

# The American Antitrust Institute: Introduction to a Virtual Public Interest Network

Albert Foer

Albert Foer is the founder and president of the American Antitrust Institute

## What is AAI?

The American Antitrust Institute (AAI) was incorporated as a non-profit organisation in 1998 to be a counterweight to conservative think tanks that often oppose antitrust[1] or try to limit its relevance. The AAI embodies the belief that decision-makers can better function in an objective, professional manner if they hear expertly crafted arguments from independent supporters, as well as opponents, of enforcement actions and policies, and if they know that there is a public interest watchdog looking over their shoulders.

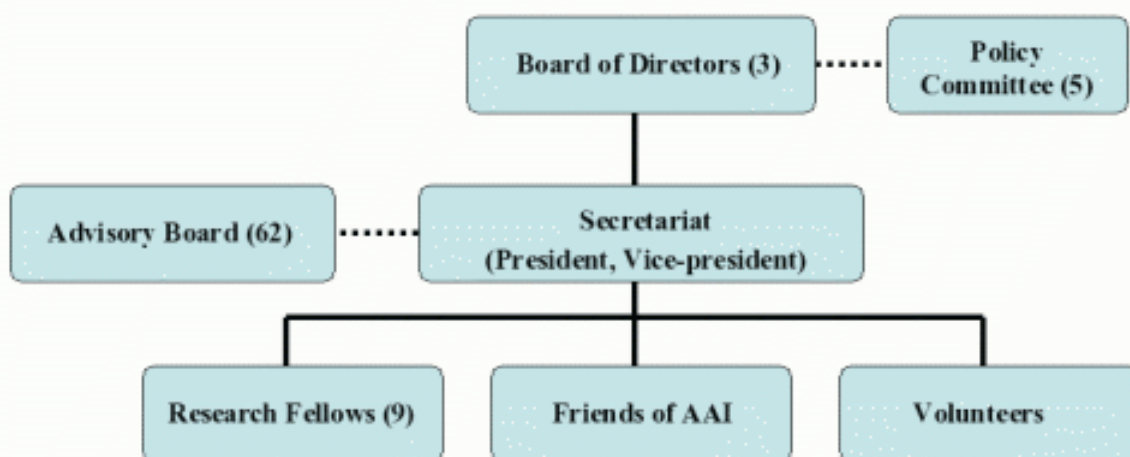
Given an initial budget of zero, the question was how to ramp up the AAI into a going concern. Physically, we put my computer and printer into the library of our home, and added a telephone and fax machine. This was our Secretariat, a word not often used in the U.S., but familiar to civil society organisations around the world.

The AAI can be seen as the offspring of the new economy models of business development, e.g., Internet-based communications, globally dispersed ‘production’ nodes, etc. At the centre of our network, linking the nodes, is the Internet.

As a ‘virtual organisation,’ we have few employees, many volunteers, and a network that operates principally through the Internet. Important to our success have been the AAI fellows. At any given time, one or two fellows are paid as consultants, while others are volunteers. The fellows are often the presenters at our annual conference, dedicating a substantial portion of their AAI time to prepare papers that will eventually be published in a law review symposium issue.[2] In this way, we are building a strong basis in the legal literature for the post-Chicago positions[3] that we are trying to develop.

Our resources are also expanded by the Advisory Board and a network of “friends” who are not formally on the Advisory Board, but who help out on special projects. We chose not to become a membership organisation because the transaction costs would be too great for our circumstances, and the core problem seemed to be that not many people other than experts care deeply about antitrust.

**Chart 1:**  
**AAI as an Organization**



## AAI Action Strategy

From the onset, our strategy has had these elements for simultaneous action: (1) putting out substantive work product (see below what has been accomplished); (2) building an advisory board; (3) developing a website, and (4) persistently pursuing fundraising efforts.

### ***Advisory Board***

Antitrust in the U.S. is in many ways a closed community of experts. For a public interest group to affect antitrust decisions (and to be sufficiently self-confident to try), it must have a level of expertise that is comparable to that of the government decision-makers and the private advocates who dominate the community. Our Advisory Board provides us with both real expertise and a cloak of credibility. Currently, the AAI Advisory Board consists of 67 persons and includes business people, academics, as well as eminent antitrust experts trained in law and economics. To avoid potential conflicts of interest (especially important to lawyers with clients), advisors do not vote on anything and their names are not used in conjunction with a substantive position of the AAI. Responsibility lies totally with the three-person Board of Directors.

