Roundtable Conference with Enforcement Officials

Agency heads from the European Commission, United Kingdom, and United States, along with the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, provide enforcement updates from their respective organizations. Topics discussed include the consumer welfare standard and public interest concerns, merger enforcement, the rule of reason, and intellectual property and innovation markets.

A Primer on CFIUS: Navigating the Evolving U.S. National Security Foreign Investment Review Process

The Trump administration’s spotlight on foreign investment and trade issues has raised the public profile of the Committee on Foreign Investment in the United States (CFIUS). Peter Thomas, Abram Ellis, and David Shogren provide an overview of the CFIUS review process from start to finish, highlighting current hot topics and exploring the implications of recently proposed reforms.

Throw Me a Lifeline! Regression Analysis Explained for Antitrust Practitioners

Continuing our series of articles explaining complex economics concepts to antitrust lawyers, Elizabeth Bailey unpacks regression analysis for practitioners. Given the breadth of settings in which regression analysis is used as technical evidence, it’s important to understand its conceptual underpinnings and some of the common ways in which it is used in antitrust matters.

Interview with Frédéric Jenny, Chairman of the OECD Competition Committee

Fred Jenny, economist, judge, professor, agency official, and longtime chair of the OECD competition committee, shares his views on transatlantic convergence, international cooperation in competition cases, and populist skepticism about competition and free markets.

Interview with Alexandre Barreto, President, Brazil’s Administrative Council for Economic Defense (CADE)

CADE’s new President speaks about a wide range of subjects, including his background, the “Car Wash” investigations, leniency in Brazil, CADE’s “Brain Project” that is designed to detect cartels, and merger remedies.

Interview with Jacques Steenbergen, President, Belgian Competition Authority

The veteran head of Belgium’s competition authority is interviewed about recent changes in the agency’s structure, merger review, sector inquiries, judicial review, abuse of superior bargaining position, and the use of interim measures.

Interview with Babatunde Irukera, Director General of Nigeria’s Consumer Protection Council

The head of Nigeria’s consumer protection agency, which is expected to become the country’s competition agency, discusses his approach to consumer protection in Africa’s largest country, efforts to engage the business sector, and the challenges that will come with establishing a competition regime in Nigeria.
JONATHAN JACOBSON: Welcome to the signature event of our Spring Meeting, the Enforcers’ Roundtable. The enforcers are here, and I will name them. They are a terrific bunch: Dr. Andrea Coscelli, the Chief Executive of the Competition and Markets Authority in the United Kingdom; the Honorable Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division at the Department of Justice; Victor Domen, Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General; the Honorable Maureen Ohlhausen, the Acting Chairman of the Federal Trade Commission; and last but certainly not least, Margrethe Vestager, Commissioner for Competition of the European Commission in Brussels.

Questions will be posed today by Debbie Feinstein, our Co-Spring Meeting Chair, and Gary Zanfagna, our Programs Officer, and I’ll probably throw in one or two myself.

Without further ado, let’s begin the discussion.
DEBBIE FEINSTEIN: The plan is to kick it off with each of our enforcers talking for a couple of minutes up at the podium and then we'll move back to the informal Q&A. Maureen, would you like to start us off?

MAUREEN OHLHAUSEN: Yes. Thanks, Debbie.

I’m very pleased to make my second appearance at the Enforcers’ Roundtable as the Acting Chairman of the FTC, and on such an auspicious day, because I understand it’s Margrethe’s birthday today. Happy birthday.

This year I’d like to address the issue of structural presumptions and the need to examine such presumptions carefully using real-world data.

Now, I see some of you antitrust wonks perking up, but I’m sorry to disappoint you, because I’m not talking about merger analysis. Instead, my topic this morning is a bit broader. I want to address the many presumptions about the FTC’s performance based on the structure of the Commission since the start of the new administration. These structural features include being headed by an Acting Republican Chairman, having only two members, one Republican and one Democrat, and fielding a team of acting bureau directors and office heads.

Despite the varying assessments by some sages in the press and elsewhere, the hard data indicates that the FTC has remained an active protector of American consumers, has expanded its advocacy for competition at all levels of our economy, and has served as a notable example of bipartisan accomplishment. While doing all of this we have been acknowledged as a rather happy place to work, as I can personally attest.

As you advertising lawyers in the audience already know, and as all you antitrust lawyers-turned-consumer-protection lawyers are now learning, one must substantiate one’s claims. So here’s the data.

I’ll begin with our competition mission. In Fiscal Year 2017 the FTC challenged 23 mergers and required remedies in 15 others. This level of activity is roughly commensurate with the last year of the previous administration, which had 22 merger challenges. We have kept up the pace in the first half of Fiscal Year 2018 with 12 merger challenges so far, including Wilhelmsen/Drew, Tronox/Cristal, and Otto Bock/Freedom Innovations, among others.

But I’d like to highlight two very recent and successful challenges that raised interesting issues. In Smucker/Conagra we challenged a merger between the Crisco and Wesson brands that would have given Smucker 70 percent control of the relevant market for branded canola and vegetable oil, and the parties abandoned after we announced our challenge.

The case involved the interesting and highly fact-specific issue of how much competition actually occurs between a national brand and the private or store label version of the same product. It really brought home the fact that every market functions differently, and deal prognosticators should remember that one cannot assume that nationally branded products always or never meaningfully compete with house brands based simply on a previous transaction in a different market.

The other merger is CDK/Auto/Mate, a proposed tie-up between providers of software for auto dealers. We were concerned that it would eliminate existing competition between a big player (CDK) and an upstart (Auto/Mate) in an already concentrated market. And more interestingly, the complaint also alleged that Auto/Mate was poised to become an even stronger competitive threat in the future, meaning that the current competition between the parties understated the most likely anticompetitive effects of this transaction.

Now, some commentators have questioned whether antitrust law can ever stop big players from squashing or absorbing promising upstarts. Our action in this case shows that the Commission
can and will block a proposed merger if a large established firm seeks to eliminate competition from a small but significant and developing competitive threat.

The parties not only abandoned the deal. Auto/Mate stated afterwards that “it was back to doing business differently than the giants do, and the big guys they’re back to shaking in their boots.”

Now, of course, our competition work isn’t limited to mergers. In FY 2017, we brought nine conduct actions compared to seven in 2016, and we added two more matters in the first half of Fiscal Year 2018.

I’ll just briefly mention one conduct case in particular, *Louisiana Board of Real Estate Appraisers*. This was the Commission’s first substantive foray into state action issues since the *North Carolina Dental* Supreme Court decision. While the matter is still in litigation, this week it produced a Commission decision that I authored on the requirements for active supervision, which many of you may find interesting.

Our work to strengthen competition is not limited to enforcement. We’ve hosted numerous workshops and conferences, including one with the FDA on competitive and regulatory barriers to generic drug entry after patent expiration.

We also filed 25 advocacy comments with state and federal decision makers on various topics.

Our Economic Liberty Task Force, which I launched last year, has helped spotlight unnecessary or overbroad occupational licensing that threatens personal liberty and harms competition. We held two roundtables and produced a video called “Voices for Liberty,” which featured military spouses who are particularly impacted by excessive licensing. I’m glad to report that other leaders, including Secretary of Labor Acosta and FCC Chairman Pai, as well as a host of state governors, have taken up this important cause.

Our consumer protection work also continued apace. Since January 2017, the agency brought or settled 131 consumer protection matters, distributed approximately $300 million in redress directly to over 3.7 million people, and supported programs that delivered more than $6 billion in refunds to consumers. And we just announced a case yesterday that will return an additional $35 million to consumers.

Now, even though you have all been locked in the Marriott this week, no one can miss the fact that privacy and data security issues are grabbing the headlines. The FTC has continued to prioritize privacy and data security during my tenure, and we have publicly announced ongoing investigations into the conduct of Facebook and Equifax.

We also announced 18 privacy and data security-related cases, including an expanded case against Uber just this week; a case against a revenge porn website, MyEx.com, which led to the defendants’ shutting down the odious site; and a trio of cases enforcing the Privacy Shield promises.

We also held various workshops on privacy issues, including one on how to define and measure the types of substantial injury consumers suffer from the exposure of their personal information, a topic that could not be more timely.

Finally, while bipartisan accomplishment may be a hard sell in D.C. these days, I’m glad this hallmark of the FTC continued during my time leading the Commission, as the numbers bear out.

Since the inauguration, we have had well over 500 unanimous votes, many of them on challenging issues in competition and consumer protection. I think that speaks well of my colleague, Commissioner McSweeny, the FTC staff, and our shared sense of mission.

That leads me to my final point. In 2017, the FTC ranked as the number four best place to work in the U.S. federal government in mid-sized agencies. We also ranked number one in several “best
places to work” categories, including effective leadership, strategic management, teamwork, and innovation.

In sum, it has been my honor and privilege to lead the agency over the past 15 months, and I look forward to our discussion.

MR. JACOBSON: Makan?

MAKAN DELRAHIM: Thank you, Jon, Debbie, Gary, and everybody of the ABA leadership. This is my first time at the Enforcers’ Roundtable.

It has been about six months now that I have had the great honor and privilege of serving in this job in my second tour of duty at the Justice Department. I think there was a DOJ report that came out with some highlights about what we have done, so I won’t bore you with too much of that information, but I will tell you a few things, just reflecting on the last six months and where I see at least the next six months going for the Antitrust Division.

It has been exciting. We have been a little busy. We’ve been active in a number of areas.

I owe a deep gratitude to the body of the government that I served for five years, the United States Senate, on its staff, because they gave me an extra four or five months to sit around and think about what I wanted to do once I did finally get confirmed. That allowed me to think about a lot of the stuff we worked on with Jon and Don Kempf and Dennis Carlton and others on the Antitrust Modernization Commission, and Deb Garza, as well as what the actual goal is.

I got a chance to actually go back and read a lot of Bill Baxter’s articles, his work, and one of my favorite Justices that you have heard about, Robert Jackson, who also headed the Division, and some of his speeches. I think it allowed me to learn a lot about the original mission of the Division and what I intended to accomplish hopefully for however long I am privileged to serve in this job.

On that, let me also say that it has just been great. There has not been a job that I’ve had where I come into work this excited. I look forward to it. I’m probably in there 14, 15 hours a day.

But a lot of that is because of the team we have. Andrew Finch, who serves as my Principal Deputy; Barry Nigro, who is no stranger to this body; Roger Alford, my old friend going back 25 years, who serves as the Deputy for International; Luke Froeb, who is our Chief Economist; and our good friend Don Kempf, who is our Deputy for Litigation, an absolute legend in antitrust litigation; along with a host of phenomenally talented folks in the Front Office, just to add to the great folks in the career staff who are the heartbeat of the Antitrust Division and keep us going.

What I got to think about, and what I’d like to highlight, are three central priorities for the Division in our effort to protect consumers and competition.

One of the things I wanted to do was return and pursue the Division’s mission as a law enforcement agency, not a regulatory agency. I cringe every time I hear, whether it’s in the press or somewhere else, talk about us as regulators. That’s not what we do. That’s not what Congress empowered us to do through the antitrust statutes.

Going back to Justice Jackson, when he was the head of the Antitrust Division—and he was FDR’s advisor before that—he strongly believed and gave a number of speeches explaining that the goal of the antitrust laws was to let free market competition work best in the absence of regulatory barriers to innovation and growth. We need to enforce those laws to make sure that the free market can decide prices, can decide the actual competition, and the innovation and growth that comes with that.

It is our duty, and I think it is what we owe to the public, vigorously and timely to enforce the antitrust laws, not necessarily wait for major failures in the market, in the structure, but enforce
those laws immediately in order to prevent those types of market breakdowns, which then forces Congress to have to address them through an alphabet soup of various commissions and bodies, which tell them “you have to have 20 percent of this and 10 percent of that and 30 percent of this,” assuming there’s not other policy reasons for doing so rather than just a breakdown in the market. I think when that happens it is a failure on the antitrust enforcer side that has required that.

To that end, that has informed my views on remedies. The government’s role should be to get in, enforce the antitrust law, have an appropriate remedy, which should be structural wherever it’s available, and get out and let the market decide, rather than us trying to guess the market 5 years, 7 years, 10 years, in some cases 100 years in some of our mergers—the whole music industry 77 years—where we try to guess what market innovation and the consumer are supposed to do. I think our role and our competency is such that those decrees should be limited, if ever allowed, and they should never be ongoing in perpetuity.

To help us in better advancing that law enforcement mission, we have announced, as some of you know, the three roundtables from experts and academics that help us better think about those issues.

We have had the first one, which dealt with the propriety of immunities and exemptions from the antitrust laws. We’ve had a number of those on our books. We also have some wonderful creations by the courts, where under the doctrine of implied immunity, they just take out a whole segment of the economy and have it be impliedly immune from the antitrust laws. If there is an appropriate way to do that, Congress should have that role, I would submit, not the courts. We did hear some great testimony on that.

The second one that is coming up is on consent decrees. What are their proper roles? How should we look at them? You know that we are reviewing 1,300 of them, and determining what we do with them in the coming months: do they work and should they still exist? Bill Baxter had a great law review article on consent decrees and on when they are appropriate and when they outlive their usefulness and how they actually become tools for anticompetitive behavior and disruption into the marketplace.

The last one is on antitrust and regulation. There was an OECD paper which showed there is actually greater consumer harm from anticompetitive regulations by the government than even the private sector. We’d like to explore that and take a look at the federal level and at the state level. Chairwoman Ohlhausen has done phenomenal work in this area with state licensure, and jointly we do a lot of competition advocacy at some of the agencies as well as in some of the states, and we are going to continue that. But we’ve got to take a look. What is the proper role there?

The second area of our central priorities deals with antitrust and intellectual property. I have given a few talks. Anybody who has known me for the last 25 years in various roles in branches of the government should not be surprised at my views, as the Intellectual Property Clause of the Constitution actually appears about 100 years before the antitrust laws were enacted by Congress and statute. I think this requires proper respect. That doesn’t mean there is no role for antitrust in the exercise and exploitation of intellectual property—in fact, we’ve been quite active in some areas—but it also doesn’t mean that antitrust is the proper role to come in and monitor certain contractual commitments that intellectual property owners have given.

We continue to study that. We don’t have all the answers. There are going to be disagreements on these views and the policies amongst us and our foreign partners, as well as us domestically, in the United States. I think the only way you resolve any kind of divergence or disputes on a particular policy is to continue to study that, engage in it in a civil way, and debate the reasons why you think that. I think that needs to be fact-based and economics-based. We are seeing more and more research over the last 15 years on those issues and policies.
Last, really, is the importance of international engagement. You have this panel, we have the top enforcers from the international community, and also many in the audience. But what we need to do is to continue to engage towards, at a minimum, a convergence of the procedures of the administration of antitrust law, and hopefully towards a convergence of at least the substantive norms, having respect for the different legal and political systems in each of our jurisdictions. With that, I am looking forward to the panel.

Thank you.

MARGRETHE VESTAGER: Bearing in mind that it is my birthday, you may be surprised that I am truly happy to be here, in a room with no windows and with more than 1,000 lawyers. [Laughter] But it is indeed a pleasure because it is when we discuss, when we talk, when we exchange views about what we do, that we can make antitrust work better.

After all, behind antitrust is an idea about society, a society where consumers have the power to ask for a fair deal. It is only right that those people that we work for, citizens in their role as consumers, know and see that this is what we are trying to do, and of course that they have a chance to question the way we go about it.

The questions that are posed, they don’t come from nowhere. They are driven, in my experience, by a sense that something is not quite right in the balance between businesses and consumers, and that sense of something being out of balance is especially strong in the digital world. So in the European Commission and in my work and our team’s work, we put a lot of energy into making sure that digital markets work.

Our cases involving Google, for instance, go to the heart of how antitrust can support innovation. Google may be one of the Web’s greatest innovators, truly loved by citizens. But our decision last year makes it clear that they don’t have the right to stop others from innovating. In the coming months, as well as advancing our cases on Android and AdSense, we will keep watching closely to make sure that Google meets its obligation to let rival comparison shopping services compete on equal terms.

Is that a new thing for competition enforcers to take an interest in innovation? The way technology is developing these days means that we are dealing not only with the high-tech industry but also with the high-tech economy.

So obviously, it is not just in the tech world that innovation is important. Just to give you one example, we have seen that in the two big agrochemical mergers, the merger of Dow and DuPont and Bayer’s purchase of Monsanto. A very important part of our work on those mergers was to make sure that innovation will continue so that farmers would get better and less toxic pesticides. We only approved the mergers after the companies agreed to sell off part of their research and development activities in a way to make sure that we still have competition and innovation.

In the months and the years ahead of us it’s my guess that these things will be even more important, but of course not at the cost of the fundamentals of antitrust, like keeping prices down for consumers by fighting cartels. In the last few years, for example, we have dealt with cartels for more than 30 different car parts and imposed fines of a total of more than €1.5 billion. Also here technology makes a difference. It can change how cartels operate, and we have to make sure that we can detect them efficiently.

I think that may sum up where we are today. New technology has not changed our promise to consumers, this promise that we will do our best to make markets work fairly for them.

But we do need to know and to make sure that the way we apply our rules is keeping up. So at the Commission we have just appointed a team of experts to report on how competition policy...
will be affected by digital changes to markets—and not just technology markets, but throughout the entire economy. We’ll discuss these issues of course openly, taking inputs from market participants and from shareholders, and discuss that in a conference that will be held in Brussels in January next year.

Of course the advisors will also report to me, but it is an important point that we also have this discussion among us—different points of view, different interests—in order to try to figure out how this will affect our work.

The panel today is another very welcome opportunity to stimulate discussions on what will happen next. Thank you very much for having me.

MR. JACOBSON: Thank you.

ANDREA COSCELLI: Good morning. Thanks, Jon and Debbie, for inviting me and thanks to the Section. It has been a very interesting couple of days, and certainly a number of the panels have given me quite a lot of food for thought and have been highly relevant to some of the discussions we are having in the United Kingdom.

I have been the chief executive of the Competition and Markets Authority in the United Kingdom for a year and a half, almost two years now. I spent my first year as Acting Chief Executive which shows that public appointment processes in the United Kingdom are not much faster than in the United States!

In terms of what we have been doing over the last 6 to 12 months and what we are doing at the moment, I will mention three categories.

The first category is trying to be an effective enforcer, so in many ways it resonates with what our colleagues here have just discussed. It is a very conscious effort on our part, as a national enforcer in a large Member State in Europe, to open investigations on anticompetitive practices, unilateral conduct and horizontal conduct.

We are doing better than we did previously. We have opened over the last 12 months ten new cases. We concluded five cases with infringement decisions and penalties. A couple of cases we concluded quickly with commitments, which are cases where the companies don’t admit liability but remedies are put in place very quickly. One of the cases was in digital markets, which is something that is important for us in terms of trying to find quick and effective solutions.

