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Antitrust: A Good Deal for All in Times of Globalization and Recession

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Autorité de la concurrence

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Antitrust: A Good Deal for All in Times of Globalization and Recession

*By Bruno Lasserre**

With the economic recession taking over from the financial crisis of 2008, attention has focused less on issues such as merger review and State aid control, and more on antitrust properly speaking, meaning the prohibition of cartels and abuses of dominance, as well as the enforcement of this prohibition by means of administrative fines imposed on corporations and/or of criminal penalties directed to individuals. Among other items, this agenda has included the following questions: 1) whether corporate fines are excessive or indeed misdirected and should be replaced in whole or at least in part by individual penalties; 2) whether antitrust enforcement itself is a luxury good or even an idea of yesterday, and should be abandoned or at least significantly relaxed.

In the following pages, I will briefly address these two issues. I will do so in reverse order, since discussing the significance of public antitrust enforcement via administrative fines and/or criminal penalties makes little sense if this enforcement has become irrelevant in the first place. I will not deal with the separate issue of private enforcement.

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I. Antitrust Enforcement in Times of Recession and Globalization: Putting the Issue in Context

When the world's economy and financial system entered into a time of unprecedented turmoil at the end of 2008, I expressed the view[1] that it was not only important, but indeed vital, that competition enforcers get their act together and meet the challenges raised by this new situation, within the scope of their mission and with their limited means.

The most urgent of those challenges, I recalled, was to answer the short-term concerns raised by a stumbling financial and banking system and by an anticipated slowdown of the real economy, while at the same time keeping an eye fixed on the long-term vision of a competitive economy that delivered merit-based benefits for corporations and consumers alike. Available means to match those challenges, I advocated, included adapting the processes put in place to scrutinize the competitive impact of corporate mergers and public subsidies before they occurred, while not compromising on the need to make such an upfront assessment instead of standing by until some of these actions had actually jeopardized growth and welfare.

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Two years later, it seems that merger review and, as far as the European Union is concerned, State aid control have gone down rather well during the downturn. A number of banking mergers were planned at the peak of the financial crisis and in its immediate aftermath, sometimes raising competition concerns, but almost all of them have been allowed to proceed thanks to the commitments negotiated between the parties and the competition authority or authorities in charge of these deals in order to alleviate such concerns. In France for instance, the recent *Banque Populaire/Caisse d'Épargne* case[2] shed some light on how a banking merger could be cleared thanks to an upfront dialogue between the parties and the enforcement agency on how the crisis affects (or not) the range of remedies available to meet the competitive concerns raised by the deal.

As for State aid cases, the European Commission has been praised for taking a series of swift decisions granting survival packages to distressed financial institutions while insisting, first, that they be devised in the least distortive way; second, that their features be sufficiently consistent so as to preserve a level-playing field throughout the European market; and, third, that the aid granted be monitored and reimbursed as soon as market conditions allowed for the distressed institution's recovery.

While no one knows whether or not this interim diagnosis will remain valid once the time comes to make a full checkup, it is therefore fair to say that, overall, merger review and State aid control seem to have adapted to recent events

by addressing the individual concerns related to the failure or potential failure of a number of key market players, while taking the steps required to make sure that customers and consumers do not end up paying the price of these operations of market maintenance. As a consequence, the debate in this regard has somewhat receded.

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In the following pages, I will briefly address these two issues. I will do so in reverse order, since discussing the significance of public antitrust enforcement via administrative fines and/or criminal penalties makes little sense if this enforcement has become irrelevant in the first place. I will not deal with the separate issue of private enforcement.

II. Is Antitrust Enforcement Irrelevant and Should It Be Relaxed or Even Relinquished?

Two issues are generally put forward in support of the idea that antitrust enforcement has become less relevant or even irrelevant today. These issues are often confused or conflated. They may be related to some extent, but in my mind they raise different questions and therefore call for a separate assessment.

The first contention (a) is that antitrust enforcement is a "luxury good," meaning that, while it may be afforded in good economic times, it must be relaxed in bad economic times. The second argument (b) is that antitrust enforcement is "so yesterday," meaning that, while it could be accommodated while Western economies flourished, it cannot be tolerated anymore in times of globalization. The first variant therefore supports a temporary relaxation of antitrust enforcement, while the second advocates its permanent dismantling.

A. IS ANTITRUST ENFORCEMENT TEMPORARILY UNAFFORDABLE?

Deciding whether antitrust enforcement is a luxury good or not is a matter of personal belief. I have a personal opinion on the matter, which is certainly sub-

jective and which some could perhaps view as biased, but which I hope all can accept as thoughtful given my background. Rather than advocating my opinion in the following lines, I will rather try to shed some light on a few elements of context to be considered when addressing the issue.

1. Antitrust Law is Intended to Benefit Both Corporations and Consumers

Perhaps one of the most remarkable developments of competition policy in the last decade is the effort put by competition authorities to root their decisions on when, why, and how to enforce the law in economic analysis. An ever-larger number of competition authorities have joined the trend as evidenced by these authorities prioritizing cases that are most likely to damage consumer welfare; evidencing robust theories of harm before challenging mergers, horizontal and vertical agreements, and unilateral conducts; balancing their likely adverse impact on competition with the efficiencies and benefits that proposed combinations or individual strategies are likely to yield; and, when necessary, making sure that remedies imposed on individual firms guarantee or restore competition without unduly chilling their freedom to invest, to innovate, and to compete on their merits.

PERHAPS ONE OF THE MOST REMARKABLE DEVELOPMENTS OF COMPETITION POLICY IN THE LAST DECADE IS THE EFFORT PUT BY COMPETITION AUTHORITIES TO ROOT THEIR DECISIONS ON WHEN, WHY, AND HOW TO ENFORCE THE LAW IN ECONOMIC ANALYSIS.

The International Competition Network ("ICN"), which is not an inter-governmental organization such as, for instance, the World Trade Organization ("WTO"), but rather an informal network now bringing together almost 120 competition enforcement agencies in the world, has played a decisive role in bringing about and accompanying this modernization.[4] On a more personal note, I have been—and I remain—a long-standing and committed advocate of such a shift towards a so-called "more economic and effects-based approach." I also hope to have driven the former *Conseil de la concurrence*, and now the *Autorité de la concurrence*, down this road since I took the helm of the agency in 2004.[5]

The dedication with which we make sure that competition policy efficiently drives, rather than unduly blocks, intelligent and courageous corporations in their efforts to take risks, to innovate, to market better products or services at better prices, and to deliver them to end-consumers should, however, not make us forget why competition law was created in the first place. Making firms more efficient and more profitable is clearly part of the picture. But competition law, as it has stood in Europe since 1957 or in France since 1986, also incorporates the notion that a fair share of the extra profits yielded by this additional efficiency be passed on to consumers.[6] In other words, it walks on two legs: driving cor-

porations to do their best is not only in their self-interest, it is also in the general interest of citizens as a whole.

A similar vision, I think, is encapsulated in one sentence of the statement made by then-Senator Obama before the American Antitrust Institute ("AAI") in the course of the 2008 presidential campaign, which could, I guess, be taken to reflect a bi-partisan view on the role of competition law and policy on the U.S. side of the Atlantic Ocean: "Antitrust is the American way to make capitalism work for consumers."[7] It is also this vision, according to which a competitive marketplace delivers growth, jobs, and welfare that benefit society as a whole, that led the French Parliament, with the support of the then-existing *Conseil de la concurrence*, to pass a legislative package revamping our competition enforcement system in 2008/2009, an aim which, it is worth being stressed, earned nearly unanimous support on the benches of the National Assembly and Senate.[8]

2. In Practice, Antitrust Enforcement Actually Balances Corporate and Consumer Welfare

The above is not just a narrative. It is fact-based. A number of competition authorities regularly publish evaluations of the benefits attached to their actions in the field of antitrust enforcement. These evaluations apply rule-of-thumbs hypotheses regarding the likely consequences of cartels and abuses of dominance, notably in terms of price increases, and the correlative benefits of staffing them via antitrust enforcement. Such hypotheses can of course be challenged, like all hypotheses. But they are transparent, based on robust economic doctrine, and generally subject to some degree of independent scrutiny by a public body other than the competition authority itself. It is, therefore, difficult to discard them completely.

