Enforcers' Roundtable

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SPEAKERS

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Lina M. Khan
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Andrea Marván Saltiel
Chair Commissioner, Federal Economic Competition Commission (COFECE), Mexico City

Margrethe Vestager
Executive Vice President, European Commission, Brussels

FIONA SCHAEFFER: Good morning, everyone. My name is Fiona Schaeffer, I am the current Chair of the Antitrust Law Section of the ABA, and I am delighted this morning to be co-moderating with Jillian Charles, who is the Vice President and General Counsel of Global Investigations, Antitrust, and Anticorruption at Honeywell.

I would love to introduce Gwendolyn Cooley, who is the National Chair of the Multistate Antitrust Task Force and calls Wisconsin home; Jonathan Kanter, the Assistant Attorney General of the U.S. Department of Justice Antitrust Division; Lina Khan, Chair of the Federal Trade Commission; Andrea Marván Saltiel, Chair and Commissioner of the Federal Mexican Economic Competition Commission (COFECE); and Margrethe Vestager, Executive Vice President and Commissioner of the European Commission.

We want to do things a little differently this morning. The feedback we got from our enforcers was that it was both boring to give and to hear prepared speeches, so we decided to eliminate them.

We wanted to start off on the personal. Before we get to our substantive topics—of which there are many, so I'm sure you will enjoy that—we wanted to know a little more about the people behind the position—What attracted you to competition and consumer protection, what inspires you, how do you navigate adversity, and how do you define success?

I want to start with you, Jillian.

JILLIAN CHARLES: Thanks, Fiona.

I am so excited to be here and to look out and see all your faces and also look at this panel and look at how this audience has changed and our panel has changed over time. Jonathan just said he is the diversity candidate on the panel. [Laughter] That's true.

I want to talk a little bit about how I measure success from this perspective. I started my career on the law firm side, I have had two tours of duty at the Department of Justice, and now I am in industry where I am in-house at a large multinational.

Measuring success to me is making antitrust accessible to businesspeople. We talk about what kinds of deals leave the boardroom and how important it is to make sure that the right deals leave the boardroom. From the industry's perspective what we care about is putting our business assets and money to the highest purpose and best use.

The way that I know that I am successful is when, like we say at Honeywell, "I am in the room where it happens," and I am talking antitrust to people in a way that is completely accessible to them—not like it's rocket science, not like it's economic theory and case law only—that's what I get to do with folks like you every day and my outside counsel—but really making antitrust part of the decision making and risk management of the business.

I feel that I have done a successful job when that happens so smoothly, so organically, and so elegantly that the business understands why antitrust matters, and the concepts are fully integrated into the decision making. So, success for me is actually the simplicity and elegance of the integration of antitrust into decision making.

FIONA SCHAEFFER: Thank you, Jillian.

For me, when I was fifteen I really thought I had a career ahead of me as a rock star or an actress. Unfortunately, my parents put the kibosh on that and said it was either law or medicine, so I chose law because my dad was a doctor. [Laughter] I found antitrust probably the next-best alternative to rock star or actress and, as you can tell, I still aspire. Maybe in my retirement.

But I am also a mother. One of the things I wanted to bring to the conversation today is we come to our job, not only as fierce advocates for our clients and with passion for this profession and antitrust practice, but also as people, and in my case as a parent of two teenage boys.

Sometimes it is hard. Mental health is really challenging for our kids. So, I just wanted to say that, and say all of the people who have connected with me over mental health really mean a lot, and this community can help you. We are together in this.

Margrethe, how about you?

MARGRETHE VESTAGER: Well, how else to be able to be in this room, a room without windows and 1500 lawyers? [Laughter.] And, you know I mean it because I celebrated my fiftieth birthday with you in this room. So, this has been my driver.

The second driver is that I think it is really important for society to deliver, that you have a fair chance of making it. First, that you feel that you are counted on, because you can be fired from your job and you will hopefully find another job; but if you have a feeling that you are fired from your society, where do you go? Nowhere to go.

I think that part of the magic of competitive markets is that you have a fair chance of making it. If you have a good idea, if you have the talent, if you have the work ethic, if you gang up with other people and make a good team, you have a fair chance of making it. I think that is the magic of what competition can do, that markets are open for everyone.

I think it also rubs off on democracy if people are being respected in their role as consumers, that they have choice, that businesses make an effort to innovate and to provide affordable prices. In that role I think you are also strengthened as a citizen, and I think whatever we can do to strengthen this feeling of inclusion and being an active citizen is important. So that gets me up in the morning.

FIONA SCHAEFFER: Gwendolyn, what about you?

GWENDOLYN COOLEY: It is very similar to Margrethe. I am here to do justice. I work for the Wisconsin Department of Justice, and I work on the Antitrust Task Force to make sure that the cases that we are bringing are getting to the right answer—which may not always be winning, although boy do I really like winning, boy do I really dislike losing! [Laughter]

But the point of what justice is is not the winning and losing. We have an adversarial system for a reason. You all are an important part of the adversarial system. We want to make sure that the government does not just decide something and then you have no input in that. We want to make sure that justice is being done. So that is how I get up in the morning.

FIONA SCHAEFFER: Andrea?

ANDREA MARVÁN SALTIEL: I will speak also from the personal side. Like you, I am a mother, I have two daughters. Margrethe just said that she celebrated her fiftieth birthday here. Yesterday I celebrated my daughter's birthday here, but she was not here.

Because of that, and because sometimes I am away from them, it is very important to explain to them what I do, the importance of what I do. I basically just tell them it is all about fair play. When they are playing with their friends, everyone tries their best, and the game has to be equal for everyone; if anyone wants to join them in the game, they should be able to join and they should be invited to play.

I think that is also a very sensitive subject because I have two daughters and I also want them to have equal opportunity to achieve whatever they want whenever they would like to.

FIONA SCHAEFFER: That is wonderful. How old did your daughter turn?

ANDREA MARVÁN SALTIEL: Eight. I had to run yesterday to buy a birthday gift because I can't go home without a birthday gift. She turned eight, and she is my older one. My younger one is five.

FIONA SCHAEFFER: That's wonderful. My boys are eighteen and sixteen, a little older than yours.

ANDREA MARVÁN SALTIEL: I'm afraid of the teenage stage.

FIONA SCHAEFFER: Lina, when Jillian and I were baby antitrust lawyers, we looked around the room and we did not see many people like us. I think we still have some way to go, but I am really pleased to see a very different room and a different composition of the enforcement community than I did starting out almost thirty years ago.

Tell us what drives you to make antitrust and consumer protection more accessible to the public, and what steps you are taking to break down the silos between competition and consumer protection and increase the impact of the cases you are bringing.

LINA KAHN: I got my start through this quirky backdoor in antitrust as a business reporter and business journalist.

One of my first assignments was to go understand how poultry farming worked in America. Through that work I really saw firsthand how markets where you have enormous amounts of consolidated power, where you have gatekeepers that are determining whether farmers can make a livelihood, really can undermine people's experience of whether they are really living in a free society.

This was one of the original insights leading up to the passage of the antitrust laws. One of the lawmakers said, "If we won't stand for a monarch, we shouldn't stand for an autocrat of trade," and there was a recognition that, if you really believed in having a free, open society that you need to have open, fair, competitive markets.

So, I view the antitrust enforcement work that we all do as just so essential for the American experiment, and one of the great honors and privileges of this job is actually getting to go out to speak to people and understand what is their experience of our economy, what is their experience of markets.

Unfortunately, all too often people do feel like they cannot get a real fair shake, be it because they have to drive a hundred miles to go to a hospital instead of five miles because there was a merger that then led a hospital to shut down; whether it is because people are not able to afford life-saving medicine for their kids because they are seeing Big Pharma companies engage in certain types of monopolistic practices—be it an entrepreneur who has a breakthrough idea but cannot fully enter the market because some of the monopolists are muscling him out, or a worker who has a great job opportunity but is not able to switch because of a non-compete clause.

These are real problems that real people face, and we have an obligation to use the laws that Congress has passed to really make sure we are fully protecting the American people from these anticompetitive practices.

JILLIAN CHARLES: Jonathan, you have also spoken about the need to democratize antitrust. Why is that important to you and how do you go about executing your vision of making antitrust about and for the people?

JONATHAN KANTER: First, thank you for having me. It is extraordinary to be here with such an esteemed group of people.

One of the things that you will probably notice throughout our discussion today is the genuine back-and-forth among all the panelists because the level of friendship and coordination among our fellow enforcers is authentic. It is something that has been built through collaboration, through discussion, and through shared values. So, I hope that the sense of genuine respect that we feel up here is something that hopefully you can sense out there.

I think all of this comes full circle, certainly for me. I was thinking in preparation for today about my experience as a child growing up in a blue-collar neighborhood in New York. I grew up around plumbers and police officers, my parents were teachers, and people who worked really hard. It was a community of people from all over the world.

