Enforcers Roundtable*

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DEBORAH GARZA: Welcome to the last program of what I think has been a very good Spring Meeting. This is the remarkable part of the Spring Meeting when we have the opportunity to speak to so many enforcers at one time. I think everybody knows who they are, but I’m going to just quickly go down the line and introduce them.

Rodney Sims is the Chair of the Australian Competition and Consumer Commission. Next, we have Sarah Oxenham Allen, who is with the Attorney General’s Office in Virginia but is also Chair of the Multistate Antitrust Task Force of NAAG. Then we have Alejandra Palacios Prieto, who is the President of COFECE in Mexico. Renata Hesse is Co-Chair of the Spring Meeting this year. Then we have Makan Delrahim, the Assistant Attorney General for the Antitrust Division in the U.S. Justice Department. Then we have Commissioner Margrethe Vestager, who everybody knows is the European Union Commissioner for Competition.

* This Roundtable has been edited for publication.
Then we have Joe Simons, who is the Chairman of the U.S. FTC. We’ll just go right into questions.

Makan, I’m going to start with you. Based on a number of your recent speeches, it seems clear that you’ve been focused on competition in the world of new technologies and zero-price markets. The Attorney General said in his confirmation hearing that he was interested in learning what the Antitrust Division’s views and priorities are in this area and we’ve seen some pretty dramatic calls to break up certain tech companies.

So, we’d like to know: what have you told the Attorney General are your priorities and intentions in this area?

MAKAN DELRAHIM: I hope you would appreciate that I will do my best to keep my conversations with the Attorney General or other senior administration folks confidential out of respect for the process, but I think generally my views have been expressed in a number of those speeches.

The great thing about the Attorney General is that he comes from industry. He spent a couple of decades as General Counsel of Verizon and on a number of boards, so he really understands the convergence, the technology.

You know, the issue is something that we’re all grappling with. It’s something that I know Joe Simons, in the great hearings that they have had, has tried to address. We continue to do the same.

There’s a lot of debate, particularly by presidential candidates, which I won’t get into, about how to address it. They seem to have found a solution, whether it’s that you can’t grow beyond $25 billion, or whatever the heck the solutions are. I think sometimes they might be misguided because we first have to identify the problem in these companies. Because of the network effects of these technology companies—you know, you have a “winner take all”—that’s really the biggest challenge.

As I’ve said before, and I think the Attorney General said at his confirmation hearing, big is not bad; big behaving badly is bad. But this is an area where we need to be vigilant as antitrust enforcers. We need to identify the issues early on because if you have a winner take all, then you might get entrenched monopolies that cause long-term problems.

You know I can’t comment on any investigations we may or may not have, but the broader issue is one that we’re all grappling with: to try to identify what the actual solution is under U.S. law.

We’re bound by some Supreme Court precedent, as many of you know. We can’t just walk into court and say, “Company X should just be broken up because we just think it’s too big” or whatever. Under our constitutional system, Congress can pass a law, and certain folks who have been proposing certain executive actions certainly could propose legislation to do that. I don’t know if that would be wise at this time.

But it’s something that we continue to study. We have had a series of folks who have come to the Division and taught us—these are economists, these are experts, these are some of the folks who might be in the audience—where we have tried to learn more about it.

There is a great article by a couple of professors at Harvard Business School, Feng Zhu and Marco Iansili, who talked about platforms.¹ These are not lawyers, but these are economists and business professors who talk about network effects and their impact on competition.

And we continue to learn. We are inviting them to come speak at the Justice Department with our staff. I think that at this stage it is that. I don’t think we’re at the same stage as some presidential candidates, who are saying there should be a cap on the growth of particular companies even if there isn’t an accompanying harm to competition by these companies.

**MS. GARZA:** Thank you, Makan.

Joe, let me continue to talk to you about the same topic—not about your conversations with the Attorney General, obviously.

The FTC announced last month the creation of a task force to monitor the U.S. tech markets for the purpose of investigating anticompetitive conduct and bringing enforcement actions when warranted.

My first question to you will be whether that task force was the outgrowth of any findings from the hearings that the Commission has been holding.

And then, secondly, the FTC announced that the task force may review consummated technology mergers. Have you come to any conclusions regarding the framework for reviewing tech mergers that differs from how the Commission has previously viewed mergers?

**JOE SIMONS:** Thanks, Deb.

Let me mention a couple things before I answer your question directly.

First of all, I want to thank you for inviting me here. The second thing I want to say is that you put together just an incredible program at the Spring Meeting, and you deserve a lot of congratulations for that. You have much to be proud of.

I’d also like to acknowledge all of my fellow Commissioners, who, I think, are in the audience, and also the FTC staff, many of whom are here as well.

And I want to point out, very proudly, that the FTC was recently voted the best place to work among mid-sized agencies in the federal government. Even more impressive, among 400 agency sub-units throughout the government, the FTC’s Bureau of Consumer Protection was voted number three on the list of best places to work, and the Bureau of Competition was voted number four. So the FTC staff has a lot to be proud of, and we thank them for making the FTC such a wonderful agency to work at.

Now, to your question. With respect to the Technology Task Force, it was not an outgrowth of the hearings, but its work will be informed by what happens at the hearings. We’ve had 11 hearings over 19 days; we’ve had 69 panels, 330 unique non-FTC participants, and 43 FTC participants; and we’ve covered a range of topics, including, specifically, high-tech platforms and acquisitions of nascent competitors. So I think that the Technology Task Force will get some significant benefit and input from these hearing sessions, in particular, and others as well.

But in terms of what our approach might be, that really is still in development. The Task Force will be looking at consummated mergers, some unconsummated mergers, as well as conduct cases. One specific issue I’m sure they will be looking at very closely is monopoly maintenance through the acquisitions of competitors, including nascent competitors.

I’m really excited that the Task Force is formed and will be up and running very shortly.

**MS. GARZA:** Sarah, the State AGs haven’t been sitting quietly by. Can you tell us how you’ve been using litigation to push the enforcement envelope and what enforcement priorities the states have?

**SARAH OXENHAM ALLEN:** Sure. Thank you for also having me here today. This is my first year as
The states have been very active in antitrust enforcement over the past year and plan to continue to be. As some of you heard FTC Commissioner Chopra say earlier this week, the momentum in antitrust enforcement over the next one to two years will be with the State AGs. So I hope that we will live up to his confidence in us.

As is our traditional practice, though, the states have a number of merger cases and a couple of conduct cases that we’re investigating with our federal antitrust partners, the FTC and DOJ, and we will continue to do those, especially where there are local markets that are affected, or potentially affected, by these cases.

For one merger, though, T-Mobile/Sprint, the states have our own independent investigation of the merger, but we are still coordinating with DOJ and the FCC as much as possible, and our relationship with DOJ on this has been very productive and harmonious. The states have to choose carefully the cases where we do our own independent investigation because we do have smaller antitrust budgets and smaller antitrust staffs than our federal agencies. We feel, though, that the magnitude of this merger, the importance to our citizens of devices that they literally hold in their hands all day long, and the potential impacts on many urban and rural local markets justify making this case one of the times when we do our own independent investigation.

In addition, the states have added a new antitrust working group at the staff level, not the attorney general level, which is looking into issues in the technology industry. We are not going to have exactly the same focus as the FTC’s Technology Task Force, but we have spoken with them and plan to coordinate with them where we can. As a matter of fact, our committee leader and Patricia Galvan, the FTC’s Task Force leader, are meeting today to discuss issues that we have in common there.

As far as our enforcement priorities, I would say that they fall into four major categories.

The first is investigations where the states were coordinating with one of the federal agencies but, for some reason or other, the federal agency either slowed down or it dropped out of the investigation and we continued to go forward. The main example of that I can think of is the Suboxone product-hop case where 42 states led by Wisconsin are suing Indivior, formerly known as Reckitt Benckiser, and Aquestive Therapeutics, formerly known as MonoSol, for a product hop from sublingual tablets to sublingual film, called Suboxone. It’s used to treat opioid use disorder. We’re in the middle of expert discovery now and we expect to go to trial in 2020.

The second category are cases that either the states started or were instrumental in getting started. I will talk more about this case in a minute, but the generic drugs price-fixing case would probably fall in that category.

