The Adversary Way to the Truth and Its Adversaries

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Our general topic this morning is "institutions and procedures" taken in the context of comparative competition law and economics. I wanted to begin this talk at a fairly general level by discussing certain cultural differences between the US and Europe and how they help account for the different ways we go about discovering truth in competition matters. But where to start? Eureka! It came to me as I spun out of the revolving door of the Grand Hotel de la Minerve this morning onto the Piazza de la Minerve. Aha! No, it won't be about the goddess of warriors, wisdom, and commerce, but the revolving door. In the US, "the revolving door" is a well-established, albeit somewhat controversial, feature of our occupational sociology and it plays a role in competition policy, as I will explain.

The Revolving Door and Competition Policy

The revolving door refers to the mobility of individuals as their career paths shuttle between jobs in the government and in the private sector. If this metaphor doesn't light your fire, you might instead think of an invisible membrane separating the civil service from the private sector. The membrane has different characteristics in different polities. I prefer the door

metaphor because it allows me to say this: the door between the state and the private sector may swing or revolve, it may open routinely or rarely, it may open inward, outward, or in both directions. And with that flourish I should note that Minerve is also the goddess of poetry.

A confession: I am a product of the American revolving door. I started my legal career as an associate at the Hogan & Hartson firm in Washington. When several partners spun through the revolving door to begin work at the Federal Trade Commission, they invited me to come along and I did. I remained in the government for six years. Then I went back into a law firm and later into the retail jewelry business, which believe it or not was my occupation before I founded the American Antitrust Institute. There was nothing unusual about a young attorney first gaining experience in a law firm and then going into the government. Even more commonly, young lawyers start off in the government and move to the private sector.

My esteemed colleague Bill Kovacic presents another example of the revolving door. After graduating from law school, he spent three years at the firm of Bryan Cave, then four years with the FTC. He also had gained experience as a clerk to a judge and as a staff member with the US Senate Judiciary Committee. Within a relatively short time, in fact, he experienced not only the private sector, but all three branches of government, judicial, legislative, and executive. Later, Bill became a law professor, but at the same time – and this is also not unusual—he was "of counsel" to a law firm and practiced with the firm's antitrust and government contracts group. More recently, Bill re-entered the government, returning to the FTC first as General Counsel, then Commissioner, then Chairman, and, after the Obama election, when the Democrats could appoint the Chairman, he resumed his role as a Commissioner. It seems clear that the public has been a huge beneficiary of this rich experience of the competition policy picture from diverse perspectives.

I dare say that not many European competition lawyers have personal histories comparable to Bill's or even mine. Let me be clear that the US also benefits from having antitrust civil servants who spend a full career in a government agency, but for the most part they have the option to leave government for more remunerative jobs in the private sector, and the antitrust civil service is in fact ornamented with professionals coming in and exiting. Europeans, on the other hand, have tended to view the civil service as a dedicated career path. Once in, you stay in. Once out, you stay out. Obviously there are exceptions, and I understand that with

respect to competition policy the situation has changed somewhat especially in Brussels over the past five years or so, but I think the generalization still holds that the membrane separating public and private is much less porous in Europe than in the US.

Although the revolving door has its downside, it is an established part of American professional life. I will only focus on the revolving door and antitrust, where I am fairly comfortable defending it. Why is it so popular? First, experience in the FTC or DOJ or a state enforcement agency is viewed as an important part of one's education as a lawyer or economist. It is an apprentice opportunity where one learns how the system operates and thereby raises one's market value, if that is one's objective. It also provides a rewarding way of life, the opportunity to feel one is contributing to the public welfare. The salary and perquisites are only modest compared to what is available in the private sector, but they are nonetheless solid enough to permit a predictable middle class style of life.

The government receives value for providing a revolving door, at least in the antitrust field. It is able to attract new entrants of high quality, despite the low salaries, because they perceive future benefits to a possible subsequent career. Government is also able to attract mid-level and senior-level professionals of demonstrated ability, who make a near-term financial sacrifice in order to enhance their long-term market value, satisfy their urge to "give something back" to the society, and /or find a cure for mid-career burnout. These lateral entry newcomers bring their talents, their experience, and their ability to train and serve as role models for younger professionals. They also serve a function similar to the baby aspirin I take to keep my blood on the thin side: they help keep the bureaucratic arteries open. At the higher levels of governmental management, the revolving door allows the prevailing administration to bring in loyalists who can help promote the policies of the President, who would otherwise be completely reliant on an embedded bureaucracy.