The Autorité de la concurrence is under a duty to systematically assess, on a case-by-case basis, what adverse consequences antitrust practices are likely to have on consumers as well as on the general economy, and, correspondingly, what benefits its enforcement yields for society.

The figures that these competition authorities put forward are eloquent. I will not detail them for the very simple reason that I am not best-placed do so since, unlike most of its counterparts, the French *Autorité de la concurrence* has not published such outcome evaluations to date. However, it is under a legal requirement, each time it intends to impose a corporate fine, to make an assessment of the economic harm caused by the cartel, agreement, or abuse of dominance that is being investigated. In other words, the *Autorité de la concurrence* is under a duty to systematically assess, on a case-by-case basis, what adverse consequences antitrust practices are likely to have on consumers as well as on the general economy, and, correspondingly, what benefits its enforcement yields for society.

The main cartel decision taken by the *Autorité* in 2009, which concerns a case of collusion among the three majors of the temporary work sector in France, illustrates this exercise. The turnover related to the collusion, which was proven to have lasted two years (but may have been around for a longer period), amounted to EUR 5 billion. The *Autorité* assessed the overcharge to be in the magnitude of 0,5 percent, while the parties' data put it between 0 and 1,4 percent.

If one applies the method used by the United Kingdom's Office of Fair Trading ("OFT") for evaluating the outcome of its cartel work, but using the likely overcharge assessed by the *Autorité* (0,5 percent) instead of the standard rule-of-thumb of 10 percent, one can estimate that the *Autorité*'s decision saved EUR 138 million. If one applies the methods used by the U.S. Department of Justice's Antitrust Division ("DOJ") and by the European Commission's Directorate General for Competition ("DG COMP") at the time of writing, the figure ranges around EUR 500 million and EUR 2,7 billion, respectively.

One must bear in mind the fact that all these figures focus on the "price effect" of the temporary work cartel (artificial overcharge borne by customers) and leave aside its "volume effect" (temporary jobs foregone due to their increased cost). They also focus on the punitive dimension of the *Autorité*'s decision (on the participants to the cartel) and leave aside its deterrent effect (discouraging these same firms as well as other corporations from colluding in the future).

Added to the administrative fines imposed by the *Autorité* in this case (EUR 94 million), the total financial saving for consumers resulting from antitrust enforcement (EUR 232 million), in one single decision, is thus much greater than the agency's annual budget (EUR 20 million).

3. Relaxing Enforcement in Times of Recession Would, In Fact, Mean Letting Consumers Down

This context may be of use when thinking about whether or not antitrust enforcement should be relaxed in bad economic times. The full story reads as follows: When firms collude or abuse their market power, instead of just trying to do their best, they do not simply break the law, they also deprive businesses that operate downstream (either as manufacturers or as distributors), as well as end-consumers, of the tangible welfare benefits of the market economy. Cartels and abuses of dominance are a legal problem (economic crime) in the first place because they are a problem for the economy (inefficient behavior that leads to catastrophic market results, as evidenced by the temporary relaxation of antitrust enforcement in the United States during President Roosevelt's first mandate (1933-1937),[9] before the administration reverted to trustbusting.[10]) But these abuses also are a political problem: How can we expect ordinary citizens to support the market economy if we "relax" while a few corporations rob them from their "fair share" of the profits delivered by the market economy?

Some of us might thus be entitled to claim that antitrust enforcement is not a "luxury good," but rather a "base product," and especially so in dire economic times during which it is often noted that cartels and abuses are more frequent. This is why it stands at the heart of Europe's single market and strategy for growth and welfare in the 21st century, as stressed in Mario Monti's recent report on the future of the EU[11].

B. IS ANTITRUST ENFORCEMENT DEFINITELY UNDESIRABLE?

Alongside the idea of a (supposedly) temporary relaxation of antitrust enforcement, a distinct claim has been made that, whatever the added value of antitrust enforcement, we can definitely not afford it any longer and must resign ourselves to abandon this hallmark of a perhaps generous, but sadly bygone, era. This claim further alleges that this change has been made unavoidable by the evolution that the world has been experiencing over the last decades and that is being, perhaps, accelerated to some extent by the current crisis, namely the advent of a more multi-polar economy. The script of this story-in-the-making is that, until and unless countries that presently have a robust antitrust enforcement regime in place (as well as, for that matter, pieces of legislation aimed at addressing other issues of general interest such as safety regulations or financial regulations) relinquish these unconscionable checks on unfettered markets, countries that currently do not have equivalent instruments in place will be at a decisive advantage in the run for economic growth.

Such a call for an abandonment of antitrust enforcement is not wholly unheard of. History tells us that, in past periods of difficult times, such an abandonment has been advocated in a variety of forums, be it the press, behind closed doors, or in the courtrooms. For instance, the well-known U.S .Supreme Court *Appalachian Coals*[12] case has recently found a distant echo, both in time and in space, in the Paris Court of Appeal *AMD*[13] case. In this case, the Court found that a very sophisticated, five-year long, nationwide cartel run by the bulk of steel traders was "serious in theory," but "largely mitigated in practice" by "a context of economic crisis, both general and sector-specific."[14]

Answering the question of antitrust's desirability is made somewhat difficult by the fact that the case for this turnaround on antitrust enforcement is often made with an assertive tone, but rarely elaborated upon in detail.

Is this story a true story? If yes, then it is worth being listened to and thought about. After all, it is only reasonable to adjust one's standard of living to one's budget.

Answering the question of antitrust's desirability is made somewhat difficult by the fact that the case for this turnaround on antitrust enforcement is often made with an assertive tone, but rarely elaborated upon in detail. As far as I can see it, though, there are at least two underlying assumptions: "Antitrust kills business," on the

one hand; "Antitrust kills Europe" (or the United States or indeed any other jurisdiction where it is part of the law), on the other hand.

Are antitrust enforcement regimes indeed millstones that prevent business from being powerful and efficient enough on the global marketplace? I use the terms "powerful" and "efficient" because the basis tenet of competition law is to drive corporations to make efficient use of their market power and to step in only when they are likely to be making, either collectively (cartels and other anticompetitive agreements) or individually (abuses of dominance), an inefficient use of such a power. This story actually has two limbs: that competition law would unduly prevent the formation of market power and/or would also unduly prevent its exercise.

1. Antitrust Law Does Not Stand in the Way of Legitimate Corporate Growth in a Globalized Economy

Frankly, I do not think that competition law enforcement acts as an illegitimate or unnecessary hurdle between corporations and market power. It is extremely rare for corporate plans to merge to be challenged or blocked by competition authorities. The test on which most modern merger regimes in the world rest is not whether the deal is likely to result in the creation of a dominant market position; rather, it is whether it is likely to result in a substantial lessening of competition—something a merger may or may not lead to, depending on the facts of the case, and which may nonetheless be offset by the efficiencies that the merger can bring about for the benefit of consumers, again depending on the facts of the case. The merger landscape abounds with recent cases in which competition authorities all around the world have given the go-ahead, with or without conditions, to mergers eventually giving birth to firms that are fully able to compete on the global or regional scene.

> FRANKLY, I DO NOT THINK THAT COMPETITION LAW ENFORCEMENT ACTS AS AN ILLEGITIMATE OR UNNECESSARY HURDLE BETWEEN CORPORATIONS AND MARKET POWER.

To take the European example and to stick to the steel industry, which has undergone successive waves of restructuring and expansion over the last decades, the French number one player, Usinor, in 2001 was allowed to merge with its fellow flag carriers, Arbed from Luxembourg and Aceralia from Spain, thus giving rise to a worldwide player, Arcelor, that later merged with Anglo-Indian Mittal Steel in 2006. The past year provides innumerable examples of other European or American corporations being allowed to combine into global businesses; these examples featured world or regional leaders in their field: *GDF/Suez* in the gas industry; *Kraft Food/Cadbury* in the food sector; *British Airways/Iberia* in the air transport business; *BNP-Paribas/Dexia* in the banking industry; *NBC Universal/Comcast* in the entertainment sector; *News Corp/BSkyB* in the media and communications business; *Schneider Electric/Areva T&D* in the power transmission and distribu-

tion sector; *Oracle/Sun* on the software market… to name but a few of the hundreds of deals that were cleared in the last year by the European Commission. The same goes with the *Autorité*, which has not hesitated since 2009 to clear mergers creating such big players as *Veolia Transport/Transdev* in the transport sector or the already mentioned *Banques Populaires/Caisses d'Épargne* in the banking business.

