Roundtable Conference with Enforcement Officials
Agency heads from the United States, Canada, and Europe provide updates from their respective agencies.

Interview with Andreas Mundt, President, Bundeskartellamt, Germany
The head of the International Competition Network’s Steering Group discusses the accomplishments and goals of the ICN and, as head of Germany’s antitrust agency, discusses cartels, abuse of dominance, and big data.

Interview with Alejandra Palacios, President, Mexican Federal Economic Competition Commission
The head of Mexico’s antitrust agency discusses the impact of the reforms to Mexico’s antitrust laws, how the agency is using its new powers to investigate barriers to competition and essential inputs, cartels, mergers, and international cooperation.

Interview with Esteban Greco, President, Argentine National Commission for the Defense of Competition
The new head of Argentina’s antitrust agency discusses plans for revitalizing the agency as Argentina seeks to reform its economic governance and his views on cartel enforcement, merger review, and improving the agency’s structure.

Paper Trail: Working Papers and Recent Scholarship
Editor John Woodbury reviews a paper describing additional evidence that the multi-firm holdings of institutional investors have reduced competition, this time among banks.
ROXANN HENRY: One of the highlights that the 3,000 folks who attend this Spring Meeting look forward to each year is to be able to hear firsthand from the enforcers whose decisions contributed to competition policy last year and will affect competition policy in the years to come.

Let me introduce to you our panel: Bill Baer, the Assistant Attorney General for the United States Department of Justice's Antitrust Division, and soon to have perhaps some other even fancier titles; Edith Ramirez, Chairwoman of the United States Federal Trade Commission; Margrethe Vestager, Commissioner for Competition, European Commission; John Pecman, Commissioner of Competition, Canadian Competition Bureau; Vic Domen, Chair, Multistate Antitrust Task Force, National Association of Attorneys General; and to my immediate right, Brian Henry—no, we are not related, nor is he my husband—who is going to help me here with questions. Brian is in-house with Coca-Cola and he is the Vice President and Senior Managing Counsel at Coca-Cola in Atlanta, and he is also the Program Officer for the Antitrust Section.

* This Roundtable has been edited for publication.

1 Mr. Baer was named Acting Associate Attorney General on April 17, 2016.
I would like to start off. We would like to give each of you an opportunity to tell us what we should be sure to remember and what we can anticipate in the year to come. Feel free to discuss what you see as the most important issues facing us today in the world of antitrust and, perhaps, offer a glimpse of your top priorities.

I will start with you, Bill.

BILL BAER: Thanks, Roxann. It is a pleasure to be here again and to be on the dais with the Henry siblings [Laughter] and four co-enforcers, colleagues and friends. I must say, working with these four over the period of time I have been in this position has been extraordinary. They are terrific people and committed—committed to making antitrust work to make markets work.

I want to thank the Attorney General, Loretta Lynch. Those of you who were here on Wednesday at lunch had a chance to hear her talk about how “liberty and justice for all” really involves a strong element of economic justice. That is a key part—it is the core mission—of what we do, all of us, as enforcers. When is the last time you had an antitrust speech by a government official that made no mention of Herfindahls or GUPPIs or leniency or cooperation discounts? She really captured the poetry of the work we do.

But it is my job to do a little of the prose. So let me move on to that.

Every Friday of the Spring Meeting we put up an annual newsletter. That is online as of this morning. A lot of the details of the last year—and, indeed, what we have done during the Obama Administration—will be there. Let me just hit a couple of highlights.

On merger enforcement, we have talked a lot in recent weeks regarding our need to be prepared to challenge problematic deals. We are skeptical about proposed remedies that don’t go far enough, as our enforcement record shows. We ran the numbers on merger enforcement this week. In the last seven years, the Obama Administration forced the abandonment of or blocked some 32 mergers. There were only ten mergers abandoned or blocked in the prior administration.

You can look at what just happened in the last year to see this approach in greater detail: Comcast/Time Warner; the Electrolux/GE matter; Applied Materials/Tokyo; the tuna merger, Chicken of the Sea and Bumble Bee.

Our work continues. We challenged United’s monopolization of slots in Newark. Just this week United abandoned its effort to acquire even more slots than the 73 percent it held. We had worked with the FAA. One of the reasons United abandoned was the fact that the FAA, having taken a close look at the need for slots in Newark, which were the means United was using to bolster its monopoly, decided they were not needed anymore. That will open up that critical airport to a whole lot more low-cost carrier competition.

We continue to be active on the civil conduct side. Probably the highlight this year was, finally, getting finality in the Apple e-Books matter, something that Vic Domen and 35 states worked so closely with us on. Cert. denial meant that another $400 million in credits for people injured by the conspiracy was added on to the $160-or-so million already paid. That means for each best-selling e-Book affected by this conspiracy, e-Book customers are getting a credit of over $6.00.

We continue to be active on the criminal side too. In this administration we have assessed criminal penalties of over $8.5 billion, $3.6 billion of that in fiscal year 2015, which was largely due to our efforts in the foreign currency exchange conspiracy. During this administration, we have indicted over 425 individuals and 144 companies. We have increased the average jail term from less than a year in the period from 1990 to 1999 to over 24 months in the current decade, driving home the notion that there is a penalty for individuals as well as for companies who join a cartel.
Securing the economic justice that the Attorney General talked about, however, means more than just pursuing law violators. It means helping promote public policy that encourages competition, that removes restraints from competition, and so we partner domestically with DOT, the FCC, the FAA, the Department of Defense, and many other agencies, state, federal, and international. We all work to be a team in terms of trying to promote a coordinated approach to law enforcement, developing shared analytics, furthering substantive convergence, and agreeing on key principles of procedural fairness.

Those should give everyone, in a fairly short snippet, a sense of where we are at the Antitrust Division, what we have done, and where we see our priorities going forward.

**MS. HENRY:** Thank you, Bill. Edith?

**EDITH RAMIREZ:** Let me start by saying that I am delighted to be here and especially pleased to be here on stage with close friends and colleagues. I also want to thank Roxann and Brian for moderating this discussion.

I also want to take this opportunity to express my deep gratitude to the FTC staff, who work so hard to ensure that we have a competitive marketplace and that consumers have access to accurate and truthful information.

The FTC has had an incredibly busy year since I was here with you last April. We also issued our “Highlights of 2015,” which were posted on the FTC website on Wednesday.

Let me also acknowledge my colleagues at the Commission, Commissioners Maureen Olshan and Terrell McSweeny. Commissioner McSweeny is here with us this morning.

I also want to mention Commissioner Julie Brill, who, as many of you know, stepped down last week. She has really been a terrific colleague and an ardent advocate for both competition and for consumer protection and made many contributions, especially in the areas of privacy and data security.

Last August, Commissioner Josh Wright also left the Commission. Like Julie, he contributed a great deal to the FTC with his perspective as both an economist and as an attorney.

Let me now turn to a few core highlights of both what the Commission has been doing and what the coming year will hold.

I will start with the importance of vigorous enforcement. As I discuss this subject I want to take the opportunity to celebrate the memory of Commissioner Tom Rosch, who passed away last week. He left a lasting mark on the Commission in many ways, but perhaps mostly because of his perspective as a highly experienced trial and antitrust attorney. He really felt that it was important for the agency to be ready to go to trial to most effectively preserve competition and protect consumers. He also felt it was important that as an agency, we not be afraid of litigating challenging cases, even if there is a risk of losing. I think that those sentiments capture the approach the agency has been taking over the last year. I will just touch on a few key highlights.

That includes *Sysco/US Foods* last year, where we were successful in getting a preliminary injunction temporarily stopping the proposed merger between the two largest broadline food distributors in the country. Ultimately the parties abandoned that transaction.

We also had an important settlement on the conduct side in the Cephalon pay-for-delay matter on the eve of trial. We obtained a significant $1.2 billion settlement that will not only ensure that Teva, the parent company of Cephalon, will not engage in anticompetitive reverse payments, but also sent a strong signal that we are going to be vigorously ensuring that the pharmaceutical industry operates in a competitive manner.
Currently, the agency is in the middle of litigating four significant merger challenges: Staples/Office Depot and three hospital merger challenges. I think this reflects the significant effort that we are making to ensure we do our job promoting competition.

On the consumer protection side, we recently filed a lawsuit against Volkswagen alleging that it deceived consumers in connection with its advertising campaign for supposedly “clean diesel” VWs and Audis. In fact, Volkswagen had apparently fitted more than 550,000 cars with illegal emission defeat devices designed to mask high emissions during government tests. The Department of Justice has filed litigation to address the environmental aspects of that case, while our focus is on consumer redress for affected consumers.

We also brought an action recently against DeVry University in connection with deceptive recruitment claims. We want to ensure that prospective students have accurate information before enrolling.

Those matters give you a sense of our recent enforcement work. I now want to touch briefly on a couple of other dimensions of our work.

We are continuing to ensure that we stay on top of new developments when it comes to technology, including disruptive technologies and new business models. That includes significant work in the area of privacy and data security, as well as monitoring the marketplace when it comes to false advertising claims like the VW and DeVry matters.

And also, of course, the significant research and policy work that the agency engages in. Last year we held a workshop on the sharing economy; we hope to issue a report on that in the coming months.

We also formed an office that we call OTECH—Office of Technology, Research, and Investigation—where we are bringing together attorneys and technologists to work side by side to address how technology is transforming the way consumers interact with the marketplace.

Finally, let me just say a word about the importance of our international engagement. For example, during our Staples/Office Depot investigation, we worked closely with both the European Commission as well as with our Canadian neighbors.

Let me also emphasize the importance of the states. They are terrific partners, and often prove essential in many of our cases, including, in particular, our healthcare provider merger work. I want to really express my gratitude to them. Over the past year, on the competition side, I believe we engaged with nearly every single state on at least one matter.

Finally, I want to recognize the close working relationship with Bill and his colleagues at ICN, OECD, and other fora, when addressing the importance of issues like procedural fairness and promoting strengthened relationships and greater cooperation among competition agencies globally.

—Edith Ramirez

MS. HENRY: Thank you. Margrethe?

MARGRETHE VESTAGER: Thank you for welcoming me. It is a real pleasure to be here and to see you as an audience. That's amazing. You must have emptied every office not only here but I know also in Brussels.

I think one of the really promising things is also to meet colleagues from a number of different jurisdictions. This is a global audience, and I think that is very good news because it is not only an occasion to watch us. It will be over—I know it will be long, but it will be over eventually—and you can get on with what I think is most important here, the ability to network, to discuss, to exchange. I think it is more important than ever.
Coming from Brussels and living in Brussels, I think everyone here who knows the city shares with me the profound sadness for the victims of the attack, people being hurt and murdered in the most brutal way. I think the best way to stand up against this is to stand together. If the perverse idea is to make us afraid of our neighbor, the best thing that we can do is to make sure that we get to talk, get to solve our problems, and get to cooperate in still better ways.

That can, of course, seem a paradox when it is all about competition. But also, to enable competition and to make markets work is a question of cooperation. This is another reason why I am so happy to be here with colleagues—and now in my second year for real—because we have had real cases to deal with, and I think that we have dealt with them in ways that have served our communities and served our citizens.

One of the things that I am picking up quite a lot is merger activities. 2015 was the highest since 2007; it picked up more than 20 percent. And not only are the numbers increasing, but also the complexity of merger cases. The 2015 year marked 11 in-depth investigations, which is a very high number for us. Those also were cases where we have shared information with colleagues globally. I think it also shows the strength, that this is for real, that in some of the in-depth investigations, which are difficult and challenging for everyone, we also share some of the analysis. I think that this is a trend that will last, that we will still see more mergers and they will still be complex.

If I should single out one area, I think I will elaborate on what Edith just mentioned, which is, of course, the tech and the mobile telephony sector. What is important for us is, of course, not the number of players in the market, but the consumers—what will be the post-merger competitive situation. As far as I know, I still think, from the cases and from the evidence that we have, that vibrant competition is the best thing to spur not only innovation but also investment. These are areas which are forming our society.

I very much admire what you do, Edith, in bringing people together in order to analyze, because these are fast-moving markets. For us the challenge is not to get new legislation or new regulation; it is to keep up analytically and in our tools to follow these developments. In that I think we can also learn a great deal from one another.

On the antitrust and cartel front, we took steps forward in a number of investigations. You may have heard of the cases that we have with Google and Gazprom. They are moving forward, of course.

But maybe there are some other things that do not raise so much attention. I think as importantly, or at least important, we have also closed a number of investigations. One is the cement industry investigation. The other one I will mention is the investment banks in the CDS probe. The reason why I mention this is because I think it is important also to be able to close cases. If you do not have sufficient evidence, then you do not have sufficient evidence, and you should close the case and get it over with in order also for these businesses to move on. I think that also strengthens the trust that when we do open cases and pursue cases that we have the evidence to make it a strong case.

One thing where we are maybe unique in the European Union is when we control state aid. It is not a novelty. I know some may think that this is something that we just invented. That is just another proof that good news travels very slowly sometimes.

In the European Union this has been done since 1957. Since 1957 the Treaty rules have outlawed government handouts that distort competition. For us there is an inherent illogic in building up an internal market, pursuing cartels, antitrust, do the merger control, if then, with the other hand, we could see that one government could hand out favors to specific companies that were not open to other companies. So for us this is part and parcel of enabling the markets to work.
Governments have the responsibility to comply with these rules. But maybe a prudent company would like to check the compliance with EU law if they think that they get a benefit. You know that what we are after is selectivity, if something is open for one company but not open to other companies or to the rest of the sector or to other sectors.

It may well be too banal, but in my experience if things seem too good to be true, very often they are not. I think that is also important food for thought. Yes, we have the legality of every question, and we have the very fine-print arguments, which is all very important. But we also have common sense. If things are too good to be true, very often they are not.

Winding up, specifically, we take more than 500 state-aid decisions every year. Some of these decisions say, “This is a no-aid question, go ahead”; or we say, “This is aid, but it is compatible with our Treaty, so go ahead”; or we say, “Oh, you didn’t get to notify the state aid; actually it’s illegal state aid, so you have to recover from the beneficiaries.”

One of our top priorities right now for enforcing state-aid rules is corporate taxation. We have intensified our scrutiny of tax measures. The thing is that a tax ruling by a government to a company can be 100 percent legitimate; it can be absolutely fine. No questions to be asked—it is compliant; it is as it should be. But the thing is that a tax ruling can also be a tool to enable a company to pay significantly less in taxes than the rest of companies in the Community. That, of course, distorts the playing field. You may compete door-to-door for the same customer on quality, price, services of your product, but one company pays the taxes that it is supposed to and the other company gets organized not to do that. That is not, in our opinion, fair competition.

In 2015 we adopted the first tax-ruling decisions concerning Luxembourg’s treatment of Fiat; the Netherlands’ tax treatment of Starbucks; and what they have in Belgium, the so-called excess profits scheme. This last scheme benefited 35 multinationals, mainly Europeans. In line with longstanding principles, these benefits have to be recovered. It is not a punishment; it is just for taxes not being paid to be paid. In the latest case, it is a question of €750 million (something like that), more than 60 percent of that from European companies.

All Member States in question have lodged appeals. That, of course, is part of our checks and balances. We can take decisions—they may be negative; they may require recovery—and then Member States can go to court. This, of course, means that this will remain with us in the time to come. We have important pending investigations, so this will remain high on the agenda also for next year. That, of course, is a specialty with us. But I know, having been here nine days, that it is an area that is followed very closely by U.S. colleagues.

MS. HENRY: Thank you. Let me mention, in connection with the getting together of folks from many jurisdictions, we have over 700 people from outside the United States attending this meeting, and we have 42 foreign enforcers attending the meeting.

John?

JOHN PECMAN: Thank you, Roxann. It is a privilege to be here on the stage with the top enforcers and my colleagues on the international front doing a lot of good work together.

In Canada we participate quite heavily in this conference. It is an annual rite of passage. You will see a lot of heavy heads and depressed people. For the first time in a long time there is not a single Canadian hockey team that is going into the playoffs. [Laughter] So again, a little bit of depression.

I was speaking with Andreas Mundt, who is, as most people know, the chair of the Steering Group for the ICN. He was trying to cheer me up. He said, “Canada is very fortunate. There are
over 120 agencies that could have been on this stage and you were chosen. You should take that as something very important.” So I take that not quite as a Stanley Cup, but I welcome the opportunity to talk about what we are doing in Canada in terms of promoting competition.

I also want to highlight the fact that one of the reasons I would say Canada does deserve to be on this stage is all the fine work that Canadian lawyers do with the ABA. There are a number of ABA committees that Canadian lawyers are participating on.

With respect to the agencies, Canada and the United States, as major trading partners, do a lot of joint and parallel investigations together. Our teams are very close. This relationship between Canada and the United States, again, bodes well for Canada to be participating in an event in which we are talking about competition internationally.

I just wanted to let Andreas know that I am grateful for his pick-me-up, but I would rather have my hockey team in the playoffs. [Laughter]

What is happening in Canada? We have a new government, as many of you know, espousing sunny ways, positive politics, and more transparent and open governance. It resonates with our organization. For a number of years now we have tried to become more open, more transparent, and more collaborative in our approach, to knock down the silos of a traditional law enforcement agency.

We have gone through some fairly significant transformations over the last a couple of years in terms of our internal organization. We have restructured, increased delegation; we have a huge amount of horizontal governance committees now; and we are, for the first time, engaged in integrated planning, trying to work as one bureau, as opposed to four or five disparate units within the organization and not communicating properly with the outside community.

Combine that with a change in enforcement philosophy. Canada is also trying to work a bit more horizontally on its enforcement work. What that means is we are trying to resolve matters without having to proceed to litigation or using full enforcement tools.

We recently put out a guideline, The Competition and Compliance Framework, which sets out the spectrum of how we advance our investigations, often starting with an education piece, advocacy, and outreach; and then going through the different levels of enforcement—the light touch, voluntary agreements, then ending up in the Tribunal.

So, many of you are thinking, “Canada has gone soft on enforcement.” I assure you that this is absolutely not the case. I grew up in the organization as a case handler. I have taken many cases forward before the Tribunal and the courts. The numbers speak for themselves. I don’t think our Competition Tribunal has been any busier. Currently there are four litigated cases. We also have 14 cases before the courts, whether they are cartels or deceptive marketing practices. That is our stick. That is going to encourage people to work more cooperatively with us.

And we have had a lot of success in terms of resolving matters through consensual proceedings. We have had eight guilty pleas for cartel orders, four consent orders for deceptive marketing practices, 19 alternative case resolutions on our consumer protection side, and seven mergers resolved through consensual orders from our Tribunal. We also had one with our Monopolistic Practices Branch and three alternative case resolutions.