The downside is that in some cases these established professionals also bring a pro-defense attitude gained through years of defending and counselling clients, although most are able to don an enforcement attitude that is balanced by having also worked from the other side of the negotiating table. The risk in antitrust is less that the Antitrust Division or the FTC will be "captured" by an industry than that it will be captured by a particular viewpoint.

Another downside could be that government professionals who have their eyes on a future private sector role will pull their punches and provide favors to possible future employers. While this may occasionally happen, the better view seems to be that private employers are more impressed by professionals who fulfill their roles professionally and who, if they return to their agency as representative of a private party, will be received as a trusted professional. There are few things less desired by a client than to be represented before the government by an attorney who is personally known to his former colleagues across the table – and personally distrusted.

So, antitrust governance benefits, on the whole, from the revolving door. The private sector also benefits from the revolving door and this has side benefits for the public as well, as former civil servants can provide their clients a relatively clear understanding of what the government expects in the way of corporate behavior. We should never underestimate the fact that much of the most important law enforcement in the competition arena comes in the boardroom by way of good professional advice.

Money has to be mentioned here. For the US, the difference in pay levels between the public and private sectors has grown to be enormous. The debt load of a recent graduate of law school or of a doctorate program is making it more and more difficult for the best qualified people to work for the government. The salary gap may possibly be shrinking in today's miserable economy, but the quality of US antitrust enforcement would surely be harmed severely if the revolving door were eliminated without also raising government salaries quite considerably. This, unfortunately, does not appear likely.

I wish I could say that American civil servants have achieved the same high status within their society as Europeans, but in the popular mind this is not the case. As a generalization Americans place civil servants below private entrepreneurs; Europeans place civil servants higher than private entrepreneurs. We will have to see if recent meltdowns and scandals will change this situation.

Now let's look at some of the implications of the picture I have just painted. We have two different attitudes toward government service, which are reflected in the way professionals conduct their careers. One system tends to place a higher value on private activity in the private sector. The other tends to place a higher value on the governmental sector. In the first system,

private enforcement of competition law is highly established. Well over 90 percent of American antitrust cases are privately brought. While many of these cases "follow on" to government cases, many are stand-alone cases brought without government participation or approval. There are relatively few follow-on and almost no stand-alone cases in Europe. The private side of the antitrust bar is decidedly under-nourished.

In the first system, information gathering that leads to antitrust cases is conducted both by government, usually with much secrecy, and by private parties through a liberal discovery procedure that is rather loosely controlled by courts. In the other system, information gathering is almost exclusively the prerogative of the enforcement agency. In the first system, there is often little confidence on the part of the public, the courts, and ultimately the enforcers themselves in government's ability to predict the future much less to make correct decisions, hence the courts (which are seen as an independent third branch of government) require a high level of proof about matters that cannot be proved, but only predicted. In the second system, there is a greater willingness to rely on civil service experts to make predictions that will not be overturned by courts. If one looks at the difference between the US and the EC on the GE/Honeywell merger, it may come down to differing levels of trust in predictions about future harms.

The Role of Private Enforcement

Let me return to a few of these points: first to the role of private enforcement, then to discovery, and eventually to prediction.

At a recent conference on international developments involving private enforcement, I was frankly surprised at how frequently Europeans referred to the American system of antitrust litigation as a "toxic cocktail." This did not appear to be offered as a term of endearment. I acknowledge that the American system is far from perfect, but I think its negatives have routinely been exaggerated, first by Americans and now by Europeans. The exaggeration is often intentional. It comes primarily from those interests that tend to be the targets of antitrust litigation-- in other words, from those who have an economic and political stake in limiting the enforcement of competition laws. It is not that they are irrational haters of those they dub "trial lawyers" or "class action attorneys" or "populists" or "consumer advocates." It is that they are

rational advocates of certain interests who are able to take a kernel of truth and build it into a Maginot Line of defense. Many, but certainly not all, of these adversaries of antitrust enforcement are ideological conservatives, and they currently command the heights of the US judiciary.