We therefore stand a world apart from the idea that merger review is an obstacle to bigness.

We therefore stand a world apart from the idea that merger review is an obstacle to bigness. What merger review does, instead, is screen corporate deals in order to make sure that increases in corporate market power often attached to increases in corporate size do not give rise to situations where a firm enjoying unconstrained market power is in a position to charge higher prices to consumers.

2. Antitrust Enforcement Does Not Prevent Business From Adjusting to the Global Recession

Likewise, I do not see how a convincing case that antitrust enforcement unduly obstructs the conduct of business can be made. Again, almost no anticompetitive practices, be they agreements or unilateral conducts, are prohibited *per se*, most of them being forbidden because of their object or (actual or potential) effects on consumers. The main exception to this statement relates to cartels; these are considered to be "unjustifiable" by the OECD[15] and therefore prohibited *per se* in the United States, as well as deemed anticompetitive in view of their very object by the European Union and by its twenty-seven Member States. I have never heard a serious economist support the idea that this approach to cartels is misplaced. And yet, competition law, as it stands in Europe, does not totally close the door to the justification of a cartel,[16] although it requires that this be done on competitive grounds and on the basis of a case-specific assessment.

The truth is that firms are legally barred from justifying cartels on the mere basis that it is profitable for them to plan their production in an "orderly" fashion (in effect restricting output or allocating markets or customers) or to set prices at a "fair" level (in effect fixing prices) in order to escape the pressure resulting from competition. It is in the nature of such "trusts" and "conspiracies" to be beneficial for their authors or, in any case, to appear as such at the time they are entered into. This is why, the step-stone of antitrust law being that corporations must behave "autonomously" on the marketplace[17] (i.e. defend and promote their interests on their own), they must prove that, whenever they enter into an agreement, this agreement is likely to result in "appreciable objective advantages that compensate the resulting disadvantages for competition"[18] (i.e. to benefit consumers and not only themselves).

The constitutional "policy" behind this legal reasoning, it is worth recalling, is that the aim of European antitrust law is not narrowly defined as "promoting economic efficiency," but more broadly as "promoting a competitive structure and process on the marketplace."[19] This statement dates back to the inception of European antitrust law, but it remains valid in full: When the European General Court clearly and willingly raised the subject of whether or not it still held true fifty years on, the European Court of Justice clearly and willingly replied in the affirmative. Economic schools of thought (and especially the "Chicago School") have therefore significantly informed and, in my mind positively enriched, the political philosophy, legal techniques, and economic reasoning that back antitrust enforcement, but have not led European courts and enforcers to turn around on long-standing constitutional choices, legal precedents, and economic wisdom. As a result, contemporary European antitrust enforcement has kept its original balance, while becoming more sophisticated, which is a good thing.

This explains, in particular, why "crisis cartels" have occasionally been accepted by competition enforcers or competent jurisdictions, but never so on the basis of a general crisis or even of a sector-specific crisis. In other words, "crisis cartels" do not enjoy a specific treatment and are only open to individual justification to the extent that they meet the standard conditions contemplated by the law (both at European and national levels) for justifying agreements that would be prohibited absent such conditions. It is therefore necessary that: 1) they "contribute to improving the production or distribution of goods or to promoting technical or economic progress" (efficiency); 2) "while allowing consumers a fair share of the resulting benefit" (fairness); 3) "not going beyond what is indispensable to attain these objectives" (necessity); and 4) "not being liable to eliminate competition" (proportionality). And the fact is that, given the magnitude of the harm that they can cause to competition and consumers, it should be correspondingly more difficult to show that they are likely to produce efficiencies that offset this harm than in the case of other anticompetitive practices. The law precisely contemplates that, the more business practices are liable to hurt consumers, the more these practices must be shown to produce positive effects that will benefit consumers.

> CONTEMPORARY EUROPEAN ANTITRUST ENFORCEMENT HAS KEPT ITS ORIGINAL BALANCE, WHILE BECOMING MORE SOPHISTICATED, WHICH IS A GOOD THING.

So antitrust enforcement not only is not intended to hurt business but, in fact, does not lead to such outcomes. What it does, however, is make sure that when firms need to adjust to changing economic circumstances, including by contemplating a "crisis cartel," they make a convincing case, resting on objective and robust evidence, that they are not adjusting at the expenses of consumers and citizens.

What abandoning antitrust enforcement thus means, in effect, is losing sight of this very neat balance.[20]

3. The World Economy Needs a Level Playing (Competition and Antitrust) Field

The second main assumption behind the "antitrust abandonment music" played by modern-days Hamlin pipers is that Europe (or the United States, Japan, and so on) have no chance of surviving in today's world if they remain at such a regulatory disadvantage with other parts of the word that do not have such a regime in place. I will make two related points on this argument which, as paradoxical as it may be, captures a very important truth about the central role of competition and policy in political systems based on the rule of law and on market economy.

THE STORY OF COMPETITION LAW OVER THE LAST CENTURY IS THAT OF AN EVER-LARGER DISSEMINATION.

First, things change. The story of competition law over the last century is that of an ever-larger dissemination. The ICN started as a pioneer group of 15 or so jurisdictions. Its membership today extends to more than 100 jurisdictions. It initially focused on how to make merger review more consistent and efficient, in order to avoid jeopardizing pro-competitive corporate deals because of lack of coordination, undue delay, red tape, or flawed economic analysis, although its mandate was, of course, broader. It now routinely enables competition enforcers from around the world to: share insight and experience on policy, substance, and processes; learn from one another; help each other; converge voluntarily on best practices (or occasionally to understand why they differ); and inform and, if appropriate or required, coordinate on ongoing cases. This results in a more efficient enforcement that benefits not only competition agencies themselves, but ultimately also businesses and consumers who benefit from a level-playing field and from consistent outcomes.

Second, this cooperative trend is neither a miracle of nature nor a given. Its development has been derived from the fruits of dedication, persuasion, and emulation. Its future continuation will require constant effort and care. At the same time, it is not sufficient in itself. We have to be realistic and stay aware that simply having a competition law regime in place on paper is of limited use if it is not effectively implemented, monitored, and advocated, as well as sometimes protected.

But what strikes me is that, in recent months, competition enforcers have not been alone in doing the job. To take the French example, both law-makers and Government executives have repeatedly expressed the view that what we needed was to go forward,[21] not backward. Europe, as well as the United States, have benefited enormously from the rise in international trade that has been made possible not only by the lowering of public tariffs, barriers and subsidies, but also by the curb put on private obstacles to free and fair commerce, including cartels, bid-rigging, and abuses of dominance. Globalization means that these rules should be shared by all of those who play the game of international trade, and not that they should be dismantled where they exist. What the world needs is a truly level playing field, based on rules that are shared by all and implemented

on a reciprocal basis—not the increased market fragmentation and cartelization that have historically proven to damage consumer welfare, to slow economic recovery, and to induce trade wars such as those in the run-up to World War II.

In a recent book, David Gerber has brilliantly analyzed the twice-aborted plans to establish a global framework for competition enforcement,[22] first with the Havana Charter in the 1940's and second with the WTO in the 1990's. The fact that these efforts have failed to date does not prevent us, in my view, from thinking about other ways of moving forward, both by fostering voluntary convergence in multilateral forums such as the OECD and by pushing for reciprocity in bilateral trade agreements. Neither should it deter us from dwelling on the good work done by the ICN over the last decade.

Merger review, antitrust enforcement, and competition advocacy should be an integral part of this global commitment, of course, but so should openness and non-discrimination of public procurement and public tender, on the one hand, and the control of public subsidies, on the other hand. Subsidies, either directly or indirectly granted on public funding, have the potential of creating substantial bias on the marketplace, not least when the firms that have benefited from them use them to develop an overseas market, to acquire foreign assets, or to bid for public contracts in other jurisdictions. Existing disciplines, notably those entered into within the framework of the WTO,[23] should thus be strictly enforced. The European Union, which has developed state-of-the-art experience in that regard with its own rules on State aid,[24] could usefully make it available to other jurisdictions.