So the numbers on resolving outside of litigation are increasing. We are pleased with that. That is where we want to be. We think it is a lot more efficient than spending our time trying to collect for damages that took place many years ago through costly litigation.

The crown jewel of our reorganization has been what we call our Competition Promotion Branch. It has multiple functions, primarily dealing with advocacy. We have been active on the disruptive technology side, advocating for ride-sharing services, and have had some success on that. I would like to talk a bit about that a bit later.
We have put out revised intellectual property enforcement guidelines, following significant consultation. We were listening. We heard from the key stakeholders who participate in the market. We took the great advice, for the most part, of participants, such as the Canadian Bar Association, the American Bar Association, the George Mason University Global Antitrust Institute, and a whole host of other contributors. We wanted to get it right.

It is a difficult area. Canada does not have a lot of case law in this area. So we benchmarked internationally and took the advice from people who are playing in the field. That was a starting point. It is a living document. As we proceed to get case law in Canada and watch these issues evolve elsewhere, we will be making changes. So the Intellectual Property Enforcement Guidelines (IPEGs) are important.

Also, our Corporate Compliance Guidance that we put out last year. I strongly believe the agencies have an important role to promote incentives for companies to do the right thing before the damage is done to the economy. So I am a big believer in corporate compliance programs.

We have set up not only advice through our bulletins, but a permanent Compliance Unit that is headed by a director who has now had some training from the Society of Corporate Compliance and Ethics. She has her designation. She is also doing a roadshow across the country with small and medium-sized businesses, informing them of what competition is, what the competition acts are, the dos and the don'ts, and providing them with some basics on corporate compliance. We think this is an important investment and plan on continuing to do that. I think the prevention side of our business is just as important—in fact, more important—than the enforcement side. They go hand in hand, I understand. We are going to continue to do that.

In terms of some things that are happening at the highest levels—I’ll talk about some of the cases later today—we are working closely with Public Works and Government Services Canada, Canada’s largest government procurer, to develop a screening program on bids, to try to do some early detection on potential bid rigging. We are benchmarking off the Korea Fair Trade Commission (KFTC) and other jurisdictions that have had some success in deterring, investigating, and prosecuting bid rigging through these detection and screening centers we have set up, where your investigators can actually start your investigation by noticing patterns that just don’t make a lot of sense.

Lastly, we have developed a three-year strategic plan. Again, that was based on some consultation. We will be putting out our annual plan, which provides the direction for our organization for the coming year in May. Again, we will be welcoming public comment to help us with our direction going forward.

MS. HENRY: Thank you, John. I will take this opportunity to thank all of the Canadians who are working on behalf of the Section. But I also want to note that we have over 60 different jurisdictions attending the meeting, and many of those jurisdictions also are contributing to the work of the Section. I want to thank them as well.

Vic?

VICTOR DOMEN: First, I would like to thank Roxann and Brian and the Section for having us here. As you know, the advantage of working with state governments is that I have 50 bosses. I am going to do my best not to forget any of them as I am naming names and going through some of their proceedings. Once again, thank you to the Section for having us. We do appreciate it.

As many of you know, this is actually the 31st birthday of the Task Force. It was formed in an effort to really allow the states to pool our resources and work together. As many of you would
imagine our resources can be somewhat limited. In a small state, such as mine, we have several folks who can work on a matter, but we do not have the breadth or depth of knowledge or in fact the resources to do many things exhaustively. So the Task Force was key in allowing us to work collectively on multistate matters, on amicus matters, in addition to just being able to share ideas and thoughts.

I do have to thank my predecessor, Kathleen Foote. She served for the last three years. She has helped me with the transition into this new role. I have seen her in the audience. She has added some invaluable advice to aid me in my new role. I do appreciate that.

In addition, throughout the week I have seen other Antitrust Task Force chairs—Kevin O’Connor and Bob Hubbard and Trish Conners. They have all been of great help to me as I have transitioned into the new role. As I said, having 50 bosses can be tricky.

One of the things that I wanted to point out, though, is when I mention 50 bosses that is a key that I think everyone needs to remember. You have 50 sovereigns, and the District of Columbia as well and a few other territories. So we don’t always agree on certain things. But in many ways we do. The Task Force is the vehicle we can use to work together on various matters. Now, sometimes what that means is that you may begin an investigation with 35 states and in the end the investigation closes or only 20 sign on to the complaint. But I wouldn’t read too much into that to think that we are not working cooperatively.

I do also have to thank both the Department of Justice and the Federal Trade Commission for the wonderful relationships that we have had with them. I think the collaborations that we have had show that the relationships have never been better.

I think with the Department of Justice the recent cert. denial in e-Books demonstrates the work that can be done with all of the federal agencies and the state agencies. As Bill Baer mentioned, there is going to be over $400 million being distributed to consumers. The states will actually be the ones working through the logistics of that. That is the fun part. But I think that it really will not be that difficult and we will be able to return some funds and money to those consumers who purchased electronic books.

In addition, our relationship with the Federal Trade Commission has been a wonderful one. As Edith Ramirez mentioned, in many cases when we are working on, in particular, hospital matters, which I will mention later, the states do not have the resources. We do not necessarily have the economic experts on staff. We are in desperate need of some of the help that we can get, because in many healthcare and hospital matters it is an individual or local investigation, and one or two people in an office in Tennessee certainly cannot tackle or bring enough resources to bear against an audience such as this. So we do need the additional help, and we certainly appreciate that.

Another example of our work with the FTC, of course, is in the Sysco/US Foods merger. I think that the ability and help that the states could provide on the local level was of much use and added some value to the investigation and the ultimate decision by the court.

As I said, I do not want to ignore some of the more specific state activity that we have had. I think many of you have seen and read some of these. But let me just briefly mention some of them:

- As you know, New York has settled its Namenda product-hopping case. It also brought a settlement with United Healthcare regarding institutional special-needs trusts.
- California had a settlement with an Indian firm related to pirated software.
- Maryland, after the decision in Leegin, decided to pass a state RPM law and has brought a case under that state law. We will see how that turns out. It is in the contact lens industry.
- We have also had settlements in some bid-rigging cases in Connecticut, Oregon, Michigan, and Puerto Rico.
To briefly sum up, I want to point out two of the major areas that I think our focus will continue to be in.

Healthcare: There is no doubt that it is on the forefront of the minds of our attorneys general, of our governors, our state government, our legislatures. Therefore, healthcare matters are always going to be there for us.

As the Affordable Care Act matures, consolidation appears to be the path that many providers and payers have chosen. But whether that is necessary to achieve effective, quality healthcare, but also maintain competitive markets, is an open question that we are going to always look into.

The second major focus is one that we did not anticipate, although we did have a sense of it a year ago. That is the impact of NC Dental. I will talk a little bit later about the impact of that decision on state government, on the attorneys general’s offices, on our legislators and governors.

In conclusion, on behalf of the state enforcers, we are going to welcome the new challenges, and we enjoy the collaboration not only among ourselves but with the other enforcers here on the panel.

Thank you.

MS. HENRY: Thank you, Vic.

I would like to turn to cartel enforcement as our first topic here. Bill, you had an impressive record year on fines, higher than $3.6 billion last fiscal year. What are your expectations for the future?

MR. BAER: To lower your expectations. [Laughter]

We do track results—we all do—year by year by year. But as antitrust lawyers, we should all understand that we are talking about markets where the sales are lumpy. If you look at this issue from an enforcers’ point of view, we act, both in our civil matters and our cartel enforcement, when we are ready to act. It turned out that during this past year, largely because of the foreign currency exchange matters, we obtained some huge settlements.

We will have many cases to bring this year and next year. Some of them may involve smaller dollars of commerce.

We have talked a lot about the poster art case we brought, where rival companies agreed to fix their prices by using the algorithms that determine prices for online sales of their products. That was a small volume-of-commerce case but a huge one in terms of sending a signal to the markets that you cannot take the old-fashioned crime and put it in an algorithm and expect a different result.

I do not know where we are going to be with regard to fines and penalties over the next year or two. I do expect—we all should expect—that they will go up and down as the volume of commerce changes and matters get resolved in a particular calendar or fiscal year. That said I am guilty of touting the years when we have had record levels. I will concede that.

MS. HENRY: Margrethe, in the European Union the fine levels actually were relatively low this year compared to, certainly, some of your earlier years. Should we read anything into that? Is it that you have conquered the issue on compliance, or is it an administrative delay? Do you have any thoughts?

MS. VESTAGER: Well, at least it is proof that, even though we need the money, we don’t take them if we can’t.

I think there is a deep truth in what Bill is saying here. Basically, it is very hard to use a calendar year to show anything sensible in this respect. If you look back at just the last five years, you
would find that one year you had five filing decisions and that gave a total of €1.8 billion and a couple of years later you had ten decisions and it gave a total of just €1.6 billion. So even though you doubled the number of decisions, you didn't increase the level of fines measured in euros.

I think what is important here is to see if we basically cover the ground. What I can see in the decisions taken over the years is that we have been in the financial markets, we have been in automotive, we have been in ICT, we have been in food—hopefully showing that there is zero tolerance, that there is no sector which is safely left alone to cartelize. I think that is the point.

Second, since we do not announce our inspections in advance, I think it is very hard—and that is how it is supposed to be—for the outsiders to judge what is in the pipeline. Eventually, the level of fines will depend on the number of decisions, the goods in question, and the value of those goods in question. I think that the thing to look at is whether we are thorough when we work, much more than the level of fines.

I think even some of the smaller cartels are very important also because of the advocacy. Sometimes a smaller sum is much easier to grasp, for citizens to say: “Well, someone is looking after us. Someone is making sure that they don’t do their deals in the back office.” In that respect, I think also the smaller fines play a very important role, both in enforcing but, of course, also as a deterrent.

**MS. HENRY:** I have to agree with that.

Bill, the Yates Memo was put out by the Department of Justice. I am going to mutilate it a little bit to compress it into a concept. One of the key issues there is focusing on the individuals as well as the corporations. And of course, in the United States we definitely have had a focus on individuals in the Antitrust Division; for many years it has been a key priority. Do you see the Yates Memo changing much for the Antitrust Division?

**MR. BAER:** First, individual accountability in our view—and that's department-wide—is core to prevention, to detection, to prosecution, and to deterrence of crimes. Obviously, antitrust crimes fit well within the category of crimes where individual accountability for corporate wrongdoing is appropriate.

We have had success in holding individuals accountable. I think, for those of you in the audience who are involved in this area of cartel enforcement, there is nothing more sobering—or, perhaps, intoxicating in a different sense—for an executive than to find out that he or she might be held accountable, individually accountable, for corporate wrongdoing. When I have counseled or been involved in internal investigations, it was obvious that the presence of individual, not just corporate, consequences to the offense actually ups the ante. So it is incredibly important.

What we are doing now, in addition to what we have done before, is making sure that in all of our prosecution memos when we are about to reach a resolution or indict a company, we have a list and a plan of action as to all the individuals involved. Over the past six or seven years, we have held accountable more than two individuals for each corporation that we have charged and with which we have settled.

We have done less of this on the civil side. But we also are looking very hard at situations where senior execs are knowingly involved in civil wrongdoing. Again, the message that you might be named because you were a participant in antitrust wrongdoing is, I think, the most powerful general deterrent for other companies and their executives to make sure they are doing both the training and the compliance needed to ensure that the antitrust laws of the United States are complied with.
BRIAN HENRY: Let’s drill down on mergers, a very important topic for all of the clients of the lawyers in the room here today. It has been a big week for mergers. The DOJ just announced a challenge to the Halliburton/Hughes deal. Attorney General Lynch spoke to the Section on Wednesday about the importance of the Department of Justice’s merger enforcement efforts.

Do you have any message to the business community regarding what appears to be a seemingly significant optimism for getting strategic competitive deals cleared by the agencies?

MR. BAER: I was up on the Hill, and Senator Blumenthal talked about the merger wave these days being a tsunami. I think there is something to that.

Loretta Lynch talked about the numbers. If you look at the deals valued at $10 billion or more, they have doubled just in the last year. And, as Margrethe said, the complexity of these deals is increasing as well.

Are there lessons to be learned from the enforcement actions we have taken, and will be taking? Yes, there are. Obviously, we are serious about suing to block deals that we think pose a risk to competition. The more complex, the more markets involved, the more important a task this becomes.

Another lesson is do not get lost in the weeds as you are advising your clients about the antitrust merits. We are looking at individual pieces, but we are also looking at the overall picture. We are taking a static look at the market today, but we are taking a forward-looking view of what is going on. There is some literature out there suggesting that markets in the United States are getting more concentrated, that corporate margins are going up, and that we are getting less competition and innovation than we have had before. So, it seems, we have work to do still.

Another lesson: Sellers should think long and hard about merging with a competitor if we actually are as committed to enforcement as the people on this dais say they are. Do you really want to put yourself in play that long? Is a reverse breakup fee going to be enough to compensate for the damage you have done to shareholder value, to worker morale, to the future of the company?

Settlement: People think if there was a settlement in a $4 million case that involved one little local market, that principle can be generalized to mergers involving multiple markets all around the world, in hundreds of geographic areas. It doesn’t work that way. That is looking at the weeds and missing the whole picture. The great advocate Groucho Marx once said: “Your Honor, who are you going to believe, me or your own two eyes?” [Laughter]

I think there is a need for some reality therapy about looking at the reality of competition in the marketplace and not the theoretical arguments that could be advanced to enforcers in an effort to get us to approve a deal. We are looking with both eyes and using all of our tools to go hard against those transactions that we think put the American economy and the American consumer at risk.

MS. HENRY: Edith, any comment or reaction on the FTC front?

MS. RAMIREZ: I share many of the same sentiments that Bill has just conveyed. Let me add that anyone who is contemplating a deal that raises antitrust risks absolutely needs to expect a very serious look by the antitrust agencies.

I also want to emphasize the point about proposed fixes that might be put on the table by the parties. We recently litigated a proposed fix in Sysco/US Foods. There you had a proposed combination of the two largest food service distributors, which offered a proposed fix that involved divesting 11 distribution centers to the third-largest distributor, PFG. The parties argued that the
divestiture would create a new national competitor that would restore the competition that would have otherwise been lost as a result of the merger. We took a hard look at that, but we ultimately disagreed and moved forward with the challenge. And the federal court agreed with us.

We are going to be taking a very serious look at what is put on the table. If we do not believe that it addresses our competitive concerns, we are absolutely going to go to the mat and pursue a challenge in court.

At the same time, I think it is also important that we not overemphasize the victories and the cases that go to trial. We want to get these calls right. One example involves the office supplies industry. Back in 1997 we challenged Staples/Office Depot, but then in 2013 we looked at the Office Depot/OfficeMax combination and found that market conditions had changed and we allowed that deal to go forward. But that did not mean that we were going to just stand by if our investigation showed that a merger between Staples and Office Depot would likely result in competitive harm. The Commission therefore moved forward with a complaint.

So we are looking at these deals very closely and want to make sure we get things right. I think it is important not to just tout the moments when we take action, but also to tout the moments when we close investigations and allow a transaction to move forward. Our aim is to allow deals that are procompetitive or competitively neutral to go forward, and we are really only looking to identify those deals that can harm competition and consumers.

**Mr. Henry:** Margrethe, in a recent interview, you indicated the possibility of exploring changes to the merger review processes in the European Union. Can you comment on what is motivating those potential changes and what those changes may be?

**Ms. Vestager:** First of all, to echo my colleagues here, that merger control is for real. I think you can do clients a great favor by preparing thoroughly. If you, yourself, think that there may be a competition issue, then prepare for how to solve it. Even in my short experience I have seen things moving forward where you initially may have thought from the first glimpse of it, “Oh, this is going to be very, very difficult.” And then you meet very prepared parties who have thought it through and who respect the markets and say, “Well, if this is going to work for the future, so the post-merger situation is so procompetitive or competitively neutral, then we will do this and that.” That, of course, makes cooperation very, very smooth.

We work with deadlines. We hope this is helpful for businesses to know what will be the procedure and when can they move on. Those deadlines are easily held to when we have very smooth and very well-prepared cooperation with the parties.

What I can see from the stats is, as a thumb rule, 90 percent of our mergers are cleared like that; 9 percent would be cleared with remedies; and 1 percent, or even less, will be prohibited.

My thinking is that maybe we can let more mergers just move on easily. In other areas we use block exemptions. I would very much like to hear your thoughts as to whether we can move on in that line of thinking to block exempt something in order for businesses just to get a pass-through.

Second, we have been considering minority control or if there are issues of minority shareholding that we ought to look at. We still have a study pending to look at this in the Member States that actually have minority shareholding control. So far, I cannot see a balanced way of proceeding in that line of thinking. I think the amount of red tape or the administrative burden you would put on businesses would not give you the benefit of a more competitive market.

But then new things emerge. I think that is one of the good things of coming together to share that. We also are considering: How can we deal with, for instance, in pharma mergers, where the
products are not yet a cash cow but the potential is there, and maybe the merger is in the very early stages of product development but it will change the market eventually. The same goes for some of the data issues. Also here we may need to think ahead in order to make sure that we get the right cases notified.

These cases may escape our normal way of thinking and our thresholds, but they may be extremely important as to how the market will develop. In that I think maybe, if we can think this through together, we can enable some mergers to pass through very easily and get the right mergers onboard and do a thorough investigation in order to make sure that citizens can enjoy competitive markets also post-merger.

**MR. HENRY**: Vic, what is happening with state enforcement in the merger world these days? Looking into your crystal ball, any comments?

**MR. DOMEN**: I don’t know that I would say there are things that we should look to in the crystal ball. But I think, returning to one of the earlier points, one of the keys to keep in mind for businesses is to really consider the potential local and regional effect of a merger.

The states can provide a more specialized review of a merger. While our federal counterparts certainly have the expertise to look at the impact of a merger on the national level, the states have that regional touch and can be able to do some things. We add value to some of these things. We certainly can help with the division of labor in some of these merger reviews. We can focus on local accounts while our federal counterparts look at national accounts.

We also, for your businesses if you are considering this, recognize that we often have special access to the witnesses and information. If a telephone call comes from a 202 Area Code to somewhere in Tennessee, it may not be answered. It may roll right to voicemail. [Laughter] So you may want to call the attorney general’s office first. I think that a call from our office to someone in Nashville or Memphis might be a little more effective.

Remember that the impact on a local economy is really felt. Other than that, the other thing that I think the states do, which can sometimes be lost, is that we are often the agency or the entity that is there for the post-merger enforcement. Oftentimes, after mergers are reviewed you move on to the next case. But the states themselves are the ones that usually deal with the post-merger effects of that merger.

