Competition in the Context of Financial Crisis: Chair’s Showcase Session Spring 2012
How does competition law fit within the broader universe of national and international economic policy? An extraordinary panel of experts assesses the forces influencing policy and practice in the competition community and explores how competition principles can contribute to economic recovery, employment, and growth.

Roundtable Conference with Enforcement Officials Spring 2013
Top enforcers from the U.S. and Europe provide updates from their respective agencies. The panelists discuss collaborations among agencies, budget constraints, patent advocacy, and the appropriate balance of competition and consumer protection efforts.

Around the World in 80 Minutes: An Update from Key Enforcement Agencies Spring 2013
A distinguished panel of enforcers from Brazil, Canada, Japan, Mexico, South Africa, and the UK explore key enforcement issues in their respective jurisdictions, including cartels, mergers, dominance, compliance, advocacy, and international cooperation.

Interview with Mark Berry, Chairman of New Zealand Commerce Commission
The head of New Zealand’s antitrust agency explores the unique cooperative relationship between New Zealand and Australia, the challenges of serving as regulator as well as enforcer, the agency’s draft merger guidelines, and the issues involved in preserving domestic competition in the dairy market, where the government has established a national export champion.

Interview with Felipe Irarrázabal, National Economic Prosecutor of Chile
Chile’s chief antitrust enforcer provides updates on recent developments in cartels, mergers, and abuse of dominance, including Chile’s merger guidelines, the prospects for introducing a pre-merger notification regime, and strengthening cartel enforcement.

Interview with Dan Sjoblom and Christine Meyer, Directors General of the Swedish and Norwegian Competition Authorities
The heads of two key Nordic competition authorities answer questions on their priorities, cooperation within the Nordic region, and developments in cartels, mergers, and abuse of dominance.
Chair’s Showcase Session: 
Competition in the Context of Financial Crisis*

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RICHARD STEUER: In 2010, when I began to conceive what the Chair’s Showcase would be, we had an economy with no growth and no jobs, and it seemed impossible to ignore the financial crisis we were in. The question for those of us in the competition community, including lawyers and economists, was this: What good are low prices for consumers if consumers do not have jobs?

Enforcers all around the world were giving speeches at that time, which you will recall, about how part of the mission of competition enforcement was to create and preserve jobs. Just what did that mean and was that accurate? I undertook at that time to write an article that addressed jobs and antitrust. It raised more questions than answers.

* Edited for publication.
† Ambassador Schwab served as the United States Trade Representative from 2006–2009.
‡ Mr. Shapiro is also currently a Senior Consultant with Charles River Associates.
Today we are in a somewhat different situation. The economy is like a patient being discharged from the hospital. You are declared “cured,” but they always wheel you out in a wheelchair because nobody is quite convinced whether you can walk on your own. So we will see how strong the economy is.

Our topic is this: What is the role of competition in creating jobs and generating growth, and how specifically does competition law fit within the other economic priorities and economic regulatory schemes that exist in the world?

It is important to understand that each of us has more than one economic identity, and this provides a lens for examining our topic. We are consumers and we have the interests of consumers; but most of us are also workers; and almost all of us are also investors, whether through a retirement plan or some other mechanism, or we may own businesses as well; and we also of course are citizens and taxpayers of our respective countries. These interests are not completely aligned, and yet we carry them all the time.

Another reality today is that in our interconnected world, with great mobility for both jobs and the movement of capital, there is more than one kind of competition. Of course, there is the competition for sales among companies that we are all familiar with in the competition world. But there also increasingly is competition among workers for jobs, something that we were not as cognizant of before the last few years. At the same time, there is also competition among nations themselves for tax revenue, for capital, for factories, for power. All of this is interrelated. All of it goes into the policy hopper.

So what should be the role of antitrust? There are at least a couple of schools of thought on this. One is that the only goal of competition should be consumer welfare, which, of course, is not always defined by everyone as exactly the same thing, but we more or less know what we mean by this. Should consumer welfare as the goal of competition law exist in pristine isolation from every other economic goal that we know about? Or should there be coordination? Is isolation of consumer welfare as the only goal of competition just “straightening out the deck chairs on the Titanic”? Would coordinating with other goals beyond consumer welfare be selling out as competition advocates?

You may be asking yourselves: “This sounds like a lot of policy wonk stuff. Should I stay or should I go and make some calls?” It is important to understand that, whatever part of competition or consumer protection you practice in, you need to be in this room because increasingly these issues are being brought into the conversation. Whether it is merger review, or even litigation, it is important to know.

If you need a couple of examples, just think about the press reports recently about the AT&T/T-Mobile matter, where the preservation of jobs was argued on more than one side of the debate; the Tyson Food/George’s merger, where the Governor of Virginia wrote an impassioned letter about job preservation to the antitrust enforcers. This is not something that can be kept out of the conversation. Whether you think that competition law should ignore job growth or not, it is impossible to ignore it completely.

So what is the recipe for jobs and growth? Is competition law the answer? Is it at least part of the answer? And if it is only a part, does trade law play a role, or does tax law play a role? What other economic laws that regulate our economic life should play a role?

In short, what we are talking about here—and we do not take on any small issues for the Showcase program—is, for those of us in the competition/consumer protection community, “What is the meaning of life?”

We all like to think that what we do really matters. But we have just been through a rocky few
years, and it raises the question in sharp relief: How much does competition law really matter when the chips are down?

So to find the answer, I invited the most talented group of people I could assemble. I am going to introduce them only in the most abbreviated way because the introductions for this illustrious panel could easily take the entire two hours. I will do it alphabetically.

Frédéric Jenny is Professor of Economics at ESSEC Business School in Paris. He is a judge of the Supreme Court of France and Chair of the Organization for Economic Co-operation and Development’s (OECD) Competition Committee. And that is just scratching the surface.

Susan Schwab is a Professor at the Maryland School of Public Policy and was the United States Trade Representative (USTR) until 2009, and also a former Director General at the U.S. Department of Commerce.

Carl Shapiro is a member of the President’s Council of Economic Advisers (CEA); he formerly was Deputy Assistant Attorney General for Economics at the Antitrust Division; and he is also a Professor of Economics at UC Berkeley.

Joseph Stiglitz is University Professor at Columbia University; a winner of not one but two Nobel Prizes, not only in Economics but also the Nobel Peace Prize; and a former Chair of the President's Council of Economic Advisers.

Phil Weiser is Dean of the University of Colorado Law School; he was senior advisor to the National Economic Council Director until 2011, and another former Deputy Assistant Attorney General at the Antitrust Division.

To moderate this brilliant panel, I asked two exceptionally well-qualified experts, Jonathan Baker and Spencer Waller. First, Spencer is going to take the panel on an exploration of how these questions that I touched on play out globally. Then Jon is going to lead an exploration of how these questions impact national policy and practice.

Jon is a Professor at American University, Washington College of Law; he was the Chief Economist at the Federal Communications Commission (FCC) until 2011, which brings another important perspective that we will get into during the morning, and a former Director of the Federal Trade Commission (FTC) Bureau of Economics.

Spencer Waller is a Professor at Loyola University Chicago School of Law and Director of Loyola’s Institute for Consumer Antitrust Studies; he was formerly in the Foreign Commerce Section of the Antitrust Division and an author of a leading treatise on this topic.

Spencer, let me turn it over to you.

MR. WALLER: Thank you, Dick. It is great to be here with this distinguished panel. I am going to guide us through some of the international aspects of this, as Dick said, and then Jon will focus on some of the more domestic aspects.

Turning to the international economic issues, I want to start first with Joe Stiglitz, who has explored so many of these themes of financial crisis and globalization in much of his recent work. Joe, to what extent are national antitrust laws—ours, the European Union’s, anybody else’s—contributing to the recovery of the world economy, impeding it, or just not mattering that much at all?

JOSEPH STIGLITZ: Let me begin by talking about the financial sector because I think everybody recognizes the financial sector was at the center of the crisis. The financial sector, I think everybody also recognizes, is rife with serious competition issues. But, unfortunately, in the response to the crisis those issues have in many ways become worse.

One of the issues, obviously, is the degree of concentration in the banking sector, which
increased enormously after the repeal of Glass-Steagall, and in the response to the crisis we merged and we now have a more concentrated financial sector.

But it is not only that. We now realize that we have banks that are too big to fail, too interconnected to fail, and too correlated to fail. When you have financial institutions like that, there is an implicit government subsidy, and it leads to an uneven playing field for getting access to capital at lower interest rates—there is well-documented evidence on that—and it distorts behavior and imposes enormous costs on the rest of our society.

The second point—and this is related to the nature of the bailouts—is that not only is there increased concentration, but when the government paid out these huge amounts of money, it gave disproportionate benefits to some large banks relative to smaller banks, and that adversely affects competition in the financial sector.

Third, there are some longstanding problems that have been brought out: (a) credit and debit card fees, something we have begun to address but clearly not adequately enough; (b) there is a lack of competition in underwriting, and very little has been done about that; (c) and there is a lack of transparency, which undermines competition. This is a point that we may come to later. We now know there is another way by which competition can be impeded—having too few firms is one problem, but even when you have a large number of firms, if you have lack of transparency and lack of information, it leads to inelasticity of demand curves, which leads to lack of competition, and to monopoly profits.

So that is one set of issues that I would outline.

A second is when you go back to the origins of competition policy/antitrust, back to Teddy Roosevelt, they did not have the neoclassical model of competition that underlies much of today’s modeling. They were worried about monopolies and both the economic and political distortions associated with monopolies. Those are really very much at the center of discussions today because monopoly is a source of inequality.

One of the reasons our economy is not performing very well—indeed, the key reason—is lack of aggregate demand, and inequality leads to lower aggregate demand. When you shift money from the bottom to the top, people at the top do not spend as much as those at the bottom and that leads to lower overall demand, weakening the economy.

The third set of issues is that in the Great Recession, while we have not had the “beggar thy neighbor” kinds of policies of Smoot-Hawley that characterized the Great Depression, what we are seeing is an increase in non-tariff barriers—the use of countervailing duties and dumping duties, for example. This has been a longstanding problem: that the standards for competition that we use in trade policy are totally different from the standards that we use in domestic competition policy. Some calculations showed that if we used the standards that we used in competition policy, almost no dumping cases would prevail; and if we used the standards we used in dumping duties, almost every American firm would be guilty of dumping. So it is not just slightly different standards; the differences are really marked. This has been brought into focus as we start bringing countervailing duty and dumping cases in partial response to the downturn. The inconsistencies really become glaring.

WALLER: So in your view to what extent do we need to revise our conceptions of competition or competition law to continue the global recovery?

MR. STIGLITZ: I would add: we need to revise our laws not only for continued recovery but also to make sure that we do not have the kinds of crises that we have had before.
The first point is that the standards for competition that we ought to be using in the financial sector need to be different, because what is at stake is not just market share (leading to market power) but also financial stability, which costs taxpayers an enormous amount.

The second thing is that we now know so clearly in that industry that lack of transparency, lack of information, is a major barrier to effective competition. We ought to be focusing more on that as an instrument of anticompetitive behavior.

The third is, going again into the international context, that we have all these rules about trying to design a global system of fair competition. But when you have a government like the United States that implicitly and explicitly gave trillions of dollars to the banking sector in the midst of the crisis, there simply is not fair competition. Other countries cannot match America’s largesse. (The exact magnitude of the gift to the banks is a matter of dispute; what is clear, though, is that the amounts were enormous.) And it is not just the money that was given. The fact that the United States is able to give that money to American banks if they make a mistake, changes the playing field enormously. Just the potential bail-out results in an uneven playing field. We now have a situation where those in emerging markets say: “We’ve destroyed the level playing field.” It is also clear that we will not be able to rectify this very easily. This was a point that the United Nations commission I chaired, which looked at the recovery (the Commission of Experts on Reforms of the International Monetary and Financial System), emphasized very strongly.

A fourth aspect that we are beginning to come to grips with is the fact that in some of the international agreements, there may be restrictions that make it difficult for us to respond in the right way to the economic crisis and to make sure we do not have another one. Particularly, I am thinking about the financial service agreements, or the bilateral trade agreement like the one between Chile and the United States. In the case of the bilateral trade agreement with Chile, there is a restriction on their employing capital controls.

Fifteen years ago, it was part of the conventional wisdom that capital market liberalization was a good thing, even though there was no empirical evidence—in fact the empirical evidence pointed out that capital market liberalization led to more instability and did not lead to more growth. But since then, we now understand that capital market liberalization can be very dangerous. Even the International Monetary Fund (IMF) has changed its position on this issue in 2011. And yet, Chile is now being strangled by this bilateral trade agreement and unable to respond to the global crisis in the way that it would like to respond.

In the United States the concern is that there may be other kinds of agreements that are part of the financial service agreement and restrain the United States, Europe, or other countries—restrictions that may impede the pursuit of broader social goals, or even the goal of ensuring the stability of the financial system. In short, we have agreements which were driven by a particular mindset that today, seem inappropriate and out of date.

**MR. WALLER:** Thanks. You have brought up some great themes that have to do with both the different ideas of competition in the antitrust sphere and in the trade sphere and the different ideas of competition between domestic and international.

Fred Jenny, you work in the European Union (EU) and the French competition framework, which view competition in a much broader context than we do typically in the United States. The competition laws of the European Union include all the familiar U.S. antitrust components of anticompetitive agreements, abuse of a dominant position, and mergers. But they also include other prohibitions of the kind that Joe was referring to: restraints on anticompetitive activity by public entities; antidumping policies; and limitations on the provision of state aid, or subsidies, depend-
ing on how you want to call it.

In light of the financial crisis, the continuing state we are in, should all jurisdictions—the United States and others—conceive of competition policy as broadly as the European Union does, or is there something unique about the European Union that is just as important but sui generis?

FRÉDÉRIC JENNY: That is a big question. Let me start by saying that I strongly believe that there are no two competition laws that are alike. When you look across the world, you see differences either in substantive provisions or in procedural provisions. The Japanese are very keen on abuse of buying power, which is not recognized as a serious problem in other jurisdictions. Korea has a concern about the diversification of chaebols, which we do not consider to be problematic in other countries. The United States does not deal with state aid, as you mentioned, whereas the European Union does.

Before one gets to saying, “Well, we should abolish all those differences,” I think that we should be aware of the fact that they come from historical, legal, and constitutional issues in those different countries, and that they reflect the variety of countries.

If you look at the European Union, to get to your specific question about the European Union and the United States, it is very clear that the Constitution of the European Union is quite different from the Constitution of the United States when it comes to the relationship between the federal (or quasi-federal in the case of Europe) level and the Member States or the federated states in the United States.

In the United States, the interpretation of the Dormant Commerce Clause leaves a lot of freedom to states, for example, to enact state laws that discriminate against firms from other states.

The European Community was created from a set of countries that were protectionist and had a long history of government intervention in economic development. The desire to create a unique market required the ability to control the initiatives of nation states and to eliminate all of the protectionist tendencies. So it is completely unacceptable in the EU constitutional context for a country to discriminate against firms from another Member State.

So the fact that you do not have a control of state aid in your antitrust law does not reflect the idea that state aid does not raise a competition issue in the United States, but it reflects the idea that there is a political consensus not to deal with those problems.

In Europe, the integration of trade policy, competition policy, and state aid control has been very good for Europe.

I think that we have seen this difference play out during the financial crisis. The competition authorities in the United States have been very much left out of the discussions about if and how to save or restructure banks or firms. In the European Union, however, the use of state aid controls by the Directorate-General for Competition (DG Comp) has been quite important to check what Member States were doing in terms of either mergers of their banks, or in terms of subsidizing their banks, or sometimes even in terms of giving subsidies to firms in the real economy to try to spur growth. In this process, DG Comp has played a very important role in terms of reshaping or contributing to the restructuring of the banking sector, in order to ensure that it would be more resistant, more resilient, than it was before we had the crisis.

It does not mean that state aid control is perfect in Europe. I think that sometimes it is still something that we are developing. For example, sometimes it is difficult when you say, “Okay, you are going to have this subsidy. The subsidy can destroy competition. I am going to try to remedy this by telling you that you should not use this subsidy to develop your market share or to lower your prices.” I think it does raise some competition issues. But still, the fact that the competition author-
ity was (a) part of the executive, (b) in charge of controlling state aid, and (c) was linked with other policy I think has been hugely beneficial for Europe.

MR. WALLER: Perhaps an even broader question: We live in a world right now where antitrust is inherently national and the economy is increasingly global, and we live in a world where our antitrust authorities do their best to cooperate with each other. In your view, from the many different roles that you have played, is that enough or do we have to create true global rules; and, if we do have to, is there any chance we can get there?

MR. JENNY: That is a loaded question.

Clearly, what has happened over the last 10–15 years is that many more countries, more than 90 new countries, have adopted a competition law. We now have more than 120 competition regimes in the world. They are all national, of course, most of them; I mean there are a few transnational but most of them are national.

It does raise the issue: Even if these numerous national competition laws have a lot of common provisions, can transnational anticompetitive practices be controlled and sanctioned? A transnational anticompetitive practice is a practice initiated in Country A that has a negative effect on competition in Country B. For this kind of case, right now, there is no systematic procedure to deal with the problem.

If I am the competition authority of Country B, I am competent to deal with the restriction of competition in my country but I need some help because I do not have jurisdiction to go and investigate in Country A, even though that is where the practice was initiated. If I am Country A, I have the ability to investigate but not the incentive since the transnational practice affected competition in Country B but not in Country A.

So we have been through phases. One of the phases has been to say, “Well, let’s try to develop voluntary cooperation between competition authorities of different countries.” We all know that there are costs and benefits to cooperating. Depending on the distribution of costs and benefits in a cooperation agreement, participating countries are going to decide to cooperate or not to cooperate on a case. If we are dealing, let’s say, with an international cartel, and Country A and Country B are both victims of this practice, then they have a common interest in sharing the cost because they are going to get the benefits of this cooperation by enforcing their respective laws.

If, on the other hand, we are dealing with an export cartel from Country A to Country B, it means that the investigation is going to be in Country A but the benefit to Country A is going to be zero since there was no restriction of competition on its markets; the benefit of the cooperation is all going to be for Country B, which will be able to implement its law and eliminate the restriction to competition in its country. In such a case the competition authority in Country A is likely to say, “I don’t feel like cooperating.” Or, rather, in a more sophisticated version, it is going to say, “Oh, I’ve got to prioritize. I’ve got limited resources, so I am going to use my resources to what is most important to my country. It just happens that investigating on your behalf is not exactly on the top of my list.”

We have had all over the world a considerable number of cases like this. To take a few:

- The United States has refused to cooperate with Brazil when Enron colluded with some other firms to rig the bids for the privatization of Eletropaulo Metropolitana.
- Another example is in Joe Stiglitz’s book, *Globalization and Its Discontents*, where he recounts his experience at the Council of Economic Advisers. The aluminum cartel was an extremely good example, where not only there was no cooperation, there was actually the
The creation of an anticompetitive practice in the United States, the cost of which was going to be borne by all the users of aluminum, which include, by the way, a lot of developing countries.

Recently at OECD, Turkey came to the Competition Committee and said, “I have been told that I should cooperate more with other jurisdictions. Let me tell you what happened. I had two export cartels from Europe into Turkey, one on coal and the other one on electrical appliances. In both cases I asked for cooperation from the EU authorities. Both times I was told, ‘(a) we don’t give secret information to other countries, and (b) we don’t have time to do it. Good-bye. Go away.’ So clearly the system doesn’t work.”

It works in some cases, but there are many cases, important cases, where it does not work. I think that there are two things that are required to improve the situation. First, one may ask whether it is admissible to allow government-sponsored export cartels, which exist in many countries. A current example is the Canadian potash cartel, which victimizes a large number of developing countries, such as China, India, or Brazil. My answer is that we should agree that governments should refrain from sponsoring or even tolerating anticompetitive export cartels. But eliminating state-supported cartels is not going to be enough.

Second, we should look for ways to improve voluntary cooperation and ways to improve consistency of competition law enforcement throughout the world. There are many different techniques to improve competition law enforcement at the international level that could be explored. It could be, for example, mutual recognition of judgments, which would allow some country not to have to restart an investigation but just to base its case on what has been challenged in another country.

But there is a need for the international community to agree to some kind of governance of global markets; we need to bridge the gap between the globalization of economic markets and the fragmentation of legal orders if we want international trade to develop.

MR. WALLER: Before we move on, I just have to get your reactions to something that is specific to Europe. We have the rare circumstance where a competition enforcer, Mario Monti, is now the Prime Minister of Italy.* He has said in the press that the cure for Italy’s economic woes—and I think perhaps Europe more generally—is more competition and for Italians to get used to competing as an important part of the continuing recovery. I just want to get your quick reactions to that.

MR. JENNY: In the United States, you do not have the benefit of having an economist as your leader. Italy has, rightly I think, particularly given the economic crisis, been wise to select Mario Monti for Prime Minister. He could push a much needed reformist agenda.

But let me add another point. When one looks at competition law enforcement—and we have done quite a bit of study of this at OECD, it is very depressing to see that competition law enforcement does not seem to make much difference to any macroeconomic indicator. It may be because there are measurement errors that do not allow us to see the positive effect of competition on those macroeconomic indicators but it may also be that competition law enforcement does not have a strong influence on the intensity of competition in markets at the aggregate level.

* Ed. Note: Mario Monti is no longer Prime Minister of Italy.
But there is something that makes a big difference for the intensity of market competition. It is deregulation. Irrespective of the effect of competition law enforcement, deregulation promotes productivity and fosters growth. In Italy, and in many countries in Europe, the sectors that are the least deregulated and where there is the least potential competition, because they are often non-transferable services, are local services. If you want to infuse a culture of competition, if you want to show that you are committed to opening up the economy, where do you start? You start with things that everybody knows about—maybe the taxis, maybe the hairdressers—as a symbolic gesture to say, “I’m serious about deregulating, opening the economy to more competition, and I know that, together with other factors, in the long run this is going to help the competitiveness of the country.” So I think that Mario Monti was quite courageous and quite right when he pushed the deregulation agenda in Italy.

When you try to deregulate, you face very fierce lobbying by those who want to keep enjoying the protection offered by regulation.

MR. WALLER: Thank you so much, Fred.

Let’s turn to Susan Schwab, who has dealt with competition issues and everything else in the international trading system in her day-to-day role as head of USTR.

I want to go back to some of the comments that Joe talked about. He just talked about the different way we look at competition in the trade system and in the antitrust world. Is there any realistic way to reconcile these differing values? He used the example of antidumping law. Could we realistically revise our understandings of antidumping law at either the World Trade Organization (WTO) level or at the national level, to make it look a little more like predatory pricing? Or is that just not in the cards because trade law is simply different and addresses different issues?

SUSAN SCHWAB: Probably not in the cards. Speaking as a non-lawyer, I think you need to look at trade policy and recognize it is something of a hybrid. Certainly in the United States, but also in my experience in Geneva at the WTO and previously at the General Agreement on Tariffs and Trade (GATT), you have lawyers and you have economists. In the United States you have foreign policy experts involved, you have politicians involved, and never the twain shall meet.

One of the reasons we are set up the way we are set up, at least currently, in the United States, and we have our trade policy configured in the Executive Office of the President, is because you have multiple agencies in the U.S. government. Plus, courtesy of Article I, Section 8, you have the executive and legislative branches interacting here, all with legitimate interests in trade policy.

When you look at our antidumping and countervailing duty laws, with countervailing duty laws being the anti-subsidy laws, they are the most legalistic of our trade laws. The fundamentals as we know them today were put down on paper in the Tokyo Round negotiations in 1979. The United States was the principal drafter. The principal drafters for the U.S. side came from the steel industry in the United States, and they were attorneys deployed by the steel industry.

Interestingly enough, today the principal users of antidumping statutes, antidumping actions, are India, Brazil, and China—generally against each other, by the way, or against the United States and the European Union. This is sort of an evolution of the use of these practices.

It is also worth noting that up until 1979 the operation of the U.S. antidumping laws resided in the Treasury Department. In 1979, part of the price that Congress exacted from the Carter administration Executive Branch for enacting the Tokyo Round Multilateral Trade Agreement was moving the antidumping determination and the anti-subsidy determination from the Treasury Department to the more industry-inclined Department of Commerce, again to give you a sense of
the relative politics in the United States underlying this statute.

The determination, for those of you not familiar with this wonderful arcane subject, the bases for determining dumping are as follows (we have three bases unless you are a nonmarket economy): (1) the product is being sold at less than the cost of production; (2) it is being sold for less in the market where it is being supposedly dumped than what it is being sold in the home market; or (3) it is being sold for less in a third-country market than in the target market.

If you happen to be a nonmarket economy, then we find a proxy country that is a market economy and we decide that you should be as competitive as, or as uncompetitive as, that proxy market. Then the International Trade Commission looks at whether there has been material injury.

So the chances of unscrambling the eggs in this particular case are pretty slim, I would say.

**MR. WALLER:** Let me go back to some of the ideas Fred was commenting on. On the international side, there is obviously no competition code that is part of the WTO system. It was originally proposed, all the way back in the 1940s, as part of the International Trade Organization (ITO) that was never passed by Congress. Bits and pieces of antitrust-type issues reside in various places of the WTO and pop up from time to time in individual disputes that are settled by the WTO panels.

What are the prospects and desirability of having a more formal set of antitrust-type rules embedded in the WTO system? In your view is it a good idea? And, I guess more importantly again, is it ever going to happen in our working lifetime?

**MS. SCHWAB:** I would say as a trade policy person and a policy wonk, my first desire right now is for the WTO and the trading system to move beyond the Doha Round, which for those of you who follow it, the 150-some-odd countries who are members of the WTO have been stuck for the last ten years trying to negotiate the Doha Round of Multilateral Trade Negotiations. It has been stuck. It is dead.

The biggest threat facing the multilateral trading system currently, quite frankly, is not anti-competition, but the Doha Round itself. Unless and until we can move on beyond that, all of the rest of this stuff is just academic. Setting that aside, the chances of us getting to “yes” on this are slim to none.

Where we do see some action that could conceivably at some point reverse-integrate, because we have been stuck in the multilateral negotiating front, is a proliferation of bilateral and regional deals. We, the United States, are negotiating the Trans-Pacific Partnership (TPP) with eight other countries. We have been talking about a trans-Atlantic negotiation, another potential free trade agreement.

Three free-trade agreements were enacted into law last year, one with Colombia, one with Panama, one with South Korea that had been negotiated in the Bush Administration, and was passed by Congress under the Obama Administration.

One of the things in the TPP negotiation is something involving state-owned enterprises and state-supported enterprises. The Australians have coined the term “competitive neutrality.” That is probably as close as I think we are coming to something that addresses this general area. It is largely focused on China, but not exclusively, and has to do with state-owned and state-supported enterprises.

**MR. WALLER:** In the course materials there is a terrific article that Susan wrote for *Foreign Affairs*, entitled “Beyond Doha,” which explores these themes in greater detail.

Let’s turn it over to more of the domestic side and the interplay of competition and other poli-
cies. Jon is going to take it away from here.

JONATHAN BAKER: Thank you, Spencer.

I would like to begin with a question for our Section Chair. Dick wrote a terrific article for Antitrust magazine where he points out that efficiency-enhancing conduct tends to lead to sustainable job growth, while anticompetitive conduct tends to harm output and, with it, employment. I am wondering how far we should go with this thinking and whether you would recommend that courts and antitrust enforcers consider the likely effects on industry employment within their jurisdiction when they are evaluating firm conduct.

MR. STEUER: I would, but to a limited extent. When in the course of evaluating a deal or in the context of litigation there are pro- and anticompetitive effects that are being weighed against one another, if the procompetitive effect has the effect of creating or preserving jobs, that should not be entirely disregarded. At the same time, if, as sometimes happens, the anticompetitive effect arguably preserves jobs, that should be discounted in an antitrust analysis. If there is any part of government policy that treats anticompetitive practices which preserve jobs as a social good, that should be outside the context of an antitrust analysis. That is for others to weigh. There are mechanisms in some sectors of the economy where those things are, in fact, given weight.

Today we have rather an ad hoc process for doing that, in this country at least, and I think the open question, which is yet to be addressed, is whether it would be a good thing or a bad thing to have a more structured way of coordinating these different considerations. Or is the structure that we have in place right now—where there are various mechanisms, like the Committee on Foreign Investment in the United States (CFIUS) and so forth, that work in isolation of an antitrust analysis—the right way to go?

I am hoping that we will get more enlightenment from the rest of this panel.

MR. BAKER: We will have some more enlightenment on institutional details in a moment. But before we get to that, I want to ask Carl something about a comment you made in a speech you gave about three years ago at an Antitrust Section conference when the recession and the financial crisis were at their worst. You said that “keeping markets competitive is no less important during times of economic hardship than during normal economic times.”

I am wondering whether there is any dissent from that proposition. Since you came to Washington this time around, how often have you heard anyone take a different view and say that we should let competition concerns take a backseat to protecting jobs or that we should restrict competition to promote economic recovery or economic growth?

CARL SHAPIRO: When I came to D.C., to the Department of Justice (DOJ) actually—that was March of 2009, about three years ago—it is good to remember the economy was really going downhill and it was very scary times. The stock market, employment—all these things were looking just very, very scary. So, coming to the DOJ, I thought, “There could very well be some backlash from people the way we saw it in the Great Depression, saying, “Competition is not a good thing, we need to control that.” In fact, I relied heavily on the great book by Ellis Hawley, The New Deal and the Problem of Monopoly. I was hoping we would not fall into that trap. I just discussed what an unwise set of policies that was, walking away from competition in the Depression.

Well, let’s spin the clock forward three years. That really has not happened. We did not see a repeat of that. We also did not see a repeat of the Great Depression, although obviously it has
been a recovery that has not been as strong as we would have liked, in large part because we are recovering from a financial crisis.

So, in a sense, I would say to folks here you should declare victory, in that the principle of competition held up very well during a time when it could have been under more attack, and was, seventy-five years ago.

Then, more positively, what have I heard? How do competition issues play out? How has that actually evolved? Certainly, since I have come to the CEA, over the last year or so, there is an intense desire to help the recovery along and, of course, focus on jobs. If you think of that as a primary policy goal, how does that relate to competition?

I think one of the things that we have stressed at the CEA is the tremendous importance of young startup firms in creating jobs. Here is a statistic that I think is quite telling. This is from work by Haltiwanger and others. In 2005—so this is before the crisis—the U.S. economy created 2.5 million new jobs in the private sector on net, net job growth that year. Of those 2.5 million, if you look at the firms that were startups, defined as they were in the first year, they created 3.5 million jobs on net. The rest of the firms lost 1 million. Now people are updating this and looking at other years.

But it has long been known we have an extremely dynamic economy in terms of jobs and in terms of businesses, in terms of startups and failures of businesses, and in terms of people flowing in and out of jobs. There is the Job Openings and Labor Turnover Survey (http://www.bls.gov/jlt/) that is done regularly and shows tremendous inflows and outflows.

So one of the lessons that I take away from that and we have been pushing is the importance of helping firms get started. This raises a whole bunch of issues, since startup activity of course was weakened by the financial crisis. For example, startup companies often rely on equity from their home historically in order to get financing. Well, a lot of that has evaporated. And of course credit tightened substantially following the financial crisis. So we have had a whole series of policies to help access the capital. The Small Business Administration of course works on this and has its own loan program. There are a number of policies.

The startup work I have described relates directly to the things we do in antitrust in that I think of it as a generalized lowering of entry barriers. We often ask, “What do we do in industry analysis? What are the entry barriers in the industry; are they high, are they low?” We think about that for mergers. The fact is there are a lot of policies that kind of generally raise or lower entry barriers—not in particular industries, but across the board. So we have been pushing in that direction, and I see there is a definite competition side to that.

For example, one of the unfortunately relatively few bipartisan pieces of legislation, the Act that the House just passed yesterday that will go to the President for signature, has to do with what is called “jumpstart our business startups,” something like that. So it has to do with basically relaxing in various ways some of the SEC rules and some other rules that arguably have stood in the way of IPOs and startups. We pushed, in particular, for crowdfunding, to open up for more crowdfunding, which I know is very popular in the tech community, coming from Berkeley. That is going to be possible now. The President will sign that soon.

I will stop there, but we can return to this.

MR. BAKER: We in the United States are not as lucky as the Italians to have an economist as our leader. But we do have the next-best thing. Our President has the Council of Economic Advisers who work in the White House. You moved from a competition agency, Carl, to a White House agency that has a broader economic portfolio. I am wondering how that move affected your
views about the role of antitrust and competition policy in formulating national economic policy.

MR. SHAPIRO: Well, I have to tell you, I think it was six months ago, I got a call from Mario Monti. He wanted to come visit me. We knew each other from when he was DG-Comp and I had done various things. I thought: “Oh, that’s very nice.” This was well before anybody had a sense he was going to be the leader of Italy. This man came and visited me in my office. I am in the Executive Office Building right next to the White House. We had a nice chat. He was asking about how things work at the CEA. Of course he has long had a broader set of economic interests than just competition policy. Then things spun forward and he is now the Prime Minister of Italy. I noticed the next time he came to visit he was meeting with the President of the United States instead of me and I did not see him. [Laughter] I was delighted, of course.