I remember thinking to myself, and a value that I realized early on, was what we like to call the American dream. I would ride by a store, a corner shop, that was started by someone who was first generation in our country, and that was freedom, that was the ability to start your own business and succeed and build for yourself and for future generations. I would see people, and I longed one day to have my own home that I owned with a garage and a driveway, which in New York was not so common, and home ownership was freedom. It was control over your own destiny.

What I have seen and what I have witnessed is that, as concentration of power emerges, that opportunity—the opportunity to have control over your own life, your own destiny, to start your own business, to succeed—starts to wither away.

I came to the realization throughout my career that antitrust should be a part of that solution, not part of that problem. That is certainly what led me to where I am today and to be sitting here with this incredible group of people.

I think the way to make sure that antitrust works for people is to engage with people, to go back to those core values, and say we are not about just numbers on a spreadsheet or grayed-out triangles. We are about that first-generation American who wants to start a business and succeed and provide for their family, someone who wants a path to upward mobility, someone who wants to be educated and thrive, or someone who just wants to work really hard and be paid a fair wage in response.

I have had experiences where I had the opportunity to talk to farmers in rural America, sitting down with them and talking to them about their experiences in their communities. That might mean, not just the destruction of the family farm, but what the destruction of the family farm means for the local bookstore, the local pharmacy, the local hospital, and the local grocery store. These are communities that are crumbling because people cannot build and sustain small businesses and people do not feel like they have control over their own destiny.

The views of these people are sophisticated. They understand what is happening. They might use different words than have traditionally been used in this forum, but they get it. We have an obligation to ask them, and we have an obligation to listen.

FIONA SCHAEFFER: Thank you, Jonathan.

We want to move on to enforcement philosophy, and I want to start with you, Lina. You have extensively written and spoken about underenforcement of the antitrust laws over the past thirty years. You said that we radically veered off-course during the Reagan Administration and we are now living with the consequences.

In your time leading the FTC, which cases do you think are emblematic of the change you have been seeking?

LINA KHAN: I would say there are three primary principles that have informed our approach to enforcement.

One, and the absolute most important, is fidelity to the law—fidelity to the law that Congress wrote, fidelity to the precedent on the books. Across our work at the agency—be it the lawsuits we are filing, the Merger Guidelines we published with DOJ, the rulemakings we are promulgating—we are taking a candid, honest look at what are the authorities Congress has given us and what

are the obligations that we have that we need to faithfully discharge to make sure we are fulfilling our congressional obligation. That informs our work across the board.

The second is making sure that we are being faithful to commercial realities and that we are enforcing the law in a way that is fit for purpose in the year 2024. That means updating assumptions where we need to, updating theories, and really not relying on outdated assumptions and theories that are clearly contravened by what we are seeing with our own eyes, with what people in the business world are telling us, with what market participants are telling us. So again, across our work—be it our lawsuits in digital markets, our lawsuits focused on things like rollup strategies—we are making sure that our enforcement work is responding to the business strategies and the tactics that we see today.

The third would be making sure that we are really engaging with the public. We have the honor of being public servants, we serve the public, and so making sure there is that constant dialogue, not just sharing with the public what we are doing, but, as Jonathan noted, listening to them, understanding what are the biggest pain points that they see. That is absolutely essential and really informs how we go about our work and how we set priorities, how we decide to devote really scarce resources, wanting to make sure that we are making the biggest impact and affecting the biggest pain points for the American people.

JILLIAN CHARLES: I am going to direct this question to Margrethe. The European Union has led the evolution of competition law in a number of areas, at least certainly from my vantage point, in Big Tech, vertical mergers, sustainability especially, and artificial intelligence (AI). To what extent are your enforcement efforts driven by a genuinely new philosophy on both sides of the Atlantic? Is there something new going on or is this more of the same?

MARGRETHE VESTAGER: To some degree everything is new, but it is all about competition. I think that is the constant.

When we in Europe got our competition laws, they were inspired by the Sherman Act of the United States. I think there is a constant: it is about competition, how to make that driver in our society be efficient.

But of course, everything is new—technology, business practices, market dynamics—everything is constantly changing and the speed of that is increasing. I hope we will have some time also to discuss AI because what we have seen for the last ten years—business development, new market dynamics, network effects, marginal cost approaching zero—all of that may come on steroids with AI. So, I think it is really important to have that constant focus on how to enable competition and make sure that it is thriving in those changing environments, and I think you see that in everything we do.

If you look at our abuse-of-dominance cases, we see new behavior and we also label them in new ways. We have these cases of disparagement of competitors' products, our pharma cases, which is a new type of cases. The most recent cases that we have had there—sort of exploitative conduct by platforms—is also a new thing, but it reflects the same wish to make sure that competition is thriving under these new circumstances.

The *Apple App Store* case, where we fined Apple €1.84 billion just a month ago, I think is a good illustration of this because we found that users have been deprived of key information about potentially cheaper offers. You know it is a complex case, but it is a simple idea—that as a consumer you ought to have choice and you need to have key information in order to exercise that choice.

When you look at mergers, I think you see the same. We interfered in the *Meta/Kustomer* case, and we took remedies in the *Google/Fitbit* case. I think we are converging quite a lot in this area of nonhorizontal/sometimes-vertical-elements of conglomerate cases. There is a strong sense of convergence with colleagues here. That could be in the *Illumina/GRAIL* case; that could be in *Booking/eTraveli*; we have the second-phase investigation that ended with abandonment of *Adobe/Figma*; *Amazon/iRobot.* I think in all of that you see changes, but the basics are very much the same because without competition there would be no consumer welfare.

Maybe just one word on *Illumina/GRAIL* because this has been a saga, multidimensional.

FIONA SCHAEFFER: And it is not over.

MARGRETE VESTAGER: And it is not over, but as of today it may be over sooner than otherwise because we have actually today approved the divestment plans by Illumina of GRAIL, plans that will ensure that GRAIL is viable and independent again. I think it reflects very, very good cooperation because we have our decision, our case work, we have the FTC's successes here, and I think that is a good sign that we can push things.

Before I close, maybe just one remark on the evolving discussion about consumer welfare. For us, consumer welfare was never just about price. Consumer welfare must be about choice, must be also about quality, must be about innovation in the marketplace, and you will have none of that without having competition in the marketplace.

I think it comes together, and I think we have been converging very, very much over these years in a way that I think makes it simpler for the business community actually to navigate because you will be met with more or less the same approach everywhere.

FIONA SCHAEFFER: Andrea, has there been a similar switch in your priorities or developments of COFECE's priorities, and do you consider yourself more like the European Union or the United States or something different altogether?

ANDREA MARVÁN SALTIEL: I would say a mix of something different and in particular, given that we all gave a little bit of context of our competition law, I think it is important to give a little bit of context of the Mexican competition law and our history.

Our Mexican competition law was enacted thirty years ago, and it was enacted in the context of the negotiation of the free trade agreement with the United States and Canada. That was when competition law and its enforcement actually was born in Mexico. You could see that it was there to guarantee that there was actually the certainty and free trade for companies. It is different from the context when the FTC was created because it was not there to break up monopolies.

I think that we are at a point now where the view, with which I completely agree, is that competition law is not only there to guarantee investment and certainty, but it has to be there to guarantee access to competition; to guarantee, as I mentioned in the first question, that there is fair play; that if there are big monopolies that are breaching competition law, we have to go and sanction them; and we have to have strong enforcement.

So, I think our views are similar, I would say, but you also have to look at it from the Mexican economy point of view, which operates differently than the European or the American economy. We have very high levels of market concentration. We have studies that show that the lack of competition makes the poorest households in Mexico pay a lot more than what they should have if there was competition.

We also have a big sector of our economy that is still an informal economy, which is also different from the European and the American perspective. In Mexico, about 50 percent of people who engage in the economy are not part of the formal economy. So, our priorities have to focus first on what matters to the population.

How are you going to get a population to have access to more and better-quality goods and services and to stop paying overprices because they are paying overprices? How are you going to break barriers to competition in order to allow more competitors? We have logistical problems in Mexico and the costs of inputs are also very high.

So, I think that is where we are focusing. We are focusing on the population. I will speak a little bit about what we are doing later, but we are focusing on the population, we are focusing on how to break barriers to competition, how to lower the inputs of logistics. Keeping that in mind, I would say our approach has three main pillars.

First, we have to focus our enforcement and our advocacy efforts in the sectors that significantly impact households, such as food, energy, transportation, cost of living, financial services, and healthcare. If you look at our investigations, that is basically where we are standing. We have ongoing investigations related to the financial sector, to the healthcare and medicine sector, to construction, and even to entertainment, which is a big part of people's lives.

I think also an important part of our enforcement is, if you look at our abuse-of-dominance or monopolization cases, most of the cases historically in Mexico were settled, so they did not reach a final decision, and there is nothing wrong with that. But now we are seeing stronger enforcement action and investigation action where our abuse-of-dominance cases are reaching the second stage and we will have a decision from the court pretty soon. I think that is also an important shift that I have to mention.