I find it hard to sustain the idea that antitrust law and policy weaken those countries that enforce them.

In conclusion, I find it hard to sustain the idea that antitrust law and policy weaken those countries that enforce them. Rather, they provide a strong reason for convincing our trading partners that the benefits associated with international trade imply that we mutually enforce rules prohibiting both undue public obstacles and private impediments to interstate commerce.

This leads us to the issue of how these standards can be best enforced.

III. Is Antitrust Enforcement via Corporate Fines Misconceived and Should It Be Phased Out in Part or in Full to the Benefit of Individual Penalties?

As with the question addressed in the previous section of this paper, the ongoing discussion on the relevance of corporate fines broadly rests on two claims that are often intertwined but that call, in my view, for a separate look. The first claim

(a) is the notion that corporate fines have become excessive in level and should be seriously lowered. The second one (b) is the case that labels corporate fines as misguided and claims that they should be replaced by, or at least mixed with, other tools, namely individual penalties such as debarment (also termed disqualification) or indeed jail terms.

These claims differ in content, but not necessarily in outcome, since both of them could eventually result in a phasing out, in part or in full, of antitrust fines.

A. HAVE CORPORATE FINES BECOME EXCESSIVE IN AMOUNT AND SHOULD THEY BE LOWERED?

European (public) enforcement of antitrust rules has relied, since its inception in the 1950's and 1960's, on administrative fines imposed on guilty corporations by specialized authorities, acting under the control of review courts.

This is not to say that criminal penalties are not available in parallel, in order to sanction individuals who are found guilty of committing an antitrust offence. This criminal track is historically absent at European level, since the European Union lacked competence in the criminal field.[25] However, it exists at the level of Member States, where it varies in both form and intensity. In France for instance, criminal penalties were historically the main instrument available for enforcing antitrust rules. Antitrust criminal law was nevertheless seldom implemented, as public prosecutors did not prioritize it and criminal judges were reluctant to enforce it.

In other words, antitrust criminal policy was a failure; a situation which eventually led the Government to set up an independent public authority specialized in enforcing antitrust rules via administrative fines imposed on guilty corporations which, pursuant to a series of reforms, ultimately became the *Autorité de la concurrence*. The Code of Commerce still provides for criminal penalties going up to four years of imprisonment against individuals,[26] but, to date, this provision has been rarely applied. I will come back to current prospects in that regard in the following section of this article.

So the distinct characteristic of the European Union and of those of its 27 Member States that have (as is the case of most of them) modeled their antitrust enforcement regime on the one in place at the European level is the central role of corporate fines to, first, punish firms found guilty of participation in a cartel or another anticompetitive agreement or abuse of dominance, and, second, deter them, as well as other corporations, from committing such infringements.

1. Corporate Fines Have Increased in Order to Become More Deterrent

It is trite to say that the overall amount of those fines has significantly increased over the recent years, both at European level and in a number of Member States.

The phenomenon is not new. Actually, the leading European precedent on how to set antitrust fines,[27] that still today grounds and governs much of the current case-law of the European General Court and Court of Justice, was born out of a fully transparent decision taken by the European Commission in the early 1980's to increase the general level of antitrust fines as compared to those achieved under its previous policy. According to public records, this decision was based on the fact that, more than twenty-five years after the birth of the European Union (then called the European Communities), serious business malpractice, in particular market-sharing, output-restricting, customer-allocating, and price-fixing agreements, had not visibly diminished either in number or in intensity.

> It is trite to say that the overall amount of fines has significantly increased over the recent years, both at European level and in a number of Member States.

This change in policy, which was endorsed by the European judicature, triggered a trend of increasing fines that was continuing when the European Commission published its second fining guidelines in 2006.[28] In this context, the first generation of guidelines, published in 1998[29] after the European General Court (then the European Court of First Instance) had invited the European Commission to do so, was intended first and foremost to make the Commission's fining practice more transparent and more consistent, by making known in advance what criteria the Commission used on a case-by-case basis and in which way it did so. The second set of guidelines had the distinct objective of increasing yet further the general level of antitrust fines. This was fully acknowledged by then-Commissioner Kroes, whose famous message to companies contemplating a violation of European rules outlawing cartels and other anticompetitive practices was clearly set on deterrence: "Don't break antitrust rules; if you do, stop as quickly as possible; once you've stopped, don't do it again."[30]

This policy produced well-known results. Total corporate antitrust fines[31] increased from EUR 540 million in 1990/1994 and EUR 293 million in 1994/1999 to EUR 3.463 million in 1999/2004 and EUR 9.761 million in 2004/2009. This trend is not unequivocal. For instance, a closer look at the last five years reveals that yearly fines, that amounted to EUR 1.846 million in 2006 and peaked to EUR 3.338 million in 2007, receded to EUR 2.270 million in 2008 and to EUR 1.623 million in 2009, before reaching EUR 3.057 million in 2010. However, if one accounts for the facts that the total amount is dependent notably first on the nature of the offences adjudicated each year by the European Commission (which has been consistently focusing over the recent period on hardcore, often international or European-wide, cartels); second, on yearly output (which varies to a significant extent if one looks, not at the number of cases handed out, which has consistently ranged between 6 and 8 since 2006, but at the number of individual firms involved in those cases, which evolved between 37 in 2008 and 69 in 2010); and third, on the individual situation of these firms

(power on the affected market, overall power, duration of participation, specific role, etc.), it is fair to say that fines have increased to a very significant extent during the last decade.

In France, the increase in fines was triggered in the first place by a radical overhaul of the sentencing provisions of the Code of Commerce that occurred in 2001.[32] The two main changes decided by the Government and the Parliament consisted, on the one hand, in increasing the legal maximum from 5 percent of the French turnover of the firm liable for the infringement to 10 percent of the worldwide turnover of the group to which it belonged, and, on the other hand, in providing that fines should not only be proportionate to the "seriousness of the infringement," to the "importance of the harm caused to the economy" and to "the individual situation of the firm or of the group to which it belongs," but should also incorporate, where applicable, a separate premium in case of "reiteration."[33]

The preamble to the bill makes it clear that the intent of Parliament was to increase the severity of the fining regime in order to meeting four challenges: first, matching a trend of ongoing recidivism among law-breakers; second, accounting for the increasing globalization of business strategies, including (but not limited to) anticompetitive practices; third, putting an end to the frequent circumvention of the previous rules by way of artificial spin-offs of daughter companies; and fourth, making domestic fining rules consistent with the standard existing at the level of the European Union.[34]

Since then, the overall level of fines imposed by the *Conseil de la concurrence* and now by the *Autorité de la concurrence* has significantly increased, in a way that can nevertheless not be compared to what occurred at European level given the differences of scope and nature between the infringement cases adjudicated by the European Commission (mainly international or European-wide cartels and large abuses of dominance) and those handled by the *Autorité* (that include not only nationwide cartels and abuses of dominance, but also a variety of regional or even local anticompetitive agreements, bid-rigging, vertical restraints and unilateral conducts).

While total figures ranged in the vicinity of EUR 60 to 65 million per annum in the first half of the 2000's—when cases handled by the agency were still being fined in accordance with the legal standard applicable until 2001—in compliance with the principle of non-retroactivity, they have subsequently amounted[35] to EUR 754 million in 2005,[36] EUR 128 million in 2006, EUR 221 million in 2007, €631 million in 2008,[37] EUR 206 million in 2009, and EUR 442 million in 2010.[38] Over the same period, the number of fining decisions has diminished (31 in 2005, 13 in 2006, 24 in 2007, 16 in 2008, 15 in 2009, and 12 in 2010), as well as the total number of firms fined in these decisions (respectively 131, 162, 82, 65, 49, and 50 in the same years). In effect, this shows that the *Autorité* has focused its enforcement on more serious offences and has, at the same time,

increased the fines it imposes, both on average and, in particular, in the case of the most serious offences.

