Roundtable Conference with Enforcement Officials Spring 2014
Top enforcers from the U.S. and Europe provide updates from their respective agencies. Among the topics the panelists discussed are: criminal enforcement, mergers, health care, e-books, privacy and data security, and coordination among agencies.

Interview with Chris Fonteijn, Chairman of the Board, Netherlands Authority for Consumers and Markets
The head of the newly amalgamated Dutch competition, consumer protection, and telecommunication regulator shares his views on the synergies between the agency’s various functions, the ACM’s priorities, cartel fines, and dealing with government behavior that affects competition.

Interview with George Lipimile, Director of the COMESA Competition Commission
COMESA’s Competition Commission Director discusses the challenges surrounding the formation of the regional competition body, the interaction between COMESA and the national competition authorities, merger thresholds, filing fees, and the process that is expected to lead to changes in how COMESA’s merger regime is administered.

Interview with Carlos Ragazzo, Former General Superintendent, Brazil’s Council for Economic Defense (CADE)
Before he stepped down at the end of May, the first General Superintendent of Brazil’s combined competition agency discussed the efforts to create an effective agency, the effort to streamline CADE’s merger review process, cartel enforcement, and international cooperation.
MODERATOR

CHRIS HOCKETT: Welcome to the Enforcers’ Roundtable, always one of the highlights of the Spring Meeting. We are fortunate today to be joined by a distinguished panel of enforcers: The Honorable Bill Baer, Assistant Attorney General of the United States and head of the DOJ’s Antitrust Division, the Honorable Edith Ramirez, Chairwoman of the Federal Trade Commission; Joaquín Almunia, Vice President and Commissioner for Competition at the European Commission; and Kathleen Foote, Senior Assistant Attorney General for the State of California, and Chair of the NAAG Antitrust Task Force. Joining me as questioners on today’s panel are Deb Garza, the Section’s International Officer, and Bill MacLeod, its Program Officer.

We will start out as we normally do, by giving each of the enforcers on the panel the opportunity to make a brief statement; then we will move to questions and answers. We will begin with Bill Baer.
BILL BAER: Thank you. It is an honor to share the dais again this year with Edith, Joaquín, and Kathleen. I would like to thank Chris, Bill, and Deb for organizing this panel.

Once again, it's time for the Antitrust Division's annual report card. I do appreciate the fact that this particular report card is self-graded. However, I'm going to refrain today from assigning a grade to the Antitrust Division's performance. I will leave that to all of you—that is one of the purposes of this session and the Spring Meeting more generally.

I would, however, make one exception and give an A+ to the career women and men of the Antitrust Division, who performed so well this year under such difficult circumstances. Our attorneys, economists, paralegals, and staff were confronted by hiring and pay freezes, budget challenges, threats of furloughs, travel restrictions, and an inexcusable 16-day shutdown, during which people were barred from coming to work even though many were willing to work without pay. And, of course, they all faced the challenge of adjusting to this quirky—to put it mildly—new Assistant Attorney General. Through it all, the Antitrust Division team kept its collective eye on the ball and made a positive difference in the average consumer's life in many different ways.

What do I mean by that? During the last year alone, merger enforcement protected competition in markets ranging from beer to online ratings and reviews services. In the airline industry, our settlement of the USAirways/American transaction is opening up new competition, better service, and lower prices to millions of consumers across the country. Consider wireless, too, where our prior enforcement efforts preserving four national firms have continued to generate aggressive new competition on price and on services.

Our civil non-merger enforcement exposed a per se unlawful conspiracy to raise prices for e-books. Those efforts restored competition, helping to drive the price of best selling e-books down from about $11 to closer to $6. Our trial victory also facilitated the state and private settlements that are directly benefitting consumers. Just this week consumers began to receive refunds and credits for past overcharges.

Our enforcement efforts showed how most-favored nation provisions, or MFNs, can be misused to injure competition in markets ranging from e-books to health care. Our continued pursuit of “do not poach” agreements will help ensure that skilled workers in high-tech markets benefit from competition for their services. The evidence we uncovered in this area has enabled the private enforcement that is going to lead to the possibility of damages for people injured by the past misconduct.

We'll talk about criminal enforcement in some detail and in some of the follow-up questions. But we exposed conspiracies to rig tax liens and real estate foreclosure auctions that deprive consumers of their home equity.

We have continued to prosecute international cartels involving auto parts and financial markets. We have worked within the administration and internationally to promote the development of sound policy involving the intersection of antitrust and intellectual property. The division has used effective advocacy to foster competition for key consumer goods and services.

At the end of the day, I think antitrust in the United States is delivering—and I include the FTC and the States in this—the sound antitrust enforcement that then-candidate Obama promised a little over five years ago.

It is useful to think about the value proposition of antitrust enforcement—the return on investment. We are, with a direct appropriation of taxpayer dollars of around $70 million a year, generating well over ten times that in criminal fines alone. So the benefit to consumers, to the U.S. Treasury, from this investment of taxpayer dollars is really paying off.

We appreciate that this conference is focused on the nitty-gritty of antitrust law. What is the...
precedent set? What is the policy adopted? Our enforcement efforts over the past year have contributed to that discussion.

In the e-books case, Judge Cote in the Southern District of New York found Apple liable for a per se unlawful conspiracy that it orchestrated with e-book publishers. Her opinion highlighted the inadequacies of Apple’s internal antitrust compliance and training efforts. It set out the court’s concerns with the credibility of employees, including senior executives, on the witness stand. She concluded ultimately that past deficiencies in antitrust compliance and training warranted the extraordinary measure of an external compliance monitor to make sure things improve going forward.

In Bazaarvoice, a consummated merger challenge, we went after a merger where the transaction price was $170 million, but which we alleged—and Judge Orrick a few months ago agreed—constituted a merger to monopoly. I’ll talk about that a little later too. We honored the commitment Christine Varney made five years ago: that we will be trial-ready and will go to court where we need to. But we also showed that we are open to meaningful structural settlements in merger cases and other cases where there is a consensual agreement that can be reached that will protect consumer interests.

We showed a continued ability to win criminal cases, most recently in Newark, in a case involving fraud and bid rigging in environmental services Superfund sites; and, just a week and a half ago in Sacramento, in a trial involving real estate foreclosure fraud.

Effective antitrust enforcement and advocacy also involves sensitivity to the impact of what we are doing and respect for the business community’s legitimate objectives. We made good on some promises we made last year.

We have implemented a policy of not disclosing likely targets in our corporate criminal settlements, so-called carve-outs. The courts have agreed that that’s an appropriate policy change, to keep those names confidential until we are prepared to actually file charges.

We worked with the PTO and the USTR to suggest refinements to the approach the ITC takes to exclusion orders.

We have incorporated the latest in technology into our merger investigations, so-called technology-assisted review. In merger cases, we have used it to dramatically lower the compliance cost for you and your clients in dealing with us and to streamline our review process.

We announced earlier this morning that we are finally going to do something real about these old, perpetual civil consent decrees that require judicial approval to take off the books. Since 1979–early 1980, we have sunsetting new decrees automatically. But we’ve had some trouble finding efficient ways to get these hundreds of old decrees off the books. We’ve now come up with a more efficient procedure, which places less of a burden on the business community.

Finally, we have, together with Edith, Joaquin, and others, continued to engage internationally to work on substantive convergence, procedural fairness, and transparency as core values for competition and antitrust enforcers.

In short, we think it has been a pretty good year.

MR. HOCKETT: Thank you, Bill. Edith?
EDITH RAMIREZ: Thank you, Chris.

Let me first say that I’m delighted to be here this morning. I’m very pleased to be here with Bill, Joaquin, and Kathleen.

This year is a very special year for the FTC. As I think most of you know, we are celebrating our centennial. We’re all very excited about that, and I’ll be talking a little bit more about that later on.

In addition to that important milestone, I wanted to mention one other that I believe deserves a special mention: As of this week, I’m now on Twitter. I am up to 226 followers—and that’s only 51 million behind Justin Bieber. I don’t think that’s too bad for an antitrust and consumer protection enforcer. By the way, you can follow me @edithramirezftc. Hopefully a few of you here will join and follow me.

Turning to the substantive highlights, we’ve had a tremendously busy year. I’m only going to have time to touch very briefly on some of the activities in which we’ve been engaged. I will start with matters that I want to highlight in the competition arena. But I also want to speak briefly about some of our consumer protection work.

Just yesterday, we announced that the Commission voted to issue an administrative complaint against AmeriGas and Blue Rhino. These two companies are the largest national suppliers of propane exchange cylinders. We have alleged that the two rivals illegally coordinated on reducing the amount of propane in the tanks that were sold to a key customer. We are being active in monitoring the marketplace and ensuring against anticompetitive conduct, and this case is just the most recent example.

I also want to take the opportunity to highlight some of the work that we are doing in the health care arena. We continue to be very vigilant when it comes to consolidation in the health care provider market. Last year, I mentioned the St. Luke’s matter.

St. Luke’s is a transaction in which St. Luke’s sought to acquire Saltzer Medical Group, the largest independent physician practice group in Idaho. We alleged that the transaction was illegal. The matter was tried this fall. In January, we received a favorable ruling from the District Court in Idaho.3 We’re very pleased with this important victory, and I want to thank all of our team members who played a role in the win. The case was a collaborative effort with the State AG’s office in Idaho, and shows the importance of collaboration between federal antitrust agencies and the states. The case is now on appeal, and we are confident that we will prevail on appeal.

I also want to mention another transaction in the merger arena that we examined last year. In this one, we determined not to take any action. This was the investigation of the transaction involving Office Depot/OfficeMax.

As many of you know, back in 1997 the Commission blocked the merger of Staples and Office Depot. This more recent investigation shows that we recognize that markets are not stagnant, that they evolve and change. This time around, when we examined this particular market, we determined that there had been significant changes since the 1997 Staples/Office Depot matter. We saw that national retailers like Walmart and Target have become much more important players in the marketplace, that online commerce now plays a significant role, and specifically that Amazon, which was in its infancy back in 1997, now has a much more significant role. As a result of those findings, we allowed the transaction to go forward.

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Let me now spend a few minutes talking about some of the policy work that we have been engaged in. For me, the research and policy part of our role—which dates back to the origins of the FTC—is particularly important. Therefore, it's something that we are going to continue to prioritize as we go forward.

Just last week, we held a two-day health care workshop. Our aim with the workshop was to look at the changing health care market. We brought together academics and other experts, as well as stakeholders, to discuss a number of different developments, including in the areas of professional regulation and innovation in the delivery of health care. Of course, as an antitrust enforcer, our aim is to promote competition and ensure that the quality of health care is elevated and that costs are low. As a result, this workshop is part of an important inquiry for us. We are accepting public comments, and it will be an ongoing endeavor. We are going to continue to hold more workshops in this area.

I also want to mention some of the advocacy work that we are doing.

In addition to some of the more familiar work that you have seen recently with regard to professional regulations, we also have taken another look at what is happening in taxi commissions, for example. This was an area that we looked at back in the 1980s. We recently filed comments with the D.C. Taxi Commission emphasizing that it’s important for local regulators to make sure that they examine what impact regulations have on new and emerging forms of competition. Uber, for example, is a new form of competition that we see in the provision of transportation services. We want to make sure that competition continues and that we can continue to see more innovation in the marketplace.

Let me now turn to a couple of things I want to highlight on the consumer protection front. On the consumer protection side, in particular, this has been a year of milestones and also a year of firsts.

We have been doing a tremendous amount of work in the area of privacy and data security. We recently announced our 50th data security settlement. Our data security program dates back to the leadership of Tim Muris, and it has been a program that has been supported and expanded by all of the Chairs since—by Debbie Majoras, Bill Kovacic, and Jon Leibowitz. In fact, just today we announced two more cases in this arena.

We are also doing a great deal of work in the mobile ecosystem, given the dramatic increase in consumer use of mobile devices. Last year—and this is an example of a “first”—we brought two cases dealing with mobile cramming. This is a practice where unauthorized charges are placed on phone bills. The charges are often fairly small, so consumers often overlook them.

We also announced a settlement with Apple in January involving the use of in-app purchases in connection with mobile apps directed to kids.

These are just a few examples showing the close attention we are paying to what’s happening in the mobile sphere to make sure that consumers are protected there in the same way they are protected in the brick-and-mortar world and when they are on their desktops.

Finally, let me just say a quick word about our international work. International work continues to be very important to us at the FTC. We are actively participating in both multilateral organizations as well as engaging bilaterally with a number of partners.

We are also cooperating with a number of other jurisdictions on individual matters. I’ll mention one recent transaction, Thermo Fisher/Life Technologies, in which we cooperated with six other jurisdictions that were looking in parallel at this transaction. In particular, I want to commend Joaquin Almunia and his team. We coordinated very closely with the EC on this matter, and we were able to reach a resolution on a timetable that was very similar to theirs.
MR. HOCKETT: Thank you, Edith. Joaquín?

JOAQUÍN ALMUNIA: Many thanks and a very good morning to all. This is the fourth time I have attended the ABA Spring Meeting and Enforcers’ Roundtable and it will be the last because my term as European Commissioner and that of this Commission ends on October 31.

I wish to thank the ABA for the opportunities it has given me to discuss competition issues with my colleagues at the U.S. competition authorities, with representatives of the U.S. judiciary, and with many experts in the field. I have noticed that, year after year, the approaches of our respective authorities have converged and our cooperation has improved. It is enormously important that we coordinate and discuss our cases because we deal with growing numbers of similar and even common cases. Edith has just mentioned the example of Thermo Fisher’s acquisition of Life Technologies. We are making a lot of progress, and this includes the authorities in the EU and the U.S. and many others in the industrialized world and, increasingly, in emerging countries.

Let me review the main areas of activity of the competition department of the European Commission since we last met. In cartel enforcement, the most important cases were in financial markets; our LIBOR and EURIBOR investigations have led to settlement decisions with seven banks and one broker in December 2013. Not all the parties involved were ready to settle, so our investigations continue with three more banks and one broker and we will issue a Statement of Objections in the next couple of months.

We have more cases in which we look into collusive practices related to the manipulation of financial and non-financial benchmarks. I think this is an issue of paramount importance, not only for competition authorities, but also for market regulators and lawmakers. In Europe, we have put forward a number of legislative initiatives to improve the way these benchmarks work. As to competition enforcement, we have been, and will continue to be, very active against cartels and other practices that raise competition concerns, such as our investigation regarding credit default swaps.

Moving on to State aid, we are still working hard to control how taxpayers’ money is used for the restructuring and, in some cases, resolution of banks in the wake of the crisis. This control is essential to protect and preserve the Economic and Monetary Union.

The EMU has just taken an important step forward; let me mention an aside to give you a brief update. The EU institutions have reached an extremely important agreement on a single resolution mechanism for euro-area banks. We already have a single bank supervisor for the euro area—the European Central Bank. The Commission’s role in State aid is preserved and will be carried out in connection with the new institutions and procedures that will be in place by the end of this year. This is extremely important because it keeps the financial sector in good health and encourages lenders to finance the real economy. Let us not forget that a dearth of lending is one of the major challenges Europe is facing in these first stages of the recovery.

To return to competition enforcement, we have been uncovering cartels in the car-parts industry, as has been the case in the U.S. and other jurisdictions. Only the other day we adopted the third decision in this industry. This time the cartelized parts were ball bearings. The first two involved the cables that transmit electricity in cars and the foam for seats. As to our ongoing investigations, they cover almost all the parts required to manufacture a car, so my successor will continue the work.

These investigations and decisions are crucial because they help the Single Market work as intended and deploy its potential for growth. We need to promote growth in Europe, and the Single Market is of the essence for this purpose. Of course, the EU also needs to be active and dynam-
ic beyond its borders, but without a strong Single Market we will not be able to do this. Competition policy is key if we are serious about building a model of the Single Market for the 21st century.

I will now move to our work in energy markets, in which we have been very active for a long time prior to the recent tensions in the gas market and the Ukrainian crisis. Over the past year, we have looked into power exchanges. And the other day we adopted two decisions involving three exchanges that had colluded or abused their dominant positions—one located in Romania and two in Western Europe. More investigations are going on in the gas and electricity sectors in other Member States. And, of course, we have the Gazprom investigation, which is important and now extremely sensitive.

But the work of competition authorities should be protected from the interference of other considerations. Our work must remain focused on the enforcement of EU competition law to help build a genuine Single Market for energy in Europe. This is an absolute necessity not only for economic but also for political reasons.

