IN THIS ISSUE

Editor’s Note: In this issue, we provide an edited and updated version of the Enforcers Roundtable from the ABA Antitrust Law Section 2019 Spring Meeting and in-depth interviews with the heads of competition and consumer protection authorities in Australia, Egypt, France, Indonesia, and Kenya. Carrying on the enforcement theme, this issue includes a consensus report on questions facing foreign authorities and their governments in considering changes to their laws, regulations, and enforcement policies concerning cartel sanctions. We end the issue with Tom Nachbar’s must-read review of Tim Wu’s book, The Curse of Bigness.

Roundtable Conference with Enforcement Officials
Agency heads from the European Commission, Mexico, Australia, and the United States, along with the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, provide enforcement updates from their respective organizations. Topics discussed include enforcement in technology/e-commerce, health care and financial markets, enforcement standards based on principles of fairness and public interest, the potential for agency guidance on vertical mergers, and current activity around cartel leniency programs.

Interview with Rod Sims, Chair, Australian Competition and Consumer Commission
The Chairman of the ACCC looks back on nearly a decade in office and discusses the agency’s competition and consumer protection priorities, its approach to market studies and small businesses, the effectiveness of Australia’s voluntary merger regime, digital platforms, and the ACCC’s litigation track record.

Interview with Amir Nabil, Chairman, Egyptian Competition Authority
The head of Egypt’s competition agency discusses cartel enforcement in Egypt, its case against FIFA, the relationship between the Egyptian agency and regional COMESA authority, the need for merger legislation, and how competition has promoted innovation in the tech sector.

Interview with Isabelle de Silva, President, French Autorité de la concurrence
The head of France’s competition agency discusses gun jumping, the culture of competition in Europe, the Siemens/Alstom merger, vertical restraints, and the role of women in antitrust.

Interview with Kurnia Toha, Chairman, Indonesian Commission for the Supervision of Business Competition (KPPU)
The head of Indonesia’s competition agency reflects on the history of Indonesia’s competition law, extraterritorial jurisdiction, merger notification, how the agency sets priorities, the impact of regulation on competition, and enforcement in the ASEAN community.

Interview with Francis Kariuki, Director General, Competition Authority of Kenya
The head of Kenya’s antitrust agency shares his views on addressing longstanding cartel behavior by trade associations, the introduction of thresholds into Kenya’s merger control system, balancing enforcement with encouragement of innovation, the relationship of national and regional enforcement regimes, and taking on a new consumer protection portfolio.

Thoughts on Cartel Sanctions
Commissioned by the Antitrust Law Section’s International Task Force and prepared by a prestigious group of practitioners and academics, this abridged version of the working party’s consensus report examines policy issues relating to the use of sanctions to deter antitrust cartels. The report specifically addresses against whom such sanctions should be imposed (companies versus individuals) and the types of sanctions that should be imposed (fines versus imprisonment).

Book Review: Heroes and Villains
Tom Nachbar reviews The Curse of Bigness: Antitrust in the New Gilded Age by Tim Wu and calls it essential reading for non-academics—enjoyable and edifying, though failing to deliver on its promise.
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.

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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:**

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
NAAG Chair. I’d like to start with the disclaimer that my comments here today are my own and they don’t necessarily reflect those of any particular attorney general or of NAAG itself.

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 cozy 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-
uations. 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 withstanding 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.
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. HESSE: 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
pharmaceutical antitrust litigation for a very long time, including New York’s successful litigation recently in the Namenda case, and 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.

**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?
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.

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?

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.
Interview with Rod Sims, Chair, Australian Competition and Consumer Commission

Editor’s Note: Rod Sims has been the Chair of the Australian Competition and Consumer Commission since August 2011. Prior to coming to the ACCC, he was Chairman of the Independent Pricing and Regulatory Tribunal of New South Wales, Commissioner on the National Competition Council, and held several positions in the private sector. He was interviewed for The Antitrust Source by John Bodrug on March 27, 2019.

THE ANTITRUST SOURCE: Thank you for taking time out of your busy week to meet with us today. Before we start, I wanted to congratulate the Australian Competition and Consumer Commission on its 2019 Government Agency of the Year Award last night.

ROD SIMS: Yes, very good.

ANTITRUST SOURCE: Could you begin by briefly describing the structure of the ACCC and its role in investigation and enforcement, as well as its relationship to the Director of Public Prosecutions, the courts, and the Competition Tribunal?

ROD SIMS: That’s a big question. We are the competition enforcement agency; we’re the consumer enforcement agency.

We are the regulator of telecommunications and the regulator of a range of other infrastructure. And we also look out for consumer product safety. So we have, probably, the widest range of activities of any like regulator in the world.

In terms of competition and consumer enforcement, when that’s done, civilly, we can do that. When we have criminal cartel prosecutions, we pass a brief of evidence to the Commonwealth Director of Public Prosecutions, who then brings the prosecution. They do all criminal matters for all Commonwealth agencies.

If it’s a criminal matter, not only do we have to put a brief of evidence to the Commonwealth Office of Public Prosecutions but then it has to go to our lower Magistrates’ Court before it finds its way into the appropriate court that can hear the case, which is the Federal Court.

So that’s criminal cartels. For all other matters, we’re a prosecutorial agency, and we bring proceedings in the Federal Court, whenever we take enforcement action, as I say, for conflict, consumer, or competition matters.

ANTITRUST SOURCE: Do you see it as efficient for the Commission to have such broad authority over not just competition matters, but also advertising and data rates and communications and transportation? Is that more challenging? Or is it more efficient to have such a broad role?

ROD SIMS: Oh, I think it’s more efficient. The two examples of that, I think, the consumer enforce-
ment benefits enormously from being linked to the competition enforcement. I think the FTC is trying a similar thing.

We’re also unique in that most of our enforcement teams do both competition and consumer work. And the litigation expertise we have in competition work and the way that’s done gives way to consumer enforcement work.

With consumer enforcement, we take a lot of cases against very big companies—recently Ford, Apple, Heinz, and a range of other companies. And we take all that very seriously. So the synergies between competition and consumer enforcement are very strong.

In relation to telecommunications, again, we regulate access to the network so that there can be competition. But being the competition and consumer enforcer also means we can bring a lot of skills to bear on the telecommunication sector.

So I think it just brings economies of scale to the regulator. I think it brings expertise that we can share in various ways. And it makes us, I think, more effective.

ANTITRUST SOURCE: The Commission also conducts market inquiries. Can you comment on the typical impetus to conduct an inquiry in a particular area?

ROD SIMS: We can either conduct market studies ourselves or the government can direct us to do so. Now, the term market studies means different things in different jurisdictions. It’s very confusing when people talk about us internationally. So we’ve done market studies, in communications, we’ve done them in the venture capital industry, and so on. When the government directs us to do them, though, they unlock our information gathering tools. So, just as we can with enforcement investigations, we can compel information, and it’s a criminal offense not to provide it. So that gives you access. That’s the big difference.

With a market study, the general objective is to make recommendations to government or to the industry itself. Most times, one or two enforcement investigations also result from the market study, which we do in the normal way where we come across things we wouldn’t have otherwise come across.

Thus, generally, the objective is recommendations to government. When the government asks us to do one, that’s exactly what they’re thinking—recommendations to government to inform public policy.

ANTITRUST SOURCE: One thing I noticed about the structure of the Commission is that you have a Deputy Chair with specific allocated responsibility for small business. What is the rationale for that? And what does that role entail?

ROD SIMS: We have two Deputies. One who has responsibility for consumer matters and one who has responsibility for small business. The small business person does a lot of relationship building, exchanging information with the hundreds of small business organizations that we have. And he also feeds in a small business perspective, particularly into franchising, but also into much of our consumer law enforcement, because consumer law is also small business law, because it is basically “don’t mislead.”

And when I speak to small businesses, the two biggest compliance issues have been misleading, and what in our jurisdiction are called “unfair contract terms,” which are standard form agreements—they’re not negotiated, so they’re very one sided. So we have a role in making sure those contracts are not unfair. And so, we take action there. We take action when small business
is misled by large business. So it’s just making sure we get that small business perspective, and that we stay very well connected with small business.

I think when I joined the organization, I thought it was unusual to have that role. But now that I’m in the organization, it is a tremendously helpful role. And our interaction with small business benefits enormously from having that role.

ANTITRUST SOURCE: Australia has a voluntary merger notification regime. What are your views on the effectiveness of the voluntary regime? Is the Commission not seeing mergers that it would have liked to have seen before they closed?

ROD SIMS: We’re taking action when companies have merged when they haven’t come to us, and that has sent a message that companies really should come to us.

Australian law simply says it’s illegal to have a merger or acquisition which has the likely effect of substantially lessening competition. So it all gets determined through the courts, if it gets that far.

If somebody goes ahead with a merger and we later form the view that it would have the likely effect of substantially lessening competition, we can take them to court, we can seek the unwinding of the acquisition. And we’ve done that a number of times. So I don’t think we have a problem with it. We had one a couple of years ago, where a company went ahead with the merger, and we forced them to divest. That’s a very recent signal to companies.

As to the complexity though, it’s got advantages and disadvantages. When we do a merger investigation, it is an investigation. It’s just like we’re gathering evidence to prosecute somebody in court. Because we have a prosecutorial system, and because it’s an informal regime, the merger parties don’t get access to the file and a range of other things that they would in a formal merger regime.

Now if they want to seek merger approval under the formal regime, then they get certain access to information. But in the informal arrangement, they don’t.

The advantage of the informal arrangement though is that it’s very flexible. There are no upfront requirements for information, and merger parties predominantly find it an efficient way to obtain clearance. While we don’t have set statutory timelines within which our decisions must be made, our merger approvals, even on complex mergers, are often faster, I think, than they are in the U.S. or the EU or in Britain.

So it has that flexibility. And most of the merger parties like it, except when we oppose the merger and they somehow think the system is flawed. But it has a fairly high degree of acceptance.

ANTITRUST SOURCE: Does the Australian substantive test for merger review include a component of public benefit that might allow a merger to proceed even if the transaction is found to result in a substantial lessening of competition?

ROD SIMS: No, that is not entirely right. There’s no public benefit test in our substantive merger test. In fact there is no public benefit test in any of the things we do, with one notable exception, and this exception may well be unique. Public benefit is taken into consideration when companies apply to us for authorization of activity that would otherwise be illegal. So they could come to get a cartel authorized. They could come to get a merger authorized. They could come to get all sorts of conduct authorized. Then we apply a combined substantial lessening of competition and public benefit test to decide whether the cartel or merger should be given approval to go ahead.
But in reality, this happens, mainly, frankly, for cartel behavior. And to give you a very good example and a very common example, you could have three coal mining companies wanting to collectively bargain with a monopoly port. So if they get together to bargain with the port, absent authorization, that’s per se illegal under our cartel laws. But we may authorize that because they’re dealing with a monopoly, so we may find that the competition detriment is negligible and is likely to be outweighed by efficiency public benefits, and so we grant authorization.

It’s only three or four authorization applications a year that are complex. But as I say, if there’s large, competitive detriment, the arrangement just would not get authorized. So the bulk of the authorization applications are granted as it’s usually authorizing behaviors that the law captures but that really don’t substantially lessen competition.

I don’t know, but I suspect in the U.S. that companies would just proceed with the conduct anyway on the basis that the DOJ or the FTC may not go after them. I don’t know. A good example is, I read recently, where your media companies wanted the law changed so they could collectively bargain with Facebook and Google. In Australia, they could come to us to get that authorized. It wouldn’t need a law change, and we would decide whether or not they could or they couldn’t based on a public benefit test. That’s where public benefit comes in. But it’s not a relevant factor in our merger decisions unless the merger parties seek merger authorization. It is also not a relevant factor in our competition enforcement.

**ANTITRUST SOURCE:** In the merger context, I note that the Commission recently pursued a gun-jumping case for pre-closing coordination between the parties. Is that a new area of focus?

**ROD SIMS:** No, it’s not an area of focus, but it’s something that, if we find it, we will act upon very strongly. We think gun-jumping in relation to merger activity is extremely serious. And if we see it, we’ll take very strong action. I wouldn’t say it’s an area of focus. I mean, we are looking forward, of course, but it’s something we do act very strongly on.

**ANTITRUST SOURCE:** In the absence of a merger notification regime, would a gun-jumping case be brought under the cartel provisions?

**ROD SIMS:** Yes. Correct.

**ANTITRUST SOURCE:** And is the recent gun-jumping enforcement tied into some of the recent amendments to the cartel provisions that extended the concept of concerted practices beyond what was in the legislation before?

**ROD SIMS:** No, we’ve had changes to our dominance regime and our concerted practices regime that I think largely flow from court decisions, where it’s been decided that the court decisions have meant that the law hasn’t acted as Parliament intended.

And so, to give an example, our law says you can’t engage in cartel activity based on a contract arrangement or understanding. Now, our courts have interpreted even the understanding as meaning you have to have some form of commitment. This probably wouldn’t arise in the U.S. If we had U.S. court interpretation, we would not need concerted practices.

We had a very good example where egg producers sent out e-mails saying there was an over-supply of eggs, and they wanted to have a meeting of the egg industry to cull the hens, where they
jointly agreed to cull the hens. Now, we had the same reaction you just had, that this was a very strange thing to do. But nonetheless, they did it. And there are a number of e-mails, and there were a couple of meetings held.

We took action against them, but lost the case because the court found we had not proven that any one egg producer had entered into an agreement with another egg producer saying, “If you cull your hens, I’ll cull mine.”

I think under U.S. law, on advice anyway, we wouldn’t have had that problem. You would not have needed to go to that extent. So it’s just fixing up a problem in the law. But that’s what it’s designed to deal with.

ANTITRUST SOURCE: With reference to litigation by the Commission, in one of your early speeches, after becoming Chair of the Commission, you commented that a success rate in litigation of close to 100 percent is too high.

ROD SIMS: Yes.

ANTITRUST SOURCE: Have you remedied that? Have you lost enough cases recently?

ROD SIMS: Yes, we have. And that has caused some amusement in the organization, where someone high-fived me when he lost a case and it showed they were contributing to my objective.

I think we’re around about 80, 85 percent of cases that we win, and I’m comfortable with that. I think 100 percent shows that we were being too conservative.

So our view is if we see behavior that we think is in breach of certainly what the law should be about and it’s arguable whether or not it is, but it involves large consumer detriment, then we’ll take the case on. We might lose or we might win. But my lawyers have to tell me that we’re on very firm ground before we take action.

I mean, if we judge the behavior is really not what the competition laws were meant to allow, and there was large detriment, we’ll take it on. And that, in Australian law, our law has many more provisions than yours does—many more provisions than either the U.S. or the EC. Because it’s got many more provisions, it can get interpreted in ways that, I think, are not really intended. So you can get some legal interpretations that say, “Look I know this really was anti-competitive behavior.” But because of this particular provision over here, it’s open to the court to interpret it this way. So, this case could easily fail. But we’ll still take it on.

ANTITRUST SOURCE: That’s generally across the board?

ROD SIMS: For competition and consumer enforcement, yes.

ANTITRUST SOURCE: Can you comment on your recent experience in cartel enforcement? The Commission has been relatively more assertive in that area as well.

ROD SIMS: It probably doesn’t apply as much because cartel is a per se offense, rather than the substantial lessening of competition, which is where judgment comes in more. But nonetheless, our cartel provisions are also quite complex. And so we have taken cases where, in our view, there was cartel activity, but the provisions of the law still meant there’s some risk.
Look, we’ve now got a very active criminal cartel program. The law allowed us to take criminal cases from mid-2009. It took some time for us to find cases where all the behavior was post-mid-2009. We found when the behavior straddled 2009, that the cases were too complicated because forward looking from mid-2009, you couldn’t rely on things that happened earlier, and that made the case very, very complex.

We then took time to, I guess, work out, that there was a difference between criminal prosecutions and civil prosecutions. And we set up a dedicated criminal cartel unit. All they do is criminal cartels. They’ve got special procedures and they know what they’re doing.

We’ve now got that up and running. And we will bring at least two or three criminal cartel cases a year. We’ve already had two successful prosecutions. We’ve got four cases in court at the moment. We’ll add to that with another two this year. So we have a very active program. But we’ll add two to three a year.

ROD SIMS: About 75 percent immunity, and 25 percent through various forms of intelligence.

ANTITRUST SOURCE: Switching to dominance and vertical restraints, I gather that the November 2017 amendments revised the concept of misuse of market power and no longer required a showing of anticompetitive purpose. Has that substantially changed the Commission’s approach in that area?

ROD SIMS: The Australian dominance law prior to November 2017 was largely useless, very hard to take action against. That was because it had a provision in there that an offending firm had to be found to have taken advantage of its substantial market power. The courts interpreted that to mean the company offending had to do something that small firms couldn’t do. It was an extreme interpretation.

If you owned a monopoly asset, and you leveraged that, and in any competitive way in another market, the law was fine, the law could work with that, because you had this monopoly asset that nobody else had. And so you could do that. But if you were a firm that didn’t have a monopoly asset, and was just engaging in anticompetitive behavior that would fit under the dominance rules of other countries, in Australia, it was very hard to get a conviction because the company could simply say, “What we were doing is something a smaller company could do.”

It was a very strange position. So we had a company that was a large company, and another company came into its territory. The larger company said to the smaller company, “You must get out of my territory, otherwise I will come into yours and flood your markets with zero priced goods and drive you out of existence.”

We lost the case, because the court argued because a smaller firm could have engaged in the same thing, we didn’t have a case. Now I’m simplifying the case enormously. But the law was unworkable. So the November 2017 change means we have a law that, I think, works in a similar way to the U.S. and the EC. And that law is going to be very useful to us. And we’ve got three or four cases under investigation at the moment. And I’m confident we’ll take one or two cases under the new law before the end of the year.

ANTITRUST SOURCE: Is the threshold of substantial degree of market power higher or lower, or similar to other jurisdictions?
ROD SIMS: I think it’s broadly similar. Some may argue it’s a bit lower. But you need to have substantial market power and in a very economic sense. That is, you need to be able to act in a way that is not significantly constrained by your competitors. And if you’re in that position, then you’re deemed to have substantial market power.

The word “dominance,” which other jurisdictions use, suggest it could be read as a higher standard, but I don’t think in practice it really is. I think dominance, and having a position where you’ve got substantial market power, means you can act not much constrained by your competitors. I think they’re very similar things.

ANTITRUST SOURCE: Particularly with the change in the law—and I think you’ve touched on this a bit already—are you seeing Australian businesses making more use of the ability to seek authorization for proposed conduct?

ROD SIMS: No, nobody’s done that yet. The debate when the law was introduced, was hysterical, as it often is when you’re making substantial change to these things. So, look, I think, the debate by business was overstated. And it became a battle over certain issues that were political at the time, and had nothing to do with the change in the law.

I just don’t imagine we’re going to get many cases for authorization for conduct that would be caught by the new dominance provisions. The companies that operate internationally in Australia were totally unconcerned by the change in the law. It was only local companies in Australia that complained about it, because they said, “We used to be able to get clear advice that we could do all these things.”

So, I don’t think they’ll come to us for authorization because, if they’re doing things that substantially lessen competition in Australia, and are doing things that will get caught by the law in the United States, and get caught by the law in the EU, they know we’re not going to authorize it. So I don’t think the fuzziness they were trying to portray in the law is actually there.

ANTITRUST SOURCE: But what about for resale price maintenance? Is there a separate track for getting authorization for that?

ROD SIMS: RPM conduct is still illegal per se. Businesses can seek immunity through the two standard processes under Australian competition law: authorization, and now also notification. There are some administrative differences between these two processes, but the same test, which is that RPM can only be exempted if the public benefits outweigh the public detriments. We look at any RPM skeptically because we are always concerned about the harm to consumers from removing discounts and reducing competition on price.

ANTITRUST SOURCE: We touched a little bit on the misleading advertising side. Would you like to comment on the Commission’s priorities for misleading advertising and representations?

ROD SIMS: We take Consumer Law extremely seriously in Australia. We’ve recently got the law changed in November 2018. So the consumer law penalties will be the same as competition law

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1 Since the interview, the ACCC has received an application for authorization of an industry code for new technology companies that includes seeking protection under the new misuse of market power provisions.
In our view, misleading consumers can cause as much damage as cartel activity can. I mean, we have had cases where companies mislead consumers, charged them double the price, and the consumers would not have paid had they not been misled.

We don’t have many cartels that see prices doubled. We’ve had some, but I think the economic effect is the same. So we take it very seriously. And a big priority is misleading consumers by large firms.

So that’s why we’re taking cases against Heinz, against Apple. Ford was an unconscionable conduct case, which I think is treating consumers extremely badly. When large companies do that, we take that seriously, as well. So misleading behavior by large companies is something we treat very seriously.

ANTITRUST SOURCE: I note that you’ve held the position of Chair of the Commission since 2011. Your term will be expiring in 2022. Can you comment on the benefits of having consistent leadership of the Commission for that period of time, as opposed to what is typically a more frequent turnover in other jurisdictions around the world?

ROD SIMS: Oh, look, I think there’s a balance. I think having five to seven-year terms is sensible, because it does lead to stability. I think anything less would see too much change in an organization. In Australia, being appointed for 10 years is not unusual. My two predecessors were both appointed for eight years. So I guess 11 is a little high. That was the government’s decision, not mine. So look, I certainly think at the end of 11 years, it’ll be time to move on and pass the baton to somebody else.

But I think, at certain levels, stability is important. We’ve got three commissioners now who have been reappointed, and they will each serve 10 years. So my 11 years is only a little bit more than theirs.

It’s nice to have a mix. We’ll have a new commissioner starting in June. It’s nice to have a mix of people who’ve been there for some time, and people coming in. So if we get our timing right, we’ve always got a couple of new players joining.

