Roundtable Conference with Enforcement Officials
Agency heads from the United States, Mexico, and Europe, along with the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, provide updates from their respective organizations. Topics discussed include leniency applications in cartel enforcement, disgorgement, non-price benefits of mergers, merger remedies, and convergence across jurisdictions.

Interview with Johannes Laitenberger, EC Director-General for Competition
The EC Director-General for Competition discusses the role of industrial policy and “fair competition” in EC enforcement, merger notification, gun jumping, merger review in innovation-sensitive markets, the EC’s whistleblower policy, and collusion through algorithms.

Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal
The Chairperson of Canada’s Competition Tribunal explains the structure of the Tribunal, the Tribunal’s approaches to mediation and case management, and the role of economic advisors and experts. He also discusses recent significant rulings of the Tribunal, tips for counsel appearing before the Tribunal, and prospects for adjudicators to participate in OECD or ICN international collaboration.

Interview with Rose Webb, Chief Executive Officer of the Hong Kong Competition Commission
The CEO of Hong Kong’s antitrust agency discusses the legal relationship between Hong Kong and China, challenges in launching the Competition Law Ordinance that came into effect in December 2015, including education and enforcement tools employed by the Commission, the interplay between competition and anti-corruption laws, information sharing with foreign agencies, the impact of the Ordinance on business in Hong Kong, and the benefits of an agency recruiting internationally.

Interview with Skaidrīte Ābraņa, Chairperson of the Competition Council of Latvia
The Chairperson of Latvia’s antitrust agency discusses the role of competition culture in Latvia’s transition to a market economy, challenges faced by the Council in enforcing the law against former monopolies, amendments to the competition law in 2016, the Council’s approach to bid rigging on public procurement contracts, merger enforcement in a small economy, and the Council’s advocacy efforts with respect to government regulation.

How Group Purchasing Organizations Reduce Healthcare Costs in a Highly Competitive Market
Dan O’Brien, Jon Leibowitz, and Russell Anello examine empirical evidence and apply economic analysis to assess the extent to which GPOs operate in a competitive market and save money for healthcare providers and patients, as well as the implications of vendor-funding of GPOs.

Understanding the Antitrust Jurisprudence of Justice Gorsuch: Conwood’s Continuing Influence
Jeffrey Klenk and Jeffrey Armstrong review the private practice experience of Supreme Court Justice Neil Gorsuch as counsel for the plaintiff in the Conwood case and discuss how it may influence his approach to antitrust cases reaching the U.S. Supreme Court during his tenure.
WILLIAM MACLEOD: We are now here for the event that defines and provides a fitting capstone for our Annual Spring Meeting. This is our opportunity to hear from enforcers from around the world about the priorities, the policies, the history, and the activities of their agencies.

We are going to follow our traditional format by giving each of our enforcers an opportunity to comment on the news and the developments from their respective jurisdictions and then we will commence with a cross-examination.

We have Vic Domen, the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) from Nashville, Tennessee; the Honorable Maureen Ohlhausen, the Acting Chairman of the Federal Trade Commission here in Washington; Alejandra Palacios, the President of the Comisión Federal de Competencia Económica (COFECE) of Mexico City; Brent Snyder, the Acting Assistant Attorney General of the U.S. Department of Justice Antitrust Division; and of course, Margrethe Vestager, the Commissioner for Competition of the European Commission in Brussels, Belgium.

Why don’t we begin with Commissioner Vestager. Commissioner?

MARGRETHE VESTAGER: Thank you for the invitation, thank you for having us come together today. I am very much looking forward to hearing what is on colleagues’ minds, how do you see your casework moving forward, how do you see the tendencies—that’s an inspiration, at least for me, and I think for all of us.

Also, because day to day, obviously, we are very busy with the casework. We have a specific point of view from the cases. I think this is a great opportunity to just take one step back and breathe and look at what we are doing and see if there are more general takeaways for our future work.
You asked us to reflect a little on the past and the future, what we have been doing, what we are going to do. That's a very topical question in Europe at the moment. I guess that some of you have been discussing Brexit. But some of you may also have missed the fact that last Saturday we celebrated the 60th anniversary of the Rome Treaty, our treaty, sort of the birth certificate of the European Union. When we look back at those 60 years, we see that our European Union has helped us to work together peacefully, to reach an unprecedented level of prosperity, peace, freedom. What we have been doing, and what we will be doing, is to create a Europe that meets the needs of its people. Sometimes that is forgotten in all the problems piling up, in all the things that we have to solve, that we have achieved amazing things before: the Wall came down, Germany became united, Europe became one. These achievements also give us the inspiration to solve the problems ahead of us.

Some of the things that we have been doing in antitrust and state aid, I think they have played their part—maybe not a main road, but they have played their part. They are important. They were written into our Treaty from the very first day. They were, of course, as you know, partly inspired by the example of the United States. If our founders were able to see what we have been doing in the last years or so, I think they would recognize what they were trying to build, what they were thinking, how they wanted it to be. They would understand why we give so much attention and effort to fighting cartels, that we go through thousands and thousands and thousands of documents in order to prove our cases.

I think that, recognizing a case like our decision to fine five truck makers for a cartel that lasted 14 years, on the one hand, they might be struck by the level of the fine, the size, €2.9 billion. It is by far the biggest fine in European Commission history. They may wonder—and probably also get over the shock of looking at our digitalized societies and what technology can do these days—but I think that our founders would also understand our work in a digital age. In our Google cases we have been looking at whether a company is harming competition by excluding rivals. In our work on e-commerce, which includes a sector inquiry and also a number of cases we launched last year, we want to know if consumers have been prevented from choosing sellers with lower prices from different EU countries. So it may be digitalized markets, but the potential abuse and harm done to consumers are the same.

When it comes to state aid, our founders would certainly agree that a selective tax benefit is state aid as sure as a grant in cash. So I think they would have understood the decisions that we took last year on a Belgian scheme that benefited 35 multinationals, as well as the aid that Ireland gave to Apple.

The merger control system is slightly younger. It has only been around for a little more than 25 years. Last year was the second busiest year of all time. We’re not only seeing more mergers, they are also getting more complex. Last year we had a merger between the world’s two biggest beer companies, AB InBev and SABMiller. It was notified in 28 authorities on every continent, except Antarctica. I’m quite sure that they drink beer in Antarctica, but they don’t have a competition authority. [Laughter]

What matters, of course, is when we do the casework and it is complex, then we need to get accurate information from the merging companies. This is why we deal very firmly with any breaches of procedural rules. Right now we are looking at a number of cases where we suspect that companies gave us incorrect information during the procedure. The other side of that coin is, of course, that we really, really, really put a lot of effort into securing procedural rights—the right to defense, access to file, the right to defend yourself.

So what happens next? A fellow Dane, Niels Bohr, said that “Predictions are hard, especially about the future.”
We do know that we have a number of cases that we will be taking forward in the near future. We’ve put a lot of work into it because speed is of the essence. Obviously, we never compromise on the quality in the casework, the right to defend yourself, but we try to move things forward as quickly as possible.

We, hopefully, can move some things forward in the year to come. We have our case on Gazprom, where we are now consulting on possible commitments. We have our cases on the digital economy, where I hope that we can make progress in the coming months. We have open investigations as to whether Luxembourg gave state aid to Amazon, McDonald’s, and Engie, a French energy company.

We also know that we will keep on working on refining our procedures. Last week we adopted a proposal to help Europe’s national competition authorities to do their work even better. The proposal deals with, I think, quite essential things, like collecting digital evidence, imposing a fine that really can deter companies from breaking the law, and of course legal guarantees for independent decision making.

This is not a detail; this is a big thing for us, because enforcing European competition law is not for the Commission alone. This is something that we do in very close cooperation with our national authorities. Actually, about 85 percent of all decisions taken under EU competition law are taken by our national authorities. So of course, to make sure that they have the right powers, that is very important for us.

And then, there are things that are much harder to predict. Some of those are about the effects of new technology. We know that data becomes an increasingly important asset. Business decisions are being outsourced to algorithms. In those areas I think we are doing our best, and I think we do understand the sorts of issues that we are likely to face. But we still have to wait and see in what case we will actually face them, because so far it has been part of the analysis but there has not been “the big data case.” We still have that to come.

But if I can make a prediction into the future which is very soon to come, it would be that my colleagues have inspiring and interesting things to say and that we will have a great roundtable, because we have great people to ask us questions that will be daring and interesting. So much for the near future. Thank you.

MR. MACLEOD: Next, Brent Snyder, Acting Assistant Attorney General.

BRENT SNYDER: Good morning, and thank you to the ABA and to Peggy and Bill for the opportunity to be here today. Also, it is a privilege to share the stage with such distinguished colleagues.

The big news for the Antitrust Division this week was the announcement by President Trump that he will be nominating Makan Delrahim as the Assistant Attorney General for Antitrust. This was very exciting news for us, not only because of his considerable experience as an antitrust attorney, but also because he is already a member of the Antitrust Division family, having served as a Deputy Assistant Attorney General during the Bush Administration. We are very excited for Makan’s arrival. We look forward to welcoming him back, and the career staff of the Division stands ready to carry out his priorities with their customary dedication and professionalism. Year in and year out, administration to administration, it’s the career staff of the Antitrust Division that’s the backbone of the work that we do.

Of course, I can’t yet speak to the particular priorities or policies of our new leadership, so nothing that I say here today should be taken as an indication otherwise.

As many of you probably know, I am the Deputy Assistant Attorney General for Criminal Enforcement. However, since January it has been my privilege to be able to serve as Acting...
Assistant Attorney General of the Antitrust Division while we await the confirmation of our new Assistant Attorney General. In this role I have been very fortunate to be assisted by a very talented group of directors, whom many of you heard from earlier this week. Patty Brink, in particular, who is here, has carried an especially heavy load because she was responsible or had the unenviable task of trying to educate me about civil antitrust enforcement. Patty, that is much appreciated, as well as the work of all the other directors.

In this expanded role that I have had for the last couple of months I have come to appreciate as never before the full breadth of the work that the Antitrust Division does, as well as just how talented and professional our career staff is.

Without treading too much of the ground that was covered by our directors on Wednesday, I do want to focus on the work that we have done recently, including some matters that you have probably seen in the news as recently as yesterday, including our settlement with AT&T and DirecTV, which was announced last Thursday, and our settlement with Smiths and Morpho, announced just yesterday, which requires the parties to divest Morpho’s desktop Explosive Trace Detection unit business so that a new buyer can replace competition that was lost by the merger.

Looking back a little further into last year and the beginning of this year, I want to highlight the accomplishments of a dedicated group of career employees who have pulled together as never before to tackle an unprecedented caseload, including trying and prevailing in five major trials in less than four months spanning November to February. The ability to try cases, and win them when necessary, is important to our credibility, both in negotiations with parties and ultimately to accomplish our mission. I’m happy to report that, thanks to the trials I just mentioned, we have a deeper bench of seasoned trial litigators than perhaps ever before, sharpened by having litigated against a number of very talented and experienced private counsel.

Let me just share a few statistics from the trials from just the last four months. More than 100 of our attorneys participated on teams that took these cases to trial. Forty-one of those attorneys stood up to represent the United States in court. Across these trials our attorneys examined 94 witnesses during a total of 54 total trial days. And not only did our attorneys gain stand-up experience, but they also prepared more than 4,000 pages of briefing during the course of those trials.

And that’s not the end. We actually have nine more cases that are scheduled for trial in 2017: two merger trials, one civil conduct trial, and six criminal trials. So we’re going to be very, very busy.

I also want to highlight some of the cases we concluded without going all the way to trial. In May of 2016 Halliburton abandoned its attempt to acquire Baker Hughes, which we had sued to stop because it would have eliminated competition in markets for 23 different products and services in the oilfield services industry.

In July of 2016 the Division also was involved in settling with Anheuser Busch InBev (ABI) to allow ABI to proceed with its acquisition of SABMiller. In this case distribution relationships turned out to play a big role in the potential competitive effects, so we designed a remedy to address not only direct competition between the parties but also these important distributor relationships.

I also want to say a word about our continued work to enforce the Hart-Scott-Rodino Act, which demonstrates that we will take action when companies violate provisions of the Act. In July 2016 the Division obtained the largest HSR penalty in history, $11 million, in a settlement of its case with ValueAct, and in January of this year the Division settled another case involving a violation of the HSR Act by Duke Energy and obtained a $600,000 penalty.

We also took action to protect the integrity of our civil and criminal investigations by criminally prosecuting individuals, one individual who obstructed a civil investigation and another individual who obstructed a criminal investigation.
And we brought criminal cases in a variety of investigations, including familiar investigations like automobile parts, residential real estate foreclosure auctions, foreign currency exchange, and capacitors, as well as first cases in our generic drug and packaged seafood investigations. Our criminal prosecutors remain very, very busy, and I fully expect that you will be hearing more from these and other investigations in the not-too-distant future.

That's a very quick summary of our work and what we have ongoing right now. Thank you very much. I look forward to answering other questions.

MR. MACLEOD: Thank you very much. President Palacios?

ALEJANDRA PALACIOS: First of all, I want to thank the ABA Antitrust Section and both William and Peggy for having Mexico in this panel. It is a true honor.

The competition reform of 2013 has provided us as an agency with an unprecedented opportunity to improve competition conditions in the Mexican market. Since then we have undertaken the task of turning COFECE into a stronger, more efficient, and more transparent regulator. Building on Eduardo Pérez Motta's work, over the past three years, the agency has gone through profound changes. The first year, basically, we were concentrated on establishing our new institutional setting—there was a new law, new by-laws, guidelines, criteria, etc.—and during the past two years we have been increasingly boosting enforcement activity.

Our Investigative authority has worked to reduce investigation times and improve efficiencies handling simultaneous cases. At the same time, several cartel conduct investigations have been initiated in markets that are very critical to the Mexican consumers, such as healthcare, food, and transport.

Since dawn raids have recently been incorporated as a very important tool to gather evidence in investigations—last year we conducted 21 dawn raids—and being aware of the importance of inspiring legal certainty, this year we will be working on a guideline regarding information and documents that may be covered by legal privilege and an internal procedure so that economic agents can assert this privilege.

Last February we announced the launching of COFECE's first criminal complaint before the Office of the Attorney General against several individuals who participated in a bid-rigging cartel, a bid rigging in the health sector. This is an important step for Mexico on materializing the criminal sanctions that were enacted in our federal criminal code in 2011. Some practitioners have mentioned that this action might mark a new era in antitrust enforcement in Mexico, particularly in cartel prosecution.

All this enforcement activity is reflected in the fact that our investigations are being taken more seriously. In 2016, for example, we received 26 leniency applications compared to four leniency applications received in 2014. My personal perception is that more often companies are investing resources in the implementation of antitrust compliance programs. I could even say that this is a new line of business for Mexican antitrust practitioners.

Regarding merger analysis, the Commission is working toward a more effective merger review. Efficiency in the analysis is important, but it mustn't come at the expense of our ability to protect competition. We are increasingly receiving cases where there is overlap, and we are working on getting the right balance, but let me tell you this is a moving target.

A 2016 highlight in merger analysis was the one between Delta and Aeromexico, both legacy airlines in Mexico and in the United States, both with relevant market shares in routes between both countries. The case was not simple. We needed to coordinate, not with an international com-
petition authority, but with an international sectoral regulatory authority—this is the U.S. Department of Transportation (DOT)—in order that our remedies and their remedies would be uniform, and we had to take an action in Mexico seven months in advance before the DOT. Also, while the analysis was taking place, a new Open Skies agreement was signed between both countries, and COFECE launched its preliminary findings on the slot allocation regime in the Mexico City Airport. A little more than a year has passed since all this action started and, as a traveler, you can notice that a ticket for the Mexico-City-to-New-York route can cost $300, versus a normal $800 tariff just the year before.

In upcoming months three sectors will be important for us.

In the energy sector, special challenges will arise with the liberalization process of retail gasoline and diesel markets. Just yesterday, for the first time in 70 years, prices were left to the market in two states of Mexico.

We have an ongoing investigation for possible cartel activity, price fixing, and/or market segmentation in the market for gasoline sales in the Mexican state of Baja California. If this cartel is confirmed, the sanction should be exemplary, as the market, as I said, is opening to competition, prices are being liberalized after many, many years of controlled prices, from a uniform price all along the country, and the risk of anticompetitive behavior is high.

We are also monitoring that Pemex, which is our country’s state oil company that for 70 years was the sole player in this market, does not abuse its dominant position. In parallel, we expect to be analyzing mergers arising from various types of alliances, vertical and horizontal, in this sector.

In the transport sector, our investigative authority issued two preliminary findings concerning (1) the procedure of essential facilities and barriers to competition in the Mexico City Airport; and (2) just recently, two weeks ago, on competitive conditions prevailing in the Mexican railway market. Both final decisions should be made in the upcoming months. If the lack of competitive conditions are confirmed in both cases, then sectoral regulators should regulate accordingly. In the railway industry, in particular, this could lead to new rights-of-way imposed by the Mexican Railway Agency.

COFECE has a special interest in the healthcare sector, particularly in the pharmaceutical industry. We are processing several investigations, for example, bid rigging in laboratory tests and latex for medical use; and a broad collusion case over the production, distribution, and commercialization of medicines.

Besides these investigations, we are also conducting a market study on off-patent drugs and the role of generic entry into the marketplace. Our findings up to now show that the number of generic competitors and the rate of entry are very low. Let me give you some numbers. In Mexico there is an average of 2.8 generic competitors per branded drug; in contrast to this figure, in the United States the figure is 10.1 major generic medicines per branded drug. There is a lapse of 26 months for the first generic to enter the market in Mexico, while in the European Union it only takes seven months. When generic drugs enter the private market, the average volume penetration in Mexico is 25 percent after two years of entry; in this timeframe the U.S. generic volume penetration is 89 percent and 74 percent in Canada. In Mexico generic prices are 20 percent below branded drugs versus a 40 percent discount in the European Union. This data just came out yesterday.

Given these facts, you can assume that something is wrong in the pharmaceutical market in Mexico. It could be regulation, it could be judiciary issues, it could have to do with demand issues, or it could be anticompetitive practices. We are working on understanding what is wrong because we want to fix it.
Finally, when we arrived at our office a little more than three years ago, we elaborated a four-year strategic plan. By the end of this year we will assess how we did in implementing it and we will write on paper what we want as an agency to accomplish for the four next years to come.

Again, thank you very much for this opportunity.

MR. MACLEOD: Thank you, President Palacios. Chairman Ohlhausen?

MAUREEN OHLHAUSEN: Good morning, everyone. It's delightful to be here. Thanks to Bill and Peggy and my fellow panelists I think we are going to have a wonderful discussion.

Obviously, it's a time of transition and everyone is interested in knowing what's going to change and what's going to remain the same. I'll touch a little bit on some of those topics in my opening remarks and then look forward to getting into them more deeply in the discussion.

First, I want to start off with a big thank-you to the FTC career staff. So much of what we accomplish is based on their efforts, and I very much appreciate the value of their work.

It has been interesting for me because I used to be on the FTC staff. That experience has greatly enriched my understanding of the Commission's mission. I'm proud to have had that experience. When I look at Chairs who went before me, such as Tim Muris and Bill Kovacic, they also shared that FTC staff experience. It's a wonderful thing to draw upon.

I'm going to touch on both competition and consumer protection issues briefly in these opening remarks. I want to compliment Bill MacLeod, in particular, in that the focus of this entire conference has been to pull those two disciplines ever more closely together and emphasize how deeply they are interwoven. Throughout my career, I've focused on both antitrust and consumer protection, so it's very nice to see it reflected in the ABA programming.

Starting off with some of our competition priorities: It is extremely important that we continue our enforcement in the healthcare space. We need to focus on enforcement in the areas that are of the greatest importance for consumers, and healthcare is very much at the top of the list. Just last year, we were successful in two hospital merger cases where we had lost at the district court level. These were very important cases, and so it was a great accomplishment for the Commission that both the Third Circuit and the Seventh Circuit provided a light at the end of the tunnel. We lost below but ended up winning big in the long run—because we established some very good precedent from those two cases.

Continued enforcement in the pharmaceutical area: We continue to hear concerns about the cost of pharmaceuticals from the public, from industry, from members of Congress, and from the new administration. We need to do what we can to understand that market, and where some of these problems are arising from anticompetitive behavior we should be delving into that. We have paid a lot of attention to mergers in the pharmaceutical space, but also conduct should continue to be an enforcement area for us.

We are also thinking about how to put the Actavis decision into action. We won that big victory in the Supreme Court for reverse-payment cases. Now the question is, how do you actually apply that during litigation? I'm really looking forward to continuing to make progress in that area.

Also, retail continues to be a big area of focus. I have had the distinction of being at the FTC during every office supply merger that we have had before the agency. So if you have any more out there, bring them in because then I can go for four. [Laughter]

But I particularly want to mention the Staples/Office Depot/OfficeMax success that the FTC had this past year. I thought it was a fascinating case. If you look at the history—the original Staples case, then the Office Depot/OfficeMax transaction that we allowed to clear, and then finally our
challenge of Staples/Office Depot, it shows how we need to understand how markets change, how
the advent of very vigorous online competition may affect some areas of the market but not all
areas. I really look to those cases as being very instructive.

On the consumer protection side, we have continued to focus on our bread-and-butter fraud
enforcement, which is such an important area for consumers. In the last year we obtained won-
derful redress for consumers in the Volkswagen case, over $10 billion, to make sure that con-
sumers are made whole after being subject to a systematic program of deception by a major com-
pany. Also, in the Western Union case, another important case for consumers, money has gone
back to consumers who were hurt by a variety of scams that a lack of company controls helped
facilitate.

In the privacy and data security area, we will have a continued focus on this very important
topic, including continued enforcement. I want to mention two cases in the past year that I thought
were particularly important.

One of them was the Ashley Madison settlement. That was a very important case focused on
a breach of data that caused substantial harm to consumers, including reports that suggested that
some consumers committed suicide when that data was exposed. I think we need to continue to
be concerned about those kinds of substantial injuries for consumers.

I also want to mention the Vizio settlement because it suggests how new technologies can
evolve in a way that companies fail to convey to consumers how they may be collecting their infor-
mation or doing so in a way that consumers don’t understand. That was a deception case and an
unfairness case. But, for me, it really raised the broader issue that we as an agency need to think
hard and talk to a lot of stakeholders about—what is consumer injury in this Information Age in
which we are living. So that is one of the things that I have put on the top of my agenda, which
includes having those discussions about how we should be thinking about consumer injury, and
bringing in lots of thoughtful people—economists, business members, and the FTC’s terrific staff.

I also have prioritized providing additional guidance to businesses. So many businesses ask
us: “We want to do the right thing. What is the right thing? How should we be taking steps to pro-
tect ourselves?” I think the FTC has done some fantastic consumer education in this area. But I
think we could do more, and I have asked staff to take a look at that.

And of course, we conduct very important and fundamental consumer education in all these
areas—something I think we have done a wonderful job on. One of the things that I’ve asked staff
to do is to actually put together a “one-stop shop” on our website, information for consumers as
well as business guidance. We have wonderful resources to bring to bear there.

One of the other things I talk a lot about is my philosophy of regulatory humility—you are prob-
ably tired of hearing me talk about it—but it is how I organize my thinking. One of the things that
I want to be sure that we are doing at the Commission is continuing to focus on real consumer
harm and very much an evidence-based approach. So that will definitely continue.

Transitioning back to the competition side, one of the long-term interests of mine and concerns
of mine has to do with the abuse of government process. Tim Muris led some wonderful work dur-
ing his time at the Commission, and it continues to pay benefits. The seeds were planted then and
we are reaping the harvest today.

I was proud to be part of some of those early inquiries into it. Recently, we brought the Viro-
Pharma case—that was actually the first case that came out under my leadership as the Chair—
which focused on repetitive petitioning before the FDA, where a branded drug allegedly used this
repetitive petitioning to keep the generic out of the market. It was very satisfying to me as I was
doing the research for that case to look at a case that cited the FTC’s Noerr-Pennington Report,
which came out under my watch when I was the head of the Office of Policy Planning. The court in that precedential case cited this particular part of that report that is a very key thing for our ViroPharma case, and I thought to myself, *I remember sitting in my office and writing that*. It was fantastic to see that seed bear fruit all these years later.

Moving beyond abuse of government process, in the enforcement space, I think we can do a lot. I have formed an Economic Liberty Task Force to focus attention on the problem of barriers that have been created to job formation, to labor mobility, in the United States. I have long talked about a problem that I call the “Brother, May I?” problem, which is where you need your competitors’ permission to enter the marketplace. We should be concerned about that as competition enforcers. But we can’t always use our competition tools—sometimes we can, but we can’t always—so our advocacy tools are so important in this space.

I think we are really at a unique moment in time when so many people on a bipartisan basis are interested in making progress in this area. Consumers, voters, and citizens are concerned about this. We are talking about: Is there too much government regulation; is it stifling the ability of people to have job opportunities?

One of the things that I really want to do as part of this Task Force is look to states as partners. I’ve talked to state governors, attorneys general, legislators, and they are interested in working together on this. I see it as a “coalition of the willing” to really shine a spotlight on this issue.

One of the other interesting things about it is it affects people you don’t even realize would be affected. So we are working also with the Department of Defense, because there is a problem where members of the military have to move a lot, they get deployed to different parts of the United States, and their trailing spouse may well need a license to practice his or her profession in that new state. It’s actually having a deleterious effect on employment of those military spouses. I think they deserve better.

Finally, I just want to say, as we are doing all of these things at the FTC—and I am pointing out where we think excessive burdens may be being placed by other parts of the world—we also need to look at ourselves, at our own activities, and ask: Are there ways we at the FTC can reduce the burdens that we are placing on legitimate businesses and the American public? So I have asked the Bureau of Competition and the Bureau of Consumer Protection to examine the breadth of the requests that they make for information in their investigations and is there a way we can streamline some of this.

I’m also undertaking a review of the FTC rules. We’re not primarily a rule-making agency, we’re primarily law enforcement, but we do have rules. One of the questions is: Are there ways we can streamline these rules, or actually get rid of some of them, in a way that will continue to have important protections in place for consumers, but have it in a way that maybe is less burdensome?

With that, thank you very much. I’m looking forward to our discussion.

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**MR. MACLEOD:** Thank you, Chairman Ohlhausen. Chair Domen?

**VICTOR DOMEN:** Thank you, Bill. Thank you, Peggy. I want to thank the entire Section, and in particular the staff, who have really helped us pull all this together.

It’s a pleasure to be here this morning. It’s one of those opportunities where the states have the opportunity to talk, not only among ourselves, but also with our colleagues both in the private bar and to the other governmental agencies, and we really do appreciate it.

Now, unlike most of the panelists up here, I actually do have to give a disclaimer because there are people above me who will certainly watch everything I say and make sure I don’t make mis-
takes. So I am not speaking on behalf of the National Association of Attorneys General, on behalf of any particular attorney general, but I will speak on some of my opinions. In fact, if I make a mistake and blow it, I will promote myself as the new Commissioner of Competition for Antarctica. [Laughter] That will be my next position, because I think that’s where I will be sent if I make a mistake.

But no, it really is a pleasure to be here. I know that the focus of the states has been a topic of discussion throughout the week. I’m currently in the second year of my three year term as the Task Force Chair. I’ve really enjoyed it tremendously. I’ve received a lot of excellent advice from some of my ATF predecessors—from Kathleen Foote, Bob Hubbard, Trish Conners, and Kevin O’Connor—they’ve really helped transition the states into the position that we are in now.

As many of you know, the Task Force was created in 1983, at a time when there was a perceived lessening of federal enforcement. So the AGs decided to really take some matters into their own hands and see what we could do. When the ATF was created, there was this explosion of joint investigations and multistate litigation, and even advocacy via amicus briefs, and I think that has proved to be very beneficial.

There are a number of states in the Task Force that really don’t have the resources necessary to bring larger cases on their own, even though the matter could impact the economies of these states. The Task Force has been that vehicle to allow us all to pool our resources, to work together, to really have what you can consider a national network of antitrust enforcers that can share ideas and share themes, and if there are common goals that we can achieve, work together. But we always do have to keep in mind, as I emphasized earlier, that each of the states are independent sovereigns, and they can blaze their own trail if they like, or not, and that’s also an important decision; sometimes a state chooses not to do something.

We do have several new attorneys general who were elected last year, and some in very large states, such as California and Pennsylvania. But it’s one of those things where we do have the rare opportunity to speak as one voice in many, many matters.

I also want to emphasize the fact that, in addition to antitrust enforcement, of course the state AGs are the principal consumer protection enforcers in their various states as well. In many cases the antitrust lawyer and the consumer protection lawyer in a particular office are the same person.

Let me just mention a few of the achievements that the states have had over the last year that I think are worth mentioning.

Obviously, we have an excellent relationship with our federal partners, both with the Department of Justice and with the Federal Trade Commission. The health insurance matters were cases that we worked jointly with the Department of Justice, and I can tell you the relationship was wonderful, fantastic, and we expect it to continue.

Working with the Federal Trade Commission, in several cases—there were several states in the Office Depot/Staples case, but on a more local level both in Pennsylvania and Illinois, the Federal Trade Commission and the local AGs worked together in those matters. Whether it was Hershey/Pinnacle or Northshore/Advocate, it was a situation where the state AGs could provide that local perspective and help the Federal Trade Commission to understand the local impact that it might have.

Obviously, there are a few cases that we are going to work on as individual states, and I think that’s a message I really want to send. I think that everyone is wondering and asking, “Well, if the federal agencies aren’t as vigorous as they have been in the past, can the states do it; will the states do it?” I think, even prior to the election, there was evidence that the multistate groups certainly can. There are two cases in particular that I would like to point out. As you all know, 42 states
have brought the suboxone product-hopping matter, second, the generic drugs price-fixing matter as well. The Generic drugs matter has 40 states, and we added Puerto Rico this week. So that is clear evidence that if the states are interested in a matter and feel it’s worth pursuing, we will do it on our own.

Now, let me talk about two of the biggest priorities for our state governments over the next year or so and going forward. A few of these priorities have been touched on by several of the panelists.

The first, and probably largest, is, of course healthcare, healthcare and pharmaceuticals. I’m not just talking about the insurance cases that we discussed. I’m talking about hospital mergers; I’m talking about reverse payments, product hopping, and provider market power. These matters really impact states on a local level, and it is something that we will continue to really focus on.

I also want to emphasize that in NAAG, if you don’t know, the President of NAAG is the current Attorney General of Connecticut, George Jepsen. For the last year he has really focused on healthcare matters. In fact, his initiative as the President has been entitled “Evolving Challenges in the American Health Care Marketplace: Competition, Cost, and Innovation in a Rapidly Changing Industry.” One month from now, in New York, on April 27 and 28, he is actually going to hold a summit that is open to everyone. I encourage you if you are in the New York area to attend that.

We also have two specific working groups in the Task Force that focus on this area. We have a Health Care Industry Working Group and a Pharmaceutical Industry Working Group, whose particular functions are to look at particular areas that multistate groups may be interested in investigating.

The second major priority for states will come as no surprise—and I think it has been mentioned at least collaterally this morning—and that is the continuing impact of the NC Dental decision on state governments. We have to deal with it. Our boards and our commissions on the state level now suddenly have a different landscape they have to work with and have to deal with. In many cases the only people in the offices that know anything about antitrust are actually the enforcers. We have tried to work very hard to prepare our legislatures, our governments, our governors, and our various boards and commissions on what to do. They have asked us: “What does the law say? What can we do? Do we actually have to restructure our entire board?” In fact, one of the biggest decisions that I think we’ve had to deal with and face is: If you are now a board member and you are facing potentially treble damages on a personal level, do you even want to serve on that board anymore? Is it worth it to you? Is it worth it to you to be proclaimed by the governor to be a sitting board member? That’s something we’ve really tried to give guidance on. We have worked very hard on many state levels to educate our boards and the governors’ offices in various states just to help them understand that.