**MR. HENRY**: John, there is a substantial amount of coordination that goes on amongst antitrust agencies in the transaction area. How does Canada participate in those cooperative endeavors? Do you have any recommendations on getting deals cleared in multiple jurisdictions, including Canada?

**MR. PECMAN**: Before I get there, I would like to comment on the environment in Canada. It is pretty much the same. We have a high number of mergers. We have had 215 or so notified deals. So it is about the standard.

But what we are seeing is the complexity of the deals. The strategic mergers are taking up a lot of our time. I just have to look at the overtime bill from my staff who are working 24/7, through the weekend.

We issued 18 secondary information requests. Those, of course, are transactions that we have to look at in depth.

We have also had a Supreme Court of Canada decision in Tervita—a small file; it’s not even notifiable—involving a hazardous waste site. Ultimately, the Supreme Court of Canada overturned the
Tribunal decision to block the deal on the basis of the efficiency defense, which is fairly unique to Canada. The Commissioner had not provided quantifiable evidence of the economic harm of the deal. Therefore, the few efficiencies that were available from the transaction outweighed the economic harm and the deal was allowed to proceed.

The lesson for us and for the legal community was there is a requirement now on the Commissioner to provide quantifiable evidence of economic harm where there is an efficiency claim. This has changed our working environment to a certain extent, in that we are seeking pricing data from problematic transactions where efficiency claims are being made. So there have been a lot more formal information requests, subpoenas, and whatnot, asking for information from third parties to help us estimate the demand so we can do the calculations to determine whether or not the efficiencies outweigh the deadweight loss of a transaction.

I just want to contextualize that a bit. I think it is important to know that Canada has moved towards more quantification in its merger work.

We have been working quite a bit with the international community. The ICN and the OECD provide wonderful guidance on setting standards and creating best practices. We do that as well bilaterally. Canada and the United States put out a document a couple of years ago on best practices for merger review enforcement, pretty much like the document that the European Union and the United States put out, to provide guidance on how cross-border transactions will take place. We have seen a proliferation of those.

We work closely with a number of agencies on the different deals where there has been action taken. The most notable is Staples/Office Depot, the first time ever Canada and the United States filed simultaneous challenges to a transaction before a court.

We have one of our Department of Justice lawyers working with the U.S. DOJ in the current proceeding. I have my investigators attending the session. Prior to that, the exchange of information at the working level, in terms of theory of the case, the types of evidence and evaluation that we are each doing, were exchanged. The work is very integrated so that we are using a common approach and that we can coordinate, whether it is on timing, on the settlement, or in terms of dealing with witnesses and how we are going to deal with the witnesses.

It is phenomenal to see where we are—and that is one of the best cases—from where we were many years ago, where you were fortunate to pick up the phone at all and it would take you the entire time of the transaction to figure out who was handling the deal on the other side.

I think we have that relationship with the European Union and many of our important trading partners. Again, it is a credit to the fine work of the ICN to help bring us together and to develop these standards.

In addition to the Office Depot case, the Iron Mountain/Recall transaction is another example of simultaneous settlements across multiple jurisdictions of a problematic deal. I think it was Canada, Australia, and the United States where significant divestitures were attained as the result of a problematic transaction.

There are cases of parties abandoning transactions because of concerns of assets in Canada that also affected the United States. For example, in LP [Louisiana Pacific Corporation]/Ainsworth, we worked closely with the United States. The American authorities had concerns about those assets creating competition problems in the United States and the transaction had problems in Canada. The companies walked away because of our joint efforts to raise the concerns.

All this is to say that on the merger front we have come a long way as an international community. I think when we can start exchanging confidential information and start moving into second-generation arrangements without a waiver—right now there is exchange of confidential infor-
mentation with a waiver—the third-party data and information will help complete the analysis that cannot be exchanged at this point in time. When we get to that stage internationally, I think you will see more synergies and more efficiencies in international merger review.

**MS. HENRY:** I have to ask, do you ever ask third parties to give waivers?

**MR. PECMAN:** We do, we definitely do. But they are often refused because they are concerned about what is going to happen with that information.

**MS. HENRY:** I wanted to pick up on a remark that Margrethe made about big data. Big data is constantly in the news. It is an issue that arises in all aspects of the evaluation of free enterprise and trade. There has been a lot of looking at this. It is a difficult issue. It is coming up more and more frequently in the area of trade regulation and with questions about what to do with it.

Do you see big data playing a role in your market power analysis? Do you see it playing a role in the competition analyses that you are making on transactions, on conduct reviews?

**MS. RAMIREZ:** How about if I jump in? This is an issue that is increasingly being asked in antitrust circles. I think there are a couple of different dimensions to it. One question that arises when we are talking about the role that big data might play in enhancing market power is: Do our existing analytical tools give us an ability to really examine what is happening here? In response to that, I think that the standard analytical framework that we use continues to apply.

In the merger context, the question is: Will the combination of data between these two merging parties create or enhance market power? To answer that question, you need to look at whether the data has unique attributes, whether there are substitutes, how easy or how costly it is for other firms to get access to that data, does the data create some type of unique strategic advantage that then could be exploited in an exclusionary way? Those are the basic questions that we ask all the time as a part of our merger and antitrust analysis.

Shortly after I joined the Commission, we had one particular matter where we were looking at a consummated merger between Dun & Bradstreet and a company called Quality Educational Data (QED). The case involved educational marketing data. In that matter, we concluded that these two firms had unique databases, and we ultimately required a divestiture of one of the databases because it had unique attributes. So there we found that the data did make a competitive difference that we needed to address.

In questions relating to big data that takes the form of consumer information, that was also an issue that the Commission tackled in its review of the Google/DoubleClick merger. That occurred shortly before I joined the Commission. There the Commission used a traditional analysis asking whether the combination of user data that Google has and that DoubleClick was collecting on behalf of its customers created or enhanced market power, raising a competitive concern. The Commission concluded that it did not and allowed the transaction to go forward. But in closing the investigation, the Commission also noted that there was another important consideration arising at the intersection of antitrust and privacy. Some privacy advocates had argued that the transaction should be blocked because the combination of that user data might mean it could potentially be exploited in a way that undermined consumer privacy. The Commission looked at that question and said if privacy is in fact a non-price form of competition that is taking place, then we would be concerned about that. So the theory of harm is there. But the Commission found that the facts really did not support it, and, therefore, it went ahead and cleared the transaction.
I think when looking at this question of big data our existing analytical tools allow us to examine it. But we also have to be open to exploring potential new theories of harm and taking a hard look. I also think it is important, however, that we make sure that, if we identify issues, they are truly competition issues, rather than what might amount to just a privacy question.

A more recent transaction that we allowed to go forward without conditions was Facebook’s acquisition of WhatsApp. There, we did not find there to be a competition problem. But the agency did issue a letter to both Facebook and WhatsApp saying, “Please remember that any promises that you have made about the way that you will handle information are ones we will expect you to fulfill.”

Again, I think it is an interesting question. We are still at an early stage in the way that we are looking at it, and we need to be open to new ways of thinking when it comes to this issue. But at the same time I think it is important to make sure that we work hard to identify whether or not there is a true antitrust or competition problem.

MS. HENRY: Margrethe, would you like to comment?

MS. VESTAGER: I will try to do it briefly because I think Edith very much covered the ground here.

For us, we see that there are two different perspectives: One is whether data protection issues or privacy issues can raise competition problems; and second, whether accumulation of big data can raise concerns.

For the latter, of course, to see that big data can be an asset, and sometimes this asset is very soon over if data do not hold for very long; sometimes it is a true asset, where you have very important things that will enable you to do your business; and, second, as a barrier to entry.

But we must always keep in mind that some of these things are extremely promising as well. Big data can allow markets to develop. They can spur innovation. They can enable new products with different prices, different probabilities. I think sometimes it is important to keep in mind that big data also holds a lot of promise, and not to be scared of it, but to be pragmatic and look at it to see, as they did there, does it raise a concern or doesn’t it?

Then, at the same time, when we say, “This is purely a matter of privacy or data protection, it is not for competition law enforcement,” also recognize that sometimes there may be a gray zone. I think as an example that the German Bundeskartellamt opened a query into Facebook. They look at Facebook’s position in the market and how they handle privacy issues, both from a German legislative point of view but also from an EU point of view.

That will, I think, enable everyone to become wiser in this zone where size and how you handle privacy and data issues may play together. It is not always easy for us to say, “This is strictly one or strictly the other.” Therefore, I think this can be a very valuable contribution to the understanding of the issue.

MR. HENRY: Let’s turn to healthcare and pharma. I’ll ask Edith and Vic to respond. Besides being comedic fodder for The Capitol Steps, the Affordable Care Act has been cited by providers, insurers, and pharmaceutical companies to justify increased transactions, cooperation, and collaboration. Has the ACA changed the way in which the antitrust laws should be applied in the healthcare context?

MS. RAMIREZ: I don’t think that it changes the way that the antitrust law is applied. I think Vic has already alluded to this.
Increasingly we are seeing these arguments being made by healthcare providers that are seeking to consolidate and they want to argue that the only way that they can accomplish the policy objectives of the Affordable Care Act is to merge. In my view, not only does the ACA make it clear that you do not have to necessarily consolidate in order to achieve the policy objectives, but I think it makes it clear that the same antitrust standards continue to apply and, in my view, absolutely need to apply.

I also think the antitrust laws and the policy objectives of the Affordable Care Act are compatible. We have been clear that we will look favorably upon procompetitive collaboration. The antitrust agencies have been saying this for years, in our guidance, speeches, and in our enforcement work. If there are procompetitive collaborations, we are going to take a hard look at those and allow consolidation and collaboration that is procompetitive.

In 2011, following the enactment of the ACA, the antitrust agencies issued guidance on ACOs that explains how ACOs can be formed without running afoul of the antitrust laws. So I think they are perfectly consistent.

At the same time, I am increasingly worried about efforts that I have seen in certain states that seek to immunize certain collaborations or consolidation from antitrust review. While these statutes may have good intentions, I am concerned about their impact because procompetitive collaborations are already permissible under the antitrust laws. As a result, I believe these state laws are going to end up allowing arrangements to go forward that end up being harmful to competition and consumers, and will end up resulting in higher prices and lower-quality healthcare.

Let me just add that, increasingly, we are seeing more and more empirical research showing the consequences of highly concentrated markets in the healthcare arena. The former Director of our Bureau of Economics, Marty Gaynor, along with other academics, published a study last December. They looked at an extensive database of private insurance rates and documented how much greater prices are in highly concentrated markets dominated by one or a small number of competing hospitals. These are very real impacts, and we are certainly going to remain vigilant and wary, in particular, of any efforts to immunize collaborations that are likely to violate the antitrust laws.

MR. DOMEN: I would completely echo what Edith said.

I think that probably the clearest example that the states, and perhaps the FTC, don’t feel this consolidation is the answer are the lawsuits that have been filed. As you know, Pennsylvania joined the FTC in the Hershey/Pinnacle matter. Illinois joined the FTC in the challenge to North Shore/Advocate Health. Right now, on the state level pre-litigation, we know that Minnesota is looking at a merger.

Edith mentioned legislation that is being passed in several states that attempts to, perhaps, immunize some of these relationships. She actually should have just simply said, “Tennessee is one of those examples.” [Laughter]

There is a proposed merger now between 20 hospitals in Tennessee and Virginia. A year ago, during this very conference, following NC Dental, legislation was being moved through the Tennessee General Assembly attempting to immunize the proposed merger. That is going to create challenges for us now because we do have a statute now that perhaps supports these collaborations.

But, as Edith has mentioned, do these collaborations actually result in higher-quality care and lower cost for consumers? Oftentimes those costs are hidden, because you go into your doctor’s office and don’t really notice it because it is pushed through to an insurance company. But, in fact, I think that most of the empirical studies done show that mergers of this type typically result in higher cost and higher prices for consumers in various areas.
So we are going to have to look very closely at that—I think that our state, in particular, as well as Virginia, are going to face those issues now—and try to balance the legislative intent with the competitive impact of a merger like that.

MR. HENRY: Bill, it is hard to pick up a newspaper without seeing articles referencing the high cost of life-saving drugs. Is there an antitrust fix?

MR. BAER: Edith and the FTC handle the non-criminal aspects of pharmaceutical concentration and mergers. To the extent there is a hint of any kind of criminal conspiracy going on, we have been, and will continue to be, involved. Why don’t I turn it over to her to finish that?

MS. RAMIREZ: We are absolutely going to do everything that we can to root out any anticompetitive consolidation or anticompetitive conduct that might lead to price hikes in drug markets. I think we have demonstrated throughout the years our commitment to ensuring that there is a competitive marketplace for pharmaceuticals.

And of course, we continue to focus on anticompetitive patent settlements in the drug area. I mentioned the Cephalon settlement that we entered into last year.

Additionally, just last week we brought a new action against Endo, its development partner, and the generics it settled with, alleging that they entered into pay-for-delay agreements. While we’ve filed amicus briefs addressing the issue in the past, this is the first time we have brought an enforcement action involving what are known as “no authorized generic” agreements, where the branded company agrees not to compete against the generic by introducing an authorized generic. Because competing against an authorized generic can significantly reduce the generic’s profits, we view these agreements as another form of potentially unlawful compensation from the brand to the generic to entice the generic to settle the patent lawsuit and delay generic entry.

But let me also say that, having looked at these issues across the board and for some time now, we encounter instances where drug price hikes are not the result of anticompetitive conduct. When we look closely at them, it turns out that there may be a manufacturing issue, a supply problem, or a shortage of a key ingredient. Consequently, the antitrust laws do not provide a basis for addressing some of the headlines that we have seen over the last year or two about significant price hikes for certain drugs. But we continue to monitor these markets and where there is anticompetitive activity taking place, we will step in.

MS. VESTAGER: I think that is exactly the balance to be held. I think neither of us wants to turn into price regulators, nor to be the ones to put an end to R&D. We are dealing with something where, of course, demand is highly inelastic and it is very often a matter of life and death. So obviously, you need competition to keep prices down. On the other hand, you would like to allow for R&D still to be profitable.

In a market where, even if it is socialized medicine or it is a more private health system, you have a very complex interplay between businesses and regulation and financing in these markets, which is why I think that we definitely have a role to play. Edith mentioned a number of them—the pay-for-delay cases or where authorization has been withdrawn just before the generic entry—all these kinds of damaging things.

At the same time, there is a role for governments and regulators to play here in order to enable affordable healthcare.

MR. HENRY: I will throw this question out to the entire panel. Product hopping and reverse pay-
ments have raised significant issues in the healthcare context. Is there any application of those concepts outside of healthcare?

MR. PECMAN: We do not have them in Canada outside the healthcare area. But we have had a file involving a product where there was a hard drop, or a hard switch if you will, of a patented eye medicine with the pending entry of a generic. We looked at that under our abuse of dominance provisions. We brought it to the attention of the parties. They moved to a soft switch, meaning they would resupply but not promote the product. That allowed the generic to come in. That has been our experience.

Our new IPEGs reflect that would be our approach. We would have some concerns with a hard switch, if the patented drug was just pulled from the market with a pending generic entry to thwart that entry, and we would take action.

But with respect to that type of conduct taking place outside of pharmaceutical drugs, we just have not seen it. In theory it could happen, but we have not seen it on a practical level.

MS. RAMIREZ: I will just add that the issue of reverse payments appears to be limited to the unique context of the regulatory framework. But at a more fundamental level, of course, reverse payments are basically agreements not to compete, and we are going to be worried about those regardless of the context or market.

When it comes to product hopping, again I think you see it more often in the pharmaceutical industry given its unique market context and regulatory framework. Product hopping is an effort to undermine the most cost-effective way of distributing generic drugs. But there, too, the conduct is not entirely unique. There is the Microsoft case where you are talking about product design that could potentially be used in an exclusionary matter. If we encounter that type of behavior in other contexts, we are certainly going to be taking a hard look.

But when we are talking about product hopping or product design more generally, we are, of course, going to be very careful not to do anything that could undermine investment and innovation. These are challenging determinations to make, and we want to be able to strike the proper balance.

MS. HENRY: Turning to another topic, in competition law we love the disruptions, the mavericks, the fighting. We tend to cheer when we have this disruptive technology that is stirring up the environment and stirring up competition and innovation. What do you see if anything, in terms of agency action with regard to the particularly important role of disruptive technologies and innovations?

I will first ask John, who put out a White Paper suggesting that the taxi regulations should be eased.

MR. PECMAN: I think it is important for competition authorities that engage in advocacy to be aware of all markets where there is disruption pending and there is consumer demand, whether it be Airbnb or ride-sharing technology, and where the historic regulators who used outdated models to create their regulations are protecting the incumbents and protecting the existing structure. I think there is an important role for competition authorities.

In the case of ride-sharing services, this was an issue globally; it was not just a Canadian issue. In fact, I know that the FTC did a lot of good work to help with letters to a number of regulators and state authorities to start having some of those regulations involving taxis loosened to allow for entry of ride-sharing services, but also allowing the taxis to compete.
We decided to take a broader approach. Rather than just intervene in each city where this dispute was going on, we published a White Paper, along with a national op-ed promoting level playing fields, the message that regulators should only regulate where required and review their regulations. In fact, that is going on now in Canada in various cities across the country. Calgary, Edmonton, this last week Ottawa—all revised their taxi regulations, loosening them, and also are creating some rules to allow for ride-sharing to take place. It is very heartening when you see the results of advocacy that you engage in. It doesn't happen every day, but this one was very visible.

Obviously, the incumbents are not pleased. So you still have people who aren't happy with what you are doing. You get phone calls and nice letters and things of that nature. Nonetheless, I think it is very gratifying as a public official to make a difference to allow for innovation and markets to grow.

MR. BAER: First, it is important to recognize that this is not a particularly new phenomenon that incumbents would try to protect market share and margins. [Laughter] Surprise!

But in high-tech markets especially, technology can accelerate the pace of change. It may well be that the incentives to disrupt the disrupters are much, much more powerful there.

When we challenged the Comcast/Time Warner Cable merger, our concern was that over-the-top video was relatively new and about to break big time. If you allowed one Internet service provider to supply nearly 60 percent of the homes across America receiving high-speed Internet service, what would that do to its ability and incentives to slow down competition from new video distributors that relied on delivering content over the internet?

In the AT&T/T-Mobile merger, which we challenged about four and a half years ago now, our concern was that T-Mobile, the little guy, was really coming up with innovative pricing and service plans. Boy, did AT&T not like that!