I brought along a copy of The Economic Report of the President, which the Council of Economic Advisers puts out every year. It gives you a sense of some of the key issues we see on the table. This is on our Web site. I would also say I am very fortunate that Craig Peters, who is from the DOJ Antitrust Division, is on detail over to the Council of Economic Advisers as Senior Economist. So we have a lot of strength actually in competition issues at the CEA, at least between the two of us and others.

From my point of view, we first have the fact that nobody really talks against competition. So it is a question about how do those principles come up more broadly as we do our job. Let me give one example. Craig and I and others are continually looking for and finding opportunities to inject competition and industry analysis ideas into the policy mix and to steer things in the right direction, whether it’s health care or financial markets.

Let me give an example in housing. We actually spend a lot of time on housing issues because it is such an ongoing challenge to the recovery actually, the fact that housing prices have not recovered, with so many people underwater on their mortgages. One of the things we have been pushing for, the Administration has pushed for over the past three years, is to help people refinance their mortgages. Interest rates are very, very low now, at historically low levels. And yet there are obstacles. If you have a mortgage and it is for more than your house is now worth, which unfortunately is the situation of 10 million people in this country, it is hard to refinance under those circumstances.

Fannie and Freddie (Mac) have had some programs to allow refinancing even when the loan-to-value ratio is above 100 percent, when you are underwater. Usually they have a limit of 80 percent in terms of what they will allow. But it turns out that the programs have given a very big advantage to your current bank, basically. If Wells Fargo is your servicer, just to use that as an example, it is much easier for them to do a refinance for you than for another bank to come in to do it. This has to do with the way various liabilities are associated, so-called representations and warranties.

So we realized—we were not the first people to realize this—that the way the program was structured, for some legitimate reasons, it was not really good. It did not promote competition among banks to do the refinance. The consequence was that there was not as much refinancing, even though rates are so low, as you would expect. And, when it did occur, the incumbent bank, if you will, or servicer, would charge more because they had—I will not say monopoly power, but they had some pricing power because of the higher costs or obstacles to anybody else coming in to refinance the homeowners’ mortgage. This is both disrupting monetary policy, because one of the ways lower interest rates are supposed to work is through the housing market and financing to put more money in people’s pockets. It is not helping with the housing market generally. It is basically allowing banks to get some degree of market power.
So we have continued to push for changes in that program. It is not easy—nothing in housing is easy—because it is very tricky in terms of Fannie and Freddie not wanting to give up the right to go back to banks that had originated loans based on fraud or other faulty problems and basically “put back the loan to them”—that’s what it’s called—so that the default risk stays with the bank. So there are tricky aspects, but we are trying to harness competition there. Everybody says, “Yeah, that’s great, competition is great, you should do it.” But then there is a debate about the nuances of how to do it. But competition is great. It is like a magic word, so we should use it.

MR. BAKER: That is good to hear.

Phil, you made a similar move, from a competition agency at the Antitrust Division to a White House agency when you went to the National Economic Council. I wonder if you have any comment on the same question I just asked Carl.

PHILIP WEISER: I have a couple of different comments.

First, I need to acknowledge both you and Carl. When I went over to the National Economic Council, Jon said to me, “Phil, the best policymaking in the White House that I saw is when the National Economic Council worked hand in hand with the Council of Economic Advisers.” That was familiar advice because the best work at the Antitrust Division is when the lawyers work well with economists. So having had the experience in an antitrust agency of working well with economists, I was well suited to go over to the White House.

That was very good advice. Having had that training, much of what I worked on was really about figuring out how to weave together sound policy and sound economics within legal constraints and within political constraints. One important principle, having started at the Antitrust Division, is knowing about true north. So this gets back to Carl’s point about competition. You can always say the magic word, and it is powerful, but can you actually do it? Because the truth is there are enormous pressures from the interests of producers. But the antitrust regime is all about thinking about consumers and having the discipline and rigor to say, “How does this actually impact consumers?” Carl’s example of people seeking to refinance their mortgages is, in effect, a “true north” perspective. I was lucky to start from that, because if you get thrown into a difficult regulatory environment where you are hearing from a lot of producers, it is not always easy to sort through and say, “Where’s true north? How does this affect consumers?”

What is also important about the antitrust discipline is you ask yourself about the people who are not represented. Because antitrust has a discipline and rigor and a healthy skepticism, if you will, sometimes of competitor complaints, you say: “Okay, there are entrepreneurs who aren’t even here yet. What do they think?” This gets back to Carl’s point about funding for entrepreneurs.

So the perspective on innovation, on entry, on people who are not coming before you, was something that I at least was able to keep in mind. A lot of that comes from the training, having spent two tours of duty in the Antitrust Division. Had I been thrown into economic policy without that, I would not have had that discipline and rigor. So from my perspective, really, the gift of starting out at the Antitrust Division is one that has kept on giving.

There is another level, too, which is really important, which is not just the knowledge you get but the relationships you develop. Carl mentioned bringing Craig over to help out. The federal government has a lot more complexity than many people from the outside think. People from the outside say, “Oh, you’re all in the federal government, right?” as if it is one happy family. Not so much. It takes a lot of effort to bring together different people across different agencies. Bringing particularly people in from competition agencies and empowering their voice was something else I
was able to do because I had such a healthy respect for what they could bring to the table.

A couple more things, too, that I want to get to. I think Fred’s point was very helpful about regulation. The other thing you get from a competition perspective is a healthy skepticism about how regulation gets used. I have heard once the good expression, “It should be like garlic in cooking, used very carefully and thoughtfully.” That is something that has again been a huge boon to our economy, is thinking critically about the role of regulation.

Here I will just end with a nod to Fred Kahn, someone else who had his career shaped through a competition policy lens and was able to bring that to regulation and really accomplish a lot with that.

MR. BAKER: Then let’s talk a little about some of the institutions by which competition policy is implemented in the United States. A great deal of that operates not just through the antitrust agencies but through sectoral regulators. So there are the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the banking agencies, etc. These agencies are all concerned with competition. But Congress has told them, to pick up on your metaphor, to use a more complex compass, that they also should consider other public-interest values. They vary by agency, but they might include ensuring the diversity of voices or meeting community needs, etc.

At the same time, we also have two federal agencies, the Antitrust Division and the Federal Trade Commission, that focus exclusively on competition—or in the FTC’s case, also on consumer protection. So does this institutional design enhance or lessen the attention that is paid to competition in federal regulation and policymaking as a whole?

MR. WEISER: I believe it is critical to enhancing and protecting competition policy. There are often proposals, and different countries have different regimes that we should talk about—I know that Fred has got some very valuable perspective on that—which do try to add more elements to the mix, and even say to an authority: “Balance the effect,” to use Dick’s point, “on jobs,” or “balance the effect on, in Canada, the Inuit people,” etc.

The challenge, if you try to ask the competition agency to take on more and more of these tasks, is it is difficult to remain disciplined about what is true north. Often you will find yourself tempted to try to mix it all up and mush it all up. Part of the challenge in keeping the rigor and discipline is thinking hard about consumer welfare and keeping that constant from impacts on jobs or on other values.

So I am a firm believer that our current institutional design serves consumers and competition policy very well. To the extent there are other values—say in the financial sector or in the media sector—it is important to have different agencies charged with vindicating and protecting those other values, whether in prophylactic regulation, or even case-by-case decision-making, with a second review. There are obviously temptations—“Wouldn’t it be more efficient if you combined them both?” But then you have to ask the question: Are you going to keep these values separate or are you going to end up with a less transparent, less effective, and potentially compromised system? I worry a lot about that.

Let me give one example. CFIUS is a regime set up for national security and it is totally separate from the antitrust review. But if you combined those two, you would end up with, I would say, a very difficult animal, where you would be asking the same agency to pursue two totally different goals. It would then have certain times when it might not be able to fully know or say what the reasons were. From a perspective of the common law system of antitrust we have, where reason-
giving, transparency, and procedural fairness are all so hardwired into the system, this would be to me a real setback and would have a lot of unintended, unfortunate consequences.

MR. BAKER: Carl, did you want to comment on this?

MR. SHAPIRO: Yes. Let me just jump into that because I am the person at CEA who is involved in the CFIUS cases, as it happens, which is a classified process. Having done plenty of Hart-Scott-Rodino (HSR) types of things over the years as well, and a small number of CFIUS cases now, I do not see that they should be combined at all. There is a different set of goals. There is a different set of expertise that is involved in terms of evaluating things. So it seems to me that it is right to keep them separate. And there are different degrees of confidentiality. Having lived that, it just seems to me it does not make sense and it is really appropriately separated.

MR. BAKER: Fred, did you want to add something?

MR. JENNY: Yes. I wanted to dissent a little bit, respectfully, and to try to bring some controversy in this debate. What you said describes very well and very convincingly the situation in the United States where you have a Council of Economic Advisers, which is composed of economists who know about competition. But this is not the typical circumstance everywhere. In many other countries, you actually have to promote competition; it is not always obvious in the minds of policymakers that competition is good. Competition authorities advocate to a certain extent for competition. But they do so somewhat clumsily.

When you start from the standpoint that you are only interested in consumer surplus and you do not care, or you do not care much, about producer surplus, which is what competition authorities tend to do, you are likely to be faced with a strong opposition. The business community is immediately alerted to the fact that you are the enemy. The politicians will consider that you have a very limited scope of vision, whereas they defend not only the welfare of consumers but also the welfare of firms and workers. Simultaneously, when you advocate your independence from the rest of the state apparatus, as competition authorities do, you do two things. You give reassurances about the quality of your decisions since they will be fair and not politically motivated. But by insisting on your independence from the executive, you also insist on your political irrelevance and in so doing create a lot of difficulties for your advocacy function.

There are different models. I will start with the EU model, for example. The Commissioners who decide on competition cases are the members of the executive of the EU. As such, they deal with all kinds of economic issues, such as industrial policy, consumer policy, trade policy, etc. If each Commissioner has an area of specialization, they talk among each other. So competition policy is integrated into the economic policy.

I think that the combination of wanting to have independent competition agencies that look only at consumer surplus, and are biased in favor of consumer surplus rather than adopting a total welfare surplus approach, has in fact slowed down the acceptability of competition in a great many countries.

MR. WEISER: This is a very important point. As we look at other countries around the world, we cannot be blind to these considerations. What I would say on that is there is an important role for political leadership and savvy about building a constituency and building a case. What Carl described is—we should not take this for granted—the blessing that we have in this country, that competi-
tion and entrepreneurship are part of our DNA. So we can kind of take it for granted. Other coun-
tries, not unlike, say, John Marshall building the case for judicial review in our court system, have

to find a way to build the case and get there.

My point still is, even if you are in those other countries, it is important to still know where true
north is.

**MR. BAKER:** Let me turn to Joe, because Joe was the Chair of the Council of Economic Advisers
and so sat in the same kind of position that Carl is in now. How did you take into account com-
petition policy in formulating broader goals?

**MR. STIGLITZ:** We had exactly this issue in telecom; there was very heated debate whether over-
sight should be just with the Department of Justice, just with the FCC, or both. We came to the
view, and I think correctly, that it should be in both.

One of our concerns, which has not been raised so far in today’s discussion, is about the FCC
being captured. The Department of Justice really does have a commitment to competition; it is in
its DNA. We were not convinced that the FCC had it so strongly in its DNA. It is important, though,
that the FCC (or the Federal Reserve, when we are looking at financial concentration) has a clear
set of criteria that it is examining.

I mentioned before that in the case of the financial sector we should be asking questions, not
just in terms of conventional approaches to market concentration, but in terms of the implications
for financial stability, taking into account the problems posed by too-big-to-fail, too-interconnect-
ed-to-fail, and too-correlated-to-fail financial institutions. In the case of media, the issue is not just
advertising, which is what you might want to focus on if the media were just an ordinary commodity
or service, but rather things like the availability of a diversity of perspectives. The media are a
part—one might even say at the center—of the marketplace of ideas that I think is absolutely crit-
ical.

So in making judgments about whether there is insufficient competition, it should be the high-
est of the standards—the conventional competition standard and the “special” standard that
relates to these industries that I have just discussed. There is no tradeoff. Part of the reason I
believe in this is that there is very little evidence of significant economies of scale and scope. And
that means that there is little if any cost in making sure that the sectors have many, small firms. I
have not seen any convincing case that backing off from strong competition standards would have
significant efficiency benefit as a result of economies of scale or scope.

**MR. BAKER:** So Joe wants to prioritize competition. Susan, do you feel like that is an appropriate
way to go?

**MS. SCHWAB:** No. I have this overwhelming urge to play the turd in the punchbowl in this conver-
sation here. [Laughter] You are just being all too lawyerly. I am going to inject a little dose of trade
policy and trade politics reality here.

First of all, the following observation. It was your comment about CFIUS that set this off.

**MR. WEISER:** Uh-oh.

**MS. SCHWAB:** No, no. I am agreeing with you, agreeing with everything that you said. When I was
United States Trade Representative, I was the USTR’s representative on CFIUS.
As you know, there is a limit to what you can say about CFIUS because it is classified. But there is public data that show that since the Exon-Florio Amendment was passed in the late 1980s, several hundred cases have gone before CFIUS. There are, I believe, two cases where the U.S. Government is on record having said, “No, this foreign acquisition of a U.S. target can’t take place.”

The United States in all of these cases, whether we are talking about antidumping, countervailing duty laws, even in CFIUS cases, we tend to be very, very transparent, very above-board in how we go about doing these things. Our trading partners pick up the worst of our habits and proceed to use the least-transparent versions of them, whether we are talking about antidumping, whether we are talking about anti-competition, regardless of what we’re talking about.

So let’s ratchet back to the example that we were starting with. We were walking down this road about telecom deregulation. From a trade policy perspective, Judge Greene’s decision in AT&T—and I am out of my natural lane here—but from a trade policy perspective, what we did by delinking the supplier of the service and the producer of the equipment was we unilaterally gave away a major trade concession that we could have used, speaking as a former trade negotiator, to open foreign markets in a procurement sense, that we are still, thirty years later, paying for. There are still negotiations going on in government procurement in the telecom sector where governments control the provision of telecom services and they provide special favoritism to their national-champion suppliers of the equipment.

Those of you who in the last couple weeks have been reading about Bell Labs, the former—speaking about entrepreneurial activity, investment in basic research—RIP, Bell Labs, and for those of you who travel, you will know that we do not actually get in the United States today, we do not actually benefit from, the highest quality. We may have among the least expensive telecom/IT services available. We do not necessarily have the highest technologically available services.

So I put that out there saying that there are linkages here. In our work in the trade policy arena, the Department of Justice and our antitrust experts do sit at the table in the interagency process. They tend not to be the most vocal or engaged. CEA is at the table. But again, I just sort of put this out there because we are having fun with this topic.

MR. BAKER: I see both Phil and Carl are very excited now. Go ahead, Carl, and then Phil.

MR. SHAPIRO: I am glad we are focusing a little on trade issues because, as I said before, competition is kind of “motherhood and apple pie.” But one of the exceptions—there are several, I am sure—has to do with when it is competition from abroad, and particularly when it is perceived as unfair in some sense. That is when things get tricky.

Certainly, China has had huge growth, and it has been particularly in the last decade exporting to us, since they acceded to the WTO, during the same period of time when our manufacturing jobs have fallen in a way that they had not in decades previous to that, even before 2007–2008. So this is an ongoing hot spot. You definitely get into these issues about “Well, are they really meeting their WTO commitments?” as well as other things, like currency, which keeps coming up, government procurement, and intellectual property. So that is where it is not enough to say the magic word; it is what does it mean when you put it into effect?

In a way going back to your first question for me, Jonathan, certainly I have seen—well, you lived through, I am sure—policies that may look pretty good but are nuanced from our point of view still prove to be hazardous because they will be reflected in a way in another country that we think
really will not be with the same nuances and in a way that kind of undermines the multilateral trading regime. USTR is often bringing that point up, and it does not matter whether it is a Republican or Democratic administration. That is a reality. So that is kind of a rich ongoing area. I am sure Joe saw this when he was at CEA too.

**MS. SCHWAB:** And competition is global.

**MR. SHAPIRO:** Yes. And China, as a nonmarket economy, really does raise some very tricky issues that I think the academics have to work on, the practitioners have to work on, and will be with us for a while.

**MR. WEISER:** You had two great points.

The first point is when I was the Deputy in charge of International at the Antitrust Division, I was very deeply sensitized to this point, which is whatever we do here, there is this risk that it gets unintentionally or intentionally misinterpreted and abused elsewhere or the worst attributes get picked up on. There is a lot there to reflect on. It is a very challenging, and I think underappreciated, point.

So one issue here, for example, is however we talk about intellectual property and the intersection of antitrust, it is obviously a different discussion for other countries, which may say, “Oh, you’re rich in intellectual property. We’re not. We’ll use our antitrust regime to basically justify whatever we want to do.” That is a risk.

It gets a little back to Fred’s point, which is if you in the United States are going to say “Competition is true north, but we understand your difficult situation.” If we give you too much license to do whatever you want, because that is what you have to do to get an antitrust regime at all, it does risk that these worst elements, and they develop these really bad habits, and you never get out of it. That is a very complicated calculus and I think a difficult issue.

I think also Carl’s point about practitioners, and the time helping agencies, whether it’s India or China, develop their DNA—once you develop your DNA in a certain way, it is very hard to then say, “Okay, now we’re ready to change it.” So when these other countries in a formative stage develop their agencies and practices, it is worth some attention and time.

The second point on telecom—I will give you one optimistic piece that is worth noting. Because of our model of competition, we did go across the world, and there was a trade agreement on telecommunications that did help open markets across the world and get away from state ownership of postal, telegraph, and telephone services (PTTs), as they were called, which again was a huge change where the United States was able to be a leader. That would be the positive side to the story. You emphasized a different side.

**MS. STIGLITZ:** The first point I want to make about the international context is this: it is always the case that people in one country feel that those who are successful in competing against them are successful only because there was unfair competition. They just believe that they are more efficient and anybody else that is beating them has to be doing something unfair or benefiting from some unfair subsidy. I saw that all the time. That is one of the reasons why I feel very nervous about this language of “fair” and “unfair” competition.

The second point: I agree that the danger of our using rules that are unfair or rules that can be abused is great. The contagion of those rules has been enormous. You gave some data on that.

One of the aspects of what I would call unfair rules is the way we treat China as a nonmarket economy. In one of my books, I talk about the abuses of how we treat dumping for nonmarket
economies. We do not ask, “Is the country selling goods below cost?” We ask, “Is the country selling goods below what it would cost a ‘comparable’ country to produce those?” In one instance, we said the country that was comparable to Poland was Canada for assessing dumping duties for golf carts. The amusing part about that was Canada did not produce golf carts because it was too expensive. But then the question was: “Well, what would it have cost Canada to produce golf carts if Canada did produce golf carts?” You get really absurd conclusions.

I thought China’s response to the allegation that it was still a nonmarket economy for which such special calculations were merited was also amusing. On one occasion, they said, “You believe that the only successful economies, don’t you, are market economies, right?” Then, the second part of the syllogism was: “Looking at our growth rate, almost 10 percent for thirty years; one has to acknowledge that that’s a success, right?” “Well, that means that China has to be a market economy.” [Laughter] Well, that may not be fully convincing, but it should be clear that China is moving toward a market economy, and that the way the U.S. calculates dumping duties for nonmarket economies is subject to extensive abuse.

As I mentioned, the couple-trillion-dollar subsidies that we gave to our financial sector and to auto and other sectors suggest that we are not really a perfect market economy. That is the reason for the sensitivity that Fred expressed about state aid, which really raises questions: Did you want to not give aid and let the economy collapse? And if one does give state aid, how does one deal with it in ensuring “fair” competition?

The final issue with respect to China that I wanted to raise is one of the areas where there is both an antidumping and a countervailing duty case going on right now: solar panels. China is providing solar panels at a low price, which is providing a global public good. We have to admit that we have not been doing our share at reducing global emissions. There is hardly a more important, global public good than preserving the planet. It seems to me this is an example where we have three issues at play: fair competition, jobs in the United States, and saving the planet. To me, the trade authorities seem to think that saving jobs is more important than saving the planet. I find that an uncomfortable position.

MR. WALLER: To say the least. [Laughter]

MS. SCHWAB: Again I would note that our antidumping and countervailing duty laws, first of all, are the least discretionary of all U.S. trade laws. Interestingly, they are the ones that lawyers had the most to do with writing, just for the record.

The Commerce Department and the International Trade Commission, as distinct from the U.S. Trade Representative’s Office—or the White House, I might add—implement these laws with limited discretion. So far, all we have on the table is the initial countervailing duty determination with single-digit subsidies identified for Chinese firms. So that is all there is so far.

The question obviously from a competition perspective, it seems to me, is: If the objective is predatory in nature, as in if you subsidize enough or you dump enough that you wipe out everybody else’s production capacity, and then you can hike up prices, you are not only going to lose the jobs but you are also not going to benefit the planet.

But yes, there is no saving-the-planet out or exception in U.S. countervailing duty law.

MR. WALLER: I just had a quick comment and then a question.

The comment is this: Particularly with respect to the antidumping and the anti-subsidy regime, why is competition so undervalued? Because Congress said so. That is the simple answer with
respect to the administration of those two laws.

**MS. SCHWAB:** And in fact these trade laws were written by tax lawyers. My understanding is tax lawyers think differently than antitrust lawyers. [Laughter]

**MR. WALLER:** But we are starting to mix two different questions. One is sort of the normative “what's more important?” The other is the institutional design of how you do it.

I have a question for Jon. You have been at two different agencies, particularly at the FCC, where the same agency is tasked with considering a public-interest standard that includes things beyond just the competition side. So I want to get your perspective on that.

And then I wanted to throw open to the panel again a question of institutional design. At the end of the day, on the policy side, not on administering a statute set by Congress, addressing a situation where anticompetitive harm is manifest, but perhaps it conflicts with a trade policy, a general foreign policy, because there are demonstrable jobs that would be created by something that is nonetheless anticompetitive—what is the best structure? Is it just that, at the end of the day, the President can instruct the Antitrust Division or some other part of the Executive agency branch simply not to proceed?

**MR. BAKER:** I think that the competition issues that I worked on when I was at the FCC were as interesting as the competition issues I have worked on anywhere. I worked on the Open Internet rulemaking and then two big mergers, Comcast/NBC and AT&T/T-Mobile. In all three, and particularly the last two, we had two great advantages at the FCC in being able to keep our focus on true north, as Phil would say.

One of those advantages is that the agency leadership was comfortable staffing the matters with people who had competition backgrounds. That was particularly true in AT&T/T-Mobile, where the transaction review was headed by Renata Hesse, who is a longtime antitrust lawyer and now back at the Justice Department in a senior position, as well as by me and some others. But the other great advantage was that we worked very closely with the Antitrust Division on these matters. My sense is that without these particular advantages competition, as a value, might be a little more contested at the FCC, and it probably, my guess would be, has been in different eras and in different economic times. I was just lucky to be there at the time I was.

**MR. WALLER:** But again, sometimes those values are really going to be at loggerheads. I am thinking about examples like Laker Airways, where there was an antitrust way to proceed and a foreign policy reason not to proceed, and the White House chose not to proceed.

I could imagine perhaps another situation where the antitrust harm is manifest, but there is simply demonstrable job creation or job preservation at stake. I know what the antitrust answer would be, because we do not tend to look at those things.

How should we structure a world where these other values get considered by somebody else as you have talked about?

**MR. WEISER:** I think a concept that is not as well understood is intra-Executive Branch deference. We often understand, when an agency does something, the court giving deference. But what may be less often thought of is deference within the Executive Branch. So when you get to the White House, thinking about whether to exercise the authority that, say, Teddy Roosevelt exercised much more readily, whether to bring an antitrust case, unless you have some extreme situation
where it’s a non-competition value that’s going to trump it—so CFIUS would be one example; you mentioned foreign policy—the White House really over the last I don’t know how long—since Nixon—has stayed out of it.

The most famous, probably, was in Ronald Reagan’s time, where the AT&T litigation went to the White House. There is a very famous meeting where, I believe, at that time Bill Baxter was the head of the Justice Department because the three people above him were all recused, so he represented the DOJ at the meeting. Jim Baker’s goal was not to have the White House get involved because he thought politically it would be bad. But in practice they deferred to Baxter. Reagan during the campaign had said things about the case that were quite critical. That was, I think, a very wise decision, and it is a very wise practice, because the level of sophistication that happens in true north, if you will, is quite high, and it is going to be only a very rare circumstance where some other factor can trump it. So I think the system we have is well set up.

In other countries, again thinking about how much political involvement to have over competition policy, again that is a risky road to go down.

MR. JENNY: I have two comments.

First of all, I have never understood, and I still do not understand, why an aggregate welfare standard would be unacceptable, because I think from the economic standpoint it would make sense. It would not necessarily translate into the protection of employment, and I think that it would be politically much more defensible then the consumer surplus standard.

I just want to point out that across the world it is not always true that the competition authorities look only at the consumer surplus and that some other body somewhere else looks at other things, “but we don’t want to know how that happens.” In other words, I think there is a bit too much of “principles that are not really backed by empirical evidence.” It is not enough to say, “I’ll do my share and the others do what they want and it is not my problem to know how all this gets together.”

My second comment is that I am not so sure that if you limit yourself to the consumer surplus standard, you necessarily end up with better decisions than if you have a wider spectrum. It seems to me when one looks across the world, that view is not particularly backed by very good empirical evidence.

MR. STIGLITZ: First, I agree with Fred that one ought to take, you might say, a comprehensive welfare perspective. But in my mind, when I think about comprehensive welfare, I think about a dynamic economy, about consumers today and in the future. This really fits in with what Carl said.

If we create an economy, for instance, where we have an environment in which new firms can easily come in, if we create a more fundamentally competitive economy, then that will give rise to higher consumer surplus over the long run. Where this is really important is in developing countries and emerging markets, where they are transforming their economy, they are restructuring their economy. The question often gets raised that, say, a large foreign company that comes in could have the effect of stifling small domestic entrepreneurship. These countries then pass laws about sourcing agreements—equivalent to community reinvestment act agreements (CRAs), employment agreements, training agreements—that some people think destroy the level playing field. I think those are absolutely essential for these countries to try to create a more dynamic economy.

Finally, when it comes to the United States, though—and I think other advanced industrial countries—the argument about jobs is more often abused than used appropriately. The responsibility
for maintaining full employment really ought to lie with macro policy, with monetary policy. While there may be some limited instances where jobs may be relevant, I think it is something that we ought to be very cautious about using.

This goes back to the point that Phil made. You want to think about not only the firms that are at the table in the room, but also the firms that are not there, today, in the economy. A focus on protecting those jobs may lead to economic policies that make it more difficult for the creation of new jobs in new industries.

Mr. Shapiro: I would just pick up briefly on Joe’s point about what makes for a dynamic economy and it is related to what I said earlier about low barriers to entry.

I wrote a paper recently for the National Bureau of Economic Research. They are doing a 50th anniversary volume on the famous paper by Arrow in 1962 on innovation and patents and so forth. There is some completely convincing literature that if you look across countries, you look across industries, there is an enormous variation in how efficient and productive firms are, even within an industry, even within a country, and so much more productivity—the big gains in productivity are to be had by letting the competitive process play out effectively, by having those firms that are more efficient grow—and yes, at the expense of others. For example, there are some of these findings that in Europe there are a lot more family firms than we have in the United States, and they are generally not as efficient. John Van Reenen has done some very nice work along these lines, for example.

So whether you are talking about developing economies or our economy, lowering entry barriers, promoting a fluid dynamic economy is so critical. And that is true for economic growth and for creating jobs.

Mr. Steuer: What I think I am hearing is that if we had folks with the wisdom of Solomon and the incorruptibility of Midas, it might make sense to have them put everything into the mix and make these decisions. But short of that, we are probably safer compartmentalizing these different considerations.

The one wild card I wanted to point out is that, in this country at least, there is the possibility that, whatever the agencies decide, customers will have standing to bring private litigation to block a deal or otherwise become involved in transactions and ask a federal judge to make decisions based on whatever the proper legal standards might be. I think this avenue thrusts that federal judge into the position of deciding which considerations are valid to evaluate, which are not, and how to make that evaluation, which is just one more level of complexity that does not exist in all jurisdictions. But as jurisdictions consider adding that prospect, it is certainly something to consider.

Mr. Weiser: And actually, the other avenue we have not talked about is the state attorneys general in this country. They do have often a different perspective than the federal enforcement agencies, particularly on remedies, where they have been a lot more comfortable with commitments maybe on jobs or keeping a plant open, or even on prices, which generally are viewed as anathema in the antitrust agencies. You do not want to say to a firm, “We’ll let you do the merger but promise to keep your prices at a certain level.” There are all sorts of concerns as to how that sort of decree would not really work. But a number of state attorneys general have said, “Well, that’s a way to protect our consumers.” So that is another component in the mix as well.

Mr. Waller: I have seen in the federal courts in hospital mergers, where, either explicitly or implic-
itly, the judges seem to be allowing some deals based on values that are other than the pure competition issues and commitments of the type that Phil is talking about.

**MR. BAKER:** I think we just switched topics in the conversation on institutional design. We were talking about separate structures that would insulate competition values in order to protect them. Then we switched over, especially in the conversation about the states, to talking about privileging competition in some ways—about institutional structures that make it trump other values. I think this issue is worth exploring here, by asking, “How far should we go in privileging competition?”

Joe has talked about environmental values being important in some context. Dick has talked about—we all can view job growth as important. To some extent, greater competition promotes those other values, but it does not always. So how do you all react to that?

**MR. SHAPIRO:** That is actually the point I was trying to make. If you really think dynamically and look at the evidence, competition often promotes jobs and economic growth. That was one of the flaws with the National Industrial Recovery Act back in the Depression.

Now, I am not going to make that argument across the board for environmental values. But I am more in favor of compartmentalizing. Look, if you have an environmental problem with greenhouse gas or mercury emissions, deal with that through other regulations; don’t muck up competition policy.

**MR. BAKER:** What if the environmental regulators or the trade folks get that trump instead of the competition folks?

**MR. SHAPIRO:** I was not trumping. I was playing regular cards. They just happen to be honor cards. [Laughter]

I just want to add the point that to argue that you ought to give up on competition would be, in effect, to say that large enterprises with dominant market share, with market power, would be better able to deal with some problem and there was no other way, like having an environmental tax or environmental regulation, to deal with it. I think the presumption is that most of these other problems in an advanced industrial country can be dealt with by other mechanisms. If we want to encourage R&D, we should maybe have an R&D subsidy or an R&D tax credit. But that is something that ought to be part of it. Use other instruments to do that.

What I was trying to say for developing-country, emerging markets, they do not have the same panoply of instruments that we have. For them I think that they may face some difficulties where even the mechanism by which they maintain competition may entail in the short run not allowing some large firm to come in and dominate and destroy markets in their country.

**MR. JENNY:** I tend to agree with Carl on the fact that competition in the long-run benefits consumers, benefits growth, and so on.

But one of the questions, at least as it is framed in the context of the OECD, is a bit different: Does competition law enforcement promote growth? There is very little evidence. As a matter of fact, the Secretariat of OECD has been looking for years to try to find any kind of evidence that competition law enforcement made any difference to growth or productivity. As I said, they did find evidence that deregulation made a difference, and that is it. That is the only thing.

So when you try to justify the fact that the competition authority is going to take a stand on a particular case by saying, “Well, this is going to promote competition innovation and growth in the
long term, there may be an exaggeration of the importance of competition law enforcement. There may be other determinants of competition besides competition law enforcement that are equally important. For example international trade may be equally or possibly more important.

So in a lot of countries the idea is not that competition is bad, it is that there may be more effective ways than competition law enforcement to promote competition.

MS. SCHWAB: I think in terms of countries administering their own trade laws, they have a fair amount of flexibility. In terms of their WTO commitments, they do not necessarily need to go to some kind of anti-competition criteria to take care of their concerns. At the end of the day, their fundamental obligations under the WTO have to do with bound tariffs; the most-favored-nation principle, meaning you do not treat one country worse than another country; and national treatment, meaning you do not treat your own entity any better than that of your trading partners’ entities. Beyond that, your fundamental out is your national security out, and you do not use that unless you absolutely, positively have to. Countries have been very, very good about not doing that.

Beyond that, there are all sorts of process mechanisms. I was alluding to that in terms of antidumping and countervailing duties. The application of individual countries’ statutes frequently is so opaque that they can be dildling with all sorts of numbers and you would not know whether the margins were accurate or whether there were in fact margins, and how do you measure injury. So they do not necessarily need to rely on that, and you are not likely, as I said, to have a conclusion of an anti-competition deal within the WTO.

