# Antitrust Magazine: Roundtable Discussion on Statements of Interest

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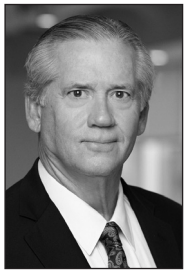

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**JAMES KEYTE:** This is a very interesting topic, as there is ebb and flow at different times. And people are particularly interested in Statements of Interest because there have been more of them lately.

Why don't we start off with Renata? What is a Statement of Interest? What is your understanding of them and the basis for using them at the DOJ?

**RENATA HESSE:** I think a Statement of Interest really is just a filing in the district court that the Division does on occasion when it wishes to inform the court about some legal principle that is an issue in a case and related to the Division's competition mission.

Not having done one of them when I was at the Division, Makan can probably speak more to the situations where they arise, but my impression is that they arise where the Division either feels like one of the litigants or a prior decision of a court has in some way misapprehended the antitrust laws and does not want a decision coming out of a district court that reflects a misunderstanding or misapplication of the antitrust laws.

**JAMES KEYTE:** We will come back to the practice or policy while you were at the Division.

Makan, any different view? I know it sounds like it is really for the district court. I am not sure it can be used at any phase on any motion, at any time. Do you have anything to add in terms of the scope of what a Statement of Interest is?

**MAKAN DELRAHIM:** The statutory command is quite broad and it authorizes any officer of the Justice Department or the Solicitor General to protect the interests of the United States in any cases that could be in federal court or state court so you can express your views on behalf of the Justice Department.

I can explain the policies of what we did during my tenure, how they were used, and the reasons behind the whole program. Effectively that is the statutory command; you could enter at any phase, at any time. We did it at the district court level. We did it at the court of appeals level. We did it at some state courts. Often these are private cases but sometimes it could be a government case that you enter into, assuming it is not a Justice Department case.

**JAMES KEYTE:** One more definitional item for the readers: How do they differ from amicus briefs in terms of the scope of what you do or making decisions about them?

We will start with you, Makan, then go back to Renata.

**MAKAN DELRAHIM:** I think it is a distinction without a difference. These happen to be on behalf of the United States. Sometimes an amicus brief is done by any private party who seeks permission and leave from a court to enter into a case. As you have seen with a lot of interested parties and other litigation, they will file as a friend of the court, but this is through a statutory grant by Congress to protect the interests of the United States, but as far as what is said it is effectively the same. When you enter an appearance or file a Statement of Interest or an amicus brief, you do that in order to preserve a certain approach or interpretation of a statute that will protect the interests of the United States, which is, ultimately, enforcement of that particular law or statute that might be pending in the litigation.

**JAMES KEYTE:** Renata, I am not sure if there were any Statements of Interest done by the DOJ during your time. Why was that, and what were the policy discussions or processes that led to that status or circumstance?

**RENATA HESSE:** Just a couple of things. I agree with Makan that at least the contents of an amicus brief and a Statement of Interest in terms of the fact that there will be legal arguments in them and there will be some principle at stake that the Division thinks is important is correct. I think the process for those two is different. Typically an amicus brief is

used either at the invitation of the court or when a party has requested it and the government is given leave to file one.

I think there were situations with Statements of Interest—I think there was at least one relatively recently—where the court said, "Sorry, I do not really want your brief, Antitrust Division," or something to that effect. I think these are all somewhat discretionary on the part of the court in terms of whether they accept them but I think of amicus briefs as coming about through a different process than a Statement of Interest, which is generated, at least as I understand it, entirely from within the Division, as opposed to either a request from a court or party.

**MAKAN DELRAHIM:** There is also a question whether the United States as a matter of right under that statutory authority can go ahead and file. Obviously, a judge has discretion as far as the amount of weight they would give to that filing; whether or not they have discretion to deny it is different and that is one of the procedural distinctions between that and an amicus brief, where you are asking leave from the court to file it if you do not have a separate statutory authority.

**RENATA HESSE:** The practice when I was at the Division, in the front office at least, which was between 2012 and 2017, was for the Division not to file in cases other than its own cases in district court, so not to even do amicus briefs generally in district court. I am not 100 percent sure where that practice came from, but I have a vague feeling that it came from the Solicitor General's office.