The third category are areas of antitrust law where the states are following onto and expanding the work begun by the federal agencies but where the federal agencies might not currently be as active. One area in the news a lot lately involves the no-poach investigations, settlement, and litigation that the Washington State AG’s Office has brought, including the ongoing litigation against Jersey Mike’s for their no-poach clauses in their franchise agreements. We also have a 14-state coalition, which is independent of Washington State, that is looking into these issues and which has negotiated a couple of settlements in this area. We’re also beginning to look at non-compete clauses in employment contracts as well.

The final category are cases that are particularly important to our AGs, who focus not just on antitrust and consumer protection issues but on a very broad range of issues that affect the daily lives of citizens in our states, particularly accessibility and affordability of health care and phar-
maceutical drugs, data and privacy issues, environmental issues, etc. This could actually be the one enforcement priority category because all of the other ones I mentioned also fit into this category.

For instance, the states’ cases against the opioid manufacturers, the Suboxone product-hop case, the generic drugs price-fixing cases, California’s case against Sutter Health, and Washington State’s case against Franciscan—all of these fit into a concern about accessible and safe health care and affordable drugs.

Our no-poach and non-compete concerns are about ensuring that the workers in our states can earn a livable wage, which also allows our states to continue to get the sales and tax revenues they need to fund government spending and make sure that we can provide necessary government services.

And the Technology Industry Working Group can help us consider issues in the big data/tech platform space that may eventually lead to antitrust or consumer protection efforts by the states to ensure data protection and appropriate privacy rights of our citizens.

So, I believe that the states will continue to not just coordinate our antitrust efforts with DOJ and the FTC, but will also continue to bring cases on our own in areas that are important to our respective AGs.

RENATA HESSE: Thank you, Sarah. Margrethe, you’ve talked about fairness in competition law, and some on this side of the Atlantic would say that there shouldn’t be anything fair about competition, it should be a fight to the death. I suspect you and your critics may be talking about different things. Could you take a moment and talk a little bit about what you meant by those comments?

MARGRETHE VESTAGER: First of all, it’s great to be here and on such a gender-balanced panel. I think that’s such a good thing.

But it’s also great to be here because these are challenging times, I think, for all of us, not only because consumers still expect low prices, but also because it is becoming more and more urgent to protect innovation. I think it’s important to learn from one another how to understand new ways of creating value, new forms of power in the marketplace, because all of that is changing.

I find very inspiring what you have been doing, Joe, in all the hearings, to lay out things that can inspire not only us but hopefully also jurisdictions all over the world, because we are trying to push for a deeper understanding of how we can use the tools we have already and also whether we need new tools. In that, I think it’s important to get the inspiration that you get by a meeting like the Spring Meeting here, by bringing so many people together from different sides of the planet. So thank you very much for that.

You talk about fairness as if it was an original thought. It’s definitely not. I cannot claim any kind of copyright on that. It’s even in the European Treaty—it’s one of the first things that you will meet when you read the preamble, that you should have fair competition, and fair competition means exactly both fair and competition. So I think for me it’s a way to talk about competition on the merits, that you compete on the most affordable prices, quality, services, innovation—all that it takes to get you out there.

That being said, in a running competition, you would start at the same starting line; but, once you start running, you still have winners and losers. The fact that you have the same starting point doesn’t mean that everyone gets a medal. So in that respect I think it is the very nature of healthy competition that it is fair.
Fair competition is also, as I see it, one of the ways of enabling a fair society where people feel that they are empowered, that they are comfortable in their society. After 30 years in politics, I realized—stupid me—that for most people politics is not something they think about on a daily basis. A lot of people don’t even vote. Some might have wished they did that now we have another Brexit vote coming up—but that’s another issue [Laughter]. But everyone is in the marketplace. You can take part in politics, you cannot take part in politics, but you’re in the marketplace.

If you find that the market serves you well, that the market serves the consumer in a fair way, then you feel empowered. I think that empowerment also reflects how you see the rest of society.

And then, of course, you find it in a number of ways of thinking. You have fair, reasonable, and nondiscriminatory prices. It’s a concept I think most people are familiar with.

But don’t get frightened. It’s not a new legal term. It’s not a new theory of harm. It doesn’t take the place of sound, in-depth investigation that takes hours and hours and hours that can be charged. [Laughter] So just embrace it.

Also, because we talk a lot, I think very importantly, about procedural fairness, and we have that also very much in common. I very much like the fact that we have the ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement from last year, which is something that we all subscribe to. In that respect, I think it’s a way to invite people to appreciate how competition works and it’s a way to tell people that the market is here for them and not the other way around.

**MS. GARZA:** Rod, turning to you, you recently declared that you are not an “antitrust hipster” and that you endorse the consumer welfare standard and are opposed to introducing broader public-interest considerations into the core of competition law enforcement. However, some might say that you have done just that with the ACCC’s Digital Platforms Inquiry, which in addition to competition concerns is addressing consumer privacy and the protection of diversity in news and journalism as a public good.

As a competition enforcer, can you address all of these disparate concerns while maintaining consumer welfare as your overriding goal?

**ROD SIMS:** Thanks very much for the question. It’s great to be here. But it is a great question and I’m delighted to have the chance to address it because the issue has come up a number of times. I want to make three points to answer the question.

The first point is that I certainly believe, and the ACCC believes, it’s wrong to introduce wider objectives into competition policy. The famous Dutch economist Jan Tinbergen came up with a fundamental principle of public policy, which is that you target each instrument at one objective and that’s the way to make effective public policy. If you try to have competition policy achieve wider objectives, if you really try and have it achieve everything, it will end up achieving nothing. So that’s the starting principle.

I think competition enforcement essentially should be about consumer welfare. It should drive the theories of harm of competition enforcement. It’s key to distinguishing between procompetitive and anticompetitive conduct.

But I guess the point I’d want to qualify that with—not so much qualify, but it’s a very important point to also keep in mind—is that the degree of or precise measurement of harm is not a neces-

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sary part of the evidentiary burden to establish if there has been damage to the competitive process.

And I think sometimes in competition enforcement we try to bring science beyond where science can go. I mean, economic models are necessarily imprecise. They are there to help your logical thinking. They are not there to give you the answer. I’ve done a lot of economic modeling in my time and know that very well.

And, of course, competition is dynamic. It’s just really very difficult to be too precise with the estimate of consumer harm.

And, of course, the fundamental law in Australia is centered on whether the conduct at issue is likely to substantially lessen competition. So, really, we’re talking about interrupting the competitive process, with consumer harm being the target of our theory of harm. So, I very strongly support the consumer welfare standard as the driving principle for identifying consumer harm. I sometimes think, however, that the evidentiary burden is higher than it needs to be.

The second point is that the ACCC is equally a competition regulator or enforcer and a consumer law enforcer. I often get surprised that consumer law enforcement ranks in many people’s eyes—or many people perhaps in this room—well below competition enforcement, and that to me makes no sense.

Everyone in this room wants people to have faith in a market economy. You can only have faith in a market economy, it can only work as we all want it to work, if you have strong competition, which is what Adam Smith taught us, and if you have consumers who aren’t being deceived in the marketplace. You need both to make it work, and it’s tricky, I think, to put one ahead of the other.

So, when we’re looking at competition and consumer issues, we are taking separate competition action and separate consumer action, but with our work in digital platforms it does actually bring the issues together. Essentially, the price of using many of the digital platforms is your data and your privacy, and the competition over this price effectively needs well-informed consumers, and so you do have the coming together of competition and consumer law.

Of course, you do have with digital platforms, I think, quite fundamental competition issues. I think there’s clear market power that Makan was referring to as well. I think there is the ability and incentive to engage in, and I think evidence of, anticompetitive conduct.

But I think the way we address the problem—and this is a key point—is through proactive but conventional competition and consumer law enforcement—and it’s that consumer angle that I want to emphasize—but also that the conventional toolkits can do it. Competition law enforcement in all the conventional ways—you don’t have to get creative in it—and consumer law, which of course is about having well-informed consumers and making sure there aren’t, under our law at least, unfair contract terms.

So, I don’t think we need to introduce new tools, I don’t think we need to introduce new thinking, but it is important to address digital platforms with both competition and consumer law.

The third point I want to make is that our work on the digital platform inquiry is an inquiry, it is not an investigation. There’s a big difference. We have been asked by the government to conduct an inquiry into digital platforms. In giving us that task they did have a particular focus on advertising in media markets. The purpose of the inquiry is to make recommendations to government. That’s what we’re solving for.

