the purpose of working with international competition NGOs that seek our assistance.³⁷ At this point in time, such assistance is limited to information and advice via our website and e-mail communications. Alas, we have no funding to offer. We would be pleased to provide links from our website to others' sites and we are prepared to participate in the future to help coordinate linkages between international competition NGOs. Individual AAI committee members may be assigned to be responsive to particular NGO's inquiries.

³⁷ Communications may be directed to aai@antitrustinstitute.org.

MCB2 e-mail contact: COMP-MEDITERRANEAN@ec.europa.eu

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