Roundtable Conference with Enforcement Officials

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RICHARD STEUER: We have with us this morning FTC Chairman Jon Leibowitz; Justice Department Antitrust Division Acting Assistant Attorney General, Sharis Pozen; the European Commission’s Competition Commissioner and Competition Vice President Joaquin Almunia; India’s Competition Commission Chairman, Ashok Chawla; and the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General and Chief of the Antitrust Section of the Office of the Attorney General of the Commonwealth of Pennsylvania, James Donahue.

Joining me this morning to ask questions are the brilliant, and presumably exhausted, Co-Chairs of our Spring Meeting, to whom we owe a tremendous round of thanks, Deb Garza and John Villafranco.

Let me begin by asking Chairman Leibowitz to say a few words.

JON LEIBOWITZ: Thank you so much, Dick. It is always a pleasure to be here, especially this year

1 Editor’s Note: This Roundtable has been edited for publication.
with Sharis Pozen, who has done such a terrific job as Acting Assistant Attorney General for Antitrust; Jim, with whom we work productively all the time on hospital investigations and other health care matters; Chairman Chawla, who is growing the Indian competition agency into a real powerhouse; and of course my friend, the extraordinary Joaquín Almunia.

The lead this year from the FTC is that just last night, Maureen Ohlhausen was confirmed and we now have a full complement of Commissioners. We are all very excited about that. I can see Julie Brill, my colleague, in the front, nodding in agreement and happiness. We’re a three-woman Commission now. And we continue to be bipartisan and consensus-driven, most of the time.

Most of the people in this audience know what we have been doing over the last year or two, so I will try to keep it brief.

Health care is a major area for us. As everyone here knows, health care spending is about 18 percent of the GDP in the United States; and in European countries, where the level of care is roughly comparable, it is less than half of that, at about 8 percent of the GDP. Our spending is not sustainable. In fact, if you read the transcripts or listened to the Affordable Care Act oral arguments in the Supreme Court this week, it seemed to be one of the few things on which the Justices actually agreed.

In the last year, we have continued to pursue challenges to anticompetitive mergers and conduct in the health care industry. We have continued to work on restricting pay-for-delay pharmaceutical agreements. We appreciate the excellent work that DG-COMP has done on a parallel track there.

We currently have three hospital cases in litigation:

We now have a full complement of Commissioners. . . .

We're a three-woman Commission now.

And we continue to be bipartisan and consensus-driven most of the time.

—COMMISSIONER LEIBOWITZ

There is a four-to-three merger in Toledo, Ohio. We just released that decision, which affirmed liability and divestiture of a hospital. The eminent and distinguished Julie Brill wrote the opinion of the Commission. We have another case in which we are waiting for a preliminary injunction decision. It is a three-to-two merger in Rockford, Illinois.

And then, perhaps the most interesting case is Phoebe Putney. That is a merger to monopoly, a two-to-one merger, in Albany, Georgia, one of the poorest counties in America. The nonprofit agreed to buy the for-profit hospital and then attempted to avoid antitrust scrutiny by asserting the entire transaction was exempted by the state action doctrine. We lost in the Eleventh Circuit in a three-judge panel. The Solicitor General agreed with us that this case was so important that he has filed a certiorari petition with the Supreme Court.

Also on the health care front, we continue to work to restrict pay-for-delay agreements, settlements in which the branded drug companies—metaphorically at least—put a big bag of cash on the table, and the generics take it because they can earn more by sitting it out and not competing than they would by entering the marketplace. As a result, generic drugs, which are about 15 percent of the price of brand drugs, are not available to consumers. Our Bureau of Economics, led by Joe Farrell, estimates that these deals cost consumers $3.5 billion each and every year.

The Congressional Budget Office has estimated that if legislation passes restricting these

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3 Editor’s Note: Subsequent to this Roundtable discussion, the U.S. District Court for the Northern District of Illinois granted a preliminary injunction enjoining the consummation of the proposed affiliation between the hospitals. See FTC v. OSF Healthcare Sys., No. 11 C 50344, 2012 U.S. Dist. LEXIS 48069 (N.D. Ill. Apr. 5, 2012).

deals, it would save the federal government $5 billion over ten years, which even in today’s world of budget deficits is still meaningful.

We have two pay-for-delay cases on appeal now. One is our appeal in the Eleventh Circuit in the AndroGel case. In the Third Circuit, we filed as an amicus in K-Dur. That decision should be coming soon. We are confident that this issue is going to be resolved in favor of consumers, either by Congress or by the courts.

On the technology front, we have a number of open investigations about which I can say very little publicly.

On the policy front, our efforts continue with projects like our work with the Department of Justice to set guidelines for accountable care organizations. Hopefully, we will have an Affordable Care Act that includes accountable care organizations; we will know that in the next couple of months.

On the consumer protection side, we continue to emphasize two areas.

One is consumer privacy. We have brought lots of privacy cases, as I am sure you know. We also released a report at the beginning of this week that called for more privacy by design, transparency, simplified choice, and a do-not-track option—not run by the government but run by companies voluntarily, that would allow consumers to opt out of having their data collected by third-party sites.

We also continue to do a lot of last-dollar fraud work.

Let me take this opportunity to make a small pitch for the FTC’s 2012 Annual Highlights. It is a new, leaner, more eco-friendly version of the annual report that you are all used to getting at the Spring Meeting. This will give you some highlights and you can link to a longer and a more detailed report about all of our activities on our Website.

MR. STEUER: Thank you.

Assistant Attorney General Pozen.

SHARIS POZEN: Thank you also, Dick. It’s a pleasure to be here, and a pleasure to be here among people that we know so well, not only in the audience but on the stage. It’s a privilege.

Someone said yesterday, “Oh, you’ve had a good year in the Antitrust Division.” I said, “No, we haven’t had a good year in the Antitrust Division. We’ve had an amazing year in the Antitrust Division.” I am happy to talk to you about that today.

There are three things I want to focus on: first, our litigation record; second, our prioritization; and then, finally, who we think are listening and watching and how we’re interacting with them.

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5 Editor’s Note: Subsequent to this Roundtable discussion, the Eleventh Circuit Court of Appeals upheld the district court’s dismissal of the FTC’s complaint under Federal Rule of Civil Procedure 12(b)(6). See FTC v. Watson Pharms., Inc., No. 10-12729, 2012 U.S. App. LEXIS 8377 (11th Cir. Apr. 25, 2012).


I’ll start with our litigation record. If anyone still has a question as to whether or not the Antitrust Division will litigate and win, that question has been answered in the affirmative. Both our criminal program and our civil program have had tremendous victories this year.

The AUO case\(^{10}\) is the most recent, led by our San Francisco Field Office. This is a criminal trial against AUO, which manufactures liquid crystal display screens that are used in televisions, computers, etc. We were put to a test here, and we knew it was a test. This was a significant trial in our criminal program challenging not only whether or not these companies had participated in a cartel, but whether or not we could prove before a jury beyond a reasonable doubt that in fact that cartel resulted in an overcharge.

We had guilty verdicts not only against AUO but its U.S. subsidiary and two key executives. The jury found beyond a reasonable doubt that there was in fact an overcharge of $500 million. That’s doubled to $1 billion. So I would assume that this case is resonating across boardrooms today.

Last night Senator Franken covered AT&T\(^{11}\). It was amazing to have a U.S. Senator stand up and say many of the things that we have said publicly about that acquisition and the benefit to consumers of attempting to block it and then it ultimately being abandoned. That was a tremendous victory for the Division.