During the course of the inquiry we have started five investigations, but they are separate from the inquiry. At the end of June we will come up with recommendations to government.

So yes, there are other dimensions coming into those recommendations. Of course, when you look at data privacy and data being that price of entry, privacy issues do feed into the competi-
tion assessment, they do feed into the consumer assessment, but in looking at these issues we’ve also formed the view that Australia’s privacy laws are inadequate, and so we’ll make recommendations on that as part of the inquiry.

We are also looking at media issues, again through a conventional competition-and-consumer law lens. You do have an unequal playing field. The digital platforms basically don’t have any regulation. The media has got massive regulations that disadvantage the conventional, traditional media relative to the digital platforms in important ways.

The other point is the digital platforms are an essential business partner for the media, they absolutely need them, but they find it very hard to monetize their work through digital platforms. This has got a lot to do with how news is ranked. Particularly if you’ve got a subscription model, there’s a range of competition issues there.

But we’ve also, because these are recommendations to government, had an eye to the public good that comes from journalism, and so we are concerned about the wider dimensions of journalism.

We certainly take the view that we’re not dealing with creative destruction here. We’re not dealing with digital platforms taking the place of the media. Digital platforms basically want to anonymize the media, they want to get people onto their platforms, and that means that you’ve got a lot of crowd-sourced information coming in, information coming in from all sources, and that tends to play down the role of journalism, which I think is a public good in society. So yes, those other issues have come into what is essentially an exercise involved in recommendations to government, but that is, as I say, very separate from our conventional competition and consumer enforcement and the lens we are bringing to this.

I guess the last point I’ll make is that I think competition law can do itself harm if it plays itself out of issues that are so important to society. So, I think traditional competition law enforcement has a big role to play in digital platforms and it’s important that that role is brought to bear.

MS. HESSE: Thank you, Rod.

Alejandra, we understand that Mexico has experienced changes with its last federal election. The new president has promised to overturn the energy reforms that opened that sector to competition and there are legislative initiatives to control the prices of medicines and bank fees. There is also talk about dislike for autonomous agencies like COFECE.

Can you tell us what’s really going on?

ALEJANDRA PALACIOS: Yes, of course. [Laughter]

Working with a new government is always a challenge, although we see many coincidences between COFECE and the new government’s agenda in terms of creating a momentum for a more inclusive economic growth policy, which is good for Mexico and in general for the world.

Competition policy and successful enforcement reduce the ability of some agents with market power to set high prices. So, based on that, I am sure that many of COFECE’s analyses and investigations can be useful inputs for some of the projects the new government has outlined.

Regarding the banking fees reform proposal, it was presented in Congress as an initiative to prohibit the collection of a set of banking fees in Mexico. When the draft decree was presented the stock exchange came down because of the news. So what we did as a competition agency is we issued an opinion directed to the Congress. What we recommended to the Senate was that each of the banking fees should be analyzed on its merits and, if deemed necessary, then that the pertinent regulator, which would be the financial regulator, must issue specific regulations.
The good news is that the draft decree will not pass as originally presented. On the other hand, COFECE has pointed out for quite some time that the banks and the financial regulators in Mexico have had a comfy relationship for many years and that there is an area of opportunity for lowering prices regarding certain fees, for example, the fee a bank can charge when you withdraw money from an ATM machine.

So, although we are not in the same boat as the initiative in terms of broadly prohibiting the collection of fees, we very much welcome the discussion in terms of the necessity of the banking sector to compete. That's always good news.

Regarding fixing the prices of medicines, there is a draft reform in Congress. However, at least in our analysis, it really isn’t a significant change to the current regulation framework. I think the news around this issue was more scandalous than what it really is when you read the initiative, although we will need to follow up on this draft to see if this situation changes.

Regarding the energy sector, many things have happened in the past few months. It is no news to say that the government wants to strengthen the publicly owned oil and gas and electricity companies and that both energy regulators—the upstream and the downstream and electricity regulators—have suffered losses of staff, specifically those in high-level positions. So their activity has slowed down for the moment.

In our competition law, as Makan said, big is not bad but bad behavior is bad whether you are big or small, so there is nothing wrong for a company to grow big if it does it through organic and fair competition. Our job is and will be to monitor these markets, and we are working on that, in order to act diligently when and if we notice anticompetitive conducts related to abuse of dominance.

Finally, in terms of resources, I would like to point out that COFECE’s main strength is our staff. Approximately 70 percent of our institutional budget is used to pay wages, and our effectiveness is directly proportional to the ability of the institution to attract and specialize our people.

At the end of 2018, a new federal law on salaries for public officials was passed in Mexico. What this law does is establish that the salary of the President is the limit used to set the rest of the salaries of the public officials. As that law passed, the President also lowered his salary considerably. He now earns 40 percent less than the previous President. So, this has had an impact on the salaries of several members of the government, including high official members of COFECE. But the good news is that nobody has left the Commission yet as a result of this wage reduction, so for now we are good. How to handle this wage cap and cuts is our biggest challenge for 2019.

To wrap up my answer I would like to stress that the quality of our work and our reputation are always the best arguments we have to present when we have challenges and external circumstances, positive and negative. So, it is our reputation that speaks for us, and so we will be carrying out our work to the best of our abilities while we are sitting in that chair.

**MS. GARZA:** Joe, there appears to be a significant divergence among the FTC Commissioners concerning vertical mergers. I think we’ve seen the evidence of that in some of the separate Commissioners’ statements in the **Fresenius/NxStage** case and **Staples/Essendant**. How would you characterize the differences and do you see the gap narrowing or continuing to get wider?

**MR. SIMONS:** Let me start by giving a little context. I went back yesterday and had folks at the Commission check to see what the voting actually has been in the last ten months since we were confirmed. There have been 304 votes since the new Commissioners arrived, and, of those, all but
14 were unopposed. So there were no dissents in that large number. I also want to point out that those 14 matters included situations where I voted with the two Democrats on the Commission, and also situations where at least one of the Democrats voted with the Republicans. So, in terms of completely partisan voting where only one party is voting for the matter, that’s only happened in a very small number of cases. These two cases that you raised are in that category. So let me talk about them.

Clearly, there was some disagreement. The statements from the Commissioners make that very clear. My sense—certainly my hope—is that these disagreements will diminish over time as we continue to talk to each other and work together. We have a tremendous working relationship. All five Commissioners talk to each other constantly. One of the benefits of a Commission that’s composed of bright and dedicated people is that you can benefit from the insights of the other folks on the Commission.

We’ve been there ten months; we started at the same time; and we’re still in a process of feeling our way along together. We’re getting more used to each other’s thought processes, which is helping our deliberations considerably. I think the views of some of the Commissioners—well, I would say all of the Commissioners—are evolving. That is even so with me, and I’ve been doing this for 35 years. My views continue to evolve, and the hearings have been helpful in that process.

I would say that folks should not take the outcomes in those two merger cases, Staples and Fresenius, as a suggestion that we will not be bringing vertical merger cases going forward. When I was the Bureau of Competition Director, which is now a long time ago, we brought two vertical merger enforcement actions. I was Bureau Director for two years, so that means we averaged one a year. I’m clearly very open to vertical merger enforcement.

I believe that a good case generally has three characteristics: good documents, good testimony, and good economics. The Staples and Fresenius cases, in my view, had none of those three things: no good documents, no good testimony, and not much real economic support. And the staff had the same view. There is no question in my mind that if we had gone to court, we would have lost those cases, and it would have been a waste of our resources.

But I do expect to see vertical cases in the future where all three legs of this stool are present. And we will bring those cases. The three legs again: good documents, good testimony, good economics. We may even see cases where, even with only two legs of the stool present, it may make sense in those circumstances to bring an enforcement action. I would expect, when we do that, we will vote these cases out on a bipartisan basis.

MS. GARZA: Joe, what was the one case where you joined with the Democratic appointees?

MR. SIMONS: I was afraid you were going to ask me that.

MS. GARZA: I’m sorry.

MR. SIMONS: We voted out a Notice of Proposed Rulemaking on the Safeguards Rule. In that case, I voted with the two Democrats, and there were dissents from the two Republicans.

MS. GARZA: Let me just continue with the vertical theme and put a question to both Makan and Joe. Is there any possibility that we will see more guidance from the agencies on vertical merger analysis, and do you think it’s possible that the FTC and DOJ will issue some sort of joint guidance on vertical mergers?
Makan, maybe you want to start.