Four players have been there for some time. I think the stability is not just the chair, it’s trying to get stability in the team and not have too many new faces all at once.

ANTITRUST SOURCE: And you had private sector experience before joining the Commission. How valuable or important is that for someone holding a senior position with a competition authority?

ROD SIMS: Oh, I think it’s extremely valuable. I spent nearly 20 years in public policy and then nearly 20 years in the private sector. And the combination of the two provides very valuable perspectives.

I spent nearly 20 years advising companies on commercial corporate strategy. So when they come along and tell me various things, I’m in a nice position to form judgments about the accuracy, or otherwise, of those statements. So, yes, I think it’s just invaluable to your perspective to have worked in the private sector.

ANTITRUST SOURCE: Would you like to make any concluding comments about your priorities for the future?
ROD SIMS: I’ll make one comment on our digital platform short inquiry. That has, I think, caused some confusion. When we get asked to do these inquiries, as I mentioned earlier, they are very much aimed at recommendations to the government.

We can also find matters that we want to investigate with an eye to enforcement, and out of the digital platform inquiry, we’re about two thirds of the way through that. We’ve got, I think, five investigations underway in relation to digital platform behavior.

But, basically, the end result is recommendations to government. And we’ve had some statements that the standard of proof behind our recommendations is not up to, basically, a competition enforcement standard. To which my answer is, “This isn’t a competition enforcement investigation. This is a government-directed inquiry, so that we can provide recommendations to government that they can then assess, and they may or may not wish to act on them.”

So it’s not as if we’re compiling a brief of evidence to put before a court. We’re providing evidence, information and analysis leading to recommendations that the government may or may not want to act on. We are a multi-faceted organization.

We do take competition matters, essentially, against the consumer welfare standard. We do the same with our consumer work. But where we’re giving recommendations to government, yes, they have to be fact-based, they have to be well analyzed. At the end of the day, the government is wanting our recommendations on very important issues, and we have to provide balanced arguments to them. It’s not as if we’re gathering evidence—in the same way as you would for competition enforcement. And I think there’s been some confusion over what an inquiry is.

And also as I say, we have no power to put in place anything from those recommendations. That is entirely up to government, which they can accept or not, and various people can still comment on our report once it’s finalized at the end of June. And their comments can influence what government does as well. So the next stage of this is a very public process, a comment on our report, leading to decisions by government.

ANTITRUST SOURCE: Looking back over the time that you’ve had as the ACCC, what’s the thing that you’re most proud of?

ROD SIMS: I think the combination of getting our success rate down to that 85, rather than the 100 we talked about earlier, so that we are taking on important cases and not being too conservative.

And I’m also very proud of the fact that we convinced the government to change the consumer penalties to make them much, much higher.

To give an example of that, we were getting $10 million penalties against Ford, $9 million against Apple, and they are way too low to grab the attention of companies like that. The Ford behavior was treating their customers in particular circumstances, which I won’t go into, unconscionably. To then see a $10 million penalty there I think is inadequate. To have that now, potentially, considerably higher, I think is an achievement I’m very proud of.

ANTITRUST SOURCE: Thank you very much.
Interview with Amir Nabil, Chairman, Egyptian Competition Authority

*Editor's Note:* Amir Nabil was named to a four-year term as Chairman of the Egyptian Competition Authority in May 2018. He worked as a Teaching and Research Assistant in the field of Competition Law and Economic Regulation at Queen Mary University of London Center for Commercial Studies, the same university from which he received his Ph.D. He acted as consultant for the Egyptian Competition Authority until he was appointed as the authority’s Chairman. He was interviewed for *The Antitrust Source* on March 28, 2019, by Joseph Krauss.

**THE ANTITRUST SOURCE:** On behalf of *The Antitrust Source*, we thank you for taking time during the Spring Meeting, to speak with us and answer some questions about your authority and yourself. For those readers of the *Source* who are not familiar with the Egyptian Competition Authority, or ECA, can you briefly explain the organizational structure of the ECA, and what parties and their advisors might expect if they have a matter before the ECA?

**AMIR NABIL:** The ECA was established 12 years ago. Our mandate is, basically, the same as any other competition authority. However, we don’t have any consumer protection mandate.

Our focus is on prohibition of cartels, abuse of dominance, and vertical restraints. From time to time we have some merger cases. We don’t have a well-developed merger law but we intervene in some mergers, as we will be discussing today. We did it, actually, since we were established in relation to some of the privatization of state-owned companies. The government would send those to us requesting our opinion on whether I would accept that the transaction may be pro-competitive or may create some competition restriction on the marketplace.

As to how is the Authority is constructed, basically, there is a Board of Directors. This is a decision-making body, and there also are, on the other side of the Authority, the technical teams, the case handlers, that do the actual cases.

Now the Authority is divided by sectoral division. Each division takes care of particular sectors of the market. We aim to grow in numbers. We have currently 30 case handlers. We aim to grow and, hopefully, by the middle of next year, we will reach 100.

As any other authority, we have many, many challenges in terms of funding, in terms of human resources, but we work closely with our partners from the government and also other stakeholders to improve the work process.

Usually, everybody has the right to submit a complaint. If the complaint is submitted, the Board of Directors considers different tools. For some of them the issue is just a cease and desist order. In other cases, it could be referring the matters to criminal courts in order for the court to set a fine.

Maybe as we discuss during the interview how the development of the legal framework of competition law is developing, I can also highlight the recent legal amendments that my administration put forward.

These focus on three main pillars. The first is enhancing the independence of the decision-making process. We also envision moving a little bit away from a criminal approach towards granting
the ECA administrative fining powers, and so a few more administrative powers. That will ensure a more effective and swift enforcement, meanwhile, and also increase certainty for businesses because what we found the last 12 years is that criminal procedures are pretty uncertain. And also, we think in some judgments the criminal court did not properly address the issue of fines.

And we are also aware of the risk that overdeterrence may actually lead to lower enforcement of competition law because, as an agency, we would be intimidated to take an action against the company if the criminal judge would set unreasonable fine. We don't want business to go out of the market, we just want to them to behave their conduct within the marketplace, as any other competition authority would aim to do.

And the third main pillar is an enlargement in the scope of our substantive provisions, in particular, those related to horizontal agreements and vertical agreements. We think that the current draft of the law does not capture enough, and does not permit us to do more of information exchange-type of practices, which happen in cartels.

On the vertical restraints, I think we have a very broad provision that is ambiguous. The new version of Article 7 gives the authority the ability to issue block exemption regulations, which is not available under the current draft. Also, we propose to create a sort of gradual incrimination of the different types of vertical restraints based on their harmfulness. First, in our view, RPM would be regarded as a hardcore restriction. The second set of restraints are restraints by object, but they can benefit from exemption. And we also created a third category on vertical restraints that can be only prohibited according to their effect. And they still can also benefit from an exemption.

This will be followed by many guidelines. And we also think to develop some sectoral guidelines.

We finished drafting our main guidelines that consist of horizontal agreement guidelines and vertical agreement guidelines. We have done lots of work on the exemption guidelines—we have a draft that I think will be ready after the legal amendments that are currently being considered. There will be more enhancement to their scope.

We have also developed settlement and fining guidelines. Because, as I said, we were trying to move a little bit away from the criminal aspect of enforcement toward the administrative one.

**ANTITRUST SOURCE:** That's a fantastic list of achievements and goals for your authority moving forward. What's the status of the proposed changes? What do you think in terms of timeline of them being put into place?

**AMIR NABIL:** Thank you. We managed to get the approval of the government. This is a great achievement. Now they are in the Parliament. They will be reviewed by the Economic Committee, I think, soon. I don't know exactly when. But I hope that by sometime this year, we'll have some amendments to our competition law.

**ANTITRUST SOURCE:** One thing I think our readers would benefit from is understanding the structure of the organization and the authority. What is your background before you became Chairman of the Authority?

**AMIR NABIL:** I had my undergraduate degree in Law from Paris 1 Panthéon-Sorbonne and also I had my master's degree in International and European Business Law from the same university. This is where I got taught European competition law.

Later I joined the Egyptian Competition Authority when it was first established. I was sent to an internship with the U.S. Department of Justice Antitrust Division. It was a life-changing experience,
I would call it seeing how the giants operate in real life, and it opened my eyes on different issues and topics under competition law. So I decided to take it further, and this is when I went to Queen Mary, University of London, to pursue my Ph.D in Competition Law.

ANTITRUST SOURCE: What was your biggest takeaway from your experience at the internship at the Antitrust Division?

AMIR NABIL: The cartel work that the Antitrust Division is doing is world-class. And we learned a lot from it. And I really still look at this as a guiding model. And I do something for those who recently join our Authority. The first thing I ask them to do is to watch the movie “The Informant!” If they want to see how real-life investigations in the cartel world are taking place. So it’s mandatory for them to watch “The Informant!”

So we look at how there is sort of integration between different law enforcement agencies in the U.S., the FBI, the Department of Justice.

ANTITRUST SOURCE: When you go through that list of objectives and goals in the legislation, I hear a lot of commonality with issues that have been discussed at the ICN and I know have been discussed at COMESA [Common Market for Eastern and Southern Africa] as well. Has your involvement with those two organizations contributed to these changes and have you felt that you’ve benefited from interactions with those two agencies in developing these changes?

AMIR NABIL: The work of the ICN is always inspiring for any competition authority. But I would say that, lately, ECA was not engaged enough with the international competition community, which is something that is on my agenda—that we get back to engaging with the international community, including the ICN.

So, while the ICN is still a greatly helpful venue, I think, and as you probably follow this debate, there needs to be more international work done in the area of competition. The economy of the world is no longer a local or a domestic economy—it’s an international one. And I think the current level of international cooperation between competition authorities is not up to a level that the world deserves.

ANTITRUST SOURCE: For an authority like the ECA, how can the ICN improve its process and recommendations to assist an agency like yours?

AMIR NABIL: Well, I think my suggestion would be actually going beyond the ICN. I think we need an international agreement on hardcore cartels.

We, at ECA, find many practices that took place abroad that have significant impact on our market, but we don’t have the legal tools to go after them. Also, the level of cooperation that we expect from relevant or other competition authorities is not up to the level that we hope.

So I would be joining those voices demanding to have a more coherent and stronger international approach toward, mainly, cartels. You hear similar voices about the merger issues because many mergers they have an international scope as I mentioned, like the Uber and Careem one, are going to affect the whole region, mainly Egypt.

So I think there is more to be done within the ICN regional cooperation, for example, as you mentioned with the COMESA, it is always helpful. We are very engaged with the COMESA Competition Commission work, whether on the merger side or the enforcement of anticompetitive practices.
And even with the Arab world, even though there is no governing, I would say, international or regional framework for competition, we still maintain one-to-one relations with the established competition authorities in neighboring countries, such as Saudi Arabia, Bahrain, Kuwait, Oman, and Morocco. It’s very important as we are opening our country for international trade and for regional trade.

**ANTITRUST SOURCE:** Do you foresee a regional organization, perhaps, developing in the next few years to include Egypt and other Arab nations to facilitate this?

**AMIR NABIL:** There are some talks at the moment about creating a free trade area comprising Arab countries. We are definitely pushing for it and for the adoption of competition rules aiming at protecting trade in this area.

**ANTITRUST SOURCE:** Do you see receptiveness on the part of the other authorities in your region for such an organization?

**AMIR NABIL:** Some authorities are very receptive of the idea because they truly understand how important it is. I will give you an example. We have the E.U.-Egypt Association Agreement, which has a competition chapter closely modeled on Article 101 and 102, and we follow closely the European model. One thing we believe that’s a drawback in the agreement is that it’s not sufficiently applied. And this is something we actually keep pushing to correct. And there will be meetings, I think, very soon, in a matter of weeks, in order to address the aspects that hold back the enforcement of the competition provisions contained in the agreement.

So as I said, it’s at the top in my agenda to engage with the international community and to promote regional and international cooperation as an area of an enforcement, learning best practices from different competition agencies, etc.

We followed the development of the Uber/Grab merger in South Asia. We had one-to-one conversations and several meetings with the Singaporean Competition Authority to learn about their case and what were the main challenges they faced. We try to integrate the whole world experience into our national one.

**ANTITRUST SOURCE:** I wanted to ask you about a few cases of the ECA specifically, namely the Uber Careem transaction, your Apple investigation, and your investigation of FIFA for the television rights to the World Cup.

**AMIR NABIL:** When you look to the practice of FIFA, around the globe, in the licensing of media rights, you will find them arranging tendering procedures, allowing companies to contribute and compete for the market. And it is very clear in the mind of the Egyptian Competition Authority what is the difference between competition for a market and competition in the market.

Football for Egypt is passion. So we are not talking about a luxurious issue. We are talking about something that brings our people together, something important for them, something that should make them proud of their country.

What we found is unjustified, long exclusivity granted to one single entity that has been actually renewed for no objective justification whatsoever and in the absence of objective standards and tendering procedures. So I think this is the kind of practices that any competition authority would find very suspicious.
ANTITRUST SOURCE: Is it your philosophy to proactively reach out to other authorities in the region? Do you see the ECA as being a proactive agency to do that or a follower of other agencies?

AMIR NABIL: Well, actually, I think we are proactive to a great extent. Let me get back to the sports example to tell you about it.

We started our investigation of the grant of licensing rights in the sport sector in 2015. We had two decision by 2016 against beIN Sports for abusing its dominant position. And that’s when we decided to focus our enforcement on what actually made beIN sports a dominant undertaking and very engaged in abusive behavior. When we looked at the market, we found that the dominant position of beIN Sports is protected by a network of exclusive rights granted by the regional Football Associations, such as the Confederation of African Football, and by the International Football Association, in that case, FIFA.

So, in January of 2017, we had our case—these are abuse of dominance cases against the Confederation of African Football for abusing its dominant position in the grant of sports licensing rights. And we also won the case in general courts, I think a few months ago.

It’s now being reviewed by the appeal court. We think we have a good case before the appeal court as well. And that’s when we decided to investigate the practices of FIFA which were similar to those of the CAF. So we actually had those cases long before the Swiss Attorney General intervened against FIFA on a related matter. So I think we were very, very proactive on this front.

ANTITRUST SOURCE: One last question on that matter. When, in your statement, the ECA cited to the urgency of the matter and its significant importance to the Egyptian viewers and market players, I guess, as an outsider, one would ask how much influence did the consumer groups or the Egyptian media authority drive the investigation?

AMIR NABIL: Yes.

ANTITRUST SOURCE: So what was that statement trying to say in terms of pointing to the consumers and the media authorities?

AMIR NABIL: Well, we are living in a moment of human history where you can actually interact directly with consumers. I mean, if you follow, ECA keeps a close eye on social media, and the comments written under each post we put on our Facebook and LinkedIn pages to see how consumers react to our intervention. So when we actually saw how consumers reacted to our beIN Sports cases and the Confederation of African Football case, we felt that we should do something about the FIFA case.

Egypt was participating in the Russia World Cup 2018. It’s a sports event of major importance, and it’s actually prohibited to be granted exclusively in the E.U. to a sole undertaking. And we all know what happened in the 2014 case that involved Great Britain versus FIFA, where the ECJ ruled in favor of England and Belgium. And that’s how we tried to be very responsive to our consumers. Yes, we were driven by the needs of our consumers. And, by the way, we are among them. We are also football fans. We are the competition experts. And if we cannot see where the competition problem is, lots of questions would be raised about our expertise and competence.

ANTITRUST SOURCE: Let’s turn back to the structure of the ECA. You mentioned 30 case handlers. Are those case handlers legal as well as economic?
AMIR NABIL: Yes.

ANTITRUST SOURCE: And how many economists do you have on the staff at the present time?

AMIR NABIL: The way we divide the work is based on sectoral experience. So we have the different divisions, focusing on different sectors.

Some of the heads of our divisions are actually economists. I believe competition lawyers are all amateur economists somehow. And economics plays a big role in our analysis even in cartels, although cartels are, per se, prohibited or are by object restriction. Through economic evidence, consumers, businesses, and the courts learn about the actual harms that cartels inflict on the economy and on consumers. Economics may not be the foundation of all of our case analysis, especially cartels analysis, but it’s important evidence indeed.

In some cases, the harm can safely be presumed. For example, the FIFA case when an entity grants a firm almost 20 years of exclusivity with no tendering procedure, I don’t think you need lots of economic analysis here.

As I said, we aim to grow further and we are developing a know-how in different areas, like ride-sharing. It’s a very important sector for our economy nowadays and, also, we are developing experience in vertical restraints. We believe that vertical restraints will play a big part of our future enforcement endeavors for several reasons.

We think there is not enough intrabrand competition. And we think also that intrabrand competition is important for small businesses to survive. Egypt is a very big country, socially different from the USA or Europe. So you need to encourage people to get into businesses and not to depend on government jobs.

It’s also part of our role to help design a competition policy that helps tackling unemployment.

ANTITRUST SOURCE: We’ve talked a lot about the FIFA case and about cartels. Let’s go to my favorite—the subject of mergers.

AMIR NABIL: I think our biggest priority is to have a proper merger law. We are currently dealing with mergers under the substantive provisions of the competition law. But they don’t offer adequate means to address all the procedural complications related to merger.

We drafted a merger law. We’re just waiting for these amendments to be approved by the government. And we will be doing the necessary advocacy for implementing and introducing a merger law. But that doesn’t hold us back from taking mergers that we seriously are concerned would be harmful to our economy and to our consumers until these amendments are adopted.

ANTITRUST SOURCE: What are your current notification requirements?

AMIR NABIL: At the time, we have an ex post notification regime for mergers, except for mergers that want to benefit from exemption under substantive provisions.

ANTITRUST SOURCE: So it only requires the notification after closing. But your draft does propose having a pre-closing notification period?

AMIR NABIL: Of course.
ANTITRUST SOURCE: What’s your thinking behind that, in terms of moving it from post-closing to pre-closing of deals?

AMIR NABIL: The benefit of pre-closing is that you can work with companies on remedies or you can block it altogether. The post-closing notification remains an ineffective notification process because it’s very burdensome to nullify a consummated merger. That’s why, when we heard about the expected transaction between Uber and Careem, we decided to be proactive and to impose on the parties pre-notification and standstill obligations.

ANTITRUST SOURCE: Seeing that dichotomy in your law and what you did with Uber/Careem—that was a very unique approach you took. Could you explain that a little bit for our readers in terms of approach?

AMIR NABIL: I think Egypt’s most valuable resource is its human resources. And we saw how start-ups in the ride-sharing economy drive out innovation and new ideas by different Egyptian entrepreneurs—actually emerging entrepreneurs.

Careem offered consumer options that Uber was lagging much behind them, like, for example, the ability to pay in cash. Most people still deal with cash. Careem was the first to offer this in Egypt. Careem was the first to integrate new services in it, like financial one, such as Careem Pay, and it’s a platform for different rides, like scooters. They were also offering some other innovative services within the ride-sharing services, etc. So Careem for us was a very innovative firm.

Uber is an international company. Wherever you travel, you can use Uber in any country in which Uber is operating. So, when we heard that the big firm would be absorbing an innovator, I think this is the kind of transaction that would alert any competition authority.

Careem was doing well. So we cannot understand why it will be absorbed as they are offering identically the same services, they are providing equally good services as Uber. I heard stories about children who used to compare prices and surge rates at each company’s platform.

ANTITRUST SOURCE: That’s fantastic.

AMIR NABIL: Exactly.

All these benefits may very likely disappear as a result of the transaction. So if a child can benefit from competition, imagine what would be the reaction of a mature person. So I think it is a very alerting transaction. I think any competition authority would have gone after it.

In the U.S., before the HSR, there were cases or mergers that were dealt with under substantive provisions of the Sherman Act. The same happened in the EU, and I think both agencies have done this because the mergers were really harmful.

ANTITRUST SOURCE: I’d say it’s a very good parallel to both the U.S. history before Hart-Scott-Rodino. Now, it was a very innovative approach to have a pre-closing notification consent requirement there.

AMIR NABIL: Yes.

ANTITRUST SOURCE: What about the agreement there allowed you to do that versus other agreements of mergers? Was there something unique in the agreement that allowed you to do that?
AMIR NABIL: In the Competition Authority, we developed information resources, and we had strong grounds to step in and be proactive and intervene to protect competition. We just wanted to ensure that there will be an ecosystem that will not block innovation, which is very, very important in the sector. Also, it's one of the new sectors heavily reliant on data. And as you probably follow from the sessions at the ABA over this week, everyone is considering how they may consider data essential facilities, how data equalization can be loyalty-enhancing, how that may block other undertakings from participating on the marketplace.

And whether or not data is an important asset in this merger, it's something we're going to have to check.

So it is again a transaction in which we try to be a proactive agency because we think it's an important segment for our economy. It's important market for our economy and consumers benefit from it greatly. It is a very innovative segment of the economy. Now you see start-ups trying to offer ride-sharing in relation to scooters. Others are focusing on buses. Uber and Careem could turn out to be the Amazon of transportation. But we don't want the other smaller Amazons to be eaten by a bigger Amazon.

ANTITRUST SOURCE: Do you see your approach to the Uber/Careem transaction as indicative of approaches you'll take in other transactions? Or was it unique to Uber and all of these circumstances that you mentioned? I understand the draft law would put that transaction clearly, within a pre-close notification requirement. But what do you see going forward until the law is passed? Do you see that as indicative of an aggressive approach by ECA?