With that, I’m going to close. I just want to say that as state enforcers we welcome the new challenges. We know that there will be several. But we will continue to collaborate as a group of states, but also with our federal and international enforcers as well.

—Victor Domen

Mr. MacLeod: Thank you, Chair Domen. As I mentioned, we have a little examination planned here. Of course I wouldn’t do that without my lawyer. Joining us for the interrogation is Peggy Ward of Jones Day. Her business card says Palo Alto, but anybody who knows Peggy knows she can be anywhere in the world on any given week. Fortunately, she was able to make it here to Washington to engage our panelists in some very intriguing questions. Peggy, I’m going to hand it off to you for the first question.
MARGARET WARD: Thank you, Bill. It’s a pleasure to be here.

Let’s kick off the discussion with a question for President Palacios. A number of us have been reading about possible changes in the North American Free Trade Agreement (NAFTA). What are the potential implications, if any, for domestic antitrust enforcement?

MS. PALACIOS: Basically, it all depends on those changes, which at this point are very uncertain.

In the pessimistic scenario, there would be competition implications—not so much on enforcement tools, the tools we have to enforce our activities, but on the competitive environment in general, assuming that restrictive measures are taken that substantially diminish trade and investment flows.

Let me explain myself. In Mexico, imports have played a fundamental role in the market. On the one hand, they serve as a source of supply of inputs that are very important for companies to be competitive in several industries, in particular; and, on the other hand, an increase in local supply of products. Imports increase the supply of products, and this pressures local prices down through competition. Therefore, a lower degree of imports would reduce competitive conditions in several markets in Mexico.

Also, as local markets concentrate, there is a heightened risk that anticompetitive practices are undertaken. And in the merger reviews, we also need to take into account that with tariffs many markets that we analyze as a NAFTA market in a geographical dimension could become local markets. And let’s not forget that something similar would happen to the United States, as American consumers and businesses also benefit from imports in competitive conditions, and also the NAFTA geographical market dimension in the United States would diminish.

Having said all this, I must say I don’t expect that NAFTA amendments will, in particular, affect COFECE’s powers and tools, as all our tools are regulated under our domestic laws. I am also sure that cooperation with the antitrust authorities of Canada and the United States would not be affected, because I think we have built relations that are trusted relations over a long time.

MS. WARD: Chairman Ohlhausen, what are your views? Are folks in the FTC thinking about how the changes might affect U.S. enforcement, merger analysis, and the like?

MS. OHLHAUSEN: Absolutely. I want to agree with Alejandra that we have strong cooperation agreements with our partners around the world, particularly Canada and Mexico, and I look forward to continuing those.

I don’t necessarily see any revisions that would impact our domestic antitrust enforcement or cooperation with our Canadian and Mexican colleagues. As you may know, Article 1501 requires all three countries to adopt and maintain measures to proscribe anticompetitive conduct. Certainly it’s possible, if there are changes, it could impact some market analysis in a particular merger, and we’ll have to wait and see on that.

But I did want to just mention something I didn’t mention in my opening remarks, that I think this discussion highlights the importance of our continued international engagement. I think we have a good story to tell about how international coordination and cooperation can be good for U.S. business and the U.S. economy. I look forward to continuing to engage internationally.

MS. WARD: Let’s shift the discussion for a few minutes to the issue of cartel and criminal enforcement. A question for Assistant Attorney General Snyder: The Division recently revised its leniency Frequently Asked Questions (FAQs), and that raised some concerns among some in the defense bar about the availability of leniency going forward, in particular whether it is being narrowed.
A couple of questions: First, what motivated those revisions; and then, second, can we in the bar and our clients expect any significant changes in how the Division will apply that leniency policy?

MR. SNYDER: We certainly take the concerns that have been expressed by the defense bar seriously because the key to a successful leniency program is predictability and transparency for those who are using it. Specifically, we understand one of the concerns is that the FAQs make it more difficult in some ways for corporate leniency applicants’ employees to obtain leniency coverage in Type B leniency situations. I think that is an issue I want to spend a couple of minutes on.

The revised FAQs simply reiterate principles from the 1993 Leniency Policy. Current employees of Type B leniency applicants have never presumptively been entitled to coverage under our Corporate Leniency Policy, although it has been our practice to generally provide such coverage for Type B leniency applicants, and it is not our intention to change that practice.

For those who may not be familiar with the Leniency Policy and the distinction between Type A and Type B, Type A leniency applies in situations when a corporate leniency applicant comes in to us and self-reports an antitrust crime of which we’re not aware. In those cases the company and all of its current directors, officers, and employees are presumptively entitled to leniency coverage, assuming they satisfy the other conditions of our leniency program. That remains unchanged.

By contrast, Type B leniency applies in situations where a company seeks leniency for conduct that we are already aware of and usually are investigating. Under our policy, a company can still get leniency even if we are investigating the conduct, unless we are at the point of having a prosecutable case against the company. In that situation leniency may no longer be available to the company. In other words, a company can’t wait until we have built a case against it and then come in at the last minute and say, “Okay, now I want leniency.” Coverage for current officers, directors, and employees in those Type B situations has never been guaranteed under our Leniency Policy. This is now being clarified and made more explicit in the FAQs.

It is important for people to understand that leniency is set up fundamentally as a race, because only one company can get leniency. In a Type A situation, you are racing your co-conspirators to get the one and only leniency that is available for that conspiracy. In a Type B situation, you are racing not only your co-conspirators but you are racing our investigation. If we are in the early stages of an investigation, it is, and it remains, our normal practice to cover the current directors, officers, and employees of Type B leniency applicants in order to obtain their cooperation to advance our investigation. That cooperation is still coming at a stage when we need all that cooperation and we are going to cover the leniency applicant's employees to get it.

If, however, our investigation is significantly advanced and we are close to having a prosecutable case because we have already developed strong evidence against the company, we may nonetheless decide that we are willing to extend leniency to the company and most of its employees to gain their cooperation. In those situations, however, we may decide to exclude from coverage the most culpable employees, whom, because of the evidence that we have already uncovered during the course of our investigation, we are already close to being able to prosecute.

The key point here is that we will inform a company about this upfront when a company asks about the availability of a Type B marker. A company doesn’t have to decide to accept a marker with its fingers crossed. It also is worth noting that a company has not prejudiced itself or outing itself by inquiring about the availability of a Type B marker because we already know who it is and it is already under investigation.

Let me give you an actual example from a case where this came up because it will give you a sense of how we intend to handle these situations. We had a covert investigation where we had
obtained through other avenues incriminating emails implicating a company’s executives. When we went public with the investigation, a company called to inquire about the availability of a leniency marker. Because the company was already under investigation, it was a Type B marker. When we told the company that a Type B marker was available, we also communicated to the company at that time that we were not inclined to cover a particular executive based on the evidence that we had already developed.

In that particular situation, and before the company had undertaken any cooperation, the company’s counsel made arguments about why it was still in the Division’s interest to cover that particular executive in the leniency, and in that case we actually agreed to do so. There was no lack of transparency or predictability for the company. It was not prejudiced in any way, and would not have been prejudiced even if we had excluded the executive in that situation. It was informed about the potential for exclusion of the executive at the time it inquired about leniency, and with that knowledge it could decide whether or not it wanted the marker. If anything, the company had a better sense from the outset about the evidence that we had that implicated both the company and the executive.

The bottom line is that there is a distinction between Type A and Type B for a reason. While our practice has generally not been to treat them differently, there will be times when it is appropriate to do so, but it will be done in a way that ensures transparency and predictability for a company at the time it accepts a marker.

MS. WARD: Leniency is certainly an issue that has come up in some of the panels this week. So it’s worth spending some time on.

MR. MACLEOD: And it’s obviously worth getting the policy fine-tuned just right, because it appears still, at 25 years, to be working remarkably well.

And indeed, as I look at the year 2016, it was perhaps a record—certainly an impressive year—of fines for the European Commission. I counted somewhere in the neighborhood of almost €4 billion. I’m interested in whether there are any predictions of the pace. But perhaps more specifically, Commissioner, have the interventions by the sectoral or national authorities in the wake of leniency applications had any effect on cartel enforcement in Europe?

MS. VESTAGER: Last year you asked me, “Why would you need to collect so many fines anymore?” [Laughter] So I can predict the question for next year, since we are sort of in this predictive mood.

The thing is that the level of fines very much reflects how the pipeline was years ago, how the casework has proceeded, if it had been necessary to do a Supplementary Statement of Objections, to send out Letters of Facts, to get the responses back from the businesses in question. So I honestly do not think that it makes much sense to compare the level of fines in different years.

What makes sense for me to discuss, as your question also suggests, is if the level of fines is sufficiently deterrent. The fine from the truck cartel is the biggest fine ever, €2.9 billion, and one of the fines, of almost €1 billion for Daimler, is the highest fine for a single company as well.

One of the things that we are focusing very much on is to make sure that fines are sufficiently deterrent. I very much appreciate your strong wording, Brent, on the race. It should be a race—a race against our investigation, a race against your co-cartelists—because that element should bring sufficient uncertainty into that line of wrongdoing.
The fine, of course, plays a very important role in this as well, because there should be something to gain, that the rest of the gang will pay the fines, and that they are big. We are very much determined to keep doing that because we do think that it works. If the fine is just another line in your spreadsheet, well then it doesn’t matter. It has to hurt, and it has to hurt in the boardroom, that someone has engaged in something that will seriously take an effort for the company actually to pay.

MR. MACLEOD: I think I might appeal for leniency as soon as this panel is over. [Laughter]

Of course, the European Union is not the only place where we have federal and state collaboration. Chair Domen, is the National Association of Attorneys General getting involved in any of the cartel enforcement that we heard described from the Department of Justice today?

MR. DOMEN: We have been involved, but not to a strong degree. I think that at this point, once again, and looking at things to come, it is certainly something that we can do.

I think that one thing that’s interesting to note for states in particular is that many of us actually do have original criminal jurisdiction over antitrust violations, which is something that is probably unknown to many of you. I think that many of you expect that we deal purely with civil matters. But we do have that on the books—not all states, but some do—so if there is the opportunity, that certainly is a possibility.

MS. WARD: President Palacios, back to you. In Mexico you referred your first criminal case to the Office of the National Prosecutor. That office then built its own criminal case using your authority’s referral as the starting point. I understand that one criticism that has been lodged is that the standard of proof of an administrative investigation is different from a criminal one. Is that criticism valid? If so, how does that affect what you and your team need to be doing to respond to it?

MS. PALACIOS: Yes. Exactly as you explained, Peggy, we presented a complaint to the National Prosecutor and it is this office that is responsible for building a criminal case.

I am not personally responsible for handling investigations in COFECE, but I am sure that when our Prosecutor believes a specific case has the requirements and the merits to be presented to the National Prosecutor, the case is handled in such a way that the evidence we gather can be used to pursue the criminal case. On the other hand, it is also important to notice that the National Prosecutor’s Office has different—and for obvious reasons harsher—powers to request further information in the cases they deem necessary. Our intention, of course, is to provide them with as much information as possible to reduce the need for additional requests. Having leniency applicants in those cases always helps because the case you can bring forward is much more clear in terms of the evidence.

All of this is a learning-by-doing process. There is always a first time for everything. This is our first time. A criticism I read in the paper was “Well, this is the first time; let’s see what happens.” If we don’t even start, then we don’t even know what will happen. So we have to move forward.

MR. MACLEOD: People tend to think that the Federal Trade Commission doesn’t get involved in criminal enforcement. In fact that is not the case. There are times when the Federal Trade Commission with the assistance of the Department of Justice has put scofflaws behind bars.

But I’d like to leave that aside now and stick with the money. On money, Chairman Ohlhausen, you have been outspoken for a number of years, first of all, when the Commission withdrew its
guidance for civil monetary assessments. You were very clear in your remarks a few minutes ago that when it comes to disgorgement it should be fundamentally and rationally based on some measure of harm.

You have a sister agency right now that is in deep difficulty in the D.C. Circuit Court of Appeals because of a civil penalty assessment that was multiplied by ten at the agency. Where is the Commission today, or at least where is the Ohlhausen policy today, on money?

**MS. OHLHAUSEN:** Thanks, Bill. You are bringing me back to my first dissent, in August 2012, when the Commission withdrew the Disgorgement Policy Statement on the antitrust side.

This, for me, really goes back to the core job of the FTC. Why were we created? We were given, particularly in the consumer protection area, a very broad statute: “unfair or deceptive acts or practices in or affecting commerce.” The great part of that is I can actually quote the whole statute. But the hard part is it is very broad. The way that was balanced was we were given limited remedies. We do not have criminal authority for constitutional reasons. But, we can refer a potential criminal matter to our sister agency.

So what is our mandate in this space? I think our mandate is to stop bad conduct, and that's the first thing that we should keep in mind—stop the bleeding, stop the bad thing that's happening—and then, secondly, make consumers whole. It's a redress function that we have.

In certain cases, like outright fraud, totally worthless products, disgorgement of all profits and the consumer harm may be the same. But we are often acting in a space where you have a product that has many different attributes and claims about one of them may not be fully substantiated when made. So the question is: Were consumers harmed by the premium that was charged for this particular unsubstantiated attribute or were they harmed by the whole product? I'm concerned that we've lost sight of that a bit. We don't have the authority to punish companies just because we don't like what they did. We are supposed to stop the bad conduct and make consumers whole.

Disgorgement in both the consumer protection and antitrust area is an enormously powerful tool. We need to realize it affects the behavior not just of defendants—it should be a deterrent to companies—but it can also affect the behavior of the enforcer. We need to keep that in mind.

One of the things that I have talked a lot about is that in any kind of government enforcement we need to have transparency and predictability. In the area of disgorgement in both consumer protection and antitrust, I think we have more work to do in this space to give better guidance to business on what to expect, and to the public at large, as well as to our staff.

**MR. MACLEOD:** One area where the agencies typically don’t collect a lot of money is mergers. But merger enforcement has a tremendous effect on the capital markets and the billions of dollars at stake, so let's look for a few minutes at some of the developments in merger enforcement.

I'd like to begin with the Commissioner and ask if there is any development, anything new there, especially in the argument that one often hears in your position—because it is one that I have often made in my position—the non-price benefits of mergers: innovations, the reasons why you should take a favorable view of my deal. I think this is something that it is worth asking the entire panel, but may we begin with you?

**MS. VESTAGER:** First of all, of course, we listen very carefully because you might be right. It can be so that a merger is beneficial for innovation, that it will promote better choice for consumers. You can see that in some previous cases—that being the Microsoft/Yahoo! search business, and then
seeing that this merger actually could make the market work better, to be a stronger competitor with the market leader. That made complete sense back then.

Another example where it was taken into consideration as valid would be in the **Tom Tom/Tele Atlas** merger, where the data from one actually would improve the product of the other in also a very competitive market.

So if we can see that it is valid, that it’s for real, that it will serve the market, then obviously we take it onboard.

If I can give some examples on the other side of things, a very recent example would be the **Dow/DuPont** merger that we approved with a number of remedies this Monday. Here our concern was exactly that in this agrochemical sector you have very few innovators; basically, you have a handful.

Innovation is important for two reasons: one is, of course, to support your pipeline, to make sure that you still have a viable business; but also, innovation in itself plays a huge role because we all want our farmers to be more safe in working with still better products and we want our environment to be still better protected. Here we couldn’t see that the merging parties would actually enforce innovation; on the contrary, there was a risk of losing innovative capacity. Therefore, it ended up with one of the conditions of the clearance being the selling or the divestiture of the entire research and development business in one of the merging parties.

You also saw that a year and a half ago in the merger of **GE/Alstom**. Alstom was just about to launch—it was all on paper, a first-class, innovative, very long process—one of the biggest gas turbines seen, the GT 36. We found that there was a big risk that it would be completely scrapped and it would never see the light of day. Therefore, that innovation was divested to a third party with part of the servicing contracts in order to maintain the pipeline and maintain the innovative capacity of this third party, because a lot of the innovation comes from the knowledge that you gain from servicing the product.

That, I think, has been quite successful. Now this giant gas turbine is up and running, and you see major investments in the market actually to produce that, because we then still have a competitive market also for gas turbines, which plays an important role in the entire transition of our energy supply to be less problematic when it comes to climate change.

**MR. MACLEOD:** Do the other enforcers have any reaction to these thoughts? Innovation, non-price benefits: are these playing any greater role in merger review in the United States? I’ll throw it to anyone who wants it first.

**MS. OHLHAUSEN:** I’ll jump in on that.

I think there certainly are instances in which merging parties can demonstrate that their combination will enhance innovation, and we need to be very alert to that because ultimately we want consumers to be better off.

But how do they go about doing that, how do they demonstrate that during the merger review, I think is the key thing. “Why is this innovation benefit tied to the merger; why can’t they achieve it without the merger?” For example, in some mergers in the healthcare space we’ve heard this a lot, “There are going to be benefits,” often involving—whether it’s insurance products or health records or something. But we need to hear more than that, more than just the hope that it will; but how will the parties actually carry out those innovation benefits; how can we feel confident that it’s likely that consumers will get these benefits from the innovation; and again, why are they merger-specific? So certainly we’re open to hearing them, but they have to explain those things to us.
MS. WARD: Let’s jump from competitive effects to remedies for a moment. The FTC recently issued a remedies report that really was the culmination of a lot of hard work among the staff to take a backward look at remedies that the Commission had approved in connection with mergers and to actually spend some resources and time evaluating the effectiveness of those remedies. The report found that in the majority of cases—I think it might have been upwards of 80 percent—the Commission deemed that those remedies were effective. Not surprisingly, a number of those cases involved divestiture of an ongoing business. That being said, the Commission’s report also concluded that some remedies had failing grades.

What lessons are to be drawn from the report, either for the FTC in terms of how it thinks about remedies policy; or, and equally so, for parties who might be approaching the Commission or the DOJ, as the case may be, with a proposed fix?

MS. OHLHAUSEN: Some of the key takeaways from the study were that every divestiture of an ongoing business successfully maintained competition at the premerger level or returned it to that point. Whereas divestitures of limited asset packages were less successful, but they did restore or maintain competition in 70 percent of cases. Thus, they were less successful than those involving ongoing businesses, but still generally successful. We had very few vertical mergers in the study, but all the remedies in those matters succeeded.

Other important takeaways involve some of the pragmatic practical difficulties that buyers faced in the short-term, and how those difficulties may have delayed their ability to compete effectively. Thus, we are establishing additional best practices—and we’ve revised our guidance, to include greater emphasis on buyers talking to the monitor, and letting staff know if there are problems earlier, and other aspects along the same lines.

But the study also raises implicitly an important question; “Well, you didn’t have a 100 percent success rate; is that a bad thing?” We have to be concerned with both under correction and over-correction for potential antitrust harm, with the latter potentially limiting the efficiencies that might otherwise flow to consumers. It’s very hard to predict the future. There are external factors—such as economic shocks or significant sector declines—that could affect these businesses regardless of a merger. So we need to keep that in mind.

One of the other things I take away from the study is the key role of empirical and retrospective work in getting our enforcement and our policy work right. I think my staff always shudders a little bit when I say, “Ultimately that’s an empirical question,” because I think they know that means they’re going to have to do a lot of digging to find those empiricals.

MS. WARD: Let’s stay on remedies for the moment. I invite reactions from President Palacios or the Commissioner. Any reactions to the Chairman’s comments? Do either of your respective teams intend to report on how you are looking at remedies, retrospective reviews, or otherwise?

MS. VESTAGER: I think to some degree we can recognize our approach in the report. Of course, because we focus so much on getting these mergers right where we have concerns, I tend sometimes to forget that myself, that the huge, huge majority of mergers just move on in simplified procedures. It goes like this, and then businesses can go on to make their dreams come true when it comes to the merger benefits.

But in the few cases where we do have concerns we have a very simple preference for structural remedies because then it is done; it will work with very, very large probability. It’s not something complicated, behavioral, where it has to have oversight, and you don’t really know if it is
going to work. I think that in the number of cases where we have seen this, where we worked with
the businesses in question, they come forward very often very well prepared because of good
guidance, knowing what to do, having foreseen where we would find issues; then they have
already planned what to divest, how to get rid of the overlaps; and that worked very well.

I think in the InBev/SABMiller merger that was already mentioned this was the case. I think it
went very well. We had another locally in Europe, in a telecom merger in Italy, where we had WIND
and Hutchison merging but selling off, divesting, a sufficient part of the market for a third party to
come and establish itself, a French company with a very strong competition culture, and the struc-
tural element in that is also very promising.

I think therefore that we can see a resemblance in views with the FTC report. I think that it is also
a reflection of the fact that we do talk a lot. The case teams come together, they can share their
insights, and even though the markets sometimes are very different, sometimes we see the same
things. Therefore, eventually, you will also share some of the insights as a matter of principle.

MS. PALACIOS: In Mexico we do have experience in both structural and behavioral remedies,
although structural remedies are something quite new. We started imposing structural remedies
about three or four years ago. In this short experience, compliance in some of the structural reme-
dies we handled has taken longer than expected. Also, we have seen—and I guess it's because
we are new in this business—that it has been difficult for us to design remedies without leaving
any gaps or loopholes that may be used, in our view, to take advantageous interpretations of how
to fulfill those post-closing divestitures, and that has been delaying those divestitures.

So the truth is that we do prefer structural remedies, and within the umbrella of structural reme-
dies, the Commission prefers up-front remedies and only as a last resort, post-closing remedies.

MS. WARD: I think while we’re talking about mergers it’s worth noting that Mexico has instituted pre-
merger review. So if you would indulge us, spend a minute or two talking about how is it working;
what challenges does it present; does it present opportunities for foreign or international cooper-
ation with your counterparts on the stage?

MS. PALACIOS: I wouldn’t say we have a premerger review as such, if you define the premerger
review as a process where the competition agency informally assesses a transaction before it is
being notified. We cannot—as other jurisdictions can—discuss in the premerger stage possible
remedies in problematic transactions. I know this has a cost on the time we take upon taking our
final decision.

In our cases—and I would say this is because of how our merger procedure is structured in the
law—the staff can only tackle competition issues and possible remedies way into the procedure.
It is a problem, we understand that, and we are trying to be more open and transparent in the pre-
liminary stages within what the law permits us.

As I said in my initial remarks, handling mergers is a moving target. What we are also trying to
do—and I think we have been quite successful in this—is to try to decide fairly quickly in the
process those cases that do not need much analysis and accompany them with fairly quick
approval decisions. Our average time in this type of analysis is 20 working days.

In more complicated cases, we do have a little more time than with the previous law. This has
helped us cooperate more intensively with U.S. agencies, both DOJ and FTC. Cooperation is very
important for us as an agency, extremely helpful I would say, especially for the definition of the
market and also for discussing theories of harm.
Our challenge still remains—and we are aware of this—of taking timely decisions in those mergers that are filed in many jurisdictions. But I would also say—and I think this is important for practitioners to listen—that companies should take into account that if they want decisions in similar times, they should file their cases on similar dates. Parties do tend to notify in some jurisdictions before they notify in others, and Mexico is one of those jurisdictions where they file later in time.

MR. MACLEOD: That is encouraging news on the cooperation front with respect to mergers. Let me broaden this question a little bit. Our current issue of Antitrust magazine documents three decades of seeking greater consistency in the rules of competition, which has been very fortunate because this increased consistency has coincided with three decades of increasing globalization of business.

About a month from now, the competition authorities from around the world will be convening in Porto at the International Competition Network (ICN) meeting, and I hope on the agenda for that meeting and in the discussions in between will be candidates for additional progress on convergence.

Are there any areas where we might be able to be optimistic for further progress on that front? I’m going to give this to anyone who is interested in taking a stab at it.

MS. OHLHAUSEN: We certainly work to encourage convergence toward fair processes, economically based analysis, and compatible remedies. But I think there still are some significant differences in rules and analysis among the world’s antitrust agencies. So we have done good work, but there is more to do.

For convergence I think there are really two key questions we need to ask, which are: Are we pursuing the same goals and should we be asking the same questions, or why maybe do we have different objectives? I think there is a general agreement that antitrust laws protect competition and promote consumer welfare and shouldn’t protect favored competitors. But I think there are some different schools of thought on what this means.

I gave a talk last year, and it’s an article now, called “What Are We Talking About When We Talk About Antitrust?” I think sometimes we all say the same word but we may mean something different. For me, it means protecting constraints on market power created by demand and supply-side substitution. But some others may see it as a function of industry structure. Some of this, I think, comes out of the different histories from which our antitrust laws developed. I think that creates room for robust debate. If we can settle on common goals in what we are trying to achieve, then I think we can make additional progress.

MR. MACLEOD: I might have seen a little room for some robust debate right here. Are there any other views on this subject? Commissioner?

MS. VESTAGER: First of all, I think it is very good news that the ICN is there and that it works as a forum which is low on procedure and high on substance, because it allows enforcers to come together and explain best practices in a forum where we actually do listen to one another. You can build the forum also on very concrete, case-by-case cooperation when a thing is notified in more jurisdictions, if it is a merger, if you find different company behavior, if there are some issues of dominant position. I think that in itself is a success, and the creation of so many new agencies, because I think that shows the willingness to try to keep speed with globalization as such.

One of the things that we would like to introduce more in international fora is the question of subsidies. We have now decades of experience as to how much subsidies can actually unlevel
the playing field. You have a business on one corner selling coffee and a business on the other corner selling coffee, and the second one may have a tax benefit from a Member State that is not available to the other business. You know, they stand there by the espresso machine looking at the other one standing by the espresso machine, knowing that their cost in terms of tax is so much lower. We need to figure out how can we discuss this.

In Japan they launched, I think, a very interesting paper, “Guidelines for Public Support for Revitalization in View of Competition Policy.” So I think there is a growing awareness of the fact that sometimes actually taxpayers are asked to step in where competition ought to do the job. That is a debate that we would very much like to promote, because we want fair competition. We do not want taxpayers involved in non-transparent ways to make it completely invisible who is actually contributing and whether you have fair competition on the merits — the quality of your products, the prices, the innovation — that you can show potential customers. I think it would be a good thing to introduce that in a more focused way also in our international community.

**MS. WARD:** Let’s move on to a new topic, Mexico. There have been some recent constitutional amendments that now give COFECE the power to investigate conduct involving essential inputs and barriers to entry even in the absence of anticompetitive conduct. We are starting to see some of the first cases emerge from these investigations.

Can you tell us a little bit about the criteria by which you identify targets of these investigations or actions? And then, for counsel and their clients who might be in the audience, should companies that are contemplating investing in Mexico now be worried or concerned that they will be required to assist their competitors with respect to getting access to their facilities?

**MS. PALACIOS:** Thank you for your question. I know when this new law was written at first the ABA was very vocal on this issue.

I will start by explaining the reason for this procedure. The reason for this procedure was the urge to tackle competition problems in Mexico. Basically, many of them are structural in nature, which are unrelated to the misbehavior of market participants but are caused by unsuccessful liberalization processes that came about in the 1980s and in the 1990s in Mexico, which have resulted in anticompetitive regulations, bottlenecks, and weak competitive pressures in general.

As we are speaking, the energy sector is being liberalized in Mexico. I always say that the government needs to be more present in the liberalization of the market. Sometimes they look at me and they say, “But exactly what we are doing is pulling the government out.”

But competition does not come sporadically; it’s not that you change the law and competition will flourish immediately. Our liberalization process needs to be accompanied because if that does not happen, then what you have is anticompetitive regulation and all sorts of bottlenecks. That happened in the reform wave in the 1980s, and this is what this procedure is trying to fix.

This procedure starts with an ex officio or a request from the executive branch through the Ministry of Economy, but it is the Competition Commission that decides if it should be opened or not, depending on if we analyze and find there are no competition related concerns in that market. We are looking at the financial, transport, agricultural, energy, and public procurement sectors because those are the sectors that are labeled as “strategic” in our strategic plan.

I would say that the process is structured in a way that all the common economic agents have effective rights and they can present evidence in their defense many times through the process. So I really do believe it is a process where you can present your arguments and your evidence regarding why the market is working correctly or what type of conditions could be imposed to fix what the Competition Commission found as a barrier to competition.
I do consider that there is no reason for foreign investors to be worried about this new procedure. I think it is good news for them, in the sense that as Mexico opens itself to competition, they have investment opportunities, and this will provide security and certainty to their investments. We are going to see heavy investment flows in the energy sector. We saw it in the telecom sector. We might see it in the railway sector. I believe it is different. I believe it opens the opportunity of foreign investment in Mexico.

MR. MACLEOD: I think there were some studies that the Federal Trade Commission launched in years past where it began to identify the issues that you have now taken up with your Task Force on Economic Liberty, Chairman Ohlhausen. I’m a little curious as to whether there are particular areas where you think your Task Force is going to focus.

And then, I am going to remind Chair Domen about the movie that we saw at the Section luncheon on Wednesday, in which just 40 years ago, the United States was weighing in on a case with an attorney general from a state defending an antitrust challenge. Forty years later, the Federal Trade Commission and a state agency were in the Supreme Court again squaring off.

I’d like to hear a little bit more about where the Task Force is going and what the states are going to do about it.

MS. OHLHAUSEN: As I previewed in my opening remarks, the Task Force is focused on shining a light on some of these barriers. A couple of interesting statistics: in the 1950s, less than 5 percent of jobs required a license and today it’s almost 30 percent. Of course, there are a variety of occupations that I think we all agree some licensing is required. We’re not focusing on having unlicensed brain surgeons or something like that.

But one of the more interesting additional figures is that there are 60 occupations that are licensed in all 50 states, but there are 1,100 occupations that are licensed in at least one state but not all states. That’s an enormous swing. If there is an activity that is unlicensed in 49 states and is only licensed in one, we might get a pretty good idea of whether this licensing is really necessary to protect consumers. Some of these occupations include things like interior decorators. I have said facetiously before I have a little trouble knowing why the government needs to protect me from an interior designer carpet bombing my living room with ugly throw pillows. I think individual consumers can figure it out for themselves.

I want to work with the states and other interested organizations to identify these kinds of licensing restrictions that might be in place or are being put in place.

Our competition advocacy program at the FTC has focused on these issues a lot in response to requests from state officials about whether these new proposed legislative regulations or changes to existing regulations are going to make consumers better off. With our consumer protection expertise and our antitrust expertise, we are particularly well suited to think about these issues.

How have we taken some initial steps? I talked about the fact that we have this great competition advocacy expertise. One thing that I have done with the staff’s wonderful help is create a microsite on the FTC’s website that pulls together all of the great work the FTC has done on these issues and identifies work done by other parties. The previous administration did a very good report about occupational licensing; the Department of Defense has reports about this; there are private reports—the FTC microsite brings that together.

And then, as I said, we are working with states. I did a Twitter chat with Governor Ricketts of Nebraska just last week on these issues. So again, we want to continue to shine a light and ultimately try to work with the states.
Again, that’s not to take enforcement totally off the table. It was very interesting to me as I sat through the Goldfarb case presentation at the lunch the other day that some of these things are still out there. They may not be exactly the same as the price schedule for the attorney closing fees, but some of the things are not too far off. We need to be alert to that as well.

**MR. DOMEN:** Well, here we go, the last ten minutes, the best part of the show. I didn’t hear “federalism” or anything like that. That’s fantastic.

But I will say I want to compliment the Commission because they have reached out to the states. One of the first calls I think you all made was to NAAG and to the Antitrust Task Force so that we could engage you and help work through all these things.