**MR. DELRAHIM:** I’m just glad you did not ask if there was divergence between the FTC and the DOJ on these issues. [Laughter]

**MR. SIMONS:** Now there’s a follow-up question. [Laughter]

**MS. GARZA:** I was thinking about it, but the way he reacted to the other—

**MR. DELRAHIM:** That’s the follow-up question.

On that point, let me just say that we have people here who I would characterize as largely reasonable, even within our front office—Andrew, Barry, Mike, Richard, and everybody else—we disagree sometimes on narrow issues, and we might disagree at times. On a commission it’s actually a good thing to have some dissent because it will air it out. Bad ideas will get shot down because there’s a debate about it. Good ideas will—you know, the cream will rise to the top as far as issues that make sense.

You know, had there not been a Robert Bork book in 1969, actually published in 1979—for good or bad, and maybe half the audience doesn’t like it—you wouldn’t have had some of the changes we have seen actually protecting consumers.

So I think the type of debate that you guys have is good. Now, we have it internally, so Andrew doesn’t write a dissent or a statement on a complaint that we file, thank God. [Laughter] But we have the debate internally and quite actively—and I encourage that. You know, Bert Foer’s son, Franklin Foer, has been at the Division and spoken. We created the Jackson-Nash series and have had some fascinating folks who are all Nobel Laureates in Economics, to come and bring the contrarian view so that we could continue to sharpen our thinking. That series I’ve been very proud of—named after, of course, the great Supreme Court Justice Robert Jackson and the economist John Nash—as it has provided that type of thought.

So, I actually may disagree with an opinion or an outcome of a case—two Commissioners or three who might dissent obviously disagreed—but, especially when they write a dissent explaining why it is they disagree, I think it helps the broader competition community. So I’m a big fan of some of that because we have a debate.

Now, on the vertical issue, getting back to the germane question you asked, the short answer is yes. I don’t think anybody in this room would agree that the 1984 Vertical Guidelines put out by the Justice Department really have any value or relevance in today’s world. I can state that.

Will you guys raise your hand?

**MS. GARZA:** I was involved in those Guidelines. I agree with you.

**MR. DELRAHIM:** I know you were, and back then they had—

**MS. GARZA:** But it’s just harsh, Makan. It’s just harsh. [Laughter]

**MR. DELRAHIM:** You and Rick [Rule] and everybody who was involved at that time—you guys had great leadership and all of that, and it was quite relevant I’m sure back then. It might just not be right now. I don’t know. I mean let’s see a show of hands of how many people in this room think the 1984 Vertical Guidelines are still relevant.
Not a single one. Not even a dissent on this one.

We have learned, though, and Steve Salop’s research has shown us, I think from 1994 or 1996—sorry, Steve, I don’t know the exact time—up to 2016 there was something on the order of about 50 or so vertical mergers that the FTC and DOJ had actually enforced. There have been several more since then, as we’ve heard. And we’ve had some body of law and some practice.

I think it would be helpful to you, as practitioners to the business community, to know where we stand from an enforcement standpoint. So, we have been working on a revision of that. We were waiting for the D.C. Circuit’s AT&T opinion to see if they were going to go one way or the other, if the law was going to change in any way.

But, despite some common rhetoric, vertical mergers have been enforced by the two agencies. It is my hope—Joe and I have discussed it briefly—that this would be an area where we can agree and put out joint Guidelines, if we can get there. We haven’t really shared drafts yet based on the two common understandings, but I think a joint product would only be better because it will culminate from the experiences of the two agencies and the experience that the two have, and hopefully it will be useful to practitioners like you.

Joe hopefully doesn’t disagree with that.

MR. SIMONS: No.

The first thing I’m going to do, though, is I’m going to defend my friend Deb. When you wrote those Guidelines back in 1984—I hadn’t read them in a long time, so yesterday I actually went back and read them—they deal largely with potential competition theories and collusion, and maybe there’s something there relating to evasion of rate regulation, which nobody thinks about anymore. So that was really it.

But then I realized, you know, that was 1984. That was before all the foreclosure literature really got into the mainstream. The seminal article written by Salop and Krattenmaker came out in 1986 in the Yale Law Journal. That was 1986, two years after you wrote those Guidelines. This is just an example. I think things really change, and we have to do something to keep up with the change.

The other thing, too—I want to say this for myself, and I’ll bet Makan agrees with this as well—you can dissent if you like—is that when you issue these types of Guidelines, you really want to do what you can to make them as bipartisan as possible—so that they last, and they’re not reversed when the administration changes.

Now, for those of you in the audience who are roughly my age, you might remember when the 1982 Merger Guidelines came out. Those Guidelines are in large measure the core of what we still have today. But when they came out in 1982, there was a lot of dissent about those Guidelines, and it took more than ten years, probably, before they gained broad support.

What you’d like to see is for us to come up with something that would have that type of support immediately. Maybe that’s not possible. But you still want to come up with something that, at least over a long period of time, will garner the support—so that’s what you aim for.

The difficulty I see with trying to craft these Guidelines is that it’s hard to think about what the framework might be because the issues are so complicated. Vertical mergers are complicated. Vertical merger analysis is much less straightforward than horizontal merger analysis; it’s hard to think about a nice, neat framework, like the 1982 Horizontal Merger Guidelines, that could be put in a form that would fit and be consistent with what we need for vertical mergers.

Here’s what I’ve been thinking about. First, we should try to see if we can come up with a high-level structure that allows us to see some light at the end of the tunnel, in terms of getting to a
place that makes sense for Vertical Merger Guidelines—and if we can do that, then we could devote substantial resources to getting there.

The other thing we could possibly do is take an intermediate step. If we’re having trouble getting to a good structure for Vertical Merger Guidelines, doing something along the lines of a Merger Commentary, like we did in the horizontal area back in Debbie Majoras’s time as FTC Chairman, might make sense.

Those are the things I’ve got in mind, and I think it’s all consistent with what Makan just said—at least I hope so.

**MS. HESSE:** Makan, shifting gears a little bit, can you tell us more about the Media Advertising Workshop that you mentioned and announced toward the end of last year?

**MR. DELRAHIM:** Yes. I think, consistent with the theme of some of the technology companies and all of that, we have had a recent slate of a number of media mergers, particularly in the broadcast area.

As many of you know, advertising has moved. It’s not necessarily just local broadcast or cable spot advertising, but there’s also online digital advertising that has entered the space.

We are going to be announcing—well, I don’t know if the actual schedule is out, but it’s May 2 and 3—a two-day workshop that will help us understand advertising markets. We’re bringing in experts on advertising in television and online, some academics, as well as practitioners and experts in this area, who will share with the Division, as part of our efforts to understand whether our market definitions need to change for those types of transactions.

We hear the arguments from parties. We have traditionally treated local broadcast advertising as a separate market from cable spot advertising, as a separate market from digital, but, as those distinctions are blurring, we need to assess whether there is justification for us to change our viewpoint with respect to those transactions.

The two-day hearing—I hope many of you will be able to attend—will be, I think, the first event in our new Anne Bingaman Auditorium and Lecture Hall, which, as many of you may know, we dedicated. I was honored to dedicate it to Anne Bingaman, who was President Clinton’s first Chief of the Antitrust Division and, importantly, the first woman AAG of the Antitrust Division, in our Liberty Square Building Auditorium, which used to be the Securities and Exchange Commission’s public hearing room. That is now a lecture hall that is all high tech, and various people can have access to it. It will be streamed and broadcast live to have as much consumption as possible.

We’ll do that, and we hope to learn and see what comes from it. We have a great host of folks, experts in the industry, that have all agreed to show up, and we’re excited to see what we learn.

We’ve done that in a number of areas. We’ll continue to do that. We’ll be doing that in the criminal cartel area, where we’re going to have a one-day Workshop on the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA)—as you know, it sunsets, I believe, in 2020 or 2021—taking a look to see what we learned and whether we could improve on that. This is part of that process.

**MS. HESSE:** Do you anticipate a report coming out or haven’t you figured that out yet?

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MR. DELRAHIM: We haven’t figured it out yet. I mean, reports can be useful, like Joe said, as Commentary or Guidelines, if they provide transparency into how as government enforcers we think about issues because then it helps you advise your clients to comply with the law.