2. Fines are Also Getting More proportionate to the Harm Caused by Cartels to the Economy

Do the above trends, that have been endorsed by the courts at the European level, and triggered by the legislature itself at the national level, mean that corporate fines have become excessive and/or that they will follow an ever-increasing pattern—as a few lawyers have suggested after throwing out a few figures? The issue can be addressed from at least two different angles: by looking at their aggregate level and by looking at their individual amount.

The claim that the aggregate amount of antitrust fines that has been levied in Europe (by the European Commission and by national competition authorities) in recent years is excessive generally rests on a comparison with figures in other jurisdictions, notably in the United States. Such a comparison is difficult to understand, not least because it sidesteps the fact that the main tool used to punish and deter cartelists in the United States is sending them to jail, a tradition that cannot be understood if one forgets that cartels have been legally considered as a felony since 1974 and are officially considered as white-collar economic crimes.[39] If one takes into consideration not only the significant and sustained increase of American corporate fines during the last half-decade ($350 million in 2004, $338 million in 2005, $473 million in 2006, $630 million in 2007, $701 million in 2008, and $1 billion in 2009), but also the significant and sustained increase of the number of days in jail to which guilty executives have been sentenced over the same period (7,334 days, 13,157 days, 5,383 days, 31,391 days, 14,331 days, and 25,396 days, respectively),[40] U.S. antitrust enforcement still appears to be considerably more severe than European antitrust enforcement. This conclusion is consistent with the finding that, on average, the penalty imposed in the United States on corporations alone is comparable to the fine imposed, on average, by the European Commission (respectively $44 million and EUR 46 million for the period 2005/2009).

On average, the penalty imposed in the United States on corporations alone is comparable to the fine imposed, on average, by the European Commission.

As for antitrust enforcement in other parts of the world, it is true that figures to date are undeniably lower. But then, which level is the "right" level? Are comparatively younger antitrust enforcement regimes relatively more lenient, or are comparatively older regimes overstretching themselves? History would tend to show that fines have only increased over time in the older regimes, and thus suggest that the younger regimes could follow a similar path in the coming years and decades. But, arguably, such an evolution would not tell us for sure who is right and who is wrong.

This is why antitrust economists look, not at the aggregate level of corporate fines, but at the amount of the fine imposed in the case of each individual antitrust offence. Not being an economist myself, I will defer to what is currently the wisdom shared by eminent independent antitrust economists on this matter. The main studies in this regard[41] agree that corporate fines better achieve deterrence than before, in that they are more proportionate to the illicit benefits that antitrust offenders are likely to expect when they enter into anticompetitive agreements as well as to the economic harm that such offences are likely to cause to consumers as a whole as well as to the broader economy.

This conclusion is consistent with the findings made by the *Autorité* in the course of the case-by-case assessment of the economic harm that it is legally bound to perform.[42] However, most economists also concur on the fact that fines are still substantially lower than what would be needed to fully ensure deterrence if one takes into account not only the potential economic harm attached to cartels and other violations of antitrust law, as I have done up until now, but also their still limited rate of detection—in particular when they are covert in nature. I will come back to this issue when discussing criminalization below.[43]

THIS IS PRECISELY WHAT BOTH THE LAW AND ECONOMICS OF ANTITRUST WOULD VIEW AS A COMBINATION OF PROPORTIONALITY AND DETERRENCE, I.E. MAKING FIRMS UNDERSTAND THAT NOT COMMITTING A SERIOUS ANTITRUST OFFENCE IN THE FIRST PLACE IS THE BEST POSSIBLE WAY NOT TO END UP PAYING AN EQUALLY SERIOUS FINE.

Like all economic assessments, these studies rest on assumptions that can be discussed to some extent. They nonetheless would seem to meet the "Daubert criteria" on the relevance and reliability of expert testimony,[44] meaning that they come from independent experts, that they have been published in scientific reviews after having been submitted to peer review, that they rest on transparent hypotheses as well as on scientifically accepted methods, and that they produce empirically tested and verifiable results. In any case, I am not aware of them having been challenged, to date, by other independent economists using equally or more robust tests and data.

To be sure, the statement recently made by a representative of the French antitrust bar in the mainstream economic press, to wit: "given the financial risk, it is better for a firm to breach its tax obligations, to commit an insider trading or to engage into money laundering than to fall in the hands of [antitrust enforcers],"[45] could be read as a confirmation that antitrust corporate fines are starting to become more than just "a cost of doing business" (in other words an economically sensible expense when compared to the huge profits that a cartel or sometimes an abuse of dominance can generate). This is precisely what both the law and economics of antitrust would view as a combination of proportionality and deterrence, i.e. making firms understand that not committing a serious

antitrust offence in the first place is the best possible way not to end up paying an equally serious fine.

That fines were not at adequate deterrence levels in the past, and even in the recent past, is difficult to doubt given the amazing rate of recidivism evidenced by antitrust enforcers. John Connor, in a recent paper that is perhaps the most comprehensive on the issue, studies a sample of international or regional cartels discovered in the last 20 years and finds a total of at least[46] 389 recidivists among firms found guilty of such an offence. He also finds that, although the mean number of cartels per recidivist is four, 52 corporations were members of seven or more cartels, 26 entered ten or more, and 6 engaged in twenty or more. Most strikingly, he stresses that, while in a number of occurrences firms that violated the law during the 1990's exhibited a slowing rate of recidivism in the 2000's (a period when more cartels were uncovered than during the previous decade), for most of the world's top antitrust recidivists the reverse occurred. It is precisely in this context, and bearing in mind the magnitude of the overcharge and broader negative welfare effects attached to cartels, that a number of competition agencies on both sides of the Atlantic increased corporate fines.

> One of the main lessons of the last year is that individual difficulties, when evidenced, are best handled in a tailor-made fashion, and not with a blanket curb put on corporate fines.

The conclusion that fines are now more proportionate to the seriousness and likely economic consequences of the offences that have been committed does not mean that these criteria are the only elements for competition authorities to take into account. The situation of each individual offender is clearly as important, especially at a time where corporations may be going through serious economic and financial difficulties which antitrust enforcers are not at all interested in making worse. But one of the main lessons of the last year is precisely that individual difficulties, when evidenced, are best handled in a tailor-made fashion, and not with a blanket curb put on corporate fines.

3. Fines are Systematically Individualized on a Case-by-Case Basis

Following the path of a number of other jurisdictions, starting with the United States and then the European Union, the *Autorité* has just announced its intention to publish the details of the guidelines it applies when setting corporate fines.

This guidance will not be the first to be released by a National Competition Authority ("NCA") of the European Union. A number of NCAs—at least eight—have already done so during the last decade. Actually, the club to which they all belong, together with the European Commission, had itself agreed in 2008 on common principles intended to facilitate the convergence and consistency of fining practices throughout Europe,[47] which the *Autorité*'s draft duly takes into account.

But this draft will be the first guidance to be published in bad economic times. This context has led the *Autorité* to look very carefully at issues that had received relatively limited attention during the past decade of economic expansion, in particular the difficult issue of ability to pay. The ability of undertakings to pay the final fine must be thoroughly assessed. It is not the goal of competition authorities to make companies bankrupt because of having to pay an antitrust fine. At the same, the moral hazard linked to the fact that corporations that have broken the law, sometimes in a very severe manner, could have an interest in pleading an inability to pay without true justification in order to escape the fine, must not be overlooked either. The standard put forward in the draft published by the *Autorité* in March 2011 intends to balance both requirements. That being said, the *Autorité*'s fining guidelines are intended for good economic times as well as bad ones, meaning that the text must be flexible enough to accommodate all market situations as well as all individual situations.

It is not the goal of competition authorities to make companies bankrupt because of having to pay an antitrust fine.