I think it is important to recognize that the states do want to promote competition. All these regulations certainly can make it more difficult for businesses to flourish, for the state economies to flourish, and so we are interested in promoting our economies, not hindering them. We all do know, however, that on the political state level many of these licensing boards have grown from a series of relationships that have existed over a long period of time. Those are going to be difficult to change quickly. It may take a few years to get there, maybe a few decades. So we can talk about that in maybe 20 years and we’ll see how we’ve done.

But truthfully, it can be recognized as a problem. As a state enforcer—that’s really what I do—when I see these anticompetitive behaviors by various boards, it bothers me just as much as anyone. But it will take some work to be able to do that, and I look forward to working with the Task Force to see what we can do.

**MS. WARD:** Let’s spend a moment or two talking about big data. A question for the Commissioner: Both in some of your recent speeches, as well as in some of DG-COMP’s recent investigations, DG-COMP has been focusing attention and resources on big data. What new issues, if any, does the growing importance of big data pose to the competition analysis of mergers, agreements, and single-firm conduct? You recently gave a speech where you touched upon the role that algorithms and the aggregation of data can play in how competitors set pricing, for example.

**MS. VESTAGER:** First of all, our main approach is that data is a great asset and that many, many good things can come out of the fact that we now have an economy that can use data in a completely different way. Like in health, for instance, you can find new specific ways of not only diagnosing but also treating people who would otherwise be left untreated because you can get data from completely different data sets.

That being said, I think it is important to focus also on the fact that then, of course, data is a big asset. It can be a barrier to entry. Data can be very difficult to replicate.

You see in some of our national authorities they are also very well aware of that. The French national authority fined one of their former incumbents for misuse of data that they had due to the fact that they used to be the incumbent, and not sharing, and therefore limiting other businesses’ ability to compete against them.

So, slowly but surely, it gains traction. This is also why I find that it is now that we should discuss how to make compliance by design. An algorithm is basically a great thing. It can do very good things for everyone. The bad thing is, of course, if it is set up to do wrong things. As always, the buck ends with people. Someone has to take the responsibility. We are not going to fine the algorithm, or to tell it to dissolve itself, or whatever. The buck ends with people, who have the responsibility for the behavior of their algorithms.
Now we talk more and more about privacy by design, that in order to make sure that you get it right, new and stronger legislation for each and every one of us to have our privacy, I think the same line of thinking as compliance by design, so that you make sure in the design of your algorithms that they do what they should and that they know the rules. There have been some, I think, quite funny examples of algorithms being set up. One concerned a book. The book was called *The Making of a Fly*. The one algorithm was set to always keep the price 27 percent higher than for the other seller, and the other seller was always set to follow the first. Someone adjusted the price manually when they realized that the book was selling—or not selling—at $23 million. That, of course, is no problem because no consumers are harmed. Well, they had a good laugh when they saw it, but that’s about it.

But I think it is just an anecdote to illustrate that things can happen out there and you have to think it through so that you do not unavoidably or on purpose get yourself into trouble. That I think we should discuss with the business community, how to deal with this, how to make sure that we get it right, because we are not there to set up a sort of a war on algorithms or any other thought. We are there to make sure that they are compliant and that consumers can have the best possible price.

**MS. WARD:** Does the Antitrust Division have any concerns about this from the cartel perspective?

**MR. SNYDER:** Absolutely. Last August we took a plea from a UK company that had used pricing algorithms to implement a price-fixing conspiracy with its competitors. This particular company and its competitors, which were online sellers of art posters on Amazon Marketplace, had agreed to adopt a specific pricing algorithm that would set the same prices for both companies and then automatically adjust their prices as well.

It wasn’t an enormous case in terms of the volume of commerce or the number of sales that were affected by the conspiracy. But it still shows that price fixing is no longer relegated to back-rooms. These are now situations when conspirators are becoming increasingly sophisticated, including in their use of data and the Internet to implement their conspiracies, and we have to find ways to continue to be vigilant in ferreting those out and prosecuting them.

**MR. MACLEOD:** Well, it’s not just cartels, of course. Chairman Ohlhausen, you have three bureaus that deal with data every day. When data issues come up, are they Bureau of Competition issues, consumer protection issues? How do you sort that out?

**MS. OHLHAUSEN:** There are Bureau of Economics issues, so I’ll start out with that because they weigh in on both sides.

It really depends. I wrote an article about big data because I think some of the thinking needs to be very clear. There are certainly consumer protection, privacy, and discrimination issues that can come to the fore from the use of big data. Big data is a wonderful tool, it can do a lot of great things. But, like any tool, it can be abused. It could be abused to violate people’s privacy; it can be abused to violate fair lending laws. All of those laws still apply, whether you are using big data techniques or not.

But on the antitrust front, I totally agree, data is an asset. I wouldn’t say it’s like any other asset, but it’s an important asset. Big data can create enormous efficiencies; it can create new products, new innovation; and in mergers we need to keep an eye on that. But could there also be barriers to entry? Certainly, and we need to use our antitrust tools to see whether there is a competition issue from big data.
One of my concerns has been occasionally concerns are raised in an antitrust review by outside parties that are really consumer protection concerns. I am alert to them, but I’m also very alert to the fact that we need to use the right tools to address the issue at hand. If it’s a competition issue, we use our competition tools. If it’s a consumer protection issue, we use our consumer protection tools.

Going back to the FTC’s Big Data Report, we went through all the laws that already apply in this area. If a human is not allowed to engage in unfair lending decisions, you can’t say, “Well, it’s really the algorithm that’s doing it.” Those laws still apply.

MR. MACLEOD: Chair Domen, two questions for you regarding the states: number one, are you worrying about data issues as well; and, number two, when it comes to security, there is a wide variety of state approaches to disclosures of security incidents. Is there anything developing on that front? Is this coming up in NAAG conversations?

MR. DOMEN: It is. I think that for us, though, you have to remember that these issues related to data—in particular breach, which is something that we have to deal with on a regular basis—is something that on the front lines we have to focus on immediately. We have to figure out, if a complaint is coming to our office, what are we going to do about it. We don’t have the luxury, perhaps, of setting policy, as some of the agencies do. We have to immediately react to a question.

So if it’s a breach, for example, what are we going to do? We have to ask has the entity gotten it under control; do they understand where the breach may have come from; but, even if they don’t, are they putting some protections in place to protect the consumers on the front line? That’s really what we view our position to be. We are there to protect the consumer from immediate harm. If that happens to be the case, we’ll try to do our best. But the policy setting often isn’t some luxury that we happen to have as states.

MR. MACLEOD: We started our discussion of the Economic Liberty Task Force with a review of some industry studies. There are some important industry studies that are a part of the portfolio of COFECE. President Palacios, is there any particular industry right now that we ought to be thinking about as important in your industry study area?

MS. PALACIOS: The pharmaceutical industry is one, both regarding market studies and ongoing investigations. If something comes out from those market studies — maybe pay-for-delay — investigations could be initiated in the near future. I think the transport sector and the energy sector are the main sectors ex officio we are concentrated on. And then, of course, whatever comes in that has anticompetitive problems, we’ll tackle them.

MR. MACLEOD: And on the industry issue, I know that e-commerce has been the subject of some significant attention in the European Union. Commissioner, are there any insights you can share with us from the e-commerce review that you have been doing?

MS. VESTAGER: Actually, it all started with a question about potential. We want to make full use of the potential of e-commerce.

One of the sort of striking things is that less than 10 percent of our SMEs do cross-border sales over the Internet. Why? It is so much easier to set up, for instance, an image on a French part of your Web shop and get yourself organized with delivery than to find brick-and-mortar, hire people, have the inventory, etc., etc.
So we wondered why: are there good reasons or bad reasons for this? Of course, we find a number of good reasons, that they hadn’t gotten to that yet or they were reluctant when it comes to consumer protection laws, that kind of thing. But we also find bad reasons, where we start questioning the way that contracts were set up.

The good thing about the sector inquiry is that what we learned during it was that a number of companies started to change their contracts already in the process of doing the sector inquiry because they became aware of “Oh, maybe it shouldn’t be that way.” That, I think, in itself is a very, very good thing.

We launched three cases just a couple of months ago in order to focus on this, where we find that consumers may not have had a full choice, that contractual restrictions disabled them from actually buying the goods where they wanted and to have them delivered.

The sector inquiry will be finalized within one or two months. But I think the main results are well known, that this is a market that we will have to follow closely because the potential of e-commerce is big. Of course, it’s a challenge to all our brick-and-mortar shops; that is obvious. But it is a challenge, I think, that should be handled not by saying “Let’s not do it” but by saying, “How can we integrate in order to serve consumers in the best possible way with e-commerce and brick-and-mortar in order to make our markets work better?”

**MR. MACLEOD:** There is a great deal more to hear. If we were a Sunday morning talk show, we would say, “Go online and continue to follow the conversation.” Unfortunately, we are not going to continue the conversation online. But on your app you have a great deal of background material that covers what we have discussed today, adds to the conversation, and goes well into the details of some of these studies and some of these initiatives.

But, unfortunately, we have run out of time. So I would like to do extend our gratitude, mine and Peggy Ward’s, on behalf of the entire Antitrust Section, to our panelists for giving us some wonderful openings and then submitting yourselves to our cross-examination for the last hour. Thank you very much.
Interview with Johannes Laitenberger, Director-General for Competition, European Commission

Editor’s Note: Johannes Laitenberger, the Director-General for Competition, European Commission, took office on September 1, 2015. He has been Deputy Director-General of the Commission’s Legal Service (2014–2015), Head of Cabinet of President Barroso (2009–2014), Spokesman of the European Commission (2005–2009), and Head of Cabinet of Commissioner Reding (2003–2004). He started his career in the European Institutions in 1996 as an adviser in the General Secretariat of the Council. In 1999, he joined the Commission as a case handler in the Directorate-General for Competition (formerly DG IV) and soon became a Member of Cabinet of Commissioner Reding (1999–2003). Mr. Laitenberger studied Law at the Rheinische Friedrich-Wilhelms-Universität, Bonn, and qualified as a German lawyer. He was interviewed for The Antitrust Source on March 29, 2017, by Juergen Schindler.

THE ANTITRUST SOURCE: Thank you so much for this interview with the Antitrust Source. Today, the UK government submitted its formal letter notifying the EU of its intention to leave the Union. Considering Brexit and other political developments around the world, where some countries are adopting a much more inward-looking and protectionist posture, do you think that competition policy will become more political again? In general, might we see a resurgence of certain concepts from social or industrial policy?

JOHANNES LAITENBERGER: I think that the financial and economic crisis of the last decade has had an effect on the discussion on economic policy in general and also about competition policy in many parts of the world. At the same time, I think that if there is one tool of economic governance that is capable of restoring trust and confidence of citizens in the economic process, then it is competition policy and competition enforcement. In fact, I think we would not have had, despite the crisis, the benefits of globalization that we have enjoyed over the last 20 or 30 years without, at the same time, this extraordinary process of cooperation and convergence in terms of competition law standards and competition policy enforcement all over the world.

If you look at the extraordinary history of the International Competition Network (ICN) over the last two decades, I think that the fact that we now have competition authorities in over a hundred jurisdictions is a confidence-building measure. In that sense, I would say that we have every interest and every incentive to continue with that cooperation because it will also help us to trust each other in economic exchanges.

You are right that there are discussions out there. They have different and multiple sources. This goes from security considerations to strategic, economic considerations. And, of course, there are legitimate points of public policy that can and must be discussed and taken into consideration in public policies.

I think at the same time, it has been a sound development over the last 20 to 30 years to clearly separate the discussion and the attainment of certain non-competition public interest considerations from the competition policy instruments because competition enforcement can achieve its mandate and objectives if it can concentrate on competition standards. Which is why, without
calling into question other public considerations, I would not advocate a mix between different public interest considerations in the same instrument.

**ANTITRUST SOURCE**: One concept that Commissioner Vestager has recently emphasized is “fair competition.” What does “fair competition” actually mean? Does it mean a departure from the Commission’s previous policy of excluding other public interest considerations from any competition analysis, or is it actually just a confirmation of the concepts of competition enforcement to date?

**JOHANNES LAITENBERGER**: I think the discussion about fairness and Commissioner Vestager’s contribution to this is, in the first place, a reaction and a response to the feeling of disaffection, the loss of trust and confidence that many people in many places in the world have with respect to the development of the political and economic system. There is a strong perception out there with many people that somehow the game is rigged and that economic outcomes are not determined on the merits. If we speak about fairness and competition policy and enforcement as a fair process, it’s, in the first place, because competition on the merits is an expression of fairness.

The underlying rationale of competition policy and competition enforcement is one of fairness, of equity, of a level playing field. And that needs to be brought forward time and again. It does not, and I would like to be very clear about this, nobody has advocated this, dispense us from meticulous legal analysis, from meticulous economic analysis, from sound reasoning on the details. But behind all of this, there is the fundamental rationale and the impetus to make sure that there is a fair competitive process. And in that sense, I think acknowledging this discussion is also stepping out a little bit of the comfort zone in the competition policy family, if I may say.

Having re-joined that family after a number of years, I’m very positively surprised, very struck how interconnected the competition policy community is, and we see this on occasions like here at the ABA Spring Meeting of the Antitrust Section. At the same time, of course, we must reflect a little bit on how to bring the product that we represent more directly to the clients. And in that sense, there is also a case for competition advocacy beyond our circles to engage economic operators, consumers, employees in that discussion. And I think that is what is called for at this point in time.

**ANTITRUST SOURCE**: So “fair competition” is not a new concept but a way of translating, as you said, complex legal and economic analysis so that regular citizens can understand what competition policy will actually achieve for them and how important it is for European policy?

**JOHANNES LAITENBERGER**: I think there is a lot of truth in what you say. Of course, we must also from time to time take a step back and look at whether our instruments, our analysis rosters, are absolutely fit for purpose, whether we are really catching what we should catch. We must avoid false positives as much as we must avoid false negatives and, in that sense, part of fair competition enforcement is also the honing of our capabilities.

So if I look at our present discussion in the European Union, I think the so-called ECN+ initiative, which aims at equipping the National Competition Authorities in a, not harmonized, but better coordinated way, is an expression of that because what we would like to see is that all the competition authorities have adequate independence, have adequate resources, have adequate tools.

We would like to see that, when it comes to the application of leniency programs, there are standards that also offer certain guarantees to leniency applicants. We are speaking about rights of
the parties in this initiative, so that is one example. Another example is the reflection that we are having about the modernization of the EU merger regulation, where so far we have not yet come to a conclusion. So all of this I think is part of the impetus in that direction.

**ANTITRUST SOURCE:** In one of your previous answers, you mentioned the International Competition Network (ICN) with which I have had the privilege, ever since I was a fellow at the FTC, of working as a Non-Governmental Advisor. I have to say it has been amazing to see the development of the ICN during the last 10 years. How do you see its future? What might the future challenges be and what contribution do you think the ICN can make to competition policy going forward?

**JOHANNES LAITENBERGER:** You know that we are engaged in the ICN with the Second Decade Project, and DG Competition is also contributing strongly to these reflections. That being said, I think the ICN is a unique forum in the sense that it exists with a minimum of organizational and institutional operators and a maximum, I think, of intense discussion, exchanges of best practices, and mutual support. Of course, and in particular under the auspices that you mentioned, the discussions that we are having worldwide, we would do well to look in particular at those areas of competition law where we still have less convergence. So we should continue on the one hand with the concrete production of the ICN tools that will help enforcement agencies, young and developing, big and small, to have a joint basis for enforcement practices and for enforcement standards.

And, on the other hand, we should try to look at up and coming discussions and issues that we are seeing. Of course, we also do that at the OECD by the way, but if you think about, for instance, two things like big data or algorithms and their impact, I think we have a lot to learn from each other. And different developments and different parts of the world will also help to hone our own possibilities. I would say the stronger our multinational exchanges and standards, the more effective competition enforcement can be.

**ANTITRUST SOURCE:** There is strong transatlantic cooperation between the European agencies and the U.S. agencies. The U.S. agencies recently released revisions of the U.S. International Guidelines. Are there any reactions on those revisions from the European Commission?

**JOHANNES LAITENBERGER:** I would first say, indeed, we have a very intense transatlantic cooperation. This includes the FTC and the Department of Justice. We also have a very strong cooperation with the Canadian Competition Bureau. This cooperation is underpinned by a number of realities of which the one I would really like to point out is the strong cooperation on an almost daily basis on the cases that we have to handle.

If I look at the present practice in mergers and acquisitions for DG Competition last year, 2016, it was the second busiest year ever in merger control. In a multitude of filings, we have been able to bring case teams together on a day-to-day basis. I think this is the most important element and one which also avoids a number of problems that uncoordinated investigations and decision-making could raise.

**ANTITRUST SOURCE:** You mentioned that the European Commission has been looking into how to modernize the EU merger regulation. While this is an ongoing process, do you have any initial reactions based on the feedback that you have received? For example, on issues such as the modification of thresholds, the treatment of minority shareholdings, or whether modifications are needed in the way mergers are notified—for example in the short form process?
JOHANNES LAITENBERGER: I’m not today in a position to give you an immediate reaction on the assessment that we have made of the submissions in the public consultation on the EU merger regulation. I think we have correctly identified the issues. And, of course, now we need to assess in detail the reactions in order to make sure that, both for our clients and for us, we really do the meaningful thing and are able to concentrate on what matters.

There is an issue of whether our current thresholds, the turnover-based thresholds, really capture all the transactions that one would need to look at or whether they could be or should be usefully complemented by a transaction value-based threshold. The concern is that we will not always capture certain transactions where, say, one of the transaction partners does not really have a meaningful turnover, as may be the case for pipeline products in pharmaceuticals or technology startups. But I think we need a little more time to really crunch the evidence from the review, and then see how this can be best translated. Of course, as always, there are different possibilities to address the matter.

I guess that when it comes to simplification, we will also be looking at measures that we can take, short of legislation. We have made quite a bit of progress in that respect in the past few years. And then one would need to assess, in a very sober cost benefit analysis, whether further measures would yield significant improvement or not.

ANTITRUST SOURCE: Will you be looking at developments in other Member States to see how changes turn out there before you take action yourself, or is this something that you would decide independently based on the data that you have collected?

JOHANNES LAITENBERGER: Again, no deliberation has been made on this. Of course, the exchanges with the Member States, the National Competition Authorities, the analysis of the legislative changes that may be taken in some Member States, all inform our assessment which is, however, an autonomous assessment.

ANTITRUST SOURCE: Commissioner Vestager has recently given a speech saying that DG Competition is looking at a number of cases in which it might double check whether the information that has been provided by the merging parties was correct. Comparing the EU with the United States, for example, where there’s a very strong body of case law on gun jumping cases and merger notification modalities, we clearly don’t have an equivalent in European law. Are these cases driven by the belief that we need to build up some case law and guidance in Europe?

JOHANNES LAITENBERGER: Well, we do have precedents in EU case law on gun jumping so this is not, I would say, the first situation where the question has come to our attention. I think more generally the system can only work if procedural fairness is respected. Procedural fairness means no gun jumping indeed. It also means the submission of correct information. And if one or the other is not the case, then I think the system is damaged and also there are obvious disadvantages for all those involved.

So it’s reasonable and sound that we are looking into the situation that has come to our attention. We do so simply based on the evidence that we are seeing. Where we have the impression something is not as it should be, we look at it. We look at it thoroughly and we simply take into account what we see.

ANTITRUST SOURCE: Besides the cases on gun jumping, which you mentioned, there are also
cases addressing the issue of the provision of incorrect or misleading information. Will these cases provide us with some new analytical concepts, such as the relevance of the information in question or causality, or is this something that is not envisaged at this point in time?

JOHANNES LAITENBERGER: Look, I think that, at the end of the day, we need to look at the complete situations that we are presented with. And then, of course, how we assess them taking into account the parameters that you have mentioned; negligence or not, all of that will play a role in the assessment. But the starting point will always be the concrete situation and then the way we assess it and how we handle it. Then, of course, guidance will arise. This being said, I would say it’s not rocket science what gun jumping is and what information is required. In this sense, there is very easy guidance: don’t gun jump and make sure that what you submit is really correct.

ANTITRUST SOURCE: Of course, it’s not rocket science, but at the same time, merger notifications can be a messy business, as we all know. In the European Union, we have the advantage of having a pre-notification system—although as a private practitioner I might also say that this can sometimes be a disadvantage. On the one hand, it’s good because you can actually discuss the transaction with the case team before notification and drill down to the real issues while quickly sorting out the non-issues. At the same time, of course, the parties have to wait until they get “the green light” for notifying. I was wondering how these upcoming decisions could affect the pre-notification process as it’s not always easy to gather and provide the required information. It’s not always easy to understand what the Commission is actually looking for, or what is really relevant for the notification. Having that kind of open discussion is the positive side of the pre-notification process. If we end up with case law that is too stringent, don’t you fear that the pre-notification process might be a more guarded and less forthcoming one?

JOHANNES LAITENBERGER: No, I don’t think so because I agree with your assessment of the pre-notification process. It is a useful assessment on both sides of what is needed to be able to conduct the investigation. What I would expect we will learn from such cases, what parties can learn from this type of case, will make even clearer what to do and how to conduct a pre-notification procedure.

ANTITRUST SOURCE: You mentioned that you had a very heavy workload last year, very much driven by big merger cases. Some of the cases were in the agro-chemical sector, and the Commission has just cleared the merger of Dow Chemical and DuPont, one of the largest mergers seen in that industry. One of the points of public discussion in these cases was whether the Commission has developed a new concept—when analyzing mergers in this sector—of “harm to innovation.” If it is new, how will the Commission analyze potential “harm to innovation” in the future?

JOHANNES LAITENBERGER: I don’t think that it is new. We have always said, and that is true both for the horizontal and the non-horizontal merger guidelines, that there are competitive parameters that go beyond prices. And innovation has been specifically named as one of these parameters.

It is true that we have been faced with a number of cases in recent years where innovation issues and the maintenance of an innovation capacity have played a role, the pharmaceutical cases for instance. But also a case like GE/Alstom had to do with the need to ensure that a certain innovation capacity, a certain pipeline for instance, stayed in the market. This has been
resolved in particular through divestments of certain pipelines and/or the part of the business that was needed to maintain innovation capabilities.

In the agro-chemical sector and, in particular, in the Dow Chemical/DuPont merger, we have seen a very concentrated market, high barriers to entry, and a very innovation-sensitive market. And so we had to look not only at the horizontal overlaps, but also at the earlier stages of the pipeline and in different innovation areas, the maintenance of the capacity to innovate. We conducted a very thorough analysis and found that Dow Chemical and DuPont were two of very few companies actually capable of competing on innovation against the specific background in this industry. And we also found in the investigation that, absent remedies, the merged entities would have had lower incentives to innovate.

The parties ultimately proposed the package of remedies that we have been able to accept. And so we have, in particular with the divestiture of components for R&D organization, been able to make sure that this innovation capacity stays in the market. We had already before that merger laid out our thinking about innovation in the Competition Policy Brief on merger control and innovation, which I think in many respects gave a clear indication of avenues that we are going to explore within the assessment of these situations.

**ANTITRUST SOURCE:** So in a way, innovation has always been a part of merger control analysis, but perhaps it's true to say it's becoming more prominent for certain sectors?

**JOHANNES LAITENBERGER:** You have certain industries I think where it plays a specific role. Take agro-chemicals. You have a very limited number of players. If you look at the situation right now, this is an industry where we have five global innovators. There are at present three big mergers going on so that the number of innovators is being reduced. Therefore, one has to look at innovation competition in such a concentrated industry, where the entry barriers are very high.

**ANTITRUST SOURCE:** You mentioned earlier that the Commission is looking at its toolbox and always has to reconsider whether it has the right tools to perform the required analysis in merger situations. One of the Commission's tools is economic analysis. Recently the General Court in Luxembourg has overturned the merger decision in UPS/TNT on the basis of the economic model used and the rights of the parties to have access to and the opportunity to discuss such an economic model. This is quite unusual because, in recent years, the Commission has actually fared quite well with merger decisions appealed to the European courts. Do you have any takeaway messages from that decision?

**JOHANNES LAITENBERGER:** We are still analyzing the UPS/TNT judgment. We have been overturned in this case on a procedural requirement where the analysis was that, in the final stages of the case, the final modulation of the econometric model had not been shared to a sufficient degree with the merging entities.

The court has set a standard in that respect, which we need to think through, without me being able today to prejudge the outcome. Two remarks, nevertheless: On the one hand, I think this case presents a number of specificities. And on the other hand, I think I can say with the best of conscience for DG Competition, for everybody involved here, that we take rights of defense extremely seriously, that we have every interest in making sure that all the relevant information that comes from the parties is taken into account in our proceedings, so that is an aspect on which I would not like to leave any doubts.
ANTITRUST SOURCE: Moving on from mergers to antitrust, in recent weeks and months there have been quite a number of interesting announcements and speeches from the Commissioner and new developments in case handling practice. Previously, the Commission had a binary approach to resolving antitrust cases, i.e., either adopting an infringement decision or accepting a settlement through the parties engaging in commitments. Recently, we have seen a kind of hybrid solution where the Commission has settled but at the same time imposed a fine. Is this something that we’re going to see more in the future and, if so, how does it tie in with other settlement processes that DG Competition already employs?

JOHANNES LAITENBERGER: The cooperation procedure in antitrust that we have initiated, if I may say so, with the ARA decision last year is, of course, part of our larger effort to try to streamline antitrust proceedings. And I think here again this is not just of procedural interest.

At the end of the day, it is important that antitrust procedures come to decisions that offer guidance to the market and that also put an end to the infringements in a good and useful timeframe. And indeed, as you mentioned, the stringent dichotomy between an Article 7 decision with the finding of an infringement and an Article 9 decision with commitments (but no finding of infringement) has maybe not always allowed, on the one hand, to find an infringement and in that respect really establish a precedent that is clear for the market, and, on the other hand, to provide also an incentive for the parties to cooperate.

We base ourselves on the fining guidelines. We look at situations where parties are ready to acknowledge the infringement, including the facts, the legal characterization, and the liability of the parties for it. Where parties also offer a structural remedy, it can go beyond what might be achievable via a simple cease-and-desist order.

We will continue to assess cases and of course the readiness of parties to cooperate to see if they lend themselves to this type of procedure. In the ARA case, the fine reduction that was given to the party was 30 percent and, of course, one will need to see in further cases what kind of fine reduction would be justified.

There are three aspects on which parties can cooperate and the extent of the fine reduction will depend on whether they cooperate on one of them, or on some of these aspects, their contribution to the efficiency of the outcomes, the procedure, and so on.

ANTITRUST SOURCE: One point that you just mentioned, which I think is very interesting, is that there’s a certain desire to create more case law. I’ve also heard the Commissioner mentioning this in several of her recent speeches. Is that part of DG Competition’s thinking?

JOHANNES LAITENBERGER: I don’t think that there is a fundamental doubt about the usefulness of commitments. There are very many situations where commitments are the right way to solve the competition concern and to bring, at the same point in time, an immediate and clear solution to the market. But it’s correct that in certain situations, the pure dichotomy between the Article 7 and the Article 9 situation calls for a possibility of refinement and it is precisely this refinement that the cooperation procedure represents.

ANTITRUST SOURCE: You mentioned the ECN+ initiative, one important point of which is trying to improve cartel enforcement tools, including a whistleblower tool. I was just wondering how you see the future of this tool itself. How do you see the effect of the tool on the willingness of companies to go for leniency, given that lots of cartel cases are leniency-driven? Currently, it’s companies that come forward, not necessarily individuals. Will that change with the new whistleblower tool?
JOHANNES LAITENBERGER: I think it is a useful tool. Of course, we have already in the past had cartel cases that were not based on leniency applications or that were not initiated by leniency applications but by information from other sources. What the DG COMP whistleblower tool does in the first place is to allow for a back channel for an informant who wants to remain anonymous. The advantage of the whistleblower tool is that there is a secure line where an informant can deposit his or her information without needing to reveal his or her identity. We can also communicate back in a way that then does not require the informant to reveal himself or herself. I think this is simply an instrument that will allow for more spontaneous and more complete information.

One can expect a double effect. It will hone our ex officio capability. And it is clearly also a message for companies that, if there is a leniency application to consider, don’t hesitate. It’s better to submit it sooner rather than later because it’s always better to go for leniency than simply to wait for what hits you.

ANTITRUST SOURCE: So the idea is to supplement the toolbox that you have? The idea isn’t that whistleblowing would replace the current leniency procedure over time?

JOHANNES LAITENBERGER: There is no intention to replace leniency with the whistleblower mechanism. I think leniency has many advantages for businesses, for enforcers. And I think it’s important that businesses have the possibility to come clean. They should use that possibility. Nobody wants to take that incentive away. But businesses should also know that we are looking beyond leniency.

ANTITRUST SOURCE: Another challenge that the Commissioner addressed in one of her speeches is where anticompetitive effects arise without the typical human interaction, i.e. where people sit down and agree to collude around a table, but rather where the collusive behavior takes place remotely, such as through algorithms. Is this something that you will be looking at more in the future? Do you think you’re well-equipped at this point in time to detect such kind of behavior, or will you need new tools to analyze this?

JOHANNES LAITENBERGER: The Commissioner, in Berlin at the International Cartel Conference, has set out the state of our thinking and of our analysis on the matter. Of course, algorithms play an ever increasing role in a number of fields in which we have to keep our eyes and ears and minds open. That also goes for cartel behavior where algorithms can play a role in collusion. We see this also in other circumstances. Think about vertical practices, the impact that, for instance, price monitoring software can have in the context of vertical practices and vertical restrictions.

So we need to follow up on this. We need to understand how this works. The rules that we have allow us to address the issues stemming from algorithms because the basic rule is obviously that what is illegal in the analog world is also illegal in the digital world.

Where we may need to hone our skills and our understanding is in the exact analysis of how an algorithm works and what it does. But this I would say is also an important element for market participants because I don’t think that it would be a reasonable attitude to simply say, we put the algorithm out there and then, maybe at a point in time when it is more sophisticated, the algorithm develops a kind of consciousness separate from the creator and enters into collusive behavior. There will also be a need for market participants to consciously take a step back from what algorithms can do. So it is a conversation that we need to have. And yes, of course, it raises the ongoing obvious point that we need also to keep our IT capabilities, our analytics up to date.
ANTITRUST SOURCE: You raised a very good point when it comes to liability. If you have artificial intelligence and self-learning algorithms, as the creator of the algorithm you may have to get back into the process because an algorithm might go wrong.

JOHANNES LAITENBERGER: Yes, absolutely. If it’s true that you can program an algorithm to learn illegal behavior, you can also program it to stop at the right moment. That may be a challenge for creators and programmers.

ANTITRUST SOURCE: Turning finally to the Damages Directive, certain deadlines for implementation have now expired. I was just wondering whether you have any concluding remarks on the state of that Directive?

JOHANNES LAITENBERGER: The deadline for the transposition of the Damages Directive by the Member States expired on the 27th of December of last year. As we speak, we have 12 Member States that have transposed the Directive (i.e., implemented into national law), and in most other Member States, the process is well underway.

We will, of course, do the necessary also in terms of infringement procedures against Member States to make sure that the process of transposition really comes to a swift end and we will do conformity checks when it comes to the transposition. This is really an important part of the completion of our competition policy, our competition law system. In this respect, it is important that consumers can avail themselves of this instrument in comparable conditions throughout the Member States. So we will be vigilant in this respect.

ANTITRUST SOURCE: Do you think that in the future you’re going to continue to assess the policy impact of the Directive? For private practitioners, one concerning development was the 100 billion Euro claim in the trucks case. Considering that’s a settlement case, the prospect of such large damages claims is something that makes companies think twice about whether they should go down the leniency route at all. Do you think the Directive will have a chilling effect on leniency applications?

