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Antitrust in 2025: Cartels, Agency Effectiveness, and a Return to Back to the Future

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I. INTRODUCTION

Predicting the future is difficult. Advances in economics and antitrust law's ability to incorporate such changes have been tremendous in the past 15 years. In 1985, Robert Zemeckis' movie *Back to the Future* came out. In that movie, Marty McFly (Michael J. Fox) travels back in time from 1985 to 1955. Marty is shocked by the differences he discovers between his world and the past world that he now inhabits. I think that most practitioners in 1985 would have been shocked to discover that antitrust now encompasses over 100 jurisdictions, that the Supreme Court now more or less fully embraces Chicago/Harvard approaches, that the rise of computing has led to massive problems of too much data to go through as part of HSR second requests, and that sophisticated econometric derived data is possible as part of antitrust analysis in mergers, monopolization cases, and in terms of damage calculations. What then can I predict with some degree of certainty so that when Michael J. Fox next makes the jump in his time machine from 2010 to 2025, can he predict with some certainty the antitrust of the future? I will focus on two areas where I have some comfort in making predictions.

II. CARTELS WILL STILL EXIST

There are strong incentives to fix prices (firm size, growth, reporting relationships, pay and performance appraisal structures, and processes) but weak incentives not to do so. In many cases the same industries are recidivists because, as a new generation retires, the next generation relearns how to coordinate with competitors. This illustrates the social norm within society and within the industry.

One might argue that the leniency programs introduced in the United States and elsewhere in the world create incentives for better compliance. Indeed, better compliance training appears to correspond with fewer occurrences of cartel behavior. Yet, better cartel compliance presumes that firm culture is changing towards greater compliance. On some level, this is true. However, this is not universal. Part of the problem is the disconnect that exists and which I believe will continue to exist between cartelists and their firms.

An individual may face pressure from the corporation, which has distinct interests from those of the individual. For example, the company will want the individual to have conversations with the company's counsel, even though counsel represents the interests of the company and not the individual. Criminal sanctions erode trust between employer and employee, possibly creating a chilling effect for compliance purposes if the employee fears that the employer may not legally support them if criminal sanctions are possible. This is particularly the case when the government pressures a firm to waive attorney client privilege. In some cases, the penalties for executives involved in a cartel to disclose might be outweighed by the cost of disclosure. An individual may not be protected under attorney-client privilege in communications with the in-house counsel.

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Moreover, in addition to hiring their own lawyer, the individual faces possible threat of retaliation. I do not foresee these dynamics fundamentally shifting in the next fifteen years.

III. SOME ANTITRUST AGENCIES WILL RUN OUT OF STEAM

With the number of new antitrust agencies increasing so rapidly, one has to wonder how effective many of them may be once the initial energy of the initial management and staff wears off and the next generation takes over the agency. I will focus on one causal factor for this prediction—the lack of sustained educational training to create a robust set of stakeholders in competition law and policy.

Very often the biggest and most important influence of competition policy is through the spread of ideas. For example, the academic community generally generates the economic theories which lie behind competition law and policy. Moreover, academics are often appointed to agencies in senior positions to implement these ideas.

Human capacity building occurs before agency staff and leadership ever set foot into competition agencies—at the university level. It begins with a general understanding of law and economics; after all, grasping the economic analysis of law is a fundamental analytical building block of competition law and policy. Law and economics provide a critical tool set for organizing law based on an understanding of how incentives shape human behavior. This approach has a profound impact on the structure of law, including contractual and property rights, as well as laws and institutions that facilitate a market-based system.

In addition to greater analytical rigor, the economic analysis of law offers greater predictability which, in turn, reduces transaction costs for doing business in a given country. Quantitative methods in economics are important as are economic analysis of the law in law schools. In law schools in most countries, analysis is heavily doctrinal. As a result, students are not well prepared to understand a field of economic regulation such as competition law. Unfortunately, an education system in this state leaves countries with judges who grapple with issues using a set of formalistic-approach analytical tools in competition cases, much in need of the improvement a combined law and economics perspective could provide.

Thus, even for those students who never practice in the area of competition law, training in economic analysis can play an important role. Antitrust specific education needs to be expanded upon so that it impacts not only future members of competition agencies, but also future members of the judiciary. Over time, a robust teaching of competition law (based on economics) in Indian law schools should stimulate a generational transformation in thinking, akin to the scientific revolution brought about by Copernicus.²

It is increasingly apparent that academics and competition agencies need to spend more time on the human dimension of competition policy. However, efforts by academics, international organizations, and antitrust agencies from more mature systems, have not been coordinated or well thought out globally as of yet. I do not think that this will change much in the next fifteen years without significant attention and resources from academics in more developed countries and from agencies pushing for a greater academic role. Effective diffusion of antitrust ideas requires a sense of how best to utilize both formal and informal learning to improve the

² Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, 1962).

analytical skills of competition agencies. Training of agency staff and of private sector practitioners needs to be an area of increased focus now to improve antitrust globally in 2025.