The Solicitor General's office generally speaks as the voice of the Justice Department and of the United States. A lot of the process around appellate briefs run through the SG's office, and my recollection at the time was that it was just not a practice to file in district court cases that were not the Division's own cases.

**JAMES KEYTE:** During those years where there was either private litigation going on or cases where you thought you had to decide whether you were going to bring your own case or investigation with similar matters, were there situations where that was frustrating at all, or where you thought that maybe it would be useful for the DOJ to weigh in?

**RENATA HESSE:** I do not remember having that kind of conversation. There were obviously cases that we watched, and we were interested in the outcomes and the principles that the courts applied. My pretty clear recollection that this was something we did not do must have come from somewhere so I must have had a conversation with someone at some point about wanting to file a brief in a case that was not the Division's case. I just can't remember the context in which it arose.

It may have been a case we were following that was not yet on appeal and we ended up being asked for our views on appeal. Part of the discussion was whether or not that was going to happen, and if it didn't happen, should we have weighed in before?

As a general matter we took the law as it came to us, either through our own cases or through private cases. And, to the extent that we felt that the law needed to advance or a court had gotten something wrong, we would look for cases that we could bring that might rectify the error.

**JAMES KEYTE:** If you recall, did you have organizations or parties, assuming it is appropriate for them in some fashion to seek a Statement of Interest? Do you recall whether it was even in the gestalt of district court litigation? It seems to be very topical, or did parties typically wait until appeal and in a more traditional amicus situation when you were there?

**RENATA HESSE:** I remember discussions about amicus briefs and whether we wanted to file an amicus in a particular case. I do not remember discussions about Statements of Interest.

**JAMES KEYTE:** We often talk about the FTC and Lina Khan finding dormant parts of the FTC Act that in her view needed to be revived and used. Makan, when you came into the DOJ. There was obviously a greater use of Statements of Interest. What precipitated that at the very beginning for you?

**MAKAN DELRAHIM:** It was one of the ten programs I wanted to implement. It was a very deliberate action and a program we created at the Division for a couple of reasons. The main reason was—and you might recall in 2003-2005 when I first had the pleasure of working with Renata I was one of the deputies, and my portfolio was appellate and international. As part of my appellate responsibilities we worked on a number of matters and courts, particularly at the cert. stage. The Supreme Court would ask for the views of the Solicitor General, which then comes down in an antitrust case, to the Antitrust Division, and we would get involved.

It was always helpful for them to decide both at the cert. stage whether they would take it and then later at the merits stage what the views of the Division are and what the views of the Solicitor General are at the Supreme Court because you are a disinterested party. Assuming you handle with discretion those responsibilities to the court, then you will continue to get—they don't always agree with you—a certain level of deference partly because you are not a competitor, a partner, a trade association pushing a view. It has a different weight than it normally would, the DOJ's views. It was modeled largely after that.

I had those ideas, and then I had about a ten-year gap between when I left to when I came back as the Assistant Attorney General. This, along with a handful of other programs, like PCSF and others, were ideas that I wanted to experiment with and implement.

The reason for creating this and becoming the officious intermeddler in a lot of private case was that you found different levels of lawyering in cases. Unlike a criminal case, like a drug or immigration case that the Criminal Division enforces where they are the sole enforcers, in antitrust cases it is the same exact law that the private parties enforce and defend. Whether monopolization or sometimes merger cases. It is the same exact law. When a law is developed through the court system the DOJ is bound by it and its enforcement could be limited if an adverse decision is rendered.

Sometimes the plaintiff's counsel may not raise the same concerns in a court when the defense counsel would raise certain defenses in a particular matter. Sometimes the courts may not have all the resources. Remember, a brilliant judge may or may not have had an antitrust case; the lucky ones might have a half a dozen or a dozen throughout their whole career.

They will then have three absolutely brilliant law clerks at their disposal at the district court who have just graduated from law school, many of whom have had no other work experience, and then you have two sides, plaintiffs and defense, with an army of lawyers perhaps and Nobel economists saying exactly the opposite thing, and the judge now has to decide a case.

We thought that: (1) It would be helpful to the court; but (2) we would not weigh in on one side or the other but say: "Hey, Your Honor, you might have seven defenses on this motion to dismiss, but we think these four are wrong and these guys are stretching the case law. Let us explain why. If you are going to find against them, these four defenses should not be relied upon." We would find particular issues that were of interest to the United States, to our enforcement priorities, and we would get involved. That was one of the reasons, and I think a compelling reason, for the Division to continue to be involved.