Given the aspect of, as I was mentioning, the context of the Mexican economy, which is different, we have to keep our focus on traditional markets but also look at more dynamic markets, such as the digital markets. If you look at our case law, that is where we are.

In the case of abuse of dominance, we have three investigations related to digital, but we also have investigations related to medical oxygen, to the electricity sector, and to supermarkets and groceries, which are essential so that people can go and buy at good prices goods and services.

The second pillar of our enforcement is—and this connects a little bit to what we were saying at the beginning—trying to convey the message that competition policy matters and that it should matter. It has to matter to this wonderful community of enforcers and practitioners, but it has to matter to the people.

So we have to take action, and we are taking a lot of action, to engage with state governments, which is something that we have never done before, and to engage with chambers of commerce. We recently signed an agreement to collaborate and exchange relevant information to see where there is a lack of competition or problems for small businesses. We signed an agreement with the Confederation of Chambers of Commerce and Services, which encompasses about 50 percent of the formal economy in Mexico.

Our third pillar is strong and stronger enforcement. We have done a lot over the years, and we have brought very important cartel and sanction cases, but we have to do more.

Under our competition law—and this is something that I have personally advocated for—we have the power to file collective actions against those companies that have breached competition law. We are concurrently working on the first case where COFECE is going to file the first collective action in order to help consumers get their money back for the breach of competition law.

Secondly, in order to have stronger enforcement, we have the power to start criminal actions in cartel cases. COFECE had only done that twice in ten years, and I am very happy that has now been renewed. Last week, the head of our investigative authority filed a criminal case for the first time in five years.

We want to make sure we are going to be bringing more cases. When we consider that there is also a criminal violation, not just a violation of the competition statute, then we are going to be bringing those cases.

JILLIAN CHARLES: Let's turn to the activity within the U.S. states. Gwendolyn, we observe that the states have been a laboratory of democracy with various new legislation. How would you describe what is going on with respect to antitrust developments at the state level?

GWENDOLYN COOLEY: I assume you are asking about legislation. The state legislatures, as I have heard on many panels, are very inventive. I would say for antitrust there are essentially five buckets of antitrust statutes that we are seeing.

Antitrust improvement statutes: Those are increasing penalties that have not been increased since the 1960s or 1970s. Washington State has one now that has $7,500 maximum liability for each violation, which, if you are talking about a prescription drug case, can get very expensive.

We are trying to correct for some unfortunate decisions, so some states are enacting explicit disgorgement authority, which I am sure you will be happy to hear. Maine, for example, has enacted one of those.

Some states have gotten antitrust improvements through expanding their offices because, as we know, many hands make light work. For example, California is likely to have about fifty antitrust attorneys—full employment for everyone in this room.

We have now three states that have considered abuse-of-dominance statutes: New York's 21st Century Act did not pass, which had a 30 percent threshold; Minnesota has a lower threshold, 20 percent, but that also has not passed; and Maine considered but did not pass an abuse-of-dominance statute with a 60 percent threshold.

I think the question is going to be, not whether one of these gets passed—I expect that one of these types of statutes will get passed in the next few years, maybe in the next five years—but I think the question will be what the threshold will be.

"Right to repair" is a super-important issue. I literally had, for the entire of March, a broken tractor sitting in my front lawn that we could not get repaired—not that I could have repaired it anyway. Right to repair is very important. Many states have considered it. Colorado in particular has really done a lot of good work on that.

Hart-Scott-Rodino (HSR) notice is extremely important. We appreciate the work that you guys are doing on that. The states are not going away, so thank you to those of you who have been providing voluntary notice to us. I really have seen improvements in that over the twenty years of service I have given to the people of the State of Wisconsin, but there is more to do.

And then there are some fun one-off bills. One is in Florida dealing with that kind of intractable problem of the company called Ticketmaster, where they are considering a bill that would have no exclusive contracts for ticket providers of venues that have received tax money and also allows for artists' ticket provider choice of venues.

So, we are seeing creativity at the legislative level, and particularly in those areas where we are not seeing action down the street.

JILLIAN CHARLES: All right, the states are not going away.

GWENDOLYN COOLEY: We are not going away.

JILLIAN CHARLES: Quotable quote.

FIONA SCHAEFFER: For Jonathan and Lina, both of your agencies have made waves with high-profile cases that there is a perception in our community that this is really about a major in Big Tech, a minor in pharmaceuticals and healthcare, and other industries do not really make the grade. Is that a fair characterization? In the interest of time, you could answer just "yes," or "no," but a brief response would be great too.

JONATHAN KANTER: A big fat no. I think there are a few airlines that would beg to differ with that characterization. [Laughter]

I think we are handling everything, I would say, from the highest tech companies to lettuce, which the last time I checked is pretty low-tech, and everything in between. We have brought cases involving airlines, food, ocean shipping, wall panels; but also high-tech cases and healthcare as well. I think, if you look at our body of work, it covers the entire waterfront from high-tech fruits to low-tech vegetables.

FIONA SCHAEFFER: And everything in between.

JONATHAN KANTER: Everything in between.

FIONA SCHAEFFER: Lina?

LINA KHAN: Yeah, look, it is always good to look at the actual facts rather than go off of vibes. If you look at the FTC's portfolio, we have taken on semiconductor mergers and mergers in the defense industry. One of the first conduct cases we filed after I joined was looking at the pesticide industry and the way that these two pesticide giants have engaged in pay-to-block schemes that deprive farmers of access to more affordable pesticides.

Anybody can go on our website where we list all of our matters and get a more accurate sense of what we are working on. It really responds to the gamut of the markets that we cover—including healthcare, because that is an especially big pain point for people—but there was a big grocery merger that was challenged earlier this year, the right-to-repair work, and non-compete work. We are really addressing the pain points that affect people's lives, which again include healthcare and digital but way, way beyond that.

FIONA SCHAEFFER: Thank you, Lina.

Why don't we move on to mergers in the interest of time, Jillian?

JILLIAN CHARLES: Yes, sure thing.

Jonathan, I will start with you. You know those of us lawyers in the private sector are in the business of advising our clients and really making predictions, giving them a sense of what is going to happen next. Our job is to give reliable advice on antitrust risks and related timing so that the business can decide which transactions are worth pursuing beyond the boardroom in a really sensible way.

That job has gotten harder in some ways. One of the ways is related to some of what we saw in the new Merger Guidelines that caught everyone's attention, and it is the presumption that transactions resulting in post-merger shares of 30 percent or more are unlawful. Many transactions are likely to trigger this presumption, but if the past is prologue, only a fraction of the deals reported to the agencies ultimately will be challenged.

Which factors drive your decision to investigate or ultimately challenge a transaction at the 30 percent level and what role do you believe economic analysis should play in those decisions?

JONATHAN KANTER: There is a lot embedded in there. I will not challenge all those assumptions, but I will start by saying that we are a law enforcement agency, and we enforce the law. Our client is the public and we want to make sure that we are protecting the interests of our client.

I will give you clarity. We will block illegal mergers. That is clear. [Laughter]

But presumptions have been part of our law for a very long time. There is nothing new in the Merger Guidelines in terms of presumptions. They all come from the law.

There have been folks in our community who have overlooked legal precedents, who have overlooked the applicability of the law. In one of the FTC's recent cases, a company tried to suggest that the presumptions from *Philadelphia National Bank* were no longer valid; the court disagreed because the Supreme Court precedent controls. This came up in some of the healthcare cases a number of years ago regarding efficiencies.

There are people on the fringe of academia who say that *Brown Shoe* is no longer binding precedent, but I think every lawyer here would be hard pressed to submit a brief on an antitrust case, let alone an antitrust merger case, that did not cite *Brown Shoe*.

The fact of the matter is we wrote our Guidelines to reflect the state of the law, the state of sound cutting-edge economics, and industry expertise. We cite to cases, we cite to binding precedent, and we lay out very clearly the kinds of issues we are going to look at.

The fact of the matter, though, is not every situation presents itself the same way. Some industries have different market realities, and so, rather than starting with formalistic questions—like "Is this horizontal or is this vertical?"—we start with the question: How does competition work in this market and is the merger going to reduce competition?

In my experience, most companies know, and know in their heart of hearts, whether a merger is going to reduce competition or not. If you start with that foundational question and you focus on the facts, I think it is often quite clear.

FIONA SCHAEFFER: Lina, you have done a lot in the area of nascent competition and innovation. I am interested to know how you assess nascent competition when the prospects of the competitor are very uncertain.

It was interesting to see the *Sanofi/Maze Therapeutics* case. In that case you took a drug that was in Phase II and viewed it as potentially viable, sufficiently viable for there to be a competitive problem. We were used to seeing that analysis applied only at Phase III previously. Is this a new standard for innovation analysis in pharma only or are you looking at that more broadly; and is the standard different for dominant companies versus nondominant; the same kind of question for potential competition, how potential is actionable?