Telecom markets are another area of activity, from mobile telephony to sectors of the digital economy. Later we may discuss important merger cases we are assessing among mobile operators. As regards device manufacturers, we are very close to adopting two decisions, one in the Apple/Samsung case and the other one in the Apple/Motorola case regarding possible abuses of standard-essential patents.

For the Single Market to work, we need good payment systems, so we are also looking into the practices of big debit- and credit-card companies—MasterCard, Visa Europe, and Visa International. These cases are distinct but have similar characteristics and are advancing at a different pace. The relationship between the Visa and MasterCard cases gave us an idea. As a competition enforcer, I am not a legislator. But, my colleague Michel Barnier, in charge of the Internal Market, has the responsibility to put forward legislation. The two of us cooperated to send new legislative proposals to Parliament and the Council on payment systems. In particular, the new legislation covers one aspect that is linked to our cases: the multilateral interchange fees and the way these companies can impose fees without abusing their dominant positions in the market.

Finally, let me talk about the pharmaceutical industry. Last year we decided two pay-for-delay cases for the first time. My predecessor Neelie Kroes had conducted a sector inquiry in the industry, whose results have led us to our present investigations. We have already taken decisions in the Lundbeck case and in the Johnson & Johnson and Novartis cases. We are close to more decisions regarding, thanks to their agreements with generic companies, some originators preventing the entry of cheaper, generic medicines in the market and keeping their prices higher than necessary. For us, protecting the interests of consumers, patients, and national health systems is another enforcement priority.

MR. HOCKETT: Thank you. Kathleen?

KATHLEEN FOOTE: Thank you. It's a pleasure to be here again to speak with you all.

The NAAG Antitrust Task Force, for those of you who are not aware, consists of antitrust bureau chiefs of 50-plus states and territories, as well as the staff attorneys and paralegals in those offices. It serves as an information clearinghouse and coordinating organization for investigation, litigation, and communication, as well as cooperation with other enforcement agencies, including the federal agencies. We have not yet begun cooperation with Europeans or others, but moving toward convergence in that area is something that at some point we may look forward to.

Although the faces of the state attorneys general who compose the top level of NAAG do
change with some frequency, the faces on the Antitrust Task Force are pretty constant. We have had a new development in the return of Puerto Rico to our group and to the annual meeting after several years of hiatus. We are very pleased with that.

I will just mention that state antitrust work is done only partly as multistate efforts through the NAAG process. I would like to touch today on some very notable developments in individual states, as well as the multistate matters that tend to arise out of the various Task Force committees.

Probably the most significant development on the multistate front was a major issue of consensus at all levels within State AG offices. That was the Supreme Court ruling in the *Mississippi v. AU Optronics* case, holding that cases filed in state court by State AGs acting as *parens patriae* on behalf of their citizens are not removable to federal court as mass actions under CAFA.

Forty-eight State AGs signed onto a multistate amicus brief supporting Mississippi in that case.\(^4\)

It did leave open the question whether or not CAFA might apply to *parens patriae* cases on the basis that they were similar to class actions. About a week after the *Mississippi* decision, the Supreme Court denied cert. on a case that would have presented that issue. So our thinking has tended to be that that issue is not likely to get much play in those cases either.

A major continuing priority for us is, of course, health care, a priority that we share with our other enforcement agencies. Health care is a traditional responsibility of the states, federal health reform notwithstanding.

Hospital mergers continue to be a focus area for many states and, increasingly, hospital market power in particular markets and the exercise of hospital market power through a variety of other kinds of measures.

Edith has already mentioned the work of the Idaho Attorney General in the *St. Luke’s* case, certainly one of the most important cases that we have seen in hospital merger enforcement in a very long time. Congratulations to the FTC for that victory. It will have tremendous ramifications around the country.

In Massachusetts, the State Attorney General was tasked several years ago with conducting an in-depth study about the drivers of the increases in health care costs. One of the things that study concluded was that market power was being exercised by a number of largely hospital providers, and exercised through certain kinds of provisions that were included in the agreements between providers and payers. That was an extremely interesting finding. It was followed up by legislation. The effects of the legislation have now been studied for a couple of years, with some findings by Massachusetts regarding the salutary effect that the legislation has had.

It is also worth noting that in a couple of merger cases, one concerning hospitals in Utica by New York and another involving the Geisinger Health System in Pennsylvania, there was also a focus in the remedies on those types of provisions in agreements with payers that might focus on exclusivity and measures that would impede the ability of payers to offer tiered health insurance products to their various customers.

This is a new area for the states. It’s one as to which there is not as much guidance. But with increasing concentration in a number of the local markets around the country, we will see greater attention being paid to it on either the legislative front or the State AG litigation front.

Also in the health care area, the cost of pharmaceuticals and generic drugs has been a long-time priority for the states, largely working through the NAAG Pharmaceutical Industry Working Group. Obviously, *Actavis* has been of great significance.

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The Working Group has been involved in damages litigation, in addition to enforcement litigation. There are no cases pending right now that have been brought by State AGs. But, last month, New York settled a case with two generic drug makers requiring them to end an agreement not to challenge one another’s rights to 180-day first-file exclusivity under the Hatch-Waxman Act.

Last week my own state, California, filed an amicus brief in a reverse payments case pending before the California Supreme Court, which will certainly be a case of first impression. This is a state court case filed under the state antitrust laws involving the Cipro drugs. Our Attorney General took the position that pay-for-delay agreements falling outside two very limited exceptions dealt with in *Actavis* should be deemed per se violations of the state antitrust law for a number of reasons, both policy reasons that are perhaps common to all such agreements, and also reasons that relate to the competition picture under the California legislation, not just our Cartwright Act, but other legislative measures that relate to health care and competition generally.

Another area that I want to touch on is an interesting and experimental one for several states. That’s the area of software piracy. This is one of those situations that arise occasionally where there is a problem that is recognized as a major one in the business world, and it doesn’t have any obvious solutions. If software piracy is committed locally, solutions are available, but if it is committed internationally, people have been looking for solutions for some time.

At a certain point, it happens that they begin knocking on the doors of State AGs. State AGs have been quite concerned about this issue for quite a number of years now and have expressed themselves collectively on that. But now, in addition, there has begun to be some experimentation with the state unfair competition acts, which are generally likened to Section 5 of the FTC Act, and in many cases have perhaps even greater flexibility than Section 5. There are now six states, I believe, that have made moves in this area. Earlier this month, Oklahoma sued a Chinese oil equipment supplier for selling equipment at artificially low prices, gaining an unfair competitive advantage over a local company by virtue of its use of pirated software. Last year, California sued two apparel manufacturers, one Chinese and one Indian, that import goods into California in competition with the Los Angeles garment industry, which happens to be quite a large industry in L.A., possibly employing, at least within city limits, a good 10 percent of the employment within Los Angeles.

Other states have also acted. Massachusetts was the very first, settling a couple of years ago with a Thai seafood importer, claims brought under Massachusetts’ unfair competition act. Washington has settled a case and has also enacted a specific statute. It’s the only statute dealing very specifically with software piracy as a form of unfair competition. It is unique in that it provides a private right of action by injured competitors.

It’s something that may or may not continue. There have not been court decisions on these cases. California is actively litigating and there are some motions pending, so we will see how that goes. But it’s an extremely interesting area and one that is unique to the state Attorneys General at this point.

In conclusion, I want to note that the NAAG Task Force Committees are quite fundamental to much of our work. Our State/Federal Cooperation Committee, in particular, works very hard to facilitate the work that we do with our several enforcement partners, most frequently the Federal Trade Commission and the Antitrust Division. The Committee advances cooperation, addresses the occasional disconnects and bottlenecks, to allow us to continue working with them as closely as we do. It is a tremendous advantage for us in many case, and one in which we continue to hope to bring value to the table as we go forward.
MR. HOCKETT: Thank you, Kathleen, and thanks to all of our panelists for those opening remarks. We’ll begin the Q&A part of this session. Let me kick it off with a question for Bill Baer. There is an impression out there that the majority of the Division’s cartel enforcement efforts have been addressed to firms located outside of the United States. Is that true, and can you describe what the Division is doing to detect and prosecute domestic cartels?

MR. BAER: I certainly agree that the majority of the press is focused on what we are doing internationally, and that’s understandable. When you think about the auto parts investigation, the LIBOR investigation that we are doing jointly with the European Commission—the dollar values involved in those matters are significant.

There is also an ongoing foreign currency exchange investigation. The Department has confirmed the existence of it. That’s a market that involves $5 trillion a day in currency exchange. So there will be attention, there will be press.

But look at what we have actually prosecuted. In the United States over the last five years—since 2009—we filed about 350 criminal cases. Half of those involved purely domestic conduct. Today—I took a look earlier this week—about 35–36 percent of our criminal enforcement attorneys are working on domestic criminal conduct investigations. And, we are going to stay committed to investigating state, local, regional, and national conduct.

It’s easy to miss these matters because the high-visibility matters get the press. But if you look at what we have done in the municipal bonds area—enforcement involving municipal guaranteed investment contracts (GICs)—we have had 18 convictions. We achieved nearly $750 million—three-quarters of a billion dollars—in redress and penalties. We have taken action locally involving real estate foreclosure auction fraud activities, fuel supply, other government procurement problems, and tax lien conspiracies. So we have been quite active. It’s just a little less visible.

You’ll see more of it. We have opened a second criminal section in D.C. of about 15 attorneys that is up and running. The section’s initial focus will be on meeting the commitment we made to the public and to the Congress at the time we reduced our field offices from seven to three: to remain active, to remain present, in all regions of the United States.

BILL MACLEOD: Edith, this is a tip for the FTC. I got a phone call Sunday morning. It was an 800 number and I was thinking of not taking the call, until I heard the individual saying, “This is a fraud alert from your credit card issuer.” I decided to pick up the phone. When I did, I learned that I had been in North Carolina the day before buying a computer. When I told the credit card company no, I had not, they said, “Well, we’re glad to hear that because we refused the transaction.” It was a face-to-face transaction. Someone had actually counterfeited my card. Fortunately for me, the bank had stopped all the charges before they came. But the issue of breaches has become, it seems, almost an everyday story. We’ve had major retailers coming into the limelight.

Can you give us a sense of what the FTC is doing? As far as I can tell, in the federal government the FTC has become the preeminent federal agency for data security, and your 50 cases certainly seem to back that characterization up. Can you give us a feel for the FTC’s plans and what you hope to accomplish in data security so we don’t get Sunday-morning phone calls like I have?

MS. RAMIREZ: Your experience and the recent breaches that we’ve all been reading about really highlight the importance of the need for better data security to protect American consumers from hackers and identity thieves.
The way we look at this issue is through the lens of identity theft and other harms that can come to consumers as a result of these breaches. Identity theft is, and has been for the last 14 years, the top complaint we get from consumers. When we look at data from the Bureau of Justice Statistics, they tell us that 7 percent of the U.S. population 16 years and older have been victims of ID theft. That is another data point that tells us how critical good data security is.

Our main objective, through the enforcement work that we do in this area—I mentioned our prior 50 data security cases and the two new ones that we announced just today—is to highlight to companies how critical it is for them to employ reasonable means to protect the consumer information that they collect and that they use as part of their business operations. It is crucial that they do that.

Frankly, from our experience and from the data that we see, it has become clear to us that companies are continuing to under-invest in this area. We want to highlight to companies that they need to put reasonable measures in place to protect consumer information. Specifically, they need to assess their risks and then put a data security program in place that guards against those risks; and they need to have someone who’s responsible for data security.

In addition to the enforcement work that we do, we provide information to help consumers who have been victims of ID theft. Helpful consumer tips can be found on our website.

We also work very closely with our criminal law enforcement partners to ensure that they can do their best to get the perpetrators of these crimes.

Finally, let me emphasize that a unanimous Commission—and we are a bipartisan Commission—has called for federal data security legislation. We are hopeful that Congress will take action this year because it is so critically important.

I also want to take this opportunity to emphasize that my colleagues, Commissioners Julie Brill and Maureen Ohlhausen, who are here this morning, have been paying particular attention to this issue and have also been working hard to make sure that this issue gets the attention that it merits.

DEBORAH GARZA: Commissioner Almunia, can you talk to us about current challenges and developments in EC merger control?

MR. ALMUNIA: First of all, let me give you a general picture of the discussion in Europe regarding merger control. I receive two kinds of comments—sometimes professional comments, in some other cases politically oriented comments—regarding how we should exercise merger control.

Some argue that the Commission’s merger control is too strict and doesn’t allow national or European champions to emerge. This is not the reality. Merger control has developed over the past decade. Today our assessment includes an economic analysis. We consider not only market shares but also the effects of a merger on the relevant markets. The vast majority of our assessments lead to positive decisions. During my mandate, we’ve adopted only four negative decisions, and I think they were solidly argued. In about 5 or 6 percent of the cases, we cleared the proposed deals with remedies, the remaining cases are cleared without remedies.

The second kind of comment refers to the link between merger control and re-industrialization. Europe has lost part of its industry during the crisis—and even before it. The industrial sector is smaller now than it was eight or ten years ago. This is cause for concern, because Europe needs a modern industrial sector that creates growth and good jobs and one that is based on high value-added research and better use of technologies.

Europe needs a consistent strategy to strengthen the industrial sector, but without using the old
protectionist tools, the old “picking the winners” policies, and without using competition policy to favor certain industries. In some cases I feel the pressure coming from certain industrial sectors, trying to convince the Commission to take into account arguments that are not competition considerations. When we assess a merger, we look at the risks it poses of reducing effective competition, not at issues that need to be addressed using other strategies and policies.

More precisely, the reform that I want to put on the table—not at the legislative level, but as a document to be discussed to prepare legislation after this Commission’s mandate—is how EU merger control can take into account minority shareholdings. So far—unlike in some Member States—we are not allowed to review these acquisitions. Some past cases show the need for us to extend our analysis in this direction, but we don’t want to create unnecessary red tape. So, we propose to include minority-shareholding acquisitions in our merger control only when they create genuine competition concerns.

MR. MACLEOD: Kathleen, can I ask you a question about a case that is generating a lot of buzz here in these meetings the last couple of days? That is the State of Michigan, the Attorney General, bringing criminal charges against two companies for allegedly depressing the price of oil and gas leases they purchased. There have been reports that DOJ is looking into the same activity—or was, anyway—but DOJ had not, at least as far as we know, filed charges. Can you give us some insights on when the states might proceed on their own?

MS. FOOTE: Sure, with the caveat, of course, that I don’t speak for the Michigan Attorney General and my knowledge is very much limited to what I also read in the news. Apparently, the AG’s office learned about it a couple of years after it happened, when there was a newspaper report about a territorial allocation of some very important oil and gas leases by a Canadian company and a company from Oklahoma, in which they agreed which counties they would bid in and which they would not. It allegedly resulted in the price going from about $1,500 an acre to $40 an acre. One can certainly imagine why that report, combined with a series of emails between the two companies proposing that they “smoke the peace pipe together” before the next round of bids, would have attracted the attention of the state attorney general—almost any enforcer, one would guess.

Not all states have criminal antitrust authority. Many of them do. Some of them don’t exercise it at all. But those that do, by and large, began exercising it with respect to the bid rigging on state highway construction projects back in the 1970s and early 1980s.

Since that time, criminal enforcement has faded. It still does go on, generally not in industries or in situations quite as high-profile as the Michigan one, but it does occur less frequently. I would suggest that there are several reasons for that.

First, of course, is that the Justice Department’s Antitrust Division has during this period become much more active in criminal enforcement in local areas. Justice, of course, has some wonderful advantages, not the least of which is the FBI. So given that states are always struggling with resources, there would seem to be no need for duplication.

Joint federal-state prosecutions are a lot more difficult to arrange in the criminal area than in the civil area. The State AG is not able to go to federal court to prosecute state criminal charges and would probably not do that in any circumstance; whereas in the civil context, there is a long tradition of supplemental jurisdiction being exercised by federal courts over state claims.

In addition to that, we now have False Claim statutes for bid-rigging issues. That also exists under federal law, but the states have their own False Claim statutes. So you may see violations
that once would have been prosecuted as criminal bid rigging now being prosecuted as false claims.

Lastly, many states now have civil penalties as a very viable remedy. The prosecution is civil rather than criminal. In our experience, civil penalties are an extremely good deterrence tool, particularly with regard to bid rigging or other kinds of activities in smaller local industries that have generally been treated as criminal.

**MR. HOCKETT:** I have a question for Vice President Almunia. It has to do with the use of commitments in abuse-of-dominance matters. The Commission has an extensive record of enforcement in the single-firm conduct area, most of which, though, are resolved by commitments. By our count, there are 28 decisions since May 2004, 23 of which were decided by commitments and five by infringement decisions. So, commitments seem to be the dominant way that the Commission resolves abuse-of-dominance matters.