As noted, it is estimated that over 90 percent of antitrust cases in the US are brought by private parties. This is actually a difficult matter to quantify because we don't have good data on what is initiated in the state courts and a plethora of class actions tend to skew the record-keeping. We also do not know for sure how many cases are originated by private parties without the help of government prosecutions. A major obstacle in obtaining good data is that the vast majority of antitrust cases in the US are settled and there is no centralized database for settlements.

The AAI undertook a thus-far unique study to try to determine the effectiveness of private cases. Our researchers, Professors Robert Lande and Joshua Davis, assisted by a variety of law students, were able to identify 40 major cases that had been completed after 1990. They went back into the files, talked to the attorneys, and were able to describe these cases and their outcomes, including settlement agreements that had been approved by the courts, in detail. The full results appear in an AAI Working Paper[1] and are summarized in a law review article.[2]

The AAI study found that the cumulative recovery for plaintiffs in just these 40 cases was in the range of $18-19.6 billion.[3] By way of comparison, the total of criminal antitrust fines imposed by the US Department of Justice since 1990 amounted to $4.3 billion.[4] As the authors note, "Measured this way, private litigation provides more than four times the deterrence of the criminal fines."[5] The authors point out that there are many methodological assumptions packed

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[1] http://www.antitrustinstitute.org/Archives/LandeDavisReport.ashx.

[2] Robert H. Lande and Joshua P. Davis, Benefits from Private Antitrust Enforcement, 42 U. S.F. Law Rev. 676, 891 (2008).

[3] All of this was cash. Id. at 891.

[4] Id., 893.

[5] Id. 894.

into this analysis, but even after all adjustments are made, the conclusion stands out like the Pantheon on the Piazza de la Minerve: private enforcement undeniably adds quite substantially to the consequences that a firm must take into account when it considers violating the antitrust laws.

A common misconception in the US is that private cases always follow-on after public cases have unearthed evidence and established liability. The AAI study found, surprisingly, that almost half of the total amount recovered came from the fifteen cases that did not follow federal, State, or EU government enforcement actions.[6]

The large role played by private enforcement is no accident. In the US, private antitrust enforcement has both deterrence and compensation as goals. The statutory law affirmatively supports decentralized private enforcement as an adjunct to centralized public enforcement. In addition to specifying that private remedies are available, the law provides for treble damages to the winner and does not require the plaintiff to take the risk of paying for the defendant's legal fees if the suit fails. This architecture was clearly designed to encourage private enforcement and it has succeeded.

Treble damages have variously been viewed as punitive, or as part of an intentional effort to motivate plaintiffs (and their attorneys) to bring cases, or as a recognition that only a portion of illegal schemes will be uncovered or challenged by anyone, so that optimal deterrence requires a multiple of the damage caused in those cases that get prosecuted. In the US, we often speak of plaintiffs' lawyers as "private attorneys general" in recognition that they are presumed to serve a public as well as private function.[7] It has also been argued that damages won in cases

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[6] Id. 897. The interplay between private and public actions is complex. It is not always possible to ascertain who should be credited with the initiation of a case. Additionally, Lande and Davis conclude: "It could well be the case that private victories or losses in one type of case (e.g., bundled rebate cases or predatory pricing cases) affect similar or related government cases in different industries, or vice versa. For this reason, it is possible that curtailing private litigation might undermine antitrust enforcement in ways that would be extremely difficult to predict." Id. 899.

[7] Generally see Jeremy A. Rabkin, "The Secret Life of the Private Attorney General," 61 Law and Contemp. Problems 179 (1998).

rarely if ever truly amount to treble damages because in the US, the calculation of damages does not include prejudgment interest (i.e., interest from the date of infraction to the date of liability does not get included in damages) and other elements (e.g., deadweight loss) that might be deemed damages.[8]

I am not suggesting that Europeans or others should adopt the US system of litigation, although if they are serious about wanting to provide compensation to persons injured by anticompetitive behavior, I think several suggestions should be of importance. First, a compensation regime requires some form of collective action, so that relatively small consumer claims can be aggregated. Second, collective action must have a mechanism associated with it that will sufficiently motivate plaintiffs, and since they are not usually able to organize their own cases, it must also motivate plaintiffs' attorneys to put forward the expenses necessary to make a case happen. The US system of contingent fee litigation is one way to effectuate representation for consumer and other classes.