The draft fining guidelines will also be the first in Europe, to my knowledge, to be released pursuant to a fully-fledged public consultation, which was launched on January 17, 2011 and lasted two months, until March 11. The draft that stakeholders had been invited to comment upon provided a comprehensive overview of the *Autorité*'s past and current fining practices, as well as of the case-law of review courts and of the European courts. It also revealed, for the first time, the different steps of the method followed in practice when assessing the various criteria provided by the law, and refined this method on a number of items. In doing so, it dwelled on European best practices, while at the same time incorporating the characteristics of French law which, as I state earlier, mandates a qualitative assessment of the harm caused to the economy. It also incorporated internationally accepted standards, including using a percentage point of the volume of affected commerce (or affected sales) as a base amount, depending on the seriousness of the infringement and on its likely economic impact, before taking into account individual elements relating to each offender's behavior and situation. Leaving aside leniency applicants who qualify for a full immunity, the draft then integrated rebates granted in case of a partial immunity or of a settlement. A special section was devoted to how each firm's ability to pay the fine at the time of the decision is assessed, as alluded to earlier on.

The criterion of the economic harm likely to flow from the offence warrants a few words, because it is rather specific to French antitrust law. The Code of Commerce and the case-law of the French Supreme Court do not require the *Autorité* to quantify the harm caused by a cartel or by an abuse of dominance, both for legal and policy reasons (public antitrust enforcement aims at punishing the offender and deterring it and other corporations from breaking the law, in the public interest, and not at measuring and compensating individual or collective

prejudices) and practical reasons (the offence has indeed taken place and it is impossible to objectively know for sure how things would have evolved precisely had it not occurred). What the legal provision on the determination of corporate fines requires from the *Autorité* is to prove its importance (in other words its order of magnitude), by making an assessment of the relevant qualitative and quantitative characteristics of the relevant market and broader economic context, on the basis of reasonably available data (aggregate market share of the offenders, barriers to entry, price-elasticity, actual or potential effects on competitors, and so on). The assessment of the actual or potential overcharge is an integral part of this exercise, but it is only a part of it, given that the law refers broadly to "the importance of the harm caused to the economy" and not strictly to "the extent of the overcharge," as explained in greater detail at a recent session of the OECD's competition committee.[48] This assessment, as I said earlier on, is a sometimes very demanding exercise, but it helps greatly in evidencing the proportionality of the final fine, among other elements to be taken into account, to its actual or potential economic incidence.

All along the process, the draft took care to achieve a balance between the three pillars that, I think, ground and should ground the sentencing practice of each and every competition authority: proportionality, individualization, and deterrence. These three aspects, it seems to me, cover the entire scope of issues that need to be addressed in the course of setting corporate fines, and are flexible enough to allow antitrust enforcers to take into consideration the specifics of each offence and of each individual offender, including the latter's ability to pay the fine at the time it is due. I see no compelling reason for throwing the old-age wisdom that antitrust fines shall punish and deter, that they shall be individualized, and that they shall be proportionate to the offence at stake in the garbage of history, although I see a compelling reason for always updating this judicial legacy and adapting it to new events.

ALL ALONG THE PROCESS, THE DRAFT TOOK CARE TO ACHIEVE A BALANCE BETWEEN THE THREE PILLARS THAT, I THINK, GROUND AND SHOULD GROUND THE SENTENCING PRACTICE OF EACH AND EVERY COMPETITION AUTHORITY: PROPORTIONALITY, INDIVIDUALIZATION, AND DETERRENCE.

To make things square, I would add a fourth guideline to the three already cited: consistency, especially in the European Union, which is an integrated economy where all National Competition Authorities apply European antitrust law in addition to their domestic law in each case that is liable to substantially affect interstate commerce. In fact, consistency should not only be a policy goal; it is now a legal requirement.[49]

The public consultation on the *Autorité*'s draft fining guidance has attracted wide attention, not only in France, and has resulted in almost thirty contributions that are expected to be published on the website of the *Autorité* at the same time as the final text, as is traditionally the case. It has given the agency the

opportunity of hearing a range of points of view and, in particular, a number of points of view that have few opportunities of making themselves heard. Besides business organizations and antitrust lawyers and economists, consumer associations, renowned academics, bar associations for other jurisdictions as well as other competition authorities have submitted very rich comments. These contributions, with many expressing very different positions, will tremendously help the *Autorité* in making its initial draft more precise, in incorporating new elements in the final guidelines, and in refining the overall balance of the document as well. We expect a final text to be published in the course of May 2011.

B. ARE CORPORATE FINES MISCONCEIVED IN ESSENCE AND SHOULD THEY BE REPLACED BY (OR COMBINED WITH) INDIVIDUAL PENALTIES?

The previous section leads me to share a number of conclusions reached either by Douglas Ginsburg and Joshua Wright, or by Joseph Harrington, or by both, in their recent discussion on antitrust sanctions.[50] But not all of them, though. The conclusions with which I agree are described in the following section.

1. Individual Compliance Matters as Well as Corporate Compliance With Antitrust Law

First, antitrust offences still abound and are probably still insufficiently undeterred by corporate fines (although the recent mobilization of a number of corporations actually fined in the recent past in Europe and/or in the United States would tend to indicate that they now represent more than just "a cost of doing business").

Second, corporate fines are probably unlikely to succeed in achieving deterrence alone (although they have been raised to a level which is now more proportionate to the harm that antitrust offences are liable to cause). This is specially so given the current context of economic recession.

Third, there are indeed a variety of persons involved in an antitrust offence: at least one legal person (the corporation(s)) and at least one physical person (the director(s) and/or employee(s)). I would stress, as do Douglas Ginsburg and Joshua Wright in their paper, that the physical persons act "within and on behalf" of the corporation, but I would immediately add that this works both ways. By that, I mean that there are two possible categories of persons who may have an incentive to violate antitrust law (or not) and who must be deterred from actually breaching it. My view is, therefore, that antitrust enforcement must "walk on two legs,"[51] as I have said on many occasions, and that public enforcers should have in their toolbox instruments that allow them both to deter corporations from becoming antitrust offenders and to punish them when they actually become outlaws, and to deter and punish individuals. I would therefore complement corporate fines with individual penalties, and not substitute one with another.

A more radical shift could be advocated, that would in effect mean transferring the weigh of deterrence from corporate fines to individual penalties alone. In support of this move, it is said notably that corporate fines end up hurting innocent corporations (and ultimately its innocent shareholders). I personally find it difficult to consider that firms can claim property of the profits made by their directors and employees in the course of business, including those generated by a prohibited business arrangement, but could at the same time disclaim liability for these same infringements in the event that they are discovered and prosecuted. Either you believe that corporations are only a set of individuals and indeed only those individuals can be held liable for their deeds in the same way as only they can benefit from their good actions. Or you accept that a legal person, in the same way as a physical person, has rights and liabilities, including liability linked to what the people who work for them do in the course of their business. Has any corporation whose director or employee was found guilty of an antitrust offense offered to hand this person back the profits generated by this offence before it was discovered and fined?

I AGREE THAT WE SHOULD HAVE A SOMEWHAT MORE "GRANULAR" VISION OF WHAT A CORPORATION ACTUALLY IS AND OF HOW IT ACTUALLY OPERATES, WHILE ADDING THAT WE SHOULD AT THE SAME TIME NOT LOSE SIGHT OF "CONVENTIONAL WISDOM."

I therefore fully agree with the very insightful idea put forward by Douglas Ginsburg and Joshua Wright that we should have a somewhat more "granular" vision of what a corporation actually is and of how it actually operates, while adding that we should at the same time not lose sight of "conventional wisdom." Corporate rights and duties exist, and it makes sense to align both corporate incentives (and shareholder incentives) and individual incentives (at directors' level as well as at employees' level) in complying with antitrust law rather than in breaching it or simply in not caring about it. This approach seems to be the one on which the European Parliament has settled on, as evidenced by its recent resolution on European competition policy in which it advocates "a wider range" of enforcement tools, including not only corporate "penalties that serve as an effective deterrent, in particular for repeat offenders," but also "individual responsibility" and "compliance."[52]

Fourth, I would follow up on Joseph Harrington' view on the "jail and/or debarment issue" by saying that the full mix of criminal penalties is useful and probably warranted in order to achieve individual deterrence. I would therefore add the faculty of debarring/disqualifying guilty individuals in appropriate cases to the possibility of sentencing them to jail terms in the case of a serious offence, rather again than substituting the latter with the former.