The public testimony and all that information we will make available online. For our deregulatory hearings that we had last year, those roundtables, we did put out a report. We summarized those. But whether or not we will do an analysis of it, if it leads to a change in how we will view broadcast mergers or other types of media mergers that will be affected by that, we will certainly put out a Commentary with information about that.

MS. HESSE: Thank you.

Margrethe, 19 European countries issued a statement calling for new antitrust rules that would better allow European champions to compete in global markets. France and Germany recently announced that they plan to propose changes to EU competition policy in the wake of the Commission’s challenge to the merger of Siemens and Alstom, and the EC Vice President—I will not say the name because I will butcher it—said that he was open to considering changes to EU competition law.

What are your thoughts on whether these calls for change should be answered; and, if so, how?

MS. VESTAGER: Yes, we do have a lively discussion—[Laughter]—slightly broader, though, than very specific competition laws, more about competitiveness as such.

Yes, things are going well if you look at key indicators, but obviously the global economy is a challenging place to do business. We see that for European businesses when they are in the global market there can be lack of market access, no reciprocity, no access to be part of public procurement processes, weak protection of intellectual property out there, high security risks coming from foreign direct investment, it can be investment that is propped up with subsidies in strategic sectors. So a number of things to deal with.

When we ask for fair competition, competition on the merits, within the European market, of course we will also stand up for that principle in the global market. I think there are many things that we can do.

One of the great things, I think, is Cecilia Malmström, my colleague in Trade, together with U.S. colleagues and Japanese colleagues, have tabled proposals in the World Trade Organization (WTO) to reform that. We have a bilateral dialogue with China on harmful subsidies. But neither of those two things will produce results within the next six months, so obviously we will have to do more ourselves.

The Council has agreed to open up again discussions about having an international procurement instrument to ask for reciprocity—if you can come and be part of the tender processes with us, we would like to be able to do the same with you. I think the time has come so that we are maybe slightly more hardnosed in those processes.

One thing, though, from the Siemens/Alstom analysis, which was an in-depth, granular analysis of competition issues, was how different markets are because Siemens and Alstom have access to a number of open markets. Siemens and Alstom can sell trains here in the United States—not many very-high-speed trains, though, judging from my experience [Laughter]—and Bombardier can sell trains in Europe. China is sealed off; we cannot go there. This, of course, affects our analysis when it comes to these mergers.

The thing is that when we do a merger case, it must rest on the specifics of the case. The Siemens/Alstom case involved going through, I think, 800,000 documents analyzing how markets
will develop for the next ten years, all the parts of the train-signaling market where we had no com-
petition concerns whatsoever.

For me, it’s still very important to say here we have a responsibility on the side of businesses
to come forward and solve competition problems because we take no issue with the logic behind
a merger. We take issue with the fact that customers should have someone to turn to if prices go
up, choice goes down, innovation stops.

That reflects, I think, something that is fundamental in the debate about competition laws, that
they reflect a strategic choice made by our founders, that the European social market economy
rests on fair competition. It’s a strategic choice. It’s not just a set of rules and you turn a screw here
or you turn a screw there, it’s a strategic choice, and it has served us very well.

This, of course, doesn’t mean that we shouldn’t look at ways to make our rules better, more effi-
cient. We have been doing quite a lot to try to reexamine the use of our competition tools. We are
looking at the UK Report on Competition in the Digital Age, the Australian report on the same
issues. My three special advisors will come with their report very soon. So, I think it is very impor-
tant to welcome and embrace an interest in how we enable fair competition and how we can
enforce that because it is indeed much more challenging than it was.

And we, of course, can challenge our own tools. The tying logic of the Android/Google case is
the same logic as in the case of nail guns and nails, so obviously we can use our tools in new sit-
vations. But it may still be that we need new tools on data sharing, on data sharing as a remedy,
a lot of that, and in that, of course, we very much hope that we can learn from one another and
get inspired from one another.

**MR. DELRAHIM:** May I just make a point on what Margrethe said, just to commend her and her lead-
ership at DG Comp? Alstom/Siemens was a merger that we jointly reviewed at the Justice
Department. There were obviously a lot of calls to create national champions, and there should-
n’t be a role necessarily for that in a pure antitrust review. The leadership you showed in with-
standing that as part of that review, despite those types of calls from various corners to do that,
and withstand the political pressure from doing that and focusing on the competition issues,
is really important. And it sends a strong signal, I think, to the broader competition community that
that’s what we do and that’s what we should do.

Obviously, there are national security and other considerations that we all factor in, but with
respect to something like that, creating a national champion even if it would harm consumers, is
not the way to do it. I just want to commend you for your leadership in doing that.

**MS. VESTAGER:** Thank you very much.

**MS. HESSE:** Alejandra, back to you. Last year COFECE announced an investigation into probable
monopoly practices in Mexico’s e-commerce market. Among other practices, COFECE said it was
investigating price discrimination by major players to impede the growth of smaller competitors.

What is the investigation about, what’s unique about the e-commerce space in your mind, and
are there other potentially anticompetitive practices that COFECE is looking at?

**MS. PALACIOS:** This is an ongoing investigation and, therefore, I cannot give details of the case.
However, according to the agreement of initiation of the investigation, which was made public last
year, the practice refers to tie-in sales, not quite price discrimination.
As you mentioned, the investigation covers e-commerce platform services in Mexico. Some examples of services that are usually related to this type of electronic platforms are financial services, logistic services, advertising of goods and services, among others.

This investigation is a milestone for COFECE, as it is the first ever opened investigation in the digital markets. It will be very handy to learn from the experience of other antitrust agencies in terms of how they investigate abuse-of-dominance conduct in these markets.

One thing I am glad of is that for the past few years we have dedicated resources to build our Digital Forensic Market Intelligence Unit, so this unit is capable and prepared to collect and analyze large volumes of information, which is characteristic of the markets within these digital features. This means we are ready and up to the task.

At this time, we are also analyzing one of our first mergers involving at least one merging party pertaining to the digital market, so that is also new for us. In this case, it’s an incumbent in the bricks-and-mortar market, a traditional retail supplier, which intends to purchase a two-sided market platform that adds value by delivering grocery products at the final consumers’ doorsteps.

Apart from being a digital market merger, this is a case that is also very interesting for us because it is the first in-depth vertical merger that COFECE has analyzed in recent years. So, we are also interested in what our colleagues have to say regarding vertical mergers.

MS. HESSE: Rod, last month the Commission announced its 2019 policy priorities, which included tackling consumer protection issues related to customer loyalty schemes, consumer guarantee rights, and the complexity and opacity of pricing of essential services in the energy and telecommunications sectors. Why did you choose these as policy priorities for the year, and what’s your view on the balance to be struck between deterring pricing opacity that can hurt consumers and pricing transparency that can lead to coordination among competitors?

MR. SIMS: Thanks for the question.

We list our priorities at the start of every year so that everybody knows what we’re focusing on. We’ve had a recent strong focus and successful focus on criminal cartels. We’ve also got a focus on unilateral conduct, particularly trying to simplify the theories of harm, which sometimes gets so complicated you lose the wood for the trees. And we have a big focus on large companies deceiving their customers. We recently took action against Ford, Apple, and Heinz. I only mention those because they’re American companies and I’m in America. There were a lot of other companies as well that we took action against and got some quite nice fines.

But the three you mentioned:

(1) The loyalty schemes are becoming, or they are, ubiquitous in all our societies. We’ve got consumer issues to address: are consumers getting deceived in terms of the benefits that they’re told they’re getting, how their information is gathered, what’s done with that information, and so on. And then we’ve got competition issues, trying to understand the effect of these loyalty schemes on competition in the market, particularly in relation to new entrants. So we think the time is right to focus on that.

(2) Consumer guarantees is just an old favorite for us. In Australia we have a law that says if the good is not fit for purpose, you are entitled to a refund or replacement, or repair if that can do the job. What you find is expensive white goods and electrical goods on average tend to fail after about 18 months, just after the warranty has disappeared, but you still have your fundamental rights to a refund or repair if the good isn’t fit for purpose. So, we keep trying to enforce that and make sure that companies can’t say to people, “Go away, it’s too late,” when in fact a premium fridge only lasted 18 months. So, it’s a very important consumer issue.
(3) The fascinating ones are, though, the opacity in our telecommunications and electricity markets. In electricity the companies deliberately market on the basis of discounts. Someone will give you a 20 percent discount, someone else will give you a 40 percent discount, but, because you don’t know the base off which the discount is coming, the 20 percent discount could be a much better deal than the 40 percent discount. The companies deliberately make all that unclear. In telecommunications it’s unclear what it is you are getting for your money in terms of speed because that hitherto hasn’t been clear. So we are focusing on these areas.