We also published in a unilateral conduct case what we call a “no grounds for action” decision, which is a reasoned decision explaining why we investigated, the concerns we had, and why on the facts we felt that this particular conduct was acceptable in terms of competition law.

On the merger side, we have been quite active. As you know, all of the large mergers affecting the United Kingdom are currently looked at by the European Commission, so we try to be effective in a sense as a complementary national enforcer. We had nine cases that we referred to our equivalent of a Second Request, and of the six cases in the Second Request that we finished during the year, four of them were cleared and two of them were cleared with divestments. And we had a dozen or so cases that we referred to Phase Two but the companies decided to offer partial divestments that we felt would address the problems either in terms of product lines or in terms of geography. They were parts of the deal, and provided an effective structural way of dealing with the problems.

We also have a fairly busy portfolio on the consumer protection side with fairly high-profile cases in a number of mainly digital markets at the moment, including online travel agents, online gambling, car rental portals, and secondary ticketing platforms, which we are very happy to do because we believe there is a lot of strength for us in being an integrated competition and con-
sumer agency and we are increasingly integrated in the way we think about problems, and think about possible solutions.

There is an increasing number of papers coming to our monthly board meetings where we discuss priorities and cases, which touch upon different angles to look at the issues potentially through both a competition and a consumer lens, which we think is a very effective way to potentially address what we see as problems.

We also spend quite a lot of time in litigation—nothing, I guess, near the scale of AT&T/Time Warner, but even in our case we could routinely spend on antitrust cases four or five weeks during trials in court with economic experts and experts of facts. For instance, Carl Shapiro, who is currently helping the DOJ, helped us on a fairly high-profile pay-for-delay case we had in court a year ago. These cases are quite significant for us in terms of resources as well.

The case I just want to mention very briefly was a pay-for-delay case very similar to a number of cases the European Commission has brought and similar to some of the FTC cases. Very recently, our specialist court, the Competition Appeal Tribunal or CAT, came up with a judgment on the facts which was broadly supportive of our case but referred to the European Court of Justice a number of points of law because of the overlap with some of the ongoing litigation through the European courts in this area. So we will have to wait for the judgment to come back from the European Court to the CAT, for the latter to take a final view on this particular case.

We are also waiting for a judgment by the CAT on a recent pharmaceutical excessive pricing case we brought against Pfizer with what was a large fine for our regime, around £90 million. The case was litigated with a trial in October-November of last year. We will expect in the next few weeks and months to have the judgment on that.

That is the first category.

The second category is, I would say, the ongoing debate, certainly in the United Kingdom and in many ways in Europe and I guess to an extent here as well, about the boundaries of antitrust and regulation and possibly legislation dealing with various issues. This is some of what Margrethe was referring to and is about digital platforms and digital markets, in a number of very important markets where there are concerns in the UK Parliament, in the media, and among consumers, about the outcomes.

There are very active discussions about the tools to achieve better outcomes. We think it is very important for us as experts in markets to be in the room and to be part of the discussion. As you would expect, we believe in dynamic competition and the ability of markets to deliver good outcomes. But we think it is very important that we are part of the discussion holistically rather than sit separately and just reiterate our points that, in a number of cases, might not be the most effective strategy and might not generate in the end, what we believe are the best outcomes.

My third and final point is obviously that we are in a transition as a country and as an agency, with the current process of exiting from the European Union, which is a complex, multi-year process. In the context of us as an agency, the endpoint, given current assumptions, will be that we will become a fully independent agency with jurisdiction over anything that affects UK consumers, so operating very much the way agencies like the Canadian, the Australian, the Japanese, and the Brazilian competition authorities operate today, with a significant proportion of their portfolio being parallel investigations with other major jurisdictions on merger and enforcement cases.

As I have said publicly a few times, we currently have a model with a “one-stop shop” for mergers with the Commission taking the lead on the large antitrust cases that we are very comfortable with and we have operated with for many years. We think it delivers well for UK consumers.
Equally, we think at the very end of this transition, we will end up with a system where we work effectively with others and do parallel investigations, which we think can work. There is no reason why we won’t be able to replicate what these other agencies are doing already, which is essentially a lot of cooperation, with a lot of working together in a constructive way with other agencies.

But going from A to B is going to be complicated, and that is essentially where we are now. There is also a parochial aspect about scaling up the agency. Our government announced two weeks ago that we will now also be the state aid regulator in the United Kingdom, trying to mirror the EU system in the context of what is likely to be a trade agreement. That is a new function for us, so it is something we will need to learn how to do.

At the same time, there is an aspect of both culture and behavior for us in moving from what essentially has been a focus on national cases to these international cases. I am pretty confident we will be able to do that, but that is partially what we are doing at the moment.

At the same time, we are an expert body that is advising our government on policy on competition matters during the negotiations and discussion of Brexit. Obviously, it is very important for us that all of these discussions are done right and that the government has all the detailed technical legal information available to make sure that all of these complex agreements that are being discussed right now land us with the right powers and the right ability to enforce the law in the interest of UK consumers.

Thank you very much.

MS. FEINSTEIN: I should add that, depending on your perspective, Vic is either almost as lucky as Margrethe or luckier because he gets to celebrate with us today and his actual birthday is tomorrow.

VICTOR DOMEN: Thank you.

I want to thank you, Jon, Debbie, and Gary, and thanks to the Section and the Section staff for inviting me to speak again this year. It’s always a pleasure coming to the Spring Meeting. It’s the opportunity for me to have some time with other antitrust enforcers, but also practitioners, giving me the opportunity to speak to some of the former ATF chairs who have really been mentors to me and helped me through this role.

Now I will say that this is actually my third and final year as the Task Force Chair. It is a three-year term. So if I have to reflect back on anything, it is the fact that I was able to survive for three years with 50 different bosses, and at least I am—if I look at my phone right, now, I think I’m okay; as of 9:59 I did not receive a Tweet from any attorney general saying “you can’t take the stage.” So I’m doing it. I’m here. [Laughter]

As many of you know, the Task Force was created in 1983. I think it’s very important for everyone to realize that it was created at a time when there was a perception that the state enforcers needed to take a bigger role in competition law throughout the country.

I also think it’s very important as a historical note for everyone to recognize that the National Association of Attorneys General was actually created in 1907 as a result of Standard Oil. All the AGs decided it was time to come together and come up with a common way to attack that problem. So NAAG itself was created as a result of an antitrust case.

I also have to give a disclaimer. The statements I am making today throughout the morning are my own; they’re not on behalf of the National Association of Attorneys General, of any particular AG, or of anyone but myself. I am not speaking on behalf of any individual the state because, as you know, each state is its own individual sovereign, and that comes with many of its own challenges. In fact, one thing to recognize is that in November of this year 30 states are going to be
voting for an attorney general, and in at least ten of those states there will be a new attorney general elected. So it’s always a dynamic that changes, and working through NAAG you never quite know what you are going to get. But at least I’ve survived for three years.

When reflecting on my tenure, though, I think what I’d like to do—and I certainly can’t take credit for any of this; this is a collaborative effort among all the states, and we work together so productively and try to support each other when we can—but in reflecting back, what I really am probably most proud of is really the states’ willingness and ability to carry the burden of advancing antitrust enforcement and antitrust law in a way that I think benefits the entire bar.

The first good example of that is, through collaboration with the Department of Justice, of course, we helped with the Amex matter. When there was a time that the states needed to step in and file that cert. petition, we were ready, we were there. The Ohio AG’s Office filed that on behalf of the states, and, lo and behold, cert. was granted. I know most folks in this room probably didn’t expect that—I’m not sure we expected that—but then, all of a sudden, we had to start preparing for argument. The Ohio Solicitor General’s Office actually argued that case on behalf of all of us.

The other thing that I certainly want to point out, too, is that the states remain extremely active in the area of healthcare. This is something that impacts all of our citizens, all of our consumers. The AGs are highly informed about those areas and really want to try to be effective in any way we can.

What we try to do is work in different areas and theories of antitrust law where the states can be effective enforcers. The biggest example might be our generic drugs price-fixing matter. You have 49 attorneys general participating in that, investigating that matter and litigating that matter.

A second one is in the product-hopping theory. We have Suboxone, which is being led by Wisconsin. That has 42 states in it.

These are independent of the federal agencies, so I think that is always something to remember: don’t forget the states.

In healthcare matters we can point to particular individual state efforts as well, whether it’s the Washington AG’s Office in the CHI Franciscan matter; California, most recently with the Sutter Health matter. But also in merger matters, such as California’s Valero case.

In fact, just last week, New York received antitrust criminal pleas in a matter dealing with trash haulers.

So I think it’s important to just recognize and remember the states are here. As a matter of fact, on Tuesday there were 53 state enforcers meeting in a room at the National Association of Attorneys General’s offices to discuss all of these matters in preparation for this conference, but also our joint state efforts moving forward.

In conclusion, what I’d like to say is just recognize that state enforcers welcome all kinds of challenges that come our way. We’re willing to take on those challenges individually or as a multistate group, but we also expect to work very closely with our federal counterparts at the Department of Justice, at the Federal Trade Commission, and with our international enforcers.

Thank you.

MR. JACOBSON: Thank you all for those.

We are going to move into a discussion of competition policy. I’m going to start out with one for Makan and Maureen, and it deals with monopoly.

Over the past 30 years, we have seen more innovation, more material progress, than at any time in our history by far. And yet, at the same time we have seen the growth of category killers — we’ve
seen Facebook, we've seen Intel, we've seen Bing. Do we have a monopoly problem in the United States; and, if so, is there anything we can do about it or should do about it?

**MR. DELRAHIM:** Look, I'm familiar with some of the popular rhetoric in this area. I think it's too broad of a brush to paint on this issue.

You have to look at the relevant markets to see if there actually is a monopoly in an area. I think a lot of the criticism refers back to a Council of Economic Advisors' report in the previous administration in 2016 that's got some serious analytical flaws, and two of the Justice Department's economists, Greg Werden and Professor Luke Froeb, who is our current DAAG for Economics, have recently issued a paper that has pointed out some of those.

So I think it's really easy—and politically, just over the last year, we've also heard on both sides of the aisle folks trying to use monopoly as a populist issue.

On some of those digital companies, without commenting on any application of the antitrust laws, I would point out that there are some category killers. But the fact that they were created in the first place, they actually have added some surplus to the economy and to consumers to begin with. That doesn't mean that they have a free pass to violate the antitrust laws, as the Department of Justice brought the case in the Microsoft case 20 years ago.

So I think we have to be careful. Big is not bad. Big that behaves badly is bad.

**MR. JACOBSON:** Maureen.

**MS. VESTAGER:** First of all, we don't have a ban against success in Europe either. If people like your
product, you grow, and that's perfectly fine with us—congratulations—but they stop if we find that there is a misuse of a dominant position, and of course we approach this in a case-by-case way.

That being said, I think it is a good thing also to have a more horizontal view about how markets develop. In Europe I think you'd say on your more general question that the jury is still out.

We know from the data we have so far that in IT and in the telecommunications sector, concentration has increased. We also know that on a horizontal level profit margins have increased. So at least there is some development in market power. We want to know more—other sectors, a longer time span—in order to get a better feeling, based on data obviously.

So far, where we are is of course this sense that we have to stay vigilant because this is what is expected from us, both in the cases themselves but also horizontally, in order to engage in the debates, because this is a debate that shouldn't be based on a feeling of monopolistic power, but about what data shows us and what cases does it give us. As Makan just said, it is not big that's bad; it is the behavior, when that is harmful to consumers, that we are obliged to go for.

MR. JACOBSON: I think all three of you are on the same wavelength.

Andrea, you’ve been quoted as indicating that enforcement may have been too lax over the last decade or two. Can you elaborate on that and explain what your examples might be?

DR. COSCELLI: Yes. Thinking specifically about mergers, I have instituted two or three programs internally to try to look at whether we are exactly in the right place in a few areas.

The first one, which in many ways is the easy one, is about barriers to entry and expansion for rivals in mergers. This is obviously something we have a good handle on, but it is quite important I think to do some retrospective analysis.

We did some a year or so ago where we looked at eight transactions that we cleared over the last five years or so on the basis of entry and expansion arguments. It wasn’t a great picture. It was fairly mixed. In some of these cases we were slightly over-optimistic. I think that it is important to be joined up and feed back into the assessment. So I would say this is really not radical but it is just best practice.

The second area I have instigated is to try to think more about remedies or consent order reviews and feed it back into mergers. Similarly to what Makan was saying earlier, one of the things I launched when I joined was a review of our historical back catalogue of remedies in mergers and markets cases. Again, it wasn’t a very pretty picture. There were lots of remedies (or consent orders) that had been in place for many years, and we all know that these type of regulations or behavioral-type remedies just age, so as time goes by they are highly unlikely to be exactly what the market needs. So we are deregulating and eliminating quite a lot of them.

But the byproduct of the exercise is also that we have found a few cases where we do have behavioral remedies that have been in place for 15, 20 years that we have now reviewed a number of times at significant cost to us and to the companies and we are still leaving them in place because we don’t feel confident that these particular industries at this particular point in time would operate properly without these remedies.

I think to me that's important to feed back into the system. Again, I think it is almost a natural behavioral bias that we all discount the future, and if the future is 15 years from now, I'm not going to be around, you're not going to be around, so you think some of these remedies are great fixes now but you don't quite internalize the risk that in 15 years’ time the agency might have to be to a degree a regulator, which is what I think we all agree we don't want to be.

So that's the second area.
The final point, which is I think the difficult part, is the challenge that a number of people are bringing to us, about dynamic competition, startups, and dominant platforms. Again, I have launched a small exercise internally on this. If you look at some of our decisions of five or six years ago in some of these markets, I think with hindsight when you look at them — and I’m sure these were absolutely the right decisions, at the time we all felt these markets were very dynamic, there were lots of things happening—that kind of fluidity has now reduced.

I worry at times that we are not tapping into all the knowledge that capital markets or technology analysts have. There are billions and billions of dollars that are allocated to companies—yes, to a very significant degree on the basis of expected efficiencies or economies of scale—things we like and we don’t have a problem with—but potentially some of it is also because there are some smart people out there who realize that taking out of the equation some potential competitors might be quite beneficial to the shareholders of their particular company. So I just want to make sure that we take that knowledge into account properly in our investigations.

Obviously, the guidance remains exactly what it is. It is more about, again, best practice in terms of looking at the cases.

**MS. FEINSTEIN:** Maureen, you mentioned that it’s open for fair debate whether we’re using the tools we have adequately. But some commentators have said you don’t even realize the tools you have, that you are viewing your tools too narrowly and that you should be looking at the effect of transactions and conduct on things like employment and other public-interest issues; and some have said that’s what Congress initially intended and the antitrust agencies have too narrow a focus on what their mission is. How do you react to that?

**MS. OHLHAUSEN:** I’m glad that people have so much confidence in the infinite wisdom of antitrust enforcers to address all social ills through their antitrust enforcement.

I think it’s difficult enough for us to go with confidence and challenge things that affect consumer welfare. When you start putting a host of other values in there that you need to balance, I think it makes it very difficult to weigh those things on a scale. I would ask, “How do you weigh local employment effects against reducing prices for consumers?” Maybe if they have lower prices they’ll create a new business and that will spur employment.

But that’s not to say those other concerns are illegitimate. The question is: “What’s the right tool to address them?” For example, I agree with Gene Kimmelman, who said at the lunch on Wednesday that we should use other regulatory tools to address those values. It’s not that they’re not important, but I don’t think antitrust is the right way to address them.

**MS. FEINSTEIN:** The State AGs are in an interesting position. They are the antitrust enforcers, but they are also the regulators in many areas. What’s your perspective on whether or not states have the ability to deal with some of these social ills, and how do they balance that with their antitrust enforcement perspective?

**MR. DOMEM:** This is where it does get difficult for me to retain my job.

I think that the important thing to recognize is that AGs do wear many, many hats. I’m going to tell you, though, on the antitrust side of the practice, AGs are not looking to eliminate the consumer welfare standard. That’s not really what we’re looking to do.

But when an attorney general is elected by the citizens of a particular state they have responsibility for competition, they have responsibility for consumer protection; they also have charity
work they must consider. So they are thinking about these problems in a very different way than everyone else in this room is.

I know that sometimes that's frustrating. I know it can be frustrating for our federal counterparts and for the bar itself. But that's just the dynamic that I think people need to recognize and understand. When an attorney general is elected, the citizens of that particular state aren't necessarily looking for her or him to apply an antitrust standard to fix a problem; they just want the problem fixed and they don't really care which doctrinal method is used to do that. So AGs do have that balance that they have to take into consideration. Of course, when I work as an enforcer, I'm always thinking in the antitrust way, but my AGs may not, and I have to recognize that.

MR. JACOBSON: Maureen, what can we expect from the FTC and more generally in the wake of the repeal of net neutrality by the FCC?

MS. OHLHAUSEN: One thing that wasn't really well understood is that the internet was founded and grew without these net neutrality rules all the way up to 2015. So it's not that all of a sudden everything is going to be under such a different approach.

The other thing, which is one of my big concerns, was the way the FCC went about doing this kind of regulation. It actually divested the FTC of authority over anything that could be considered a common carrier service, including broadband.

I think it's great that now the FTC is back in the game here, and particularly because the new internet world will work is that ISPs need to be clear about how they are providing services; they have an affirmative obligation to provide that information. If they say, “no blocking, no throttling, or we’re going to do this or that,” and that information is inaccurate or they don't adhere to it, the FTC can bring an enforcement action. So our consumer protection tools are really important here. Obviously, we or the Department of Justice could bring an antitrust case if we find that there is some sort of anticompetitive behavior going on.

The FTC has also entered into a memorandum of understanding with the FCC to enforce restoring internet freedom obligations and we are working carefully with them.

One of my big concerns was in the loss of the consumer protection oversight, because DOJ could always step in on the antitrust side. The way the FCC did this, it actually took away consumer protections that the FCC itself didn't have the authority to enforce. I think it's really important that the FTC is back in the game, but working hand in hand with the FCC to ensure that consumers get the information they need and those promises by ISPs are kept.

MR. JACOBSON: Thank you.

We’re going to segue a bit and focus more directly on M&A activity. Let me start with Margrethe.

You have had three huge agricultural mergers over the past several months—ChemChina/Syngenta, Dow/DuPont, and Bayer/Monsanto. Has the fact that these were done in such a close time to each other been a factor in your analysis, and how generally have you looked at these particular deals?

MS. VESTAGER: You’re right, it’s a lot of change in a very, very short period of time, and in the same sector.

Obviously, we apply the “first come, first served” principle, which is I think the only decent thing in a lot of life’s areas.