A third example is the book publishers and Apple. Amazon came up with a successful innovative model that made more e-Books available at much lower prices, and a conspiracy formed to confront Amazon.

We just need to be aware that those incentives to slow down innovation and protect incumbent positions are going to be there, and we need to make sure we are vigilant in going after companies that act on these incentives.

MS. VESTAGER: I would just say that this is something where I hear so often that I have stopped counting: “I believe in competition, but—[Laughter]—competition is very, very good in other markets. It’s a little inconvenient here.”

In that I think we can contribute in trying to balance things, to say, “Of course there are legitimate social concerns—of taxes being paid, of insurance for customers—and there may be something there.” But at the same time, also saying, “Well, maybe this is the time”—I totally agree on the advocacy point—“maybe this is the time where advocacy can actually open up things also for the incumbents and enable things in a different way.”

Also we are discussing it quite a lot because we are preparing a more general communication on the collaborative economy, formerly known as the sharing economy. Remember how it went for that artist? Maybe we should just stay with the “sharing economy.”

Anyway, trying not to define things too closely, trying not to think that we can think everything through, but also enable things, to let go just a little—and, of course, paying due attention also to the disrupters, that they respect competition rules as well.

MS. RAMIREZ: Just very briefly, I will note that I share and echo the comments that the others have
already been made on this topic. We are also, of course, incredibly interested in what is happen-
ing in the sharing economy. We are also engaged in the advocacy efforts that John alluded to.

For us, in particular, we believe it is important to take a look and study this area. As both a com-
petition agency and a consumer protection agency, the intersection and interplay raised by the
sharing economy is incredibly interesting. We held a workshop last June and we are going to be
issuing a report. We have taken the opportunity in some of our advocacy to local policymakers to
remind them of the importance of competition and ensuring that regulation doesn’t impede that.
We also point out and offer suggestions—in situations where personal information is being gath-
ered—about how local lawmakers can take steps to ensure that consumer information is appro-
priately protected and secure. This is a very interesting issue for us, given that intersection.

MR. HENRY: Let’s turn to the issue of dominance. The Commission recently undertook an inquiry
into geo-blocking, which is where online retailers refuse to sell to consumers in other EU countries.
Is that going to be a significant part of your agenda going forward?

MS. VESTAGER: It is in two respects: both in general because this is part of our building up of the
digital single market within the European Union; and second, because we have made a sector
inquiry into e-commerce and there will be a follow-up to that inquiry.

The geo-blocking element of the digital single market is very important. A lot of the citizen expe-
rience is: “We have paid. We would like to honor rights of creators, but we would also like when
we have paid for the content to be able to see it.” If your wife has dragged you all the way to south-
ern Europe, you still would like to see your favorite soccer matches. You wouldn’t believe how big
a driver soccer is in that respect. [Laughter]

People think that it is a paradoxical thing that you do the right thing, you do pay rightholders,
and yet you cannot see the content that you have paid for if you leave the geographical area in
which they want to sell it to you. We take that very seriously and will pass, or at least table, pro-
posals to change that.

Second, we made a sector inquiry into e-commerce because we wonder how it can be that less
than 10 percent of our small and medium-sized e-commerce businesses would do cross-border
e-commerce. You have a potential of more than 500 million customers, and yet you limit yourself,
if it was Danish e-commerce, to just 5 million customers. That is thought-provoking. It is quite
important when it comes to e-commerce.

Our worry is not if that is your independent business decision because of language barriers or
culture or whatever; but if these are contractual restrictions, then we have a concern, if it is your
vendor saying to you, “Only within this area can you actually sell your products.” That we will come
back to because we see in the e-commerce study that in a number of cases people come back
to us and say, “These are contractual restrictions that are disabling our free business thinking and
how we will create our business looking forward.”

MR. HENRY: What is the current stay of play on the Google matter? Are there any lessons that other
companies can learn from your inquiry?

MS. VESTAGER: I guess that remains to be seen. We have had on that a very substantial, I can say
as a serious understatement, response to the Statement of Objection. We are in the process of
analyzing that, and taking onboard also some third-party comments, in order to get a full picture.
When those analyses are done, then of course we can take next steps. But it would be absolute-
ly premature to do that before we are done with the analysis.
You know we have a number of open questions as well when it comes to advertising and the use of third-party content.

Also, we are opening a newer investigation into the Android operating system. One of the concerns there would be that Android comes with a suite of apps. We have a concern if there is an element of tying in that. So that is not just a suite but also a suit, maybe one that is a little too tight.

The second concern is that you can do Android forks. Is this for real? Is it truly open in order to develop the way that operating systems can enable innovation in this industry?

We make this a very high priority, but obviously it is way too early to conclude. But these are the concerns that we opened upon.

**MR. HENRY:** Bill or Edith, any follow-up on the issue of monopolization cases in the United States?

**MR. BAER:** Just quickly, the acquisition or abuse of a dominant position can take many forms. It can be through mergers—and I know both agencies have been vigilant in challenging efforts to merge to monopoly. It can be through the acquisition of scarce inputs, like our case against United for seeking to enhance its dominant position at Newark Airport. It can be through cooperative/collaborative/collusive behavior or through contracts with others, as was alleged against Visa and MasterCard in our *American Express* case. So there are numerous legal avenues we can take to attack monopolistic conduct that injures consumers, that damages competition and the economy.

The starting point, I think it is important to remind ourselves, is to look at who is getting hurt and why, and then what particular statute—Section 1, Section 2, Section 7, Section 5—can be used to go after the problem. The starting point is bad conduct that injures consumers.

**MS. RAMIREZ:** Very briefly, from my perspective, I want to say that I agree with Bill. But I also want to highlight a recent case we brought to stop a monopolist's exclusionary conduct.

Let me mention one case, the *McWane* case, where the Commission issued an opinion finding that a dominant firm’s exclusive-dealing program violated the antitrust laws by preventing a competitor from meaningfully competing. It’s not a sexy market—domestic pipe fittings—and as a result, I think this case might be overlooked, but I think it really does demonstrate how the antitrust laws can be used to stop dominant firms from illegally maintaining their monopoly.

It was an important case coming out of the FTC that was affirmed by the Eleventh Circuit, and the Supreme Court recently denied cert. It shows that regardless of the market, if we find dominant firms engaging in exclusionary conduct, we are going to intervene to stop the misconduct.

**MS. HENRY:** There has been a lot going on in the antitrust world in private litigation as well. A number of the agencies have weighed in on private litigation matters. Of course, in Europe they are just starting with the new initiatives in private litigation.

But for the states, Vic, you have a very special new relationship to private litigation. Would you like to give us a quick understanding of your new position?

**MR. DOMEN:** It is an interesting position, to say the least. As we have alluded to several times today, the *NC Dental* decision did have quite an impact on the states and for attorneys general in particular.

We have spent our careers usually—well, always—on the left side of the “v.” We have always been the plaintiff. We have been the one doing the enforcing. Suddenly, we have found ourselves on the right side of the “v.”, which is defending our boards and commissions and their members.
when they have been sued following some form of alleged anticompetitive conduct by a board or a commission. That has really put us in an unusual position, simply because we are not used to thinking that way. It is unusual for us to have to change to the other side of the bar.

What we have tried to do is work together. Through the Antitrust Task Force we have tried to pool ideas and have formed a State Action Working Group. I can tell you that 37 state enforcers met earlier this week, and this was one of the topics of discussion. It will remain a topic of discussion for us. I know that at least 12 different states are involved with litigation of some type as defense counsel in these matters, and in those states there are at least 17 pending matters.

*NC Dental* has really changed our focus. We are using, obviously, the guidance provided by the FTC to help us. But we are also trying to gather as much information as we possibly can.

There are a number of reactions to this decision. They vary from executive orders and AG opinions to legislation in multiple jurisdictions. By my last count, 32 states, at least, have legislation that is moving through. But once again, our legislatures aren’t always sitting full-time, so sometimes that legislation doesn’t make it through in a current session. So we are not sure how to handle these issues.

But the lawsuits continue to come. It has really been a challenge for us. I think state governments are struggling with it. Do we restructure boards? Do we add a czar of state action compliance? Are there regulations that probably don’t need oversight? I think all of those avenues are out there. But the states have not quite figured out which one will be the most effective. I think that litigation may help us find that route.

I also would report that, just in the last two weeks, the first post-*NC Dental* matter is now being considered in the Fourth Circuit, with the Virginia Attorney General’s Office representing the State Board of Medicine against a private party in a license dispute, a disciplinary dispute. So we will see how the circuit courts now deal with the post-*NC Dental* world.

As I said, it is a pleasure to be on the defensive side of the bar, but there is a lot I need to learn.

**MS. HENRY:** I think this goes along with Margrethe’s notion of competition—that now you have to look at it all across the board. Certainly, the fact that there are parties who are suing suggests that those parties are looking at a need for further competition in matters regulated by state agencies populated by competitors.

I want to give everyone on this panel a chance to have a last word, to give us a takeaway. You’ve got a great audience here. What is the nugget that you want them to remember as they walk out of the room?

**MR. BAER:** This, I guess, could be a last last word, which a lot of people will be grateful for.

I want, first, to thank the Section and the practitioners and the economists who engaged in this and the other events at this meeting. The enforcers benefit so much from the fact that you are on the front lines and you want to engage, want to understand, the issues that concern us. The more we can inform you about what we are doing and why, the easier you make our jobs. This conference and our substantial involvement in it are done in that spirit. So thank you.

I have been in this great job three and a half years, worked with a front-office team—Renata, Sonia, Dave, Nancy, Brent, Caroline, Leslie, Juan—that has been great to work with.

But the privilege of a lifetime has been working with the men and women of the Antitrust Division. Watching these people work with resources which were 30 percent under budget, dealing with that stupid government shutdown a few years ago, working as a team to bring the tough cases, these folks are incredible. You know many of them. I have come to know and love them all. I want to thank them.
MS. RAMIREZ: Before I offer my concluding thoughts, I want to say a few words about Bill. He really has been an absolutely wonderful partner for me and for the FTC. We have gone on the road together internationally. We have testified together. It really has been a wonderful partnership, and I want to thank him for his terrific work.

I also want to say Bill that I hope you stay in touch, and that you remember where you came from, the Federal Trade Commission. [Laughter]

MR. BAER: I never forget it.

MS. RAMIREZ: As a closing thought, I really want to emphasize what an exciting time we are in. There are so many interesting questions that we are exploring in the field of antitrust, among them the intersection of antitrust and big data that we discussed earlier. We, frankly, only touched the surface of the many fascinating issues that we are dealing with as antitrust agencies.

The message I want to convey is that we are going to be very active at the FTC, vigorously enforcing the antitrust laws, to ensure that markets remain competitive and that consumers are protected. We are also focusing on how technology is changing both competition and the way that consumers interface with markets.

In addition to that, we continue to work hard to make sure that we get things right. This kind of a conference is so incredibly important in that regard. It provides a valuable forum for sharing ideas, and we really appreciate the give-and-take between private practitioners and the agencies that goes on here. We want to hear critiques. We want to deepen our understanding. We want to become a better and more effective agency.

I really want to thank all of you for dedicating so much time and effort to putting together such a terrific program and the ABA for organizing this conference. It is really only by engaging in deep thinking and research that we will continue to progress as we tackle these incredibly complicated questions.

Thank you.

MS. VESTAGER: I can echo that. I think you have been unbelievably patient with us. You know it is not us who are doing the job. It is done by our staffers, all the people working in our agencies.

One of the amazing things, and one of the great privileges, is to see how close that cooperation is—that phones are being picked up, that planes have been taken in order also to physically come together, to share insights, to discuss theories of harm, to get the job done. That I think is amazing.

Looking from the outside, one may think, “Oh, it is so legalistic, it is all blah, blah, blah, blah.” I think that has been used quite a lot here, this “blah, blah, blah, blah.” It was not a reference. [Laughter]

But the main thing is that there is a very deep value here in serving the citizens. I sense that whenever I come together, no matter what side of the bar, that there is this great sense that we actually serve the citizens by making markets work better and enabling fair competition.

I think that one of the things I want to say to you, Bill, is that you really were an enabler for me, to introduce me to this community, to show how things can be done, but also to show that antitrust can be fun. When I was sitting here the first time last year and heard your opening remarks—you made everybody laugh and feel at home and relaxed—I realized, “Oh, maybe you can get your
shoulders down.” [Laughter] In a couple of years, if you get a second or a third mandate, you can make people laugh as well.

I think you are really, really great in doing that, never ever losing the depth and the seriousness of how we serve but always enabling the laughs that make us remember the depth of what we are doing. Thank you very much.

There is just one last thing, which I have learned the hard way, about 2015. I was young in the job, so I said, “We will be done by—I think it was—the second quarter.” Then I realized that that kind of daring announcement can be turned against you.

So I think my biggest takeaway from 2015 is the very basic idea that fast is better than slow, but best of all is to be just. No matter where we are and how we cooperate and how we sometimes argue, I think we share that. That is my takeaway, and it will also be my leading motive over the years to come.

Thank you very much.

MR. PECMAN: I am going to start by paying homage to Bill, whom I have worked with since I have been Commissioner. I have seen what a great leader he is over his organization, the respect he commands, his technical knowledge, his ability to work with other jurisdictions and to make things happen. He has been a mentor to me. Bill, I am going to miss you from that perspective.

But, more importantly, you are a brother in arms in terms of fighting cartels. I know you’ve got a soft spot for that area, as do I. The importance of individual accountability is important, and we recognize that you treat these types of offenses very seriously. We all know they are very egregious. Having a comrade on that front is something I am going to miss. I hope they find someone who has that same kind of passion on the cartel side.

Bill, I want to wish you all the best.

I am going to follow the theme of family, the international family. It is a family—whether it be here at the ABA Antitrust Section Spring Meeting, the intersection between the agencies, the lawyers, the economists—all working towards the same goal of trying to improve competition laws and policies for the betterment of our economy and our citizens. It is a community I have been in for 32 years. I like to work with it. As opposed to people focusing on conflict, I like to focus on how we work together to make everything better.

The ICN and OECD competition committees are the ideal places where you see that happen live, and with great work products that can be used internationally to help continue with convergence and cooperation.

Where Canada is going to be this year is just going to be doing the same—investments in the ICN, OECD, other international fora; a lot of bilateral development, particularly with the ASEAN countries, who are new, going into the TPP. These are new agencies that we need to come to, to develop, and work with together. I think it is for the betterment of all of us.

The last thing that I will say lines up with where our government wants to go. We all want to become innovation nations. I think our government is serious about that. So we are going to try to help any way we can, through either advocacy or take enforcement cases that deal with the innovation market, whether it is digital or other innovation. As we all know, innovation spurs growth for your economy, and of course competition law has a key role to play in that area.

MR. DOMEN: I will wrap this up very quickly as well.

Thank you to the Section for giving us the opportunity to speak.

I would also like to extend a thank you to Bill. There has been tension in the past between state and federal enforcers, but I can tell you and reiterate the relationship between us has never been
better. The positive relationship has filtered down through the entire Division, and we thank Bill for that. We are certainly going to miss you. I have appreciated the opportunity to work with you and the entire Division. I look forward to that in the future.

Just wrapping up otherwise quickly, the State ATF will continue to focus on healthcare—it is a big issue—but we certainly will not forget the consumer protection side. Privacy issues and financial services remain very important to our agencies because in many cases our antitrust law is also our consumer protection law.

With that, thank you very much.

MS. HENRY: I would like to thank everybody here in the audience as well as, obviously, everybody here on the dais with me. You have given generously of your time and efforts.

I also would like to especially say let’s all thank Bill. [Standing ovation from the audience]
Interview with Andreas Mundt,
President of the German Bundeskartellamt
(Federal Cartel Office)

Editor’s Note: Andreas Mundt has been President of the German Bundeskartellamt (Federal Cartel Office) since December 2009. In September 2013 he was elected as the Steering Group Chair of the International Competition Network and was re-elected for a second term in May 2015. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, he worked for the Federal Ministry of Economics from 1991 to 1993. After working on the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, he joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was Head of the International Section of the Bundeskartellamt from 2001 to 2005 and Director of General Policy from 2005 to 2009. Since 2010 Mr. Mundt has been a member of the Bureau of the OECD Competition Committee. He was interviewed for The Antitrust Source on April 6, 2016, by Terry Calvani.

THE ANTITRUST SOURCE: I’m delighted to welcome you to Washington on this lovely spring day. Let me begin by focusing on some international issues. When I first became a Commissioner at the U.S. Federal Trade Commission, competition law enforcement was almost entirely domestic, inward looking if you will. The Americans did American antitrust, the Germans did German antitrust, and we pretty much played in our own sandboxes.

The world is different today. We have over 100 competition law enforcement agencies that are members of the ICN, and while unheard of in my era, today it’s not uncommon to see a merger acquisition reviewed by a large number of countries. Cartel investigations also are very often international. There are a lot of drivers, if I can use that analogy, on the competition law highway.

No one envisions any country waiving its jurisdiction, ceding its sovereignty to some international enforcement organ at this point, but is it time for the ICN to think about guidance, perhaps traffic rules for the competition law enforcement highway? This exists today within the European Competition Network in the context of Regulation 1/2003. Do you see this as a possible issue for the world’s enforcement community? Is there a role for the ICN in this regard?

ANDREAS MUNDT: Global norms, of course, sound appealing, and it is indeed the strength of the EU system that all national competition agencies apply the same European law, the same substantive standards.

We have tried to develop a wider common standard in the past and found that it doesn’t work on a global level. If you remember, we tried to include the idea of a level playing field in competition in trade negotiations and trade agreements, but this was far too overambitious. We are never going to see a world competition rule, and I hope we will never see a world competition agency.

Instead, we have chosen a bottom-up approach. Since the WTO was not really successful, we as competition agencies took the lead. We have founded our own international organization. Of course, we are not legislators. We cannot create global norms but what we can do is to set global standards. We tell legislators what a law should look like and we establish standards on how an agency should apply the rules.
The ICN covers all areas of competition. We look into mergers, into unilateral conduct, into cartel enforcement. And for all of these matters you’ll find a rich universe of guidance on the ICN Web site.\(^1\) We hold teleseminars and webinars, we have web-based platforms and online training. We do all of this with one aim: we want to help create a level playing field for companies throughout the world.

I think the ICN has a pre-eminent role in this process because it is the only body in the world which is able to set these kind of standards. They are practical, proven, and they work. This is why many other international organizations like UNCTAD and the World Bank make use of ICN material. It is why we as agencies, when we provide training somewhere, also make use of ICN material. This is the way we approached it in the past and given the successes of the ICN, it seems to be very promising also for the future.