LINA KHAN: We always look at the specific facts to understand what is really happening here. In the *Sanofi/Maze* instance, you had Sanofi with an effective FDA-granted monopoly on the treatment for Pompe disease.

Pompe disease is this really awful kind of muscle degenerative condition that kicks in for people oftentimes when they are very young, and so people are reliant on these drugs to live a normal healthy life. The treatment that Sanofi has requires biweekly IV infusions and an average course of treatment could cost somewhere around $750,000 a year.

Maze had underway a treatment that could be taken orally twice a day and potentially save people thousands of dollars in addition to time and hassle, so a real promising innovative drug in the pipeline; and you have a company, Sanofi, which currently has a monopoly, that is trying to get an exclusive license to that innovative drug in the pipeline.

In that type of situation, where you literally have a monopolist trying to buy out one of the most promising treatments in development, that is of course going to raise major concern. If you have a situation instead where you have a lot of different therapeutic indications on the market for a particular drug, that could look different.

I know sometimes people also make the argument that oftentimes you need these types of acquisitions for commercialization, and absolutely we can understand sometimes you have to have that commercialization chain play out.

The bottom line is do not sell to the monopolist, and that is what we saw ending up happening in the *Sanofi/Maze* instance, where the one entity with a huge interest in continuing to monetize this drug would have felt threatened by this innovative drug in the pipeline, and so it seemed like a pretty important case for us to be bringing.

Across the board we are going to be looking at factors like: What else is in the market? What else is underway? And really, what are the stakes of getting this wrong? When you have people having to pay $750,000 a year for an essential drug, and when there is something in the market that could actually transform their lives, that is really high stakes. As the Federal Trade Commission enforcers are looking to serve the public, those are the types of matters that we absolutely think are critical to be bringing.

JILLIAN CHARLES: This question is for you, Andrea. There is a perception, at least amongst some of us in the private bar, that the review process in Mexico is taking longer for deals than even for those where we are making very technical filings. First of all, I don't know if you agree with that. You might actually have the data that might correct this perception, so you certainly can do that.

But to the extent there is that perception—and sometimes people like to say perception is reality a little bit—maybe you can talk some about what COFECE is doing to manage that and whether or not the fast-track procedure is getting used enough. And maybe the pathway to the answer is there is a perception there and maybe there is some data to correct it.

ANDREA MARVÁN SALTIEL: Yes, thank you. As my colleagues were saying, it is always good to go to the facts and to the data. I am very happy to share them, and I will give you the data in just a second.

I also want to mention we are adopting a rigorous analysis of mergers, but also, we want to give certainty to practitioners into what we are going to look at, how we are going to look at it, and how much time we are going to take to look at it.

For mergers that do not present a risk or a problem, we have the full intention—and I think we are working on this and I will give you the numbers—to resolve it very fast whenever there is not a potential risk. However, when there are doubts, we will carefully look at these mergers.

Just to go to the numbers, during 2023, in which we received about 150 merger filings, 80 percent of the transactions raised no doubts or no concerns at all, and we adopted that decision in about fifteen business days. That is three weeks. I would say that is pretty quick.

In those cases where we had to look a little bit more at them and make a more in-depth analysis, the final resolution was adopted in thirty-one business days. That is two months. I would say that is not bad. It does not take that long.

When you look at some of the ratings that are out there done by reporters and part of the competition community, the average length of an in-depth merger review in Mexico is quite similar to the timeframe of other jurisdictions, such as the United Kingdom and et cetera. However, I do not want this to be interpreted as that we are not listening to that perception. We want to give certainty and do a quick merger analysis whenever there is not a problem.

However, there is also a statement I would like to make here. We are also taking action against those companies who should have filed the merger and they did not do it, even though the merger does not represent a risk in itself.

In the past two years, we have opened eleven proceedings against companies that were legally obligated to notify a merger and failed to do so or decided to close a merger before the transaction was authorized. Again, even if these mergers did not represent a risk to the market, we want the companies out there to know that they have to come to us. We are making efforts, and I think our numbers show that we are resolving the merger cases very quickly, but they still have to come to us whenever the thresholds are met.

As I mentioned, we are taking a good look at mergers that might represent a problem. For the first time in almost five years, a couple of months ago we objected to a merger. I will not talk about this a lot, but we also recently conditioned a very big merger that was worth about $6.5 billion to remedies regarding the purchase of electricity plants.

So, we are looking at mergers, we are taking a stance on remedies or objecting, and whenever there is not a problem, we will resolve it very quickly. I hope that changes the current perception.

JILLIAN CHARLES: And maybe encourage folks to use the fast-track approach.

FIONA SCHAEFFER: Margrethe, unlike the United States where our jurisdictional thresholds for mergers are very low and we are constantly submitting these very boring technical filings, in the European Commission in Brussels, your jurisdiction is a lot more limited in merger review. You have tried to expand that jurisdiction using the Dutch Clause, and we see in the current opinion of the Advocate General that may be a challenging path for you to proceed on going forward. We will see how the *Illumina/GRAIL* opinion turns out. But do you think it is time to take a new look at the EU Merger Regulation (EUMR) and expand your jurisdictional scope?

MARGRETHE VESTAGER: No. I should elaborate a bit.

First, for perspective, a very long time ago we changed our threshold and what we found was that you would have a lot of work to do in notifying and we would have a lot of work to do in figuring out where to find the cases where an intervention may be needed. So, we discarded that idea. We did not really see that it was working.

Second, we have well-functioning merger regulation. We do not call it the "Dutch Clause" because that makes you think about the Dutch sandwich, which used to be a tax evasion tool. We do not like that, and the Dutch do not like either, so we talk about Article 22.

Article 22 is actually a tool for the Member States to be able to notify to us things that they think we should look at. It is not the Commission sitting and saying, "We want that, we want that, and we want that." It is everything but a power grab from the Commission side. Member States need to know that this is serious business and there is something at stake.

The third element is there needs to be something at stake. We can only actually accept a referral from Member States, notifiable in Member States or not notifiable in Member States, if trade between Member States is affected and/or if there is a significant threat to competition; otherwise, we cannot take it.

So far, we have had three cases, including *Illumina/GRAIL*, so I think that this is a very measured, qualified response to something that could otherwise be a huge administrative burden.

I think we have an obligation to do so, and I think we have an obligation to keep track of what happens in the marketplace because when we look at entrenched market power and how that can be protected, if we cannot see relevant mergers, of course we have a responsibility to take action.

I think everybody in our part of the world has read the Advocate General's opinion. It is not the final judgment. Of course, we are looking forward to getting that. But as I see it, it is measured, it is effective, and it is anything but a bureaucratic grasp of power.

JILLIAN CHARLES: We'll see how that works out in the United States.

Let's double click on this idea that the states are not going away. The states are in fact using the State Antitrust Venue Act to challenge mergers in their own right, and there also seems to be a trend of the states to use a mini-HSR Act, which you mentioned earlier.

How do you choose which cases merit the use of your limited resources? As the states begin to act more independently in their own right, how do you choose where you are going to put your time, which ones are you going to bring? What do you focus on when it comes to merger challenges?

GWENDOLYN COOLEY: First of all, let's give the State Antitrust Enforcement Venue Act a nickname starting now, SAEVA, because we are going to be talking about that probably forever.

What SAEVA says is that states get a chance to bring a case in the venue of our choosing, like my friends up here. That is all it says.

States are using that to challenge mergers in state courts and in federal courts in their jurisdictions they are using it for conduct cases. Every Friday at 11 o'clock I host Antitrust 101 for state antitrust enforcers.

Today's case—I won't make you stand up and recite the holding or the facts—is going to be California v. American Stores. Jonathan talked about how important it is to read the cases, and that is what the states are doing. California v. American Stores says that states have the authority to bring challenges to mergers that have a nationwide effect.

As to where we are going to decide to put our resources, we decide to bring cases based on what affects the needs of our constituents, our citizens. We are really concerned.

I am not on the Albertsons/Kroger's case, just for clarity. If you think about it, I cannot think of anything that is more fundamental than bringing a case related to grocery stores. Every person in this room eats. Every person in this room—even I, who grow a lot of my own food—gets food from the grocery store. So, if you are thinking about where to put your resources, that seems to be a pretty good place.

JONATHAN KANTER: You are going to save a competition.

GWENDOLYN COOLEY: "Save a competition"—I love that.

FIONA SCHAEFFER: Let's move on to conduct. This is a question for Jonathan and for Lina.

Jonathan, firstly, from the outside looking in we are seeing fewer international cartel investigations than a decade ago and you seem more focused on domestic cartels—government procurement and certainly the employee no-poach agreements. First of all, is that an accurate assessment; and what is the right balance do you think between domestic and international cartel prosecutions; and in a world where leniency does not seem as attractive as it used to be, are you using AI to go out and find cartels on your own?

JONATHAN KANTER: Wow, there is a lot in there! Again, I am not sure I would buy into the assumptions there.