What guidance can market actors take from that record, and how does the Commission decide whether to impose fines or accept commitments? And can you discuss whether there are any reasons why the balance seems to be tilting toward commitments?

**MR. ALMUNIA:** Since Regulation 1/2003 came into force we have two options in abuse of dominance cases. One leads to a prohibition decision. It includes Statements of Objections, cease and desist orders, and, in most of the cases, a fine.

The other route leads to a commitments decision. With or without issuing a Statement of Objections, the party under investigation can send us a proposal of commitments which we analyze to see if it can allay our concerns. Such analysis may involve a market test, and discussions with the original complainants, the party under investigation, and stakeholders. When, at the end of the process, we consider that the commitments proposed are good enough to eliminate all competition problems, we can turn them into legally binding commitments through an Article 9 decision.

Since this possibility was introduced ten years ago, we have adopted more commitments than prohibition decisions. Why so? Mainly because commitment decisions can restore good competitive conditions quickly, and in certain markets this is what is needed. It is true that commitments have less deterrent effect because there is no fine. However, their medium- to long-term effects are strong because they are legally binding. Commitments can avoid the recurrence of the concerns that were at the origin of the investigation. One last warning is in order here. Be careful not to breach the commitments. You will remember that a few months ago the Commission imposed a substantial fine on a company that had breached its commitments.

We will adopt two decisions on standard-essential patents in the coming weeks—I talked about them earlier. In one case we are preparing a prohibition decision; in the other, the decision is based on commitments. This is because in the latter case the party put forward commitments that we considered adequate. In the former case, the party preferred to go all the way. They will probably challenge our decision in court and we will argue our case, which is all very well.

So, to cut a long story short, we adopt a pragmatic approach. In each case, we balance the pros and cons. In the energy sector, for instance, we have adopted several commitment decisions, as we have in innovative industries, such as in the e-books case, and probably will in the Google investigation.

**MS. GARZA:** Chairwoman Ramirez, in your opening remarks, you mentioned your victory in Idaho against the hospital that was acquiring a physician practice. In the opinion of the district court,
the court credited the defendant’s arguments about the kinds of efficiencies that the Affordable Care Act had encouraged, but nevertheless found that the merger would be anticompetitive.

So, we have two questions. First, if efficiencies like improved patient care are not going to carry the day in a hospital or physician merger matter, what will? Second, and more broadly, is there a tension between the Affordable Care Act policies and the antitrust laws; and, if there is, how does the agency expect to try to reconcile those tensions?

**MS. RAMIREZ:** Let me start with your second question first, and then I will address the specifics in the *St. Luke’s* matter.

We feel very strongly that the antitrust laws are compatible with the Affordable Care Act and with the policies of the ACA. The aim is the same: we believe that with competition, costs will be lowered and the quality of service will be elevated. We are out there looking at transactions, and, as part of our review, we are also taking a close look at any efficiencies that the parties might be claiming might result from the transaction. That was, in fact, the case in the *St. Luke’s* matter. Kathleen mentioned how significant a case this is, and the issue of efficiencies is one of the key reasons why it is significant. The parties argued that the transaction would lead to greater efficiencies, very much in line with the policy objectives of the ACA.

Let me emphasize that we agree that coordination of care through collaborative arrangements between health care providers can potentially result in procompetitive benefits. But that is an issue that has to be examined very closely. In this particular case, the district court judge, who produced a very thoughtful opinion and took a very close look at this issue, ultimately determined that the efficiencies that *St. Luke’s* was arguing should lead to approval of the transaction could have been achieved through other means.

So it’s not that efficiencies won’t carry the day in this area; it’s simply that it’s a fact-specific inquiry. We always ask in any transaction, “Are these merger-specific efficiencies or can they be achieved through other means?” In our view, the transaction was going to lead to anticompetitive results, and that’s why we challenged it, and that was also what the district court concluded.

**MS. GARZA:** Bill, did you have any comments on that?

**MR. BAER:** First of all, I agree with what Chairwoman Ramirez said. I think the key commitment you are getting from federal antitrust enforcement in the health care sector as we transition to a new competitive model is twofold. Number one, we are committed to continuing our effort to provide guidance, to help people do things properly as they adjust to the new competitive dynamic. But second, to continue to enforce the law, whether it be against providers, or third-party payers, who are abusing market power or seeking to extract market power inappropriately out of this changing environment.

**MR. MACLEOD:** Kathleen, as Deb mentioned, that was also a state initiative, the *St. Luke’s* case, and that does seem to be more the pattern of enforcement with federal/state cooperation. Are there any hallmarks that you can point to, any ways that one can predict when we will see collaboration, as opposed to the Michigan case where the Attorney General seemed to go it alone?

**MS. FOOTE:** Certainly, in the merger context, I think there is quite a long track record. States, obviously, are not bound to review mergers under Hart-Scott-Rodino, so it is very much a pick-and-choose operation for states. And, in fact, there are not enormous numbers of mergers that states
become involved in. I looked at one point at California’s involvement over about a ten-year period, and we had reviewed about four mergers per year. I think you might find that other states have the same, or maybe even less.

But there is definitely a rhyme and reason to the ones that we do become involved in. There are three categories. One is a merger that is going to affect ordinary consumers in the state in significant ways, and I would venture to say that our involvement in some of the telecom mergers would fall into that category. Another is where there are local markets being specifically impacted; grocery stores are a good example. The proposed Staples/Office Depot merger of a number of years ago attracted a lot of attention from State AGs because of both of those factors. Then, the third area is where there are particular state health-and-safety interests involved. Waste hauling would be a primary example of that.

In the hospital arena, all three of those factors very much apply.

One could use those same factors as a sort of guidepost in non-merger matters. In the “affecting ordinary consumers” category, e-books would be an example. In the local market area, the eBay no-poach case is one since it involves Silicon Valley. That’s very much a local market of special interest for us in California. That is another collaboration with DOJ, as e-books was. In pay-for-delay, a lot of state AG work has gone on with the FTC. That, or the most-favored-nations clause litigated by the Michigan AG with DOJ, are the kinds of cases where, once again, the state health and safety interest crops up.

MR. MACLEOD: I can say, from the standpoint of someone who has been on the receiving end of joint state and federal investigations and prosecutions, they are not much fun.

So let me ask you a second question about that. Feel free to speak candidly. I won’t tell Bill or Edith what you’ve said. To whom should one go first if one is seeking to resolve these? Should we go to the states, the feds?

MS. FOOTE: Well, speaking very candidly, I would suggest that you contact both together and work on it together. In a merger context, that can sometimes not work squarely from a coordination standpoint because you will have several states looking at state-specific issues and you will have the FTC or DOJ looking at all states. For reasons of confidentiality, you don’t want to be having states at the table that don’t belong there when you’re talking about state-specific solutions.

But, aside from that, a joint approach should not be a problem, and it’s something that I think people who have done it know how to do properly. And it is the best approach. The opposite, the occasional situation in which merging companies go first to a state, attempting to get some kind of momentum going through a state settlement or a series of state settlements that may then influence the federal settlement, is a bad approach, in all candor. It does not happen often. When it does happen, of course, it is extremely problematic for all of us who work together on a regular basis. In every case that I am aware of, that strategy has ultimately backfired for the companies that have attempted it.

MR. MACLEOD: Bill or Edith, I suppose I should put the same question to you. Would you disagree with what Kathleen just said?

MR. BAER: Not at all. Look, if you are defending a company and you are dealing with federal and state investigations one might think there is potentially an opportunity to divide and conquer. What has been terrific, really growing, over the last couple of decades is the degree of coordination. So
that strategy, as Kathleen said, is unlikely to be effective.

Substantively, in the merger area—just to pick up on what Kathleen said—I met a couple of weeks ago with Eric Schneiderman, the New York AG. States are often happy to defer to the FTC and the Antitrust Division in the merger area, largely because they think that, as we are pursuing the national interest, we are protecting the citizens of their state. And, given their limited resources, California, New York, and other states can take their antitrust teams and put them where they can make a difference, having confidence that, substantively, our standards are standards they believe in. This really allows us to deploy the antitrust enforcement troops most effectively.

**MR. MACLEOD:** Edith, let me ask a question about privacy, as opposed to data security, although often they can be related. We heard a ringing defense last night at the Section dinner of the programs of the NSA. But, as we have read in the press, there does seem to be still some debate that we might expect to continue on this, especially from the European side, where there is a very different regime that governs privacy rules. One result is the EU-U.S. safe harbor whereby companies, in order to transfer data, certify that they are compliant with the EU rules as well as the U.S. rules. Is the framework working, and do you see it being a viable mechanism for the foreseeable future?

**MS. RAMIREZ:** Yes, I think the Safe Harbor mechanism is working. I think it is effective, and I also think it is critical that we have it in place.

Just to provide context for those who may not be familiar with the EU-U.S. Safe Harbor Framework, it is a mechanism that has been put in place to allow the lawful transfer of EU data by U.S. companies to the United States. The way it works is that companies self-certify that they are complying with seven high-level principles. The program is administered by the Department of Commerce. We at the FTC are the backstop enforcer of the program.

The way that the program was originally designed in terms of enforcement was that if there was noncompliance, the FTC was to receive referrals from EU data protection authorities and then we would take action. As it turned out, we have received very few referrals from the European Union. The fact that there haven’t been many enforcement actions has been a subject of concern in the past. As a result of that, given that it wasn’t working the way it had been envisioned, we at the FTC have been proactively looking at compliance. So in all of our matters, we make a point to see whether companies that have self-certified are in fact complying with their promises.

In fact, we have orders against a number of companies, including Facebook and Google, relative to failures to comply with the Safe Harbor Framework. In total, we have more than 20 cases in this area, and we brought a slew of Safe Harbor enforcement cases this year against a wide range of companies.

Let me also emphasize that the Safe Harbor Framework is aimed at the commercial sector. It has an express exception for national security. And, at the FTC, we focus on commercial sector privacy, so national security is outside of our domain. Other jurisdictions, European law for instance, also have exceptions for national security.

So for these reasons, I do feel that the Safe Harbor program is working. At the same time, we acknowledge the criticisms and think that there are ways that we can improve the way the program is operating. In fact, the European Commission, and specifically Commissioner Viviane Reding, one of Joaquin’s colleagues, is looking very closely at this issue and issued a report last Fall stating that in her view the program should continue. But she did also make certain recommendations about potential improvements.
We are engaged, along with the Department of Commerce, in a dialogue with the European Commission and Commissioner Reding and her staff on these issues. I wrote a letter to Commissioner Reding in which we committed to make improvements in this area and to work together with her. That dialogue is ongoing.

MS. GARZA: AG Baer, you mentioned in your opening remarks that you had been bringing cases in the mortgage industry for rigging auctions. We count about 68 guilty pleas thus far. But you did have to go to trial recently, a jury trial that you won. We wonder if you would tell us if there are any takeaways for us coming out of that trial.

MR. BAER: The behavior here, which we have been going after since about 2008, involves people taking advantage of the collapse of property values all across the United States. Homeowners had mortgages that were under water. Banks foreclose, and those foreclosed properties are then sold at auction at the local courthouse. The people who tend to buy up those properties were conspiring to depress the auction prices.

We found out about it. We received tips. We worked, as we do on many of the criminal matters, with the FBI, and we developed evidence from across the United States, leading to about 70 convictions thus far for that behavior. These crimes are just outrageous. They not only defraud the bank, which gets coverage up to the amount of the mortgage, but in many of these distressed sales the real value of the property would have entitled that homeowner—now out of his or her home—to the overage. So that's why it matters, it matters locally, and why we have invested the resources.

We have had a lot of guilty pleas, but there always is the challenge of the first time you go to court and you are put to your proof in the criminal context. We had a three-week trial in Sacramento. It concluded about two weeks ago. We had charged three individuals—an auctioneer and the two principal conspirators in the bid-rigging scheme. We won convictions against each of the two principals for an antitrust violation and, in one case, for an obstruction count as well. The jury acquitted the auctioneer. I think, in terms of lessons learned, we may not have explained well enough to the jury the role of the auctioneer, as kind of a hub in a hub-and-spoke conspiracy.

But what we did learn is that juries understand these issues. Where the evidence is there—where we are able to prove guilt beyond a reasonable doubt—they are more than willing to enter convictions against these folks. We hope that this will send a message in the many matters we have pending in California and the southeastern United States that these cases have some real resonance to them. People ought to look very carefully at whether to risk a much more significant penalty as opposed to coming in and trying to reach consensual resolution early with us.

MS. GARZA: Can we expect to see more coming out of the Division in the financial services area?

MR. BAER: Yes. We have been active, as I think I said at the front end, involving muni GICs, involving LIBOR, and the Justice Department has confirmed an ongoing foreign currency exchange matter. In addition, more locally, we have resources invested in sort of a comparable scheme to the foreclosure fraud, involving tax liens. We have a number of convictions there as well. So yes, it is an important area for us.

MR. HOCKETT: A question for Vice President Almunia on pay-for-delay patent settlements. That has
been a hot topic on both sides of the Atlantic, as we know. The European Commission has arguably taken a more restrictive view than the U.S. Supreme Court did by prohibiting some settlements as a restriction by object, kind of as a per se violation, where no inquiry into the effect is made. How does the Commission distinguish between pay-for-delay cases where the effects will be relevant and those where the effects will not be considered?

MR. ALMUNIA: Last year we adopted two decisions on pay-for-delay cases; the Lundbeck decision and the decision involving Johnson & Johnson and Novartis. In both, our analysis was the following. First, we needed to show that the generic challengers were potential competitors and that the behavior of the parties limited their entry. The by-object analysis here is not a pure per se conclusion, as we reach, for instance, in some cartel investigations. We also need to conduct a careful examination of the possible procompetitive justifications put forward for any agreement between an originator and a generic company and, in particular, assess any efficiency claims they may involve. So it is a more subtle analysis than the one of a typical per se infringement. In my view, the approach followed in the Lundbeck decision we adopted in mid-2013 is close to the Actavis case. In addition, we are investigating two other cases: the Servier case and the acquisition of Cephalon by Teva.

At the same time, we publish regular reports on the agreements between originators and generic companies. Since we laid out our criteria after the 2009 sector inquiry, the number of agreements that have been notified to the Commission and that comply with our doctrine has increased. So, both through enforcement and the publication of our reports, the situation is clearly improving. I hope that the signals we send to the sector are giving legal certainty in this sensitive area and are becoming increasingly acceptable to the parties.

MR. MACLEOD: I would like to ask another couple of merger questions, first for Vice President Almunia and then for Assistant Attorney General Baer.

You mentioned telecom mergers at the outset in your speech. One of the debates that seems to be emerging now in the European Commission is the companies arguing the need for consolidation in order to address the tremendous investments in infrastructure that they need to accomplish to remain efficient. So we are having another issue of the efficiency as a merger defense arising. Is that kind of argument gaining some traction and sympathy in the EC?

MR. ALMUNIA: This is a very important debate. At present we are analyzing two mergers between mobile-phone operators in Ireland and in Germany. We will probably analyze more such mergers in the future, not only between mobile operators, but also mergers involving cable operators. The sector is going through a very ambitious consolidation process in Europe because, as you said, there is the need to invest a lot in the new infrastructure for the 4G LTE technologies. Competition between telecom operators and the so-called over-the-top players is crucial because, as telecom operators argue, the value added is going from those who must invest in infrastructure to those who profit from it.

How are mergers assessed in this setting? As you know, identifying the relevant markets is always crucial. But we have a paradox in this industry. Sometimes the deals involve large players with European and global operations. To give you an example, the four largest mobile-phone operators cover 80 percent of Europe’s mobile-phone users. However, the relevant markets continue to be national because spectrum allocation is national; services and the conditions under which they are offered to users are national; prices are different; we still have roaming charges when we
cross national borders; and so on and so forth.

As we assess each merger, we must take into account the fact that the relevant market is national and make sure that the deal does not lead to a significant reduction of effective competition. When this is the case, the companies are expected to offer strong enough remedies, regardless of their business strategies. My duty is to protect the interests of users, assuring them wider choice, lower prices, quality services, and better conditions, thanks to keen competition in the market.

So the debate is very interesting, but the need for more investments in the network—which is, of course, crucial—will not change the criteria under which we review mergers. What should change is the fact that Europe’s mobile-phone markets are still national. This set-up belongs with the 20th century, not the 21st. Unfortunately, this is beyond my remit. If it depended on me, Europe would have a single market for mobile-phone operators tomorrow, with a single regulator, EU-wide spectrum allocation, and a common range of services for users in every country.