JOHANNES LAITENBERGER: I think the Directive has a number of features that strike the right balance between keeping the incentive for leniency and at the same time giving the people who have been harmed a right to compensation. The mechanism of the Directive under which the immunity applicant is not jointly and separately liable for the damages from the cartel, but only for its direct damages, is an important element. And, of course, let’s not forget that leniency was not instituted as a kind of leap of faith, but because there is a real risk for businesses to be detected if they are involved in cartel behavior.

Therefore it would also be imprudent if businesses now were not to step forward and not avail themselves of the leniency possibility. Because, in the end, not using leniency will always over time result in greater damage than the other options. This being said, this Directive, like any directive, will be evaluated and reviewed once we have sufficient experience of the functioning of the system. So a few years down the line, we will of course evaluate the functioning of the Directive and see whether it has met all the expectations that it needs to. That is part of our better regulation process.

ANTITRUST SOURCE: Thank you so much for this interview and safe travels back to Brussels.
Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal

Editor’s Note: The Honourable Denis Gascon was appointed Judge of the Federal Court of Canada on February 26, 2015. He was also appointed Chairperson of the Canadian Competition Tribunal on April 30, 2015. Prior to joining the Federal Court, he was a partner with Norton Rose Fulbright Canada in Montreal, where he headed the firm’s Antitrust and Competition Team in Canada. Mr. Justice Gascon practiced competition law and international trade law at Ogilvy Renault (now Norton Rose Fulbright Canada) for 25 years. Mr. Justice Gascon received his Bachelor of Laws from the Université de Montréal in 1988. He also has a Bachelor of Science in economics as well as a Diplôme d’études approfondies (D.E.A.) in economics. He was interviewed for The Antitrust Source on March 30, 2017, by Thomas Collin.

THE ANTITRUST SOURCE: Justice Gascon, I’m looking forward to asking you some questions this morning about the Competition Tribunal, Canadian competition law, and also your individual experience.

Let’s begin with the Tribunal itself. We don’t have in the United States a specialized court to decide antitrust or competition cases. Can you give us an explanation as to how the Tribunal works, why it was set up, and the scope of its jurisdiction?

DENIS GASCON: First, let me thank you for conducting this interview and the ABA for organizing it. I am very pleased to be here this morning to talk about the Tribunal.

We have a bifurcated model in Canada, with the Commissioner of Competition and the Competition Bureau having an investigative function, and the Tribunal acting as the adjudicator in civil competition matters.

So, there are very distinct roles for the Commissioner, on one side, and for the Competition Tribunal, on the other. And we also have a bifurcated model in terms of our legislation in Canada, the Competition Act. We have civil provisions, and we have criminal provisions. The jurisdiction of the Tribunal is limited to the civil provisions. The criminal provisions are handled by the regular criminal courts.

Our jurisdiction at the Tribunal is therefore limited to the civil provisions of the Competition Act, and that means essentially mergers, abuse of dominance or monopolization, deceptive marketing practices, and a new provision we have had for some seven years now, civil collaborations between competitors.

The Tribunal was established 30 years ago, in 1986, when the Competition Act was revamped and Canada moved away from some criminal provisions and enacted a number of new provisions in the civil area. At the time, the government wanted to create a judicial body which had essentially two fundamental features: (1) a specialized expertise both from a legal standpoint and an economic standpoint; and (2) a more expedited process.

The civil provisions of the Competition Act involve conduct where the competitive effects are the major element. The idea was thus to create a body having specialized expertise and, given
that competition is intimately related to business activity, a body where the process will be faster than what you would expect to have in the regular civil courts.

So these were the two drivers behind the creation of the Tribunal—this specialized expertise, and the process. In terms of the expertise, that’s why we have this special structure, whereby the Tribunal is composed of both judicial members, who are Federal Court judges like myself, and lay members, who typically will have a background in economics or business activity.

In terms of process, the Tribunal has developed a number of rules to make its proceedings more efficient and more expeditious, so that we can handle cases more rapidly than regular courts.

Another feature which I think is important to underline is the fact that the Tribunal is truly at arm’s length from the Competition Bureau, just as a federal court would be. So we are independent and, at a conference like this [2017 Spring Meeting of the Section of Antitrust Law], I am always faced with this task of explaining the model that we have in Canada, where the independence of our adjudicating tribunal is a major distinction between Canada’s enforcement model and the model of many other enforcement authorities around the globe. The Tribunal is an independent body deciding the cases, and this is a key feature of the model that we have developed in Canada.

ANTITRUST SOURCE: Let me follow up on the independence of the Tribunal from the Commissioner. Are the cases that you hear exclusively cases involving the Commissioner and rulings by the Commissioner or does the Tribunal have additional jurisdiction?

DENIS GASCON: It is a good question. The Commissioner is the main party appearing before us, but, further to recent amendments to the Competition Act, Canada has started to develop some private rights of action. So, for certain civil provisions of the Act, a private party can come and apply to the Tribunal, subject to obtaining leave from the Tribunal. Private actions before the Tribunal have been an incremental process, and they are still very limited. Incidentally, I don’t think there is any jurisdiction in the world where private actions are as expanded as what you have in your country, but Canada is slightly different from other jurisdictions in that private actions have developed and grown over recent years. That said, private actions still remain a small portion of competition litigation in Canada.

Before the Tribunal, you can bring a private action for refusal to deal, for some restrictive trade practices like exclusive dealing, and now for price maintenance, which has been open to private actions recently. However, the two main provisions of the Competition Act over which the Tribunal has jurisdiction—mergers and abuse of dominance—cannot be the subject of a private right of action. There have been discussions about opening the abuse of dominance provision to private action, but that is a policy question that I cannot comment on.

So the Tribunal hears private actions, subject to leave being granted. So far, there have been about 30 cases before the Tribunal where a leave application has been filed, but only about a third of those have advanced beyond the leave stage.

It may be part of the Canadian approach or “culture,” but, when the government created the opportunity for private actions, there was a concern that it would be opening a floodgate and that dozens and dozens of actions would be initiated without substantive basis. So this is why Canada subjected private actions to a leave process. We at the Tribunal will look at an application and determine, as a threshold matter, whether there is enough to go forward on the merits. And, as I indicated, so far only about a third of the private actions filed have gone beyond the leave stage.
The vast majority of cases brought before the Tribunal remain cases filed by the Commissioner.

**ANTITRUST SOURCE:** In a private action, does the Tribunal then function basically as the court of first instance, making fact findings and ruling on the disputed issues of fact and law?

**DENIS GASCON:** Yes. The Tribunal is like a court of first instance. It is like a trial court. We hear the factual evidence. We have not talked about the structure of the Tribunal yet, but typically cases on the merits are heard by a panel of at least three members, one of whom has to be a judicial member and one of whom has to be a lay member.

Normally, we have two judicial members and one lay member on a panel, and a panel is always presided over by a judicial member. The findings of facts are made by the whole panel. If there are purely legal issues, these are to be determined by the judicial members only. If you have purely factual issues, all three members will participate in the decision-making.

Our decisions are appealed directly to the Federal Court of Appeal, as are Federal Court decisions in Canada.

**ANTITRUST SOURCE:** How are the lay members appointed? Do the judicial members have some input on the selection of lay members for the Tribunal?

**DENIS GASCON:** The *Competition Tribunal Act* provides that the Tribunal can have up to six judicial members and up to eight lay members. As Chairperson, I make the decision as to who will be sitting on a given panel.

For judicial members, you have to take into account the fact that we are all Federal Court judges with our respective case load from the Federal Court. So in terms of availability, that is a factor in determining who will be able to sit on a panel. There may also be conflict issues, especially for someone like me who is coming from the competition bar. I have been on the Tribunal for two years now, and I have had some instances where I could not take a case because it was something I had worked on when the Commissioner was investigating it, and it has now come before the Tribunal.

The lay members are also subject to conflict of interest rules. Although we have a roster of eight, currently we have only three lay members because the term of a number of lay members expired at the end of 2016. We are in the process of filling those vacant positions, and appointments are expected to be made shortly by the government. In fact, the government will be announcing, I am told sometime in the coming week or so, its request for new applications for lay members.

The judicial members definitely are not involved in the process of selecting lay members. As Chairperson, however, I may be consulted, and I may also put forward names of individuals whom I think would be good candidates as lay members. At the end of the day, though, it is the government making the decision—more specifically, the Minister of Science, Innovation, and Economic Development.

Lay members are typically appointed for five years, and judicial members can be appointed for up to seven years. They are appointed through what we call the “Governor in Council” in Canada. In the very early days of the Tribunal, challenges were brought against the Tribunal on the ground that the lay members were not truly independent. The Federal Court of Appeal, however, held that they were independent because of provisions contained in the *Competition Tribunal Act* regarding their tenure and remuneration.
So, the selection of lay members is a process in which I may be indirectly involved because I am the Chairperson of the Tribunal, but, at the end of the day, it is a decision of the government.

**ANTITRUST SOURCE:** Let me ask about your responsibilities as a Federal Court judge. Does the Tribunal occupy all of your time as a federal judge and have all of your attention?

**DENIS GASCON:** If the case load was such that I would be required to work full time as the Chairperson and judicial member of the Tribunal, that would be the priority for me.

It is understood that the Federal Court would free as much of my time as needed to handle the work at the Tribunal. The reality is that the case load is not such that the Tribunal requires all of my time. Since I have been appointed, I would say that approximately 50 percent of my time is spent on Tribunal matters. The rest of my time is spent on regular Federal Court work, which I think is very similar to your federal court. We are basically the court controlling the activities of the federal government. The Federal Court deals with matters within the federal jurisdiction and controls the legality of the activities of the federal government. So anyone questioning the legality of an action taken by a Minister or an agency would bring the matter before our Federal Court, and that includes, for example, patent cases, trademark cases, immigration, national security—all of the activities in which the various agencies of the federal government are engaged. So I spend, I would say, half of my time as a Federal Court judge and the other half handling Competition Tribunal matters.

**ANTITRUST SOURCE:** Let me ask you about the mediation directive issued last year by the Tribunal. In some of our federal courts of appeals in this country there are comparable mediation procedures. Would you describe how your procedure is intended to work and whether it has been extensively utilized?

**DENIS GASCON:** Yes. First of all, it is a very recent development. We issued our Practice Direction regarding Mediation in June of last year, so it is not even a year old.

So far, it has been a very successful process. I think it is useful to step back a moment and to see why we now have mediation as an option at the Tribunal. I think that you have to look at it from the Tribunal’s perspective but also—and I believe this ties in with what you said about your own experience in the U.S.—from the perspective of the judicial regime in general.

As far as the Tribunal's perspective is concerned, we have, as I mentioned earlier, the mandate to develop a more informal, more expeditious process to resolve competition matters. So that concern has always been an element that drove the activities of the Tribunal. We noticed that the Tribunal may not have been utilized as much as people expected it would be when it was created. My predecessors thus looked at the idea of opening other doors through which matters could be brought up and resolved in the Tribunal. The normal litigation process is what we have in place, but we explored the possibility of creating other doors through which the Tribunal could help resolve matters under its jurisdiction. So we initiated discussions with that idea in mind through the Bench and Bar Liaison Committee that we have at the Tribunal. After discussing this with the Bar and with representatives of the Competition Bureau, mediation was identified as the low-hanging fruit, and this is what led to the Practice Direction on Mediation.

From a more general perspective, the other driving factor behind the mediation option is the need for better access to justice. Our Supreme Court has issued a very important decision in 2014
recognizing that access to justice is the main challenge that courts are facing today.\(^1\) And when I say access to justice, I mean access in terms of cost of litigation and access in terms of timing and efficiency of litigation. In that decision, the Supreme Court called for a cultural shift in the approach to our adversarial system.

And the idea was that there needs to be other ways to resolve disputes, ways which are as effective and legitimate as the conventional trial court. If you look at the reforms made to the codes of civil procedure in place in various Canadian provinces, you will see more and more of a trend towards alternative dispute resolution models, including procedures for mediation.

So what we are doing at the Tribunal with mediation did not arrive by accident. It is really part of a more general trend in the whole judicial system.

It is in line with our mission at the Tribunal, and it is also in line with what we are seeing on a more global level in the judicial system in terms of access to justice.

The Practice Direction itself is three pages in length, and the principles are pretty general. First, mediation has to be by agreement. The Tribunal offers this option, but we are not imposing it on parties. The essence of mediation is that it is voluntary. What we have seen since the mediation option has been in place is that parties will plan to have a mediation session somewhere in their proposed schedule for a given application. The mediation may take place before or after discovery. That is not for us at the Tribunal to decide; it is up to the parties to determine when they want to have the mediation.

The parties also decide on the scope of the mediation, and it can be a mediation on the whole application or a mediation on a very specific aspect, such as product or geographic market definition. Even if it does not resolve the whole matter, the mediation can thus serve to narrow the issues.

It is also up to the parties to determine who they will use as a mediator. So far, the idea is that they will use one of the judicial members of the Tribunal because judicial members have some experience in the area. Typically, the parties know them, so they have confidence that the mediator can bring the dispute to a resolution. But, again, that is for the parties to choose. They can come to us and ask us to recommend an outside mediator, but that has not happened so far. Counsel in this area are experienced, and they know the qualifications of judicial members of the Tribunal.

If there is a resolution following the mediation session, the parties will confirm its terms in a consent agreement, which will then be registered with the Tribunal, as is done with any other consent agreement. So far, we have had two successful mediations, one in Parkland,\(^2\) which was a merger case, and other one in Moose Knuckles,\(^3\) which was a deceptive marketing practices case—two very different cases which were both mediated to a successful resolution. We are also scheduled to have a mediation in an abuse of dominance case later this year.

Mediation is thus a process that has taken on a life of its own, and, because of the early successes, parties now say, “Why not try to explore that?” So far, I think the parties are very pleased with the results, which has always been the goal.

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\(^1\) Hryniak v. Mauldin, [2014] 1 SCR 87 (Can. Supreme Ct.).


In addition to mediation as a door allowing better access to justice, it may be worth considering other methods that may be able to provide for more expeditious resolution of matters before the Tribunal, especially in the merger area where timing is of the essence. These other options could involve either a summary trial or other forms of summary disposition, provided the procedure is agreeable to all parties. There are currently discussions with the Bar and the Commissioner on that front.

**ANTITRUST SOURCE:** If mediation doesn’t result in an agreed resolution, when the case is heard on the merits, will the judicial members of the panel be different from the judicial member who presided at the mediation?

**DENIS GASCON:** This is a very good question and, in fact, unless the parties agree to the contrary, the mediator will never sit on the hearing on the merits. The parties could decide that they want to have that person on their panel, but the principle is that the mediator will not be hearing the case on the merits.

In fact, in the two cases that I mentioned, I was the case management judge, but I was not the mediator. I was continuing to manage the two cases, but the mediation was something totally different in which I was not involved. I did not even have access to the documents that were filed as part of the mediation. These are two separate processes, but, again, the parties may decide after an unsuccessful mediation to have the mediator sit on the merits panel.

**ANTITRUST SOURCE:** Understood. Let me shift gears here and ask you a few questions about the actual procedure in a case that you’re considering. And specifically, let me ask you about expert witnesses. Are there situations in which the Tribunal will appoint its own expert? Sometimes in federal courts in this country that happens. The judge will select on his or her own initiative, with the consent of the parties, an independent expert to address some of the issues in the case. Is that something that you’ve considered or done, or how would you view that?

**DENIS GASCON:** We have two mechanisms whereby the Tribunal can use independent economic advisors. We have a more formal one and we have what I call an informal mechanism. The formal one is in our rules of procedure, which provide that the Tribunal can appoint an expert.

We would typically do that in consultation with the parties, but the independent expert would be advising on issues specified by the Tribunal. His or her report would be made available to the parties, and they would have an opportunity to comment on it and respond to it.

We also have an informal process whereby the Tribunal can appoint an economic advisor. Historically, we had a permanent economist on the staff of the Tribunal, but the position is no longer warranted given the Tribunal’s intermittent workload. So there have been four or five cases in recent years where we have informally appointed such an economic advisor. We have done so to assist the Tribunal in the advisor’s specific area of expertise. The practice we have developed is that, if the economic advisor writes a report, we will, for procedural fairness, make the report available to the parties and give them an opportunity to comment.

This subject leads me back to the qualifications of lay members on the Tribunal. The ideal lay member, for me as Chairperson, is a professor of economics, or someone having solid economic background. But you can also have someone with industry expertise or accounting expertise. In some cases where pure economic or econometric issues were central to the decision, there has been a need to go beyond the lay member sitting on the panel and to secure the needed economic expertise through an economic advisor.
The Tribunal has also been at the forefront of a number of initiatives in terms of handling expert evidence. An important trend that we see with respect to expert evidence is the idea that experts should be there to assist the Tribunal and not to plead the case of a party. This is a change that we are seeing not only at the Tribunal but in other judicial settings. The Tribunal has always thought that this is what the role of experts should be. They are not there to advocate the position of a party; they are there to assist the Tribunal. Under our rules at the Tribunal, we have what we call an acknowledgment of expert witness. An expert appearing before the Tribunal has to sign an acknowledgment indicating that he or she is acting impartially and that his or her first duty is to the Tribunal, not to the parties hiring them. Experts are indeed much more helpful to the Tribunal because of this requirement that they remain independent and impartial.

Another procedure that we can resort to is to have panels of expert witnesses. This is sometimes referred to as hot-tubbing of experts. Having experts appearing together and asking questions to one another can assist in narrowing the issues much more quickly than you would be able to do through the typical adversary process, where the expert is defending or advocating the position of a party. Our rules therefore provide for witness panels, and we have considered the possibility of using these in some cases.

**ANTITRUST SOURCE:** I want to ask one other question about case management before turning to some of your recent rulings. In terms of case management, does the Tribunal impose on the parties time limits on how long a hearing is going to run or what each side can do in terms of presenting arguments and witnesses?

**DENIS GASCON:** Yes. In fact, the Tribunal is known as being pretty “hands-on” in terms of case management. As soon as the pleadings are in, we will call a case management conference to fix the timetable for the whole proceeding, so the process moves very rapidly. We try to complete a hearing on the merits and all discovery in less than a year, and we plan, at the very beginning of a matter, all the upcoming steps in the case, including interim motions, discovery, examination of witnesses, and other matters. So we have a good idea of the timetable very early, and we follow it closely.

We also have what I call hearing management processes, and the one that you are referring to is what we call that “chess clock” process. We ask counsel how much time they need for the oral hearing. Counsel will tell the Tribunal, for example, “We need two weeks or three weeks,” but it is up to them to determine how much total time they need. Once they have determined the time needed for the hearing, we will determine the duration of the hearing and allocate time. Each side will have, for example, 30 hours. And having a “chess clock” process means that you start the hearing knowing that you have, let’s say, 30 hours allotted to you, and you have to plan your case within that timeframe.

Whenever counsel for a party is on her or his feet, the time counts against that party unless they were responding to matters raised by the Tribunal. If you make a motion objecting to a testimony or to an exhibit and you win, the time is attributed to the other side. If you make a motion and you lose, the time is counted against you. Basically, at every break or at the end of each day, the parties know exactly how much time is left in the overall envelope that was determined at the beginning of the hearing. So in terms of how you plan and allocate the time, it is up to counsel to decide. You can decide to spend 90 percent of your time on direct examination and leave little time for cross-examination or little time for argument. But at the end of the day, you have to present your case within the time allotted to you.
This process forces counsel to think about narrowing the issues and focusing on what is really important to their case. Which witnesses should you be spending time on? Should you continue if cross-examination is leading nowhere? Maybe it is not wise to spend too much time on an objection with limited chances of success, because it is going to be counted against you. So the “chess clock” procedure is a mechanism by which we have been able to manage hearings at the Tribunal very effectively. Hearings move more rapidly because of it. The Federal Court is now looking at this as something they may want to implement in areas like intellectual property where you have complex cases, similar to competition cases. Initially, there was some concern that counsel would complain about procedural fairness or not being able to present their case, but, frankly, it never happened.

This “chess clock” procedure forces counsel to think about their strategy and, at the end of the day, I think this allows the Tribunal to have an efficient process, with the hearing focusing on what is truly at stake and what are the real issues that need to be determined.

**ANTITRUST SOURCE**: And what kind of expedited procedures are available in the case of a merger, if any?

**DENIS GASCON**: Apart from what I described so far, there is nothing different for a merger. We have an interim injunction process, but this does not address the merits of the underlying application. With respect to the merits of merger cases, the parties are mindful of the fact that it would help if there were some form of summary disposition process. That said, I should add that, even under the Tribunal’s normal processes, rulings on the merits are made more quickly by the Tribunal than by the regular courts.

But if we could have a process that would allow merger challenges to be resolved more rapidly, that would certainly be beneficial. At this moment, however, there is no separate trial process for mergers.

**ANTITRUST SOURCE**: Let me ask you now about the actual rulings by the Tribunal and which ones you would view as particularly significant and why. Let’s look at 2016, for example.

**DENIS GASCON**: Before the mediation in *Parkland*, there was an important interim injunction ruling that I issued. The Commissioner was seeking a preliminary injunction preventing the merger in certain geographic markets. This was an important ruling because it enabled the Tribunal to clarify the test be met on a request for a preliminary injunction.

The Commissioner was not seeking a freezing of the assets or a hold separate order for the entire transaction. He was arguing that there would be irreparable harm to competition in the relevant markets because of the delay between the application to the Tribunal and the hearing on the merits. The issue was whether the evidence of irreparable harm to competition was sufficient to meet the threshold of the preliminary injunction, and that issue had never been raised before at the Tribunal. So that was an important precedent, the *Parkland* case.

Another important recent case was the *Toronto Real Estate Board (TREB)* decision on abuse of dominance. There, I have to be a bit prudent because the case is currently before the Federal Court of Appeal. In fact, we expect a decision in the first half of 2017.
It was an important case because not only did the Tribunal clarify the test on abuse of dominance but it also addressed to what extent, in an innovation case, qualitative evidence could be enough to meet the test of anticompetitive effects and substantial lessening of competition. The Tribunal concluded, based on the evidence as a whole, both quantitative and qualitative, that there was enough to meet the test, which is the balance of probability in civil cases.

In that case, there was not the same type of quantitative evidence that you often have in competition cases. We however concluded that the qualitative evidence on the non-price elements of competition, the effect of innovation on the range of services, and the impact on the quality of service was sufficient to establish anticompetitive effects resulting in a substantial lessening or prevention of competition. So, the case was important both in terms of abuse of dominance and the nature of evidence sufficient to establish anticompetitive effects.

Since I have been appointed at the Tribunal, I have been saying to counsel time and time again that facts are determinant. We are a trial court. At the end of the day, we apply the civil test of balance of probabilities based on the evidence before us. Even though it may not have been the perfect econometric model, the factual and qualitative evidence was found to be sufficient in TREB. The TREB case was an important decision on that front.

Another case was a challenge made by Kobo to a consent agreement in the e-books matter. You have also had decisions in the United States on e-books. In that case, the Commissioner concluded a consent agreement with some publishers, and it was then registered with the Tribunal. Once a consent agreement is registered, the Tribunal does not have jurisdiction to review unless a third party directly affected by it raises a challenge. And this is what happened in Rakuten Kobo Inc. v. Commissioner. Kobo attacked the Commissioner’s consent agreement with the publishers and that allowed the Tribunal to clarify on what grounds a third party could challenge a consent agreement. We also considered what facts need to be included in a consent agreement.

Based on our analysis, we determined that the consent agreement concluded with the publishers was not adequate. At the end of the day, the Commissioner agreed that, because of the test clarified by the Tribunal, the consent agreement with the publishers had to be rescinded. The Competition Bureau went back to the negotiating table and concluded new consent agreements that were registered early this year.

**ANTITRUST SOURCE:** Do you expect or anticipate that, given the ruling in the Kobo case, consent agreements negotiated prior to the ruling may become subject to challenge by third parties?

**DENIS GASCON:** That’s an issue that we were wondering about, but that’s not what we’ve seen. We will have an interest in how the Commissioner addresses future consent agreements. If you look at the new consent agreements that have been renegotiated in the e-books matter, and which are now again subject to another challenge by Kobo, it would appear that the Commissioner has taken into account the requirements that we’ve established for the consent agreements going forward.

**ANTITRUST SOURCE:** When the Federal Court of Appeal reviews fact finding by the Tribunal, what standard does it apply? Does it defer to the Tribunal’s fact finding?

**DENIS GASCON:** It does, to some extent. The Federal Court of Appeal acknowledges the specific expertise of this Tribunal. Its judges acknowledge that they should be deferential to the findings.

5 Rakuten Kobo Inc. v. Comm’r of Competition, 2016 Comp. Trib. 11 (Can.).
of facts made by the Tribunal, but an appeal is still reviewed on the merits. The Court shows some deference to the expertise of the Tribunal. This doesn’t mean that the Federal Court of Appeal will not intervene in a Tribunal decision — and it has in a number of cases when issues of law or of mixed facts and law were raised — but having specialized expertise in the Tribunal makes it appropriate for the Court to show deference to pure findings of fact. The TREB appeal will be an interesting decision from the Federal Court of Appeal because the Tribunal’s decision was very facts-based.

**ANTITRUST SOURCE**: Let me move now to another area, Justice Gascon. Can you give us a little bit of insight into how your prior experience in the private bar either prepared you for serving on the Tribunal or has influenced how you hear cases as a justice?

**DENIS GASCON**: Well, it has certainly prepared me because, you see, I come with knowledge of the competition/antitrust area. I come also with the knowledge of most, if not all, of the actors in this area, whether it is the Commissioner, members of the Competition Bureau, or practitioners in the private bar. So I know them quite well. But at the same time, you also realize quickly that looking at things as a judge is quite different. There are things that you would not have noticed or thought about when you were acting as counsel.

Two things have mostly struck me since I have joined the bench. The first one is that, when you are sitting at the Tribunal or as a Federal Court judge, you realize that the cases that come before you are not the easy ones. What comes before the Tribunal are the difficult cases, the borderline cases, the cases that are not easy to decide.

And the second thing you realize is that, as a judge, you have more limited resources compared to what you had in private practice. You have this conjunction of difficult cases with much more limited resources to draw upon in deciding them. Competition is a very sophisticated and specialized area of the law. You have very sophisticated counsel and law firms with ample resources, and you, as a judge, have limited resources. This means that, as a judge, you rely heavily on counsel.

The good decisions are those in which the judge or the Tribunal can rely on good counsel. You want counsel to be there to help you do your work, and the best lawyers will be presenting the facts accurately and the legal arguments fairly. We know that they are going to be able to give us the material needed to render good decisions.

As a private practitioner, I did not have a complete understanding of that dimension of the work of a judge, especially in an area that is highly specialized like competition. So the role of counsel, and this is what I have been explaining to all stakeholders since I have been appointed, is very, very essential to the work that we do. Let me add this. The role of counsel is to persuade the court or the Tribunal of his or her position. What I have observed as a judge is that, in order to be persuaded by counsel, there are two skills that counsel must master.

The first one is the ability to instill trust. Counsel has to gain the trust of the Tribunal. And how do you do that? You do that by presenting the case fairly and understanding where your weaknesses are. Frankly, when you are the judge, you very quickly see the things that will work and the things that will not work from the evidence and the arguments. You need to be able to trust that counsel will be presenting the case fairly and will acknowledge where the case is strong and where it is not. That is part of persuading the judge.

The second skill to master is the ability for counsel to focus on the key elements of his or her case. What you realize as a judge is that counsel who are most likely to be successful are those
who are able to focus their argument on the key elements of their case. We still see a lot of the “kitchen-sink” approach, with counsel throwing everything at the judge and not focusing on what the strong points and important issues are. That does not really work. Instead, as counsel you have to be able to focus your efforts on the strong points in your case. The reality is that, even though cases before the Tribunal are difficult and complex, they will usually turn on a very limited number of issues. This is where, as counsel, you have to focus your efforts, knowing that the case will be won or lost on these issues.

From the bench, it looks very obvious, but not all counsel understand the need for this approach. Again, that is something that you very quickly realize sitting up there on the bench.

**ANTITRUST SOURCE:** As a presiding judge, do you sometimes tell counsel, “Don’t spend time on that. I’m interested in this instead.”

**DENIS GASCON:** Judges have different styles. I tend to be more interventionist and tell counsel, even from the start, when I think that the case will turn on issue X or Y. That said, I will never impose on counsel to change his or her strategy. That is their choice. But I will tell them, “I expect that you will address this point, this point, and this point,” or “I am concerned about this evidence,” or, “I don’t understand this point.” I will indicate to counsel where I have concerns, where I need clarifications or explanations and what issues I expect counsel to address.

This does not mean that counsel cannot discuss other points. If they go on with an argument which I think is not leading anywhere, I will tell them. I do that to be helpful and to indicate to counsel where they should be spending their time. I always do that politely and with respect. I have the greatest respect for counsel—especially knowing and coming from this area of the law. We are very privileged as Federal judges to have able counsel before us. These are highly qualified individuals, and whenever I make suggestions, it is always with respect for whatever argument counsel is advancing. But at the end of the day, I do not want to surprise counsel by deciding a point they did not have an opportunity to address because I failed to inform them that I thought that was where the case would or could be heading.

**ANTITRUST SOURCE:** Justice Gascon, let me turn away now from the Tribunal and ask you a little bit about your activities with international bar organizations and competition organizations. Can you tell us about that?

**DENIS GASCON:** Yes. I believed, when I was a practitioner, that the international dimension of this area of the law, the competition area, is very important. What we have seen and still see today, especially at the agency level, in terms of harmonization and collaboration at the international level, is a big success story.

And, since I have been appointed as a judge, I have been trying to see how, from an adjudicator’s perspective, this international dimension can be developed and replicated, to make it as helpful to judges as it has been for agencies and for practitioners. Up to now, what has happened at the international level, whether it is at the ICN [International Competition Network] or at the OECD [Organization for Economic Co-operation and Development], is really more agency-focused. I think that there is a place for adjudicators like us at the Tribunal, and for competition judges in general. And in fact, I have been involved in two initiatives on that front.

Last October, the OECD asked me to attend a judges’ workshop in Asia. The Korea Policy Center of the OECD organized the workshop. This was a training workshop for judges from seven
or eight countries in Asia on how to handle competition cases. This kind of exchanges and learning from the experience and practices of others is exactly what international bodies have done at the agency level. And I think there is room for similar exchanges for adjudicators. I am still at the stage where I am trying to assess what kind of opportunities there could be for adjudicators, especially at the OECD and at the ICN, because I think there is room for that.

As for the second initiative, I was recently at the OECD Competition Law Forum in Paris, which is held every year in early December. There also, I believe there is a role for judges to play and to contribute in a forum like this, but I was struck by the fact that there were very few judges participating in it at this stage. To me, it was as if the adjudicators were the elephant in the room. Everybody was talking about them, but they were not there! Everyone was asking, “How would a court react to this kind of enforcement action? How would courts react to these kinds of cases?” And I was saying to myself, “Well, maybe it would be helpful in this kind of forum to hear, as I do in other areas, from judges as to what works and what does not work before a court or an adjudicative body? What kind of evidence can convince a judge and what kind of evidence does not convince?”

So this is my involvement so far.

I need to add one caveat. We must always remain mindful of the fact that we, as judges and adjudicators, need to be independent and remain independent from the agencies. And this is where I am trying to find the right way in terms of involvement in the international activities. But, as a judge, you have to be careful about preserving that independence—especially in a model like the one we have in Canada or in your country, where you have the Federal Courts reviewing decisions of the Department of Justice. In this type of model, the independence of the judiciary from the agency is a key feature.

There are things that, in terms of training and experiences, judges can share that would be to the benefit of the judicial system in competition matters in general. At the same time, we have to remain mindful that we are independent from the Competition Bureau and the Commissioner, just as we are independent from the different parties appearing before us.