But let's start with the fact that antitrust is law enforcement. We follow the facts and the law. If there are criminals who are part of an international cartel, we take action and we investigate it. If there are criminals who are part of a domestic cartel, we take action and investigate. I think we have a historic number of open Grand Jury investigations that cover the waterfront and cover the waterfronts over the ocean. We are bringing cases across the entire continuum.

We are investing heavily in detection tools, and we are using technology ourselves and we are using other sources and methods to make sure that we are proactively detecting antitrust crimes.

Leniency is still a very important part of our program, but we are not solely relying on leniency as our source for case generation.

FIONA SCHAEFFER: Lina, as we were chatting before this panel Jonathan was telling me they have a dedicated grant of $45 million to invest in AI as a tool for detection and also challenging anticompetitive conduct. How are you incorporating AI in your enforcement efforts, and do you have a similar budget for bringing in the robots to help you?

LINA KHAN: Not enough. We always welcome additional support from Congress. We have been lucky these last few years to have gotten some resource increases.

We have invested in those in a variety of ways, one of which was to create a new Office of Technology. We have been able to hire data scientists, data engineers, AI experts, technologists who can really embed across our enforcement teams, sit down alongside the economists and the lawyers, look under the hood, and understand how these firms are actually doing business, how these algorithms are actually working.

We have already had lawsuits where we have counts in parts of the complaint that we only were able to pursue because we had technologists as part of our team who were able to decipher and figure out what some of these algorithms were doing. So, it is already paying off. We have a small team of technologists, but they really punch above their weight and are ensuring that across the board the agency is able to fully ferret out lawbreaking even if it is being pursued through more sophisticated algorithmic tools.

We have been very clear that there is no AI exemption from the laws on the books. We sometimes see at these moments of new technologies and new tools efforts by businesses to try to kind of dazzle policymakers and say, "Look, this is so new, it is so novel, it is so shiny, of course these traditional rules and laws are not fit for purpose."

But absolutely there is no exemption from the laws prohibiting collusion, the laws prohibiting price fixing, the laws prohibiting monopolization, the laws prohibiting fraud, and so if any of those practices are being pursued, be it through algorithms or without algorithms, the FTC is going to take action, and we are looking forward to continuing to build out our technological expertise across the agency to make sure we can fully do that.

FIONA SCHAEFFER: I also wanted to ask you about privacy. We do not have a federal privacy law, and maybe we never will, so in its absence the states have taken the spotlight in privacy policy and enforcement. How do you view your role at the FTC and your leadership in addressing consumer privacy?

LINA KHAN: First of all, I really commend the states for playing such an active role. Given the continued digitization across the economy, privacy is really fundamental, and making sure that people are not being subjected to data abuse, that people are not having to surrender to endless surveillance just to use basic services that are essential for navigating day-to-life, is absolutely critical.

I have been really pleased with the whole set of progress we have been able to make in our data privacy work. We have current litigation underway against a data broker called Kochava and, even though that litigation is ongoing, we already got from the judge a really favorable opinion that makes clear that invasions of privacy can constitute injury under Section 5 of the FTC Act. This is a really important development because what it basically means is you do not have to go out and show some second-order or third-order harm that occurred through your data being taken; the invasion of privacy itself is injury. That is a really important development in the law itself.

Beyond that, the FTC has been really active in making clear that, especially when we are talking about sensitive data—this includes health data, this includes geolocation data that can reveal your precise location, this can involve browsing data, which websites you are visiting—that can reveal an enormous amount about a person. With these categories of sensitive data there has to be a default presumption against selling this data or against sharing this data. Unless companies are affirmatively getting permission from users to sell this sensitive data or share this sensitive data they cannot as a default matter do that.

That has been a really important advance across our data privacy work to explain what this new default is as well as have having some of the wind at our backs of the Kochava ruling relating to standalone violations of privacy constituting injury.

FIONA SCHAEFFER: Just a brief follow-up question on that. If there ever were federal legislation that created a privacy bureau, would you make a pitch for that bureau to belong at the FTC? That could be a yes-or-no answer.

LINA KHAN: The FTC has decades of privacy enforcement experience, and so we think that would be very appropriate.

JILLIAN CHARLES: Gwendolyn, last year on this stage you announced the formation of the states' working group related to criminal enforcement. Where does that stand and what should we expect to see from the states in this arena?

GWENDOLYN COOLEY: Thank you. Recently my friends in California made some news by reminding everyone that they have criminal enforcement authority. I don't know why that surprised everyone. Forty-four states have some form of criminal enforcement authority.

Like you said, last year I announced the BRACE Committee that is working with your Procurement Collusion Strike Force. We are taking a comprehensive look at industries, particularly those industries that deal with the state governments, to make sure that we are staying on top of bid rigging and things like that. To make sure that we have the tools, in the same way that Antitrust 101 makes sure people understand the antitrust laws, we are making sure that people have the tools to know how to do criminal enforcement of the antitrust laws.

It has been a year since the committee was formed. Obviously, criminal investigations take a long time, which I'm sure gives you great comfort. I expect to see more of this in the coming year. We are very interested in making sure that we are on top of bid rigging in our states.

FIONA SCHAEFFER: I want to move to a topic that is near and dear to my heart because I do have kids and worry about a sustainable future. Margrethe, I first of all want to commend you for being one of the first to introduce a soft safe harbor in the new horizontal block exemptions that provide for sustainability agreements to get a safe harbor.

How has the business community reacted, what are you doing to prevent greenwashing, and do you think your policy and your safe harbor can be effective without equivalent action from jurisdictions like the United States?

MARGRETHE VESTAGER: First, let me underline what Lina just said. I think there is also a sense of convergence now. In Europe we have the privilege of having Europe-wide privacy laws, and that of course helps a lot.

But exactly on the point of getting data right, because obviously we see that more and more as an additional barrier to access in a number of markets—if you cannot access data, you cannot enter that market—also, the buildup of our own competences with the Chief Technology Officer, with horizontal resources to help out the case teams to get it right with technology tools.

Of course, I think every jurisdiction has had it for years, but building on our experience and getting more and more advanced I think is absolutely crucial and that we share experiences and insights as to how we can do that in the best possible way, because otherwise we will lose our efficiency as enforcers.

You know, sometimes if you take back, let's say, 20 terabytes of data, that is so much paper it is not humanly possible to go through it. Obviously, you need AI to help you find the patterns, find the smoking gun, in all of that. I think we are really on it. We have resources to do this. I think that is another common denominator.

I also want to underline the points about potential competition because we see that as well. We can see that in the situation where there is a parallel pipeline where there is a risk of losing one of the drugs in one of the pipelines. It is very important for us that both drugs have a fair chance of making it in the marketplace. It can also be that someone is trying to buy up what is actually quite early on in the discovery process but that is promising.

I think very much we have the same approach because if we lose competition in the pharmaceutical sector a lot of people will suffer from this, and also because access to affordable medicine is absolutely key for minimizing inequality in health.

And then, getting to what you asked about, I have my first grandchild and that has made me realize that I will know someone who will live in the year 2100. So, all of a sudden, it is not far away.

My fear is that businesses cooperating on sustainability is as far away because we have organized ourselves to make sure that businesses can see what they can do and what they cannot do in order to cooperate when we have real sustainability objectives. For instance, we sign up as

businesses for the Paris Agreement targets. In order to make that happen, we can indeed give a safe harbor; we can make sure that they can go ahead and do it.

We have guidelines ready. They were ready last summer. I have talked about this a gazillion times. Have we had any response to that? No. None.

And we are not afraid of greenwashing. The European Parliament just passed legislation to eradicate greenwashing because trust is absolutely essential. We have the guidelines to enable a safe harbor if you really want to do sustainability cooperation. We have the framework to make sure that this is not greenwashing so that consumers can trust that this is for real.

I think it is important and I think we all share that drive to see, if at all possible without disabling competition, competition law enforcement can enable sustainability because we are all in this struggle of implementing our promises of fighting climate change.

I only have one concern so to speak both when it comes to sustainability and creating prosperity when pursuing sustainability and when it comes to the geopolitics and the industrial politics of these years: never ever disable competition. Whatever subsidy you see being handed out, if you do not have competition as the driver, the risk is of course that those subsidies will be used for anything, but we need to make sure that you get there to deliver what the market would otherwise not deliver.

So, we are really doing what we can and we are really hoping for strong business take-up of this because actually everybody should have a sense of urgency. Right now, we are not getting there when it comes to fighting climate change, and when that little boy now is in his sixties in the year 2100, he will look back and say, "Did you do what you could?" If not, you will not be on the nice list.

JILLIAN CHARLES: Jumping back to this side of the Atlantic, you know on the U.S. side the Department of Justice has withdrawn the safe harbors for competitor information exchange. At the same time businesses are facing—my sort of pet peeve—legal uncertainty involving how we act in the absence of guidelines with respect to AI and sustainability.