MR. MACLEOD: Bill, some of the best news a client ever gets at the beginning of a deal is the antitrust counsel saying “this is not reportable.” I suspect the Bazaarvoice folks heard that at some point along the way. And, lo and behold, here comes DOJ. Can you give us a feel for when we should be telling our clients “it’s not reportable but worry anyway”?

MR. BAER: Good clients will always ask the question: “Is it a problem? I know it’s not reportable, but is it a problem?”

I think there are several takeaways from our challenge in Bazaarvoice. Number one, it reinforces the shared commitment between the two agencies that enforce Section 7 of the Clayton Act: the fact that a transaction is not reportable doesn’t mean it’s not a problem. In December, the FTC—Debbie Feinstein is in the front row today—resolved a longstanding dispute over battery components in Polypore and got meaningful relief.

We went to court in Bazaarvoice, a $170 million transaction involving online ratings and review services because it looked to us like a merger to monopoly. The parties thought they had the leverage because the deal was closed; they thought that it was not reportable and so that’s the end of the inquiry. Part of what I think we need to do as enforcers is make it clear that’s not necessarily the end of the inquiry.

The trial was fascinating. You had this whole issue of “Can antitrust really apply in high-tech markets?” In the courtroom the names “Amazon” and “Facebook” were invoked as though, because they are somehow operating near this space, there cannot be an anticompetitive problem. But of course, what you need to do in a courtroom is actually prove that companies like that, names we all recognize, are actually providing a competitive constraint on the market at issue, in this case online ratings and review services. And they weren’t. The companies couldn’t prove it. The judge agreed they couldn’t prove it, and he ruled the transaction unlawful.

So you’ve got the principle of going after consummated transactions where they’re problematic, and the principle that Section 7 has real force and effect in high-tech markets where you can prove a risk of anticompetitive harm.

The third principle, one we are working to put into effect in this case, is that, if you lose, this is not just a matter of divesting that which you bought 20 months ago. Rather, the obligation is to restore the competitive dynamic that would have existed but for the unlawful conduct, the consummation of the deal. That’s the one remaining issue we have that we are working on with Judge Orrick and the parties in the Northern District. Establishing that principle is important as well.
is, you don’t get the fruits of your bad behavior. You’ve got to work with us and the court to establish the competitive dynamic that would have existed but for the unlawful activity.

MS. GARZA: Would you foresee seeking disgorgement in that kind of situation?

MR. BAER: Generally, in consummated merger transactions, we’d look to see whether disgorgement was appropriate or necessary, whether there was ill-gotten gain. In Bazaarvoice, there certainly was a drag on the market and a diminished period of competition. Therefore, in our post-decision pleading, our focus is on divesting the assets, including the intellectual property, that will create a but-for world that enables PowerReviews and its new owners to actually be a meaningful competitor in that space.

MS. GARZA: Kathleen, ever since Leegin, companies have had to deal with two sets of laws, rule of reason at the federal level and in some states, and then per se illegality in other states. How do you see the law developing in this area, and do you think there is any possibility of convergence of standards?

MS. FOOTE: I think it’s possible, but only over the very long term, frankly, and more likely through legislation.

There are three states at least that continue to treat RPM as per violations of their state laws: California, New York, and Maryland. So we are not going to be seeing great numbers of new cases in those states because the practice is simply not going to be followed. That has been our experience so far.

There have been a couple of appellate court decisions in California reaffirming the per se rule. In my view, one issue with rule of reason as it is applied elsewhere in the country is that a rule of reason case is very much limited to its facts and therefore it doesn’t necessarily establish a good guidepost for anyone else.

If you go back to the origins of much of the literature on RPM, an opportunity for study was created when a number of states enacted fair trade laws in order to protect local businesses from the incursion of discounting chains. A situation was set up that was kind of ideal for economists, and there were a great number of comparative studies that were done over the years. Those ultimately led to the conclusion that there was a significant increase in cost to consumers, which led to the abolition of the fair trade laws.

Now the whole retailing picture has changed a great deal and there is great concern about retail and about the survival of brick-and-mortar stores. It is legitimate to have concerns about that, and it is certainly legitimate to think, in my view, that there may be reason to look at motivations that surround some of those protections. But they are not necessarily motivations that relate to competition directly. Again, that may be legislated.

The fact that Canada is going to be doing something different from California and New York may provide some kind of a basis for some new comparative studies. But absent some real economic evidence about the differences in the current kind of market, I think it is difficult to say that there is going to be a consensus.

MR. HOCKETT: I have a question for Chairwoman Ramirez. There has been lots of discussion about the role of competition law in addressing the harm that could be caused by patent assertion entities in acquiring and asserting patents. The FTC is in the midst of a major study on that issue.
When can we expect to see the outcome of that study? In the meantime, will there be a pause in the FTC’s enforcement as the study reaches its conclusion?

**MS. RAMIREZ:** Let me give you an update on where things stand relative to our study on PAE activity. We issued a Federal Register notice in September and have received a number of different and very valuable comments from a wide range of stakeholders. We have also been working closely with the Department of Justice and getting input from them with regard to the design of our study and the type of information that we are hoping to obtain.

The study needs to go through another round of comments. We also need to obtain approval from OMB to proceed. That is ongoing, and we are hoping to complete that process soon. Once the study has been approved, we can go forward and seek the information so that we can ultimately shed some light on the impact that patent assertion entity activity is having.

We felt there was a lack of empirical data in this area, outside of certain litigation data that we have—statistics about lawsuits that are being brought by PAEs. We felt it was important to get a much wider and deeper view of what is actually happening to better understand the benefits and the costs of PAE activity. That is the main aim of the study, and we will conclude it as soon as we can. I am working very closely with staff on this issue because it is a priority for me to complete the study.

As regards your question about enforcement, let me say that we are monitoring the marketplace in this area and looking at PAE activity that might violate Section 5’s prohibitions on unfair or deceptive conduct, as well as unfair methods of competition. In fact, it has been disclosed that we have one ongoing investigation in the consumer protection arena with regard to one PAE that we allege has sent out thousands of deceptive letters to small retailers and small businesses. The reason that this investigation was disclosed was that the company, in response to our investigation, decided to sue the Commission, and so it has now become public. So, again, we are going to be utilizing all of our authority as well as continuing our examination.

**MR. HOCKETT:** Yesterday we had a two-hour Showcase program on antitrust and due process. We are running short of time, so I want to get your input on this as the head of the agency, Bill, and also you, Edith. What role do you see the U.S. agencies having in influencing global norms and standards for due process and transparency?

**MR. BAER:** Let me segue into that, if I can. I said at the beginning that we share those values with other U.S. antitrust enforcers. We share them with European enforcers as well. One of the many things we are going to miss about Vice President Almunia is his commitment to promoting these values of substantive convergence, procedural fairness, transparency.

It is pleasantly surprising to me, in the 15 months I have been on the job, the amount of time we spend working with our fellow enforcers on a multilateral basis—OECD, ICN. But we also engage on a bilateral basis, talking about these issues, talking about what works, talking about commitment to common principles, talking about how best we can share practices that work and discussing practices that do not work. The ICN, FTC, and DOJ co-hosted an event at the FTC Conference Center on Tuesday, where, with nongovernmental representatives, people sat around and talked about these issues, talked about how to advance the thinking.

In closing remarks on Tuesday, I made the observation that while we all are pretty good about agreeing on general principles and the norms to which we aspire—that's talking the talk—we also need to continue to work on walking the walk, by applying those principles in specific matters,
making sure the parties to an investigation know what it is about and are given an opportunity to respond meaningfully, and making sure the general commitment to a process is observed in practice. Collectively, and on a bilateral basis, I think competition enforcers need to be—and are—continuing to work on these issues. We have made a lot of progress, but there’s a ways to go.

**MR. HOCKETT:** Chairwoman Ramirez, you have been candid in some remarks you have made about your concerns in this area, particularly concerning China. Can you share with us your view about how we are going to achieve global convergence on these standards?

**MS. RAMIREZ:** Let me say that I share and echo the observations that Bill has made. This is a critically important issue for us as antitrust enforcers. Process is just as important as substance. If you don’t get the process right, it undermines outcomes, even if you have the good, solid, substantive rules.

I’ll highlight two reasons why I think process is key. First, it is important to afford the parties that come before us basic fairness and basic procedural rights so that they feel they have had an opportunity to be heard. It’s also critical because that is the way, in my view, that we can assure ourselves that we reach informed decisions.

On a broader level, it is critical to our very legitimacy as antitrust agencies. As individual agencies, good process gives us credibility and legitimacy within our jurisdictions. But equally, at the international level, I think that when there are jurisdictions that do not provide due process, it hurts the international antitrust system as a whole. I think that is why all of us who are on this stage care so deeply about that issue and think that it is so vital.

**MR. HOCKETT:** I think that we need to move to our final questions. The one for Joaquin is an obvious one. Given your introductory remarks, you are about to finish your term as Commissioner. As you look back on your term, what do you consider to have been your most significant accomplishments? And, looking ahead for the Commission, what do you see as the most difficult challenges likely to face the international competition community?

**MR. ALMUNIA:** It’s still too soon to talk about these things. We are in March. The end of the mandate is the 31st of October. I have a lot of work to do yet.

Jokes apart, the landmarks of my term would certainly include the new Directive on Private Enforcement I referred to earlier. It is the first time we have this sort of legislation at the European level. The Directive will now be translated into the legal frameworks of the 28 Member States. Some of them, following our recommendations, are also putting forward legislation for collective redress to compensate the victims of antitrust infringements. I think this is a very important step forward.

Due process was another advancement I am proud of. Our procedures have—and continue to be—improved. Over and above the different systems in the U.S., in Europe, and in other jurisdictions we are all keen to improve the guarantees of the parties and to engage everyone who may be affected by our decisions.

As to the decisions taken in individual cases, most people would probably say that the Google case was the most important one. However, looking forward, I believe that our commitment to keeping financial markets level and open will have a larger impact. After the financial crisis, there is not only the need to better regulate financial activities—those of course are being regulated in a different way, in a better way. There is also the need of aligning the conduct in the financial sec-
tor with the standards that apply in every other sector of the economy. Competition authorities have a say in this.

Lastly, let me point out the work carried out over the last couple of years to modernize State aid policy and which will be finalized in the next few months, among others, with the new guidelines on energy and the environment, and on research, development, and innovation. Together with the guidelines adopted so far and the procedural changes, the new regime will improve the system we have in the EU to control public subsidies and make sure they are compatible with the internal market. The State aid modernization strategy will produce a simpler set of pan-European rules and help national governments align their expenditures with the policies that can boost growth and create jobs in Europe. I hope that our work will be regarded as one of the elements—not the only one, but one of the elements—that helped achieve these goals.

**MR. MACLEOD:** Edith, you mentioned plans for a commemoration of the FTC’s first century. Can you give us just a little sneak preview of what you have in mind?

**MS. RAMIREZ:** We do plan to have a public celebration. We plan to have a centennial dinner and symposium. November 6 will be the date of the dinner—it will follow the ABA Fall Forum—and then we will have a symposium the following day, on November 7.

There’s a lot of energy and excitement at the FTC as we look back on all of the accomplishments of our agency over the course of the last 100 years. Today I have only had a chance to talk about a very small fraction of what we have done even in just the last few months, and certainly over the last year. I didn’t even mention the important victories before the Supreme Court in *Actavis* and *Phoebe Putney*, as well as all of the great work that we are doing in connection with privacy and the Internet of things.

We really are at the cutting edge, and we are extremely excited to have an opportunity this year to celebrate these accomplishments, to reflect back on our history, and to look to the future and what the next 100 years will hold.

Let me say in closing—and it is certainly too early to bid farewell to Vice President Almunia—but I do want to take the opportunity to say how delighted I’ve been to have had the opportunity to engage with him throughout my tenure at the Commission, and I am looking forward to continuing to work with him.

**MR. ALMUNIA:** Muchas gracias.

**MR. HOCKETT:** I thank everybody for being here. I would like you to thank our panelists for their wonderful contributions.

Our meeting is adjourned and we look forward to seeing you next year. Thank you.
Interview with Chris Fonteijn, Chairman of the Board, Netherlands Authority for Consumers and Markets

Editor’s Note: Chris Fonteijn is the Chairman of the Board of the Netherlands Authority for Consumers and Markets. From 2005 to 2013, he was Chairman of the Netherlands Independent Post and Telecommunications Authority, and between 2011 and 2013 he was also Chairman of the Netherlands Competition Authority. He earned his master’s degree in law from Leiden University. From 1980 until 2005, he was a lawyer at the Rotterdam-based law firm NautaDutilh. At NautaDutilh, he specialized in energy and corporate law, ultimately directing the firms’ Energy & Utilities Group. From July 1, 2011, until the launch of the ACM, he was also the Chairman of the Board of the Netherlands Competition Authority.

He was interviewed for The Antitrust Source on March 26, 2014, by John Bodrug.

THE ANTITRUST SOURCE: Could you briefly describe the competition enforcement system in the Netherlands, including the structure and the role of the competition authority?

CHRIS FONTEIJN: Thank you. The Netherlands has had a competition authority since 1998. This authority, the NMa, focused on traditional competition work and it housed the energy regulator as well.

We also had a telecommunications regulator, OPTA, which I chaired for the last eight years, and a third agency, the Consumer Authority. These three organizations were merged on the first of April last year. This new agency is the Netherlands Authority for Consumers and Markets, or ACM. ACM, which is one year old, now does competition enforcement; all of the regulatory work comprising energy, transport, telecom and post regulation; and the consumer protection tasks.

ANTITRUST SOURCE: Congratulations on your one-year anniversary. Have you had enough experience to date to assess whether the combination is generating efficiencies and synergies?

CHRIS FONTEIJN: Although it is a bit early to tell, we see that from the financial side, we have succeeded in achieving the government’s aim to reduce budgets, and we have done that without putting pressure on the competencies of the entire agency.

So yes, I have personally become increasingly convinced that the merger was a good idea. When I consider how we now look at issues in energy and telecoms from the competition perspective, we have been able to create mixed teams with competition and regulatory experts as well as from the consumer protection side. This has an effect on the robustness of the solution, and I’m absolutely convinced that the combination is creating synergies.

One example of a synergy is the work of the Office of the Chief Economist, which now serves all areas of the agency, sometimes even simultaneously on joint projects. While we have still a way to go because ACM is still young, the synergies are already being realized in terms of efficiency as well as in terms of cost cutting.
ANTITRUST SOURCE: Does the combination of functions help to recruit people to the authority? Is that a challenge for the agency?

CHRIS FONTEIJN: These synergies also create opportunities, so although we suffered from budget cuts and we could not hire young people due to a general civil service hiring freeze, the problem has been solved to a certain extent. If our budget is cut further and we’re entirely restricted from hiring, that would be a great concern to me.

Now that we are gradually rehiring, we see that ACM seems to be very popular—there is an enormous interest from people to come to work for us. Unfortunately, we only have a few places to offer. At present we are looking for 10 to 18 young academics.

ANTITRUST SOURCE: You mentioned the Office of the Chief Economist. Could you expand on how that group works with all of the different branches of your organization?

CHRIS FONTEIJN: The Chief Economist’s Office has been put directly under the board, as an independent office, comparable to how the Chief Economist’s Office works within DG Competition of the European Commission. They serve as a review office for investigations and propositions to the board where needed and depending on the circumstances of the case.

One of the important things the Chief Economist’s Office has worked on is calculating the outcome of the agency. In fact, ACM just published a report on its outcome in its first year. Unlike the previous NMA calculations, this of course also included all of our regulatory and consumer work. And the Chief Economist’s Office also, for example, assists case investigators in developing ways to calculate the consumer harm caused by particular business behavior.

ANTITRUST SOURCE: When the integration was first proposed, there were concerns about information sharing between the different branches. Does that continue to be an issue or how has that concern been addressed?

CHRIS FONTEIJN: There has not been anything in the media about that issue recently. Most of the information we get in we can share within the investigation, if we need to use it. However, if information is transmitted to ACM from another competition authority, and that information can only be used for one particular purpose, then that will be the case. However, in most situations information that we receive, for instance, in the regulatory work, we can also share within the organization on the basis of the ACM Establishment Act.

When ACM was first created we were depicted as a giant octopus, with our tentacles in everything. However, this image seems to have largely dissipated now that the general public is aware that for ACM case handlers, for the most part, it is “business as usual.”

ANTITRUST SOURCE: In the health care sector, in particular, the primary regulator—not the ACM—has jurisdiction with respect to entities with significant market power but the ACM still has authority to apply certain provisions of competition law in this sector. How has the ACM managed this overlapping authority?