In theory one could have private compensation without necessarily adding to deterrence, if private compensation were to be subtracted from government fines. Better, however, is to recognize that resources allocated to governments are rarely if ever adequate sufficiently to police the private sector for anticompetitive problems, much less to deter the occurrence of such problems. Even with resources, there will be priorities—economic, legal, or political-- that will keep a government from prosecuting cases in which bad corporate behavior has injured victims. With that recognition, we raise the question of the extent to which a fair and workable market-based system ought to include specific motivations for private enforcement of competition law. Such topics as treble or punitive damages aside, we need to address whether there will be stand-alone cases brought by private attorneys in the absence of government action and if so, how lawyers and economists will obtain the information necessary to construct a viable complaint that can be prosecuted to victory.

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[8] Robert H. Lande, "Are Antitrust "Treble" Damages Really Single Damages? ", 54 Ohio St. L.J. 115 (1993). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

Discovery

If a private enforcement system is limited to follow-on cases, the plaintiff has little need to obtain information about the defendant or the defendant's illegal actions, because this could be furnished (at least for the most part) by the government in its legal documents. A system could be made to work so that the only proof needed for compensation would be the plaintiff's proffer of the government's final judgment of liability and proof of the plaintiff's damages caused by the defendant's illegal behavior, evidence in the possession of the plaintiff. If, on the other hand, stand-alone cases are facilitated or if the government does not routinely make sufficient information available, it is necessary to have a system of information disclosure that makes it realistically possible for the plaintiff to build a case.

In the US, that system is known as "discovery," which is authorized by the Federal Rules of Civil Procedure. But even before getting to discovery, it is necessary for a plaintiff to obtain sufficient information to fulfill the requirements of pleading. That is, although in the US a complaint is only required to put the defense on notice of what claims are being presented to the court, the Supreme Court's opinion in *Twombly* [9] in 2007 declared that it is not enough in an antitrust case to plead that a conspiracy exists. The plaintiff must also provide enough factual matter (taken by the court as true) to suggest that an agreement was made. This newly articulated "plausible on its face" standard is potentially quite troubling, because it is applied on a motion to dismiss, which typically takes place before discovery has begun. Indeed, a purpose of the raised standard is to require a reasonable expectation that discovery will reveal evidence of illegal agreement. Our courts have plainly become concerned about the time and expense inherent in antitrust discovery.

The other side of the story, of course, is that when one talks about a secret conspiracy, it usually takes discovery, supported by the authority of the court, to ferret out the factual material needed to draft a specific complaint. Readers familiar with Joseph Heller's great novel, Catch-22, will immediately recognize the problem. . How do you discover the facts to demonstrate

[9] Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955 (2007).

plausibility without first having some discovery? *Twombly* motions to dismiss not only antitrust cases but other types of cases as well are now a dime a dozen and these motions constitute one more procedural obstacle for any plaintiff. [10] For an antitrust case, the pre-discovery plaintiff may obtain information in a variety of voluntary ways, including from persons who believe they were hurt by the defendants, newspapers and trade press, informants and whistleblowers, and others either in the industry or who are expert observers of the industry.

If a plaintiff survives the motion to dismiss, discovery then proceeds. In the US this is generally unsupervised in the first instance and may include demands for documents, written interrogatories, and oral interrogations. When disputes arise, which is not infrequent, they are taken to the court for resolution. The process of discovery in an antitrust case undoubtedly is usually expensive. It can involve many months of attorney and paralegal time, millions of documents and computerized data (e.g., e-mail), costs of duplication, and administrative costs such as the court's time for resolving disputes.

It should be possible to have a discovery system under the immediate control of the court, which is refined for competition cases, without going to the extremes that sometimes occur in the US system. As previously presented in the EC White Paper[11] and now also in the European Commission's proposal for Council Directive on Damages Actions, Europe is moving toward balancing the need for disclosure in antitrust cases against the risks inherent in broad, burdensome discovery. According to Article 7 (2) and (3), national courts shall be bound by the principles of necessity, relevance and proportionality prior to approving an order for disclosure. To reach this balance, claimants would be obliged to produce to the court all facts showing that they were harmed, and would be entitled to request only precise categories of evidence that are necessary and proportional to their claim. Access to evidence would be based upon "fact-based pleading" and would be under strict judicial control. The operative legal term is not "discovery"

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[10] A recent opinion of the US Supreme Court indicates that the Twombly approach will be applied very broadly, and not only with respect to antitrust. Ashcroft v. Iqbal, Docket No. 1015.