I don't remember whether it was Lina or Jonathan—maybe both of you—who said there is no exemption for sustainability, but so far, we do not have the guidelines on what is permissible. The absence of those guidelines builds the kind of uncertainty that makes it hard to advise clients on what to do.

Maybe we can talk about what guidelines we have that are usable for collaboration around sustainability and other matters and where we can find opportunities for competitors to collaborate in this area without acting as if they have a total exemption.

JONATHAN KANTER: Thanks for the question. I think it is important to unpack what we have done so far.

I think what you are referring to are the Healthcare Guidelines that would not affect areas like AI or some of the other points that you raised in your question. Those Healthcare Guidelines were written at a time when our healthcare system was dramatically different from what it is today and the kinds of problems we are confronting today are dramatically different. It included some things that may have made sense at a time when people shared information in Redweld folders and manila envelopes.

The idea, for example, that use of a third-party intermediary is something that makes harm to competition less likely is just not true in 2024. The fact of the matter is the use of intermediaries, especially intermediaries that have access to programmatic technology that can help coordinate

and fix prices, may make it worse. We are litigating a case like that right now in the agriculture space, but this is an issue our agencies are confronting in the real estate space and many others.

We have to start with market realities, and the market realities are that technology is now being used to reduce competition—it can be used to coordinate prices, it can be used to fix prices, it can be used to allocate markets—and if we are not recognizing those realities then I think we are not fulfilling our obligations as enforcers.

In terms of guidance, I guess I would take a step back and say Congress has provided guidance in the law and courts have interpreted the law and we have a rich history of antitrust cases in this country going back over a hundred years. To me that is the most applicable guidance.

There are a lot of really skilled lawyers in this room—I can look out and see that it is packed to standing room only—and many of those folks charge a lot of money because they are very intelligent and offer lots of services. I am confident that, with a close look at the law and the facts, companies and lawyers can figure out how to stay on the right side of the law.

LINA KHAN: The other thing I will add to that is it is the job of Congress to create exemptions to the antitrust laws; it is not the job of the U.S. antitrust enforcers to create exemptions to the antitrust laws.

Congress has in various cases created those exemptions. There is an exemption in the Clayton Act for labor and for workers to come together and organize. Congress made clear that it is not appropriate to use antitrust prosecution against workers who are trying to collectively organize and bargain. There is also the Capper-Volstead Act that makes clear that farmers in cooperatives are able to operate in certain ways. It is really the job of Congress to create those types of exemptions rather than our agencies.

We have made clear that there is no environmental, social, and governance (ESG) exemption to the antitrust laws. If we ever hear an argument that "We recognize this merger raises legal concern, but we are going to make all these ESG commitments," that is just not something that we are able to honor under the existing law. If there is interest or desire in the business community for those types of rules or exemptions, I really encourage you all to engage with Congress on that.

FIONA SCHAEFFER: Moving on, Andrea, over the past year your agency has had some landmark cases when prosecuting cartels as you mentioned earlier.

There has also been a noticeable shift toward new market investigations. You had one that opened up in 2023 and another this year. How has your agency approached these market investigations and can you briefly tell us what the results have been?

ANDREA MARVÁN SALTIEL: Yes, of course.

In 2014 COFECE was given the power to conduct market investigations and it has been a process during the years to find the investigations and our scope of action within these investigations.

Ultimately, the law states that, as a result of these investigations, we can do three things. First, we can make nonbinding regulatory recommendations whenever what we find in these investigations is that there is a barrier to competition caused by a regulation or a law.

But there are two other important actions that we can take. First, we can issue behavioral orders to companies or individuals telling them to refrain from doing something or obliging them to start doing something different. Secondly, in more extreme cases we can order the divestiture of certain companies. This is just to give a little bit of context.

Right now, in ongoing investigations focusing, as I mentioned, on what matters most to the population and how to get them better-quality goods and services, we have two investigations related to transportation services.

The first one is related to land passenger transportation. I should mention that in Mexico the main form of transportation for the population is land, it is not flying. Flying is considered a luxury. When citizens travel from one state to another they use land transportation. So we are looking into that.

We are also looking at rail transportation. I mentioned that there was a logistics problem in Mexico, so we are also looking at barriers to competition in railroads. Finally, we have another investigation into the distribution and commercialization of corn flour.

Now I will talk briefly about a case that we brought last year regarding the credit card payment system. Again, some context is always, I think, important. In Mexico when you look at financial inclusion, the levels of financial inclusion are much lower than in similar economies, like Brazil for example.

When you look at the European Union, the commissions that are charged in Mexico when someone uses a credit card in a store are six times higher when compared to the European Union. Only 56 percent of the adult population in Mexico has access to some type of financial cards, so we must act and find what is going on in order to have more financial inclusion. It is too expensive for small businesses to accept credit cards because what the banks are charging every time that credit card is used inhibits using credit cards.

We had an investigation last year. What we found was that there were strong barriers to competition related to the payment systems. How is the system going? The credit card payment system or debit card payment system in Mexico was actually designed decades ago to incentivize players to start a payment system. The rules were designed that way decades ago.

This is a very different time. You have a lot of players who want to enter into the market, who want to participate in the market, and that will translate, as I mentioned, into more financial inclusion and into making it cheaper for small businesses to accept credit cards.

What we found out was, firstly, due to the logic of creating a card payment system, the regulation allowed for self-regulation, so the incumbents in the market get to decide when another participant is going to come in, how much it is going to cost, who is going to certify them, so they basically set the rules. It is not the financial regulators; it is the incumbents.

We said that is a very big problem and a barrier to competition. The regulation has to be changed in order for the regulators to be at least determining what are the general rules and give certainty and make it easier for other players to come into the market.

Another interesting aspect that we found is that the incumbent payment and settlement system providers—of which there are only two—are owned by the largest banks in Mexico. Some of them own one of the companies and the other one owns another of the companies. Again, these market investigations do not involve anticompetitive conduct, so they do not get to sanctions, but some red flags were clearly raised due to the risk of anticompetitive exchanges of information.

What we did apart from issuing recommendations to the financial regulators with whom we are working very closely—because it doesn't matter that we issue this market regulation; if the regulation doesn't change, then the market is not going to change and it is not going to get fixed—in order for them to adopt the changes necessary through the regulation is we also ordered the companies, especially the payment and the settlement system companies, or the providers to:

Firstly, they should install an independent competition compliance officer; now they have to do that; now they are compelled to do that. In addition, they need to adopt a very tailored and

detailed compliance program because it turns out that we do not know if they are compliant with the competition law.

Here, I would just like to make a point on compliance and why compliance is so important. Companies have to be responsible for the actions of their employees and their directors.

We had a case involving two very big supermarket chains in Mexico where the managers of two small stores that were located in very rural areas of Mexico colluded with corn or tortilla flour producers on how much a kilo of tortilla flour would cost. Of course, the top officials of the supermarket companies were not aware that the managers in these very small stores were actually colluding. But it didn't matter. The companies were sanctioned and the individuals were sanctioned. That is why compliance matters.

I hope I get a chance to talk briefly about another case we recently had when we talk about digital, but that is an overview of what we are doing with our market investigations.

FIONA SCHAEFFER: Thank you, Andrea.

Before we leave this topic, I just want to make a request on behalf of our children collectively, and that is this. We have been having a series of debates on sustainability in antitrust, first at Howard University, then in Tokyo, and finally at Oxford University.

At that debate we had someone join us from the Harvard Business School, Peter Tufano, who is a world-leading expert on financing for environmental transition and change, who told us we have approximately seven years left in our carbon budget after which, if we do not get below 1.5°C, there are going to be catastrophic effects. When he saw us debating things like an antitrust exemption and how we apply the law in connection with sustainability, he was a little nonplussed. He said, "We have to be doing everything we can in every single way, private/public, to try to address and mitigate this disaster."

I understand you are not in the guidance business, but what I would ask of you is let's have a workshop to discuss these issues. It is really critical.

In addition, my own request is on the HSR front. When we get this lovely new form, I would love to do a workshop with you as well so we can make sure that we are all complying as you would expect.

JONATHAN KANTER: Let me react to that a little bit because I think it is important. I don't want anyone to come away from this discussion with the wrong impression.

Antitrust and competition law enforcement is not standing in the way of progress. The antitrust laws and competition laws address anticompetitive and exclusionary behavior that harms competition. I do not see any impediment to progress with respect to any industry including the importance of sustainability. I would be concerned if there was a perception that somehow antitrust law and antitrust law enforcement is impeding progress.

GWENDOLYN COOLEY: And then I of course have to chime in with I don't want there to be a perception that I am not up here representing all the attorneys general, which I do.

The reason why we have a debate about this is because there is disagreement. We have a group of attorneys general who think that collusion in order to have beneficial ends is not acceptable. When you have that kind of situation you have your least favorite thing, which is uncertainty. I think that I agree with the Chair that your remedy is up the street. While I appreciate the admonishment, you know.