CHRIS FONTEIJN: The health care regulator is involved particularly in the tariff regulation related specifically to health care. Yes, it does look at all aspects of health care, and it issues us with an advice on how it sees a proposed merger affecting the market prices. We are the only competent authority to assess the health care mergers for compliance with the Competition Act. There has
been a large wave of health care mergers in recent years. In fact, the bulk of the health care work that we do is assessing mergers, particularly between hospitals. That actually takes a lot of our competition resources.

In theory, the health regulator has a right to apply remedies when there is significant market power, however, with the exception of one small instance, they have never used that.

**ANTITRUST SOURCE:** Your 2013 priorities document identifies a number of items, including the objective of countering unfair competition by government organizations with commercial activities. What steps has the ACM undertaken towards that objective?

**CHRIS FONTEIJN:** The objective is based on a new piece of legislation. We had a lot of debate in parliament on governments carrying out tasks that the private sector could do. I’m sure in the U.S. it's the same thing. For example, related to local government organizations providing sports fields or other services that are also offered by private commercial entities, et cetera. The new legislation stipulates that when government does provide such a service, they have to do that on a level playing field, using separate accounts for the separate activities, with clear rules on cross-subsidization.

So far, because the municipalities seem fairly unaware of the details of the legislation, ACM has used advocacy to explain to government agencies and municipalities what the Act is and what they can expect from our enforcement of it. We gave them one year to get up to speed. That year ends July 1. We have used this time to identify the issues for the municipalities and for the government agencies and to explain these to them. We have also conducted a study and measured how prepared they are for these new rules.

My expectation is that the issues will be relatively minor, that it’s more, as far as I can see now, a matter of municipalities not knowing what the issues are rather than that they are willfully breaking the rules.

**ANTITRUST SOURCE:** Are remedies available under that legislation?

**CHRIS FONTEIJN:** It’s a good question. There is no penalty involved, but we can publish a declaratory order that the behavior be altered, subject to periodic penalty payments. We can certainly get the media involved, and of course, we can ask the ministry to take action.

The government has a country to run, and it’s important that local government is involved in providing facilities, where these are necessary for the public interest. The Act, and our enforcement of it, ensures that in doing so, they refrain from anticompetitive behavior.

**ANTITRUST SOURCE:** Another priority of general interest everywhere is mobile telephone competition. What steps has the ACM taken or does it plan to take in that area.

**CHRIS FONTEIJN:** One of ACM’s priorities has been in telephony. In this area, a similar issue crops up as that in the energy sector, namely that one must balance the consumer’s interest of having low costs while at the same time allowing for the possibility for undertakings to invest in the network. Both sectors require a modernized network, which requires huge investments.

Although we also deal with mobile, it’s generally in the telephony world where we regulate certain prices, particularly on the issue of Internet access. At such time we must ask ourselves, how do we allow the companies to invest sufficiently for the next generation of work as they call it, and yet at the same time allow for the protection of consumer interests and maintain reasonable fees.
ANTITRUST SOURCE: In that sector, last November the ACM made an announcement relating to an investigation of the wireless sector where some companies made announcements about their future pricing intentions. The ACM determined that there was not a violation of the competition law, but it obtained an agreement from the companies not to make statements of their future pricing. Is that an example of synergies between different branches of the ACM?

CHRIS FONTEIJN: Yes, I think it could be seen as an example of a synergy between the different sectors, but it also perhaps has to do with our enforcement style. ACM uses a problem-solving approach to market problems, rather than always seeking to impose a fine. For example, where we can solve a problem with a commitment, we do so. One advantage of this approach is that we avoid years of lengthy and costly litigation.

ANTITRUST SOURCE: In some instances the ACM has brought cartel proceedings against persons who were alleged to have facilitated the cartel by organizing meetings. In other cases, the ACM has obtained commitments to resolve matters on a going-forward basis. What kind of factors come into play in deciding which approach to take?

CHRIS FONTEIJN: The instances where we have brought cases against individuals, those effectively have been cases about the actual leadership of the cartel in question. That, in my personal view, is a very effective way of dealing with cartel deterrence. And we plan to go a little bit further with that.

ANTITRUST SOURCE: I understand that the ACM has concerns about whether the fines for cartels are high enough. In the Netherlands there have been some proposals to raise the maximum fine above the current cap of 10 percent of turnover. Can you comment on the degree to which the current maximum fine of 10 percent of turnover is an impediment to effective enforcement?

CHRIS FONTEIJN: That’s an interesting point. However, it’s based on a misunderstanding because ACM has never felt that the law had restricted us in issuing the fines that we felt should justifiably be issued. We have only very occasionally found that the strict application of the fining guidelines leads to high fines in cartels involving smaller players. But you have a point, there is in parliament, sometimes a feeling that the penalties are not high enough.

Two things have happened. When a new government came into place two years ago, there was a proposal that to alleviate budget problems they would give the agency an instruction to increase penalties with, I think, 200 million or 300 million extra. There was then an outcry all over the competition world in the Netherlands. We are an independent agency. We cannot simply take instructions to increase our penalties. So that was withdrawn.

The feeling stayed that the Minister had to do something, and the ministry has now prepared a piece of legislation calling for a raise in the ceilings for the penalties. ACM can then, as before, independently determine the appropriate level of the fine, depending on the circumstances of the case.

Our comment has been that such a law would be out of step with the European Commission system because all over Europe we have the same system, with a similar maximum. If it’s going to be the law, it’s going to be a law. If you look at the cartels, where we take 10 percent of the entire turnover as a basis, we do not expect to go over the maximum in any case. If the legislation does go through, I doubt very much whether it will have an effect on these larger cartel cases.
ANTITRUST SOURCE: Another interesting development in the Netherlands is a recent court decision prohibiting publication of a cartel fine imposed in the real estate sector until the final appeals are completed because of concerns about the implications for the individual. What are your views on the implications of that decision?

CHRIS FONTEIJN: My view is that we always, or practically always, try to get the fine and the intervention publicized if we can. At the same time, we know that courts may hold certain opinions. For this reason, we prepare the publication and give the draft to the party in question, providing them with the possibility to go to court and to challenge it. And the court will then weigh up the various interests.

Many times it allows us to publicize, and sometimes it gives a lot of weight to the interest of the affected party and says we have to wait, for instance, for the judgment of the court of first instance or perhaps even for the final judgment before we can publish. But we continue making a point that the publication in itself serves a purpose of deterrence. That’s why we often really push the issue and try to publicize. Of course, sometimes as you rightly say, the courts intervene, and may temporarily restrict us from publishing.

ANTITRUST SOURCE: Do you have any views on the extent to which private enforcement or private actions in the Netherlands are helping to deter cartel activity.

CHRIS FONTEIJN: Yes. It’s not too much so far, but as you know the European Commission is now developing legislation to allow more effective private enforcement. That also has to do with, from the perspective of the agency, the delicate issue of accessing documentation obtained by the enforcement agency in its leniency program.

There has been much debate on how far that information flow should go, and I think that now a system has been decided on that is workable for all, where we have achieved a balance, and we are not deterring leniency applicants. I’m personally in favor of the whole system, as long as it doesn’t negatively affect the leniency programs.

ANTITRUST SOURCE: Some reports have made an observation that the ACM has brought relatively few abuse of dominance investigations compared to other agencies. In your view is that accurate or has that changed since these reports?

CHRIS FONTEIJN: I think yes and no. I think in the past we have struggled a bit with dominance cases. We’ve lost one or two, in which we have put a lot of effort. I think once you take on a dominance case, you will realize the amount of resources it takes to get the case to a certain level. I would not say we are hesitant to take on new cases, we are simply aware of the resources involved. We currently have two or three in the pipeline, one we will come out within the next month; in this case we have accepted commitments to solve the market problem.*

But I take the point that we have done relatively little. Personally, I would like to do more about that. I am convinced that we need to take cultural issues into account more. I’m not naïve, but I

* After this interview took place, the consultation round regarding the proposed commitment was published at https://www.acm.nl/nl/publicaties/publicatie/12853/ontwerp-toezeggingsbesluit-Buma-Stemra/. An English language press release about the case can be found at https://www.acm.nl/en/publications/publication/12856/Buma-Stemra-promises-ACM-to-offer-more-options-in-music-copyright-management/.
do believe that the bar in our country plays a role in avoiding perhaps too sharp practices on the part of the incumbent. So I do commend the legal profession because I know they have a certain influence in advising their clients to stay away from illegal conduct of this nature. It would be naïve to think that nothing illegal will ever happen, but it’s also true that if they receive proper advice, they might be restrained from breaching the rules in the first place.

**ANTITRUST SOURCE:** Could you tell us about some of the ACM’s recent merger enforcement activities?

**CHRIS FONTEIJN:** We have had a lot of health care mergers in particular. I think 20 or 25 in the last year alone. In some of these cases we went to the phase two investigations. We had some cases the year before in which we accepted conditions involving price ceilings. One case of note in the recent past concerned a merger in the food and agricultural business, which we ended up blocking due to irresolvable competition concerns.

Another interesting case is one we assessed two years ago and will again look into due to a change in ownership. This is the KPN/Reggefiber merger where KPN, the telecom incumbent, merged with an enterprise developing broadband. When the joint venture was first established, I headed the Telecom Authority, but not yet the Competition Authority. In this case I worked together with the Competition Authority to ensure that the remedies in the merger were exactly aligned with the regulatory remedies from the telecom regulator. That was, at that time, experimental. The issue is again coming up now because now KPN, the incumbent, wishes to gain a majority shareholding in the joint venture. That case is now under scrutiny.

We also accept structural remedies where this is appropriate, for instance, in the supermarket business, where companies propose to sell certain supermarkets in order to resolve competition concerns.

I remember that when I came to the Competition Authority, I felt a distinct aversion against behavioral remedies as they’re difficult to police, et cetera, et cetera. However, now I am not too worried about them. I’m open generally to discussing proper behavioral remedies—if they can be policed and if they are sharply enough defined, it doesn’t worry me too much. Perhaps this is due to the synergies that a combined regulator and competition enforcer can offer in accepting these types of remedies and policing them.

**ANTITRUST SOURCE:** What role do efficiencies play in the ACM’s merger analysis?

**CHRIS FONTEIJN:** We do the traditional work and of course consider, when the companies in question come up with the alleged efficiencies, whether these efficiencies will indeed be passed on to the consumer. First of all, the chief economist plays an important role in determining whether efficiencies actually exist to be potentially passed on at all.

Secondly, we consider whether such efficiencies serve the interest of the alleged consumer and not just the companies, and whether these efficiencies follow directly from the merger or may be better obtained in another way. I don’t think we are unique in the way we do that. That is the technique that is used generally in the European Union.

**ANTITRUST SOURCE:** Another factor that seems to have played a role in a number of the mergers reviewed by the ACM is countervailing buying power. Has that been a persuasive element in some cases?
CHRIS FONTEIJN: It has been an issue in the supermarket and agricultural business. For instance, we had quite some political turmoil regarding the position of the farmers vis-à-vis the large supermarkets. In that case, the issue was whether countervailing buying power existed. At the time, it was alleged that the supermarkets had too much buyer power. In the Netherlands, we have two or three really large supermarket chains. The general public sentiment is that these three chains have a lot of power. However, we conducted a market study and determined that it was not necessary for us to intervene.

ANTITRUST SOURCE: Are there any other major enforcement or policy developments that you would like to highlight?

CHRIS FONTEIJN: Maybe two things. Yesterday we issued a press release concerning a large potential merger in the cable sector. KPN, as already mentioned, is the incumbent, and we have two major cable operators, one of them is Liberty Global—John Malone—and the other is UPC. If these are permitted to merge, they will together cover practically the entire country.

The parties have announced the proposed merger, and two weeks ago, they notified the European Commission. In the press release we stated that we are of the opinion that the best place to judge that merger is the Netherlands. We expect the results of the European Commission’s allocation decision to come out in a month’s time.

One thing that strikes me sometimes, which is rather a big issue in our country, but less so in other countries, is the role of government itself in competition issues. The major cases that we have had in this first year are cases where the government has, for policy reasons, induced the parties to cooperate, for instance, to protect the environment. We have, for example, had cases where they have introduced a restriction on veterinarians being allowed to enter the farms because of the fight against too many antibiotics, so only one vet could enter the farm. The question is whether that is an exclusionary practice and could lead to an infringement of competition law. It depends, of course, on the facts of the case.

A second example has been a big case where animal welfare played a role, in which the policymakers induced producers of chicken to allow more living space for chickens. Prices increased, and only “properly bred” chickens could be sold in the supermarkets. The issue is how much competition remains on the market and to what degree the arrangement is anticompetitive. Of course, you can imagine there’s been a lot of tension where the government and policymakers try to induce animal welfare agreements, where we then have to point out that they are contrary to competition law and that other more consumer friendly solutions will need to be sought.

Another example where policy considerations and our enforcement efforts collide has been what is called the Energy Agreement under the aegis of the government. All players in the energy world, particularly the generators of electricity, have agreed to the development of well-balanced green power. Part of that large overarching agreement included the closure of certain coal-fired plants, which were going to be phased out anyway. In this instance, we provided an informal opinion that in our view, such an agreement would constitute a cartel. Our opinion attracted media coverage because, of course, the environmental movement was in favor of the Agreement. The generators were in favor, the government was in favor, and we had to object on competition grounds. In our opinion, the price increase that this part of the agreement would have caused would not have weighed up against the claimed environmental benefit.

So the really sticky cases that we’ve had over the last year have been cases where the government was involved in trying to facilitate self-regulation rather than legislating. This seems to be
the government’s style in the last couple of years. The problem is that once the market parties set up agreements to cooperate, then they come under our jurisdiction, and this makes headlines in the press.

The problem is that at times, arguments based on protecting the environment actually serve more the interest of the parties involved, than the environment itself. We are there to ensure that the consumer is not harmed in the process.

**ANTITRUST SOURCE:** To the extent that you haven’t already covered it, what do you foresee as the new challenges for the ACM in the coming year?

**CHRIS FONTEIJN:** I think we need to work very hard to avoid silos. When I started this work and when I got the assignment for the merger, I talked a lot with Bill Kovacic, for instance. And he's always told me to look at the FTC. See the lessons you can learn from how they are structured and how they run, and try to make your organization a really integrated one, where the competition side is aware of what the consumer and the regulatory sides do and make sure you integrate your leadership.

I think the main challenge we have is to try not so much to prioritize within the competition side or within the regulatory and the consumer side but have rather overarching priorities for the agency itself. The strategy we have is that the consumer is central, and we are working very hard to try to make that work.

We celebrate our first anniversary in June with a conference, which we have called “Innovation in Oversight & Innovation and Oversight.” Part of that involves looking at the restructuring of the oversight agencies, using more innovation in the way we do our work, how we exercise our oversight powers, behavioral economics, the modern inspection techniques, and other similar aspects. The other part is ensuring that oversight does not stifle innovation.

Mr. Cass Sunstein, who wrote *Simple* is one of the speakers, as is Bill Kovacic, so we should have a very interesting program. Trying to innovate in the way we detect, and trying to integrate the various silos of the work. It’s all very promising! So, those are challenges for ACM in the future.
Interview with George Lipimile, Director of the COMESA Competition Commission

Editor’s Note: George K. Lipimile is the Director of the COMESA Competition Commission.* Previously, he served as Senior Advisor at the Division of Competition and Consumer Law and Policy of the United Nations Conference on Trade and Development and he established and served as the first Executive Director of the Zambia Competition Commission. He has been instrumental in the drafting of several competition laws and consumer protection laws in the Southern and Eastern Africa Region. He holds Bachelor of Arts and Bachelor of Laws degrees from the University of Zambia, and Master of Science degree in Intellectual Property Law from Queen Mary and Westfield College, University of London.

He was interviewed for The Antitrust Source on March 28, 2014, by Fiona Schaeffer.

The Antitrust Source: The world is very interested in what COMESA is doing in the area of competition enforcement. Your merger control regime has been operational for about a year now. What changes are you considering?

George Lipimile: Although the Commission was established in February 2011 it only became operational in January 2013. The delay in operationalizing the Commission was due to matters related to the financing of the operations, recruitment of personnel, and putting in place the necessary logistics.

The major challenge we faced upon the commencement of the operations had to do with the appropriateness of the law itself. It is important to note that the COMESA Competition Regulations were prepared and negotiated among the Member States prior to 2004. It has been now over ten years of the law being dormant. At that time only four Member States had national competition laws, namely, Kenya, Malawi, Zambia and Zimbabwe. This meant that there was still no deep understanding and experience in enforcing competition law in the Common Market. As a result, the Regulations exhibited three characteristics.