AMIR NABIL: Until the law is passed, I think we will be taking on what I would call alerting mergers. If you consider the Uber and Careem merger versus other commercial operations that took place in Egypt recently, for the latter, they took place in markets in which many participants are active. Yes, they may raise competition concerns. And, for example, if they took place in Europe, they would be cleared under conditions, but until the law is passed we will only be focusing on alerting mergers, such as Uber/Careem. It's a merger between the two main competitors. I think it's something as I said, that any competition authority will look at.

So if the question is, are we considering further action against alerting mergers? The answer is yes. What is an alerting merger and a non-alerting merger? I think to a great extent it depends on whether the merger would create or strengthen a dominant position

ANTITRUST SOURCE: You know it when you see it.

AMIR NABIL: Exactly. If the two main competitors are joining forces, this is definitely alerting.

ANTITRUST SOURCE: Well, to put it another way, if there's a transaction that raises significant possibility of significant harm, then that's in your duty to take some action against that to protect Egyptian consumers or, at least, allow time to investigate it to determine whether that harm is really going to take place.

AMIR NABIL: Of course, I also want to be very clear about this: we never reached the conclusion yet that the impact of this transaction will be harmful. We are still, as I said, studying the ride-sharing economy—it could be different from other sectors in which a similar merger takes place, but we still need to study it.
ANTITRUST SOURCE: Well, it was a fascinating case to watch. And, again, a very innovative approach. So you should be applauded for that.

We mentioned, and it was covered heavily by the press, was the ECA's action against Apple and its exclusive distribution agreement. Exclusive distribution agreements are typical in many industries in many regions of the world. What was particularly troublesome about Apple's agreement that caused the ECA to look at that and take an action?

AMIR NABIL: Well, let me just begin by saying our Apple case was the easiest case we worked on as it was straightforward.

Let me first explain the market for electronic devices, specifically smartphones. There are no tariffs whatsoever for importing smartphones. And this was a deliberate state policy to encourage people to have access to more advanced technologies in order to promote competition on other marketplaces, such as the applications that are used over this iPhone, including ride-sharing applications that we just discussed. So adequate access to reliable and advanced technology is a driver for economic growth. And that's why our government choose not to impose any sort of tariffs on the imports of smartphones.

What we found is, naturally, the objective of this policy is to benefit from the lowest available price on the international market. Many people will say there is a strong inter-brand competition between Korean and Chinese manufacturers of smartphone devices, and I agree. But there are other factors you also should take into consideration, which is that our consumers regard Apple products as reliable products. They appreciate the privacy benefits that an Apple device affords them. And also, switching from an iOS-based device to an Android-based device is cumbersome for our consumers, specifically, non-sophisticated consumers.

We found a price difference between an Apple device in Egypt and the same Apple device in UAE of 40 percent in some instances. The first thing that you will ask is whether there is a business justification for this—if there are duties? And the answer is no.

We factor in the taxes and we still find a 40 percent difference, even after factoring taxes. We factor in transportation, and we still find a difference. So we couldn't find any economic justification that would justify a geoblock and an isolation of the Egyptian market from international competition within the brand of Apple, except trying to protect the local or a domestic distributor from competition.

Statistics showed that 70 percent of Apple products available on the Egyptian market are actually coming from abroad, and we saw that this is proving exactly the same point we are trying to make, that people are not interested in buying, highly priced products if they can get cheaper products from abroad. Consumers used to ask their relatives traveling abroad to buy them Apple devices for much less money. So I guess it was a very straightforward case.

And as I said yesterday in one of the discussions I had, there is a divergence between the European approach and the American approach, in relation to vertical restraints. Yet in this case we believe that under both regimes there is no efficiency justification whatsoever that you can find for many vertical restraints. It just an unjustified price difference for exactly the same product.

Apple and its distributors were very cooperative, and they offered commitments, and we accepted them. And we hope in the next few months there will be more intense competition between those who are willing to import Apple products from wherever, as long as they comply with the other health and safety regulations ofthe government.

ANTITRUST SOURCE: Do you see your action against Apple as indicating a priority on behalf of the ECA to look at distribution agreements for other industries as well, given that experience?
AMIR NABIL: Yes. We are currently looking into distribution agreements in the automotive industry. Even in the automotive sector, vertical restraints can even harm small workshops that also try to develop their know-how and bring new customers or those that are selling spare parts. We want more firms to contribute to the market. And we think some forms of vertical restraints actually inhibit them doing that.

ANTITRUST SOURCE: What are the interactions between COMESA the ECA on merger cases?

AMIR NABIL: What happens is when the COMESA receives a merger notification, if the Egyptian market is involved, they will request our cooperation to investigate what could be the impact of the merger on the Egyptian market. And so it's like the ECN, the European Competition Network, without having a name for it. But it's the Competition Commission of the COMESA Member States Network.

ANTITRUST SOURCE: Could you foresee a situation where there is a matter which COMESA thinks it should handle but you believe it's going to have a strong impact in Egypt and therefore the ECA would step in instead of COMESA?

AMIR NABIL: There is a referral mechanism under the COMESA competition regulation, but we haven't used it yet. Definitely, if we found that for a merger, COMESA will be more equipped to, and actually has jurisdiction to investigate, we will definitely work together to see it.

ANTITRUST SOURCE: Do you feel you have an adequate toolbox of investigative tools and powers to fully investigate both mergers and non-merger conduct abuse of dominance cases? Or are there additional tools that you are seeking that, perhaps, COMESA has that you do not? That might affect the referral decision?

AMIR NABIL: Well, we do have important enforcement tools such as dawn raids, seizure of documents if necessary, and requesting information. And we use them very frequently. I think we increased the level of dawn raids against some associations of undertakings, in which we found that some of the members tried to use the umbrella of the association to engage in anticompetitive practices, mainly cartels. We did this a lot in 2018. Dawn raids are still available for abuse of dominance.

For mergers, we cooperate with the COMESA regarding mergers that affect trade between Member States in the common market.

ANTITRUST SOURCE: One other thing which we’ve discovered in this country and many other countries as well, is that sometimes some of the more significant barriers to competition come from government itself. Is this an area where the ECA has been active?

AMIR NABIL: Actually, it’s a very important question. We are quite active on this front. Maybe it doesn’t make it to our press releases because we’ve managed to resolve these aspects through discussions and meetings with relevant government agencies. We think it’s more productive to do it this way to earn trust.

Many of these decisions can be justified by objective concerns, but you are just trying to find a less restrictive means to achieve the goals through it.
And one achievement that we are very proud of is that we managed to introduce a new provision in the newly promulgated public procurement law that imposed on every government entity a requirement to inform ECA in case of suspicious, sufficient bid rigging. But also, we gave them direct power to eliminate from the bid any entity that the public entity finds has sort of interlocking ties with another competitor in the same bid.

So we give them actual power to fix the bidding process. We are now drafting a guideline on how to unravel interlocking ties between competitors, to make it easier for those agencies to discover these issues. So, on one hand, there is post-notification when it comes to bid rigging to allow for investigation, but on the other, administrative agencies can use the ECA’s expertise ex ante in order to make sure that the bid process is genuinely competitive.

**ANTITRUST SOURCE:** So they can have real time information on the current bidding processes.

**AMIR NABIL:** Of course. We are now developing some technological solutions to make it real time when it comes to bid rigging, to detect what’s happening—to detect the history of the bidders and find patterns of collusion and maybe, in that sense, we may be able to better advise government agencies who to exclude and who to include in the process. So we are trying also to make bid rigging a more real-time thing.

**ANTITRUST SOURCE:** Are there any other achievements during the 12 years of ECA that you are particularly proud of?

**AMIR NABIL:** Many specifically in the areas of cartel enforcement, we had a successful intervention through advocacy in the civil aviation sector ten years ago, when ECA successfully managed to amend a regulation that tended to give the incumbent some advantage over new entrants. And we advocated for a change of this situation, and the harmful provisions were ultimately eliminated.

With advocacy our teams have developed experiences in different sectors.

**ANTITRUST SOURCE:** One last question. Since we are here at the ABA Antitrust Section Spring Meeting, what do you find to be most beneficial to you as a head of an authority, in terms of the programs and other things offered?

**AMIR NABIL:** If we talk about the sessions, there are definitely very, very interesting and rich discussions on both sides of the Atlantic on different topics.

We are currently interested in the area of big data and tech giants. We’re all following the developments in the European Commission. We feel that we start getting into this debate. We also need to be proactive and engage in this debate, which we find very, very important.

It’s also a venue where you get to meet practitioners and public officials on both sides and to further your international agenda. So it’s a very rich, I think, venue for an exchange of contacts and also of experience.

**ANTITRUST SOURCE:** Well, we’ll let you get back to the sessions then. Thank you.
Interview with Isabelle de Silva, President, French Autorité de la concurrence

Editor’s Note: Isabelle de Silva was appointed President of the French Autorité de la concurrence in October 2016, having served as a member of the agency since 2014. She served in various governmental capacities, including with the Ministry of Culture and Communication and the Ministry of Ecology, Sustainable Development, Transport and Housing, and lately as president of a chamber of the French Supreme Administrative Court (the Conseil d’État). She was interviewed for the Antitrust Source on March 28, 2019, by Andreas Reindl.

THE ANTITRUST SOURCE: For those readers less familiar with the Autorité de la concurrence, could you start by briefly explaining how the authority is organized and especially also what your jurisdiction encompasses?

ISABELLE DE SILVA: The Autorité de la concurrence was created in 2008, and took over from the Conseil de la concurrence, which was established in 1986. The Conseil originated from the Competition Commission, which had been in existence since the ‘50s.

Today, we are about 200 people and we have three main powers. The first is to approve mergers. Before 2008, this power was in the hands of the Minister for the Economy, and the Conseil would intervene to give an opinion on the most difficult cases. The team in charge of mergers is, roughly, 25 people and we examine 130 mergers per year.

The second main power of the agency is to examine competition infringements.

The third mission of the agency is to give opinions to the government. This is something quite specific for the French agency. The law provides that we must examine and give an opinion, based on the competition point of view, on certain legal texts like laws and decrees.

We also have a strong activity of drafting opinions asked for by our parliament, as well as sector inquiries issued at our own initiative.

Case handlers can look at cases of competition enforcement and work on opinions at the same time.

In addition, like all of the competition agencies in Europe, we spend quite a lot of time doing cooperation within the ECN, the ICN, and the OECD. The French agency has been involved in the ICN since its creation and has invested a lot in its development.

ANTITRUST SOURCE: You have been at the Autorité for about two-and-a-half years. What was your career path before you joined the Autorité?

ISABELLE DE SILVA: Originally, I graduated from a Business School in France. During my studies I’ve spent some time at Berkeley University and at Bocconi University. I then decided to do the ENA, the school for civil servants in France.
When I graduated from the ENA, I decided to choose the path of the administrative jurisdiction, so I joined the Conseil d'État, which is the French Supreme Administrative Court. It gave me the opportunity to alternate positions either as a judge at the court or as a senior official with ministries in our government. I was, for example, an advisor to the Minister for Culture, in charge of the press sector and press regulation in the '90s, and later the Chief Legal Counsel to the Minister for the Environment, Industry and Housing. My last position before joining the Autorité de la concurrence was President of the Chamber in charge of cases dealing with finance, environment, and justice at the Conseil d'État.

**ANTITRUST SOURCE:** From these previous positions, did you have any experience that helped you when you became president at the Autorité?

**ISABELLE DE SILVA:** I think that the main thing that helped me was the fact that I have a legal and economic background. I don’t know if I could say economic because I’m from a business school, so I’m not sure that economists would consider that. But I’ve always been very interested in the economy, the way companies work, and I did several internships with companies. I think that I’ve always been interested in this aspect of things.

Since the beginning of my career, I have really been interested in what you would call in France, regulation. When the Telecommunications Regulation Agency was created, I became their legal advisor. I was impressed by the way this agency made competition happen in the market that used to operate with one incumbent—the National Telecommunications Company. It was a huge change. Witnessing how a regulatory agency could transform the market was quite an experience.

I also got to work with the energy regulator when I was at the Ministry for the Environment. I later was a member of the regulator for the distribution of the press, and I had been a member of the Autorité de la concurrence for two years as a non-permanent member, before joining the agency.

In my day-to-day work, having been a judge in charge of a chamber also really helped me run the agency. A lot of what I do when I sit in cases—as President, I get to preside over the most important cases—is to bring the whole board to reach an informed decision and to lead a lively debate with the board, because we have many non-permanent members who come from civil society. It is a very diverse board and we have to reach the best decision. I also really like to look into the legal intricacies of cases, and writing decisions has always been a favorite activity for me.

**ANTITRUST SOURCE:** When you started at the Autorité, did you have any particular project, plan, or objectives in mind that you wanted to achieve?

**ISABELLE DE SILVA:** I think that one first objective was to maintain the high level of reputation that the agency gained with my predecessor, Bruno Lasserre, who did a lot to develop the agency and to boost its capabilities, for example, by hiring more economists.

I also came with the idea that we should be extremely active to tackle digital issues, and that we had to be an agency that would help government and legislative bodies have a clear view of when the law might be changed. I think that having a strong interaction with the government and the legislator is very important because it’s all part of defining a competition policy. Having a competition policy that works means not only applying the law as it is, but also saying where there is a gap in the law.

Another part of the work of the agency, which I feel is particularly useful, is to help other fields of government take into account the interests of the consumer and of competition. Because
sometimes it’s rather alien territory. The government has lots of interests to take into account but not so much competition. Or it might be biased by incumbents. Our role is to say: “Don’t forget the consumers”; “Don’t forget that it’s important to minimize barriers to entry.” The fact that we are independent from the government and that we are not in a bilateral relationship with a specific sector gives us both more freedom and a cross-section, wider vision of the economy.

**ANTITRUST SOURCE:** Did you make any organizational adjustments so that the Autorité would be able to more effectively focus on the issues you wanted to emphasize?

**ISABELLE DE SILVA:** Within a few months after I arrived, I launched a comprehensive internal review process, with a large participation of the staff and members of the board to have a sort of internal diagnosis of what we could do better.

We set up several working groups on various subjects, including how to better prioritize and manage cases and how to adapt existing means. The issue of timeliness and a faster resolution of cases so that they have an impact on the economy is a top priority. We also worked on helping new staff to be better trained. We even designed new tools for that.

This internal exercise was also an opportunity for us to assess our existing legal framework so as to see what could be improved. We identified all the different features that we felt were lacking in our statute (the French Code of Commerce). We then discussed with the government the ways to implement those changes.

As an example, when we do dawn raids today, when there are several sites that we must visit—typically in the case of a company having several subsidiaries on the French territory—we must refer the matter to the judge of each locality. We therefore proposed to have the power to talk to a single judge who would give us the powers to conduct dawn raids in the different localities.

Regarding more important points, we asked for some legal changes that would enable us to have a more expedited procedure in antitrust cases. Today, we have two written sets of adversarial procedures and then one oral hearing. We felt that, in some cases, we could have only one written adversarial round, and then the oral hearing.

We really tried to see everything that was not perfect and that we wanted to have in our legal framework. It was interesting because some ideas that we had, in the end, were approved by the ECN plus Directive, such as for example, the possibility of deciding interim measures at our own initiative.

**ANTITRUST SOURCE:** Any major learnings, things you didn’t expect, things that were more difficult than you expected? Or things that you have been able to achieve since you started?

**ISABELLE DE SILVA:** One thing I discovered that was initially a bit surprising for me is that the competition world seems mostly made up of experts who spend their whole career in the field of competition. That’s a bit surprising for me as I had a diversified career, like most top civil servants. At the same time, there are many good aspects to it because you have highly specialized lawyers and case handlers. Sometimes it can have some downside though because people may have only their field of activity as reference.

**ANTITRUST SOURCE:** It’s a world of competition geeks, that’s true. You have contacts, of course, within the ECN, OECD, the ICN, and you attend the Antitrust Section Spring Meeting. Did you see anything that differentiates the Autorité, where you feel that you are in a better or worse, or simply a different position, than other competition authorities?
ISABELLE DE SILVA: Being the head of the agency gives me the ability to meet with senior representatives coming from law firms, companies, but also ministries. I’m really impressed by the level of discussions that we have. The economic and legal debates that we have about big data, for example, is impressive. The dialogue between academia and enforcers is also something that I appreciate a lot. It creates a very positive dynamic.

When it comes to differences in Europe and beyond, I’m often impressed by the convergence on the tough problems, for example, data protection, the digital economy. When we meet with enforcers from Israel, the United States, and Japan, from the beginning, we speak the same language. And we often identify the same priorities. Of course, there are differences in terms of enforcement. In Europe, there are similarities among agencies. I would say Germany, Italy, Spain, Portugal are quite similar, although the legal systems have some differences. But we really have the same priorities, and we tend to look at things the same way.

Differences lay in the legal framework. For example, there’s the fact that the U.K. examines far fewer mergers than we do, and that Germany tends to issue less administrative fines than we do. Even with more recent members of the European Union, like Lithuania, which is a very dynamic agency, I would say that there is no major difference of views. We tend to have the same vision of where we want to go as enforcers.

At the international level, I enjoy the dialogue within the ICN or the OECD. It gives me many ideas about new cases we should look into and also about ways of handling cases. I spend a good portion of my time learning about what’s going on in other agencies. What I really like is to be able to have an intense dialogue with other enforcers on how they lead their investigations.

ANTITRUST SOURCE: Do you believe that the French, let’s call it “enabling” environment, the conditions under which you operate as a competition authority, make a difference for you—compared to say the U.K. competition authority?

ISABELLE DE SILVA: When I speak with my colleagues in Germany and the U.K. for example, it’s quite similar in that we spend a lot of time discussing with the government and the parliament. Still, I would say that the culture of competition is not as strong in France as it is in Germany, the U.K. or the U.S. It’s striking. When I speak with members of Parliament, they tend to see competition as something a little bit negative. That’s why I think we need to do a lot of explaining and advocacy. Often competition is misunderstood. I’m often told: “You only think about prices, you only think about consumers.” I’m constantly explaining that “consumers” can also be companies, and that consumers need to have a special advocate.

ANTITRUST SOURCE: It creates more opportunities for you to persuade others. Let’s turn to some substantive areas. Let’s start with mergers, first with some questions on procedural aspects.

French merger control law has relatively high notification thresholds, and I understand you’re thinking about options to review mergers that don’t meet the thresholds under some sort of ex post regime. Is this already something concrete?

ISABELLE DE SILVA: Yes. We spent a lot of time thinking about whether we needed to create a value transaction threshold or another ex post merger control regime.

The Facebook/Whatsapp merger was certainly a major turning block for everybody interested in merger policy, and started the whole debate about a possible blind corner in our merger control regime. We conducted an internal analysis of whether we were “missing” mergers that we
would have liked to control but that would be below the threshold. We also opened a public consultation that took several months. Our conclusions were that we were not able to control some transactions that had a sizable impact on the competitive process. This was not only the case in the digital sector, but also in pharmaceuticals, or even in the food industry, for example.

We initially asked ourselves whether we needed to introduce a value transaction threshold in the French system. We felt that it was not necessarily the best solution for several reasons. There was the debate about what the value of the transaction is and how you define and evaluate it. The Germans and Austrians took a lot of time to solve it, and we saw that it was complex. There was also the issue of us controlling and looking at a lot of transactions that didn’t have any competitive interest.

That’s why we considered an ex post merger regime as an alternative proposal. We extensively discussed with the U.S. FTC and DOJ, the Swedish competition agency, and other competition agencies to understand how they were using such a power, and what their feedback was.

In the end, we made a proposal to the government to introduce such an ex post mechanism in our legal framework. The legal community was quite strongly opposed to such a change, and there were concerns about possible negative effects on startups wishing to be bought by big companies. It is now up to the government to decide what to do. The Prime Minister has announced in his speech during the 10th anniversary of the Autorité that he was considering the issue.

ANTITRUST SOURCE: So it would be the French way to address the problem that the Germans and the Austrians have addressed by introducing transaction value-based notification thresholds?

ISABELLE DE SILVA: Yes. We see this not only as a tool to look at certain big mergers in the digital economy, but also as an answer to examine mergers in sectors of the economy that are relatively small, so that the mergers don’t reach the threshold, yet you may have high market shares and competition issues. We also made clear to stakeholders that if such a regime was introduced, we would provide some guidelines about how we would consider intervening, and that it would be a limited intervention only. We are also mindful of our resources and we want to look at mergers where there is a big competitive risk.

ANTITRUST SOURCE: You mentioned that when you examined the issue, you did identify some transactions that you thought should have been reviewed. Do you find that those were mostly national transactions that you thought you wanted to see, or were these large, international, Facebook-type transactions?

ISABELLE DE SILVA: The transactions that we identified were mostly French transactions, sometimes in the tech sector, sometimes not. I’m not saying that those mergers should have been blocked, but there were at least 10 to 15 mergers we would have liked to have a look at.

ANTITRUST SOURCE: Let’s move to the next topic, staying on the procedural side: gun jumping. Clearly, with the Altice decision, the Autorité de la concurrence was at the forefront of the gun-jumping discussion in Europe. And you generated the interest in this topic, not just with the decision itself, but with some of the language used in the decision, which made people wonder how far the Autorité might be willing to extend the concept of gun jumping. You even published an article on this decision. What would be your main takeaway from the Altice case?

ISABELLE DE SILVA: One of the reasons why the case attracted so much attention is that we decid-
ed to issue a significant fine of 80 million euros, because we considered that it was a serious infringement and because this was a big merger, which presented a number of competition issues.

There was a debate about what was allowed and what was forbidden. Even though we had reached a settlement and we could have issued a short decision, we chose to draft a very detailed decision to explain our reasoning to stakeholders and the legal community. There was a lot of debate about the use of so called “clean teams” and how the company could avoid gun jumping when discussing with another company while preparing the merger. What was the type of information they could share? In what way? So we really went into a lot of details about some elements of the decision.