FIONA SCHAEFFER: I will just end on this by saying people in Europe are seeing this differently. On our world tour we are hearing that the lack of explicit guidance in the United States is an impediment to companies doing things that may be different from what they had to do in the past or needed to do.

For example, we may need to make hard decisions about moving to a more sustainable bottle, eliminating plastic bottles while moving to something that is more consistent with our environment. That could involve collective action to withdraw a product.

You don't have to answer me now. I would love to do this workshop and let's talk about these issues because they are hard and I don't think it is enough to simply say, "Congress acts and we can't guard."

JONATHAN KANTER: At the same time, companies shouldn't use antitrust as an excuse to shirk their responsibilities to promote progress across a wide range of issues, whether it is AI safety and security or environmental sustainability.

LINA KHAN: The great thing about competition is that it can spur a race to the top. If firms are really committed to solving some of these problems, they should take the boldness of being market leaders. Again, there is nothing that our agencies are doing that is inhibiting that.

MARGRETHE VESTAGER: We tend to think that there is a middle ground here. The transition that we are in right now is driven by a political commitment. Everybody went to Paris and committed "We are going to do this together."

The market was on a different course. It was on a course of basically continuing a fossil-based economy so the market would not deliver with the necessary speed what we need to fulfill our promises. So *allons* to the next generation!

What we see in Europe is that there is the necessity of incentives for subsidies in order to turn the market, in order for the market to deliver everything we need. Because competition is such a good driver, we need a well-functioning market to support our green transition and to create prosperity in doing so. We need prosperity in order also to fulfill the promise that we have made for more inclusive societies where everybody can be better off.

I think it is important for businesses to consider what can be done. We see it at our Member State level. I think the Germans, the Dutch, and the Belgian competition authorities have businesses knocking on their doors and they have found a middle ground where they say: "We will not disable competition and we do not accept collusion that is here in order to harm consumers. But there are things that can be done and, believe me, we will be of course careful not to undermine competition because that is the most fundamental driver, but also realizing that we have serious flaws in the marketplace in order to fulfill what is a political commitment and not just a politically-driven transition or a market-driven transition, and this is a matter of urgency."

LINA KHAN: Fiona, the last thing I will leave you with on this is that in the U.S. system an incredibly important principle is the separation of powers. As law enforcers we really are limited by the tools that we have. I know the impression or the feeling or the emotion sometimes can be that we have these awesome powers that we are just using arbitrarily, but there are really serious limits to those authorities, and it is incredibly important that we stay in our lane and not use our authority for going outside of the boundaries of what Congress has instructed us to do.

I recognize that there may be frustrations out in the world, that there are problems that are not being solved, but again as democratically accountable enforcers, it is incredibly important both that we fulfill the duty that Congress has given us but also that we do not go beyond the bounds.

FIONA SCHAEFFER: To be continued.

I wanted to say a word on remedies and ask you, Margrethe: You do not have criminal deterrents in the European Commission, but you do have really powerful fining power and you use it very well. But are you seeing that financial penalties are a sufficient deterrent? It seems like you do have people being fined over and over again, maybe for different conduct, but some say that they regard this fining as a cost of doing business and they go out on their merry way and do not actually change. Do you think there are other measures that are needed to create the deterrence effect of your decisions?

MARGRETHE VESTAGER: Two perspectives on that. I think on average our fines are between 4 and 5 percent of global turnover. If you look at the latest fine that we gave to Apple for anti-steering, we also provided a lump-sum fine in order to have the level of deterrence that we would otherwise not have had.

A decision is not just a fine. It is also to say, "Stop what you are doing and do not put anything in place that would have the same effect as to what you were doing before." I think it is important that you have that order to change your behavior. The fine is there to punish past behavior. What the decision actually orders you to do is to change your behavior for the future.

The second perspective is that, as you say, we have seen repeated offenses by a number of companies. We have had not one, not two, not three, but now we are on our fourth Google case. We have had a number of Amazon cases. We have a Facebook case right now. We have one final Apple case. We have another one that is in the making.

So what we were thinking was that case-by-case laws enforcement is not enough because, not only can a fine have a level where they say, "Yeah, sure, we'll pay the fine and take you to court," but it can also be that the time it takes us from when we realize something is wrong and there is a suspicious behavior here until we have the final decision is very long. That may be one of the reasons why the learning curve seems to be a bit flatter than desirable for the businesses in question.

This is why now competition law enforcement has the sibling of the Digital Markets Act (DMA), which changed the game because it can work much faster. For our competition law tools to kick in, we need to demonstrate dominance, dominant market power. The DMA gives us the power to designate core platform services and because of that businesses are gatekeepers. That resets the entire game to say, "If you have the designations, these are the do's and these are the don'ts."

If we see or suspect noncompliance, we can open cases. We have a tentative deadline of six months to state our grounds, another six months to take a decision; then, if behavior is not changing and we have a negative decision on compliance, penalties will start kicking in.

I think that is important because it is not only the question of the fines and change of behavior; it is also a question of the speed at which this is happening. While we work businesses are suffering from illegal behavior and because of that consumers do not enjoy what competition should bring them—lower prices, choice, innovation, better quality than what they would otherwise have had.

So, we think quite a lot about how to change behavior, in particular when we get close to the business model. That I think is what we do with the do's and don'ts of the DMA.

JILLIAN CHARLES: Maybe we can stay an extra minute on the DMA and talk to us a little about what challenges, if any, you are finding in actually being able to enforce it. It is relatively new, but are you experiencing any challenges there since the quote we've had from you is that you are going to enforce real-time. Tell us a little bit about any challenges you are experiencing there or anticipating.

MARGRETHE VESTAGER: It seems to be very challenging to a number of the businesses that are in scope because otherwise we would not have now five noncompliance cases. It seems to be challenging to realize what compliance means.

Now we will investigate. We have been very happy to support the road to compliance asking for beta testing in order for gatekeepers to get feedback in the marketplace on what compliance would actually look like.

Not only have we these five cases of suspected noncompliance, but we have also given restraining orders for potential evidence to be kept for a number of considerations we have for other potential noncompliance cases. And then, of course, we have a regulatory dialogue with those that we see are very close to compliance.

I think the main challenge is, as always, that with the passing of the DMA, which happened in record time in our legislative system, I think it changed perception and it changed the expectation in the community.

I think a lot of U.S. businesses will have a lot of good business coming when businesses are fully compliant with the DMA because there will be no self-preferencing, there will be no anti-steering; you will get in touch with your own customers, you can actually get there when someone is looking for your services.

But it will take effort to get there because we get to something where changed behavior is what is actually needed.

FIONA SCHAEFFER: Andrea, on the topic of digital markets, I know you just finished a study in e-commerce. What insights has that given you and how will you approach digital markets as the result of that study?

ANDREA MARVÁN SALTIEL: As I mentioned—and I think as fellow enforcers we all feel the same way—we have to adjust to digital, but we can't overlook traditional markets. Now I am going to talk a little bit about digital.

The investigative authority in COFECE recently concluded a market investigation, which is similar to the credit card payment system investigation, where it concluded that e-commerce in Mexico presents certain barriers to competition. I will just talk about the findings that the investigative authority found because this is still ongoing and now the parties have the opportunity to present evidence in a proceeding and then the board will make a final decision. Again, I will just speak about the findings that the investigative authority got in the investigation.

First, they concluded that the market is highly concentrated both on the seller and the purchaser sides. We have two big companies in Mexico called Amazon and Mercado Libre, which hold 80 percent of the market share in Mexico.

Second, what they found in the findings was that the sellers and the purchasers both exhibit single-homing behavior. When you look at it from the seller side, only a small percentage of them are in other marketplaces and there are very few sellers that sell in both of those platforms. When

you look at the purchasers' side, very few of them change marketplaces; they are very loyal to one of these two marketplaces.

They concluded that there are very high barriers to entry mainly due to network effects and the cost of advertising, brand recognition, et cetera. The investigative authority identified three barriers to competition.

The first one is related to the additional services that are included with the subscriptions. Both of their memberships include free delivery or other related services, but they also include unrelated services, such as video games and streaming et cetera. The investigative authority concluded that these services increase entry costs for any other new marketplaces and they will have to, not only compete with marketplaces, but compete with other unrelated services.

Second, that there is a lack of transparency in the management of offers within the platform. The sellers have no transparency or clarity about what their business model has to be and what they have to do in order to appear in the buy-box or the best offer. Since there is no transparency or clarity, the sellers cannot just adjust their commercial strategy to effectively compete to get the buy-box, but also it is not clear if there are advantages to the platforms' own products.

The third barrier that we found is the preference toward the marketplaces' logistics solutions. The users do not have full freedom to select the logistics company they want to use. Also, the marketplaces seem to favor those sellers that hire their storage, their packaging, and their delivery services. This reinforces the single-homing behavior that the investigative authority saw.

