



Roundtable Conference with Enforcement Officials

Attorney General Eric Holder and agency heads from the U.S. and Europe provide updates from their respective agencies. Among the topics discussed are criminal enforcement, merger challenges, impact of new technologies, state immunity, and worldwide antitrust and consumer protection enforcement.

Interview with John Pecman, Commissioner of Competition, Competition Bureau, Canada

The head of Canada's competition agency discusses his plans to balance enforcement and advocacy, the reorganization of the Competition Bureau, and the impact of a series of appellate court decisions on mergers, trade associations, and price maintenance.

Interview with António Gomes, President, Portuguese Competition Authority

António Gomes reflects on the growth in the capability of the Portuguese Competition Authority, including the success of its leniency and merger programs and on his outreach to the bar and key stakeholders in Portugal.

Interview with Han Li Toh, Chief Executive and Commissioner, Competition Commission of Singapore

The Chief Executive of Singapore's competition agency reflects on the particular challenges of applying competition law in a small mercantile jurisdiction, noting that local transactions, not multinational ones, are often the most problematic.

Interview with Tembinkosi Bonakele, Commissioner, South African Competition Commission

Tembi Bonakele discusses the possible criminalization of South Africa's cartel regime, how the agency handles public interest factors, the agency's review of the health care sector, and more.

Roundtable Conference with Enforcement Officials*

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MODERATOR



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SPEAKER



Eric Holder
Attorney General of
the United States

QUESTIONERS

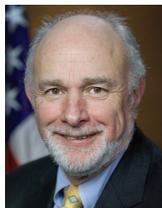


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HOWARD FELLER: Good morning. I want to welcome you to the Enforcers' Roundtable program, always one of the featured programs at the Spring Meeting.

This year we had a late-breaking development that is tremendously exciting. For the first time in the history of the Antitrust Section, the Attorney General of the United States is speaking at one of our conferences. Without any further ado, it is my great honor and privilege to introduce to you The Honorable Eric Holder, Attorney General of the United States.

ERIC HOLDER: Thank you, Howard, for those kind words and for your outstanding leadership of the ABA Section of Antitrust Law. The Antitrust Section, and this Spring Meeting in particular, I think, provides a vital channel for fostering dialogue between practitioners and scholars, for extending the collective expertise of Section members, and for enhancing overall compliance with antitrust laws in the United States, but also around the world. I am grateful to have this opportunity to be with you today and to be a part of what I think is a really special gathering.

* *Editor's Note:* This Roundtable has been edited for publication.

It's an honor to stand with so many valued friends and colleagues; talented members of the antitrust bar; and distinguished public leaders representing enforcement authorities at all levels, both domestic and international—including the panel members I know you are eager to hear from after me. And it is a great privilege to join you at what is both, I think, an exciting moment for antitrust enforcement generally and a reflective moment for me personally.

Because my own professional path will soon lead me in a new direction, I have had the opportunity lately to take stock of all that the hardworking men and women of the Justice Department—and our remarkable Antitrust Division—have achieved over the last six years.

When I took office as Attorney General in 2009—in the aftermath of a global financial crisis, and in the midst of deep and widespread economic uncertainty—one of my central priorities was to bring strength and fairness to the rules by which our commercial enterprises operate. And a core focus was protecting our citizens and ensuring fair competition throughout the American marketplace.

As former Attorney General Robert Kennedy noted over half a century ago, the antitrust laws of this nation are designed to protect and to vindicate the principles of free enterprise—principles that, as he said—and I quote—“underlie the whole structure of a free society.” They are a vital safeguard for competition, fundamental to the structure of our economy, and they contribute directly to the prosperity of our nation and the economic freedom of our citizens. Their enforcement is in the interest of all those who believe in free markets; their values bear no partisan stripe or political creed; and their promises of competition, innovation, and growth are woven into the fabric not only of this country, but of all those that have adopted antitrust regimes based on these shared values.

This Administration's commitment to vigorous antitrust enforcement extends as far back as September 2007, when then-Senator Barack Obama vowed that, if he were elected President, he would step up enforcement activity in a comprehensive way—and I quote—“to ensure that the benefits of competition are fully realized by consumers.” I think that's exactly what we have done.

For the past six years, we have worked tirelessly to realize antitrust law's promise of robust marketplaces and fair competition. We have approached threats to that promise as level-headed law enforcers making considered judgments on the merits, always guided by economic common sense and fidelity to the law. And where we have found violations, we have been prepared to litigate in full, no matter how complex the case, in defense of the American consumer and in the pursuit of the cause of justice.

On the criminal side, the scale, the scope, and the impact of our enforcement efforts are unprecedented. In the most recent fiscal year, we obtained a record tally of fines and penalties, totaling nearly \$1.3 billion. We have undertaken the largest criminal investigation in antitrust history in order to root out price fixing and bid rigging in the auto parts industry. And we have increased the average number of corporate executives sentenced to serve time for antitrust crimes to 29 per year, while lengthening their average sentence to over two years. Whether it involves price fixing of computer components or bid rigging in real estate foreclosure auctions, we have pursued all forms of criminal conduct—running the gamut from local wrongdoing to transnational crime.

All told, through the really extraordinary leadership of dedicated Assistant Attorneys General like Bill Baer—and former leaders of the Antitrust Division like Christine Varney, Sharis Pozen, Joe Wayland, and Renata Hesse, who I'm delighted to have with us today—the Antitrust Division's criminal program has prosecuted 385 individuals and 129 corporations over the course of the Obama Administration. We have obtained more than \$5 billion in fines and penalties, which have

But more important than the victories themselves is the message they send to businesses everywhere: no matter how lengthy the investigation, no matter how challenging the environment, and no matter how complex the practice or industry at hand, we will never shrink from litigation nor shirk our sacred responsibility to uphold the laws of our nation and to protect the consumer.

—BILL BAER

been a major contributor to the Justice Department's Crime Victim Fund, helping victims of all types of crime access the medical, legal, financial, and other services they need to move forward with their lives. And through our tireless efforts, we have sent a clear and, I think, really consistent message to all those who would take advantage of American consumers, exploit our markets, or subvert our laws. The Antitrust Division will simply not tolerate their dishonest and destructive behavior. In that regard, I expect that there will be more significant news on the criminal side within the next few weeks.

Of course, while the criminal program has proven itself as an intrepid and hard-charging component of our fight to maintain competition in the marketplace, there is no real doubt that the civil side has kept pace at every juncture. We have challenged numerous mergers that were likely to substantially reduce competition in critical sectors of the American economy, including mobile wireless, airlines, and beer—a market in which Bill Baer demonstrated, I think, a deep interest and a curious expertise. [Laughter] I think he was sampling a lot of trial exhibits. [Laughter]

Two mergers foundered at trial, while many others were abandoned or entirely restructured as a result of our enforcement measures.

We also successfully challenged an array of non-merger business practices that distorted the competitive process and threatened to harm the marketplace. Everyone in this room knows about some of the most prominent examples of our success, like our trial-court victory against Apple over the pricing of e-books and our more recent success against American Express, whose contractual restraints have long stifled competition among credit card companies.

But more important than the victories themselves is the message they send to businesses everywhere: no matter how lengthy the investigation, no matter how challenging the environment, and no matter how complex the practice or industry at hand, we will never shrink from litigation nor shirk our sacred responsibility to uphold the laws of our nation and to protect the consumer. For the United States Department of Justice, there is no unlawful conduct that is too complicated to pursue, and no company too large or individual too powerful to be held accountable for actions that harm the American people.

I am tremendously proud—tremendously proud—of the inspiring individual efforts and the collective accomplishments of the Antitrust Division these last six years, as well as those of our enforcement partners at the FTC, in state governments, and around the world. We have been committed to smart, rigorous, and assertive antitrust enforcement across all sectors of our economy. And as we move forward, executives worldwide surely know that this Antitrust Division and its partners stand ready to do what is necessary to protect consumer welfare.

Although my time at the Justice Department will soon draw to a close, the Department's commitment to effective antitrust enforcement and to the critical values it advances will not waver. As the Antitrust Division carries its work into the future, and resolves to continue building on the extraordinary record of achievement that I have highlighted today, I urge you all to stay engaged, to adhere to the high standards of this important area of the law, and to never lose sight of this country's founding commitments to liberty and to justice.

In the appropriate enforcement of the antitrust laws we make real the promise of our democracy and our founding documents. Vigorous competition in all spheres is what makes this nation exceptional. It makes progress more likely and promotes the general welfare. The desire to make the promise of competition real has been at the heart of our efforts these past six years.

I close by expressing again the pride I have in the women and men of our Antitrust Division who have done truly historic things in service to the American people. I think that when the history of this era is written it will be said that this Division—at this time—made our nation more open, more

just, and more ready to confront the economic issues of the day. That will be high praise, but, because of my colleagues' dedication, their vision, I believe that praise will be well deserved.

Thank you.

MR. FELLER: How exciting was that? This next portion of the program is going to prove to be just as memorable.

It is my pleasure to serve as the moderator of the Enforcers' Roundtable program, which features the heads of the antitrust and consumer protection enforcement agencies in the United States, the European Union, and the United Kingdom. The other questioners for this program are the co-chairs of the Spring Meeting, Sharis Pozen and Hartmut Schneider.

Our distinguished panelists are very well known to everyone here, so I am not going to take a lot of time to go over their individual bios. You do have them in your materials. In alphabetical order, our panelists are: Assistant Attorney General Bill Baer; the Chairman of the Competition and Markets Authority, Lord David Currie; the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, Kathleen Foote; the Chairwoman of the Federal Trade Commission, Edith Ramirez; the Commissioner for Competition of the European Commission, Margrethe Vestager.

Another exciting aspect of this program is that, for the first time, Ms. Vestager and Chairman Currie are presenting and speaking at a conference in the United States. Thank you both very much for your presence here today.

One of the highlights of the Spring Meeting is to be able to hear firsthand from the enforcers, whose decisions contributed to the competition policy last year and whose ideas will shape policy in 2015 and beyond. We would like to start out by giving each of you an opportunity to tell us what we should be sure to remember, what issues you see emerging, and what we can anticipate.

Bill, we'll start with you.

BILL BAER: Thank you, Howard, Sharis, Hartmut. This was a great Spring Meeting once again, and congratulations to you all.

We have spent some time getting ready for this panel. We had a double time commitment this year because everybody was trying to figure out how to pronounce Margrethe's first and last names. [Laughter] But we are all working on it and she is very forgiving. So, Margarethe, we thank you for that.

It is a little hard to follow the Attorney General. It is probably better that I really not try very much. The other way of saying it is, "The son of a gun stole my best stuff." [Laughter]

But one thing I did want to say is that those of us who have had the privilege of working with him over these last years appreciate that—and you could hear it in his voice this morning—this is a guy who is committed to on-the-merits antitrust enforcement. It is nonpartisan for him. It's get the facts right, get the analytics right, and then go get it done.

When we would meet with him to talk about a recommendation, it was always merits-based. And, if we convinced him we had it, he said, "Go! I'll support you all the way." And he has done it. It has really been a privilege for all of us to work with Attorney General Holder.

Just some quick highlights on our year.

The Attorney General talked about cartel enforcement. It continues to be a large part—roughly 40 percent—of what we do. We are committed to going after companies and holding them accountable, but also their senior executives. We are committed to fair and effective enforcement. We are committed to going after local bad behavior, such as bid rigging of mortgage foreclosure

auctions that harms homeowners who have been tossed out of their homes, by denying them the benefit of the fair proceeds of an auction sale. We are committed to pursuing international cartels, like ocean shipping, like auto parts. We are very actively involved in the financial services market, and will continue to be over the course of the next year.

Many of you saw last week we announced our first—though perhaps not our last—enforcement action on a scheme involving an effort to fix online poster prices. It involved conspirators adopting specific pricing algorithms for the agreed-upon posters so that when a consumer searched for a poster in an online marketplace, the prices offered by the conspirators for the same product were exactly the same. It is a small case in terms of the total volume of commerce, but very significant because those who are incentivized to fix prices are more than willing to take the risk of moving that to a high-tech online platform. The prosecution clearly demonstrates that wherever we find it, we will go after price fixing that harms U.S. consumers with great vigor.

We have also continued robust civil enforcement. The Attorney General talked about the *American Express* case, about the e-books case.

One thing we have also focused on this last year is making sure that in a situation where wrongdoing has occurred—where an anticompetitive merger has taken place, where there has been gun-jumping, or where a joint venture has been formed and raised prices unlawfully—that our relief includes disgorgement of ill-gotten gains. I suspect my colleague Edith may have something to say about disgorgement when her turn comes around and I will leave the rest of that to her.

But the principle here is: if you do wrong, you shouldn't be able to pocket the dollars from your wrongdoing.

Finally, a word about what brings us together on this stage. We do have individual responsibilities in terms of enforcing the law in our Member States, our home countries, our home states. But, collectively, we are working very hard together to advance the principles of effective antitrust enforcement. Over the last six years, we at the Antitrust Division have worked with 49 different state attorneys general, Puerto Rico, and Guam on enforcement matters. Our cooperation with Europe and with the new CMA, David Currie's organization, could not be better.

A key foundation of effective enforcement in the United States is the wonderful partnership that the FTC and the Antitrust Division have had over the years. Edith and I recognize a shared responsibility to work together, in terms of advocacy and splitting up responsibilities, but also to take the show on the road—going around and talking about principles of effective enforcement around the world. We just have a wonderful time doing it together.

With that, I will turn it back to you, Howard.

MR. FELLER: Edith.

EDITH RAMIREZ: First, let me say that I am delighted to be here, on the stage with my distinguished colleagues, and especially delighted to welcome David and Margrethe to D.C. to join us at this terrific conference.

I also want to take the opportunity to acknowledge two of my colleagues who are here this morning, Commissioners Julie Brill and Terrell McSweeney.

Let me start off by saying that there was one accolade, one accomplishment, which the Attorney General did not mention this morning, and that is that I had the pleasure of presenting the Miles Kirkpatrick Award to Bill, as well as to another former director, David Vladeck. It is the highest honor that we at the FTC can bestow on someone. It was to recognize the contributions to the agency during his time as Director of the Bureau of Competition, as well as his extraordi-

nary contributions to the antitrust community in his current role as Assistant Attorney General and as a private practitioner.

I also want to disabuse anyone of the notion that we gave him the award to influence any subsequent clearance discussions [Laughter]. But, Bill, we'll have to talk later. [Laughter]

Let me now turn to a few FTC highlights over the course of the past year.

As I think most of you know, we celebrated our centennial anniversary this past year, and we had an absolutely phenomenal year. I only have time this morning to mention a few highlights from the last couple of months, but we had an extraordinary year. I want to first acknowledge all of the FTC staff who are in the audience for their dedication and commitment that has led to the terrific outcomes I'm going to mention this morning.

Let me start off by talking about our most recent Supreme Court victory in the *North Carolina Board of Dental Examiners* case. This is our third Supreme Court victory over the course of the last two years. It reflects a longstanding and bipartisan initiative that the Agency has had to develop and clarify the state action doctrine. The Supreme Court affirmed the Commission's decision that the state action doctrine did not shield the anticompetitive conduct of a state board that was comprised of private actors who actively participate in the field they regulated.

I think the role that antitrust enforcers play in terms of furthering and developing antitrust doctrine is crucially important.

I also want to mention an important merger challenge that we recently filed—*Sysco/U.S. Foods*. There, the Commission authorized the filing of a complaint seeking a preliminary injunction challenging the proposed \$8.2 billion merger of Sysco and U.S. Foods. We have alleged that the proposed transaction would be anticompetitive in the broad-line food service distribution market, both nationwide and in a number of local markets. The preliminary injunction hearing is going to be taking place early this coming month.

Another important court victory that we just received this week, in perfect timing for discussion during the course of this conference is the Eleventh Circuit's decision in the *McWane* case. I think that decision is quite important for the development of Section 2 and exclusive dealing law. It involves an exclusive distribution program that a monopolist was using in order to prevent a market entrant from becoming a meaningful competitor, and it is another decision that affirms an administrative ruling by the Commission.

Let me mention two other things. We are still placing a significant focus on the conduct side in the pharmaceutical sector, taking a very close look at strategies that branded manufacturers use to prevent or delay the entry of generic competition. In September we filed our first new pay-for-delay case since the *Actavis* decision, against AbbVie. That particular case includes allegations relating to both pay-for-delay as well as sham litigation.

I want to make one final point on the competition side and then I want to say a few words about consumer protection. It is also very important for antitrust enforcers to look back at what we have done and to evaluate the effectiveness of our work. In an effort to do that, we have launched a remedies study that will update and expand on a study that the FTC conducted back in the late 1990s, during Bill's time. It will allow us to take a look back at our prior remedies and evaluate their effectiveness.

Finally, I'll just say a few words about the other half of what we do—consumer protection. Over the course of the last year, as we have been looking back at the origins of the Agency and determining how we can be most effective, we have been paying even more attention to the technological changes that have been taking place in the marketplace and how they have impacted consumers. For example, we have really stepped up our efforts when it comes to ensuring the

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protection of consumers in the mobile ecosystem. That includes tackling issues like mobile cramming, unauthorized charges, and deceptive advertising relating to the delivery of broadband services, in a major case against AT&T.

In addition to making sure that we are effective and that we stay on top of what consumers are doing, we have also been paying very close attention not only to changing business models and changing uses of technology but also to demographics. We have made a significant effort to ensure that, as our consumer population changes—as the American population gets older and more ethnically and racially diverse—we really look hard at how fraud and other deceptive or unfair practices are impacting consumers in different communities differently, and that we are attuned to that. And, in turn, that impacts how we deploy our enforcement resources as well as our outreach. I hope to talk a little bit more about the consumer protection mission later this morning.

I will leave it at that. Thank you.

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MR. FELLER: Thank you, Edith.

Margrethe, would you like to go next?

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MARGRETHE VESTAGER: I would be happy to do so. I think this is as spontaneous as it can be, because this was not agreed upon. [Laughter]

for society, for law

It is a true pleasure to be here. I think it was a special gift to be able to hear Mr. Holder speak in the beginning because, as a newcomer to the competition world, it is truly reassuring to hear the values of competition law enforcement spoken so strongly. The impartiality, that no one is too big, no one is too small, to be taken on if there is a case where consumers need to be protected to ensure choice, affordable prices, and innovation—I think that is at the core of our mission. I think this conference, all the effort put into its organization, is also a sign of just how important that is. As businesses have grown global, I think it has been a challenge for society, for law enforcement, to follow. And it is essential to be just as effective when faced with global businesses in order to protect citizens and customers.

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The fact that this conference this year is so big, and with representatives from so many different countries, I think shows very clearly that law enforcement wants to be up to the challenge, and we should be reinforcing our cooperation, both when it comes to sending one message to businesses that engage in wrongdoing, but also to be working as closely together as possible in individual matters. Therefore, I hope that you will rest assured that I will be in the forefront of promoting that cooperation, very much appreciative of the global advocacy done by my U.S. colleagues.

—MARGRETHE VESTAGER

The need for cooperation is, of course, at the core of our European Union values since 1957. And in the competition world, the Commission works in very close cooperation with all the national authorities. The Commission would not be able to do its job in a proper way if we couldn't rely on national authorities also to do their job. I think it is very important to recognize that yes, the European Commission is very established, has strong competences, but we also need the national authorities to do their job—for instance, when it comes to daily necessities like food, where our national authorities are doing a wonderful job.

The second thing is that while impartial and rigorous enforcement of the competition rules is essential, it is still disputed, especially in difficult times. The crisis has been as deep in Europe as any seen before. Times have been truly tough. Therefore, even though we have the best record of all to prove that competition, openness, and trade are the way to go instead of protectionism, of course it comes up that: "Antitrust is a good thing in theory, but it may be a little bit inconvenient today—it is Friday, almost the weekend, so maybe we should wait until next week; and it is

very hard to get things done on a Tuesday, and on a Tuesday it is almost Wednesday, and then you are very close to the weekend, so maybe you should wait until next week”—then it just passes on.

I think we should take this debate head-on because there is something very important at stake. Basically, what is at stake, in the midterm, in the long run, is the health of our economies and not least jobs and consumer welfare. I do not think that any company can be competitive on the global stage if it is not competitive at home. These two things, of course, are closely related. If you want to be able to make it globally, you have to be able to make it at home as well. We can find both strength and encouragement in these messages and values because they are at the heart of our case work.

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One thing that I very much appreciate, because it is a true treasure to come in as a newcomer and find such competent and engaged services as I have done in DG Competition, is also to use these very concrete insights from our case work to feed into some of the Commission's more general legislative proposals.

You may know that the Commission is working on plans to advance European Energy Union, the digital single market, and capital market union. We will contribute with our very concrete fact-based knowledge about how markets work in order to help Europe grow. And facts are at the core of our mission. This was put as strongly as possible by Mr. Holder earlier. Our work has to be fact-based, based on the evidence. It should be able to stand up in court.

Finally, the cooperation that we have across jurisdictions can lead also into convergence in results. I think that should be our aim.

Look at merger control. About 60 percent of the complex cases require that we work very closely with agencies in other countries—that we coordinate, including on remedies. That is a very concrete token of the fact that we have gone global. However, there can also be very good reasons to reach different results, because of course there can be differences between markets, between legislation, in the way that we approach things.

The Commission's *Google* case is an obvious example to mention here. We may have reached different conclusions so far—the statement of objections that we just adopted sets out our preliminary view that Google's conduct is in breach of EU competition rules. If it is of any comfort to you, the word "preliminary" is as difficult for me as my name is to you. [Laughter] Even though we have reached different conclusions so far, rest assured that we share the same values. I think that is most important—to build on the facts, to build on the evidence, to be able and willing to go all the way, in the interests of consumers.

Thank you.

MR. FELLER: Thank you. David, we will go on to the United Kingdom.

DAVID CURRIE: Howard, thank you very much. It is a great pleasure to be here this year. I should have been at the conference last year, but unfortunately family circumstances meant that I couldn't come.

That would have marked the launch of the Competition and Markets Authority. We have just celebrated our first birthday. So what I would like to do is to give you a little bit of a sense of the reforms that have happened in the U.K. context.