ANTITRUST SOURCE: Let me move to what might be a touchy issue. State intervention has become an often-discussed topic within the antitrust community at large. What role does the ICN play in terms of issues like state intervention or agency independence? Do you see your role or the ICN's role increasing in these particular areas?

ANDREAS MUNDT: Well, politicians are always interested in the work of competition authorities because, of course, we intervene in the economy from time to time. Our work is always a little bit of a political issue. In the ICN we try to address these kinds of topics with the means that we have. We had a special project on state-owned enterprises at the 2014 annual conference and we have just set up a series of town hall teleconferences dealing with the interaction of competition policy and other government policies, which are open to ICN members and non-governmental advisors where heads of agencies discussed the state of play in their jurisdictions. We had town hall meetings on public interest considerations in merger cases, on competition and industrial policy considerations and on state-owned enterprises.

In addition, in the past, we have tried to support agencies if there was a worry that a government was not taking the importance of competition seriously. For example, we provide letters from the ICN Steering Group Chair to the agency that could be passed on to the government with a hint that there are global standards.

I think advocacy towards government and other stakeholders is something for every agency to do. We try to help with the work of the Advocacy Working Group, which develops tools illustrating how to advocate for competition. It is a twofold approach. We do something as ICN to support agencies, plus we have set up a rich set of instruments to help agencies to advocate for competition vis-a-vis the government and also the business community.

ANTITRUST SOURCE: Again, looking at the ICN, it has grown exponentially over the years, reflecting the growing number of active competition agencies. One really remarkable thing about the ICN is that it was conceived and has operated as a virtual organization. But periodically one hears the question of whether the ICN has outgrown its virtual existence and now is the time to consider a physical secretariat. What is your view about that?

ANDREAS MUNDT: First I would say that the Competition Bureau in Canada is much more than a

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\(^1\) See http://www.internationalcompetitionnetwork.org.
virtual secretariat. There are people who do nothing else but care for the interests and the needs of the ICN. So there is something like a standing staff. It's maybe not a brick and mortar secretariat but it's very close to it. That is one point. The other point is that it works very well the way we do it. It creates a maximum of flexibility, and this is something that we want to maintain. Another issue is that whoever wishes for a brick and mortar, physical secretariat should tell me as the chair of the steering group where to get resources; who is going to finance that? We are competition agencies, we all struggle with resources at home, and I do not see anybody providing extra money and extra resources to finance a standing secretariat in the ICN.

So my answer is that we have a secretariat dedicating considerable effort and it works very well. This does not, of course, mean that the ICN does not have to change over time. We have just had a fantastic workshop in Washington on the future of the ICN. Personally, I see a need for flexibility to cater for the needs of our growing membership, and I see the need to turn to new topics that we haven’t tackled so far with regard to the digital economy. I see the need for organizational improvements, maybe also with regard to outreach. We’re good at that, but I think we can still improve.

So there are a lot of things that might need to be done and this is why we have asked ICN members and NGAs for input into our second decade follow-up initiative. We will discuss the results at the Annual Conference in Singapore. We are not a young organization anymore, but a mature international organization sometimes facing the same difficulties and the same challenges as other international organizations. We have to cope with that.

ANTITRUST SOURCE: I guess one might wonder how long we’ll be able to free ride on the good will of the Canadians. But as long as they’re happy with the situation I guess we’re all better off.

ANDREAS MUNDT: Maybe just one word on that, it’s the Canadians who host the secretariat, but of course there are many, many other agencies putting a lot of resources into the ICN, including my agency and many others which draft our papers, prepare our seminars and workshops, and shoot training videos. There’s a lot going on in many agencies, and I think in their own way everyone devotes as much resources as possible to this network.

ANTITRUST SOURCE: Let’s turn to some wider issues. I know you have been interested in the digital economy, but do you see a need to fine tune the competition rules, the regulations and laws, to fit the challenges of the digital economy? Or do you think the agencies currently have the tools that they need to equip them for this challenge? I know this has been a topic that you’ve given a lot of thought to. Has the ball moved in either direction in your view?

ANDREAS MUNDT: I think you have put it exactly right in your question—it’s fine tuning that we need. Most of the new issues which digitalization raises can be dealt with by applying the classical tools of competition law. Nevertheless we are in regular contact with lawmakers to discuss minor adjustments to the legal framework because of certain special phenomena in the digital world.

Competition parameters such as network effects or innovation competition are becoming increasingly important on digital markets. The access to data, in any form, has also developed into

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a significant competition parameter and potential source of market power. Network effects can be decisive for the market position of any company. Other competition parameters—such as price competition or market shares as an indicator of market power—tend to be less important for the Internet economy than for more traditional markets.

Therefore, expanding the criteria for market dominance should be considered in the upcoming amendment of the German Competition Act, or Gesetz gegen Wettbewerbsbeschränkungen, which we will see this year.

What is more, we need a legal clarification that markets, in which people do not pay with money, can also be markets in terms of competition law. Companies like Google certainly are active on a market, even if the users do not pay money for the search engine.

Furthermore, the amendment could contain adjustments to criteria for taking up merger cases, introducing a transaction volume criterion into German competition law. The takeover of WhatsApp by Facebook for more than US$19 billion nearly escaped control by the European or national authorities because WhatsApp’s turnover was extremely low at the time. As takeovers of companies with a still-developing turnover can often be seen in the digital economy, it is important to find a way to look more closely at these deals as a competition authority.

**ANTITRUST SOURCE:** Over the years, I think you and I have agreed on a good many competition law issues and have had differences on a couple. One where I think we found ourselves on opposite sides of the fence has to do with criminal sanctions for cartel conduct. There seems to be evidence that despite high European fines, monetary sanctions don’t bring about sufficient deterrence. There was a study done by two French economists recently that suggested not only do European fines fail to secure the ill-gotten gains associated with cartel behavior, but they really have very little deterrent effect. Do you think it’s time to rethink this issue?

**ANDREAS MUNDT:** It is true that the significance of the fines imposed goes beyond the detection and punishment of individual cartels. The fear of being fined can deter others from forming a cartel. And it is also true that the impending sanction has to be appreciable to have a deterrent effect. I am deeply convinced that in Germany this is the case. The fines are high, and the companies take the cartel enforcement of our authority very serious.

In Germany and the European Union we also see more and more private damages actions. If cartel members have to expect actions for damages from customers harmed by the cartel in addition to a heavy fine, this appreciably weakens the attractiveness of these illegal and socially damaging agreements.

But there is always criticism from both sides. Some say the fines are too high, some say we should turn to criminal sanctions. We have one area in Germany where cartel infringement is criminal for the individuals involved, and that is bid rigging. Experience from this area does not really speak much in favor of criminalization: prosecution is in the hands of public prosecutors and tends to be quite slow. Usually, the prosecution of the companies involved—which is in our hands—is much quicker. We also continue to see bid-rigging cases in Germany, so criminalization does not seem to increase deterrence dramatically.

I think, to have a deterrent effect, the risk of being caught is as important as the sanction itself. In recent years the Bundeskartellamt significantly stepped up its efforts in cartel prosecution. This has a deterrent effect. If you look at the way companies in Germany apply compliance programs, just to give an example, many companies really do a lot. This has changed tremendously.

What is equally important is that we also impose fines on individuals. This is something that may
be missing in some jurisdictions. I think that catching up with those who are personally responsible, and the possibility that they may have to go before court, is an important issue.

You also have to consider that criminal sanctions make the procedure much lengthier and much more complicated. We see that in other criminal proceedings in Germany. In view of this I favor a quick procedure, a quick sanction. I think that this is more effective than criminal sanctions.

**ANTITRUST SOURCE:** Let me focus on Europe more generally for a moment. There’s obviously an effort now being made to harmonize procedural rules of the national competition authorities with a view to make the national competition authorities more effective enforcement agencies. Where does that effort stand now and where do you think it’s going to end up?

**ANDREAS MUNDT:** We welcome the European Commission’s decision to launch this public consultation in order to evaluate the national authorities’ effectiveness in enforcing the European antitrust rules.

There are still many differences in Europe. We have different procedures, we have different instruments when it comes to investigations. For example, some national competition agencies may conduct dawn raids on business premises only, not on private premises.

We try to be convergent in this area through soft law. If you look at the model leniency program, competition agencies have done a lot to create a level playing field throughout Europe. But some things can only be done by the European Commission through legislation. This is why we welcome very much what Margrethe Vestager is doing.

We consider that the evaluation exercise has particular relevance regarding the national authorities’ power to impose fines for antitrust violations. German law has considerable shortcomings in this regard, which enable antitrust infringers to escape fines that have been imposed or are about to be imposed by means of corporate restructuring. This is not mere theory: The Bundeskartellamt has already had to forgo millions of Euros in fines in a number of cartel cases.

The German government is currently reviewing the law with a view to a possible amendment. We are confident that this review will result in legislation that will tackle existing loopholes. However, in the interest of creating a level playing field for companies and authorities in the EU, we would welcome an initiative to go beyond national solutions and take steps towards the European model, e.g., with regard to fining parent companies of groups and to fining legal and/or economic successors.

**ANTITRUST SOURCE:** I believe that the Federal Cartel Office conducted a joint study with the French competition agency to study big data and its implications for competition law. Where is the study going? What do you hope to learn and do you see it having practical implications for competition law enforcement?

**ANDREAS MUNDT:** Well, I believe so. It is not a sector inquiry, so it is not the kind of in-depth investigation that you have after one or two years of investigation. Rather, it was an exercise where we looked from a very fundamental viewpoint into the question of what big data means for the application of competition law.³

We tried to find out what big data is, and what we mean by data. We look at its implications with regard to competition law, what does it have to do with dominance, what does it have to do with certain behavior? What about the access to data? Big data concerns many areas of competition law with regard to mergers and unilateral conduct.

In this paper we try to set out our thoughts and describe where Europe—not only Europe but mainly Europe—stands on assessing big data in relation to competition law. It's a very descriptive paper. We as agencies hope to benefit from this work and we hope that it facilitates our assessment of big data when it comes to cases in the areas of mainly mergers and unilateral conduct.

ANTITRUST SOURCE: Germany pays a lot of attention to vertical restraints. The sense here, at least held by many, is that Germany takes a stricter approach on some vertical issues not only when compared with the United States, but when compared with other European competition agencies. Would you agree with that assessment?

ANDREAS MUNDT: I would not really agree with that. I would agree with an assessment that said we have some divergence worldwide on the assessment of vertical restraints. This is not limited to Europe. If you look at the U.S., some huge companies will say that if you consider applying vertical restraints, you might get into trouble, maybe not in Washington but in some states; that is something you really have to struggle with.

So this is not a phenomenon only limited to our focus on Europe. It is something we also have in the U.S., something we see throughout the world. This is why we look at this in the ICN and its unilateral conduct work.

At the Bundeskartellamt we have looked at a couple of cases in this area with regard to retail distribution. One of them is the Asics case, just to give an example, where we had to ask questions about the company’s prohibition of making use of price comparison Web sites. We had to assess how far a company may go in banning the use of its logo for online advertising. And the very difficult issue of the ban on sales via third party platforms—Amazon, eBay—which might be essential for small dealers and retailers with a stationary shop to survive. The future of retail—that is what we hear from the relevant associations as well—is hybrid, involving both stationary and online sales.

So here, I see a task for us as competition agencies to keep markets open. And we are discussing this with the European Union, within the ICN, and with other European competition agencies. We have decided cases in this area, and we did not base our conclusions on findings where we did not have an agreement with the European Union. The outcome of the Asics case had, from my point of view, the full support of the European Commission.

We had other areas of cases where we had to assess most favored nation clauses; that is, the hotel booking cases. These cases were widely discussed, but I do not see that we have a lot of divergence within Europe. I mean we have no established case law on these cases. They are still new in a sense.

The European Commission has not dealt with these kinds of cases in the past so we had to find our own way. If you look at how far we have come, we have come to an agreement here; we have similar if not the same theory of harm. We have remedies—all of us have imposed remedies that go in a very similar direction. Only at the very, very end do we have some gap with regard to the remedies, which might be explained by different market structure in different countries throughout Europe.

Additionally, the Bundeskartellamt was the only agency, as far as I know, that has really carried
out a full-fledged investigation. The other competition agencies have adopted commitments. Our approach was, by the way, recently also adopted by legislation in France, and there is similar legislation on the way in Italy, as well. So I would agree that the picture is not completely homogeneous, but the divergence that we see is, from my point of view, well justified and minor compared to the convergence that we have reached on most of the questions in these cases. And you should not forget that we speak about national markets that might call for differentiated solutions.

ANTITRUST SOURCE: There has been a discussion of a vertical guidance note in this area that might be issued by the Federal Cartel Office. Is there something forthcoming?

ANDREAS MUNDT: There is something going on related to the recent big price maintenance case that we have carried out in the food retail sector. We started investigations and dawn raids back in 2010. Until now, we have imposed fines of €242 million. We are going to close this case in due course.

Because the food retailers often stated that they did not quite know what is allowed, what is not allowed, where the border is between a recommendation on price and price maintenance, we have offered to draw up a paper. The focus will be on the food retail market; it will not include online shops.

Due to the experience that we have gained in this case, I think that is a good idea, and we have much support from the business community, lawyers, and economists. We have been in the first consultation stage now with associations, lawyer’s associations and retailers. We are now drafting the paper and when we have the draft we will go into a second consultation phase.

ANTITRUST SOURCE: There have been reports about the Federal Cartel Office adopting a new electronic whistle-blowing system through which anonymous tips can lead to investigations. I’m curious, how is that working and is that something you’d recommend that other agencies adopt or are you far enough along with it to make an assessment?

ANDREAS MUNDT: Indeed we have such an online system on our Web site where an anonymous whistle-blower can contact us to give us a tip-off. The whistle-blower remains anonymous. He can set up a mailbox which allows him to further communicate with us. The information is forwarded to the decision divisions and we name a case officer as the contact person. But the case officer has no idea who is on the other side of the line.

Of course, the handling of such a system must be very thoughtful, but I think it’s worth it. The advantage is obvious; we can communicate and that is necessary because you know as well as I do with anonymous sources that one should always be very careful. That has also proven to be true with this system. I’ll give you some figures. We set it up in June 2012 and by the end of January 2016, we saw something like 35,000 clicks on this system. So people are taking up contact with us.

We are very careful with anonymous tip-offs coming through this system as we always are with anonymous sources. At the Bundeskartellamt itself, we have set up a lot of checks and balances in order to be able to deal properly and appropriately with information from anonymous sources. Before a proceeding is initiated based on an anonymous tip-off, we make sure that the content of the information meets certain quality criteria; for example, that it is sufficiently detailed, that it is accompanied by conclusive evidence, or that the facts provided have been confirmed by further research. We are very thorough in assessing this type of information.
Actually, some dawn raids have been carried out based on anonymous tip-offs. And we have just finished one large case in the area of suppliers of car components where we have imposed a fine of €90 million on six companies. And that case goes back to information obtained from our whistle-blowing system. So we can work it out. We are thorough, we are very careful, and it leads to good results in the end. And we will continue with the system because it has proven to be a valuable tool for uncovering secret cartels.

ANTITRUST SOURCE: I want to just a follow up on that. When I was working with the Irish Authority we would get anonymous tips where you would really like to have an opportunity to ask the person questions. Is it correct that the BKA case officer has a real opportunity for dialogue with the person providing the tip in this program?

ANDREAS MUNDT: Exactly. If the whistle-blower sets up a mailbox, we can ask follow-up questions and receive answers. Then you can quickly see whether it is a serious tip-off or not. And we sometimes communicate over time and elaborate on the information with those who come in via the system.

ANTITRUST SOURCE: So much more valuable than a letter that is the likely end of your contact?

ANDREAS MUNDT: Absolutely. A letter is sometimes not very much, and it is extremely difficult to assess if there is someone who is just disappointed by certain behavior, or if there is someone who really has something to tell in substance. Being able to communicate with the source is the great advantage of the system. That allows us to get a better assessment of the source and at the same time of the information itself. In that, the system is very helpful.

ANTITRUST SOURCE: That’s really interesting. The Federal Cartel Office recently announced that it’s initiating an antitrust investigation, a competition law investigation of Facebook, for its data collection practices. And the investigation suggests that your agency believes that antitrust competition law may have a role to play in protecting the privacy of consumers. I just want to make sure I understand that correctly. What is the connection that you see between competition law and consumer protection law in this regard?

ANDREAS MUNDT: It’s a pending case and therefore we can just share some initial thoughts on it. We look at whether Facebook has abused its possibly dominant position in the market for social networks with its specific terms of service on the use of user data. We have indications that Facebook’s conditions of use violate German data protection rules. Of course, not every law infringement by a dominant company is also relevant under competition law. But we have a ruling by the Federal Court of Justice that there can be a link between the violation of the law on general terms and conditions and the assessment of exploitative abuse in the case of a dominant company. According to this decision, the use of illegal terms and conditions may constitute an abuse, in particular, if the acceptance of these illegal terms follows from the dominant position. So what we have to do in this case is to take a very close look at whether there is a link between a data protection infringement on the one hand and the abuse of market power of a dominant firm on the other. We are at a very early stage. For the time being we will investigate the relevant product market to see if Facebook is dominant here or not, and then we will look at the possible link between the possible dominance and the violation of data protection rules.
By the way, it’s an administrative proceeding so there are no fines at stake, of course. And this is a case where we will cooperate very closely with the European Commission, which we already did before we initiated the proceeding. We will work closely with the national competition agencies in Europe and of course with the data protection agencies in Germany, and maybe in other countries.

**ANTITRUST SOURCE:** Andreas, I very much appreciate you taking time to talk today. Let me conclude with one question. I suppose if you were to canvass people who have been plowing the fields of competition for some time and ask them to name a very prominent German competition law enforcement official, two names would come to the top, Wolfgang Karte and yourself. You are certainly more visible than most of your predecessors. Now I’m given to understand that the powers of the president of Bundeskartellamt have not changed but I am curious about whether the role has changed.

You are one of the most prominent people on the world competition stage today, taking nothing away from any of your predecessors. Do you see the role as evolving over time?

**ANDREAS MUNDT:** Well, the law has not changed so it’s maybe the role within the agency. I’m someone who has been working within the agency before becoming president. I have been a case handler, so I know how it works. And you must see that the president of the Bundeskartellamt, of course, is already involved in a certain way in the daily work of setting priorities and allocating resources. Sector inquiries, for example, require a great amount of resources that need to be allocated.