When you do get to state-owned enterprises and state-supported enterprises, there is an area where I think there is a growing momentum. But a lot of countries, including the United States—you talked about Fannie and Freddie—we have our own state-supported enterprises and we would have to reconcile that as part of our conversations in such an agreement.

MR. STIGLITZ: I just want to question the notion that Fred mentioned, that competition law enforcement does not make a difference. It seems to me it is very difficult to do convincing empirical work because it is not just the cases that you enforce that determine the effectiveness of competition policy. The fact that you have a legal framework leads people to behave differently. If you did not have it, we would easily wind up, I think, with rampant monopolies. Adam Smith pointed this out 200 years ago.

I think an economy rife with monopolies would be very innovative in figuring out how to deter entry, to create entry barriers. We already know with all our laws how clever some of our firms are in creating entry barriers. If we had no laws, I think there would be enormous lack of competitive dynamics in our economy.

—JOSEPH STIGLITZ

MR. JENNY: Yes, I believe that competition law makes a difference for the reasons mentioned by Joe, but political leaders are more difficult to convince when you cannot show clear correlations.

MR. BAKER: I want to interject before we go to Carl that we have actually run this experiment in the United States a couple times. For example, there was a period when the antitrust laws were basically not enforced after they were enacted and we had a wave of mergers to monopoly. Then there was the National Recovery Administration (NRA) period, and we saw what the firms did with those codes. And Appalachian Coals was around the same time, in the Depression.
So when we have run the experiment in the United States, we see that when antitrust is not enforced in some gross, large way, we get the very kinds of competitive issues that show up that Joe was talking about.

**MR. SHAPIRO:** On exactly that same point, Fred, I think you should go back to the OECD and tell them to stop torturing themselves by looking for this connection, because unless you see a sharp change in competition policy not caused by some other things, and then you can track GDP growth for some number of years after that, it is very unlikely you are going to be able to see that connection looking across these countries.

The fact is—think about it—we have, I would say, compelling evidence that competition promotes productivity growth and jobs. We can talk about that evidence. So what you should go back and tell them to focus on is making sure that competition policy promotes competition, and then we will be okay in terms of GDP.

**MR. JENNY:** But it is not the OECD Secretariat that is obsessed with this issue. Very often competition authorities in developing, and sometimes developed, countries have to justify to their ministers that they are useful. The ministers say, “Show me a proof somewhere that what you do is helpful.” The competition authority says, “Economic reasoning tells us—‘Yes,’ say the minister, “but this is not enough.”

**MR. SHAPIRO:** I stand by my previous comments. [Laughter]

**MR. WEISER:** Let me go back to the AT&T case, where the FCC had not been in effect promoting competition in telecommunications and where you did get the antitrust case making a big impact. One way to think about why that was important on the innovation front that Joe—

**MR. BAKER:** You are talking about the divestiture?

**MR. WEISER:** Sorry. I should be clear. You have to keep track. The 1974-filed and settled-in-the-1980s case.

That was an era where Dow Corning had invented fiber optic cable—initially invented at Bell Labs—but they were really commercializing it. They wanted to sell it to AT&T. AT&T was a monopoly at that point, and had not depreciated its long-haul network. AT&T said, “Go pound sand. By the time we are ready to upgrade to fiber optics, it will be the 1990s and by then we’ll do it ourselves.” Not the best message to entrepreneurs.

What happened after the case was that both MCI and Sprint bought fiber optic cables. Sprint famously ran a commercial that you could hear a pin drop on its network. AT&T then depreciated its whole network and laid fiber optics. That type of innovation, that openness to entrepreneurship, was because you undid a monopoly control of an industry. In that sense, deregulation and competition fit together.

So I think there are good stories we can tell. They may not be as empirically grounded as what some of the economists are looking for.

**MR. WALLER:** If this was The Chris Matthews Show, we have reached a point where we would get to scoops and predictions. I wanted to give each of the panelists, because we have covered so much ground, a chance to do any predictions or recommendations that deal with these issues of
competition, other values, institutional design, competition, and the global economy.

I will start with myself. I am going to limit myself to a prediction. That is, we are going to see more and more antitrust-type dispute settlement cases in the WTO, building on cases like Kodak/Fuji, Mexican Telecom, the rare earths and minerals cases coming out of China, and that over time you will begin to see a common law of antitrust begin to emerge in the WTO, but not the kinds of codes that most of us think are just not politically likely to be negotiated. That is my prediction.

Can I challenge any of our panelists to offer any similar prediction or recommendation?

MR. WEISER: I will give a prediction and a recommendation. Following the great work of Carl on the CEA and others, I think we are going to get more and more economists and “antitrust types” going to different economic policy positions. I think that is a great harbinger. I think also at the FCC, we will get more people like Jon and Renata. Again, I do think there is a lot of benefit that comes from bringing that expertise throughout the government.

MS. SCHWAB: I would like to see the Obama Administration not pull its punches in the TPP negotiations on state-owned enterprises and state-supported enterprises. Do not be timid. Lead by example.

I do not know if this is a prediction or just an observation. The trade issues intersect with competition and intellectual property issues involving China, which is not part of TPP but is lurking—I do not mean that in a bad way—just that it is the huge elephant in the room, in a sense, in the Pacific trading context—those I just think will continue to heat up and put stress essentially on our WTO and international multilateral regime because their economy is big, growing, different, and they are prepared to push the limits on things.

Other areas that I think intersect with competition and many of you work on—not so much the trade as such for many of you, but the intellectual property issues, exclusion orders of the ITC—there is going to be a lot of activity here and it will intersect with the trade issues.

MR. STIGLITZ: In terms of prediction, I think in the aftermath of the financial crisis there is going to be more sensitivity to other kinds of sources of imperfections of competition—barriers to entry of the kind that Carl talked about in the housing sector. These are quite different from the standard kinds of barriers to competition or limits to competition, and they will need to be given more attention.

Second, in terms of recommendation, I think that, as I emphasized in my talk, in the area of finance what we are concerned with in terms of bigness is too big to fail, too intertwined, too correlated to fail, and those have very big consequences and are not going to be judged by standard competition criteria.

In the media, access to information and diversity of views have very big social consequences, again not to be judged by conventional market share kind of analysis.

MR. SHAPIRO: I guess my question coming in is: should there be and will there be structural changes in how these various considerations are going to be evaluated? I think that, at least in the foreseeable future, my prediction is there will not be any changes. Whether we have the best system or not, we probably have the most practical system. But in terms of should there be, I think the hope is that exchanges like this and greater sensitivity among people making these decisions in different settings will help to make more rational decisions, even if we have only the best sys-
tem that we can possibly have. It is maybe second-best, but it will do.

**MR. JENNY:** One prediction and one recommendation.

The prediction is that trade policy is going to take over competition policy in the next twenty years. One can see that already. Many regional trade agreements all over the world provide for the establishment of fairly elaborate competition regimes at the federal level or the sub-regional level. This is becoming quite important. You can see this happening in CARICOM, UEMOA, COMESA, ECOWAS, but also in the Andean Community, in the Eurasian Economic Community; even APEC is moving in that direction, even if a little bit more slowly.* But clearly, in those trade discussions there is more and more consideration for the issue of competition and there is the development of new initiatives. This is what pushes the competition issue forward.

The recommendation is to the competition authorities. I think that competition authorities should stop living in splendid isolation and should try to recognize that in industrial policy, consumer policy, and trade policy there are important elements promoting competition. Competition authorities should have to establish some kind of link with those policies, rather than saying, “Oh, consumer protection, this is different, I don’t want to deal with it,” or, “Trade policy, I don’t want to hear about it, trade negotiators do not understand competition” or, “Industrial policy means government intervention which can only be less successful than the competitive market.”

So I think there would be a great increase in the visibility, the importance, and the influence of competition policy if competition authorities were more open to a wider view of what promotes competition.

**MR. BAKER:** I think I am going to go in a different direction. It is a U.S.-oriented observation, and not a prediction or a recommendation but a worry. I see the way that the conversation has been going about the health care legislation over the past couple years and in the Supreme Court, and I am wondering whether—in an environment where there is greater energy behind views that the government should play less of a role in our economic life, on the one hand, and, on the other hand, a greater attention to concerns about inequality growing out of Occupy Wall Street, and given that we have a divided political system, and a situation in which the Supreme Court has changed the campaign finance regulations in ways that may allow some financial interests to have more voice than before—whether competition concerns will be left behind as regulation, and what we are going to do as a country in the regulatory arena, become more contested or up in the air.

**MR. STEUER:** I must say even though a lot of this was born of the recent globalization, I have a cartoon in my office that is about 110 years old from *Puck*, and it is called, “The high tariff and big monopoly juggernaut.” I can assure you that we have been having this conversation for at least 110 years. Perhaps it is more urgent today than ever because the world is so much smaller.

But I hope everybody here appreciates that while the issues that we have been discussing seem like very big policy issues off in the clouds, they impact everything that all of us here do on one level or another. If these issues are not on your radar screen, you need a bigger radar screen.

Please join me in thanking everybody on this illustrious panel.

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Roundtable Conference with Enforcement Officials*

American Bar Association Section of Antitrust Law Spring Meeting • Washington, D.C. • April 12, 2013

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**TED VOORHEES:** Welcome to the Enforcers’ Roundtable, the last program of our Spring Meeting.

We are very honored to have an extremely distinguished group of top enforcers with us. I am going to very briefly introduce them, then each will have a few opening comments, and then we will go to questions.

We have with us The Honorable William Baer, Assistant Attorney General in Charge of the Antitrust Division at the Department of Justice; the Honorable Edith Ramirez, Chairwoman of the Federal Trade Commission; Joaquin Almunia, Vice-President and Commissioner for Competition, European Commission, DG Competition; Andreas Mundt, President of the Bundeskartellamt from Germany; Kathleen Foote, who is here representing the National Association of Attorneys General (NAAG), as the chair of the NAAG Multistate Antitrust Task Force, and is Senior Assistant Attorney General, California Department of Justice.

* Editor’s Note: This Roundtable has been edited for publication.
Our two questioners are Bill Blumenthal from the law firm of Sidley Austin and Gail Levine from Verizon. Though Bill and Gail and I will probably do very little of the talking, to the extent we do, we are doing so wearing our ABA hats, not our law firm hats, not our client hats, not our company hats.

With that, let's get started.

BILL BAER: Thank you, Ted. It's a pleasure to be here. Gail and Bill, it's an honor to be on the dais with you and with my fellow enforcers.

I arrived at the Division about three months ago just after the start of the new year. It's a great privilege to be part of such a talented team and it's great to be back in public service. I literally wake up every day with that thought, and almost every night I leave the office with that same thought.

I do want to mention that we have a new Deputy Assistant Attorney General for Economics—some of you have met him this week—Aviv Nevo from Northwestern. We are glad to have him on the team.

I obviously take no credit for the many accomplishments the Antitrust Division achieved in the first four years of the Obama Administration, despite the fact that I am in Washington and that is what one normally does. But I can and I do share pride in the Division's accomplishments. They include vigorous and successful merger enforcement—the H&R Block/TaxACT case, the AT&T/T-Mobile challenge, and 3M/Avery. More recently, the Division challenged the Anheuser-Busch InBev/Grupo Modelo transaction and a consummated deal out in California involving Bazaarvoice and PowerReviews.

Jointly with the FTC, merger guidance was updated, as talented lawyers and economists from both agencies worked to bring our articulation of enforcement in line with actual current enforcement.

There were nonmerger challenges. Two notable ones are the e-books challenge and the just recently resolved challenge to Blue Cross/Blue Shield of Michigan's inappropriate use of most-favored-nation clauses. For me, those two cases illustrate how antitrust enforcement can make a difference to consumers in their everyday lives. If you just look at the e-books lawsuit, filed jointly with a number of states against Apple and the major book publishers for conspiring to suppress competition for e-books, in the few months since we have settled with the publishers, e-book prices have fallen—they have really fallen. For New York Times-type best-sellers, according to the latest publicly available information, the average e-book price has dropped from over $11 to closer to $8.

As you know, the Division's record this past few years shows a willingness to go to court when we need to. Indeed, as of last month we had a record seven civil matters in litigation, both merger challenges and challenges to anticompetitive conduct.

Our criminal enforcement program, under Scott Hammond's leadership, has continued its great work: sixty-three criminal cases filed this year and a record $1.14 billion in criminal fines.

There are great results in the courtroom—trial victories in LCD, municipal bond cases, and a recent trial involving coastal shipping in San Juan, Puerto Rico.

I'm not going to make this any more of a recital of accomplishments than I just did. We have a newsletter we publish annually that went live on our website this morning. It contains more detail on the Division's accomplishments over the last year.

You will also find this morning an announcement I am making on our home page involving our criminal enforcement program. I understand the Division's carve-out policy has been discussed
in panels earlier this week. The statement I issued today describes some modifications we are making to that policy. While in the past we have carved out employees for a number of different reasons, going forward we will carve out or exclude from corporate plea agreements only those employees we have reason to believe were involved in criminal wrongdoing and who are potential targets of our ongoing criminal investigation. In light of this change, when we file a corporate plea agreement in the federal district court, we will at the same time ask the court to seal the names of the individual carve-outs. This morning’s statement provides further details on that.

What’s next for the Antitrust Division? Going forward, in my view, we need to stay focused on targeting those situations where we can demonstrate real consumer harm from anticompetitive conduct. We need, especially in this environment, to make sure to use taxpayer dollars that are entrusted to us wisely. I think the Division has met that test. In the last five years, Congress has given us a net appropriation of around $80 million, on average, per year. Our average annual criminal fines have been roughly ten times that, $800 million. You add to that the consumer savings that come about from focused civil enforcement involving everything from health care to e-books to cerveza—one of my favorites—the U.S. taxpayer is getting a pretty good deal. That’s a return on investment a lot of people in the private sector would envy.

We need to keep it up. We need to use all the weapons in our arsenal—civil enforcement, criminal enforcement, close coordination with the states, working jointly on issues in common with Edith and the Federal Trade Commission—to examine important developments in antitrust enforcement. We need to work closely with our counterparts around the world, not just on case cooperation, but issues of transparency and due process and cutting-edge legal issues. We need to continue to provide guidance to you and to the business community on what behaviors we see as problematic and why we see them as problematic.

I am looking forward to doing a full year at the Division and continuing to pursue its mission of protecting competition and consumers.

Thank you for having me here today.

MR. VOORHEES: Edith.

EDITH RAMIREZ: Let me first say that it is a pleasure to be here with all of you in my first Enforcers’ Roundtable, particularly with such an esteemed group.

The first thing that I want to do is to acknowledge our former Chairman, Jon Leibowitz, and all of the terrific work that he has done at the FTC. One of the hallmarks of the Federal Trade Commission has long been that we are a fact-based, bipartisan, consensus-driven agency. There has always been a great deal of continuity regardless of who is at the helm. Jon Leibowitz certainly carried on that tradition, and it will continue under my leadership as well.

Let me take a few minutes to highlight a handful of significant accomplishments at the Federal Trade Commission over the course of the last year and also touch on what you can expect in the coming year.

It has been a remarkable year for the FTC at the Supreme Court. We had two cases before the Supreme Court this term, the first, FTC v. Phoebe Putney, decided in February, and the second, FTC v. Actavis, argued in late March.

In Phoebe Putney, the Supreme Court ruled unanimously in favor of the agency holding that the state action doctrine does not immunize what we allege is a merger-to-monopoly hospital merger in Albany, Georgia. We were very pleased with that ruling and believe it will not only prevent anticompetitive transactions between hospitals, but in other industries as well. The matter is now...
proceeding. In fact, just yesterday the FTC renewed its motion for a preliminary injunction to pre-
vent any further integration between the hospitals before and during the pendency of the admin-
istrative hearing, which is slated to begin this summer.

The second case, FTC v. Actavis, involves an alleged pay-for-delay, or reverse payment, agree-
ment to settle patent infringement litigation between a branded pharmaceutical company and mul-
tiple generics involving the male testosterone replacement drug, AndroGel. Reverse payments in
the pharmaceutical arena have, of course, been an area of considerable focus by the agency, and
we are very pleased that the Supreme Court is reviewing this issue. We are hopeful that the Court
will overturn the Eleventh Circuit’s use of the scope-of-the-patent test, which insulates these harm-
ful deals from antitrust scrutiny, and instead follow the Third Circuit’s holding in K-Dur and find that
these anticompetitive agreements are presumptively unlawful.

As both of these Supreme Court cases illustrate, a significant focus for the agency has been
maintaining competition in hospital and health care markets, including, in particular, provider mar-
kets.

As Phoebe Putney shows, we’ve been very active in challenging hospital mergers. Recently,
we successfully blocked hospital mergers in Rockford, Illinois, and in Toledo, Ohio. If the current
hospital merger wave continues, you should expect to see continued FTC activity to stop anti-
competitive hospital mergers.

In addition to transactions involving two general acute care hospitals, we are also increasingly
focused on consolidation involving other health care providers that raise similar concerns as those
between two hospitals. This includes deals involving specialty hospitals and physician groups. Last
December, with the assistance of the Pennsylvania Attorney General’s office, we stopped a pro-
posed merger between a dominant hospital and a surgery center in Reading, Pennsylvania. More
recently, in conjunction with the Idaho Attorney General, we filed suit challenging the state’s dom-
inant health care system’s acquisition of a physicians’ group.

In the pharmaceutical arena, we also continue to be very vigilant. Branded companies continue
to take aggressive steps to protect their drug franchises from generic competition, often
through the abuse of the pharmaceutical regulatory process. In addition to pay-for-delay, we are
also looking at other life-cycle management strategies that branded drug companies have been
adopting that may be designed to delay or prevent generic entry.

We recently filed amicus briefs in two private litigations involving strategies that raise concerns
for the agency. The first, filed in March in the Actelion matter, involves the potential anticompeti-
tive abuses of safety protocols, known as REMS (Risk Evaluation and Mitigation Strategies). Brands
may have used REMS to prevent generics from accessing samples of branded products to conduct bioequivalence testing, a necessary step to begin the Hatch-Waxman process. The other amicus brief, filed in November in the Mylan case, involves “product hopping,” where a brand introduces and switches patients to a new formulation of an existing branded drug product that offers little or no therapeutic benefits over the original product, to prevent generic com-
petition generated by state drug substitution laws.

In addition to health care, the FTC continues to place a priority on the technology sector.
Because of the significant role standard setting plays in this sector, the FTC has used its enforce-
ment authority to preserve the integrity of the standard-setting process, as we did recently in the
Google/MMI and Bosch cases, and a long line of cases before that, including Dell, Unocal,
Rambus, and N-Data. The Commission hasn’t finalized the orders in Google or Bosch, but they
do show our commitment to remaining vigilant in the technology sector.

We will also continue our research and policy work on emerging competition questions facing

—Edith Ramirez
the technology sector. For example, in December we hosted a workshop in conjunction with the Department of Justice focused on patent assertion entities (PAEs). We invited a number of different stakeholders to share their views of PAEs and their impact on competition. We will continue to look at issues surrounding PAEs in the coming year.

I also want to touch briefly on some of the consumer protection work that the agency has done over the past year. We have focused a great deal on two issues: privacy and fraud that targets financially distressed consumers—what we have called “last-dollar fraud.” These two areas are vital to American consumers, and we will continue to monitor them and bring enforcement actions where appropriate.

On the privacy front I want to highlight some of the FTC’s recent work. This past December we updated our Children’s Online Privacy Protection Act (COPPA) Rule to address the way kids are using technology today. That rule goes into effect in July and we will be actively enforcing it.

This past year we also obtained a record fine against Google for $22.5 million, the largest fine assessed for a privacy violation. The fine resolved charges that Google violated a 2011 FTC consent order when it bypassed a block on tracking cookies.

Given the proliferation of smartphones, we are also going to be continuing to pay greater attention to the privacy ramifications in the mobile arena. We have some upcoming workshops involving mobile cramming issues, mobile security, and also mobile privacy issues.

Finally, we have initiated a study looking at the data broker industry, which is an industry that raises a number of privacy concerns. These companies amass large volumes of data obtained from both public and nonpublic sources, often without consumers’ knowledge or consent. Given these concerns, we are conducting a study and we aim to issue a report by the end of this year.

With regard to last dollar fraud, the FTC has continued its efforts to curb abuses and deception in connection with debt-collection, debt relief and mortgage loan modifications.

I’ve hit just a few quick highlights this morning. For more details about the agency’s many accomplishments over the past year, I urge you to look at the FTC’s Annual Highlights, which are now available on the agency’s website.

MR. VOORHEES: Thank you.

Joaquin.

JOAQUÍN ALMUNIA: Thank you very much. Thank you very much to the ABA, the organizers of this Spring Meeting. I am very happy to be here with my new colleagues, with Edith and Bill, with all my colleagues and friends, Andreas, and with the representatives of the judiciary and the prosecutors in the United States. I know how important your role is and that of your colleagues here in the U.S. system.

Talking about competition policy, since the last Spring Meeting, the last twelve months, from a European perspective, have been about competition in times of economic difficulties. We have an ongoing discussion in Europe about this. Over the past months, as I’ve met with CEOs and representatives of the private sector and representatives of governments in Europe, some of them ask me from time to time, “But why are you so strict enforcing competition rules even in the present difficulties?” Of course, my answer is, “Precisely because we need to overcome economic difficulties, and precisely because we need to improve the way our economies function, and because we need to launch structural reforms.” Competition policy enforcement is the easiest and cheapest structural reform that we can introduce in European economies to improve our potential growth, to create and gain jobs, and to offer a better future for our people.
So our enforcement has not weakened in 2012–2013, but has been even more intense, as I will try to tell you in a few words.

On cartels, of course, we continue to work intensively. We issued decisions over the last twelve months on four cartels or groups of cartels. In one decision, in cathode tubes for the old-style TVs, we adopted the highest fine ever in the EU, €1.4 billion, for the group of cartelists in this sector. The other three decisions focused on more or less traditional sectors.

Now, looking into the near future, in the coming months, we will be dealing with cartel investigations in new sectors, or in modern sectors. We are looking at some cartels in the financial sector, and maybe later in the questions and answers I will have the opportunity to say a few words on our investigations in this regard.

On abuse of dominant position, we have been working very intensively and with very good cooperation with our U.S. colleagues. By the way, we also issued an Article 9 decision on e-books with similar conditions to the ones set out by the Department of Justice. We have also adopted some decisions on telecoms.

In the European Union, with twenty-seven members—very soon twenty-eight members because Croatia will join on July 1—we are to some extent dealing with issues that we dealt with ten years ago in the Western European countries, that have now arisen in the central and Eastern European countries that joined the European Union in 2004 and 2007. For instance, in the telecom sector, we have adopted some decisions and we are developing some investigations. In the energy sector, this week, we adopted two days ago an important decision, another Article 9 decision with legally binding commitments for the Czech Republic energy sector incumbent.

Mergers have been quite a difficult task this year. We had to adopt two negative decisions since the last Spring Meeting, one being Ryanair/Aer Lingus. Ryanair tried for a second time, but unfortunately, the Commission had to give the same answer, that it was not possible. We also had a very important case with a big U.S. company, UPS, United Parcel Service, that wanted to acquire the Dutch postal integrator TNT, but the problems identified couldn’t be solved through the proposed remedies and, unfortunately, we had to adopt a negative decision.

We had positive decisions in mergers with tough discussions about remedies in Glencore/Xstrata, British Airways/BMI, the two mergers acquiring EMI, one by Sony and the other one by Universal, and the merger between Hutchinson and another telecom operator in Austria. In all these cases, after in-depth investigations and a lot of discussions, we managed to find adequate solutions and we were able to clear the mergers.

And, as always, we continue to work in our particular domain, the control of state aid, of public subsidies, in a lot of sectors. It is extremely important in times of economic difficulties to avoid even more distortions in the functioning of our internal market caused by public money being used in the wrong way, not tackling market failures but trying to support one company against the others or one sector against the others.

And since the beginning of the financial crisis, of course, we have done a lot of work with public money being channeled to the financial sector, to the banking sector, in Europe. We are dealing, one way or another, with something like 25 percent of the total EU banking system. They need to restructure every single bank that is receiving public support, in terms of public capital injections or support for the winding down of toxic assets or support for liquidity or state guarantees.

This is producing good results in terms of modernization and reinforcement of our banking system. On the one hand, the banking system is being weakened by the consequences of the crisis, but at the same time, thanks to our instruments to control the use of public money, I think we are contributing—and this is a unique feature of the European Commission as a competition authori-
ty—we are contributing to the restructuring and reinforcement of a healthy banking system, which I think is very good and will be very beneficial for our economies in Europe.

Of course we continue to have a lot of work in the sectors that I mentioned, and maybe in the questions and answers we can go deeper into these issues.

As to energy, our investigation of Gazprom is very relevant for the future of the gas sector in Europe. Sixteen European countries are depending, more or less, on imports coming from Russian gas through Gazprom’s infrastructure.

We are also working in the pharmaceutical sector. For the first time, we will have to decide in the coming months on some pay-for-delay issues in several cases (Lundbeck, Servier and some others), following up on our sector inquiry three years ago.

We are dealing, of course, with the same cases, more or less, as the U.S. authorities on standard essential patents, the use of injunctions, and how to license these patents on what we call FRAND terms. You refer to RAND—that is the name here—but we are dealing with the same issues, using the same approach as our colleagues.

Last but not least, we are dealing with Google, and not only in one investigation. We recently received a new complaint regarding other parts of Google’s activities, namely the Android environment. That will help us to analyze more deeply aspects that we were already analyzing before. I don’t know yet what we will conclude, if we will go ahead or not.

But this requires a lot of work and a very innovative approach to sectors that ten years ago were not relevant in our discussions but now are some of the most important priorities for us as antitrust enforcers here, in Europe, and everywhere in the world.

MR. VOORHEES: Andreas, the view from Germany?

ANDREAS MUNDT: Thank you very much, Ted, for inviting me to this conference and for inviting me on this panel. At least for two hours I have the opportunity now to feel as one of the big elephants in the herd of international competition regimes. I am very happy to be here.

In case some of you in this room have never had any dealings with the Bundeskartellamt (the Federal Cartel Office), I will take a moment to present the German competition agency to you. The Bundeskartellamt was founded in 1958, so it is quite a mature agency, certainly one of the oldest in Europe. The Bundeskartellamt is located in Bonn, which once was the capital of Germany, on the Rhine. It is an independent higher federal authority which is assigned to the Federal Ministry of Economics and Technology. In 1999 its official seat was transferred from Berlin to Bonn as part of the relocation program of the government.

We have a staff of approximately 340 people. Around 140 of these are legal experts or economists. In addition, we also have many IT specialists, controllers, and support staff. Our yearly budget is around €25 million.

As an agency of an EU Member State, we have a very active enforcement record in all areas of competition law. We have around 1,000 merger filings a year in Germany. That may sound like quite a lot, but the Federal Cartel Office is also well known for its effectiveness and efficiency in merger control. A merger that is obviously unproblematic can sometimes be cleared within two days.

The filing requirements in Germany are extremely low compared to many other jurisdictions. Yesterday I heard a panelist say that a Form CO, that is a form required in European Merger Control, can easily fill thousands of pages of paper. For a merger filing in Germany, however, sometimes a few pages are sufficient. Given that our decision divisions are specialized by indus-
trial sectors, our case handlers typically know the sector they are dealing with quite well, and can assess quickly whether a merger is likely to raise concerns. So we are very efficient and can handle 1,000 mergers, although I admit it is a big number of filings.

Mergers have been the focus of the Federal Cartel Office for a long time. In the last years, however, we have shifted our focus towards anti-cartel enforcement. We have had a leniency program since 2000, which was revised in 2006, and we have set up specialized units to combat cartels. With these changes we have managed to investigate a quickly growing number of cartel cases in Germany. If you compare the year 2005 with 2013, you will see that we have doubled the number of cartel cases within these eight years.

In 2012 the Bundeskartellamt closed fifteen cartel cases against fifty-nine companies and we have imposed fines of €303 million. The highest single fine was a fine of €103 million against Thyssenkrupp in a rail track case. We also fined the managers involved in a cartel infringement. For them the highest fine is usually one year's salary.

The Bundeskartellamt also has a good success rate at the courts. Just on Monday of this week the Federal Court of Justice in Karlsruhe confirmed the highest fine that we have ever imposed in Germany, which totaled €300 million against a couple of companies.

I think we have developed a great record over the years in anti-cartel enforcement. That is supported by the fact that we have a lot of settlement cases. Our settlement procedures are extremely flexible and I think that is one key feature of the Bundeskartellamt, that it is quite a flexible competition agency.

So anti-cartel enforcement is one priority. The second priority has turned out to be vertical restraints, where we are aiming at the right balance of enforcement. Here the focus is mainly on two areas.

One area is pure and simple resale price maintenance. The Bundeskartellamt had a number of cases in this area, for example with regard to contact lenses, software, medicine, and hearing aids. It is evident that resale price maintenance plays a role in many sectors. The biggest investigation the Bundeskartellamt had in this respect is still ongoing. This is a resale price maintenance case in the food retail sector. There seems to be strong evidence that RPM is applied in this area to many consumer goods including coffee, sweets, pet food, beer, baby food, and personal hygiene products. So we are dealing with this issue on a very large scale. This is all the more relevant as there are mainly four large food retailers in Germany with a joint market share of 85 percent. The market in this area is therefore highly concentrated.

The second area of vertical restraints relates to the digital or online economy. Here the focus is on two clusters of cases. One cluster is best-price guarantees concerning online market platforms.

The Bundeskartellamt has opened an investigation against Amazon Marketplace. Amazon Marketplace has imposed very strict restrictions on platform sellers not to sell their products cheaper in their own online store or on any other platform in Germany. The Bundeskartellamt is investigating if this leads to a restriction of competition.

The Bundeskartellamt is also investigating similar issues in the area of hotel marketing platforms. So we are dealing with such practices in a number of cases.

The second cluster of cases concerns companies restricting online sales. This is a broad phenomenon, at least in Germany. Companies want to protect brick-and-mortar shops and keep up consumer prices. The Bunderskartellamt is currently investigating business strategies of Asics and Adidas. Both companies have set up selective distribution systems with certain qualitative or quantitative requirements for retailers. This can lead to far-reaching restrictions of Internet sales.

—Andreas Mundt
I think these are very important cases, because here we are about to shape the relationship between sales on the Internet and sales in brick-and-mortar shops.

We are not dealing with these cases all alone. There is close cooperation with the other competition agencies in Europe. This is all the more important as these cases will influence the future of sales on the Internet and the digital economy as a whole.

Maybe one last point on the question of international cooperation, because in my position as head of the Federal Cartel Office, I am also a Vice Chair of the ICN Steering Group. We have seen tremendous development in international cooperation over the last few years. To give you a perspective from Germany, I would like to mention that we hold a conference every two years, the so-called International Conference on Competition. It started back in 1981 when my predecessor, Wolfgang Kartte, had the idea that we needed more international cooperation. So he set up this conference and invited all the heads of agencies worldwide. Many of them accepted the invitation. This wonderful group had a nice evening in Mr. Kartte's garden with a barbecue and beer because at that time it was a distinguished group of twenty-five people. That's how it started in 1981. Three weeks ago, we held this conference in Berlin with 350 attendees from more than sixty countries and up to thirty heads of agencies. So you can see how this international conference has gained importance over the last decades.

The Bundeskartellamt is very active in the ICN and in other multilateral forums like the OECD and UNCTAD. The fact that the ICN has over 120 members today is a good sign. But I think the best indicator that the ICN matters and that we have success is that we are implementing the work that the ICN has done. Many jurisdictions throughout the world have changed their regimes, including important agencies like Brazil and Germany, and we are very active in promoting further implementation.

I also recommend—my last remark—not to underestimate bilateral cooperation. For a long time we have had close cooperation with the U.S. agencies. In cartel cases, we once did a joint dawn raid with the DOJ going into Los Angeles at 8 o'clock in the morning, the Federal Cartel Office going in at the same time, 5 o'clock in the afternoon. So for us it was more or less a dusk raid—rather than a dawn raid.

This cooperation does not only happen in cartel cases. It is also important in merger cases. The Bundeskartellamt also coordinated its investigation with the DOJ on the CPTN joint venture for the acquisition of Novell patents. Not only did the agencies jointly investigate, they also imposed coordinated remedies. In another U.S.-German case, a common trustee was installed. Further to international cooperation we have, of course, a lot of bilateral cooperation between agencies of EU Member States which is of growing importance.

So my message for you is we may only be an elephant today for two hours, but vis-à-vis companies we can be powerful challengers, just as the big agencies in Europe and across the ocean.

MR. VOORHEES: Kathleen, the view from the states.

KATHLEEN FOOTE: Thank you.

I too am a first-timer at the Enforcers’ Roundtable. I am very happy to be here, as I was recently handed the task of chairing the NAAG Multistate Antitrust Task Force. The Task Force is now in its twenty-eighth year, so I guess it is among the youngest of the various agencies represented here. I am only the tenth chair.