On the one hand, you do need informed consumers for markets to work. On the other hand, of course, as a competition agency, we fully understand that you’ve got to be careful that the transparency doesn’t facilitate coordinated behavior, particularly in markets where there is high concentration and there’s not much differentiation in the service.

But what we find also is that often the suppliers have got all this information anyway, it’s the consumers who don’t have it, so really there’s not that much risk of coordinated behavior. And, in the case of electricity and telecommunications, it really is trying to bring some clarity over whether the discount is truly what it is meant to be and whether you’re truly getting the service in terms of speed that you signed up for. I think we’re making great progress on this. And these are matters that fundamentally go to people’s faith in the market. If people lose faith in the electricity market, lose faith in the telecommunications market, it has profound effects on people’s faith in our market economy, and we don’t want that.

**MS. HESSÉ:** Sarah, you spoke earlier about drug pricing in particular. Joseph Nielsen, a Connecticut Assistant Attorney General, recently stated in an interview that a State AG investigation into price fixing in the generic pharmaceuticals market has expanded to cover potentially hundreds of drugs. Typically, we see DOJ in the lead on criminal investigations.

What prompted the State AG investigation and what interests are the states looking to protect?

**MS. ALLEN:** Well, first I’d like to say poor Joe Nielsen. The staff attorneys at the AGs’ Offices are trained not to speak to the press more than we have to. So, even when you say something truthful, when it gets repeated that many times, you feel like you’ve done something wrong. But he did have a truthful statement.

Currently, our generic drugs price-fixing case is being led by Connecticut, New York, and Florida. It has 47 state plaintiffs, so it’s very bipartisan; 18 pharmaceutical company defendants, 2 individual defendants; and it covers currently 15 different medications. The case has been consolidated into an MDL in the Eastern District of Pennsylvania. Although almost half of our states have criminal antitrust authority, we aren’t really able to prosecute them as a multistate in federal court, so this case is a civil law enforcement action. We are seeking damages and disgorgement as alternate remedies. I believe that Connecticut started this case from reading the paper, so that’s where sometimes cases come from.

Based on our investigation so far, we do have good evidence to potentially expand our complaint to cover hundreds of drugs and more generic manufacturer defendants. This is a widespread conspiracy that covered almost the entire generic drug industry.

And, as I mentioned earlier, the accessibility of health care and the affordability of pharmaceutical drugs is a central concern of our attorneys general. The states have been involved in

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It is hard to imagine another area of enforcement that is more important to our AGs’ antitrust mission right now than affordable health care and competitive markets. It’s especially important to ensure that generic drugs, which were supposed to be the cheaper alternative to brand drugs, are not artificially overpriced because of anticompetitive behavior.

And so, for the antitrust defense bar here today, just look at the possibility of the expansion of our case as a possible full-employment guarantee for you as more drugs and more generic manufacturers are added to our case.

**MS. GARZA:** Did you say interdependent pricing or coordinated pricing?

**MS. ALLEN:** Coordinated pricing.

Makan, in remarks before the Berkeley-Stanford Advanced Patent Law Institute you announced that DOJ was withdrawing its support for a 2013 Policy Statement that had been jointly issued with the Patent and Trademark Office (PTO) relating to remedies and standard-essential patents. What did you disagree with in that Policy Statement, and can we expect a new Policy Statement on this issue?

**MR. DELRAHIM:** This is another one of those where good people could disagree on the policy direction of some of these types of cases. Renata and I have had very friendly discussions about this in the past.

What do I disagree with? I don’t know if the Policy Statement accurately reflects the law. Specifically, one is I think it mentions—I don’t want to mis-paraphrase it—that injunctions in a patent case could harm competition and consumers, which are the code words for “an antitrust violation”; but an order of an injunction itself should not be, or an exclusion order of the ITC may be against the public interest, which again I don’t think it necessarily is. By definition, I think intellectual property, particularly patents, have the element of exclusion, so it is almost pointless to not be able to get an exclusion order where warranted.

Now, I was on the briefs as an amicus in *eBay v. MercExchange* in the Supreme Court, and I was on the side where I thought the Federal Circuit had gone too far for an automatic injunction and that the four-part test for an injunction was the appropriate standard. That’s what our law is, that’s what our common law and the constitutional system requires, and unless and until Congress changes that view, where you have made a contractual commitment, whether it’s part of a standard setting or otherwise, we don’t have a different rule in our patent laws for an injunction to be issued when you’re a standard essential patent or you’re not. We have a process where you go to court and you can get it or you don’t.

Once you remove that, it changes obviously the leverage model of the innovator and the ability to seek compensation. I consulted with my colleague, Andrei Iancu over at the Patent and Trademark Office, and we had some discussions. I think I’ve probably given more speeches than any of you want to read about the issues on these topics, of why that is so important.

Again, I think *Motorola Mobility v. Microsoft* up in the State of Washington, that federal case, was the proper way of handling that. If there’s a violation of a contractual commitment, that’s an issue of fact finding: is your request for royalties reasonable or not? They found it wasn’t, and they determined what that is, and that’s the judicial system. To then say that a standard essential patent
should not be deserving of an exclusion order or an injunction “just because,” I think is not supported by the law and I think that was the reason why we withdrew that.

We’re talking with the PTO. Whether there’ll be a replacement of that—I don’t know if it’s necessary to have a replacement, other than what the four-part test in eBay commanded by the Supreme Court tells us we should do, which has always been the rule.

That’s getting a little bit specific to a couple of the areas of the Policy Statement and why we did that.

**The number of leniency applications**

**MS. HESSE:** Makan and Margrethe—maybe, Margrethe, you can start on this one—there have been some reports that leniency applications are on the decline worldwide.

First, is that a correct perception? Second, do you think we’ve passed peak cartel enforcement, or are you taking steps to compensate for the decline in leniency applications in other ways?

**MS. VESTAGER:** As you say, leniency is very important. It’s a very important tool in our work, I think, as in most jurisdictions. By nature, cartels are difficult to find, since that’s the point of the cartel, that they’re secret. Spoiler alert: there will be more insight for you later on. [Laughter]

What we can see is that we have had a number of cartels. I think for the last two years we imposed fines of €2.7 billion, and that was after the record year in 2016. So we have strong cartel enforcement.

That being said, we are definitely not at the top of our leniency applications right now, so obviously we invest a lot in our ex officio work, because part of the leniency program, for that to work, is of course that you’re afraid that someone else will go catch you.

So, in our strategy we do three different things:

First, we have invested in digital investigation methodologies. We have set up a unit staffed with people who have specific skills in doing that, gathering and improving our data analysis.

Second, we have created sort of a centralized intelligence network with other DGs, agencies, that may sort of see things that they wonder about and they would then get in touch with us to say, “Well, this may not be right,” so that we can get started.

Third, In 2017 we launched a whistleblower tool so that you can get in touch with us and we can have a real dialogue about what you want to tell us while you are still being protected and anonymized, because the identity here is of course very important.

So we are pushing for our own tools to be more effective in that and also for leniency to be more attractive.

Talking about attractive leniency, we have now launched what we call eLeniency to make it easier for companies, and of course their legal representatives, to submit statements, documents, all that is needed in order to have leniency in cartel proceedings.

So, I think the bottom line of this is that the number of leniency applications goes up and down, but cartel investigation is still, of course, a very high priority because cartels are probably the most damaging sort of illegal market intervention that you can think of, which is why, of course, we push these methods in order to be able to make it attractive to report not only yourself but specifically also report on others.

**MR. DELRAHIM:** In the United States I can tell you that I am pleased to report that I have looked at the statistics, and in 2018 the leniency applications were on par with the historical averages. In fact, 2018 is higher than 2017, despite, I think, some reports that I have turned down opening certain criminal investigations. That’s just simply not true.
Do I take a critical view of cases, just as in our civil cases, when they come up to open up a matter? I take our criminal enforcement authority very seriously. Have there been additional information requests that have gone down to the staff to develop better evidence or better theories of harm? Absolutely. As Judge Leon recently said at a public hearing, “I’m not a mushroom in the dark.”