It is true that I try to take quite a hands-on approach. I’m very interested in the cases that we’re doing. I try to be involved in the cases from the start until the end to be informed and to be able to discuss the cases with my people. Of course, a decision is taken in the decision division, but nevertheless I see my role, as I sometimes say, as a sparring partner of them and to discuss things.

We have changed the organizational structure to a certain extent. We have implemented checks and balances, we have set up a chief economist bureau, we have strengthened the litigation department where those who take decisions in particular cases can go for support. And the world has also changed within the Bundeskartellamt with regard to the support by the IT structure. I play an active media role so I think all of these are elements that might lead to some evolutionary changes in the agency and that might have changed the picture a little bit.

That is the same path I follow in the ICN. Sometimes I find that the Bundeskartellamt and the ICN are not so different. And it’s not that you’re taking a revolutionary approach, but you have to evolve the development over time and this is what I have done at the Bundeskartellamt and I think this is what we are going to do with the ICN as well.
Interview with Alejandra Palacios, Chair, COFECE, Mexico

Editor’s Note: Alejandra Palacios Prieto was appointed Presiding Commissioner of the Mexican Federal Commission for Economic Competition in 2013. Previously, she was Director of Public Governance at the Mexican Institute for Competitiveness from 2007 to 2013, a lecturer at the Autonomous Institute of Technology of Mexico (ITAM) from 2002 to 2008, including serving as the academic coordinator of its economics department from 2005 to 2006, and a consultant for the Federal Telecommunications Commission in 2011. She earned her bachelor’s degree in Economics and an MBA from ITAM, and a Master’s degree in Public Policy and Administration from the Center for Research and Teaching in Economics (CIDE). She was interviewed for The Antitrust Source on April 5, 2016, by Allan Van Fleet.

THE ANTITRUST SOURCE: What has your experience been under the new constitutional reforms that were passed in 2013 and the regulations that your organization adopted in 2014? Are they doing well? Do you see anything you would like to change about them?

ALEJANDRA PALACIOS: The law was enacted in July 2014, so we have been working under this new law for a year and a half. Just today, for example, we announced a statement of objection regarding the pension fund system.1 We had an investigation of agents who manage and administer pension funds in Mexico. This is the first time an enforcement procedure will be analyzed under the new law. It is the first investigation with the new law.

This procedure is different from the previous procedures. For example, after there is a statement of objection, we start a new stage within the procedure. This stage is like a quasi-judicial process. The parties put forward their allegations before the Commissioners make a final decision. The prosecutor, Carlos Mena, is part of the process. The pension funds administrators who are being investigated are also part of the process.

Thus, the Board of Commissioners will listen to both sides and will make a final decision. So, it’s a quasi-judicial process. It is something new. We have never had a process like this.

ANTITRUST SOURCE: So, the prosecutor holds a position within the Federal Economic Commission? In the United States, the FTC would have to refer it to the Justice Department for actual prosecution, but this is a position within COFECE?

ALEJANDRA PALACIOS: Yes, it is a position within COFECE. Carlos Mena was named by the majority of the Board of Commissioners. But the prosecutor, and this is important, has technical and functional autonomy. This means that the prosecutor decides when to open an investigation and how to lead that investigation. He also decides or proposes whenever the investigation should be closed or to elaborate on the statement of objection.

So, all of that enforcement activity is handled by Carlos Mena. Then, after the statement of objections is presented, we as Commissioners take into account the documents, what the investigators say, and then, we also listen to the parties.

ANTITRUST SOURCE: Another interesting feature is whether COFECE has the power, not only under the new law but the old law, to investigate and make recommendations and recommend even stronger actions for other agencies of the federal government or state government to the extent that affects competition? Is that correct?

ALEJANDRA PALACIOS: Partially. We do a lot of advocacy work and within our advocacy work we do make recommendations to other government bodies regarding, from our views, how regulations or public policy could or should be put in place to ensure competition. Those opinions, at least most of them, are not binding. Then we have the elimination of barriers procedure, which is new under our law, and these recommendations are binding.

We have different mechanisms to ensure competition. Sometimes we do conduct investigations, sometimes we do structural investigations, and sometimes we do advocacy. Our reaction depends on the issue.

ANTITRUST SOURCE: Let me back up a bit. I know the new law provides what American lawyers would find a very interesting way of appointing Commissioners. Would you share that procedure with us and your experience going through it?

ALEJANDRA PALACIOS: Yes. Well, what the law says is that when a Commissioner’s term is over, the position is open to any interested person. Once the position is open, the Head of the Mexican Central Bank, the Head of the National Institute of Education Evaluation, and the Head of the National Institute of Statistics and Geography create a reviewing committee.

The first thing they do is issue a public call. Then the applicants shall prove their eligibility before the reviewing committee. There are a lot of requirements, including experience, professional performance, and having no recent links to firms that are subject to the competition authority’s procedures.

Then, the committee revises these requirements and selects, from the applicants, who can go forward with the procedure. After that, they have to take a written exam, or a technical test, regarding competition and regulatory matters as well as law issues.

ANTITRUST SOURCE: Like being back in school?

ALEJANDRA PALACIOS: Yes. And I did study for my exam. After that, the reviewing committee selects between three to five applicants with the highest scores on the exam, depending on how many people are part of the process. Then this list is sent to the President of Mexico. The President has to choose the nominee for Commissioner from that list. That name goes to the Senate for a vote, and the candidate would need at least two-thirds of the Senate votes to become a Commissioner.

For example, one Commissioner’s tenure ended on the last day of February, so now the position is open. As of October or November of last year, the committee knew this position would be open so they made a call in December. The candidates took the exam, and the list has already
been sent to the President. Now, the President of Mexico has a list of five applicants and he will have to choose one to send to Congress.

**ANTITRUST SOURCE:** Would you tell us a little bit about your background that brought you to this position?

**ALEJANDRA PALACIOS:** Well, this is my first time working in the Mexican government. This is my first time being a public servant. Before this, I worked in a think tank called the Mexican Institute of Competitiveness. I would say it is a very renowned Mexican think tank specializing in public policy and competitiveness. I was the director of all regulatory and competition issues. So I did some work in competition and regulatory matters from a think tank and civil society perspective. I was very active concerning the telecom industry, and I was also very active on issues regarding public procurement. And before that I was a professor at the university, ITAM, which I would say has the best economics school in Mexico.

**ANTITRUST SOURCE:** Kind of like the MiT of Mexico?

**ALEJANDRA PALACIOS:** Yes. I taught basic microeconomics and I also taught industrial organization there.

**I think we have had many interesting cases for different reasons.**

**ANTITRUST SOURCE:** Now, most of the members of COFECE, like yourself, are economists rather than lawyers, is that correct?

**ALEJANDRA PALACIOS:** On the Board of Commissioners, yes. In general, I think we are basically 50/50. The heads of unit, the prosecutor, and the technical secretariat, which is in charge of mergers and the quasi-judicial process, are all lawyers. The person who works in my office on advocacy issues is also a lawyer.

**ANTITRUST SOURCE:** Do you find that the economists have a different approach to some of the competition issues you have faced? And what do you think about how the economist and the lawyers work together?

**ALEJANDRA PALACIOS:** I think that what the Commissioners and I are trying to do when we make a decision as economists is put economic theory in conjunction with what the law stipulates. We work on this every day. If your analysis cannot be translated into a legal argument, then it will not work. We know that, and we work on that. It is also interesting because all of us, as Commissioners, have a Chief of Staff from our offices, who are lawyers. So we do have that combination.

**ANTITRUST SOURCE:** Since you have been the Presiding Commissioner, what, what would you say, has been the most interesting conduct investigation or prosecution?

**ALEJANDRA PALACIOS:** I think we have had many interesting cases for different reasons. If I had to choose the most innovative one, I would say it is the one regarding how takeoff and landing slots are being allocated at Mexico City’s airport, to find out if there is enough competition among airlines at that hub. I would say it’s the most innovative because it’s the first time that we as an authority have used the new procedure regarding barriers to competition.
The investigation process is not yet complete. As I was explaining, the investigative authority put forward a preliminary review. Now the interested parties are preparing their arguments, and they will bring them forward to the Commission. After the Board of Commissioners listens to both sides, we shall take a final decision.

**ANTITRUST SOURCE:** Will this proceeding go under the provisions of the new law that allows the Commission and its Investigative Authority to look at whether there are barriers to entry or conditions in a market that hinder competition or restrict access to an essential input that you are allowed to conduct, even when there has not been an allegation of bad contract on the part of players in the market?

**ALEJANDRA PALACIOS:** Yes. It is Article 94 of the new law.

**ANTITRUST SOURCE:** That caused some controversy. Even our own American Bar Association suggested that it might lead to discouragement of procompetitive behavior, and the ABA was concerned about such investigations running away. Based on what you have seen so far, do you feel that there are procedural and economic safeguards to make sure that the new power is exercised properly?

**ALEJANDRA PALACIOS:** Yes. I think it is very important to mention that after the preliminary investigation, the law provides a space where companies can be heard. Not only to be heard, but where they can also propose remedies for the Commissioners to take into account. Then, of course, there is always the possibility of asking the judiciary to review the legality of our actions after the Commission makes its final resolution. On this procedure, I think I have been very clear, but I’ll repeat that we are committed to divestitures only when other remedies are insufficient. It is a last resort procedure and we see it like that.

**ANTITRUST SOURCE:** You mentioned that if a party is not satisfied with the procedure at COFECE, it has a judicial remedy. Would that be to one of the new specialized competition courts?

**ALEJANDRA PALACIOS:** Yes. All, of our cases are looked at by these new specialized courts.

**ANTITRUST SOURCE:** What has been your experience with the specialized courts? Do you feel that they really understand competition issues better than judges more used to dealing with criminals, divorces, or car accidents?

**ALEJANDRA PALACIOS:** I think it is too soon to make a comprehensive evaluation of their work. However, from this limited experience, I would say that there are two highly positive benefits. One is that cases are being resolved in a shorter period. I think that is very important because one of the basic principles of justice is that it has to be expeditious. And I’m not talking about the process being expedited by months, but years. We still have cases in the Commission that have been ongoing for 10 to 12 years. If a case takes six, seven, eight, nine years for the judiciary to review it, well, that is not expeditious in my way of understanding things.

The other benefit is that judges are analyzing the cases with more knowledge of competition and a better understanding of the implications of the Commission’s resolution.

So given this limited experience, I do think it’s been highly positive.
**ANTITRUST SOURCE:** Let me ask you a little bit about the Commission’s role and your role in educating not only the judiciary, but also lawyers and businesspersons, about competition and the law. For example, I recall that you and I participated in a program in Mexico City involving COFECE, the American Bar Association, and the Barra Mexicana on price signaling.

COFECE had just issued some draft regulations regarding that. Have you had other opportunities to try to educate the judiciary, business people, and lawyers on what the new law is all about?

**ALEJANDRA PALACIOS:** Yes. I would say that we have also been working very hard on advocacy issues. We have an advocacy plan. Once a month I sit down with the advocacy team and we analyze our progress. One of the important things the advocacy group is doing now is reaching out to the private sector. We have done various things over the last year. For example, we created at least 11 guidelines or technical criteria regarding how COFECE will apply the law.

I think that these technical matters and guidelines are important. For example, we have drawn up a merger guideline, we have set a guideline regarding how we will apply the immunity or leniency program, and we addressed the exchange of information between competitors topic also. We also have established a technical criteria regarding how we will use the Herfindahl index to analyze market concentration. Others included a compliance guide and a very practical pamphlet regarding the most important issues of the law.

This year, we’re having conversations with the private sector, in particular, with associations and chambers of commerce. We are trying to let them know what their obligations are regarding the law and also about how the law protects them as businessmen who want to compete in the market.

**ANTITRUST SOURCE:** Are you able to tell us how the immunity and leniency program is working in Mexico? Do you have enough public experience to be able to share with us?

**ALEJANDRA PALACIOS:** I can say that the numbers are growing. In 2013, the first year of the program, we had four applicants. In 2014, we had five or six applicants, but in 2015 we had 18 applicants. So, I think those numbers speak for themselves.

**ANTITRUST SOURCE:** Are you finding that when applicants confess cartel activity, it is generally confined to Mexico, or are they reporting multinational cartels?

**ALEJANDRA PALACIOS:** I don’t have access to those numbers because it’s the prosecutor who handles the program. But what I can say is that the program was really initiated by international cartels. Nobody in Mexico ever applied. Since there is now the possibility of penal sanctions, the logic has changed. The incentives are different so now we have domestic applicants.

**ANTITRUST SOURCE:** Recently, other parts of Mexico’s civil laws were amended to allow for the possibility of private actions and even collective actions for competition violations. Do you believe that has affected the culture of competition and a person’s willingness to try to get out of trouble earlier?

**ALEJANDRA PALACIOS:** We are not there yet. For example, last year, the Supreme Court of Justice ruled on a public procurement case in Mexico where the Mexican Social Security Institute, or IMSS, the single largest purchaser of pharmaceutical products and other medical supplies, had
bought insulin and bid rigging was uncovered. That judicial review was important because the res-
olution says that indirect methods like economic analysis can help us, as a competition
Commission, determine that there is a cartel.

It is important because it's very hard to find direct evidence . . . .

ANTITRUST SOURCE: The smoking gun.

ALEJANDRA PALACIOS: Exactly, so we know that indirect evidence, like economic analysis, works.
The cartel was investigated from 2003 to 2006. It was sanctioned in 2009, and then we had a final
resolution in 2015. So we might be interested in filing for damages now, but it might be too late.
They are looking into that. We have not had consumers proactively asking for damages. I think that
we need to build a system, but I do not think we are at that step yet.

ANTITRUST SOURCE: Another new tool the Commission has is the ability to conduct visitas de ver-
ificación, something that is similar to the ability to conduct a dawn raid such as the United States
and other countries have. Has the Commission had the opportunity to do that yet, or are you
allowed to tell us?

ALEJANDRA PALACIOS: Yes. Well, as you know, the investigative authority is in charge of perform-
ing the dawn raids, and we prioritize tasks in order to perform this type of investigation. When we
arrived at the Commission, there was no dawn raid experience. Now I can say that there have
been seven separate cases in which we have performed dawn raids.

ANTITRUST SOURCE: Let me switch over to talking about mergers and acquisitions, or as they are
called in Mexico, concentraciones. What has been the most interesting concentration investigation
you have been a part of?

ALEJANDRA PALACIOS: Last year we did an analysis of two big chain grocery stores. One chain
was called Soriana and the other one was called Comercial Mexicana. I haven't been working in
the authority all that time, but what my colleagues tell me is that it has been one of the most com-
plicated merger analyses we've ever done. We analyzed 160 local markets to determine if there
was going to be competition issues in each of these local markets.

So it was a huge analysis. At the end of the day, we found problems in 27 of the 160 markets.
To be approved, we put forward a structural remedy. Before we arrived at the Commission, its only
experience was in conduct remedies. Now we are applying structural remedies, so, I think that's
a big step.

ANTITRUST SOURCE: But the Commission will also apply conduct remedies when it's appropriate?

ALEJANDRA PALACIOS: If it is necessary, yes, of course. I think we need to know how to apply
structural and conduct remedies and to choose to use them depending on the specific merger
and the problem we are finding in that merger. It is not that we are not using conduct remedies,
it's just that we are adding to our knowledge on how to apply structural remedies, and I find that
interesting.

ANTITRUST SOURCE: Based on that experience, can you say whether the Commission has a pref-
ference in dealing with an illegal concentration? Do you have a preference for either the structural or the conduct remedies?

**ALEJANDRA PALACIOS:** I don’t think we have a decided preference. I think it depends on the case. In some cases, the only way to protect the market is with a structural remedy, and in other cases, there’s no structural remedy available and you only have conduct remedies. There might also be cases where a remedy is not available and you have to block it.

I would say we’re open to everything, but it depends on the case. It is easier to follow-up on structural remedies just because once the remedy is done, you do not have to continue reviewing it. You have to review conduct remedies every six months or every year and constantly see what is happening.

So, in the administrative sense, structural remedies are easier than conduct remedies. But I would say that we are open to using whatever remedy is necessary to protect the market.

**ANTITRUST SOURCE:** Another tool you gained in the new law was a clarification that merging parties do have to notify the Commission before they consummate their merger. Given the uncertainty of the previous law, and the newness of some of the regulations, are you finding that businesses are complying? Or do you find that people have problems either remembering to notify or have difficulty in understanding the notification requirements?

**ALEJANDRA PALACIOS:** I think that it is very clear, at least for the practitioners, clients, and the Commission, that you cannot close a transaction if you don’t have COFECE’s approval.

In 2013, we analyzed 120 mergers. Last year, we analyzed 150. So, we analyzed 30 more. But you can’t say that this slow growth is because they have to notify us. As you know, you have more mergers when the economy is booming than when there is a depression. So, it’s really difficult to say why exactly we have this growth of 30 mergers. But what I would say is that last year was the first time the authority ever sanctioned a failure to notify a concentration when it was legally required to do so.

A lot of things happened for the first time in 2015; it was a good year.

**ANTITRUST SOURCE:** What are some of the other interesting things that happened in 2015?

**ALEJANDRA PALACIOS:** Well, as I was telling you, I find the number of dawn raids being done and the number of applicants to the leniency program extraordinary. Using a structural remedy was also something new. Imposing a fine for failure to notify a concentration was new. Then we applied a fine because some economic agents did not comply with remedies imposed by a merger resolution, which was also new. We also opened several investigations.

**ANTITRUST SOURCE:** Let me ask you about the increase in the number of concentrations, or mergers, the Commission had to review. If it’s not a complicated case like the supermarkets, are you finding that the staff and the Commission are able to handle those efficiently? What’s your turnaround time?

**ALEJANDRA PALACIOS:** Our turnaround time is about 20 business days.

**ANTITRUST SOURCE:** Really?
ALEJANDRA PALACIOS: Yes. We are trying to be very expeditious in cases that clearly do not pose any risk to competition. We are also trying to be very thorough on those cases that do pose a risk to competition.

In big round numbers, we analyzed 150 concentrations last year. Of those, 10 were difficult, or might have posed a problem to competition. Out of those 10, four came out with some type of remedy and one was blocked. And again, we do want to be very expeditious in those cases where there is not going to be an issue.

We are very interested in learning how the FTC manages mergers and how they execute the initial screening process. We want to import those best practices to Mexico.

ANTITRUST SOURCE: Have you had the experience of coordinating with other countries’ agencies, say, perhaps particularly with the United States or Canada on mergers that affect our whole North American Free Trade area?