[11] White Paper on Damages Actions for breach of the EC antitrust rules, Brussels 2.4.2008, COM (2008) 165 final.

but "disclosure" by a party, which could be compelled, subject to its relevance, necessity, and "proportionality." However, the Commission (pursuant Article 7 (6)) will allow Member States to maintain or introduce rules that would provide for wider disclosure. It remains to be seen how far the Member States will be willing to go to make use of that flexibility.

The EC recommendations leave a great deal of discretion to national judges for implementation. While the flexibility provided by this discretion may be desirable for achieving an appropriate balance between the need for evidence and the danger of overbroad discovery obligations, such flexibility sacrifices predictability and certainty. Thus, depending on how national judges interpret the Commission's recommendations, European litigants may notice little change or may experience something approaching American-style pre-trial discovery.

In fact, the differences between proposed European and current American discovery in private cases do not appear to be terribly large, in that US courts have the authority to exercise strict controls and although they do not tend to get deeply involved until there are signs that the parties cannot work out problems themselves, if they sense abuse they are likely to intervene. Perhaps the main difference will be that European judges, representing the majesty of more highly respected officialdom, are more intimately involved from the beginning, whereas US courts effectively delegate discovery to the private parties themselves until there is a demonstrated need for more detailed supervision. As my political science mentor, Professor Norton Long, trained me to ask, is this a difference that makes a difference?

The Search for Truth in Competition Policy

I have been talking about cultural differences reflected in private enforcement and in discovery. Turning now to a related question, what may we say about the two main approaches toward pursuing the truth in competition policy, the adversarial approach that characterizes US antitrust and the inquisitorial approach that characterizes European competition policy? I believe this takes us back to some of the cultural differences we began with.

A half-century ago, on the twentieth birthday of the Federal Rules of Civil Procedure, the U.S. Supreme Court recognized the contribution of the discovery provisions to truth-based

judicial decision making with these words: "Modern instruments of discovery serve a useful purpose…. They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues of facts disclosed to the fullest possible extent."[12] The discovery procedures established by rules 26 through 37 may be the most important provisions of the Federal Rules of Civil Procedure. Embodied in these rules are philosophical implications essential to the broad objective of the American civil justice system: to provide for the meaningful expression of a citizen's right to redress for wrongs done to person or property. These rules were founded on the premise that access to knowledge is necessary to ascertain the truth.

Isn't an adversarial process likely to fit better in a system that emphasizes private action and gives highest status to private actors? In such a system, there is a certain level of distrust of government that leads to the following generalization: truth will emerge from the clash of advocates, each armed with access to the same factual information, perhaps presented by retained economics experts as well as specialized attorneys, with the truth to be determined by a generalist judge-and-generalist jury unless the parties waive the right to a jury. The result, it has been said, will be that judicial proceedings become "a battle of wits rather than a search for the truth." [13] Whether or not the government pursues a case, a private party may initiate a case and as we have seen, the system encourages private antitrust litigation. Decision-makers are generalists, not antitrust experts. The implication is that common man and common sense play a substantial role in the evolution of competition policy.

The inquisitorial process, on the other hand, seems better fitted to a system that emphasizes the role of government and gives a higher status to government officials, including judges. In such a system, the control of what competition cases will be brought lies with the government, the availability of information relevant to the case depends strongly on what the judge asks and what the government and judge choose to disclose. Determination of the truth lies with government and judicial experts, not with juries.

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[12] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

[13] Wright & Miller, Federal Practice and Procedure § 2001, at 18-19 (1970 & Supp. 1992).