I think the Enterprise and Regulatory Reform Act of last year will be seen as being the major reform of the U.K. system. The old system wasn't broken, it was working very well, but the reforms were intended to make it work even better. We have to work with greater pace and efficiency, to

tighter statutory timetables, to make competition policy a bit more fleet of foot. And we have been given resources to do that. We had a 30 percent uplift in budget from the Treasury in circumstances where public spending was under considerable pressure.

One key purpose for that extra funding was to enhance our enforcement record. We are determined to enforce more competition cases, consumer protection enforcement, and, importantly, cartel enforcement, both civil and criminal. Our record in the United Kingdom in cartel enforcement has not been as strong as we would like, but we do have a number of cases that will be coming forward that we think will change that for the good.

One of the interesting features of the reforms is we were given a general duty, which was that we must seek to promote competition both within and outside the United Kingdom for the benefit of consumers. That is not suggesting that we should be doing Edith's or Bill's or Margrethe's work, but it does give us a real license to work internationally and cooperate very thoroughly internationally, as we have in the past. We are absolutely determined to do that. I would echo the remarks that have been made about the way in which that international cooperation with the United States and with the European Commission is working very effectively.

We are helped in that by having a very international Board. We have the privilege to have Bill Kovacic on our Board; and Philip Lowe, who ran DG-Comp for a number of years, is also on our Board; as is Annetje Ottow, a professor of law at the University of Utrecht. So we are very international in the way we work, and that international commitment is absolute.

We have another objective, to extend the boundaries of competition. We are particularly interested in online issues, but it will often move from that into big data; but, importantly, also the regulated sectors in the United Kingdom. We have sector regulation which covers something like 25 percent of the economy, including health. In the past, the Office of Fair Trading had not done very much in that area. There has been a paucity of competition cases. We are determined to change that.

We have created a thing called the U.K. Competition Network, modeled on the European Competition Network, to enhance cooperation in competition matters between us, in the lead, with our sector regulators. That is working very well. There has been an uplift in the number of competition cases.

Finally, let me just flag the rather unusual markets regime that we have in the United Kingdom. In the past, this was operated by the Office of Fair Trading doing an investigation at phase 1 and, where appropriate, referring to a phase 2 market inquiry done by the Competition Commission. That regime stays in place, although under a single roof. So we are careful to keep those two phases separate and independent.

It is a powerful regime because we are able to impose remedies even when nobody has done anything illegal. If we can demonstrate sufficient consumer detriment in a market that is not working well, then we can impose remedies to enhance their operation to the benefit of consumers—proportionate remedies of course, but we can impose those. Because that is a heavy responsibility, we make sure we are very much rigorous, evidence-based, transparent, and, importantly, open to appeal.

We have concluded two cases that we inherited from the Competition Commission, in payday lending and private health, and we have launched major inquiries in energy and in personal and SME banking. Those two inquiries, I think, are going to be very significant. They touch everybody's lives.

Finally, compliance. The other side of enforcement is that we want to raise the profile of competition issues in the boardroom. Before I took this job, I sat on the boards of a number of com-

panies, and I can tell you that the awareness of competition issues was lower than it should have been. We have determined to actually raise the profile, to make people aware of their responsibilities. Most companies want to comply, and often it is ignorance that leads them not to understand.

We have done surveys that show, particularly, SMEs do not understand both their rights under competition and consumer law, but also their responsibilities not to breach those rules. Enhancing that awareness is going to be an important agenda for us going forward—long term, it will take time, but we are determined to make a difference.

MR. FELLER: Thank you, David.

Kathleen will go on to what is happening in the states.

KATHLEEN FOOTE: Thank you, Howard, and thank you all. It is always such a pleasure to be here.

Although the National Association of State Attorneys General has been around for over a hundred years, the Multistate Task Force on Antitrust began in 1985, so we are celebrating our 30th birthday this year.

For those of you who are not familiar with our Task Force, its formation heralded quite an explosion of joint investigations across states, major multistate litigation, often the civil-redress type of litigation on behalf of consumers, and advocacy via amicus briefs whose multistate authorship has proved influential. The Task Force work by multiple small bureaus and antitrust enforcement agencies has been quite powerful in encouraging enforcement of state antitrust laws, as well as the assertion of state interests under the federal laws.

State antitrust enforcement quite regularly goes hand in hand with consumer protection. State attorneys general are primary enforcers of consumer protection under state law. In fact, in many states the consumer protection law is also the antitrust law.

In the past year, the multistate achievements include a number of collaborations with our regular colleagues, DOJ and FTC, on several mergers affecting local markets. Those are the mergers that interest state attorneys general by far the most.

In the *St. Luke's* case, for which the FTC deserves enormous praise and recognition, the attorney general of the State of Idaho stood side-by-side with the FTC throughout that, committing almost his entire staff and certainly his entire budget, as well as his own personal efforts, to its success.

The work of quite a number of states on the Sysco/U.S. Foods merger has resulted now in a filing. There are many state AGs who are continuing to assist, helping to carry the burden, particularly on depositions as they take place all around the country.

On the nonmerger side of state activity, there has been a lot of individual state activity that is worth a mention here. There have been at least four settlements by states of bid rigging. That, of course, has been our bread and butter over the years. Connecticut, Oregon, Michigan, and Puerto Rico have settled bid-rigging cases—in Puerto Rico multiple bid-rigging cases—very recently. Michigan is continuing to go forward with one of its bid-rigging cases under their criminal law.

In addition, on the civil side, New York has recently finished a trial, now on appeal, in the pharmaceutical product-hopping case involving the drug Namenda.

In California, my own state, we recently concluded a case that we brought with Bill's shop against eBay involving no-poach agreements by employers not to hire each other's employees. In the case of the California suit, damages were sought under our *parens patriae* authority for the

individuals affected. We have finished the claims process, which became very personal for many of us who had direct contact with a number of the affected employees in the course of making certain that claims were filed promptly.

In the upcoming year I would say that health-care issues are front and center for us, with the maturing of the Affordable Care Act, the formation of the state exchanges, and an enormous amount of merger activity, both horizontal and vertical, in the context of Accountable Care Organization formation. The fact that the ACA relies, in part, on antitrust enforcement to achieve the cost savings anticipated by the law has caused the antitrust enforcers in our states and our state health regulatory agencies to begin to form some new working relationships that we had not had in the past.

Also upcoming, a great many of the state attorneys general are conducting comprehensive reviews of agency composition and decision-making authority, assisting the state governing branch to comply with the *North Carolina Dentists* ruling that the Federal Trade Commission recently won in the U.S. Supreme Court regarding the active supervision of state boards that are constituted with significant market participation.

These are some very significant challenges for all of us, particularly in the small bureaus where many of us serve. But we are certainly looking forward to the challenges and look forward to continued collaboration among ourselves and our federal counterparts. Thank you.

MR. FELLER: Thank you, Kathleen.

Sharis?

SHARIS POZEN: I will start on cartels, and I am going to start with Bill. Bill, I actually have the ATR site marked as a favorite and I have been trolling around on it. I noticed that the 20 largest fines in cartels have been on non-U.S.-based companies. Do you want to comment on that, or comment on cartels generally?

MR. BAER: Sure. It's a fair question. But I think there is a fairly simple and direct answer: when we determine the fines to seek, we do it largely on the basis of the volume of affected commerce. An international cartel is often going to involve commerce that is much larger and results in larger fines, reflecting a more significant impact on U.S. consumers than a smaller local or domestic cartel.

It turns out, I think, that of the Fortune 500 companies, 75 percent of them now are non-U.S.-based. So the fact that the distribution would be the way it is at a given moment in time is not shocking.

Now, all of you heard the Attorney General make some vague reference to the possibility of upcoming cartel actions in the near future. I want to assure you that right after the meeting ends I am going to go back to the office and call him and find out what it is he thinks I am working on. [Laughter]

MS. POZEN: Margrethe, can you talk to us a little bit about the EC cartel enforcement that you saw in 2014 and then going forward in your mandate?

MS. VESTAGER: First of all, cartel work will remain a priority. And 2014 was a very good year for us. It is a challenge to live up to.

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There were ten decisions, which is quite a lot compared to the years before. Eight out of ten were settlements; two were full procedures. This shows that settlement is now part of our toolbox, that we can use it as well as the normal procedure.

I think it is also a good thing that cartel enforcement covers a very broad range of sectors. Last year there were decisions in banking, in car parts, in foods and consumer goods. And the title of my memoir is going to be “The Envelope Cartel.” You should write more letters, please, so they don’t have to turn to these measures. It is bad. [Laughter]

And, of course, since business is increasingly global, a number of these cartels are global as well. But I think you will find that, looking into it, the approach is balanced. Even though you have half-and-half involvement of EU and U.S.-based companies, you would find that it is not necessarily the same thing when it comes to fines. There was a total of \$2 billion in fines in euros and two-thirds of that was imposed on EU-based firms.

So in that respect it is hard to find any kind of pattern here. On the contrary, I think that when you go through our numbers you would find that this is truly enforcement based on the individual case and the facts and the evidence in the case. I find that most satisfactory. This is the way it has been working so far, and that will continue of course.

MS. POZEN: There has been a lot of discussion about cooperation on a variety of levels. A lot of these cartels, as I said, are non-U.S.-based companies with international impact. Bill and Margrethe, how do you think about cooperation on a cartel matter, what have you seen work, etc.?

MR. BAER: We have some limits because of confidentiality restrictions in the United States. Criminal Rule 6(e) limits a little what we can share. But, particularly with regards to situations where there is an international cartel and there is a leniency applicant, we are able to work together in terms of sharing information provided to us by a leniency applicant. We are often able to coordinate the dawn raids, the search warrants in the United States, and to time this not just with the European Commission, but with other enforcement authorities around the world.

We have seen increasingly other enforcement authorities, when they have a leniency applicant who is reporting on conduct that affects markets outside that particular geographic picture, bring us into the picture. So the coordination is most effective and done quite well at the front end.

That big bang when we all show up really causes other companies to do a very prompt internal investigation and assessment of exposure. I think we encourage self-reporting by people who may not be first in line but have come to realize that there are benefits from getting in and ‘fessing up to cartel behavior.

MS. VESTAGER: I agree completely on this approach. What we see is when we work, for instance, with authorities in South Korea or in other jurisdictions, we find the same efficiency and we find the same dedication.

I think it is working very well. It is quite amazing for me, as a newcomer, to experience the limitations on cooperation—because they are obvious, not least because of differences in laws, as Bill has said—and then anyway to find ways where it is completely legitimate to coordinate and to share and to make sure that, even though we are in different places around the globe, be that day or night, we coordinate in order to make sure that we get the evidence that we actually need. When it comes to antitrust, the ability to knock on doors very early in the morning, and to do it at the same time, is an important part of the work that we do.

MS. POZEN: David, how about the CMA and cartel activity?

LORD CURRIE: We have built up a cartel team. Unfortunately, I have had no direct experience of the cooperation there has been in the past, but all my people say that the cooperation with the U.S. authorities and with the Commission has worked very well. In enforcing international cartel action, clearly we are not in the lead, but we will be very supportive in those actions.

We are also prosecuting some purely UK cartels—or we are about to move into that—because I suspect the prevalence of bid rigging and that type of activity is probably greater than we would like. We want to get a few successes in that area to demonstrate to business that actually that type of activity is seriously criminal and a significant change to our criminal cartel offense, where the requirement for us to demonstrate dishonesty has been removed with a number of safeguards. This is a somewhat technical change, but I think it will enable us to bring people who are in breach of the law to justice more effectively.

HARTMUT SCHNEIDER: Let's stay with international cooperation for a minute. At the Spring Meeting Luncheon two days ago, Bill Kovacic pointed, in particular, to China as one of the leading antitrust enforcers outside the jurisdictions represented here. We continue to see aggressive enforcement out of China, including in the recent *Qualcomm* decision. Sometimes there have been questions both about due process and about the substantive application of the law.

We are interested in hearing how each of your agencies cooperate with the Chinese enforcement agencies and what you see as the future of Chinese antitrust law.

Edith, do you want to go first?

MS. RAMIREZ: Sure. Let me start off by saying that I echo all of the comments that have been made by my colleagues about the importance of international engagement with counterparts around the globe. Much of what we are doing day in and day out involves matters that have multi-jurisdictional dimensions. This coordination and regular dialogue is, in my view, just an absolute top priority.

When it comes to China, that is certainly a very important relationship to us here in the United States. Together with the Department of Justice, the FTC has a Memorandum of Understanding with the three Chinese anti-monopoly agencies, and we engage with them on multiple levels pursuant to that MOU.

It includes formal high-level annual consultations, formal consultations. Bill and I went to China last year and they are going to be coming to Washington later this year for that formal dialogue. But, in addition to that, there is also considerable informal dialogue as well as cooperation in particular matters. That is really quite crucial.

Frankly, looking at the overall development of the Chinese enforcement program, it really has been astonishing, particularly when you take into account the fact that these agencies are small, that they are very young and have only been doing business for just a few years, and of course that they are facing an economy that is still very much in transition and becoming more market-oriented.

So I think it is quite remarkable what we have seen out of China. And something else to keep in mind is that the Chinese agencies are doing their work with the entire world watching very closely.

Going forward, I think we are going to see even more active engagement and enforcement on the part of the Chinese agencies. Of course, we do a number of things differently than they do. As enforcers, each of us has to apply our own laws and apply them to the particular market conditions of our respective jurisdictions. We have certainly seen differences across jurisdictions, as we have seen this week with the announcement from Margrethe about the Google case.

But that being said, I think that it is also important to emphasize, as international enforcers, that there are a few elements that I believe are especially important and certain core values that should apply across the board. Let me just highlight two of those. One is the importance of procedural fairness. The other is the importance of competition analysis focusing on economic evidence of effects on competition and not on particular rivals. Let me elaborate on both of those points.

I think when it comes to procedural fairness, it is crucial for the legitimacy of the work that we do that investigations be transparent, that parties understand the nature of the concerns or allegations that an enforcer is investigating, that parties have an opportunity to present their case, an opportunity to be heard, and are treated fairly during the course of an investigation, so that, regardless of the outcome, they feel that they had a fair opportunity to be heard and to defend themselves.

As international enforcers, certain core values should apply across the board: procedural fairness and a focus on competitive effects.

—EDITH RAMIREZ

Secondly, it is really crucial that the focus be on how we, as competition authorities, can advance long-term consumer welfare and enable long-term investment. I have certainly expressed concerns in this area, particularly when it comes to the application of the antitrust laws to matters that involve intellectual property. Again, promoting consumer welfare and ensuring that long-term investment will continue is key, as opposed to other non-competition policy objectives. It is key because it really goes to the legitimacy of our entire competition policy enterprise.

MR. SCHNEIDER: Bill, what is the Division's perspective on this?

MR. BAER: First of all, I echo and endorse the remarks of Chairwoman Ramirez.

Two points. On the one hand, this is a nascent competition regime in China, six-and-a-half-years old. We have the benefit of 125 years of the Sherman Act, 100 years of the FTC Act, 100 years of the Clayton Act. One needs to have some patience.

At the same time, we were learning to apply those statutes in a different environment, a far less international economy. So we can't wait for other developing antitrust regimes to get up to the international norms over a leisurely period of time. It affects investment. It affects fairness. It is why President Obama, when he went to China in November, engaged directly with the leadership of China.

It is why this Administration has secured some commitments from the Chinese government about transparency, about due process, about equal application of the law to domestic and to foreign industries. It is important. We are spending a lot of time on it because it is in the interest of consistent and coherent international enforcement. It is also good for the Chinese government and the Chinese people, in terms of encouraging investment in their economy, which continues to grow at a rapid rate.

So it is and will remain a priority for us over the years.

MR. SCHNEIDER: Margrethe, can you give us your perspective?

MS. VESTAGER: We have the same very high priority for this cooperation. It will sound as if we have coordinated our messages here. It is very much the same approach.

One thing is we think that in the concrete case work there is a lot of knowledge sharing, obviously. We have been working with the Chinese authorities, especially MOFCOM, on a number of merger cases, including to some extent on remedies. It has been as rewarding, I hope, for MOFCOM as it is for us. There has been less cooperation in concrete antitrust cases, but probably that will change in the future.

We have also put some resources into actually coming together and sharing knowledge about processes, about organization, how can things be done. When we make a priority of respect for due process we have to share how we actually do that. Coming together in that respect, getting to know each other better, I think is one of the cornerstones, of course, and then to supplement that also with key working relationships also on the higher level in order to support the mutual understanding of how this should develop. That's why I am also planning to be in China in the coming year.

MR. SCHNEIDER: David, you mentioned the CMA celebrated its first anniversary a little while ago. How have you interacted with your counterparts in China?

LORD CURRIE: The Office of Fair Trading had done quite a lot in respect of China. They had in place a Memorandum of Understanding with all three competition agencies, which we have taken over. Our staff interact fairly regularly with Chinese competition staff.

Like Margrethe, I am planning to go to China later this year. I haven't been for two or three years. My first time was 25 years ago, and I have seen a lot of change over those 25 years.

As Bill said, the competition regime is new, it is developing quite fast, and we need to do all we can to get them to move further towards international standards.

I was encouraged by the comments that Shang Ming made about MOFCOM's efforts to increase accessibility and transparency, as well as their aim to manage timetables efficiently to meet the needs of international firms. I think that is encouraging.

Of course, there remain notable differences in enforcement between China and elsewhere. We need to continue the dialogue and keep working on this.

MR. FELLER: We would like to talk a little bit about the antitrust issues that have arisen from new technologies. Recently we have seen a number of new technologies and business models—such as Uber, Tesla, Redfin, Airbnb—that have been changing markets but are also being viewed in some cases as disrupting markets. They are facing resistance sometimes from incumbents, also resistance from regulatory barriers.

Kathleen, many of the regulatory barriers have been at the state and local level. Some states have already started to investigate certain practices, like New York is looking into Uber pricing. What role do you see for the state agencies with regard to these technologies that are seen as disruptive because of state and local regulations?

MS. FOOTE: All right, Howard. I notice that three of the four disruptive players that you mentioned are San Francisco companies.

MR. FELLER: We want you to feel comfortable.

MS. FOOTE: I assume that you are starting with me because I am from San Francisco, so you are hoping that I am going to be disruptive too. [Laughter] Normally I would defer to Bill on that, but I will do my best.

I would certainly point out that there are regulations for almost all commercial activity. The new technologies do enjoy some benefit as they start from relative lack of regulation that everyone else is subject to. It does often give them a brief advantage over the incumbents. Obviously, that ends up changing.

There is, in fact, a long history of unsung and often behind-the-scenes efforts of state attorneys general in many states to ward off a number of the legislative or regulatory measures intended to squelch competition by insurgent entrepreneurs to protect local monopolies or to confer state action immunity at times on specific transactions. Certainly, those efforts, quiet though they may be at times, I envision continuing.

I think that the FTC, with the help of the Supreme Court in *North Carolina Dental*, has cracked open the door, at least a little bit, to potential antitrust liability of a captive state or local agency that is using its governmental authority to protect incumbents. It is not entirely clear what that will mean in the long run with regard to the innovators. But the very fact that such actions are no longer immune, at least in some cases, could prove to be significant, possibly even revolutionary, in the full migration towards deregulation that we are encountering.

But the very fact that such actions are no longer immune, at least in some cases, could prove to be significant, possibly even revolutionary, in the full migration towards deregulation that we are encountering.

All of that said, though, I think we need some continued deference to the states. They are engaged in the very difficult job of balancing freedom of competition against a number of very important police power interests, not least of which involve public-health issues, neighborhood safety issues with regard to Airbnb, and many other things. As a former local official, former mayor of my small town, I can certainly attest to the fact that in the minds of the public, zoning regulations are of the utmost importance. Now my allegiance is, of course, to competition above all, but I have to acknowledge that there are certainly other interests at play and the balance is difficult to achieve.

I will say, with regard at least to the implications of the *North Carolina Dental* decision, if those agencies do impose regulations, the states will need to weigh their value more carefully, in light of the active supervision requirement. Imposing a sufficient regulatory apparatus is going to be more expensive, with the cost directly borne by the state and local governments.

MR. FELLER: Edith and Bill, your agencies have certainly engaged in competition advocacy in some areas. What role do you see your agencies playing in addressing anticompetitive restraints that arise in markets with new technologies, new business models?

MS. RAMIREZ: I think there are three important roles for agencies to play in this area.

One is on the enforcement side. Kathleen has already discussed—and I mentioned earlier—the *North Carolina Dental* case. Given the portion of our economy that is governed by occupational licensing and state licensing requirements generally, I don't think we can overstate the importance of that decision by the Supreme Court.

I do understand that states have a number of questions about exactly what the implications are and what additional burdens are going to be placed on states to exercise appropriate supervision and oversight over state boards that do have members who have private interests. We do plan to issue guidance in the near future—that is a conversation that is taking place with Debbie Feinstein.

But, in addition to the implications of *North Carolina Dental* and also possible enforcement in this area, there is also an important advocacy role. The FTC has, for a significant amount of time, provided comments and suggestions to local policymakers regarding these types of issues. For example, we have provided comments to local taxi commissions that were considering regulations that, while there might be some claimed health or safety justification, might also have the impact of creating barriers for new and disruptive business models.

We share our competition policy expertise to urge these lawmakers and regulators to consider the competitive impact of those proposed regulations, and also urge that, to the extent that they are necessary for consumer protection purposes, they really be tailored to those particular concerns and not be overbroad.

—KATHLEEN FOOTE

Let me also highlight a third role that I think is also an important and fundamental one, which is that as enforcers we need to take a step back and study and examine these issues so that we really fully understand the impact of these new technologies and business models.

I am pleased to be able to announce that we are going to hold a workshop on June 9, on what is colloquially referred to as the “sharing economy.” We are going to be looking at the business models that have grown using Internet peer-to-peer platforms that allow entrepreneurs to access consumers more directly, considering the ramifications of these models, and also examining how existing regulatory frameworks can deal with them. We are going to be examining and convening relevant stakeholders to address both the competitive implications as well as consumer protection implications, again in an effort to gain better understanding that we can then deploy, whether it is in future advocacy or also, if need be and appropriate, in the enforcement context.