In the competition area, there are many other enforcement models that differ from ours. The “integrated” model is the most common in competition circles. So when you are talking about the Tribunal and its role in international circles, you have to keep this distinctiveness in mind.

**ANTITRUST SOURCE:** Thank you very much, Justice Gascon. Is there anything you want to add before we conclude?

**DENIS GASCON:** Nothing in particular. We could of course go on and on and talk about the Tribunal’s experience for another hour, but I think we have covered a number of elements that illustrate the particular features of the Tribunal and of the judicial model that we have in Canada. As Chairperson of the Tribunal or as a Federal Court judge, I am always trying to find ways to improve our processes in order to make the Court or the Tribunal more accessible, while at the same time remaining extremely mindful of the procedural fairness that we, as the judicial members of the Tribunal, need to protect and make sure is respected.
Interview with Rose Webb, Chief Executive Officer, Hong Kong Competition Commission

Editor’s Note: Rose Webb was appointed to the position of Chief Executive Officer of the Hong Kong Competition Commission in March 2016. She previously held the position of Senior Executive Director at the Commission from April 2014. Ms. Webb has been closely involved in the formation and development of the Commission and in all aspects of its operations since the commencement of the Competition Ordinance on December 14, 2015. Immediately prior to her appointment to the Commission, Ms. Webb was Executive General Manager, Mergers and Adjudication, at the Australian Competition and Consumer Commission.

Ms. Webb graduated with a double degree in Economics and Law from the Australian National University and has an LLM degree from Sydney University. She also holds a Graduate Diploma in Practical Legal Training from the College of Law and a Graduate Diploma in Governance, Policy and Public Affairs from Queensland University. She was interviewed for The Antitrust Source on March 29, 2017, by John Bodrug.

THE ANTITRUST SOURCE: Could you start by briefly explaining the current legal status of Hong Kong and its relationship to China? For example, does a business operating in Hong Kong have to comply with both Chinese and Hong Kong competition laws?

ROSE WEBB: Hong Kong has quite a separate legal jurisdiction. That’s one of the main things that was kept separate after Hong Kong was handed over to China in 1997.

Hong Kong inherited the British common law system and then had developed some common law of its own. It is this system that still operates in Hong Kong. Companies are registered separately in Hong Kong and in China, and the competition laws and courts are markedly different from those in the Mainland. The only reason a company in Hong Kong would have to comply with both sets of competition laws would be if it was operating across the border. Quite a lot of companies in Hong Kong have, for example, their business headquarters in Hong Kong but a factory in the Mainland, and they may have to comply with both laws.

For a business that wants to comply with Hong Kong law, it just looks at the Hong Kong statutes. Many multinationals have a Hong Kong office and they would be subject to Hong Kong laws. There’s no appeal from the court in Hong Kong to a court in China or anything like that.

So really, it’s quite separate, and the rule of law and the common law tradition are very strong in Hong Kong.

ANTITRUST SOURCE: You are the Chief Executive Officer of the Commission. How is that role different from the Chair of the Commission?

ROSE WEBB: The Commission in Hong Kong is a statutory body, but like many statutory bodies in Hong Kong it’s a board/executive model, very similar to a company in some ways. Every one of our members is a non-executive member. The Chairperson herself is also a non-executive. Members are paid a small honorarium and it is a part-time position.
The statute allows delegation of the day-to-day operation of the Commission to the CEO. But the board members in the end make the final decision on significant issues, such as commencing a proceeding in court, issuing a block exemption order, and a number of other non-delegable matters under the Ordinance.

The executive wing, of which I’m the Chief Executive Officer, is responsible for the day-to-day operation of the Commission and is to a large extent autonomous, subject to general governance and overview by the members of the Commission, including the Chairperson. The Chairperson is more involved than the other members in the sense we discuss various issues with her on a regular basis and she often represents the Commission at public events.

**ANTITRUST SOURCE:** The Commission is the investigative body and the Competition Tribunal is the one that actually issues a decision that might impose a penalty.

**ROSE WEBB:** Exactly. So we conduct an investigation, then we have to go to the members of the Commission to get a decision to start those proceedings, and then we would apply to the Tribunal.

**ANTITRUST SOURCE:** I understand that the board of the Commission has up to 14 members.

**ROSE WEBB:** The Chairperson and 14 other members. I’ve come to understand that a large number of members is a reasonably common feature of Hong Kong statutory body arrangements. It’s seen as a way of making sure there’s representation of all sectors of the Hong Kong economy.

We have some academics, some economists, and lawyers who do have competition expertise—also some representatives of the Consumer Council. We have some members who are there as representatives of the small business sector.

There are some members representing larger industry sectors. We have one member who is also a member of our telecommunications authority, so he is a liaison point between both authorities. We also have some members who some other jurisdictions may find slightly unusual, for example currently practicing professionals and business people. The board is intended to encapsulate a cross section of the Hong Kong community and have representatives from all sectors.

**ANTITRUST SOURCE:** It’s still early days, but that sounds like a large group. Has the board functioned efficiently so far?

**ROSE WEBB:** I think that they’re very good. All of them are very interested in the work of the Commission and they’re very expert in their individual fields and bring a lot to bear. It’s been really helpful, because the Commission’s executive team are not from Hong Kong, to have such a broad representation of the local Hong Kong community and people who’ve been engaged to various aspects of Hong Kong for a long time.

It can get unwieldy. Actually one of the biggest problems we’ve had is working out a good way in which to make sure their conflicts are dealt with properly. There is a process for declaring a conflict of interest—they do have quite a lot of them—and then determining how do we deal with them. Does that mean the member in question has to step outside the room or is it satisfactory that the member can remain for the discussion? In a few of the early meetings it took longer to work out how to deal with the conflicts. It was important to ensure a proper process because we have 15 people with all different conflicts of all different types.
In terms of the actual decision making, there is some good discussion, and sometimes that can be a bit lengthy because everyone has a view, but in the end, generally the board is pretty unanimous coming to a resolution about matters. So it seems to work well, even though perhaps, it is quite a large number.

**ANTITRUST SOURCE:** Turning to the substantive Competition Law Ordinance, I note that the First Conduct Rule, the cartel provision, specifically prohibits a member of a trade association from giving effect to a decision of the association where the object or effect of the decision is to prevent, restrict, or distort competition in Hong Kong. The Commission has also issued guidelines on trade associations and some of its early investigations have involved trade associations. What can you say about the thinking behind the focus on trade associations in the legislation?

**ROSE WEBB:** The legislation is taken from Article 101 in Europe, which also refers to trade associations. Although, in fact, the specific wording of this provision about trade associations is a little bit different from the European provision, but that was its genesis.

So I don’t think there was any particular idea that we would focus on trade associations at the drafting stage. But once we started looking into encouraging compliance in Hong Kong before the law commenced, we found that Hong Kong has a lot of trade associations. It’s a very common way of doing business in Hong Kong. A lot of trade associations are not just trade associations, but very much community bodies in which people conduct their social life as well as their business life. Prior to the Competition Ordinance they hadn’t had to be aware at all of issues about information sharing or price fixing.

We found trade associations to be both a real risk area but also a very obvious way in which we could hopefully get compliance messages out to a large body of people through a single source. That’s why we try to be focused and push some of our education activity to trade associations. It was very helpful for us, if they were having a seminar or a meeting of the members, we could go along and talk to them without having to organize the logistics of all that ourselves.

And then, as it got closer to when the law was going to commence, we were looking for some things to do to try and make more concrete what we were talking about when we talked about competition concerns. Also we had hired our enforcement officers and they couldn’t undertake any enforcement until the law commenced. It can be quite tedious for people who are investigators to be stuck in the office with nothing to investigate.

So we started this project of looking at what trade associations had on their public websites in terms of codes of conduct or rules for members. This got our investigators to start thinking about competition issues by looking through these websites and identifying things that were obvious risk areas. We then engaged with trade associations and recommended they reform their rules. Quite a few of them did, which, again, was a good reiteration of our compliance messages.

**ANTITRUST SOURCE:** Commission press releases indicate that the Commission contacted the Newspaper Hawker Association with concerns about its retail pricing recommendation and the association then took immediate corrective action.

In contrast, in November 2016, the Commission issued a public notice with respect to two professional trade associations identifying certain concerns about their codes of conduct, and indicating that, if they did not take corrective action by a certain date, the Commission would take action to address the situation. Given that date has passed, can you comment on whether there was corrective action by the associations?
ROSE WEBB: Yes, there was. In both cases our public airing of our concerns about their conduct had the desired effect. One of them has removed the rule that we were quite concerned about. The other has suspended that rule pending an annual general meeting that will happen at some later time, which they said was necessary under the rules of the association.

But I think that’s a good contrast because the Newspaper Hawkers were very innocent and just came up with this price-fixing arrangement and put it up on their Facebook page. Actually it was the media who picked it up and came and said, “Isn’t this what you’ve been talking about—this price-fixing stuff?” We immediately contacted the Hawkers Association and they changed the arrangement. We were very satisfied that, in their case, it was ignorance that had led them to come to the view that they should have an agreement on the price of cigarettes.

With the professional associations, we had sent numerous warning letters advising that they should change and they still hadn’t. So, in the end, we were not concerned about going public. It seemed clear they weren’t going to take some action within a reasonable timeframe as almost a year had passed since the law commenced. It was a good message for us to send that people do really need to take action to comply and not just say they were thinking about whether they would amend their rules.

ANTITRUST SOURCE: Is it this type of public notice a technique that you might use again in the future?

ROSE WEBB: Yes. I think we will. We’re very determined that we’ll use the full range of available remedies, and shining a light on conduct of concern may be something we do in other cases if we think it is an appropriate outcome.

In other cases we may require something more of the parties along the lines of commitment, and then obviously in major cases we’ll be thinking about going to the Tribunal. The point in this case was to say, “Well you can’t just keep sending us letters saying you’re going to change maybe one day.” We needed to show that we were serious about our concerns.

ANTITRUST SOURCE: Speaking of the full range of available tools, last week the Commission took its first bid-rigging case to the Competition Tribunal. Can you talk about that case?

ROSE WEBB: I can’t say too much now because it’s before the Tribunal and so obviously I don’t want to prejudge any of the decision making of the Tribunal and there’s quite a way to go in terms of how this case will play out. But what I can say is that we had done quite a lot of public education about bid rigging, including seminars for procurement officers in businesses in Hong Kong. We had given tips for looking out for tenders that might be rigged. For example, a grammatical mistake that looks similar in some tenders. On Friday, we gave a seminar and then Monday some people who had attended the seminar came in and said, “Oh, we’ve just had this tender and look we found these grammatical mistakes,” and various other suspicious aspects of it.

So it was a really good indication to us that our public education was working well. In this case, the allegation is that the parties have engaged in bid rigging in relation to a tender by the YWCA for a server system. It will be interesting to see how it plays out.

ANTITRUST SOURCE: This case is brought against five technology companies for allegedly submitting dummy bids. There’s just potential fines and no charges against individuals at this point.
ROSE WEBB: Yes. We do have the power to take action against individuals. There’s a provision in the Ordinance that allows the Commission to seek a penalty against a person who was “involved” in a contravention. This provision is similar to that found in the Australian legislation.

We can therefore take cases against individuals, but strategically there are a few reasons why we didn’t in this case. One, this law has to be actually interpreted in the Hong Kong context. There may be some issues with it, but also we thought, for our first case, it was really more important to give the message about the company’s responsibility for the conduct of its employees. And so, therefore, we wanted to show that the company was the one who ultimately would be held responsible.

And it’s also fair to say that these were not really senior employees, at least for some of the parties concerned. We really thought a better strategy in this case would be to focus on the companies and not get ourselves into legal issues that may come from taking a case against an individual.

ANTITRUST SOURCE: I read as well about another bid-rigging case in Hong Kong in 2016, referred to as the Garden Vista case, which was brought under a different Ordinance, not the Competition Law Ordinance. Does that law continue to be in effect in Hong Kong as well?

ROSE WEBB: Yes. The intersection between corruption law and competition law is an issue that we have faced a few times. “Bid rigging” in the public mind in Hong Kong can either mean corruption or a competition issue.

The Garden Vista case was a corruption case where someone who had been engaged as a consultant for a big building renovation project took some payments from various engineering companies that he then helped to win the tender. So it did have some issues of tender rigging as well, but it was mostly a corruption case, and because that conduct all happened before the Competition Ordinance came into effect, there was no competition issue. There is still quite a strong anti-corruption law in Hong Kong and a strong anti-corruption enforcer, the Independent Commission Against Corruption (ICAC). We have a lot of relationships with them.

ANTITRUST SOURCE: In the Garden Vista case, the individual who pleaded guilty received 35 months in jail, which seemed pretty strong in the circumstances. Does that reflect what you expect to be the judicial attitude for competition offenses once it comes to prosecuting individuals?

ROSE WEBB: That’s an interesting question. There is a very strong anticorruption culture in Hong Kong. I think it comes from the fact that for many years there was a lot of concern about corruption. Hong Kong was the first country in the world to have an independent commission against corruption. It prides itself on setting up an anticorruption body of this type.

The ICAC is very well resourced, they’re very strong, and I think Hong Kong now wants to mark itself as not being a corrupt economy. This is reflected in the attitude that you see from the court to corruption cases, and even cases concerning the lesser issue of misconduct in public office, where long sentences can be applied.

Whether that will actually translate to competition issues will be interesting to see because I think there’s still a perception in Hong Kong that it’s a competitive economy and became competitive without competition law. Possibly in some sectors there is still a view that “we don’t really know why we need this law at all.” I think the Competition Tribunal itself is very sound and probably wouldn’t be swayed by those sorts of sentiments, but the general feeling against corruption
in the Hong Kong community may not be directly translatable into a general feeling against anti-competitive conduct.

ANTITRUST SOURCE: Again, it’s early days for the competition law in Hong Kong, but the Commission has had a leniency policy in effect since December 2015. I’m sure you can’t comment on anything specific, but can you comment on whether you’re seeing any activity?

ROSE WEBB: I can say that people have been using our leniency policy. I think there are two aspects to it. One is the international leniency applications, where people seek leniency around the world, and Hong Kong is now one jurisdiction that they’ve added to their list.

In some aspects, we’ve probably been on the tail-end of some of those worldwide approaches. But then there’s domestic cartels. To what extent people will come in for those, I guess that maybe is still a bit of an open question.

ANTITRUST SOURCE: For the competition law provision on serious anticompetitive conduct, such as price fixing and bid rigging, that’s a prohibition that applies to everyone. But for some less serious conduct, the potential restrictions do not apply for parties where the combined turnover of the enterprises doesn’t exceed a monetary threshold of $200 million. Can you comment on the rationale for creating what one might call this safe harbor?

ROSE WEBB: Yes. This actually happened during the legislative process, which was before I was in Hong Kong, but there was a general concern about competition law and feeling that maybe Hong Kong didn’t really need one. And a large concern of small and medium enterprise businesses was that they would be subject to a law that no one could explain to them in black and white.

People had referred to the fact that this is an economic law and whether conduct is in contravention may depend on the facts and situation. The small business sector was very vocal with complaints that small business people would never work out whether they were in compliance or not. They suggested that they were at risk of finding themselves in the Tribunal with a completely innocent action. So the legislature decided that, for these types of offenses that were perhaps a little bit less black and white, there would be a de minimis exemption for the very small businesses.

ANTITRUST SOURCE: What kind of conduct is in that category?

ROSE WEBB: Mostly it would be vertical agreements, including in some cases resale price maintenance (RPM). For most RPM cases, you would expect that, even though a small business might be the victim or the target of the RPM or the vertical conduct, the actual person instigating the agreement is probably large enough that the de minimis limit will be exceeded.

But I guess if there were two very small businesses engaging in a sort of vertical arrangement, that would be the obvious circumstance that may be exempt. I really don’t think it is actually going to come up that often—we certainly haven’t found this. As far as I am aware we’ve only had one complaint where we thought maybe it could have fallen under the exemption. It was some exclusionary conduct by a relatively minor business.

ANTITRUST SOURCE: Would you have to demonstrate an anticompetitive effect for that kind of conduct anyway?
ROSE WEBB: I think probably yes. We have both an object and effect test similar to the European provisions and we’ve said that, for most serious anticompetitive conduct, which is the conduct to which the de minimis exemption does not apply, we think it’s object, but we’ve also said that potentially some other conduct might be object offenses. The definition of “serious anti-competitive conduct” in the Ordinance does not necessarily line up squarely with conduct that is an “object” offense. This is one of the wrinkles in the law. We’ll need to see how the Tribunal goes with interpreting where the lines should be drawn in Hong Kong between that conduct that is an object offense and that where the effect should be considered.

ANTITRUST SOURCE: The Second Conduct Rule deals with abuse of dominance issues. Can you foresee particular challenges in applying an abuse of dominance concept in Hong Kong, which is geographically relatively small? One might expect to see a number of industries with relatively high market shares compared to more broadly based economics.

ROSE WEBB: I think that’s right. There are quite high market shares. There are quite a few quite oligopolistic sectors. I think that’s why the government decided not to call it abuse of dominance but an “abuse of substantial market power.” So we take a signal that there could be two or more parties in a particular sector that both have sufficient market power to make themselves subject to that provision.

Generally we have been quite careful not to equate market shares to substantial market power because it will depend on the circumstances. But I think because many markets are oligopolistic, there probably should be some Second Conduct Rule cases. A large part of the Hong Kong economy is quite vertically integrated, not so much through actual vertical integration, but through a lot of arrangements and agreements between the parties. How they all work in practice has raised quite a few issues.

ANTITRUST SOURCE: The other major area that we typically look to for competition law is mergers. Hong Kong doesn’t have a merger control regime at this point, except with respect to telecom. This raises a couple of issues. You’ve said the Commission has shared jurisdiction with the telecom authority in Hong Kong. Who would be reviewing telecom mergers?

ROSE WEBB: Under the Memorandum of Understanding (MOU) we have, the telecommunications authority takes a lead on those telecommunication matters. The MOU arrangements allow the possibility for matters to be transferred to us, but I think in practice it will actually be the telecommunications authority for mergers.

ANTITRUST SOURCE: Do you anticipate that the merger control regime could be expanded beyond telecommunications?

ROSE WEBB: Yes. And I think any observer of a competition regime would say mergers is the third pillar that you have to have, and it doesn’t really make much logical sense to not have a merger control regime. For example, people could be engaging in an anticompetitive agreement. You say they can’t do that, but they could achieve the same effect by merging.

However, the government decided that, as competition law was new to Hong Kong, some time should be given before bringing in a universal merger law.

There was already a telecommunications merger regime and so, as a legacy, they left that in. The Commission has certainly suggested that, when the law comes to be reviewed in a couple of
years’ time, the government should consider applying the merger rule that is in the legislation more generally. I understand Hong Kong and Malaysia are the only two countries that do not have a merger regime, and it doesn’t sit very well having a modern competition regime without a merger law.

ANTITRUST SOURCE: You mentioned some contexts, for example in cartels, where the Commission has investigations that are a part of an international matter. In those international matters, and particularly if the Hong Kong competition law is expanded to mergers as well, there’s often sharing of confidential information between jurisdictions. What kind of protections are there for confidential information—if you’re providing information to the Hong Kong Commission, is that information going to be shared with other regimes, in particular China, given the relationship with China?

ROSE WEBB: We do have a very strong confidentiality provision in the Ordinance and the only specific information sharing that it allows is with the telecommunications authority. There’s a specific provision for that, but otherwise, the Ordinance really puts a duty on us to protect confidential information.

There is a provision that we can use information in the course of conducting our activities, and I guess there may be some matters where sharing some information becomes part of conducting our activities. However, we don’t have any positive gateway provisions in the law specifically relating to overseas authorities at the moment. We’d be very concerned to make sure that we take care with any information sharing that we did with any other overseas agencies and that we thought carefully through whether we actually have the power to do that.

In our leniency policy we in-built a requirement that parties give us a waiver. That was a way of making sure that we could share information in a leniency context regardless of, potentially, the limitations of our Ordinance.

ANTITRUST SOURCE: In the absence of a waiver, is it the Commission’s position that it would not share confidential information with foreign agencies?

ROSE WEBB: I think that’s right. I’m just not being completely conclusive because we do have the power to use confidential information for our own purposes so there may be cases where that allows us to share information. However, if we were just sharing for the sake of helping another authority it may not be permitted by the Ordinance. We are very alert to the credibility of the agency. It depends a lot on people having confidence to give you confidential information so we are taking care with how we treat such information.

ANTITRUST SOURCE: I take it that the status of sharing information with MOFCOM would be just like any other competition authority.

ROSE WEBB: Yes, absolutely. And in fact, MOFCOM, because we don’t have mergers, we don’t really engage with them much at all. Generally with the Chinese authorities, it’s been high level exchanges at this point—information about our current work on guidelines and publications and things like that, but no actual operational information sharing at all.

ANTITRUST SOURCE: Can you comment on the scope of private litigation for violations of the Competition Ordinance, either in the courts, or can private parties take matters to the Tribunal?
ROSE WEBB: No, they can’t. Originally there was a provision in the Ordinance to allow for a private right of action but, again, because of the concerns of the business sector about being subject to litigation, that was removed during the political debate on the Bill. The only private right of action is a follow-on suit to an action by the Commission. So if we get a declaration from the court that there’s been a contravention, then a party can come and sue for damages, but they can’t initiate an action in the Tribunal.

And so that creates some issues for us because, essentially, if we decide not to pursue a complaint, we’re potentially denying the party their avenue for a redress. Similarly with our leniency policy, we had to make it a provision that, if we granted someone leniency, they would consent to a declaration by the court, because if we didn’t have that, and we didn’t take the party to court, then the applicant would not be subject to damages.

ANTITRUST SOURCE: Is that just single damages?

ROSE WEBB: Yes. It’s going to be single damages, and that’s a bit unclear how the court will actually work all that out and calculate it.

ANTITRUST SOURCE: We’ve talked about the acceptance of the business community for the new competition law. More generally, has there been widespread acceptance in Hong Kong of the new legislation?

ROSE WEBB: Yes, I think so. In the three years that I’ve been there I’ve noticed the change. When I first arrived, there was still quite a lot of concern about it. The concern was that it would be very difficult for people to comply or even more fundamentally not understanding why you have a competition law. Hong Kong is a very well-developed economy and often quoted as being the most competitive economy in the world and very free market-oriented.

People didn’t grasp sometimes what the point of the competition law was. Over time we’re seeing quite a shift. People genuinely like to be compliant with the law and so a lot of people have brought themselves into compliance regardless of their view of the law. But we’re also observing people actually understanding why they might benefit from the competition law regime. And certainly over time, rather than the small business sector being completely concerned about it and not seeing anything in it for them, we’re starting to see it from people who can see that there are various business opportunities for them.

For example, perhaps they can now price their products as they like, because there was a lot of retail price maintenance and very little freedom for many small retailers to set their own prices. Now they’re saying, “OK, I can now come up with some ways of competing and distinguishing myself.” We are also starting to see quite a lot of business go online. Perhaps before because there were so many price controls, people couldn’t sell online cheaper than they could offline. Now you can see the growth of online pet food and online food delivery and everything. I think you can put that down at least in part to people seizing the business opportunities that have come with there being a competition law.

However, there were likely some businesses that may have had a very comfortable existence, where they didn’t really have to compete hard for profits because there was some agreement to share the profits amongst the parties, either vertically or horizontally. Some of that is falling away, and so, they’re starting to find it a little difficult, but generally people are becoming more accepting.
ANTITRUST SOURCE: You’ve mentioned reaching out to trade associations in particular, but the Commission has taken some other innovative steps to make the competition law a lot better known in the community. Could you talk about some of those? I read about a mini-drama television series, for example.

ROSE WEBB: Yes. Actually, we did a few videos in the very early days, just promoting the benefits of competition, and they were very popular. Hong Kong has a very well-developed film and television industry, which to my mind is very innovative. The main free-to-air TV station has an arrangement where they will help you with the production of public service related videos. And they use the celebrities that they have on contract to be the actors in the video. They offer a one minute slot in the primetime for two weeks, so we could make 10 small programs as part of these arrangements.

The Commission came up with the general ideas for each episode. But I was surprised how excellent the TV crew were at coming up with a script that was quite compelling and engaging. They aired it about three or four months before the law commenced, and we got a very big audience for them. We also were able to use them as training tools that we could show at all our seminars. They’ve been very popular. And then we did a similar video campaign in relation to bid rigging, again, just because we found that it was an effective way of getting our message across.

ANTITRUST SOURCE: And there was a contest for schools?

ROSE WEBB: Yes. We’ve just started that. So Hong Kong, again, surprises me. I had to go and give a talk to secondary school students who are having a debating competition across Hong Kong where the topic was “that the Hong Kong Competition Ordinance does not go far enough.” There were 15- and 16-year olds preparing to have a territory-wide debating competition about competition law.

We’ve now joined up with the Education Bureau. One of the topics in their civil studies syllabus is Competition Law. We help with some of the teaching materials for that, but we’ve also started a competition where a group of students and a teacher can put together some advocacy material, either cartoons or a video or posters or something like that. The winner of the competition gets a trip to Singapore. We’ve organized with our colleagues at the Competition Commission of Singapore to host a visit. And we also have a professor at the National University of Singapore who is going to give them a talk as well. I think it’s a good way of reaching out to the school population.

ANTITRUST SOURCE: Another aspect of developing policies in Hong Kong has been the approach of recruiting senior members internationally, like yourself and your predecessor, and I gather even at lower levels as well. Can you comment on how that has helped to facilitate not only development of the law, but perhaps even outreach and acceptance in the community?

ROSE WEBB: Yes. Hong Kong is a very open economy and there’s very little restriction on employment arrangements in terms of not having to be a citizen of Hong Kong to work in a public body. I think that has been to their great advantage compared to many other newly formed agencies in the region, which have had no option but to only have local employees.

In Hong Kong they’ve deliberately taken the approach of engaging people who have experience in competition law, economics, or similar enforcement roles. I think it has helped us get a run-
ning start because the executives like me arrived about 18 months before the law commenced and had a long opportunity to get in place case management systems and manuals and practices and procedures. If you were not used to working in an authority, it may not occur to you that you needed all of that as vital infrastructure to just make the thing work.

I think it also helped with our guidelines and our education material that we could leverage our expertise, and we’ve certainly had people from other jurisdictions at all levels of the agency. There’s quite a transient expat community in Hong Kong. We’ve actually found people who’ve moved to Hong Kong because their partner has work and, because they have some competition background we’ve been able to engage them because anyone with experience is helpful.

We’ve got a good mixture now of people who had some competition law experience, maybe working at a law firm or competition authority, and then people who are completely new to it but know Hong Kong well. One of the issues is that, when you employ a whole lot of people not from Hong Kong, just understanding the economy, how the business works and, importantly understanding Cantonese, is all a handicap. It’s been important that our Commission members and a fair proportion of our staff were local.

So I think it worked quite well for Hong Kong because it certainly moved a lot quicker than a lot of other agencies. People are often surprised that we’ve only been in operation for about 15 or 16 months when we are where we are with both our enforcement activity and that we’ve completed projects like our proposed shipping block exemption.

ANTITRUST SOURCE: Your predecessor, Stanley Wong, was certainly a very well-known figure in the American and Canadian Bars. I wonder if you could talk about the foundation work that he laid and how you then picked up on that.

ROSE WEBB: Yes, he certainly was well known in North America but actually also quite well known in Asia because he’d been consulting since he had finished up in Ireland, including giving competition advice to competition authorities and particularly to many authorities in Asia.

And he also had a good understanding of how different competition regimes worked in different jurisdictions. The Commission staff included Australians, who were used to a prosecutorial model, and Stanley from Canada had experience with a similar model. Then we had the Europeans who understood that law, which was similar to the law that we had in Hong Kong. Stan, of course, also had experience with the European law in Ireland.

So it was very valuable having his combination of North American experience from Canada and European experience from Ireland, then he’d worked in Asia a lot so he could bring that experience, and he’d worked on quite a few authorities’ leniency policies and things like this. So he also had a lot of experience in issues and traps new authorities had fallen into. I think that was probably what he bought to the Commission. He came with a very wide-ranging understanding of how competition law could be done in different places, which I found very interesting because I had come from just working in one jurisdiction.

ANTITRUST SOURCE: I was going to ask you where you see the right balance between enforcement and outreach by a new commission, but with the bid-rigging proceedings commenced last week, you’ve already brought an enforcement action.

ROSE WEBB: We had that long lead-up period, which was longer than everyone anticipated, before the law commenced. We had no choice but to do outreach during that period, which we
did with a bit of a vengeance. So, as I mentioned, we had a whole lot of people whom we’d employed as investigators. We were sending them out to do PowerPoint presentations, which is a good way of making them learn competition through explaining it to other people.

So we had a really big advocacy emphasis and we carried that on for a large part of last year, but we were also very busy getting them on some enforcement activity. Unfortunately, that’s a little bit less transparent, and people can’t see how much enforcement activity you’re doing unless they’re the ones who are the recipients of your search warrant or your information notice. Certainly the law firms in Hong Kong were understanding how much we were doing, but until we actually have the case in the Tribunal it is not so obvious to the general public.

**Antitrust Source:** What is the Commission’s advocacy role in providing input on proposed legislation and regulation in Hong Kong? I note that the Hong Kong legislature recently proactively sought the Commission’s opinion on a professional accountants Bill. Does that signal a general receptiveness of the legislature to get input from the Commission?

**Rose Webb:** There’s a provision in the Ordinance that part of our function is to provide competition advice to the government. It’s probably fair to say that when I first came to Hong Kong, a lot of the civil servants did not have a strong focus on competition issues when they were considering policy options. I guess that was understandable because they hadn’t had a competition law.

But it’s certainly changing quite rapidly. We’re now seeing that, if it’s not the policy agency that raises whether there would be some competition concern with their proposal, then, when they go to the legislative drafters from the Department of Justice, they get asked about whether they’ve checked with the Commission. Or if it doesn’t get picked up there, at the Bills Committee of the Legislative Council, a legislator will say “Is this compatible with competition policy?” So we’re seeing it at all stages of the policy making process.

**Antitrust Source:** Is consideration of the impact on competition almost becoming part of a checklist?

**Rose Webb:** I can’t guarantee you that it’s completely comprehensive, and there’s certainly been a few proposals where we say, “Oh, obviously they didn’t think about talking to us first,” and that’s why it’s being picked up later in the process.

But it’s certainly becoming more the case that legislative proposals or regulatory proposals are being run by us, just asking the question, “Is there a competition issue in this?”, which I think is actually a very good sign because a lot of the conduct that we get complaints about is conduct that we couldn’t do anything about under the Ordinance because it is government policy.

**Antitrust Source:** Does the Commission provide guidance to private parties on the application of the Competition Ordinance to proposed conduct, like the business review letters in the United States?

**Rose Webb:** Yes. We do have a provision in the Ordinance that allows us to provide something called a “capital D” Decision, and that’s as to whether one of the efficiency exclusions or other exemptions would apply to a particular proposal. Once we make that decision, it gives them certainty about how the Commission interprets the law. Once we’ve made the Decision, then we can’t prosecute a person later in relation to that conduct. So we’ve got a very formal transparent process.
THE ANTITRUST SOURCE: Is a Decision like a block exemption?

ROSE WEBB: Exactly, except it can be a one-off arrangement rather than an industry-wide practice.

Apart from the formal process, we also try to be helpful and provide people guidance and encourage compliance. However we can’t give legal advice, because that’s not our role.