After the decision was published we entered another phase with a very intense discussion with stakeholders—companies, lawyers—with the view of explaining clearly the “rules of the game.” For example, we held a conference on gun jumping with the wider antitrust community. We also met with the Association of Competition Lawyers in France, which had set up a group to analyze the decision. I also wrote an article in a specialized publication to provide further answers in order to give as much clarity as possible to all stakeholders. I received some good feedback about this article and the questions raised by stakeholders have been clarified. We will now wait to see what the General Court will say about the EC decision regarding Altice in Portugal.

**ANTITRUST SOURCE:** Yes, the conduct there was apparently as bad as in the case that resulted in the French decision.

**ISABELLE DE SILVA:** There were some similar elements in the two Altice cases, yes.

**ANTITRUST SOURCE:** After your decision, the Court of Justice decided the Ernst and Young case. Did you feel that that somehow impacted the scope of your Altice decision?

**ISABELLE DE SILVA:** No, because it was afterwards . . .

**ANTITRUST SOURCE:** I meant in terms of the holding in Ernst and Young.

**ISABELLE DE SILVA:** There was a debate and my interpretation of the Ernst and Young decision is that it’s not contrary to ours. I have heard issues being raised about the fact that the judgment would lead to an interpretation of gun jumping that could be narrower than the one we had applied.

We applied French law. So in any event, we are not directly affected by this jurisprudence based on the European regulation. But, of course, in our decision, we also made references to European jurisprudence because we always try to be as coherent as possible with European law, even though we were only applying French law in that case. The Ernst and Young case was also quite specific.

**ANTITRUST SOURCE:** I understand from your summary of the French Altice decision that the focus in a gun-jumping inquiry should be on the acquisition of control, a controlling interest, and that seems to be largely aligned with the European Court.

Because you mentioned your interaction with stakeholders, what has been the feedback from the private sector? Do stakeholders feel that the rules are clear enough now? Or are they still worried that there’s too much uncertainty?
**ISABELLE DE SILVA:** Regarding gun jumping, I feel that there is much less anxiety now. And what I see is that in-house counsel and lawyers are much more careful than before.

What gave even more importance to this issue was that after our decision it so happened that there was the EC decision, and many others in Brazil, Lithuania, and all over Europe. There were precedents in the U.S. and in Europe but, suddenly, this large number of gun-jumping cases was impressive. It especially became a major issue for companies with the level of fines the EC, or ourselves, had decided to impose.

Let’s not forget in the end that some mergers are abandoned. When such situations occur, you don’t necessarily want to give your competitor all your strategic information, or to engage in discussions that may be regarded as illegal agreements. It’s also a precaution not to start acting “as one” when the merger is not finished and approved.

**ANTITRUST SOURCE:** We can’t talk about mergers without getting to Siemens/Alstom and the fallout from the case. You are from the country where the criticism of the decision was stronger than anywhere else.

**ISABELLE DE SILVA:** That was also the case in Germany.

**ANTITRUST SOURCE:** Yes, true. So you share that position. What is your view of the French Minister’s reaction to the decision by the Commission?

**ISABELLE DE SILVA:** I’ll just say it’s a case we followed closely, like all major cases. I have to say that some of the criticism seemed to be a little bit extreme to me, most of it coming from authorities that don’t necessarily have the day-to-day knowledge of how mergers are analyzed and examined.

This merger had been very much supported by governments, which explains why there was acute disappointment expressed about the outcome. I think that it raises more general questions that are, for some of them, legitimate and that need to be addressed.

The question for example of how you evaluate potential competition and the geographic definition of the market is something that we know is not easy. Is the market the world or Europe? This point was raised in that case and is not so easy to tackle. Sometimes the line is not easy to draw, so I think this could be debated. I also think that the issue of how agencies assess potential competition is central to the current debate, for example when you consider entry by digital giants. Another worthwhile debate is the one concerning the issue of the time frame for the merger analysis.

This being said, I completely agree with the way the Commission did the merger analysis.

I think that the reaction was also strong because some elements of the general European policy may be found lacking. A choice that was made some years ago was to not make it possible to render the public tenders in Europe conditional to reciprocity. It is a legitimate concern, and I said it several times, including to our government. The answer may not be in changing competition or merger policy, but in developing policies that may be underdeveloped today.

This should probably lead us to re-examine trade relations with certain regions of the world where competition enforcement is much lower than in Europe. A few weeks ago, during the Autorité’s 10th anniversary in Paris, Pascal Lamy, former WTO chief, acknowledged that maybe he had made a mistake in not taking into account public subsidies in the rules of the WTO and that, in retrospect, they should have been included.
Regarding the possibility of intervention by the Council in merger decisions by the EC, this could be imagined (we have this system in France and Germany). This would however be very complex to define from an institutional point of view. There would also be a serious risk of politicizing decisions that today are not perceived to be political.

Even from the point of view of French interest, this might lead to some debates from other countries criticizing mergers that the French government would like to see approved. So this might not be the best idea. It’s not impossible, but in the end, it might become more of a problem than a solution.

**ANTITRUST SOURCE:** You mentioned the Ministerial intervention. Last year, your agency was at the receiving end of a government decision that modified the remedy in one of your merger decisions. What is the role of the Autorité, when the Minister, essentially, takes over a case? What was your reaction when the Minister allowed the merger to proceed with modified remedies?

**ISABELLE DE SILVA:** This was the first time that this faculty was used since the Autorité received the power to approve mergers in 2008. The Minister can only intervene on grounds other than competition, like employment or industry objectives.

The fact that the Minister intervened in that case is linked to the many specificities of the case. It was a difficult merger with a very high market share in the food processing industry. We found that the competition and possibility of entry were extremely low, due to characteristics of the market of canned foods and because you needed, for instance, specialized production lines. It was also the first time that we had ever issued an injunction to sell plants because the company wasn’t willing to propose remedies.

The main reason why the Minister decided to intervene was because the French government had offered a specific financial help to the company that was being bought. Furthermore, the company put forward that it needed to keep all its assets to survive.

Had this faculty by the Minister not been in place, there might have been some pressure on us to approve or not approve the merger. As the system stands, we are able to do our job without having to take into account other elements that are difficult to incorporate in the competition analysis.

**ANTITRUST SOURCE:** One last point on this case. You mentioned before the somewhat incestuous relationship within the competition community. If you consider the reactions after Siemens/Alstom and the French-German proposal, there was, within the competition community, a strong reaction saying, “No, no, no. We know how things are done best in competition law, and the French-German proposal is wrong for the following competition-specific reasons.” With your wider background, do you feel that we should engage more with a wider range of stakeholders, and that there is a risk that we assume too much if we talk only within the competition community?

**ISABELLE DE SILVA:** The competition world really likes to debate, sometimes endlessly, about the Intel case and other things that we find fascinating, and maybe we don’t spend enough time engaging with the rest of the world and explaining what we do. We must hear what is being said, and be able to provide answers. There were some excellent points made by, for example, the Economist about the value of the current system.

It is beneficial when players react and explain why the current system is good and why we must defend what is good about it. We shouldn’t refuse the debate, because we will not be heard oth-
otherwise. Engaging in the debate is something that Jean Tirole, among others, does very well in France. He's a strong advocate for competition with an open mind. The positive outcome of this debate is that there is a lot of discussion in France and Germany. We'll see what comes up in terms of political mandate for the next European Commission, and we intend to be active participants in that debate.

**ANTITRUST SOURCE:** We cannot talk with a European competition authority without talking about vertical restraints. That's on the forefront of everyone's mind.

To start with a concrete example, one decision last year that got a lot of attention was your decision in the Stihl case, where you decided that even for something as risky as chainsaws, a ban on online sales would be unlawful. From your practical experience, can you think of any product where you still might think that there could be legitimate reason to ban internet sales?

On chainsaws, for example, even the Bundeskartellamt, certainly not a very soft agency when it comes to online sales restrictions, once indicated that it might accept an online sales ban. But is there any space left? Or should we simply assume, regardless of what the product is, that internet sales bans are always unlawful, and a supplier might only regulate how the product is sold?

**ISABELLE DE SILVA:** What we did was really an in-depth analysis of the specifics of the case. We started from the point of view that online sales should be allowed whenever possible, because of the positive effects they have on competition.

We also took into account several elements. For example, we considered the security regulations applicable to those products in France and in Europe. There was no general rule saying you must get your product in person and receive a special training. We also took into account other specificities such as the fact, in some instances, those products were freely available in shops. This was a very fact-based analysis, and we found in the end that the policy of Stihl was contrary to competition law.

Another important side of this decision was the confirmation that it was possible to have selective distribution for those products. This element wasn’t so obvious but, for different reasons, we concluded that the company had the right to have a restrictive distribution. We took into account the Coty judgment to try to reach a comprehensive decision that draws a broader picture than what's being said about Stihl. We are waiting for the decision of the court.

**ANTITRUST SOURCE:** There is also a particular French aspect to this. France is one of the centers of the European luxury and branded products industry. I could imagine that representatives of that industry probably would argue that it would be very procompetitive for them to have more control of their distribution systems. Do you get any pushback from these stakeholders against your enforcement approach?

**ISABELLE DE SILVA:** The question of the legal framework in a distribution system is extremely important. It's a very big field of the law. In discussions with companies, the Autorité has had for some time the point of view of defending selective distribution, but this wasn’t always aligned with the views in Germany. We feel selective distribution can have some clear benefits for customers, like the presence of shops that fit certain standards and a quality sales environment. This has been quite a strong view in the agency before my time, and I feel it's good that Coty completely confirmed that view because there was a strong debate.

We will need more cases in the future to have a clearer overview. I'm not sure that this is the end of the debate. We'll certainly have other developments, maybe relating to cases in Germany.
ANTITRUST SOURCE: You mentioned before your advocacy efforts, which are one of your key activities. Could you provide us any good examples of some recent efforts where you provided input to the government and you actually saw some positive results?

ISABELLE DE SILVA: One of the best examples is the Macron law of 2015 that, effectively, created the possibility of coach transportation between the cities of France. It was something that had been forbidden in France, and the Autorité prepared an opinion saying we should allow competition. It offered the possibility to travel by coach, which was a sector of the economy that did not exist. New connections between cities were developed that didn’t exist by train or by public coach transport, and many jobs were created as a direct effect.

Customers found a service that they liked. We saw that lots of students and retired people were taking those coaches because they were not time-constrained and they liked this mode of transport. Prices were also very low and attractive compared to train prices, which had gone up in France. This is a good example of a quick adoption by the law of our recommendations, just a few months after we issued the opinion.

There are other examples. The Prime Minister recently announced, in a speech he gave during the 10th anniversary of the Autorité, that he was finally opening the reform of the car spare parts that we had been advocating since 2012.

In France, visible spare parts are protected by patent law, and cannot be sold by other providers. For many years, the car industry has been active to prevent any change of law, and we have been saying that customers were paying much more in France than in other countries. But due to the on-going yellow vest movement, the issue has now become a priority for the government. The question of customer buying power is central in France today. All the reforms that can have a benefit for consumers are perceived to be quite positive.

I also think of two current examples. Next week, we will publish an opinion on the modernization and liberalization of the health industry in the field of distribution of medicine and biology laboratories. And we just issued an opinion on the audiovisual sector saying that the draft law under preparation by the government should be a very ambitious reform, and should do away with many of the restraints that create a competitive disadvantage between traditional broadcasters and big players like Netflix, Amazon, or Apple.

ANTITRUST SOURCE: The current government, the Macron government, promotes market liberalization as its flagship idea and wants to improve the competitiveness of the French industry. Has this changed the role of the Autorité? Do you get a more receptive audience now? Or is the regulatory culture just too deeply ingrained?

ISABELLE DE SILVA: Emmanuel Macron has had a huge impact as Minister of the economy because the Macron law of 2015 was one of the most ambitious reforms in recent years. The law also gave new powers to the Autorité to regulate legal professions, which was something that we didn’t do before. This enabled us to also foster competition in those professions that were not open to new commerce.

ANTITRUST SOURCE: The legal profession is very much focused on issues like diversity and inclusion. This is perhaps an extra tough topic for the private sector, where progress is slower than in the public sector. Nevertheless, it would be very interesting to hear from you as a woman, as a female head of agency, how do you think about the issue? How is the situation, particularly at the Autorité? And what measures have you been taking to support female colleagues?
ISABELLE DE SILVA: I think that among competition agencies, we’re in a pretty good place. Several women are heads of agencies like Margarida in Portugal, Margrethe in Brussels, or Alejandra in Mexico. We are already at a good level of parity between men and women.

The same is true for the Autorité. We have a fairly even 50/50 split between men and women at the staff level. At the higher level of management, we are fairly balanced as well. At the level of the board, we used to have more women than men and now due to a new law that imposes a strict 50/50 split, we’ve had to diminish the number of women! That’s the paradox of the law that was meant to “protect women” and that, in some cases, might “protect men.”

More widely speaking, I think that the competition law bar in France is maybe more gender-balanced than the M&A bar for example. Still, from what I hear from the lawyers’ community, the next priority is really this issue of the number of women partners. I see lots of women practicing as lawyers, in-house counsel, and in universities. I supported the initiative Women @ competition because I think that everything that can help women empower themselves and move forward is important. The talent is really there.

I also feel that the Autorité offers a good balance between work and family life, this is also one of the reasons why we attract people from diverse backgrounds, including the private sector, and I’m very happy that our work conditions are so well perceived.

ANTITRUST SOURCE: From your own experience, what would be your advice to younger female competition lawyers? What are the key things to watch out to sustain a career and succeed as a competition lawyer?

ISABELLE DE SILVA: Women should maybe be more assertive and not let men have the monopoly of speaking out. I noticed at a hearing recently that only men were sitting in the front row and speaking, while female lawyers would sit in the back and not speak, although, I can imagine, they had been very active in preparing the case. There is a big responsibility from law firms to promote equal opportunities, including by offering opportunities to speak at hearings and before courts.

We are trying to develop internally at the Autorité ways to better help young women lawyers develop their career by giving them very practical tips and advice on how to seize opportunities. I think this is the type of thing that can really help, especially when a woman would hesitate to take a job because she’s afraid that she might not be able to do it. Some encouragement is always welcome!

ANTITRUST SOURCE: Thank you very much for joining us. This has been very enjoyable and instructive.
Interview with Kurnia Toha, Chairman, Indonesian Commission for the Supervision of Business Competition

Editor’s Note: Kurnia Toha was named Chairman of the Indonesian Commission for the Supervision of Business Competition (KPPU) in 2018. After earning a law degree in Indonesia, he obtained advanced law degrees at the University of Washington School of Law. He has been a law professor at several educational institutions, and had key roles in the drafting of the Indonesian competition law and its recent amendments. He was interviewed for The Antitrust Source on March 28, by Hugh Hollman.

THE ANTITRUST SOURCE: Chairman Toha, thank you for being here with us today. You were appointed to the KPPU in May last year, along with nine other Commissioners, and then appointed as Chairman for the period 2018–2020.

KURNIA TOHA: Yes, that’s correct.

ANTITRUST SOURCE: What is most important for you to accomplish during your term?

KURNIA TOHA: Actually, before I became a Commissioner, I was an associate professor in faculty of law of the University of Indonesia, responsible for the antitrust law subject for the undergraduate and graduate school.

When I was working as a professor, I found a lot of criticism directed to KPPU, especially on the law enforcement and case handling procedure. So I think it’s very important to change the current law and its implementing regulation in order to bring it in line with the principle of due process of law and to enhance KPPU’s enforcement effort.

Another important point to change is the law itself because in Law Number 5 of 1999, there are some articles that are not in line with international practice and that also obstruct KPPU’s ability to handle cases.

In 2004, KPPU assigned me to prepare the draft amendment of the law. But nothing happened at that time. Later on, in 2014, I was assigned by KPPU, for the second time, to prepare the draft amendment. Those amendments are now still being discussed in the Parliament.

ANTITRUST SOURCE: When you say you were assigned, I understand you were Chairman of the Preparatory Team for the Amendment of Law Number 5 Year 1999 in 2014. And when you became Chairman of the KPPU in 2018, did you then propose a number of changes to the Indonesian Competition Law?

KURNIA TOHA: Yes.

ANTITRUST SOURCE: From your perspective, what are the most important required changes?
KURNIA TOHA: First is about extraterritoriality. As far as I know, this idea was previously rejected by the government and the Parliament. So maybe it will not change, but we still have time to discuss this.

ANTITRUST SOURCE: You actually wrote an article on extraterritoriality back in 2007, entitled, “Extraterritorial Applicability of Indonesia Business Competition Law as an Efforts Dealing ASEAN Single Market.” In that article, I think you had a particular concern that local businesses could be hurt by the free market, as I understand you said foreign companies are not subject to the Indonesian competition law.

KURNIA TOHA: Yes, that’s right.

ANTITRUST SOURCE: Accordingly, you suggested that the law should be amended to subject foreign companies to the Indonesian authority?

KURNIA TOHA: Yes, yes.

Another subject that is very important is the shifting of post-merger notification to pre-merger notification. And also to increase the administrative fines.

ANTITRUST SOURCE: As you said, the Indonesian competition law is a post-closing jurisdiction. And there is a requirement to notify within 30 days of the closing of the transaction.

KURNIA TOHA: Yes, that’s correct. We plan to move towards pre-merger notification. And, fortunately, this is already agreed by the government and also by the Parliament.

ANTITRUST SOURCE: What do you think the timing is for those changes?

KURNIA TOHA: The last time we had a discussion in the hearing with the Parliament and the government was in January. At the time, I was very optimistic that this law would be enacted in January or February. But suddenly, the hearing stopped. So the Parliament scheduled it to come before a hearing after the election. There will be elections on the 17th of April. So, hopefully, in the third week of April we will have another hearing. We are still optimistic that this amendment will be finished and will be enacted this year.

ANTITRUST SOURCE: We’ll watch that space in hopeful anticipation. Earlier, we also started speaking about some of the possible changes to the Indonesian competition law. What other goals do you have in mind for your term as Chairman of the KPPU?

KURNIA TOHA: We would like to focus our effort on cases that have the greatest impact on society, and usually these kinds of cases are derived from ex officio investigations. Thus, it is also important for us to improve our market studies, which findings could lead to ex officio investigations. Hopefully, we can find initiatives, or cases, that really affect the economy or the people.

ANTITRUST SOURCE: Are you focusing on any particular sectors at the moment?

KURNIA TOHA: Yes. We have some industries that we’ll focus on in five years. Those industries are: the food industry, health and education industry, transportation and logistics and digital economy, oil and energy, finance and banking, and also property.
the food industry, health and education industry, transportation and logistics and digital economy, oil and energy, finance and banking, and also property.

**ANTITRUST SOURCE:** You held a workshop in December 2018 during which you did a competition assessment that focused on government procurement.

**KURNIA TOHA:** That was a competition checklist. We tried to have a program not only for the central government but also for the regional governments to have their regulations in line with the principle of fair competition and to ensure due process of law.

**ANTITRUST SOURCE:** Were you applying the OECD competition assessment toolkit?

**KURNIA TOHA:** We formulated our competition checklist based on the OECD checklist. But now we learned some more, and made it in accord with the conditions in Indonesia. But mainly, this was based on the OECD competition checklist.

**ANTITRUST SOURCE:** The Supreme Court of the Republic of Indonesia\(^1\) rejected an appeal filed by the KPPU because of the lack of due process of law. At the time, the KPPU responded that they plan to remedy the procedural system accordingly. Was this case what you had in mind when you were referencing the need to bring the Indonesian law into conformity with due process?

**KURNIA TOHA:** Yes, actually, when I was an academician, I criticized the KPPU because I thought the procedural law is not in line with the due process of law. So, honestly speaking, I made that opinion, not based on that case, but based on my knowledge about the due process of law because I’ve also been teaching criminal law, criminal procedure law for almost 20 years.

**ANTITRUST SOURCE:** What particular areas do you think need improving when it comes to due process?

**KURNIA TOHA:** We already have a new procedural law, KPPU Regulation Number One of 2019. So under the previous regulation, the Commissioners had input from the beginning of the case. From the initial process, when the investigator had an investigation, the Commissioners were always there. Afterward, the Commissioners decide whether a case could proceed to the hearing process or not. We changed it. In this revised procedure, the Commissioners will only be involved in the Hearing Process. This is to make sure that our case handling procedure is aligned with due process of law.

**ANTITRUST SOURCE:** These changes then are designed to ensure that the Commissioner is more impartial in making decisions by not being involved in the initial investigation?

**KURNIA TOHA:** Yes, independent, more independent. We are already asking our investigators to work more professionally—so we don’t have a feeling of just dismissing the case at the preliminary stage. And the previous regulation, in our opinion, is not in line with due process of law.

\(^1\) Decision No. 1106 K/Pdt-Sus-KPPU/2017.
example, when we bring in a top executive as a witness, the witness brought their assistant, and if the top executive does not understand the question, then they asked the assistant.

Based on the new regulation, we will only have witnesses that really are the ones who know the facts and heard it by themselves or had input in the case. So it's not because the witness is the president of the company that he may be a witness. And also if the company representatives or their attorneys do not show up, we will cancel the hearing. In the past, from my own experience in the hearing process, sometimes the company representatives or their attorney just didn’t show up. But in the future, that will not happen anymore.

**ANTITRUST SOURCE:** And will these due process procedures apply to cartel offenses?

**KURNIA TOHA:** All the cases.

**ANTITRUST SOURCE:** I referenced the December workshop in an earlier question. Another aspect that was discussed at the workshop was the need to protect domestic business from foreign businesses. Do you think this reflects a move towards protectionism in Indonesia?