The mergers were each a little different—we were focusing on different things. In ChemChina/Syngenta it was focusing on generic pesticides. Dow/DuPont was more about originator pesti-
icides, including innovation. In Bayer/Monsanto, where we conditionally approved the merger and we are in the process of looking into buyer approval of their quite large divestiture, probably around €6 billion in total, it is pesticides, seeds, traits, including innovation, and of course traditional agriculture.

Even though it’s the same big sector, they have different approaches, and they are obviously different companies. In that respect, of course the case-by-case approach made a lot of sense.

The thing is, talking about previous questions about concentration, these deals change the sector. But one of the things I think that we have been able to achieve is that you will still have competition; you’ll have competition in innovation, in research and development because you have the same number of global organizations. These are just a few already because this is sort of the second wave of concentration in this sector after it concentrated 10 or 15 years ago. But you still have the same number of players also when it comes to some of the things that we see also in the very near future, competition in systems and competition in digital agriculture.

Here of course it is very important for us also to show citizens that we have an interplay between competition law enforcement and what the regulator decides, because there has been a lot of worry about these mergers, especially Bayer/Monsanto. I think we have received 50,000 postcards, emails, tweets, almost a million signatures from people who worry. So to engage with that community, to say, “We look to make sure that the farmer will still have the opportunity of choice and that this market will be an innovative market, but the rules on environment, on making sure that we have insects and a secure environment for the farmer, for us as citizens, in the end that remains the same before and after these mergers.”

I think it is very important to say, “These mergers take place in a regulated environment and these are regulated environments that are different.” It’s a very different environment for you, Makan, to look into this merger compared to us. Even though there are a number of similarities, there are differences as well, and I think to a very large degree they come from the regulatory approach.

These have been huge investigations. I think it is also a good example of how we work because you see all the many mergers that go through a simplified procedure, I think now more than 75 percent go through a simplified procedure. That is a 10 percent increase over the last five years I think, and we are also doing it quicker with shorter pre-notification periods.

So you have this sort of double-sided effect that, on the one hand, things become bigger, more complicated, we put in many more resources; on the other hand, we simplify, we make sure that there is nothing to worry about, but as fast as possible.

MR. JACOBSON: Thank you very much.

One of the things I learn from that—certainly not the most important but the most practical—is that you can actually protest a merger via a tweet. That’s an interesting development.

MS. VESTAGER: Actually we have taken on an antitrust investigation also via a tweet in the Speed Skaters case. There were speed skaters complaining about the eligibility rules, and we took the case and decided upon it last year. So we are not as advanced as you are over here on Twitter, but we use it too. [Laughter]

MR. JACOBSON: Wow! Excellent.

From the truly sublime to the even more ridiculous, let’s talk a little bit about public interest factors. Did they play a role in your analysis, Andrea, of Sky/Fox?
DR. COSCELLI: Yes. This is an ongoing case so I have to limit myself in what I can say, and also a case that is being decided by an independent inquiry group, so again I am really ring-fenced out in the investigation. But there is quite a lot in the public domain I can briefly talk about.

In the European context and in the UK context there are very limited grounds for intervention on public interest grounds: national security, plurality of the media, and financial stability.

The acquisition by Fox of the stake in Sky, the large European pay-TV platform that it did not own, was cleared by the European Commission on competition grounds many months ago now. The UK government was worried about media plurality in the United Kingdom and asked the communications regulator to do a first-phase review, and then there was a reference to us for a second-phase review.

In terms of the process, we are not the decision maker, so we have to send our advice to the Secretary of State for Digital, Culture, Media and Sport by the end of the month.

We provisionally—this is now in the public domain—concluded that we were worried about the acquisition on media plurality grounds. This is essentially about the plurality of persons in control of media assets to preserve a healthy and functioning democracy.

I think what is interesting for a wider audience is already in our provisional findings report—our final report will be published in the next few weeks—which contains quite a lot of analysis. It built on the work that was done by the communications regulator and the discussions in the United Kingdom in the last couple of years, which were originally based on quite a lot of work done by U.S.-based academics in this field. For instance, my good friend Andrea Prat, who is at Columbia University, has done quite a lot of work in this area that has been quite influential for our analysis.

The idea is very much to try to understand today, given the technologies, holistically, how print, TV, radio, and internet all work together in terms of influencing the news flow and the news debate, and what is an acceptable share of ownership of these assets.

The other thing which is quite interesting in the analysis, again which is based on these academic pieces, is really trying to distinguish the source of the information, i.e., the “new journalism,” from the actual distribution of it. We all know that the two things are quite different in terms of platforms.

So I think it is quite interesting. We have to wait and see on the specifics, but I think it is certainly of greater interest in terms of the analysis potentially to others in the future as well.

MR. JACOBSON: Thank you.

GARY ZANFAGNA: Makan, I finally get to ask a question in this crowd, and it's an easy one. There is a little trial going on down the road, and it has been said—everybody knows—virtually always, vertical mergers are solved through remedies. What makes this case different? Why challenge this case? Can you give us any insight on that?

MR. DELRAHIM: Well, I'm glad you got a chance to ask a question. Sadly, I won't have a chance to answer that question out of respect for Judge Leon and the ongoing trial in the AT&T case, so I won't comment on that.

Just generally on verticals and mergers, I would dispute that statement that all vertical mergers have been remedied.

MR. ZANFAGNA: I said “most.”

MR. DELRAHIM: Most vertical mergers have had remedies imposed, and some of those remedies
have been abandonment, and some have been structural changes. There has been a theme spun out there that in 40 years these things have just been solved through behavioral relief.

For some folks who say some of those or most of those have been behavioral, there is a presumption that the harm caused by those mergers has now been remedied. I would question whether or not that is true in several high-profile vertical mergers in the recent past that are subject to behavioral consent decrees. I would question whether those harms have actually been solved to the benefit of the consumer.

And then, I think one of the issues is enforceability of some of those, given the legal standards. We have, as you know, a preponderance of the evidence standard to prove an antitrust violation. But, until recently, in all of our consent decrees, to enforce a violation of the consent decree you had a clear and convincing standard to prove to a court a violation of the decree.

I just think that's completely out of whack. That's why we have taken the steps we have taken to require that as a condition of any consent decree, parties have to agree that a future enforcement action has to be by a preponderance.

So it could be that some of those that have had much higher standards, if they had a lower standard you would have seen greater enforcement actions against violations of the consent decree and the consistent harms that have resulted from such violations.

MR. ZANFAGNA: Vic, as a follow-up, often states participate in merger challenges. Why didn’t the states join this one?

MR. DOMEN: First, let me just state and recognize that we do understand that vertical deals do and can raise competition issues and concerns. We have not completely walked away from that line of thinking.

Second, our attorneys general consider so many different cases and have to individually balance each one to determine: Is this the one that we want to put resources in; is this the appropriate place to put it? Is this of such a national scope that the Department of Justice or the Federal Trade Commission can handle it and allow us to focus on other issues where there is a greater or a more important local concern?

So I really wouldn’t read too much into the fact that the states didn’t join in this matter because there are so many other matters where we have.

MR. ZANFAGNA: There were more pressing, bigger matters to take care of.

MR. DOMEN: Absolutely, absolutely, and next year someone else will tell you about them. [Laughter]

MR. ZANFAGNA: Margrethe, I have a question for you on mergers. The recent Apple proposed acquisition of Shazam didn’t meet merger threshold filing requirements. I think Austria and other States eventually referred it to you guys. How does that process work basically, and what are your interests in accepting that? Why are you looking at that transaction?

MS. VESTAGER: The main rule is a rather strict, sort of turnover-based system for who's looking at what. But we have this flexibility, and I think it’s a good thing that you have the flexibility because a rule without exception may become a problem.

This is a deal that was notifiable in Austria, and they said, “Maybe you should look at it.” Then other national jurisdictions joined to say, “Will you look at this?”
When we consider whether to accept a referral or not, of course first we consider: Can this have an effect on the internal market? Will this have pan-European potential harmful consequences to consumers? On that basis we can accept the case. I think it is good to have this flexibility because the more pan-European the more sense it makes for the European Commission to look into the case.

There are early examples as well. I think the most well-known is the Facebook/WhatsApp deal, now some years ago, that we were looking at on a referral request from the United Kingdom.

So it is not out of the ordinary. It happens. Now we are in the process. It is an open case so I will not comment upon it.

MR. JACOBSON: We are going to move a bit into civil nonmerger. Margrethe, you’re still on the spot. The question is a fairly broad one. Intel is an example, but a number of commentators have taken the view that the European Commission is favoring competitors over consumers in their analyses, particularly in dominance matters. What’s your perspective on that criticism?

MS. VESTAGER: Well, we don’t. [Laughter]

We take an interest in how the market is working. You know, of course, when we do a market test, for instance about a remedy that is offered, maybe a divestiture, we ask customers, subcontractors, and competitors as well. But, of course, in order for that to make sense we put on the glasses of experience because obviously there can be an angle that has to do with the position of the competitor, not the market itself, which is also why we prefer comments in a market test that says “in order to do A you need B.” That’s the kind of thing we can use. If you say, “I don’t think it will work,” that we cannot use for anything, because that’s more feeling.

Second, in the Intel judgment, and also when we then were looking into the Qualcomm case that we decided now a couple of months ago, we have to figure out what is happening in the market and what different kinds of analytical tools can we use in order to see if a competitor is foreclosed or not able to play a role in the marketplace.

I think the important thing in the Intel judgment was to say: “Well, yes there is a presumption at work here, but it’s not unrebuttable.” The business will have to, of course,” be able to say, “No, this was not the case.” But if you can prove your case with whatever analytical tool you use, of course you do that, because the presumption is still that an exclusivity rebate is a problem. I think that was very well put.

But it wouldn’t make any sense for us to start promoting competitors, because what if the competitor then causes the next competition problem? Then you would be in it, and you would be in too deep. And anyway, even if you have this crazy idea, we have the court to keep us honest.

MR. JACOBSON: Thank you.

A follow-up on that. One of Makan’s predecessors, Bill Baxter, a highly regarded AAG, took the view that a competitor complaint was a signal that the behavior or the transaction was good because competitors’ interests are in higher prices and less innovation—“the quiet life,” as Judge Hand put it over here—as opposed to consumer interests, which uniformly go to greater innovation and lower prices.

Was he wrong about that, or is it just incomplete?

MS. VESTAGER: I don’t think that’s for me to judge upon.

But the way we see it is that we take complaints as a starting point. We cannot base anything
on whatever is in the complaint. Of course we have to do the job ourselves to see what is happen-
ing in the marketplace.

That being said, the input that we get from the market is important. I don’t think that you should
work in an ivory tower, not being able to hear what is going on in the marketplace. What we hear—
and that was part of the complaints in the Google case—is people saying, “We have no chance
in showing potential customers what we have to offer,” or “How would anyone invest in a compa-
ny that cannot be found?” Then, I think, you immediately see that consumers are not able to judge
by themselves. So the main mechanism of the Google case is that Google promoted the Google
shopping box, the first competitor you see is on page 4 of the results.

Have you ever been there?

**MR. JACOBSON:** I do all my shopping on Amazon.

Makan, let me turn now to you. What is the view at the Division of competitor complaints?

**MR. DELRAHIM:** I think you have to ultimately take a look at the effect on the consumer and com-
petition. We have always treated competitors’ complaints—you have to look at that within a prism,
a little bit of a grain of salt, to see if they are just competing, and antitrust laws are not intended
to protect competitors but the actual competition. So we always look behind that complaint.

That doesn’t mean that competitors’ interests would not be aligned with competition and con-
sumers, particularly in certain areas where a potential transaction or a behavior deals with an
input, so a likely effect will be raising the rival’s costs, which will ultimately raise the prices to con-
sumers and harm the competitive process, or foreclosure. Either of those would be very legitimate
because the interests would be aligned.

But by themselves the competitor complaints—“Oh look, these guys are going to kill us
because they are going to be more efficient,” for example, is not the type of complaint that we take
seriously.

**MR. JACOBSON:** Following up a little bit, you’ve given some remarks about potential concerns in
digital platforms. Is there anything you can say beyond “We might have potential concerns in dig-
ital platforms?”

**MR. DELRAHIM:** Look, we would investigate if there is credible evidence of an abuse of market
power. Certainly I’m not against opening up an investigation. God knows I’m not afraid of bring-
ing a lawsuit.

**MR. JACOBSON:** I think we’ve seen that.

**MR. DELRAHIM:** Except in the right cases where there is the evidence and the economics to prove
that there is a harm, I’m not trigger happy to bring those.

But we also have to be careful in the Section 2 context to not kill the golden goose of innova-
tion in the first place. Because of the potential harm that we could cause by an erroneous enforce-
ment action, we have to be careful, make sure we have the facts and the evidence to be able to
take that action.

I was, as you know, a big fan of the Justice Department’s case against Microsoft, which a lot
of folks, including The Wall Street Journal’s editorial page and others, criticized, criticized my for-
mer boss who launched those investigations in the Senate, Orrin Hatch, and the Justice Depart-
ment. But ultimately a unanimous D.C. Circuit, led by Judge Doug Ginsburg, who is well known to folks here and is not some left-wing crazy, wrote an opinion affirming the violations of the antitrust laws there.

So I think we just have to be careful in the Section 2 context, but that doesn’t mean there isn’t a role for enforcement. I have no real criticism, necessarily, of the EC’s complaint, partly because it would be unfair without investigating the evidence they have on their record. Of any of the investigations in cases they have recently brought, if we were privy to some of those and had the proper evidence that was credible, we could be bringing those cases.

MS. FEINSTEIN: Andrea, high pharmaceutical pricing is an issue in a number of jurisdictions. You seem to have some tools to address it. Can you talk a little bit about the Pfizer excessive pricing case and how pharmaceutical companies and others should think about their pricing actions?

DR. COSCELLI: That’s the case I was referring to briefly earlier, which is a standalone excessive pricing case we brought against Pfizer for an increase of 2,600 percent in the price of a very old drug. That was achieved through a mechanism whereby the drug was sold to someone so that it could be treated as a generic product and then at that point the company had freedom to set prices outside the regulatory mechanism.

We do quite a lot of work in pharma and we are very mindful of the incentives for innovation. We have ended up in the last few years looking at this particular case, which we published so it is in the public domain, and then have a few ongoing investigations where companies have on purpose strategically tried to find ways to increase very significantly the prices of old generic drugs.

We are talking about drugs that were invented in the 1930s and in the 1950s. There was no change in cost or the like, just ways to find very significant price increases through the regulatory system. Our view is that this is illegal under competition law.

We were then looking at the symptoms. Looking at this price increase as an economist, you wonder how is it possible that you can increase a price by 10,000 percent and nothing happens. In a number of cases there are a number of horizontal practices, horizontal issues, that we are investigating, so it is quite likely that when over the years things settle most of these cases will be seen through a much more traditional lens.

But as I said, personally, I am not worried about the signals or the incentives. There has been a big discussion in our courts in October and November. There will be a judgment in the next few weeks or months. We will see what the tribunal thinks about our cases in this area.

—Andrea Coscelli

MS. FEINSTEIN: Makan and Vic, can you discuss the Amex case and the impending Supreme Court decision. What should be the standard? How do you think the rule of reason should play out in that case?

MR. DELRAHIM: Thanks to Vic and his colleagues that sought cert., we got a chance to take a look at that and hopefully correct the Second Circuit’s mistakes in that case consistent with the brief that the Solicitor General provided and the arguments that Deputy SG Malcolm Stewart made at the Court.

I think it’s exciting to watch for a number of reasons. One is it’s going to be the first antitrust opinion with the newest Supreme Court Justice, Neil Gorsuch. Justice Gorsuch, as many of you know, was an antitrust litigator, so he will be bringing some additional insight to the Court, and a lot of us are looking at that.
It will also have perhaps some commentary in the case, depending on how they write it, about the issue of two-sided platforms in the digital space that might pose some new, novel challenges to antitrust.

I think the Justice Department’s brief in that case sets out just exactly the right test of when procompetitive justifications should be considered and at what stage. I hope that’s where they end up.

I think, like most people in this room and Vic and his colleagues in the states, we are excited to watch what the Court does on that one and see the interactions on the Court. There was a hotly debated oral argument with Justice Sotomayor and Justice Gorsuch taking very active roles. It will be interesting to see the dynamics for an antitrust case that might guide us in future cases.

Mr. Domen: Makan is absolutely right and I certainly echo his comments. This is one of the benefits of the relationship that we have with our federal counterparts. This was an opportunity. We have all worked together since 2010 on this case. When it came time to bring it across the goal line, we were able to work together and get it done, and I think we all had the same goal and desire.

I think all of us in this room are hoping we get more guidance on how to interpret a two-sided market and what the burden of proof is going to be on parties now. That is the benefit of this case. I think we are all very excited to hear about it.

I don’t know how long it may take for the Justices to issue a decision, but it is one of those things where I echo what I said earlier, where the states were able to help to advance the practice in this area.

I look forward to a decision so we can all scurry around and read it as quickly as we can and see how we approach the next antitrust case. So I think it’s one of those that we are excited to help bring to the end.

Mr. Jacobson: Thank you, Vic.

Margrethe, the activity in terms of intrabrand vertical restraints has been fairly muted on both sides of the pond for a number of years. But this last year the CJEU came out with Coty. What are the implications, if any, for your work?

Ms. Vestager: Of course now we know much more—and that is of course our bread and butter—how the Court thinks.

But also we saw in the sector inquiry that we did on e-commerce that vertical price maintenance and other restrictions seemed to be a thing. The good thing was of course that the sector inquiry in itself enabled change. We saw a number of businesses saying, “Let’s start looking; maybe we should refrain; maybe we should change our contracts.” That of course is most welcome, that the work that we do works as an inspiration.

Of course we will still have to do cases. A couple of cases came up from the sector inquiry. One of the reasons why we really take this to heart is of course that that kind of restriction can completely partition the single market, and the single market is part of the jewel of the European Union, to enable consumers to have the benefit of a much bigger market than their national market.

Mr. Jacobson: We are going to move now briefly into intellectual property and innovation. Debbie has a few questions starting with Maureen.
**MS. FEINSTEIN:** Maureen, you’ve expressed concern in the past regarding the potential for international competition regimes to wield antitrust principles against U.S. IP rights abroad. How do you perceive those risks today?

**MS. OHLHAUSEN:** I think those risks continue and in some ways they are growing. I was frustrated because I was always hearing that our belief in strong IP rights was just faith-based, that there’s no evidence to show it was connected with innovation, or that we could change the system and somehow do it better.

I’m an empiricist at heart, so I went and did a fairly broad study to find what evidence I could find—and there’s actually quite a bit—about the link between strong IP rights and innovation as measured by R&D investment.

You can see around the world there is this link where if IP rights are diminished, R&D goes down; if IP rights are stronger, R&D is higher. That’s not an endless relationship, of course.