First, we can safely say that the laws were adapted to deal with the situation of the markets prior to 2004. The jurisprudence in competition law was very limited and very new, not only in the COMESA market, but I think even outside Africa;

Second, given a lapse of time from when the Regulations were enacted in 2004 and the time for their enforcement in 2013, the gap affected the suitability of the Regulations, given the changed economic reforms undertaken by the Member States, which in turn affected the structure of the regional Markets. Consequently, the stakeholders have started asking whether the Regulations

* COMESA stands for the Common Market for Eastern and Southern Africa. Its Member States are Burundi, Comoros, Democratic Republic of Congo (Kinshasa), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Swaziland, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia, and Zimbabwe. The headquarters of the Competition Commission is in Lilongwe, Malawi.
crafted over ten years ago without enforcement are capable of dealing with the emerging competition matters of today.

Third, most of our Member States do not have strong and enforceable competition laws at national level. Hence, it was difficult for them to understand and appreciate the introduction of a regional competition law regime.

Apart from the three constraints I have mentioned, the Commission encountered further problems in trying to enforce the merger control provisions. These were related especially to the lack of clarity in relation to provisions regarding merger notifications. There was a need to clarify the concepts used in the legislation, the procedures to be followed, and the notification requirements. Hence, there was an important need to introduce the merger guidelines, not only in relation to the merger notifications but also to the other aspects of the regulations, such as vertical and horizontal restraints, exemptions, and other areas of the Regulations.

We put up the draft merger guidelines on our website and solicited comments from the public, especially from the stakeholders. The response from the stakeholders was massive and very helpful. At the same time we contacted a lot of people for advice and comments on our drafts.

As regards the merger notifications received by the Commission when we opened our doors, the response from the stakeholders was very positive. We received over 15 merger notifications within the first six months of our operations.

ANTITRUST SOURCE: Why did it take 10 years from the enactment of the law for it to be operational? What were some of the challenges along the way?

GEORGE LIPIMILE: The COMESA Secretariat is in better position to explain the causes of the delay. However, the delay in the operationization of the Regulations can be attributed to several factors. As earlier mentioned, the idea of having a regional competition regime was very new to the Member States. Hence, it was difficult to lobby the necessary support from the Member States for them to subscribe financially to the establishment of the Commission. Consequently, the COMESA Secretariat's lack of funding could have been the main course for the delay in commencing the operations of the Commission.

There might had been other factors like the non-availability of skilled manpower and material resources to establish the Commission. The Member States finally in 2011 provided the budget for the start-up finance to establish and commence the operations of the Commission.

ANTITRUST SOURCE: You mentioned that the law was outdated before it even became operational. One of the observations that have been made is that the COMESA Regulation is quite broad in its application to mergers. And the Competition Commission has identified some challenges because of the broad scope of the law. What are some of the challenges that you’ve identified?

GEORGE LIPIMILE: You are right, we have been facing some challenges in the interpretation and the implementation of certain provisions relating to mergers. The major challenges can be divided into three categories, namely, the zero merger notification threshold, the unclear local nexus requirement, and the scope of application of the Regulations to mergers.

The stakeholders have raised concerns over these issues and with their participation. We are now in the process of developing guidelines in relation to the three issues aimed at creating certainty, transparency, and to apply the international best practices in their enforcement.

The zero merger notification thresholds in the Regulations make all mergers notifiable as long as they satisfy the regional dimension requirement under Article 23(3)(a).
The local nexus requirement is ambiguous as a result of the broadness of Article 23(3)(a) of the Regulations. According to Article 23(3)(a), a merger is notifiable even if the target has no presence in the Common Market, as long as the acquirer or the target firm has presence in two or more COMESA Member States.

The scope of application of the Regulations provided under Article 3(2) requires that for transactions to be captured by the Regulations, they should have an appreciable effect on trade between Member States and should restrict competition in the Common Market. However, Article 23(3)(a) captures all mergers on condition that they satisfy the regional dimension requirement. Therefore, it appears there is an ambiguity between Article 3(2) and Article 23(3)(a). The two provisions need to be aligned so that there is no conflict in their interpretation and application.

There are other areas of the merger control provisions of which the stakeholders have further raised concerns. These have to deal with the need to give definitions to the concepts applied in the text. The concerns relate to what type of transactions require notification, the definition of “control,” treatment of joint ventures, meaning of “decision to merge,” approach to mergers taking place in a series, timeframes, and many more procedural matters. However, the guidelines which will very soon be adopted have attempted to address most of these issues.

The other challenge we found was resources, both human and financial resources. It was quite difficult to mobilize resources. Whereas we had the seed capital, so to say, to start the Commission running, the available funds are not enough to sustain a fully-fledged Commission.

ANTITRUST SOURCE: One of the reasons that you might be overburdened with filings is the current zero threshold. That was a concern the Commission identified in your report in August 2013, which called for a team of experts to examine various aspects of the law.

GEORGE LIPIMILE: In practice, the setting of the threshold at zero generated an outcry from the stakeholders and various challenges for the Commission. For instance, it increased the workload for the Commission to assess cases that, given their magnitude, were not likely to generate anti-competitive effects and that did not allow the Commission to fully focus on complex transactions or other more harmful competition issues. Further, it created an additional administrative burden on businesses, which discouraged transactions, especially those of small magnitude, affecting regional integration and business development in the Common Market.

Yes, the zero threshold, and the regional dimension requirement have been the two major concerns by the business community. However, it should be understood that the Commission’s decision to come up with the zero thresholds has a history to it. First let’s start with the practice relating to this issue undertaken by our Member States. You’ll find that most of the Member States which have national competition legislation started their operations with a zero threshold. Basically all mergers were notifiable. Even at present, if you go to the Member States like Malawi, Kenya, Swaziland, and I think many more, you will find that they all have not come up as yet with the merger notification thresholds. Those with the merger notification thresholds, only did so lately. Hence, the practice in the region has been to commence operations of the law with having all mergers notifiable. After the national competition authority has gained knowledge of the market dynamics and the structures of its market at the national level, it will then introduce the merger notification thresholds.

Similarly, when the Commission was established in 2011 the need to establish the notification thresholds for both mergers and abuse of dominance was recognized and addressed. That is why at its inception, the Commission appointed a consultant to come up with the thresholds for the
merger notifications and for abuse of dominance cases. The consultant carried out a study and presented the recommended thresholds to the Member States and the stakeholders. However, the Member States were not happy with the figures and the formulae which the consultant recommended. In other words, we could not reach a consensus among the Member States on the matter; hence we could not adopt the consultant’s recommendations. There were also views expressed that the thresholds which were recommended did not take into account the different development levels of the Member States and did not reflect the true market structure of the Common Market.

Given the various views by the Member States, it was resolved that a fresh study should be undertaken and that, in the meantime, the Commission shall commence operations with a zero threshold notification requirement. This, as it was emphasized by the Board of Commissioners, was going to be a temporary measure. This will allow another consultant to be appointed and get a practicable idea of the type of mergers that are taking place in the Common Market, and recommend the appropriate quantifiable threshold.

We have been operational for over a year now, with more than 20 mergers notified. We are now in a position to appreciate the market structures of the Member States and the different amounts of business, and what type of companies are involved in mergers and other forms of acquisitions. We have, since, appointed a consultant, with the help and assistance of the International Finance Corporation of the World Bank Group. He has since commenced work on the assignment, and he is currently finalizing the stakeholder consultations. He is expected to present his report in May 2014. The adoption of the consultant’s recommendations is expected to commence in July 2014.

Apart from coming up with quantifiable merger notification thresholds based on combined annual turnover or assets in the Common Market in regard to mergers with a regional dimension, we are further supposed to come up with a method for the calculation of annual turnover and assets. As I mentioned earlier, this is the thrust of the consultancy. In fact, I may say that the primary purpose of the consultancy is to bring about a set of thresholds for mandatory notification that consider the characteristics of COMESA Member States and International standards of merger control.

Whereas the focus is on the thresholds, the consultant will also examine and recommend on the procedural and enforcement aspects of the whole platform of the merger control framework in the Regulations.

ANTITRUST SOURCE: Do you think a model along the lines of the EU merger control thresholds would work for the COMESA regime?

GEORGE LIPIMILE: Without preempting the work of the consultant, I would say there is a lot to learn from the European model. You will observe that most of the key provisions in the COMESA Competition Regulations are modeled on the European competition law and principles. Hence, their enforcement and implementation shall borrow a lot from the European practice. It is common to find a replication of Article 101 and 102 of the Treaty on the Functioning of the European Union, the TFEU, in most of the national competition laws. Even Article 16 and 18 of the COMESA Regulations are modeled on the same provisions of the TFEU.

Of course, the Commission will consider variations, taking into account the peculiarities of the Common Market.

In regard to the establishing of the thresholds, I believe that in the European Union two alternative sets of thresholds apply, and there are already in existence detailed rules on the calcula-
tion and geographical allocation of turnover for merger control. The European system has over the years established useful jurisprudence that can address some of our needs.

The consultant will be expected to make a comprehensive and analytical economic assessment of sectors in the Common Market, with a view to determining the merger thresholds in accordance with the Regulations. The consultant shall provide for the prescription of merger notification thresholds based on the internationally accepted criteria and principles. Consequently, we expect the consultant, among other issues, to look at how the issue of the merger thresholds has been dealt with by the European Union and, more importantly, the Member States.

**ANTITRUST SOURCE:** One fundamental question is whether the COMESA regime is a one-stop shop for mergers with a COMESA dimension, in which case the Member States would still have residual merger authority for mergers that don’t meet COMESA thresholds, or whether COMESA is a sole or concurrent jurisdiction.

**GEORGE LIPIMILE:** This is quite a moot question given the current wording in the Regulations. The principle of “one stop shop” entails that once a transaction is notifiable to the Commission it does not have to be notified to any of the national competition authorities. It has been argued that the Regulations do not seem to explicitly give such a position. There is, however, a Treaty obligation that requires Member States to confer upon the regulations of the council the force of law and the necessary legal effect within their respective territories. Further, the Member States are required under the COMESA Treaty to abstain from taking any measure which could jeopardize the attainment of the objectives of the Regulations.

As regards the participation of Member States, the regulations state that a national competition authority that wants to review a “regional dimension” merger must request a referral from the Commission. Hence, it is reasonable to deduce from this rule that a contrario, without referral, there is no jurisdiction for the national competition authority.

However, with the commencement of the enforcement of the COMESA Competition Regulations and Rules on January 14, 2013, there are now two separate legal regimes which govern the enforcement of competition law and policy in the COMESA Member States: first, the National Competition laws, which are the national legal orders comprising the respective bodies of legal rules within each of the COMESA Member States; and second, the Regional Legal Framework, which comprise the body of legal rules created at COMESA level, such as the COMESA Competition Regulations and Rules.

Given the two legal orders, the national order shall apply to the enforcement of anticompetitive practices emanating at national level, and hence, enforced by the national competition authorities in their respective Member States. Whereas the regional framework shall be invoked generally where there is a cross border impact.

**ANTITRUST SOURCE:** So can you clarify which mergers would be subject to domestic review by a Member State?

**GEORGE LIPIMILE:** I will answer the question in the context of the scope of application of the COMESA Competition Regulations. In general terms, the application of all the provisions in the Regulations is limited to agreements, decisions, or concerted practices that may affect trade between Member States. The inter-Member State trade clause is therefore of central importance in COMESA Competition Law, since it defines the boundary between areas respectively covered...
by the COMESA Competition Regulations and the law of Member States. The effect on inter-state trade is satisfied where conduct brings about an alteration in the structure of competition in the Common Market.

However, the Regulations may apply to anticompetitive conduct confined to the territory of a single Member State which is capable of having repercussions on patterns of trade and competition in the Common Market. Hence, the fact that the parties to an agreement are from the same Member State does not mean that there can be no effect on trade between Member States. The Regulations may apply to agreements between undertakings in the same Member State.

**ANTITRUST SOURCE:** What if the merger involves a South African company and a company active in a COMESA Member State, for example?

**GEORGE LIPIMILE:** Yes, the effects doctrine. If that merger has an effect on the Common Market, then it may be captured by the regulations. Even if a merger is done outside the Common Market, if it has the effect or object of affecting the Common Market, or being harmful to the Common Market, then we are able to respond to such a situation.

So the effects doctrine can be applied where there’s a COMESA Member State and the other participant is in a non-COMESA Member State, but you have to prove whether there is appreciable effect on the Common Market. If there is an appreciable effect in the Common Market as a result of a merger, then you should be able to have jurisdiction over such a matter. And we have powers under the Regulation to recall a non-notifiable merger to be notified to the Commission if we feel that there are grounds for such a transaction to be notified.

Even at the time when we come up with quantifiable notification thresholds, the Regulations allow us to require parties to a non-notifiable merger to notify the Commission of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is contrary to public interest.

**ANTITRUST SOURCE:** Under the effects doctrine then, are we safe to advise clients that even if the buyer is operational in two or more COMESA Member States, no notification to COMESA is required as long as the target is not active in any COMESA Member State, because there couldn’t be an appreciable effect on competition in a COMESA Member State?

**GEORGE LIPIMILE:** Yes, but you have to be very careful with the way the regional dimension is defined in the regulations. You know, it provides for a situation whereby the acquiring firm and/or the target firm operate in the Common Market. This is one of the provisions which is problematic and has attracted public criticism. The major criticism is that the provision doesn’t address the issue of nexus or the volume of trade being conducted in the Common Market. So, that’s where a lot of complaints have come in.

**ANTITRUST SOURCE:** Yes, but the Regulation appears to make clear that mergers must have an “appreciable effect on trade between Member States” for COMESA to have jurisdiction.

**GEORGE LIPIMILE:** It is important to appreciate that Article 3 of the Regulations plays a fundamental role as a guide for the interpretation of the other provisions of the Regulations. From its wording, Article 3 plays a general role in the structure of the Regulations. Hence, all the provisions in the Regulations should be interpreted as applying solely to conduct falling within the scope of
Article 3 definitions. This general role is evident from the fact that Article 3 is found in the preliminary part of the Regulations and deals with their scope of Application. The aim of this preliminary part is precisely to define the scope of all the other provisions of the Regulations.

It is also important to refer to Article 3(2) to which the Regulations only apply to conduct that has an appreciable effect on trade between Member States and which restricts competition in the Common Market. Such a provision seems to imply that a “notifiable merger,” is to be defined as a merger having an appreciable impact on trade between Member States and having the capacity or potential to restrict competition in the Common Market.

The main consequence of this, as I see it, is that Article 23(4) of the Regulations should be read as granting the Board discretion to set the thresholds, whilst, however, imposing a limit on this discretion to the extent that only mergers which have an appreciable effect on trade between Member States and which have at least the potential to restrict competition within the Common Market should be deemed notifiable.

ANTITRUST SOURCE: This is something we have had to contend with in other merger control regimes. It’s part of the growing pains.

GEORGE LIPIMILE: It is. We put it down to the development of jurisprudence because if you look at most of these provisions which seem to be problematic, some of them exist and are still operating in the domestic laws of Member States. It’s only that, for the first time, the competition regime in Africa has been brought to the public scrutiny.

And I would say that when the COMESA Competition Regulations were adopted in 2004, no one bothered about the quality of the national competition laws. But if you look at the terms of reference, which guided the enactment of the regional law, it was said that special attention should be given to the existing national competition laws in formulating the regional law.

So if you were to look at the national laws at that time, there was the Zambia Competition Act, Zimbabwe Competition Act, Kenya Competition Act. Hence the regional law has to some extent been influenced by the national laws that existed at the time.

ANTITRUST SOURCE: Who are the consultants who are working on the report?

GEORGE LIPIMILE: The Consultants were hired with the financial assistance of the International Finance Corporation, which is part of the World Bank Group. The consultant appointed to review the merger control procedure is MacMillan Keck, Attorneys & Solicitors of Geneva, Switzerland.

ANTITRUST SOURCE: And after the consultant’s report, what is the next step to implement any changes?