We’re certainly trying to encourage compliance, and you do that by being helpful with people. I think often we found that, if we say, “Here’s where our concerns would be and here’s why we think you might be able to not do it this way but do it some other way,” people often go and think about it again. I guess their legal advisors also take what they can from that meeting in giving further advice to their clients.
Interview with Skaidrīte Ābrama, Chairperson, Competition Council of Latvia

Editor’s Note: Skaidrīte Ābrama became Chairperson of the Competition Council of Latvia in June 2012, when she was appointed by the Cabinet of Ministers to a five-year term. She has been with the Competition Council since 2004, first appointed for a five-year term as a Board Member. From 2009 to 2011 she worked in the position of Chief Economist, providing economic advice and expertise in case handling and market studies. Before entering the Competition Council, she held leading positions with large international companies in Latvia. Ābrama studied at the University of Latvia International Business and Economics, finished postgraduate studies in Economics and Business Management at Swiss Institutes AKAD and IMAKA, and holds an MBA. She was interviewed for The Antitrust Source on March 30, 2017, by Russell Damtoft.

THE ANTITRUST SOURCE: It’s been 25 years since Latvia’s independence was restored. Even before the Russian troops had fully pulled out of the country, one of the first things Latvia did was pass a competition law. I wonder if you could reflect on the transition that Latvia has made over this time. Is the process of transition to a market economy complete at this point or is there still work to be done?

SKAIDRĪTE ĀBRAMA: Yes, indeed. Competition culture and the competition market economy have been growing over 25 years of our history. In the early 1990s, the changes were very far reaching in Latvia. In this regard, I think there were huge differences from other post-Soviet countries. When I see and compare the level of what we have achieved, it is really incredible what has been done.

In the early ’90s, the Antimonopoly Committee was established. At that time, the staff not only supervised all so-called natural monopolies, but also started to implement a competition culture. This was very important at that time because the country was just beginning to move towards a market economy, and it was not so easy to develop competitive thinking, a competitive culture. And we still are in the process of promoting and developing a strong competition culture.

The first phase was the introduction of the market economy and the establishment of the Competition Law. The second phase, which was very important for Latvia, was in the early 2000s when we harmonized our legislation with the European Union competition rules.

I started to work at the Competition Council as a Board Member in 2004, and I remember the first dawn raids, which took place the same year. After the first dawn raids, thanks to collected electronic evidence, we learned about collusive patterns in cartel cases, and we started to look more deeply at the behavior of enterprises. These were two important steps of what we did. But I have to admit that we are still in the process of developing competition legislation and competition culture because we see that this is indispensable for the Latvian market economy.

In 2016, many new amendments to the Competition Law were adopted. It was a major modernization of the Latvian Competition Law, including modernization of merger control, prioritization strategy, and a number of other new tools for compliance with the law. Execution of our requests,
cooperation with the authority, etc. were introduced as well. The amendments also provide for a presumption that cartels have caused damage and that, as a result of such violation, price has been increased 10 per cent, unless it is proven otherwise.

But after a couple of months, we drafted new amendments because there are still imperfections in our enforcement. Namely, it is necessary to grant the Competition Council powers to fight one of the most significant competition issues in Latvia—competition distortions created by public administrative bodies. Currently, in such cases, the authority is entitled only to give recommendatory opinions which are neither binding nor punitive.

**ANTITRUST SOURCE:** If you were to go out into Liepaja or Rezekne, would you find people thinking about market economies and competition the same way they would in Heidelberg or Helsinki?

**SKAIDRĪTE ĀBRAMA:** You know, in a new economy, it's very strange how people think about competition and market economy. Of course, they like the benefits from competition and such economy. In Latvia, we can be proud that we have achieved huge successes in many sectors. For example, in telecommunication, we have one of the fastest Internet connections for a very low price. This is because of very fierce competition between the three largest market players.

People, entrepreneurs, like the benefits of competition, but they often do not follow the rules of fair competition. For example, we have a lot of bid-rigging cases. Since 2012, about 70 percent of our prohibited agreement cases are bid-rigging cases in public tenders. It means that, as people are embarking in business, they do not understand or simply do not want to operate under, conditions of the market economy. This is the problem.

I think in large cities such as Liepaja and Riga, the people have more knowledge about the Competition Law. We have organized for them many different informative and educational events, both for undertakings and for procurement organizers of municipalities. We have launched a two-year project of informative seminars together with the anti-corruption bureau and the procurement bureau. But for people who are living in smaller towns, they really do not see the difference between the Competition Council or, say, the tax office when we organize dawn raids in some suspected bid-rigging cases.

Therefore, it's very important for new economies such as ours to have strong enforcement and significant cases to show as an example to other market participants how not to conduct their business. In 2012 we said in our strategy that we will focus on the most severe cases where fines need to be increased. But, at the same time, we promised to facilitate a strong competition culture, which means educating and informing people in different ways—all stakeholders, everybody who participates in the marketplace.

**ANTITRUST SOURCE:** I remember when I was in your country over 20 years ago and we were talking about dawn raids. After one of my DOJ colleagues described our search warrant process, we were asked, “Oh, like the KGB used to do?” Of course we said, “No, not quite like that.” But if you have that kind of memory from Soviet days, might that have led to resistance to those kinds of investigative tools?

**SKAIDRĪTE ĀBRAMA:** Most undertakings do not resist the idea of dawn raids because they understand that, to prove an infringement, you need to collect evidence. However, I remember, when I started to head the authority, politicians said, “Why should the Competition Council conduct dawn raids on our milk production companies?”
What possibly still might be considered as a bad memory from old Soviet times is leniency, whistleblowing. It doesn’t work well in Latvia because people are not willing to report and to complain about those they know. Perhaps, it might be explained by memories about olden times when we didn’t like to complain or tell about our neighbors. Maybe this is a result of a smaller economy and its culture. And as I said, we have a lot of bid-rigging cases and only five leniency applications despite having a leniency program in our Competition Law since 2004. Actually, the first leniency application we received only eight years later, in 2012. Since that time, we have had only five cases through leniency applications.

We have better results with leniency-plus applications, meaning that if, during the investigation, the company provides information about other infringements that the authority is not aware of, it receives up to 50 percent fine reduction in the investigated case and is exempted from penalties in other infringement cases.

**ANTITRUST SOURCE:** Being an informant has a different meaning in that context?

**SKAIDRĪTE ĀBRAMA:** Being an informant still has a negative meaning in my country. When we built information about the first leniency case, it was a very huge case. It was the Volkswagen cartel where five Volkswagen dealers and an importer in Latvia were involved. We organized a press conference and said, “Finally, the first leniency application,” without disclosing the name of the applicant. But what was the interest of the journalists, really? “Who was the informant, why he has done it?”

**ANTITRUST SOURCE:** The Competition Council did something that I thought was remarkable recently. They estimated the welfare gain to Latvia in a way that showed the Council had saved the Latvian economy so much money that the return to the public was about 52 Euros for each Euro invested. How did you come by that number? Has this had an impact with the public or with the government?

**SKAIDRĪTE ĀBRAMA:** First, about this proportion, one Euro to 52 Euros. We used the methodology developed by the OECD and adopted by the UK and other countries. We have adapted it to the Latvian situation. The calculation is based on the assumption that the public benefit is any potential loss to consumers that is avoided because particular infringements are stopped or averted by the authority.

Decisions adopted in 2013 to 2015 on cartels, abuse of dominant position, and also mergers were taken into account. Fines imposed were not included within the estimated public benefit because of their primary goal—prevention and damage reduction of the infringement.

And, indeed, I think it’s a very remarkable number. Actually, we have tried to estimate benefits from competition policy since 2006, when we elaborated our first strategy, to figure out how to measure the success or results. When we found this methodology elaborated by the OECD, we understood that now we have a tool to demonstrate to society what the Competition Council is doing and how the public resources are used in the benefit of the society. And it demonstrates that a small agency can be very efficient.

**ANTITRUST SOURCE:** Have you had a good reaction to this from the Parliament and from the public?

**SKAIDRITE ABRAMA:** We informed the public as well as our Ministry of Economics, which is super-
vising us, but I cannot say that there has been a lot of reaction. I think the Ministry was very proud that a small agency can perform so well, struggling all the time with the staff drain, with low salaries that are not at a level that will easily attract and retain professional lawyers or economists. Unfortunately, these estimates didn’t help us to increase our budget, or benefits for our staff.

**ANTITRUST SOURCE:** What’s the relationship between the Council and the Ministry of Economics?

**SKAIDRĪTE ĀBRAMA:** The Competition Council is supervised by the Ministry of Economics. I have been the Chairperson of the office since 2012, and, actually, during my term we have demonstrated to the Ministry that we are an independent decision-making body, that we are professionals, and that we will not tolerate somebody from the Ministry or other parties criticizing or the like our decisions or fine setting because only the court can approve or annul our decisions. I think, during those five years, the Ministry has changed its behavior to the positive side and it’s been possible to establish more productive relations. We report regularly about our standings, about our work, what we have done, and our results, but they do not have influence on what we do or how we should do it.

**ANTITRUST SOURCE:** Coming back to bid rigging—I wonder if you could tell us a little bit more about how you approach that.

**SKAIDRĪTE ĀBRAMA:** Bid-rigging schemes in public procurements, unfortunately, have been the most frequently detected infringement for several years. Why are there so many bid-rigging cases? It is probably specific to the Latvian economy. In the Latvian economy, still about 14 percent of the GDP is public procurement. For many small and medium-sized companies, public tenders are the main income source.

In 2012, when we saw that leniency was still not working, we understood that we had to be more proactive. We started to organize meetings and workshops for public procurement organizers explaining how to detect possibly coordinated tenders and what to do afterwards. And after each event, we received information from those organizers, and they said they had really found some similarities, some signs of possible bid rigging.

In 2013, we received about 12 applications or information from public procurement organizers, and in about half, we initiated cases. Next year, the number increased to 21. In 12 cases we initiated investigations. Additionally, we often receive tip-offs through a tool on our website to report violations anonymously. Besides that, the authority conducts 12–15 sector inquiries each year and those findings often help us to disclose signs of alleged prohibited agreements or abuse of dominance.

If the leniency doesn’t work well, the authority should be very proactive, and we have to encompass all public procurement organizers—from local government to even the State Prison Administration.

We also use an active prevention tool, by exercising the right to prioritize our enforcement activities. Namely, on smaller scope or less significant occasions of alleged prohibited agreements, since 2013 the Competition Council has issued warnings without initiating formal case investigations, thus focusing its resources on investigation and elimination of the most severe infringements. Thus, in 2016 after assessing the tender documentation received and the data on participation of the alleged infringers in other public procurements, we issued six warnings to 21
persons. If we speak about statistics during the last five years, we have had 19 bid-rigging cases, where 89 companies have been fined. At the same time, we have issued more than 60 warnings to undertakings that operate in 39 different industries.

**ANTITRUST SOURCE:** Is privatization still an ongoing process?

**SKAIDRĪTE ĀBRAMA:** In Latvia, privatization was launched in 1991, and is still ongoing, though the remaining amount of state property to be privatized is irrelevant. A number of state owned enterprises that are strategically important or with critical infrastructure are not likely to be privatized in the near future, or at least discussions on such plans aren’t taking place. On the other hand, there is now an ongoing debate about what to do with the two largest telecommunication services providers in which the state owns shares—fixed platform operator Lattelecom and also a mobile telecommunication provider, LMT. The government has not yet decided on the future options—to merge or to sell its shares. If a merger were to take place, there is a risk of creating a very dominant market player that can change the entire competition landscape in that sector. That is our concern.

**ANTITRUST SOURCE:** I want to turn to the dominance area. What have been the major targets of your dominance work?

**SKAIDRĪTE ĀBRAMA:** We still have a number of publicly owned companies, former natural monopolies that possess a dominant position. New, smaller entrants are not able to compete equally because incumbents own important infrastructure, data basis, specific know-how, etc. Almost all of them have been under our scrutiny, either through infringement cases or market inquiries, or through competition advocacy activities. Most of them comply with the Competition Law and have not repeatedly got into our sight in the context of violations. Nevertheless, there are some relapses, for example, Latvian Post, the Riga Freeport Authority, Latvian collective copyright management association AKKA/LA, Latvian Gas, etc.

The record-holder is the Riga Freeport Authority—it took four infringement decisions for it to cease similar violations. It distorted competition by using its administrative power to ensure competitive advantages for tug boats of its daughter company, and create barriers for private tug boat owners to operate in the port of Riga. For the first time in 2009, a competition distortion was detected and an infringement was found in activities of the Freeport Authority. Again, in 2011, a similar infringement was found. Even though both decisions were upheld by the Supreme Court, distortion of competition continued and the Freeport Authority refused to observe requirements imposed by the Competition Council to ensure equal conditions in the port of Riga.

In June 2015, the Competition Council signed an administrative contract with the Freeport Authority, which finally agreed to cease to provide commercial services of tug boats, thus, terminating unlawful targeting of private tugboat service operators. A fine of more than €600,000 was imposed on it.

Actually, every year we have about two or three cases on abuse of dominant position. Although there are incentives to examine the behavior of particular undertakings more often, we are still prioritizing our operation. Thus, if we see signs of potential abuse of market power, in smaller cases we clarify the circumstances and try to solve the violation by using alternative methods without initiating a formal investigation—through a negotiation process. We initiate formal cases only when the infringement is severe, has a systematic character, and has an impact on the whole market.
structure. Traditional complaints about unfair practices, such as by local communal service providers towards their clients, we mostly solve these other cases by negotiations and the undertakings obey because they know that otherwise enforcement will follow. Still, many companies, like bus terminals in the two largest cities, have been under our review for abuse of dominance for charging excessive fees to bus carriers for entrance to the terminals.

Last year we concluded one of the most significant cases on abuse of a dominant position. For the first time, we analyzed whether loyalty rebate systems designed and implemented by a dominant undertaking constituted a Competition Law infringement. During the investigation, the Competition Council concluded that Knauf Group companies had created and, at least from 2009 to 2014, implemented an anticompetitive loyalty rebate system to their clients, which are the largest Latvian retailers of building materials. The system laid down conditions of receiving individualized, retroactive loyalty rebates and motivated retailers to purchase plasterboard together with other building materials primarily and at the maximum possible capacity from the Knauf Group companies.

**ANTITRUST SOURCE:** I know you’re active in the merger area. In what sectors do you see the most issues?

**SKAIDRĪTE ĀBRAMA:** Every year we have to examine about 15 to 20 merger cases, and recently there is a trend of strong competitors merging. They merge because they need to develop their export ability, to expand out of Latvia and out of the Baltic market. We have worked on many mergers in the food processing sector, in the retail sector, fuel retail sector, and the financial sector. These are quite complicated mergers, where we apply the newest methods of economics and econometrics.

**ANTITRUST SOURCE:** Where you have firms that propose to merge to strengthen their export position, do you have situations where you see that kind of effect, but also where the merger would have an anticompetitive effect within the domestic market?

**SKAIDRĪTE ĀBRAMA:** Yes, it has always been a question, especially for such a small economy like Latvia. For example, this was an issue two years ago when the two largest dairy milk producers merged.

And for us, it was a dilemma to decide. Of course, they needed to strengthen their capability to go out of the Latvian market, even out of the European market, where the competition between the largest producers is fierce. At the same time we analyzed about 10 relevant product groups to see what would happen on the domestic side. We saw that there were very strong imports, not only from Baltic countries but also from Poland and other European countries. Then we decided, yes, these mergers can be permitted because these producers will not be able to dramatically increase the prices for many product groups where they have high market share in Latvia, such as specific sorts of cheese, cottage cheese, or ice cream, because the imported similar products will have a strong impact and cause strong pressure.

It means that Latvia is a small but open market. No sector is excluded from competition, and, therefore, in case some producer tries to increase its prices, foreign products will put pressure on them, too. Besides, the retail sector in Latvia is quite concentrated, and the largest retailers possess sufficient market power to diversify their purchases and have an economic incentive to provide consumers with the wider choice of goods.
**ANTITRUST SOURCE:** How well you think the merger notification system is working in Latvia now?

**SKAIÐRĪTE ĀBRAMA:** I am convinced that, gradually, we have established an effective merger notification system. On the one hand, our system covers all the major mergers that have a significant impact on competition in Latvia. On the other hand, the merger notification thresholds (a total turnover in Latvia of more than €30 million and an individual turnover of more than €1.5 million) is high enough to avoid imposing an excessive administrative burden on business having to report on minor mergers.

Also, before merger notification, companies tend to consult with us and submit all necessary documents, which eliminates incomplete reporting. Furthermore, in many cases the company is allowed to submit a so-called shorter merger report, thus relieving businesses from unnecessary information gathering and submission.

The most recent amendments to the Competition Law also made other significant changes, for example, they abolished the market share threshold, introduced a merger processing fee, allowed exemptions from certain information requirements, expanded the number of cases eligible for the shortened merger report, etc.

For example, in 2016 we had more than 30 pre-notification consultations on possible mergers, but in only 16 cases mergers were notified. It means that we consult undertakings and inform them when they have to apply and when they do not have to apply for merger approval. We apply simple procedures for mergers which do not have strong impact on markets.

In general, our merger notification system works very well. After each merger evaluation, we ask the companies to assess our work, via questionnaires. Usually we receive positive feedback—that our experts have shown very good knowledge about the sector investigated in the merger case or merging parties are satisfied with the timeframe in which the merger was cleared.

We have the first phase (it’s one month) and afterwards, if necessary, the second phase, four months in total, when the decision has to be taken. But, of course, we understand that sometimes the business cannot wait so long. If we have a merger case, it’s our priority, and the case handler can put other tasks like market inquiries or other cases aside, to focus his or her full attention on the proposed transaction assessment.

**ANTITRUST SOURCE:** Your thresholds, I think, are higher than in many countries, which perhaps means that you have a higher proportion of cases going to phase two than in many countries. Are you satisfied with the threshold? Or might there be some things getting by you that perhaps should be reviewed?

**SKAIÐRĪTE ĀBRAMA:** Indeed, the merger notification thresholds in Latvia are high enough—compared to Lithuania (€14 million), more than twice as high, and compared to Estonia (€6 million) five times higher. However, it has a positive impact. On the one hand the competition authority is not unnecessarily burdened by business evaluations that have an insignificant effect on competition. On the other hand, a merger transaction does not create unnecessary regulatory obstacles on business created by the merger report preparation, submission, and approval.

Besides, in order to avoid risks of unnoticed creation of dominant players in low-turnover sectors, we have now in our Competition Law a new provision which permits us, if the market turnover is lower but the company is quite dominant, to require information from the company within 12 months after a merger that has not been notified to our authority. Then we can assess whether the
A merger has created a dominant position. Thus, I think our thresholds give us the opportunity to see what is going on and to focus on important merger cases.

**ANTITRUST SOURCE:** I want to turn to the advocacy area for a minute. You had some public recommendations recently in the waste management market. I wonder if you could tell us a little bit about that?

**SKAIDRĪTE ĀBRAMA:** The waste management market is quite a critical sector in Latvia for competition because of the heavy involvement of municipalities that have established their own companies. At least half of Latvian municipalities wholly or partly own undertakings that provide waste management services in the region, thus closing this region for competition with private sector service providers.

Starting in 2013, we saw that municipalities were establishing their own waste management companies. It seemed to us that markets slowly became closed to competition. In 2015, we initiated the market study. In our market study, we identified a number of challenges, including increased municipality involvement in the business, problems with separate waste collection, issues concerning quality of concluded agreements and provided services of waste-management, as well as barriers created by regulation that hinder effective competition.

Furthermore, we saw that the regulatory framework was challenging. For example, in order to enter the packaging waste collection service market, an undertaking is obligated to conclude agreements with at least 50 sorted waste collection areas in the whole territory of Latvia, which is three in each of the waste management regions. During the market study, we stated that, in most cases, operators of sorted waste collection sites refused to conclude agreements without objective justification, thus creating additional administrative and financial barriers for entering the packaging waste collection service market.

Moreover, in 2015, despite very strong opposition from the Competition Council, the Parliament adopted amendments to the Waste Management Law that made it possible for municipalities to require the businesses to use the municipal waste service. These amendments reduce the opportunities for private waste service companies to operate in this business and expand the monopoly power of the municipal companies.

Also, recently the Riga City Council voted in favor of closing the waste management market in Riga for 20 years. The Riga City Council supported a plan to enter into a public-private partnership agreement to form a joint venture with one waste manager. This partnership would be effective for 20 years. Such a decision will dramatically affect competition and the market development of waste management in Riga, and even in Latvia as a whole, because Riga, as the capital of Latvia, is a very significant territory for the market.

To prevent all that, we made a lot of recommendations to the municipalities and the relevant Ministry. We organized a conference with the municipalities, trying to convince them that they have to organize tenders, even if they have their own in-house service provider, because there will be the possibility of gaining a better proposal if there is a tender. But, of course, it’s very hard for us to convince them. This is because of the very strong lobby of municipalities in the government. They regard the waste management sector as being so complicated that the private undertakings are not able to fully perform as necessary. The municipal lobby has made it so that municipal companies are very actively involved in the market.

Despite that, we have not given up. We are still advocating that regulation should be changed and that the market should be open for more competition. We are convinced that only private companies can make more innovative developments in the market.
But not only waste management causes us concerns. Speaking about our advocacy efforts, there are other critical sectors in our sights, such as the healthcare sector, the pharmaceutical sector, gas market liberalization, the postal sector, etc.—these are very complicated sectors for competition, for private companies to develop and to enter the market.

ANTITRUST SOURCE: One thing we hear in both English and Latvian—and many other languages as well—is that competition is great, just not in my sector.

SKAIDRĪTE ĀBRAMA: It’s what we in Latvia can very often say of the Riga Municipality because the Riga Municipality makes a lot of trouble for competitors and thus for its citizens in different sectors. For example, the Riga Municipality decided about five years ago to establish a company that produces bottled water. And we said: “Why? There is already strong competition. About 20 companies are producing bottled water, why should the Riga Municipality do it?” Despite strong opposition from the Competition Council and from private companies and their association, the municipal company was established. I said to the executive director of the Riga Municipality, “You like to enjoy the benefits of competition. You have mobile phones and great telecommunication services. Why you are destroying a level playing field in Riga in all the sectors where you are getting involved?” And the answer was quite similar to what you mentioned.

ANTITRUST SOURCE: You’ve been doing some work on sectoral studies. Could you tell us about some of the more important ones and what results you’ve seen.

SKAIDRĪTE ĀBRAMA: In sectoral studies we primarily focus on markets that affect society the most. In recent years, we have taken a close look into such markets as electricity, funeral services, medicine, waste management, and so forth. One of the most surprising, both to the Competition Council and to society, was the funeral services market inquiry, finished in 2015. As a starting point we received complaints that, in some hospitals, there are funeral services firms where the same medical personnel work and force relatives of deceased to use their services by using information at their disposal on deceased ones.

ANTITRUST SOURCE: Oh, you would worry about the incentives there!

SKAIDRĪTE ĀBRAMA: Yes. And this is not fair competition because the doctor or the nurse said: “You have to go to this funeral service provider who is in our hospital.” In this context, we invited the Consumer Rights Protection Centre and the State Revenue Service to get involved with a public survey and to provide their opinion. We stated that the market lacks a regulatory framework, the competition is distorted, and consumers are adversely affected. We called on responsible institutions to establish common rules of fair practices. Currently, an interdisciplinary working group is assessing possible solutions.

Actually, we are making a lot of market inquiries to understand how the markets are performing, how competition is developing, and to find out whether consumers benefit. A lot of investigations have been done during the last ten years in the retail sector because it’s highly concentrated in Latvia. There are usually complaints from suppliers that the largest retailers are behaving unfairly in the market, requesting a lot of various discounts, unfair contract terms, applying severe sanctions for minor violations by returning unsold goods in large quantities, even in damaged shape, etc.
It means we need to have not only strong enforcement, which is very important, but also intense advocacy. It’s very important to do both things. In this situation we are very actively looking around. We are a small agency, having only 50 people, but we are very actively following the newest developments in all sectors. The sectoral regulators and Ministries usually consult us as they know that we have information collected from our market inquiries or from investigations, and we can make useful recommendations.

Speaking about one of the last market inquiries, just before April 3 this year, when the natural gas market in Latvia was opened to competition, we concluded an inquiry assessing the potential risks of the gas market liberalization. Before the market opening, only Russia was supplying gas to Latvia. And the market was in the hands of monopoly undertaking Latvian Gas, which is connected to Russian Gas. In the inquiry, we evaluated whether Latvian Gas has made some burdens for buyers to move to other suppliers. As we did find such, we pointed out to both Latvian Gas and its clients, for example, that the undertaking has had no objective basis to make the user pay for unfulfilled “take-or-pay” liabilities for a period earlier than the previous year. Clients are now freely able to sign contracts with other natural gas suppliers.

**ANTITRUST SOURCE:** You have pipes coming in from other countries?

**SKAIDRĪTE ĀBRAMA:** The Latvian natural gas supply system is not directly connected to systems of other European Union Member States, except Lithuania and Estonia. But a significant infrastructure project is being developed to make it possible to integrate Baltic States into the diversified market. Of course, it will take time, but the first step is, again, to build a competition culture.

**ANTITRUST SOURCE:** You’ve done quite a bit of outreach to consumers, through public education. Can you tell us a little bit about what you’ve done and how that’s worked?

**SKAIDRĪTE ĀBRAMA:** We regard public education as an indispensable and inherent part of the promotion of competition culture. It is important to elaborate specific topics and contents for each target group.

First of all, there are public administrative bodies, especially local governments, where some of them still do not understand what fair competition in the market means and delivers. As I mentioned earlier, municipalities that establish their own companies very often discriminate against private companies over public ones. We should educate and inform public administrative bodies that they have to make competition assessments if they make decisions or new regulations. We should educate public procurement organizers on how to organize the procurement in a fair manner, in order, again, to ensure a level playing field for all participants and not only for one company, which, say, has a good relationship with somebody from the procurement commission. Unfortunately, that happens very often.

If we speak about the large number of bid-rigging cases disclosed by our authority in recent years, in a number of cases the competition infringements go hand-in-hand with corruption. Corrupt public procurement organizers decide which company should be the winner, and then this company looks for others who can supply more expensive offers along with them in rigged public procurements.

As I already mentioned, we are actively educating organizers of procurements and explaining to them how to detect signs of alleged prohibited agreements in tenders. Thus, we gain allies in this fight against this harmful habit of the business environment.
We also organize workshops in different regions of Latvia for undertakings. We are interested to allow undertakings to effectively cooperate, but not collude. Sometimes they do not understand the difference between lawful cooperation and anticompetitive collusion. We have had many cases of information exchanges among members of associations. Recently we have published guidelines for NGOs and their members to avoid anticompetitive actions. In these guidelines, we explained what kind of actions and questions may be discussed and implemented, and what kind of topics, under specific conditions, might create risks of prohibited agreements.

This year, our competition authority, in cooperation with the Corruption Prevention and Combating Bureau and the Procurement Monitoring Bureau, launched a two year project—a series of workshops in all of the largest Latvian cities. We invited participation from both public procurement experts from the state and local governments, and entrepreneurs as well.

**ANTITRUST SOURCE:** I want to talk a little bit about Latvia’s place in Europe. Often Latvia is spoken of in the same breath with Lithuania and Estonia, as if it’s just one place with about 10 syllables. Maybe that’s because of the shared historical experience. Is there a particularly close collaboration between the three countries, or are they just two of your 27 European partners?

**SKAIÐRĪTE ĀBRAMA:** Estonia, Latvia, and Lithuania are neighbors who live in the Baltic region. We have similarities in history and economic developments, and in the thinking of people, their mentalities. It’s no surprise that many European countries, and outside Europe, regard us as the Baltic region because we are small and really share a number of similarities.

We have indeed good cooperation between our competition authorities, provided and maintained through such a forum as the Baltic Competition Conference every year. At this meeting, staff from all three countries gather together, discuss newest cases, tell each other about the newest developments in the markets, regulation amendments, proposals, and ideas. In more complex merger cases or if the merging party also operates in either Lithuania or Estonia, we consult with the relevant authority. Also, we have tried to initiate joint sector inquiries to provide more in-depth analysis into the markets. And it works very well.

But despite that, our institutions, their status, structure, and range of functions differ significantly. Nevertheless, also in this context there are hot topics to be discussed. For example, we speak with our Estonian colleagues about the possible benefits for competition promotion of having the competition authority and the public utilities commission under one roof, as the Estonian authority does, or with our Lithuanian colleagues about their experience and regulatory framework concerning the fight against competition distortions created by public bodies.

In addition, we actively take part in the European Competition Network, and there we have a much broader community family of 28 members. Actually, we as new countries, Latvia, Lithuania, and Estonia are very actively involved in European processes. I believe that the European Competition Network can benefit also from our experience, our enthusiasm and willingness to have a proactive position in competition enforcement and promotion.

**ANTITRUST SOURCE:** Well, you have one other neighbor, a large neighbor.

**SKAIÐRĪTE ĀBRAMA:** That is true.

**ANTITRUST SOURCE:** What’s the relationship with Russia and the Federal Antimonopoly Service?

**SKAIÐRĪTE ĀBRAMA:** A while ago there was a memorandum concluded between Latvia and
Russia, but in more recent years we are not actively cooperating. Of course, if they require some information from us, for example, about developments in the pharmaceutical sectors or how we regard some economic problem, we provide the information. I have to admit, that we have had more close and informal cooperation during the last years with the Ukrainian competition authority. We have had several meetings, provided them with support in legislative changes, case handling and advocacy, and we have developed very friendly relations.

**ANTITRUST SOURCE:** Your own background is in business, and I’m curious what perspective your business background brought when you came in to the public sector, to the Council.

**SKAIĐRĪTE ĀBRAMA:** Actually, in business I have always worked in a very competitive environment. In the ’90s, I was a marketing director, and my main task was to strategize about how to compete and how to be the best in the radio broadcasting market. And quite often according to national ratings we were the number one in Latvia. In 2000, I worked for a large German company—Internationaler Bund. I established a Latvian company on behalf of German stakeholders, and it dealt with vocational, education, social work and, again, my task was how to succeed in the market, how to find the niche where to be one of the best.

I think I brought to the Competition Authority the mentality that you have to think first of all about your initiative, efficiency, and your clients’ and partners’ satisfaction. You have to see strategic results. Not make long processes, a lot of bureaucracy, but be flexible. You have to really set priorities because resources are scarce, and to focus on them.

I also think it was very important to change the thinking of my colleagues, convincing them that, despite the fact that the Competition Council is a public institution, we are also in some way competing—with similar law enforcement agencies and sector regulators in our country and with other competition authorities abroad, as well. It means that we must offer the best, the most useful, and innovative operation.

In our authority we have this principle—openness to society, operative actions, and accessibility to entrepreneurs. Our partners appreciate it. Five years ago, it was not usual to organize regular conferences, meetings, or workshops with NGOs and undertakings to discuss problems, to provide a lot of communication activities. We are doing it because we understand that information is power, and it’s also power for undertakings.

As a head of the authority, I always keep in mind an expression by psychologist and behavioral economist Daniel Kahneman: you have to avoid wasting your time on small non-significant issues, but you have to strongly focus on strategic goals which can deliver for your institutional development. I fully agree with that.

**ANTITRUST SOURCE:** Are there any changes in the institution or in the legislation that you’re expecting to see in the coming years?

**SKAIĐRĪTE ĀBRAMA:** I really expect the Competition Council finally will be an independent institution as it should be.

First, it cannot be normally regarded, if you are supervised by the Ministry which itself or its fellow Ministries are shareholders in many state-owned enterprises that are still in a dominant position in Latvia. In addition, public administrative bodies in Latvia tend to ignore principles of competition neutrality. The Competition Council must be empowered with effective rights to enforce and to challenge decisions and acts of public administrative bodies if they infringe competition
rules and are discriminatory. Therefore, we have to be distanced from the government and shielded from any political influence. Currently, the regulation does not make the opinion of the Competition Council binding on public institutions.