One of my concerns is that not only is it a problem if a particular company has its IP rights diminished through—whether it’s a merger review or a conduct investigation around the world that could affect innovation overall because the IP rights holder is not allowed to get the reward for the investment that it takes to create the IP.

It can be internationally, but I also will mention one of the first dissents I did at the FTC in the FTC merger case, *Bosch*, where we said: “Oh, you’ve got some IP rights there; you’re going to have to agree to share them on a totally open basis at zero price.” I thought that sent a terrible message around the world.

I think we have seen just as concerning a growth of restrictions on IP rights through merger remedies that say, “You have to share these IP rights more broadly at a set government price.” So there are still lots of concerns.

**MS. FEINSTEIN:** Margrethe, do you share those concerns; and, if so, are there tools that you have to address those concerns?

**MS. VESTAGER:** We tend to think that competition law enforcement does play a role in the context of IP rights. If you look at some of the cases, like the *Samsung/Motorola* cases, you see that we find that there is an interrelationship here. This is based on a European reality. The commitments that we have taken in the *Samsung* case concern the European Economic Area only.

We are trying to find what we consider a balanced approach—of course that can always be debated—and I think we are in a constructive talk about maybe slightly diverging views here. But IP rights are obviously very important.

We were just talking about Andrea’s pharma cases where you also have to balance things, because obviously if there is no prize for innovation, you stop innovating; on the other hand, at a certain time, of course society at large will have to say, “Fine, you got your prize, you got your reward for innovation, but now it is also for others to share in this knowledge.” That balance has to be kept. I think Andrea’s case is an obvious example of when things get completely unbalanced so to speak.

You also know that we put quite an effort into standardization because standard-essential patents—well, the nature of the beast is of course that competitors come together, they agree on things. While normally that may not be the ideal for competition law enforcers, but still we find that it can work also as a source of innovation, that you can balance the rights of the rightholder and those who would like to license it.
For us this balance is very important, and we will try to keep it also in the coming years. If you have had a chance to see the latest Commission communication on these issues, you see that we maintain this carefully crafted balance between the two sides.

**MS. FEINSTEIN:** Andrea, how do you view the role of enforcement in the digital economy and highly innovative markets?

**DR. COSCELLI:** That is a very live debate for us as well.

I think some of the economics, the analytical framework, the antitrust issues, we have a good handle on. So my concerns are, first, on the process side, that these cases take quite a long time and sometimes the timing can be out of sync with the business reality. The second is almost an internal R&D point, it is having the skills and the knowledge within the agency so that we can be effective in understanding the issues.

For instance, we have recently announced that we are going to appoint in the next few weeks a chief data scientist for the CMA. We are creating a unit and we are trying to leverage a bit more the knowledge sitting outside the agency so that it can become part of the case teams in the front office actually working on cases.

**MR. JACOBSON:** We are going to move on to cartels.

**MR. ZANFAGNA:** Makan, the numbers are in and they are down. Cartel criminal charges are down. In the data on your website, in 2017, you charged 27 companies, which is down from 52 in 2016 and 66 companies in 2015. What's going on with that? Is the corporate compliance program that good that there is no more coordination out there in the economy, or is there another explanation?

**MR. DELRAHIM:** Yes. I arrived and every corporation was afraid of doing that. [Laughter]

Let me just tell you I have looked at the numbers. I think a perhaps better metric could be the leniency applications that come to blow the whistle on these, and several of these have a several-year tail before you start seeing actual convictions or a public hearing on these. Our leniency applications are just about the same as the historical averages over the past year.

Sadly, cartel activity is continuing. We have been just as active and aggressive. I think some of the things we will be doing—for example, taking some enforcement actions under our 4a authority on behalf of the taxpayers and combining that with our leniency applications and providing some additional incentives for folks consistent with that paragraph to allow for single damages even where the U.S. government is the plaintiff in those cases—will provide additional incentive for folks to come in.

**MR. ZANFAGNA:** A follow-up question I have is where leniency applications are, and you just answered that. Okay, that's good.

Moving on—just in the interest of time we’re kind of dancing around different questions—one I really want to get in—I don’t know whether you just crossed this one off, but I want to do this one. Margrethe, last year, you fined three recycling companies $68 million or so for fixing prices that were depressing the prices for purchasing scrap auto batteries. I find that very interesting, that they were fixing prices to keep them down versus fixing prices to keep them up.

So I was curious. First of all, is the theory the same? How is the analysis different or the same for when you’re enforcing for keeping prices down in a market versus up?
MS. VESTAGER: The thing is that this is a buyers’ cartel, and actually we are dealing with a commodity that is the most recycled product, car batteries, so it is a very important market for environmental reasons, circular economy reasons, and straightforward economic reasons.

What we saw in the analysis was also kind of plain vanilla because this was not about passing on benefits to consumers; this was about increasing profits. So we basically saw the same thing as we saw in a suppliers’ cartel in this buyers’ cartel. It was pretty much the same.

We talk a lot about digital markets and everything is very advanced and “if they have an algorithm we want an algorithm too.” This is an old-school market and this is an old-school cartel, and it’s about the same thing that it was always about: “How can we make more money on the back of consumers and the other people we are dealing with?”

I very much appreciate these cases as well to show our constituency that we are not over-focusing on digital issues, that we are also there in car recycling, batteries, car parts, cement, beer—you know, important stuff. [Laughter]

MR. JACOBSON: Makan, ten years ago you and I were on the Antitrust Modernization Commission and we made some recommendations concerning Hanover Shoe and Illinois Brick. I see that the Division has dipped its toe into that water recently. Can you tell us where the Division is on these issues?

MR. DELRAHIM: As you mentioned, I have been, in my personal capacity and as a Commissioner on the AMC, critical of Hanover Shoe and Illinois Brick, which have perhaps outlived their viability. It has created a perverse incentive for a number of reasons, and new developments—including the Class Action Fairness Act, where a lot of indirect purchaser cases from various states are now being consolidated into MDLs with the direct purchasers, so that the same judge has to deal with them anyway. So some of the original concerns about not allowing indirect purchasers to bring a case under federal law may no longer be valid.

As a matter of equity, it makes no sense that consumers in half of the country can bring actions for damages that have been passed on to them for antitrust violations but the other half cannot under the federal laws.

And then, because of Hanover Shoe, which started the problem 50 years ago, if you are the direct purchaser and you have passed on all the damages that you would have incurred as a result of that cartel activity, you can still collect damages and you get a windfall.

So you have this perverse incentive, which should be looked at. The Commission has looked at it. RAND did a study. There have been numerous scholarly articles. Hopefully, at some point, the Supreme Court will take a look at it. I don’t know if there will be an opportunity to do so.

MR. JACOBSON: It might take a bite at that apple. [Laughter]

MR. DELRAHIM: It might. But we don’t know what the vehicle will be. Certainly in that case the question is not presented. But we will see what that is.

I think the more folks continue to think about it and whether we still need those rules in antitrust enforcement, the more I think we can help improve the broader enforcement regime.

MR. JACOBSON: Last, but certainly not least, consumer protection. I think, Gary, you have some questions.

MR. ZANFAGNA: I do.
Maureen, with six years as a Commissioner and as Acting Chairman, what would you suggest are the most significant accomplishments over that time that you’d like to share with us?

**MS. OHLHAUSEN:** One of the most significant accomplishments is an issue I actually worked on since I started at the Commission way back when, and it’s really entertaining as a Commissioner and as Chairman to read underlying memos that I wrote way back when I was in the General Counsel’s Office.

This was the issue. The FTC Act has an exemption that the FTC doesn’t have authority over common carriers. The question is: Does that mean common carriers carrying out common carrier activities, or does it mean if a company has any little bit of common carrier activity then the whole company is carved out from the FTC’s jurisdiction?

This is a very important issue. It comes up a lot in consumer protection, in particular as we are in an increasingly digital online world where many different lines of business have converged into one.

We won a very important victory in the Ninth Circuit, a unanimous *en banc* decision, which upheld the FTC’s long-held position, which is that the common carrier exemption is an activities-based exemption and not a status-based exemption. I think that was very, very key. I worked very closely with the FCC in a variety of roles that I’ve had at the agency, and one of the things that I really appreciated was the fact that they filed an amicus brief that said that the FTC’s interpretation really made sense with their powers and their role, and I think that made a key difference. I’m very pleased about that.

Another important case on data security is the *Wyndham* case that we brought, which was about a data security breach. I remember when we were talking about this and the parties were saying, “You don’t have the authority; you shouldn’t bring this case.” I said, “You know, we’ve brought a lot of cases under this authority; it’s a good time to find out whether we actually have it or not.” The Third Circuit found that we did, and I think that was very important.

It is an area that just continues to grow. As I already talked about, the headlines every day, the white-hot intensity on privacy and data security.

One other case that I wanted to mention is the *POM Wonderful* case, which had to do with advertising substantiation. In that one I actually wrote for the Commission the liability opinion, but then I concurred on remedy because I thought our remedy was too onerous and would restrict commercial speech too much and it would actually reduce useful information getting into the hands of consumers. The D.C. Circuit actually agreed with that. It upheld the idea that when you make claims you have to substantiate them, but it also drew a careful line to say for safe products you don’t have to have the level of substantiation that a drug might require.

That is a very important idea because advertising often gets kind of a bad rap in our society. But it’s a very important way to convey useful information to consumers and is a form of competition, as we see companies competing with each other through advertising.

I would say those were three I would mention.

**MR. ZANFAGNA:** What initiatives would you like to see continued in the new slate of Commissioners?

**MS. OHLHAUSEN:** Continuing on the privacy front, when we talk about privacy and the kinds of substantial injury that consumers could suffer if their personal information is exposed. We have a lot of understanding that if your bank account number or your credit card number is exposed, or your Social Security number, you might suffer some financial injury.
But I think there is more to substantial injury, like the MyEx.com case I brought, where people had their intimate images exposed with their personal information, some of the harms that they suffered—harassment, loss of jobs, and just great emotional distress are substantial.

I think as more information is available about consumers—we are seeing lots of concerns about this—we need to be able to identify and define and measure and quantify what kinds of substantial injury outside the financial area should be cognizable under the FTC Act.

I did a workshop of informational injury last December to really get this discussion going. I hope my colleagues in the future will continue it.

MR. JACOBSON: I’ll ask this to both Maureen and Margrethe. Margrethe, this is not one we talked about earlier.

GDPR is going to have a huge impact on privacy but it also may have some impact on competition. Maureen, has the FTC been looking at the impacts of all the third-party providers that are likely to be cut off or marginalized through GDPR?

MS. OHLHAUSEN: I think one of the great benefits of the FTC having both a consumer protection and a competition mission is we do look at these issues in that kind of holistic way. We have looked at big data and the benefits that it can bring to consumers in competition as well as the risks.

I do think that when the FTC looks at something like a new, sweeping regulatory system, we’re aware of the fact that it might have some benefits but also some risks to consumers, who may lose some of the benefits that they have been getting from their own online services. I think it will be interesting to see how it all plays out with the GDPR.

MR. JACOBSON: So I sprang this on you, but do you have any reaction to it?

MS. VESTAGER: This is very important for me.

First, we have to stop talking about it as GDPR because anything that abbreviates to a four-letter abbreviation is supposed to be kept secret. No one then has a clue. This would be truly sad, because right now, one would have thought that we asked Facebook to have a scandal, because all of a sudden people have woken up to say, “Oh wow, this is what it’s about? It’s about me.”

Now, coming into effect in May, enforceable rights for the citizen, the right to move your data, obligations not to ask for more data than you need to provide the service. I think this is very important. When we ask Europeans, four out of five say “We feel completely powerless,” and then they tick the box. That doesn’t really make sense.

If we were to have the full potential of big data—and it’s enormous and it’s promising and it’s great—then we have to make people more comfortable. If we want the innovation from big data, I think this is very important.

We expect also innovation coming from new rights, people who say: “Our starting point will be the rights of the individual. We will make services that will help you enforce your rights. We will have privacy by design.”

And, of course, we take it as a great encouragement that Facebook has decided to implement the European standard as their global standard. I think this shows how competition and the regulatory approach need to go hand in hand, because this will promote competition, this will allow consumers to choose more, this will enable them to move their business from one service provider to another, and that is also what competition is about.

If you feel powerless, you don’t act, and we really need consumers to act in order for competition to work.
MR. JACOBSON: Thank you.

We are unfortunately out of time. We've crossed off probably 50 percent of the questions that we had.

But we are fortunate not only to have five tremendous panelists but five really epic enforcers of competition and consumer protection law.

I'd like everyone to give them a huge hand.

That brings to a close the Sixty-Sixth Annual Spring Meeting. I hope you had a great time. We'll see you again next year. ●
A Primer on CFIUS: Navigating the Evolving U.S. National Security Foreign Investment Review Process

Peter Thomas, Abram Ellis, and David Shogren

The Trump Administration’s spotlight on foreign investment and trade issues, as well as its recent highly publicized intervention to block Broadcom’s hostile bid for Qualcomm, has raised the public profile of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”), the inter-agency committee charged with reviewing foreign investments in U.S. businesses for potential national security issues. At the same time, U.S. companies continue to develop cutting-edge technologies with potential defense applications while collecting, storing, and analyzing ever more data on U.S. citizens, leading CFIUS to increase its scrutiny of cross-border deals, particularly by investors hailing from countries of special concern such as China and Russia. Against these realities, national security regulatory lawyers are increasingly being asked by clients for help navigating the U.S. foreign investment review process.

In this article, we provide an overview of the CFIUS review process from start to finish, highlighting current hot topics and exploring the implications of recently proposed reforms. Antitrust practitioners should be aware of the impact that CFIUS review may have on the client’s transaction, in terms of timing and substance, especially where divestitures of U.S. businesses to foreign companies are contemplated to address competition concerns. Although opaque and evolving, and despite the uniquely aggressive stance of the current Committee, CFIUS reviews should not bar the overwhelming majority of cross-border transactions when risks are identified and mitigated early in the deal process.

The Committee

In terms of composition, process, and available remedies, CFIUS differs in meaningful ways from the U.S. regulators with whom antitrust practitioners normally interact. CFIUS is a nine-member interagency committee within the Executive Branch of the U.S. government tasked with reviewing “covered transactions,” i.e., any transaction that could result in “control” of a U.S. business by a foreign person (including minority investments and other transactions falling short of complete acquisitions), for potential risks to “national security.” Unlike deals subject to notification under the HSR Act, transacting parties can decide whether to submit a voluntary notification to CFIUS. Where CFIUS determines that a covered transaction may pose a national security concern, however, CFIUS can and increasingly does proactively contact parties to strongly encourage them to submit a voluntary notification. If the parties refuse, CFIUS can self-initiate an investigation (an

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1 For an overview of the various regulatory approval processes implicated in international mergers, see Am. Bar Ass’n Section of Antitrust Law, Report of the Task Force on Foreign Investment Review (Sept. 28, 2015), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20150928_foreign_investment.authcheckdam.pdf.

Agency Review). Where national security concerns are identified, CFIUS will negotiate mitigation agreements or insist on assurances from the parties to address those concerns. Should CFIUS determine that mitigation is not feasible, or if the parties and CFIUS cannot agree on mitigation measures, CFIUS can recommend that the President suspend or prohibit the transaction.

**Authority and Composition**

The Committee’s authority springs from Section 721 of the Defense Production Act of 1950, as amended, which gives the President authority to investigate the impact on U.S. national security of mergers, acquisitions, and takeovers by or with foreign persons that could result in foreign control over persons engaged in interstate commerce in the United States. This authority enables the President to suspend or prohibit transactions—or, in the case of a completed transaction, order mitigation measures or divestitures—if the President concludes (1) there is credible evidence that the foreign interest exercising control might take action that threatens U.S. national security, and (2) existing law (other than the International Emergency Economic Powers Act) does not provide adequate authority to protect U.S. national security. Rather than house such reviews within the White House, however, the President has delegated investigative authority to CFIUS by executive order.4

Administratively, the Department of the Treasury chairs the Committee, which is composed of eight other voting members consisting of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy; the Office of the U.S. Trade Representative (USTR); and the Office of Science & Technology Policy. As appropriate, other Executive Branch offices observe and participate in CFIUS’s activities, including the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council. In addition, both the Director of National Intelligence and the Secretary of Labor serve as ex-officio members of CFIUS without voting power.

**Initiating Reviews**

The review process begins with the submission to Treasury of a draft joint voluntary notice (JVN) from the parties, detailing the transaction, the U.S. target, and the foreign acquirer. As provided by regulation, the JVN must include, among other things: (1) the nature and purpose of the transaction and copies of relevant deal documents; (2) names, addresses, and other information for each parent entity of the buyer(s) up through the ultimate parent entity; (3) personal identifier information (PII) for officers, directors, and certain shareholders at every entity in the foreign investor ownership chain (which must be submitted in a separate enclosure with the JVN); and (4) buyer disclosures regarding plans to shut down or move any of the target’s facilities offshore, consolidate or divest product lines or technologies, modify or terminate government contracts, or elimi-

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3 The International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq.) (IEEPA) provides the President with broad authority to “deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States,” but invoking IEEPA requires the President to first declare a “national emergency.” And as noted during passage of the Exon-Florio amendment (which added section 721 to the Defense Production Act of 1950), using IEEPA in the context of a particular foreign investment in a U.S. business would be “virtually the equivalent of a declaration of hostilities against the government of the acquirer company.” Acquisitions by Foreign Companies: Hearing Before the S. Comm. on Commerce, Science, and Transp., 100th Cong. 17 (1987) (statement of Sen. Wilson). Accordingly, as a practical matter, IEEPA is unlikely to be invoked in the context of a transaction subject to CFIUS review (though it technically could be).

nate the domestic supply of any product. Because a key focus of CFIUS is evaluating the extent of potential foreign government control in the target post-transaction and any resulting threat to national security—including whether any foreign government would have contingent rights, “golden shares,” appointment rights, or convertible voting instruments in the target, buyer, or buyer’s parents—identifying such foreign government control early may allow parties to structure transactions or take other steps at the outset to mitigate concerns, which can save valuable time later.

The JVN also must provide market share estimates for the products and services offered by the U.S. business that is the subject of the transaction and identify whether the U.S. business is a sole source or single qualified source for any U.S. government agency. Where the U.S. business has large or dominant market shares, there may be national security concerns around the potential for supply disruption of products or services to the U.S. government by the foreign acquirer. It is generally good practice to ensure that market share estimates disclosed to CFIUS are consistent with those provided to the U.S. Federal Trade Commission and Department of Justice as part of a substantive competition review, but the antitrust regulators are not typically part of the CFIUS review and their views on market definition may differ significantly from those of the Committee.