If it requires my signature, it requires my time to review that and open that. But there has not been an instance of a criminal investigation where I have refused to open that up, other than getting some additional information and developing the cases. So, I think that is good.

But the leniency program is one of our, I think, best enforcement and prosecutorial investigation tools. The addition of ACPERA, which I mentioned we have a one-day workshop roundtable on—it’s coming up; I think we’re doing that April 11—to look at that and see if it continues to improve our leniency program.

My goal is to continue to see if there are better ways to improve it both domestically and internationally. It has been the single best tool that has protected consumers from a spate of international cartels that we have uncovered and will continue to uncover.

I should also just mention that as of the end of 2018—I want to get these figures right—we had 91 open grand jury investigations. That's the highest number of pending grand jury investigations since the end of 2010.

We also have been involved and are preparing for an unprecedented number of trials that are coming up. In 2017 nine criminal cases went to trial, the highest number in the last two decades. The trend seems likely to continue as, at present now, prosecutors are preparing for six trials coming up.

We had a very major victory on the law, which I was very proud of and proud of our team, particularly in Chicago and our Appellate Section in Washington, with Andrew Finch arguing the Tenth Circuit appeal, in the Kemp case. That was one where it was fraught with some dangers of whether or not our per se rule could be applied.

This was a case where you had heir location services—not air, but heir meaning there were inheritance heirs—where they had actually a market allocation agreement between them. They had argued it should be evaluated under the rule of reason.

The judge ruled a certain way. It went up to the Tenth Circuit. We won largely on it. We got some great language from the Tenth Circuit, although they withheld ruling, because of jurisdictional issues, on the issue of whether or not it should be rule of reason or per se. We were faced with the issue that if we had to litigate a criminal case under a rule of reason, then do we go up to the Tenth Circuit? It was a difficult enigma for us.

But, fortunately, with our staff we went back to the district court and the judge and made the proper arguments to the judge. We considered his new opinion, and he did appropriately apply the per se rule, as is the exact law.

So we’ve had some challenges, but with that one, after about a 15-month legal detour—and there was a lot of strategy that was involved to make sure we safely landed that plane—I think our per se program is in good shape, and Richard Powers is busy at work.

I couldn’t be more proud of all of the new leadership we have across the country in every one of our sections—New York is the only exception—but every other section chief is brand new. Both of our Washington Criminal Sections, San Francisco, and Chicago all have great new leadership and they are all working hard for the taxpayers.

**MS. HESSE:** Alejandra, in November 2018 Argentina, Brazil, Chile, Mexico, and Peru signed the...
Charter of Paris reaffirming their commitment to the basic principles of these programs and to their improvement. What prompted this event?

**MS. PALACIOS:** I will start by saying that our peer agencies in Brazil, Chile, as well as Colombia, Peru, and ourselves, have been aggressively prosecuting cartel activity. Some years ago some practitioners said that cartels were a “hot topic” in Latin America. In this fight we have used leniency as an investigative tool with some success.

In this context, in the soft paper cartel case in Latin America, the Andean Community’s Competition Authority, which is a supranational body with no leniency program, decided to fine two companies which had received full immunity from the national competition authorities of Peru and Colombia, making public the names of these companies.

In my view, the Andean Community action by itself did not undermine the confidence in all leniency programs in the region, as it was written at that moment—maybe for some agencies it did, but not of the whole region, or at least it didn’t undermine the Mexican program—although, for example, from that experience the Peruvian Congress had intentions to reform the Leniency Program, reducing the benefits granted by the authority to the first-in leniency applications.

So, in this context, as members of the Latin American Alliance, we decided to sign the charter. We wanted to make three things clear:

One is to recognize the benefits of the leniency program as a cornerstone of our investigations, and we wanted to make that public.

Second, we assert the commitment of these authorities in particular in terms of the confidentiality of the applicants to the program.

And third, to send a message to our governments that best practices in leniency programs exist and that if regulations or new laws would come about, they should aim to conform to these international practices instead of departing from them.

So, in a nutshell, it’s the importance of this investigation tool, our commitment to confidentiality, and trying to maintain at least a certain degree of consistency among our programs and of our programs with international best practices.

**MS. GARZA:** Rod, it has been ten years since Australia criminalized cartels and we haven’t seen any cartelists sent to prison yet. Is that because they don’t exist in Australia, or what have you been doing in your cartel enforcement work?

**MR. SIMS:** It’s a question we often get asked, and I really enjoy the fact that lawyers want to put people in jail. I think that’s just fantastic. [Laughter]

Our criminal cartel regime or legislation came on in the middle of 2009. We eventually worked out that only if activity really was fully after mid-2009 could we take the case because otherwise we had a blend of activity that just didn’t work.

We then used our general teams to do criminal cartel work, and we found that didn’t work, we needed specialized teams, so we formed a specialized, dedicated criminal cartel team, because only that way could we establish the processes and expertise in criminal work that is separate from, of course, our core long-established skills in civil work. So perhaps we were slow in working that out, but we now have put a large investment into that dedicated criminal cartel unit.

We have also done a lot of intelligence work and outreach work, particularly with public procurement and in the construction sector, just explaining to people what a cartel is. You’d be stunned how many people don’t really understand what a cartel is and don’t recognize it when they see it, so we have done a lot of work there.
I should add to what has been said that of course our immunity applications are going up, so there is continuing demand for work. And we have long had, of course, a civil cartel program. But we want to make sure that we have an active intelligence program. We don’t want to just be reliant on immunity applications. People have to know that if they don’t seek immunity, there’s still a good chance they’ll get caught. So, now the good news is we are up and away. We have now a well-oiled criminal cartel machine.

In 2017 we had our first successful criminal prosecution in relation to NYK, a Japanese shipping company. We’ve also had K Line plead guilty. So we’re on the cusp of two successes.

More importantly, in 2018 we had three very important matters in banking, health care, and involving a trade union. Our banking case involved six senior executives in ANZ Bank, Citigroup, and Deutsche Bank. The allegation there is a cartel in trading in ANZ Bank shares. So, that is being tested now in the courts.

The other case that’s really fascinating is taking cartel action in relation to the largest, most-high-profile trade union in the country and a senior trade union official.

We will institute or begin proceedings in three other cases in 2019, and we are determined to keep running at least three cases a year until we actually make a dent in people’s perception of the benefits of undertaking cartel activity.

So it’s a big focus for us. We’ve made a huge investment. These things take time, but we’re getting there.

MS. GARZA: Thank you, Rod. Joe, I’m going to go back to you on the other end. The United States is one of the only industrialized nations that does not have a federal consumer privacy law. Do you think there is an argument to be made for developing a privacy law or sets of laws at the federal level in the United States?

MR. SIMONS: Yes, definitely. I definitely do think there’s a good case for federal privacy legislation. I also believe very strongly that the FTC is the agency that should be enforcing whatever legislation is passed. I think the process of enacting federal privacy legislation is going to involve some difficult tradeoffs regarding cultural and societal values, that really only the Congress is situated to take care of. We’ve suggested that they should not dump it on us by saying, “Hey, you take care of it, you come up with the rules, you come up with the regulations.” We don’t want that. We want Congress to do that.

But, like I said, we will enforce it. We’ve committed to them that, whatever legislation they pass, we have the expertise and experience to enforce whatever they pass, and we would do it vigorously and enthusiastically.

We’ve told the Congress a few things that we would like to see in any legislation, and we’ve offered some suggestions regarding how they should think about some of these tradeoffs.

First, we told the Congress we would want the ability to get civil penalties for initial privacy violations. We think this is the only way we can create an effective deterrent effect so that, whatever legislation they pass and whatever rules are in place, those can be effectively enforced.

The problem you have with privacy (and also data security) issues is proving any kind of significant or large amount of harm for the purpose of calculating redress. You can prove some harm, enough to bring a case under the statute, but to get monetary redress is very, very difficult. We think civil penalties would take care of that.
The second thing we’ve asked for in whatever legislation they pass is targeted rulemaking—similar to what we have in the Children’s Online Privacy Protection Rule (COPPA)—that would allow the FTC to keep up with technological developments. But the key word is “targeted.” We don’t want to be in a situation where it’s open-ended and involves lots of agency discretion. Again, we want Congress to make those hard decisions.

The third thing we’ve told the Congress we would like to see is to get rid of the common carrier and nonprofit exemptions; under our current FTC Act jurisdiction, we cannot take action against those folks.