GEORGE LIPIMILE: There is a process under the COMESA statutes under which different types of documents are adopted. In an event that the consultants recommend any amendment, or an introduction of a new regulation or rule under the treaty, such amendment or rule shall require approval by the Council of Ministers. The Council of Ministers comprise the Ministers of Trade and Industry of the Member States. The process involved before the documents are tabled before the Council of Ministers can sometimes be quite lengthy. It is a consultative process involving the relevant institutions in the Member States. This is meant to build the relevant consensus among the key stakeholders and national level, and allows the necessary consultations with the private sector and institutions at national level.
However, the procedure in regard to the guidelines is more relaxed. This is because the final product requires the approval of the Board of Commissioners, as opposed to the Council of Ministers. Consequently, once the consultants hand over their findings and recommendation, the guidelines shall be tabled before the Board for adoption. Hence, we do not foresee any problems, as the Board is currently monitoring the process.

Right now, there’s one more aspect, where we’re required to subject the recommendation by the consultant to the public, to the users of the system, the lawyers, and interested parties. So no matter what we do, we’ll put it on the website, and invite comments from the public. We shall also approach directly targeted individuals and institutions. We approach them directly, so that’s also taken into account.

So everything will be moving very fast because after we get all the reviews we’ve got to get to the consultant.

We have listened to the concerns expressed by the stakeholders in relation to the high merger filing fees. The concerns are being addressed.

ANTITRUST SOURCE: Is there a role for the ABA Antitrust Section to play in providing comments once a proposal has been published?

GEORGE LIPIMILE: The ABA has been very helpful from the beginning. We have received considerable technical assistance. When we commenced operations, we received from the ABA a set of books on competition for our library. The ABA has also assisted with the ongoing drafting of guidelines with providing us with valuable comments. Although we do not have any formal agreement with the ABA, they continue assisting us with advisory services and essential competition literature.

ANTITRUST SOURCE: Concerns also have been expressed that the filing fee is too high. Will the consultant also look at this?

GEORGE LIPIMILE: Yes, you know, merger fees are always connected with the threshold. Once the quantifiable notification threshold comes into place, it will affect the filing fees. Going back to the issue of the filing fees, the half a million dollars is the maximum. It’s not that every merger will attract half a million. This is the maximum that you pay, and we’ve dealt so far with over 27 mergers, and not all of them have paid half a million. Some mergers have attracted fees as low as $300. The amount of fees payable is connected with the size of the combined turnover or assets of the parties derived from the Common Market.

We have listened to the concerns expressed by the stakeholders in relation to the high merger filing fees. The concerns are being addressed. Once we finalize the guidelines related to the application of Article 3(2), on the “appreciable effects,” we anticipate a situation where the fees may even be scaled down. The method for the calculation of annual turnover and assets, once prescribed, should also affect the filing fees. The consultant shall attempt to realign the fees payable to the amount or the cost the Commission incurs to carry out the assessment of a given merger.

ANTITRUST SOURCE: Where does the filing fee go? Does it contribute to funding the CCC’s operations?

GEORGE LIPIMILE: Ideally, no competition authority should be dependent on filing fees for its budgets, staff salaries, or bonuses. A linkage of this nature may skew incentives to revise notifi-
cation thresholds because consideration of limitations that may be warranted on the basis of competition-oriented objectives must be weighed against the collateral fiscal effects. Another risk that must be considered is that the ability of competition authorities to fund their law enforcement activities may be compromised when the current merger wave subsides.

We have a revenue sharing formula that was approved by the Council of Ministers. Under these formulae, 50 percent goes back to the designated Member States. By designated, we mean the countries affected by the mergers, and the CCC retains the 50 percent. So that's how the formula works. The Commission uses most of this money to fund the cost of investigations.

**ANTITRUST SOURCE:** You mention that you’ve received 27 merger notifications to date.

**GEORGE LIPIMILE:** Up to February, yes.

**ANTITRUST SOURCE:** Can you give us a sense of how many transactions you’ve looked at and concluded did not need to be notified?

**GEORGE LIPIMILE:** As mentioned earlier, we have continued to discuss the interpretation and implication of Article 3(2) which has the potential to exclude some transactions from the application of the regulations through the use of the “appreciable effect” test. The parties have argued that their transactions qualify to be exempted under Article 3 of the Regulations because the transaction shall have no appreciable competition effects in the Common Market and, thus, there is no need to notify. The situation has posed problems given that we have a zero threshold and hence, it becomes uncertain to tell which transaction will have no appreciable effect on trade and restrict competition in the Common Market. Further, there has been an argument as to who has the final say as to the application of Article 3: is it the parties or the Commission?

In the meantime, the Commission has now developed an “office practice” whereby some transactions, after discussions between the parties and the Commission, are exempted or issued with a “comfort letter.” We have to be careful that only deserving transactions escape the duty to notify.

**ANTITRUST SOURCE:** I’ve seen reports that the CCC is willing to engage in informal consultations with merging parties to determine whether or not a merger needs to be notified.

**GEORGE LIPIMILE:** We allow for what we call “pre-conference sessions.” These involve informal meetings between the Commission staff and the representatives of the parties to a merger. At these meetings we attempt to dissect the transaction so that we understand it better and agree on the form of notification. In fact, we encourage these meetings a lot. We’ve had situations where, after the meeting, we have found that the transaction need not be notified with the Commission but with the national competition authority.

**ANTITRUST SOURCE:** That’s useful to know. Can you tell us a little bit more about the structure of the review process?

**GEORGE LIPIMILE:** Once the case is received and authorized for investigation, the secretariat carries out the necessary assessment. Thereafter, the investigation report together with a summary and recommendation is presented to the Committee of Initial Determination. The Committee shall make
a determination independent of our recommendation. The decision of the Committee is then communicated to the notifying parties. If any of the parties or a third party is still aggrieved by the decision, an appeal can be made to the full Board. An appeal against the decision of the Board can be made to the COMESA Court of Justice, and thereafter to the COMESA Court of Appeal. So far, maybe due to our consultative approach during investigation, none of our decisions has been challenged.

However, we had a situation where a Member State raised an issue while the matter had already been referred to the Committee of Initial Determination. Since the matter that was raised was material, we had to recall the case to address the issue.

Further, there was a situation where the Committee of Initial Determination referred the case back to us in order to do more investigation on a particular issue and directed that they will decide on the resubmitted case by way of notational voting without a meeting. Why? This is because the Commission does not want to delay decisions unnecessarily.

ANTITRUST SOURCE: Have there been any decisions requiring remedies in any of the merger notifications received to date?

GEORGE LIPIMILE: Not yet. The process we apply is very consultative, and we work with the parties at almost every step of analysis. During this process we address the issues as we proceed in our investigation. All the competition concerns by the Commission are presented to the parties and sometimes at this stage there is the need to reconstruct the transaction. Sometimes, as mentioned earlier, the pre-conference sessions tend to iron out any potential conflict.

ANTITRUST SOURCE: Are you focused at all on cartel enforcement?

GEORGE LIPIMILE: This is the issue which we are discussing with the national competition authorities of the region. If you look at cartel enforcement in the region, the only country which has been successful is South Africa, through the application of the leniency program. In fact, I was talking to the Commissioner of South Africa as to why the other countries with leniency programs have not been equally successful in busting cartels. Why is it only South Africa? To give you an example, Mauritius has had a leniency program for four years, but it seems the program has not been successful.

Now the other issue we are discussing is that a lot of cartels have been busted in South Africa, involving the construction, fertilizer, and other sectors. The companies which are involved and found guilty are also trading in the neighboring countries, such as the COMESA Member States. The exploitative profits from the cartel behavior are not only restricted to the South African market, but to the neighboring countries as well.

So what do we do about it? We need to commence discussions with the South Africa Competition Commission with a view of establishing some form of cooperation in the fight against cartels. We have in this regard sent an invitation to the South Africa Competition Commission to visit us and probably discuss the areas of cooperation in enforcement and investigation.

ANTITRUST SOURCE: Would you be open to a delegation of judges from other jurisdictions meeting with your judiciary?

GEORGE LIPIMILE: That is the best. Nothing beats that.
You may wish to know that the subject of competition law is not yet popular with our courts. There is very little litigation in this area of this law, hence, the judges are not familiar with the competition law cases. There is a need to sensitize our judiciary with the law. As globalization intensifies, the likelihood of competition cases coming before our national and regional courts is drawing near; hence, the need for our judges to be prepared. In fact, we have already witnessed competition cases coming before the national courts in Zambia, Zimbabwe, and Malawi.

We need special tailored seminars for the judges in the region. This may cost money, but the benefits and advantages in the long run are enormous.

ANTITRUST SOURCE: I also wanted to ask you about international cooperation. Have you cooperated with any other antitrust agencies in your review of the 27 mergers that have been notified to date?

GEORGE LIPIMILE: We should, simply because most of the mergers which are captured by the Regulations are mostly international companies, and most of these will be assessed under other jurisdictions. Hence, we find ourselves sometimes asking whether a given merger has been already authorized in London, or authorized in America. Hence, there is need for international cooperation in various areas including competition advocacy, enforcement and investigation, and the sharing of information is very important.

Secondly, the exchange of confidential information between competition authorities is an important feature of deepening cooperation. The Commission intends to enter into agreements with other competition agencies that will allow the exchange of confidential and/or non-confidential business information in the course of competition investigations. Such an agreement should include safeguards to ensure that confidential information, competitively sensitive information that is exchanged between enforcement agencies, does not become public.

Moreover, this can assist the Commission in conducting coordinated cartel prosecutions by allowing cooperation in the investigation of regional or international cartels or multi-jurisdictional merger reviews. Member States should under their own laws have provisions enabling them to protect confidential information.

ANTITRUST SOURCE: Is it a priority for the CCC to develop more formal cooperation mechanisms?

GEORGE LIPIMILE: As mentioned earlier on, there are situations where we find out that a merger notification with the Commission has been dealt with by another authority in Europe. In this case, there may be need to seek information from the European competition authority. The Commission shall seek to establish formal cooperation mechanism with other regional competition authorities and national competition authorities in the region and abroad.

Within the Common Market, the situation is a bit easier. We are required by the law that whenever we receive a merger notification we notify all the relevant Member States and call upon any interested persons who wish to submit written representations to the Commission. In this regard, the affected Member States are always consulted and briefed on the nature of the inquiry and invited to submit comments on the effect of the transaction on their territory.

We are currently working with the Member States developing a legal framework on enforcement cooperation. This is aimed at creating procedures and areas of cooperation between the Commission and the Member States at the domestic level.
ANTITRUST SOURCE: How many staff do you have at the Commission and how do you go about recruiting and training them?

GEORGE LIPIMILE: The recruitment of staff is a continuous process; it is a phased approach. The consultations that were made with the Member States yielded several recommendations on how to improve the recruiting, training, and retention of skilled professionals at the Commission.

It is important to note that manpower, like any other, is an expensive resource that must be carefully planned for. Hence, the Commission uses various methods of recruitment to be employed, depending on the source of funding. We intend to have employees on fixed term, short term, secondment, voluntary arrangements, and many other arrangements.

We started with six professional staff, and the work load has since increased. Hence, we intend to recruit four more staff at the technical level. Our main source of staff are the national competition authorities of the Member States. This does not stop us from recruiting outside or from non-Member States.

The training needs of the Commission shall remain a challenge for a long time due to the lack of adequate funds and other resources. We have been fortunate that some institutions, like the USA FTC has been offering free specialized training to our staff. We hope to approach more international institutions and developed competition authorities to assist with our training needs.

ANTITRUST SOURCE: Are they all lawyers?

GEORGE LIPIMILE: At the moment we are lucky that our current staff hold combined qualifications of both law and economics. And we have at least three staff members who have specialized in competition law at the masters level, at Kings College of the United Kingdom.

We are encouraging our staff to continue sharpening their skills in their respective disciplines.

ANTITRUST SOURCE: Do you have any plans to invite staff from other competition agencies to work with you for a period of time? I understand that these secondments have been employed successfully by other new competition agencies.

GEORGE LIPIMILE: Yes, in fact we have made request to institutions like DG-Competition to second their staff to our Commission. We consider this as one of the best form of skill and knowledge transfer. We hope that the developed competition authorities shall consider seconding their staff to the Commission. Further, we shall be appreciative if financial assistance is provided to entice the retired competition experts to spend time at our Commission.

ANTITRUST SOURCE: What competition advocacy do you plan on doing in the next year? And secondly, what are some of the biggest challenges you see lying ahead for the Commission?

GEORGE LIPIMILE: The two questions are quite related. For a new competition authority like ours, and given that it is the first time competition law is been enforced at the regional level, competition advocacy is very important. The Member States are yet to know and get used to the regional enforcement of the law, more so their obligations and compliance requirements. It is important for the Member States to understand that a regional competition policy is one of the tools aimed at achieving the objectives of the COMESA Treaty—that of regional economic integration.

There is also the issue of the relationships and the sharing of power between the Commission
and the national competition authorities. This requires a lot of dialogue between the Commission and the Member States.

The major challenge we are facing is the non-domestication of the COMESA Treaty by the Member States. This has caused problems as regards the enforcement of the competition regulations at national level. There is the need for the Member States to show greater commitment to the regional economic integration agenda under the Treaty, of which the regional competition policy is an important component of that process.

**ANTITRUST SOURCE:** I’m delighted that you were able to take the time today and tell us about your first year of operations and give us a sense of what’s ahead.

**GEORGE LIPIMILE:** We wish to thank you very much for inviting us to this interview, and we hope we have been able to answer your questions. Our objective is to establish an effective regional competition regime. We are thankful to friends who have put a lot of good effort to come and assist us in this task. We are certain that we shall not fail, given the goodwill and the available assistance from ABA, IBA, ICN, ICA, GCF, and the International law firms. We are happy to continue working with these institutions.
Interview with Carlos Ragazzo, Commissioner, Brazil’s Council for Economic Defense (CADE)

Editor’s Note: Carlos Ragazzo was the General Superintendent of Brazil’s Administrative Council for Economic Defense (CADE, following the Portuguese acronym) from May 2012, when the position was created by comprehensive reforms to Brazil’s competition law, until he stepped down in May 2014.* Previously he had served for four years as a Commissioner of CADE, and the head of the General Coordination of Competition at the Secretariat for Economic Monitoring (SEAE) for five years, and as a lawyer in private practice. He is also a Professor of Competition Law at Fundação Getúlio Vargas.

He was interviewed for The Antitrust Source by Russell Damtoft on March 26, 2014.

THE ANTITRUST SOURCE: First, for those who aren’t familiar with Brazil’s competition system, could you explain what your role is and how that relates to those of the Commissioners and how you interact with each other?

CARLOS RAGAZZO: Brazil has two bodies within the antitrust authority: the Superintendence and the Tribunal. The Superintendence is responsible for the investigation phase. It carries out analysis of pre-merger notifications. In case the merger requires remedies or even a full rejection, the Superintendence has to refer the case to the Tribunal, for a final judgment. It also conducts the investigations into anticompetitive practices. After the investigatory phase, the case is referred to the Tribunal, which will ultimately decide upon a conviction or not.

ANTITRUST SOURCE: It’s been a few years since the new CADE was formed from the remnants of the old CADE, SEAE and SDE. How is it going? What have been the key challenges in building this new institution?

CARLOS RAGAZZO: It’s going well. You can see in the numbers that we now have coming out of our merger review. In 2005 CADE had an average of 250 days for a merger review. This number has been decreasing over the years.

After the law passed and we adopted the pre-merger system, we implemented a few changes management-wise, and we were able, to a greater extent, to reduce this average duration. We’re now reviewing fast-track mergers on an average of 19 days, and, taking an overall view of merger cases, we average 25 days.

Cartel-wise, it hasn’t changed that much because the law didn’t change that much in that regard. But we are now diversifying the sorts of investigations that we are performing. We have

* Mr. Ragazzo stepped down from his post with CADE on May 29, 2014, after this interview was conducted.
begun to investigate in different regions of Brazil. We have investigations in the Northeast, in the South—in places other than São Paulo, which is the main business center of Brazil. We have also diversified the sorts of sectors we are now pursuing in our anti-cartel enforcement actions.

**ANTITRUST SOURCE:** Bringing together three different institutions must have had its challenges. Can you tell us a little bit about how that process went?

**CARLOS RAGAZZO:** Well, when we came to know that the law was likely to be approved, we decided to form a few working groups, each of them responsible for a specific aspect of the transition. There were people responsible for the move to the new building, the new CADE premises, there were people responsible for training in anticipation of the transition to the pre-merger review regime, and there were people responsible for the organization of the new workflow for merger review. I was responsible for the last one.

After we divided up the tasks, I, myself, for instance, went overseas to carry out a benchmarking exercise in the United States, at the FTC, in Europe, in Canada, and several other places in order to see how agencies’ management worked. When the law was passed, we had a transition period of six months. That was the time available for this benchmarking and for the preparation of the institution. So, when the moment came that we needed to deliver, it was easier because we had already planned the whole thing.