Fifth, I would add to the above the idea, also addressed by Douglas Ginsburg and Joshua Wright in their paper, that compliance can be driven forward by the traditional "stick and carrot" approach and that a serious compliance policy, that

is officially supported by the firm's philosophy and leadership, as well as actually implemented and monitored and accompanied by sanctions in case of breach, can go a long way in bringing on board individual incentives for antitrust compliance. This is, in fact, a topic on which the *Autorité de la concurrence* has committed itself, by announcing that it would release a draft policy document on antitrust compliance in autumn 2011 and, at the same time, launch a public consultation on draft guidelines on antitrust settlement.[53]

Sixth, the experience of the *Autorité* is that the toolbox of antitrust enforcers can usefully comprise injunctions of publication, whereby the agency requires guilty firms to publish summaries of the case in the general or special media. This power is provided for by French law[54] and is routinely used by the *Autorité*, notably in cartel cases. It has obvious enforcement and advocacy virtues.

2. Making Criminal Enforcement Effective in the French Context

Creating a criminal antitrust law (where it does not exist at present) and/or beefing up criminal antitrust enforcement (where a law already exists as is the case in France) is one issue. Articulating it smoothly with administrative enforcement is another. I will turn to each of these issues briefly.

I AM A SUPPORTER OF CRIMINAL ANTITRUST ENFORCEMENT AGAINST INDIVIDUALS, BUT I ALSO THINK THAT THIS TYPE OF ENFORCEMENT SHOULD REMAIN WHERE IT BELONGS.

I am a supporter of criminal antitrust enforcement against individuals, but I also think that this type of enforcement should remain where it belongs: in the hands of criminal judges and public prosecutors, while independent competition authorities remained firmly focused on enforcement against corporations. In my mind, given the constitutional, legal, and historical background of a number of Member States of the European Union, and in particular of France, these are really seen as being two very different, albeit complementary, jobs.

Obviously, however, just having a criminal law in place does not mean that it will be applied, as is the case in France. This situation is unfortunate and I want to shed some light on why this is so and what can be done to make progress.

First, there is certainly a problem in the law itself. In most countries where it exists, such as the United Kingdom or the United States, antitrust criminal law is focused on secret, hardcore offences (cartels and bid-rigging). This, it seems to me, makes sense from an economic viewpoint (limiting risks of wrong conviction), from a legal standpoint (ensuring certainty and predictability), and as a matter of policy (focusing public morality). Only hardcore offences, defined as those that unmistakably hurt the economy and consumer welfare and, by and large, lack any redeeming virtue—characteristics that make their legal status

clear-cut and which everyone consequently understands upfront are wrong—fall in that category.

Other antitrust offences are not so clear-cut and cannot consequently be understood upfront to be wrong. This is because such offences, including most vertical restraints and abuses of dominance other than practices blatantly aimed at excluding or exploiting competitors, are not unmistakably liable to harm competition and incapable of producing economic efficiencies.

In France, however antitrust law makes it a criminal offence for individuals to participate, in a decisive and fraudulent way, in any type of anticompetitive practice, either in combination or alone. The fact that the current provision is so broad and thus not so clear-cut is certainly one of the reasons why it is rarely applied to date. This leads me to advocate not "more criminalization," but "better criminalization," by narrowing down the scope of criminal law to hardcore anticompetitive practices.

THIS LEADS ME TO ADVOCATE NOT "MORE CRIMINALIZATION," BUT "BETTER CRIMINALIZATION," BY NARROWING DOWN THE SCOPE OF CRIMINAL LAW TO HARDCORE ANTICOMPETITIVE PRACTICES.

Second, there are a number of problems with the enforcement of the law. To start with, public policy-makers currently do not prioritize "crime in the suit," as it has been described in the United States[55] as much as "crime on the street." But this de-prioritization could be rethought given the diagnosis that the 2008/2009 financial crisis, and the ongoing economic recession that it has engendered, was caused by excessively risky and sometimes unconscionable business practices that were left unchecked by public policy-makers until it was very late in the day. If we roll up our sleeves to re-dimension the financial regulatory framework, and to re-mobilize public bodies in charge of applying it, should we not do the same in the field of antitrust? If we agree that we need not only adequate rules and dedicated agencies in charge of making sure that companies play by these rules, but also public prosecutors committed to making sure that individuals comply with the law as well, should we not apply this lesson to antitrust as well?

In addition, although judges have become specialized to some extent, they still lack the expertise and experience needed to make them familiar with antitrust criminal enforcement. Training would help, in order to make sure that the cases brought by public prosecutors are well-understood and well-handled.

Third, there are certainly ways of better coordinating prosecutors and judges in charge of criminal enforcement against individual offenders and competition authorities in charge of administrative enforcement against corporate offenders. I've already underlined the most important of them all in my mind: putting in place a program of individual leniency, in parallel to the one that already exists for firms.[56] This would not only benefit directors and employees who decide to help competition authorities to detect and successfully prosecute cartels by giv-

ing them the benefit of a full or partial immunity against debarment or jail. It would also benefit companies. Today, companies which contemplate cooperating with a competition enforcer in exchange for a fine immunity or reduction often struggle to secure the help of their current or past directors and employees, who are left unprotected against the risk of a jail term. Tomorrow, with an individual leniency program in place, the incentive of directors and employees to cooperate would be better aligned with the incentive of their firms to do the same.

This small proposal, which could have a big outcome while not costing a cent, is not revolutionary. It has specifically been advocated in a recent report on the future of French business law,[57] and could be readily incorporated in a draft bill on the modernization of economic justice.

IV. Going Forward

To sum up the above, I would remind ourselves that in Europe, as well as in most parts of the world, the number one priority of citizens is to get their fair share of the market economy that they are asked to support. In practice, this means (1) getting a job and (2) earning sufficient money to be able to rest, to support their family, and to plan for their future. This is why competition and competition law and policy are directly relevant to their wellbeing. They are the Magna Carta of the market economy because they drive firms and, when needed, remind them not only to do their best on the marketplace but also to do it for the benefit of consumers (who are their customers as well as, often, their employees), rather than at the expense of consumers.

In a time of economic globalization and recession, as well as of rising prices (especially for commodities, energy and food), competition is a good deal for corporations and consumers alike. Promoting competition law and enforcement, and making it more efficient rather than relaxing it or abandoning it, should therefore also be a good deal for policy-makers. ◀

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1 Bruno Lasserre, *How Can National Competition Authorities Mobilize in Times of Global Crisis*?, 12(1) Global Competition Pol'y., December 15, 2008 (*available* online at: https://www.competitionpolicyinternational.com/how-can-national-competition-authorities-mobilize-in-times-of-global-crisis).

2 Decision n° 09-DCC-16 of the Autorité de la concurrence of 22 June 2009 relating to the merger between Caisse d'Épargne and Banque Populaire (*available* online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=316&id_article=1234)

3 This debate seems to surface each time a political or economic crisis appears. Enlightening, although very different, perspectives on its past occurrences can be found in Carl Shapiro, *Competition Policy in Distressed Industries*, Remarks as prepared for delivery to the ABA Antitrust Symposium on Competition as a Public Policy, May 13, 2009 (*available* online at: http://www.usdoj.gov/atr/public/speeches/245857.htm) and Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, 12(1) Global Competition Pol'y, (Autumn 2008), *available* online at: https://www.competitionpolicyinternational.com/antitrust-enforcement-during-national-crises-an-unhappy-history/).

4 The projects undertaken by the ICN in this respect, as well as the products delivered notably within the Merger Working Group and the Unilateral Conduct Working Group, are all *available* online at: (http://www.internationalcompetitionnetwork.org/library.aspx).

5 For a mid-term assessment of what has been done and what remains to be done, *see* Bruno Lasserre, *The New French Competition Law Enforcement Regime,* COMPETITION L. INT'L, (October 2009) (*available* online at: http://www.autoritedelaconcurrence.fr/doc/competition_law_international_october_2009.pdf).

6 Specifically, Article 101 of the Treaty on the Functioning of the European Union (TFEU) states that agreements prohibited because of their anticompetitive object or effects can nonetheless be justified where they "contribute to improving the production or distribution of goods or to promoting technical or economic progress" (efficiency), "while allowing consumers a fair share of the resulting benefit" (fairness). In essence, a similar justification is available in the case of prima facie abusive unilateral conduct prohibited by Article 102 of the TFEU. The test and formula are similar under French law (see Article L. 420-1, L. 420-2 and L. 420-4 of the Code of Commerce).