Second, we do not have autonomous budgeting, and our management tools also are limited. Our salaries are not competitive, even when compared with wage levels within the Ministries or other regulatory or law enforcement agencies. To be precise, this year our budget is €1.26 million and we have 50 employees. By comparison, according to the 2016 Global Competition Review data, among the world’s 39 top competition authorities, in which we have been included since 2015, we have the lowest budget and, likely, the lowest salaries.

Therefore we have drafted two amendment proposals. One of the proposals is that the Competition Law should have provisions which would allow the Competition Council to enforce the law in cases when public administrative bodies have destroyed level playing fields. The second proposal is that we should be exempted from civil service status, that we should be exempted from the unified wage grid, and we have to be at the same status as the public utilities regulator, or financial and capital markets regulator, which are independent and much better resourced and financed than our authority. It’s aimed to strengthen the capability of the authority because we need to have enough final resources and we need to have professional staff.

I have heard that the FTC attracts professionals and lawyers from private companies. Unfortunately, our authority can attract only young people who have finished university but who do not have enough professional experience. Then they come to the Competition Council and we teach them on the job. It’s not a very fast process because after one, two years you can see whether one is the right person. Many of them choose to leave the office. A job at the competition authority is not easy.

**ANTITRUST SOURCE:** We talked at the beginning of the interview about how, 25 years ago, the Competition Council was one of the newest authorities, but that’s not true anymore. It’s probably now one of the older ones. If you were to meet here during the Antitrust Section Spring Meeting with someone who was newly appointed to head a brand new Competition Authority, maybe in a developing country, what advice would you give them on how to make success of the operation?

**SKAIDRĪTE ĀBRAMA:** I think two points are very important.

First of all, authorities need to have strong investigative power, the right to find significant infringements and penalize the infringers. Authorities need to have the right to issue fines, to collect fines and not permit perpetrators to escape. It means authorities need strong enforcement. If they have high-impact cases to demonstrate to society what they are doing and what they can prevent, entrepreneurs and society in general will start to understand and respect the basic values of fair competition.

Second, in parallel with enforcement, new authorities need to invest a lot in the development of competition culture and advocacy, actively promoting benefits from competition. Strong advocacy is needed towards government, towards parliament, sector regulators, and Ministries. Then both wings of competition protection will have good balance.

**ANTITRUST SOURCE:** When your term ends, how would you like people to look back and remember your time as the head of the agency?

**SKAIDRĪTE ĀBRAMA:** I hope my people will remember that I was a strong supporter of the idea
that the Competition Council should be fully independent—not only functionally, but also institutionally, personally, financially. Secondly, it is very important that we start to pay close attention to the fact that public administrative bodies may extremely negatively affect the business environment and that the Latvian Competition Law should be amended to give the authority enforcement power against their anticompetitive actions and decisions. But who knows, maybe it will be proven otherwise.
How Group Purchasing Organizations Reduce Healthcare Procurement Costs in a Highly Competitive Market

Daniel O’Brien, Jon Leibowitz, and Russell Anello

The public policy debate over group purchasing organizations (GPOs)—organizations through which healthcare providers collectively negotiate and purchase medical supplies—goes back more than three decades. In 1986, Congress endorsed GPOs as a powerful tool to inject competition and lower prices into the market for medical supplies. Finding that GPOs “can help reduce health care costs for the government and private sector alike,” lawmakers determined there was “no justification for prohibiting such cost-saving arrangements,” and carved out clear legal protection for payments to these organizations.¹

Sixteen years later, in 2002 and 2003, Congress took another hard look at GPOs in a series of Senate hearings, this time questioning whether GPOs—which one Senator called “the nerve center of our health care system”—were actually beset by conflicts of interest that reduced competition.² Concerns included whether GPOs obtain the lowest prices for their members and whether their contracting practices made it difficult for some suppliers to obtain GPO contracts. Among other witnesses, the Senate heard from a medical supply company that had filed a lawsuit claiming its products had been unfairly excluded from GPO contracts in violation of federal antitrust laws.³

In response to the concerns expressed at the Senate hearings, GPOs adopted an industry-wide code of conduct that aims to achieve high-quality healthcare, cost savings, and competitive purchasing. Congress has not passed new legislation pertaining to GPOs for 30 years. Yet the debate over the effect of GPOs on competition in the American healthcare market continues, with a few critics arguing that the GPO funding model Congress authorized in the 1980s—fees paid by vendors—has given GPOs an incentive to raise healthcare supply costs.

¹ H.R. Rep. No. 99-727, at 72–73 (1986). Without this carve-out, the legality of payments from healthcare suppliers to fund GPOs under the Anti-Kickback Statute was ambiguous, as discussed below.

² Hospital Group Purchasing: Lowering Costs at the Expense of Patient Health and Medical Innovations?, Hearing of the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary, 107th Cong. (2002) (statement of Chairman Herb Kohl); see also Hospital Group Purchasing: Has the Market Become More Open to Competition?, Hearing of the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the Senate Comm. on the Judiciary, 108th Cong. (2003) [hereinafter Senate Hearing: Has the Market Become More Open to Competition?].

Today, the debate over how to stem rising healthcare costs has taken center stage. Because GPOs play an integral role in the medical supply chain, questions of whether GPOs operate competitively and whether they reduce healthcare costs have greater urgency. In 2014, the General Accountability Office (GAO) examined the impact of GPOs’ funding structure on federal healthcare costs, but concluded there was “little empirical evidence to definitively assess the impact of the vendor-fee-based funding structure." Our article examines empirical evidence and applies economic analysis to assess these questions, including the impact of the vendor-funding model on competition and costs. We reach the following conclusions:

1. **GPOs save money for healthcare providers and patients.** GPOs negotiate contracts between medical supply and services vendors and healthcare providers, including hospitals. In that role, GPOs can lower transaction costs (for example, reducing the number of negotiations) and negotiate lower prices. Customer surveys show that providers realize cost savings of 10 to 18 percent by using GPOs, measured relative to the costs providers would have incurred if they negotiated prices on their own. Providers are likely to pass some of these cost savings on to patients.

2. **GPOs appear to operate in a vigorously competitive procurement market.** Several factors suggest the medical procurement market is highly competitive. Providers can choose from multiple GPOs and can, and commonly do, use multiple GPOs simultaneously. Providers often own and control their GPOs, and they can, and do, procure supplies directly from vendors.

3. **The current GPO vendor funding model is consistent with competition and cost savings.** Vendor funding is a more efficient means of funding GPOs in comparison to provider funding, if it leads to reductions in transaction costs. It is equally efficient otherwise. Collecting fees from vendors, a practice that is common in other industries, is likely more efficient for GPOs than alternative funding mechanisms.

Accordingly, as policymakers struggle to contain rising healthcare costs, we find evidence that GPOs improve efficiency and reduce costs in the supply chain, while being constrained by vigorous competitive forces. We also find that vendor funding, which Congress authorized more than three decades ago, likely contributes to the cost savings, and altering that structure would reduce savings.

**GPOs and the Regulatory Safe Harbor**

GPOs negotiate prices for drugs, devices, and other medical products and services on behalf of healthcare providers, including hospitals, ambulatory care facilities, physician practices, nursing homes, and home health agencies. Often, GPOs are owned by their member providers. They do not take title to or possession of medical products. Rather, the central purpose of GPOs is to improve efficiency by reducing transaction costs and negotiating lower prices for supplies than

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5 Id. at 23.

providers might otherwise obtain on their own. GPOs also provide a range of additional services to healthcare providers that may lower costs or improve operations.

In 1986, Congress believed that GPOs constrained healthcare costs using their traditional vendor-funding model but also recognized that the legality of this funding stream was ambiguous under the Anti-Kickback Statute (AKS), a law prohibiting the payment or receipt of money to induce referrals for business or purchase orders payable through federal healthcare programs. As a result, Congress enacted the GPO Statutory Clarification, which clarified the legality of administrative fees paid by vendors to GPOs. In considering the bill, the House Budget Committee explained that GPOs could help reduce healthcare costs, and that the bill “creates an exception to the anti-kickback provisions for amounts paid by vendors” to GPOs in order “to assure GPOs and the vendors who contract with them, that they do not risk prosecution as a result of the fees the GPOs collect . . . from the vendors.”

In 1992, the Department of Health and Human Services followed up with regulations establishing a safe harbor for vendor payments to GPOs (GPO Regulatory Safe Harbor).

How GPOs Cut Costs

Recent surveys of healthcare providers show that GPOs reduce healthcare costs. Economic analysis explains why: providers voluntarily decide whether to join a GPO and, after joining, decide whether to purchase any particular item under the GPO contract or under a contract obtained directly from a supplier or another GPO. A healthcare provider would likely have no incentive to become a GPO member or choose to make purchases through a GPO if these strategies increased its costs or inefficiently reduced its supply choices. This incentive structure provides a strong basis to expect that GPOs reduce providers’ costs. This conclusion is supported in the economic literature, which identifies at least two mechanisms through which GPOs could reduce providers’ operating costs and thereby reduce healthcare costs: transaction cost savings and lower prices from larger discounts.

Evidence of Cost Savings. In recent surveys, hospital executives report that GPOs reduce the cost of their healthcare supplies by 10 to 18 percent.

The most recent study is by Lawton Burns and Rada Yovovich, who surveyed hospital executives responsible for supply chain management in their organizations. One set of questions

1 The AKS was enacted in 1972 as an amendment to the Social Security Act. 42 U.S.C. § 1320a-7b(b)(1)–(2).
2 The GPO Statutory Clarification, 42 U.S.C. § 1320a-7b(b)(3)(C), has also been referred to as a “safe harbor” provision or as a statutory “exception.” See, e.g., GAO (2014) Report, supra note 4, at 7 n.13. We do not adopt that terminology in this article.
5 In 1987, Congress instructed HHS to establish regulations creating safe harbors from the AKS; see Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 14, 101 Stat. 680, 697 (1987). This resulted in the modern GPO Regulatory Safe Harbor; see 42 C.F.R. § 1901.952(i).
6 We use several terms throughout the article that we define as follows. “Supplies” or “healthcare supplies” refer to non-labor products and services used by healthcare providers in the supply of healthcare services. These include medical products, devices, pharmaceuticals, information technology products, and food products and services. “Transaction costs” refer to the administrative costs in the supply chain associated with sale and purchase of healthcare supplies. “Procurement costs” include both transaction costs and the prices paid for supplies. “Costs” or “operating costs” refer to all expenses associated with operating the relevant business.
asked the executives whether their GPOs allowed them to achieve cost savings in various ways. More than 80 percent of the respondents either strongly agreed or agreed that their GPOs generate

- “Savings from lower prices (88%)”
- “Demonstrable cost savings and improvements (86%)”
- “Savings from contract standardization (84%).”  

Another set of questions in this survey asked the executives whether they were satisfied with various aspects of their GPOs. Eighty-four percent of respondents reported being very satisfied or satisfied that their GPOs achieve “group purchasing and other discounts.”

The authors conclude that the respondent hospitals in their survey derive benefits from GPOs in the form of both lower prices and cost savings.

Studies commissioned by the GPO industry find evidence of similar cost savings. Eugene Schneller surveyed 429 hospitals in 28 hospital systems for information on the savings they achieved via lower supply prices and reduced labor requirements by purchasing through a GPO rather than directly from suppliers. The estimates from this survey indicate that GPOs lowered hospitals’ supply costs by 18.7 percent. Other surveys report that GPOs reduce hospitals’ supply costs by 10 to 15 percent.

**Theories of Cost Savings.** There are two main mechanisms for the cost reduction reflected in these surveys: lower transaction costs and lower prices through joint negotiation.

**Cutting Transaction Costs.** One of the roles of GPOs is to reduce transaction costs in the healthcare supply chain. The healthcare supply acquisition process is complex, involving thousands of suppliers selling many more thousands of pharmaceuticals, devices, products, and services to thousands of healthcare providers. Because prices are frequently negotiated and negotiations can be complicated, the scope for transaction cost savings from reducing the number of negotiations is large.

For perspective, imagine that 1000 vendors each sell 10 products to each of 2000 hospitals. If each vendor bargains separately with each hospital, there are 2 million negotiations to determine as many as 20 million prices. If the GPO negotiates one price for each product on behalf of its

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14 Id. at 7.
15 Id. at 8.
16 See also Lawton R. Burns & J. Andrew Lee, Hospital Purchasing Alliances: Utilization, Services, and Performance, 33 Health Care Mgmt. Rev. 203 (2008) (concluding that GPOs reduce healthcare costs by lowering product prices and transaction costs).
19 Premier alone—just one of five national GPOs—has approximately 2200 contracts with approximately 1200 suppliers covering a wide range of products and services, including medical and surgical products, pharmaceuticals, laboratory supplies, capital equipment, information technology, facilities and construction, food, and other services. Premier Annual Report, supra note 6, at 9. There are more than 5000 hospitals in the United States, see Am. Hosp. Ass’n, Fast Facts on U.S. Hospitals, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited June 4, 2017), and 96–98% of them use GPOs. Healthcare Supply Chain Ass’n, A Primer on Group Purchasing Organizations: Questions and Answers, http://c.ymcdn.com/sites/www.supplychainassociation.org/resource/resmgr/research/gpo_primer.pdf (last visited June 4, 2017). In addition, thousands of other health care providers, such as physician group practices and long-term care facilities, use GPOs.
20 If 1000 vendors negotiate with 2000 hospitals, the number of negotiations is 2,000,000 [1000 x 2000]. If each negotiation involves 10 prices, the number of prices negotiated is 20,000,000 [1000 x 2000 x 10].
members, then the number of negotiations falls from 2 million to 1000, and the number of prices negotiated falls from 20 million to 10,000.\textsuperscript{21}

GPOs provide a range of services for each contract they negotiate, including contract development, negotiation, and management. The 2009 survey by Schneller found that individual hospitals would require a 115 percent increase in labor (about nine full-time equivalents for the typical hospital) to replace the functions performed by their GPOs.\textsuperscript{22}

**Reducing Prices through Joint Negotiation.** In addition to savings realized from lower transaction costs, economic literature identifies several ways by which joint purchasing can yield lower prices than buyers can obtain on their own:

- **Stronger bargaining positions.** A healthcare provider’s bargaining strength depends in part on the size of the loss it can impose on a vendor by refusing agreement. If a vendor has little to lose from failing to reach an agreement with the provider, then the provider’s bargaining position is weak, while if the vendor has a lot to lose, then the provider’s position is strong.\textsuperscript{23}

- **Volume and other discounts.** GPOs contract for discounts that vary according to the amount of supplies that providers purchase. Volume and other discounts have efficiency properties that are well established in the economic literature. One reason for volume discounts arises when the vendor’s cost per unit declines with volume. For example, costs related to marketing, procurement, accounting, and shipping typically do not increase proportionately with the volume sold and therefore are likely to decline on a per unit basis with the volume purchased. A second important efficiency-related reason for discounts arises from vendors’ incentives to sell more products or reach more customers. A supplier that has market power (such as a supplier of a differentiated medical device) generally has an incentive to charge a lower marginal price and sell a higher quantity to a buyer when it can offer volume discounts than when it is limited to charging a simple per-unit price.\textsuperscript{23} A reduction in a per-unit price reduces the supplier’s profit on all units sold, whereas a reduction in the marginal price under a volume discount schedule reduces price only on additional units sold. This motivation for discounts exists even if the supplier’s costs do not decline with volume, and such discounts provide an important offset to potential harmful effects from supplier market power.

- **More intense supplier competition.** A recurring theme in the economic literature on procurement is that buyers can sometimes intensify competition among suppliers—and thereby obtain lower prices—by committing in advance to limit the number of supply sources.\textsuperscript{24} Consistent with this logic, GPOs sometimes employ dual-source or single-source strategies to force suppliers to compete against each other and thereby obtain lower prices. GPOs state that they do this “when it is advantageous to their customers.”\textsuperscript{25} This strategy works because

\textsuperscript{21} The GPO reduces the number of buy-side negotiations from 2000 to 1. This reduces both the number of negotiations and the number of prices negotiated by a factor of 2000, so the number of negotiations falls to 1000 [2,000,000/2000] and the number of prices negotiated falls to 10,000 [20,000,000/2000].

\textsuperscript{22} Schneller, supra note 17, at 23.

\textsuperscript{23} The effective marginal price is the amount the buyer is willing to pay for one additional unit of the product. Under a volume discount, this price determines the amount the buyer purchases.

\textsuperscript{24} See James J. Anton & Dennis A. Yao, Split Awards, Procurement, and Innovation, RAND J. ECON. 538 (1989); Daniel P. O’Brien & Greg Shaffer, Nonlinear Supply Contracts, Exclusive Dealing, and Equilibrium Market Foreclosure, 6 J. ECON. & MGMT. STRATEGY 755 (1997); James Dana, Buyer Groups as Strategic Commitments, 74 GAMES & ECON. BEHAV. 470 (2012). Of course, an individual healthcare provider that self-procures might also benefit from committing to limit its sources and auctioning supply rights, but a GPO is able to achieve the same result at much lower transaction costs by performing this function for all of its members at once.

limiting the number of sources increases the intensity of bidding at the front end for the right to be one of those limited sources.

**Competition in the GPO market**

**The Nature of GPO Competition.** The market for procurement services offered by GPOs is fragmented, with at least five national GPOs, many smaller players that operate regionally or locally, and active self-supply by providers that also use GPO services. In addition, many GPOs are fully or partially owned by their member providers. Both member ownership and the potential for self-supply are factors that increase competition in the market for GPO services.

- **Member Ownership.** Ownership by member providers creates an obvious constraint on a GPO’s incentive and ability to engage in anticompetitive behavior that would harm its members. In fact, it likely creates an incentive for GPOs to do the opposite. Providers that are also members are unlikely to benefit from using GPOs to increase their costs. Instead, they stand to benefit from using GPOs to reduce their transaction costs and negotiate lower prices for healthcare products. Because member-owned GPOs compete for business with non-member-owned GPOs, the competitive constraint on GPOs imposed by member ownership does not require that all GPOs are member-owned.

- **Self-Supply.** Providers’ ability to purchase healthcare products without using GPOs is another important constraint on GPO behavior. Although 96–98 percent of hospitals use GPOs for the majority of their procurement needs, hospitals purchase more than 25 percent of their healthcare products without the services of a GPO.

Studies show that GPO members sometimes pay lower prices by purchasing from outside their GPOs. This evidence indicates that a GPO that sought to opportunistically negotiate higher supply prices (to increase the fees it collects) would be constrained by providers’ abilities to purchase outside the GPO. The data and economic theory in these studies do not suggest such a price difference is attributable to the GPO funding model. Irrespective of the funding mechanism, GPO members can seek and sometimes find better deals outside their GPOs, and this constrains anticompetitive behavior by GPOs.

**Measuring Competitive Intensity.** Competitive performance in this type of market depends on the competitive interactions among GPOs, constraints imposed by member ownership, and how providers’ use of self-supply responds to changes in price (the “elasticity of self-supply”). We are not aware of any studies that document the effects of member ownership and the elasticity of

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26 National players include Vizient, Premier, HealthTrust, Intalere, and Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP). Membership of the first four GPOs listed includes providers in all segments, while MMCAP covers government facilities.

27 The Healthcare Supply Chain Association reports that there are more than 600 GPOs nationwide. Healthcare Supply Chain Association, supra note 19.

28 Members of Premier, a publicly traded GPO with a national footprint, own 68% of its voting shares. Premier Annual Report, supra note 6, at 35.

29 A concern sometimes raised about GPOs by antitrust authorities is that they might have the ability to exercise monopsony power, leading to lower input prices, lower output, and higher output prices. Traditional monopsony concerns are lessened when the vendor is obligated to supply the quantities buyers wish to purchase under the terms of the GPO contract. See Roger D. Blair & Christine P. Durrance, *Group Purchasing Organizations, Monopsony, and Antitrust Policy*, 35 MANAGERIAL & DECISION ECON. 433 (2014).

30 Healthcare Supply Chain Association, supra note 19.

self-supply by providers on competition in the GPO market. Therefore, we look for indirect measures of the intensity of competition in this market. As described below, we estimate that the GPO market operates with a level of competition equivalent to what one would expect from an unconcentrated market with more than 10 independent competitors of equal size.

A common indicator of competitive performance that antitrust authorities use is the Herfindahl-Hirschman index of competition (HHI). Using the HHI to measure concentration in GPO services is difficult, however, due to the lack of systematic data on GPO sales. Additionally, the HHI would not capture the effects of GPO member ownership and the potential for self-supply by providers.

An alternative approach is the “numbers equivalent” of firms in the market in question. The numbers equivalent represents the number of equally sized competitors that would yield the observed average margin in a market if competitors made independent production decisions. A numbers equivalent of 10, for example, means that market performance, as measured by the average margin, is the same as it would be with 10 competitors of equal size making independent production decisions.

The numbers equivalent provides a way to account for the factors that make the GPO market more competitive than is suggested by standard measures of concentration. The greater the competition resulting from member ownership or self-supply, the higher the numbers equivalent will be. For example, in a market with six competitors, a numbers equivalent of 10 would mean that factors are at work (e.g., member ownership or self-supply) that make the market operate more competitively than it would in the absence of those factors.

The numbers equivalent in a market is calculated using information on margins and the market elasticity of demand. The formula for the numbers equivalent is:

\[
NE = \frac{1}{[\text{Average Margin}] \times [\text{Market Elasticity}]}
\]

As the average margin decreases, the numbers equivalent rises. For a given market elasticity, lower margins therefore indicate more competitive behavior, or a higher “numbers equivalent” of competitors.

32 The HHI equals the sum of the squared market shares of all competitors in the market. The Horizontal Merger Guidelines use this index to classify markets as highly concentrated, moderately concentrated, or unconcentrated. U.S. Dept of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010), http://ftc.gov/os/2010/08/100819hmng.pdf. Antitrust authorities use this classification to help assess the likelihood of anticompetitive effects from mergers and other behavior that affects competition.


34 Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization 153 (3d ed. 1999).

35 A firm’s margin equals its markup over marginal cost divided by its price. The lower the average margin in a market, the greater the degree of competition, other factors being equal.
For illustration, we construct an estimate of the numbers equivalent for GPOs using margin information from publicly traded GPOs\textsuperscript{36} and demand elasticity information from the economic literature on healthcare.\textsuperscript{37} Given the competitive pressures imposed by the number of local and regional GPO competitors, the member ownership of many GPOs, and the ability of providers to engage in self-supply, we might expect a numbers equivalent for GPO services to be above the number of national GPOs (five). Consistent with this expectation, our illustrative estimates yield a numbers equivalent between 22 and 26,\textsuperscript{38} which indicates that the GPO market is performing as a highly competitive, unconcentrated market.

The GPO Funding Model

Most GPOs are funded by vendor-paid administrative fees that are calculated as a percentage of the sales made pursuant to GPO contracts. While some have suggested that a funding model based on vendor fees contributes to higher healthcare costs and should be altered (presumably in favor of provider funding),\textsuperscript{39} our analysis suggests otherwise. We analyze how the source of funding—whether fees are collected from suppliers or providers—affects healthcare costs. We find no basis for altering the GPO funding mechanism, and conclude that doing so would likely raise healthcare costs.

The Neutrality Principle. Well-established economic principles indicate that the source of GPO funding is unlikely to have an impact on healthcare costs apart from its effects on transaction costs. That is, the source of funding is unlikely to affect prices, quantities, and the distribution of profit between providers and vendors, but it could affect transaction costs. This reasoning borrows from the economic literature on taxation, which establishes that the burden of a tax, such as an excise tax based on a percentage of the purchase price, generally does not depend on whether the tax is levied on buyers or sellers. We refer to this fundamental economic proposition as the “neutrality principle.” Applied to the GPO funding question, GPOs use market mechanisms to drive prices down through negotiations between buyers and sellers; their ability to reduce prices in these negotiations is unrelated to whether their fees are nominally paid by the buyer or by the seller.

\footnotesize\textsuperscript{36} The relevant margin for calculating the numbers equivalent is the average long-run margin of all GPOs competing in the market. We do not have access to margin information for all firms, but we can obtain a conservative estimate of the margin from the annual reports of two GPOs: Premier and MedAssets (predecessor to Vizient). These estimates are conservative because Premier and MedAssets were two of the largest GPOs, and larger firms have higher margins in the oligopoly model that motivates the numbers equivalent measure. After removing amortization costs associated with acquisitions, Premier’s 2016 operating margin was 23%, its 2015 operating margin was 27%, and MedAssets’ 2014 operating margin after the same adjustment was 24%. See Premier Inc., 2016 Annual Report, supra note 6; Premier, Inc., 2015 Annual Report, http://s21.q4cdn.com/577521493/files/doc_financials/2015/PINC-2015_6_30-10K_FINAL.pdf, MedAssets, Inc., 2014 Annual Report, https://www.sec.gov/Archives/edgar/data/1254419/000119312515073413/d825932d10k.htm. (MedAssets’s most recent annual report is from 2014 as it subsequently merged with Vizient).

\footnotesize\textsuperscript{37} A survey conducted by the RAND Corporation finds that estimates of the elasticity of demand for healthcare center around 0.17. See Jeanne S. Ringel et al., The Elasticity of Demand for Health Care. A Review of the Literature and Its Application to the Military Health System xi (Paper No. MR-1355-OSD, RAND National Defense Research Institute, 2002). If we assume that procurement services vary proportionately with the production of healthcare services and make the conservative assumption that healthcare providers pass on no more than 100% of their cost increases to patients, then the elasticity of demand for healthcare is an upper bound on the elasticity of demand for procurement services.

\footnotesize\textsuperscript{38} Using the formula in the text along with the margins ranging from 23% to 27% (see supra note 36) and an elasticity of 0.17 (see supra note 37), the numbers equivalent ranges from 22 [= 1/(0.17)(0.27)] to 26 [= 1/(0.17)(0.23)].

\footnotesize\textsuperscript{39} See Litan et al., supra note 31, at 37.
As an illustration, consider a medical product sold by a single vendor at a cost of $100, which includes all production and selling costs. Assume that a GPO negotiates on behalf of providers and incurs a cost of $2 for its services. Thus, the total cost to the vendor of producing and selling the product, and to each provider acquiring the product, is $102. To keep the example simple, imagine that the GPO has all the bargaining power. We will show that, except for any transaction cost effects, it does not matter whether administrative fees are levied on the vendor or the providers.

Suppose first that the GPO collects an administrative fee from the vendor, calculated as a percentage of the price paid by providers. To generate the greatest possible value for the providers it represents, the GPO will choose the lowest possible price of supplies: the price will be enough to cover the vendor's cost, $100, plus an amount sufficient to fund the GPO's own cost, $2. Thus, the price is $102. The percentage fee paid to cover GPO costs is thus 1.96% [= 2/102].

Now suppose that the payment mechanism is altered so that an administrative fee is collected from providers instead. For each unit purchased, providers will pay some purchase price to the vendor and an administrative fee to the GPO. The lowest purchase price that covers the vendor's cost in this case is $100, and the percentage fee that raises enough revenue to cover the GPO's $2 cost is 2 percent.

Although pre-fee prices, percentage fee rates, and flow of funds differ, the after-fee prices and total administrative fee paid do not change. This is directly analogous to the standard economic result that tax incidence is neutral with respect to where taxes are levied.

The example just presented assumes that the GPO represents the interests of providers, but the neutrality principle does not depend on whose interests the GPO represents. Suppose we modify the example so that providers are willing to pay $200 for the product, with the cost of the product and GPO service remaining at $100 and $2, respectively. If the GPO collects an administrative fee from the vendor, it will set the highest price consistent with making the sale, which is $200, and collect $2 from the vendor to cover its cost. The percentage fee in this case is 1.0 percent [= 2/200]. Alternatively, if the GPO collects an administrative fee from the provider, the strategy that serves the supplier best is to charge the provider $198 for the product and a $2 administrative fee to cover GPO's cost. In this case, the percentage fee is 1.01 percent [= 2/198]. Although the pre-fee prices, percentage fee rates, and the flow of funds differ depending on who pays the fee, the after-fee prices and total administrative fee paid do not change.

The neutrality principle holds under a wide range of assumptions. The principle implies that the source of funding is unlikely to have consequence beyond its implications for transaction costs, as discussed next.

**Funding Model and Transaction Costs.** Given the neutrality principle, the prevalent use of vendor-paid fees over provider-paid fees means that vendor-paid fees are likely to be more efficient. The reason is simply that if the source of GPO funding does not affect prices and quanti-
ties (the neutrality principle), then GPOs have an incentive to choose the method with the lowest transaction costs. GPOs that do not minimize transaction costs are likely to be displaced by GPOs that do. This prediction is particularly strong in light of the competitive nature of the GPO market and in the absence of evidence of collusion, coordination, or other anticompetitive activity.

Thus, the natural inference from the prevalence of vendor funding among GPOs is that this funding mechanism is more efficient than the alternative of collecting these fees from providers. Under this inference, it follows that (1) vendor-paid fees allow GPOs to provide a greater reduction in healthcare costs than would be possible by shifting fees to providers and (2) prohibiting a vendor-fee-based funding model would likely raise healthcare costs.

This inference makes intuitive sense given the structure of the markets for healthcare supplies and services. The Healthcare Supply Chain Association estimates that a national GPO may serve approximately 3000 hospitals and 100,000 non-acute providers and contract with roughly 2500 vendors. Collecting fees from 2500 vendors is likely more efficient than doing so from 103,000 providers. The alternative funding model based on provider fees would likely increase the costs of collecting fees. By analogy with taxation, the transaction costs of collecting sales taxes would likely rise dramatically if consumers rather than merchants remitted sales taxes for all of their purchases.

Concerns About Vendor Funding. Concerns expressed by commentators regarding vendor-fee-based funding typically fall into three classes: (1) incentive distortions—the current vendor fee structure may discourage GPOs from negotiating lower prices;42 (2) exclusion—vendor fees may exclude rival suppliers and raise prices;43 and (3) fraud—providers may fail to report “sharebacks” of administrative fees received from GPOs, potentially leading to excessive Medicare reimbursement.44 Ultimately, none of these concerns alters our analysis that vendor fees likely reduce healthcare costs by lowering transaction costs involved in procurement. These three concerns are discussed in turn below.

Incentive Distortions. The incentive distortion concern discussed in the literature appears to be as follows: because administrative fees are proportional to vendors’ sales, a GPO might increase its fee revenue by negotiating higher prices for drugs, devices, and other products and services, rather than the lowest possible prices on behalf of its member providers.45 However, as discussed above, GPOs face constraints from three main sources: their members, who often own their GPOs and desire low prices; competition from other GPOs; and member providers’ ability to self-procure supplies. These constraints restrict GPOs’ ability to raise their members’ costs.

Holding aside the competitive nature of the GPO market, the incentive distortion argument appears unrelated to the question of whether GPOs collect fees from vendors or from providers. According to the argument, an incentive distortion would arise whether fees that are propor-

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45 Litan et al., write: “If a GPO is receiving an administrative fee equal to a percentage of the proceeds, the GPO’s incentive to seek out the lowest prices for hospitals is weakened.” Litan et al., supra note 31, at 25. To a lesser extent the GAO (2014) Report echoes this concern: “[T]he GPO funding structure protected under the safe harbor—specifically, the payment of administrative fees by vendors based on a percentage of the cost of the product or services—raises questions about whether GPOs are actually negotiating the lowest prices.” GAO (2014) Report, supra note 4, at 22–23.
al to sales were paid to GPOs by vendors or providers. If payments from vendors were barred, GPOs would likely require providers to pay their fees based on a percentage of sales, because sales-based fees have many advantages over other types of fees.46 Yet, if the incentive distortion concern is valid, the same distortion would exist.

Because vendor fees are likely more efficient to collect than provider fees, the most likely effect of shifting administrative fees from vendors to providers would be an increase in the transaction costs of supply procurement and, ultimately, higher healthcare costs.