**KURNIA TOHA:** No, we don’t mean it as a form of protectionism because both the foreign companies and domestic companies will be treated in the same manner.

**ANTITRUST SOURCE:** Actually, we are concerned about the increased cross-border cases that involved multinational companies and or foreign companies, and also competition violations being conducted by foreign companies that affect the Indonesian market. We hope that the KPPU can investigate and can handle these cases.

**ANTITRUST SOURCE:** From what I’ve been reading about the KPPU, it is very active in the M&A area, having received 74 merger notifications last year. Do you foresee that with your proposed changes to the Indonesian competition law more companies will need to notify?

**KURNIA TOHA:** I don’t think so. Because at this time, we already have voluntary pre-merger notification, and a lot of companies will choose to voluntarily notify us or consult with us even before the transaction takes place, including the foreign companies. They already have such a good practice of pre-merger notification in their home country.

**ANTITRUST SOURCE:** The KPPU has also fined companies for not delivering a notification within the stipulated period, including a fine of IDR 3.75 billion on PT Cipta Multi Prima for the acquisition of PT Darma Henwa Tnk.

**KURNIA TOHA:** Yes.

**ANTITRUST SOURCE:** Can you tell us how those fines were calculated?

**KURNIA TOHA:** Actually, we have our own regulation on administrative fines for overdue merger notification. This regulation stated that the fines for each overdue day are 1 billion Rupiah, provided that the maximum total amount of fines shall not be more than 25 billion Rupiah. But the KPPU’s Council has discretion to reduce the fines should the reported parties be showing their goodwill and cooperation in the enforcement proceedings, and vice versa.
ANTITRUST SOURCE: Do you plan on also fining companies once you move to a pre-closing notification system if a party does not notify within a certain period of time of a merger agreement being signed?

KURNIA TOHA: Yes, yes. I think so.

ANTITRUST SOURCE: I believe that many other jurisdictions like the United States and European Union allow parties to go ahead and notify at their will provided the transaction is not closed before receiving clearance.

KURNIA TOHA: And maybe we can apply another doctrine—there is, for example, the single economic entity doctrine. That doctrine and the theory are not originally, from Indonesia. So we adopted it, especially from the U.S.

ANTITRUST SOURCE: Which jurisdictions do you look to for possible guidance on competition law?

KURNIA TOHA: We learn much from U.S. practice. And before I became a Commissioner, I have been called as expert witness many times. Thus, I learned some doctrines from the U.S. and, of course we also learn from Europe.

ANTITRUST SOURCE: Is there any particular area that you look to the U.S. more than Europe?

KURNIA TOHA: Yes. In law school, I taught about Indonesian competition law that was promulgated in 1999. I taught that subject since 1998, but in 1998, we didn’t have our own competition law yet. So oftentimes I referred to the Sherman Act and the Clayton Act, and we found a lot of doctrines from the U.S. practice.

ANTITRUST SOURCE: We referenced the OECD earlier, and there is also the ICN; do you look to those organizations for guidance as well?

KURNIA TOHA: Yes. For example, we take some of OECD’s policy briefs as our references in revising our case handling procedure.

ANTITRUST SOURCE: Since KPPU has come into being, the ASEAN Community has become much more significant in the competition area. Please could you explain to us how the KPPU interacts with ASEAN on the application of competition law?

KURNIA TOHA: Yes, even before I became a Commissioner, KPPU has had a close cooperation with the ASEAN Member States and, of course, we look forward to strengthening that cooperation.

Last year, we signed a Memorandum of Understanding on Enforcement Cooperation with the Competition and Consumer Commission of Singapore. We also formed an ASEAN Competition Enforcers’ Network, or ACEN, with all of the ASEAN Member States. Its Terms of Reference was developed by KPPU.

As the oldest competition authority in ASEAN, KPPU also contributes its knowledge and best practices to the region by conducting staff exchanges with other competition authorities in ASEAN, such as those in Malaysia, Singapore, Philippines, and Cambodia. These staff exchanges
were conducted with the support of the Japan ASEAN Integration Fund technical assistance project for competition authorities in ASEAN, which is managed by KPPU, in cooperation with the Japan Fair Trade Commission.

**ANTITRUST SOURCE:** Please could you describe how that cooperation among other ASEAN countries works in practice?

**KURNIA TOHA:** Yes, formally we have a MOU with Singapore’s CCCS. So we can exchange information and also coordinate and cooperate our enforcement activities with them.

**ANTITRUST SOURCE:** The KPPU recently published a market study on the digital economy in Indonesia. What were the key considerations of the KPPU in preparing that study?

**KURNIA TOHA:** The digital economy is one of our priorities. However, we don’t have specific guidance yet, but we already have our market studies on the digital economy in Indonesia. Of course, the digital economy is now rapidly changing, and we should learn about that. And, of course, we would also like to know what businesses think about this sector.

**ANTITRUST SOURCE:** Do you also look into matters of data privacy?

**KURNIA TOHA:** Yes, of course.

**ANTITRUST SOURCE:** And have you also considered whether innovation might be an aspect that you would evaluate?

**KURNIA TOHA:** Of course, as innovation is one of the goals of competition, and innovation could have a great impact on peoples’ welfare.

**ANTITRUST SOURCE:** Are there any other areas of the Indonesian economy that you think you will be focusing on particularly, like you did with the digital economy report?

**KURNIA TOHA:** I said that we have several sectors that are our priorities. So now we are focusing our efforts in the food sector and also looking at the partnership between large companies with medium, small, and micro companies.

**ANTITRUST SOURCE:** What are your concerns with those partnerships?

**KURNIA TOHA:** In 2008, KPPU was mandated with a new authority through Law No. 20 Year 2008 regarding Micro, Small, and Medium Enterprises, or MSMEs. Such authority includes supervision of partnerships between MSMEs and large companies. With such authority, KPPU may inspect business contracts between the companies to avoid abuse of market dominance by large companies. One of the examples is partnership in agriculture sector, which is the partnership between large agriculture companies with the farmers. So with the farmer, we address the partnership between the agriculture company with a small company or with the farmer.

**ANTITRUST SOURCE:** Are you investigating informal partnerships or formal collaborations like joint ventures?
KURNIA TOHA: Not a joint venture, actually. But if they have a contract or agreement, we will monitor and evaluate whether the large company has certain abusive arrangements towards the medium/small/micro company.

ANTITRUST SOURCE: Are you primarily concerned about so-called superior bargaining positions as it is described in Japan?

KURNIA TOHA: Yes, that’s correct.

ANTITRUST SOURCE: And are you looking to Japan for guidance?

KURNIA TOHA: Actually, we are still preparing the guidelines. We are referring to some countries that have such authority.

ANTITRUST SOURCE: And how does that compare to dominance? Are you looking at this through a dominance framework, or are you looking at it as an abuse of superior bargaining?

KURNIA TOHA: So, in these partnerships we evaluate their agreement from a competition perspective, and also consider the superior bargaining position.

ANTITRUST SOURCE: Is there anything else that you would like to share with our readers about your experiences or objectives as Chairman of the KPPU?

KURNIA TOHA: Yes. At this time, the amendment of the Indonesian Competition Law is still under final discussion in the Parliament. Should the amendment be approved within this year, we will need a lot of best practices from advanced competition authorities, including the FTC and DOJ, in formulating the implementing regulations or guidelines.

ANTITRUST SOURCE: Do you think you have the resources internally to implement the anticipated changes to the law?

KURNIA TOHA: At this time, we are also in the process of reorganization, in order to improve the performance of each bureau in KPPU.

ANTITRUST SOURCE: You’ve been involved with the KPPU from its very beginning. All these years later, are you pleased with how far the KPPU has come?

KURNIA TOHA: Actually, since I became a Commissioner, I see problems that I didn’t think about before! So I hope that I can make positive changes in KPPU and make KPPU the leading competition authority in ASEAN. Hopefully, with the new law, we will have significant improvement in our enforcement authorities. We are also expecting to have our budget increased next year.

ANTITRUST SOURCE: With those additional resources, where would you focus your efforts?

KURNIA TOHA: Currently, we only have 87 investigators to cover 34 provinces in Indonesia. Indonesia has almost 1 million companies, compared with our limited human resources and
budget, the workload is beyond imagination. Additionally, we should also supervise the partnership between large and micro/small/medium companies.

ANTITRUST SOURCE: Chairman Toha, thank you for sharing your vision of the future for Indonesian competition law and the KPPU. I am sure our readers will appreciate learning about the imminent change to the law and your priorities for your tenure as Chairman. Thank you again for your time.
Interview with Francis Kariuki, Director General, Competition Authority of Kenya

Editor's Note: Francis Kariuki has served as the Director General of the Competition Authority of Kenya since January 2013, and held a similar position with its predecessor agency. He is a founding member of the African Competition Forum. He holds a Master of Science in Economic Regulation and Competition from City University, London; a BA in Economics & Business Studies (Kenyatta University); and various Certificates in Strategic Leadership and Corporate Governance. He was interviewed for The Antitrust Source on March 27, 2019, by Russell Damtoft.

THE ANTITRUST SOURCE: Thank you so much for agreeing to an interview. You've been with the Competition Authority of Kenya for a long time. I think a rich experience has been developed. Can you tell us a little bit about the history and the organization of the Competition Authority?

FRANCIS KARIUKI: Yes, as you have indicated, the Competition Authority of Kenya was created eight years ago. The law which created the organization came into operation in August 2011. Competition regulation in Kenya before then was under the mandate of a department within the National Treasury.

However, as part of the Economic Recovery Strategy, the government voted to review the status and institutional dispensation of the then competition regulator and make it more competent and at the same time accord it more resources, both in terms of the budget and human resources. This was facilitated through, among others, modernization of the law, including expanding the regulatory framework and creating an independent institutional dispensation.

Since 2011, we have witnessed progressive support by the government in terms of resources to the tune of the budget allocation growing by over 300 percent. At the start in 2011, we had a staff establishment of 12. The Authority's establishment currently is at 72 and expected to grow to 92 at the end of the calendar year.

In terms of the approach to regulation, we started by regulating mergers because we had to build adequate capacity. And now we have expanded to enforcement of cartels and also the other mandate of consumer protection. The government has also expanded the mandate of the Authority to deal with abuse of superior bargaining power, including late payments to suppliers. And I'm happy that one of the topics which was being discussed within this year's ABA Antitrust Section Conference was the abuse of superior bargaining position.

ANTITRUST SOURCE: Turning to yourself, I know you were with the predecessor organization as well. What brought you into this field? What was your own pathway that led you to the position you have now?

FRANCIS KARIUKI: Let me begin by saying that I grew up in a rural village in Kenya. My parents were quite possessive of me to do economics, because the Minister for Finance then was one of their classmates when they grew up. And therefore they were always saying, like read hard, you'll
become like—then he was called honorable Kibaki, later he became the President of Kenya. So from the time I was young it is that, “I want you to be an economist and work in the National Treasury.” My parents really nudged me towards this.

The other passion when I was growing up and through my experience, I realized that you can come from a humble background, and when given opportunity you can become whoever you aspire—I came from a humble background. And what has driven me is that even small businesses, if they are given opportunities, the start-ups, they can be able to grow and become big.

So as a human being my past experiences guides me. Then, in the government, I have received support since when I was engaged in the service. I worked for a few years and then I was nominated for a course in one of the leading schools in London, which specialized in competition regulation.

After that, still I was given the opportunity to lead in the review and the revision of the then competition law. And I wish to thank all the people who were in the National Treasury then for the support they gave me. So generally, I can say it is through nurture and nature that I have been able to progress to where I am.

But the other thing that I’d like to state is that leadership cannot be taken as a starting point. I’d like to be evaluated after I leave the Authority. What is the legacy? What is the impact of my legacy to the Kenyan citizenry?

**ANTITRUST SOURCE:** And what is it you would like people to say when they’re looking back and evaluating your time at the controls?

**FRANCIS KARIUKI:** He came, he made an organization, which has been quite credible in all spheres of its mandate and grounded in a formidable foundation.

**ANTITRUST SOURCE:** Every country is unique and has different economic and social problems that need to be solved. And what do you see as the problems which competition law—and then I’m going to get into consumer law as well—needs to solve for Kenya?

**FRANCIS KARIUKI:** We are in an economic situation where we have trade associations. Not long ago, the fixing of prices, territorial allocation, sharing of sensitive information was the norm of the day. And we have not had a serious generational change in regard to the leadership of those associations.

During the time of price controls, they used to agree and go to the National Treasury for price-fixing purposes during the National Budget. And now there’s a new sheriff in town who is telling them that sharing of this information is against the law. So that has been quite a challenge in terms of trade associations. Their history is not conducive to the way they should be behaving. And now we are telling them to head off by 180 degrees. It’s quite challenging.

The other area is in terms of the promulgation of regulations by government entities, which create obstacles to competition in the market. For example, in the agriculture sector, you realize there was a lot of protection, especially in the tea industry, where the incumbents were protected from competition.

The other issue was in regard to the competition culture, let me call it interface between the policymakers and the incumbents. It was a challenge that after many years of protection, incumbents are faced with the threats of new entrants hence reducing their space and profits in the relevant markets.
The other challenge is in regard to the new economy. The issue of data and the issue of platforms, which relate to both competition and consumer protection.

This issue is not only in Europe but it’s happening in Europe and affecting Africa. We have a challenge in terms of evaluating it. We’re using the traditional methods to enforce consumer protection and competition provisions in these areas. The question is, are they adequate?

ANTITRUST SOURCE: One thing that very much impressed me about Kenya is how quickly Kenya has adapted to a tech wave, such as MPESA and other emerging technologies that have really made themselves felt even deep into the countryside in Kenya. Kenyans could buy services on their devices from an early date. How is the Competition Authority been able to ride the tech wave and to stay on top of the developments in that area?

FRANCIS KARIUKI: Let me say that our approach has always been if it’s good for the consumer, let the consumer enjoy. If, at the end of the day, it’s reducing that last mile from the consumer’s house to the bank, and the consumer is not walking or riding a car to go there for a service, they are saving time for other purposes. The Authority has always said, let’s accord the innovation space—more of a regulatory sandbox.

Secondly, is that we are sure, and we are aware that these kind of platforms, whether they are being developed using innovation, are using a lot of money. There’s, obviously, for sustainability of innovation and the market themselves, a need to give firms the chance to recoup.

The biggest challenge is, what level of investments have firms deployed? I want to share one challenge we experienced in the area of mobile money payment, where the dominant firm had some exclusive agreement with the mobile money agents. After a complaint, we found exclusivity clauses under the contracts between the dominant firm and its agents. However, the dominant firm defended itself by saying that it had made a lot of investments. So we evaluated what kind of investments they had supposedly made. We found out that they used to go to the rural areas, get the biggest shopkeeper, like a grocery owner, paint the shop with their logo, and then they would say that was their investment! We found the investment not to be proprietary and we forced them to open up the network.

From this experience I can comfortably say that technology will support the consumer, but also it can be used to block new entrants into the market. Also, the other angle I would want to bring out is that it’s also good to work with sector regulators. They have a lot of data. They have a lot of information regarding the sectors that they are regulating.

But in terms of looking at wide economic policy, I am of the opinion that the competition agencies sit in a vantage position to advance new markets, more than the sector regulators. Therefore there is this need to build the interface between competition agencies and sector regulators. That is why we have corporation frameworks with various sector regulators such as the Communication Authority of Kenya, the Central Bank of Kenya, and the Insurance Regulatory Agency.

ANTITRUST SOURCE: That’s really interesting, because in any of these sectors, there are aspects where regulation is necessary. The instinct of regulators is sometimes that all problems can be solved with regulation, but that also has the potential to dampen incentives to invest. So how have you been able to hit the balance between the right level of regulatory oversight without dampening the innovative urges in the market?

FRANCIS KARIUKI: That’s a good question. To address the challenge, we have developed what we call a Regulatory Impact Assessment Framework for competition. We have shared the framework
with sector regulators, and generally the framework focuses on ensuring that any regulation does not dampen competition. Also, it provides for mechanisms to evaluate if the regulation dampens competition: can its objectives be met through other means or alternatives? This ensures that the objectives of the regulation and the interests of innovation are well-balanced for the sake of consumers.

ANTITRUST SOURCE: So it sounds like your approach is more one of building alliances with the regulators instead of trying to come in with a heavy hand and say you’re doing it all wrong.

FRANCIS KARIUKI: Yes. It is what we may term as collaborative regulation through building of alliances. A competition agency has to regulate all the sectors but it does not have the technical in-depth knowledge of what is happening within those sectors. Therefore, it’s advisable to work with the sector regulators to arrive at optimal decisions.

ANTITRUST SOURCE: I want to move back to some of the traditional areas of enforcement. Today you’re about ten years into merger control in Kenya. And last year you set up some thresholds for merger notification. Can you tell us how that was done and whether you’re satisfied with the way it’s working out. Are you seeing the cases that you want to be seeing?

FRANCIS KARIUKI: Yes. The Kenyan law of the ’80s was very intrusive in terms of the merger regime. For example a transaction involving two grocery shops would legalistically require the regulators’ approval.

But is that the proper use of resources? Is it supporting investments in the country and in the region? We are competing with our neighbors in terms of attracting foreign direct investment. If we go to those more nuances, how are we going to compete in a global market?

And yet, when we look at the historical figures, of the mergers we have analyzed, about 96 percent are approved without conditions. So, why focus so much on something where you already know the answer? So, we decided to come up with thresholds. However, the transaction is fast tracked.

But the other angle is that we have to be aligned to another fact as well. We have been looking at market shares and therefore market power in regard to market turnover. However, small companies, small start-ups maybe, have critical data, critical software which may create market power. These are emerging issues which we need to take into consideration as we continually improve the threshold regime. And that’s why I was really excited with the FTC hearings in regard to where we are moving in regards to the data.

The other challenge in terms of the thresholds—I know there has been the issue of a national thresholds in COMESA, the COMESA Competition Commission. There has been discussion regarding merger thresholds as to the national and the regional economic community competition agencies. There has been a problem of dual notification.

But let me put it very, very clearly that the challenge we have been having, it’s not a personal one or a lack of appreciation of the importance of our regional economic community authority. It’s an issue of how best can we donate powers we have been given by our Parliament to another outside entity within proper legal mechanisms. Towards this, the Competition Act of Kenya has been amended to provide for exclusion of some transactions.

Pursuant to this, we have drafted, with COMESA, some draft regulations in regard to how we are going to donate some merger transactions powers.
ANTITRUST SOURCE: You have another addition to the mix now with the East African Community. How will your work intersect with the EAC’s Authority?

FRANCIS KARIUKI: It’s another matter we have to deal with. Luckily, I’m also a commissioner with the East African Community Competition Authority. But I can see there could be some challenges in terms of forum shopping, if it’s not addressed between COMESA and the East African Community. At East African Community we have discussed how we can come up with a framework to avoid that double notification. I’m happy that Kenya has been able to deal with COMESA, and these are processes we can inform the East African community. The challenge is that there’s one member that is not a COMESA member. Obviously that’s an issue of negotiations in terms of moving forward.

ANTITRUST SOURCE: One debate about merger control that we often hear about in many countries is the balance between the traditional consumer welfare standard and the interest in protecting other social goals—employment, things of that nature. How do you approach that debate in Kenya?

FRANCIS KARIUKI: Our law has two criteria; substantial lessening of competition and public interest regarding mergers. How do we balance them? The Authority’s approach is that when there’s a merger, obviously there are some jobs which have to be lost. But we have to sit down with the companies. And they explain to us why they are losing jobs. If there are two positions of marketing manager, you cannot force a company to employ two marketing managers. What I mean is that you cannot view the criteria under public interest from an ivory tower and impose them. They have to be negotiated solutions, and that is what the Authority’s approach has been.

ANTITRUST SOURCE: You take the long view?

FRANCIS KARIUKI: Yes.

ANTITRUST SOURCE: I have read about a big merger that is going on right now, between two mobile operators—Telecom and Airtel—which, as I understand is a merger between the number two and the number three? How do you approach mergers which reduce the number of competitors but which don’t change the dominance in the market? And does the fact that the Kenyan government has an ownership interest in Telecom affect the way you think about things?

FRANCIS KARIUKI: Yes, I’ve seen the proposed merger reports in the press. Otherwise, informally, there have been some meetings in regard to the merger, but I cannot speak authoritatively about the transaction. But from a helicopter view, we have number two and number three, coming together and we have a dominant firm. I have not arrived at a position. However, if a merger can make someone become a more credible competitor, to manage a dominant competitor, the Authority may be inclined to approve that merger.

ANTITRUST SOURCE: Moving on to cartels, can you tell us what are the big challenges that you see in Kenya?
FRANCIS KARIUKI: We had a different approach when we started enforcing cartels. We started with a Special Compliance Program, where we gave general amnesty in some of the sectors which we thought cartel-like behavior to be prevalent, and also in the sectors which are very key in terms of supporting the growth of competition and the growth of economic development in a country. Those were the financial and the agriculture sectors.

After that, we have now started hard enforcement. We have conducted two dawn raids. The last one was in December last year. We are still analyzing the information we got. The indications are that there was very clear coordination of activities.

But the challenge is in regard to collection of evidentiary information during the dawn raid. I literally closed our offices, because when you’re conducting a dawn raid at four offices in four locations, I need support from the whole Authority staff. So, generally, the challenge is in terms of the numbers and collection of evidentiary information. Then the other challenge we are seeing is that when you go to the site, the information and the data are not on that site. It’s somewhere in the Alps or somewhere in Silicon Valley.

How do you progress from there? Whom do you serve? Whom do you subpoena to give you the information? That’s another challenge we are seeing.

Then the other challenge which we are seeing is futuristic. It’s when in the very near future cartels will be done by machines, some algorithm in whatever form they’ll be. How do we progress towards that?