7 Barak Obama, *Statement for the American Antitrust Institute*, 2007 (*available* online at: http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

8 The legislative package, which comprises two main pieces (Law No. 2008-776 of 4 August 2008 on the Modernization of the Economy and Ordinance No. 2008-1161 of 13 November 2008 on the Modernization of Competition Enforcement), includes a number of other measures intended to make the economy more competitive, initially suggested by the Commission on the Liberation of French Growth in its report of January 2008 (*available* online at: http://lesrapports.ladocumentation francaise.fr/BRP/084000041/0000.pdf).

9 *See* references, *supra* note 3.

10 Both in domestic policies and on the international scene (*see* in this regard the letter from the President of the United States of September 6, 1944 to the Secretary of State concerning cartel policy).

11 Mario Monti, *A New Strategy for the Single Market—At the Service of Europe's economy and society*, Report to the President of the European Commission, 9 May 2010 (*available* online at: http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf).

12 Appalachian Coals v. US*,* 288 U.S. 344 (1933).

13 Judgment of the Court of Appeal of Paris of 19 January 2010, *AMD* Sud-Ouest a.o.

14 The Minister for Economy, who alone had the power to challenge the case before the Cour de Cassation (Supreme Court), did not do so at the time. The Parliament regretted this situation and empowered the Autorité de la Concurrence to make such an appeal in future cases. In a recent judgement, the Supreme Court clearly distanced itself from the Court of Appeal.

15 Recommendation No. C(98)35/Final of the Council of the OECD of 25 March 1990 concerning Effective Action against Hard Core Cartels.

16 Judgment of the European General Court of 15 July 1994 in Case T-17/93, Matra Hachette/European Commission.

17 Judgment of the European Court of Justice of 16 December 1975 in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, Suiker Unie a.o./European Commission.

18 Judgments of the European Court of Justice of 13 July 1966 in Joined Cases 56/64 and 58/64, Consten & Grundig, and of 6 October 2009 in Joined Cases C-501/06 P e.a., GlaxoSmithKline/European Commission.

19 Judgment GlaxoSmithKline/European Commission, *Id.* ¶63: "[i]t must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price." A comparable philosophy grounds U.S. antitrust law as interpreted in a number of past cases by the U.S. Supreme Court.

20 With very negative consequences for the economy as a whole, as evidenced by studies on the tolling of antitrust in the United States during the Great Depression of the 1930's. *See* for instance Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, in Symposium: The Effect of Economic Crises on Antitrust Policy, 77(1) ANTITRUST L.J. (2010).

21 *See* my recent hearing before the Parliament (record of session No. 78 of 23 June 2010 of the Economic Committee of the French National Assembly, *available* online at: http://www.assemblee-nationale.fr/13/cr-eco/09-10/c0910078.asp#P6_217), as well as "*Europe must defend its interests while remaining faithful to its openness to the world*", joint tribune published in LE MONDE of 9 February 2011 by Mikolaj Dowgielewicz, Werner Hoyer, Diego Lopez Garrido, Pedro Lourtie, Paolo Romani, & Laurent Wauquiez, European Secretaries of State or Ministers of Economy of Poland, Germany, Spain, Portugal, Italy, and France.

22 DAVID GERBER, GLOBAL COMPETITION: LAW, MARKETS & GLOBALIZATION, (2010).

23 Agreement on Subsidies and Countervailing Measures (*available* online at: http://www.wto.org/english/docs_e/legal_e/24-scm.pdf).

24 Article 107 of the Treaty on the Functioning of the European Union.

25 For a comprehensive and insightful analysis of the criminalization issue in the context of European antitrust law and policy, *see* Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS (Claus-Dieter Ehlermann & Isabela Atanasiu eds.) (2006).

26 Article L. 420-6 of the Code of Commerce.

27 Judgment of the European Court of Justice of 7 June 1983 in Joined Cases 100 to 103/80, Musique Diffusion Française/European Commission.

28 Guidelines of the European Commission of 1st September 2006 on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (*available* online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF).

29 Guidelines of the European Commission of 14 January 1998 on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 (*available* online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:009:0003:0005:EN:PDF).

30 European Commission press release No. IP/06/857 of 28 June 2006, *Commission revises guidelines for setting antitrust fines* (*available* online at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=0&language=EN&guiLanguage=en).

31 Prior to judicial review (*available* online at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).

32 Law N. 2001-420 of 15 May 2001 on New Economic Regulations.

33 Article L. 464-2 of the Code of Commerce.

34 I have looked in greater detail at this issue in a previous article: *La regulation concurrentielle un an après sa réforme: un point de vue d'autorité (part 2)*, (4) CONCURRENCES (2010) (*available* online at: http://www.autoritedelaconcurrence.fr/doc/partie2_unanap_reforme_bl_concurrences.pdf).

35 Prior to judicial review.

36 Due mainly to a case in which the *Conseil de la concurrence* fined a nationwide cartel committed by the three domestic mobile phone operators (decision No. 05-D-53 of 30 November 2005 relating to practices committed in the mobile telephony sector, *available* online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=160&id_article=502).

37 Due mainly to a case in which the *Conseil* fined a nationwide cartel committed by steel trade operators (decision No. 08-D-32 of 16 December 2008 relating to practices committed in the steel trade industry, *available* online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=256&id_article=1015), an offence which the Paris Court of Appeal confirmed on the merits, while very sharply reducing the fines (*supra* note 12). The *Conseil* did not legally have the power, at the time, to appeal judgments of the Paris Court of Appeal before the Supreme Court. This power has been provided for since then.

38 Due mainly to a case in which the *Autorité* fined 11 banks for colluding on fees charged on the processing of checks (decision No. 10-D-38 of 20 September 2010 relating to the tariffs and condition on the handling of checks, *available* online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1472).

39 Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, 24th Annual National Institute on White Collar Crime, February 25, 2010.

40 *Id*.

41 Notably the numerous studies published by John Connor on American and European antitrust enforcement, as well as by Emmanuel Combe on European antitrust enforcement, as well as those cited therein.

42 See § II.A.2 above.

43 See § III.B below.

44 Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993).

45 *Atteintes à la concurrence: pour des sanctions plus cohérentes,* LES ECHOS, 20 December 2010.

46 John M. Connor, *Recidivism Revealed: Private International Cartels 1990-2009,* 6(2) COMPETITION POL'Y INT'L, (Autumn 2010). The actual figure might be greater because some competition authorities do not reveal the name of fined offenders, or at least of some of them, in their published decisions.

47 European Competition Authorities (ECA), *Principles for convergence on pecuniary sanctions imposed on undertakings for infringements of antitrust law*, (May 2008) (*available* online at: http://www.autoritedelaconcurrence.fr/doc/eca_principles_uk.pdf).

48 *See* note No. DAF/COMP/WD(2011)16 of OECD of 4 February 2001, *Roundtable on the quantification of harm to competition by national courts and competition agencies: note of France* (*available* online at: http://www.autoritedelaconcurrence.fr/doc/ocde_quantif_harm_fev11_uk.pdf).

49 Judgment of the European Court of Justice of 11 June 2009 in Case C-429/07, *X BV*.

50 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions,* and Joseph Harrington, *Comment on Antitrust Sanctions,* 6(2) Competition Pol'y Int'l, (Autumn 2010).

51 Notably during the ICN's 2009 Annual Conference (Zurich, Switerland)'s Cartel Working Group Plenary.

52 Resolution No. 2010/2137 of 20 January 2001 of the European Parliament on the report on competition policy for 2009, ¶¶ 56, 60 (*available* online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0023+0+DOC+XML+V0//EN).

53 *See* press release of the *Autorité* of 17 January 2011.

54 Article L. 464-2 of the Code of Commerce.

55 *Supra* note 39.

56 Article L. 464-2 of the Code of Commerce.

57 Report of January 2008 of the Working Group presided by Jean-Marie Coulon on the Future of Business Law (available online at: http://lesrapports.ladocumentationfrancaise.fr/BRP/084000090/0000.pdf).