And then, of course, H&R Block\(^{12}\). One former assistant attorney general said to me, “It reads like an antitrust treatise.” It does. It’s eighty pages. I think for us and for the Federal Trade Commission what is particularly important is the use of our 2010 Horizontal Merger Guidelines\(^{13}\) throughout that opinion.

How did we achieve these litigation victories? It was a team effort, there is no doubt about it, and it is across the Division.

Our career staff are some of the best litigators you are going to go against. Using AT&T as an example, we faced at last count nine law firms. We were led by Joe Wayland, our Deputy Assistant Attorney General for Litigation, who is an experienced trial lawyer, who’s a member of the American College of Trial Lawyers. He brought in some help as well. He brought in Glenn Pomerantz and Dave Dinielli from Munger Tolles. That team, working with our career staff, went toe-to-toe with at least nine law firms.

We’ve also institutionalized our litigation function by hiring a director for litigation. We have a thirty-year veteran, Mark Ryan, who joined us from Mayer Brown, who has a lot of trial experience and will be a resource going forward for our litigation efforts.

Second, on prioritization, it was interesting when Jon and I met with Chairman Chawla and talked about how agencies set priorities. I can tell you our priorities in the Antitrust Division were set four years ago by the President of the United States. Barack Obama announced that if he was elected there was going to be a reinvigoration of antitrust enforcement. That is the promise he made, and that’s the promise that we believe we have kept.

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In looking at how you do that, I was thinking when talking to the Chairman that one of the first things we did out of the box three-and-a-half years ago was recognize that we were in the Antitrust Division with the backdrop of one of the most significant financial crises this country has ever faced. We decided early on that we were going to put down a marker, and that marker was going to be a hard marker, that antitrust enforcement was going to be reinvigorated and tougher than ever because it is even more important in distressed economic times to have strong antitrust enforcement to ensure that markets remain competitive. We made a mistake, I would say, after the Great Depression, when there was the thought you actually ease up on antitrust enforcement, and we have learned from that mistake.

So that was our first marker. It was a hard marker put down by Assistant Attorney General Varney and Deputy Assistant Attorney General Carl Shapiro in many speeches and public statements.

Second of all, we focused on those industries that I like to call our “pocketbook” industries. I would highlight four of those: the financial services industry, the telecommunications and technology industry, health care, and agriculture. We looked at these industries holistically. We talked to experts in them, thought about them, thought about what the competitive issues were. Our main focus was on consumers. These are the things that affect the American consumers’ budgets most significantly.

In financial services we found criminal conduct and we prosecuted in our Muni Bonds case.\(^\text{14}\) Muni bonds affect cities and counties around the United States. They are used to build public facilities. We found that there was bid rigging and cartel activity in that industry. We ended up entering into global settlements with many institutions as well as prosecuting individuals.

Also, as I said, in technology—I don’t need to talk about AT&T. There is also Google/ITA.\(^\text{15}\)

In health care we worked on concentration in health insurance markets as well as illegal agreements that we think health insurers and others had been instituting in the form of MFNs and exclusive arrangements.

And finally, in agriculture, we heard from the industry through our workshops, and that has infused our enforcement efforts.\(^\text{16}\) We’ve brought cases in fluid milk, now a criminal action; in tomatoes; also in poultry.

So finally, as I said, who’s listening and who’s watching? We knew business was listening and watching, and we wanted to ensure that there was clarity and transparency in what we were doing. So our competitive impact statements were detailed, we issued closing statements, we gave speeches, so that folks knew where we were drawing the line.

\(^\text{14}\) See Antitrust Div., U.S. Dep’t of Justice, Division Update Spring 2012, Criminal Program, Municipal Bonds, http://www.justice.gov/atr/public/division-update/2012/criminal-program.html (describing an “on-going investigation into bid-rigging in the municipal bonds derivatives market” that “has so far resulted in 13 guilty pleas and pending charges against six individuals,” as well as “resolutions with large financial institutions...which have agreed to pay a total of $745 million in restitution, penalties and disgorgement”; with links to six settlement agreements and numerous press releases spanning period from October 2009 to January 2012).

The Antitrust Division’s ongoing criminal investigations are paralleled by the civil class action pending under the caption \textit{In re Municipal Derivatives Antitrust Litigation, MDL No. 1950} (S.D.N.Y. pretrial proceedings consolidated June 18, 2008).


\(^\text{16}\) See Sharis A. Pozen, \textit{Agriculture and Antitrust: Dispatches and Learning from the Workshops on Competition in Agriculture}, \textit{ANTITRUST}, Spring 2012, at 8.
And then, finally, our international colleagues. We wanted to work cooperatively with our international colleagues and develop new relationships with emerging economies.

I’d like to say on a personal note, as I step down at the end of April, I am so grateful for all the support that I have felt from this community. It has been remarkable. I’d also like to thank the career staff at the Division. I could not work with better colleagues. It has been an honor to serve side-by-side with you. Our front office over the three-and-a-half years and the experts that we brought in were a pleasure to work with.

And finally, I have to thank the former Assistant Attorney General Christine Varney. I wouldn’t be here but for her, coming in as her chief of staff and then being made the Acting by Attorney General Holder.

Thank you all very much. It has been an awesome year.

MR. STEUER: Thank you.

Vice President Almunia.

JOAQUÍN ALMUNIA: Good morning. Thank you very much for inviting me again for the second year in a row. I am very happy to be here in the States with colleagues and friends and honored to be in front of all these very important constituents for all competition enforcers and of course for the European Commission too.

What did we do this year or why did we do it? We focused on three priorities since last year’s discussion here, more or less the same as the year before:

● First of all, the crisis. In Europe, the crisis is probably more pressing than here. We are still dealing with some of the toughest consequences of the financial crisis that started in 2008.

● Second, the very fast technological change, new activities. This is a big challenge for competition enforcers to deal with new activities, with new ways to consider the evolution of the markets, with new behavior that can be considered as breaching the competition rules.

● Third, we continued to work on cooperation. We increasingly need to work together with our colleagues here in the United States and in many other countries and jurisdictions because our cases are becoming global. We need to strengthen our coordination with other enforcers, and we need to improve the way we can work together, even starting from different systems and different legal traditions.

So, allow me to go into some detail on these three priorities. First, the crisis. On top of the traditional competition enforcement that is common to all of our colleagues in other parts of the world, the European Commission also deals with State aid control. Given that a lot of public money is being channeled through the financial sector, in Europe we have a very high responsibility to put order in the use of public money to support the financial system. This requires a lot of efforts from our side.

We are quite happy with how we are able to use our State aid control instruments to restructure financial institutions, to put them on a viable ground for the future, to better organize the burden sharing of the resources and the efforts required to restructure financial institutions. We also work to avoid—and this is extremely important for us—internal barriers and distortions of competition within our internal market. These could arise through the wrong and uncontrolled use of public money. I think we have managed to do a lot of good work this year and succeeded in preserving the integrity of our internal market.

At the end of last year, I had hoped to eliminate the special State aid crisis regime to deal with all these consequences of the financial crisis. But, because of the sovereign debt crisis, we were
obliged to prolong this exceptional regime, at least during this year, and we therefore continue to use this framework.

We have also had some cases with special difficulties in the countries where there are financial programs to deal with the sovereign debt crisis—in Greece, Portugal, Ireland—and we are still facing some difficulties in some other cases. But all in all, I think we can be satisfied with the way we are using State aid instruments.

On the traditional enforcement of competition rules, cartels continue to be priority number one. We adopted four decisions in 2011. Last Wednesday we adopted decisions in two important cartel cases, freight forwarding and mountings for windows. In the freight forwarding case, we have had very good cooperation with our colleagues here in the U.S. and in other cases, with other competition authorities.