As a younger competition agency, we are aware of these challenges. And that’s why we are seeking greater cooperation between agencies. And even more, where we can use even diplomatic missions in terms of how we cooperate in terms of some of the sectors.

ANTITRUST SOURCE: I want to turn to consumer protection for a minute. The consumer protection portfolio is a recent addition to the Authority’s work. What led to that?

FRANCIS KARIUKI: The previous law was being enforced by a department that did not have consumer protection. The new law now has consumer protection.

The thinking of the government and also the drafters of the law is that there is an obvious nexus between competition regulation and consumer protection. As one of the advisors of the government I advised that the competition enforcement ensures that the goods and services are produced at prices which are signaled by the forces of supply and demand.

And when these goods are produced, then we have the link—how do you take them to the consumer? How do you ensure that they are of good quality? How do you ensure that they are not misrepresented? So, there’s that nexus between production and distribution to the table.

The Government took the idea, because also it had the minimalist approach to creation of institutions.

ANTITRUST SOURCE: Most consumer protection regulators—I started out my career in that field—find that the number of complaints that you receive relative to the amount of resources you have is huge. The metaphor we sometimes use is that it’s like drinking out of a fire hose. What are your priorities? Where do you try to focus your resources in the consumer area?

FRANCIS KARIUKI: You’ve hit the nail on the head. In fact, we were discussing this two months ago in the Authority. We realized we are attending to small complaints/issues. Some of these complaints can be resolved using consumer lobby groups. How can we work with consumer lobby
groups? If they are unable to resolve, they can escalate the issues to the Authority. These are some of the issues we are grappling with.

So, the Manager of the Consumer Department—and I’m happy he’s here with me today—has started focusing on sector-wide problems. We are focusing on misrepresentation, especially in the edible oil market.

Also, I can share an example we resolved in the mobile money and payments sector. There was no pricing transparency in the mobile payments and money transfers. The Authority investigated the whole sector, 47 service providers, and ordered that there had to be transparency prior to a consumer engaging them to make payment. This has changed the face of mobile payments and mobile money transfers in Kenya.

So, we are moving from this more nitty-gritty, resource engaging, but minimal impact, to big substantial cases with same resources but the impact is bigger.

ANTITRUST SOURCE: On another topic, one issue that is prevalent in all countries, but maybe more so in developing countries, is the existence of corruption in society.

FRANCIS KARIUKI: Yes.

ANTITRUST SOURCE: Is that something that you see, and do you see a relationship between competition law and policy and reducing the amount of corruption in society?

FRANCIS KARIUKI: Yes. Sure. You shouldn’t worry asking such a question because corruption affects all countries. I think it’s just the levels of corruption that vary.

And, do I see how competition policy enforcement can help in this? Sure, I do. You realize that most of the corruption issues are in public procurement. And as a competition agency, there’s much we can do with the Public Procurement Regulatory Authority. To support our country in the fight against corruption, we have developed a cooperation framework with the Public Procurement Regulatory Authority. We have a work plan for the next two years, in regard to how we are going to increase transparency and openness in public procurement.

In addition, we have an inter-agency Committee, which is spearheading the activities. These include creating more transparency in public procurement, digitalizing the process, among others.

ANTITRUST SOURCE: This is fascinating. I could go on at great length. I want to ask one question, and it’s about technical assistance.

The Competition Authority of Kenya is one of the more experienced in Africa. Are you finding yourself in the position of providing technical assistance to some of the newer agencies in your community that are coming online with competition systems?

FRANCIS KARIUKI: Yes, totally. And it’s not just the new organizations. This is an area where we have to harness knowledge and agree on where we have—if I may use this term—competitive advantage and see how we can join hands as organizations. For example, in Kenya, we have been approached in terms of how we managed the mobile platforms, how we manage Uber entering to Kenya, how we manage the mobile payments markets.

ANTITRUST SOURCE: This has been very instructive. I wish we had another hour to talk. Thank you
all and congratulations for all that you’ve achieved, and I appreciate your taking the time to talk with us today.

FRANCIS KARIUKI: Thank you, and I can say I wish to thank the ABA for inviting us. The papers, the handouts, they are quite informative, and we feel that the Authority can be able to learn a lot and be able to advance its enforcement.
Some Thoughts on Cartel Sanctions

When thinking about cartel sanctions, it is important to recognize that legal and cultural differences suggest that countries will adopt different approaches to cartel sanctions. That said, both the enforcement community and others interested in the subject should seriously consider the use of economic theory and the analysis of empirical data when developing their own sanctions program.

Two important issues arise when considering sanctions for hard-core cartel law violations. First, against whom (or what) should sanctions be imposed? Individuals, companies, or both? Second, what sanctions should be employed? Individuals can be fined or imprisoned; companies can only be fined. We address both these questions from the perspective of general deterrence. 1

With respect to private litigation, while it seeks primarily to protect a restitutionary interest, it also deters illegal conduct at the margin. While we briefly explore this issue, it is not central to the discussion.

The definition of “hard-core” cartels also merits discussion. Some jurisdictions, for example, may treat exchanges of information in much the same fashion as “hard-core” price fixing. Others have sometimes mistakenly characterized horizontal restraints associated with efficiency enhancing joint ventures as price fixing. Drawing on the work of the international enforcement community, and in particular the competition committee of the Organization for Economic Co-operation and Development (OECD), we use the term “hard-core cartels” to mean “an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, rig bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.”

An overly broad definition of cartel behavior may deter firms from legitimate efficiency enhancing joint ventures as they strive to avoid conduct that might be misconstrued as illegal.

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* The authors are a working party commissioned by the ABA Antitrust Law Section’s International Task Force to provide a short summary of the policy issues relevant to the deterrence of antitrust cartel violations that might be useful to foreign authorities and their governments in their consideration of changes to their laws, regulations, and enforcement policies. The report is a consensus document, but not every participant would agree with all of the content. The report has been edited for publication. The working party is indebted to Elise Nelson, Latham & Watkins, and Diane Tuomala, Freshfields Bruckhaus Deringer US LLP, for their significant assistance.

1 Sanctions predicated on general deterrence seek to deter similarly situated individuals and companies from committing the same offense. Specific deterrence seeks to deter the same individual or company from committing the same offense again. Other reasons to punish include retribution, restraint, and rehabilitation. There seems little reason to be concerned in this context about restraint or rehabilitation, and although some might also include retribution and specific deterrence as other goals, there is a consensus that general deterrence is the most important.

Introduction

The economic theory of crime has consistently taught that there is a penalty that will generate optimal deterrence, i.e., that yields a net benefit for society. This basic conclusion arises out of the understanding that law enforcement has both costs and benefits, and that, therefore, it is not socially optimal to deter all crimes.

The optimal number of crimes to deter is the number at which the benefits of law enforcement are at least equal to the costs of law enforcement. Relevant factors in determining the appropriate balance include: (1) the cost of detecting a crime and convicting the criminal(s); (2) the type of penalty and its deterrent effect, e.g., monetary fines or custodial remedies; (3) the social benefit resulting from preventing the crime from happening in the first place; and (4) the cost of wrongly imposing a sanction on a non-violating party.

Economic theory also teaches that to achieve such a goal, the optimal penalty must be such that the firm or individual that may commit the crime internalizes the costs that would be imposed on the commonwealth if the crime were committed rather than trying to reap its potential benefits. To do so, the penalty must be based on harm, and “the optimal penalty will equal the harm from the offense” when the “enforcement costs are zero, and the probability of detection and punishment is one.” In the real world, with positive enforcement costs and a probability of detection that is less than one, the optimal penalty must actually exceed the harm to consumers and society as a whole.

The model discussed above is not without its critics. Gregory Werden and Marilyn Simon argue that the economics of crime analysis and use of fines advocated by Gary Becker and others is fundamentally flawed, ignoring as it does the need for custodial sanctions. Their objections are several, including the inability of most firms to pay a properly derived fine (taking into account both the injury associated with the overcharge and the losses to society) and the failure to take into account the agency problem.

Many who find the Becker model to be useful also appreciate

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3 Becker, supra note 3, at 170.

4 See, e.g., Landes, supra note 4, at 653, 656 (stating that “[t]otal harm to consumers equals . . . the sum of the aggregate overcharge and deadweight loss” and finding that the optimal sanction should be equal to the net harm to customers plus the deadweight loss when the enforcement costs are equal to zero and the probability of detection is equal to one).


6 Michelle M. Burton & Bruce H. Kobayashi, Regarding the Optimality of Cartel Fines, ABA CARTEL & CRIM. PRACT. COMM. NEWSLETTER, Spring 2017, at 22. This assumes risk neutrality on the part of the offender.

7 A risk-neutral person values a lottery with an expected value of $X the same as $X with certainty, where the expected value of a lottery is the sum of the potential outcomes multiplied by their respective probabilities. Thus, if a lottery offered one chance in 100 of paying $1,000 and otherwise paid nothing, its expected value would be $10 ($1,000 x 1/100). A risk-neutral person would be indifferent between a ticket in this lottery and a certain $10. A risk-averse person dislikes risk in the sense that he would prefer the certain $10 to the lottery. A risk-prefering person would prefer the lottery to the certain $10.


9 See Werden & Simon, supra note 8.

10 See notes 29–30 and accompanying text infra, for a discussion of both the consumer-producer transfer payment and the deadweight welfare losses to society.

11 See notes 19–22 and accompanying text infra, for a discussion of the agency issues.
these two limitations, and for that reason believe that custodial sentences are also appropriate. But Werden and Simon go further, arguing that the notion of over-deterrence has no application to price fixing; it cannot be over-deterred.

Hard-core cartel activity has been described as “the supreme evil” and “the most egregious” violation of antitrust law.\(^{12}\) It has been widely recognized as capable of inflicting severe economic harm, and there has been a call to ensure that cartel activity is adequately “detected, deterred, and punished.”\(^{13}\) Indeed, some 125 jurisdictions around the world have competition laws, and almost all seek to impose sanctions to deter cartel activity.\(^{14}\) Due to the longevity and perceived success of its enforcement program, the experience of the United States is often looked to as a guide for others contemplating the implementation or revision of their programs.

U.S. law provides for monetary fines for both culpable firms and individuals and custodial remedies for individuals.\(^{15}\) Individual sanctions are thought necessary because cartels cannot exist without the active participation of human actors.\(^{16}\) The U.S. Sentencing Guidelines set forth relevant factors for judges to consider in imposing sanctions.\(^{17}\) A key factor in gauging the deterrent impact of these sentences is the probability of detection and punishment, which is necessarily less than one in the context of cartel activity.\(^{18}\)

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\(^{13}\) Alison Jones & Rebecca A. Williams, The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution, 2 J. ANTITRUST ENFORCEMENT 100 (2014).


\(^{15}\) For a discussion of the rationale for and a description of U.S. cartel sanctions, see Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, Deterrence and Detection of Cartels: Using All the Tools and Sanctions, 56 ANTITRUST BULL. 207 (2011). Other behavioral remedies are sometimes employed. For example, undertakings may be precluded from participating in public tenders, required to implement antitrust compliance programs, or be subjected to compliance monitoring.

\(^{16}\) Donald Baker, Deterring Cartels—The Criminalization Dimension 11, Competition Law Enforcement Seminar, Dublin (Mar. 23, 2012) (noting that “illegal conspiracies do not exist in the abstract; active participation by particular individuals is essential to the success of any conspiracy”).

\(^{17}\) See U.S. SENTENCING COMM’N, GUIDELINES MANUAL (2016), https://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf. U.S. courts are mandated to consider the Guidelines in the imposition of sanctions. 18 U.S.C. § 3551 et seq. Although courts were initially bound to follow the Guidelines, today they are treated as non-binding, although sentencing courts must consult the Guidelines.

\(^{18}\) See United States v. Booker, 543 U.S. 220 (2005). Despite their non-binding character, they remain influential in the sentencing process.

\(^{19}\) Leniency programs have helped to increase this probability. See Nathan H. Miller, Strategic Leniency and Cartel Enforcement, 99 AM. ECON. REV. 750 (2009) (finding that from January 1, 1985, to March 15, 2005, leniency in the United States has yielded a 59% decrease in the formation of cartels and a 62% increase in cartel detection). If, prior to 1991, the rate of detection were around 15%, Miller’s model would predict approximately a 25% rate of detection by 2005, a detection rate that is hypothesized to be true. See, e.g., Douglas H. Ginsburg & Joshua D. Wright, Antitrust Sanctions, COMPETITION POL’Y INT’L 3, 8 (2010) (arguing that the probability of detection may be as high as 25 percent with leniency taken into account), But see Emmanuel Combe, Constance Monnier & Renaud Legal, Cartels: The Probability of Getting Caught in the European Union (Bruges Eur. Econ. Res. Papers, Mar. 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061, (finding that the probability of detection in Europe ranged between 12.9% and 13.3%); Peter G. Bryant & E. Woodrow Eckard, Jr., Price Fixing: The Probability of Getting Caught, 73 REV. ECON. & STAT. 531 (1991) (finding that only between 13% and 17% of price fixers are successfully prosecuted during the time period studied in the United States). Although the Bryant and Eckard article contains outdated data and the methodology has been called into question, the literature in this area is not robust, and it is, with Combe, Monnier & Legal, one of the two most cited studies. However, as estimated by Miller, and theoretically supported by Ginsburg & Wright, the rate of detection has likely increased as a result of the success of modern leniency programs. Nonetheless, it is certainly possible, if not likely, that the probability remains significantly below one.
Which to Sanction: The Firm or the Individual?

Individual Sanctions. Although it is common practice to identify firms as cartel participants, it is well understood that firms can act only through human representatives (e.g., officers and employees) in committing cartel offenses. It is therefore necessary to discern whether sanctions on the firm or individual—or some combination of the two—are more appropriate to deter cartel activity. In order to do so, it is important to understand corporate governance and, in particular, the principal-agent problem: how the incentives of individual employees may not be aligned with those of their firm.

The principal-agent problem arises when management and ownership in the firm are not one and the same, as is true for the vast majority of firms. Employees, including officers, are hired as agents of firms to perform particular functions on behalf of the principal. These functions generally involve some decision-making authority that the principal delegates to the agent. Often, however, the incentives of the principal and those of the agent are not perfectly aligned. For example, the owner generally wants to maximize firm welfare, while employees are more interested in their own personal well-being, which includes taking actions that may or may not be in the best interest of the firm as a whole (i.e., engaging in ventures or activities that benefit the employee’s department to the detriment of another department). Therefore, the principal faces the problem of incentivizing the agent to align his or her interests with those of the firm. The principal-agent problem becomes more pronounced as separation between ownership and management of the firm increases, which is particularly true for large public corporations. A stockholder completely detached from the management of the corporation is generally concerned only with the value of the ownership interest, while a non-owner employee is generally concerned primarily with his or her own compensation, career prospects, and the like.

As a result, it is those employees who are the most “ambitious individuals seeking promotion, reputation enhancement, bonuses, or other indirect gains from appearing to have been more commercially successful than they really were” who most frequently participate in or facilitate cartel activity.

While the Sherman Act has always permitted criminal prosecution of individuals since its enactment in 1890, other jurisdictions are increasingly amending or adding new legislation permitting sanctions on individuals for cartel behavior. Many conclude that individual sanctions are “the

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19 The principal-agent problem has been well studied in the literature. See, e.g., Keith N. Hylton, Deterrence and Antitrust Punishment: Firms Versus Agents, 100 IOWA L. REV. 2069 (2015); Christopher R. Leslie, Cartels, Agency Costs, and Finding Virtue in Faithless Agents, 49 WM. & MARY L. REV. 1621 (2008); Kobayashi, supra note 7.


22 It may be the case, then, that in those instances where the firm is structured more like the former, the incentives of the firm and the individuals who fix prices may not actually diverge or may diverge less than in the latter.


25 As of 2016, outside of the United States, actual imprisonment as a criminal sanction for individuals in cartel cases had only been imposed in the UK and Israel, with the UK’s only successful prison sentence occurring in the Marine Hose case. Mark Simpson, The Criminal Cartel Offence Around the World, COMPETITION WORLD, Qtr. 2, 2016, at 6–9. However, in recent years an increasing number of jurisdictions have
most appropriate and effective sanctions for antitrust violations” as “the individuals responsible for
the [antitrust violation] should be given a sufficient disincentive to discourage them from engag-
ing in the activity.”26

Sanctions on the Firm. Most jurisdictions, including the United States, impose monetary
sanctions on firms found to have engaged in cartel activity. Properly calculated sanctions have the
potential to deter the firm from cartel participation by rendering it unprofitable, thereby providing
an economic incentive for compliance. Second, the prospect of sanctions may encourage firms
to implement compliance programs to discourage individuals from engaging in cartel activities.27

How to Sanction: Monetary, Custodial, or Behavior? Or a Mixture?

Types of Sanctions. Monetary sanctions or fines, which can be imposed on firms and individu-
als, seek to deter by making cartel conduct unprofitable by recovering the harm—or increased
prices—that buyers suffered while the illegal activities were ongoing.28 Custodial sanctions, which
can be imposed on individuals, impose significant non-monetary costs—most notably the loss of
liberty—on culpable individuals to deter individuals from cartel conduct in the first place. The third
type of sanctions, behavioral remedies, can be imposed on firms or individuals, although behav-
ioral sanctions are generally imposed on firms and are aimed at preventing recidivism.

Economic theory suggests that in order for a monetary penalty to be sufficient, it must be based
on the harm caused to society and not to the consumer.29 This is because determining the harm
to consumers is much easier than determining the gain to the wrongdoer, and because total harm
includes both the overcharge, i.e., the consumer-producer transfer payment, and the injury asso-
ciated with the misallocation of resources, i.e., the deadweight welfare loss.30 Monetary sanctions
are also attractive because they contribute to the exchequer while many others impose costs on
the commonwealth. However, the effectiveness of the monetary penalty will largely depend on
both how the penalty is calculated and on upon whom it is imposed.

The objective of custodial sanctions is the same but determination of the appropriate sentence
is more difficult. While utility functions vary, there is little in the literature on optimal custodial sen-
tences for cartel behavior. Opinions differ, as is evidenced by the varied range of sentences pro-
vided for across jurisdictions. Moreover, the issue is complicated by the diverse factors relevant

adopted regulations allowing for criminal sanctions on individuals. At least 34 countries impose criminal sanctions on individuals for car-
tel convictions. See MORGAN LEWIS, 2016 GLOBAL CARTEL ENFORCEMENT REPORT (2016), https://www.morganlewis.com/?pubs/2016-
year-end-global-cartel-enforcement-report. However, some jurisdictions, e.g., France and Germany, provide criminal sanctions for only a
limited set of hard-core cartel offenses, such as bid rigging or recidivist conduct.

26 See, e.g., Donald C. Klawiter, Antitrust Criminal Sanctions: The Evolution of Executive Punishm ent, 6 COMPETITION POL’Y INT’L 83, 83
(2010); Ginsburg & Wright, supra note 18, at 3.

27 Some jurisdictions provide credit for compliance programs when imposing sanctions on firms; others do not. We do not address that issue
here although it must be addressed when implementing a sanctions regime for cartel infringement.

28 See Landes, supra note 4, at 653 (noting that harm is equal to not only the supracompetitive prices paid by consumers but also the dead-
weight loss).

29 See supra note 6 and accompanying text.

L. REV. 331, 341 (1989) (“In the context of antitrust violations, the social loss used for calculating the optimal penalty is equal to the net
harm imposed on all parties (excluding, of course, the violators). In general this calculation will equal any increase in total payments made
by customers over what would have been the competitive price, plus the ‘deadweight loss’ associated with any reduction in output.”); William
of the aggregate overcharge and deadweight loss.”).
to sentencing. For example, some jurisdictions reduce sentences for cooperation; some do so for good behavior while incarcerated; and in others, the courts have very wide discretion in sentencing and may elect to impose probation rather than commit an individual to prison. Moreover, prison conditions vary widely among jurisdictions and often within the same jurisdiction. Nonetheless, it seems reasonable to assume that business executives are likely to be deterred by the near-certain deprivation of liberty for a non-trivial amount of time. Unfortunately, there has been little scholarship on what that entails.

**Monetary Sanctions.**

Fines on the Firm. Monetary fines are the most appropriate sanction for firms. But they are not without issues. First, history is replete with instances in which firms have been unable to pay appropriate fines and the reduced fine loses some or all of its deterrent character.

Second, there are cases where the firm appropriately implemented well-designed compliance policies and programs but where individuals, acting in accordance with their own incentives, engaged in illegal conduct, creating unavoidable liability for the firm. In these instances, the firm may be subjected to liability that it could not have reasonably avoided by actions of the firm alone.

Third, the ownership of the firm may have changed between the period of the illegal conduct and its discovery. Often, years pass before cartel behavior is discovered. This is particularly true where the equity stock of a firm is actively traded. A similar issue is presented when the firm has acquired an entity that has been engaged in cartel conduct but where the best due diligence could not have discovered the conduct.

Fourth, there is some evidence that monetary sanctions at current levels in some jurisdictions are inadequate to deter and would have to be much higher to do so, i.e., large enough to outweigh the potential benefit to the firm. More importantly, it is argued that fines would have to increase to such a level that many firms would be put into liquidation, which could impose significant external costs on employees, suppliers, and the community tax base.

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31 See Werden & Simon, supra note 8, at 935 (“There are several reasons to believe that the marginal deterrent effect on price fixers and other white-collar criminals remains high only for rather short terms of imprisonment and then falls rather rapidly.”).