The antitrust regulators may also have an interest in the outcome of the CFIUS process. For example, the FTC closely followed CFIUS’s review of NXP’s 2015 sale of its RF Power business to a Chinese state-owned entity, JAC Capital, because that transaction was intended to alleviate competition concerns related to the FTC’s review of the pending NXP merger with Freescale Semiconductors. The FTC was hesitant to approve the NXP/Freescale merger until it became clear that CFIUS would not block NXP’s carve-out of its RF Power business.

Once submitted, CFIUS staff will review the parties’ draft JVN and provide comments, normally within about two weeks. After revising the draft JVN to address any comments from CFIUS, the parties submit a final JVN, which the Committee typically accepts by sending a “Day 1” letter to the parties within a week or so. Acceptance kicks off a 30-day review period during which the intelligence agencies perform a national security threat assessment to help CFIUS determine whether the foreign party and the transaction may present national security concerns. During this 30-day review, parties can expect to receive follow-up questions from CFIUS, which must be addressed within three business days, absent an extension from the Committee. At the end of the 30-day review, CFIUS may open a 45-day investigation if a member agency advises the Staff Chair that the transaction could threaten national security or if an agency taking lead on the 30-day review recommends that CFIUS do so.

In 2017, 70 percent of the nearly 240 CFIUS reviews proceeded to the investigation phase. If an investigation is opened and the Committee and the parties to the transaction are unable to agree to mitigation terms before the 45-day period lapses, with CFIUS’s permission, the parties may withdraw and refile their JVN, effectively restarting the 75-day clock. Parties can continue to withdraw and refile their JVN as long as CFIUS continues to grant permission for them to do so.

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6 See 31 C.F.R. § 800.402(c)(3)(i) and (v).
7 There is a rebuttable presumption in favor of a 45-day investigation in situations where: (i) the buyer represents or is controlled by a foreign government; or (ii) the transaction involves “critical infrastructure.”
Although the practice of withdrawing and refiling is not new, there has been a marked expansion in its use during the Trump Administration, resulting in extended timetables for CFIUS investigations, particularly those involving Chinese investors.

Risk Identification and Mitigation
CFIUS will conduct a risk-based assessment examining the “threat” posed by the foreign buyer or investor and the potential vulnerabilities associated with the U.S. business. The threat may be specific to the investor’s country or the investor itself or both. The Committee will consider a wide range of factors in performing its risk assessment, including: (1) whether the U.S. business is considered part of “critical infrastructure”; (2) the physical proximity of assets of the U.S. business to U.S. government and military facilities and restricted airspace; (3) any advanced technology controlled by the U.S. business that may have defense applications, including, for example, semiconductors, artificial intelligence and robotics; (4) access through the U.S. business to sensitive and personal data of U.S. citizens or valuable confidential business information; (5) sensitive U.S. government contracts, particularly classified contracts, of the U.S. business; and (6) the involvement of state-owned enterprises or other foreign government-controlled entities. Considering this wide range of potential risk factors, parties should identify and assess possible hot-button issues at the outset to avoid delays or other impediments likely to appear once CFIUS initiates its review.

Transactions notified to CFIUS often also implicate other national security-related regulatory processes, which can impact parties’ timelines and affect the Committee’s review. For example, foreign investors need to be mindful of the International Traffic in Arms Regulations (ITAR) and other export control regimes that might require filings with the State Department or the Commerce Department. Similarly, to the extent that a foreign investor seeks control of a U.S. business that has a facility clearance and engages in classified activities, counsel will need to engage with the Defense Security Service of the Department of Defense to put in place Foreign Ownership, Control, or Influence (FOCI) mitigation measures.

Ultimately, CFIUS may conclude a 45-day investigation unconditionally or ask the parties to agree to mitigation measures that alleviate national security concerns. Such mitigation agreements could include, for example: (1) restricted individual- or entity-level information access or control rights; (2) restricted physical access to facilities; (3) assurances that the U.S. business will continue supplying products and services to the U.S. government, or that the U.S. business will not move particular operations offshore; (4) assurances that U.S. government agencies will maintain access to information possessed by the target or the target’s systems; and/or (5) a pre-closing production “ramp up” to ensure sensitive U.S. government or defense contractor clients have time to find alternative suppliers. On enforcement, CFIUS’s regulations permit mitigation agreements to include actual or liquidated damages for breach.

Ability to Halt Transactions
CFIUS itself cannot permanently suspend or block transactions, but it can recommend the President do so if the Committee concludes a covered transaction imposes unresolvable national security concerns. The President then has 15 days to make a decision, which is final and not appealable. As a practical matter, parties will usually abandon their transaction when CFIUS sig-

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9 For a full list of factors CFIUS may consider in its national security review, see Defense Production Act of 1950 § 721(f), 50 U.S.C. § 4565(f).
nals an intent to oppose the deal. Indeed, formal executive action has been used to halt transactions only five times, although three such instances have occurred within the past two years:

- On February 2, 1990, President Bush ordered the state-owned China National Aero-Technology Import & Export Corporation to divest Mamco Manufacturing Company, a Seattle-based company that manufactured aerospace parts;
- On September 28, 2012, President Obama ordered Ralls Corporation, a U.S. company owned by Chinese nationals, to divest its interests in four wind farm projects in Oregon located near restricted airspace;
- On December 2, 2016, President Obama blocked the sale of the U.S. assets of a German semiconductor manufacturer, Aixtron SE, to a Chinese investor, Fujian Grand Chip Investment Fund;
- On September 13, 2017, President Trump blocked the sale of Lattice Semiconductor to Canyon Bridge Capital Partners, a private equity firm managed by U.S. nationals but backed by funds from several Chinese state-owned entities; and
- On March 12, 2018, President Trump prohibited Broadcom, a semiconductor manufacturer co-headquartered in Singapore and the United States, from acquiring Qualcomm, a leading U.S. semiconductor and telecommunications equipment manufacturers.

Although only the President can permanently suspend or block covered transactions, CFIUS does have the ability to impose any condition to mitigate national security threats implicated by covered transactions and “take any necessary actions in connection with the transaction to protect the national security of the United States.” The full extent of the Committee’s powers has never been tested, but CFIUS’s recent actions in connection with a highly publicized hostile bid for Qualcomm by Broadcom shows that the Committee interprets them quite broadly.

On January 29, 2018, Qualcomm submitted a unilateral notification regarding Broadcom’s attempt to elect a majority of Qualcomm’s board—using CFIUS as a “shield”—before any agreement had been reached between the parties, and without Broadcom’s cooperation. At the time, Broadcom was a widely held company, publicly traded on NASDAQ, and co-headquartered in the United States and Singapore, but the company’s parent was a Singapore entity, its legal address was in Singapore, and Broadcom had not finished relocating its domicile to the United States. This provided a jurisdictional “hook” that allowed CFIUS to investigate, which it did.

On March 4, 2018, Treasury Secretary Steven Mnuchin issued an interim order on behalf of CFIUS, requiring Qualcomm’s upcoming annual stockholder meeting be postponed for 30 days and obligating Broadcom to provide CFIUS with five business days’ notice “before taking any action toward re-domiciliation in the United States.” The interim order was followed a day later by an explanatory letter from Treasury’s Deputy Assistant Secretary of Investment Security, spelling out the Committee’s concerns with the transaction. Although such exchanges are normally hidden from public view, Qualcomm filed copies of the interim order and explanatory letter with the SEC shortly after receiving them. Adding to the unusual nature of the review, Broadcom

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reportedly did not comply with the Committee’s interim order and instead hastened its re-domestication, announcing on March 12, 2018, that it was “in the final stages” and revising the expected re-domestication date to April 3, 2018. Later that same day, President Trump issued an executive order blocking Broadcom’s takeover efforts.14

Although it was the President’s order in the end that stopped Broadcom from acquiring Qualcomm, the Committee’s attempt to stop Broadcom from taking further steps to re-domesticate in the United States (which would have removed the hook for CFIUS’s jurisdiction) shows that, in the current climate, CFIUS will not hesitate to use every arrow in its quiver where it perceives threats to national security.

An Unprecedentedly Proactive Committee

CFIUS has steadily staked out more aggressive (and some would say increasingly politicized) positions over the past few years, finding sufficient “control” to warrant jurisdiction in ever-more-attenuated circumstances and declining to entertain mitigation to resolve concerns previously handled by agreement. For example, it was widely reported in February 2016 that Unisplendour, a Chinese IT firm indirectly owned by a Chinese state-owned enterprise, withdrew its planned $3.8 billion investment in Western Digital, an electronic storage solutions manufacturer based in the United States, after encountering resistance from CFIUS. Under the terms of that deal, Unisplendour would have received a minority stake in Western Digital (about 15 percent) and the right to nominate a single director to Western Digital’s board, but no intellectual property rights, sensitive technologies, or other assets that typically attract attention from the Committee.

Going further, a group of Chinese and Singapore investors announced in September 2017 that they were abandoning a minority (10 percent) investment in HERE Technologies, an Amsterdam-based company that provides high-resolution maps to leading carmakers.15 Transactions that result in 10 percent or less foreign ownership are expressly carved out of CFIUS’s jurisdiction by regulation if they are “solely for the purpose of passive investment,”16 so the Committee’s objection to the HERE investment was taken as a clear erosion of the “passive investment” safe harbor by the CFIUS bar.

In many ways, the Committee’s handling of the Qualcomm/Broadcom review represents a high-water mark. For the first time, CFIUS recommended that a transaction be blocked before any deal agreements were executed, apparently concluding that Broadcom’s efforts to elect a majority of Qualcomm’s directors would give Broadcom enough control over Qualcomm to satisfy the Committee’s jurisdictional requirements. And on potential harm to U.S. national security, CFIUS appears to have focused on threats entirely independent of Broadcom’s status as a foreign investor. As the Committee’s March 5, 2018 letter to the parties explains, CFIUS was concerned that Broadcom would reduce Qualcomm’s research and development funding (notwithstanding the company’s pledges to the contrary), allowing third-party Chinese companies (particularly Huawei) to take the lead on 5G telecommunications technology and also possibly disrupting supply under critical Department of Defense and other U.S. government contracts. But Qualcomm

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15 See HERE Press Release, HERE Expands into China; Provides Update on Shareholders (Sept. 26, 2017), https://www.here.com/en/company/newsroom/press-releases/2017-26-09; see also Yuan Yang, Chinese Bid for Mapping Company Falls at US Hurdle, FIN. TIMES (Sept. 27, 2017), https://www.ft.com/content/6f0e519c-a33f-11e7-9e4f-7f5e6a7c98a2.

16 31 C.F.R. § 800.302(b).
and all other U.S. businesses are permitted under U.S. law to reduce R&D spending or make other internal business decisions without inviting CFIUS interference.

**Heightened Focus on Sensitive Technology and PII**

Coinciding with the Committee’s across-the-board ramp up has been a heightened focus on deals involving sensitive technologies, such as those related to semiconductor design and manufacturing. President Obama made headlines in December 2016 when he issued an executive order blocking the sale of the U.S. assets of a German semiconductor, Aixtron SE, to a Chinese investor, Fujian Grand Chip Investment Fund. From the text of the order, Aixtron’s use of Metal Organic Chemical Vapor Deposition (MOCVD) systems to build semiconductor materials was clearly a key concern to the Committee. A highly complex manufacturing process, MOCVD is used to produce Gallium Nitride (GaN) semiconductors, which are often found in military products, such as radar transmitters and electronic-jamming equipment.

About nine months later, President Trump similarly made headlines when he blocked the sale of Lattice Semiconductor to Canyon Bridge Capital Partners, a private equity firm managed by U.S. nationals and backed by funds from several Chinese state-owned entities. The concern, as articulated in a press release issued by Secretary Mnuchin, related to “the potential transfer of intellectual property to the foreign acquirer, the Chinese government’s role in supporting [the] transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government.” Not all semiconductor-related investments are the same, however, as CFIUS recently signaled when it cleared the sale of Akrion Systems LLC, a small U.S. equipment supplier to semiconductor manufacturers, to Naura Microelectronics Equipment Co Ltd, a Chinese equipment supplier to semiconductor manufacturers, within a single 75-day review cycle.

Another key area of concern at CFIUS is the extent of consumer or other potentially sensitive data that the target U.S. business collects, uses, or otherwise can access. Earlier this year, MoneyGram International Inc. and Ant Financial Services Group called off their proposed merger after a well-publicized and protracted review in response to CFIUS concerns about MoneyGram’s consumer data and potential breaches of that data in China. Prior to the Ant Financial/MoneyGram review, the most notable PII-related case study had been Fosun International’s acquisition of Ironshore Inc., an insurer that owned a subsidiary serving federal employees. Fosun and Ironshore initially decided against notifying CFIUS of the transaction, but CFIUS approached the parties shortly after closing with concerns regarding Wright USA, a small Ironshore subsidiary serving federal employees. Ultimately, according to public reports, Fosun divested Wright USA to a third party to resolve the Committee’s concerns before selling the rest of Ironshore to Liberty Mutual.

**Strict Scrutiny of Chinese Investment**

The current environment is uniquely challenging for Chinese investors, who must convince a skeptical administration heavily focused on U.S.-China geopolitical and trade considerations, that the proposed transaction raises no national security concerns. Doing so is not impossible, however. Based on parties’ public reports, CFIUS has cleared at least eight transactions involving Chinese investors since January 1, 2017. To put this in perspective, at least 16 such investments were abandoned in the face of CFIUS opposition during the same period. Three others are currently pending, and one of the recently cleared transactions—the sale of Genworth Financial, a U.S.-based insurance company, to China Oceanwide, a Chinese real estate and financial serv-
ices company—went through at least four or five review cycles. Close scrutiny from CFIUS is not new to Chinese investors but, as the numbers reflect, the Committee now demands almost absolute perfection, analyzing every possible risk factor and increasingly declining to consider even exceedingly robust mitigation proposals.

Underscoring the uphill battle Chinese investors face and the geopolitical and economic considerations they must contend with, this past March President Trump directed Secretary Mnuchin to propose restrictions on Chinese investment in “industries or technologies deemed important to the United States” using “any available statutory authority.” The President’s order coincided with a report from USTR, summarizing the conclusions of a seven-month-long investigation into the effects of China’s policies and practices on U.S. intellectual property rights, innovation, and technology development. As part of the investigation, USTR staff reviewed “hundreds” of transactions in “technology-intensive” sectors, such as aviation, integrated circuits, information technology, biotechnology, and industrial machinery. Particularly noteworthy, the report concluded that China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer. At press time, neither President Trump’s directive nor Secretary Mnuchin’s public remarks on the subject clarify whether any investment restrictions will exist within the current CFIUS framework, but heightened formal restrictions on Chinese investment are clearly a priority for the administration.

Proposed Legislative Reforms

Independent of any forthcoming China-specific investment restrictions being considered by USTR and Secretary Mnuchin, a bipartisan group of lawmakers introduced sweeping reform legislation in both the House and Senate last November to close perceived gaps in CFIUS’s jurisdiction and bolster the Committee’s powers. A number of reform efforts have come and gone with little effect since enactment of the last major overhaul bill in 2007, but the recently proposed bill—the Foreign Investment Risk Review Modernization Act (FIRRMA)—enjoys broad support from the administration, and passage appears to be more a question of “when” (and in what form) than “if.”

One striking and potentially far-reaching aspect of FIRRMA relates to the treatment of “emerging and foundational technologies.” As originally introduced last November, FIRRMA would have expanded CFIUS’s jurisdiction beyond M&A transactions to broadly include IP transfers to foreign persons by U.S. “critical technology companies.” But this aspect of FIRRMA has been the subject of several congressional hearings and extensive lobbying efforts, and the current draft bill contemplates using enhanced export control processes to address the transfer of “emerging and foundational technologies.” Specifically, FIRRMA in its current form would create an interagency process to identify emerging and foundational technologies “essential to the national security of the United States” (but not considered “critical technologies” under the Defense Production Act) that would be subject to the Department of Commerce’s export control regime.

The Senate version of FIRRMA also would allow CFIUS to review any foreign investment in a U.S. “critical infrastructure company” or a U.S. “critical technology company”—terms that are broadly defined to include any U.S. businesses that own, operate, or primarily provide services to entities that operate critical infrastructure, or U.S. businesses that produce, trade in, design, test, manufacture, service, or develop critical technologies. Purely “passive investments” would be exempt if the foreign investor would not have any of the following: (1) access to non-public technical information possessed by the U.S. business; (2) membership or observer rights to the board of directors, or the right to nominate a member or observer; (3) involvement (other than through the voting
shares) in substantive decision making; or (4) a parallel strategic partnership or other material financial relationship with the U.S. business.

Lastly, FIRRMA would extend CFIUS’s jurisdiction to purchases or leases of private or public real estate in the United States if that real estate is in “close proximity” to a sensitive U.S. government property or facility, regardless of whether the transaction involved control over a U.S. business. At present, this expansion of jurisdiction likely will be limited to commercial real estate outside of urban areas. As a practical matter, however, especially if the foreign acquirer is from a country of concern, “physical proximity” analysis is a standard part of due diligence in real estate transactions, virtually all of which involve the acquisition of a U.S. business.

While FIRRMA would extend the Committee’s jurisdiction to reach the types of real estate transactions, minority investments, and contribution arrangements described above, FIRRMA would also authorize CFIUS to enact regulations exempting some transactions otherwise covered by these new categories based on the identity of the host country. In determining which foreign countries are eligible for exemption, FIRRMA would direct CFIUS to consider factors, such as whether the United States has a mutual defense treaty in effect with the country or whether the United States and the foreign country have a mutual arrangement to safeguard national security as it pertains to foreign investment. The Senate version would also allow CFIUS to consider whether a country is a party to nuclear non-proliferation regimes in developing the “white list.”

In sharp contrast to the existing voluntary-notice framework, the draft legislation mandates that parties disclose their transactions to CFIUS in some circumstances, including situations where practitioners today might recommend not submitting a transaction to CFIUS for voluntary review. In the original version of FIRRMA, parties to transactions involving a foreign person’s acquisition of a voting interest of at least 25 percent in a U.S. business would be required to disclose their transaction to the Committee where a foreign government directly or indirectly owned a voting interest of at least 25 percent in the foreign person. Parties subject to the mandatory disclosure requirement would have the option of submitting a “short form” notice providing basic information about the contemplated transaction at least 45 days before closing or filing a full written notice no later than 90 days before closing. As the legislation has moved through congressional committees, the provision has evolved to require such mandatory disclosures where a foreign government acquires a “substantial” interest in a U.S. business. Whether this survives in the final bill or the requirement of mandatory disclosures is left for CFIUS to define in implementing regulations based on criteria included in the bill is an open issue. The current Senate version would exempt investors from “white list” countries from the mandatory declarations requirement.