Notably, vendor-paid fees based on sales are common in many industries. Examples include online retailers such as Amazon, online auction providers like eBay, and credit card services. We are not aware of any economic studies indicating that vendor-paid fees create unwanted incentives in these industries.

Exclusion. Although exclusive dealing agreements are not inherently anticompetitive, they are sometimes challenged under the antitrust laws if they potentially foreclose competitors from the market. Exclusion concerns surrounding vendor-paid fees boil down to two arguments that such fees enhance the scope for anticompetitive exclusion. One argument is that small manufacturers cannot afford to pay administrative fees, so the fees effectively deny them access to a critical mass of providers to buy their products. A second argument is that vendor-paid fees increase the likelihood of anticompetitive exclusive dealing arrangements. Neither argument withstands scrutiny.

First, the affordability concern ignores the implications of the neutrality principle, which yields a strong presumption that the source of GPO funding will not affect vendors’ profits. In particular, the share of the “burden” of administrative fees borne by vendors does not depend on whether the fees are paid by vendors or providers, just as the “burden” of a tax does not depend on whether it is paid by sellers or buyers. The most likely effect of shifting administrative fees from vendors to providers would be an increase in transaction costs, and vendors would likely bear a portion of the increase.47 This would make small vendors less likely to participate in sales through GPOs, the opposite of the intended effect.

Second, most GPO contracts with vendors are not exclusive. While GPOs sometimes negotiate sole-source contracts with vendors, GPOs more often provide a schedule of contract opportunities that include multiple vendors for a particular type of product. In addition, providers often purchase through multiple GPOs and make other purchases without the services of a GPO.

Third, economic principles do not support the claim that vendor-paid fees enhance the scope of anticompetitive exclusion. The exclusive dealing concern appears to be based on the idea that buyers require compensation to convince them to agree to exclusive contracts, and vendor fees might constitute such compensation. However, administrative fees are typically proportional to sales, whereas the payments from suppliers to buyers in anticompetitive theories of exclusive dealing are typically upfront fixed payments that do not vary with sales. The economic literature

46 Other types of fees include per-unit or “direct” taxes, or flat fees. The taxation literature establishes that ad valorem taxes (sales-based taxes) are generally more efficient than direct taxes. See Simon P. Anderson, Andre De Palma & Brent Kreider, The Efficiency of Indirect Taxes Under Imperfect Competition, 81 J. PUB. ECON. 231 (2001); Sofia Delipalla & Michael Keen, The Comparison Between Ad Valorem and Specific Taxation Under Imperfect Competition, 49 J. PUB. ECON. 351 (1992). The main problem with flat fees is that they are likely to make it too expensive for smaller providers to use GPOs.

47 Higher transaction costs would likely require higher administrative fees to cover the additional costs. It follows from principles of tax incidence (administrative fees are essentially a tax) that sellers (vendors) would likely bear part of the burden of higher fees whether the fees are levied on the sellers (vendors) or the buyers (providers).
does not support the idea that vendor-paid fees proportional to sales are conducive to anticompetitive exclusive dealing arrangements.\textsuperscript{48}

Additionally, economic literature explains how individual firms or groups of firms can sometimes intensify supplier competition by committing to purchase from a limited set of suppliers. Exclusion in this context is an effort to induce greater competition among suppliers to obtain lower prices. Consistent with this insight, GPOs sometimes negotiate dual-source and sole-source contracts with vendors “when it is advantageous to their customers.”\textsuperscript{49} As a result of the neutrality principle, the benefits of this strategy exist independently of whether administrative fees are levied on vendors or providers.

The circumstances in which potential harm from exclusion outweighs potential pro-competitive effects in any industry are complex and must be examined on a case-by-case basis. This task is one to which the antitrust process is well suited. For example, courts commonly consider exclusive dealing arrangements under the rule of reason, considering factors such as the defendant’s market power, the degree to which a competitor is foreclosed from the market, barriers to entry, and legitimate business justifications for exclusive dealing.\textsuperscript{50} In the GPO context, the structure of the market (including its relatively high level of competition, provider ownership, and ability of providers to self-procure) would seem to make a finding of anticompetitive exclusion unlikely.\textsuperscript{51}

Fraud Concerns. Finally, the concern that sharebacks (payments from GPOs to providers negotiated as part of the GPO contract) will not be reported and therefore costs will be overstated is a common one in industries that involve government reimbursement or cost-based price regulation. For example, direct sales to hospitals—sales that are not based on a GPO contract—raise the same concern because sellers often offer rebates or discounts to a buyer that the buyer may fail to report. In addition, if GPO fees were paid by providers, GPOs could still provide sharebacks to the providers, and manufacturers could provide rebates as well. We have not identified anything unique about GPOs or vendor funding that increases the risk of fraud over other types of purchases by providers. As the General Accountability Office has recognized, alleged fraud can be

\textsuperscript{48} Theories in which suppliers make upfront fixed payments to buyers to convince them to agree to exclusive dealing arrangements include the “divide and conquer theories,” see Eric Rasmusen, Mark Ramseyer & John Wiley Jr., \textit{Naked Exclusion}, 81 AM. ECON. REV. 1137 (1991); Ilya Segal & Michael Whinston, \textit{Naked Exclusion: Comment}, 90 AM. ECON. REV. 296 (2000), and the “softening competition” theories, see John Simpson & Abraham Wickelgren, \textit{Naked Exclusion, Efficient Breach, and Downstream Competition}, 97 AM. ECON. REV. 1305 (2007); Jose Miguel Abito & Julian Wright, \textit{Exclusive Dealing with Imperfect Downstream Competition}, 26 INT’L J. INDUS. ORGS. 227 (2008). If the payments from the supplier to buyers were proportional to sales in these models, the supplier would likely adjust the price of the product to offset the exclusivity payments. In this case, buyers would no longer have incentives to agree to the contracts, and the theories would break down.


\textsuperscript{50} See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016) (in applying rule of reason analysis to an exclusive dealing arrangement, primarily considering whether the arrangement implicated a “substantial foreclosure of the market”). In the early 2000s, Retractable Technologies, Inc., a manufacturer of syringes, brought a case in the Eastern District of Texas alleging that a competing manufacturer of syringes and certain GPOs had violated the antitrust laws through sole-source supplier relationships with hospitals and healthcare providers that foreclosed Retractable Technologies from the market. See Third Amended Complaint, Retractable Technologies, Inc. v. Becton Dickinson & Co., No. 5:01-CV-036 (E.D. Tex. Jan. 21, 2003). The claims against GPOs were settled before trial.

\textsuperscript{51} See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (finding exclusive dealing arrangement did not substantially foreclose competition where there is no “seller with a dominant position in the market”).
addressed by enforcing current law, which requires healthcare providers to report sharebacks along with their costs in Medicare cost reports.52

Recent Trends

Recent developments in the GPO marketplace further illustrate the competitive nature of the market. As healthcare costs continue to rise, and pressure to reduce patient costs increases, healthcare providers are increasingly seeking new ways to use GPOs to achieve efficiencies, including through the use of regional GPOs and additional GPO services, such as data analytics.

The recent rise of regional GPOs53 not only introduces additional competition to the market, but also highlights the low barriers to entry for new GPOs and the low switching costs enjoyed by healthcare providers. Indeed, many providers are members of multiple GPOs. A regional GPO may be able to negotiate lower prices than national GPOs on particular products for which its member providers can commit to a higher level of utilization than the members of a national GPO.

GPOs have also increasingly sought to differentiate themselves by offering additional services to their members. For example, GPOs offer a growing array of data analytics that aim to help providers reduce procurement costs while improving patient outcomes by integrating supply chain data into their clinical practices.54 These additional services have the potential to further reduce provider's costs and also to provide an additional level of competition in the GPO market.

Conclusion

Both evidence and theory support the conclusion that GPOs produce healthcare cost savings and that the market for GPO services is competitive. In addition, economic analysis yields an inference that the vendor fee model is likely to reduce transaction costs compared to other funding models. In other words, the “nerve center of our health care system” appears to be functioning as Congress intended when it protected GPOs’ funding model more than 30 years ago. As a result, we find no empirical or economic basis to change this model.

52 Consistent with this approach, the GAO observed that “hospitals’ potential underreporting of administrative fee revenue presents an immediate risk that can be addressed within the current GPO funding structure,” GAO (2014) Report, supra note 4, at 23 (emphasis added). The GAO recommended that “the Secretary of the Department of Health and Human Services determine whether hospitals are appropriately reporting their administrative fee revenues on their Medicare cost reports and take steps to address any under reporting that may be found.” Id. at 23–24.


Understanding the Antitrust Jurisprudence of Justice Gorsuch: *Conwood’s* Continuing Influence

Jeffrey Klenk and Jeffrey Armstrong

A review of newly appointed Supreme Court Justice Neil Gorsuch’s antitrust opinions shows that his jurisprudence with respect to antitrust issues is well within mainstream legal thinking and that he is keenly familiar with the economic theory underpinning such cases. In fact, a careful reading of his most prominent antitrust decision, *Novell*, indicates that his judicial philosophy is informed not only by economic theory but also by his days in private practice as an antitrust attorney. Specifically, in *Novell*, Gorsuch makes reference to *Conwood*, a case that still stands as one of the largest antitrust damages awards ever and in which he was one of the lead attorneys for the plaintiff. Gorsuch’s use of *Conwood* as an example of anticompetitive conduct and his involvement as an attorney in that case suggests his experience on that matter continues to influence his approach to antitrust and that he understands the challenges which antitrust plaintiffs often face. *Conwood* also sparked new ways of thinking about and testing for alleged anticompetitive conduct in a variety of cases, some of which could percolate up to the Supreme Court during Gorsuch’s tenure.

**Time in Private Practice**

Gorsuch joined the Washington, DC firm Kellogg Huber in 1995 and made partner just two years later. Reflecting back on Gorsuch’s time at the firm, Mark Hansen, one of the name partners there, observed that Gorsuch is not “afraid of antitrust; he understands it and is comfortable with it.” 1 Hansen went on to conclude that Gorsuch is “quite familiar with both sides of the “v.” in the antitrust world.” 2

Gorsuch’s familiarity with the plaintiff’s side of the “v.” undoubtedly comes from his experience on *Conwood.* 3 While at Kellogg Huber, Gorsuch was part of a team that filed suit on behalf of Conwood Co., a moist snuff manufacturer, against rival United States Tobacco (UST). Gorsuch served as second chair at trial and helped manage and run several aspects of the case, including investigating the facts, drafting the complaint, examining witnesses, and writing post-trial motions and briefs. 4 As part of this work, Gorsuch appears to have been involved in working with Conwood’s expert witnesses, defending the deposition of at least one of them. 5

2 Id.
After being filed in 1998, the case proceeded to trial in 2000 and resulted in a damages award of $350 million—$1.05 billion after trebling. The verdict was upheld by the Sixth Circuit in 2002. As part of the appeals process, Gorsuch co-authored a brief providing insight into the allegations and arguments of the case that he would later refer to in his Novell decision.6

Work on Conwood

At issue in Conwood was the conduct of UST, the dominant branded manufacturer, in exerting control at the retail level over a product category known as “moist snuff” smokeless tobacco. Conwood, Gorsuch’s client, claimed that UST engaged in a “systematic abuse of its undisputed monopoly power” by, among other actions, throwing away Conwood’s display racks and more generally monopolizing the moist snuff category by abuse of category management and incentivizing retailers to drop Conwood’s moist snuff products.7 As Gorsuch would later observe in his Novell decision,8 Conwood exemplifies one of the “common forms of alleged misconduct” in which a monopolist might engage, along with a number of other forms of unilateral conduct, such as exclusive dealing (Microsoft)9 and tying (Eastman Kodak).10 In citing these cases together as examples of anticompetitive practices, Gorsuch places Conwood alongside some of the most significant antitrust cases in recent history.

As argued by Conwood in its appellate brief, UST unlawfully monopolized the U.S. market for moist snuff in three main ways: (1) unlawful removal of Conwood’s products and display racks from stores; (2) abuse of its position as “category captain” over retailers; and (3) paying retailers to grant UST exclusive vending rights and subordinate Conwood’s presence in stores. Conwood’s legal team argued that all of these actions were orchestrated by senior executives at UST on a scale that was so extreme that “only a monopolist could do these things.”11

According to Conwood’s first allegation, UST removed as many as 20,000 Conwood display racks per month, costing up to $100,000 in replacement costs (not counting lost sales while the racks or products were missing).12 Gorsuch and the other authors of Conwood’s brief also claimed that UST either disposed of Conwood’s products or positioned them in UST’s display racks to hide their visibility, as well as removing Conwood’s point-of-sale signage.

UST’s second area of alleged misconduct was the abuse of its position as category captain for retailers. In a category management arrangement, a retailer often appoints a manufacturer as the “category captain” that takes the lead in assisting the retailer with pricing, assortment, and merchandising decisions for the entire category, including rivals’ products. As explained by Gorsuch and his colleagues, however, UST “wielded substantial power” over retailers such that it was able to exploit the “trust” of retailers to block both retailers and consumers from having material information about products and prices. For example, a less expensive variety of moist snuff known as “price value” was “buried” within UST’s display rack and its signage removed, thus making it dif-

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7 Id. at 2. Neither Conwood nor UST owned retail outlets but rather, like other moist snuff manufacturers, such as Swedish Match and Swisher Sweets, they distributed their product through wholesalers and retailers.
8 Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013).
11 Conwood Appellate Brief, supra note 6, at 16.
12 Id. at 13.
ficult for consumers to observe “price differential[s]” among different brands. UST also reported biased sales statistics to retailers that understated the sales potential of Conwood’s products and overstated its own. These actions served to limit consumers’ awareness of and access to alternatives in stores that may have been more affordable.

The third area of challenged conduct concerned exclusive vending rights. As Gorsuch and his colleagues noted in their brief, UST paid stores to “eliminate competitors’ racks and advertising” under the guise of its Customer Alliance Program (CAP). Under CAP, UST paid retailers to give its racks more favorable placement in stores. CAP also required retailers to furnish UST with their stores’ moist snuff sales data, and recorded the specific functions performed by retailers in order to calculate their compensation. Retailers that were part of CAP came to comprise “80 percent of UST’s sales volume.”

In support of these allegations, the Conwood brief co-authored by Gorsuch recounts a fact-intensive investigation, including testimony by over 60 retailers, affidavits from 241 Conwood field representatives, and admissions from UST field representatives and executives. Gorsuch described this in his Senate confirmation questionnaire as a “massive discovery” effort. He even spent time in the field with retailers and store owners to develop evidence of UST’s conduct. Such a comprehensive and systematic building of an antitrust case, grounded in factual evidence, is something that Gorsuch would come to demand as an appellate judge.

Moreover, Gorsuch and his colleagues had a firm grasp on the economic theory and empirical analyses done by their experts. For example, the damages model put forward by Conwood’s economic expert garnered much scrutiny, including an amicus brief authored, in part, by a Nobel Prize winning economist. Despite this scrutiny—namely, assertions that Conwood’s expert failed to construct a damages model adequately related to Conwood’s theory of injury—Gorsuch and his colleagues were able to present factual evidence supporting the model’s causal connection between UST’s alleged conduct and Conwood’s claimed injury.

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13 Id. at 11–12, 14–15.
14 Conwood, 290 F.3d at 776.
15 The syllabus of an antitrust course taught by Gorsuch in fact lists Conwood under the topic of exclusive dealing. See Gorsuch’s Responses, supra note 4, appendix 19.
16 Conwood Appellate Brief, supra note 6, at 15.
17 The participating retailers, the agreement dates, and the merchandising functions stores performed were memorialized in standardized CAP worksheets. Id. at 16.
18 Id. at 15, 16.
19 Id. at 17.
20 Gorsuch’s Responses, supra note 4, at 53.
21 See, e.g., John Pfeifer, Supreme Court Nominee Helped Win Big Award Here, PADUCAH SUN, May 3, 2017, at 1A.
23 Conwood’s expert, Richard Leftwich, employed a regression model to analyze Conwood’s change in market shares over time as a function of Conwood’s initial “foothold” shares in each state in the continental U.S. See Conwood Appellate Brief, supra note 6, at 29–31.
24 For example, documents from UST’s senior management and field representatives stated: “Once established, Conwood was difficult to dislodge,” and “I hope that we can act quickly . . . to put [Conwood] away before they get a bigger foothold in the market.” See Conwood Appellate Brief, supra note 6, at 9–10. These statements indicate UST intensified its exclusionary activity where Conwood’s foothold was low—the explanatory variable in the regression model—to deprive Conwood of gaining sales momentum in stores—the dependent variable.
damages model was that it failed to control for various “competitive factors” in the marketplace.\textsuperscript{25} Yet again, though, Gorsuch and his colleagues carefully connected the model’s framework with a number of competitive factors, including all factors proposed by the opposing expert.\textsuperscript{26} The Sixth Circuit agreed that the work of Conwood’s expert was reliable and declined to exclude his testimony.\textsuperscript{27}

### Decision in Novell

Gorsuch has authored three antitrust opinions.\textsuperscript{28} The most prominent—and controversial—of these decisions was rendered in a dispute between Novell and Microsoft. Although Gorsuch’s reasoning in that decision hewed closely to Supreme Court precedents and can be considered well within the legal mainstream, it attracted much criticism for evincing too pro-defendant a bias. Yet, much of what Gorsuch demanded out of Novell, as the plaintiff, was similar to what he had previously presented as a plaintiff’s attorney for Conwood.

The dispute between Novell and Microsoft arose when Microsoft withdrew access to some of its intellectual property, namely application programming interfaces (known as APIs), that could be used by third-party programmers (like Novell) to better integrate their own products with Microsoft’s products. As alleged by Novell, Microsoft’s withdrawal of these APIs helped it “maintain its monopoly in the market for Intel-compatible personal computer operating systems.”\textsuperscript{29} Novell provided a putative explanation for Microsoft’s conduct by claiming that, since the withdrawal of APIs prevented it from reaching the marketplace sooner with its own product, Microsoft’s competing product attracted a “larger group of consumers” and further entrenched that group of consumers’ reliance on Microsoft’s operating system rather than a competing operating system.

Accepting that Microsoft possessed market power, Gorsuch crystallized the issue to be addressed as whether Microsoft’s actions were themselves anticompetitive. In doing so, he observed that the “proper focus” for addressing this issue, based both on Supreme Court and Tenth Circuit precedent, should not be on “protecting competitors” but rather on “protecting the process of competition,” thus shifting concern away from competitors and towards consumers.\textsuperscript{30} This was also Gorsuch’s own focus when litigating Conwood.

In laying out his framework for addressing Microsoft’s conduct, Gorsuch was simply endorsing the well-established view that antitrust laws exist for the protection of competition, not competitors.\textsuperscript{31} As explained by Gorsuch:

\begin{quote}
The antitrust laws don’t turn private parties into bounty hunters entitled to a windfall anytime they can
\end{quote}

\textsuperscript{25} Conwood Appellate Brief, supra note 6, at 9–10.
\textsuperscript{26} Id. at 31–33.
\textsuperscript{27} Conwood, 290 F.3d at 791–94.
\textsuperscript{28} See Novell, 731 F.3d 1064; Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009) (dealing with a hospital refusing to offer consulting privileges to a rival nephrology practice); Kay Elec. Co-op. v. City of Newkirk, Okla., 647 F.3d 1039, 1041 (10th Cir. 2011) (dealing with whether a municipality enjoyed antitrust immunity from the Sherman Act). Gorsuch authored an additional decision, Griffin v. Smith, 572 Fed. App’x 625 (10th Cir. 2014), stemming from a contention that prison officials violated federal antitrust laws, but concluded that the prisoner’s claims were frivolous and noted that his opinion would count as a second strike for purposes of the Prison Litigation Reform Act.
\textsuperscript{29} Novell, 731 F.3d at 1075.
\textsuperscript{30} Id.
ferret out anticompetitive conduct lurking somewhere in the marketplace. To prevail, a private party
must establish some link between the defendant’s alleged anticompetitive conduct, on the one hand,
and its injuries and the consumer’s, on the other.32

With such observations in hand, Gorsuch takes a narrow view of the circumstances in which
the refusal of one firm to deal with another constitutes anticompetitive behavior.

In Colgate, a decision now over 90 years old, the Supreme Court concluded that the Sherman
Act “does not restrict the long recognized right of a trader or manufacturer engaged in an entire-
ly private business, freely to exercise his own independent discretion as to parties with whom he
will deal.”33 Robert Bork, echoing the Supreme Court’s sentiments, argued that a “presumption of
freedom” with respect to whom competitors might deal “seems appropriate to a free market econ-
omy” and concluded that refusals to deal should generally be permitted unless pursued in fur-
therance of other anticompetitive behavior.34 The Supreme Court has more recently addressed
allegations stemming from refusals to deal, culminating in its decisions in Aspen Skiing and
Trinko, authored by Justices Stevens and Scalia, respectively.35

In deciding Novell, Gorsuch favorably cited Scalia’s logic: for a firm’s conduct to be anticom-
petitive, its refusal to deal must “suggest . . . a willingness to forsake short-term profits to achieve
an anticompetitive end.”36 Gorsuch further compared refusal to deal cases to ones involving
claims of predatory pricing, and concluded that to “avoid penalizing normal competitive conduct”
a “showing that the monopolist’s refusal to deal was part of a larger anticompetitive enterprise”
was also necessary.37 As summed up by Gorsuch, “Put simply, the monopolist’s conduct must be
irrational but for its anticompetitive effect.”38

Unfortunately for Novell, Gorsuch could find “no evidence from which a reasonable jury could
infer that Microsoft’s discontinuation [of its prior relationship with Novell] suggested a willingness
to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm
competition.”39 In fact, Gorsuch pointed to evidence proffered by Novell itself that, in his opinion,
suggested that Microsoft’s conduct may have yielded immediate increases in its profitability, par-
ticularly for applications software. To the extent that Microsoft’s conduct may have allowed it to bet-
ter compete against Novell in that arena, inhibiting such conduct could have chilled the very ben-
efits to consumers Gorsuch was seeking to protect. Thus, Gorsuch declined to overturn the
district court’s ruling that Microsoft’s conduct did not violate Section 2.

After Gorsuch rendered his Novell decision, the American Antitrust Institute (AAI) filed an ami-
cus brief arguing for a rehearing en banc, claiming, “If allowed to stand, the ruling would impair
the ability of innovative companies and the government to prevent monopolists that dominate crit-
ical sectors of the economy from denying or degrading access to their networks to rivals.”40 AAI,
in particular, took exception to Gorsuch’s “adoption and misuse of the so-called ‘profit sacrifice test’ as an essential element of liability for refusal to deal.”\textsuperscript{41} In its brief, AAI argued that while a sacrifice of short-term profits might be a \textit{sufficient} condition to find anticompetitive behavior it is certainly not a \textit{necessary} condition:

Profit sacrifice is relevant because it is one way to show anticompetitive intent or lack of a legitimate justification . . . . However, anticompetitive purpose or the lack of a legitimate business justification may be demonstrated in other ways, as Novell apparently did here through documentary evidence and testimony.\textsuperscript{42}

Although critical of Gorsuch’s decision in \textit{Novell}, in its assessment of his fitness for the Supreme Court, AAI noted that his work in private practice, specifically his work in \textit{Conwood}, was of a “different tenor.” Yet, it is not clear that Gorsuch’s economic reasoning in \textit{Novell} really marks a break from his work in private practice. Indeed, in explaining his decision in \textit{Novell}, Gorsuch makes a number of references back to \textit{Conwood}.

\textbf{Influence of \textit{Conwood} on the \textit{Novell} Decision}

Gorsuch wrote in \textit{Novell} that as a judge, it is reasonable to look back to “evidence and experience derived from past cases,” to glean insight into whether the conduct being challenged is truly anticompetitive or whether a finding for the plaintiff would risk being a “false positive.”\textsuperscript{43} Indeed, in laying out his reasoning in \textit{Novell}, Gorsuch cites to \textit{Conwood} a number times for examples of what he views as obviously anticompetitive conduct.

In \textit{Novell}, Gorsuch’s primary concern with the theory of the case was that there was no evidence of harm to consumers; rather, Novell’s claims revolved around its own alleged inability to compete as a result of Microsoft’s refusal to deal. Gorsuch viewed Microsoft’s actions more as a business tort or as an act of fraud rather than conduct giving rise to an antitrust claim. Likewise, while Conwood presumably would have had legal recourse against UST regardless, its claims only rose to the level of an antitrust violation once it could be shown that UST’s conduct resulted in harm to competition, rather than just to Conwood. Explicitly referring back to \textit{Conwood}, Gorsuch observed that it is “when the defendant’s deceptive actions . . . are so widespread and long-standing and practically incapable of refutation that they are capable of injuring both consumers and competitors.”\textsuperscript{44}

One gets the sense that in relying on his experiences in \textit{Conwood} as well as the Sixth Circuit’s affirmation of liability and harm in that case, Gorsuch was expecting Novell’s counsel to present a fact-based analysis of how Microsoft’s conduct either raised consumers’ prices or reduced their choices. When such an analysis was not forthcoming, Gorsuch found that Novell’s claims did not

\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id. at 6. As support for its claims, AAI references the work of Steven Salop, an antitrust scholar, who observes that since “[a]ntitrust law focuses on consumer welfare” a test based on a consumer welfare standard is “useful” because it more directly matches the challenged conduct with its competitive effects. \textit{See} Steven Salop, \textit{Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard}, 73 \textit{Antitrust L.J.} 311, 336 (2006). Salop goes on to conclude that “there is no reason to think that the impact on the defendant’s profits in the hypothetical world of the profit-sacrifice test would be a good proxy for the impact on consumers.” \textit{Id.} In contrast, the FTC does endorse the use of a profit-sacrifice test stating that “a refusal to aid rivals that makes economic or business sense \textit{apart from a tendency to impair competition} is not exclusionary.” \textit{See} Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 16–17, \textit{Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP}, 540 U.S. 398 (2004).
\item \textsuperscript{43} \textit{Novell}, 731 F.3d at 1072.
\item \textsuperscript{44} Id. at 1079–80 (citing \textit{Conwood}, 290 F.3d at 783).
\end{itemize}
rise to the level of an antitrust violation. Citing to Conwood, Gorsuch observed that a “rival is always free to bring a section 2 claim for affirmatively interfering with its business activities in the marketplace.”\(^{45}\) In other words, Gorsuch may have been willing to entertain a claim against Microsoft, just not in the way articulated by Novell’s counsel.\(^{46}\)

**Broader Influences of Conwood**

Conwood appears not only to have had an important influence on Gorsuch but on antitrust as well, prompting scholarly review of the way manufacturers compete for shelf space and how retailers and consumers benefit from this competition. One young economist and law student at the time of the Conwood verdict, later FTC Commissioner Joshua Wright, decided to conduct original doctoral research on the economic theory of category management and applied it to the facts of Conwood.

Wright postulated that one important reason retailers enter into category management contracts is to grant a single manufacturer priority—but not fully exclusive—shelf space. For product categories where consumers have a strong preference for variety, this arrangement has efficiency advantages for retailers seeking simultaneously to satisfy a wide range of consumer tastes and motivate manufacturers to compete for the best position in retailers’ stores.\(^{47}\)

By framing retailers’ shelf space decisions as a competition among manufacturers for favorable product placement, Wright suggested shifting the focus away from the nature of UST’s conduct to its effects by analyzing whether or not UST’s actions actually moved Conwood’s products to less favorable shelf space. Specifically, Wright proposed quantitatively testing whether or not UST suffered an actual reduction in shelf-space or “facings” in display racks as a result of UST’s misconduct. By contrast, Gorsuch and his colleagues presented systematic qualitative evidence of widespread misconduct by UST and Conwood’s lost sales, but not whether these losses impaired Conwood’s viability or its ability to compete for shelf space. At the time of Conwood though, Wright’s economic theory of category captain arrangements had not yet been published and the facings data required for such an analysis may not have been available, so it could not have been used as a guide to assess procompetitive and anticompetitive tradeoffs.

One way the analysis proposed by Wright could have been employed would have been to use information collected from UST’s CAP retailers. As part of CAP, retailers were required to furnish UST with highly granular store-level moist snuff sales data. This database was potentially a sizable evidentiary resource as it tracked individual retailers’ decisions about shelf space across thousands of stores. Using this data, an economist could have compared Conwood’s actual product sales in CAP stores that elected to give UST favorable shelf space (such as priority rack placement or exclusive vending rights) with Conwood’s sales in CAP stores that chose neutral merchandising tasks (such as rotating out stale product).\(^{48}\)

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\(^{45}\) Id. at 1076 (citing Conwood, 290 F.3d at 783–84).

\(^{46}\) Gorsuch acknowledges that Novell may have been better served by claiming an antitrust violation in the market for “office suite applications,” which is a market in which Novell actually competes, but was prevented from doing so due to statute of limitations for conduct that had happened back in the 1990s.


\(^{48}\) This type of control-treatment framework has a high degree of statistical reliability. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 92–95 (2d ed. 2000). Follow-on cases, such as that involving Swedish Match, in fact adopted such an analysis.
Such an analysis also may have been enlightening given the potential procompetitive effects, as presented by Wright, of competition by manufacturers for retailers’ store space. For example, by paying retailers a fee to move UST’s racks from low to high visibility locations in the store, more consumers would have been exposed to the moist snuff category, including former smokers with little or no brand loyalty searching for alternatives like smokeless tobacco. In fact, UST acknowledges this opportunity in its financial filings from that time period.49 The result is that the net effect on UST’s rivals could have been neutral or even positive (e.g., if they were housed in UST’s racks or located within sight of UST’s products).

Conwood may also be the harbinger of a relatively new form of anticompetitive conduct. As Gorsuch notes, Conwood is an example of an antitrust violation by a firm with market power that had the effect of distorting market information and thus misleading consumers. Recent scholarship has, in fact, started to focus on the potential market power being conferred on large aggregators of consumer and financial information and other forms of data.50 Through the manipulation of this data it may be possible, as was done by UST in Conwood, to influence consumers’ choices in ways that benefit the provider of the information to the detriment of other firms or, especially, consumers. Antitrust lawsuits alleging information distortion or manipulation have already arisen in many industries, including financial market benchmarks like LIBOR.51 Some of these cases could eventually work their way up to the Supreme Court for consideration by Gorsuch and the other justices.

Thus, Conwood is not just a case about an obscure tobacco product but also can be seen as opening new fields of economic inquiry that have stimulated research resulting in more precise ways for measuring consumer harm. With the advent of both offline and online point-of-sale data providing a rich source of information about retailers and consumers’ purchases, it will become increasingly possible to analyze and isolate the effects of conduct challenged as anticompetitive at the time and place where the conduct occurred.52 Given Gorsuch’s emphasis on the need to prove harm to competition through higher prices or fewer choices to consumers, it will be interesting to see if he continues to hold plaintiffs’ counsel to more rigorous, empirical testing of the claims they are presenting.

**Conclusion**

Hansen, Gorsuch’s partner in private practice, has noted that, in their conversations, Gorsuch has “told him that his experience as a litigator was formative and still influences his thinking as a judge.”53 Gorsuch himself has acknowledged that “[p]racticing in the trial work trenches of the law” impacts the perspective he brings to the bench.54 These influences from private practice,
most notably from *Conwood*, do indeed appear in Gorsuch’s work as a judge. Gorsuch’s familiarity with economics has also appeared in his work as a judge, notably his willingness to wrestle with the profit-sacrifice test in *Novell*. Given this background, one can expect Gorsuch to be a Supreme Court Justice who understands the challenges plaintiffs face yet demands that counsel for those plaintiffs engage in rigorous, factual analysis to demonstrate that their claims in fact lead to harm to competition.