The Task Force consists of the antitrust bureau chiefs of the fifty-plus states and territories, as well as the staff in all of those offices. It serves as both an information clearinghouse and as a
coordinating organization for investigations, for litigation and, of course, for communication and cooperation with other enforcement agencies, including the federal agencies. We operate largely through committees and working groups. I will just touch on the work of a number of those because they are emblematic of the kinds of work that the states are doing.

First, our Amicus Committee has been particularly active in the last year or two. The AndroGel case, which Edith mentioned, is one that greatly interested the states, and the states submitted an amicus brief in that case. Pay-for-delay is a very high priority for the states, not only as an enforcement matter but because the states themselves are very large purchasers of pharmaceuticals and, therefore, victims of those particular practices.

In another matter, the Phoebe Putney case, recently decided by the Supreme Court, the views of the states as expressed in our amicus brief were explicitly noted by the Supreme Court. The reason was, of course, that case involved the possible application of state action immunity, to general delegations of state authority. Our brief spoke to the unintended consequences of a broad application of immunity, which would put quite a burden on state legislators, among others, to foresee every possible eventuality. The Supreme Court cited that in particular in its decision.

We have also been active in the lower courts with another group of amicus briefs and actual direct litigation by a number of states considering whether or not CAFA, the Class Action Fairness Act, applies to parens patriae claims for monetary relief brought by the states under our parens patriae authority. There have been certain decisions, or certain motions brought, seeking removal of those cases to federal court as either class actions or mass actions under CAFA. The attorneys general have, of course, resisted this in the interest of retaining their prerogative to file cases on behalf of consumers in their own state courts under state laws at their discretion.

The answer to whether CAFA applies to parens patriae has been answered “No” in the Fourth, Seventh, and Ninth Circuits. It was answered “Yes” in the Fifth Circuit. There are now two conflicting petitions for cert pending before the Supreme Court. These are being closely watched by all of the states, and certainly by our Amicus Committee. That particular issue impacts not only antitrust, but consumer protection. I will just note that state attorneys general are among the preeminent enforcers of state consumer protection laws. The mortgage fraud cases that, of course, all of you are aware of were brought by state AGs under state laws and, generally, our consumer protection units. In a great many cases, those units are part of the antitrust units within the states, although in the larger states, such as my own, they are not.

A number of states also conduct much of their civil enforcement at least literally under their consumer protection statutes, either exclusively or in addition to their antitrust statutes.

I will just mention that our Pharmaceutical Industry Working Group, which has worked on the pay-for-delay cases, among others, has been historically active.

There are two new working groups, and I mention these particularly because although I can’t say for certain that they are a harbinger of any future enforcement agenda, because that is obviously a matter for each one of the attorneys general, they are certainly emblematic of current emphasis. One is the Health Care Working Group. First, health care markets are generally local and a traditional attorney general concern, as local markets generally are. Second, health care is a major state responsibility. Attorneys general have worked on health care issues in antitrust, although not exclusively antitrust, for many, many years.

We very often have worked on health care issues with the federal agencies. In one example already mentioned, the Blue Cross/Blue Shield case with the DOJ, the State of Michigan was deeply involved. With the FTC, the St. Luke’s Hospital case was filed along with the State of Idaho. Pennsylvania also worked with the FTC in a recent hospital merger.
A second brand new working group within the Antitrust Task Force is the Class Action Working Group. We don’t generally bring class actions, but in fact we find ourselves increasingly acting as co-counsel in class actions, and sometimes in different roles. In one role, the state is present in class action cases as a major purchaser, once again as a victim. In that sense, we perhaps resemble more the large corporate opt-outs in some of those class actions, particularly those that involve follow-on civil litigation to the cartel enforcement that has been going on.

We also are involved, under our parens patriae authority once again, representing our consumers. There is at least partial overlapping representation with the classes in those cases. It has become extremely important as we move forward in those cases. Examples of those include the LCD civil litigation, DRAM civil litigation, and of course e-books, which has already been mentioned.

It is particularly important that we learn everything we can about the class action world and litigation and the changes in class action work so that we use either our opt-out status or our overlapping representation status most effectively overall on behalf of consumers.

I will mention just in passing, because Andreas has mentioned it, that RPM remains a significant issue for many states. There are at least four states that have not followed the change in the Sherman Act jurisprudence after Leegin. Those states, including my own, constitute about 20 percent of the country by population and closer to 25 percent by GDP. So certainly it is an important issue. And there are some other states that have not yet been heard from on that.

Finally, I will just note our State-Federal Cooperation Committee works on a regular basis with DOJ and the FTC to advance cooperation, to address the occasional procedural disconnects and bottlenecks that arise. That is going extremely well, and we greatly appreciate the ability to work as closely with them as we do.

MR. VOORHEES: Let me start off the questions on the general topic of consultation and collaboration. This picks up a little bit on a point that Andreas made about the very close, good, consultative-collaborative efforts between his country and U.S. agencies.

Nonetheless, two years ago we had a prominent speech by a former FTC Commissioner who commented that he found in his experience that there was more collaboration and consultation between the FTC and Europe than there was at the time between the FTC and the DOJ. It was kind of an interesting comment and created some buzz.

I just wonder—I’m sure there is wonderful personal collaboration, Bill and Edith, between the two of you, but do you see an institutional issue or not; and, if so, what are you doing about it?

MR. BAER: It’s a good question. I actually think the cooperation between the FTC and DOJ is quite good, and not just from the time Edith and I have been working together. If you look back at the last couple of years—I mentioned the Merger Guidelines in my talk—look at the joint workshops on MFNs; the cooperation on these tough IP issues involving patent assertion entities. We put out some joint guidance to help health care organizations comply with the Affordable Care Act. That is terrific stuff. And there is actually more going on at the staff level than I suspect even Edith and I know about.

Here are two examples. We received some help from members of the FTC Bureau of Competition staff on investigative techniques on a matter we are investigating because they had confronted similar issues in the past. We also talked to the FTC’s compliance staff a week ago about an issue that had come up with order compliance, where we were getting a unique and inappropriate—we thought—interpretation of our prior orders. We thought it made sense to talk with the
FTC about how to improve our consent decrees and avoid giving somebody similar arguments going forward.

The cooperation between the European Commission and, respectively, the FTC and the Antitrust Division mentioned in your question is hugely important. It is at a high level. We have bilateral communications on many issues. There is close bilateral case coordination with the EC, which is what you would expect when two agencies are working on the same case matter. In the U.S., the FTC and the Antitrust Division do not have similar case collaboration because we have a clearance system that makes sure that the FTC and the Antitrust Division are not duplicating or replicating efforts in the same area.

Edith and I have been friends since the day she came on the Commission. She is an excellent Chair. We have talked a lot in the last couple of weeks. We are working well together. Indeed, next week we are going to take this little show on the road. We are going to go up to Capitol Hill and talk to the Senate Judiciary Committee on Tuesday afternoon.

Frankly, I think the relationship is good and it is only going to get better. There is enough to do in terms of providing good, effective antitrust enforcement for American consumers, and we are going at it together.

**MS. RAMIREZ:** Bill, I believe you covered most of the highlights, but let me add a few thoughts.

As a preliminary matter, it is important to note that the nature of the relationships varies. While there is significant cooperation at the individual case level with international agencies like the EC, we generally do not collaborate on specific enforcement matters with DOJ. Obviously that direct case cooperation lends a different dimension to our relationship with the EC and other international enforcers.

That said, I believe that the relationship between the two agencies is very strong. For example, in its latest Transition Report, the Antitrust Section gave the agencies good marks regarding the clearance process. And while clearance represents only a limited part of our cooperation, I only expect our ties to deepen in the coming months.

Bill has already mentioned all of the great collaboration that we are doing with regard to competition policy issues. I have been engaged in discussions with folks at the Department of Justice on IP issues, and we expect to have even more collaboration on that front in the future.

Let me just also add that Bill and I have been in regular contact. We are also trying to be creative in our approach to the potential synergies between the two agencies. As a result, I expect that you will see even greater coordination and collaboration between the two agencies in the future.

**BILL BLUMENTHAL:** Let me ask about another aspect of agency health. Everyone in the audience who has been in government, who is in government, knows that the two main levers of government management are personnel and budget. I’m not going to ask about personnel, but I am going to ask about budget because we can’t help but notice that governments everywhere are under tremendous financial stress.

Kathleen, I’m going to ask this to you in the first instance, although I would be interested in hearing reactions down the row.

What is the effect, what has been the effect, what do we think is going to be the effect, of sequestration and austerity? What’s the effect on the enforcement program? Will there be furloughs?
MS. FOOTE: I am actually glad to have the opportunity to answer this because, although we have not referred to it as sequestration in the states, significant budget cutting is an experience that virtually all states have been facing for three or four years now. So we are seeing now the effects of it both on a short-term and a long-term basis.

We have generally had—and I am speaking most definitely of the California experience, but it is an experience that has been shared by, if not all states, a great many other states—deep budget cuts. There have been furloughs, either rotating furloughs or—in California there has been a 5 percent cut, which corresponds to a one-day-a-month essentially vacation day, other than the fact that your professional responsibilities don’t necessarily correspond to that kind of vacation time and there is no one else to fill in the gap.

I will also mention that in California the same thing has happened within our court system and has resulted in tremendous dislocation. Not only are the courts actually closed for business one day a month, but there have been furloughs of staff employees and a number of very important and beneficial programs, including, for example, the complex litigation programs in our superior courts that have been curtailed.

Of course, things like pay raises and so on have gone by the boards, and that certainly contributes over the years to some impacts on staff and on staffing levels and who is there.

On a short-term basis, as an agency you try to do more with less. There is a kind of triage. There is a sort of a Scotch-tape-and-baling-wire approach. You postpone investments in certain things, for example, hardware and software upgrades. You cut out-of-pocket expenses. Those are the quickest and easiest cuts to make.

And, of course, it’s not necessarily the enforcement agency itself that is doing the cutting. It will be budget people, who are not necessarily thinking primarily about enforcement; they are thinking more about internal needs and the ease of getting these things into place quickly.

So things like travel, conferences, and that would include, for example, the ability of the states to participate in Multistate Task Force events and meetings and so on. Those tend to go by the board pretty quickly. So there is some impact on coordination and ability to coordinate, although it is sort of around the edges.

Public outreach tends to go. That is a significant loss. Consultants tend to go. For the states that is quite important because among our consultants are economic consultants when we don’t have staff economists, and most of us do not.

On a little more long-term basis, what happens is positions are not eliminated, but as they are vacated, they are left vacant for a much longer period of time. What tends to happen then is you begin to get imbalances between units or between types of work. Those can go along for quite some time before they are really addressed in a significant way. Addressing them on a permanent basis, obviously, means making permanent staff cuts, and no one really wants to do that.

We have experienced hiring problems in California most recently, not in antitrust, but in some new units starting up looking for more experienced attorneys who have been eager to work in some of the newer enterprises that state AGs are getting involved in. Ultimately, we have found that those more senior people are not able to do it. So we have moved a little bit younger in the list.

Does it affect prosecution priorities? I would like to say no, I don’t believe that that has been the case for us so far—and remember, we are several years into it. But it is important to note that any significant prosecution involves risk, there is an opportunity cost to it, and there are commitments that include some commitments to funding. So ultimately, although we are not there yet, it is something that would probably need to be faced up to at some point down the line.
I certainly hope that my federal colleagues don’t come even close to what we have experienced and that we will all get beyond this particular economic crisis very soon.

MR. BLUMENTHAL: Andreas and Joaquín, we use sanitized terms like “sequestration,” but you guys called it a “crisis.” It must be really bad for you guys. What’s the situation in Europe?

MR. MUNDT: I think the Bundeskartellamt is in a quite unique situation, not only in Europe but worldwide, because with regard to the current crisis that has affected most European countries and other countries worldwide, Germany has not been seriously affected so far. This has led to the fortunate situation that the Bundeskartellamt has grown over the last years. We have received additional staff and additional means, so we were able to increase our staff by about 10 percent, in 2012, and we are likely to grow as well this year. I think this is due to two facts.

First, as I already mentioned, Germany has done very well to come through the crisis. That is from my point view due to the fact that we still have a very strong industry in Germany, which has carried us quite well through this crisis.

We have very effective small and medium-size enterprises in Germany that are active on a global scale. Most of you won’t know—I learned this just last week—that the company that is building the package for the iPhone is a small German enterprise and it is “following Apple throughout China.” For a German small enterprise, that is not that easy.

So we have a very competitive environment in Germany for these companies. If you are competitive in Germany, that is a good precondition to be competitive in the whole world.

The second issue is we have been extremely active over the last year. If you look at our Web site, we have never, ever released as many press releases as in the last year. We have seen a lot of cartel cases. We have done a lot of competition advocacy. We have shown the benefit of our work for the consumer, including immediate value for the consumer.

We always stress that the protection of competition is the best protection for consumers. That is something that is now acknowledged by politicians, members of Parliament, and the government. I think this is a twofold reason why we have a very good standing for the time being and why we have received additional funding for our agency, which we could very well need, because we had always been a rather small agency, one of the smallest worldwide compared to GDP and compared to the population. I think that was a development by which we have caught up with other agencies around the world.

MR. ALMUNIA: Since the beginning of budgetary adjustments in most of our Member States, of course the EU budget also had been aligned with these efforts. But at the beginning of the crisis in 2008–2009, because of the huge task that was given to the Commission for control of the public resources going to the financial sector, the Competition DG increased its human resources, thanks to the new tasks and the new responsibilities that we had to fulfill.

At the same time, the other parts of the Competition DG, in fact the majority of the DG’s services, have been more or less constrained along the same lines as other services of the European Union. But at the same time, with twelve new Member States, comes an increasing workload. They bring new problems, we have started to look into their economies, which gives us a lot of work.

So we have been combining new responsibilities with some increase in human resources during the past four years, but with a lot of increases in productivity of our staff.

Looking from now to 2020, the European Union is finalizing the discussions on the multi-annual financial framework, the framework for our budgets for the next seven years. In this framework—
it has not yet been definitely adopted but the discussions are in the final stages—the level of human resources expenditure in the European Commission and in the other European institutions will need to be reduced, more or less, at a pace of one percent a year of these expenditures.

I will try to convince the budgetary authorities that the Competition DG and the competition staff should not be affected because we are contributing to the revenue side of the EU budget, although this is not the aim of our enforcement, of course. All our fines are transformed into revenues for the EU budget. That allows the national contributions to be reduced. So, if we see that in the past three years the total fines we adopted were, broadly speaking, something like €6 billion, then I will say to my German friends—not Andreas who would not discuss these issues with me—but to the finance minister of his country and other people that a third means €2 billion saved for the German budget thanks to the competition enforcement.

So I think I have good arguments to avoid an even distribution across services of the budgetary adjustments that the European Union will undergo in the coming years.

**MR. BLUMENTHAL:** Edith and Bill, for the two of you, how bad a hit do you think the FTC and DOJ will take?

**MS. RAMIREZ:** We are doing our best so that the ongoing budget constraints don’t impact our core functions or mission, but budgetary issues have been with us for some years now. The agency has taken a number of steps in recent years in anticipation of potential budget cuts, and, more recently, in anticipation of a potential sequestration. Specifically, we have been looking very closely over the last couple of years at hiring and have adjusted our hiring expectations, including encouraging voluntary early retirements. We are also taking a deep look at all discretionary spending, including travel.

Fortunately, so far, the budget issues have not had a significant impact on our ability to fulfill our core enforcement mission, but I believe agency finances will be an ongoing issue that we need to be looking at very closely. My hope is that Congress will work with us to assure that we can continue to protect American consumers and work to protect and promote competition.

**MR. BAER:** To just add briefly to that, Kathleen Foote’s eloquent presentation shows why sometimes being ahead of the curve is not such a good thing.

This is serious. It’s real. In the federal government as a whole, the Antitrust Division, the one area that I manage, we are looking to do everything we can do to avoid furloughs, focusing on mission-critical work. That’s all you can do and do it as best as you can.

**MR. MUNDT:** Just a remark on the idea that we might initiate procedures in order to go for fines. When I discuss this with the Budget Committee of the Parliament I use the same arguments as Joaquín does. But I am always very well aware that this has to be used with care because the success of our work cannot be measured by fines. Our task, of course, is to make markets work. I think we are all very well aware of that.

The fact that we are set under pressure by parliaments, by budget people, by governments in this way might sometimes lead us in the wrong direction. But we should always have a clear vision about what our main task is, which is not collecting fines. That is only a part of our enforcement work.

**MR. VOORHEES:** Gail, take us to some happier turf.
**GAIL LEVINE:** You guys have fielded questions from us on communication, and you’ve fielded questions from us on budget. Let’s take a dive into substance.

Let’s start with patents. The U.S. antitrust enforcers have been very active in their public advocacy on the kind of relief available in the case of RAND-burdened patents, that is, a patent whose owner has made a public commitment about the kind of royalty he will accept. Are the agencies interested in playing a similar role of public advocacy with respect to the relief available for non-RAND-encumbered patents?

**MS. RAMIREZ:** Gail, let me tackle your question. Let me begin my response by taking a step backward.

I would first note that a great deal of attention has been focused on the work that the agencies have been undertaking with regard to intellectual property. But I want to emphasize that I certainly don’t see patent rights and antitrust to be at odds or in tension. I think both share the same goals, including promoting innovation and advancing consumer welfare. I want to make sure that that message is heard loud and clear.

I also want to emphasize that even though there has been a great focus on the specific issue that you’ve raised—relief available to holders of RAND-encumbered patents—this is really part and parcel of a very significant area of work that both agencies have undertaken over the last two decades. I will focus, of course, on what the FTC has done. We have spent years studying this area and it is important to recognize that our IP advocacy work is much broader than just standard-essential patents.

We issued a report back in 2003 that addressed the important issue of patent quality that included a number of different recommendations. More recently, and more directly relevant to the question that you raised, the FTC issued a report in March of 2011 on the “Evolving IP Marketplace” that focused on the issue of patent notice and patent remedies. In that report we addressed how courts should take RAND commitments into account, particularly when evaluating whether or not it is appropriate to issue an injunction. So as these examples show, the FTC’s advocacy has focused on broader issues outside of standard setting.

At the same time, we have also paid great attention to the standard-setting context, given its deep importance in the IT sector and the fact that standards promote competition across a wide range of products and ultimately are highly beneficial to consumers. Consequently, the FTC views standard setting as procompetitive, and we want to protect and ensure the integrity of that process. That is why we have focused a great deal on ensuring that RAND commitments that are made in that context are upheld and that efforts to renege on those commitments are prevented.

That doesn’t mean, though, that outside of the standard-setting arena there may not also be concerns about the impact on competition of the assertion of patent rights more broadly. This is an area that as an agency we will be looking at closely. Whether or not there is a role for antitrust, of course, will depend on the particular facts of any given case, but as an agency we are looking at this issue. Stay tuned. You may see more in that arena.

**MS. LEVINE:** Bill, do you have anything to add on that score?

**MR. BAER:** This time Edith has largely preempted the field, and nicely done.

You asked a question about public advocacy. There are two criteria that ought to be met. First of all, you need to have a forum in which to say something, and then you need to have something you can say. We need to be careful in this area. As Edith said, we don’t see intellectual property...
and antitrust as being at odds with each other. We need to identify areas where there is harm that goes beyond the lawful scope of a patent. We need to look for opportunities to articulate those concerns.

Eight weeks ago we filed a comment jointly with the Patent and Trademark Office at the ITC, talking about a framework it might be able to use when there may be bad behavior going on in an effort to obtain an exclusionary order out of the International Trade Commission. That is an example, in addition to the workshops that we are doing together, of studying, thinking, and then speaking when we have something to say.

**MS. LEVINE:** Can our European guests give us an update on what is going on with this issue at the European Court of Justice, which I understand has just agreed to speak to this issue?

**MR. MUNDT:** We have indeed a very important private litigation case going on in Germany. The role of patents is a very important one, of course. We had a roundtable on this topic at the OECD back in 2009. The result of that discussion was that it is a question of the right balance between patent rights and competition law.

There is indeed a lot of private litigation on patents in Germany. We have two specialized courts, the regional courts in Düsseldorf and in Mannheim, and these two courts deal with almost all the patent litigation in Germany. They have a very strong reputation even internationally.

The private litigation case that you are referring to dealt with the questions: What is the relationship between patents on the one side and competition law on the other side? When can I go for an injunction without infringing competition law? The specialized court in Düsseldorf has decided to refer this specific case with five important questions to the European Court of Justice. We expect to get some important clarifications and guidance from the European Court of Justice, even if it might still take some time. But at least we will have a clearer picture then as far as Europe is concerned, because any ruling of the ECJ will be of highest importance for Germany as well as for the European Commission.

Another interesting aspect about this patent case is that this is a case between two Chinese companies, Huawei and ZTE, which were before a German court and which are now subject to the ruling of the ECJ.

**MR. ALMUNIA:** One comment from the EU point of view, the general EU point of view: we have some cases dealing with standard-essential patents, involving the use of injunctions, what can be considered as RAND or FRAND conditions, that ask what is the definition of the “willing licensee.” That for us is a concept that needs to be taken into account when considering the possible existence of an abuse of dominance because of the way the owner of the standard-essential patent tries to prevent the potential licensees from using these patents.

We have two main cases that are more advanced than others in the pipeline, the Apple/Samsung case and the Apple/Motorola case. We will look at what the European Court of Justice says, indeed, but we should not necessarily wait for the Court ruling to adopt decisions if we are ready to adopt decisions setting for the first time from the antitrust point of view a doctrine on the use of standard-essential patents and the licensing of those patents. Let’s see who is first.

In any case, of course, once the European Court of Justice sets their position on this case, a firm position, we will need to include this in our considerations.

But this is not the only case on how to combine patent and competition concerns. I will give you two other examples of cases that we are now investigating and discussing.
On the one hand, the pay-for-delay cases in the pharma sector have to do with patent settlements, or possible patent settlements. We have been monitoring the existence of patent settlements at the EU level since 2009, and every year we publish a report. We think the way the market in the pharma sector is working has improved a lot, thanks not to cases decided—we have not yet decided the two cases, as I said before; the Lundbeck case will be the first one—but thanks to the criteria that were drawn from the sector inquiry that we carried out four years ago. The other case where the use of patents is involved—and this is not a simple case and we are working together with our friends from the FTC—is about refrigerants for cars. It is not an easy case. But we will be very interested, I think, in how we can deal with this case.

Mr. Blumenthal: I know there is a limit to how much people are prepared to say about pending cases, especially when grand juries are in the picture. Joaquín, in your opening remarks I think you alluded to financial services and said we might get back into that in the Q&A. Let me take you up on that.

We keep reading about LIBOR, EURIBOR, things like that. Of course it’s civil for you, it’s not criminal like it is over here. What can you tell us about the state of play in Europe and what we ought to expect?

Mr. Almunia: I can tell you some things and I cannot tell you some other things. [Laughter]

We started investigations when we received information about the manipulation of interest-rate benchmarks. We are investigating potential collusive actions of cartels linked with the manipulation of these interest-rate benchmarks. Other authorities, other regulators, or other jurisdictions are looking into other aspects of this manipulation from the point of view of the individual conduct of some traders, with criminal offenses, or from the point of view of the abuses in the market, from the market regulators.

But as here in the United States, we are also looking into possible cartels regarding this manipulation. We are looking into LIBOR, EURIBOR, and Tibor, the Tokyo benchmark, linked in these three cases with three currencies, the yen, the euro, and the Swiss franc. We are more advanced in the first two cases than the third one. I have asked the Competition DG to give these cases “top priority” because I think it is absolutely necessary to regain confidence in these benchmarks, which are essential for the functioning of the economy and for the proper use of extremely important financial instruments, to regain confidence and to establish clearer rules of the game.

It is not only about the action of the regulators or legislators, who are working hard. We at the Commission have put forward some legal initiatives to reorganize the way these benchmarks are established. But at the same time we need to regain confidence and we need to investigate the possible existence of cartels and collusive actions. That is what we are doing. I hope if the investigation continues to go as it has in the past month, that before the end of the year we will have our first decisions.

I think as the antitrust authority we are not the only ones who can restore order and who can resolve the extremely worrying situation created by this manipulation, but I do think from the antitrust point of view we need to contribute to the regaining of confidence in these markets. I hope that we will be able to comply with this internal benchmark for the Commission and try to adopt the first decisions in these cases before the end of the year.

Ms. Levine: I’ve got a question for the states, for Kathleen. Some states have been following the practice of delegating to private law firms some of the case prosecution work that has tradition-
ally been done by the offices of the state attorneys general. How has that played out in the antitrust sphere?

**MS. FOOTE:** Probably the most famous use of outside counsel by the states occurred during the tobacco litigation, which was largely consumer protection, although there was an antitrust wrinkle to it.

I will say that it is done by almost all states to some degree, more or less, over time. Probably the most eminent outside counsel the states ever engaged was Chief Justice Roberts before his appointment in the appeal from the liability phase of the *Microsoft* litigation.

The issues that relate to the hiring of outside counsel differ to some degree from one state to the next. The conflict-of-interest questions, which I know are ones that have been of concern to the public, are generally addressed under the Rules of Professional Responsibility in each of the different states. The question particularly arises also regarding delegation of the attorney general’s authority. The attorney general has powers and duties established under constitutions and by state courts. I think, by and large, it has been held that as long as there is oversight by the attorney general, and supervision and ultimate decision-making by the attorney general as client, the various state courts have upheld the use of outside counsel. It is certainly important to the states to be able to do that, given the lack of staffing that most of us have. I am sure most states will continue to do that.

The conflict issue does arise in certain particular situations with regard to contingency fees, although most state courts have found that there is no inherent conflict in that. Certain states, and most notably my own, have found that it is a conflict. About a year and a half ago, the California Supreme Court opened the door just a little bit, not so much for the state but for local agencies, on contingency fees.

The other area where it does become significant—and this is not so widely known—has to do with when we are in investigative mode. When we are in litigation, it generally works fairly smoothly under the assumptions I’ve just outlined. In investigative mode, and particularly for multistate investigations or for federal-state investigations, it doesn’t really work at all. The reason for that has to do with the confidentiality of those investigations and the fact that an outsider may have dealt with the potential conflict issues or breach-of-confidentiality issues internal to that state, but certainly has not done so with regard to the other states or other jurisdictions involved.

Nevertheless, I think this is something that is going to continue in the future necessarily, and, if handled appropriately, it is by no means a bad thing.

**MR. BLUMENTHAL:** Let me ask both a consumer protection and competition-related question. It’s not uncommon to find ourselves in a circumstance where steps that are intended to further the mission of protecting consumers have the collateral consequence of suppressing competition. Examples include things like licensure requirements that protect minimum quality but also erect barriers to entry. The FTC had some cases in the dentistry area. There have been cases involving hair care, people who want to provide hair care services but are barred because of licensure.

There are examples involving minimum service mandates—real estate would be an example—where there is a minimum package but it has the effect of limiting consumer choice, preventing consumers from getting a smaller package.

An open-ended question to the group— whoever wants to jump in, take it: What is your approach to balancing competition and consumer protection when the two are in tension?
MR. ALMUNIA: In our view, both consumer protection legislation or regulation or provisions and competition enforcement have the same objectives: consumer welfare, to protect consumers and users against abuses, against distortions, against inefficiencies.

I don’t have any particular case in mind to use as an example in our recent activity at the EU level. But in many cases, mergers or antitrust investigations, we are analyzing efficiencies. One of the elements creating efficiencies that needs to be balanced with the distortions created by the particular action is consumer welfare. In our analysis of efficiencies, consumer welfare is more and more present in our discussions before adopting decisions. In general, if an EU regulation exists, we take it as a given fact in the context of EU competition enforcement, and EU regulations in this field usually complement our enforcement actions.

So from the intellectual point of view I don’t see any contradiction. Maybe in some cases, in some jurisdictions, there were very tough discussions on how to combine one and another aspect, but I don’t have in my mind any particular challenging case.

MR. MUNDT: I would usually say—I fully agree with Joaquín on this matter—both go in the right and in the same direction, although the focus is slightly different. Competition law leads to better functioning markets and increased competition, whereas consumer protection is more about the negative consequences of information asymmetry and similar issues. Maybe we have a slightly different approach to that in Europe than in the United States.

I want to give you an example. The Bundeskartellamt pursues cases which you in the U.S. would probably say are more a matter of regulation. For example, the Bundeskartellamt had excessive pricing cases in the area of energy and drinking water. However, we do that only where there are captured customers that cannot switch their provider and only if there is no regulation. But, of course, there can be the criticism that what we do in this area is a little bit of regulation and goes a little bit beyond what you in the U.S. might call antitrust law.

With regard to the protection of consumers, I think in Europe we are maybe a bit more light-handed with regulation. If you think about, for example, what real estate agents are supposed to do and not supposed to do, we have quite clear regulation on minimum standards. That is regulated by law and we have no problems with that. In other countries, the same issues might be subject to rulings of the competition agency or of the consumer protection agency, which sometimes falls in the same hands.

So I would say the climate for regulation in this area in Europe might be somewhat more flexible—or somewhat more open, to put it neutrally—than it is in other countries, maybe especially than it is in the United States.

MS. RAMIREZ: Let me jump in here and say that the FTC approaches and carries out its dual mission very similarly to how Joaquin described the approach in the EC. We view antitrust and vigorous competition as one of the main ways to advance consumer welfare.

By the same token, we view our consumer protection mission as critical to ensuring that consumers have access to accurate, truthful information that is free of fraud or duress. That is why so much of our work goes to making sure that consumers can in fact make meaningful, informed choices. That includes all of the work that we do, for example, in the ad substantiation arena.

Similarly, it is an important consideration in the privacy area as well. There is a considerable lack of consumer information and understanding about the way companies use consumer data and information. The FTC has been encouraging companies to be more transparent about their data practices so that consumers can make meaningful choices based on how companies collect and use their personal information and to encourage competition in this arena.
FTC efforts related to professional service licensing requirements also highlight our dual mission. That is an area where consumer protection is consistent with competition because consumers lack the expertise or the time to evaluate meaningfully the services that are being provided by sellers. So again, having access to reliable information and sufficient safeguards is vital, and that is very consistent with our consumer protection mission.

At the same time, as antitrust enforcers, we are also concerned that unnecessary licensing requirements might be used as a way of favoring incumbents, deterring entry, or otherwise suppressing competition.

**MS. LEVINE:** Here’s a question for the Federal Trade Commission. Can you tell us something about your vision for the use of Section 5 in the coming years?

**MS. RAMIREZ:** My view of Section 5 is really quite simple. I see my job and the agency’s enforcement mission as guarding against harm to competition, harm to the competitive process, and harm to consumers. Fulfilling that mission is going to be the key driver in how I believe that the FTC should use its Section 5 authority. Section 5 is part of the FTC’s arsenal and one of the tools that Congress gave to the FTC when it was first created. It’s a tool that I feel the agency ought to use when appropriate to protect consumers.

At the same time, I appreciate that it is important that companies have guidance and understand how it is that the agency intends to use this authority. The reason there isn’t more Section 5 guidance is that Section 2 has proven to be broader than was anticipated in 1914 when the agency was created. Consequently, the vast majority of the Commission’s enforcement activities involve conduct that falls squarely within the scope of the Sherman and Clayton Acts, and I expect that will continue.

However, there is conduct that harms both competition and consumers but arguably falls outside the letter of the Sherman Act. In those cases, it is appropriate to use stand-alone Section 5 authority. I’m a firm believer that it is appropriate for the Commission to develop the law on an incremental, case-by-case basis.

In the recent past, the agency has used its Section 5 authority to address a few types of misconduct, including invitations to collude, improper information exchanges, and abuses of the standard setting process. I would expect that the FTC will continue to use Section 5 in a similarly judicious and careful manner going forward.

**MR. BLUMENTHAL:** Let me ask a China question if I may. We keep reading in the press about how Western governments are concerned about Chinese state activities directed at infiltrating companies, infiltrating governments, trying to appropriate IP and other data. With that in mind, my question to all of you is: How is it going with the MOU?

**MS. RAMIREZ:** Our MOU with China’s three antimonopoly agencies has helped us to further relationships among our agencies. Last September we held the first joint dialogue among China’s three agencies, the FTC, and DOJ, which provided an opportunity for the productive discussion of both high-level competition issues as well as more specific topics. We expect to have the second joint dialogue in China this fall.

Both during those joint dialogues and at other meetings we have urged the Chinese agencies to guard confidential business information obtained in the course of an investigation. We stressed that this is not only a vital issue for companies, but also crucial to the agencies’ credibility and ultimately their ability to function effectively in enforcing the antimonopoly law.
The MOU also contemplates training programs and workshops. We hosted a MOFCOM official at the FTC for six months and look forward to opportunities for more staff interaction in the future, not only through technical assistance, but also through direct case cooperation. We look forward to continued engagement with the Chinese agencies. We have found them to be very engaged and very interested in learning how we apply the antitrust laws.