Cartels will continue to be priority number one. We expect to issue more cartel decisions this year than in 2011. There are quite a few cases in the pipeline.

We are also using the new settlement instrument more and more. Three out of the four decisions of last year were settlements. I consider this a very useful instrument if we can settle the case. We are not obliged, of course, to settle, and not all cases are suitable for settlements. However, if we can settle under good conditions and put an end to the infringement, we prefer to accelerate the decision-making through a settlement procedure. I think that is good for everybody: we free our resources and companies can restore their reputation. We will continue to use the instrument whenever suitable in the future.

Merger activity has started to grow again in 2011 in Europe and also in the United States and in other areas. We had one particular case that created a lot of difficulties for us and was the only negative decision we took in over a year, the Deutsche Börse/NYSE Euronext case. We had a lot of discussions prior to taking the decision. We asked the parties involved in the merger for divestiture of their European-based derivatives exchange, but this was not possible. For the parties it was a deal breaker. Unfortunately, we had to give a negative decision in this case. If allowed, the merger would have led to a near-monopoly in European financial derivatives worldwide.

During my mandate, during these two years, the only negative decision apart from the Deutsche Börse/NYSE Euronext, involved the proposed merger between two Greek airlines that would have also created a quasi-monopoly on the Greek air transport market.

Even though Deutsche Börse has announced it will appeal, I must point out that a negative decision prohibiting a merger is not the rule for us, it is the exception. To the extent possible, what I will continue to do is to try to find with the parties involved remedies to overcome the difficulties encountered allowing us to clear most mergers. For instance, in recent months, we have cleared some important mergers: Google/Motorola, also in cooperation with our U.S. friends; Microsoft/Skype, another very good example of cooperation with our U.S. colleagues.

In antitrust, we adopted some important decisions and we opened formal proceedings in several cases. A trend that I see is that new technologies, new activities, are becoming a real issue in our antitrust enforcement, especially for abuse of dominant position or unilateral conduct. For example, we are now dealing with cases regarding the so-called patent wars. This is a very important issue, and we are paying a lot of attention to this.

We established with our Horizontal Guidelines more than one year ago the rules of the game, the FRAND terms to license standard essential patents (SEP). This is one of our most important priorities as a new activity. We are not yet at the end of investigations involving this issue, and we also have other ongoing cases including Google.

The last thing that I wanted to mention is how we deal with our colleagues in other countries, with other competition authorities. The global nature of our cases requires more and more cooperation. I am very happy with the kind of cooperation we have reached with Sharis and Jon here in the United States. I am also very happy with the kind of cooperation we have managed to develop with some of our Asian colleagues, like Japan and Korea. We are trying to do the same with our colleagues in the most important emerging countries—China, India, Brazil, and others. I think this is the next challenge for all the competition enforcers around the world. We need to build a stronger community of competition enforcers. We don’t want to be used by different players in different cases because we are not able to coordinate ourselves.

Thank you very much.

MR. STEUER: Thank you.

Turning to India, Chairman Chawla.

ASHOK CHAWLA: Thank you, Richard.

Ladies and gentlemen, it is indeed a daunting task to be here in the midst of such veteran, well-established agencies with wisdom from years of experience. We are actually a baby in this business of competition law. Let me spend the time allotted to me to cover briefly where we come from and where we stand, what are the challenges that we face in India.

As most of you would know, the early years of our economic development were controlled substantially by the state. The philosophy until 1990–1991, was that the states should control the commanding heights of the economy. A lot of that started changing about twenty years ago, in 1991. Physical controls gave way to financial controls. Trade policy was reasonably liberalized, the tax regime was rationalized, customs duties started going down in keeping with the levels in the South East Asian region. The process of regulatory reform also started at that time. So twenty years have seen a fair amount of change in the Indian economy, with less government, more business, with a system which is less inward-looking than what it used to be.

The precursor of the present competition law was the Monopolies and Restrictive Trade Practices Act, which some of you may have heard of. This was passed way back in 1969, where the focus was more on size and structure. It was intended to control the proliferation of monopolies. But that piece of legislation was clearly out of synch with what was happening in the relatively new India post-liberalization. Therefore, the Competition Act of 2002 was enacted. It faced certain legal difficulties and challenges until amended in 2007.

The advantage that we had as latecomers was that there was the wisdom of the entire world to pick from and put it in the legislation. The Act is, I would say, basically very robust—in fact quite ambitious—built on the best legal practices and systems from around the world. The Act focuses on behavior, not merely on size and structure. It focuses on not just dominance but abuse of dominance, which is what the best practice is.

As part of the Act, the Competition Commission of India was set up. It has powers which are both inquisitorial and of enforcement. The inquiry and the investigation are done by an office that reports to the Commission but is reasonably independent. The Commission adjudicates in matters that come before it.
Appeals lie first to the Competition Appellate Tribunal, which is a full-fledged judicial body, and thereafter the Supreme Court of India.

The Act covers the three main pillars in relation to competition law and the competition culture. There is the unilateral action part, the abuse of dominance; there are provisions relating to cartels; and there is prior mandatory approval for mergers and acquisitions above a threshold, which in the first instance has very consciously and very carefully been kept at a level that is reasonably high so that the normal process of consolidation of business and industry, which is very crucial for future growth and which is the way business grows is not stifled.

The Commission can act on information which comes from informants. This is interesting. They are informants, not complainants, because the person who gives information need not have any specific nexus with the matter which he is raising before the Commission. He gives us information. If we feel there is something in it that needs to be looked into, the matter proceeds. Otherwise it stands closed.

We also have powers to suo moto look at matters which are anticompetitive.

There are provisions for penalties in the case of antitrust behavior which go up to 10 percent of the average turnover of the last three years.

In the case of cartel activity, penalties have been kept higher. It is 10 percent of the profits for each year that the activity continues. But we do not have criminal jurisdiction, as in some of the other countries.

The tools that we have at our disposal to implement the Act are:

- Evidence on paper,
- Oral evidence, which the investigator takes;
- Experts; and
- A leniency provision for cartels, which will presumably become a more serious proposition once a few cartel cases are decided.

What we do not have is search-and-seizure power or the power of dawn raids, which is something that we have suggested to the government. It is possible that an amendment to the Act will be contemplated. But as of now this power is not available.

We have mergers and regulations time limits, which are under the Act 210 days. We have in the regulations kept them at 180 days.

In respect of cases which prima facie do not seem to have any major adverse impact on competition, we have imposed a self-regulating discipline that we will decide those cases in thirty days. All the cases that have come to us in the last eight or nine months since those provisions were enforced have been disposed of within those thirty days because they were relatively simple, straightforward cases.

What are the focus areas? What is it that we will concentrate on as we go ahead?

One, we need to build capacity in the organization both from internal and domestic sources but also by collaborating with some of the more mature jurisdictions, which we are in the process of doing.

Number two, communication—that is the second C—which includes advocacy, advocacy not just with businesses, advocacy not just with other stakeholders, but equally importantly with government, which still operates a number of regulated areas and which has the baggage of policies which may not entirely stand the test of competitive neutrality.

Lastly, the third C is we need to be credible in the manner in which we build our organization as we go ahead.
MR. STEUER: Thank you.

Chair Donahue?

JAMES DONAHUE: Thank you, Richard, and thank you for inviting me here today to speak on behalf of the state attorneys general.

This week the Supreme Court heard arguments on challenges by twenty-six attorneys general to the new health care reform law. Those arguments focused on, among other things, the mandate that people buy insurance and whether that is legal or not. I am not going to talk about that.