Of course, there were some minor incidents. For instance, when we switched to the new building, there were no electrical installations. So, we had to work from home for these first two weeks. That was actually something very important because it built confidence in the team as we managed to overcome this sort of situation.

Also, many people were concerned that we were not going to deliver at the time because of the complex transition to the pre-merger review system. In a month or so following the transition, everything cooled down and we were able to achieve the target of a 30-day average for fast-track merger cases, which we have maintained since then.

**ANTITRUST SOURCE:** Would you talk a little bit about the role of economists? Most of your previous economists in SEAE were located in Rio. Were you able to bring that economic capacity with you to the new CADE, or did you have to build a new economic analysis team?

**CARLOS RAGAZZO:** Only one person from SEAE went to the new institution. He’s now the head of our Merger Screening Unit. All of the rest who were hired along the way either came from the previous CADE Tribunal to the Superintendence or were hired externally.

**ANTITRUST SOURCE:** Whenever we meet CADE staff members, they seem to be a very capable and highly committed group. What’s the strategy for attracting and retaining top-quality people?

**CARLOS RAGAZZO:** It’s the culture of the place. When we realized that we were not going to receive new people following the adoption of the new law, the top CADE management was all together in the room and we decided that we had to handle that situation somehow. The way that we decided to handle it was to innovate. So every day, CADE staff tries to innovate. Even with working hours. We even tried to establish different working hours. We tried to establish an environment of people who have a certain extent of leeway to get the job done. It’s more based on results than on the means to get the results.
We have that very, very clearly in our minds. It's something that is important to us: to have a culture of delivery. Whenever we achieve a result that we consider is not up to our standard, we strive to do better. It's something that we always look for, so we built up a culture of improving every day, in spite of all of the difficulties we face, budgetary or otherwise.

ANTITRUST SOURCE: Let's turn to mergers. When the new CADE team came into being, there was quite a backlog of merger cases. What was your strategy for reducing that to the level you described a minute ago?

CARLOS RAGAZZO: We began by identifying what sort of problem we were dealing with. There was a lot of mixture in the management of fast-track and non-fast-track cases. There wasn't a strategy to deal with the moderate cases. In my view, they represent the worst problem because they are neither fast-track cases nor complex cases so you have to deliver the decision in a faster way than complex cases but they cannot be that fast. Our other challenge was dealing with the complex cases. We had different strategies for each one of those.

For the fast-track, I decided to set up a pre-merger screening unit, which is responsible for sorting out the cases. Whatever is fast-track is decided within this unit. There is a lot of flexibility involved in such analysis. We re-established a direct line with the lawyers in order to answer any doubts. These are the people responsible for dealing with almost 90 percent of what we receive merger-wise.

Then, for the cases that are distributed to the different parts of the Superintendence of CADE, we have a different strategy. We have divided up the units based on sectors, rather than on a first-come, first-served basis.

On account of certain specificities of Brazil, we had a social improvement whereby a lot of people actually became middle class. Forty million people became middle class. So now, these people are buying TV sets, they're buying fridges, they're buying a lot of things and they have an access to higher education.

So we have waves of mergers: mergers of retail stores, mergers of health insurance, mergers of higher education institutions. So by building up these units with knowledge on these specific sectors, it made it possible for us to speed up our analysis of moderate mergers.

With complex mergers, we understood that tackling these is going to take a while. This is something that happens everywhere, in the U.S., in the E.U. They take longer. They need more time for you to investigate. This the reason why we think if it comes to that, if it comes to a larger period of time for analyzing a complex merger, it's fine. The thing is you have to really pinpoint which merger is complex.

So last year, for instance, I think we sent recommendations to the Tribunal on fewer than five complex mergers including restrictions on approval. If you're able to identify and then sort out which cases are which, it's easier for you to work faster.

ANTITRUST SOURCE: Recently, Brazil’s merger thresholds were raised to R$750 and R$75 million. Do you think that's an appropriate threshold, and do you foresee any changes?

CARLOS RAGAZZO: There was a lot of work involved in identifying whether this number would be appropriate and what sorts of cases we would be missing if we used those numbers.

We did an analysis on CADE’s jurisprudence in order to see which cases we were going to lose. Now we have a different strategy because we are monitoring the market for mergers which do not
meet the notification thresholds but merit an analysis by CADE. When we consider a merger that falls beneath the threshold might merit an analysis by CADE, we then ask the parties to notify the merger to CADE.

I think, having those two combined—an increase in threshold and the possibility of calling mergers to us that do not meet the notification thresholds—is a good idea. It has worked well for us.

**ANTITRUST SOURCE:** Have you had cases where you have asked for filings when the amounts have been below the threshold?

**CARLOS RAGAZZO:** This is a funny thing. One of the cases that we decided to pursue, we discovered later on that it fell within the criteria.

**ANTITRUST SOURCE:** The change to the pre-merger notifications system led to a lot of interest about when CADE would see pre-merger activities as amounting to gun-jumping. What has been your experience with identifying gun-jumping situations and whether any clear lines have been developed?

**CARLOS RAGAZZO:** The thing is, people are still adjusting to the fact that we now have a pre-merger regime and the business community is still trying, to a certain extent, to understand gun-jumping, which is pretty much the same in Brazil as it is in the U.S. The requirement would be pretty much alike. There is no different standpoint or different stance from the Brazilian authority. So we’ve had a couple of gun-jumping cases, but I don’t see in the future a major problem regarding this issue.

**ANTITRUST SOURCE:** Turning to the substantive analysis of mergers, what standards do you use to determine whether a merger might be anticompetitive?

**CARLOS RAGAZZO:** We follow guidelines which we have enacted a few years ago and which are now actually under revision. But the thing is, it’s pretty much standard. I would say that the requirement is pretty much international. You hardly see a merger which has some sort of problem in Brazil not having a problem in the U.S. and not having a problem in the EU. To a certain extent, the revision of these guidelines may warrant some external comments and suggestions, but I think that the standard would be pretty much the same.

**ANTITRUST SOURCE:** What’s been your experience working with other jurisdictions on merger cases?

**CARLOS RAGAZZO:** In the previous system when we had a post-merger notification review system, we didn’t have the need to cooperate because everyone had already made a decision by the time we analyzed the case. It’s not like that anymore. We have collaborated at least in a couple of cases with the European Commission last year, and it has worked fine.

I think that the main problem is whenever you’re dealing with a very complex merger, you have to coordinate the timing and the discussion of the remedies involved to see whether they’re going to be a problem in your country. And this has worked well with the EU so far.
**Antitrust Source:** Have parties been willing to give you waivers to allow you to discuss confidential information with international counterparts?

**Carlos Ragazzo:** Yes. One of the first parts of the merger review is to assess whether this transaction is being analyzed by foreign jurisdictions.

**Antitrust Source:** CADE has done a lot to increase its anti-cartel enforcement capability over a number of years. Can you tell us about some of the recent developments and what we should expect to see in the future?

**Carlos Ragazzo:** I think that the main developments that we’ve had in these two years was the settlement procedures. We’ve now made it possible for people to present second in, third in, and so on and so forth, applications in order to collaborate with us. The settlement system that we used to have was more a pay to go system. So you pay, you’re not involved in collaborating and presenting evidence to aid investigations and make it faster.

We switched to this model and we are more like what happens overseas, so you have discounts depending on the place that you get in line and depending on the evidence that you present to us. And you now have a requirement to stay with us until the very end, collaborating in order to get this discount. And I think this has changed the way that we do things in Brazil, namely because people were accustomed to getting out of the procedure very quickly, though the procedure would still be ongoing because of all the other parties involved.

We now require a confession from the parties. We require collaboration, statements and evidence of infringement. And that’s speeding up the process and I think it’s going to be a trend in Brazil for the next years.

**Antitrust Source:** Can you tell us about the relationship between CADE and the Public Prosecutor’s Office, which, as I understand it, has the responsibility for bringing criminal cartel proceedings. What is that relationship like? Is that working well and do you expect changes in the future?

**Carlos Ragazzo:** One of the issues that we have to resolve in Brazil either by legislation or a corporate agreement is to define which public prosecutor is responsible for a given case. We do have some precedents in court in order to establish this jurisdiction. But it’s case by case and it depends on levels of information that you have in the beginning of the case. So in order to avoid that discussion, we try to sign leniency agreements with both federal and state public prosecutors whenever there is a doubt on the jurisdiction involved in the case. This is not the best, but to a certain extent it has worked thus far.

**Antitrust Source:** Could you give us an example of recent cartel cases that provide a good illustration of what you hope to be doing more of?

**Carlos Ragazzo:** Let me divide this in two situations, leniency and non-leniency. We are now in the middle of an investigation, which already has an open procedure and formal accusation, which is in salt production. This is the sort of case that we want to develop more because it is in an interior region of Brazil, in the northeast. It didn’t come through leniency. It came through a complaint.

We think that there might be cases that don’t come through leniency and that we have to pay
One of the things that we have to focus on is non-leniency cases; how to develop intelligence in order to build up that kind of work.

And in leniency cases, I think we want to have more cases like the subway case but without the political concerns, because the case got a little bit mixed up with the corruption charges. But cartel-wise, I think it’s a very strong case with very good initiative. When you see such a huge investigation and the way that we process the information that we were able to get from the dawn raid, we think this is the sort of thing that we should be doing in the next few years.

The subway case was an investigation involving the formation of cartels regarding the subway station lines in São Paulo, Brasília, and other states. And this is a very high-profile case involving many companies, many international companies involved in the biddings. And there are some elements indicating that these companies may have colluded in order to define which would be the winners in the each of these bids.

ANTITRUST SOURCE: CADE gets in the news for its handling of mergers and cartels, but let’s turn to abuse of dominance. When do you make abuse of dominance a priority?

CARLOS RAGAZZO: Abuse of dominance cases are very time consuming and they entail a lot of case handlers in order to be able to do a fine job on any given case. So we’re trying to select a few cases to bring.

We are now focusing on two sorts of unilateral cases. On one hand, sham litigation cases and on the other hand regulatory cases that have unilateral concerns. They are on their way. They’re not ready yet.

ANTITRUST SOURCE: What can you tell us about the characteristics of unilateral cases that would make them more attractive from your point of view, without getting into the specifics of the cases?

CARLOS RAGAZZO: I think some of the high-tech cases have very similar issues both in Brazil and overseas. So sometimes you just have to follow what’s happening overseas in order to see whether there is a case in Brazil as well. And people are trying to understand that and presenting their complaints as well. It’s not something that we’re doing one sided. The Brazilian community and the Brazilian antitrust community are grasping what’s happening overseas in order to see whether this is something that could be a problem also in Brazil.

ANTITRUST SOURCE: Do you have a practice of cooperating with foreign agencies in abuse of dominance cases?

CARLOS RAGAZZO: Yes. The whole idea is to discuss the rationale. Sometimes the economic rationale is very much the same and sometimes the remedies that people offer in order to reach a consent decree are pretty much the same. So it’s always nice to have a heads-up with someone else who is doing the same case or has heard similar case overseas.

ANTITRUST SOURCE: You have a very large competition bar in Brazil. Can you tell me a little bit about your relationship with the bar and what the interchange is like between CADE and the private bar?

CARLOS RAGAZZO: We often go to seminars, and we have an annual meeting. I think you have par-
ticipated at least once or twice. But I think the main collaboration that we have with the lawyers are in public consultations.

Whenever you issue a new regulation, they actively participate, and I think that we have accepted a lot of their contributions. They’re dealing with the day-to-day cases and they have to answer the doubts presented by their clients, so they have a different view than we have whenever we issue a new regulation.

**ANTITRUST SOURCE:** Does CADE take an active role advocating for sound regulatory policy in Brazil?

**CARLOS RAGAZZO:** That role has fallen upon SEAE. We’ve done a couple of initiatives. I have appeared in two hearings in the Supreme Court in order to discuss regulatory questions that were being brought by constitutional issues.

And this is something that we want to do, but right now, since we have the staffing problem, we have to focus in order to keep the things that are doing well, well. And to expand our activity might not be the wisest choice right now. But we are doing some things in that regard.

**ANTITRUST SOURCE:** What do you see as the right role for CADE to play in the international competition community? Is that a priority of yours?

**CARLOS RAGAZZO:** It has always been. I think since the very beginning, if you look at the ICN, we have chaired and co-chaired several working groups. Our president is now the Vice-Chair of ICN, which shows the level of commitment that we have in the institution.

To a certain extent, we can be of service to a lot of institutions carrying out transition work, and this is something that we are doing. We are exchanging views with other jurisdictions. People want to know what we did during the transition because it was, at least in my view, very successful. And there was a lot of concern, which was to a certain extent fair, before the transition came.

I think we can play this role. We can present to other jurisdictions examples of the transition now to switch to new models of management, how to improve the level of work that you can do merger-wise. We have a lot of experience with that.

**ANTITRUST SOURCE:** Brazil and the United States have had an antitrust cooperation agreement for over ten years now. Can you tell me how cooperation under that agreement has worked out so far?

**CARLOS RAGAZZO:** That is a very hard question because I have such a longstanding relationship with the U.S. that when I came here to study at NYU, I interned with the FTC! So I built my relationships from there until today.

It’s very hard for me to pinpoint a given situation. I think it’s an ongoing basis. Whenever we have cases, we discuss, whenever we have doubts, we discuss. All of the people, both from the FTC and the DOJ, have always been very available for us. They are very, very keen to answer all our questions and exchange views. We do that a lot.

We speak regarding cases, we speak regarding capacity building, we discuss in so many different fields but it’s hard for me just to pinpoint just a specific situation. I think we’re very much integrated.

**ANTITRUST SOURCE:** It really seems that you have accomplished a huge amount in this transition
in a short period of time. What do you see as the challenges that are still to be addressed?

CARLOS RAGAZZO: I think first, we have two accomplishments. First, we have to convey the idea that whatever we manage to solve during these two years, there’s got to be a permanent solution rather than something transitory. Merger review periods will be kept. A growing number of investigations in different sectors and in different regions will remain as a trend.

And I believe we have everything to do it. It’s just a matter of time for us to analyze that duration of merger review. The time for the reviews would be pretty much the same, it might vary a little bit, but it’s not going to be very different from what we have now.

Cartels, I think the way is to develop an intelligence vision in order to address the cases that don’t come through leniency. That doesn’t mean that leniency is not a priority—it is—but just to have some sort of knowledge on cases that don’t come through leniency is going to be something very important for us because to a certain extent, we’re still building the knowledge of the competition authority in the business community. I think it has grown a lot. The number of applications that we received in leniency reveals that. And unilateral cases, I think it’s a matter of choosing which case to pursue.

ANTITRUST SOURCE: I had a conversation a couple of years ago with a former head of CADE as he was coming to the end of his mandate and I asked, “What direction do you think CADE will take under your successor?” And he replied, “It doesn’t really matter because we’re so well-established as an institution that the result will be good, no matter who is selected.” Do you agree with that sentiment and if you do, what is it that has made for such a stable institutional framework?

CARLOS RAGAZZO: A very complex statement. And I think that I can answer it addressing the building of an institution. If you could see the age of the heads of units. The first time that you were in Brazil, for instance, there were a lot of units, and the heads were 25, 26—very young people. These people have aged, they have stayed. Some of them have over 10 years of experience—like me. It’s more about keeping the people than the procedures. It’s more who stays than the workflow.

ANTITRUST SOURCE: Do you see any further legislative changes coming to the competition law in Brazil?

CARLOS RAGAZZO: I can see some regulations changing, not specific legislation that has to go through the Congress. But we are always trying to adapt and we’re always trying to make it clearer.

The more complex the cases, the more complex the regulation we have to adopt. This is an ongoing basis, and I can tell you that from the time that I began working for the antitrust commission in Brazil in 2003, we have much clearer guidance now than we had back then. And that’s a good thing because the matters became more complex, the cases became more complex, the theories became more complex. But the procedures have not become more complex.

ANTITRUST SOURCE: If you were to meet the head of a new competition agency for the first time and he asked for you advice about how to set up an effective competition agency, what would you tell him based on what you’ve learned in CADE?
CARLOS RAGAZZO: Pay attention to management. If you have a well managed institution, all of the other problems are going to be solved because you have more time to spend on the cases.

When we decided to reduce the backlog, when we decided to be more efficient, that really came to me as the clearest option I could ever make. When we clear up the number of mergers that we are clearing now in this amount of time, this span of time, I see my people having more time to spend discussing the merits of the case.

So cases are becoming more complex. We are making better and better analyses. And this is only possible because we became more efficient. We saw the transition as an opportunity for changes that needed to be done.