**MR. BAER:** I agree with that. The dialogue has been constructive and candid. That is an emerging competition regime. They are clearly interested in the experience the United States has had, the Europeans have had, and that’s terrific. We will embrace and continue that dialogue.

**MR. ALMUNIA:** May I add something from the European perspective? We signed some months ago a memorandum of understanding with two Chinese competition agencies. We had signed years before with MOFCOM, and we have had regular dialogues with them every year. Now we have also established these regular dialogues with the other two agencies.

On top of this, we have been dealing with some mergers in Europe where Chinese companies were participating, trying to acquire EU companies. In the last eight or nine cases we cleared all the mergers. We were looking into one particular issue that concerned us: to what extent a Chinese company that wants to acquire a European one, wants to invest in Europe, acquiring assets in Europe, had established clear coordination mechanisms with other state-owned companies or with the public authorities in China, to consider if the relevant player in this merger is one company or is a group of companies and who is the one who will take control. But as I said, we cleared the mergers.

We have been cooperating with the Chinese competition authorities in some mergers with consequences in China. We have been cooperating with them more and more.

But our relevant problems when discussing economic relations with the Chinese companies or with the Chinese economic sectors are not basically focused on antitrust concerns. Our real concern is intellectual property rights, subsidies, and public procurement. These are very serious issues that go beyond what an antitrust authority can solve with our traditional instruments.

**MR. BLUMENTHAL:** When you were considering whether it was one company or multiple companies, whether they were state-owned enterprises, what was the conclusion?

**MR. ALMUNIA:** In some instances we considered that there could be links. But I have to say that we have reached the same conclusion from time to time with European companies that also have the state as a shareholder. So it is not a specific analytical tool for Chinese companies. It is an analytical tool that we use every time we think a company that wants to acquire another one is operating not on behalf of their own particular interests but on behalf of a group that goes well beyond the perimeter of this particular company.

But as I said, in the last eight or nine cases we cleared the mergers.

**MR. MUNDT:** We do not have very much experience concerning cooperation with Chinese competition agencies. We had one case, which was the merger of BHP Billiton and Rio Tinto, where there was—I wouldn’t say close cooperation with the Chinese competition agencies—but there was consultation.

The Bundeskartellamt always has a lot of cases, especially mergers in the area of chemical products, where we find it very difficult to establish the relationship between the companies in
China. As Joaquin has just mentioned, it can be more difficult to come to a well-founded conclusion regarding Chinese companies than companies operating outside China in other countries. That is the current impression of a competition agency of an EU Member State. So we do face some problems in this area.

**MR. VOORHEES:** We have come to ten minutes before the hour. So let me ask each of our panelists in two minutes or less to provide any wrap-up comments or comments about priorities, whatever you want to do in two minutes or less.

**MR. BAER:** Okay. I will try to make this brief.

Our strategic plan for the next year is really a modified Willie Sutton principle. You remember he was asked, “Why do you rob banks?” and he said, “Because that’s where the money is.” Our effort has got to be, with the limited taxpayer dollars available to us, to focus on behavior that causes the most significant consumer injury. Whether that means telecom, autos, health care, transportation, we will look hard at where the problems are biggest, and that is where we are going to devote our scarce resources.

We are going to offer guidance where appropriate. I am, however, not a big fan of “GINOs,” guidelines in name only, where you put out ten pages of caveats and then put a big heading “Guidelines” on it. We can offer guidance in many ways—through cases, competitive impact statements, through explanations of why we chose not to go forward in a particular area.

That is an important part of what we do. But it is also important that we not waste your time with formal guidance that actually doesn’t really help you figure out with your clients whether or not there is going to be a problem.

As I said at the beginning, to me it’s all about the challenge of showing the Congress and the U.S. taxpayer that antitrust enforcement is a good value proposition. That’s where we’re going to be focused.

**MR. VOORHEES:** Thanks.

Edith?

**MS. RAMIREZ:** The immediate priorities at the Federal Trade Commission are those that I highlighted in my opening remarks—areas of significant impact on consumers. That includes tech sector, privacy, and preventing fraud and deception aimed at low-income and disadvantaged consumers.

I also want to mention something that I didn’t touch on during the course of my opening remarks. I would like to place greater emphasis on the agency’s research function. I believe it is very important for the antitrust agencies, and enforcers generally, to assess the impact of their decisions.

Consequently, I want the FTC to engage in more merger retrospectives so that we can better understand whether the agency’s predictions and subsequent decisions proved right or wrong. I would then hope to use that information to improve our decision making in the future.

**MR. VOORHEES:** Great. Thanks.

Joaquin?

**MR. ALMUNIA:** This morning I was reading the newspaper, and there was an op-ed with some com-
ments about statements by the director general of the WTO, Pascal Lamy, a former member of the European Commission, warning about the risks of protectionism.

These risks have been there since the beginning of the financial crisis five years ago, and in particular, from the European perspective, we feel these risks. And not only within our internal market—we feel these risks when publishing the new rules of the game for the future in the economic relationship with our partners around the world—we were talking about China—of course the relationship with the United States, with other industrialized countries. Our citizens will suffer a lot and will lose a lot of welfare and benefits if we give in to these protectionist trends.

I think antitrust authorities and antitrust instruments are very useful tools to eliminate these risks, and we need to use them without giving up, without paying attention to the voices that warn us about the negative consequences of being strict in competition policy enforcement. This is my firm belief. This is the reason why I think international cooperation among us, among antitrust authorities, as Andreas said at the beginning, is of the essence. I would like it very much if the Chinese competition authorities were integrated in the International Competition Network one day and participate with all of us in discussions on how to improve the way competition policy can be implemented and can be put at the services of our citizens.

In particular, let me add now here that I am very, very happy with the initiatives of both President Obama and our EU authorities to open negotiations at the highest level for a trans-Atlantic free trade agreement. I do not know if competition will be included in the final text of this agreement. In any case, given the high level of understanding and cooperation with our U.S. friends and colleagues, if competition is to be mentioned in this free trade agreement between the United States and the European Union, we will not have a lot of difficulty cooperating for the success of this agreement.

MR. VOORHEES: Andreas.

MR. MUNDT: I echo everything that Joaquín has said. As far as the Bundeskartellamt is concerned, I have sketched out our priorities at the very beginning.

But I forgot to mention one thing. That is the fact that our law is currently being revised. The eighth amendment of our law has been discussed for some time already but now the project has got stuck in the legislative process. One important issue at stake is the question how far we will include public health insurance companies under competition law in the future. That is something that is vital for me, that we broaden the foundation for competition law in Germany.

The general impression in our political sphere seems to be that regulation is somewhat better than competition because regulation is faster and companies know what to expect—at least, they believe they know what to expect. The competitive process is something that takes time until you see the results. To fight against this current stream, to fight for competition vis-à-vis regulation, is one key issue for me as far as my own country is concerned, and we will continue to work on that.

Another issue with this amendment is that we would be happy to apply the SIEC test in the future. That would allow us to even further strengthen our economic expertise. In the past, when asked who our chief economist is, we always answered, “We don’t have a chief economist because our chief is an economist.” These times are long past, years ago. We have really developed our specialized economic expertise over the years. I think the introduction of the SIEC test would be another step into the future. I would be very happy if we could achieve that eighth amendment in the near future, although I am very skeptical about it.

—Ioaquín Almunia
**MR. VOORHEES:** Kathleen?

**MS. FOOTE:** I think I addressed in my opening remarks what are the primary enforcement priorities of the bulk of the states which we are attempting to work with within the Multistate Task Force.

Collectively, as the Multistate Task Force, certainly our mission is to realize the potential of coordinated enforcement. We are, I think, only part way down that road, and we will be continuing down that road and refining what we've got and exploring new methods and new tools that we can use to promote that goal.

**MR. VOORHEES:** I would really like to thank our audience for being so attentive and for staying with us.

Bill, Edith, Joaquín, Andreas, Kathleen, on behalf of myself, Bill, Gail, and our tremendous audience, thank you so much for your participation.
Around the World in 80 Minutes (or so): An Update from Key Enforcement Agencies

American Bar Association Section of Antitrust Law Spring Meeting • Washington, D.C. • April 11, 2013

RANDOLPH TRITELL: Good morning and thank you for joining us. We have a lot of ground to cover, a lot of the world to cover, and a lot of topics to cover, so I’m just going to say a few words about the format of our program. We’re going to organize the program by theme. We’ll first ask everybody on our panel to share some of the key developments in their jurisdiction. We will then discuss developments by subject area: cartels, mergers, dominance, compliance, advocacy, and international cooperation.

Let’s introduce the moderator of the program, Ken Glazer. Ken is a partner in the Sidley Austin firm in Washington and the Antitrust Section’s International Officer. With that, I’m going to turn the program over to Ken.

KENNETH GLAZER: South Africa, Canada, Mexico, Brazil, Japan, United Kingdom—six key jurisdictions. We’re honored to have senior representatives of these jurisdictions with us today. If you have spent any time in international antitrust circles, you will have encountered these countries.
As Randy said, we have organized the discussion around six topics. Let’s start with key developments and priorities of the agencies.

Eduardo, I think you were going to start with a few comments.

**EDUARDO PÉREZ-MOTTA:** Today in Mexico we are in the middle of one of the major reforms in telecoms and competition. I would say very frankly to all of you that this is the best example I can share with you of how advocacy, from a competition agency point of view, could generate the political movement to make a major reform that has as an objective basically to increase competition and to decrease barriers to entry in a sector that is as important as telecoms—important as the basis for productivity and the possibility of growth to many other sectors in our economy.

This reform includes the concept of convergence, reducing barriers to entry on interconnection rates, on access to content, opening the barriers and opening the possibility of foreign investment—100 percent investment possibilities in telecoms, 49 percent in TV. We used to have 49 percent in telecoms and zero percent in TV. We’re going to have even more than the U.S. The U.S. in TV I think is no more than 25 percent. That is a good opportunity to follow the Mexican work—and the tender of radio spectrum for the creation of at least two new national broadcasters in TV.

So this is a major reform. This is the agenda that has been proposed in the last eight years by the Mexican competition authority.

**MR. GLAZER:** Marcos, I think you were going to talk about the experience that Brazil has had in its first year under its new regime.

**MARCOS PAULO VERISSIMO:** We have been through a major reform. As some of you may know, a year ago we merged three different authorities into one. It’s very important for administrative jobs to put everybody together working in the same place, to sort of create a new common culture at the agency. We have also had a major reform as far as the merger regime is concerned. We migrated from an ex post regime of approval to an ex ante regime of approval. That was also a very important challenge.

The most important aspect of this challenge was the ability of the new agency to clear cases, especially simple cases, in an economic timeframe. This was, actually, the great challenge because there were both reasons and incentives for the old regime to be sort of slow in handling the cases. In the new context, that would be impossible.

The good news for this introduction is that we have been through it successfully. We are clearing simple cases within less than thirty days.

We have also been able to focus our attention, especially at the tribunal, as we call it—the part of the new agency in charge of decisions—on cartels, which is also good news. We had a pipeline of cases that we needed to decide upon. We are doing that. I believe that the major change has happened in this area and context.

Our future priorities will be, for the next couple of years, to strengthen the culture of the new agency, to complete the process of administrative organization, and certainly to complete the regulation of the new merger regime. We have to regulate concepts such as associative agreements, whether you will or will not have to present certain operations of acquisition of assets and so on. This is going to be work for the next two years maybe.

**MR. GLAZER:** Big changes also have taken place in the institutional structure of the U.K. competition authorities. Philip, can you talk a little bit about your priorities looking ahead?
PHILIP COLLINS: As I’m sure you know, there’s a proposal currently before Parliament, in its final stages, to merge our two existing bodies, the Office of Fair Trading and the Competition Commission, into a single unitary authority, which will then be known as the Competition and Markets Authority. So you’ll need to get used to the acronym CMA from April 2014.

This will be a competition and consumer agency. There was an initial idea that it would only deal with antitrust. In fact it will have the full range of legal powers that we at the OFT have at the moment. It will be a competition and consumer agency.

There will be some legislative changes. Most of those are, I would say, relatively minor. Many are consequential upon bringing together the two organizations and actually adapting the legislation to the operation of the competition and consumer regimes in a single institution and under a single board.

I will talk a little later about one other significant change, which is in the criminal cartel offense. What I would like to focus on, as we enter our last year—our last year started on the 1st of April, ten days ago—is how this creation of the CMA affects our plans and priorities.

Our first priority is what we broadly call business as usual. We entered the financial year with a very good portfolio of work. We’re not in any respect taking our foot off the pedal, so to speak. We continue to invest in high-impact enforcement cases, both in the competition and consumer area.

We’re carrying forward the main crosscutting themes we pursued last year. These are, first, focusing on vulnerable consumers—people who, for one reason or another, are generally vulnerable, but also those who are affected by the current economic climate. Secondly, we are focusing on pricing used as a barrier to fair choice and competition. That includes, in particular, online issues. Thirdly, we are focusing on novel and developing markets and business models; and, fourthly, we are also focusing on public services.

We have added one new theme this year around working more closely with the economic regulators where there are concurrent competition and consumer powers with the OFT. A change that is going to be introduced is that the CMA will have a stronger position than we have had to date and it is important to help prepare for this.

The second priority is to help ensure that the new institution, the CMA, hits the ground running so that there is no loss of momentum in the overall regime and that they take over a full portfolio of work in various stages of development. It is critical, for them and for us, that we are developing ideas which they can put into casework and projects pretty early on in the CMA’s life.

We remain, as I say, very focused on the rich portfolio of cases. We have also substantially reviewed our procedures for Competition Act cases. One thing we will need to do, I think, is make sure, as the year goes on, that we are focusing on the right cases. That means starting new ones and continuing to pursue existing ones even more rigorously. There may be some cases which, for one reason or another may, once we get into the evidence or the priorities, actually need to be closed down. But I would think they would be relatively minor.

The last point, which is actually critical in any kind of institutional change—and we have institutional change in other countries in Europe, in Denmark and in the Netherlands and in Spain—is actually bringing the staff with us. The staff are the people who make the regime work. We are very focused on making sure that our staff are motivated and engaged. A big part of that is learning and development. Another big part of it is making sure they are doing interesting work.

MR. GLAZER: We’re going to move on to cartels specifically, unless any of the other panelists would like to say a word about some major priorities, in a general sense.
JOHN PECMAN: I can start talking a bit about cartels. But in terms of major changes in Canada, I guess we’re in a transition period now. I have been the Interim Commissioner for six months.* The government is proceeding with the staffing process. So we’re expecting a permanent appointment in the foreseeable future.

With my taking on the helm as a career staffer, we made some minor tweaks in terms of our approach. We have pursued competition advocacy, an area that we had stopped for a while as we were focusing on our new amendments to our legislation. We have a couple of interventions before the telecommunications and broadcasting regulator and one before Industry Canada involving the digital economy. That is a slight change from where we were before.

We’re increasing our collaboration with the business community, legal community, in terms of developing policies and procedures. That’s continuing, and it actually is accelerating, I think, recently.

With respect to cartels, this is an area that I really wanted to talk about, the health of our leniency program. There have been many commentators who have indicated that it’s on life support as a result of the Maxzone decision last fall. In that decision, Chief Justice Crampton indicated that cartel offenses were very serious, that it was akin to fraud and required severe penalties, including jail time. He endorsed our leniency program. In Canada, leniency refers to cooperating parties that lose the race for immunity. Leniency applicants—the first in receive immunity from prosecution for the individuals, as well as a 50 percent reduction from the usual fine levels.

Justice Crampton was complimentary of the program. He indicated that it aligned with sentencing principles of our criminal code. It was the first endorsement of that product by the judiciary. However, he was very critical of the submissions and the evidentiary record that was brought before him, indicating it was difficult for the court to determine the gravity of the offense, in that there was no evidence of overcharge or the illegal gains presented before him. In the course of a cartel investigation and bid-rigging investigation, where you have a per se provision, that is not usually evidence that is obtained and, of course, is difficult to show, in any event, unless, of course, you use some economic modeling.

All this is to say that it caused some angst in the legal community that there is now potentially a lack of certainty when parties go before the courts, if there has been a plea agreement between the Crown and the defense. I’m very happy to say that last week there was a guilty plea filed before the Ontario Superior Court, which the court accepted. They were made aware of the Maxzone decision and the comments from the Chief Judge at the federal court. Basically, the court asked a few questions, but ultimately accepted the approach that is used internationally, determining the relevant volume of commerce using the 20 percent figure. The court adopted that, agreed that it could be difficult to demonstrate what the actual overcharge was. In that particular case, it was involving auto parts. It was Yazaki which pleaded guilty to that particular offense.

We are very pleased to say that we believe our leniency program is healthy and alive. Stay tuned on that front.

I have two other quick points I would like to make. One pertains to the open court system in Canada. There have been some concerns, in international investigations especially, with the early release of our affidavit material that supports either production orders or search warrants in our courts. Those documents are generally available to the public once they have been executed. We

* Ed. Note: Mr. Pecman was appointed Commissioner of Competition on June 12, 2013.
do protect the identity of the immunity applicant. However, there is a sufficient amount of information on that record that provides a bit of a roadmap to the investigation, as well as providing information to class action lawyers to initiate proceedings.

There has been some concern about parties coming into Canada who are worried about premature release of information. We have been working with the American bar and the Canadian bar to come up with an approach that will provide for further protections and extended sealing orders on those documents to prevent that type of concern. It's something that we have been working on. We have proceeded in a domestic matter with revised language to extend that sealing order. I'm hoping that is going to provide comfort to international practitioners that we do take very seriously the need to protect the immunity applicant's information and identity, and we will continue to protect that going forward.

Last but not least, we are making some revisions to our leniency and immunity program, the FAQs, as a result of developments over time. They are fairly recent programs. Again we're consulting with the Canadian and American bar on changes regarding clarity and issues involving waivers. One issue I would like to point out is, when parties come into Canada for a marker, if they have gone into other jurisdictions and started to provide evidence, we're expecting a waiver to be provided to us immediately at that point in time so we can coordinate with our international counterparts in our investigations.

MR. GLAZER: Michiyo, can you speak to what's happening on the cartel front in Japan?

MICHIYO HAMADA: Not on the cartel, but on our major changes in general.

It seems like the JFTC has recently joined the ranks of dignified agencies whose top official is not appointed swiftly. Since last September, when our former Chairman, Takeshima, stepped down, the JFTC had been without a permanent chairmanship for more than five months. Finally, Mr. Kazuyuki Sugimoto assumed the position on March 5. In his inaugural statement, he addressed many points, but I would like to introduce only one point here. He noted globalized and cross-border business activities and he stressed the importance of cooperation and coordination with overseas competition agencies. Thus, the JFTC will keep contributing to international cooperation and coordination more than ever.

MR. GLAZER: So leadership change at the JFTC and transitional leadership in Canada. The leniency program is alive and well in Canada, I think I heard you say, John.

MR. PECMAN: That's correct.

MR. GLAZER: Is the message that we should not ignore Canada when it comes to criminal behavior?

MR. PECMAN: Well, if you do, you do it at your own risk. We continue to have very close relationships with our trading partners. We do monitor public announcements regarding investigations. If you haven't come into Canada, do it at your own risk.

MR. GLAZER: Michiyo, would you say a word or two about cartel enforcement by the JFTC?

MS. HAMADA: Recently in Japan, a series of auto parts cartels were surely our major cases. Firstly,
the JFTC detected cartels relating to wire harnesses and imposed surcharges of nearly 13 billion Japanese yen on three auto parts makers in January last year. The surcharge against Yazaki amounted to 9.6 billion yen. It's about $100 million U.S. dollars. The amount is the highest surcharge imposed on a single firm in Japan.

Secondly, in November last year, the JFTC concluded the investigation of cartels relating to automotive generators, starters, etc., and issued surcharge payment orders of nearly 3.4 billion yen in total.

Thirdly, in March this year, cartels relating to automotive lamps resulted in 4.7 billion yen of surcharges.

Fourthly, cartels on bearings also became subject to surcharges, totaling 13.4 billion yen. In this case the JFTC filed criminal accusations against three companies and seven individuals.

I think it’s worth mentioning here that the JFTC has made efforts to fight cross-border cartels together with overseas agencies. As for the auto parts cartels, the JFTC coordinated simultaneous dawn raids with agencies in the U.S., EU, Canada, and so on. Such enhanced liaisons are indispensable to detect international cartels effectively and swiftly.

I would like to add one more comment. While tackling auto parts cartels in Japan, we learned what’s going on in the U.S. For example, Yazaki agreed to pay nearly five times larger fines than our highest-ever surcharge imposed on the firm. Besides, Yazaki’s six executives accepted up to two years’ service in a U.S. prison. I’m impressed with the aggressive approach by the U.S. competition authority. Maybe I will be impressed again when we learn what’s going on in the U.S. as far as the private litigations in the near future.

**MR. GLAZER:** Active cartel busting by Canada, by the JFTC. Philip, is the U.K. an exception to that?

**MR. COLLINS:** No, no. You ignore the U.K. at your peril.

As you know, we have had criminal cartel powers now for the best part of ten years. There have been very few cases, and indeed only one successful case, which was *Marine Hose*.

I’ll say something in a minute about leniency, because we have made some significant changes there, but I want to say something first about how we have refocused and reorganized our efforts in the cartels area, because this is really beginning to bear fruit.

We now have many more investigators who are experienced, particularly in criminal law enforcement. We have recruited them typically from the police and from other law enforcement agencies. We have also substantially increased our investigatory staff and our intelligence functions; and we have also substantially increased the experience of the people at the top, including in criminal prosecutions.

Coupled with that, we’re also making greater use of what are called in the U.K. covert intelligence gathering and surveillance powers, which authorize us, under very strict conditions, for instance, to make audio and video recordings. We’re also making much greater use of our powers—or considering the use of the powers—to arrest suspects. For instance, we routinely consider whether to make arrests when carrying out dawn raids where there is a potential criminal case.

An interesting aspect of this is that we therefore find that a much higher proportion of our cases are what we call own-initiative investigations—i.e., they are based on leads or tip-offs that we are then able to use to initiate and build a case. We have one case at the moment that started with one tiny scrap of paper around which we are now building what looks a very promising case.

So I’m reasonably confident that you will see a growing number of criminal cases, not necessarily very large in numbers compared to the U.S. I’m fairly confident that they will start this year.
Those of you who follow the press will have seen that there have been a number of arrests recently. I can’t say any more about those cases.

I want to talk about leniency, because we consulted on, and substantially revised, our leniency guidance a while ago. I think the really good response we received to the consultation from practitioners and others was a great tribute to the OFT staff, who spent a huge amount of time engaging with interested parties and revising the guidance. It has been welcomed by business and by lawyers as being very clear and very comprehensive. In particular, the use of flowcharts and comprehensive explanations has really helped people to understand how the system works.

The one issue that is still outstanding, which many of you will know about, is the question of legal professional privilege waivers. The problem there arose out of observations made by the judge in the Airline Fuel Surcharges case. Notwithstanding our submissions in court, the judge suggested that we may be required to seek legal professional privileged material by threatening to withdraw leniency. Many people made the point that that was going to undermine the leniency policy. We consulted further. We made it clear this was limited to criminal cases.

The current position is that obviously this is not an easy issue, because it affects all criminal cases where evidence is relied on when it has been given by cooperating defendants. Although we can’t announce a final decision because of continuing discussions, I’m reasonably confident that we’ll be able to do that shortly.

I did make some earlier reference to the changes in the criminal cartel events that will come into force in 2014. They, as you probably know, remove the requirement for the proving of dishonesty and they replace it with an exclusion for those arrangements that are notified to customers or are published. In addition to that, there are three additional defenses that are introduced, as well as a requirement for the CMA, as it will then be, to give statutory guidance on when it will use those powers. If you’re interested in that, there’s a very excellent speech by Ali Nikpay, our head of criminal and consumer enforcement, and you can read the detail there [http://www.oft.gov.uk/shared_oft/speeches/2012/1112.pdf].

MR. GLAZER: Beefed-up powers to attack cartels.

MR. COLLINS: Yes, very much so.

MR. GLAZER: Marcos, would you tell us about cartel enforcement in Brazil?

MR. VERISSIMO: Just a very quick note. The reforms we had had a minor impact in the cartel area, in the sense of its legal regulation but a major impact as far as the structure of the agency is concerned. We now have a team specifically dedicated to investigating new cartels and a different team especially dedicated to process the proceedings of the cartel cases we have. We have different teams at the tribunal to decide upon the cases. At the tribunal, we have more time to deal with cartels because of the changes in the merger regime.

So I believe that you will probably hear more about Brazil in the cartel area in the next two years or so. We have decided this year seven new cases. We settled three other different cases. I believe that the number of cases we will be deciding upon will certainly increase and the number of new investigations will certainly increase as well.

MR. GLAZER: Shan, do you want to come in on the cartel situation in South Africa?

SHAN RAMBURUTH: Very quickly. I think we also have a story to tell about the success of our
Corporate Leniency Policy and how that led to greater enforcement in the cartels area. We started our CLP in 2005. Between 2005 and 2008, we got about ten applications for CLP, the reason being that it was not designed properly. We needed to give greater clarity in the CLP provisions around when somebody does indeed definitely get leniency or not. There was uncertainty. So we revised our CLP program, and since 2008, we have gotten over 250 CLP applications.

Over 100 of these were initially concerning bid rigging in the public sector, mostly bid rigging in construction in the public sector. With this number of CLP applications, to prosecute each one of them was quite a daunting task for us. We drew from some of the experiences in the U.K. and the Netherlands by devising what we called a fast-track settlement program, where we have incentivized firms to come clean on all the bids that they have rigged in the construction sector, and in return, they would get a lesser fine than they would have got if we had prosecuted each of these cases. So we played a version of prisoner’s dilemma with the construction industry, basically.

We are at the tail end of that project, which has worked out very well. We’ve got twenty firms participating in it. We think that all of them have revealed all the projects that they have been involved in collusive tendering over. Of course, those firms who don’t participate in this program, the fast-track settlement program, we will prosecute in the normal course.

MR. GLAZER: Eduardo, do you want to say something about cartels?

MR. PÉREZ-MOTTA: Just briefly, I want to say that we had a major reform of our competition law in 2011. One of the most important impacts that we have seen is that in the last two years criminal sanctions were introduced in reform of cartels. The most important impact that we observe that tells how the market perceived those changes was in the number of leniency applications. In the last two years, we have received a little bit more than forty new leniency applications, which means that there is a clear perception in the Mexican market that it is better to comply first, that it is better to send this signal to the authority to stop this kind of practice. This is just an interesting element that I wanted to share with you.

Let’s move on to mergers. Eduardo, would you mind kicking it off?

MR. PÉREZ-MOTTA: There was a notification of a merger between Nestlé and Pfizer in November of last year. The Mexican authority decided not to approve it, not to authorize that merger, basically because that merger implied a concentration of around 88 percent of the market in infant milk formulas. We performed some econometric analysis. We designed a model to see what the impact would be of this concentration in that market on prices. We found that prices would increase at least 12 percent in those particular products.

So we went to analyze barriers to entry, which is what normally all agencies do. We found that to make a new plant to produce infant milk formulas would take around four years, which is not minor, and second, this market is not a very efficient market, in the sense that there are brand loyalties with the pediatricians. When you bring your baby to your doctor and he says, “This is the formula that I would suggest you to give to your baby,” it’s going to be almost impossible that you could have the creativity to look for other formulas and not to follow the instructions of your doctor. That makes it very difficult to change from one product to another.

So we decided not to approve it. This was a global merger. Other agencies—for instance, China—approved the merger. Clearly there were no problems in that market. And other agencies,
like South Africa, approved it with conditions. Australia approved it with conditions. I understand
that Chile is in the process of analyzing this case as well.

But what is interesting is not the fact that an agency like the Mexican agency did not approve
this case—and we are now obtaining information from the company on how to comply—but the
main point here is that you could have different decisions by different agencies, but the good thing
is that we normally use the same methodology to analyze the merger.

Take another case, like the beer case here in the U.S., and compare it with that case in Mexico.
I mean Anheuser-Busch InBev and Modelo. In the case of the U.S., it’s in the process of being anal-
yzed. There might be some important decisions in the next few days. In Mexico that was
approved without any problem because in the Mexican market it didn’t make any difference at all.
We don’t have Budweiser anyway in our country, so it didn’t make a difference and we decided
to approve it. But the methodology that we used is the same methodology that has been used by
the Department of Justice. And this is the most important message.

**MR. TRITELL:** Eduardo, we’re going to hopefully have time to come to some discussion of inter-
national cooperation later, but I wonder, given the reference to other agencies that were reviewing
this transaction and reached different results under different market conditions, if you had the
opportunity to cooperate and to discuss your analysis with what was going on in some of the other
jurisdictions?

**MR. PÉREZ-MOTTA:** That’s a good question, Randy. Actually, we did. We had a very good exchange
of information with other authorities. That was the case specifically with Australia. They were in the
process of starting the case at the same time. We knew what was going on with South Africa, as
well as in Chile. So, yes, cooperation—it’s a good example of a process that we normally do.

This is more common with the U.S. in the case of Mexico, because we have a free trade agree-
ment with the U.S. and Canada. So it is relatively common to have mergers which are basically in
the same market. In the case of Nestlé-Pfizer, for instance, we have had a completely different
market, or even in the case of beers, there are transport costs that are so important that it is not
so easy to move those beers from one country to the other. In the north, of course, there are more
possibilities to do it—in the north of Mexico, in the south of the U.S.

The market was different. We had a very good exchange of information in the case of the beer
market, for instance, with the Department of Justice.

**MR. GLAZER:** Philip, you want to make a comment.

**MR. COLLINS:** Just a quick observation there. Obviously, from a European perspective, most of
these very large mergers tend to be dealt with at the European Union level in Brussels. That’s not
always the case, but the vast majority of very large mergers are dealt with in Brussels. Where we
have domestic mergers that have cross-border implications—where they are being scrutinized by
other authorities—then both at phase 1 that we do, and at phase 2 that the Competition Commis-

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sion does, there is the best possible cooperation.

Having said that, you don’t necessarily always come to the same conclusions. We have had
one or two cases recently where there have been different conclusions, based on what would
appear to be very similar facts. That just reflects a difference in the assessment of the situation.

What I would say in relation to mergers generally in the U.K. is that the level of activity and the
number of problematic mergers is now very high. We have made more references to the Com-
petition Commission in phase 2 this year than ever before. That, we think, reflects the economic cycle, the economic conditions, because the kinds of deals that are being done are those that are likely to raise competition problems and potentially, unless they are addressed and assessed carefully, will give rise to long-term problems in the sectors concerned. So we think it’s the right thing to be doing, looking at these cases and referring them, where appropriate.

**MR. GLAZER:** Michiyo, do you want to speak to mergers for a moment?

**MS. HAMADA:** As to merger review, the JFTC revised the procedure in July 2011. Its aim was to enhance swiftness, transparency, and predictability of the review, as well as to ensure further international conformity. For example, there was a prior consultation system in Japan before. Interested parties could get a final answer from the JFTC ahead of the statutory filing. But the system was abolished.

Another revised point relates to early termination. The statutory waiting period for phase 1 review is thirty days, which can be shortened by the JFTC upon request from the parties. By the revision, we eased conditions for this early termination. Also communication between parties and the JFTC was facilitated. Upon request, the JFTC explains the issues or concerns which should be addressed in the review.

The revised procedure has been working well. The average reviewing period has been shortened significantly. Parties who have gone through the new procedure are giving favorable feedback.

There is one more reason why they are happy. A phase 2 review period of ninety days maximum starts when all the secondary requested records are accepted by the JFTC. Therefore, parties can retain the right to push the start button of the phase 2 period by retaining one last page of the requested records. This newly invented technique is now adopted by most parties concerned. They are happy because they can, by adopting this technique, control the time schedule so that they may negotiate with the JFTC as long as they like.

**MR. GLAZER:** Marcos, would you make a comment or two about merger enforcement under the new regime?

**MR. VERISSIMO:** The major changes of last year occurred in the context of merger cases. Basically, the idea was that we had to move from an ex post analysis regime to an ex ante regime. It placed in front of us a lot of challenges. One of them was to improve the efficiency of the system in Brazil. We have been throughout the busiest years, 2009, 2010, and 2011, analyzing 800 to 900 cases a year. We thought it was too much.

We had to analyze the cases twice. They were first analyzed by the authority connected to the Ministry of Finance and then by the antitrust authority. We had to change that, and the new statute tried to do those changes.

An important challenge was the timeframe for phase 1 cases, because they were previously analyzed ex post and could take something like ninety days or maybe 100 days, which would be unacceptable in the context of new ex ante review.

I believe that the results of those changes throughout this year were good. We are now analyzing phase 1 cases, what we call summary cases, within twenty to thirty days. That’s a very reasonable figure, considering that we just reformed the whole system. The issue of deciding twice is not an issue now. The tribunal at the antitrust authority will only analyze cases that have had an
opposition by the investigation department. We have only had one case like that so far this year, but the figures will certainly increase as well.