There is another part of the law that we get a lot of inquiries about on the antitrust side, and that is the accountable care organizations (ACOs). That provision of the law has had two impacts on state attorneys general offices. One is we have seen an awful lot more mergers. In the past year, Massachusetts has looked at six hospital mergers; Pennsylvania has also looked at six; Connecticut has looked at three. These are states, Massachusetts and Connecticut, where there rarely have been hospital transactions before. I can go through a list: Tennessee, California, Illinois, Ohio—all have seen hospital mergers is the past year, many of them justified on the basis that they need to merge in order to become an ACO.

But it’s not only hospital mergers. We see mergers between hospitals and physician practices, mergers between physician practices within the same specialty; multi-specialty physician practice mergers; and ancillary service mergers, like dialysis centers.

So there is a whole lot of merger activity that is being produced out of this desire to establish ACOs.

One other thing here. We’re almost always doing hospital mergers in urban areas with the Federal Trade Commission because there is a Hart-Scott-Rodino reporting requirement there. All the other mergers, and even hospital mergers in rural areas, we are doing those by ourselves. There is no HSR reporting. So we know about it but maybe the Federal Trade Commission doesn’t. In some of these cases, the Federal Trade Commission comes in and helps us. A lot of these other cases we are doing on our own.

Now, as a little aside, I want to note that neither the health care reform law nor any other law is providing the states with more funding to do all these merger transaction reviews.

The other effect that we see here is that ACOs are raising, not lowering, prices, in part because apparently some of this consolidation is leading to ACOs having market power.

—NAAG CHAIRMAN

Donahue

That is a problem not only in Pennsylvania, but it’s a problem in many areas around the country where there are these ACOs or these vertically integrated organizations that are seen as very efficient. But when it gets down to what they do locally, they may be raising costs to either employees or seniors.

I want to talk about another topic—and Assistant Attorney General Pozen mentioned it—the Muni Bonds case. The Department of Justice has done a fabulous job developing the evidence of liability in that case. It has been a great partnership with them, because we have worked with them to figure out what the wrongful conduct that DOJ uncovered cost our municipalities.

We have settled, with DOJ and a number of other federal agencies, for a total of $350 million in redress. That’s not the entire amount—there are additional fines and other payments. But $350 million of the amount that has been recovered will go back to the municipalities.

We are about to start sending out checks from Bank of America. Those checks are going to 1200 municipalities and nonprofits across the country. Some of those checks are for hundreds of thousands of dollars. I’m sure you can pick up the paper every day, no matter where you are in the country—the city where my office is, Harrisburg, is in the news for not having a lot of money—and you can see that all these entities are distressed. So the ability to give them back money from the effects of price fixing is really terrific.

Lastly, I want to talk about our core business, which is bringing horizontal price-fixing cases.

A week ago, Ohio brought an action against two rock salt producers in the state which had a longstanding agreement to allocate markets. I recommend reading the complaint. It is really detailed and it outlines a conspiracy that has cost the taxpayers of Ohio quite a bit.

We are also looking at this from a preventative standpoint. There is an attorney at DOJ, Fred Parmenter, who noticed that in the road materials area there are a lot of mergers that go through because nobody knows about them. Not every quarry in the United States that may be bought by a big conglomerate or something like that is large enough to trigger an HSR filing. So Fred came to the states, and he has come to the state departments of transportation, and had this great idea to help save taxpayers money and ensure that they have a competitive market when we go out and buy road materials. It has been, I think, pretty successful and it has been a great partnership.
The last case I want to mention is that Michigan has brought a criminal case against five gasoline stations in Madison Heights, Michigan, and they have obtained criminal fines and guilty pleas of $20,000–$50,000.\textsuperscript{21} This is very significant because it’s a criminal case that involves gasoline.

Also, sort of as an aside, I think all of us on the American side up here on the stage get complaints about gasoline prices all the time. Nine times out of ten, we go out and investigate them and we come back and we say, “Well, it’s really because OPEC has done something” or “it’s a change in supply and demand.” It’s really frustrating for us to go back to consumers, who are upset about the fact that the price of gas has gone up. But here was a case where people complained about the price of gas going up and there is actually something that we could do about it. So that’s really terrific.

The wrap-up here is that, from the states’ perspective, we have an excellent partnership with the two federal agencies and we are working very closely with them on lots of cases, and we are out there vigorously enforcing the antitrust laws on our own.

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MR. STEUER: Thank you.

We are now going to launch into some questions and some dialogue. To kick it off, John is going to ask Chairman Leibowitz a question about privacy.

JOHN VILLAFRANCO: This has been a big week—actually a big month—for privacy. The White House issued its Policy Framework earlier last month and earlier this week, the FTC issued its own Privacy Report, which apparently is based on unfairness, as opposed to deception.\textsuperscript{22} Unfairness, of course, is an act that causes substantial injury not reasonably avoidable without countervailing benefits.

I want to focus on that last prong. There have been commentators who have asked about the effects of privacy regulation on competition, disadvantaged rivals, effect on innovation, and effect on consumers. What are your views on that particular prong and how do the recommendations relate to the effect on competition and consumers?

MR. LEIBOWITZ: Well, I do not think they relate to unfairness at all. In yesterday’s hearing before the Energy and Commerce Committee, we made that point.

Our recommendations are in our Privacy Report, which is very thorough. We had 450 comments on our draft report. Our recommendations are best practices. They are not enforceable. We like companies to rise to the level of best practices. Many are there already. But some believe that meeting the recommendation puts them at a competitive disadvantage. So we want to move forward on privacy in a very self-regulatory way.

Now, our Report has several different tenets.

One is privacy by design. When a company is developing the coolest new app, they ought to put privacy protections into it. Some companies do that. We issued a report three weeks ago where we found that mobile apps actually had very low levels of privacy protection. So we are working with industry to move forward with improvements.

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The second tenet is choice. Consumers should have more choice about where their information is going. I think most people agree with this concept. Part of the choice architecture is the notion of “do not track,” which would allow consumers to opt out of being tracked by third-party Websites, with a few exceptions for things like bandwidth monitoring and fraud detection.

The third tenet is transparency. We think there ought to be more privacy transparency online, particularly in the mobile space. Let me tell you how bleak privacy notices are online. The Declaration of Independence is about 1300 words. Martin Luther King’s “I Have a Dream” speech is about 1600 words. The average privacy policy online is more than 2100 words. So it is no wonder that people do not read them.

We are very committed to privacy at the Commission. Reasonable people may disagree about exactly how to move forward on it. From our perspective, we aspire to best practices, which some companies are already meeting.

**MS. GARZA:** Assistant Attorney General Pozen, the proposed AT&T/T-Mobile merger was indeed big news this year, so I hope you don’t mind answering a couple questions about that. The first question is, would you discuss the Justice Department litigation strategy you followed there? For some of us, it was one of the most interesting things about the case.

Second, there was a lot of discussion about the merger’s effect on jobs. As I recall, the Justice Department’s press release even referred to job loss. Can you tell us if in fact the Division did consider the impact on jobs and whether you think job impact is a part of antitrust analysis? If so, how you deal with it?

**MS. POZEN:** For us there were really two important things we took away from litigation strategy. One was the team we put together. Second was our work with the Federal Communications Commission.

When I started I talked about our litigation efforts and how things have really moved forward on that with our Deputy Assistant Attorney General for Litigation, with our Director for Litigation, and then bringing in what we call special government employees, Glenn Pomerantz and Dave Dinielli. I was reminded of Teddy Roosevelt, who said that you need to “speak softly and carry a big stick.” I can tell you in AT&T we had a big stick in terms of our litigation team and the Division-wide effort. I applaud how everyone pulled and worked together and were led by really experienced trial lawyers. That was key.