### ***Website***

The Internet is at heart of our network. The AAI website is accessed from all over the world and reaches a large proportion of the American antitrust community.[4] When we produce an output, we post it on the website and then send notices by e-mail to three lists: the American Bar Association Antitrust Section E-Mail Listserv; the media contact list we have compiled, and a list we call 'friends of AAI'. Our notification usually provides the headline and invites the recipient to visit our website ([www.antitrustinstitute.org](http://www.antitrustinstitute.org)) for the details.

Our website has several features to note. Most importantly, we post every new activity that the AAI undertakes. After some time, this is moved to our *Archives* section, where materials can be searched on the basis of any word in the text. Our *Who's Who in Antitrust* section contains contact information for the Federal Trade Commission (FTC), Department of Justice (DOJ), and National Association of Attorneys General (NAAG), among many others. Our *Links* section provides what we think is a very complete, user-friendly way of finding information about antitrust.

### ***Fundraising***

When we analysed our sources of revenue from inception in 1998 through the end of 2002, we found that we had received gifts from 58 different contributors, including those who bought patron tables at our three annual conferences. Our funding has come from individuals, foundations, law firms, corporations, and associations. About 27 percent of the total of over \$1.33 million had come from corporations; 23 percent from law firms that do a lot of plaintiffs work; 18 percent from individuals and private foundations; 15 percent from defense-oriented law firms; ten percent from trade associations; and the remainder from public interest organisations, public relations firms, and miscellaneous.

In our original planning, we had underrated the role of private money from special interests. It should have been obvious that there are at least two sides to every antitrust battle and that a lot of money can be on the table in an antitrust contest. Often, one of these sides is working (perhaps unintentionally) for the interests of consumers and its position is one we would take in any event, but because of our credibility, some interests who find that we are taking a congenial position (or who hope we will do so) may make a contribution to our general treasury. We have never taken or changed a position because of money, but there are obvious difficulties inherent in accepting private contributions.

## What Has AAI Accomplished?

In our first five years of existence, we have achieved a substantial degree of recognition in the American antitrust community. Many of the most qualified people in the profession participate in our deliberations and provide volunteer services. A large portion of the community reads our website regularly, we are sought out by the media, and the current Chairman of the FTC has used his public platform on several occasions to call attention to what he perceives to be our policy failings.[5] In other words, we are taken seriously within the government.

In its first five years, the AAI generated a large quantity of writings that can be reviewed in our website's archives.[6] We had an estimated 3,000 media communications. We ran six annual national conferences and workshops; and co-sponsored with universities or public interest groups workshops and roundtables on network access, defense procurement, supplier joint ventures, and marketing and antitrust. (I hasten to add that a lot more has occurred since this inventory in early 2003.)