So we are basically happy with what’s happening in the sense of putting the reform into force.

Now, as I said before, the challenge is to improve the efficiency of the system, work harder on timeframes and, I believe, work harder with the regulation of certain aspects that remain unclear in the legislation. For instance, the most important aspects that are still unclear are certain situations in which some people could interpret the statute as demanding notification and other people could interpret it the other way.

For instance, acquisition of assets is an important issue that remains uncertain, whether we should count revenues of minority shareholders in certain circumstances, how to count revenues when you have private equity funds involved, and the concept of associative agreements. The new law requires us to examine certain associative agreements that may have the same practical result of a merger. But it’s still unclear what those associative agreements would mean.

I believe there is a need for the agency to issue regulations clarifying those points. Those are points that should not be left for case law to be decided. I believe they should be regulated up front. I guess this will be the challenge for the next few years.

MR. TRITELL: Do you anticipate that the agency will be promulgating guidelines to provide further interpretation of the law?

MR. VERISSIMO: Certainly. We are actually reforming our guidelines for economic analysis. We will also issue within this year, I believe, new guidelines on notification criteria.

MR. TRITELL: Will you be consulting internationally on those guidelines and provide opportunities for organizations such as the American Bar Association to offer their comments?

MR. VERISSIMO: Certainly, certainly.

MR. GLAZER: Wonderful.

You mentioned minority shareholdings. A lot of jurisdictions are grappling with the question of how to deal with those.

We’re going to move on to compliance, unless Shan or John wants to say anything about mergers.

MR. PECMAN: I’ll jump in real quickly.

We have been quite active on the merger front. We have had three consent orders within the past six months in the areas of telecom, waste, and airline services. As well, we have had a decision from the Federal Court of Appeal regarding a prevent case. It’s the first prevent decision in Canada and provides some excellent jurisprudence.

With respect to international cooperation, we have been working quite closely with our major trading partners, using the waiver process to exchange information, and have engaged in a number of roundtables with our U.S. counterparts and our Mexican counterparts on best practices.

So we’ve been quite busy and quite active on the merger front.

MR. GLAZER: When you say “prevent cases,” is that what we in the United States refer to as potential competition?
MR. PECKMAN: Prevention of competition. I would think it’s the same—as opposed to a substantial lessening test.

MR. GLAZER: Moving on to compliance, Michiyo, would you please speak to that?

MS. HAMADA: The most important task for our competition agency is vigorous law enforcement. But our ultimate goal is to achieve a competitive environment rather than to pile up fines or prison terms. So the JFTC has been encouraging compliance efforts by companies. Today I would like to share our perspectives by mentioning a survey report we published last year.

Let’s see the current status in Japan. Efforts to establish the compliance system have made significant progress recently. Nearly 70 percent of listed companies on the main stock exchange have prepared competition law compliance manuals. On the other hand, about 60 percent of the violators were found to have violated competition law while equipped with the manuals. The compliance efforts are not sufficient yet, in light of the effectiveness.

Aiming to motivate the businesses toward more effective compliance, we stressed the significance of compliance in the report like this: Compliance is not only a “tool for complying with laws and regulations,” but also a “tool for controlling risks and avoiding costs.” Moreover, it’s a “tool for maintaining and improving corporate value.”

Another message is that deterrence efforts are most important, but not enough by themselves. Violations can happen under full efforts for deterrence. You should be employing measures for early detection of a possible violation, as well as preparing for damage control in case of emergency. So remember DDD, which means deterrence, detection, and damage control. In Japanese, they are kenshu, kansa, and kikikani, so we call them KKK. I think we were lucky to have found out the compatible word “DDD” in English and have avoided the word “KKK” in our translation.

The report covers recommended compliance practices, too. The most recommended one is initiative and the strong commitment of top management. We also recommend a risk-based approach—that is, to identify specific risks unique to each firm and tailor preventive measures suitable to the risks.

In addition, an integrated approach as a corporate group is urgently needed irrespective of whether subsidiaries are located at home or overseas. The survey results show Japanese companies are still behind in establishing a global compliance program. However, I guess the situation is changing now, since many Japanese firms are getting severe lessons from overseas agencies, notably from the DOJ.

The report is also recommending specific model practices as to compliance manual, training, audit, whistle-blowing system, in-house leniency policy, and so on. Its summary, written in English, is posted on our website. [http://www.jftc.go.jp/en/pressreleases/yearly-2012/nov/121128AMA_Compliance.files/121128AMA_Compliance.pdf]

MR. GLAZER: Philip, on compliance in the U.K.?

MR. COLLINS: Perhaps I can give a few remarks. We, like JFTC, have invested quite substantially in the subject of compliance. We do that for several reasons:

First of all, the message from big businesses which had in-house competition lawyers was that this wasn’t being taken sufficiently seriously in their organizations. That was also the feedback we received from our own board members who had worked in large businesses.
Secondly, my own experience and that of others who have been in private practice, was that compliance wasn’t being done at the right level, or perhaps even in the right way. We think that the compliance work that we have encouraged, which has been done very much in conjunction with business groups, is a strong complement to our enforcement work. We did a lot of research. We produced a report called **Drivers of Compliance**. [http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf](http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf)

We then produced a suite of materials that are on our website, including a film, which can be used as part of a compliance program.

We think it’s very important to continue investing in this. We’re currently going through a further round of consultations to see what the next steps will be.

The anecdotal evidence is that a combination of our compliance work together with a still relatively small number of, but very high-impact, cases has actually raised the subject of competition compliance right up into the boardroom agendas of big companies, and they realize now that the risks of breaches of competition law are now so great, in terms of penalties, potential criminal cases, reputation and also damages, that it’s something that they cannot avoid looking at.

So we’re quite encouraged by that. We are also very encouraged by both OECD Competition Committee meetings and ICN meetings, where many different agencies around the world have presented different ways in which they are addressing the question of compliance. I think it’s a very positive step.

**MR. GLAZER:** Philip, in the U.K., if a firm has an adequate compliance program, does that get them any credit with the agency if they ultimately are found to violate the law, either in terms of liability or sanctions?

**MR. COLLINS:** In principle, what we say in our latest penalty guidance is that we will give a discount of up to 10 percent where we are satisfied that there is a clear and unambiguous commitment to compliance and that appropriate steps have been taken. Now, we’re not going to audit the whole thing, but if they come forward with a convincing case that they had a good compliance program where, nevertheless, somebody has gone wrong and infringed the law, then, in principle, we will give a discount, and we have given a discount in cases. We think that’s important.

We know some agencies around the world don’t take that view, but it’s a view that we think is the right one.

**MR. GLAZER:** Let’s move on to the subject of advocacy and market studies. We’ll continue with you, Philip. What’s happening in the U.K. on that front?

**MR. COLLINS:** One of the things that struck me when I arrived at the OFT, which is now getting on for eight years, was the relative lack of interest, particularly amongst private practitioners, in competition advocacy and in our market studies work. As you know, in the U.K. we have this rather unique tool, now called the market investigation reference, in which we can refer whole markets or issues in markets to what is now called the Competition Commission. That, I know, is regarded as being a rather odd tool in some parts of the world, but actually it’s a tool which is being increasingly looked at by a number of agencies.

We have that power, that formal power. But we also did an increasing amount of market studies and advocacy work. I think one of the difficulties that practitioners have had about this is that they are very interested in the enforcement process and so on, but they are less interested in the work which seems to be a bit softer and a bit, as they would see it, woolly.
We think it’s very important that our advocacy and our market studies work complement our enforcement work. In fact, there are a significant number of cases we are pursuing now where a market study actually leads to enforcement work. We have had several cases recently, most notably in mobility aids, where a study suggested that something was not quite right in this market, but where it wasn’t clear what it was. Was it regulation? Was it competition infringement? Was it a consumer protection issue? In some cases, as I have said, a study has led to enforcement action.

We also have had cases where a study has led to substantial changes in the way in which a market is regulated: examples like taxis and pharmacies and so on.

It’s quite difficult to deal with the subject, because different agencies look at competition advocacy and market studies in different ways. Some have formal powers to do it. Some don’t, but they do it anyway. Some agencies have formal powers to intervene and make representations in relation to legislation.

I think it’s fair to say that our portfolio in this area is very rich. If you look at the things we have sent off to the Competition Commission using the very formal instrument of a market investigation reference—we have sent four or five in recent years: aggregates, private health care, private car insurance, statutory audit services. The most dramatic example of the way in which this tool works is the fact that the Competition Commission can, even though there’s no infringement of the law, ultimately order divestment, as it did in the *London and Scottish Airports* case.

But these formal reference powers aside, there’s a lot of other work that we’re doing. For instance, we have done market studies in the last two or three years on dentistry, public and private, on equity underwriting, on mobility aids, as I have mentioned, and on road fuel prices. This last one is a perennial issue in most jurisdictions around the world, with governments constantly pressing agencies to look at fuel prices, only to find—surprise, surprise—that actually the biggest factors that influence fuel prices are (a) oil prices, and (b) taxation.

We have done a market study on secondhand cars—big issues for consumers there. We are currently doing a study on workplace pensions, which is a huge, long-term issue for the U.K., where the government is redesigning the private pension system. There’s a significant risk that quite long-term damage could be done to consumers and to competition, unless the structure, and the way it works, are set up in the right way.

We’re currently doing a very interesting piece of work that has been launched in the last two weeks on the way in which the U.K. should implement the payment services directive, which essentially is around how you regulate payment systems. Our ability to do some quick work and provide input to the government on the way in which that regime might be designed is, I think, very important for the long-term health, for instance, of the economy in terms of the way payment systems work for consumers as well as businesses.

So that gives you a flavor. Because of the transition to the new authority, we think it’s very important to keep up the advocacy and the market studies work. We are constantly engaged with government, particularly where they are introducing new policies in the areas of health and education, and trying to focus their minds on the way in which competition and market principles can actually produce a better overall long-term outcome, for both the taxpayer and for citizens.

So that gives you a flavor of the sorts of things that we’re doing at the moment.

**MR. GLAZER:** Eduardo, advocacy in Mexico.

**MR. PÉREZ-MOTTA:** I started my position in this panel explaining how the telecom reform that is
being analyzed at this moment in the Mexican Senate was basically a result of an advocacy exercise of the competition authority. As in the case of the U.K., we made a market study. We generated proposals. Then we started to advocate for those regulatory changes. In the end, that was approved and accepted by the Mexican politicians, and they made a proposal to the Congress. So this is a good example.

But now we also are in the process of institutionalizing our advocacy mechanisms. We made an agreement with an agency that is called the Federal Commission for Regulatory Improvement in Mexico, which is the commission that analyzes and evaluates the regulatory impact that any new regulation may have. They basically make the analysis of costs and benefits of that regulation. They made a regulatory assessment.

What we proposed was to introduce in that analysis a competition assessment that is going to be made by the competition authority and is going to be included and introduced in the formal process of evaluation that the Federal Regulatory Improvement Commission does in any new case. This gives the competition authority the possibility to make a competition assessment of any new regulation formally. This is going to be public and this is going to be basically shared with all members in our society.

I think this is a very interesting approach. We are using the competition assessment toolkit that was designed by the OECD to do this exercise. I think maybe next year, if we are invited again to share with you some of our experiences, we will be able to give you some results of that mechanism of institutional work between these commissions, the Mexican competition authority and the Mexican regulatory authority.

MR. COLLINS: What’s the interface between the competition authority and this new body in terms of selecting the things that should be looked at? Obviously there’s a huge canvas you could play on. One of the problems that we face is, how do you actually choose the right things to focus on, given your limited resources? How is that going to work in the Mexican context?

MR. PÉREZ-MOTTA: Actually, we are going to try to be very efficient. We are designing a checklist that is very simple, that is very easy, that could be made by the players that are proposing the new regulation. Then we will make an evaluation of the cases.

MR. COLLINS: So there will be a burden on those who propose new legislation to actually do a certain amount of self-certification.

MR. PÉREZ-MOTTA: Exactly.

MR. COLLINS: Which will maybe, then, filter out those cases which are worthy of looking at.

We had a similar situation in the U.K., where there had to be an impact assessment on new legislation, including competition. It proved quite difficult to operate because a huge amount of time was spent explaining the competition impact—usually quite late in the day, when all the decisions had been made and there was a certain amount of ex post rationalization.

It’s an interesting idea. I think it’s quite difficult to implement in practice.

MR. PÉREZ-MOTTA: Actually, the proponents of the new regulation will have to do the first part of the work. And that is going to help. But, of course, it’s going to be a new addition of a job for the authority that is not going to be an easy one.
MR. GLAZER: Shan, competition advocacy in South Africa.

MR. RAMBURUTH: In South Africa we didn’t prioritize advocacy in the first instance, when our agencies came into being, notwithstanding a lot of advice that that should be one of the first things we ought to be doing. We, in fact, prioritized enforcement. I think that was the correct thing to have done, because, as Allan Fels once said, you need a few scalps in order to get people to pay attention. That’s precisely what did happen, I think, with us. The credibility of the agency, its legitimacy amongst politicians and the general public, was, in the first instance, developed through our enforcement action.

But increasingly over time, we have been getting government departments approaching us for advice insofar as they were regulators in some part of the economy that fell under their jurisdiction. I’m thinking of fuel prices that are regulated in South Africa, and health care, which is regulated through different professional bodies and hospital associations. There’s a very complex web of regulators in health care.

We offer a service where we give advisory opinions. People can ask us, in theory, under certain circumstances, is this or is this not a problem? Increasingly, we have been getting government departments asking for advice on how to construct one or another regulation that they are required to do as part of their regulatory functions.

But more recently, in fact, starting the first of April, we have a new legislation that gives the competition authority powers to conduct market inquiries in a way very similar to what Philip has described is happening in the U.K. Whereas we previously had a market inquiry into bank charges, we didn’t do that with the authority having any powers. That was done on a voluntary basis, where we asked different stakeholders to provide us with information voluntarily. But now the new legislation will give us powers to subpoena information and documents, subpoena individuals to provide information, in a non-adversarial kind of process, where the idea will be to get to the bottom of how these markets work, mostly, in the end, to be making policy recommendations.

However, our Act also enables us to take enforcement action based on what comes out of a market inquiry. This is all very new to us. We would have to now construct and devise and design how we conduct this market inquiry in a way that’s meaningful and results in the desired outcomes.

But the one area that I already see problems with—and I would be interested to hear what Philip has to say about this—is where, because we could take enforcement actions arising out of market inquiry, companies and their lawyers are going to cry out that this is a fishing trip basically, that we are out there to get information under the guise of a market inquiry and then beat them over the head on it. I see that as something we have to tackle, and we have to do so credibly and in a way that assures people that this is not done in any underhanded way, but is a genuine thing that we have to do.

MR. GLAZER: Philip, have you heard people complain in the U.K. about fishing expeditions?

MR. COLLINS: No, we haven’t had the complaint of fishing expeditions, but it’s something that we are constantly conscious of. There is a tension, obviously, between the ability essentially to subpoena documents, and potentially, as you have in a market investigation reference, to force businesses to divest, and, on the other hand, trying to take a “softly, softly” approach and come up with policy recommendations.

The approach we tend to take in market studies is not to use formal legal powers, unless we
are confident that there is an issue that can be addressed by legal remedies. We try and engage with the parties in a variety of different formats. Quite often we will not launch a full market study until we have done what we now call a “call for information,” which is essentially just consulting all interested parties on what the issues are in the market. What we try to work out is, are the problems in the market really competition problems or are they some other problems caused by some other issues?

So I think there is an issue there, but we haven’t been faced, in the recent past anyway, with accusations that we’re fishing. But it is something that I do recognize.

The other thing is, obviously, once you announce that you’re doing a market study, it can, as a result of people looking at their consciences and their documents, result in people coming forward for leniency because they realize they have infringed the law.

MR. GLAZER: We’re going to move on to our final topic of cooperation and convergence. We touched on cooperation and convergence a little before, Eduardo, when you were talking about the Pfizer-Nestlé case, for example.

MR. RAMBURUTH: I think in the context that I come from, the African region, and if you look more broadly as well, at why countries adopt competition law—what is the key driver behind getting countries to adopt competition law—just out of the blue, in the recent past, this is happening—I think that in a lot of instances this is driven externally for many countries, where, because of trade agreements or because of loan conditions, they are required to have competition law. What has happened as a consequence is that the community we have today, the competition law community, seeing the inevitability of this happening, would prefer to have a convergence, would prefer to put together one set of documents for all jurisdictions rather than doing different ones for different jurisdictions.

I think that's a very understandable response to how things have turned out, how things have developed. But I think the one problem is that if countries are adopting these laws because of external pressures, there isn’t the kind of commitment to it that you would have if they had done it to achieve their own policy objectives derived out of their own context and developed their own vision and sense of purpose around how one goes about implementing these laws.

South Africa has been in quite a unique situation because of an accident of history, I suppose, where we began to relook at a whole bunch of policies, given the new South Africa, at about the same time that there was this reemergence of competition law. We had the luxury of really looking at this law, looking at this policy instrument, and saying, how can we use it to achieve the socially desirable outcomes that we want as a country?

For me, that has been a major reason for the success in South Africa. We were doing it because we wanted to achieve goals that we had set rather than goals that others had set for us.

This is just by way of saying that I think that convergence—I think it might be a bit of a naive view to expect countries coming from different places, with different institutional make-ups, to converge quickly and automatically—you just set the law and suddenly there's convergence. It doesn’t happen like that. You need institutions that have to be painfully built, sometimes over decades, in order to implement sophisticated law like competition law.

I think, in our experience, that is one of the big issues we’re facing around questions of convergence and cooperation—the institutional capacities within countries, and I’m talking here in the African context mostly, to implement such a law. By this I mean not just the organization of the
competition authority, but the legal system, the courts, the judges, the enforcement mechanisms, and the media. All of these institutions play a role in making enforcement of this law meaningful in one way or the other.

All of these issues play themselves out in COMESA, a community of east and southern African countries. COMESA has a treaty pretty much like the European treaty, wanting to achieve the same goals—opening up a free trade area, opening up the markets in COMESA. They have now a competition authority that is COMESA-wide. In other words, there’s a regional competition authority, as well as national ones. The national authorities are not very well developed. The regional authority is struggling to build itself up as an institution. There are a lot of debates within it around what it should be doing and how it should be operating. There isn’t the history of how they arrived there. They are making it up de novo, brand-new.

I make a big deal out of this because there needs to be an awareness that you are dealing in a lot of countries with institutions that in a place like the United States you might take for granted, but don’t exist in many of these countries.

There’s a lot more I can say about that, but perhaps I should just round off to talk about the Africa Competition Forum, which is a new initiative in Africa trying to build up a network of competition authorities in Africa, where we’re setting up capacity-building programs for competition authorities. A lot of these have to do with basic things like how to develop an organization, what the workflow is in a competition authority, how you manage a competition authority—all the issues that the ICN calls agency effectiveness. It’s perhaps the biggest issue facing these authorities.

Another interesting project we have, just to mention it, is a research project involving six countries, where we are doing research into three markets: poultry, cement, and sugar. These are cross-border markets. Through this research project, we will develop and build the skills in order to understand how these markets work in the first instance, before we can go to the second stage of thinking about enforcement action.

**MR. TRITELL:** Shan, you mentioned some of the obstacles to achieving convergence ultimately in terms of building institutions and the time it can take in a transition economy. But is the goal ultimately to achieve what we normally talk about as convergence towards international norms and best practices or is there also a question of different fundamental values and goals that developing countries might be aspiring to, looking at the South African experience and these regulations that have just come out from COMESA, which, in many respects, are significantly different from the international standards that we have seen in the ICN?

It’s a little unfair to ask you to address that in a very short way, but it would be interesting to get your perspective on that.

**MR. RAMBURUTH:** I think there are different values and goals, but I don’t mean that in the kind of crude cultural sense. I mean values that also derive from the institutional terrain that you come from. I’m not talking about values in the ethics sense. I’m talking about values in terms of what the conditions in your countries are. The level of poverty, for example, is something that will make a politician think differently about how they go about implementing various policies. I think that competition policy will be subject to that as well.

**MR. GLAZER:** Let me just ask Eduardo, who has a unique perch to talk about convergence as the current president of the International Competition Network—can you speak for just one or two minutes about international convergence?
MR. PÉREZ-MOTTA: In this trip around the world in so few minutes, I’m going to change my hat from the Mexican competition authority to the ICN, chairmanship of the steering group.

I would say the most important two objectives of the ICN are, one, cooperation, and two, convergence. In international cooperation, just the name of the ICN, which is the International Cooperation Network—and I would say network is an important feature of our organization—as a network, we just organize meetings and promote networking activities, like the one that you are having here and that we are having at this moment. Why do you have 2,740 practitioners and enforcers in this meeting? Because there is a value of networking.

This is what we do in the ICN. Just knowing who the case handler is for these kinds of investigations in another jurisdiction is so important. And to promote exchange between them is important—to exchange telephone numbers, to know who they are, what they are doing. This is not a trivial issue.

Second, we have also mechanisms of cooperation. We have designed recommended practices on interagency coordination on merger reviews, in cartel work and enforcement cooperation.

Actually, today the steering group has started a major project—Philip Collins is part of that project, a very active part, and I see Rachel Brandenburger here, who has been also an instrumental part of this project—which is basically an enforcement cooperation project together with the OECD. This is maybe one of the most important projects that we have now in the ICN.

In terms of convergence, I completely agree with what Shan has said. I am always tempted to compare ICN with another organization where I used to be—and I frankly like that organization very much—which is the WTO. If you compare WTO with ICN, in WTO, once you sign an agreement, you have to meet that agreement; you have to comply. If you don’t do it, you go to dispute settlement. There is a big mechanism of enforcement, which is good.

We don’t have that in the ICN. We convince, we advocate, and we understand that agencies have to have different speeds of convergence and adjustment, which is what you were saying, and I completely agree. The realities of different countries in Latin America, in Africa, in Asia are just different. They have different speeds of adjustment that we have to respect.

But the ICN helps to do that in a very efficient way. We identify best international practices and discuss them among ourselves. Those are non-mandatory. They are non-binding. But what we are finding is that every agency that reforms their law normally goes in line with those best international practices that are suggested.

The case of Brazil is a very good example. It’s a beautiful example—all the institutional reforms that you just had, Marcos, and the methodologies that you are using, the ex ante notification for measures is moving in a very nice way. This is a very good example. It took years. It took the time that was needed for your political process and your reality to do it.

Let me put on another hat. We are running a regional center for competition policy in Latin America. This is one of the most important goals of that center, which is to generate guidelines. We are generating semi-tailored guidelines. We are generating market studies. We are generating networks between judges, for instance, which is crucial. We normally think that our decisions end in our agencies. That’s not true, of course. They end in the judiciary. So we have to inform them. We have to have good communication with them, with the understanding that they are a completely different body.

But we are doing that in Latin America as well with these regional centers. This is another way to get convergence, to get cooperation, and to have better instruments to promote the best market-oriented policies through competition.

MR. GLAZER: Please join me in thanking our distinguished panel.
Interview with Mark Berry, 
Chair, New Zealand Commerce Commission

Editor’s Note: In this interview with The Antitrust Source, the Chair of the New Zealand Commerce Commission, Mark Berry, discusses New Zealand’s new merger guidelines, Trans-Tasman cooperation, the Commission’s special role as a sectoral regulator, and how the Commission addressed the domestic consequences of a monopoly established to export New Zealand’s milk production.

Mark Berry was appointed Chair in April 2009, and holds a term that will expire in 2014. Prior to coming to the Commerce Commission, he was a partner in the law firm Bell Gully, a consultant with Chapman Tripp, a barrister sole, and, from 1999 to 2001, Deputy Chair of the Commission. He holds a J.S.D. from Columbia University, New York. He has taught at Otago University Law School. In 2010, he also was appointed for a three-year term as an Associate Member of the Australian Competition and Consumer Commission.

This in-person interview was conducted by Meg Guerin-Calvert for The Antitrust Source on April 9, 2013.

ANTITRUST SOURCE: The Commerce Commission seems to have an incredibly broad scope of responsibility, including fair trading, consumer credit, business competition, regulated industries and, within those, a fair number of major industry sectors. Could you give us an overview of the organizational structure of the Commerce Commission and how each of these functional areas are included and prioritized? And then we’re very interested in how you have the teams of lawyers and economists organized.

MARK BERRY: Right, well our mandate is indeed very broad. We started out like the FTC, as an antitrust authority. New Zealand came quite late to regulation and so it wasn’t until 2001 that regulatory regimes emerged, first telecommunications, then dairy, and more recently electricity lines businesses, gas pipelines, and certain airport services.

There was no particular logic as to why we became the regulator; my expectation is we were simply the body that was in place and so that’s how we have grown over the last little while since 2001. In terms of our organization we are an independent agency, with a board comprising, currently, seven members. We also have a commissioner from the ACCC—Jill Walker—on a cross-appointment to our commission and I’m also a cross-appointee to ACCC.

We’re not a big organization. We have around 175 staff in total, including all of our operational performance branches. I think of our organization as essentially two pyramids. One is the competition/consumer branch and the other is the regulation branch.

Commissioners are involved in both antitrust and regulatory work. I am involved in all aspects of the Commission’s work except for telecommunications.

In terms of the prioritization of work streams, we have both adjudicatory and prosecutorial functions. By virtue of statutory requirements, adjudication naturally takes priority. So when we have a merger clearance or authorization application, or a trade practices authorization application, that is a priority.
We have had in the last three years quite extensive streams of regulatory tasks. We have had to set, for the first time, specific methodologies, which are your basic building blocks of regulation. These have included asset valuation, the cost of capital, and so on. Now all of these regulatory tasks have had quite vigorous legislative timeframes by which they had to be done and so naturally this has also governed prioritization.

Off the back of those tasks, very often we find our decisions are subject to appeals. Also our decisions are open to judicial review, so there is associated litigation, which assumes priority.

For the rest of our work we are the body that investigates and prosecutes matters, particularly under the competition and also consumer laws—but given the limited resources that we have, we have given careful consideration to enforcement criteria to help us prioritize. We have also published enforcement response guidelines and we’ve had very positive feedback from the marketplace on these guidelines.

We look at matters such as seriousness of conduct, the extent of the detriment or harm and also issues of public interest. I think that of all of those matters, the question about detriment is the one that will most likely govern whether or not we are likely to intervene. And so those broadly are the criteria that we use for prioritization of prosecution actions.

**ANTITRUST SOURCE:** Before we turn to other topics, you’ve mentioned a feature that is somewhat different than in many other countries, which is the very, very close relationship with the competition authorities in Australia and having common or cross seats.

Can you elaborate a little bit more on that and maybe also give us a little bit more perspective as to how that cooperation relationship between the two countries has operated?

**BERRY:** We have a particular history of economic closeness to Australia, and much of it goes back to government initiatives. That began at the time of our CER, or Common Economic Relations Treaty, which was entered into with Australia back in 1983. As a result of that, there has been, particularly from the New Zealand point of view, an awareness of the benefits to the New Zealand economy through getting closer to Australia and having access to Australian markets.

As part of our harmonization we have very often mirrored Australian commercial legislation, and in fact our Commerce Act directly reflects that, and is largely based on the Australian model, the Trade Practices Act of 1974.

Our courts have very often relied upon Australian case law in interpreting our Commerce Act. In addition there is value for businesses that transact on both sides of the Tasman to be subject to laws that they know and understand on both sides.

In terms of information sharing, last year our Commerce Act was amended to enable us at the NZCC to share compulsorily acquired information with the ACCC and also to provide investigatory assistance to the ACCC and other recognized overseas regulators. The amendments reflect similar provisions in Australian legislation. There are certain safeguards, so that won’t happen automatically. If there are public interest concerns or if matters are legally privileged, these could be reasons not to share the information, but otherwise, we have a true spirit of cooperation and sharing information with the ACCC.

Another indicator of our close working relationship with Australia is that we have a very close dialogue with the members and staff of the ACCC and other recognized overseas regulators. For example, the investigators have monthly meetings together and there is close communication on matters of common inquiry.

There have been a number of trans-Tasman matters—these are largely mergers with global dimension, and I know that our staffs have worked very closely with the ACCC staff to see how
they’re analyzing the markets. The same is true if we have a trade practice investigation. In these cases, we will talk to the ACCC and learn from the wealth of experience they can share with us on that.

**ANTITRUST SOURCE:** Keeping that in mind, you had mentioned that you do have the new draft merger guidelines. Could you give us an idea of the most important changes or perhaps even clarification of priorities or analytics that might have occurred? I think one area that’s of great interest oftentimes is the precise wording of efficiencies analysis and how it’s taken into consideration. If you could speak to those that would be of great interest.

**BERRY:** We have put out new draft merger guidelines. The changes are not radically different but simply reflect updates to account for developments in New Zealand case law and to have regard to developments and international precedents, such as for example the FTC and DOJ guidelines. We haven’t revisited our merger guidelines for ten years or so.

If I could just highlight two matters in relation to these guidelines: First is the cornerstone counterfactual analysis that we do under our merger provision, Section 47. This section prohibits mergers that are likely to result in a substantial lessening of competition. Our case law has developed a very rigorous counterfactual analysis that involves analyzing the situation both with and without merger. The factual, or merger, is always quite straightforward to analyze. But inevitably when we look at what are likely counterfactuals without the merger, we do get into some degree of speculation. We are required to identify whether or not there is a real chance of any given counterfactual happening. This is an area where the courts have had much to say. There needs to be more than the mere possibility of the counterfactual, but it does not need to be more likely than not. And so, for example, a probability of less than 50 percent could be counted as a counterfactual for the purposes of our section 47 analysis.

Another issue which has come out of our case law is that the courts have accepted that we may find multiple counterfactuals. Now this does get to be a little bit messy potentially—we do look at some cases where you arguably could say that there could be more than one counterfactual. And so our task usually is to take the one counterfactual that would have the most competition concerns attaching to it. And if it is found that this counterfactual is likely to involve a substantial lessening of competition, then clearance will not be granted to the proposal.

A problem may be seen to arise where a merger may be turned down on the basis of a counterfactual which is perhaps not the most likely counterfactual. That is a problem of our jurisprudence. Our new draft guidelines simply reflect these principles developed by our courts which we are bound to follow.

The second question, on efficiencies, is another matter where there has been particular color surrounding the legislation. From the outset we have had an authorization process. In a small market economy it is recognized that there could be mergers that could pose a substantial lessening of competition resulting in detriments. We can still authorize that merger if there are countervailing public benefits. Public benefits include efficiencies, and so we look at all three here—productive, dynamic, and allocative. So we have a robust process under which efficiencies can be taken into account. That is the authorization process, and we have separate guidelines on this.

The question of how we think about efficiencies also arises in relation to assessments of whether any merger may substantially lessen competition. According to precedent, it is relevant to have regard to efficiencies in this setting, but there’s been no particular elaboration as to how this is to be done.
And so we have looked at efficiencies in this situation and given guidance to the extent we can. We have identified two key factors which we think would need to be established before efficiencies can count in this setting. First, the efficiencies would not be realized without the merger and secondly—and we were largely guided I think by North American guidelines—we say that the efficiency gains are not going to be given much weight, unless we are assured that they would likely be passed on to the consumers in some way.

Efficiencies are not going to be easy for anybody to establish under the substantial lessening of competition test. We have yet to give clearance to a merger on efficiency grounds, but we do recognize the relevance of the consideration under the substantial lessening of competition test. However, we will continue to see authorization cases where the more comprehensive efficiencies defense comes into play. For example last year we had a matter that was a two-to-one merger in the wool scouring industry. In that matter, we found that it would result in a substantial lessening of competition, but we granted authorization based on countervailing public benefits that were established in the case.

**ANTITRUST SOURCE:** Where is the place for those considering transactions or involved in transactions to see how such public benefits tests have actually been met or implemented?

**BERRY:** We publish reasons for our decisions. These are available on our website. Also, there are court precedents on the public benefit test. I just mentioned the wool scour case, *Godfrey Hirst.* This was one such case that went to the High Court on appeal. And so we clearly articulate in our decisions how we apply a test for typical productive efficiency gains. These are the efficiency gains that are most clearly articulated. We find it more difficult to attach quantification to dynamic efficiency gains but we normally will do as much as we can in this regard. Based on our case law we are required to the extent possible to quantify benefits and detriments.

And so typically people coming to us with an authorization application will have an economic expert with a brief that would have clearly articulated what they claimed to be the benefits and detriments of the proposal. At the end of the day we undertake both quantitative and qualitative assessment.

**ANTITRUST SOURCE:** Let’s switch for a moment and come back to the responsibilities that the Commission has in quite an array of regulated sectors, including dairy, natural gas, and electricity. And given that scope, could you give us a perspective on what the major developments have been there? One area that I think is going to be a bit less familiar to some of the readers is the concept of a price quality default path. I leave it open to you to talk about what the key developments and areas have been in one or more of those sectors.