These models are no more than rough approximations of reality. For example, in the US alongside the Department of Justice model of litigating cases in the federal courts is the administrative model embodied in the Federal Trade Commission, which is an independent body of experts with broad powers of investigation as well as prosecution and adjudication. (And I might point out, the five Commissioners almost always have experience in the private sector before they are appointed by the President.) Moreover, while American judges are typically not antitrust experts, they play a very important role in the creation of policies and rules that give the system a large degree of coherence. In recent years, federal judges have displayed an obvious disdain for antitrust . The Supreme Court produced a pattern of procedural and substantive limitations that is at least in part explained by a pro-defendant concern about the costs of discovery, lack of confidence in the ability of judges to control cases, and antagonism toward juries because they may not understand the finer points of economic theory. In this sense the US antitrust system may be moving away from its roots in common law toward something that gives judges a greater ability to control the process and outcome.

As the European system begins the next step in providing mechanisms for private remedies for competition violations, it must confront many of the questions that the American system has answered in the past and is re-answering today. What types of violations will be subject to stand-alone cases initiated by private parties? How will private parties aggregate claims? How will private parties gain access to information necessary not only for winning a case but also for determining whether to initiate a case? And how will private parties pay for the costs of prosecuting a case? The advent of private enforcement in Europe is undoubtedly going to make life more complicated and will bring the adversarial and inquisitorial models somewhat closer together. For example, private cases will be adjudged by a multitude of courts, which even in a civil law jurisdiction will require higher courts to rule on conflicting interpretations. The dominance of the state in competition policy will to some degree be broken as more players enter the game.

As we discuss whether the adversarial or the inquisitorial model is more likely to determine the truth in any given antitrust case, I remind you that Minerve, the goddess of wisdom, warriors, and commerce, presided over both the useful and the ornamental arts. We need to distinguish between the useful and the ornamental. The question about adversarial

versus inquisitorial assumes, first of all, that the truth is what the game is all about. But let's think about this for a moment.

Truth applies to the factual aspect of a case. That is, it is either true or false that Intel did the things that the EC says it did to disadvantage AMD. A well-executed investigation by a government can bring the facts to light, whether the adversarial or the inquisitorial approach is used, so that factual truth may be determined through either approach. Is one approach more *likely* to ferret out all the relevant facts, especially when they are more convoluted than in the Intel case?

At the same time, which approach is likely to be more economically and administratively efficient? In a system of justice, economy and administrative efficiency are also important, so long as they do not unduly undermine the search for truth. Compromises between truth and efficiency must necessarily be made because resources are limited. We could spend all the government's resources on establishing the truth of a single case, or bring a dozen cases that result in substantial justice at the occasional expense of some degree of truth. The situation is further complicated by recognition that while facts can be true or false, the more important questions in the implementation of competition policy relate not to truth but to probabilities, that is to judgments of what is more or less likely to happen in the future.

The essence of competition policy is not whether John struck Charles. Rather, if Intel conditions the price at which it sells X-86 microchips on the customer's purchase of a certain percentage of its microchip requirements from Intel, or if Intel pays its customers to not purchase chips from AMD, will these tactics make it so unlikely that its sole competitor will be able to compete on the merits, that Intel should be enjoined from undertaking such loyalty rebates in the future? What remedies will assure that such tactics are not repeated?

Prediction is the essence of competition policy and the one thing we know about prediction is that there is not just one future, but rather at any point in time there is an array of possible future scenarios. This is true not only for macro questions such as what will be the competitive effects if Honeywell and GE are permitted to merge? Even at the micro level, when we define a product market, we ask what consumers and potential competitors will do within two years if the price of a product is raised by five percent. So, on the important questions that arise

in the making of competition policy, the search is not necessarily for truth but for more or less likely probabilities.

The search for this type of knowledge depends on a combination of factual assumptions (which may be more or less true), past experience (which is to some extent a matter of interpretation), logic (which always depends on assumptions), and expert prognostication. The expertise component usually rests on more than one base. It may come from officials in the executive branch, from participants in the market, from economic consultants, and from the judges themselves, whose expertise may not be in economics but rather in taking a range of materials into account while rendering wise or at least reasonable judgments.

Where does this bring us? Perhaps the goddess would share my conclusion that the most useful question is not whether a system is characterized as more adversarial or more inquisitorial, but whether the judgments that come out of the system are perceived as reasonable and legitimate. This, in any event, leads us back to cultural expectations and the competence of the individuals who play leading roles in the process.