32 As noted earlier, the penalty would need to significantly exceed the aggregate overcharge faced by consumers to take into account the fact the cartel detection rate is less than one. See generally, e.g., Bryant & Eckard, supra note 19; see also Margaret C. Levenstein & Valerie Y. Suslow, Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy, 71 ANTI TRUST L.J. 801, 801 (2004); D. Daniel Sokol, Policing the Firm, 39 NOTRE DAME L. REV. 785, 793 (2013) (“Explaining high recidivism is the fact that a firm may be better off financially for participation in a cartel even after paying fines when caught.”).

33 See generally Margaret C. Levenstein & Valerie Y. Suslow, What Determines Cartel Success?, 44 J. ECON. LIT. 43 (2016) (finding the average duration of discovered cartels from a number of studies is between 5 and 7 years).

34 See Emmanuel Combe & Constance Monnier, Fines Against Hard Core Cartels in Europe: The Myth of Overenforcement, 56 ANTI TRUST BULL. 235 (2011), (finding that the very high fines imposed by the European Commission are far too low and fail seriously to deter). See also Wouter Wils, Is Criminalisation of EU Competition Law the Answer?, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: LEGAL AND ECONOMIC IMPLICATIONS FOR THE EU MEMBER STATES 60, 79 n.9 (Katalin J. Cseres et al. eds, 2006) (finding that fines would have to be dramatically higher to effectively deter); Joseph E. Harrington, Jr., Antitrust Enforcement, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 181 (Steven N. Durlauf & Lawrence E. Blume eds., 2008) (finding that even when high fines are imposed on firms, “financial penalties fall significantly short of making collusion unprofitable.”); Werden & Simon, supra note 8 (where the authors, drawing on U.S. Department of Justice data, illustrate that firms could not pay fines derived from the Becker model in a large number of cases); Werden, Hammond & Barnett, supra note 15, at 211; cf. Gregory J. Werden, Sanctioning Cartel Activity: Let the Punishment Fit the Crime, 5 EUR. COMP. J. 19, 30–31 (Apr. 2009).

35 It has been suggested that in cases of extremely high monetary fines, sanctions “may lead to bankruptcy of the firms in the market, which would result in a more highly concentrated market and potential monopoly by the remaining firm.” Sokol, supra note 32, at 796 & n.54. See also Catherine Craycraft, Joseph L. Craycraft & Joseph C. Gallo, Antitrust Sanctions and a Firm’s Ability to Pay, 12 REV. INDUS. ORG. 171 (1977).
Notwithstanding the above, most regimes impose monetary fines on firms found culpable of cartel conduct. The fact that they are arguably inadequate or inequitable does not mean that they do not have value for the reasons stated in the beginning of this section.

**Individual Fines.** Individual fines may assist in deterring cartel conduct and are widely employed by regimes that impose individual sanctions. However, they too present problems. Many doubt that meaningful monetary sanctions could be imposed on individuals at a level that would deter cartel conduct. Whatever rewards may have been obtained by individuals may have been expended on family, holidays, etc., and no longer available to satisfy monetary sanctions. Therefore, it is very plausible that in many instances, individuals will be unable to pay more than nominal fines.

Additionally, there is evidence that firms have directly or indirectly reimbursed individuals for monetary sanctions, and it is widely recognized that it can be difficult to prevent this practice.  

**Custodial Sanctions.** Obviously, a term of imprisonment imposes significant costs on the individual; these costs include loss of liberty, the likely loss of income, and injury to career opportunities, to name but a few. The U.S. Department of Justice, which has been by far the most active competition authority in the imposition of custodial sentences, believes strongly in the deterrent value associated with such sanctions. Former U.S. Deputy Assistant General Scott Hammond has stated: “The best evidence of its impact is the fact that we have detected international cartels that fix prices everywhere around the world except in the U.S. . . . They have avoided extending the cartel activity to the lucrative U.S. market because they feared detection and going to jail.”

In addition, much of the U.S. cartel prosecution is of foreign firms whose conduct has had anticompetitive effects in the United States. Some argue that this is because executives of U.S. firms are more cognizant of the prospect of imprisonment and are accordingly deterred from participating in cartel conduct in the United States.

Opponents of custodial sentences argue that (1) the standard of proof in criminal cases is more difficult, thus permitting some cartelists to escape punishment; (2) such sanctions are costly; and (3) cartel offenses ought not to be criminal as a matter of public policy.

The first point is true; enhanced burdens of proof are common in criminal cases in most jurisdictions. Officials within the U.S. Department of Justice are quick to counter that notwithstanding the heightened standard, they have a very successful record of criminal prosecution.

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36 See, e.g., OECD, R OUNDTABLES: CARTEL SANCTIONS AGAINST INDIVIDUALS 100 (2006), https://www.oecd.org/competition/cartels/34306028.pdf (noting that because it is impracticable to prevent a firm from reimbursing an employee, “incarceration is the single greatest deterrent to the commission of antitrust offenses”).

37 Peter Scott, Go Directly to Jail, GLOBAL COMPETITION REV. (Nov. 2008), https://globalcompetitionreview.com/insight/november-2008/1049240/go-directly-to-jail. Unfortunately, the Department of Justice has been unwilling to provide data that would substantiate this claim because of laws protecting the confidential nature of the evidence. See, e.g., Scott D. Hammond, Caught in the Act: Inside an International Cartel, OECD Competition Committee, Working Party No. 3, Public Prosecutor’s Program (Oct. 18, 2005), https://www.justice.gov/atr/speech/caught-act-inside-international-cartel (“Shortly after [the lysine] investigation became public in 1995 and cartel members realized that the FBI might be watching, [the DOJ] learned from cooperating defendants in several investigations that the cartels changed their practices in order to avoid having meetings or calls in the United States and tried, where possible, to exclude the participation of U.S. personnel in conspiracies.”).


It is also true that incarceration is costly. But the question is not just one of costs, which are fairly easy to measure, but also benefit, which is hard to quantify. Still, as noted above, the United States ascribes the success of its cartel enforcement to the availability and imposition of custodial sanctions.

The last proffered objection is more difficult, since it may be related to cultural differences. The United States criminalizes more conduct than do most countries. Other countries are less inclined to incarcerate, especially for white collar crimes. Leaving aside the severity of sentences, whether cartel offenses merit criminalization depends on whether one regards cartels as a form of theft or fraud—both of which merit criminalization in almost all jurisdictions. If so, why treat cartels more leniently than other crimes of theft and fraud? Nonetheless, there is serious opposition to the imposition of custodial sentences in many jurisdictions. This is also reflected in jurisdictions where cartel conduct is criminalized but where the courts refuse to impose custodial sentences on individuals convicted of criminal cartel offenses. In that context, it must be noted that, notwithstanding the availability of custodial sentences for cartel offenses since 1890, it was not until the 1970s that cartelists were routinely imprisoned in the United States. This may suggest that it simply takes time for judges to become comfortable sentencing “white collar” criminals to actual time in prison. Indeed, there is an increasing number of countries where the judiciary now seems more willing to commit cartelists to prison.

The fact that an increasing number of jurisdictions have criminalized cartel conduct and opted for the imposition of custodial sentences suggests that competition authorities and their governments ought to consider both the agency issues previously discussed and the wisdom of such sanctions.


42 Clearly many jurisdictions do regard price fixing as a form of theft. Former head of the U.K. competition authority Sir John Vickers put it this way: “Since hard-core cartels are like theft, criminalization makes the punishment fit what is indeed a crime.” John Vickers, Address Before the British Chamber of Commerce 4 (Mar. 31, 2003). See also Joel Klein, former Assistant Att’y Gen., Address Before the ABA Section of Antitrust Law (Apr. 6, 2000) (stating that price fixers were simply “well dressed thieves”).

43 The Irish experience is illustrative. Ireland has criminalized cartel conduct for many years and yet not one defendant convicted of price fixing has actually served time in prison. Interestingly, the Irish Parliament, signaling its view of the serious nature of the offense, raised the maximum term of imprisonment to 10 years and vested jurisdiction in the Central Criminal Court, which has jurisdiction to try murder, treason, rape, and price-fixing cases.

44 See generally Werden, supra note 34, at 20–22 (noting that although custodial sanctions have been available for cartel activities since the Sherman Act was passed in 1890, the first 70 years did not see much use of custodial sanctions).

45 This was likely a factor in the U.S. experience, but the mandatory nature of the Sentencing Guidelines was probably much more important. By the time the mandatory nature of the Guidelines was overturned, judges had become accustomed to sentencing cartelists to prison.

46 Although slow to see the actual incarceration of cartelists, there is change in the air in Brazil, with at least one cartelist now in prison. Caroline Binham, Global Fines for Price-Fixing Hit $5.3bn Record High, FIN. TIMES (Jan. 6, 2015), https://www.ft.com/content/83c27142-95a8-11e4-b3a6-00144feabdc0. In 2016, a Canadian court sentenced an IT services firm executive to an 18-month suspended sentence for bid rigging. See Press Release, Competition Bureau Can., Former IT Senior Official Pleads Guilty, Commits to Assisting With Compliance Efforts (Aug. 24, 2016), https://www.canada.ca/en/competition-bureau/news/2016/08/second-individual-sentenced-for-rigging-bids-for-federal-government-contracts.html. In addition, the presidents of two bread companies in Israel were also sentenced to 12-month prison terms in 2016 by the Israeli Antitrust Authority related to their participation in a conspiracy to fix the prices of bread in Israel. Dror Halavi, Two Sentenced to Prison in “Breadgate” Scandal, HAMODIA, Jan. 24, 2016, 6:08am, http://hamodia.com/?2016/701714/?two-sentenced-to-prison-in-breadgate-scandal/.

47 See discussion supra note 25.
Behavioral Remedies. Behavioral remedies can be imposed either on the firm or on the individual. Corporate behavioral sanctions are more common and widely accepted. They include such remedies as requiring the debarment from public procurement tenders, implementation of compliance or monitoring programs, and reporting to a monitor that submits reports to the government agency that investigated the illegal antitrust behavior. Individual behavioral sanctions are less common and have only been put in place in a few jurisdictions. Such sanctions include the debarment of individuals from serving on boards of directors and other limits on career opportunities. The efficacy of individual behavioral sanctions, however, has been the subject of debate.

Although private rights of action to recover damages associated with cartel overcharges are generally thought to serve a restitutionary interest, they clearly deter cartel conduct to some extent. Private damage litigation and awards can impose very significant costs on cartelists. There is a debate as to whether the U.S. private damage system is a good model for emulation, but clearly a properly structured form of restitution would complement public sanctions in securing optimal deterrence.

The difficulty is whether to consider private enforcement in setting public sanctions. And, if so, how? Private enforcement might be seen by some as a partial substitute for public enforcement because both are means of generating deterrence. Indeed, while there will often be scale economies in “monopolistic” public enforcement, public enforcement can be costly from a budgetary perspective, and there will be occasions in which competition among private enforcers will generate efficiencies. This is likely to be the case when the victims of anticompetitive behavior—and the plaintiffs’ attorneys who are likely to represent them—will have an incentive to bring suits. So, public and private enforcement might be complementary in some instances.


49 There are arguments for similar behavioral sanctions against individuals. However, the effectiveness of such sanctions in deterring cartel activities or punishing participation in a cartel is unknown. See generally, e.g., Ginsburg & Wright, supra note 19 (arguing that behavioral remedies, such as forbidding prosecuted individuals from being members on the boards of other firms or being hired into the position of CEO, might deter individuals from participating in cartels). But see Werden, Hammond & Barnett, supra note 15, at 216 (“So a lifetime term of disqualification might provide less deterrent punch than a year in prison.”).

50 The U.S. Supreme Court recognized the important role that private actions for damages plays in the U.S. context in Hawaii v. Standard Oil Co. of California, observing: “The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.” 405 U.S. 251, 262 (1972) (quoting Perma Life Mufflers, Inc. v. Int’l Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring)).


53 R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, Private v. Public Antitrust Enforcement: A Strategic Analysis, 92 J. PUB. ECON. 1863 (2008) (pointing to the knowledge advantage of private enforcement, but cautioning that private enforcers are more likely to use the antitrust laws strategically, to the disadvantage of consumers).
The topic is rendered even more complex because private rights of action vary radically from jurisdiction to jurisdiction: actual or punitive relief, pre-judgment interest or no interest, ability to sue absent a government prosecution, aggressive or limited discovery, symmetrical treatment of costs and attorneys’ fees, etc. As a result, without further analysis, one cannot be certain that fines in systems with active private enforcement should be somewhat lower than fines in systems without such enforcement.

Conclusion

The two questions are (1) who (or what) should be punished, and (2) how. While separate issues, both must be simultaneously considered, as the effectiveness of a sanction depends on both the type of actor and the form of the penalty.

Importantly, the effectiveness of a sanction depends in part on assumptions made about the probability of detection and punishment, because any penalty must take that into account. It is admitted that determining the optimal sanction when the rate of detection is not equal to one is difficult. The literature on incidence of cartel detection is sparse. Obviously more research is needed but given that it is clear that the probability of detection is not one, authorities must consider the probability of detection and punishment when setting cartel sanctions. Resort to the currently available data is necessary in the absence of a more robust literature.
Book Review

Heroes and Villains of Antitrust

Tim Wu
The Curse of Bigness: Antitrust in the New Gilded Age
2018

Reviewed by Thomas B. Nachbar

It is hard to argue that any book about antitrust is essential reading for non-academics, but Tim Wu’s The Curse of Bigness1 is that book. In this divided political climate, disdain for large corporations and the power they wield may be the one thing that unites right and left, with daily news stories about a possible executive order by the President, the potential for hearings and legislation in Congress, and proceedings at the Federal Trade Commission, all focused on the size, power, and overreaching of big companies, especially big tech. There is a nascent populist movement aligned against large firms, many of which are in high-technology businesses.2 This book is an accessible and compelling story that explains some of the intuitions underlying that movement.

Wu’s book is not a dry treatment of markets and monopoly prices. As explained in the book’s introduction, the book is about today’s political climate, where polarization and demonization are rampant. Today’s economy, one in which wealth and economic power have been concentrated in a small number of large firms, “represents a profound threat to democracy itself.”3 A new approach to antitrust is necessary to avoid returning to a world of “widespread popular anger and demands for something new and different” that leads to “a return to the politics of outrage and of violence.”4 It is a time with direct parallels to the economic disenchantment that led to the rise of fascism and communism. Wu claims to present a version of antitrust that offers a way back to a better time, when antitrust law protected us and our economy from the kinds of concentrations of wealth and power than endangered not only the economy but the political system. This is a story of that time and how we’ve lost our way.

As enjoyable and edifying as it is, though, in the end Wu’s book fails to deliver on its promise. Wu misdiagnoses the ills of today’s antitrust while failing to demonstrate either that his vision of antitrust is any more workable today than it was when it was rejected or, for that matter, that yesterday’s antitrust still makes sense to solve so many problems for which we have other, modern regulatory solutions. In the end, Wu has become caught up in his story, losing sight of the limits of storytelling for solving modern problems.

2 See Nizan Geslevich Packin, Breaking Up Is Hard To Do, But That May Be Where Big Tech Is Heading, FORBES (Nov. 16, 2018) (“It is hard to imagine that Senator Elizabeth Warren and President Donald Trump agree on much. . . . But when it comes to the largest U.S. tech companies, the Trump administration and Senator Warren appear to share the same intuition: these entities might just be too big.”).
3 Wu, supra note 1, at 15.
4 Id. at 22.
A story cannot be told without characters, and like any compelling storyteller, Wu provides both heroes and villains. Among the heroes Wu counts trust-busting presidents and attorneys general, such as Theodore Roosevelt and Thurman Arnold. Also heroic are the Federal Trade Commission and, to a lesser extent, the Department of Justice, agencies that brought “big cases” against industrial behemoths like AT&T and IBM, realizing the promise of antitrust law and transforming industries (for the better) in the process.5

But Wu’s principal hero is Louis Brandeis, from whom Wu takes the title of his book. Brandeis, “advocate, reformer, and Supreme Court Justice,”6 is one of the most famous lawyers of the last hundred years. As understood by Wu, Brandeis’s views on the economy were formed by a childhood lived in Louisville, Kentucky, “a place of industrial freedom and openness to competition, yet with an economy that yielded adequate spoils for all.”7 After high school and study in Germany, Brandeis “achieved famously high grades at Harvard Law School . . . developed a passion for canoeing and horseback riding,” and “built a distinguished legal practice” in Boston.8

Although content to live a quiet life in practice, Wu’s Brandeis was “stirred to action” by the rise of the trusts, which were engaged in an “economic eugenics movement” (or alternatively a “pogrom”) against small businesses, many of which happened to be Brandeis’s clients.9 So aroused, Brandeis stood up to J.P. Morgan’s plan to consolidate much of the area’s transportation companies into the monopolistic New Haven Railroad, and although Brandeis failed (he was, after all, “just one man against Morgan and his resources”10), the episode served to crystalize his understanding of the economy, and specifically of the close relationship between government and the economy: “A good country and a good economy . . . would be one that provided to everybody sufficient liberties and adequate support to live meaningful, fulfilling lives,” a matter of not only economic, but constitutional, import.11

Most importantly, Brandeis realized the connection between theoretical freedom and economic reality. After all, an individual with freedom on paper cannot realize it if living in economic bondage. This was a critical point for Brandeis, highlighting restrictions on freedom not only by government but also by private interests.12 Following Brandeis, Wu examines the potential for private interests to restrict personal freedoms by virtue of their economic power, with antitrust law a primary means to prevent it.

Wu also supplies villains aplenty, starting with Morgan himself along with his “anointed lieutenant” Charles Mellon, a “charismatic charmer” who duped the public and the press into supporting the New Haven.13 Predictably, the villains get their comeuppance. Although justice was delayed in the case of the New Haven, it does eventually come, when it is revealed that the monopoly had been hiding “gross inefficiencies with [its] size”14 and it is dismantled by Morgan.

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5 Id. at 93–97 (on AT&T); id. at 110–13 (on IBM).
6 Id. at 33.
7 Id. at 34.
8 Id. at 35.
9 Id.
10 Id. at 36.
11 Id. at 39–40.
12 Id. at 40–41.
13 Id. at 35–36.
14 Id. at 38.
under threat of antitrust lawsuit by federal regulators, but only after years of wrecks, derailments, delays, injuries, and deaths. Also featured is John D. Rockefeller, who, in addition to performing numerous bad acts, Wu suggests suffered from a “dual morality” that included a “split personality characteristic” that enabled and even self-justified his (along with Morgan’s) bad conduct.\textsuperscript{15} That side of the cast is filled out with a number of industrialists and presidents (such as McKinley and George W. Bush) who were weak on antitrust.

The philosophy of men like Rockefeller, Morgan, and other supporting members of the “Trust Movement,” as Wu names it, was laissez-faire and Social Darwinism, which justified “a kind of industrial eugenics campaign.”\textsuperscript{16} The monopolists’ campaign (which mirrored Rockefeller’s own belief in eugenics) was to realize perfection in the form of centralized, industrial control of the economy.\textsuperscript{17}

Although the historical villains are cast against Brandeis, the book is primarily concerned with modern villains of antitrust, who are not genocidal monopolists but rather a group of seemingly harmless academics, proponents of what has become to be known as the “Chicago School” of antitrust, and most especially one member of the Chicago School: Robert Bork. Wu’s backstory for Bork is less distinctive than his account of Brandeis’s idyllic childhood. Bork grew up in the suburbs, “made an effort to join the Marines at the end of the Second World War,”\textsuperscript{18} and “declared himself a socialist” in his youth before experiencing a “religious conversion” (the latter being Bork’s words, not Wu’s) to libertarianism. That conversion came at the hands of another member of the Chicago School, Aaron Director, who in turn was “neither a lawyer, nor an economist with a PhD,” but rather was “a mysterious Socrates-like figure who left behind few written works”\textsuperscript{19} but whose influence has been felt through those he educated at the University of Chicago.

One might wonder why Bork would garner such attention from Wu, especially when antitrust has so many colorful villains to offer. As it happens, Bork’s nefarious act, akin to Morgan and Rockefeller’s deceitful scheming, was to popularize the idea that antitrust courts should focus on “consumer welfare” (scare quotes Wu’s, not mine), an argument he perfected in his famous (at least among antitrust lawyers) book, \textit{The Antitrust Paradox}.

The consumer welfare standard directs courts to examine the legality of a trade restraint based on the degree to which the restraint harms consumers. This was something of a shift in the antitrust law at the time. In the 1960s, the Court had increasingly looked at trends in industry structure to prohibit practices before they lead to any harm to consumers—to act “when the trend to a lessening of competition in a line of commerce was still its incipiency.”\textsuperscript{20} The consumer welfare standard argues that the best way to measure effects on competition (the protection of which is the ostensible object of the antitrust laws) is to look at the effect on consumers rather than in some other way, for instance by seeing how it affects the number or vitality of competitors. Wu does not overstate the case when he says that the consumer welfare standard has come to dominate American antitrust doctrine—it has.

\begin{itemize}
  \item \textsuperscript{15} Id. at 61.
  \item \textsuperscript{16} Id. at 28.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id. at 87. On this score, Wu appears to be mistaken. Bork apparently did serve in the Marines. Twice. Al Kamen & Matt Schudel, Robert H. Bork, Conservative Judicial Icon, Dies at 85, WASH. POST. (Dec. 19, 2012), www.washingtonpost.com/local/obituaries/judge-robert-h-bork-conservative-icon/2012/12/19/49453de4-c5da-11df-94e1-c5afa35a9e59_story.html?utm_term=.c96cadd5c50.
  \item \textsuperscript{19} Wu, supra note 1, at 87.
  \item \textsuperscript{20} Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).
\end{itemize}
According to Wu, Bork justified use of the consumer welfare standard by arguing that it had been part of the original intent behind the Sherman Act.\(^{21}\) That historical claim legitimized the consumer welfare standard, allowing it to capture antitrust doctrine. The consumer welfare standard was based in economics, albeit the kind of simplified economics that appeals to judges, who “can become anxious when asked to decide complex and challenging cases”\(^{22}\) and who, reeling from attacks of judicial activism in the late ’60s and ’70s, latched on to the historically fortified consumer welfare standard, “as a tool of judicial restraint (not unlike ‘originalism,’ another of Bork’s favorites)” (scare (internal) quotes again Wu’s).\(^{23}\) Bork did not invent the consumer welfare standard (that was Director), but he did “weaponize”\(^{24}\) it against antitrust.