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—DAVID CURRIE

MR. FELLER: Bill, any comments?

MR. BAER: A couple of key points.

First, I think we all share the view that innovation and promoting opportunities for innovation are keys to a growing economy. Dynamic efficiencies matter. They drive us forward.

I think we can also agree that, as a general matter, incumbents do not like the revenue-shrinking or margin-shrinking effect of that, and that some incumbents will go to great lengths to protect that income stream. Some of what we can do, as Edith said, is law enforcement based, some of it is advocacy based, and we need to be prepared to do both.

I think a key thing for us enforcers to do is exactly what Edith said: first of all, make sure we understand the facts so that we sort out a legitimate health-and-safety claim from a bogus claim. This can be local, it can be state, it can be federal. It can be incumbents trying to protect takeoff and landing slots; it can be people trying to limit the availability of spectrum, or limit the ability of municipalities to develop local broadband alternatives to the Internet service provider who is dominant in its community.

But the point is to make sure we have the facts right and then take the time to educate the public, the state and local authorities, whose elected political role we respect. I think they can benefit from getting a balanced view of the costs of regulation versus the benefits of these dynamic efficiencies that drive our economy.

MR. FELLER: David, do you see the CMA getting involved in this, either on the competition side or the consumer protection side?

LORD CURRIE: Absolutely. Obviously, as others have said, we are instinctively supportive of innovation and disruption as a competitive dynamic. I think, more generally, the United Kingdom is quite open to such things, much less likely to reach for the protective instrument.

Emerging business models is something that we are very interested in exploring further and understanding further. We will be making sure that when disruptive players in the United Kingdom compete with incumbents that the new entrants do not find the playing field tilted against them, and we will be alive to the temptation for incumbents to dress up self-interested considerations in the guise of consumer protection arguments. We’ve got to be careful. Sometimes that is legitimate, but often it is not.

I should have said in my introduction that one of the roles we have been given by government is to be an advocate for competition within government, both in the terms of new legislation which

we can scrutinize and comment on, but we will be looking for regulations that are in place or might be being put into place that might act as barriers. Where we publish a comment on legislation and make recommendations the expectation will be that government will accept it, and, if it doesn't, it has to be on the public record as to why it has not done so. Our advocacy role, which the OFT always had, will be significantly strengthened by these reforms.

But it is very early days in these markets. I think we all need to understand more about how the markets and business models are working. So I am looking forward to the June OECD Competition Committee meeting, which is discussing exactly these sets of issues. We certainly feel we need to deepen our understanding of what are complex issues.

It is clearly going to be very important for us all to make sure these markets remain open to innovation and change.

MR. FELLER: Margrethe, we have already seen some activity at the Member State level in the European Union on some of these issues. Do you see that continuing at the Member State level or do you see the Commission getting involved in that as well?

MS. VESTAGER: First of all, I think it will grow and grow and grow in the years to come. The sharing economy is, I think, a new fact of life, both in large scale but also in small scale. I just heard about a woman who had created her own small platform to enable herself to lend out a soup pan—she only used it a few times a year, so why not share it? [Laughter]

So both in the very small, but also in the very large, scale you find that it is changing our culture. When we talk about the environment, about the use of resources, we would like to get more out of it.

I think, of course, that we should welcome these developments because they are very important in order to get things more balanced. I think balance is also the word here.

Understanding what goes on, both to enable competition to take place, because basically that is what is happening—and I think that is absolutely as it should be. But there are also completely legitimate concerns when it comes to hindering free riding, to make sure that when there are consumer concerns, tax concerns, we ensure that there is actually a level playing field; and then, on the other side, also to make sure that the incumbents do not enable themselves to erect barriers which are not due.

I think there is a lot of work to be done and to learn, as Edith said I think very much to the point, a few minutes ago. We are looking into it. We have had complaints by some of those companies who say that, "The Member States are not enabling us to provide services as should be our role in the single market." So we will, both in the short run but also in the long run, be looking into it from the Commission side.

MR. SCHNEIDER: Let's turn our attention to mergers. This will be a question for all of our enforcers.

One of the phenomena that we have seen in the last few months is the return of what some call the "mega-mergers": large transactions that we have not seen in a number of years. Sometimes those mega-mergers occur in industries that are already heavily concentrated as a result of prior transactions in those industries. How and to what extent do you as enforcers take account of those acquisition trends in an industry when you review transactions that come to your attention?

MR. BAER: First, I think you are right that, after many years of capital sitting on the sidelines following the 2008 financial crisis, we can see companies investing in strategic acquisitions. A high-

er percentage of strategic acquisitions have the potential to have antitrust/competition concerns associated with them.

Section 7 of the Clayton Act is an incipency standard, and the fact that there have been prior transactions does raise the question of whether even a modest increase in concentration does get us to a tipping point.

We do look at our past analysis. We did this in the airline industry. Had we gone to trial against American Airlines, we would have been prepared to show that some of the efficiency claims made in connection with prior transactions did not in fact materialize, that the market became more interdependent and less competitive.

I hesitate to bring up the beer industry, because the Attorney General seems to think I have a special affinity. [Laughter] But when we challenged the ABI [Anheuser-Busch InBev] acquisition of Grupo Modelo, part of the defense there was, "We already own 48–49 percent, so just getting control is not going to change the competitive dynamic." But our complaint said—and we were again prepared to prove at trial—that even that modest change in control would have indeed disrupted what was a fairly aggressive pattern of competition by Grupo Modelo in the United States through its Corona brand.

So we want to make sure we are not tied down by the argument that "you approved the last one, that obligates you to approve the next one." It is important that we are looking at each transaction on its merits, whether it is a mega-merger or a smaller transaction.

MS. RAMIREZ: I think we certainly have a very similar view. We are going to be looking at each transaction on its own merits. But what has happened in the past may very well impact the existing market conditions, and that will certainly be a factor. In addition, prior deals and concentration can also give us the natural experiments that allow us to better assess arguments about entry and about the merging parties' ability to achieve efficiencies. Again, we will look at everything on its own merits, but clearly what has happened in terms of prior deals will certainly impact our overall analysis.

MS. VESTAGER: First of all, I think that we should welcome these developments because it is a sign that the global economy is finally picking up, that there is more trust that now it is a good thing to invest, to acquire other companies, to merge. So in that respect it is a very good thing that our enforcement shops are busier.

But again, I fully share the point of view that we have to address these cases one by one, because otherwise we risk misunderstanding market developments. And I think we also risk sending a wrong message to companies in the future, saying, "Oh, they took this decision; now I can make a prognosis that they will take the next decision and the third decision and the fourth decision in exactly the same way."

Some of these markets change rather fast, and when you are dealing with fast-moving markets, then again you have to deal with the cases individually. I think that one of the main challenges for us is for people to understand that you cannot just say that "Because of what you did yesterday in that other case we expect you to do the same tomorrow," even though the situation is another one. I think that is an important message to get across.

LORD CURRIE: Mega-mergers would almost certainly go to the European Commission, not to the CMA, although clearly we have a strong interest in some of them and we would work very closely with the Commission.

At the moment, for example, we have a merger between BT and one of our mobile operators at the same time as two other mobile operators wish to merge. The second case is at the European level. The first is one that we ourselves are considering. Clearly, we need to be working closely together on those two cases because the interconnections are very important.

By and large, the merger regime in the United Kingdom has been carried over from the old regime. It hasn't changed in any significant way. One thing I would flag, though, is that our regime is a voluntary one. Some people suggest that that somehow is soft touch. We are very diligent, on the contrary, in calling cases in, looking at cases that should have been referred but were not.

For example, at phase 2 we have currently six mergers under consideration. Two of them were called in by us. It is quite important that companies considering mergers that involve us should actually think about whether a referral is necessary. Otherwise we might at later stage call them in, and that is disruptive to business and the merger process.

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MR. BAER: May I make one quick additional point? We recently challenged a merger involving National CineMedia and Screenvision. It was widely reported when that deal was abandoned that I had expressed some public skepticism about the judgment involved in the boardroom in deciding to go forward with a merger to monopoly. I want to clarify that that is exactly what I was doing. [Laughter]

There are some ideas that should never get out of corporate headquarters. The fact is that they are inevitably going to be challenged by the Federal Trade Commission or the Antitrust Division. It wastes time. It wasted the time of my people. But basically, at the end of the day, it is a huge embarrassment for a company to get out there and invest in something, get its shareholders all excited, and then have to pull out at the last minute.

One of the things you in this room do is to give the companies your best judgment about where we are and what we think. It's why we have Merger Guidelines. People need to take this seriously because we do, and it is not worth your clients' time and it is not worth our time to challenge things that are patently problematic.

—BILL BAER

MS. VESTAGER: Sometimes we talk about these cases as if they are always very problematic, always have to go into phase 2, always involve a lot of trouble for the companies involved. Some of the cases, I think, from the company side are very well prepared and show a basic understanding of our concerns.

I think Holcim/Lafarge is a very good example of that. They wanted to merge. They understood, of course, and had taken completely onboard what would be the challenges looking ahead. Therefore, it could be cleared in phase 1—of course with a substantial remedy package—but I think very well prepared on the company side.

It may not involve that many hours on your behalf—I wouldn't be the judge of that—but at least it enabled a very quick process on our side. I think that it is very important to take that up as an example, that when we work constructively with companies, even in enormous mergers, then things can actually be very quick.

MS. RAMIREZ: If I can jump in, let me also note that sometimes a company will have in mind what it believes to be an appropriate remedy, an appropriate fix. We are encountering that in the *Sysco/U.S. Foods* matter, where the parties entered into an agreement and they felt that if they made a divestiture of certain distribution centers to the third-largest player in the market then that would be enough. We ended up rejecting that proposal and proceeding with a challenge, which is set for a preliminary injunction hearing in May.

MS. FOOTE: I will certainly endorse everything that everyone else has said about this.

The states do from time to time review mergers individually in local markets, probably most notably in healthcare, where states have done a great deal in that respect. Many of those transactions are well below the HSR level for federal review. But when there are mega-deals, those are obviously HSR reviewable, and the federal agencies are quite expert.

In those cases, though, very often there are very significant impacts on local markets. States are selective in our participation. We will generally do so where there is a real value-added to our focusing on those local markets: where there are local accounts versus the national accounts in something like *Sysco/U.S. Foods*; where there are particular vulnerable populations affected, an issue called out by the state merger guidelines—one of the very few differences, if you can find them, between the state and the federal Horizontal Merger Guidelines—or if they are in key industries, particularly industries that affect state interests. Healthcare certainly falls in that category. Waste hauling and landfills are another classic example, where there would be very significant state interest and close state involvement with the witnesses and possible state enterprises that will be impacted.

[W]hile it is of course important to be looking at major deals, we should not lose sight of the importance of some of these smaller deals that may not grab the headlines but also can create competitive problems that we have to address.

—EDITH RAMIREZ

MR. SCHNEIDER: Another trend that we seem to be seeing is an increase in merger litigation. Bill and Edith, in particular, do you think this is a coincidence or related to what we have discussed and possibly a trend going forward?

MS. RAMIREZ: Let me say, in terms of the size of the transactions, I don't think that necessarily translates into there being an anticompetitive problem. Sometimes you have a mega-deal where there really aren't that many significant overlaps. We encounter this fairly regularly in the pharmaceutical industry, where there are major deals but we are able to really hone in on what the anticompetitive problem is, and so they end up being resolved by having targeted divestitures that can allow the deal to go forward.

Let me also mention that, while a lot of these mega-deals are the ones that end up getting a lot of attention in the news, I do not want to lose sight of the fact that you have a lot of smaller deals that do create competitive problems, and it is important for us to take action in those. We certainly handle quite a few of these. One recent example is the abandonment of the proposed Verisk/EagleView transaction dealing with the market for rooftop aerial measurements that are used by the insurance industry to evaluate property claims.

So, while it is of course important to be looking at major deals, we should not lose sight of the importance of some of these smaller deals that may not grab the headlines but also can create competitive problems that we have to address.

MR. BAER: I don't know that there is an increasing trend toward merger litigation. I do know that at the Antitrust Division we have approached our merger investigations with the notion that we may well be put to our proof and that we need to be prepared to go to court to tell a story of anticompetitive harm that we commit to tell under the Horizontal Merger Guidelines. When you know that on the other side you've got very talented advocates—lawyers, economists, others—for a transaction, being litigation ready basically allows us to confront the issues in a more direct and appropriate fashion.

And there is a certain reality therapy, I think, that goes through the companies' point of view, the deal advocates, about: "Where are we going? Where are we going to be? Should we put undertakings on the table early? How should we approach it?"

So going into a merger investigation not committed to a particular outcome, but committed to the notion that if we find a problem we are going to be prepared to go to court and prove the nature and the extent of the problem, is the right mindset, I think, for an enforcer to bring to merger enforcement.

MS. POZEN: We will move on to healthcare and pharmaceuticals. Reverse-payment settlements in intellectual property disputes between branded and generic drugs have been a very hot topic. We spent some time on that yesterday in the hot-topics panel. Both the European Commission and, particularly, the Federal Trade Commission have been active in these areas.

I thought I would actually turn to you, Edith, because you have a lot of cases I know going on in the courts. There have been developments while we sit here. I've been getting email prompts on what is happening in that area.

You do have cases pending, and I know there is a look back that you wanted to do. So would you talk to us a little bit about how you are thinking about it in these matters as the Chairwoman of the Federal Trade Commission, and how you see these cases moving forward, particularly after the *Actavis* Supreme Court standard was set?

MS. RAMIREZ: Absolutely. It is an area that the FTC has been focused on for a very long time, and we were certainly thrilled by the Supreme Court's decision in *Actavis*.

We are, first of all, moving forward with ongoing litigation right now in three different matters.

The *Actavis* case itself was remanded to the trial court and is in active discovery.

Another ongoing case is the *Cephalon* matter. In that particular case, it only took us seven years, but we finally have a trial date. That case is set to go to trial in June. We did receive a favorable ruling by the judge in that matter relating to our ability to get disgorgement. The judge affirmed that the Agency does have the authority and the ability to obtain disgorgement as a remedy. I want to echo a comment that Bill had made at the outset about the importance of using that as a remedial tool, particularly in situations when injunctive relief is really not going to be an effective way of addressing and remedying the anticompetitive problem. So we are looking forward to being able to move forward with that trial soon.

Let me also mention—and I made reference to this in my opening remarks—a new case that we filed alleging pay-for-delay, and that's the *AbbVie* litigation that we filed in the fall. We are in the process of addressing a motion to dismiss. In that particular case, one issue that has arisen post-*Actavis* is whether or not the fact that a branded manufacturer gives a noncash payment as consideration in settling patent litigation is something that is subject to antitrust scrutiny. We take the position that you do not need to hand over a bag of cash, but that you can give value in other ways, such as through side deals. *AbbVie* involves a supply agreement that we believe is what constitutes the unlawful payment.

There are a number of issues post-*Actavis* that are being addressed by the courts right now, and we are certainly keeping an eye on that—not only dealing with them in our own lawsuits, but also submitting amicus briefs where we think it is appropriate or we think that we can help develop the law.

MS. POZEN: That's great.

I know on the state level you have been particularly focused, Kathleen, on the pharmaceutical sector. Do you want to talk a little bit about that and where you see that headed?

MS. FOOTE: We have been for quite some time. One reason for that, of course, is the states are major purchasers of pharmaceuticals through the state agencies. But also, obviously, healthcare is a core issue for states under both their police power and the competition law.

I had mentioned earlier that New York had on its own pursued a product-hopping case involving Namenda. It went through trial. There was argument earlier this week in the Second Circuit regarding that, whether or not the 135-page decision with a great many factual findings would be upheld.

We have had for a long time a Pharmaceutical Industry Task Force within our Multistate Task Force. It was earlier focused on Medicaid fraud reimbursements and now very much it focuses on reverse payments.

There have been quite a number of multistate cases filed and now settled.

Probably most significant, though, what the *Actavis* decision opened up—one of the almost throwaway lines in it perhaps—was that it is generally not necessary to litigate the validity of the patent, that you can look at the anticompetitive/procompetitive impacts of the agreement itself without considering that. That opens up the whole question of whether these things can be litigated under state antitrust law.

There is a case pending before the California Supreme Court on exactly that question. There was argument on March 3. They must issue their ruling on it within 90 days. So we are due for something that could be very, very significant, if those cases are now to be heard under state antitrust laws, which in some cases may be somewhat more stringent in their interpretation. State laws certainly can be different from the standpoint of procedure, whether or not there is a presumption of anticompetitive effect and precisely how the sequence of burden of proof might go forward in a case under state antitrust law.

[T]he Actavis decision opened up . . . the whole question of whether these things can be litigated under state antitrust law.

—KATHLEEN FOOTE

MS. POZEN: You mentioned the New York case on product hopping. Do you see other states following that, or is that one of a kind?

MS. FOOTE: I don't think it is one of a kind. It is the only one that is extant right now. But this is an area that continues to be of great significance to the states.

MR. FELLER: Let's talk a little bit about civil enforcement activities. Kathleen, we've seen some states—including yours, Florida, Illinois, a few others—that have become more active in bringing civil follow-on cases in price-fixing matters in the last couple years. What do you see as far as the future there? Do you see continued expansion by state attorneys general on this front, bringing follow-on class action-type cases?

MS. FOOTE: I think it will very much depend on how things go with regard to the class action bar. Certainly, in some cases, the follow-on civil litigation that we do relates to the state's own claims, and nobody else is going to be representing those.

But a major aspect of what the states have done in that area is to represent consumer claims using the *parens patriae* authority that state attorneys general have. Now, if the class action bar is actually effectively representing consumer claims, there is obviously less reason for the states to be involved in most cases.

I would say that the states' interest in stepping into that kind of litigation, particularly in the cartel follow-on matters, increased as it looked like the ability of indirect purchaser classes to be certified in federal court was becoming more and more difficult. The *parens patriae* authority allows

the states to go forward on behalf of consumers without a class certification procedure, which can be extremely arduous and extremely expensive, and ultimately works to the disadvantage of consumers.

The tide seems to be shifting perhaps in small ways on that. In some of the more recent cases indirect purchasers have been successful. But I think it will most certainly depend.

MR. FELLER: David, we'll talk about the new law that is going into effect this October. As I understand it, it would establish a competition appeals tribunal as a venue for private enforcement in the United Kingdom and will make it easier for claimants to bring claims by facilitating opt-out collective actions. Are we seeing the United Kingdom go the way of the United States in terms of its approach to follow-on private actions for antitrust law or competition law violations?

[T]he present opt-in system of collective action doesn't seem to be working. . . . There was only one case, brought by the Consumers' Association in 2007, following an OFT infringement decision . . .

—DAVID CURRIE

LORD CURRIE: First of all, both the Office of Fair Trading and the CMA subsequently were in favor of this change. The principal reason for that is the present opt-in system of collective action doesn't seem to be working. There were very low levels of redress. There was only one case, brought by the Consumers' Association in 2007, following an OFT infringement decision—very little activity before. These reforms will clearly increase the amount, but I don't think we are going to see a flood.

There are important differences between what we are introducing and what you have here in the United States. For example, the specialist Competition Appeal Tribunal will have to certify that a case is suitable for opt-out. We retain the loser-pays-cost rule, which should deter unmeritorious cases. There is no possibility of enhanced damages. The level of damages will be determined by a judge rather than a jury. Collective actions will not be able to be brought by law firms, third-party funders, or special-purpose vehicles. Contingency fees will not be allowable for opt-out actions. Those are significant differences.

We think this regime will increase the number of cases. We think that is desirable. I don't think it is going to lead to an absolute flood. But we'll have to see.

MR. FELLER: Margrethe, I would like to ask you about an article in *The Financial Times* in the last month or two. They quoted you as saying—and I'm just reading what was in *The Financial Times*—"You are not a competition enforcer inclined to settle cases in backroom deals." You were quoted as saying, "It is very important not to make a habit out of settlements. You need on occasion to develop case law, and only our judges and going to court can do that." The article said that you appear more willing to take the confrontational route of bringing charges, possible fines, conditions, and then court battles.

Now, you could probably make it easy and say that you were just totally misquoted; or, if they were even close, could you comment upon those comments in the article?

MS. VESTAGER: Actually I think I was stating the obvious. It would be a very strange thing to say that we will now as a rule, as a habit, as addictive as—whatever, smoking—and I know firsthand; I am a smoker who doesn't smoke—to say that this is what we will do in all cases. I think it is quite obvious that we should be willing to use every tool in our toolbox. Otherwise we will not have the consideration, the insight that we need for our case law to develop. And we will also need companies who engage in cartels, in misuse of dominant position, to know that we are willing to see them in court when necessary.

I think it is very important to be open about it because then businesses know who they are dealing with, and all the businesses who just compete on the merits, by the book, do their job, try to

innovate, do the best for consumers—that they know that we will use every tool in the toolbox in order to get a fair and level playing field. I think that is important.

I think it is also an important signal that the European Parliament passed our antitrust damages action just last year, and our Member States have to implement this in their national legislation within the next year-and-a-half, in order to enable people actually to get compensation for harm. We will have to follow this very thoroughly.

I think, as David said, it will lead to more cases but we will not be flooded. But I think that is an important signal that these opportunities also exist within the European Union. It is not the same as in the States, we are not copying things, but it shares the same rationale.

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important for us to

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—EDITH RAMIREZ

MR. SCHNEIDER: I want to come back to consumer protection. David, the CMA has a mission for consumer protection as well. How has that developed over the last year?

LORD CURRIE: We think it is very important that consumer protection and competition enforcement work together. We see them as complementary in important ways.

It is fair to say that in the period leading up to the reforms that there was talk of taking away consumer powers from the new Authority. That did not happen. But the intention is that the CMA will have a more focused approach.