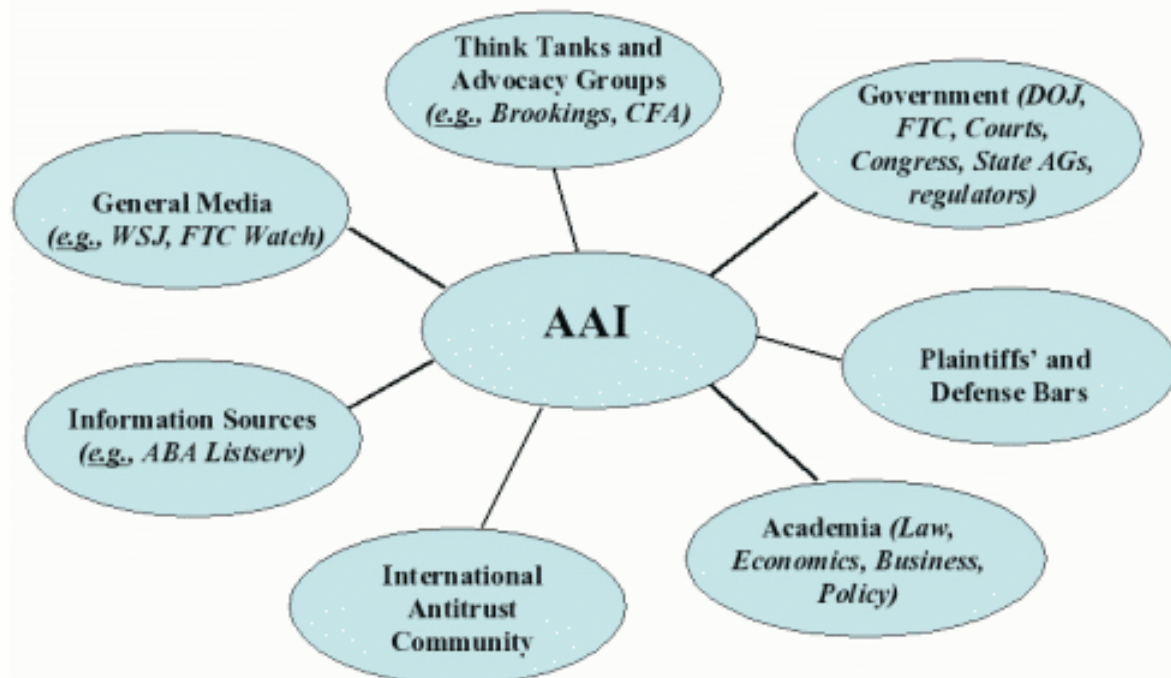
We consider the Microsoft case to be the most important antitrust case since the AT&T breakup in the 1970s,[8] and a polling of our Advisory Board showed that most members were strongly of the view that Microsoft had violated the antitrust laws in a way that required a serious remedy. We filed what the Court called a “major brief” against the DOJ settlement.[9] We also launched our one (and so far, only) lawsuit to challenge the compliance of Microsoft and the DOJ with the Tunney Act’s[10] requirements for disclosures relating to the DOJ settlement with Microsoft.[11] While this was unsuccessful as a suit, it gained important publicity for the points we were concerned about, and the Court that was handling the settlement permitted the AAI to argue as *amicus curiae*. [12]

Among the testimony and statements we provided to Congress, I will mention only our first effort to affect the appropriations process. We knew that Congress rarely heard from outsiders in regard to the budgets of the FTC and the DOJ, and we knew that the appropriations staff were not particularly well-briefed on antitrust. So we provided a 40-page discussion of the history of antitrust, antitrust budgets, and antitrust performance, emphasising all the activities that needed to be done and the urgent need for more funding. We convinced 32 organisations to sign a letter conveying this report. Suddenly, and for the first time, there was a public display of upport for an antitrust budget increase – and an increase occurred.

Often, our contribution is to put new issues on the antitrust table or to be a megaphone for good ideas that have not been considered sufficiently. For example, we have tracked the development of “category captains”[13] in the consumer goods industries, identified antitrust issues, and called them to the attention of the FTC, DOJ, and general public through articles, conferences, and interventions.

Measuring the effectiveness of a public interest group is not easy, especially if, as in the case of AAI, the objective is a long-term changing of the climate. Even if one knew exactly what to measure, causation would likely be impossible to attribute. What follows is an effort to count what can be counted. It shows conclusively that we have been *active*. Perhaps, five years from now others will be in a position to explore whether we have been *effective*.

**Chart 3:**  
**AAI in the Antitrust Community**



## Ambitions for Future

What we have not yet achieved, however, is true institutional status, comparable to the large and well-funded think tanks that have supported a more conservative approach to regulation and antitrust intervention in the economy. This will take the passage of time in combination with funding that is more substantial and predictable.

Towards the end of our fifth year, we adopted some formal Guidelines of Operation that are posted on our website.[14] These are intended to respond to certain areas in which we have had to make decisions about how to operate. Here are the issues that we thought required policy decisions:

- Should AAI intervene as an advocate in particular cases and investigations?
- What limitations should there be on sources of revenue and what type of disclosure is appropriate?
- How much bureaucracy is needed, e.g. to approve initiation of an undertaking or statement of a policy?
- What factors should be taken into account when deciding to employ the organisation's resources?
- To what extent should we participate in lobbying?
- To what extent should we work jointly with other organisations?
- To what extent should we reveal to the public the content of conversations we have with government officials?