The second reason that we created the program was that the Antitrust Division—especially since Hart-Scott-Rodino was involved and certainly for merger cases—did not go into court and have a lot of oral argument time. You did not appeal. You had a handful of appeals, sentencing guidelines, cases and cartels, and maybe every now and then a merger case would go up to an appeal before a merger was abandoned or something, but you did not really have substantive cases go up to the courts, but you did have private cases.

Why was that important? For recruiting great appellate lawyers and those Supreme Court clerks or appellate clerks who otherwise would go to the civil division appellate, not the Antitrust Division. I thought the most interesting cases should be antitrust, but they are not going to come to the Division where they do not have oral argument opportunities. It really created an institutional interest. The Division has always had great-quality lawyers and they have continued, but it attracted folks who were interested in clarifying the decided law.

One thing we did was have four attorneys rotate from the sections who were mostly involved in merger investigations but at their request they would detail into the appellate section to get these opportunities. Now they are writing briefs and doing oral arguments. I believe in a span of eighteen months when we created this there were forty-six oral argument opportunities for the attorneys of the Division, not just the appellate attorneys but the other attorneys at the sections who rotated through.

So there were two functions for the institution: clarify antitrust law and develop the Division's lawyers. Depending on which side of a particular case somebody is on they either love it or hate it, but I think for the institution, it was good 100 percent of the time.

**JAMES KEYTE:** I know this is more than an abstract question for you, Renata, since you were not doing them and the decisions were made elsewhere and were not part of the program. There is a spectrum of case law, legal philosophy, policy, and politics even potentially. At the abstract level is there any concern in using Statements of Interest so regularly that those different forces might exert different kinds of arguments and pressures rather than just in a pure sense of: "Where is the case law? Where is the policy? Where does the DOJ want it to be," especially with administrations that change and maybe different underlying legal or economic philosophies. Do you see that as a problem with more proactive use of Statements of Interest?

**RENATA HESSE:** I have a few thoughts on this. I have a natural hesitation to have government resources deployed in private cases as a general matter because government resources are pretty scarce and the voice of the government can be very loud and have an effect on cases. Makan just described that as being part of the reason to do it in some situations where there may be weak lawyering on one side or the other, but I have this institutional sense that we should reserve the Department's voice for those rare situations where it is either called on by a court, has its own case, or its views are requested by the Supreme Court or otherwise.

Part of the reason for that is that I think the government's voice can start to feel political in some way if there is a constant stream of these statements. I have not gone back to double-check, but it feels to me like, depending on what administration is in power, the statements lean one way or the other in terms of broader interpretation of the antitrust laws to capture more things or more conservative approaches to the antitrust laws to capture fewer things. As all things in our current discourse have become more polarized I worry about

the statement adding to that in the same way. I am guilty of doing an IP policy statement which was then redone and then just taken off the books. The merger guidelines have now gone through a revision. There are lots of questions about whether or not they will be revised again or what is going to happen.

I prefer a more stable voice from the government than one that tends to shift, not in the same case, but as to the same legal principles across cases. I do worry about the Division's voice, and I wish I could remember the name of the case where I think the judge did say: "Thanks but no thanks. I don't really see why your views are relevant here." That is really not a great thing for the Justice Department to have a judge say. We want judges to say: "Oh you are weighing in. That is really important and we need to listen to you."

**MAKAN DELRAHIM:** I don't know if it was the same one, but there was one case out of four dozen or so. It was a district court case, *Blue Cross Blue Shield v. Oscar*, where we filed and the judge, like in a footnote—and he was just wrong. It went out on appeal, and I think I argued that particular appeal to the Eleventh Circuit if I am remembering that one correctly, and then Congress passed the statute in a unanimous way in the direction we wanted, and the case settled. I believe that was the only instance.

**JAMES KEYTE:** Renata, it is an interesting observation if you have in a sense a statutory right to make a filing under 517, but I have read a little where the court has to let the filing happen but what it does with it is another matter.

Makan, when you thought of and implemented this program were you concerned at all about being perceived as pushing doctrines that were more than case law extensions of a certain philosophy or might be viewed as the politics of the use of antitrust in the scope of enforcement?