We are building it up. We have a number of active cases. The OFT did good work, for example, in the area of children's online apps, where there is a lot of very serious consumer detriment for very vulnerable young kids. We are doing work in the area of enforcing high standards in consumer law compliance across the car rental industry, where we are working with European partners. I think those activities are very important. We have done other work in higher education and dealing with pyramid promotional scheme cases.

It is a very important emphasis for us. We are putting more of our resources into it. And, as a signal, we are taking on the presidency of the International Consumer Protection and Enforcement Network (ICPEN) from July this year. We want to try to enhance the international work in this area.

MR. SCHNEIDER: This is a good segue back to the United States. Edith, you had mentioned the consumer protection and enforcement activities of the Federal Trade Commission. Can you talk a little more about that?

MS. RAMIREZ: Sure. One thing that has been very important for us is addressing the way that technology and new emerging products and services have altered the way that consumers live their daily lives. In particular, as I mentioned earlier, we have a priority for ensuring that the protections that consumers have in the brick-and-mortar world also exist in the mobile ecosystem.

I mentioned some recent cases involving mobile cramming. We had a settlement involving AT&T in which they agreed to pay \$80 million for consumer redress to deal with unauthorized charges on mobile statements. We had a similar resolution involving T-Mobile. And we are currently litigating a case against AT&T dealing with the delivery of wireless broadband services and what we contend was deceptive advertising with regard to the use of data-throttling practices after consumers hit a particular limit.

Technology has affected our entire portfolio. The very first set of cases that the Agency brought, back in the early 1900s, involved deceptive advertising. Among the advertising issues we are dealing with today involve health claims by a number of apps that we contend lack adequate substantiation. For example, we recently had a couple of settlements involving apps that claimed to

allow for the early detection of skin cancer and had no real science to back that up. So we are doing a lot of work in that area.

Let me also mention some of the policy work that we have done in the area of privacy and data security. In January, we issued a report on the “Internet of Things.” These are the devices that we are increasingly bringing into our homes, into our workplaces, and also putting on our bodies, that end up collecting all sorts of information. The report acknowledges all of the terrific benefits that these devices provide to consumers, but then also identifies risks in terms of privacy as well as security, and recommends certain best practices to address those risks.

Let me also briefly mention that we recently announced our new Office of Technology Research and Investigation. This is an office that is an outgrowth of what was our Mobile Technology Unit. It really shows the emphasis that we are placing on ensuring that we have the internal skillset to be able to assess the impact of innovation both on the consumer protection matters that we handle, but also in dealing with and helping us to understand exactly how digital platforms are operating and how consumer data is being used in many of the new business models we see.

We are going to be bringing in even more folks who have that expertise to allow us to better understand how technology is employed and to help us develop our research projects, as well as help us on an ongoing basis with our enforcement and policy work.

MS. VESTAGER: I think it is the best way to end this panel on enforcement because it shows what it is really about. We may not have the same duties in my portfolio, but consumers are crucial to the way that we work.

When we do look at markets—I was quite misled, because I had heard the term “market definition” over and over again, and I expected a special pen delivered to me where I could define markets, sitting in my ivory tower looking out over Europe. But there was no such thing, unfortunately—no, fortunately.

What we do basically is we look at consumer behavior—who can consumers turn to if companies merge? I think also in that we show very clearly that in every respect we have consumer interest at heart. This is what it is all about, to compete on the merits and, therefore, when you merge making sure that consumers can still have choice, affordable prices, and innovation. Therefore, I think we complement each other, no matter the mandate that we hold, in a perfect way.

MR. SCHNEIDER: You have moderated the transition to the conclusion much more eloquently than I could do it. In soccer terms, I will take the pass and give the ball to Bill. What are your takeaways for our audience?

MR. BAER: At the beginning I thanked the conference organizers. I do want to take the minute I have to thank the participants. You can tell from the number of competition enforcers who come to this, who actively participate, that we value this conference. It is a great opportunity outside the context of a specific case for us to engage in a dialogue, for you to challenge our assumptions, for you to understand our enforcement priorities. It is a truly wonderful event.

It takes a lot of time and energy on our part, but it is paid off in spades. You leave here, we hope, with a better sense of what is important to us, you are in a position to advise your clients, you are in a position when you come back to see us on a case matter to understand the concerns that will be running through our minds and address them in a way that makes you effective advocates on behalf of your clients.

We are grateful for all of those of you who came and spent the week with us. Thank you.

This is what it is all about, to compete on the merits and, therefore, when you merge making sure that consumers can still have choice, affordable prices, and innovation.
—MARGRETHE VESTAGER

MS. RAMIREZ: I think the key takeaway for me, looking at the program over the course of this week and listening to the conversation that we have had this morning, is that it is just an incredible time to be in the business that we are in—to be promoting competition and the interests of consumers.

We really face incredibly complicated problems and a dynamic and complex marketplace. But I think that by coming together we are really able to share experiences and knowledge. That includes everyone here who is on the stage, from Bill, a fellow federal government enforcer, to Kathleen, representing the states, and to my international colleagues. I am especially interested, for instance, in the sector inquiry that Margrethe launched earlier this year on the digital economy. I think we have so much to learn from each other.

Despite the challenges we face, I think that we, as antitrust and consumer protection enforcers, really are well positioned to tackle these complex problems.

Let me conclude with a shameless plug. I have only been able to skim the surface of what the FTC has done over the last year. As I said at the beginning of my remarks, we have had an incredible year. I urge everyone to take a look at the FTC's "Annual Highlights" that we released this week on our website.

Thank you.

MS. VESTAGER: If I was nervous, I now feel safe. I think it has been great to be here. I think it was a privilege, as I said early on, to start with Mr. Holder, because it shows how much we share.

A number of the debates that have begun this week—I am not thinking of anyone in particular—will probably not end with this conference. I think there will be plenty of time to come back and back and back to some of the issues that we have not been able to touch upon in this panel.

But I think as a foundation, as a direction, for the concrete debates on the Google case and other cases, I hope that you have a sense of the values that will guide us and of the impartiality and the rigor in the interpretation of facts. I think that is the prime takeaway, that that is the goal for enforcers all over the international space.

LORD CURRIE: As a relative newcomer to the competition world, I have been struck by the real community of interest amongst the competition authorities around the world. I think that has been reflected in the discussion today—and the community of interest with the legal profession working in this area who really care about the way in which the regime works.

As a former communications regulator, I interacted with my fellow international regulators. There was not anything like the same degree of commonality of purpose in that community. I value that hugely.

I hope I have given a sense of where we are going in the United Kingdom, why I think the reforms we have seen in the UK are going to be significant. Of course, we have to show the results of that. We haven't yet done that. We have some things to prove. You may want to invite either me or my Chief Executive back in a year or two's time to see whether we have lived up to the promise that we have made.

I have greatly appreciated this conference. It has been very valuable.

MS. FOOTE: One of the most interesting things for me in the course of the last few years participating here with you all has been learning more and more about the development of the ECN and the ICN, which obviously have any number of things in common with the Multistate Task Force group, although there are certainly differences. As we all look increasingly at global issues, I am very much looking forward to greater dialogue about some of those issues.

I would also like to thank you and all of my colleagues up here for the privilege. It has indeed been a great privilege.

MR. FELLER: Thank you.

Just a couple of very quick closing remarks.

Before I address the panel, I would like to recognize two people who were instrumental in helping us with the topics and questions today. They are Andrea Murino and Jason Daniels. Thank you both for helping us with this today.

I would like to thank the panelists. This has been a great session. I think it lived up to the billing that we gave it earlier.

We want to thank this distinguished group, these outstanding government officials, for sharing their thoughts, their insights, and their comments with us today. Thank you very much. This was wonderful. ●

Interview with John Pecman, Commissioner of Competition, Competition Bureau, Canada

Editor's Note: John Pecman was appointed to a five-year term as Commissioner of Competition on June 12, 2013. An economist by training, he has worked at the Competition Bureau as an investigator, manager, and executive for more than 30 years, including as Competition Officer, as Senior Deputy Commissioner of the Criminal Matters Branch, and as Interim Commissioner. He is a member of the Steering Group of the International Competition Network, and formerly served as the Co-Chair of the Enforcement Techniques Sub-Group of the ICN's Cartel Working Group. He earned his degree in economics from McMaster University.

He was interviewed for The Antitrust Source by Russell Damtoft on April 15, 2015.

THE ANTITRUST SOURCE: You've had time to settle into the Commissioner's office now. I wonder if you could tell us if there is a strategic vision that you've enunciated as to where you'd like to be taking competition law and policy in Canada.



Photo: Couvrette/Ottawa

JOHN PECMAN: Yes, I've now been Commissioner of Competition in Canada for almost two years, and I acted as Commissioner as well for eight months prior to that. So I've had an opportunity to articulate my goals and visions for the organization over that period of time. It basically comes down to implementing modern governance and public management principles. Primarily, I'm looking at increasing transparency and collaboration, while delivering our mandate in a more balanced and holistic fashion.

I think it's really important to stress that our mandate as a law enforcement agency is obviously paramount. Strong enforcement and targeted investigations are still our anchor, our bread and butter, and we're going to continue to do that.

Prior to my taking over, we had some significant amendments to our legislation that strengthened our cartel provisions and aligned our merger enforcement processes with the U.S. There were stronger remedies on the consumer protection side as well as on the criminal cartel side. As a result, we had become a bit more one dimensional as an organization, focusing almost strictly on enforcement and behaving as litigants more often than trying to ensure that the Canadian economy was complying with the legislation and deterring anticompetitive conduct through a range of approaches.

The Bureau as an antitrust enforcer has been enamored, I could say, with the law enforcement aspect of our work; but our ultimate goal is not engaging in litigation, but bettering the economy through the variety of means available to us. I would prefer to take a more holistic and balanced approach. This includes two components. First, it includes what I call "shared compliance." This is where we work together with the business and legal communities to obtain compliance with our legislation. You may have noticed that we are revising our *Corporate Compliance Programs Bulletin* to point out that we are stressing prevention as a means of obtaining improved deterrence

and compliance with competition laws, which in my view as an economist means a more competitive marketplace and, of course, improvements in the economy.

Second, it includes market studies and advocacy. We had stopped doing that as an organization prior to my tenure, and I thought it was very important for us to move back into competition promotion—promoting competition with the regulators, which is part of our legislation, as well as through market studies that highlight issues in specific markets and propose competition-friendly solutions. Hopefully we'll see changes in the marketplace that are just as significant as those from enforcement action, including lower prices, increased product choice and greater innovation for consumers.

So that has been the objective in the organization. We've announced a couple of initiatives on the transparency side. We've had a couple of changes in our approach.

Strong enforcement and targeted investigations

First of all, we've put out guidelines on Communication During Inquiries, where we make it clear to stakeholders and targets of our investigations how and when we will communicate with them during investigations, with the hope of engaging on issues earlier and achieving remedies outside of contested proceedings.

are still our anchor,

We've also issued more position statements following merger review. We're issuing quarterly statistics of our activities. We've tried to become a bit more open, more extroverted if you will, and remove the traditional firewalls that you find around law enforcement agencies.

our bread and butter,

Traditionally, law enforcement agencies and the military like to work behind firewalls, do their work with their heads down and engage very little. Again, the intent is try to change the culture of the organization to increase engagement through these types of guidelines and by encouraging staff to engage earlier, while still protecting the integrity of investigations and the confidentiality of information. So that's the real challenge.

and we're going to

continue to do that.

On the collaboration piece, that involves both domestic and international partners. We've entered into many memoranda of understanding and cooperation agreements over the past few years, domestically with police partners and with the provinces. We just recently did this with the province of Ontario on the consumer protection side, and with our telecom and broadcasting regulator.

We've done some important work in moving towards this vision and I would suggest that the recent realignment initiative within the organization has supported that objective.

ANTITRUST SOURCE: Let's go on with that. The reorganization has been a big issue within the Bureau. Can you tell us a little bit more about what you've done and what you are trying to accomplish with it?

JOHN PECMAN: Yes. I think the realignment feeds into the vision that I brought to the organization. It's made up of three distinct parts.

The first is the restructuring of our organization with the intent of working better as an agency, removing the internal silos, the vertical relationship in place between the enforcement branches and the Commissioner.

We're joining our antitrust work in the area of monopolistic practices and mergers into one unit—the Mergers and Monopolistic Practices Branch. There's a lot of overlap in terms of the type of work we do and the analysis that we conduct, and there are often carry-on investigations following a merger into the monopolistic practices side. There were a number of synergies in making that combination and helping take away those silos that existed previously with our Mergers Directorate working pretty much according to its process and not interacting significantly with the Monopolistic Practices Directorate.

On the cartels and deceptive marketing side, the Cartels and Deceptive Marketing Practices Branch is a new unit that's been created because there are also synergies with the type of work they both do. Cartels is a traditional antitrust function. The commonality with deceptive marketing practices, or consumer protection, is that they're both investigating conduct akin to fraud. And so there are overlaps in terms of investigations and how they can work together.

Both of those groups have criminal provisions to enforce. Hard-core cartels are criminal offenses in Canada. As for deceptive marketing practices, these can be examined through either a criminal or civil lens. So there's a lot of procedural overlap. And what it really has done is brought our consumer protection group into the fold, if you will, more strongly than it was in the past.

That's it on the enforcement piece. The crown jewel of our restructuring was the creation of the Competition Promotion Branch, which brought together three branches that formerly reported to me. We have created huge efficiencies in reporting. Our international affairs unit, our public affairs unit, our legislative affairs group, and our economic policy and enforcement group all work and report to our new Deputy Commissioner of Competition Promotion, Rambod Behboodi. He comes to us from elsewhere in the federal government; he understands how government works and will help us with this interface. He also has international experience as a former diplomat, so he can help us on the international piece as well.

This Competition Promotion Branch is going to handle our new outreach initiative. We'll be advancing advocacy work and market studies. We are, as I mentioned earlier, focusing on prevention and creating a compliance unit that will be working with small and medium-sized businesses to encourage compliance with the Competition Act, to develop compliance programs. This branch is going to be really important in terms of outreach.

And then finally, we have the Corporate Services Branch, which will deal with talent management, building our capital, dealing with budgets and IT and the usual corporate services. It will also have an enforcement function, with our forensic electronic evidence unit being housed within the Corporate Services Branch. So it will continue to work with the rest of the organization in enforcement matters.

As for the structure—the revised structure streamlined reporting lines and will, I believe, help us work better as a group, as a unit. But the second phase of the realignment, the governance structure of the organization, is probably the foundation of our working as one unit, and we've established four new governance committees.

I've been working at the Bureau now for 30 years, and every Commissioner has tried to have our organization prioritize the work horizontally across the organization. This new committee that we've created, the Major Enforcement and Advocacy Committee, comprises executives and managers from across the organization who will decide where the organization is going to make key investments on enforcement and on advocacy. Given our fixed budget, we have to be strategic. This group will do the challenge function on enforcement and advocacy, and will determine whether or not it falls within our priorities and make recommendations on how the file should be advanced—whether it should go on a full enforcement scale, including possible litigation, versus maybe using alternative case resolutions to resolve them, or other means of dealing with the matter.

By bringing a horizontal lens into the organization, comparing the investment that we'll be making on a consumer protection case versus a monopolistic practices file, and deciding where our money is best spent, we'll be able to make some of those decisions on a horizontal basis as opposed to the Commissioner making them on a siloed or vertical basis. It's an experiment, quite frankly. We're very hopeful that this will work. Matthew Boswell, who's the head of our Cartels and Deceptive Marketing Practices Branch, is heading that committee and brings his experience into chairing it.

We also have a Practices and Procedures Committee that will give us guidelines outlining the procedures we use in our enforcement work. That committee will also work horizontally across the organization.

There is also a new Strategic Policy and Planning Committee. Planning is becoming an integrated process across our organization, as opposed to each group doing their own. This is another aspect of the “One Bureau” concept that we’re trying to implement.

And finally, there is a Corporate Management Committee that’s going to deal with talent management, training and other corporate initiatives, staffing, and so forth.

The third part of realignment involves the development of a three-year strategic vision, which will guide our activities over the next three years and help improve the effectiveness and efficiency of our competition enforcement and competition promotion activities.

ANTITRUST SOURCE: Is there any preliminary sense of how well it’s working?

JOHN PECMAN: The new structure came into force and effect on April 1, and my executives are keen to implement it. They started the merger of the enforcement branches prior to that and from early indications, we are seeing change across the Bureau.

Some people like the old way of doing things. So there was a challenge there. There was some resistance, but I’m seeing a lot of positive feedback from the management team as well as from staff. They’re now able to work on different lines of business which they weren’t able to before. For example, in the Cartels and Deceptive Marketing Practices Branch, they have had some joint teams in terms of investigations across those two lines of business. There are also joint management meetings. These are great results and we’re just a few weeks into implementing the reorganization.

Our governance committees have just started developing terms of reference. I think there’s been two files now that have gone to the Major Enforcement and Advocacy Committee and they’ve kicked the tires and made recommendations to me on how to proceed on them already. And again, I’m hopeful that this will provide a more holistic approach to our work in the organization.

ANTITRUST SOURCE: Unlike any of your predecessors, you came to the Commissioner’s office following a long career inside the Bureau, and you’re also the first economist to head the Bureau as opposed to being a lawyer. Can you tell us if either or both of those has affected the way you’ve thought about things and how you manage the Bureau?

JOHN PECMAN: Yes. I think there were two influences in terms of this vision I have for the organization. One was having worked my way through the organization, starting as a case handler, as a manager and executive working under seven different Commissioners, with their own goals and objectives.

And over time, cherry picking and identifying things that you thought were best practices if you were running the organization—for example, where we look at using alternative case resolution and a competition promotion framework lens. Konrad von Finckenstein had a conformity continuum approach that he brought to the organization that was set aside over time. This is an approach that I thought needed to be brought back. Sheridan Scott was the first to bring in a significant advocacy and market studies focus, which was no longer a priority prior to my tenure. I thought that was an important initiative that also needed to be brought back.

But apart from my own personal experiences as an investigator, as an economist I have the goal of growing the economic pie in the country, as opposed to just winning and taking matters

before the courts. I understand that taking matters before the courts is the cornerstone of law enforcement, but I think my economics background has helped shape where I want to take this organization.

More importantly, during my career I undertook executive training on modern governance and public management where I learned about the concepts that are now best practices across all government. We're trying to be more transparent and collaborative in our approach, as opposed to working in silos or bunkers.

ANTITRUST SOURCE: Working with other elements of government gets into the question of competition advocacy, which has become an increased focus since you've been the Commissioner. Can you tell us what your main advocacy priorities are and how you think about setting those priorities?

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JOHN PECMAN: Well, I think there's no end of work on advocacy, given that governments still have a propensity to participate in the marketplace. It's a question of where you can make a difference and influence government and where there is receptivity to your advocacy. It also helps to think about where we're going to invest our scarce resources as we are going from ground zero with no advocacy to trying to find resources to develop an advocacy group.

We have currently focused primarily on the digital economy, which is now the bedrock of all economies and cuts across all economic sectors. We would like to make sure that this economic sector is being influenced by competitive forces and not too much regulation.

There have been a number of representations to our broadcast and telecommunications regulator to try to influence and improve competition in the wireless and broadcasting space, and in a number of areas where we see that regulation has in fact caused some problems in terms of pricing and access to services.

Also, we've advocated for some regulations where the incumbents have a natural monopoly, or where you see market failure because of the incumbents' inherent market power. In those instances, we will advocate to have some level of regulation until the playing field can become level. This has been an area where we've made numerous regulatory interventions and submissions.

We have also introduced a publication called "The Competition Advocate," and our first publication was put out a few months ago. It pertained to intervention work that we've done with the City of Toronto on improving its taxi services. In that intervention, we identified alternate digital sharing services such as Uber as being important to improving taxi service and improving pricing for consumers. We are going to continue to use this publication to make recommendations about how to improve competition for the benefit of Canadians.

We also consulted with the public on areas they want us to participate in going forward, so that will help inform us. We have a bit of a shopping list. Obviously, financial markets are important. We'll be looking at that area. The Government has announced new codes of conduct in the financial market sector for interchange fees, for example. We'll want to keep an eye on that and intervene when required to ensure that sector is not being overregulated by codes of conduct.

An interesting one that we have been working on is our study of the retail beer market in Ontario and Quebec. As you may know, beer distribution and retail in Ontario is highly regulated through a monopolistic government-owned entity, but which is run by the major breweries. Of course, we would be interested in seeing more competitive processes involved in the sale of beer as you find here in the United States and many places around the world where you can actually

buy your beer at the corner store or a grocery store. We think this would allow for more convenience for consumers and obviously gives them more choices of where they buy their beer. And we hope ultimately that better pricing will result from more open, less regulated markets. There have been recent changes in these markets, including an announcement that structural changes will be made to the retail beer market in Ontario. We will continue to monitor these markets and seek ways of promoting increased competition.

ANTITRUST SOURCE: So let's turn to the mergers area. Canada just had what the U.S. hasn't had for decade, which is a Supreme Court case addressing substantive merger analysis. Can you tell us about the *Tervita* case? And in particular what that might mean for how the Bureau is going to analyze efficiency claims going forward?

JOHN PECMAN: Yes. That merger was not notifiable. It involved a transaction in the hazardous waste disposal industry in Northeastern British Columbia, a very localized transaction, very small, approximately \$6 million in total value. But the transaction, we believed, was going to prevent competition for, and maintain a monopoly in, the market for the disposal of hazardous waste at secure landfills. So we challenged the transaction and this went through the Tribunal process.

The Tribunal agreed with the Commissioner's position that this transaction would substantially prevent competition and required some remedies. The parties appealed to the Federal Court of Appeal. Again, the Commissioner was successful on the appeal, and the case ultimately went to the Supreme Court.

The Supreme Court reversed the decision of the Tribunal and the Federal Court of Appeal on the basis that the efficiencies were greater than, and offset, the anticompetitive effects of the merger. The parties made some representations on efficiencies from the transaction, very *de minimis*, I think in the order of \$24,000 a year. Because the Commissioner had not quantified the anticompetitive effects of the transaction, the Court treated the anticompetitive effects as zero. As a result, the court overturned the lower court's decision and permitted the transaction to proceed.