And then, as I said, our relations with the FCC. The FCC is an expert agency. They know this industry inside and out. They deal with it every day. They have a public interest standard and they consider competition in that. We had developed a strong relationship with them, in particular in our work on Comcast/NBC,23 where again it’s public knowledge that we were sharing documents, sharing databases. That continued on through AT&T.

Their work was particularly important. They looked at jobs as part of their public interest standard, and they unpackaged in their staff report the allegations and assertions about jobs.

It was interesting to live in Washington at the time. I think every morning when you watched the morning news shows, there was a commercial that AT&T ran talking about the job expansion. And it is unusual because, at the same time, when you have parties coming in and talking to you about

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synergies and one of the line items is elimination of redundancies, I think we all know that's job elimination.

But in terms of whether we consider that in our analysis, I actually look at it sort of the other way, that if we continue to promote and ensure competition, the economy expands, innovation occurs, and jobs are created.

So no, it's not part of our regular analysis, but it's something that we are hopeful for if we continue to be the cop on the beat, we continue to maintain competition and markets.

**MR. STEUER:** Vice President Almunia, the European financial issues have dominated the financial news on both sides of the Atlantic. What role do you expect that competition law is going to play in stabilizing the individual economies of Member States?

**MR. ALMUNIA:** I referred briefly in my presentation to the role of our State aid control rules in the financial sector. This is extremely important. Three or four years ago, the financial sector in Europe was affected by the financial crisis, in a similar way to the United States. But there is a second round of problems in Europe because of the links between the sovereign debt crisis and the balance sheets of the financial institutions. We are using our State aid control to allow the treasuries, the public sector, and the budgets in the different Member States in Europe to support the banks when this is needed for financial stability reasons. We do this to avoid the materialization of systemic risk in some countries, but at the same time to preserve the rules and the level playing field in our internal market.

I think we are doing the work that will in the future be carried out by a resolution authority at the European level. The European Commission will put forward legal initiatives for the creation of a resolution authority at the EU level. We are not yet there, but probably in the next few months we will put forward this initiative.

In the meantime, during the process of discussions of this legal initiative by the European Parliament and the Council of Ministers, the ECOFIN Council, we will continue to use State aid control in the same way as we have been doing in the last year.

As I said before, we have now more viable financial institutions that have been restructured. We have been able to avoid the closure of national financial markets. Thanks to the banking sector rules and with the help of the European Central Bank that is providing liquidity, we continue to have an internal market for the financial sector. So far, so good.

In addition, we are modernizing the State aid rules24 for the good functioning of the economies in Europe. We have right now almost forty different guidelines for the control of State aid in different sectors, for different purposes—environment, research and development, regional aid, small and medium-sized enterprises, risk capital, the maritime sector—and we imperatively need to modernize the way State aid control is managed. We need this reform in order to be able to support the activities that will require public support to overcome the crisis and to foster economic growth, but without giving in to protectionist trends, without establishing new barriers within the internal market and without distorting the level playing field.

This modernization of the State aid regime will be presented in the next couple of months. I will put forward the ideas at the beginning of April to my colleagues in the European Commission, to the ministers, and the European Parliament in the next months.

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I hope that from now until the end of 2013—so before the new budgetary seven-years framework will come into force in Europe—we will have modernized the guidelines for State aid control. I hope that we will have simplified the procedures and established better cooperation with Member States. At the same time, most Member States in Europe are embarked on very ambitious and very demanding fiscal consolidation strategies.

So I want to emphasize the need to use public money better when needed for new activities and at the same time put in more demanding rules to avoid the waste of public money in the fiscal consolidation period that we are living in.

A final point on Europe. When I meet with European companies and European governments, they tell me: “Europe is the only one who is putting State aid under control. What will you do when dealing with public subsidies that are being given in the United States, in Asia, in emerging countries, in all the industrialized countries?”

This is a major issue for the next years. We need to avoid protectionism at all levels, in our market and internationally. We need to cooperate not only on antitrust enforcement, we need also to cooperate—and this is not always the task of other competition authorities, but it is a task for public authorities around the world—to establish clearer rules and a more strict discipline in using subsidies. We have to avoid having protectionist temptations materialize, to avoid further distortions in the way different economies relate with the others. This is necessary because the global economy requires a stronger and clearer framework for the use of public money not only in Europe but also in the other parts of the world.

MR. STEUER: Sometimes, in the short term, and particularly during a crisis, it seems that the priorities behind state aid decisions and competition decisions might be in conflict. Given your responsibility to look at both, how do you strike a balance when they seem to conflict?

MR. ALMUNIA: In relation to the enforcement of the state aid rules, for example, these days we are dealing with a case of a company in France in the transport sector that received in the past a lot of public money. We adopted recently a negative decision, so this public money that was not compatible with the EU State aid rules should be recovered by the French State. This company is facing very serious difficulties and is in a liquidation procedure in France. There is one buyer that wants to buy part of the assets and wants to keep part of the activities of that company. To take into account the social problems around this failed company, to create conditions with our decisions to allow the activities that can be viable in the market to continue, but at the same time to request the company to comply with the State aid rules and with the consequences of a negative decision, is not an easy task, but is a possible task.

Probably at the beginning of next week the Commission, under my proposal, will adopt a decision establishing the right balance between the different interests at stake. We have been able to do so in the past, and the European Court of Justice often supports our decisions and rules against appeals it finds unfounded.

I think that we should be rigorous in enforcing this part of our responsibilities because, if not, the bad money will create the possibilities for bad economic performance, for bad companies, for zombie companies in the market who distort competition. This would prevent new activities to develop and flourish that would allow us to have a more sustainable path of growth.

This is not the first time that we are dealing with these difficult tradeoffs. But on this occasion, given the depth of the crisis, this is a very important task and responsibility.
MR. VILLAFRANCO: Chairman Chawla, the Section and its members are devoting increased attention to India of late. I know many of us are busy with all sorts of matters that have an Indian component to them.

What unique features are there in the Indian economy that require competition rules or procedures that are different from those here in the United States or in the European Union?

MR. CHAWLA: As I mentioned in my opening statement, the law is essentially modeled on the kind of law that prevails in most of the mature jurisdictions. So in terms of legal provisions, there are not many changes or differences.

But I also touched on the kind of economic history that we are carrying on our shoulders. There will be, I guess, some differences in terms of interpretation of law, in terms of the evolving jurisprudence on competition matters as we go ahead, because it cannot be entirely in a vacuum anywhere in the world, and also therefore not in India.

So, basically speaking, the approach will have to be balanced. We will have to strike a balance between the absolutely purist approach and temper that with the development of India so that genuine businesses, genuine parties that wish to invest, companies that wish to merge as part of the consolidation process, are not unduly frightened and it is not seen as something that is anti-growth and anti-development.

Basically, the law will have to be implemented, and the law will prevail, with a certain amount of balance.

MS. GARZA: Chairman Donahue, we understand that local interests have been putting pressure on states to challenge mergers where the federal agencies have decided not to bring an enforcement action. Do you foresee that the states would attempt to challenge a transaction that neither the Federal Trade Commission nor the U.S. Justice Department has decided to challenge?

MR. DONAHUE: The short answer to that question is yes. I think, if you look at our history in Pennsylvania, there have been a number of hospital mergers where the FTC has closed their investigation and we have gone forward, either informing the parties that we are going to sue to block the merger or working out a consent decree.25

I think there are a lot of specific industries where the states have a lot of experience—health care is one, retailing, road materials, prescription drugs—where we have all done litigation. If you take prescription drugs in the TriCor case,26 the states again were prepared to litigate that case by themselves.