ALEJANDRA PALACIOS: Yes. I would say that cooperation within agencies, with other countries has been quite successful. I think cooperation on merger reviews is developing rapidly, and mostly with the North American region because many of the transactions pose North American implications. At the end of 2014, we analyzed a case with DOJ and the Canadian Competition Bureau and we all came out with remedies at the same time.

ANTITRUST SOURCE: Do you recall which case that was?

ALEJANDRA PALACIOS: Continental/Veyance. Additionally, last year we relied on the FTC’s analysis of the Albertsons/Safeway merger, which came out just before our own grocery chain analysis, to learn how to analyze and define local markets.

So there our cooperation was not within the case, but it was more in terms of capacity building, which is also very important. Most recently, Mexico and U.S. authorities have been analyzing a possible merger and an antitrust immunity between Delta and Aeroméxico. We have had conversations with DOT and DOJ.

ANTITRUST SOURCE: When you and your fellow Commissioners are thinking about competition policy in Mexico, and you look to what other countries are doing, do you look more to what is happening in the United States, or in the European Union? Or do you take both into account?

ALEJANDRA PALACIOS: Well, we cooperate more closely with the U.S. authorities by far. I would say this happens for two reasons. One is because many of the transactions have implications for both Mexican and U.S. markets, so we have more cases in common.

If we have more cases in common, it is more natural to cooperate more closely. The Delta/Aeroméxico case is a clear example. That transaction will only have implications in the Mexican and U.S. markets, so it’s an analysis only by DOJ and COFECE. Therefore, you’re not cooperating with other agencies because other agencies don’t have jurisdiction over that particular transaction. That is one reason.

I think the other reason is that the FTC and DOJ see Mexico as an important agency in Latin America. When we get stronger, we can pass on our experience on to other countries in Latin America.

When we receive capacity building from the U.S. agencies, we know we need to share our
knowledge with our colleagues in other Latin American countries. We are working on that. We have a program where we receive between five and seven public servants from competition agencies in Latin America. They come to our agency and they work with us. They are involved in our cases, our merger analyses, our advocacy program, and the work of our international affairs office. We teach them what we know. That is a new program that also started in 2015.

ANTITRUST SOURCE: It is excellent to see you spreading the knowledge. Let me ask you this: where I live and work in Houston, we see Mexico opening its energy sector to international competition, which is hugely important. How has COFECE participated in that?

ALEJANDRA PALACIOS: In December 2013, there was a major constitutional reform. It opened up the electricity, oil, and gas markets in Mexico. I would say that 2014 and 2015 were very important years in terms of the regulation of these markets. When you amend the constitution, you don’t automatically have competition in all markets.

The reform outlined certain times for opening certain markets because, naturally, Mexico as a country, needed the time to put the necessary provisions in place to open those markets. There was a need to construct the new rules of the game, and 2014 and 2015 were those years. As a Commission, we were active in providing technical advice on competition aspects, formally and informally, to the different energy regulators on those regulatory provisions.

For example, we worked on cross-participation issues, on how to open access and regulate distribution transport or storage in the natural gas market, on symmetric regulation in the commercialization of natural gas by PEMEX, because it’s huge, and on the electricity market regulation. Later this year, and in 2017 and 2018, we will start to see players coming on the market. That is when we will have to monitor how firms conduct themselves to see if there is any kind of abuse of dominance or cartel behavior.

ANTITRUST SOURCE: Let me just ask you broadly, now, with a few years of experience with the new laws and regulations, what would you change if you could? If President Peña Nieto said, “Presiding Commissioner, how can I help you, what should we change?”

ALEJANDRA PALACIOS: I would say nothing yet. As an authority, we have experienced profound changes in the last two years. And as an authority that is starting to implement these changes, I think we need to concentrate on capitalizing our work more than thinking about what should change. There are many things in the law we have not even tried working on, so how can I tell you if they work or not if we haven’t even given them time to mature?

So, I think I would not change anything yet. Plus, it could be a Pandora’s box; once we ask for a change, someone else will ask for something else. There was a reform in 2006, 2009, 2011, and one again in 2013. I think it is time to implement what we have, and in time, we will see if it works for us.

ANTITRUST SOURCE: Fair enough. Now, most of the readers of this article are going to be American lawyers interested in Mexico. What would be your most important piece of advice to an American competition lawyer who is involved in a matter in Mexico?

ALEJANDRA PALACIOS: I would say that it is very important to understand the new legal framework. It is for this reason that we have issued a number of important guidelines and technical criteria. I
would invite them to look them up. I would also tell them that COFECE is committed to acting with absolute transparency and being very respectful of due process. Because of that, we worked very hard last year on all of those guidelines and criteria; it is not only so that the practitioners can know how the new system works but it’s also our commitment to apply those criteria and those guidelines in our work. I think that knowing how the Competition Commission will analyze cases and will work gives certainty.●
Interview with Esteban Manuel Greco, President of the National Commission for the Defense of Competition, Argentina

Editor’s Note: Esteban Manuel Greco is the President of the Comisión Nacional de Defensa de la Competencia (CNDC) in Argentina. Previously, he was an international consultant for public and private organizations on competition policy, economic regulation, and energy economics from 2001 to 2015, and a partner at GPR Economia SA from 2009–2015. He was a Commissioner and Chief Economist at CNDC from 2000 to 2001, and an economist and deputy manager at Argentina’s natural gas regulatory agency from 1995 to 2000. He has been a graduate and undergraduate professor at the University of Buenos Aires, National University of Mar del Plata, Torcuato di Tella University, University of San Andrés, and Argentine Business University (UADE). He holds an M.A. in Economics from Torcuato Di Tella University-Inter American Development Bank and a degree in Economics from the University of Buenos Aires. He was interviewed for The Antitrust Source by John Bodrug on April 6, 2016.

THE ANTITRUST SOURCE: Congratulations on your recent appointment as president of the National Commission for the Defense of Competition in Argentina. I appreciate you being here today.

Following elections last November, Argentina’s new president, Mauricio Macri, moved quickly to change a number of government policies on export taxes and currency controls and resolve disputes with international creditors. The President is also reported to have announced that the current administration intends to strengthen the powers of the Argentinean competition authority. Does this announcement signal an intent to quickly adopt a new antitrust enforcement approach in Argentina?

ESTEBAN GRECO: First of all, thank you for your invitation to this interview. And yes, absolutely: Argentina has a new approach to competition policy and this implies in the first place an intention to activate competition law enforcement and competition policy. This was not a priority in the past and now this is a big priority and important for the government. This new approach includes the adoption of technical and professional foundations for decisions towards best practices in these competition matters. So absolutely, we have a new approach, and competition is an important issue on our national policy agenda.

ANTITRUST SOURCE: What do you see as your top priorities for the enforcement agency in the next short while?

ESTEBAN GRECO: Our main priorities derive from the competition act and our law. I always used to call them “triple P.” The first P is penalize anticompetitive behavior. This links to one of our main priorities of using antitrust action to tackle cartels and abuse of dominant position. I think this was not one of the activities prioritized in previous years. The second P, the second priority, is to prevent concentration when this concentration could result in restrictions and distortions to competition. This links to our activity of merger and acquisitions control or review. And the third priority,
or our third P, is to promote competition. This means addressing competition advocacy issues. We have a lot of work to do in educating our business community, our public officials, and those in academic circles. We need to educate the community about competition law, about the internalization of competition as a valid and efficient way to allocate resources. I think in the past there was a loss of confidence in competitive markets as a valid and efficient way to allocate resources, and we need to reestablish confidence in this important instrument in a modern economy. But in this sense we need to show good and strong enforcement of competition law because when there is an infringement of this law and there are anticompetitive behaviors we have to fix it and make sure that markets are working properly.

These are big priorities or main goals. We need to have serious goals and more practical priorities in each of these areas.

ARGENTINA HAS A NEW APPROACH TO COMPETITION POLICY AND THIS IMPLIES IN THE FIRST PLACE AN INTENTION TO ACTIVATE COMPETITION LAW ENFORCEMENT AND COMPETITION POLICY.

ANTITRUST SOURCE: Can you provide particular examples of your plans, such as in the area of cartel enforcement? A 2006 OECD peer review of the Argentina competition law commented that private sector participants perceived that cartel activity was common in Argentina. The report added that this perception may have been the result of a lack of awareness in the business community of the cartel offenses. The report also questioned whether the fines were high enough. And I note that just in February, Argentina’s finance minister commented that Argentina’s businesses will have to get used to competition being a good thing and not just for business but for the citizenry at large. Is that part of a perception issue that you see in Argentina and, if so, how would you go about addressing that?

ESTEBAN GRECO: I think anti-cartel activity needs to be prioritized. I think there is a lot of work to do within the actual legal framework and we need to make amendments to the actual legal framework. We have a poor record in penalizing cartels in Argentina; we have only three relevant cases. One involved a cartel of cement firms. Then we had two cases, one bigger and one smaller in recent years, about cartels in public dealings for medical supplies to hospitals.

These are the main cases in more than 20 years of competition law enforcement in Argentina. I think we have different reasons for that poor record. One is that we do not have adequate tools, and the other is that we do not allocate enough good resources to this area. We need to work and improve our practice and procedures, allocate more resources and better resources to the issue, and give more quality to our decisions.

And at the same time we need to promote some changes in legal framework. We need to include a leniency program in competition law and we need to update the fines. We have really outdated fines. Currently, our maximum fine is about $10 million because our competition act is from 1999 and was last amended in 2001. So the value of the fines and even the thresholds for merger review are in pesos and included in the law. So we need a law to update these figures. That is one of the amendments that we need, to exclude these monetary figures from the law.

ANTITRUST SOURCE: To put them in regulations, for example, to allow the government to update them more quickly?

ESTEBAN GRECO: Yes. We cannot update the fines if we do not change the law. We also have another regulation to issue about how are we going to act towards cartels. We are involved in training programs. We are now organizing a training program with the World Bank about cartels and cartel prosecution and IT forensics for cartels and this is one important step in this line.
ANTITRUST SOURCE: Are you contemplating any steps to increase the consequences of cartel conduct for individuals?

ESTEBAN GRECO: This is an important question. We do not have criminal penalties in competition law for cartels and I think this is one of the issues to discuss in a new project to amend the competition law. We are working on amendments to the competition law to send to congress this year. And this is one of the main issues.

I think we have two main issues; one main issue is institutional. We need to modify the institutional design. We need more independence in the process of deciding the awards and penalties and judging the conduct and fines and penalties for antitrust. We also need to include modern tools in the law, like leniency programs, and discuss other issues like procedures, update the thresholds and times, discuss criminal penalties, and maybe include a promotion or kind of facilitation of private enforcement.

ANTITRUST SOURCE: That's a big agenda.

ESTEBAN GRECO: Yes.

ANTITRUST SOURCE: You mentioned institutional design as one of the issues. Could you explain that? Does that have to do with the independence of the CNDC?

ESTEBAN GRECO: Yes. In Argentina we have an advantage in competition policy and competition law enforcement in that we do not have to build in a green field. We have a large history of competition policy and action. We were one of the first countries of Latin America with a competition law, we were one of the first agencies with action in competition enforcement in Latin America, and we had a very important competition community. In the private sector we have lawyers and economists with expertise and in the public sector we have valuable staff and professionals. But we previously had very erratic policies related to competition law enforcement.

I want to stress that our approach is that competition is a public good. We need to understand this as a policy that has endurance and is durable across different administrations, independent from who is in charge in the presidency, because competition law enforcement is something that is good for consumer welfare and for economic development. But the institutional design needs to take into account our own history and international experience too. We had precedents for how to organize the institutions and the agencies.

We had and have now an agency that depends on the executive; the final decision on competition issues is from the Secretary of Internal Commerce. The agency’s political dependence gives the Secretary discretionary powers to change the way in which competition policy is enforced. Previously we had huge changes in the way competition law enforcement took place in Argentina. And this is a problem because it did not give a credible and durable signal of how we are going to deal with these issues.

And on the other side, in 1999 congress issued a law that established an independent tribunal that never was created. So the law established a tribunal with seven nominated commissioners, outlining a complicated nomination process and removal procedure. This never took place and it was never implemented, so this law was not politically viable. So I think we need to take this precedent into account to use our creativity to propose changes in the law.

The important goal is that the new or improved institution or competition agency has to have
independence to issue sanctions. We have to be clear that there will not be political influence in fines in some form or another. This is an important goal. The way that we organize and design the institution may be different. We have examples in Latin America like Chile and Brazil, that had their own reforms, and they are working better than in the past. We need to learn about the international experience, best practices, and from our own precedents to propose a new institutional arrangement.

**ANTITRUST SOURCE:** Another side of that issue is that the OECD 2006 peer review study observed that the ministry of economy and production would sometimes ask CNDC to investigate and report on a sector if the ministry felt that there had been unwarranted price increases. The peer review also suggested that this fed into a public perception that competition law was a weapon against inflation. Do you anticipate that CNDC will have less of a role in that kind of investigation and be able to focus its resources on what you’ve talked about?

**ESTEBAN GRECO:** Yes, I think there may be a misunderstanding in the public opinion about the role of competition law enforcement and competition policy. I want to clarify that. I do not think, and the Competition Commission does not think, that competition law enforcement and competition policy is a tool against inflation. I think the government is clarifying this too. This misunderstanding might come from the misguidance that the government or the state gave in the past about the role of the state in the markets.

I told you about this loss of confidence in competitive markets as a way of allocating resources. Besides that, maybe there was an approach of the past government that the government has a role to intervene directly in markets even in competitive or potentially competitive markets. With this approach, government officials often made arrangements and agreements with private firms and competitors, sitting them at a table to intervene in the way the market functions and what kind of practices they have to do or what kind of prices they have to charge.

I think these were misguided signals. We need to change this approach and clarify the competition law and the kinds of behaviors that are legal under competition law and what behaviors are not. I think the issue we face now is that the government is dealing with a high inflation problem that came from the past. We’ve had high inflation since 2007 and inflation is not good for competition. Inflation harms competition because consumers lose their references and inflation increases the cost of changing suppliers. But the competition policy and competition law enforcement is not the tool to deal with inflation. I want to clarify that.

**ANTITRUST SOURCE:** Perhaps we could move to the topic of mergers. Do you have any plans to change the competition authority’s approach to merger review? In particular, do you accept the perspective of some commentators that merger review in Argentina has often taken too long?

**ESTEBAN GRECO:** Yes, I agree with that. I was one of the commentators because I am the co-author of a couple of papers with statistical analysis of mergers. Our review of the situation endorsed my previous conclusions in the sense that there was a tendency of increasing delay in merger review. I can give you some numbers. Through the end of March we had 334 pending merger and acquisition filings. The average between filing and, as of the end of March, clearance, is 2.6 years. This is too long.

There are filings that are going to be resolved in a few days and others that will take a little longer. But within this average you have filings with a delay of four or five years since the filing. The
reason or the causes of this are different. One is the threshold problem; we need to update the 
threshold for merger notification. Today we have a threshold of about $13 million sales in Argentina 
of the merging parties and the minimum value of the assets to be acquired is approximately $1.3 
million. Therefore, any firm that has sales greater than $13 million in Argentina and buys another 
firm or an asset of more than $1.3 million has to notify a merger, or has to make a filing.

This is a problem but we are also implementing internal procedures to make it faster to analyze 
the non-important or less significant cases. We are implementing a simplified procedure to fast-
track these kind of operations or filings. Of the more than 300 filings, about 35 percent of these 
are conglomerate mergers with no horizontal or vertical relationship and thus little effect in terms 
of competition. These cases, on average, are taking about 1.8 years and this is not acceptable. 
We are taking action to resolve these kinds of mergers more quickly.

**ANTITRUST SOURCE:** Are you contemplating a short form or expedited review for transactions with 
no horizontal or vertical overlaps?

**ESTEBAN GRECO:** As a matter of fact, we have in our regulations a short form called F1. We also 
have a longer form called F2 for second phase or more complicated or problematic mergers. And 
we can use the same filing forms. But currently our law says that a merger would be implicitly or 
tactically approved in 45 working days, and there's the clue.

If the Commission asks the parties for more information or to complete the form, the clock stops 
and then the Competition Commission can extend the term indefinitely. That's what is happening 
today. We need to use these information requests more conservatively and reallocate resources 
to more significant and important cases—and not to cases that don’t have competition problems.

There might be other ways to explain this point. For example, competition was not a priority for 
the government and maybe the government was comfortable with delaying resolutions of cases 
as a way to force firms to make concessions that would be used to achieve other political goals, 
such as forcing firms to negotiate on other issues like price increases. This is not our duty and we 
are not going to do anything apart from enforcing competition law. We are going to make every 
effort to make this procedure align with the best practices in the world. Maybe 45 working days 
might be too short for a complex or difficult or potentially harmful merger, but not for a simple 
merger.

We need to reallocate our resources and improve this because now we have two conse-
quences. One is that the merger review process is not binding. If you merge anyway and if the 
Competition Commission, three years after the closing, has something to say, we cannot in reali-
ty go backwards to a premerger situation. This is one of the problems. The other is that these 
delays are an obstacle or an impediment to new investments. So we really need to improve this 
process a lot.

**ANTITRUST SOURCE:** You commented that it’s hard to go back and unscramble the eggs a few 
years later. Presumably, that means that the parties are closing the transaction before obtaining 
clearance. Are they closing before even notifying the CNDC because they don’t have to notify until 
seven days after closing? Or when do the parties have to notify?

**ESTEBAN GRECO:** Yes, parties can notify until one week after they close. Practically, the parties are 
notifying after the closing and going ahead with the transactions. Some years ago, maybe 10 or 
15 years ago, when merger review began in Argentina, I was a chief economist and then I was a
commissioner. At that time, the companies or firms used to wait for the decision of the competition authority to close the deal and go forward with the merger. Now the reality is that nobody is waiting.

**ANTITRUST SOURCE:** Is it your objective, on the one hand, to speed up the merger review but also to have the expectation that parties would wait for the clearance before they complete the transaction?

**ESTEBAN GRECO:** Yes—that’s a good question. This is one of the issues that we are analyzing, to change the law. But we cannot change the notification or the filing procedures to say that we should have premerger notification if we do not improve our procedures and reduce the review time drastically. So, I think we have to do both things.

**ANTITRUST SOURCE:** It appears that in its merger reviews, the Argentine competition authority pays relatively more attention than some other jurisdictions to non-compete covenants and the duration of the non-compete. Is that going to continue to be a focus? Or, is that correct?