If enacted in its current form, FIRRMA would dramatically increase the number of transactions that are subject to CFIUS review, placing significant new demands on the already over-burdened Committee. Last year, CFIUS reviewed nearly 240 cases, up from about 95 cases a decade ago; moreover, 70 percent of CFIUS cases went to a second-phase 45-day investigation.\(^\text{17}\) To ameliorate resource concerns, FIRRMA would establish a dedicated fund in the U.S. Treasury, call for appropriations “as may be necessary to perform the functions of the Committee,” authorize CFIUS to assess and collect fees for written notices filed with the Committee, and confer special hiring authority on CFIUS member agencies, enabling them to shortcut the traditional government hiring process.

\(^{17}\) See Tarbert Statement, supra note 8.
Procedurally, FIRRMA would also increase the initial review period to 45 days (from 30 days), and provide for an additional 30-day extension in “extraordinary circumstances” to complete the Committee’s investigation, meaning that some CFIUS reviews potentially could take as long as 120 days. Adding authority independent of the President, FIRRMA would give CFIUS the power to “suspend” transactions during the Committee’s investigation, and the legislation contemplates civil penalties should parties violate any “order” issued under the reform statute.

Conclusion
In light of the current public spotlight on foreign investment and trade-related concerns, the Committee’s unprecedentedly aggressive approach to national security reviews, and the very real prospects for significant legislative reform, now is a uniquely interesting and challenging time for antitrust practitioners to understand the CFIUS process when developing a comprehensive strategy to obtain regulatory approvals for their client’s transactions.
Throw Me a Lifeline!
Regression Analysis Explained for Antitrust Practitioners

Elizabeth M. Bailey

Many years ago, I answered a phone call from an old friend who is now a lawyer. I knew he had one of his first matters headed toward litigation. He had no time for pleasantries and jumped right into the problem. He had just gotten off the phone with the economist he had retained.

“Progression!” he said to me, “My economist wants to run Progressions. What in the world is he talking about?”

“Did you say Progression?” I asked.

“Yes, Progression!”

“Is he also asking for data?” I probed.

“Yes, he says he needs a lot of data to do this Progression thing,” he sighed.

“The economist you hired said ‘Regression’ not ‘Progression’” I replied. “He wants to run Regressions.”

“OK, Regressions. But that does not change anything: What is a Regression and why is the economist I hired telling me he needs to run one?” he asked.

Similar anecdotes collected since that telephone call lead me to believe that the spirit of this conversation has played out hundreds of times across the antitrust bar.

Familiarity with regression analysis is important because it is a well-accepted scientific tool used in both merger and non-merger matters.¹ Conclusions drawn from regression analysis related to competitive dynamics are often discussed and relied upon by government antitrust agencies and in judicial opinions.² Regression analysis has been used to address a variety of data-driven issues that arise in competition matters, including defining product and geographic markets, identifying potential price effects, assessing commonality in class certification, and calculating damages. Given the breadth of settings in which regression analysis is used as technical evidence, it makes good sense to be familiar with its conceptual underpinnings and some of the common ways in which it is used in antitrust matters.

¹ For additional discussion of regression analysis, two non-technical references are Daniel L. Rubinfeld, Quantitative Methods in Antitrust, in ISSUES IN COMPETITION LAW AND POLICY 723 (ABA Section of Antitrust Law 2008), and Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 415 (Fed. Judicial Ctr., 3d ed. 2011).

What is Regression Analysis?

A regression is a statistical tool used to measure a precise relationship between two, and often more, factors or phenomena.\(^3\)

If you drive to work in the morning, you know that the time it takes you to get to the office depends on how many other cars are also on the road. While it is useful to know it takes longer to drive to work when there are more cars on the road, in many situations, it is more useful to know how much longer it is going to take to get to the office. Is it five additional minutes or 30 additional minutes? A regression can be used to measure that relationship. If there are 100 more cars on the road because you leave the house an hour later than usual, a regression analysis calculates how many more minutes it is going to take, on average, to get into the office based on the increase in the number of cars.

Regression analysis starts by laying out a theoretical question that you want to measure. Following the drive to work example, suppose we are interested in knowing by how many minutes your commute time increases when the number of other cars on the road increases. Suppose we believe that a simple relationship describes how the time it takes to drive to work is related to the number of other cars on the road. The simple relationship is written as follows:

\[
\text{Drive Time} = \alpha + \beta \times \text{Cars on the Road}
\]

We call the formula used to describe this relationship the regression specification.\(^4\) Translated into words, this regression specification tells us that we believe: (1) the time it takes to drive to work depends only on the number of other cars on the road, and (2) the time it takes to drive to work and the number of other cars on the road are related to each other linearly.

The variable on the left side, the time it takes to drive to work, is called the dependent variable because we are asking what this variable depends on. The variable on the right side, the number of other cars on the road, is called the explanatory variable\(^5\) because we are using it to explain the dependent variable.

However, in most situations, relationships are more complex than just a simple two-variable relationship. For example, the time it takes to drive to work likely depends on more than just the number of other cars on the road. Other factors likely include weather conditions, whether there is road construction that is blocking or slowing lanes, whether a traffic accident has happened, and how many red stop lights you hit along the way. If we believe other factors also play a role in explaining the dependent variable, then it makes sense to include multiple explanatory variables in the regression analysis.\(^6\)

To say we are going to run a regression means, in the context of our example, that we are going to use data on the time it takes to drive to work and the number of other cars on the road to obtain

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\(^3\) See William Greene, Econometric Analysis (3d ed. 1999) for an academic textbook reference on regression analysis and econometrics more generally. As with jelly beans, regression analysis comes in many flavors. Ordinary Least Squares (OLS) and Instrumental Variables (IV) are two of the more common regression techniques used for analyses in antitrust matters.

\(^4\) This specification is for a simple linear regression. To generalize, such a regression specification is typically written as \(Y = \alpha + \beta \times X\) where \(Y\) is the dependent variable, \(\alpha\) is the intercept coefficient, \(\beta\) is the slope coefficient, and \(X\) is the explanatory variable. These variables and coefficients are described in detail in the text below.

\(^5\) Sometimes the explanatory variables are referred to as independent variables. However, the use of the term independent variable implies that the variable is independent of (i.e., not related to) the other right side variables. The term explanatory variable is a more general term allowing for potential relationships among other variables in the regression specification.

\(^6\) We write the regression specification for a multiple regression analysis as \(Y = \alpha + \beta_1 \times X_1 + \beta_2 \times X_2 + \beta_3 \times X_3 + \ldots\). As discussed later in this article, failure to include all explanatory factors can lead to omitted variable bias.
an estimate of the values of $\alpha$ and $\beta$ in our regression specification.\(^7\) We call $\alpha$ and $\beta$ the regression coefficients.\(^8\)

The values of $\alpha$ and $\beta$ describe what the linear regression line looks like.\(^9\) The coefficient $\alpha$, the intercept,\(^10\) tells us what the value of the dependent variable would be if the explanatory variable were equal to zero (i.e., where the line crosses the Y-axis). In our example, the coefficient $\alpha$ tells us, in words, how long it would take to drive to work if there were no other cars on the road.\(^11\)

The coefficient $\beta$, the slope, measures how the time it takes to drive to work is related to the number of other cars on the road. Specifically, the coefficient $\beta$ tells us precisely by how much the time it takes to drive to work changes as the number of cars on the road changes. For example, suppose the time it takes to drive to work is measured in minutes. If we were to find $\beta$ equals 0.05, then when the number of cars on the road increases by 100, the time it takes to drive to work would increase by five minutes ($=0.05\times100$ cars). Similarly, if the number of cars on the road were to decline by 100, the time it takes to drive to work would decrease by five minutes ($=0.05\times-100$ cars).

The coefficient $\beta$ tells us whether the line describing the relationship between number of other cars on the road and the time it takes to drive to work is flat or steep. As shown in Figure 1, the blue line shows a relatively flat regression line ($\beta$ close to zero) while the green line shows a relatively steep regression line ($\beta$ relatively far from zero).

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\(^7\) Technically, regression analysis finds the estimates of $\alpha$ and $\beta$ that provide the best fit to the data. In the context of a one explanatory variable regression, of all the possible lines we could draw through the pairs of data points, we want to find the line that best fits the data. One criterion that is frequently used to determine the best fit is to minimize the sum of squared errors. A regression using this criterion is referred to as ordinary least squares.

\(^8\) In the context of ordinary least squares regression analysis, another term for regression coefficient is regression parameter.

\(^9\) In the context of a two-variable regression, the regression line represents the two-dimensional straight line that best fits the scatterplot of data points. In a multiple regression model with three variables (i.e., two explanatory variables), the regression line that best fits the data is a three-dimensional plane.

\(^10\) The intercept is sometimes referred to as the constant term because its value does not depend on the values taken on by the explanatory variables (i.e., it is constant regardless of the value of the explanatory variables).

\(^11\) If $\text{Cars on the Road}$ is equal to zero, then: $\text{Drive Time} = \alpha + \beta \times \text{Cars on the Road} = \alpha + \beta \times 0 = \alpha + 0 = \alpha$. 
What if $\beta$ equals zero? If we believe we correctly specified our regression and that the data we are using to estimate the regression line are measured appropriately, then we interpret $\beta$ equal to zero as telling us that the number of cars on the road does not explain the time it takes to drive to work (see the pink line in Figure 1). That is, the time it takes to drive to work does not change no matter how many other cars are—or are not—on the road. If $\beta$ equals zero, we conclude that these two variables are not related to one another.

**Can Visual Inspection of a Chart Be Used Instead of Regression Analysis?**

There are situations in which a simple visual inspection of a scatterplot (sometimes colloquially referred to as the eyeball test) can be extremely informative. However, there are at least two reasons why a simple visual inspection of a scatterplot is usually not sufficient to measure a relationship between two or more factors or phenomena.

First, while a scatterplot chart of two variables may be able to suggest visually that the two variables appear to move together, a visual inspection cannot precisely measure that relationship. As shown in Figure 2a, through visual inspection alone, it is unlikely that we would be able to determine whether the precise relationship between the drive time to work and number of cars on the road is that every 100 additional cars on the road leads to a 10-minute increase in drive time or whether every 100 additional cars on the road leads to a 12-minute increase in drive time, and so on. In situations in which we are interested in measuring the precise relationship between two or more variables, visual inspection is generally not sufficient.

Second, even if a scatterplot chart could be used to precisely measure a relationship between two variables, in most situations, more than one factor explains the movement in another factor. When multiple factors are related, as is likely in the case of drive time to work, it is difficult to impossible to use a visual display of the data to measure those relationships. A standard two-dimensional scatterplot can display the visual relationship between number of other cars on the road and drive time to work (see Figure 2a), and a three dimensional display may be possible—though often cumbersome—to view the relationship between number of other cars on the road, weather conditions, and drive time to work (see Figure 2b). However, a visual display of the rela-
The relationship between more than three factors is difficult to impossible because four or more dimensions would need to be condensed into two (or three) dimensions to be readily visualized. Examples include the addition of road construction blocking traffic lanes, severity of a traffic accident, and so on.

What Are Some of the Ways Antitrust Practitioners Use Regression Analysis?
Regression analysis is used to provide data-driven evidence for a wide variety of questions that arise in merger and non-merger antitrust matters. While far from an exhaustive list of all of the settings in which regression analysis has been used, common settings include assessing the scope of the relevant geographic or product market, estimating the magnitude of elasticities of demand, predicting potential price effects from a merger, and estimating overcharges in matters involving damage claims.

For example, whether a potential restraint, such as a joint venture or a refusal to deal, gives rise to competitive harm often turns on the scope of the relevant geographic or product market. Regression analysis can be used to inform the proper relevant market. For example, a central question may be whether the relevant geographic market is limited to Region A (e.g., the United States) or is properly expanded to include Region B (e.g., Asia). A multiple regression can be used to identify the magnitude—and speed—of an import response from Region B into Region A as a result of a relative price change between the two regions, controlling for other factors. Data-driven evidence on the magnitude of the increase in imports in response to a relative price increase informs the scope of the relevant geographic market. In general, the larger the response and the quicker the response, the more likely Region B is properly included in the relevant geographic market around Region A.

Likewise, regression analysis is frequently used to estimate a price elasticity of demand, which also can be used to inform the scope of the relevant market. The price elasticity of demand measures how responsive quantity demanded is to changes in price, everything else held equal. A multiple regression can be used to estimate the price elasticity of demand, with quantity as the dependent variable, price as an explanatory factor, and additional explanatory variables included to control for the other factors that also would be expected to affect quantity demanded, such as the price of a potential substitute product as well as demographic factors.
Additionally, the key analytical exercise in evaluating a proposed merger between two firms is to predict the potential price effect resulting from the merger. If the products sold by the two firms are particularly close or unique in the eyes of consumers, then the merger may be anticompetitive. On the other hand, if rival firms provide strong competitive constraints on the two firms because consumers view those products as equivalent substitutes, then the merger is unlikely to be anticompetitive. Multiple regression analysis can assess the extent to which consumers consider other firms’ products close competitive alternatives to those offered by the parties.

One way to do this is to estimate by how much one of the merging party’s (Firm A) store-level sales were affected by entry from the other party to the proposed merger (Firm B) compared to entry by third-party rival firms (Firms W, X, Y, and Z). If the results of the regression analysis indicate that the magnitude of the hit to sales from entry by each of these rival firms is similar, then the results are likely to support the argument that the parties’ products are not particularly unique or special relative to products available from rivals in the marketplace. On the other hand, if the magnitude of the hit to sales from entry by the other party to the proposed merger is large and the magnitude of the hit to sales from entry by third-party rivals is substantially smaller, then the evidence from the regression analysis may be more consistent with rivals providing only a limited competitive constraint.

Last, regression analysis is also frequently used in matters involving potential damages. Regression analysis can be used to estimate the magnitude of the damages, if any, by comparing prices before, during, and/or after an alleged event, such as a price-fixing agreement, took place. To determine by how much prices increased as the result of an alleged agreement, multiple regression analysis, with price as the dependent variable, is often used. The regression specification would typically include an “on”/“off” indicator variable for the period during which the agreement was alleged to be in effect (“on”), as well as additional explanatory variables to control for the other supply and demand factors on which price would be expected to depend, such as input costs and macroeconomic conditions.

### How Can Regression Analysis Mislead?

While regression analysis is a powerful scientific tool to use to measure the relationship between two or more variables, regression analysis can also create confusion. Regression analysis can be misused and the coefficient estimates can be misinterpreted, rendering results and inferences unreliable.

Although regression analysis does not need to be as flawless as science performed in a controlled laboratory setting in order to be of value, it is important to know where to look for the flaws and the blemishes. The larger the flaws and the blemishes, the less reliable the results of the regression analysis will be to the fact finder. While regression analysis can mislead for many reasons, the most common in my experience fall into three categories.

**Untethered from Common Sense.** Sound regression analysis does not take a spaghetti-on-the-wall approach, in which factors are included through a trial-and-error method in order to choose the relationship that appears to work out most favorably. Sound use of regression analysis relates the specific facts of the matter at hand to the choice of regression specification. Regression analysis should not be undertaken in a vacuum, untethered to the non-statistical information also available in the matter. The choice of regression specification and the factors that are expected to matter should be grounded in—and consistent with—available documentary evidence, deposition testimony from relevant business personnel, and/or sensible economic theory.

**Correlation Is Not Causality.** Although regression analysis establishes a correlation between two variables, regression analysis does not typically establish causality between those two vari-
ables. Economic theory and common sense, not linear regression analysis, tell us whether the first factor causes the second factor, whether the second factor causes the first factor, or whether the causality runs in both directions. In fact, it is even possible for two factors to appear related to one another but have no meaningful relationship to one another or any causal relationship whatsoever.12

For example, imagine a research study that found that people who sleep a large number of hours of the day are also people who are more likely to be sick. That is, there is a positive correlation between hours spent sleeping and being sick. Now, while there may well be a relationship between the two variables, it would take a large leap of the imagination to conclude that sleeping more hours is what causes people to be sick. It is much more plausible that the causality runs the other direction: being sick is what causes those same people to sleep more hours of the day.

In antitrust matters, relationships often have causality running in both directions. For example, it can be informative to use regression analysis to estimate an elasticity of demand. However, in doing so, it is important to take into account that the relationship between price and quantity is bidirectional. In particular, through the demand-side relationship, quantity demanded is usually negatively related to price (because a lower price increases consumer demand for the product). At the same time, through the supply-side relationship, price is often positively related to the quantity supplied (because, after some point, a greater volume supplied increases production costs and thus the price, of the product).

A Duck Is Not Always a Duck (Multi-Collinearity, Omitted Variables, and Measurement Error). In regression analysis, the coefficient on each of the explanatory variables, $\beta$, is interpreted as providing the precise measure of the relationship between that explanatory variable and the dependent variable. For example, if the explanatory variable is labeled Other Cars on the Road, then the coefficient on this variable is interpreted as the change in the dependent variable when the number of other cars on the road changes. This interpretation is correct if the regression is correctly specified and the data used to run the regression are available and appropriately measured.

However, there are instances in which, just because a factor is identified as representing the number of other cars on the road (a duck, so to speak), that coefficient need not be correctly interpreted as the contribution attributed to the Other Cars on the Road factor. The potential for multicollinearity, omitted variables, and measurement error are three reasons why a coefficient may not be correctly interpreted as the factor appears to be labeled.

Multicollinearity arises when two, or more, explanatory factors are highly related to each other.13 For example, the listing price of a house and the ultimate sale price of a house are likely to be highly collinear. A higher listing price will go hand in hand with a higher sales price. Similarly, crude oil prices and gasoline prices at the pump are likely to be highly collinear. It is difficult to identify the true coefficient estimates for variables that are highly collinear with one another because the separate effect from one explanatory factor compared to the other explanatory fac-

12 “Spurious correlation” is the term used when two variables appear related but in fact have no meaningful relationship to one another. In addition to simple coincidence, another reason two variables may appear related to one another but in fact have no causal relationship to each other is because a common third factor is driving both variables to move in a similar way. For example, suppose we observe rising housing prices in San Francisco and rising housing prices in Washington, DC. While the two series of data would be positively related to each other, it is unlikely that one is causing the other. Rather, a third factor, such as common changing preferences toward city-living and/or job growth common to both cities, may be the underlying factor driving the increase in both price series.

13 In the extreme, two explanatory factors can be perfectly collinear. As an example, if a variable takes on one of two values, e.g., On/Off, then including an explanatory variable for On and an explanatory variable for Off in a regression specification would result in perfect collinearity because the data that comprise these two variables would be the exact opposite of one other. That is, knowing the values taken on by the On variable for each observation would allow the values taken on by the Off variable to be known perfectly.
tor cannot be disentangled. Factors that are collinear are not typically estimated with precision. The estimated coefficients may have the wrong sign (e.g., negative instead of positive), unreasonable magnitude, and/or appear to have no relationship with the dependent variable.  