This is very interesting in that there have been two mergers that have been challenged which involved the efficiencies defense, including the *Superior Propane* case which involved another domestic transaction of two national propane companies that merged into one firm, pretty much a monopoly.

ANTITRUST SOURCE: You worked on that one, didn't you?

JOHN PECMAN: That was early days. It was my file as a senior investigator and so I've lived the difficulty of the Tribunal phase in trying to balance the efficiencies defense, which is unique to Canada—I think South Africa has a similar defense. In the *Superior Propane* case there were substantial efficiencies. The courts ruled that the efficiencies saved the deal and allowed the transaction to take place.

Having said that, Parliament, in creating this efficiencies defense, did so with the view of providing Canadian companies and investors with the ability to increase in size, so that they could compete internationally. Given the smaller size of the Canadian economy, companies require economies of scale to compete internationally. This was the intention behind the efficiencies defense, to allow Canada to become more competitive on an international scale at the expense of local competition.

And the issue here is that in both *Tervita* and *Superior Propane*, neither of those cases involved international commerce or international trade, and it was not expected that it would impact inter-

national issues. But the anticompetitive deals were allowed to proceed notwithstanding. Justice Rothstein of the Supreme Court even pointed out in *Tervita* that Parliament may want to revisit that defense on the basis that it could be applied outside of international transactions.

Secondly, this decision made it quite clear that wherever an efficiencies defense is contemplated by the parties, the Commissioner must quantify any quantifiable anticompetitive effects and, of course, that takes us into the world of econometrics. Economists are front and center now in the battle of determining whether or not a transaction is anticompetitive. This had been the case in Canada, but now the numbers have a lot more meaning. We are wrestling with exactly how to extract the information that's needed for us earlier in the process to enable us to do the quantifications.

ANTITRUST SOURCE: So does this mean you may have to ask the parties for more information than you might otherwise have had to?

JOHN PECMAN: I want to be careful because there are not many problematic transactions. For certain deals where there could be a problem, we need to look at how we obtain the data necessary for us to quantify the anticompetitive effects of the deal, not only from the merging parties but also from third parties. Because to do econometric modeling you need to calculate demand elasticities, which involves more than statements from the parties. So we're studying how best to proceed in this new world order.

We have some experts on efficiencies as well as some economists who are helping us, and we have a roundtable with the Canadian Bar Association at the end of May where we're going to discuss a proposed approach on how to bring forward the efficiencies data and the issues on quantification of efficiencies earlier in the process when there's a problematic transaction.

There is going to be some debate and we're going to learn from feedback as well from the public on how we should be dealing with the data. It's interesting times for Canada. Boiling down all of the anticompetitive effects of a transaction into a quantifiable number is a real challenge because, as you know, there are many variables to consider, such as dynamic efficiencies, innovation issues and other non-price effects. These variables may not be captured if we're strictly focusing on the traditional price effects of a deal. There will be some debate both internally and with the public on how we proceed.

ANTITRUST SOURCE: Reading only a little bit between the lines, I think that I'm picking up some skepticism about how well the jurisprudence has matched the intent of Parliament as embodied by the efficiencies defense. Is that the case?

JOHN PECMAN: As it pertains to its application to domestic transactions, I think that's a fair comment. We have alerted Industry Canada, which is responsible for competition policy and framework changes, to the comments made by Justice Rothstein for consideration of potential amendment, which is one approach to deal with the question of possible overreach. As to the defense itself, whether it should continue to be a defense or a factor in the merger review process like one finds in most jurisdictions, that's another open question.

There was a review of the merger provisions back in 2007. The Competition Policy Review Panel, known as the Wilson Panel, did look at the defense and felt it was appropriate for Canada at that time, so it's not clear to us if there may be imminent changes, but at least the debate and discussion is beginning.

ANTITRUST SOURCE: Turning to a different area, we've watched as your Parliament has been considering legislation that would direct the Bureau to study cross-border price differences between the U.S. and Canada. Can you tell us what's behind this initiative and if it does pass, can you tell us what the Bureau might be preparing to do to implement such a directive?

JOHN PECMAN: My hometown of Niagara Falls is on the border between Canada and the U.S., and what one finds is that a lot of shopping is done by Canadians in the U.S. Even in Ottawa, we're only about an hour away from the border and there are a lot of road trips, if you will, to the U.S. to shop on weekends. And a reason it is happening is because prices are often lower in the U.S. than in Canada.

And there was some concern, obviously, by the Government that revenue was leaving our country. A study was conducted by a Senate committee and it determined that there may in fact be price discrimination taking place in certain product areas, where the price differential between Canada and U.S. could not be justified on costs alone. And as a result of that study, Parliament and the Government looked at solutions as to how we can try to minimize the price discrimination that may or may not be happening between Canada and the U.S., because it is to the detriment of the Canadian economy that our spending goes into the U.S.

Now, there's a question of whether or not there are some anticompetitive practices behind some of this price discrimination. And so, a bill was introduced in the House of Commons a few months back known as the Price Transparency Act, which would provide the Commissioner of Competition with the ability to conduct market studies on this issue, including the ability to compel evidence both in Canada and in the U.S. The study would look at the determinants of the price differential between the two countries and, if they are not cost justified, explain that in the report and make recommendations to the Minister of Industry. Those recommendations could include developing an enforcement provision to tackle the issue. Or it could suggest that there are no significant price differentials outside of costs that are at play here.

It is a new potential power that would allow us to look at this question. There's also the issue of resources to conduct these types of studies, which would be quite expensive to undertake. The quantity of studies that we would engage in during the early stages of implementation, at least, would depend on resources that are available to us to engage in this work.

The bill is still currently before Parliament and it's not entirely clear that it is going to become law, but we are getting ready for that eventuality. We have a couple of staff that are doing some preliminary work on which products we would be undertaking, and that work includes looking at some of the historical studies that have already been done, developing criteria, and working with economic experts to help us deal with forensic cost accounting. Cost accounting is not traditionally done at the Bureau, therefore expert help would provide us with some skills and ability to conduct these studies so as to enable us to arrive at informed recommendations.

We're getting ready for this now, although we are not quite sure when and if the bill will be passed by Parliament. Nonetheless, the government has identified a concern by the Canadian public regarding cross-border shopping and this is one of the potential solutions to this issue.

ANTITRUST SOURCE: Moving on to the agreements area, I was reading a fascinating case recently involving credit cards. That's one which I think ultimately went against the Bureau, if I understand correctly, based on the scope of the Competition Act's provisions on price maintenance. Can you tell us briefly about that case, what you think its significance might be? Will credit card rates still be a focus for you, and do you expect more price maintenance work going forward?

JOHN PECMAN: That's a big question and encompasses a very important enforcement policy issue regarding interchange fees that banks and credit card companies impose on retailers for their credit card services. Interchange fees involve two-sided markets and are very complicated. We had received complaints indicating that comparing our interchange fees to rates around the world, we've got some of the highest in the world. We tackled this particular issue under the price maintenance provisions, which we felt was the most appropriate way to deal with the issue.

Ultimately, the Tribunal felt it was an appropriate case for us to bring forward. We failed on a technicality because the Tribunal found that there wasn't a resale, so our price maintenance provisions wouldn't apply. Nevertheless, the Tribunal found that both Visa and MasterCard had market power and felt that a solution was required, but not from it. The Tribunal suggested that perhaps this was a case for regulation. The Department of Finance subsequently announced changes to the Code of Conduct for the Credit and Debit Card Industry in Canada relating to interchange rates.

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ANTITRUST SOURCE: Last summer, your *Toronto Real Estate Board* case went to the Federal Court of Appeal and that resulted in a big win for the Bureau. Do you expect that anticompetitive activity by trade associations is going to continue to be an area of focus?

JOHN PECMAN: Yes, the TREB case involved the Toronto Real Estate Board creating rules that impeded innovation for new business models in the real estate sector. It pertained to the availability of data on sold houses, and not making it available to brokers using innovative business models, such as “virtual office websites.”

We challenged the matter before the Competition Tribunal. The Tribunal did not accept that the abuse of dominance provision applied to TREB, based on the *Canada Pipe* decision. We appealed the Tribunal's decision to the Federal Court of Appeal. The Federal Court of Appeal felt that the Tribunal was looking at this issue too narrowly, reversed, and sent it back to the Tribunal for reconsideration, which is going to take place in the fall.

The Bureau expects that we will receive a decision this time on the merits of the complete case, as opposed to just dealing with the application of the provision. We feel quite confident, given the nature of the conduct here, that some type of remedial action is required in order to facilitate and improve competition in the important market for residential real estate brokerage services.

This case involved abuse of dominance by a trade association, and the reason that we pursued the case under the abuse provisions was the availability of remedies. Our agreements provision just did not provide for positive behavioral change. The remedy under that provision is really limited to cease and desist orders. So the remedy actually drove our decision to challenge TREB's conduct under the abuse of dominance provision.

There is no exemption under the Act for trade associations—they must abide by the Competition Act. If an association engages in anticompetitive conduct, we will review the conduct under the appropriate section of the Act, whether the criminal cartel provision or the civil agreements or abuse of dominance provisions.

ANTITRUST SOURCE: One area the Bureau has been looking at, as has the FTC, is agreements between branded and generic pharmaceutical manufacturers sometimes referred to as “pay for delay.” I know you've had a workshop on that and issued a white paper. I have two questions about that. First, do you have an enforcement approach in mind for these kinds of agreements? And second, the white paper got some attention, including from the ABA, because it referenced

the potential for criminal enforcement. Could you tell us where you would see a role for criminal enforcement in pay for delay cases?

JOHN PECMAN: As you point out, the Bureau is looking at revising its Intellectual Property Enforcement Guidelines. One of the major areas for improvement was to provide guidance and direction to the public about how we would approach pay for delay settlement agreements in the context of our enforcement provisions.

Given that we had recently moved to a per se price-fixing provision and the fact that our view is that the branded companies and generic companies need to take care that they are not overreaching in their agreements by using the settlement process to engage in anticompetitive conduct—specifically conduct that extends beyond the period of a patent—that could run afoul of the criminal and/or civil provisions in the Competition Act, we felt the need to put out some guidance on the approach we would take in those particular matters, and we did that in the form of a white paper.

We understand that in the U.S., criminal review of these types of agreements is not common, and I don't believe it's happened in the past. We have received submissions now from the American Bar Association and the Canadian Bar Association among others, providing guidance to us in terms of how they see us applying our legislation to this very difficult area. We are considering that advice at this point in time. The plan is to issue revised Intellectual Property Enforcement Guidelines in early June for public comment.¹ We will provide direction based on the white paper consultation, our own views, and include some hypothetical examples of how we would apply the Act in this area.

That is the current game plan with respect to this difficult area. As I said, the application of the criminal provisions is outside the U.S. approach. We are seriously looking at the advice we received on when we should review these types of agreements criminally.

Much will be driven by the facts. If the intent is to fix prices or allocate markets, parties will not be saved by reverse payment litigation settlement because, in our view, they've committed egregious anticompetitive conduct. I think that would happen on a limited basis, but where the facts support us advancing one of these cases criminally, we won't hesitate to do so.

ANTITRUST SOURCE: Last year at the ABA Section of Antitrust Law Spring Meeting you made a suggestion that you might be considering some sort of notification requirement for joint venture agreements. I wonder if you have given that further consideration and whether that's something that will be on the Bureau's agenda?

JOHN PECMAN: Joint ventures and strategic alliances are not reportable to our agency. Unless there's a complaint from the marketplace, we may not become aware of them. On the other hand, mergers that exceed certain thresholds are subject to mandatory pre-merger notification. This provides the Bureau with an opportunity to review mergers before they close.

My view is that where there may be potentially anticompetitive strategic alliances and joint ventures, companies and legal counsel may want the comfort provided by a Bureau review before engaging in costly combinations of this sort. And so there may be an appetite for some type of advice or clearance or guidance from the Bureau.

¹ The Draft Intellectual Property Enforcement Guidelines were issued on June 9, 2015, and can be found at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03959.html>.

We are still considering how we can go forward with this proposal. We're not sure that there's an appetite by the government to extend the notifiable merger process to this area. There's been no indication on that front.

Having said that, I made it perfectly clear that we're looking for a notification regime for pay for delay agreements, which is an area where agreements between competitors do not come to our attention. It's virtually impossible for us to identify potentially anticompetitive agreements that could result in higher prices for both branded and generic drugs.

In Canada, I believe we have some of the highest generic drug prices in the world. And so the need for a regime similar to that at the FTC, I feel is extremely important. This is change I will certainly be advocating for.

In Canada, I believe we have some of the highest generic drug prices in the world. And so the need for a regime similar to that at the FTC, I feel is extremely important. This is change I will certainly be advocating for.

ANTITRUST SOURCE: I want to turn for a minute to fair business practices as it's known at the Bureau, or what at the FTC is referred to as unfair and deceptive activities or more simply consumer protection. Can you tell us how that area relates to your competition work and how you prioritize and allocate resources between the two different areas?

JOHN PECMAN: Yes. The institutional design one finds around the world between how jurisdictions treat consumer protection versus antitrust and competition law varies. Our tradition, at least since I've been at the Bureau, has been to have the Competition Bureau administer both of these lines of business.

I think there are some very important synergies between the types of work that we're doing. Why it's important to have one agency oversee the two really turns on the question of ensuring a level playing field based on accurate information. So if consumers and businesses are being deceived and are purchasing products because of misleading representations, you will see effects on competition. Companies that should not be market leaders all of a sudden are, based on asymmetric information or lack of proper information to enable consumers and businesses to make informed decisions. And as a result, it has an effect on competition in the marketplace.

There is a link between these areas in my view. One example I could point to would be our cramming case on premium text messaging, where we allege that all three major incumbents in the wireless sector are engaging in similar conduct and obtaining revenue from premium text messaging that was not earned and that the product was not supplied to consumers, although a payment was obtained by the incumbents. You see lack of competition around consumer protection issues as well. I believe there are linkages to that work.

And obviously there are a number of similarities on investigatory processes and procedures as well. We are very pleased that we're making those ties even tighter between our antitrust work and our consumer protection work. We continue to believe it's the right fit. It's a good model and I would suggest that the FTC would say the same thing.

ANTITRUST SOURCE: You've also been active in the area of deceptive pricing. I think there was a recent case against several prominent car rental companies. Can you tell us when we might expect the Bureau to take action in cases where the advertised price is not the final price?

JOHN PECMAN: This has been an area in which the Bureau has been quite active. Previously, there was a case involving Bell Canada, where the advertised prices did not reflect the final price. Bell ultimately addressed our concerns with a very significant administrative monetary penalty of \$10 million and a change of conduct.

There have been some cases and continue to be cases in this area. We have another one involving the furniture market where one of our major furniture retailers was advertising that customers did not have to pay a cent and had a number of disclaimers around this ad. We've alleged that there were additional costs involved in purchasing the product in the first instance.

And, of course, the recent car rentals case, involving allegations the price that's being advertised is nowhere near the final price one pays, given the additional non-optional fees charged by these companies.

With those matters before the courts, I will need to be careful about saying too much more about them. I'll just say that the car rentals case is the first matter that we've brought forward under new legislation involving Anti-Spam, as a number of the representations were made online.

All this to say, it's an area that we believe is extremely important. Consumers need to see clear and accurate information on a retailer's pricing, and not be deceived by a price that does not reflect the final purchase price.

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ANTITRUST SOURCE: You've had some cases where you've emphasized monetary remedies in the fair business practices area, and had both restitution to consumers and administrative monetary penalties. Can you give us some idea on when you use each tool, what you think about setting the level of monetary penalties in these kinds of cases, and give us some examples?

JOHN PECMAN: The ability to obtain restitution for some consumer protection cases is fairly new. That power was provided to us in 2009 and we believe it's really important, where possible, to try to make consumers whole from conduct that has affected them and conduct that the courts have found to be materially false or misleading.

The restitution piece is something that we'll continue to focus on where we can do it, where it's efficient, and it's easy to distribute this type of money back to consumers. On administrative monetary penalties, we are considering developing guidelines that would give some indication to the public on when and how we will make recommendations to the court, taking into consideration factors such as the volume of commerce and recidivism. And also, when companies are considering settling, if they see transparent guidelines they will have some certainty as to what it would cost them to resolve the matter.

The Bureau had some success with the *Bell* case. I believe we received the maximum penalty. As a settlement, however, there was not a lot of guidance about the weighing of factors in assessing a penalty amount. We've had some jurisprudence in the *Rogers/Chatr* case. The court imposed a minimal penalty for the portion of the case that we were successful on, and provided some guidance on how it decided that quantum. I believe there needs to be more work and more guidance from the Bureau in this area.

ANTITRUST SOURCE: The amount of trade across the 49th parallel means the Bureau is often working on cases where it and the FTC and DOJ frequently intersect. How well is that relationship working and are there things that could be done to make it work better?

JOHN PECMAN: Approximately 70 percent of Canada's foreign trade takes place with the U.S. I don't believe we have better partners than the FTC and the U.S. DOJ on the antitrust side and the FTC on the consumer protection side. We have excellent working relationships on the enforcement side, conducting parallel investigations and merger review. On cartel enforcement, companies are self-reporting both to Canada and the U.S., and we regularly work together to execute search war-

rants. We also coordinate how we will remedy particular files on the consumer protection side as well, where we find there are a number of parallel investigations where information is being shared.

There are a number of working groups at the officer level and the manager level, to help build those bridges and continue the relationship. I feel trust is really important in any relationship and I believe that exists currently with our good friends to the south.

Where I feel we can continue to improve is on the exchange of actual evidence. We currently have the ability to exchange confidential information where there's a waiver in place or in criminal context, where we seek an MLAT to obtain information. This is where there could be better information exchange between us to make our relationship the best.

My vision for our work together would not see parallel investigations, but would see joint investigations where we could work more efficiently together as opposed to having two parallel teams investigating the same matter. That is an aspirational concept. However, in order to reach that stage of cooperation, we will have to be able to share confidential information. Joint investigations might not be conducted in my tenure, but it would certainly be something I'd like to see happen in the future.

ANTITRUST SOURCE: I know you've recently been to meet with the competition agencies in China and India. What kind of relationship are you looking for with those agencies?

JOHN PECMAN: We signed MOUs with India in December—it's a first generation variety—and with SAIC in China just couple of weeks ago.

With all of our international partners, we are trying to build trust so that we can work together on coordinated investigations where required, but also to ensure that Canadian exporters and investors can count on competitive markets in China and India and elsewhere. The only way to do that is to try to work bilaterally and multilaterally with international agencies to come up with like approaches, like legislation, soft convergence, if you will. It is important to take these first steps of entering into MOUs to enable dialogue on policy, to start working together on enforcement cases and to provide technical assistance where required.

The Bureau intends to make investments on technical assistance with India further to our MOU. We sent three officers to India a few weeks ago, and they spent a week providing guidance on merger review. Our MOU with India contemplates a work plan which will include staff exchanges between our two organizations.

As for China, we have one MOU we've signed with SAIC. We also have tentative agreements with the other two agencies. MOFCOM and NDRC are also future partners, and we're looking forward to formalizing those arrangements in the near future.²

India and China are part of a greater strategy for Canada in terms of improving economic relations. Many trade agreements with Canada include competition chapters, and our MOUs help to facilitate those trade agreements. The baby tigers, if you will, of the ASEAN countries will be another area for us to focus on going forward.

In addition to our traditional partners, we expect a number of MOUs in this coming year with other agencies, for the same expressed purpose of soft convergence and international cooperation.

² Since this interview was conducted, the Bureau has signed an MOU with MOFCOM.

ANTITRUST SOURCE: Last question. Since we're holding this interview on the margins of the ABA Spring Meeting, I would like to know a little bit more about your vision for the relationship between the Bureau and the Bar, and especially the ABA.

JOHN PECMAN: Well, you've heard one of our guiding principles is collaboration, and I think the level of collaboration between the Canadian Bar Association and the Bureau, and the American Bar Association and the Bureau, couldn't be better. From the ABA's perspective, they have provided very valuable and helpful comments on a number of guidance documents, including the pay for delay white paper.

We've participated in the Spring Meeting and support it on an annual basis. It's very important for us and helps us further our relationship with the ABA. The international task force on cartels has given us a significant amount of guidance in the development and improvement of our leniency and immunity programs. We continue to engage regularly with that task force. One of my senior deputies, Matthew Boswell, is now also a member of the Compliance and Ethics Committee of the ABA Section of Antitrust Law.

Our relationship with the CBA National Competition Law Section couldn't be better, in my view. We have vice-chairs on all but one of its committees. We fully support the Fall and Spring conferences and the dialogue that we have, whether it be regarding guidelines, legislation, or potential legislation, has been incredible.

I'd like to see our good relationship with the ABA and CBA continue because it provides for a better work product by the Bureau. It furthers my goal of shared compliance. That is, we are working together with the same goal of obtaining compliance with Canada's competition legislation. ●

Interview with António Gomes, President, Portuguese Competition Authority

Editor's Note: António Gomes took office as President of the Board of the Portuguese Competition Authority on September 16, 2013. Previously, he was Senior Competition Expert at the Organization for Economic Cooperation and Development in Paris, and was a Senior Economist and then Director of the Merger Department of the Portuguese Competition Authority from 2005 to 2013. Prior to coming to the Authority, he held teaching posts in Economics at the University of Aveiro and the University of York. He has an undergraduate degree in Economics from the University of Coimbra (1995), Masters Degrees in Economics from the University of York and the Nova University of Lisbon, and a Doctorate in Economics from the University of York.

He was interviewed for The Antitrust Source by Amadeu Ribeiro on April 15, 2015.

THE ANTITRUST SOURCE: Let's start with a question which is more general in nature. Portugal has had a new competition law since May 2012. What are your views on the enforcement of the law so far?



ANTÓNIO GOMES: Our view is very positive towards the new Portuguese Competition Act, which was approved in 2012. The new law has introduced several important changes to our regime both in the antitrust field and with regard to merger control. I would highlight, as one of the main legal changes introduced, the ability of setting priorities in the enforcement activities of the Portuguese Competition Authority, allowing us to better allocate resources.