**ESTEBAN GRECO:** That perception is correct. The Competition Commission has been restrictive in merger cases. There are several merger cases in which the Competition Commission authority used the approval process to change non-compete covenants. We have several precedents in that way. I think non-compete covenants are not prohibited per se by the law, but the precedents in our practice are that the Competition Commission did not allow restrictive non-compete covenants. I think we have this clarified in Competition Commission decisions. Generally, the limit is considered two years of non-compete covenants for general cases, and maybe five years if there is “know how” transfer.

This is a precedent and I think this will continue in the future. Maybe it’s arguable that if the merger case is not problematic, the Competition Commission does not have to intervene in changing the non-compete covenants. It’s something to discuss, but I think we have to take into account our precedents.

**ANTITRUST SOURCE:** Could you comment on the approach to dominance or monopolization, what the history has been in Argentina, and what your anticipated enforcement policy is likely to be in that area? Will that be an area of focus for you?

**ESTEBAN GRECO:** Yes. I think that most of the cases that had a sanction or penalty in our precedents are dominance cases. The most important case is an LPG case where we imposed a fine on the main oil company in Argentina, YPF. This case began in 1998 or 1997 and was decided by the Commission in 1999. The fine imposed on YPF was $109 million. YPF litigated and appealed the decision and the Supreme Court confirmed the decision five or six years later. One issue around that is that the company paid one-third of the original fine in dollars because in the middle of the process there was a huge devaluation of local currency.

Another thing to analyze is how to establish the fines when the local currency may be devaluated in the meantime.

**ANTITRUST SOURCE:** Are there other remedies available for abuse of dominance like conduct remedies or divestitures?
ESTEBAN GRECO: We do not have divestiture remedies in antitrust cases as a competition authority decision. We can only propose structural remedies for mergers, not for dominance cases or cartels. According to the law, the competition authority can request divestiture from the court, but it has never been done. However, we can recommend some behavioral remedies in order to end a practice or a conduct, and we can fine the parties. Another issue is that we do not have criminal penalties for dominance or cartel cases.

ANTITRUST SOURCE: I think earlier you briefly mentioned private enforcement. Do you anticipate in the changes you’re contemplating that there might be a greater role for private enforcement, for private parties to sue for competition law violations or class actions in Argentina?

ESTEBAN GRECO: Yes, private enforcement in Argentina is still in the early stages. Argentina’s enforcement system of competition law has been almost exclusively public, through the Competition Commission. It’s different from the United States where there is a lot of private enforcement. In Argentina, we have some obstacles to private enforcement. One challenge is the difficulty in producing evidence that proves the existence of illegal activities. Generally, this is complex evidence and it is difficult to privately obtain.

The other obstacle is the length of time required. If the parties have to wait for the competition authority to investigate and reach a decision, then they can begin the prosecution of civil damages. The other problem is that in a lot of cases, the claims are small amounts and they are not incentivized to organize. In a way, class actions could help this.

There were very few cases that sought to impose civil liability for antitrust regulations in Argentina. We are analyzing amendments in competition law to facilitate or promote this kind of private enforcement. Regarding class actions, I can say that the Supreme Court has clarified the scope of class actions in Argentina and this includes competition issues; not only competition issues but environmental issues and consumer protection issues are included. But we do not have precedent yet. We might have cases in environmental protection and some consumer protection cases, but we do not have class action cases in competition. Maybe some regulation regarding how to proceed with class action competition cases is needed and would help to enforce the competition law in Argentina.

ANTITRUST SOURCE: Would you like to comment on the extent to which the Argentine authority cooperates and exchanges information with other competition authorities in other jurisdictions and how you might see that evolving in the future?

ESTEBAN GRECO: Yes. We have some formal, bilateral agreements with other competition agencies. We have agreements with Brazil, Mexico, Spain, and Ecuador. I think these agreements are formal agreements, but our agency hasn’t used them very often. I think we need to reactivate the use of these agreements not only to exchange information on our approaches about how to deal with competition issues, but maybe we have the same kind of problems in Latin American countries. Or we share relevant markets with our neighbors.

So I think we need to strengthen these links and we need more agreements with other agencies like Chile, Colombia, and Peru. We may also need some systematic cooperation in cases, taking into account confidentiality issues. But one of our priorities, one that I stress, is the internationalization of the agency. We want to improve links with other international organizations, other agencies in the region and around the world, to improve our practice.
One of our goals is to take actions to achieve the best practices from around the world, so we need to strengthen these links. We just began to do that. We are organizing a training program with the FTC and DOJ. This collaboration improves our capabilities. We are also organizing other training activities with the World Bank and other organizations, with UNCTAD, the United Nations Conference on Trade and Development, and we are strengthening our links with our partner agencies in Latin America. I think this is one of our important areas of work.

**ANTITRUST SOURCE:** Thank you very much for your time and I wish you the best of luck in implementing your ambitious agenda.

**ESTEBAN GRECO:** Thank you. It’s a big challenge but we do it with passion. We are happy to do it.
Paper Trail: Working Papers and Recent Scholarship

Editor’s Note: Editor John Woodbury discusses a paper describing additional evidence that the multi-firm holdings of institutional investors have reduced competition, this time among banks.

Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers


In a recent Paper Trail, I discussed a study providing evidence that increased concentration among institutional investors in the airline industry resulted in significant fare increases and output reductions. That paper began by noting that many of the same large institutional investors have holdings in multiple airlines. This raises the possibility that these investors may explicitly encourage the rival airlines to soften competition with each other. Alternatively, those investment links may result in management’s unilaterally accounting for the returns to these investors in its profit-maximization decisions—that is, the returns to these investors become part of management’s profit calculus, returns that also depend on the profits of the rival airlines. To measure the extent and ultimately the effect of these multiple-airline investment stakes on prices, the paper relied on the Modified Herfindahl-Hirschman Index (MHHI) of concentration. This metric includes as components the conventional Herfindahl-Hirschman Index (i.e., concentration on airline routes measured by airline shares) and an additional component reflecting the airline ownership stakes of the leading institutional investors.

My discussion noted the paper’s conclusion that the effect of accounting for institutional stake holders resulted in fares at least 10 percent higher than if institutional investors had no such investment stakes in the airlines. It appears that this paper has already had an enforcement impact. In its ongoing investigation of the airline industry, the Justice Department is apparently assessing the extent to which communications between the airlines and these investors fostered or facilitated fare or capacity collusion.

4 Paper Trail 2014, supra note 1, at 5.
Among other issues, my discussion of the paper suggested caution in adopting general antitrust remedies addressing the extent of institutional ownership within U.S. markets until further research confirms the robustness of this effect. In that vein, a more recent paper written by two of the authors of the airline paper—José Azar (a colleague of the reviewer’s at Charles River Associates) and Martin Schmalz (Ross School of Business, University of Michigan)—along with Sahil Raina (Ross School of Business, University of Michigan) has extended the original analysis to the common institutional investor ownership of banks.

The authors note that (as with airlines) the stock ownership of banks by institutional investors is common and that these investors have stakes in multiple rival banks. For example, four of the same institutional investors (Vanguard, State Street, Fidelity, and BlackRock) have significant stakes in some of the largest banks in the United States: JPMorgan Chase, Bank of America, Citigroup, and Wells Fargo. As with the airline industry analysis, these common ownership stakes raise the possibility that the investors use (explicitly or implicitly) their ownership clout to encourage or suggest that competition for bank deposits should be softened.

And as with airlines—either via encouragement by institutional investors or via unilateral action by the bank managers—the bank managers in theory could account for the effect of the bank’s actions not only on the bank’s profits but also on the profits of the rival banks held by the investors. And, in that way, competition among banks for deposits could be reduced.

But the authors note an additional twist: “[M]any banks have asset management divisions that are shareholders of competitor banks. As a consequence, banking is an industry in which an effective concentration measure has to jointly take into account common ownership [by institutional investors] and cross ownership [by the banks themselves].”

On that front, the authors extend the MHHI to account for these additional cross-ownership links to form what the authors refer to as the Generalized Herfindahl-Hirschman Index (GHHI) of concentration. As with the MHHI, the authors assume that firms primarily focus on the economic incentives of those shareholders with the most control rights in the firm. The outcome is that the firm will put weight not only on its own profits but also on the profits of its competitors—to the extent that its most powerful shareholders also have stakes in those competitors.

As shown in the paper’s Figure VI (A) and reproduced below, the gap between the standard HHI and the GHHI is substantial and has been increasing at the county level (the geographic unit of observation for the statistical analysis). Both indices were relatively flat until around 2007, after which the HHI remained relatively flat while the GHHI began rising substantially through 2013. The

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7 Azar et al. 2016, Table I at 46.
8 Id. at 4–5. A much more extensive and informative discussion of the “activism” by institutional investors can be found in the original airline paper. See Azar et al. 2015, supra note 2, at 32–36.
10 Id. at 13. Having said that, for most of the approximately 3,000 counties in the paper’s sample (about 80%), the difference between the MHHI and the GHHI is less than 100 points (where both indices are measured over the HHI range of 0 to 10,000). For 231 counties, the difference is more than 200 points. Azar et al. 2016, at 2–3. It is puzzling why the authors did not provide examples of the extent of the cross-ownership links among banks themselves, as they did with institutional investors. That may be, as just noted, that there is often little difference between the GHHI and MHHI, i.e., that the institutional investor links are typically far more important than the bank cross-ownership links.
11 The figure is extracted from Azar et al. 2016, Figure VI (A) titled “County-level bank concentration,” at 67.
mean of the GHHI over the entire period is about 1,400 points higher than the mean HHI, and for 2013, the gap appears to be about 2,500 points.\footnote{Azar et al. 2016, Table II at 47 and Figure VI (A) at 67. The authors note (at 3) that this gap “compares to regulatory thresholds for merger review of 200 HHI points.” But this comparison seems to suggest that the right benchmark is no common or cross ownership. In a merger context, one would be focused on the change in the GHHI, not its level, and comparing that to the 200-point threshold. However, it is not even clear that after accounting for the common- and cross-ownership links, the threshold should be the same as that for the HHI. Putting aside the 200 point threshold, the more important point is that the gap between the GHHI and HHI certainly could suggest a far less competitive market than one might have thought considering only conventional measures of concentration.}

If one were to use the HHI itself as a structural indicator of whether banking competition has become less significant, one might reach the conclusion that (other things equal) it has not. The GHHI, however, tells a far different story of seemingly and significantly reduced competition. As Figure VI (A) might suggest, because there appears to be little correlation between the HHI and GHHI, the authors point out that use of the HHI instead of the GHHI to determine the pricing effects of banking concentration could lead to a conclusion of little or no effect of concentration on prices. That conclusion could be wrong because the analysis would have failed to account for the common- and cross-ownership links across the banks by institutional investors and the banks themselves.\footnote{Id. at 12.}

Having constructed the GHHI using detailed data from a variety of sources, the authors then consider the effect of the GHHI on money market and interest-bearing checking account maintenance fees, account balance thresholds (below which the fee is imposed), and interest rates on CDs, money market funds, and interest-bearing checking accounts. In the “baseline” regressions, the standard HHI rarely has a significant effect on these outcome variables. This is not a surprise, given how stable the HHI series is over time (as shown in the figure above). By contrast, the GHHI is almost always highly significant, suggesting that the GHHI is a much more powerful metric for gauging competition than the HHI.\footnote{It would have been interesting to consider whether the MHHI would have performed as well, given the similarity between the two indices and given the reduced data requirements for the MHHI alone. See supra note 10.}
But the authors note that it is possible that “investors predict banks’ profit margins, buy more stock in those banks, and thus generate the link between the GHHI and prices [of interest].” Using an instrumental variable technique, the paper attempts to account for this possibility of reverse causality. The baseline results remain robust. The HHI is rarely statistically significant while the GHHI is almost always highly significant.

Given the statistical strength of the GHHI effect, a key question is how empirically important the GHHI effect is. To some extent, this depends on the question being asked. The paper reports that for interest-bearing checking accounts, “a one-standard deviation increase [about 1500 points] in the GHHI due to changes in common ownership leads to an increase of $1.33 in fees (an 11% increase) and an increase of $719 in thresholds (a 16.8% increase).” Putting this in perspective, “The effect of a one-standard deviation increase in the GHHI is comparable to 20% of the growth in fees [between 2003 and 2013] and 17% of the growth in thresholds for interest-bearing accounts in that period.” The paper found similar large GHHI effects for money market account fees and thresholds.

As an alternative gauge, suppose one were reviewing a merger between two banks. I used the data provided in the paper and the results in Table IV to assess the effect of a 500-point increase in the GHHI (about a 15% increase over the sample mean of 3,250) on maintenance fees and thresholds. That is, I assume there is a banking merger that generates that increase in the GHHI.

Interpreting the results causally, the 500-point GHHI increase would generate an increase of $0.11 in the monthly money market fees and about $0.45 in the monthly checking account fees. As a percentage of the mean fees in the sample, that is equivalent to a 1% increase and a 4% increase in the money market fees and checking account fees, respectively.

There is a larger impact on the account thresholds. The increase in money market thresholds from the 500-point GHHI increase would be about $166 (or an increase of about 6% above the mean threshold) and about $243 for checking account thresholds (also an increase of about 6% above the mean threshold). On one hand, the direct competitive harm to consumers is more difficult to isolate, because many consumers likely would be below the thresholds in any event. On the other hand, it is reasonable to infer that an important dimension of competition by banks for deposits is rendered less significant in an empirically important way by such an increase in the GHHI.

But there is another dimension to the analysis that may be more significant. Looking at Figure VI (A) above, between 2007 and 2013, the GHHI appears to have increased by about 1,600 points (or more). Based on the results of the instrumented regressions, that would suggest an accom-

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16 Id. at 24. Note that in the model the effect of a change in the GHHI on the various outcome variables is linear, i.e., independent of the level of the GHHI. It is possible that a given change in the GHHI has a larger (or smaller) impact in more concentrated markets than in markets more removed from competitive concerns.
17 Id. at 24–25.
18 Id. at 24.
19 Id. at 51–53. Given some data complexities in constructing the interest rate variables, the price effects of GHHI changes on interest rates are more difficult to calculate. See Aazar et al. 2016, at 9–10.
20 However, the thresholds, the maintenance fees, and the interest rates are likely simultaneously determined, something not accounted for in the paper.
21 A caveat here is that these calculations are based on the “raw” GHHI data, not the instrumented GHHI. However, the authors note that instrument and the GHHI are very highly correlated. Aazar et al. 2016, at 23.
panying increase in the monthly money market and checking account fees of $0.34 and $1.44, respectively. While the 2007 mean levels of these variables are not included in the paper, these changes imply that the money market and checking account fees as of 2013 are, respectively, 3.5% and 12% higher than the overall sample means. The account balance thresholds for both checking accounts and money market accounts are also higher in 2013—about 18% higher than the overall sample means.

The results suggest that increases in the ownership links of institutional investors and banks have had (judged by these results) a significant adverse secular effect on bank competition (less so for fees than for thresholds).

The two previous examples—a bank merger and evaluating the secular trend in the banking GHHI—are relatively easy to assess, given the focus on a data-rich banking industry. Suppose, however, that either two institutional investors chose to merge or an institutional investor chose to significantly increase its shareholdings generally. In both cases, a competitive analysis taking into account the factors discussed above would be far more extensive than current conventional merger analysis. In both cases, any market in which the institutional investors had shareholdings would have to be assessed in combination with all other institutional investors to estimate the competitive impact of those changes. One could imagine that this would be a difficult exercise in that it requires data not only on the institutional investors but also the downstream firms in which they invest, including the various markets in which each of those downstream firms operates. For each of those markets, a GHHI would need to be calculated, and that may require information from those downstream firms even though they are not direct parties to the merger or the stock acquisition.22

Of course, all of this assumes that the antitrust agencies would accept the use of the GHHI (or MHHI) in merger enforcement specifically and antitrust enforcement generally—and that it would make sense to do so. In a thoughtful consideration of antitrust enforcement in light of the airline and banking findings, Jonathan Baker points out the limitations and hurdles of incorporating institutional investor relationships into antitrust policy.23 For example (and among other issues), suppose that in some specific matter, one or more institutional investors has stakes not only in the ultimate downstream firms of concern but also in some of the input suppliers to those firms. If the analysis concludes that heightened downstream market power would reduce the demand for the input suppliers, the institutional investor may be worse off if its share of the increased profits of the ultimate downstream firm does not at least offset the loss in profits for the upstream input suppliers to that firm.24

In addition, I noted in my discussion of the airline industry results that further research is necessary (although the analysis of the banking industry is one important effort in that regard) before the GHHI (or MHHI) becomes a pillar of antitrust enforcement. Baker similarly notes that “the empirical economic literature relating overlapping financial investor ownership to higher prices is

22 While it is not unusual for the agencies to request information from rivals of the merged firm, the scope of such a request could be much broader if the GHHI were used as a gauge of the merger’s effect on competition. Of course, it is possible that the agencies could exempt small shareholdings in particular markets.


24 Id. at 225 & n.65; see also Paper Trail 2014, supra note 1, at 6. Note that the profit-maximization problem facing a firm’s managers becomes far more complex if the manager must account not only for institutional investor stakes in the firm’s rival but also in its input suppliers.
in its infancy.” 25 Azar et al. also urge the antitrust agencies to “allocate considerable resources to understanding the role of institutional investors in product pricing and capacity decisions.” 26 In addition, Azar et al. observe that “much care would have to be taken to appropriately weigh the benefits and costs of the current structure of the asset management industry.” 27

Having emphasized the need for further study, antitrust practitioners nonetheless may well (and perhaps should) experience some unease as a result of these two papers. In both cases, the statistical analyses are robust in suggesting that antitrust policy may have overlooked a significant analytic component that has reduced competition and so harmed consumers. 28

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26 Azar et al. 2016, at 34.
27 Id. at 35. Interestingly, Baker cogently addresses possible claims of adverse capital market effects that might flow from the expanded antitrust review, such as impaired corporate governance and increased costs of portfolio diversification, and finds them unpersuasive. Baker, supra note 23, at 227–31.
28 I should note that while I have focused on the antitrust implications of the paper, the paper itself suggests other ramifications flowing from the antitrust analyses, such as increasing income inequality and crime. These and other broader issues are discussed in greater detail in Einer Elhauge, Horizontal Shareholding, 129 Harv. L. Rev. 1267, 1278–1301 (2016), http://harvardlawreview.org/2016/03/horizontal-shareholding/, and Baker, supra note 23, at 212–23. See also my discussion of Elhauge, supra, in Paper Trail: Working Papers and Recent Scholarship, Antitrust Source (Oct. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_paper_trail_10_19f.authcheckdam.pdf.