Substantively, we are looking for funding that will allow us to retain additional fellows, who can expand the scope and intensity of our work. For example, we have outstanding a proposal to create a Center for Information and Competition Policy within the AAI. Quite significantly, we recently received a cy pres grant,[15] coming out of the settlement of a cartel case in California, that will permit us to produce a documentary film about the benefits of antitrust for consumers and to introduce a curriculum segment based on the film into high schools.

What is very important also is that the AAI's experience demonstrates that it is possible with the help of the Internet to build from scratch, with little funding, and in a relatively short time an influential public interest organisation dedicated to research, education, and advocacy in the field of antitrust. Obviously, circumstances will be different in each country, but the need for developing a constituency for competition policy will be similar in each nation where competition policy is being given its day to prove itself, and we hope our experience can serve as a model.

## Footnotes

[1] The author is the founder and president of the American Antitrust Institute. This is an abbreviated version of a much longer, footnoted, essay that can be found at <http://www.antitrustinstitute.org/recent2/275.cfm>. (Contact: Albert A. Foer, 202-276-6002, [bfoer@antitrustinstitute.org](mailto:bfoer@antitrustinstitute.org).)

[2] "Antitrust" is the American term for what in much of the world is referred to as "competition policy." It includes laws limiting monopoly, certain mergers, and various forms of unilateral or multilateral behaviour by companies.

[3] Each of our conferences has yielded up such an issue. The first four were the law reviews of the University of Pittsburgh, Case Western Reserve, New York Law School, and Buffalo Law Review. In 2004, we will have symposium issues in the Antitrust Law Bulletin and the Antitrust Law Journal.

[4] The "Chicago School" is a conservative application of neoclassical economics to legal analysis. In the case of antitrust, it focuses on enforcement against cartels and pricefixing among direct competitors. The "Chicago School" has dominated American antitrust policy since the election of President Reagan in 1980. While "post-Chicago" has no precisely defined meaning, it encompasses positions that support a more aggressive antitrust program. "Post-Chicago", as compared to "Chicago", implies a greater propensity to find market failures and a greater optimism about the ability of government to intervene in the economy to protect consumers from the consequences of anticompetitive situations.

[5] We estimate about 200,000 "hits" per, or about 14,000 "visits" per month.

[6] We have also been praised in public by an Attorney General of the U.S., an Assistant Attorney General for Antitrust, and a Chairman of the Federal Trade Commission. As it happens, they were all Democratic appointees.

[7] I counted 79 short columns, op-eds, and prepared speeches; 48 larger works including monographs and published articles; 21 statements to Congress or the White House, including live testimony; 14 amicus briefs; 35

comments to regulatory agencies including the DOJ, FTC, DOT, Federal Regulation and Oversight of Energy (FERC), and other federal agencies.

[8] The American Telephone and Telegraph Co. (AT&T), a huge communications monopoly, was broken up into many parts as a result of an antitrust case brought by the Department of Justice. Today's vibrant telecommunications industry in the U.S. is the result of de-monopolisation.

[9] <http://www.antitrustinstitute.org/recent2/163.cfm>.

[10] The Tunney Act requires the Department of Justice to provide information to the public when it settles an antitrust case without a trial and the public has an opportunity to send in comments before the outcome is final.

[11] <http://www.antitrustinstitute.org/recent2/164.cfm>.

[12] <http://www.antitrustinstitute.org/recent2/177.cfm>.

[13] In many consumer goods industries, major retailers have in recent years begun to appoint leading suppliers as “captains” of various categories of products, providing a great deal of information to the captains who in turn advise the retailer on what products to stock (including their competitors), where to place various products on the shelves, what price to charge, how to promote all the products in the category, etc. This can give the captain a great advantage over its competitors and may also facilitate collusion.

[14] <http://www.antitrustinstitute.org/recent2/236.cfm>, adopted by the Board of Directors on 30 January 2003.

[15] *Cy pres* is a doctrine that permits court discretion to fulfill the intent of a trust that has for some reason failed. It is used in occasional antitrust class actions where money is left over after the plaintiff class is victorious by trial or by settlement, and there are funds left over after all claims have been processed.