In terms of antitrust enforcement, there are new procedural tools which enhance our efficiency, such as settlement procedures and the possibility of closing a case following commitments offered by the parties. New investigative tools have also been provided, namely search and seizure of digital evidence and the possibility of searching non-business premises. These changes will have a significant deterrent effect. I would also mention that time limits for investigations have been introduced in the new law.

In the context of the 2012 reform, our leniency program was also revamped. In Portugal, there has been a leniency program since 2006, but with limited success until 2012. Since the legislative reform, the leniency program is working much better and leniency requests have been picking up. There have been more leniency requests in the last three years alone—nine in total—than those submitted in the previous seven years, when we had only six leniency requests.

In terms of merger control, there have also been relevant improvements. A new substantive test was introduced, moving from the former dominance test to the SIEC [significant impediment of effective competition] test, the same test as the one applied by the European Commission and other EU jurisdictions. There were also changes in the notification thresholds, which I think are now more adequate to our reality.

There are new rules regarding the duty to notify a merger. Previously, the parties were obliged to notify the merger within seven days of completing an agreement. That limit has been removed,

allowing more room for pre-notification contacts. This is quite positive both for the parties and for the Portuguese Competition Authority.

Overall, I would say that our activity has really improved and that, both in antitrust and in mergers, the new law of 2012 has been positive.

ANTITRUST SOURCE: Starting with merger review, what has been the effect of the new law on the number of notifications? Has it increased or decreased, and if so, why? And what is your sense of the thresholds today? Do they capture the volume of transactions that they should be capturing or not?

Before the legislative reform, merger cases that would entail a market share above 30 percent had to be notified. That threshold has now increased to 50 percent.

ANTÓNIO GOMES: Actually, there was a change in the notification thresholds both with regard to the turnover threshold and to the market share threshold, which was kept in the new law. When the new law was being discussed, there was an in-depth analysis of the experience of the authority in merger control in the previous ten years. This experience was then taken into account in fine-tuning the notification thresholds. The goal of this refinement was twofold. On the one hand, it was to reduce the administrative burden on firms and to avoid the scrutiny by the Portuguese Competition Authority of mergers that were less likely to create competition concerns. Simultaneously, there was the concern about not missing out on those mergers that could raise competition concerns.

In the end, I think we reached a very balanced approach. There was an increase in the minimum turnover threshold as well as changes in the market share threshold. Before the legislative reform, merger cases that would entail a market share above 30 percent had to be notified. That threshold has now increased to 50 percent. As to mergers creating market shares between 30 and 50 percent, the threshold has been combined with a turnover threshold.

Therefore, we are keeping a necessary local nexus and at the same time guaranteeing that the Portuguese Competition Authority is able to assess mergers that are more likely to raise competition concerns taking place in small markets where companies have small turnovers.

In practice, following the change of the thresholds, we observe a reduction in the number of notifications, from an annual average of around 70 merger cases to an average of 40 cases per year. Therefore, we now have a more targeted merger control in terms of impact on competition, which allows us to allocate more resources to complex cases.

ANTITRUST SOURCE: So overall, it seems that you're pleased with the way that the thresholds are working and you would not foresee any future changes?

ANTÓNIO GOMES: I would not foresee any changes in the near future. Of course, there is always a debate as to whether market share thresholds should be maintained. A market share threshold may entail a degree of legal uncertainty for the parties, as it requires a definition of the relevant market in order to ascertain whether the threshold is met or not.

However, the work that we have been doing on the pre-notification contacts with firms has allowed companies to directly engage in a dialogue with the competition authority and to clarify all relevant aspects regarding the notification threshold.

This translates into straightforward facts: in the past year, two-thirds of the pre-notification contacts with the Competition Authority did not lead to notifications. This means that, following the discussion with the parties and the information provided by the Competition Authority, the conclusion reached was that those cases were not notifiable to the Competition Authority. So our experience

shows that there are effective means of overcoming the potential challenges that a market share threshold may pose to firms.

ANTITRUST SOURCE: Let's assume then the case has been notified, how do you go about investigating a transaction? How does the Competition Authority get the information from third parties, customers, and competitors? Can third parties participate in the process? What tools do you normally use?

ANTÓNIO GOMES: The procedure is initiated with a notification form. Depending on the kind of transaction, the parties may submit a full form or a simplified form. The first step after receiving a complete notification is to publish a summary of the transaction in two newspapers, inviting third parties to send their observations on the merger. This is the first means of encouraging third parties to submit their views on a merger.

Another important step in our decision-making process is the consultation of sector regulators, whenever the market is subject to sector regulation. The Competition Authority requests an opinion by the sector regulator, which is not binding as a general rule, except for the case of the media regulator for plurality issues.

One of the main investigative tools is requests for information that can be addressed to the notifying party or to third parties. The reply to requests for information is mandatory; otherwise companies may be subject to penalties. We engage very often with third parties through information requests.

However, there are other means for third parties to intervene in the proceedings. Third parties may not only send their observations in the early stage of the proceedings, but they may also participate throughout the investigation by providing new information.

There are also specific timing requirements for formally hearing the views of third parties that oppose the merger, before issuing a decision to initiate an in-depth assessment of the merger or before the final decision. We always hear the notifying party and third parties that oppose the merger.

This is how we engage third parties. Moreover, in some cases, we may interact with consumers, namely by conducting consumer surveys, which has happened in the past. In the assessment of cases, we also very often use economic studies and sometimes even more complex merger simulation tools.

Our substantive assessment and guidelines are very much influenced by the EU framework and by other jurisdictions. Our practice and guidelines are similar to the European Commission's and we have also drawn inspiration from the United Kingdom and U.S. guidelines, for instance, in terms of horizontal mergers.

ANTITRUST SOURCE: To what extent would they differ from the European guidelines and UK guidelines, and what was the reason for the differences? A related question is, given the relatively small size of Portugal compared to other European countries, does that have any influence on how you go about reviewing the case?

ANTÓNIO GOMES: I do not think that the overall size of the country has a significant influence in the assessment of a merger case. Having said that, the fact that there is a reduced number of players in certain markets may demand an even more careful assessment of a merger case. The decisive parameter is the geographic scope of the relevant markets, namely if it is wider than national, national, or even local.

If the merger takes place in a national market or affects local markets, a particularly careful assessment will be carried out in a small economy, because any concentration may lead to a significant increase in market power and substantial competitive effects.

In terms of the differences, we were particularly interested in the UK and U.S. guidelines in the way they approach market definition as instrumental and not always a necessary step in the assessment of particular cases. We have looked into diversion ratios and developed UPP analysis, making use of methods, especially in cases of differentiated products, to assess closeness of competition between competitors and the competitive constraints that may be eliminated by a merger. We were inspired in those aspects by the UK and U.S. guidelines.

In terms of the differences, we were particularly interested

ANTITRUST SOURCE: In preparing for this interview, I spoke with fellow antitrust practitioners in Portugal, and I've asked them how they felt about the enforcement of the law these days. When I asked if they would suggest improvements on the merger review front, they had a hard time figuring out what to say in response to that. One question that comes up is whether the Competition Authority uses requests for information, which in Portugal suspends the review period, to extend the merger review process. Is this correct? If yes, are there any plans to address this issue?

in the UK and U.S.

ANTÓNIO GOMES: First of all, I am very pleased to hear that the local bar praises in a certain way the work of the Competition Authority. The Competition Authority is aiming to enhance transparency towards the public in general, but also towards competition lawyers. We have been engaging as much as possible with competition lawyers in discussing several issues of competition policy. In Portugal, we are fortunate to have a very dynamic local bar which is very engaged in the debate on competition law policy and enforcement.

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About the criticisms, we have already identified the assessment of complex mergers as an area where there is room for improvement. In terms of simplified mergers and regular merger cases, good results have been achieved both in terms of substance and timing. On average, our review period for all the mergers that we deal with is around 40 calendar days, which is quite reasonable. But we are aware that in complex mergers we may seek to shorten the period of analysis.

I would not say that information requests are being used strategically to stop the clock. Nevertheless, there is scope for better planning the investigations, which could allow for fewer requests for information instead of spreading them throughout the procedure.

The involvement of the chief economist and of our economic studies bureau earlier on in the process can also contribute to identifying more accurately the relevant competition concerns at an earlier stage of the procedure, which will mean reducing the review periods for complex mergers.

Another area where it may be possible to enhance the assessment of complex mergers is by improving the already-positive relationship that we have with sector regulators. I think that we can do more on that front. We are planning to do so, not only formally, but also by increasing our informal contacts with the sector regulators. I think that all these measures would provide adequate responses to the criticisms you mentioned.

ANTITRUST SOURCE: Moving on to conduct investigations, can you give us an overview of the types of conduct that might trigger an investigation by the Competition Authority? Are there, for example, any sectors that are particularly sensitive in the eyes of the Competition Authority? Can you comment on recent examples of investigations that were opened and why?

ANTÓNIO GOMES: Let me start by mentioning what types of infringements we can investigate. We

have cartel infringements and other horizontal agreements, such as exchange of sensitive information between market players. We also have abuse of dominance cases, both exploitative abuses and exclusionary abuses. Our experience has focused more on the exclusionary abuse side than on the exploitative side. We also conduct investigations on vertical restrictions.

If we look at our current investigations, we have 22 ongoing investigations, which are quite evenly spread out in between those three types of infringements. There are eight cartel or horizontal agreement cases, six abuse of dominance cases, and eight vertical restraint cases being assessed.

In terms of sectors, unfortunately or fortunately—it depends on the point of view—current legislation applicable to our priority-setting mechanism states that no sectors of activity to which we would give more priority in the exercise of sanctioning powers can be identified. So I cannot actually tell you. It doesn't mean that those priorities are not set internally, but we cannot make them public. What I can say is that we do set priorities and that we are trying to focus on the most serious infringements and those that affect consumers the most.

Our main priority is the fight against cartels. We have been developing substantial work on that front. First and foremost, the priority is to reinforce the leniency program. That is already picking up, but we need to strengthen and promote the leniency program more.

The Competition Authority needs to be a strong enforcer in those cases that are being investigated at the moment, because that will trigger new leniency applications in the future. We need to have sufficiently deterrent fines in order to make companies that may be involved in a cartel think twice, and they may consequently have the courage to come before us and confess to having participated in a cartel.

We are also trying to improve the efficiency of our work. An example concerning a very important sector of the economy is public procurement. The Competition Authority will look at public procurement databases to screen for possible collusive behavior in public tenders. The plan is to develop this in cooperation with other public entities that follow public procurement activities closely. So, even if we do not actually have a sector priority that we can announce publicly, we do have a priority for the next few years of fighting bid rigging and other kinds of collusive behavior in public procurement.

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ANTITRUST SOURCE: Let me ask you for a few more details about anti-cartel enforcement. How does the leniency program work in practice? For example, if I'd like to report a cartel, is there a marker system? What kind of collaboration are you looking to receive from parties approaching the Competition Authority? Are there oral submissions? Are parties required to make written submissions? What kinds of evidence would you expect to receive?

ANTÓNIO GOMES: We have both written and oral leniency submissions. The format depends on the level of protection of documents that companies are looking for. Following the changes in the leniency regime in 2012, legislation has provided additional protection to leniency documents. There is no disclosure of those documents to third parties, in written or oral form. There is limited access to those documents by the parties themselves. At some point in time, they will be able to look at those documents, but this is done in a closed data room.

Most of our leniency applications start with a marker. That means that the parties can come forward with a minimum level of information. That has been important, and the marker system was improved in 2012. We have given more flexibility for companies to complete or perfect the marker.

Now, it is explicitly foreseen that the Competition Authority can adjust the timing needed to perfect the markers more flexibly. That has been important to guarantee cooperation with different

Member States of the European Union. Sometimes it happens that a company wishes to come forward with a leniency application in several Member States. The fact that the company does not need to perfect the marker right away in one Member State facilitates the whole process.

We believe that it is very important to have markers to allow companies to come forward with minimum information. Of course, this minimum information has to provide some evidence on the potential cartel.

There is full immunity from fines for the first leniency applicant, and reductions of fines for subsequent applicants if they bring further information with significant added value, which can help us further investigate the case.

I think that the leniency program has been working rather well. We have seen improvements in the use of this program. In 2014, for example, there was a record of seven leniency applications. This is a lot more than in the past. So I think that we are on the right path.

ANTITRUST SOURCE: And do you see them increasing more in public procurement cases?

ANTÓNIO GOMES: We have had good experiences with leniency in different kinds of cases, including public procurement cases.

If you will allow me, I would like to go back to our antitrust work to mention that we have been pursuing several investigations, preparing our pipeline of cases for the future, and also taking decisions. Early this year, we issued one prohibition decision in a vertical restraints case in the bottled gas markets, involving territorial restrictions. The investigated party was restricting the possibility of its distributors to engage in passive sales outside their territories, leading to a fine of nine million Euros. I believe this year will reveal further enforcement actions and we are quite confident in our future antitrust activity.

ANTITRUST SOURCE: What kind of nexus do you need to have with Portugal to trigger an investigation in the country by the Competition Authority? Do you need to have local sales? Is there a de minimis test in this respect? Do you need to have actual effects in the country or do only potential effects trigger an investigation and potentially a fine?

ANTÓNIO GOMES: You may have cases that involve restrictions to competition by object and by effect, similar to the EU regime.

In terms of cases by object, the most striking one is the case of a cartel. In the case of a cartel, no proof of the effects is necessary to conclude an investigation and to impose sanctions. In those cases, if there is a cartel that affects, or may affect, Portuguese consumers, it may be investigated by the Portuguese Competition Authority.

As part of the European Competition Network, the Portuguese Competition Authority closely cooperates with other European jurisdictions in terms of case allocation. Discussions within the European Competition Network may occur on whether the cartel case is taken up at the European Commission level or by National Competition Authorities.

For other types of infringements, we may need to prove effects on competition and the de minimis rule may apply. The Portuguese Competition Authority usually follows the EU standard in that regard. The Portuguese Competition Authority may also choose to take up cases or not, according to its enforcement priorities.

In any case, the need to prove actual effects on competition depends on the type of infringement under investigation. For example, in cases of exchange of sensitive information, there are

decisions by the courts that in some situations there are restrictions by object and other where it may be necessary to prove the effects. So it depends on the type of infringement.

ANTITRUST SOURCE: Is there a difference when it comes to penalties? Will they differ depending on the nature of the case? Can you give us some examples?

ANTÓNIO GOMES: We issued guidelines on fines in 2012. This was the first time the Competition Authority issued guidelines on this issue. There are several factors that influence the fine. Certainly the seriousness of the infringement is important.

The guidelines aim at providing as much legal certainty as possible for companies because we think that is important for leniency applications and settlement decisions. But there are various mitigating and aggravating factors that have to be taken into account, and it may not always be easy to predict the level of fines in a specific case. In our decisions we try to explain the factors that are being considered in terms of aggravating factors or mitigating factors. We start by looking at the basic amount of the fine, which can go up to 30 percent of the sales in the affected markets. It is from that amount that we calculate the fine with a legal maximum of 10 percent of the turnover of the company.

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ANTITRUST SOURCE: Let's talk a little bit about the relationship of the Competition Authority and the courts. If we have a decision by the authority, can it be appealed? How familiar are the courts in Portugal with competition law matters? I understand there's a court that specializes in various matters including competition law. What kind of work do they perform? Are they allowed to review the substance of matters? In practice, do you see them paying attention more to procedural aspects of your investigations rather than substance?

ANTÓNIO GOMES: All the final decisions by the Portuguese Competition Authority, both in mergers and in antitrust, can be appealed to court. The courts have full jurisdiction on the assessment of these cases. They perform a full review of those cases, which means looking at the substance of the case, not only at procedural issues. The fines imposed by the Portuguese Competition Authority can be increased, maintained, or reduced by the court.

Our experience so far with the new specialized court on competition and regulation has been rather positive. The Competition, Regulation and Supervision Court was created in 2012. It has heard several decisions of the Competition Authority, and so far we are pleased by the fact that all our antitrust decisions have been upheld. This means that all the work developed in terms of enhancing the quality of our decisions and also respecting procedural fairness has been bearing fruit. We believe this means that we are on the right track.

In the future it is only natural that the court will not uphold all our decisions, and we will need to learn from that. We believe that judicial review is a fundamental part of the system, so we should learn from the decisions by our courts whether they are in favor or against the decision of the Competition Authority.

However, we are not only pleased because the court has upheld our decisions. We think that the creation of this court has been very positive in terms of the deadlines for decision making, which have been considerably improved. In fact, the new specialized court has been taking decisions much more quickly than we had previously. That is very good for enforcement.

If we would suggest some changes in the way the courts may be operating, we believe that one of the problems we can identify is the lack of a stable group of judges who can stay for a long period of time and gain experience in dealing with competition matters on the job, let us say in a

“learning by doing” way. We still have a lot of rotation of judges. So one judge may gain important experience during one year, and the year after that he or she is placed in another court. A new judge will have to build expertise again. So far, I think that we have been fortunate with the judges at the specialized court, but, of course, things would work much better if we had a stable group of judges.

Finally, I just wanted to give you one example of how the courts have looked at the substance of cases. We recently had a case of abuse of dominance against a premium sports channel company, Sport TV. In that case, the Court decided to appoint an economic advisor because the case was based on economic evidence and analysis. The public prosecutor also appointed an economic advisor. The parties had an economic advisor and, of course, the Competition Authority had its own economic advisor. This allowed the Court to take the discussion on economic issues to a deeper level in terms of substance. It was a novel approach by the court, which was also positive in terms of the result. The case was the first abuse of dominance case confirmed by the courts of both first and second instances in Portugal.

ANTITRUST SOURCE: Congratulations. It seems that after so much scrutiny, having the decision upheld is a sign that what you’re doing is very solid. Moving on to competition advocacy, I understand you’ve been promoting a so-called fair play campaign in Portugal. Can you tell us about it, what it means and the results of it so far?

ANTÓNIO GOMES: Advocacy work, coupled with vigorous enforcement work, is certainly one of the main roles of competition authorities. Companies can only comply with the rules if they are fully aware of those rules.

The Competition Authority has a role there, to explain the rules, the risks of infringing competition law, the ways to mitigate those risks, and to explain to companies the benefits of competition for the overall economy, for example, in terms of economic growth. I think this is an important role of competition authorities and we believe it is important not only to provide information to companies, but also to engage and interact directly with them.

Having this in mind, we decided last year to launch a road show across the country. We started the Fair Play Campaign, with the motto “Fair play: with competition everybody wins.” We visited eight cities countrywide, in partnership with ten national and local business associations. This was a very welcome initiative. We had more than 500 registered participants. It allowed us to promote greater visibility in terms of what the rules of competition are, but also of the work of the Competition Authority. Overall I would say that this was a very, very important initiative in Portugal.

We will not stop here, and we are trying to engage with different stakeholders, such as judges, the media, and consumers directly. For example, in the area of public procurement that I mentioned earlier, we want to engage with public entities to help them identify possible breaches of competition law and to assist them in improving their procurement, including the design of tenders. So we have been quite active in the advocacy front.

ANTITRUST SOURCE: You’ve already talked a little bit about the relationship between the Authority and other European agencies and national authorities and also the European Commission. Can you tell us a little bit more about this collaboration and how it matters for practitioners?

ANTÓNIO GOMES: First of all, I would like to say that the Portuguese Competition Authority is very committed to cooperating with different agencies, not only within the European Competition

Network, but also with other agencies worldwide. I think one important lesson I take from my professional experience is that we can always learn from others, and that international cooperation is in general a very positive thing.

In terms of the European Competition Network, we have cooperation at the antitrust and merger levels. Both of them are quite fruitful for our work. In terms of antitrust, this cooperation is quite developed since Regulation 1/2003, which created a system of close cooperation between the different agencies in Europe. For example, we discuss case allocation, and we are able to exchange confidential information and to coordinate and assist each other in investigations.

This is important for companies because it provides for consistency in the assessment of antitrust infringements. I think that companies are much more comfortable when they know that all those agencies which may potentially investigate a possible infringement will look at it in a consistent manner, and that the outcome will not be as diverse as it could be if the agencies were not cooperating with each other.

In terms of merger control, we also have positive cooperation. First of all, we inform each other within the “European Competition Authorities” of the cases that might have to be notified in multiple jurisdictions. We do not have the same ability to exchange confidential information in merger cases as we do in antitrust. We need to have waivers from the parties to exchange confidential information. However, even in the absence of waivers, that does not prevent us from discussing the substance of the cases without actually talking about confidential issues.

We also cooperate intensely within the ECN Merger Working Group, where we try to establish best practices, exchange experiences and see how to tackle certain common issues. I think that cooperation in that group has been quite constructive.

Finally, there is a referral mechanism in Europe, which means that merger cases can either be reviewed by the European Commission or by the national competition authorities. That mechanism has allowed, to a certain extent, the most appropriate authority to review the merger, which is also important for the companies themselves. ●

Interview with Han Li Toh, Chief Executive and Commissioner, Competition Commission of Singapore

Editor's Note: Han Li Toh is the Chief Executive and a Commissioner of the Competition Commission of Singapore. He also serves on the Military Court of Appeal and the Copyright Tribunal. He was previously the Assistant Chief Executive (Legal & Enforcement) of the Competition Commission. Before coming to the Competition Commission, he served as a Law Clerk to the Chief Justice of Singapore, Deputy Public Prosecutor and State Counsel in the Attorney-General's Chambers, Senior Assistant Registrar at the Supreme Court and as Registrar and District Judge of the State Courts. He earned his law degree at Cambridge University, obtained a Master of Laws from the University of Chicago and a Master in Public Management from the Lee Kuan Yew School of Public Policy. He is admitted to practice law in Singapore, England, and New York.

He was interviewed for The Antitrust Source on April 16, 2015, by John Bodrug.

THE ANTITRUST SOURCE: As a city state, Singapore is a relatively small country in the context of the global economy. Can you comment on the challenges for small jurisdictions seeking enforcement action or remedies in contexts such as international cartels or mergers affecting multiple jurisdictions?