According to Wu, having been historically legitimized by Bork, the consumer welfare standard was like a virus that, once injected into antitrust doctrine, turned the doctrine on itself, destroying its capacity to control big business. By offering this simplified form of economics with a purported historical basis, Bork’s “radically narrow reading of the Sherman Act”\(^{25}\) that was initially considered “absurd and even insane”\(^{26}\) eventually took hold, leading to a “not merely pruned but enfeebled”\(^{27}\) antitrust doctrine. The implication of Bork’s work was not that the Sherman Act should be read narrowly; it was that regulation really had no place at all. “The belief that really mattered was that the market enjoyed its own sovereignty and was therefore necessarily immune from mere democratic politics.”\(^{28}\)

At this point in the story we can all see what’s coming: the demise of antitrust and the return of the ideology of the robber barons. The consumer welfare standard “was really \textit{laissez-faire} reincarnated, without the Social Darwinist baggage.”\(^{29}\) It’s the return to the Gilded Age promised by the book’s title.

One would think that a story of the modern gilded age would focus on modern captains of industry. Bill Gates makes an appearance (“the archetype of the evil nerd,” head of Microsoft, an “aggressive, cunning, and often abusive machine”\(^{30}\)), but there’s no mention of others like Steve Jobs (whose attitudes toward vertical integration, one might think, Wu would find most troubling) or Jeff Bezos. But Wu has picked his characters for a reason, and his attacks on robber barons like Morgan and even on Bork himself are something of a sideshow, for the real villain in Wu’s story is the consumer welfare standard itself.

In taking on the consumer welfare standard, Wu has picked quite a fight. The consumer welfare standard is hugely popular in antitrust doctrine. Rhetorically irresistible (after all, who could be against consumer welfare?) and analytically powerful, it is at the core of almost every major modern Supreme Court antitrust case. It is favored by Supreme Court Justices of all stripes. The consumer welfare standard is antitrust’s version of middle-class tax cuts. Everyone (at least among Justices) claims to be in favor of it.

\(\begin{align*}
21 & \text{ Wu, supra note 1, at 88.} \\
22 & \text{Id. at 91.} \\
23 & \text{Id. at 90.} \\
24 & \text{Id. at 86.} \\
25 & \text{Id. at 89.} \\
26 & \text{Id. at 88.} \\
27 & \text{Id. at 103.} \\
28 & \text{Id. at 92.} \\
29 & \text{Id. at 91.} \\
30 & \text{Wu, supra note 1, at 98.}
\end{align*}\)
But, regardless of its popularity, for Wu the consumer welfare standard must go. The reason has less to do with its lack of historical basis than with its implications for very modern arguments about antitrust advanced by Wu and other proponents of what he styles “a broader neo-progressive revival” and what has been less-generously referred to as “hipster antitrust.” For these neo-Brandeisians, which includes people like Lina Khan, who shares Wu’s broader, neo-Brandeisian agenda and whose student-authored law review article about Amazon garnered about as much media attention as a law review article could, the consumer welfare standard represents a considerable barrier to their academic agenda. They would have antitrust enforcers focus on the business practices of large companies, while the consumer welfare standard focuses the antitrust inquiry on the effects of practices on consumers. According the neo-Brandeisians, future benefits are likely to come from a robust number of competitors, whose welfare is largely ignored by the current analysis.

The consumer welfare standard requires theorists like Wu and Khan to demonstrate how Amazon’s (to take Khan’s example) business practices, such as using data gleaned from the distribution it performs for other sellers to come up with competing products and services, harms consumers. Khan’s argument has an intuitive appeal. Amazon’s conduct looks bad on the surface; those other sellers are Amazon’s customers for distribution, and so it hardly seems fair to use data acquired from serving them to compete with them. Although an attractive theory aimed at an attractive target, the case against Amazon looks questionable on its facts. There is little evidence that Amazon’s practices are actually having much effect on anything. But the more fundamental problem from the perspective of antitrust as applied through the consumer welfare standard is that practices like Amazon’s don’t seem to hurt consumers; consumers are generally better off for Amazon’s collection of information if Amazon uses that information to develop services and products that consumers want. It may seem untoward, but that kind of untoward, elbow-knocking competition is the kind of conduct antitrust not only permits but encourages—the “paradox” of Bork’s title, a paradox embodied in the consumer welfare calculus and a paradox virtually universally accepted in antitrust doctrine.

And therein lies a problem for Wu’s account, for the consumer welfare standard’s appeal reaches far beyond historical or intentionalist understandings of the Sherman Act. Lewis Powell, author of Continental T.V. v. GTE Sylvania, the case that brought the consumer welfare standard firmly into antitrust law, was no intentionalist, and although he cites Bork in that case, it’s not for the historical basis of the consumer welfare standard.
Indeed, the Court seems to have largely ignored legislative intent in its interpretation of the Sherman Act, focusing more on practical economic realities than any particular understanding of what Congress envisioned in 1890. Justice Scalia, dean of another historical methodology, originalism (which gets a sidelong glance from Wu39), considered himself freed from 1890 understandings of competition or consumer welfare by the Sherman Act’s vague language.40 Perhaps the greatest proponent of the consumer welfare standard on the Court was Justice Kennedy, who invoked it both in revising the Court’s approach to predatory pricing41 (a primary focus of Bork’s) and overruling the per se prohibition on resale price maintenance,42 and no one would mistake him for an antitrust intentionalist. Wu is greatly overstating the role of Bork’s historical argument in securing the place of the consumer welfare standard, at least if one looks at the cases.

In the end, Wu’s historical attack on Bork resembles a strawman, because although Wu emphasizes the historical element, history was hardly the central part of Bork’s argument for the consumer welfare standard. Bork did make the historical argument, and I’m not going to defend it, but his argument was much broader than that. To quote a summary from The Antitrust Paradox: “The language of the antitrust statutes, their legislative histories, the major structural features of antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare.”43 That’s much more than history, and the vast majority of the book’s 341 pages are devoted to economic analysis of current practices, not the intent of Congress in 1890.

Rather, Bork’s primary contribution was not his recitation of the history but his successful connection between productive efficiency and allocative efficiency.44 Bork’s argument was that the types of restraints outlawed by the Court (such as vertical integration, in which a manufacturer would operate its own retail outlets instead of using independent dealers) would increase the productive efficiency of the firm. Bork argued that such gains in efficiency were likely to be passed on to consumers because of “the obvious fact that more efficient methods of doing business are as valuable to the public as they are to the businessmen.”45 When he did that, there arose a reason for the Court to be careful about outlawing particular business practices—there was a real downside to aggressive antitrust enforcement because the effects of limiting business practices might go beyond the big businesses and harm individual consumers.

You can agree or disagree with Bork’s argument—indeed, whether efficiency gains will be passed on to consumers is likely to vary from market to market—but that was the claim. The inter-

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39 See Wu, supra note 1, at 90.
The relationship between productive efficiency and allocative efficiency—what Bork called “consumer welfare”—was the powerful claim of Bork’s work, not the discovery of some hidden volume that revealed John Sherman and Teddy Roosevelt had been price theorists all along.46

The connection to price theory, which is a central character in Wu’s story but goes undescibed, has to do with the harm caused by these practices. The problem for antitrust is that it’s hard, just looking at a practice, to determine whether that practice is likely to harm or benefit competition. Let’s say a pizza parlor wants to buy a delivery company so the pizza parlor can deliver its own pizzas. Does that help competition (by enabling cheaper pizza delivery) or harm it (by removing the delivery company from the market for delivery services or by keeping other pizza parlors from using the same delivery company to deliver their pizzas)? It’s hard to know, but price theory tells us that practices that harm competition will raise prices (and reduce output). If the combined price of pizza and delivery goes up, then the restraint is likely harmful; if it goes down, not so much. Higher prices, combined with reduced output, is a way to detect whether a restraint is harmful, and price theory’s application to antitrust is a response to concerns over the ability to separate beneficial from harmful business practices.

Thus, the consumer welfare standard is less a theory about how antitrust must work or what John Sherman thought than it is a theory of measurement—a theory about how to detect harmful business practices. Much of the Court’s preference for the consumer welfare standard is prompted not by original intent or Progressive Era understandings about antitrust—it has to do with the possibility and costs of errors in antitrust enforcement.47 And that leads to what is a critically important but missing character in Wu’s story: regulatory skepticism and its effect on the Court’s understanding of antitrust.

Consumer welfare was not the only game going in the 1970s and ‘80s. At the same time Bork was developing the consumer welfare standard for antitrust, another series of theories were rising, challenging the role of regulation and regulatory agencies like the FTC everywhere in law. Deep regulatory skepticism exploded at the same time as the Court was revising its approach to antitrust,49 a broad regulatory skepticism that reached far beyond antitrust, forming the core of what was Ronald Reagan’s, and has become the Republican party’s, deregulatory agenda.50 This wasn’t just an era of The Antitrust Paradox; it was the era of The Prophets of Regulation51 and The Calculus of Consent.52

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51 THOMAS MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN (1986).
That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets.\footnote{Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57, 82 (2013).} Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct—the practice once outlawed would remain outlawed.\footnote{Easterbrook, supra note 48, at 3 (“Judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”).} And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers—not to mention the treble damages that the liable antitrust defendant would have to pay.

Importantly, there would be no way to correct the error. The intuition underlying that broader regulatory skepticism has a particular resonance for antitrust, reflecting antitrust's own misgivings about monopoly while recognizing that the only true monopoly is government itself. If you can't trust anyone, you might as well decentralize your distrust. Verizon and AT&T may be big, but at least when they mess up, there's a possibility for correction; not so when the federal government makes a similar mistake. That skepticism is readily apparent in the Supreme Court's modern antitrust doctrine.\footnote{See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) (“In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct.”); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) (“It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”) Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“Misplaced inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).}

While courts and commentators were (re)discovering government failures, the consumer welfare standard offered a two-part corrective to an antitrust doctrine that many had agreed had gone awry based on a misunderstanding about both the wisdom of government intervention and the resilience of markets. The consumer welfare standard both provided a way to clearly identify a point at which intervention was beneficial and emphasized the potential benefits consumers might reap from business practices. For instance, under the consumer welfare standard, the inter-brand competition enabled by the vertical restraints in \textit{Sylvania} was seen as helping give consumers a choice—the Court saw them as enabling Sylvania to break into a market and to offer competition against RCA, which had 60–70 percent of the market at the time.\footnote{\textit{GTE Sylvania}, 433 U.S. at 38 n.1.} And if it didn’t work—if consumers didn’t like Sylvania’s exclusive dealerships—the only party that would suffer would be Sylvania, since consumers could always go to RCA if they didn’t like Sylvania’s terms. But if consumers were harmed, as evidenced by an increase in prices for televisions combined with a reduction in sales, then we would know the restraint was both harmful and successful and intervention was warranted.

Regulatory skepticism emphasized the likelihood and cost of government error at the same time that the consumer welfare standard emphasized the value of innovative business practices,
even ones that had the potential to be harmful. Although perhaps not rising to the significance of the consumer welfare standard, growing regulatory skepticism (which accompanied the rise of political economics, which emphasized the likelihood that the regulatory process could be subverted to illegitimate ends) dramatically shifted the Court’s appetite for risk in aggressively applying the antitrust laws, a diminished appetite it retains today. That regulatory skepticism is only likely to grow on a Court in which Anthony Kennedy has been replaced by Brett Kavanaugh.57

Focusing on the consumer welfare standard and ignoring the role of regulatory skepticism is an understandable choice for Wu’s storytelling, for regulatory skepticism is a far more diffuse enemy, more of a fog that blurs the landscape of regulatory reform than the polarizing Bork and the singular consumer welfare standard. But focusing on Bork and the consumer welfare standard as villains blinds Wu not only to the subtleties of both but also to a variety of objections to his agenda, most of which have less to do with the substance of antitrust law than the fallibility of the institutions that will apply it, a fallibility that underlies that self-same regulatory skepticism. Wu unsurprisingly has little to say about regulatory efficacy, other than to applaud what he considers to be a forgotten era of “big cases” and to apologize for a period of widely acknowledged antitrust over-reaching by both the Department of Justice58 and the Federal Trade Commission59 in the 1960s and ’70s. At the same time Wu argues for expanded power for the FTC in what is one of the less convincing parts of the book. The climax of Wu’s story is the rejection of the consumer welfare standard, but his failure to identify and respond to the Court’s regulatory skepticism is arguably fatal to the story’s resolution, since rejecting the consumer welfare standard does not necessarily lead one to embrace the “Neo-Brandeisian” order he advocates.

And this is the second major failing of the book, although it is an understandable one: Although Wu recognizes the overreaching that provided a theoretical opening for the consumer welfare standard to take hold, he does nothing to explain how he would alter the failed antitrust policies of the 1960s in order to respond to the criticisms that led to the rise of the consumer welfare standard. While he apologizes for what he agrees was overreach in cases like Von’s Grocery,60 just a few pages later, he endorses the “incipiency” standard from Brown Shoe that formed the bulwark of Von’s Grocery.61

Bork rightly saw the incipiency standard that drove cases like Von’s Grocery as an open invitation to judges to imagine any number of potential horribles that might or might not arise any number of years in the future, and the consumer welfare standard constrains such speculation. Neither Wu nor other neo-Brandeisians to date have even tried to explain how they would apply their version of the incipiency standard in a way that would not lead to more Von’s Grocery-like decisions. Wu’s failure to see the consumer welfare standard as part of a larger movement to constrain regulators leads him to ignore these other objections, and what is left is really no more than a plea to bring back incipiency or something like it, with all its faults. Indeed, other than Von’s Grocery and


58 Wu, supra note 1, at 104.

59 Id. at 113.

60 Id. at 104.

61 Id. at 127–28; see United States v. Von’s Grocery Co., 384 U.S. 270, 278–79 (1966) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962)). Footnotes 12–14 of Von’s Grocery are dedicated to the incipiency theory of Brown Shoe along with a host of other cases that today are widely considered to be both wrongheaded and wrongly decided.
the FTC cereal investigation, it's not clear which cases from that era Wu doesn't like and therefore it's hard to see how his proposed standard would work differently, or really at all.

Just as Wu has been selective in his choice of villains, he's been selective in his choice of heroes, and Wu's Brandeis has been idealized to suit Wu's purpose. Brandeis, portrayed as an advocate for an economy of small (probably local-sourced) businesses, had a much broader vision of power politics in industrial relations, one more focused on balance than size. He was happy with huge concentrations of power so long as they were equally balanced between employer and labor. Brandeis's vision of "industrial democracy" emphasized the role of workers, not consumers. Wu's history misplaces Brandeis's economic vision as agrarian decentralization resembling Louisville, when he was equally comfortable with the labor-centric industrialization of big business and big labor resembling Pittsburgh.

Some of Wu's policy proposals are more workable than others. Wu's proposal for a "market investigation" law would allow the FTC to break up any industry that is concentrated and stagnant (which Wu, following Donald Turner, defines as ten years) is rife with problems of administrability. In today's markets, it's hard enough to identify a discrete industry at any given moment, much less over the period of a decade. Is Facebook's industry stagnant? And what is Facebook's industry? Social media? Advertising? Communications? Nor has the FTC shown itself capable of carrying out such a task. Wu's suggestion for substantive merger law, following Einer Elhauge, would arbitrarily draw the concentration line at 4, seemingly regardless of industry structure, which would be a major step backward.

But some of Wu's suggestions are both workable and too easily ignored. Wu's call for greater transparency in the merger process is both sensible and cognizant of a problem with current merger review procedure: It's designed largely for the convenience of the merging parties. Wu is right to point out that large mergers are matters of public import—huge firms control enormous resources, and the public has an interest in how those resources are going to be deployed. Given the degree of openness required by modern securities law—in which analyst calls are a staple—the degree of secrecy in current merger review is an anachronism.

Given his concern about the capture of antitrust by economics, some of Wu's suggestions are just puzzling. I could not agree more that antitrust has lost something through academics' singular focus on economics. Wu's cure for the bad economics of the Chicago School is to apply

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63 Louis D. Brandeis, Shall We Abandon the Policy of Competition, in The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis 107–08 (Osmond K. Fraenkel ed., 1934) ("The only right claimed by the labor unions is that of collective bargaining, and this right employers also should have and exercise. It would be perfectly proper for independent competing employers to form employers' organizations, and to deal with the labor unions upon exactly the same footing as is the case with the unions—that is collectively."). See also Nachbar, supra note 51, at 67; Duplex Printing Press Co. v. Deering, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting) (arguing that § 20 of the Clayton Act was designed to "equalize before the law the position of workingmen and employers as industrial combatants").
64 Louis D. Brandeis, On Industrial Relations, in The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis 83 (Osmond K. Fraenkel ed., 1934) (describing "industrial democracy" as "a position through which labor may participate in management").
65 Brandeis did have his theories about the limits of economies of scale, see Louis D. Brandeis, Competition, in The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis 117 (Osmond K. Fraenkel ed., 1934), but he seemed comfortable with agglomerations of industrial power so long as labor had a seat at the table in managerial decisions. Brandeis, supra note 62, at 83.
66 Wu, supra note 1, at 134.
67 Id. at 129.
68 Id. at 129–30.
69 Nachbar, supra note 53, at 65–66.
different economics, but that does little to address the problem of how an overly academic approach to economics has led antitrust away from practical realities. Wu's move mirrors a larger movement in antitrust scholarship away from so-called static neoclassical economic models of behavior inherent in the consumer welfare standard and toward the "dynamic" approaches of industrial organization theory.70 Never mind that the rise of the Chicago School itself was in response to the failings of earlier attempts to use the models of industrial organization.71 Attempting to apply that kind of planned economic thinking to industries as dynamic as today's technology industries is likely to become an exercise in tail-chasing. By the time the industry has been modeled and managed, it likely will have changed.

Similarly, applying Brandeis's thinking seems a poor fit to so many aspects of the modern economy. Brandeis wrote in an era of low labor mobility and practically no industry or consumer regulation. Today we live in a time of extremely high labor mobility and a universe of regulation unheard of at the time of the original **Curse of Bigness**, regulation that specifically responded to many of the ills Brandeis complained of in that tome, such as the Occupational Safety and Health Act, the Employee Retirement Income Security Act, minimum wage laws, and even the Clean Air Act, Social Security, and Medicare. A single legislative event—the National Labor Relations Act—answered many of Brandeis's concerns, the majority of which were consumed with harms to laborers, not consumers.72 Many of the problems Brandeis himself was seeking to solve by attacking the power of industrialists have been solved in other ways. It's not clear that even Brandeis would have thought that enhancing antitrust would be the way to solve the remaining ones. Such has generally been antitrust's answer to specific bad conduct: regulation prohibiting it, regardless of whether it also presents a threat to competition.73

In the end, it's not clear either that Wu has accurately channeled Brandeis (who had views far more complex than Wu acknowledges) or that we could return to the vision of antitrust that Wu attributes to Brandeis, partly because the world where that vision resided no longer exists. Rather, Wu's quest to return to Brandeis's antitrust, much like populist longing for a time when manufacturing was the core of the American economy with General Motors at its epicenter, is an exercise in wistful historicism. There's no going back to that time, and if we could, we wouldn't want to. It is tempting to criticize the neo-Brandeisians' efforts to reconstruct antitrust in Louis Brandeis's image as bad antitrust policy,74 but the real problem is that they're hopelessly nostalgic.

Even if the book doesn't perfectly connect to the Brandeis of 100 years ago, there is no disputing its connection to today's debates about the proper role of antitrust enforcement (and regulation more generally) in government, industry, and academia. In more ways than Wu may like to admit, this book is a mirror of *The Antitrust Paradox*, although about 100 times more readable. Wu's writing represents a critical movement not unlike Bork's own. In Bork's case, it was in response to the "incipiency" theory that he had seen capture the Warren Court of the 1960s. And like Wu, Bork saw his work in antitrust as reaching beyond antitrust to larger issues of government

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70 Wu, supra note 1, at 138.
72 See supra the text accompanying note 63.
and constitutional order. More than anything, what unites Bork’s and Wu’s work is that they are both writing against what they consider to be an unwise and illegitimate movement that has captured antitrust.

And so we return to Wu’s opening admonition about the relationship between antitrust and the larger political climate. In the end, Wu’s book is not a cure for today’s political climate as much as it is a symptom of it. Wu has taken sides, and that choice is reflected in the story he tells. Wu wants to turn back the clock—to return to a time when he thinks enforcers took antitrust more seriously. But that impulse has led Wu to blame Bork’s admittedly weak historical arguments for what Wu sees as weak antitrust doctrine. As with so many attempts to identify a singular and poorly defended cause (a scapegoat) for what is in reality a complex set of policies and historical developments, Wu has missed the larger movement in which the consumer welfare standard has operated to remake antitrust over the last 40 years. Informative and entertaining as it is to read, one can’t help concluding that the primary lesson to be drawn from Wu’s story is that—as reflected in too many of today’s policy debates—if we need to be careful when picking our heroes, we need to be doubly so when picking our villains.

75 BORK, supra note 43, at 10.