I’d be less than honest if I said, “Look, every single case is a case that we’ve got the resources to challenge,” because there are some mergers that involve quite a number of issues, quite a number of different facets, a lot of efficiency claims. And maybe there are some mergers that we don’t have the resources to challenge. The thing is I don’t think anybody can bet that there is a particular transaction that we wouldn’t challenge if we thought there was still a competitive problem.

MS. GARZA: Would that be your answer, including in a situation where a federal agency had entered into a settlement with the parties to a merger?

MR. DONAHUE: Even if there was a settlement, yes. If we thought that there was an interest there that wasn’t appropriately addressed, we would do that. Not to knock the federal agencies, but there are times when we have a much better insight on local issues than they do. We’ve gotten more information, and we maybe have different information and a different perspective on information.

We were talking among ourselves the other day. North Carolina noted that they were working with the federal agencies on a road material merger, an asphalt merger, and they checked with the Department of Transportation, and I think the DOJ had said, “No, those two asphalt plants are close together.” The North Carolina DOT said, “No, no, no. There’s a mountain between those two plants. When you drive around the mountain, the asphalt cools to the point where it’s no longer usable.” That’s something that we know. That’s something that we can bring and we might act differently than the agencies from here in Washington would.

MR. LEIBOWITZ: Jim is exactly right. Sometimes state AGs have better insight, particularly into local problems or local issues. I would also say—and I think all on this panel agree—that when we work together we are much stronger collectively than we are individually. Our agency and the states have been working cooperatively on a variety of matters.

MS. POZEN: I would echo what you’re saying, Jon. I think—again I’m sorry I’m beating the drum on AT&T—but that was an example. Not only did we work together, but really the states helped us tremendously with the workload there in terms of depositions and discovery, et cetera. It was a wonderful example of cooperation. We instituted new tools there so that we could further cooperate with the states.

Right now we are working with the states on eBooks—I said that at my hearing—and with the EC. Again, together, as we move forward on those kinds of investigations, working in parallel, working together where we can, I agree with you, I think it’s better for us as agencies and law enforcers. I also think it is better for the parties if you know that we’re all on the phone together. It’s more efficient, more effective, for business as well.

MR. STEUER: Thank you.

If we may turn from the lower tech of asphalt to high tech, John has a question for Chairman Leibowitz.

MR. VILLA FRANCO: Technology mergers are making news. Recently, both EC and the U.S. authorities examined acquisitions of patent portfolios that raised concerns about the acquirer using those portfolios for anticompetitive purposes. What tools does the FTC have to address competition issues in the standard-setting area?

MR. LEIBOWITZ: Well, as we know, standards can be procompetitive. They play a big and pro-

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ductive role in interoperability between products and encourage competition on price and innovation. But, as we have seen over the years, the standard-setting process occasionally can be manipulated in anticompetitive ways.

I should note that our Section 5 authority over unfair methods of competition is broader than the antitrust laws and could be a very useful tool in this area.

What we have found in some of our investigations is that a standard-setting organization (SSO) member might deceptively wait until after a standard is agreed, then even wait several more years until a standard has been established, then finally reveal that it has what is known as a “standard essential patent” that covers the standard. And it can use that standard essential patent to try to leverage higher royalties. This was the nature of the Rambus case, which was ongoing when Tom Rosch and I came to the Commission. We approached Rambus as a monopolization case.

Another issue we are considering is the problem of SSOs encountering later attempts to say, “Your technology reads on my patent.” They have tried to get members to agree to RAND or FRAND commitments—fair, reasonable, and nondiscriminatory terms—a somewhat amorphous concept to be sure. But what it means is if an SSO participant is competing to have its technology included in the standard, it is promising to license at reasonable terms. Now, if an SSO member again engages in deception, we can go after that entity. And there may also be circumstances that would merit a challenge under Section 5 outside of that. So it may be, for example, that if you have offered a RAND or a FRAND commitment to go into court and seek an injunction, rather than damages, that might itself be a Section 5 violation.

The Commission is looking at this. These are very serious and important issues. You want to make sure that innovation continues. But you also want to make sure that companies cannot engage in licensing that is supposed to be worked out and then hold up that innovation.

MS. POZEN: I’ll add on too because we did issue a closing statement and worked very closely with the EC on Google/Motorola. We, coincidentally, had three mergers in front of us—not just Google/Motorola, but also the transfer of Nortel and Novell’s patents, all at the same time. So these were significant patent portfolios being transferred into the hands of significant technology companies—Google, Apple, and Microsoft.

We looked at them very holistically. We convened an internal group on intellectual property to think about what it means when you transfer these patents; in particular, as Jon has articulated, the SEPs, or the standard essential patents, and the likelihood of holdup through injunctions or exclusionary actions with our International Trade Commission (ITC).

At the end of the day, we concluded that it did not violate Section 7 to transfer these. In particular, on those matters, as we noted in our closing statement, three of the companies issued letters to the standard-setting bodies regarding what they would do with the holdup aspect of it, the injunctions and exclusionary practices. Really, just two of them went directly to that issue. Microsoft and Apple articulated in a very clear way—which to some extent gave us some comfort, and we certainly saw that as a positive development.

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But you have to remain concerned about this kind of power. You mentioned in your opening, Joaquin, these patent wars that are going on that could possibly inhibit competition if these patents are asserted in a way that results in harm to competition.

**MR. ALMUNIA:** If I may add some words on this, we dealt with this issue when we were discussing the EU Horizontal Guidelines at the end of 2010. We established that the licensing of these patents should be offered on FRAND terms. The question is: how do you define FRAND terms on a case by case basis? It is not always easy.

But after the adoption of the Horizontal Guidelines, we were facing one case, Apple/Samsung. We opened proceedings because we think that the use of injunctions from Samsung’s point of view may not have been in accordance with our rules. We are now dealing with this case.

Afterwards, in cooperation with you, we analyzed the Google/Motorola case. That was the only one that was notified in the European Union, not the others.

We cleared the Google/Motorola case. But I remember I gave a warning, saying, “Well, we didn’t find any merger-specific problems, but there are problems around the use of standard essential patents to possibly abuse market power.”

After this clearance, we received complaints from Apple and Microsoft against Motorola. We are now discussing what to do with these. Probably in the next days you will know what we decide to do.

But the question of patents and the standards—these tensions, this patent war—is not only taking place in this particular sector. The setting of standards can be a powerful instrument to foreclose competitors. We are dealing with one case in the banking sector for e-payments. The European Payment Council, a banking sector organization, was discussing the creation of a framework for e-payments in Europe. We opened proceedings because we thought that there were risks of foreclosing the non-bank competitors in the e-payments. We are dealing with this case.

We also launched a request for information to the big telecom operators in Europe because, for mobile services, payments, and other kinds of services, they were having meetings. We asked them for further information to look into what they are discussing because there is also a risk of establishing some kinds of standards that can foreclose other operators from the possibility of giving these services under normal terms.

So the new technologies are fantastic, but, not only from the privacy point of view but also from the pure antitrust or competition point of view, they give us a lot of work.

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**MS. POZEN:** It’s fair to say what you’re hearing from us is it’s a new frontier that we recognize could have competitive impact. But at the same time I know at DOJ we are particularly mindful that these are property rights, and we are trying to find that right line, that right balance, between when they can be asserted rightfully and when they have gone too far and have been asserted in a way that creates competitive harm.