HAN LI TOH: Let me talk a bit about international cartels first. Yes, we are a small state, but we have a lot of trade flows. In fact, our GDP is larger than a number of medium-sized countries. We are a major financial center. We are a major shipping center, one of the largest ports in the world. We are a major aviation hub. So there's a lot of stream of commerce that passes through Singapore.

Being an open economy, we are open to good things and also bad things, so whether it's cartels or monopolization, it can happen to us. I think the leniency program we've had has been very effective in international enforcement. One of the requirements of the leniency program, which is quite similar to leniency programs in jurisdictions such as the EU or the UK, is that you have to earn leniency by cooperating. There have been cases we've had, for example, the freight forwarders cartel, where there were five applicants for leniency. So you actually have a lot of evidence coming in to help with the enforcement action. In fact, after we imposed the penalties on the freight forwarders, there were no appeals. That was a good outcome.

Leniency is important for international cartels. It helps in the cases which involve, for example, foreign witnesses. In the freight forwarders cartel example, the Japanese companies which were leniency applicants had to secure the attendance of the key witnesses to provide evidence, and that was the condition under the program to earn a discount (of up to 100 percent, depending on where you were in the queue).

On mergers, we've reviewed about 50 mergers since we've started. We are a voluntary regime, which is quite unusual in the context of merger control regimes. There are only a few voluntary regimes in the world, such as the UK, Singapore, Australia, and New Zealand. Basically, parties do a self-assessment in deciding whether to notify CCS, and factors considered would include

market share, as well as CR3 (the concentration of the top three firms in the market). One of the advantages, I suppose, with a voluntary scheme is that you don't get flooded with a lot of mergers that would probably otherwise be cleared. I think the system works quite well because a small agency has fewer staff compared to a large agency, so you need to be efficient in how you use your resources. And we don't want to spend a lot of resources just clearing mergers which are non-problematic.

So the mergers which we do get have been filtered and screened by the party's counsel, and are those which they feel are probably above the market share/CR3 thresholds and need to be cleared by the authority. Based on our experience to date, the international mergers are less problematic, because Singapore is such an open economy, we are able to source goods and services from many places around the world. Being a transport hub facilitates sourcing.

The ones that are

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actually the domestic

mergers.

To give you an example, Holcim-Lafarge, a well-publicized merger between two European companies, was notified to Singapore. It turns out that cement doesn't travel very well, so we don't source mainly from Europe. Instead, we get a lot of cement from Japan and Korea rather than Europe. I think a lot of the global mergers where the product is quite homogeneous aren't really problematic in Singapore because of the ability to source from multiple jurisdictions.

The ones that are problematic are actually the domestic mergers. And we just blocked one last month in the Parkway proposed acquisition of RadLink, which involved radio imaging centers and the use of radiopharmaceuticals.¹ A radiopharmaceutical is a radioactive element used to scan for cancer. What happens is that when you inject it into the bloodstream, it shows up in the scan because it's radioactive. But because it's radioactive, it has a shelf life of a few hours. So obviously, you can't obtain it from overseas, because it's not going to last. There are only two companies in Singapore manufacturing this in a cyclotron, and they decided to merge. So we said, look, there will be no other choice if you do that, so we said no, you can't. And anyway, the deal didn't go through after our intervention, so they're not merging anymore but the seller has found another buyer.

ANTITRUST SOURCE: You mentioned the cement merger that was notified to the CCS. Does that indicate that the CCS is receiving notifications on mergers even where the parties don't have much of a physical presence in Singapore? Are parties notifying CCS where they are selling into Singapore or otherwise having effects in Singapore?

HAN LI TOH: Holcim-Lafarge did have a physical presence in Singapore, but there was also a strong local supplier of cement. I think they did cross the thresholds, but they weren't really high.

ANTITRUST SOURCE: Where a transaction involves multiple jurisdictions that raise some issues, is the CCS relatively more receptive to behavioral remedies, as opposed to insisting on divestitures? Is the CCS more likely to seek divestiture as a remedy for a purely domestic transaction?

HAN LI TOH: Last year, we had the JobStreet merger involving an Australian-based online recruitment advertising company, in an industry where, basically, you advertise on these portals for job seekers to come in and look for jobs. In that case, there was a mixture of behavioral and struc-

¹ See http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/ccs/press_release/P-20150316-1.html.

tural remedies imposed.² The behavioral remedies included holding the price constant for the next three years and not allowing exclusive dealing.

The interesting thing about that case was, although it's a digital economy merger, the actual underlying services are jobs in Singapore, so the market is going to be of a limited size due to our small domestic jobs market. The bigger players outside have looked at this market and decided that it may not be worthwhile to come in because it's not a big market for them. So there was a limit to how many of the big boys would come in. At the end of the day, we felt that while we couldn't clear it unconditionally, if you held the price constant for three years, and if there's no exclusive dealing, there was a chance that some of the competitors would be able to perhaps come in and become a constraint after that period. So that was the explanation behind it being able to merge.

ANTITRUST SOURCE: In other words, the behavioral remedy was accepted in part because of the nature of the industry and expected entry in Singapore after that three year period?

HAN LI TOH: That's right. So unlike in a large economy like the U.S., I think in small economies, sometimes the market doesn't regenerate as well as in the large economies, so you do have some of these peculiar issues.

ANTITRUST SOURCE: Can you comment on the role of efficiencies in your merger analysis? I'm particularly interested in whether a smaller economy might give relatively more weight to efficiencies than is given in larger economies.

HAN LI TOH: Not necessarily. It's balancing between efficiencies and a substantial loss of competition. It's just a question of whether one is more than the other. In a small economy, you would probably have higher market concentration because of fewer players. So that's why our thresholds are higher. For example, for abuse of dominance, it's 60 percent. While we would probably have a more concentrated market, I think, in terms of the weighing, it's not different whether there's a merger on a large scale, as long as there's some constraint. There may not be a lot of parties, but as long as it's sufficient constraint, I think that would be all right.

There was a case a few years ago involving bitumen drums. Initially, we issued a statement of objection because, for that market, there were only two players. But after we issued the statement of objections, or the probable position, a significant new player entered the market, and so we cleared it on that basis. I think that's a case where there were some efficiencies in merging, but at the same, there was lessening of competition. And then there was sufficient competitive constraint on the merged entity (even though it was just one other player, it was a significant one). So that's how we weigh it in a small economy.

ANTITRUST SOURCE: More generally, as I understand it, your legislation does provide for an efficiencies defense. How do you go about weighing efficiencies against the anticompetitive effects?

HAN LI TOH: For example, let's say you had a merger of two parties, and they were competing quite vigorously in terms of discounting. You could actually quantify the amount of discounts that

² The full decision of the CCS is available at <https://www.ccs.gov.sg/~media/custom/ccs/files/public%20register%20and%20consultation/public%20consultation%20items/proposed%20acquisition%20by%20seek%20asia%20investments%20pte/seekgdpublic.ashx>.

would be lost if they merged versus the efficiency gains in terms of pooling of resources or whatever. And then if one is higher than the other, then it would tell you whether or not it would be cleared. So if the discounts were larger than the savings from the merger, you may not want to clear it. We may not clear the merger because the loss to the consumer is larger than the gain to the parties.

ANTITRUST SOURCE: Does the CCS look to see whether those efficiencies will be passed onto consumers as part of the weighing?

HAN LI TOH: That would also depend on the constraints of the merging party because, obviously, if there's a weak constraint, there's no incentive to pass on the efficiencies to consumers. So that would be another factor as well. Of course, it's quite difficult to quantify how much is passed on, because all you know is that in the worst case, you lose all the discounting. So your point is whether the efficiencies will be passed on or not. But it's a bit hard to tell.

ANTITRUST SOURCE: There was a comment in the JobStreet decision that seemed to suggest that, because of the efficiencies, JobStreet would be in a stronger position relative to its competitors, and that seemed to raise more concern that the merged firm may engage in exclusive dealing. So can efficiencies actually lead to greater issues in your review?

HAN LI TOH: The issue there was whether, after they merge, if they entered into exclusive agreements, it would effectively lock up pretty much the whole market. But we found out in the JobStreet case that job seekers like to multihome, meaning that they would subscribe to more than one job portal. That's helpful, because it gives them the option to shop around. And that's why we've put in one of the behavioral remedies—that is, no exclusive dealing, to allow the state of multihoming to continue.

ANTITRUST SOURCE: One last question on the merger review process. I note that the CCS merger review process is quite transparent, in the sense that when parties file a notification, CCS posts a notice of that and invites consultation from the public. At the conclusion of the review, CCS issues quite a detailed decision, as in the JobStreet case. How valuable do you find that solicitation of comments from the public? Does the process solicit comments from people that you would otherwise not be calling because you know they're customers or suppliers?

HAN LI TOH: It's not just being posted on the website, but there's also a media release. So it goes into the media dailies, the newspapers. The Parkway merger was very interesting because we had a lot of feedback. That was the one with the radiopharmaceuticals. We had a lot of comments from customers of these two parties. And I think they were able to comment because they probably saw the media release, which was featured in a newspaper. And actually, some of them wrote to the newspaper forum page, saying, oh, I'm glad that CCS is looking into this. I think they were really concerned. So I think it was useful.

But I think in other cases, we probably need to follow up with the industry key players, in case they missed it. So we would just call them up and say, can you have a look at this and see whether you want to comment? And if at the end of the day, nobody comments, then we assume that nobody's objecting, right? That makes it easier. So I guess it's good either way, as long as you feel that the reach is sufficient.

ANTITRUST SOURCE: Almost like a double check.

HAN LI TOH: That's right.

ANTITRUST SOURCE: What role, more generally, even beyond mergers, does economics play in your analysis? Do you have a separate economics unit?

HAN LI TOH: When we look at cases, we form a case team, and the case team always has an economist. So without a doubt, economics is a big factor, whether you're looking at constraints in the market or the focal product market. So you definitely need to have economists on the team to look at both issues.

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ANTITRUST SOURCE: Whether we're talking about mergers or cartels or other types of investigations, what has CCS's experience been in terms of cooperating with other foreign competition authorities? Obviously, because of your proximity, Singapore would often be looking at markets that overlap with Indonesia, China, or Australia, for example.

HAN LI TOH: In the freight forwarding case, we had occasion to talk to the Japan Fair Trading Commission. The difference there was that they had already completed the case. So the issue was trying to understand how they calculated the penalties, because the parties were almost the same and we foresaw that there could be some argument about proportionality or parity or whatever. So it was useful to talk to the JFTC on those issues.

We look at quite a lot of airline joint ventures, and obviously because the market is defined as the origin and destination points between two cities, we've talked to the Australians quite a bit, for example, in the QANTAS/Emirates joint venture, the Singapore International Airlines/Air New Zealand joint venture. So yes, it's definitely important, because we always try to get a sense of how they're looking at the picture.

ANTITRUST SOURCE: Do you need confidentiality waivers from the parties to have the two-way flow?

HAN LI TOH: We do. Although a lot of the times it's not so much confidential information, but just trying to understand, for example, in the Japanese case, how they calculate penalties. With the Australians or the New Zealanders, it was how they are looking at the markets, because I think a lot of the information about the routes, the number of players on the routes, et cetera, is public. These are not really confidential information.

ANTITRUST SOURCE: I noticed that CCS has a mandate to conduct market studies on its own initiative, even apart from its enforcement actions. Can you talk a bit about that and how it interplays with your investigations?

HAN LI TOH: We also have a notification procedure, which the Europeans have done away with. Basically, if the parties aren't sure about proposed agreements, they can file a notification with CCS for a decision or guidance.

ANTITRUST SOURCE: So this isn't just for mergers. This notice could be for a distribution agreement?

HAN LI TOH: For example, we had a case involving the Medical Association on price recommendations, and they wanted to know whether or not it would be infringing the Act. They had taken it down, but they wanted to reinstate the price recommendations. And because there was a before and an after—there was a time where there was the price recommendations enforced, and then there was a time where they took it down—we were able to do a market study on the effects.

ANTITRUST SOURCE: A natural experiment.

HAN LI TOH: A natural experiment, absolutely, yes. So, in that case, it was useful for the purpose of the recommendation. The other type of market study is, for example, the airline market study that we did. We had done a number of JV cases, and we had cleared them on the basis of their economic benefits. We wanted to verify whether or not the benefits as claimed by the parties, and largely accepted by us, actually materialized. It turns out that the literature, interestingly, in America is that airline JVs are beneficial because you get lower prices and more passengers. The consultant who did the study for us found there were more passengers, but not necessarily lower prices. The prices stayed the same. But I think one out of two is good enough. So at least that was half, which was some comfort. So we used the market study for purposes of verification.

Then, there would be cases where we would want to look at a market where there may not be anticompetitive conduct—no illegal conduct per se—but there's some concern about whether the market is functioning as well as it should be. The one we're doing now is the one that probably every competition agency does, which is on petrol pricing. I don't know whether or not we'll find anything, but what we're trying to understand is how they price. Because the price of crude oil has gone down, and there's this thing about market incentives saying that, where the price of crude oil goes up, the petrol companies will raise prices like a rocket, but when it comes down, prices fall like a feather. So, one objective is to verify whether it's rocket and feather, and secondly, it's to try and understand how they price and what are the components they look at. What are the cost components they look at when they price?

ANTITRUST SOURCE: Perhaps you could elaborate on CCS's advocacy mandate and talk about some of your significant initiatives and achievements in that area and any impact on legislation or regulation.

HAN LI TOH: One of our statutory functions is to advise the government and other agencies on national policies, particularly in respect of competition. We have a division that looks at that and market studies, our Policy and Markets Division. The idea is that, while government action is excluded from the Competition Act, that doesn't mean that government action would impact the market in a good way all the time, right? So enforcement is very important to us, but I think, part of the broader perspective of having good competitive markets is making sure the government policy doesn't influence markets in a bad way. We do provide advice to government agencies over their policies.

One example I can give you is about the third-party taxi apps. This phenomenon, as you know, is a global issue. Many countries are struggling with it. We have finally moved to a position where we will allow it to happen through regulation, but we have advised the Land Transport Authority on some of the possible pros and cons of the policy. For us, generally speaking, we don't like tight regulations. But we can understand that, from their perspective, they feel there's a need to prevent overcharging. In many countries, taxi fares are regulated anyway. So we accepted that as

One of our statutory functions is to advise the government and other agencies on national policies, particularly in respect of competition.

part of the framework. But I think the plus point is that you have new entrants, new market entry, new ways of conducting businesses—bringing taxis and consumers together through platforms—and that, I think, is a net positive.

ANTITRUST SOURCE: I note that you are not only the chief executive of the CCS, you're also a member of Singapore's copyright tribunal. Does that appointment reflect a recognition of the significance of competition principles in the intellectual property context, or the interplay between the two?

HAN LI TOH: Well, I was appointed to the copyright tribunal when I was the assistant chief executive of CCS. And yes, because of that, I sat on a case involving collecting societies, which I think you know, is one of those interface areas between competition law and intellectual property. So yes, there is a lot of overlap. We have a task force in CCS together with the Intellectual Property Office of Singapore to look at these kinds of overlap issues, and one of them was collecting societies. So yes, there's a lot of synergy, and I believe I was appointed to the panel because of that background.

ANTITRUST SOURCE: I gather that the advocacy mandate has had a significant role in the negotiation of free trade agreements as well.

HAN LI TOH: Yes. Today, modern free trade agreements all have competition chapters. There are two big multilateral ones that we're currently involved in. One is the Trans-Pacific Partnership, of which you're aware. We hope that can be passed before the next presidential election season.

The other one involves the ten ASEAN countries, plus six treaty partners: India, China, Korea, Japan, Australia, and New Zealand. That's significant because it's all of Asia and ASEAN, and there's a competition chapter in that free trade agreement. And this year, we actually chair the working group. So they've had a few meetings in Singapore and India. I think the next one is in Japan. I think there's good progress being made.

If you look at the history of competition and trade, it was partly trade that kicked it off. Actually, it's interesting because it was proposed at the WTO Ministerial Conference in Singapore back in 1996, if I'm not wrong, that a working group be established to study the interaction between trade and competition policy. And then it didn't come into the agenda or got taken off the Doha Round work program subsequently. And now it's come back in again through these multilateral trade agreements, so it's interesting.

ANTITRUST SOURCE: The Singapore legislation has been in effect for 10 years. And I think you've been involved in the CCS for a good part of that time. Can you comment on the challenges that were faced in achieving credibility as a competition regulator with companies based in Singapore and international companies that trade in Singapore over that 10-year period?

HAN LI TOH: Firstly, in terms of enforcement, you need to be credible. We have an administrative system like the EU. We decide on the liability and the penalties. But there is an appeal process to an independent tribunal, the Competition Appeal Board.

So it was important for the first few cases to make sure that we weren't overturned on appeal on liability. There were some adjustments of penalties by the Competition Appeal Board, but I think we can live with that. It was important to make sure that we were not overturned on liability because that would not have been a good start for a young agency.

A leniency program can only be effective if people think you're going to enforce the law, right? Otherwise, why bother? So I think once you get the first few in and you are seen to be taking action, it does build a momentum of its own after that. So those were some of the steps we took to reach where we are today.

ANTITRUST SOURCE: I can't end the interview without asking you about the CCS sponsorship of the annual animation contest and essay contest. They're very effective, I think, looking at them on the CCS Web site.³ But has that helped to promote public awareness of CCS and competition legislation?

HAN LI TOH: It's all about outreach. When you have a contest, first, you tell the contestants the scenario in which they need to produce the short film. So then they understand what a competition issue is and what they are supposed to produce.

The benefit is that you get a number of entries. Most of them are, I think, at the high school and junior college level. Some are actually of quite high quality, and we are now using the winners' entries as part of our advocacy outreach, so it's a win-win. The students understand what it's all about, and we get to use the products for advocacy. So I think it's a good way of outreach. ●

³ <https://www.ccs.gov.sg/education-and-compliance/education-resources/digital-animation>.

Interview with Tembinkosi Bonakele, Commissioner, South African Competition Commission

Editor's Note: Tembinkosi Bonakele has been Commissioner of the South African Competition Commission since April 2014, having served as Acting Commissioner since October 2013. Prior to that, he served in various senior positions at the Commission, including head of mergers, head of compliance, senior legal counsel, and Deputy Commissioner. He previously practiced with Cheadle Thompson and Haysom in Johannesburg, largely in the areas of labor law, regulation and health and safety, and with the corporate finance and antitrust groups at Clifford Chance's New York office. He occasionally teaches competition law at the University of Fort Hare, Wits University, and is a fellow of the University of Johannesburg's Centre for Competition, Regulation and Economic Development. Bonakele currently serves as the Chairperson of the African Competition Forum and is a member of the International Competition Network Steering Group. He holds a BJuris and an LLB from the University of Fort Hare and an MBA from Gordon Institute of Business Science (GIBS), University of Pretoria.

This interview was conducted for The Antitrust Source by Krisztian Katona on April 16, 2015.

THE ANTITRUST SOURCE: The South African Competition Commission has recently celebrated its 15th anniversary. Congratulations on reaching this milestone. You have been part of the agency for much of the first 15 years. Building on this experience, could you tell us about the lessons the agency has learned over the past 15 years and recent challenges the Commission has faced?



TEMBINKOSI BONAKELE: I think the first thing we have learned over the past 15 years is the importance of the institutions. Institutions are important, as well as the instruments that are available for those institutions. Things like clear legislation, clear policies are quite important, as well as people. I would say that, for me, institution building is one of the biggest lessons we have learned, the centrality of it in whatever enforcement work you want to do.

The second thing we have learned is that we must prioritize. In an economy like ours, there is so much that we could do, and sometimes we are even expected to do. But it is very important for us to choose certain things that we do. That also implies deciding what we won't do. The challenges are so enormous and the resources so limited that you have to constantly prioritize. In the past ten years or so, we have really institutionalized strategic planning, prioritization of sectors, and so on. I would say those are the main lessons we have learned.

The last one I would mention is that we also now know that we have to invest a bit of time in understanding the markets we want to focus on. Investment in research in understanding how these markets work, even before we have a case before us, is also one of the lessons we have learned in the recent past.

ANTITRUST SOURCE: You mentioned the importance of choosing the right strategy and prioritization. What are your current competition enforcement priorities and why these areas?

TEMBINKOSI BONAKELE: First of all, let me tell you how we go about choosing sectors. We look at the impact of these on consumers. Because so many South Africans are poor, the impact on poor

consumers is quite important. We look at the history of that sector in terms of our experience with it and what we know of the sector. We also look at the importance of the sector to the South African economy.

Using these criteria, we decided on the following priority sectors: food and agro-processing, intermediate industrial products which are often inputs into the manufacturing sector, infrastructure products and services, telecommunications, health care, and financial services. Those would be the main ones. There are areas where we have prioritized cases outside those sectors, especially cartel cases, but predominantly these are the sectors that we are looking into.

ANTITRUST SOURCE: One of the priority sectors you mentioned is health care. This is an area in which, following the 2009 competition law amendments relating to market inquiries came into effect in April 2013, you have started a sector inquiry. Could you tell us about this inquiry and your objectives with it?

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TEMBINKOSI BONAKELE: It came about as a result of complaints from various stakeholders that the costs of private health care were increasing far higher than the general rate of inflation. Some people were attributing this to competition factors. We ourselves had worked on a couple of health care mergers, particularly in the hospital sector, as well as in the insurance sector. A lot of these mergers were approved. There was a lot of consolidation in the past couple of years. As a result, we now have three main hospital groups dominating in different regions.

Because of the complexity of the sector, the agency arrangements make it very difficult to understand where these cost drivers really come from. When you talk to the sector, there is also a lot of “blame game.” So we wanted to get into that and really understand what is going on without pursuing a particular investigation against a particular firm. It is really a fact-finding mission. That is what we want to do.

We have appointed a former chief justice to lead a panel of five technical specialists in competition law, economics, and in health systems, to conduct the inquiry on our behalf. It is really a high-level panel with the right balance of skills. We weren't required to appoint an independent panel to conduct market inquiries, but we did this because I think we recognized that in this sector it was important that we have a very objective process. There is a history of a lot of suspicion and litigation, litigation against government on certain policy initiatives. We wanted to dispel any notions that we could be coming with a hidden agenda. We really want to understand, so we appointed an objective, independent panel to assist us in doing the inquiry.