Multicollinearity can be a confounding factor in antitrust matters. As an example, consider a proposed merger between two brick-and-mortar retailers. In evaluating the likely competitive effect of the proposed merger, it is often useful to understand how, if at all, the prices for the parties’ products depend on the presence or absence of other nearby brick-and-mortar retailers that sell similar products. A common regression specification is to consider prices for particular stock-keeping-units (SKU) from one of the merging parties as the dependent variable and a series of explanatory variables reflecting the presence (or absence) of other potentially price-constraining brick-and-mortar retailers in geographic proximity (e.g., located in the same shopping center as the merging party, located within a one-mile distance band of the merging party, or located within a five-mile distance band of the merging party).

If two of the brick-and-mortar retailers used as explanatory factors are typically co-located together in the same shopping center, then the physical location of these two retailers will be highly collinear, making it hard to disentangle the separate effect from each of the two co-located retailers on the party’s SKU prices. The difficulty here comes from the fact that the same signal (the co-location) is being used to tease out two potentially different effects (the two rival retailers). In this case, identifying which of the two co-located rival retailers is a more important factor in constraining the party’s SKU prices may only be possible with the addition of non-statistical evidence from business documents and/or testimony from business personnel.

Omission of one or more relevant explanatory variables in a regression specification can happen for several reasons. The regression may be incorrectly specified in the sense that an explanatory factor that is expected to help explain the dependent variable is excluded from the regression specification. Alternatively, while the regression may be correctly specified, data may not be available for one or more factors or phenomena that are expected to matter. If there are omitted variables, the effects of the omitted variables are typically soaked up by the explanatory variables that are included. As a result, the magnitude of the estimated coefficients for the included explanatory variables may be too big or too small compared to their “true” values because some of the effect of the omitted variable is attributed (incorrectly) to the included explanatory variables.

For example, in transactions in which products are sold through a bid process, regression analysis is often used to measure the relationship between explanatory factors, such as the identities of rival bidders, and the price bid by a particular firm. While sometimes difficult to measure, a firm’s backlog (that is, the firm’s accumulation of unfinished products in the queue to be supplied to customers) can be one factor that contributes to the explanation of a firm’s bid price on future products to be supplied. In some situations, the greater the firm’s current backlog, the higher the firm’s bid price for sale and delivery of products in the future. If documents or testimony suggests that backlog may be a factor that explains bid prices, then the failure to include backlog as an explanatory factor may result in the coefficients for included variables of interest, such as the identity of rival bidders, being too big or too small compared to their true contribution.

Measurement error occurs when the data used for one or more factors in the regression are imprecisely measured relative to how that factor is described in the regression specification. For

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14 With multicollinearity, the coefficients for the two (or more) explanatory factors may not be individually statistically different from zero, but taken together, have joint statistical significance.
example, it may be difficult to accurately measure the number of other cars on the road because we observe the count of cars passing through only one particular intersection rather than along the entire route of the commute. Similarly, it may be difficult to accurately measure road conditions. For example, we may observe only inches of snow accumulated, not the more relevant factor of how well-plowed the roads remain during the snowstorm. In the presence of measurement error, the estimated coefficients may be too big or too small compared to their true values had the data been measured without error.

**Conclusion**

Regression analysis is well-accepted scientific evidence relied on in merger and non-merger antitrust matters. Combined with other non-statistical evidence, such as documents and testimony, technical evidence from regression analysis can be a powerful tool for measuring the relationship between two, or more, factors or phenomena.

Regression analysis, however, should not be a substitute for careful and critical thinking about the regression specification, the data being used, and the results being generated. Regression analysis should not replace common-sense thinking that is tethered to the specific facts at hand. If garbage goes in regression analysis, whether in the form of a poor regression specification or poor data availability, then garbage will come out and create confusion. This will render the inferences from the regression analysis output unreliable. Regression analysis does not need to be flawless in order to be of value, but it is important to know where to look for the blemishes in order to evaluate the reliability of the results. The scientific and technical nature of the evidence generated from regression analysis requires lawyers, economists, expert witnesses, and fact finders to be careful consumers of regression analysis.
Interview with Frédéric Jenny, Chairman of OECD Competition Committee

Editor’s Note: Frédéric Jenny, Professor of Economics at ESSEC Business School in Paris, is Chairman of the OECD Competition Committee (since 1994). He was Vice-Chair of the French Competition Authority (1993–2004), Non-Executive board member of the Office of Fair Trading (2007–2014), Judge on the French Supreme Court (Cour de Cassation) (2004–2012) and Chairman of the WTO Working Group on Trade and Competition (1997–2003). He was interviewed for The Antitrust Source by Krisztian Katona.

THE ANTITRUST SOURCE: You have been the chair of the OECD Competition Committee since 1994 and, of course, there have been major developments in international antitrust policy and enforcement since then, with an ever-growing and complex level of antitrust enforcement agencies and international organizations that focus on policy issues, and also on enforcement issues.

Over time, competition policy has become a key item on the agenda in many jurisdictions. So, my first question to you is what do you view as the two or three most important antitrust developments over the last couple of decades?

FRÉDÉRIC JENNY: It’s hard to choose two or three because so many exciting developments have taken place. But the most striking development has been the fact that competition policy and competition law enforcement have become a crucial element of economic policy in many economies throughout the world. This development has come in the wake of the push for trade liberalization and of a general trend toward more market-oriented economies.

I think, to be honest, that the OECD competition committee—which has devoted a lot of resources to the technical assistance of newly-established competition authorities, has peer reviewed a large number of non-OECD member countries, and has been very active in the promotion of good practices—has contributed substantially to this development.

The second development which strikes me as important is the increasing convergence among jurisdictions on the substantive analysis in competition law enforcement.

The convergence has not been limited to the North Atlantic, although in the early 2000s major steps took place towards greater convergence on substantive analysis in competition law between the U.S. and the EU. But even when we look across the world to new jurisdictions which have recently adopted competition laws, we see that their ways of assessing competition law issues are largely aligned with the practice of older, more-established jurisdictions and that they use the traditional tools of antitrust, such as the Hypothetical Monopolist Test to define markets, or the HHI to assess concentration in a market, et cetera.

There remains work to be done to promote convergence on how to assess anticompetitive practices by firms with market power, or on the types of remedies to be used, but on many other fronts, and in particular with respect to merger control, convergence on the methods to be used for substantive analysis has largely taken place. The idea that horizontal anticompetitive agreements are particularly nefarious and how one should look at them has also been accepted throughout the world.
And I think that the third important development has been the tremendous increase in the intensity and the depth of cooperation on enforcement between competition authorities.

Formal cooperation among competition authorities on cases with transnational dimensions is now common, but there have also been a great deal of informal exchanges between competition authorities, technical assistance offered by competition authorities with a lot of experience to newer agencies to try to bring them up to speed, and generalized exchanges of ideas between competition authorities.

So, the increase in the number of countries enforcing competition law, the convergence across jurisdictions of substantive ideas on competition law enforcement, and increased cooperation among competition authorities seem to me to be the three most important factors as I look back over the 22 years that I’ve been the Chair of the OECD Competition Committee.

**ANTITRUST SOURCE**: How do you see the role the Committee has played in international antitrust policy and practice over this period, and also how has the work of the committee changed over time? I assume that has been pretty significant since 1994, as well.

**FRÉDÉRIC JENNY**: First, one should keep in mind the fact that the OECD Competition Committee is, I believe, the most important forum where competition officials engage in the discussion of fundamental issues relating to competition law enforcement or competition policy. Thus, the OECD Competition committee is the place where the deepest exchanges on the principles we apply and how we should apply them take place. Now, these exchanges have been, of course, the foundation for a great deal of convergence.

Furthermore, the debates among the members of the Competition Committee of OECD, which includes, by the way, not only the members of the OECD but also the 15 or so countries which are associated with the committee even if they are not OECD member countries, have hugely benefited from the work of the secretariat, which writes excellent background papers on a number of topics to help those discussions.

This collective production of good practices and good thinking has been materialized by “the best practice roundtables,” which we have held and for which we have systematically published the country contributions, the experts’ presentations, and the secretariat background note, when there was one. We have held over 100 of those “best practices roundtables” on a very wide variety of topics, which have been explored in detail. For each topic we have tried to come up with the best possible and most relevant interpretation of competition law, we have tried to identify the relevant tools to address the topic, and we have explored past jurisprudence in the OECD countries.

The “best practice roundtable series” is one source which is used not only by competition authorities, but also by judges, law firms, and economists throughout the world. So this is really important. We have also been able to offer technical assistance based on this analytical work.

Another important instrument which has fostered convergence has been the peer reviews undertaken by the OECD Competition Committee. Countries which want to improve their domestic competition law or competition policy can ask to be peer reviewed, whether or not they are Member States of OECD. Those peer reviews are based on extremely thorough analysis of the local situations and they always end with recommendations for the peer-reviewed country or competition authority. These peer reviews have been put forward by competition authorities or advocates promoting domestic changes as important and relevant indications of the direction which the country should follow.

So, the work of the OECD Competition Committee has been a combination of technical seminars, serious thought in the Committee on best practices, on cutting edge issues, and peer reviews.
The Committee composition and working methods have changed over time in different ways. The Committee itself is no longer composed mostly of representatives of government ministries. The vast majority of its members are now the heads of independent agencies and this makes the conversation among the members more technical, more professional, and less political. The Committee changed its working method, which used to be centered on the production of substantive reports that took many years to be finalized and led to intense negotiations among the Member countries. Nowadays competition authorities in the Committee are mostly interested in sharing experiences; discussing the challenges they face when dealing with new issues, such as the financial crisis of 2008 or the emergence of the digital economy; entertaining a dialogue with legal and economic experts, non-members, judges, and members of the academic community; et cetera. Finally, the OECD Competition Committee is very much interested in opening up to other policy communities so that competition law enforcement will be supported by complementary policies.

**ANTITRUST SOURCE:** What are the major projects the OECD Competition Committee and its working parties are currently engaged in? And also, what have been the OECD's greatest competition achievements and documents or guidance documents in recent time?

**FRÉDÉRIC JENNY:** There are many different dimensions to our work. So, let me start with international cooperation. Because the OECD is the Organization for Economic Cooperation, international cooperation has been very important to us.

In terms of output, under my chairmanship, the OECD Competition Committee has proposed two recommendations on international cooperation on competition, which were adopted by the OECD Council. In 1995 we proposed the 1995 Recommendation on International Cooperation. This Recommendation was reviewed and updated in 2014 and replaced by the Recommendation concerning International Co-operation on Competition Investigations and Proceedings. The 2014 Recommendation deals with the commitment to cooperate, the mechanisms of notification of investigations, and the coordination of investigations with respect to timing, substantive analysis, and remedies. Furthermore, the 2014 Recommendation calls for the adoption of national provisions that allow competition agencies to exchange confidential information without the need to seek prior consent from the source of the information—so-called “information gateways”—and for enhanced cooperation in the form of investigative assistance, including the possibility to execute dawn-raids, or inspections of premises, requests of information, witness testimonies, et cetera, on behalf of another agency. In between those two recommendations, in 2005, we published a document on best practices for the formal exchange of information between competition authorities in hard-core cartel investigations.

Now those documents have shaped the way in which enforcement cooperation is done by competition agencies. We know that this is the case because we have made an inventory of 140 memoranda of understanding and of 15 cooperation agreements among competition authorities, and we saw that the large majority of them were inspired by the 1995 recommendation.

The 2014 recommendation has also already had an impact. Some of the instruments suggested in the recommendation have been adopted in agreements of the EU, Japan, Australia, and New Zealand.

Those recommendations encourage competition authorities in Member States, and also competition authorities in non-OECD countries, to deepen cooperation with other competition agencies, and they are the basis on which agreements or memoranda of understanding are signed between competition authorities.
This is one example of how we work, of the kind of instruments we produce, and of the impact that our work has on international cooperation on competition. And we review the effectiveness of the instruments we produce on a regular basis.

**ANTITRUST SOURCE:** You mentioned increasing convergence and cooperation over the years. Just to step back in time, at the very first OECD Global Forum on Competition in 2001, there was a heated exchange between Bill Kolasky and Mario Monti over their respective agencies’ decisions in GE-Honeywell. Of course, since then we have seen a tremendous amount of convergence and much deeper and broader cooperation in merger control globally. How do you see the state of convergence and interagency cooperation in the conduct area are compared to merger control?

**FRÉDÉRIC JENNY:** Well, first of all, I think that there has been also a tremendous convergence in the conduct area. Convergence is not limited to the merger area. One example I would give is the adoption by the EU of two important ideas which came from the U.S. The first idea is that the goal of competition law enforcement is the protection of consumer welfare. If you know the history of European competition law, it was not obvious that the goal of the European competition law should be the protection of consumer welfare rather than as a way to facilitate the achievement of the internal market. The second idea that was imported into European law is that, when it comes to abuse of dominance cases and looking at exclusionary practices, a more economic approach is necessary to distinguish between practices that should be prohibited and practices which should be allowed. Again, the adoption of such an idea by the European Commission was not obvious because of the more formalistic or legalistic background of European competition law. If we think about vertical restraints, there also has been quite a lot of convergence across the Atlantic. Initially, European competition law was very suspicious of vertical restraints because there was a fear that such restraints might be used to limit the integration of the European market.

In the 2000s we moved towards a more economic analysis of those vertical restraints and to a less “political interpretation” of the goal of competition law. As a result, vertical restraints are now looked at in the European context to a large extent with a view which is much more aligned with U.S. analysis. Now, there are still areas where convergence is not complete and, to be honest, I think there is a limit to what we can expect in terms of convergence. If I take exploitative practices by dominant firms, for example, we still have to acknowledge that there is a difference between Europe and the U.S. This difference is largely explained by different historical developments in the EU and in the U.S. In the U.S., the vibrancy of the economy is due to firms that grew and became dominant because they were efficient and, therefore, their dominance is in many ways the result of their superior economic performance.

In Europe, large firms were often protected by the states, either because they had concessions or because they had some other protection or privilege. Thus, large powerful firms do not necessarily mean more efficient firms. Second, of course, we have in mind the European history of the late 1920s and the 1930s which led to the Second World War. There is a notion that powerful businesses somehow corrupted the political system and pushed governments to spend a lot of money on armament which was good for business but also led to military destruction.

It is thus fully understandable that in the U.S., competition authorities would refrain from intervening against firms with market power unless they had strong evidence of misdeed.
It is also understandable that, in Europe, competition authorities would be more wary of economically powerful firms and of firms having a dominant position on the market, and they would want to intervene more frequently to ensure that such firms do not abuse their dominant position.

We can try to push for more convergence, but I think that there is a limit to what we can achieve with respect to convergence, and this is one of the reasons why cooperation between or among competition authorities is necessary. Of course, cooperation among competition authorities would be a necessity even if every country in the world had the same competition law, if we want to tackle the issue of transnational anticompetitive conduct or transactions. But when there are differences in the interpretation of competition laws due to historical or philosophical differences between countries, cooperation is also necessary to avoid conflicts or inconsistencies, either in substantive analysis or in the design of remedies.

I think that historically what we’ve seen, at least during my time at the OECD, is an enormous emphasis on convergence until the early 2000s, and since then quite a bit of emphasis on cooperation.

**ANTITRUST SOURCE:** You discussed exploring ways to develop cooperation between agencies to face today’s challenges of globalization and transnational conduct or transactions. One instrument you noted was information gateways. Where do you see international cooperation going in the coming years, and what new ways and tools of cooperation do you expect competition agencies to adopt to address today’s challenges?

**FRÉDÉRIC JENNY:** Over the last 20 years, there has been tremendous progress on the issue of international cooperation among competition authorities, but in a sense we have reached a plateau. The challenge now is to find new ways to deepen our cooperation. We do a lot of thinking within the OECD Competition Committee about ways to deepen cooperation compared to the current level. In this respect, a number of ideas are worth investigating.

A very old idea that may need to be revived is the idea of “positive comity.” The question is whether the idea of positive comity could lead to a better protocol involving more systematic cooperation between competition authorities. There were high hopes in the late ‘80s that positive comity could be the basis of enhanced cooperation agreements, and then this notion was somehow forgotten and we moved to other bases for cooperation. One may think about whether there would be ways to revive this idea that a positive comity obligation could be translated into a useful cooperation protocol between competition authorities, particularly when it comes to extraterritorial remedies.

But there are also other ideas worth exploring, like establishing a one-stop-shop system. When Christine Varney became Assistant Attorney General for Antitrust, the first time she came to OECD, she talked about whether we should start thinking about one-stop-shop systems, or “lead agency” models, for mergers. Following such models, one could achieve a higher degree of consistency of decisions across jurisdictions. But for something like the “lead agency” model to work, this “lead agency” would somehow have to take into consideration in its decision-making process the impact of the merger in other jurisdictions.

Partial or total recognition of foreign decisions may be another useful instrument that would facilitate convergence and could decrease the cost of enforcement of transnational cases.

The idea that multilateral or regional cooperation should be encouraged, as opposed to the development of a “spaghetti bowl” of bilateral cooperation agreements, might be also something to consider.
So there are different possibilities that at least are being considered right now at the OECD Competition Committee. It is too early to say whether any of these leads will turn out to be useful, but we will devote some time in the next two years to exploring them.

**ANTITRUST SOURCE:** Last December, the Competition Committee held a roundtable discussion to debate challenges related to the imposition of extraterritorial remedies in light of recent cases, and also to discuss how agencies approach enforcement in cross-border matters.

What are your views or thoughts about the issues and challenges these extraterritorial remedies pose in competition enforcement, and what has been the discussion or the key outcomes of the discussion last December at the Committee?

**FRÉDÉRIC JENNY:** The risk of interference between national competition law regimes is likely to increase for a number of reasons, among which are the increasing interpenetration of national markets and the development of the digital economy. Because of the development of the global value chain, competition authorities may be concerned about the effectiveness of the remedies they impose when they find a competition infringement in the global supply of a component incorporated in a product which may be sold in their country. They then may be tempted to impose remedies which have an extraterritorial reach.

I am convinced that this is one area where one should explore whether positive comity obligations could help us solve some of the problems raised by the risks of extraterritorial remedies. When there is no other way to solve a competition problem in a country than imposing a remedy with an extraterritorial reach, competition authorities contemplating such remedies, would, for example, have a duty to consult with the competition authorities of other countries that might be affected by their remedies. This consultation could help the competition authority of the country likely to be affected by the extraterritorial remedy imposed by another country’s competition authority to make suggestions or representations to minimize possible interference or inconsistencies between the competition regime of the country which wants to impose the extraterritorial remedies and its own regime.