As I mentioned, this is an ongoing investigation. The preliminary decision was just reached a couple of weeks ago. Now we have to analyze what the companies' arguments are going to be and then the board will reach a final decision. Nevertheless, I do believe that this investigation touched upon really important topics related to digital markets, such as behavioral biases, choice architecture, and transparency of the algorithm. So we will keep you posted on how it turns out.

FIONA SCHAEFFER: We look forward to that.

Before we wrap up, we wanted to give you guys an opportunity—and gals, actually most of us are gals—to ask each other questions.

I want to start with you, Margrethe. What is your question for someone else on this panel?

MARGRETHE VESTAGER: I would ask Jon and Lina: As we are more and more world connected, the benefit of trying to achieve support becomes bigger; so how do we make sure that possible differences based on different market situations or different legal bases are being used to sort of tackle what could be envy or distrust making us less effective in our cooperation?

Sometimes I hear, "Oh, you are so last year, you Europe, and look at what they can do now in the States." Looking at what we do together, I think it is because we are more scary than we were before.

JONATHAN KANTER: I want to say at the outset, if there is a message from the international perspective, it is that there has never been more alignment in my career that we need strong and vigorous enforcement of competition law and policy.

In my experience, the agencies are working together better than I have ever seen in my lifetime. That includes internationally, that includes Europe and the United States, that includes the FTC and the DOJ, and it includes the State AGs and federal antitrust enforcers.

The fact of the matter is I think there is a broad recognition globally that competition policy is important—it is important to our fundamental values, it is important to our livelihoods, it is important to our way of life. What I see is more harmonization and more collaboration and cooperation than I have ever seen before.

LINA KHAN: One thing I will add is that there is a longstanding tradition at the FTC of working closely with our international partners, going all the way back to Chairman Muris and Chairman Kovacic, and there was a lot of advocacy from the business community really urging the FTC and the DOJ to stand hand-in-hand. We got letters from the ABA and a letter from the Chamber of Commerce urging this type of harmonization.

It has been really curious to see over the last couple of years some of the tenor of that shift. You have to wonder: Is it that there is only a desire for harmonization in the direction of exporting laxity and exporting nonenforcement as opposed to a sincere design to see more alignment? It has just been really interesting to see.

I have been really grateful for really strong working relationships across the board with the states and with our international partners. This is a moment of tremendous challenge but also of tremendous opportunity, and it has been really fantastic to go through this time with shared learning and learn from each of our unique, distinct experiences based on our own jurisdictions and figure out how we can be addressing the challenges that we are each facing.

FIONA SCHAEFFER: Thanks, Lina.

What is your question and to whom? I should just say, to give everyone a chance, we will probably limit to two-minute answers.

LINA KHAN: Another area of cooperation that we have really been investing in is our work with the states. Partly that is because the states have the ability to provide redress and disgorgement in ways that the FTC cannot. There are so many examples that come to mind for it—be it the pesticides case, the *Amazon* case, be it a whole bunch of healthcare work. I am curious, Gwendolyn, to your mind are there particular examples or areas for continuing to build this out?

GWENDOLYN COOLEY: I think we have a great working relationship with our federal counterparts, and I really appreciate the attention you guys have paid to that.

Those of you who have gone through the revolving door in and out of government have no idea how good it is now. I'm sure that also strikes a little bit of fear within your hearts.

Our main issues I would say are the small logistical issues that I think we will need to continue to work on. I was thinking after the Enforcers Summit about the "whole of government" approach and how we might use that to deal with some of those problems—agreeing on confidentiality; how does Homeland Security work with local police departments? We should ask them. There have to be ways to solve these problems to make it easier for us to cooperate.

In answer to your earlier question, I don't wonder about why there is a shift away from us all working together as a force multiplier. I think it is pretty obvious because we are very effective when we are working together. Those are important things.

You also asked about cases. We need to continue to work hard in the agriculture space and in the food space. What people out in middle America really care about is making sure that we are keeping a safe and competitive food supply, and so—yeah—let's keep doing that.

FIONA SCHAEFFER: Andrea, what is your question?

ANDREA MARVÁN SALTIEL: My question is to Margrethe. I will give a bit of context very quickly. My question is about competition and sustainability. We know and we have already spoken about everything that our fellow enforcers are doing to help competition enhance or boost sustainability.

I have seen how competition can help workers have better pay, it can help reduce the gender payment gap, and that is something that in Mexico we have advanced a lot. We have labor cases, we have cases related to price caps on women professional fútbol players, but we still haven't gotten into sustainability.

We launched a questionnaire open to everyone to see what the meeting point between competition and sustainability are. We started from there, but now we want to take it further.

What is your advice to competition agencies who want to put sustainability into the agenda and still haven't managed to do so?

MARGRETHE VESTAGER: As you could hear, I also wondered if we have managed to do so. We provide the opportunity, but I don't think that we have had a lot of effect yet.

For us, the first thing was to realize we are definitely a subcontractor when it comes to this. Sustainability at large comes from setting targets, having enabling laws in order to get there, making sure that when subsidies are given that they actually maintain or at least do not harm competition in order to get there.

That was our starting point. We are a subcontractor, we can do something, but it is not for us. But we should not shy away from whatever it is possible to do. I think that is an interesting conversation. I will be more than happy to take that further on in a setting where we have more than two minutes to finalize that.

ANDREA MARVÁN SALTIEL: I agree.

FIONA SCHAEFFER: It's the workshop.

Jonathan, what is your question and to whom?

JONATHAN KANTER: Madame Executive Vice President, you are coming to the conclusion of your second mandate, and you have had an indelible impact on the competition and antitrust law community. You have this broad group of folks from across the world assembled. What observations do you have about your experience? What wisdom and advice would you impart to future enforcers?

MARGRETHE VESTAGER: In two minutes?

JONATHAN KANTER: Or less. [Laughter]

MARGRETHE VESTAGER: I think if I were to redo it, I would have been bolder because we do not have a lot of time. Concentration is increasing in every jurisdiction, not because of lack of competition enforcement, but I think because of market dynamics as such—because of globalization, because of trade patterns, for many different reasons.

In order to be effective, I think to be always obviously on the good side of the rule of law, adhere to our mandate, but make sure that we use it in full and that we keep pushing how we see the law unfold in changing market circumstances, technological circumstances, and different business

practices in order to be able to see what is ongoing. Business practices on the illegal side of the law are very creative and they will keep developing, and if we do not see it, we will not be effective. I think that takes boldness to say, "This is new, we do not think that it is legal, we will do our best to prove it, and we are willing also to go to court even though we are not 100 percent certain of winning," because we serve.

And, as we all started out saying, there are people out there who need a fair chance in the society that we live in, and a fair, open, competitive market is part of providing that chance for everybody.

FIONA SCHAEFFER: Finally, Gwendolyn, a one-minute question and a one-minute answer.

GWENDOLYN COOLEY: You have one minute to answer, Andrea, my friend. You are in very much of the same situation that the states are in. When we challenge a case, we hear challenges to our authority, including conduct cases and merger cases, particularly when our friends here onstage are doing them as well. How do you handle that?

ANDREA MARVÁN SALTIEL: In Mexico there is a particular situation where they are discussing what is the best institutional arrangement or model to enforce competition law, whether it should be an independent decentralized agency or it should be more aligned with the views of the executive.

I would say first of all this is not just about competition. This is a discussion that is being made related to other enforcement or other policies—such as transportation, such as transparency, data privacy, et cetera.

Just to focus on competition, when you look at the results that COFECE has given since we became an independent agency, you can see our fines are twenty-three times higher than they were eleven years ago. When you look at the sectors in which we have managed to contribute, we are basically looking into every sector that is relevant for people's lives.

I feel very blessed to be the head of an institution that is comprised of professional and excellent public officials who are totally committed to competition.

I am certain that there is a lot to be done, but I believe that institutions have to evolve, not go back, so we have to see where COFECE has to evolve. We are giving Congress the elements they need to take their decision. Again, I am certain that with the numbers and the evidence COFECE will be reinforced.

FIONA SCHAEFFER: Finally, Margrethe, this was your tenth anniversary of coming to the Spring Meeting. I think you are unquestionably one of the most impactful enforcers globally we have ever seen. It personally makes me sad to think that you may not be in this job after October. We'll see. I just wanted to thank you for your leadership and inspiration, and we want to see you come back anyway. [Sustained Applause]

MARGRETHE VESTAGER: Thank you.

FIONA SCHAEFFER: We'd love you to come back. Whatever you are doing, I'm sure we will want to hear from you. And we still want that HSR workshop even if we are not getting sustainability. [Laughter]

Last but not least, I am closing what I think was an amazing Spring Meeting. I hope you all had as much fun and learned as much as we did.

I am really pleased to announce our new Vice Chair who will one day—it takes many years, I can attest to that—be our future Chair, Melanie Aitken, former Competition Bureau Commissioner. [Applause]

You can see the other nominations on the website that will be coming out. After Steve Cernak and Renata Hesse, we have a great lineup of leadership for you.

It has been my privilege to do this with you. Safe travels and let's continue all of these great conversations. ●