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ALBERT FOER AND NIGEL BARRELLA

Building a Global Civil Society Infrastructure

Around the world today, the ideal of free and fair competition is on the move. Well over 100 jurisdictions now have antitrust laws and competition authorities to enforce those laws. And billions of consumers worldwide, now stand ready to benefit from the appropriate enforcement of competition policy through increased choices, expanding economic opportunities and lower prices of goods and services.

Unfortunately, much work remains to be done to realise this ideal. To have any effect at all, an antitrust law must actually be enforced. A well-trained and adequately funded competition authority must dutifully and properly carry out its mission, if the benefits of these structures are to be realised. Good government is required in this area as in all others, and good government is rare unless it is supported by a caring civil society. In short, we need more than merely laws and duly appointed authorities; we need active support from civil society if we are to realise the benefits of competition policy. This truism is not limited to nations that are committedly and truly democratic. In all market-oriented jurisdictions, there is a need for civil society support of strong laws, of intelligent and often controversial government initiatives, and of public funding. If the public doesn't care, the powerful forces that oppose the oversight of antitrust will have all the leverage and their weight, as if by Newtonian physics, will prevail.

This year, the American Antitrust Institute (AAI), a non-governmental organisation (NGO) based in the US, celebrates its 15th anniversary of advocating a robust competition policy. Our work has mainly been arguing for the benefits to society of

intelligent antitrust enforcement, and also educating the public and raising awareness of the relevant issues. We have learned a great deal from Pradeep Mehta and CUTS, true pioneers in the field of competition advocacy, having worked on behalf of consumers for over 30 years. Owing especially to Pradeep's vision and hard work, CUTS has made itself an indispensable part of the international civil society infrastructure particularly in South Asia, and a respected voice for people-based competition policy. We are proud that Pradeep Mehta serves on the AAI Advisory Board.

Going forward and drawing no small amount of inspiration from Pradeep's work, AAI will be expanding relations with consumer-minded NGOs around the world, offering the pro-bono expert support of its 130-person Advisory Board to NGOs that seek help in formulating pro-competition policies, strategies, and submissions to government agencies and courts. In the US, AAI's mission is to improve antitrust enforcement by serving as a pro-enforcement watchdog of American antitrust enforcement institutions, both public and private. As we establish partnerships in other countries and this international outreach project picks up steam, the eventual goal is to find funding, separate this project from AAI, and work jointly with a whole new yet-to-be international competition advocacy organisation.

Like the AAI, a new organisation will likely be a virtual network of experts on competition laws and policy, drawn from around the world. This broad, decentralised approach has served AAI very well, and can be expected to work even better on international problems, where breadth and diversity of knowledge is even more critical and expenses are such that internet communication will necessarily take precedence over in-person meetings. It is likely that many partnerships will be initiated primarily with consumer-focused NGOs as well as with academic institutions, lawyers' organisations and general public interest organisations.

In our vision, the new international organisation will also help consumer and competition advocacy NGOs to deal with the obstacles they will inevitably face—and the new organisation will also be dealing with these obstacles itself. Here, the experience of our network of experts from AAI and CUTS will be particularly

useful. At AAI, for example, we initially had little idea of how we would raise funds for our operations. We did not foresee that an unusual feature of certain American class actions—known as “Cy Pres Grants”—would provide us with a significant portion of funding. But more relevantly to other jurisdictions, we also found that private companies with an interest in a level playing field will sometimes make contributions.

As private enforcement of antitrust becomes more prevalent around the world, it will become more frequent to find reasonably well-funded companies fighting each other—and one side will likely be aligned with consumer interests. This insight can be turned into a potential source of funding for a competition advocacy organisation. On an international scale in light of ongoing globalisation, we can expect an even greater level of interest from companies facing the challenges of competing in foreign markets—perhaps in the face of protectionist government policies that give domestic companies unfair competitive advantages. The answer to the fundraising challenge is really to seek as many sources as possible while remaining independent both in reality and in public perception.

Another key challenge that new institutions would face is maintaining independence from government. Governments too often inhibit competition by giving unfair advantages to particular private players. Similarly, politically-driven governments may neglect to enforce the antitrust laws against favoured private entities, public entities, or formerly public entities now controlled by friends of officials. Competition authorities are particularly concerned, at the present time, with what is known simply as ‘the advocacy function.’ This refers to finding ways to influence other parts of the government to adopt pro-competition policies. This can be a lonely, controversial, and even dangerous role for a small and relatively new agency. It is an area in which civil society support is especially welcome and indeed necessary.

Whether applauding or condemning a government action, a competition advocacy NGO is likely to make friends and enemies. But as both AAI and CUTS know, today’s ally may be tomorrow’s

opponent, and vice versa. What should endure are the principles being advocated.

At AAI, in order to maintain our independence to criticise the American agencies that enforce competition policies, we do not have any members of our Board of Directors or our Advisory Board who are currently employed by the federal government and we do not seek or accept funding by antitrust agencies, we may need to criticise at some point in time. Indeed, if we were funded by an antitrust agency and came out in its support on specific cases, we would have diminished credibility. We recognise the possibility that organisations in other countries will sometimes need to strike a different balance.

A final, related challenge for new civil society organisations is building sufficient expertise to feel self-confident in taking public antitrust positions. Competition policy is a complicated field, even more so because it is such a new concept in many countries, and the law has much room for development. A significant portion of a nation's antitrust expertise is located either within the government enforcement agencies themselves or within the law firms that represent defendant (or potentially defendant) companies. Outside expertise therefore, can be very useful in assisting the growth of a pro-competition civil society infrastructure. To help address this challenge, our envisioned international organisation would ideally help connect a global network of experts.

Ultimately, we envision a day when competition advocacy will become a permanent part of the civil society in every market-oriented country. Only in this way can we insure that competition authorities can have the ongoing support needed for optimal functioning and at the same time will always be properly held accountable to the public for any failures to robustly advocate for consumers through competition policy. What is needed, as CUTS has amply demonstrated, is both a cheer leader for well-conceived and effective governmental intervention in the market, and a vigorous watchdog to assure that government does its job properly.