**BERRY:** I’ll talk mainly about what is known as Part Four of the Commerce Act which deals with electricity lines services, gas pipelines services, and the airports. This is a new area of our regulatory role. In 2008, our Commerce Act was amended to produce this new important regulatory regime. It involves setting input methodologies and associated default price quality paths and related regulatory instruments.

For the past three years we’ve been going through consultation processes. We have been endeavoring to bring clarity to what we are doing so that regulated entities and interested persons will understand how this is all unfolding. We have delivered our decisions, and these have been subject to appeal. So we are going through growing pains, and this new regulatory regime is
essentially only just now three years old. There probably needs to be another three to four years before the regime begins to properly settle in. We get criticism about the lack of certainty and how this may impact the dynamics of the market and ability to invest. But I think this is simply a function of developing a new complicated regulatory regime for the first time.

The guiding principle that we have had to follow under Part Four is that we are developing regulation to promote long-term benefits for consumers by promoting outcomes consistent with outcomes in competitive markets. And so that is the kind of basic approach that we have had to try and adopt in fashioning our regulatory rules.

In undertaking this task, we have had to take into account various factors, including the need to provide investment incentives, while at the same time ensuring that excessive profits are not earned. So we sit in the middle of this quite difficult contest between regulated entities and consumers.

There are a number of different settings to which regulatory rules apply. The first is that all of the companies I just mentioned, including the three international airports, electricity transmission and distribution companies, and gas transmission and distribution pipelines, are subject to information disclosure requirements. And we are required annually to monitor and to report on the extent to which this informs interested persons. The test here relates to the impact that Part Four is having. To what extent is information disclosure promoting outcomes that are consistent with competitive markets?

The second part of the regime is the price quality paths. Now this is a low-cost form of regulation which is designed to attach to all of these entities, except for airports and consumer-owned electricity lines businesses. Even though we are a very small country, we have twenty-nine electricity distribution companies and so this was the driving force for design of low-cost default price-quality path, or DPPs as we call them. For anybody who isn't happy with their DPP, they can then seek a customized proposal, known as the customized price-quality path, or CPP, to suit their particular needs.

If I could just touch on what we’ve done with the DPP regime. This is the first regulatory set of prices for a long time, and we were looking at a lot of companies with different profiles. Some are consumer owned and they have needed to raise prices to consumers to enable them to invest properly in their networks. On the other hand, we have utilities that are listed on the stock exchange. We have found that some have been earning excessive profits. We have set revenue caps or weighted average price caps for all of these entities based on current and projected profitability. This is pursuant to a five-year price path under which these companies are entitled to a CPI minus x adjustment annually.

Under the first set of DPPs for electricity distribution companies, there were thirteen winners which had price increases. Some had very substantial increases of CPI plus 10 percent over the next two years with more increases to follow. They were mostly the consumer-owned bodies. There were some which had approximately 10 percent discounts on their revenue and they were public listed companies.

Similar issues have emerged in relation to the gas pipelines. That gives background to what happened with the initial set of default price quality paths. The other major challenge under Part Four has been to set the so-called input methodologies. These are matters such as asset valuation, cost of capital, allocation of common costs, and taxation. We consulted from 2009 to the end of 2010 on the set of these basic building blocks.
ground on what role those parties and/or their advisors played in the process and what role the Commission staff played in that hearing?

**BERRY:** When we started the process it was a huge task for us because we had never done this before, so you can imagine the challenge in front of us. We recruited a number of contractors. We had an increase of staff of about twenty-five people from memory. We were also lucky to attract staff with foreign regulatory experience, most notably from the United Kingdom.

We started the process by putting out a discussion paper, in which we gave oxygen to all of our views on how all of these matters were going to be analyzed. And we also engaged an expert panel to assist in this process. This panel was headed by Professor George Yarrow.

We held public hearings at which all of the parties participated at the same time. Day one of our hearing was about the purpose of Part Four: what does this new purpose statement mean? How we should think about developing regulation to mimic competition?

Day two was about asset valuation principles at a high level. Day three was on cost of capital, and so on. So over the course of eighteen months we moved from that initial consultation and we eventually put out a draft decision paper for each of electricity, gas, and airports. From here there was an opportunity for final written submissions and cross-submissions before we issued our final decisions.

I should make special reference to the involvement of Professor Yarrow and the expert panel. The panel wasn’t just saying what we wanted them to say. They did provide genuine independent input and all parties had the right to make submissions on their views.

We have had extensive appeals on virtually all of our input methodologies decisions, and this is really not a surprise given that it was the first time we had made these decisions, which are of course critical measures for these companies into the future. We have had a hearing in our High Court, starting in September last year and that finished in February this year. That was heard by a panel comprising a New Zealand High Court judge, assisted by two lay members, both being members of the Australian Competition Tribunal with regulatory experience. So that’s been the extent of the process that we have followed on developing these important methodologies.

**ANTITRUST SOURCE:** Are there any major regulated industry sectors in which the Commerce Commission does not have authority, or shares authority with another regulatory agency?

**BERRY:** We are fairly much the one-stop shop of regulation as it has been imposed. First, there was the introduction of the telecommunications regulatory regime, which was given to us in 2001. That same year, our major dairy company, Fonterra, was created. This national champion was granted bypass from our merger laws. But in return, a regulatory regime was required to address domestic market power issues which arose from their merger. Then followed regulation of electricity lines, gas pipelines, and the airports under Part Four, as I have just been discussing.

The one area that we currently don’t have jurisdiction is more in the trade practice arena. There are exemptions in relation to international shipping and aviation. Both of these are currently governed essentially by the transport administration. However, there has been a recent report produced by our Productivity Commission which recommends that these matters should also fall within our jurisdiction. Following that report, a bill is currently before the New Zealand parliament proposing removal of the exemption for international shipping. The Select Committee report on that bill also recommends that the exemption for international civil aviation be reconsidered as part
of a review of the Civil Aviation Act. It seems likely, therefore, that both shipping and civil aviation will transition to a Commerce Act regime.

For completeness, I should add that various rules relating to electricity lines businesses and gas pipelines are set by other agencies, namely the Electricity Authority and the Gas Industry Company. The Electricity Authority is responsible for the structure of prices charged by electricity distributors. The Gas Industry Company is an industry-owned company which works with the government and industry to develop policy relating to rules in relation to all aspects of the gas markets.

But the bulk of the price quality rulings fall on us, through our powers to impose information disclosure requirements, and to set price quality regulation which determines the total revenue suppliers recover.

**ANTITRUST SOURCE:** What are the types of concerns in monopolization and cartels, and how do these matters come to you?

**BERRY:** In terms of cartels, we have had a significant traffic of international cases. These are air cargo and like cases which started out with the leniency applications in the U.S. and in Europe. And so we have worked our way through all of those cases as they have come by.

One thing that has only just happened in the last year has been two domestic cartel applications for leniency. These are the first time in a long time that we have received such applications. I expect that the fewness of such applications is due to the small market economy that is New Zealand. As a whistleblower you may pay a price in terms of your future employability.

In terms of the other trade practice work we do, it often is largely driven by complaints that are presented to us. That would be the main way that we become involved in this. We do have an intelligence-gathering unit that is now two years old, and we are building capability in that area and in the related area of advocacy. Indeed, one of the leniency applications I referred to before—in what is a significant sector—is likely to be a result of our advocacy work.

**ANTITRUST SOURCE:** Can you give us some background as well about the Commission’s fair trading and consumer credit work? There again seems to be a fair amount of activity. How in particular do those issues arise as a priority and where are you taking action?

**BERRY:** Yes, we have a very active fair trading and credit contract consumer unit. It does a high volume of cases. We also do a lot of interventions through our low level inquiry unit, where we get some great results. The low level inquiry unit is designed to provide a rapid response to matters that appear to be minor breaches of the Fair Trading Act. It operates with a strong focus on educating traders about their obligations and consumers about their rights. At the other end of the scale, the major cases we have done are all based on detriment coupled with the goal of achieving consumer compensation.

To give one very recent example, there was a financial product marketed in New Zealand known as Credit Sails. This was marketed as capital protected and so a lot of people went into this and believed that they would at least get a dollar back for each dollar invested. The product failed and investors stood to recover only 2 percent of their capital. We investigated this and concluded that investors had been misled and we advised that we would prosecute. We ended up in a settlement situation. We have achieved a $60 million settlement which puts right 87 percent of the investment without going to court. This is one of a number of cases which have progressed in this way, with very real results being achieved for consumers.
**ANTITRUST SOURCE:** How particularly have you worked with other jurisdictions in terms of cartel and merger enforcement? Are there specific jurisdictions in addition to Australia that you have tended to be doing much more collaboration with on those?

**BERRY:** We have also worked very closely with your Department of Justice and the Canadian and European authorities on all of those cartel cases. In terms of the merger regime, there have been a number of international mergers recently, such as the Penguin and Random House merger and the EMI merger, where we have been in a regular dialogue with the agencies in North America or in Europe particularly.

So we do have good access to sharing our views on how we’re analyzing the cases, the timelines for decisions, and so on. The information sharing is always easier in the merger arena given that the parties seem to be quite prepared to give waivers for the exchange of information. That’s in their interest, in order to achieve decisions as soon as possible.

In the case of cartel investigations, of course, the sharing of information is very different. That’s more complicated, and there are going to be a lot more issues there.

**ANTITRUST SOURCE:** In terms of regulatory regime, the area we haven’t talked about very much is dairy. Is that unique to New Zealand?

**BERRY:** I think it is unique and there are quite discrete rules built around Fonterra. Fonterra is purchasing virtually all of the raw milk from farmers, and it also has a significant downstream presence in the New Zealand domestic market place.

About 95 percent of our dairy production is exported, so to the extent that there are domestic market concerns, they attach to a very small amount of our domestic raw milk production. The policy design problem was for the government to ensure that raw milk was available to other competitors downstream in the New Zealand domestic market and that’s where the tension has risen. There have been a number of new processing plants which manufacture cheese or milk powder, primarily for export.

Complaints have arisen in respect of how Fonterra sets the price it pays for milk. Fonterra sets prices through its milk price manual. It’s a very complex set of arrangements when you’ve got a cooperative company being a monopsony buyer for the milk.

There has been a recent revisit of the dairy industry under the relevant legislation resulting in new regulatory provisions. We have a new ongoing role as an overseer to monitor the milk price manual to see whether or not Fonterra’s prices are in accordance with the purpose statement of the legislation. Now this is a very new and untested formulation to date. We did do a dry run review last year, and over the course of this year we are looking more closely at that manual and its implementation, so that is a work in progress.

**ANTITRUST SOURCE:** What do you see for the next year or two as the major challenges or the major areas you will be focused on?

**BERRY:** I think it’s fair to say that we are beginning to see the light at the end of the tunnel on regulatory matters. Just what will come out of the input methodologies appeals is yet to be seen, and time needs to pass before the new regime beds down. But I think the worst is behind us.

There are challenges for us in the years ahead. First of all, we need to do more with less. There will inevitably be higher expectations of us and most likely decreases in real terms of funding. So
we have to act smarter in the way we use our enforcement tools. This includes prioritization of cases and the like, and we need to constantly enhance our staff capability, achieve efficiencies, and so on. I rate those kinds of challenges very highly.

Two other challenges: We are in the process of moving to the criminalization of cartels. There is a bill before parliament which we expect to be passed by the end of this year, so we are doing much to develop capability to handle criminal investigations. We have worked quite closely with other foreign agencies on this. We have had helpful assistance from the Department of Justice, the Canadian Competition Bureau, and the ACCC.

One particular challenge that will come out of this is the collaborative activities exemption under this new regime. There is a clearance regime, so parties can come to us and seek clearance for their collaborative activity on the basis that they will say that it will not substantially lessen competition. We don’t know what kind of workflow is going to come with these clearances. Nobody is talking to us yet, so we wait and see with interest. Meantime, we are working up guidelines to help those proposing to make applications.

The final challenge I would like to mention is our ongoing problem with our monopolization laws. Our Supreme Court has fashioned a very restrictive narrow rule which we don’t think was ever intended. The rule in a nutshell is that there is only a violation of our monopoly law on the following basis: First you have to suppose that the market is hypothetically competitive. So, you strip away all aspects of the market dominance. Then you ask the question would the monopolist have acted the same way in this hypothetically competitive market.

That’s the framework that we have sitting on our doorstep now to analyze monopolization. We ordinarily don’t enter into the policy debate. There is a separate agency, the Ministry of Innovation, Business, and Employment, that advises the Minister of Commerce. But it’s been three years since the Supreme Court decision and we are now working harder to raise the debate on this particular topic with the hope that legislative reform may result in the emergence of a more appropriate monopolization law.

And I should add that we are about to have the benefit of Andy Gavil’s contribution to this topic. He has agreed to come down and to be a keynote speaker at our first Commission conference in October this year. I had a very useful meeting this morning with him discussing how he’s going to lead the discussion.

**ANTITRUST SOURCE:** Thank you very much.
Interview with Felipe Irarrázabal, Chile’s National Economic Prosecutor

Editor’s Note: In this interview with The Antitrust Source, Chile’s National Economic Prosecutor, Felipe Irarrázabal Philippi discusses the priorities and challenges of antitrust enforcement in Chile. Among other things, he discusses recent high profile mergers in the airline sector, Chile’s growing emphasis on cartel prosecutions, including a case in the pharmaceutical sector, and the relationships between his office and the Tribunal for the Defense of Free Competition, which adjudicates competition cases in Chile.

Mr. Irarrázabal was appointed as National Economic Prosecutor in August 2010, having held that position since April 2010 on an interim basis. He earned his law degree from Universidad de Chile and an LL.M. from Yale University School of Law. Prior to his appointment as National Economic Prosecutor, he was partner at the law firm of Philippi, Yrarrázaval, Pulido & Brunner in Santiago. He also worked at Cleary, Gottlieb, Steen & Hamilton in New York and in the Ministry of Education of Chile. Since 2000, he has been a professor of Economic Law at the School of Law of Universidad de Chile. This interview was conducted by Alden Abbott for The Antitrust Source on April 9, 2013.

ANTITRUST SOURCE: Could you briefly describe the structure and role of the Chilean competition investigative and advocacy agency, the Fiscalía Nacional Economica, and explain how it interacts with Chile’s decision-making body, the Tribunal de Defensa de la Libre Competencia, which rules on competition cases?

FELIPE IRARRÁZABAL: In a brief fashion, I would say that in Chile we have three different institutions with three different natures. The first one is the Fiscalía, which is the administrative agency in charge of the investigation processes and advocacy. Once the Fiscalía is convinced on the merits of a case, the Fiscalía can file a claim before the Tribunal. The Fiscalía is the oldest antitrust institution in Chile. It was created by a law enacted in 1963.

The Tribunal is a specialized tribunal just for antitrust cases and it’s composed of five judges—three attorneys and two economists—and was created in 2003. The Tribunal can, after due process, decide a specific case on the merits and issue an award. That award can be appealed before a specialized chamber of the Supreme Court that specializes in constitutional and administrative issues.

So, I would say that the Chilean structure has three different steps. The first is administrative, with all the rights that could come up within an administrative procedure; then you have a judicial step before a specialized tribunal, with all the rights that emerge from the due process, which is the Tribunal de la Libre Competencia; and finally, the recourse before the Supreme Court which puts antitrust law and issues within the general legal scenario.

I would say that this structure has been working smoothly and well, and I think the due process is really protected in this system. Also, I would add that the whole process is relatively quick, because it could take around two years to have a really final award in the Chilean system.

On the other hand, it is somehow difficult, the job that has to be done by the Fiscalía as the prosecutor’s office. When the Fiscalía is convinced that we do have a good case, then, we have to have good evidence to convince the Tribunal. The Tribunal, in this aspect, is completely inde-
dependent from the Fiscalía, the administrative agency. And then, if the Fiscalía is in tune with the award of the Tribunal, we have to convince the Supreme Court to confirm such award.

**ANTITRUST SOURCE:** Felipe, you have been national economic prosecutor for the Fiscalía since August 2010. What do you view as the greatest challenge that you have faced and will face in the future in your position as director of the Fiscalía?

**IRARRÁZABAL:** If I have to name just three, I would say, first of all, prioritization, which is essential if you want to have a healthy and efficient agency. Prioritization means to have some parameters that help you in selecting which are the good cases—not only cases that you are sure to win, but also cases that you would like to try because you want to have some case law.

Prioritization is not easy because we have to resist the pressure of the people and also of the political forces to have many cases in many markets. To have a certain level of reputation, you need to go deep into some cases because basically they are more sensitive to a community, and more attractive from the antitrust perspective.

And once you have done that, you have to put a lot of effort on those cases. The hope is that once you win the cases in a very efficient way because you have collected good evidence in the investigation process, there is a deterrence effect not just on that market, but on other markets. That I would say is the most important part of prioritization—we believe that it's efficient if we select good cases and if we conduct those cases in a very effective and profound way. And if we finally get the results, then the market and the companies learn as well from that specific work, through the wording of the awards.

I would say the second challenge is cartel cases, in a smaller economy like the Chilean one. Specifically, I think we have conducted cartel investigations in the last three years in a very successful way. And within the cartel cases, I think what is probably the most difficult part is how we use the new intrusive powers, which are basically dawn raids, and the interception of communications. We have to be prudent in exercising the intrusive powers, but we have to have the courage to use those intrusive powers that were approved by the Congress at the end of 2009 and I think we have been using them.

In 2011, we filed a claim against the poultry market, where we are seeking around $110 million for a cartel case. That was a result of a dawn raid so we were able to gather what we see as strong evidence in that case. In 2011 as well, we filed two claims against the bus market between cities where we recorded conversations of the owners and executives of the companies, who were dealing in a cartel that were fixing prices.

So, those cartel cases where we use intrusive powers are still before the tribunal and we expect that we will get a good result based on the quality of the evidence.

My third challenge is to strengthen the antitrust control on mergers. Although our law is relatively old in the context of Latin America—the initial law was enacted in 1959—we have had many amendments through the years. But since the beginning, we did not have anything like the Clayton Act and its pre-merger notification process. Because of that, it has not been that easy to deal with merger cases. We have been doing, I think, relatively well but it's not that easy because we don’t have the mechanisms of a pre-merger notification process.

**ANTITRUST SOURCE:** Are there any plans for legislation or regulation to introduce pre-merger notification in Chile?

**IRARRÁZABAL:** I personally had been satisfied with the voluntary system because, obviously, it has
zero administrative cost. But based on my experience in the last years, I think Chile will need an
efficient pre-merger notification process that should be mandatory.

We hope that this will result in a reasonable law. And when I say reasonable law, I’m referring
to the threshold. The threshold should be high enough that it does not compromise the agency by
leading it to work just on merger cases that are really not important. So, it must be a high enough
threshold to free the agency to also work on cartel cases and abuse of dominance infractions.

ANTITRUST SOURCE: You mentioned cartels a minute ago. I note that in 2012, the Tribunal imposed
the highest fines allowable under the Chilean Competition Act on the pharmacies cartel. And the
Supreme Court has upheld the Tribunal’s decision. Do you think that has broader implications for
combating cartels in Chile and perhaps international cartels that extend beyond Chile?

IRARRÁZABAL: Absolutely. It was a very hard case. Probably Chileans understood how dangerous
cartels are because of this specific case. The word “collusion” now is well known in our normal
vocabulary.

It was very difficult, and we faced many issues. We had to go to the Constitutional Tribunal
twice, to the Supreme Court twice, even to a Court of Appeals two to three times, and to the
General Comptroller’s Office, because of this case.

So, I think it enhanced the Fiscalía’s sharpness, our ability to be more strategic on how we deal
with this sort of huge case. It demanded many resources, not just from the Fiscalía’s profession-
als, but we also hired outside attorneys, specifically attorneys with a huge knowledge on criminal
cases.

And after three and one-half years, we basically won, and we won 100 percent of the request-
ed fine. So, the Tribunal, even the Supreme Court, applied the law in its full extension so an
approximately $40 million U.S. fine was imposed on the pharmacy retailers.

I think we learned a lot, and it was an experience, but I would say a very demanding experi-
ence. We had to be very alert to the strategic resources available to our opponents. And I would
have to say that probably that was a case that changed the way the people, the companies, the
government, and even the political parties look at the role of the Fiscalía and the Tribunal, and the
importance on having a strong antitrust enforcement, in a country with a powerful market econo-
my orientation.

ANTITRUST SOURCE: The Fiscalía also has had a very important case in the area of mergers. Could
you discuss the roles of the Fiscalía and the Tribunal in reviewing the merger between LAN
Airlines of Chile and TAM Airlines of Brazil, and perhaps a history of that and also the mitigation
conditions subject to which the merger eventually was approved? And perhaps also you could let
us know how well those conditions have been implemented and how things are going with regard
to this very important merger of two national airlines?

IRARRÁZABAL: Well, that’s a very interesting question. I would say the beginning of the story was
not that successful because after four months negotiating or, at the beginning, investigating the
merger, we came up with an agreement with LAN. We understood the whole transaction so we
focused on what we think were the most important antitrust issues. So we reached an agreement
with strong mitigation conditions.

Before the 2009 amendment, the possibility of signing settlement agreements between the
Fiscalía and a party was not possible. It was a provision enacted in 2009 that explicitly allowed
settlements. So, we didn’t have previous experience on how the Tribunal would be construing that provision.

But a couple of hours before we filed our request for approval, a private consumer protection group filed a consultation on the whole process. In a decision that we considered legally inappropriate, the Tribunal decided to start the long consultation process and not to review the settlement agreement under a fast procedure set forth in the law.

The consultation process started by a consumer protection group took one year. We participated in that process and because we were satisfied with the agreement, we just confirmed in the consultation process that we wanted to replicate the wording of that agreement.

Another lesson from this case is that we understood that we needed some help from an expert consulting firm that could help us oversee the agreement, to make sure that the company was fulfilling the terms of approval because it could be very expensive and very technical. The aviation industry is highly sophisticated. Therefore, we requested the Tribunal to oblige LAN to hire an aviation expert to help the Fiscalía on the control of the mitigation measures.

Finally, I would like to highlight the cooperation we had with the Brazilian agency, the CADE. We had many conference calls and I think it was a very nice and helpful relationship between the two agencies. We also receive some help and thoughts from the U.S. agency and the European agency.

After one year of analyzing the proposed transaction, finally the Tribunal issued an order that I have to say is very similar to the settlement we reached with the company in four months. We were satisfied with that result, and we defended the resolution issued by the Tribunal before the Supreme Court, and it was finally wholly confirmed.

ANTITRUST SOURCE: So, this collaboration with Brazil reflects something that’s more and more important—the need for national competition agencies to reach out and work in tandem with fellow agencies on matters across borders. In that regard, in March 2011, the Fiscalía signed an antitrust cooperation agreement with the U.S. FTC and U.S. Department of Justice. How has cooperation under that agreement worked out so far?

IRARRÁZABAL: Well, we felt very pleased to have that agreement signed in 2011. We understood that only a few countries have an agreement with both of the U.S. agencies, and we were gratified of that and we thought that somehow reflected the seriousness of our agency and all its work, not just during my period, but in the previous periods.

But it’s not just a paper, because it has been implemented in many different ways. We have received visits from professionals from the Department of Justice, I would say twice in this year, and we discussed with the professionals some very vital and strategic issues such as remedies on behavioral mergers and leniency programs on cartels. So, that’s one aspect of the cooperation agreement, I mean to have professionals fly down to Chile and to have a three or four day seminar in Chile with the case handlers. It has been a very close relationship, inspired in the reciprocity and trust.

But also on specific cases where there is an international flavor, we normally tend to use the phone, I mean we make conference calls with our counterparts in the U.S. agencies, and I would say that that has been a very fluid and satisfactory relationship. We hope that in the future, it develops more and more, within the natural and normal constraints of the confidential information.

ANTITRUST SOURCE: Getting back briefly to cartel issues, I know that Chile’s 2009 competition law amendments provided for the introduction of a standard leniency program, gave the Fiscalía
dawn raid powers such as you’d have in Europe, and increased maximum sanctions. How effective have those changes been? Could you say something about your cooperation on cartel cases with foreign competition agencies?

**IRARRÁZABAL:** Well, I believe that leniency programs are the most effective tools to fight against cartels. That’s for sure. And also to have upgraded powers to increase maximum sanctions to around $30 million per defendant, I think that helped the deterrent purposes and enforceability of the law.

I think it’s just the beginning. We have had four years’ experience with our leniency program. We have our deadlines. We have been doing advocacy about the program. And so far, we have one case, an international case, a compressor case where we received a leniency program request from a U.S. company, Tecumseh. We filed a claim against Whirlpool, a U.S. company that built compressors, which are the most expensive and important part of refrigerators. So, in that case, Whirlpool was fined approximately $10 million by the Tribunal, and the case is currently under review by the Supreme Court. We hope that the Supreme Court will sustain our work. So we do have a leniency program that has, so far, been successful.

We would like to speed up the process a little and to have more leniency applications, but if I have to summarize my perception, it’s that I am optimistic that the leniency program will be more and more powerful in the coming years.

Regarding cooperation among agencies in cartel cases, we have had so far very rewarding experiences. It is true that sometimes it is not easy to deal with the confidentiality issues and the waivers, but my impression is that the agencies have an understanding that leniencies are normally a world phenomenon, and the agencies need to coordinate themselves and abandon a purely parochial view.

**ANTITRUST SOURCE:** We understand Chile has issued merger review guidelines in 2012. Were those influenced by the ICN or other international models? How has the business community reacted to the guidelines?

**IRARRÁZABAL:** We made a very strong effort in 2012 to issue new guidelines, especially the merger review guideline. We opened a process where we put the draft on the web, and we even received comments from the Federal Trade Commission on the draft.

We finally approved the final version and we looked at all the models, really. It’s probably a mix, depending on the particular aspect of the guidelines. We looked at all the merger guidelines that were in force in that year.

The guidelines have worked efficiently so far. We have put deadlines on the process of reviewing the transaction and also we offer to companies that if they knock on our doors, we will follow the steps that are in the guidelines, and we will make an objective and a technical review of the merger. And if we are satisfied, we would issue a resolution saying that we are fine with the merger or that they have to change some things and compromise something on the merger through mitigating measures.

At the end of 2012, we asked Deloitte to ask the legal community in Chile, as the OFT did in 2007, how they see the merger guidelines, and especially the deterrence effect on what we have been doing. The report issued by Deloitte has been posted on our webpage. What they found is that over 90 percent of the legal antitrust community said that the merger guidelines were important to follow and were a real improvement on the legal certainty of how the Fiscalía would proceed in case of a merger.
ANTITRUST SOURCE: Let’s turn to a different area of competition law, abuse of dominance. Specifically, what is the view of the Fiscalía on approaching, analyzing abuse of dominance, and are there any particularly important matters or types of investigations regarding abuse of dominance you’d wish to highlight?

IRARRÁZABAL: Well, by and large, I would say that the abuse of dominance cases in Chile are and have been very important in the past. Almost 50 percent of the cases in Chile are related to abuse of dominance. I think that is explained because the economy and the market is not that deep, so the concentrations are high, and because of that, the antitrust agency has a lot to say on abuses.

So, I believe, and that’s my personal opinion, that in that area we have tended to follow more the European approach rather than the U.S. approach. Obviously, that’s a generalization and you might find specifically different cases where we have been following different approaches. But I would say that currently, we are closely looking at the effects of the conducts that may be abused, in an economic view rather than formalistic approach.

If I have to mention our last important cases, I would say the Coca-Cola case, where we finally reached a settlement which was very important in terms that Coca-Cola bottlers agree on providing some space in their coolers for inexpensive brands, under certain specific conditions. And lately, the Unilever case which was just filed last week, a case against Unilever, the U.S. company, requesting a fine of $20 million for foreclosing the market to competitors in the detergent market. Unilever is the company that has over 70 percent of the detergent market in Chile.

ANTITRUST SOURCE: The Fiscalía has been busy with public enforcement. In your view, what is the current status and possible future role for private competition law enforcement in Chile?

IRARRÁZABAL: Well, I would say that that private enforcement has so far not been fully developed. A private entity can file a claim requesting fines, and this mechanism has been thoroughly exerted in the last years. However, regarding procedures requesting damages, the opposite has happened.

Theoretically, and it has been used in some specific cases, there is a provision in our law that permits a claim on requesting damages. But it’s not under the track of the Tribunal; it’s under the track of ordinary tribunals. So, it would obviously take long, because ordinary tribunals are involved, and my understanding is that damages have to be proven. I recall two cases where private companies have requested damages. One that I have in my head is in the airline industry, and the other is the tobacco industry. But by and large, this kind of procedure is rare and in this aspect probably, we look much more at a European model than at the U.S. model.

The most important question that will be answered soon is whether class actions can go on once you have an award in an antitrust case. If this question will be answered soon, it’s because the SERNAE, which is the agency in charge of consumer protection rights, has just filed a claim against the pharmaceutical retailers because of our cartel case. If so, the private enforcement will be increased in the coming years.

ANTITRUST SOURCE: In 2011 to 2012, a commission of experts considered a total revision of the Chilean competition regime, looking at criminal enforcement, at the Fiscalía’s investigation procedures, at the merger controls system. Could you give us your view on the proposals and the study by this commission?

IRARRÁZABAL: This commission was convened by the President of the Republic just after the
poultry case was known by the media because of the filing of the claim. In that claim the Fiscalía was requesting a fine of around $120 million. That was the origin of the commission.

We were not part of the commission, obviously, but we were invited to the commission to give our view. And I would say that our view, as Fiscalía, is very much in tune with the result of the commission's report, in terms that there are at least two main things that should be fixed in the Chilean system. The first to create a pre-merger control system. And the second is to give more consistency and power to a leniency program, to make it very effective on how protected you will be if you apply under the leniency program.

We don't know of any draft bill so far, but we will see. We may be expecting to have a specific wording or proposal in the future regarding these amendments to antitrust law.

ANTITRUST SOURCE: Could you tell us briefly about the role of the Fiscalía in competition advocacy, specifically looking at regulation, legislative proposals, and so forth in Chile that may have an impact or currently have an impact on competition and consumer welfare?

IRARRÁZABAL: We have been working hard in the last couple of years on advocacy. Basically, what we have been doing is drafting guidelines, which we think is very important because it reduces uncertainties about how the Fiscalía views the application or enforcement of the antitrust law. And in that effort, we have approved a couple of guidelines which I think are very important.

So, you just mentioned merger guidelines, but also we drafted a guideline regarding the public sector and the antitrust law. This was very important, because it drew the line on where we as an antitrust agency will be working and on where the regulators should have room to work—I mean, where the limits are on the antitrust law and the laws in the regulation of specific sectors.

We also approved a guideline on trade associations. This guideline reflected our experience in specific cases. Trade associations could be used as vehicles for cartel organization, and in a very inexpensive way, because they gather all the industry by organizing meetings with all the competitors. And I would say that at least in Chile, there are many trade associations and they were not so conscious of how dangerous it could be really to pass the frontier and to violate the antitrust law, trying to organize the market in a different way than the free market.

So, that's an important guideline, and we're working now on a vertical restrictions guideline, which we have been working based on European models. Professor Patrick Rey of Toulouse has been helping us with the economics of this guideline.

On the same path, we have been working on reports on specific markets requested by us to the best Chilean universities. Last year, we launched a report made by the Catholic University of Valparaíso on health insurance sector, which was very well-received by the media, and it created a huge debate on how the industry is being organized. We have also launched a report made by the University of Chile, the faculty of economics, on the banking system, where again we wanted to be clear on which aspects of banking market regulation would somehow not be the best option from the antitrust perspective.

So I think probably through guidelines and through the reports made by third parties, we have been working hard on advocacy.

ANTITRUST SOURCE: That's a very impressive record of advocacy. Thank you.
Interview with Dan Sjöblom and Christine Meyer, Directors General of the Swedish and Norwegian Competition Authorities

Editor’s Note: In this interview with The Antitrust Source, the Directors General of two key Nordic competition authorities, Dan Sjöblom of Sweden’s Konkurrensverket and Christine Meyer of Norway’s Konkurransetilsynet, discuss the priorities and challenges of their agencies, cooperation among the Nordic agencies, and the state of cartel, merger, and single firm conduct enforcement in each country.

Dan Sjöblom was appointed to a six-year term as Director General of the Swedish Competition Authority in March 2009. From 1996 until his appointment, he had held a variety of posts in DG-Competition at the European Commission, the most recent of which was as Head of merger control in the field of energy. Prior to working at DG COMP, he had worked in the Swedish Competition Authority, a post he filled since graduating from the University of Stockholm in 1991.

Christine Meyer took office as Director General of the Norwegian Competition Authority in April 2011, also serving a six-year term. Prior to taking office, she was a professor at the Norwegian School of Economics and Business Administration, specializing in mergers and acquisitions. She earned a degree in economics and business administration from NHH. She has also held posts as a state secretary and as a member of the Bergen city council.

This interview was conducted by Krisztian Katona for The Antitrust Source on April 9, 2013.