The Weak Culture of Competition Policy

Does the revolving door lead to wiser antitrust decisions because the staff and decision-makers of an agency are likely to have personal histories that reflect experience on both sides of the negotiating table? For example, does breadth of background improve an individual's ability to make predictions that turn out to be correct? Does an adversarial process work better if the adversaries can better understand each other's perspective? Or does the sharpness of debate get blunted by the commonality of experience? Does the revolving door lead to better enforcement because the private sector, relying on former government insiders, has a better picture of what behavior will or will not be attacked by the government? Or does this simply lead to anticompetitive private decisions that are more likely to escape government notice? Does the revolving door lead to a more efficient administration of the antitrust enterprise as a whole because adversaries who can see things from each other's perspective are more likely to trust each other and cooperate in the resolution of a conflict? Or will the opposite be the case? Will

the competition culture be stronger if there is a door that swings freely in both directions? Unfortunately, Minerve has not prepared me to answer these questions.

Although I have focused on some cultural differences and how they manifest themselves in the substance and processes of competition policy, I will close on an aspect of culture that seems to be widely shared among the nations that have competition laws, namely that the roots of competition as a national policy are relatively shallow. This is still the case in the US, even with its century-plus of experience, and more so in nations that have only recently adopted competition laws, such as many of the EU's member states, and all the more so in nations that are communist, such as China, that recently developed a degree of confidence in markets such as Russia or that have been dominated by state owned enterprises or a small number of large, vertically integrated private systems, such as Japan and Korea. I attribute the shallow roots of competition policy in some places to a very limited experience with markets, in others to a deep-seated popular preference for statist institutions, and everywhere to general ignorance of economics and specific ignorance of the role and benefits of competition for the average consumer and the average business.

What must advocates of competition policy do to nurture and strengthen the roots? First, they must press educators at all levels to make fundamental economics a subject on a par with reading, writing, and arithmetic. Like street law, street economics must be taught more frequently and more meaningfully in schools.[14] Second, the competition authorities need to address themselves more vigorously to public education about the value of what they do. National Competition Days are beneficial. A World Competition Day, as proposed by India's Consumer Unity Trust, would be even better. Cases need to be publicized and explained in layman's terms not merely as government victories but as victories that benefit real people. Third, infrastructures supportive of the competition policy enterprise must be developed. These can include bar association competition sections, academic centers for competition studies, and competition advocacy NGO's. I believe a key to this development is the extension of private

[14] Please see the AAI's contribution to popular education, a half-hour video, "Fair Fight in the Marketplace," and its enrichment website, www.fairfightfilm.org.

enforcement that will facilitate the recovery of damages by plaintiffs and by aggregates of plaintiffs.

Apart from the obvious, that the availability of a damages remedy serves the purposes of just compensation for injury and deters violations of the law, there are two additional reasons for supporting private enforcement that are perhaps less obvious. First, it is not enough for the average citizen is to see a hypothetical benefit when the government prosecutes an anti-competitive act; who cares, really, if the government collects a fine? There must be a tangible benefit that flows to the people who are harmed and to others who can imagine themselves as possibly being harmed in another circumstance. Second, building a private enforcement structure also generates a much-enhanced constituency that has a direct stake in the competition enterprise, namely the attorneys and economists who will earn a livelihood in this field. As investors in certain knowledge and skills, they will naturally seek to influence public attitudes that favor the competition enterprise.

We live in a world without an antitrust center. There is no single law, no single arbiter of conflicts. Local values, local cultures necessarily play a role in determining how competition law and its enforcement will evolve locally. It is important to recognize the role of culture and not to insist on a "one size fits all" approach. At the same time, culture is dynamic and can be modified by the efforts of elites, such as those who dominate competition policy in each nation, if they make an intelligent and sustained effort to develop public understanding and constituency support

Antitrust or competition policy, call it what you will, is the middle ground between too much government regulation and too little. We've come a long distance from the mid-1900's when Sweden's democratic socialism was referred to as the middle way. With the economic dislocation of the past 18 months and the collapse of so many companies, there is not only an opportunity but a need to rethink all sorts of economic policies. American conservatives such as Alan Greenspan and Richard Posner now say that they had underestimated the role that government must play in a capitalist economy. This is the time for that happy middle ground to expand. The need for a stronger antitrust culture to support the middle way has become imperative.