**MAKAN DELRAHIM:** Absolutely. I think one of the most important responsibilities in this type of a program is to make sure you stay objective and true. For the Solicitor General, of course ideology matters. You have various appeals in a particular case that the Supreme Court on any issue, from the Biden administration to the Trump administration, is going to reverse just like they did from the Trump to the Biden Administrations. Some of those are policy issue differences and those are ideological. I think it is less political and much more ideological.

**JAMES KEYTE:** "Ideological" is probably the right word.

**MAKAN DELRAHIM:** There are issues where you can do that but that is where there is room for reasonable people to totally agree or disagree, such as vertical restraints in labor cases. One of my colleagues that I respect the heck out of, Doha Mekki—the policy change from my time, when I thought the vertical restraints of those should be reviewed under the rule of reason because a per se review of that would actually harm consumers. I explained that in an amicus brief as well as testimony before Congress, but the Biden Administration reversed filings in that they thought it should be under a per se rule.

That is totally fine. I think you can have a different view especially if the court has not decided that issue and it is up for debate where that goes. I could disagree, and I have every right to, but they can do that.

That is one example where I think the danger, as Renata explained, is that if it vacillates and you have different viewpoints and if the amicus brief or the Statement of Interest stretches beyond the law—let's add yet another factor into a particular test that everybody has lived with.

You should not be changing the law through this process. You should go to Congress for that, but you could perfectly well talk about different points of the law that have not been decided.

One thing I would say that would respectfully diverge from Renata's viewpoints on this is that I do think it is one of the best bangs for the buck for the taxpayer dollar. The DOJ could never have enough money to go out there and talk about every antitrust case or every transaction or practice out there. What our system of antitrust enforcement really relies on is that you have enforcement policies, there are a handful of cases, and you have counsel that advise companies, and good corporate citizens will often follow that so you adjust that behavior if there are cases.

If the DOJ wants to have a particular case, let's say a certain healthcare practice or patent licensing practice, if they are developing their case that could take three, four, five, six, or seven years and thirty or forty attorneys to get to a decision that sets that law or clarifies that. You could have a case, file an amicus, and that expresses that viewpoint and influence that with forty to fifty hours of attorney time. I think it is the most efficient and cost-effective way for the government to express its view and set a policy out there that could affect practices within that whole industry.

Let me give you an example. There was a case in North Carolina. It was a private case that had to do with anti-poaching. There was an agreement to not poach between Duke University Medical School and University of North Carolina Medical School. We could have had our own case. It could have taken five or six years to ever get out there.

The defendants had certain immunity from the antitrust laws that they had conjured up—as they should, as good lawyers do when you are an advocate in that case. We went in and said: "No, this is a per se horizontal restraint." There was no immunity because one of the co-defendants happened to be a state actor, the University of North Carolina, which Duke was trying to use to its the benefit.

We filed; the judge expressed it—in fact, I think Doha argued that case from my front office at that time, and immediately the parties settled because one of their defenses

of implied immunity was out. That was the cheapest way to express our view and get a court opinion ruling that I could ever find.

From a government efficiency standpoint, I think it has a lot of benefit, but the fear is, as Renata correctly stated, that you cannot vacillate. You cannot go in there and express your political and ideological policy views and say, "Hey, this Supreme Court case should be interpreted in a completely different way because that is that this administration's policy view."

That should not happen. You should restrain yourself, like the SG does in the Supreme Court filings most of the time, by being bound to the precedent. That is generally my view on that.

**JAMES KEYTE:** Renata, you mentioned resources in enforcement policy. Do you think that kind of proactive, efficient, go in and hit important issues has the potential to undermine focus on enforcement in a way where the DOJ can develop the record the way it wants the record to be developed, develop the theories, the expertise, and the experts? It is an attractive way in terms of hitting a lot of issues, as Makan explains, but at the same time there are limited resources.

You have both been at the DOJ, and when you guys bring cases, you want them thoroughly developed in the way you want them developed. Does that undermine bringing your own cases, in the sense: "Maybe we do not need to go after these kinds of cases because we are already in them in Statements of Interest." Is there a tension there that you see, Renata?