ANTITRUST SOURCE: Could you briefly describe the competition enforcement system in Sweden and Norway and the structure and role of the competition authority? Could you also tell us about the organizational changes both agencies have recently experienced?

DAN SJÖBLOM: The Swedish system is prosecutorial and in that way is similar to the U.S. system. We have some decision powers, but with our bigger decisions we have to go to a designated court in order to impose a fine on somebody, to stop a merger, or to get the authorization to do a dawn raid.

We have competition powers, so in Sweden we enforce the Competition Act and we also enforce the Act on Public Procurement. So we oversee how all the State and the local agencies use public money according to the procurement rules.

We don’t have any sectoral regulatory powers and we don’t have any consumer powers. We have about 140 staff, roughly half of whom are working on antitrust matters including advocacy, about one quarter are working on procurement, and the rest are administrative staff.

The EU-style Swedish competition act was enacted in 1993 and it has since then undergone a number of changes. We have had a fairly stable system with small improvements but really no major reforms. We have reviewed, for example, our merger thresholds every four or five years.
We have a government inquiry ongoing at the moment to update, for example, our powers to review electronic evidence in dawn raids in cartel cases. Obviously these days when we do inspections, much of the things we look at tend to be in computers. Still, the law is sort of written to fit the era when we were looking for physical documents only. So there are a few things like that going on but no major reforms at the moment.

CHRISTINE MEYER: We are purely an agency for competition and, as the Swedish and Danish authorities, we have no board of directors. This means that I as general director make all the decisions in the agency.

We are about 115 staff members and 10 of these are allocated to handle public procurement. For public procurement I only have administrative responsibility and decisions are taken by separate public procurement complaints board.

We have, in contrast to Sweden, decision powers to impose fines. Our cartel and abuse decisions can be taken to court by the parties whereas merger decisions can be appealed to the ministry.

The government has recently forwarded a white paper to the parliament that further harmonizes the Norwegian competition regime with the EU Commission. The most significant change is the proposal to increase the merger thresholds and bring them up to the levels of the Swedish and Danish competition authorities.

The white paper also introduces settlements as a way of dealing with enforcement cases. Moreover, there are some indications that our powers in dawn raids will be somewhat restricted.

ANTITRUST SOURCE: Could you tell us about your key enforcement priorities?

MEYER: We have been prioritizing cartels for a number of years, and this systematic prioritization has given results. We recently had a large asphalt case in which we imposed historically high fines.

This is also a result of our leniency program, which was introduced in 2004. It took some time for the leniency program to work, but in the last couple of years we have received a number of applications.

When it comes to abuse of dominance cases, we are currently working on one large case in the telecom sector. Moreover, we have established a task force which has the objective of finding possible abuse cases, hence not just relying on our inbox.

As for mergers, they will continue to take up a number of our resources, but naturally we are not in very much control of when and how many mergers the parties file to the authority. Due to the proposal in the white paper to increase the thresholds there will probably be some changes in how we exercise our merger control. I expect we have to be more active in finding the anti-competitive cases whereas until now we have relied on the parties’ notifications to the authority.

SJÖBLOM: I think it’s pretty much the same in the Swedish system. We have four kinds of cases, part of which are mergers that prioritize themselves. As Christine was saying, they come in and you just have to deal with them. There are statutory deadlines. Sometimes it gets pretty tight when there are several big mergers at the same time. In an organization like ours, you have to use the resources that are otherwise devoted to horizontal agreements and abuse cases in merger cases when they come along. So, unfortunately, other cases will suffer, but that’s sometimes the only choice we have.
Then we have a fourth case type that is a little bit unique to Sweden. Since the past three years, we have had the power to intervene against public agencies, government, or local government in their activities to sell goods or services on commercial markets in competition with private companies. It’s a new form of power and the idea is to deal with a problem where private entrepreneurs are being undermined by public bodies and publicly sponsored market activities.

We generally think that cartels are the worse competition problem. Like Christine was saying, we’re also putting a lot of effort into promoting our leniency program. It’s relatively difficult in a small economy like Sweden to get a leniency program working as we’d like it to. We do get some leniency cases coming to the door, but we have to use a lot of effort on ex officio work, including talking to people in cartel-prone industries and other forms of advocacy. We go out a lot—we may meet as much as 50 business associations annually to talk about our programs. In addition to increasing awareness, every now and then we get somebody to come to us and give us information that leads us on to cartel behavior.

Overall, we try to continually re-assess our prioritization across all four areas of our enforcement activities. The hottest case this week may not be the hottest case next month. We are a relatively small agency, and I think one of the biggest challenges is to be able to end investigations where despite significant investments you are unable to pin down a compelling theory of harm.

**ANTITRUST SOURCE:** You both mentioned cartels and the fact that your agencies have been very active in their fight against cartels. You have also been raising awareness about your leniency program, including through media tools. What are some of your recent cartel enforcement actions?

**SJÖBLOM:** Christine mentioned that they have an asphalt cartel, and I think this is something that happens all through the Nordic countries. We had a big asphalt cartel a few years back as well, in which we got a good judgment from the courts. I think the Finnish authority had an asphalt matter as well.

When it comes to the big cartel matters in Europe, they tend to end up with the European Commission. We assist the Commission in international cartels that have one or more participants in Sweden, and we have at least a couple of those matters every year, some years even more.

The targets of our national cartel enforcement tend to be relatively small companies. That also means that at the end of the day, you get fines that may be relatively high at the national, such as Swedish or Norwegian level, but when you compare those to the big international cartels that are being prosecuted in the U.S., EU, or elsewhere, our fines may look very small. We also don’t have any criminal sanctions.

So I think those are some of the challenges we face in getting our leniency programs to work better. So that’s why we spend a lot of time on destabilizing cartels and are keen to show that we can bring cases ex officio.

**MEYER:** We had one very important case in the Supreme Court where the main issue was the level of fine imposed by the authority. The Supreme Court upheld our decision and overturned the decision from the lower court to reduce the fines by 90 percent. High fines are key to deter competition crime, and the decision in the Supreme Court supported this stance.

We have also worked with the European Commission on detecting anti-competitive behavior in a cartel trading electricity. We participated in the dawn raid but also had two case handlers sitting in Brussels for a certain period.
We also had a number of cases in the retail sector, in particular the food sector. These cases can potentially restructure the whole market and involve both cartel investigations and several mergers.

**ANTITRUST SOURCE:** In the abuse of dominance area, you both have had significant matters that were recently decided by courts. In the Tine Meierier matter, the Norwegian Supreme Court clarified the application of the prohibition of Section 11 of the Competition Act relating to the abuse of a dominant position. Would you tell us about the Supreme Court’s decision and the broader implications it might have for abuse of dominance investigations in Norway?

**MEYER:** The Tine Meierier court decision was a really close call because it was a split decision, but unfortunately not in our favor.

My concern is of course that large companies do not have respect for the competition law and will not fear abusing their dominant position. That is one of the reasons why we now have made abuse of dominance one of our main priorities. We have started to pursue a case in the telecommunications sector involving the largest telecom corporation. I think this case can have a major impact on the large corporations showing that we do not shy away from abuse cases after the loss in the Tine case. The Tine case also demonstrates a significant difference between the Swedish and the Norwegian court systems—the Swedish system has a specialized court while ours is a general court. This implies that we have to be even more clever in building up cases and presenting them to judges in an understandable way, since, of course, judges are not experts on economics and competition. In my view, abuse cases are the most difficult ones to present in court.

**ANTITRUST SOURCE:** In Sweden, in the recent TeliaSonera matter, the Stockholm City Court agreed with the authority’s decision that TeliaSonera abused its dominant position in the broadband/ADSL market through margin squeeze. Would you shed some light on this matter and the court’s decision?

**SJÖBLUM:** In the TeliaSonera margin squeeze case, the first level court handed down its decision in 2011 supporting our view. The case was with the first level court for some six years or seven that included a tour down to Luxembourg for a preliminary ruling by the European Court.

Now, we’re actually expecting the final decision from the upper level court where we had oral pleadings last fall. In Telia’s view they hadn’t abused anything and they have helped their competitors by offering a product; and they say that what they have done is certainly much better than reducing supply. Our view is that that’s not true. We agree they have not refused to supply but they have supplied at levels that either gave an insufficient margin for competitors to maintain their activities in the market or even negative margins. And what they did, which commercially was probably a very planned and clever strategy, was to stop their competitors from making investments in competing infrastructure thereby foreclosing the market from developing. By not refusing to supply, they also avoided being regulated by the telephony regulatory authority.

So it’s quite a complex case, and we very much are looking forward to the final decision, and we’re very confident that it will go our way and the advice that was given by the court in Luxembourg is pretty clearly steering the decision in our direction as well. So on that case, we’re very hopeful.

More broadly on abuse of dominance cases, our view is much of what Christine was saying. These cases are enormously difficult. They tend to occur in industries that used to be monopolies—state-owned monopolies and that have been liberalized over the last twenty years.
We use enormous resources on these cases and it takes a very long time to get them investigated and it then takes a very long time to get them through the courts. We use so much manpower on them that in fact, we cannot do more than a very small number of abuse cases at the same time. And that, of course, makes you worried. We probably should be doing more abuse cases, but what can you do about it, how can we be as effective and not using 10,000 man hours on a case but maybe 5,000 man hours? That’s something that we’re thinking about.

**ANTITRUST SOURCE:** In the merger area, you have had some recent headline-grabbing enforcement actions, for example, the merger of two garden center chains in Norway and the Arla/Milko dairy merger in Sweden, which also included failing firm issues. Would you tell us about these and any other noteworthy merger matters that you’d like to raise?

**SJÖBLOM:** The Arla/Milko case was really interesting. It was a failing firm case. It concerned cooperatives, and the smaller cooperative was failing and they wanted to sell the business to the market dominant company, Arla. Arla is very large, and there were a number of very small cooperatives outside of these two. It was clear that the merger would raise competition concerns, so what we really had to focus on was what was counterfactual, so if we intervene what was going to happen and what could happen without our intervention.

We’ve talked a lot, not only to the industry, but to people who are familiar with bankruptcy situations and we had discussions with other dairy companies and I think we came to the balanced decision that we allowed the merger to go through but we required them to divest all the assets that would have been divested had there been a bankruptcy sale of the assets. When we were having these discussions with the companies, they were very certain that these assets would be very hard to sell. In fact, they were saying that the assets were unsellable.

In this matter, we agreed to have a provision that I think we’ve never had before in any merger case where the scrap value would be sort of a bottom figure, so they were saying these assets would be sold at scrap as there’s a lot of metal in there. So we agreed on the scrap value and they sold it at significantly more than that to somebody who’s now running the production business on a completely different model than before. It’s not a cooperative and it has introduced a lot of new and healthy competition in a very tight market. So this was a real success story I think in that sense. It’s not often that you get such a good a result.

We’ve had a few other cases in the past year in the telecom and broadband/TV sectors. We have intervened in these matters, and as I was saying before, in the Swedish system we cannot prohibit a merger. We have to go to court. And what’s happened in all these cases is that once we have gone to court, the parties withdrew.

**MEYER:** In Norway, we have quite low thresholds in our merger control, and the white paper suggest raising the thresholds for the companies combined from 200 million NOK to 1 billion and for the acquiree from 20 million NOK to 200. In the last one-and-a-half years, we have blocked three mergers and three other mergers have been passed with remedies. In two of the mergers our concern was that large, national corporations were able to obtain local monopolies through serial acquisitions of small local firms.

In the garden center merger you mentioned, a large national company was planning to acquire a small garden center and through this obtain a position close to a monopoly in the local market. This was a test case as the national corporation had plans to acquire smaller garden centers throughout Norway. In the other case that involved national champions, the largest telecom cor-
poration was planning to acquire quite a small company in the southern part of Norway. This merg-
er was passed with a combination of structural and behavioral remedies.

We also have two mergers in the media sector. One case involved two large newspaper organ-
izations. We investigated both the national and local markets and looked at both advertisers and
readers. Again, we ended up with further investigations in the local markets using diversion
rations for the first time. The merger was passed on condition that two newspapers were sold off.

And then recently we had a merger between two companies involved in media monitoring and
analysis. There were only three full-fledged players in the market and our concern was that we
would end up with two. This decision to block the merger was not appealed to the ministry.

We also had a merger in the car service industry, and this was interesting because we had to
decide which was most important, competition between the independent dealers or competition
between the independent dealers and the authorized dealers. This merger was passed with
remedies. Finally, we blocked a merger between two laundry corporations where our concern was
that combined the two parties would gain close to monopoly power in local areas in Norway.

I would say our enforcement has been very concerned with trying to avoid monopolization in
local areas. Norway has a long coastline and is densely populated. Travel between cities and
regions is quite cumbersome and many markets are local. Hence, you need competition author-

ANTITRUST SOURCE: Are there any other major enforcement or policy developments you would like
to highlight?

MEYER: We have had a recent review of Norway’s ban on frequent flyer programs. This ban has
been important to secure competition in the Norwegian market and was key to get entry into the
market when there was only one player. Our recommendation to the government was to partially
lift the ban, upholding the ban on routes to and from smaller destinations. The government first
decided to uphold the ban for all destinations, then changed its decision due to disputes with the
EFTA surveillance authority, lifting the ban altogether.

SJÖBLOM: Maybe I will mention here an interesting line of cases that we’ve had recently, which is
a lot of sports-related cases.

We had two cases that were in front of the court—one was about the rules of the motorsport
association, which required basically total loyalty from both the drivers and the people who assist-
ed in the competition, and we were saying that that went too far, you cannot require absolute loy-
alty, as this essentially is a way to cement your monopoly. Our view was that the association had
to allow the people who are involved in sports to also be active outside of the association that
they’re a member of without risking exclusion and that the association should provide for a right
to have conflicts about such matters settled by a court.

Towards the end of last year, the court found in our favor. Now we have various follow-up activ-
ities going on and there’s a lot of debate in the society as this has been an area where competi-
tion principles have not really come through in Sweden for a very long period of time. There are
some people who were unhappy about the way that we examined this case and the way that the
courts agreed with us. We, however, are pleased with the result and think it can only strengthen
sporting organizations and the civic society to be subject to basic competition principles.

And then the second sports case which was interesting was the NHL case. Last autumn you
had here in the United States a lockout situation. This resulted in some, mainly Swedish, players


that wanted to come home and play and stay in shape. What happened then was that the two upper leagues in Sweden decided to have a sort of collective boycott of the NHL players because they were saying, “It’s no good for the games, you have certain players who are only there for a period or part of the series,” and it has an uneven strength in the teams over the season. It’s confusing for their audiences and what not. We also suspected that the real, behind the scenes reason, was to limit the costs for the clubs. And we thought the result was a cartel-like agreement to limit production to the detriment of paying consumers.

We intervened by means of an interim measure decision saying that those decisions by the two leagues cannot be upheld—that they were anti-competitive. The second level league accepted our decision and lots of players entered the second level league and played there successfully. I don’t think that the audience was very confused. They came in big numbers.

The upper level league, however, didn’t want to follow our decisions and they appealed our interim measure decision. They said they would abide by our decision but this is questionable, as only 2 of the 12 teams actually took any players from the NHL during the period when the interim measures decision was under appeal. I’ve seen some statistics indicating that they had far less audience in the first level division than they had in the second level division during the period. We thought this was quite interesting.

At the end of the day, we actually lost the interim measures case in court. The court somewhat surprisingly ruled that this had not been a boycott directed towards the NHL players, but a general measure directed at short-term employment. We were very confused when we saw that. I think even the clubs were also confused, as there was a public statement by representatives of those clubs saying that the boycott had not been directed against any player but specifically the NHL situation. We were going to continue the main procedure hoping to get his confusion cleared out in the process, but then the lockout ended in the NHL, and that also ended the whole thing for us.

MEYER: We had another case in the food retail sector that challenged our whole merger regime. The largest retail chain acquired a major part of another retail chain, but used a temporary construction to divide the transaction into single contracts. They argued that each of these contracts were below the threshold and hence did not file this as a merger transaction.

SJÖBLOM: Clever lawyers trying to circumvent the rules.

MEYER: Absolutely. We have warned the parties that we may fine them for breaching the merger control.

ANTITRUST SOURCE: Your agencies are very active internationally, in particular in organizations promoting convergence and cooperation, such as the ICN and the OECD, but also bilaterally, including, for example, the Swedish authority’s ongoing technical assistance project in Georgia.

Would you tell us about your international work, in particular your experience in working with international organizations? Do you see further logical steps that could be taken in the interest of international cooperation and/or convergence?

MEYER: International cooperation is very important to the Norwegian competition authority. It is particularly important for us because we are not an EU member. Through the international cooperation we become part of the EU-competition network, thus being able to participate in discussion, be informed about new developments and learn from other authorities. For example, the work
of the ICN’s cartel working group has been very useful for us in establishing our leniency program and we adopted a lot of the best practices from that program.

We have also a lot to learn from the DOJ and FTC, and I am quite surprised how similar challenges are that we face in our efforts to deter anticompetitive behavior. We find the American case law very useful in our work.

In my view international cooperation is particularly important in our field because the regimes are so similar. We prioritize international cooperation very strongly.

SJÖBLOM: The perspective as an EU member, I mean the cooperation we have inside the EU and the ECN, I would hardly even describe that as being international cooperation because it’s almost part of our domestic enforcement. We are so intertwined and the contact is so natural and so frequent, it is a part of our case work. The rules even say that there are many decisions we cannot even adopt legally without consulting with our friends in the EU, so really it becomes part of our own case handling. As Christine was saying, being part of that network is very helpful in terms of the strengthening procedures, learning from each other, best practices spreading across the network.

And for me, the ICN is very much the same but on a bigger scale. I’ve been involved with the ICN since it started when I was at the European Commission and I think it’s just such a tremendous opportunity for all of us to learn from each other.

And, not least, the newer agencies—you mentioned the Georgian agency—there are many, many agencies like that and, which have in the past 12, 13 years, come a long way, and I think in many occasions thanks to the support that they can now get quite easily and the structures are there to do all this good work.

But also, I mean if you look at it more selfishly, I think for our agency as an employer, it’s a good deal to be able to offer case handlers the opportunity to participate in all of these activities. We could spend time on training courses and pay a lot of money to go on training courses and conferences. I think it’s not even half as good as the investment of sending them on ICN workshops or to go to the OECD and present a paper on whatever topic that happens to be part of the program there. It’s meeting people from other agencies at the jurisdiction that do the same job, that’s really learning by doing in a very efficient way and it’s very attractive to most of us. It has so many benefits.

And then when we do capacity building with Georgia, I mean that’s in a sense it’s a little bit like paying back. I think we owe it at a certain level—we can do it so we should do it, and also taking on some responsibilities like in the ICN where we co-chair one of the groups. We have the capacity and resources to do it. Not so many agencies do, so I think we are in a sense obliged to do it, and we are certainly happy to do it.

MEYER: Following up on what Dan said, we have as one of our strategic goals to obtain a high level of international professionalism and we couldn’t do this without the international cooperation.

We strive to be better all the time and to challenge ourselves by writing papers to the OECD, visiting other agencies to learn from them, cooperating closely with the academic community, and having visits from distinguished professors. In fact we recently had Professor Carl Shapiro visiting the authority.

ANTITRUST SOURCE: Your agencies, along with the competition authorities of Finland, Denmark and Iceland, are members of the Nordic Alliance. Would you tell us about this regional cooperation forum and the way it functions? How does your cooperation experience in the Nordic Alliance
compare with your participation in other international fora, such as the ECN? Are there lessons from the Nordic experience from which other jurisdictions could benefit?

**SJÖBLOM:** There are actually two more agencies in the Nordic Alliance in addition to the five you mentioned. We also have the Greenland competition agency and the Faroe Islands that are both part of Denmark but they are independent in many ways and they have their own competition agencies.

This cooperation has been running now for more than fifty years, which is quite amazing. So you can imagine that the investment that has been going into this already has over the years made it very easy for us to reach out and cooperate when there is a need.

There are many people inside the organizations who know each other from these meetings. The heads of agencies meet once a year in the spring and we also meet in a bigger group of say 6–8 people from each agency once a year in the autumn.

So all the time, many, many people get to interact and, there, we have workshops and we share experiences on whatever topic seems to be hot for the moment. So there are very few topics that we have not been through. Recently, we have also been doing more at the heads of agency level. We have been going into sort of the agency effectiveness kind of topics and discussing more issues like how do you run your agency, what lessons can I learn from you—what have you tested, what worked, what didn’t work so well.

Annually, we also do a joint report on a given topic. Going back, they tended to be sectoral, so electricity or retail or whatever it happened to be. A tendency is that we now may do broader topics. We have recently had a clear advocacy focus, so we have for example been doing things on competition policy during financial crisis.

Most recently, we worked on topics, such as how competition can assist things like innovation, growth, and how we can contribute to larger societal goals.

Essentially, all of us wanted to show that we are important agencies and investing in our agencies is a good way to contribute to those bigger goals.

But we also have a multilateral agreement at government level through which we can exchange confidential information without any waivers from the parties. It’s very useful to have. We don’t make use of it very often but every now and then we happened to have had, for example, between us, Norway, and Sweden, parallel investigations of mergers. It’s very easy for case handlers to discuss very openly theories of harm, and “what kind of information do you have, oh, they gave it you, that piece of information—funny as they gave me something else.”

So that’s a good thing to have and I think it’s been around for about 10 years, I think we have done papers on it for the OECD quite some time back and that might be something for other regional organizations. I think that’s a future challenge for all of us, how to deal with confidential information. And if you built that trust over a long period of time, maybe you can get sort of the political support to have those kinds of agreements—it’s very hard to start with getting that kind of agreement. I think you need to start with the cooperation and then you can move on to something like our agreement at Government levels.

**MEYER:** I totally agree with what Dan said. When I wanted to reorganize our organization we ask our colleagues in the Danish authority, how do you do it and what can we learn from you. When we were planning to focus more of our resources on abuse of dominance cases, we went to Sweden to talk about how Dan was doing it. And we’re turning to the Icelandic director to talk about what he has done in Iceland.
So because we know one another, we can utilize this cooperation also between the meetings and not just in the meetings.

**ANTITRUST SOURCE:** Christine, following a review of over two years, the Norwegian Competition Law Reform Commission’s 2012 report recommended a number of changes to the country’s competition regime, including amendments to the leniency program to include individuals and significantly higher thresholds for merger notification. Would you provide your views on these proposals?

**MEYER:** In terms of increasing merger thresholds substantially, we have been skeptical. And the reason is that it will be more difficult to detect anticompetitive mergers under the new threshold. In the past couple of years we have intervened in a number of mergers below the proposed threshold. The increase in the threshold is substantial—though one might argue that these are at a too low level now. But going from 200 million to 1 billion is a quite significant step. So we tried to argue we should rather lessen the information required for firm S to file the mergers than abandon the filing totally.

Now the government has made its decision we have to respect that and find other ways to detect anticompetitive mergers. I think we need to focus more on market surveillance than we have in the past.

You also mentioned leniency. Leniency has been put in place for corporations but not for individuals. For individuals we have had agreement with the public prosecutor not to prosecute individuals who are employed by companies filing leniency unless we ask them to. But this agreement might not give full confidence to the individuals. The original proposal was that individuals should have the same right as corporations, but the government wants to open up to prosecute individuals. Exactly how is a work in progress.

And in terms of our powers in dawn raids, we now have to make copies as the main rule. We didn’t in the past, but we do not foresee this as a major problem.

**ANTITRUST SOURCE:** In 2011, you both participated in a program than Dan hosted looking into the relationship between competition and consumer protection. Indeed, some of your neighbors, such as Denmark and Finland, have recently consolidated these functions. Do you see this trend extending to Sweden or Norway? Would you see consolidation as a net positive or negative in your country?

**SJÖBLOM:** I think there are no plans to consolidate in Sweden, and I’m happy that there are no plans. We have good cooperation with the consumer protection agency. They are located in a city 400 kilometers away from Stockholm, so basically bringing us together would certainly be cumbersome.

On a substantive level, we have a cooperation agreement with them. We exchange views on any subject that we think is closely related. That happens remarkably infrequently.

I think it’s a few cases a year where we have any issue to actually discuss. We meet at the head of agency level once a year and our agendas are pretty short. So in my view, from what I’ve seen through that cooperation, I think that the synergies between the two organizations would be very small and I think the risk is much bigger that you could lose focus.

I would be very interested to see—you mentioned the Danish and the Finnish authorities and there are other examples that have been merged recently, such as the Dutch and Spanish. I hope
that they do good studies sort of comparing the pre-merger and post-merger results that we get some sort of sound evaluation of the effects of those mergers down the line. I am very afraid that it could be that these mergers would lessen the surveillance of competition matters.

And it's just more complaints in the consumer field for example and if you don't protect sort of the staff that work on competition matters, which are much more difficult and the economic analysis requires a lot of resources, then I would fear that consumer work could easily crowd out competition work. And it could also be tempting I think for the agency to actually let it develop in the direction because I think the consumer issues tend to be much more publicly interesting.

So for an agency with both competition and consumer powers, my suspicion is that it may be much easier to grab public attention to it in the consumer line of work. I think this loss of competition focus could be a danger to having effective competition surveillance in your jurisdiction. So I'm hoping that I'm right in my prediction that this is not in the cards in Sweden.

**MEYER:** On a personal note, I enjoy my work very much and enjoy being closely involved in the cases. My fear would be that my role would change and I would become much more of an administrator.

As in Sweden, the competition authority and the consumer protection agency are located in different cities. The Norwegian competition authority was relocated from Oslo to Bergen about ten years ago.

To my knowledge, this issue has not been debated in Norway. And we also have two consumer agencies, one which is overseeing the Marketing Control Act, which is the Ombudsman, and one which is more of a state funded interest group for consumers.

In the number of countries where this had happened this seems to have been driven by budget reasons. I don't think that's a good reason for merging and there must be some real synergies. Our colleague from Denmark is quite convincing that their merger has been a success, and knowing her I believe she can exploit the synergies.

If we think that merging with other agencies is a good idea, one could also look at the sectoral regulators. It will be interesting to follow the merger in the Netherlands, for example, where there both the telecom sector regulator, competition authority, and consumer agency have merged.

On the whole, I'm happy there seem to be no plans in Norway but if there were plans, then we would just have to do it.

**ANTITRUST SOURCE:** Your authorities are active in competition advocacy with, for example, both agencies recently issuing extensive reports on competition issues in the food supply industry. What are the findings of these reports? Are there other examples of advocacy that are particularly noteworthy?

**SJÖBLOM:** We do a lot of advocacy. Mostly we choose our topics inside the agency. The food chain report, however, was actually one that the government asked us to do. We had done many reports on the food industry over the previous years and we pretty much expected what the results were going to be, so we found it important to agree with the government on expectations before the report was conducted.

I think essentially, the political problem that the Department of Agriculture wanted us to look at was that certain retailers appear to have large buying power and they were having relatively large profit margins. So there were some rather public cases of big retailers earning lots of money and it was felt then that something must be wrong in the way competition worked in the markets because you shouldn’t be able to have those margins.
What we found, in fact, was that competition in food retail seems to be pretty healthy. The retailers that had the large profit margins run very efficient organizations. So we didn’t think that there was a problem with the buying power for these retailers. We thought that they were actually under sufficient downstream competition from the other chains to act competitively and to share the benefits of that purchasing power with the customers.

**MEYER**: We also had a report, but in contrast to Sweden it did not cover the whole value chain. It only looked at the relations between the suppliers, retailers, and consumers.

And in our view, that was one of the major flaws of the report, leaving out the primary producers and the anticompetitive effects of the Norwegian barriers to trade. Because of high import barriers, there is little competition to the Norwegian suppliers, in particular for agricultural products. Moreover, international retail chains find it difficult to enter into Norway because they have to build up their business from scratch and cannot benefit from their deals with non-Norwegian suppliers.

We expressed this view and the Food Supply Chain Commission as well as the agricultural sector was quite upset with our statements. However, we have an obligation to protect and facilitate competition. This is an important part of our advocacy role. Through this process and a number of advocacy initiatives, we have strengthened our mandate to have an independent voice and that’s going continue to be a strong voice.

The commission identified the problem as large and powerful retail chains, our stance was that the concentration was much higher on the supplier side much due to high barriers to entry and so forth. This is an ongoing debate in Norway and there has recently been a proposal for a new law of conduct regulating the relations between suppliers and retailers.

We also had heated debates for and against regulating the book industry. Today the book industry has exemption from the competition law in terms of RPM (resale price maintenance). Now the government has proposed to make this into a law which also regulates e-books. We have strongly opposed this law, but unfortunately lost the debate. It seems we’re the only ones opposing the law; the whole industry is very much in favor of RPM and has managed to convince the lawmakers.

In other matters we try our best to raise our voice for competition. And we have been taking a much more active role in the media. I have my own column in the business paper every six weeks. So we are trying to be in the public arena to raise our voice. I find the advocacy work much more important than I thought it would be when I took office.

**SJÖBLOM**: And I would just complement what I said before with some other examples. Every now and then, we are given the task of looking more broadly at the Swedish economy for barriers to entry for markets where competition doesn’t seem to work. We had our biggest assignment like that in 2008, when government asked us to do a really broad sweep. We came up with a big report with some 60 or so recommendations on things government might do to improve the functioning of the economy, inquiries to be started, legislation to be passed or not to be passed as it may be.

The sheer size of it became sort of important. The government a few years later issued a book following up on the proposal so it might actually show that of 60 or so proposals, they had actually implemented almost 50 or so, so that was quite high level.

And this year, we had been given a smaller version of that kind of assignment again and we’re now focusing in on a few areas where we think there are still market malfunctioning issues, many of which relate to the construction markets. We have a few different things there that we are interested in, such as standard setting for construction products, the procedure under which permits...
to construct houses and other buildings are granted, and the way that land is allocated by public landowners for construction works.

In addition, we’re looking into dentistry, where there are some issues. We’re looking into retail sales of gasoline and other fuels. And we’re also looking to a broader topic—which is connected to the powers that I have mentioned before which is how you have equal competitive terms between on one hand public bodies, on the one hand private organizations—and we’re going to conclude a report, hopefully with some good recommendations, at the end of this year.

**MEYER**: And what I’ve done is that to tell the Norwegian authorities that we should do the same as Sweden. It would be a really, really good idea if we could do the same type of review in Norway, looking at anticompetitive regulation and making specific proposals to strengthen competition. And I think Norway needs that, in particular because we have had no economic crisis in Norway.

**ANTITRUST SOURCE**: Looking ahead, what do you foresee as main challenges for your authority over the next year?

**MEYER**: One challenge which I also realized, after two years in office, is that we need to talk about competition and why competition is such a good idea. Among politicians and decision makers, they seem to forget about why competition is important and I think we have talked about it constantly bringing out the good message to the public. So when I give talks and whenever I’m talking to the media, we enthusiastically talk about why competition is working, why is it good for consumers, how it leads to lower prices and better quality. I think that’s one of the things to bring this to the forefront of attention also among politicians.

Furthermore, I think a challenge which we have to constantly work on, is our young staff. When they gain some experience, they choose to go and work for law firms or whatever. And when we handle cases, we sit with our young and somewhat inexperienced team on one side and meet very experienced—some with experience from the competition authority—on the other side of the table. This is challenging. I think we have to systematically try to retain the personnel and even put more effort into that.

So those are our two major challenges.

**SJÖBLOM**: I’ll do two challenges as well. I think that the first challenge has to do with cases. We need to do more and better cases. We will continue to invest in improving our procedures. My ambition—although I don’t want to put a firm number on it—is that we should bring several antitrust cases to the courts every year.

As it is now, it goes a little bit up and down. Certain years, it might be three, in other years, it might be another figure. We need to up those figures just a little bit, not necessarily double them. And I think the way to do that is to get better at spending a little bit less time in preparing each and every case and a little bit better at doing our negative priorities.

We have started with what I think is an exciting program, a lean management program where I’m hoping that there will be some benefits in this direction. I’m hoping that will help us to figure out ways of working smarter. Targeting cases better and using a little bit less resources, and if we can use a little bit less resources at each case, we can do a little bit more cases and then we should have the net outcome and move forward. So that’s at least the plan. We’ll see if it works.

And my second challenge I think is like Christine said: staff retention. We also have a fairly high turnover in particular among the younger case officers who come to us, and I think we have close
to 15 or so percent turnover every year. So I guess the average stay in that category would be about two to three years. I’m hoping to do things to make many want to stay for a fourth year, and I think that will give us very good means to also improve the case throughout and the case output. We’re also having some programs to support this development. For example, we’ve been doing a values project for a few years and I think that’s improved office atmosphere and been quite popular with staff. We also do annual measurements of employee satisfaction.

We also have a project which we’re starting now which is on personal development which aims to put a little bit longer perspective on personal development with the goal that each case officer should have a personal development plan which is not annual but stretches over maybe three years.

I’m hoping that these building blocks will converge and that we will in a few years’ time be able to reap the benefits from it.

**ANTITRUST SOURCE:** Thank you very much for your time.