The final thing we’ve talked to the Congress about relates to the tradeoff between competition and privacy. Depending on how you approach privacy legislation, you could find yourself in a situation where the more privacy you have—the more stringent enforcement you have on the privacy side—the less competition you have.

The FTC has a dual mission, competition and consumer protection, so we’re sensitive to both of those things. We’re very nervous that if you get too much privacy protection, you might get into a situation where it becomes hard for small companies, especially potential new entrants, to compete with the more established, bigger platforms. You could end up in a situation where in order to protect privacy you’re actually entrenching digital monopolies, and that would be a mistake. So, we encourage the Congress in whatever type of legislation they enact to try to avoid that situation.

MS. GARZA: Joe, is the reason that you prefer to have Congress act in this area rather than telling the FTC to make the tradeoffs is because you see the tradeoffs as being inherently a political choice?

MR. SIMONS: Yes.

MS. GARZA: And are you nervous at all that what you’ll get is going to sufficiently recognize those nuances you’ve just described in the balance between competition law and privacy?

MR. SIMONS: Well, yes, I’m nervous, and that’s why we’ve told them, “Please take care to consider these tradeoffs.”

The privacy issue, like I said, has really serious societal and cultural values attached to it, including how do you want to approach it. That’s something that elected officials should be doing, not the FTC.

The other thing driving this now is you’ve got California and other states in the mix developing their own legislation, and there’s a danger that you’ll have kind of a patchwork. That’s something that probably really needs to be avoided. That’s probably also the impetus for why this is now getting so much traction in Congress.

MS. HESSE: That was actually a perfect segue.

Sarah, several states, including California, have indicated that they will follow Europe and adopt General Data Protection Regulation (GDPR)-style protections. What can you tell us about the status of these laws and the states that have moved to adopt them? And do you think that the rollout of these laws will increase state enforcement of privacy and data breach cases; and, if so, how do you think that will work?
MS. ALLEN: As far as I know, California is the only state so far to adopt any privacy legislation like the European Union's GDPR standard, and it's called the California Consumer Privacy Act, which is slated to go into effect in January 2020.

There is a patchwork of several different types of data breach notification or reporting laws in all 50 states, but no comprehensive GDPR-style legislation.

There have been congressional hearings about developing federal privacy legislation, but Senator Feinstein from California has said she won't support any federal legislation that provides less consumer protection than the California privacy law does. So then you get into these questions of tradeoffs.

One of the issues I know that Congress has been discussing is whether the federal privacy law should have an opt-in standard like GDPR or an opt-out standard like California. But questions have arisen about whether consumers can ever meaningfully opt out. I know former-AG-now-Senator Hawley from Missouri has pointed out that Google never stops tracking the phone's location even when the consumer has turned off the location services or isn't using his phone. So that would be an instance in which a question arises as to whether you can meaningfully opt out.

Another problem with the opt-out standard is entrenching the monopolist in their monopoly position. General Hood from Mississippi and General Brnovich from Arizona have both made statements to the press that they are looking into developing a lawsuit against Google, but it's unclear whether it will be a consumer protection or an antitrust case, or have allegations of both. General Hood compared the case that he is developing to the Microsoft case, which would obviously be an antitrust case, but then said he would use his consumer protection law to bring the case. I think that's why it's a little unclear.

In December General Racine from Washington, DC, sued Facebook under DC's consumer protection act for privacy violations, claiming that many DC residents who installed the Facebook app on their phones then had their personal information collected not only of them but all their Facebook friends without their permission. The AG's Office is seeking damages, penalties, and injunctive relief in that case. And, although states do coordinate on consumer protection cases, there is no one single federal consumer protection act, like with the federal privacy legislation, that they can use to file a single action in federal court. So, as with the states' opioid cases, these privacy consumer cases would then have to be filed one by one in individual state courts, which sometimes makes it harder for the companies to defend.

The states do coordinate on common issues in each state and they do sometimes jointly negotiate settlements, but the fact remains that it can be up to 51 different cases that companies have to defend, and, without a single privacy statute that creates a federal cause of action, companies may have to try to comply with disparate standards state by state.

—SARAH OXENHAM ALLEN

MS. HESSE: Margrethe, this could be your last Spring Meeting Enforcers’ Roundtable, although we’re not sure yet. We don’t know yet who will be the next Competition Commissioner. If it’s not you, what would you like to be remembered for and what would you advise your successor to do differently?

MS. VESTAGER: This is a tricky question.

Of course I would like to be remembered, but I would definitely not like to be missed. Of course we do our best to make sure that everything is prepared for the successor to pick up just as well as it was prepared for me to pick up after my predecessor. So it is a tricky thing.
There is one thing, though, that is sort of an undercurrent in this mandate. You know there is the saying that if you do things one time it could be an error, if you do it two times you’re still testing, but when you have done things three times it is already a habit. This is actually sort of like my participation in the ABA Spring Meetings.

I have been trying to humanize competition law by knitting. This is why I’ve got something for you here.

**MS. HESSE:** The suspense is building.

**MS. VESTAGER:** I think some of you should save it. It’s an elephant. The big star of course is for lawyers and the smaller one for economists. [Laughter] There you go.

**MS. GARZA:** Margrethe, does this mean you’re a Republican? [Laughter]

**MS. VESTAGER:** As you see, it has the European stars and the U.S. colors, so it’s a beautiful symbol of coming together.

You know the thing about elephants that’s amazing is that they are led by a female and they tend to remember very well. So treat ‘em nicely and go get ‘em.

**MS. GARZA:** Thank you.

Believe it or not, we have eight minutes left. Would anyone on the panel like to add some concluding words?

Makan, is there anything you’d like to say?

**MR. DELRAHIM:** I would have liked to have been remembered as Lululemon’s first male model, but unfortunately they went with Nick Foles [Laughter], the NFL Super Bowl MVP, they just announced this week.

You guys each year keep outdoing yourselves at the ABA Antitrust Law Section. This year is better than the last and last year was better than the year before. It’s amazing what you do to propagate the antitrust and consumer protection knowledge not only here in the United States amongst practitioners but internationally. And certainly, the budgets that Joe and I have to live with, certainly half the budget that Alejandra now needs to deal with, are not enough to prevent all the anti-competitive activity that goes on. A lot of it happens because of the great counsel that you guys provide to companies that intend to be corporate citizens. This is a critical part of the enforcement of competition rules. So thank you for doing what you’re doing.

**MS. HESSE:** Thank you, Makan.

Alejandra, you don’t have to compliment us, but do you have any final words that you’d like to say?

**MS. PALACIOS:** This is my second time on this panel and I am very appreciative that you give this space to Mexico. At the end of the day, I represent the Mexican government in antitrust issues.

I don’t know if I’ll be with Margrethe in another panel in the near future. You are inspiring. Thank you for your friendship.

**MS. GARZA:** Sarah, this is your first time. Do you have anything to tell us that you haven’t had a chance to get out?
**MS. ALLEN:** I think the states are very excited right now. I feel like there's a sense of excitement that we haven't seen in a long time, some fresh ideas. We have a lot of committees that are both thoughtfully looking at issues and then perhaps some case generation. I am really looking forward to my three years as Chair.

**MS. GARZA:** Rod, any concluding comments from you?

**MR. SIMS:** Just that this is my first ABA conference, and having been here, I'm sorry I haven't been here many times before. So I'll certainly try to get back. And thanks very much for the invitation.

The other point is that it has just been interesting observing all the issues that come up, but particularly in relation to digital platforms, and I think the more we have discussions like this, the more we can get a common understanding of the issues and get a common understanding of the approaches. These are global issues and it is much better if we have some alignment as to what are the issues and what's the approach that should be taken.

**MS. GARZA:** Joe, you have the final word before we close the Spring Meeting.

**MR. SIMONS:** I want to provide a little bit of an historical comment. This is my 36th ABA Spring Meeting. When I started coming to these meetings, this was all guys; there were no women. You might be able to count the number of women in the room on your left hand. I look out in the audience today, and of course on the panel, and I see so much more diversity. It's really rewarding to see that—to see that opportunities are being taken advantage of, and that our community is much more diverse than it used to be. It seems to become more diverse as each day goes by. I know that that's pursuant to purposeful policies promoted by the leadership of the ABA Section of Antitrust Law, and I just want to commend you for doing a terrific job.

**MS. GARZA:** Thank you.

With that, we will conclude this Spring Meeting. Thank you all very much for attending.