We are very happy with the progress of their work. They are due to finalize the inquiry by the end of this year, 2015. We understand that they are on track, although there are people who have said that the timelines might be too pressed. We will engage with that and see what we can do. But we are also determined to bring closure to the process as soon as possible.

Just for your benefit, what the panel can do is provide us with recommendations. Recommendations could have implications for regulation, for example. They could have implications for enforcement if they find anything that they think we should be pursuing as a Commission. They could also be recommendations to the industry. So it is really open, what they can do.

ANTITRUST SOURCE: Let's talk about merger enforcement next. One important issue about South Africa's merger regime for international practitioners is the role of public interest factors in merger review. Public interest factors have played a key role in the review of a number of recent mergers, such as Walmart-Massmart, Pioneer Hi-Bred-Pannar Seed, and Glencore-Xtrata. You have

recently also held a public consultation on draft guidelines on public interest factors in mergers. What do you hope to achieve with the guidelines and what feedback have you received?

TEMBINKOSI BONAKELE: Well, we want some legal certainty. The very idea of including public interest in the South African legislation was so that there is a transparent process through which these could be looked at. In other jurisdictions, the tradition is for authorities only to look at competition matters, efficiency issues. But we know that this public interest exists whether they come in the form of national security, food security, employment, etc. We have seen in the UK recently that the big issue was jobs in the AstraZeneca attempted merger. The merger was effectively blocked through a political process.

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We know that these issues do exist, but I suppose there is no consensus globally on where they should fit and how they should be articulated. In any event, the South African legislature has decided that this should sit with competition authorities. As authorities look at the impact of a merger on competition, so they should also look at the impact of a merger on public interest issues, which include employment, impact on medium and small businesses, impact on the industrial sector, and things like that.

As you can imagine, this, once invoked, tends sometimes to be controversial. We want to bring about certainty on how you do it.

A lot of issues are contestable in mergers. The impact of a merger is a predictive analysis. We can't get away from that, but at least we can outline principles we would look at as we assess the impact of the merger and hopefully guide parties on what it is that we consider important.

The one thing that is clear in the draft guidelines is that we would like people to pay attention to these matters and do the analysis up front. Just like they would do the economic analysis on the impact on competition, they should do an analysis of the impact on public interest issues. It makes the work very easy. The impact is not big in the majority of cases, but there would be those few cases, as you mentioned, some of them cases like Walmart. That became a very big issue. But you must understand, Walmart was one merger in a list of about 300 mergers we looked at that year. So there would be a few cases where these become important. Hopefully we are able to provide guidance on how they are treated by authorities.

ANTITRUST SOURCE: How do you balance public interest factors with competition factors when reviewing mergers?

TEMBINKOSI BONAKELE: Essentially we make an analysis on competition issues and we make an analysis on public interest matters. It is possible for either of these to outweigh the other. Technically a merger could be problematic but can be rescued by public interest. As an example, if you had a merger that would lead to some form of restriction in competition, but without that merger you would lose a lot of jobs, that consolidation we could allow in order to save those jobs.

So public interest issues could rescue what otherwise would be a merger that would have been condemned. But sometimes public interest issues could also lead to condemnation of a merger, even though on competition grounds alone that merger wouldn't be a problem, if we found that there were significant public interest issues. I have to say that in practice, we have never done this. What we have done is impose conditions that will ameliorate the impact of such a merger.

These are the things that we want to clarify in the guidelines, to say that we are objective when we look at this and there is some predictability in the system. But in the end, it is the old task of the regulator to balance various things, just like you balance between efficiencies and sometimes

restriction of competition. It's hard to say where the balance should be, but at least you know that that is what you need to do.

ANTITRUST SOURCE: Turning next to abuse of dominance, one important enforcement area of late has been excessive pricing. Could you tell us about the Competition Commission's enforcement of excessive pricing cases, in particular in light of the recent decision in the Sasol matter?

TEMBINKOSI BONAKELE: Just to put it in context, we have had a few cases in the past 15 years on abuse of dominance. I don't think that there is going to be an upsurge of abuse of dominance cases. I think these will always be few and far between. I think we have tackled abuse of dominance in instances where there has been very clear exploitative abuse, the impact is clear and visible, and the dominance itself is huge. Sometimes people have called this "super-dominance," when you essentially have a critical product that is produced by a single firm. If you look at the history of our abuse of dominance cases, they tend to be those cases.

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There has been a problem because of the sort of differences in approach on how to interpret the concept of abuse of dominance. But the Sasol judgment adds something that I think is quite important for South Africa, which is that the Competition Tribunal says that when you look at a super-dominant firm, you also need to look at how that dominance was acquired—was it acquired on merit or was it acquired through some form of state support? It could be direct subsidy, it could be tax breaks, it could be investments and so on—and found that in that particular case, Sasol acquired its dominance largely through state support and that this was a factor to be considered in assessing abuse of dominance.

It is quite an important case for us. We know that it is subject to appeal before the Competition Appeal Court. We will be watching that with interest.

ANTITRUST SOURCE: In the cartel area, there have been a number of significant developments in South Africa over the last few years. I think back in 2008, you amended and improved your leniency program. How is your leniency program working today?

TEMBINKOSI BONAKELE: Our leniency program has been hugely successful in helping us uncover cartels. Even when we have, ourselves, uncovered a cartel, it has made it much easier to investigate and prosecute it, once we have a leniency applicant. I think we are very satisfied at this stage with how the program works. Sometimes we have complemented it with certain policies. For example, when we had to deal with an unprecedented number of contraventions in the construction sector, it became clear that the leniency program itself was not adequate, and we then added what we called a fast-track settlement program.

One has to look at it in context, but I think overall we have uncovered a lot of important cartels. Our big bread investigation was partly aided by having a leniency applicant. In the construction cases themselves, which was really an unprecedented cartel in both its breadth and magnitude, our leniency policy played a significant role in uncovering that.

ANTITRUST SOURCE: Following up on the fast-track settlement process, you mentioned the Commission used it for the first time in the recent construction cartel investigation. What has been your experience with this new settlement process? Have you used it in other instances since then?

TEMBINKOSI BONAKELE: We have used a variation of it. It is not a standing policy. We did it specif-

ically for those construction cases. We have used a variation of it in the recent bid-rigging cases for furniture removals. Because we, again, had thousands of contracts there, each of which potentially could be a discrete case on its own, we adopted a process through which we could fast-track those cases.

It worked quite well. We invited firms to participate in the fast-track settlement process, where we were clear on how the fines would be calculated and the discounts that would be applied in order to incentivize them to come forward. It worked, because the majority of firms came forward, they settled, and they disclosed everything, which was part of the condition, and settled.

I think, if there is one thing I am a bit worried about, it was large firms that had lawyers who were able to take advantage of the process, but the construction cartel went beyond just the large firms. There were a lot of mid-sized and small firms that also participated in the cartel. Some of these didn't take advantage of the process. We are now at a stage where we have to prosecute all of those that did not participate in the fast-track settlement process. We are finding that a lot of them are mid-sized firms.

So I think it has worked. It worked quite well. I have this residual concern about mid-sized and smaller firms. That is largely a function of not having lawyers with the sophistication to participate in systems like this. But we also promise that if people don't come forward, we will prosecute. So we have to do what we have to do.

ANTITRUST SOURCE: Following recent decisions by the Supreme Court of Appeal and the Constitutional Court, South African courts now recognize both opt-in and opt-out class actions for private damages. Could you tell us about these developments and their likely impact?

TEMBINKOSI BONAKELE: Class action in South Africa is a fairly new concept and is quite underdeveloped. We have it now established as part of our legal system through the 1996 Constitution. Initially, I think most people's understanding was that it applied to constitutional rights or human rights.

There has been this uncertainty whether it could apply to all sorts of general civil cases. We had a case following our bread cartel where there was a group that tried a class action. The Court has now confirmed that, in fact, one can institute a class action, and has added this requirement for opting in and opting out.

But I think that we are still in a situation where the courts are sort of making law in this area, and so it is going to be a very long road until there is certainty. I think it is going to be very difficult for claimants still.

I think the courts have made it clear that Parliament should consider enacting specific legislation dealing with class actions. So my hope is that that is what will happen. Otherwise, this area would develop by way of jurisprudence, which I think is going to be long and sometimes painful.

ANTITRUST SOURCE: There has been a pending amendment to criminalize cartel conduct in South Africa. What is the status of this amendment?

TEMBINKOSI BONAKELE: The amendment is still pending. In South Africa, by law, a bill becomes an Act of Parliament once assented to by the President. That legislation has been assented to by the President. But it doesn't come into effect until the President promulgates a date for its effectiveness. That promulgation has not yet occurred, because, in part, there were objections on constitutional grounds to the framing of the act. These have not been revisited by Parliament. As I

understand, the bill was sent back to Parliament for reconsideration, and Parliament was satisfied that the bill will meet constitutional muster. Neither have they been referred to the Constitutional Court, which, in South Africa law, can be done by the President before signing any legislation if he thought it was unconstitutional.

It would seem that, from a legislative process point of view, we are now in a position where this would be made law, given that there has not been any process to address what were raised as constitutional concerns. Government has made its intentions clear that they want to promulgate an effective date for criminalization.

One of the other issues we have to deal with is the institutional readiness. In terms of the South African Constitution, the agency that is entrusted to bring criminal prosecutions is the National Prosecuting Authority. There would have to be, in a sense, a shared jurisdiction between the competition authorities and the National Prosecuting Authority on cartels because we will still have the powers to investigate firms to which administrative penalties could be applied.

So there is a lot of work to be done. We are engaging with both the National Prosecuting Authority and the South African Police Services to make sure that if and when the legislation comes into effect, there are institutional arrangements that would ensure that it is implemented properly.

A combination of all of these, I think, has led to an unusually long delay in the implementation of this legislation.

ANTITRUST SOURCE: Recently there has also been a proposed amendment on collective dominance in South Africa. Could you tell us where this amendment stands? Also are there any other pending legislative amendments in South Africa?

TEMBINKOSI BONAKELE: This was part of that 2009 legislation. Something called “complex monopolies” was introduced into legislation, which is a concept very similar to collective dominance. It is a very complicated piece of legislation. Essentially, it creates a threshold that would have to be met for firms to be regarded as a complex monopoly, which would then trigger the application of these new provisions. The thresholds are about the size of the firm, their market shares, individually and collectively. Once those thresholds are met, these provisions would then apply.

These are very unique provisions, but assuming they come into effect, they would apply to very, very few, highly concentrated markets. That part of the legislation, too, is still pending, also for reasons similar to the ones that I have explained regarding criminalization. I have my doubts though about whether they will actually be effected.

ANTITRUST SOURCE: Turning to the judicial review of competition decisions, recently several important Competition Tribunal decisions have been overturned by the Competition Appeal Court. Could you tell us about the South African system of appeals of competition decisions and, more specifically, the reasons behind the Appeal Court’s decisions in overturning several of the Tribunal’s recent decisions?

TEMBINKOSI BONAKELE: There is the Competition Commission, which is both the investigator and the prosecutor. Then cases are prosecuted before a specialized Competition Tribunal, which is usually a panel of three, a combination of economists and lawyers. The decisions of the Competition Tribunal are appealable or reviewable before the Competition Appeal Court. It is a specialized court constituted by High Court judges. Its decisions with respect to merits are appealable only on exceptional constitutional grounds to the Constitutional Court.

To give you an example, if one were to say that human rights were trampled upon during an investigation, that would constitute special circumstances for appealing further to the Constitutional Court. But the idea is to make the Competition Appeal Court the last court of appeal on competition matters.

Our court system is a little bit complicated. Above the Competition Appeal Court there is also the Supreme Court of Appeal, which is a court below the Constitutional Court on normal criminal and civil matters. But that Court has no jurisdiction on competition law matters. It has, however, jurisdiction on matters of legality. One of the problems we have found is that if a legality issue arises, these could be adjudicated by the normal High Court, as they don't have to go to the Competition Appeal court. They are appealable to the Supreme Court of Appeal. It has created an opportunity for forum shopping on competition matters. One can go and appeal a case before the Competition Appeal Court from the Tribunal on the merits or one may pick a legality issue, which would include, for example, things like fairness in the procedure. You can go to the normal courts with that.

There are old questions in South Africa about how much a higher court, like the Competition Appeal Court, should defer to a specialist tribunal that is constituted by specialists, like economists and so on. This debate, I think, remains unsettled.

What we have seen is that this forum shopping has had the impact of delaying the hearing of cases on the merits.

On the other hand, we have also seen a lot of Competition Tribunal decisions overturned by the Competition Appeal Court. I would say that that is normal. I would as a prosecutor, of course, be worried that it happens so often that the court second guesses a specialist tribunal on facts, it would make parties always appeal the Tribunal decisions.

There are old questions in South Africa about how much a higher court, like the Competition Appeal Court, should defer to a specialist tribunal that is constituted by specialists, like economists and so on. This debate, I think, remains unsettled. I think we have seen our courts delving into real substantive matters and in a sense sometimes second-guessing the Tribunal on those matters.

I think there will always be cases where the courts have to do that, but I wouldn't say I am satisfied with where the balance is. I think we sometimes also accept that the Tribunal is wrong in certain cases, but I think what we have not seen enough is guidance from the courts. I am sure that this is still going to come with time. But I don't think there is enough guidance on all of these matters coming from the courts.

ANTITRUST SOURCE: You have recently been appointed Chair of the African Competition Forum. Could you tell us about this organization, your role as its Chair, and your agenda for the coming year?

TEMBINKOSI BONAKELE: The African Competition Forum is a forum of authorities in Africa, in the entire continent. We have members from all regions, including Southern Africa, Eastern Africa, West Africa, as well as North Africa. At the moment the ACF's members are 29 national competition agencies and three regional competition authorities. It is quite a diverse group, with various legal traditions. But I think what is in common is that these are all enforcement agencies on the continent.

We got together primarily to share experiences, and this grew to working together in capacity-building programs. In the past two years or so, we institutionalized the ACF a bit. We had a secretariat that was appointed, with some donor funding. We ran a lot of successful capacity-building projects, training of investigators as well as research.

It is a very important initiative because a lot of agencies on the continent are new. It is important for us to start talking about concepts, empowering one another. I see that the next level is

going to be us talking about the cases we are doing, talking about the sectors we are looking at, and sharing best practices in those areas.

It is a fairly new organization, but it is growing, and growing quite fast. It also faces a lot of challenges, a lot of issues. For example, in meetings we must have translators, because Africa has a few working languages, which is quite costly. But members are determined to keep it going. We are working with various international supporters for ACF to get its work done.

ANTITRUST SOURCE: Are there any particular issues or areas that you are planning to cover in the framework of the African Competition Forum in the coming year?

TEMBINKOSI BONAKELE: We are doing it step by step. The first thing we did was a needs analysis. Although agencies are at various stages of development, it became clear that predominantly, agencies were starting off. So the area of training became a key one—just training on basic antitrust concepts, how to define markets, those sorts of things.

As I said, I think the evolution from that is going to be where we start talking about cases. We had a research project which we conducted amongst six ACF members in sectors that were identified by them: sugar, cement, and poultry. You can see that we are starting with things that are, in a sense, soft. I think the next evolution would be where we deal with the hard part, which is about investigations and bringing cases. Investigations have actually been started by some authorities as a result of the ACF research.

I think there is also a lot of scope to cooperate on mergers, although probably this makes sense more at a regional level than continent-wide. We are encouraging, for example, Southern Africa to work together on this, East Africa to do the same, as well as other regions in the continent.

ANTITRUST SOURCE: In recent years there has been an increase in the number of African national competition authorities with an active enforcement agenda. At the same time, we have seen an increase in the number of regional organizations that are enforcing, or planning to enforce, competition laws in Africa. These regional organizations include the Southern African Development Community, the West African Economic and Monetary Union, the Common Market for Eastern and Southern Africa, and the Economic Community of West African States.

What are your views about these developments in Africa? What changes do you expect on the African competition landscape in the coming years?

TEMBINKOSI BONAKELE: I think that the regional economic integration is likely to lead to more integration of competition enforcement as well. The regional approach, which I think is going to be largely underpinned by having the existing agencies in countries working together, is going to be important. Only COMESA has been established as really a regional agency with jurisdiction in a number of countries.

I think that we still have yet to see how successful that model is going to be. It may well be the model for the future. But in at least the medium term, I expect that there is going to be a lot of push for coordination amongst the existing agencies.

I do think that the existing regional bodies could do more to support competition enforcement in their regions. I think ECOWAS can certainly do more in West Africa. In fact, at the ACF, we want to talk to ECOWAS and some of the big jurisdictions in West Africa about this. SADC has a secretariat that is supporting competition law in the region.

So there are various initiatives at different stages. But I think the big picture is that regional economic integration is going at a fairly fast pace. I know that in June of this year, the heads of state

will be signing, or at least getting together to discuss, the integration of COMESA and SADC into a single regional body. I know that there are going to be negotiations soon, if they haven't started already, about the continent-wide free trade area in Africa. All of these, I think, will have an impact on how we work as competition authorities.

ANTITRUST SOURCE: On international cooperation, you are an active member of a number of international organizations, such as the ICN and OECD, and also participate in the competition dialogue with your BRICS partners. Could you tell us a little more about your international agenda? To what extent has the Commission been engaged in international cooperation with other competition authorities? For example, have you cooperated in enforcement actions with foreign counterparts?

TEMBINKOSI BONAKELE: Yes, we have good relationships with a number of jurisdictions. We work very closely with our counterparts on international mergers and cartels. For example, we consult broadly with the U.S. authorities. We consult with DG COMP, the UK and the Netherlands authorities in Europe as and when matters do arise. We have found that very useful. I think probably mergers is the most advanced area of cooperation. It is not even heavily officialized. I think we have managed to strengthen our relationships and people-to-people contacts. People are able to talk about mergers in general terms within the framework of confidentiality issues in their jurisdictions, share insights, and so on.

In the area of enforcement, we have had some cooperation again as and when the need arises. We talk to our counterparts about investigations. We have had coordinated dawn raids that we have done in certain cases with major jurisdictions. We worked with the DOJ, DG COMP, as well as the authorities in Japan. So I am happy with that.

I think that we are never going to be at the forefront of every international cartel, but in sectors where we are heavily exposed, we will always coordinate with our international counterparts.

I think the best thing is to take them on a case-by-case basis. There is no point in cooperating for the sake of cooperating in cases. One has got to look at what the benefits of that are. We are happy with our relationships with various jurisdictions across the world.

We do the same in the continent. We have arrangements, sometimes on a case-by-case basis. We host people from other countries who come and work at the Commission to see how we do things. We second people to that. We benefited from very similar arrangements as well. A couple of years ago we had resident advisers from the U.S., who spent months in South Africa.

So it is evolving. Now it involves us doing the same with our counterparts in the continent.

ANTITRUST SOURCE: Looking ahead, what do you foresee as the main challenges for the Commission over the next year?

TEMBINKOSI BONAKELE: We have adopted a new strategy now. We are going to need to embed that. We have new sectors we have identified. A sector like telecommunications is highly complex and is going to require us to work with the sector regulator, ICASA. We also are going to have major work to do, which I suspect is going to involve a lot of advocacy, on health care, once the inquiry has been finalized.

I think we are entering a stage of market inquiries. I think we are going to need to create capacity for this. It is a new mandate for us. We have learned a lot of lessons with the health care inquiry, one of which is that these inquiries are very resource-intensive and costly, particularly if you have to outsource a lot of things. So I think we are going to need to develop new capacity.

If the criminalization provisions come into effect, we are going to need to develop new capacity for that. In fact, we are working on the assumption that they are going to be promulgated very soon, so we need to gear ourselves up for implementation. We are working on the MOU with criminal prosecuting authorities around that. We need to train people at the Commission on how to do investigations in such a way that we don't compromise a subsequent criminal prosecution, as well as train people who might have to do the criminal prosecution on competition issues.

I think those are the major challenges in the coming year.

ANTITRUST SOURCE: We started this interview with a question related to the 15th anniversary of the Commission. Building on your agency's 15 years of experience, what advice would you give younger competition authorities, in particular those emerging in Africa?

TEMBINKOSI BONAKELE: I think I will start where I began, which is institutional building. Institutions are very important. I think a few countries actually have promulgated legislation and not paid attention to getting the funding. You can't have institutions without funding, so you pass the legislation to get the funding. You get people. You employ people. You develop systems.

I think those, for me, are very important building blocks of a successful agency.

Then choose what you want to start with. In the case of the South African Competition Commission, we started with mergers. We found that a very good introduction into competition law. It was not a choice we made consciously. It was because there is a mandatory notification requirement for mergers, and we are obliged to look at them. But they taught us a lot about the markets and competition laws and theories of harm and all of those basic things.

I think, instead of trying to do everything, one must pick a sweet spot and stick to it. From there, one would be amazed with the learnings that come out.

One more thing I should add. I just want to mention that we are hosting the 4th BRICS International Competition Conference in November 2015 in South Africa. It will be held from the 10th to the 13th of November in Durban, a city on the east coast of South Africa. It is going to be quite an important conference that is held under the auspices of BRICS, but bringing together international thought leaders in the area of competition regulation and development. The theme of the conference is "Competition and Inclusive Growth." What we want to do is really grapple with whether there is a relationship between competition regulation and things like inequality, poverty, and so on. This allows us to look at competition regulation from a developing country perspective. We have very high-powered speakers. In fact, we have Joe Stiglitz confirmed as one of the speakers. We have invited our international counterparts to this and look forward to hosting them. It is quite an important thing for us.

Of course, we do play a role as well in other fora—we participate as an observer in the OECD Competition Committee. We play a big role in the ICN, where we are a member of the Steering Group and a co-chair of the Cartels Working Group. We also participate in UNCTAD.

So we take our international work quite seriously and we learn a lot from interacting with our international counterparts. ●