**MS. GARZA:** Sharis, you have talked about priorities for the new administration. One of the first things that the administration did was to withdraw the *Section 2 Report*, which created expectations that we would then see a Section 2 case. We did see one Section 2 case, *United Regional Health Care System*,34 which involved tiered discounts that amounted to de facto exclusive dealing. Can you explain a little bit about why the DOJ chose to pursue that as a—“pure Section 2 case,” under Section 2 only and not Section 1? And can you tell us whether there are other Section 2 cases in the pipeline?

**MS. POZEN:** To reflect back on when the *Section 2 Report* was withdrawn, what we tried to make clear at that point was it was a tremendous amount of work and effort to put all of the learning about Section 2 in one place. It really was just the conclusions and the discussion about false positives that we disagreed with when we withdrew it. It is still an excellent resource and still used.

And, just as you said, our *United Regional* case was our one—we say “pure,” because sometimes in mergers you’ll allege a Section 2 claim, and it had been alleged in the past—but this was our first Section 2 unilateral conduct case since 1999. We thought it was important for a couple of reasons. One, it was in health care. Health care was a priority and will continue to be a priority. We want to ensure that competition flourishes in what has been described as an industry where there can be real competitive problems. Second, as you said, Deb, it was the contracting practices that were the real issue. Here you had a monopoly hospital that was using a pricing scheme to explicitly exclude a competitor.

We worked hard on that consent agreement, because you don’t want to exclude all pricing contracting. Rather, you do want to eliminate those that are exclusionary and leading to barriers to entry or lack of competition.

I mentioned earlier our efforts to be more transparent. I would commend the competitive impact statement on that particular case35 because a lot of care was taken in drafting it to articulate the standard there in terms of the interplay of cost and price and how we would be looking at that going forward.

So we do see it as a significant case. Section 2 cases take a lot of time and effort. I had a question at one point, when we brought the *Blue Cross/Blue Shield of Michigan* MFN case.36 One of the questions was: You didn’t plead that as a Section 2 case. To some degree, that had to do with the market shares across Michigan and the burden under Section 2 that we’re quite mindful of.

So the efforts are under way to ferret out those kinds of monopoly behaviors when they cross the line and they take exclusionary actions, like happened in *United Regional*, and enter into

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predatory acts to maintain monopolies. That is an ongoing effort at the Division and will continue to be.

MR. STEUER: We should talk about cartels. John, I think you have a question for Vice President Almunia.

MR. VILLA FRANCO: Regarding cartels, what do you see as future trends in enforcement? Will leniency continue to be important? The Commission lost several cases last year on the issue of parental liability. Does this suggest a fundamental shift in your view in enforcement against parent companies?

MR. ALMUNIA: Cartels, as I said before, are our priority number one. We are working on a long list of cases right now.

I can signal two areas where we have a lot of work on cartel issues: the financial sector, where other regulators and competition authorities are also dealing with some cases of illegal agreements that we are investigating. And also in the automobile sector, we are dealing with a list of different suspected cartels.

I referred before to how we are using settlements. We are very happy with this new tool. It allows us to decide on cases in a quicker way and with good results, which is different from the experiences we had two or three years ago.

The leniency problems are also very important. It is true that the Court of Justice asked us to legislate, to decide to what extent the information we receive from the leniency applicants should be protected. We are preparing legislation in this regard. We will probably put forward legal initiatives this year to delimit the way we will protect the leniency applicants with the documents they submit to us.

Regarding parental liability, there have also been some recent rulings of the Court of Justice. All in all, I think they support the way we consider the existence of parental liability. In some cases, the Court has asked us to better argue our parental liability claims. In our decisions right now, these kinds of arguments that were requested by the Court of Justice are being included in the original decisions. So, all in all, we consider that our cartel enforcement stands well up to the Court of Justice’s careful scrutiny.

One last issue that I want to mention regarding cartels enforcement is that, as you remember, we adopted the new Fining Guidelines in 2006. We have received three rulings from the Court of Justice supporting the substance of the new guidelines of 2006. These rulings allow us to be on the safe side when discussions about the level of the fines continue.

At the beginning of the implementation of these Guidelines, there were opinions saying, “You are going well above what will be accepted by the Court of Justice.” Now we have possible decisions supporting our enforcement.

MR. STEUER: Chairman Chawla, I wanted to jump in and ask a question of you. I should point out that our Section is going to be having a particular focus in the coming year on India. And so we are especially glad that you could join us today.

I have a question about mergers. In some recent filings in India, it appeared that there were exempt transactions in which premerger notification was filed anyway, and those transactions were approved quite quickly. The examples I have in mind are Alstrom and Siemens reorganizations. Is this what really happened there; and, if it is, what does it mean for other companies that
are considering whether or not they should be filing?

**MR. CHAWLA:** Our regulations provide for certain categories where notifications are not required to be filed. Those two transactions involved only intragroup acquisitions. Intragroup mergers, amalgamations, were not exempt from the notification requirements at that point in time. When these cases came to us, we didn’t really lose time in approving them. In addition, about a month ago we revised our regulations to provide that intragroup mergers and amalgamations no longer need to file.

So the whole idea is that we will continuously, based on our experience, go on fine-tuning the regulations with a view to reducing the compliance burden, particularly in cases where there is really not likely to be any adverse effect on competition. That’s how we handled this particular issue.

**MS. GARZA:** Chairman Donahue, some of the states have continued to pursue per se cases against resale price maintenance after *Leegin Creative Leather Products*. Can you tell me from your perspective what we can expect the states to continue to do?

**MR. DONAHUE:** The states have gone through this before with their indirect purchaser statutes. They went all the way to the Supreme Court in *ARC America*, where the Supreme Court said that the states could have a different antitrust rule in that case, that they could collect damages for indirect purchasers, when the Supreme Court had said in *Illinois Brick* that you could not collect damages for indirect purchasers under the federal antitrust laws. So the states have done that before.

In the context of the constitutionality of resale price maintenance, whether it’s per se or not, I guess the argument is something along the lines—it’s a Dormant Commerce Clause argument—that because there have been Supreme Court cases which have held that pricing regulations in one state that have an effect on other states are unlawful under the Commerce Clause, that might apply in this situation. Those cases typically involved alcoholic beverages and a law that said: “You must post a price in our state, and you can’t sell to any other distributor in another state at a lower price.” There the Supreme Court said there is an extraterritorial effect, an effect not permitted by the Commerce Clause.

Resale price maintenance is different. First off, there is no price; there is no actual price regulation by the state. Secondly, because resale price maintenance may be per se unlawful in a state, that doesn’t mean that goods are sold at different prices. Prior to the Supreme Court’s decision in *Leegin*, there are plenty of manufacturers that had RPM programs out there that met the criteria in another Supreme Court case, *Colgate*, and lots of goods were sold and are sold at the manufacturer’s suggested retail price.

The key thing here is that you have to take this apart and look at what is resale price maintenance. What are the elements there? You need a good product, the manufacturer has to pick the right price, and it has to pick the right distribution system. If the manufacturer has a poor product or picks the wrong price, then the manufacturer has a problem with its retailers that *Leegin* isn’t

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going to fix. You know, they can have all the *Leegin* policies in the world; those retailers are going to discount that product because it’s the wrong price.

If the manufacturer chooses the wrong distribution system, then you are using resale price maintenance to, in effect, establish a cartel among retailers because you have this product distributed to too many retailers, they are all competing with each other to lower prices, and then you are using this policy to establish a cartel. I submit that’s unlawful in all fifty states. There’s no constitutional problem.