**RENATA HESSE:** I am not sure I see the tension although I could imagine a situation where you think you could handle something more effectively through a policy mechanism as opposed to a law enforcement mechanism, and the Division does that all the time with policy speeches, policy statements, guidelines, guidance and all those kinds of things. There has always been the ability for the Division to attack issues that are not easily or quickly attacked in litigation through some other mechanism. I completely take Makan's point that this is potentially an efficient way to achieve a legal result that would otherwise take a long time and maybe not even come up in a Division case like in immunity or a situation like that.

I have a lingering discomfort with the idea that the Division is playing in the sandbox of private cases that other people are prosecuting, defending, and putting their money into and parties are expecting outcomes based on the quality of the advocacy that their lawyers bring. To suddenly have the Division throwing its weight around in a case feels a little—

**JAMES KEYTE:** Certainly it seems fair for the person who can get the Division to do it.

**RENATA HESSE:** I am reminded of a phrase that Susan Creighton used to talk about—which does not apply here but it is what keeps coming to mind—called "cheap exclusion." It is a shortcut that the Division could take. I am not sure that if I were running the Division that is a shortcut I would want to take, but reasonable minds can differ on that.

**JAMES KEYTE:** I could see where, if the DOJ is going to take something on where it would want to use its own resources to control the case and not go in for those shortcuts at the same time you can see how much of state of intel can cover important issues, especially in the changing legal, economic environment, and the immediacy of issues with the approach that Makan took.

However, there certainly is a greater risk when you are having twenty, thirty, forty of these on different issues, for them to touch on subjects that then might have a different view with a new administration. I think we saw some of that in anti-poaching. It reminds me of back in the day when every different administration would have a new view of Section Two and there would be the modernization and this and that committees and then four years later it is back to something else.

Renata, do you think, if this is something that will continue, that there is a risk of a seesaw back and forth, much like with the Merger Guidelines of positions on issues that then kind of make it both less predictable and less credible if there is too much of a back and forth on so many different topics cutting across administrations?

**RENATA HESSE:** I think Makan and I agree on that wholeheartedly. You do not want that whiplashing of:

"Oh, no, this is per se illegal."
"Oh, no, it is not per se illegal"

Or:

"This is a violation of Section Two."
"No, it is not a violation of Section Two."

That is not good government and it is certainly not good for the Division's reputation in the courts and otherwise. I am not suggesting that doing these Statements of Interest is necessarily going to lead us down that path. I just think there is a risk of that happening, and in today's world that risk is even bigger than it was in the past because antitrust has historically been quite bipartisan and there has been a lot of agreement between Republican and Democratic administrations, and that fabric is getting torn a little bit.

Maybe it is a matter of using your discretion as Assistant Attorney General—not pointing at Makan as having misused his discretion on any of these, but going forward being careful about how and when you use this particular tool.

**JAMES KEYTE:** Even if you take standard-essential patents or something like that and look at a *Qualcomm* kind of case where

you could really have strong differences of view, that would play out in a very legitimate way in different administrations.

How did you manage that, Makan? Would you sometimes avoid subject areas where you knew that there was either a different ideology or philosophy involved? How did you make those decisions?

**MAKAN DELRAHIM:** It literally came down to what the issue was and which issue in a particular case we would get involved with. We got into some hot ones in labor dispute. I remember the *Writers Guild* case, and I have a ton of friends who happen to be writers and producers who were texting and calling me, saying: "Why the heck would you do this? You are screwing us." Well, no, it was the right decision in that time, and we took them as they came.

We in fact had a process that we put in place in the appellate section and in the competition advocacy policy section where we would review weekly all the private cases and all the filings and then there would be a writeup of it, and each week I would go through them with our key staff: "Are these cases we want to get involved with?" Once we were doing these of course parties also came to us in their cases wanting us to get involved one way or the other.

Again, it was important that, just like the SG's office, we did not get involved by saying, "This person should win or that person should win." We let the facts and the cases, but it was on specific points of the law where we felt that either the parties did not even raise that and we thought, *Hey, Judge, you gotta be careful on this*, or they raised it and we amplified or extended it.

I think it is not how many times or what cases the DOJ gets involved with that is important. Where the discretion should come in is what is said and how it is said. You should not be stretching the law. Frankly if the DOJ got involved in every single case I may have clients that will not be happy with that or I may have clients that might be happy with that at any one time, but if they got involved with every single case where they have the resources and an issue came up that implicated their interest in the development of the law, so be it, but they have got to be careful about what is said in those cases. That is really the important part.