**MR. STEUER:** I’d like to throw out a couple of questions to all of our panelists and give everybody a chance to comment on them. One that I think everyone will be interested in is this: Occasionally counsel are accused of trying to game the system when they’re dealing with enforcement agencies. I’d like to ask each of you what some of the worst abuses are that you have seen and what really gets under your skin.

Sharis, would you like to begin?

**MS. POZEN:** I’m happy to. I think one of the things I’m sure you’ve heard from your folks as well is we still have parties today who will tell us one thing about their industry or their markets and tell the EC something different. I don’t think anyone should take for granted that we aren’t talking to each other, saying, “Did they say this to you and did they say this to you?” I think that’s trying to game us. Trying to play us one off each other and not allowing waiver so that we can work together, thinking that that’s efficient and effective and doesn’t get under our skin, as you say, is foolhardy. We used to always say we had pick-up-the-phone relationships with international authorities. In fact, there is now real-time cooperation.

I think, secondly, I’m a big believer that you come in with the facts that support your case and you come in and you admit your weaknesses. I think that is a much better way to approach us in trying to convince us of your point of view.

Those would be my tips.

**MR. STEUER:** Chairman Leibowitz, what annoys you?

**MR. LEIBOWITZ:** I agree with Sharis that the best advocates that come before the agency are ones that acknowledge that they do not have a monopoly on the truth and that there might be arguments on the other side. I think they come off as more credible and ultimately more persuasive.

But I would say as a whole we have a private bar—on both the competition and the consumer protection sides—that is incredibly talented and very ethical. I think we are fortunate.

**MR. STEUER:** Vice President Almunia, you’ve seen many lawyers from both Europe and the United States. What is it that gets under your skin?

**MR. ALMUNIA:** I have no particular complaints. I understand the responsibilities and the job of each other. I know we are not playing in the same part of the field. But these are the rules of the game. The important issue is our coordination, our cooperation, our dialogue. As I said before and as Sharis and Jon have just said, we are cooperating very, very well with other competition agencies. So I think, just in case, we are protected against some kind of bad games that some would try.

**MR. STEUER:** Chairman Chawla, I don’t know how many bad habits competition attorneys in India
have learned from the rest of the world yet, but are there things that you would warn against counsel who appear before your Commission trying?

**MR. CHAWLA:** Richard, just as we are learning on the job, our counsel are also learning by doing. So I think at this stage they can't be accused of gaming the system. But having said that, our law doesn't really provide for or encourage an adversarial kind of situation. But sometimes the counsel who appear before us—now, I don’t know whether they have learned this from you or from elsewhere—they sometimes tend to take very aggressive and strong positions, which are not really going to help the way we carry this forward and the way the jurisprudence evolves. So I guess we all will find a way to handle this as we go along.

**MR. DONAHUE:** This is a little bit inside baseball, but the e-discovery—we will hear things like “Oh no, we’re not creating a database of our documents. We have them all on paper.” “Really, 9 million documents you’ve printed on paper? Oh, come on!”

We’ve kind of had this experience where they’ll say one thing to us and then something completely different to the DOJ or the FTC about what format they are in. We know the stuff has been loaded into an electronic database. There are some compatibility issues we might have to deal with. But that’s one thing that gets under our skin. It really drives up our costs too.

**MR. STEUER:** Now, everybody spoke when we opened about some of the accomplishments that you’ve achieved over the past year. But I’d like to ask each of you if you could speak a bit about your top enforcement priorities for the coming year. If I may begin with Chairman Leibowitz?

**MR. LEIBOWITZ:** I’ll just cover a few.

On both sides of the agency, consumer protection and antitrust, technology issues will be in the vanguard. And we will be working together with our colleagues across the Atlantic on technology issues.

On the consumer protection side, we will focus on last-dollar frauds, foreclosure rescue scams, and credit-reduction scams. We have brought dozens of these cases in the last few years. With our partners, the State Attorneys General, we have been involved in more than 400 cases in that area.

On the competition side, health care will continue to be a critically important driver. One issue that we are beginning to consider involves REMS abuses. REMS is an acronym for risk evaluation and mitigation strategies. These are special protections for drugs that are known to have potentially serious risks. They are dangerous drugs, and you want to have additional safety protections. Additional safety protections make sense. But, under the pretext of concern for patient safety, it seems that some of the branded drug companies may be systematically denying potential generic competitors samples of their drugs by claiming that they cannot provide it to the generic drug manufacturer because the generic does not have adequate protection. This is going to be an issue that we are going to be looking at in the future.

You can read about many of these issues in our “Annual Highlights” brochure, which you can link to, with a picture of the four—now we are five—Commissioners, bipartisan, consensus-driven, and collaborative.41

MR. STEUER: Assistant Attorney General Pozen?

MS. POZEN: For me it will be a smooth transition to my successor.

MR. LEIBOWITZ: We are all delighted that confirmations are moving forward again.

MS. POZEN: It really is trying to ensure—I tried to do that when I started—and I would say probably more of the same. Our compass is set. It’s vigorous antitrust enforcement. That’s what we’re about.

MR. STEUER: Vice President, Almunia, what do you see for the year ahead?

MR. ALMUNIA: Of course, financial services continue to be a big priority, not only because of the restructuring of the banking system in Europe, but also because we are dealing with cases referring to the good functioning of financial markets and financial services. It is extremely important to avoid creating barriers or market positions that will not allow having more sustainable and efficient financial activities in Europe and throughout the world. We are dealing with some antitrust cases referring to financial markets and services, which will be a clear priority for the next twelve months.

The new technologies: The digital world, of course, is always a priority. We have discussed this morning some of the cases and some of the issues that are at the top of our agenda.

Let me recall that we also have a lot of work in Europe with the pharmaceutical sector. We carried out a pharma sector inquiry a few years ago. Probably in the next twelve months some of the cases that emerged after that sector inquiry will require some decisions on our side. I think this would be a very good step forward, always in this sector in very good cooperation with the FTC.

MR. STEUER: Chairman Chawla, what do you foresee for the year ahead in India?

MR. CHAWLA: The main priority I think we will push this year is cartel investigations, some of which are in the pipeline, because that will surely tell us whether we have cut our teeth or not. There clearly are some prima facie kinds of cases which we are looking at, so we should be able to deliver on that. That will, I guess, enhance our confidence and our skills in what we are doing.

Number two, on the antitrust side, we are getting a lot of stray and random information from all kinds of sources. We are in the process of trying to prioritize what sectors or activities we will examine at this point in time so that we get maximum output from the limited kinds of resources and manpower and time that we are able to devote, so that that makes a good impact on the kind of work and perception about the agency. This of course will necessarily have to be within the framework of the legal processes prescribed.

MR. STEUER: Chair Donahue, what do you foresee in state enforcement for the year ahead?

MR. DONAHUE: A couple of things.

One is we have a lot of things in the pipeline in dealing with horizontal core types of conduct—price fixing, bid rigging, that sort of stuff. Some of our attention gets diverted away from that because of all the mergers that we have been dealing with. So I think we need to be more selective in the merger cases that we pursue and really focus on some of our core things, because we
need to bring these other cases forward.

Obviously, health care is going to continue to be a major focus of our offices, in part because it’s inherently local, in part because it is very important to our citizens, and in part because in many parts of our states, health care is the biggest industry, by a long shot.

No matter what happens with the health care reform law, those ideas, like accredited care organizations and can you become more efficient about the way you do things, are still going to be there. There is still going to be a need to go and address the cost issues and the access issues involving health care, regardless of what happens here in Washington with the law. That is going to be a major focus of the Attorneys General.

MR. STEUER: This has been a tremendously informative panel. Thank you to all of our panelists.