Yes, we went through them, but it did not really matter the type of heat that you would get. As Renata said, antitrust law, let's say the last seven or eight years maybe, there was much more interest in it generally from the public and media, and it has continued.

The one thing I will say is that the center of gravity of antitrust may have moved, but I do not think there are partisan differences as much anymore. You have seen Vice President J.D. Vance praise Lina Khan and her enforcement; the President announcing our soon-to-be Assistant Attorney General Gail Slater and now Chairman Andrew Ferguson very much praised vigorous antitrust enforcement.

I think there will be some changes between the different styles and procedural approaches, but I think as far as the appetite for antitrust enforcement we are now seeing a new bipartisan support for it that may have been developing over the last ten years.

**JAMES KEYTE:** I think Makan gave us a little bit of a looking forward, and we will end on looking forward. Why don't you both make some quick observations for practitioners out there if you are interested in having the government weigh in? Sometimes you do not want them to weigh in on a Statement of Interest, but what are the best ways to do that if you are in a case and you think, "T*he government would have an interest in where this law is headed*." What is the best way, the logistics and mechanics, to do that?

**MAKAN DELRAHIM:** First, I think you have to look at your case and see if it implicates something that the government could or should have an interest in? It may not be on their radar screen.

Second, be meticulous in the integrity and the credibility of the arguments that you would pose to the government. That goes without saying whenever you are dealing with any part of the government, whether it is the SG's office, the Senate, the House, or the Justice Department in other aspects. You want to go in and explain both sides of the case. Where is the precedent on one side, where is the precedent on the other, and why should the government take an hour of its time to support you in a court?

Following that, you have to develop the case. What would be the legal position that the government, in this case the DOJ, would take? I would look to precedent. Have they been involved in these types of cases? Do not go in and say—and I have had clients that have come to us—"Support our version of the facts." The government does not do that and should not do that. They are not a trier of facts. Rather, ask them to comment on the development of the law if there is an area that is not clear or you would like to emphasize a past precedent.

Let's say there is a Ninth Circuit precedent or an Eleventh Circuit precedent. You are now in the D.C. Circuit and you would like that to be extended, so you say: "Okay, this test should be adopted in the D.C. Circuit," rather than some errant—the type of arguments that would be credible and do it with the utmost integrity.

**JAMES KEYTE:** Last for both of you quickly. Renata, Do you see this as, "Okay, it's here to stay, and are you ready to play?" What do you see for the next four years?

**RENATA HESSE:** Just to comment a little bit on what Makan just said, I agree on the preparation point. I do think it is also important to think about whether this is a legal

principle that the government should care about. There are plenty of those lurking around.

Generally the appellate section that looks at these so, mechanically, I would go talk to Daniel Haar or one of his assistant chiefs about whatever the matter is, but think hard about why the government should care enough to expend the resources to try to have its voice heard in this particular situation.

**JAMES KEYTE:** That is very useful.

**RENATA HESSE:** I think these are here to stay. That would be my guess. To Makan's point, I think they have been used effectively by the Division to get its perspective out in cases where that is important and judges have found them helpful. I also think generally that once something is out there and being done it is hard to put the genie back in the bottle.

Again, I have a natural hesitation and humility when thinking about the role of the government. I think the weight of the government and its voice should be used sparingly, but I do not quibble with the idea that these are helpful ways of having the government's voice heard in particular cases.

**JAMES KEYTE:** Anything further observations, Makan, about the future use of these with the DOJ and Gail Slater?

**MAKAN DELRAHIM:** I think they are probably here to stay. The frequency of them will really depend on individual preferences and the leadership, but I think you will also see more judges asking for these views because they see the benefit of that. I have probably spoken to at least a dozen judges at different events or conferences where they have come up to me, both at DOJ and since, thanking me for it because they found it incredibly helpful and useful to them. They may not always agree with the DOJ's filings, but they have repeatedly voiced that it was always helpful to them.

**JAMES KEYTE:** All right. Perfect. I think that is both a great summary of where we have been on Statements of Interest and where we are headed. I thank you both very much. It will be of great interest to the readers of *Antitrust Magazine*. ■