**ANTITRUST SOURCE:** Turning to another topic, one of the Competition Committee’s ongoing strategic themes is competition and the digital economy. Over the last few meetings of the Committee there were a number of roundtables on different issues in the digital economy, including a series of discussions on disruptive innovation in different sectors, multisided markets, algorithms, big data, and other topics.

How do you see the issues and challenges for competition enforcers created by the emergence and development of the digital sector? What have you learned from the ongoing roundtables with OECD members and observers?

**FRÉDÉRIC JENNY:** The emergence and the growing importance of the digital economy create a number of challenges for competition authorities. For example, the growing importance of disruptive innovations, which are often, even though not always, linked to the development of digital technologies calls into question the idea that a market is the locus of competition. Indeed, we see more and more cases of disruptive innovators competing with firms in an industry, while the disruptive innovators are not directly operating on the market they disrupt and are not trying to enter this market. So, we have to revise our view of the market as being the locus of where all the competitors are because we now know that particularly when it comes to disruptive innovations, there are competitors coming from outside of the market.
Talking about disruptive innovations, competition authorities have always had some difficulty establishing the consequence of practices or transactions on innovation and on the future of competition because the relationship between concentration, competition, and innovation is complex and not well understood by economists. But there is even more difficulty predicting the impact of transactions or behaviors on disruptive innovations or the possible impact of disruptive innovations on market competition in the future. For example, the Microsoft EU decision did not anticipate that Google was about to become the major competitor of Microsoft. Similarly, the OFT decision on the Facebook/Instagram merger did not anticipate that Instagram could become a social network competing with Facebook and only looked at it from the standpoint of a camera application.

The growing importance of the digital economy, and in particular the development of the sharing economy, may also challenge our definition of what is a firm, because we now see cases where the supply of a service to consumers does not come from an arm's-length transaction between consumers and providers organized following the traditional vertical and hierarchical organization that most firms have. Instead the provision of the service results from cooperation between the consumer of a service, the owner of an asset susceptible of providing the service, and a digital platform allowing them to communicate with each other. This leads to complex legal issues about the definition of what is a firm in this context and the characterization of the area of activity of the firm.

Then, there are other challenges. For example, we have challenges with regard to how to treat multi-sided markets, how to assess market power on such markets, and how to characterize anticompetitive practices on such markets. Multi-sided markets can exist, of course, outside of the digital economy, but the growth of the digital economy has facilitated the development of such markets.

We are used to defining markets by using the Hypothetical Monopolist Test. But the question we are faced with now is how to adapt this instrument to the case where there are several sides to the market. What are the interactions between the sides that we have to take into consideration? What are the instruments to measure these interactions? Are there cases where we do not have to worry about the multi-sidedness of the market, et cetera? To help the competition community on these matters, the OECD Competition Committee organized hearings of economists and recently published a methodological booklet on how to deal with those issues. If we now consider what is anticompetitive, we all know that a price below variable costs on one side of a multi-sided market does not necessarily indicate predation. So we have to adapt our traditional view that pricing which is below variable costs must mean predation.

What all this means is that we have to adapt our tools of analysis and our instruments, and this is exactly why the OECD Competition Committee has put a lot of effort and continues to do so in the organization of roundtables and hearings on various aspects of the impact of the digital economy on competition law enforcement and competition policy. The ultimate objective of this work is to bring competition authorities up to speed by consulting economists who have specialized in studying those issues and are willing to put their collective wisdom at our disposal so that we can come up with practical tools for competition authorities when they deal with the digital economy.

And I think it's useful because when, for example, I look across the world at decisions on multi-sided markets, I see that it is still true now that some competition agencies, even in fairly developed countries, recognize the existence of such markets but then analyze them by looking at competition issues on one side and then looking at competition issues on the other side, while completely forgetting the interaction between the various sides of the market.

So, clearly, we have not yet gotten to the point where the proper analytical instruments to deal with the digital economy challenges are in general use.
Turning now to procedural fairness and due process, this has been a hot topic in international antitrust for years now. The Competition Committee held a series of roundtables and also published a report on procedural fairness a few years ago, following which the ICN also picked up this topic and recently prepared guidance documents. I understand that OECD members are considering further work on these issues. Where do you think we are on procedure of fairness and due process issues in competition enforcement these days, and what issues and challenges do you see in this area?

FRÉDÉRIC JENNY: First of all, I think that we are on the right track with respect to procedural fairness and transparency in competition proceedings. A decade or so ago Christine Varney tried to push the OECD Competition Committee to discuss procedural fairness, but it soon became obvious that there was little appetite for this discussion. I think that the reason is that originally we looked at the issue of due process while trying to find an ideal model of due process.

And I think that this was a mistake, because due process is something that has to be adjusted to or put into the context of the legal systems of each country, and those legal systems can be quite different. So what happened was that the discussion was interrupted for a number of years and then it was reactivated because the membership realized that indeed, as you’ve said, due process is too important to ignore.

I think that there is a combination of reasons why collective discussion of due process has become so important. The interpenetration of markets means that competition authorities need to cooperate more and more with each other and, for this cooperation to take place, they must trust that the competition authorities with whom they cooperate respect due process. The move toward a more economic approach to competition law means that competition authorities’ decisions are more complex, and there is a need to ensure that the proper procedure has been followed as a guarantee that these decisions are purely the result of the competition authorities’ analysis of the legal and economic facts of the case. The level of administrative sanctions for violators of competition laws has increased in some countries to a quasi-criminal level and, in parallel, there is an increasing concern that procedures leading to such harsh sanctions should be fair.

The current discussion on due process issues is on a much more pragmatic level than used to be the case. There is now a realization that there are basic principles of due process on which we can, I believe, all agree. For example, the fact that the suspected violations should be notified to the party investigated, the fact that the party suspected of a violation should have access to the file, the fact that the possibility should be given to the party investigated to rebut the charges, et cetera. But those principles should be adapted in each country. Because of the differences in legal systems there is no “one size fits all” way of meeting the basic principles of due process. So the crucial question is now the way in which the general principles are in fact adapted in each national system.

The ICN has also looked at issues of transparency and procedural fairness, and its work is a very good starting point. At the OECD Competition Committee we are considering whether it would be worthwhile to explore what we can add to the ICN work, for example with respect to the treatment of confidential information or of legal privilege and whether there is a consensus on good practices to be followed in the adaptation of the general principles of due process and transparency in the legal systems of the OECD Member States.

So, it seems to me that the discussion of the issues of transparency and procedural fairness has gathered momentum and is going well.
**ANTITRUST SOURCE:** Another topic is that these days we see a widespread and growing concern over the economic power of large companies, in particular in the technology sector. I understand that the Competition Committee will hold a hearing in June to discuss issues, such as whether market concentration is changing in different countries, what measures can be used to assess concentration, and whether competition agencies should be concerned about any of the changes in the marketplace. What are your views about these concerns about growing concentration in the marketplace?

**FRÉDÉRIC JENNY:** I’m quite happy that we’re going to have this hearing because a hearing as opposed to a traditional roundtable discussion is what we do when we don’t know if there’s a problem but we want to know more about the issue from the people who claim that there’s a problem.

So, for example, we had hearings on the development of the digital economy at the very beginning when it wasn’t clear to us what the issues were. More recently, we had one on artificial intelligence to try to get an angle on what kind of problems could exist that we are not used to dealing with and that we should be aware of.

So, I’m looking at this hearing on concentration as an inquiry allowing competition authorities to assess whether there is convincing scientific evidence that market concentration is increasing, whether this means that competition has become less intense, and whether there is something that competition authorities have missed or should do differently in the future. For this assessment we are going to hear from economists who think that there is a problem and economists who are skeptical of this view. By the way, we used the same methodology recently to try to assess the validity of the claim that common ownership of competitors by financial institutions raised a competition problem. Another controversial topic.

It is impossible for me, before having participated in the hearing, to go beyond this because as you know this is a field which is quite contentious. There are economists with very different views on this topic, and I really cannot tell at this point whether I’m convinced that there is a competition problem that we haven’t seen and that we should deal with. If there is evidence that aggregate concentration is growing and that this increase in aggregate concentration also leads to a potential lessening of competition on markets, we will have to ask ourselves whether we have too narrow a view of relevant markets or of competition mechanisms on relevant markets. But we are not there yet.

**ANTITRUST SOURCE:** One hotly debated topic in international antitrust is the consideration of public interest factors in competition enforcement. As part of that international discussion, for example, the OECD also had a roundtable in 2016 focusing on public interest considerations in merger control, in which there was discussion of merger control rules and public interest clauses and also the relevant challenges for competition authorities.

I know you have done a lot of thinking about these issues over the years and I’m curious where you see this international debate about public interest considerations of competition enforcement going in the coming years?

**FRÉDÉRIC JENNY:** I think that this issue is not going to go away easily and that, therefore, the debate is going to continue. I think that what we see is that there’s a rise, certainly in Europe, but not only in Europe, of populism. An important part of the populist vote is fueled by a discontent with international competition or international trade or globalization. But, in fact, the discontent expressed by populist movements is a reaction against competitive mechanisms. As an econo-
mist, I am used to thinking that competition works very well and that there are no losers in the competition game if you assume that reallocation of resources takes place, which is a theoretical textbook assumption.

In theory, if a firm underperforms in an activity, either it improves its efficiency or it leaves the market. The reallocation mechanism allows the factors of production, both the capital and the labor, to be reallocated to other markets, and in the long run all markets are in equilibrium, all labor and capital are fully employed, and society benefits from the increased efficiency due to the competitive pressures.

There is a big disconnect between this ideal long-term situation and what happens in the short- and medium-term in reality. Indeed, in the real world we have people who are winners and people who are losers in the competitive game. And the crucial question is whether the people who lose their jobs because of competition can benefit from the reallocation process to find other opportunities elsewhere. Capital doesn’t have much of a problem to reallocate itself in other industries. We see firms coming in and out of industries, or even countries, all the time because capital has become very mobile.

But labor doesn’t seem to be mobile, or at least some kind of labor is not that mobile. I would say low-skilled or semi-skilled labor is not very mobile, neither professionally nor geographically, for all kinds of reasons. For example, if you have several people working in a family and one of them loses his or her job, it can be difficult for that person to relocate elsewhere because either the family has to split up or there is a risk that the other member of the family who has not lost a his or her job might not find an adequate job in the new location where the first person could find a new opportunity. If a worker has built a house in a place close to his job and has to move somewhere else to find a new job, he or she can run the risk of losing quite a bit.

Professionally, it is not always easy for workers who have lost their job in one activity to acquire the skills that will be in demand in another activity et cetera. Some workers who have been displaced because of competition may either be unemployed for long periods of time or have to take pay cuts to keep their job.

So if we acknowledge that reallocation of labor does not take place as we would hope and that some people lose in the process of competition, the question is whether competition authorities should be concerned about what happens to the losers. The traditional view has been that the losers can be compensated by the winners since competition is in principle a positive-sum game. And by and large, competition authorities have held the view that there are other policy instruments than competition law to ensure that the losers in the competitive game are compensated. Therefore, competition authorities have held the view that they should stick to the narrow mandate of promoting competition and efficiency and not be concerned with the problem of fairness or redistribution. But there are two limits to this reasoning. First of all, it seems that in most countries the tools of redistribution are not very effective and that redistribution doesn’t take place very easily, which means that there are losers who do not get compensated and feel that competition is unfair. Second, one could argue that the main issue is not so much to redistribute the gains brought about by competition to the losers but rather to facilitate the reallocation of labor across regions and activities so that the losers in one activity can find new opportunities in another activity. Redistribution, even when it works, is like putting a band-aid on a wound, but it’s not preventing the wound in the first place.

As there are large numbers of low-skilled workers in developed countries losing their jobs or part of their income because of a combination of technological development and increased competitive pressures, competition has increasingly been seen as an unfair economic mechanism
making capitalists richer but making a part of the working class or of the middle class engaged in traditional industrial activities poorer. This has fueled the populist discontent with “liberalism” and market-oriented reforms. This is partly why in a large number of countries there is not much popular support for competition or for the work of competition authorities in spite of their claim that they protect consumer welfare. If we had successful policies facilitating professional and geographical mobility for low-skilled workers, the negative reactions against market mechanisms would be less powerful.

So the questions which have been hotly debated recently are the following: should competition authorities think about the tradeoff between increased competition and efficiency and increased perceived unfairness of the market mechanism, and if so, do they have the appropriate instruments to trade off efficiency considerations versus considerations of fairness? For example, if a merger is likely to limit competition but also to allow a more orderly migration of jobs from the activity of the merging firms to other activities, should this second effect be weighed against the inefficiencies associated with the decrease in competition? We know that tradeoffs of that nature are considered in the competition laws of some developing countries like South Africa. But we also know that we do not have good instruments to engage in such tradeoffs.

There may be other ways for competition authorities to take into consideration the fairness of the competitive process besides including fairness as a goal of competition law. For example, competition authorities could advocate more forcefully for policies, such as educational policies, or policies which facilitate geographical mobility, such as housing policies which facilitate the geographical reallocation of labor. They could also target their enforcement priorities to cases where the benefits of increased competition accrue disproportionately to the relatively less well-off consumers in order to mitigate the perceived unfairness of the competitive process.

**ANTITRUST SOURCE:** Over the years you have worked with a number of competition agencies at different stages of their development. What prospects do you see for developing countries with new agencies and also what advice would you give to an emerging competition enforcer?

**FRÉDÉRIC JENNY:** I’m struck by the fact that in a number of developing countries, and in some developed countries as well, you may end up having quite a good competition agency and yet very little competition. To a certain extent this was the case in France for a number of years. The reason for this phenomenon is that, in many countries, the complementary policies to competition law enforcement, such as deregulation or regulatory reform, promotion of the rule of law, fight against corruption, open trade policies, curbs on the powers of state owned enterprises, et cetera, are not implemented. Yet, if competition law enforcement is necessary to promote competition, it is not sufficient by itself to ensure a competitive economy.

So it seems to me that what is really important in those countries is to have something over and beyond competition law which is a competition policy and, in particular, a competitive neutrality framework.

With respect to competitive neutrality, when you look at countries like Indonesia, Malaysia, and China, and many others, you see that no matter how effective the competition authorities are, there are still state-owned enterprises that have better access to capital than their private sector competitors, that have regulations that are favorable to them and unfavorable to their competitors, that are exempted from competition law, that have an undue influence on the sectoral regulator, that are sheltered from the risk of bankruptcy, and so on and so forth. In this kind of environment, the enforcement activities of the competition authority, even if this competition authority is quite active, are only going to be of marginal importance in the general economic landscape.
At OECD, we did quite a bit of work over the years on deregulation and regulatory reform as well as on competition policy. But I think that it is important to say to the countries which have acquired a competition law and still have all kinds of regulation and all kinds of state-owned enterprises that are not competing fairly with other private domestic or foreign firms, that they need to better integrate competition law enforcement with competition policy and to have a competitive neutrality framework.

Needless to say, competition authorities in their advocacy function are well placed to send this message. Thus, competition advocacy is an important function of competition authorities. But, in too many countries, the competition authority, particularly when it is a young agency, is unfortunately not sufficiently listened to.

ANTITRUST SOURCE: Looking ahead, what would be your predictions for the next 25 years of internationally enforced antitrust enforcement and policy? How do you anticipate the OECD Competition Committee will change over this period?

FRÉDÉRIC JENNY: Let me first look at the past to get an idea of what the future could be. When I came into the Committee, the Committee members were representatives of ministries. At that time there was, in most OECD Member States, a competition division in the Ministry of Finance or the Ministry of Economic Affairs, and the idea that there should be independent competition authorities was not widely understood.

Over the last 25 years, there’s been a radical change. There are now very few representatives of governments in the Committee, but there are representatives of independent competition authorities who are very proud of their independence and try to protect it, which, I think, is a very good development. Yet, I also think that the next step would be to integrate a little bit more competition law enforcement with competition policy and with other dimensions of economic policy.

It seems to me that one of the failures in a number of OECD member countries is that there is an insufficiently developed linkage between competition law enforcement and competition policy on the one hand and other economic policies, on the other hand. This leads to inconsistencies, this leads to competition law enforcement being seen as the domain of the gurus of competition, who are not part of the mainstream of economic policy.

And I think that we could increase our effectiveness by deepening the dialogue with policy makers in other fields of economic policy, such as anti-corruption, trade, investment, and more generally all those other policies that have an impact on the level of competition.

So, if I have a prediction to make it is that competition authorities which value their independence but suffer from their isolation to a certain extent will find ways to try to foster better dialogue with other economic policy makers. Needless to say, the OECD, being a horizontal organization dealing with all aspects of economic policies, is a good place to help member countries better integrate competition law enforcement and economic policies.
Interview with Alexandre Barreto, President of Brazil’s Administrative Council for Economic Defense (CADE)

Editor’s Note: Alexandre Barreto was appointed president of Brazil’s Administrative Council for Economic Defense (CADE) in April 2017. He holds a Masters in Management, a specialization in Public Management, and a bachelor’s degree in Management. He has more than 25 years of experience in the public sector, including in the areas of procedural reform, fraud prevention, and prevention of bid rigging. This interview was conducted for The Antitrust Source by John Bodrug on March 29, 2018.

THE ANTITRUST SOURCE: Thank you for taking time for this interview and congratulations on CADE’s GCR Agency of the Year Americas Award.

ALEXANDRE BARRETO: Thank you. It was completely unexpected for us. It was very important because 2017 was a year of transition. We had a new President, a new General Superintendent, and three new Commissioners. This award is a way of recognizing that the whole team continues doing the good work. It is very important for us. Thank you.

ANTITRUST SOURCE: Could you start by outlining the structure of CADE, the role of the President, and how CADE’s investigative and adjudicative roles work?

ALEXANDRE BARRETO: Yes. The framework that we have now was brought in by a new law—actually not so new—introduced in 2012. Before that, the Brazilian antitrust system was composed of three independent bodies—CADE itself, which was responsible for judging the cases, the Secretariat of Economic Law, which was responsible for investigations, and the Secretariat for Economic Monitoring, which is linked to the Ministry of Finance and responsible for giving economic support for the decisions.

After the law, we had encouraged the unification of the different enforcement activities—judgment, investigation, and economic studies. The framework is very well designed because now we have the enforcement and adjudicative responsibilities under a single institution. In order to separate the judgment and investigative bodies we have a so-called Chinese wall.

The investigation is conducted by the General Superintendence. They are also responsible for negotiating the leniency agreements and the settlement agreements that we have, although these agreements can also be negotiated by our Administrative Tribunal. To illustrate how well the Chinese wall works, even I do not have knowledge about the negotiation of a leniency agreement. The Tribunal will only have full knowledge of a leniency agreement during the judgment phase. The division of competences is very well designed because it allows us to have mechanisms of checks and balances inside the agency.

The General Superintendence is responsible for instructing the activities of nine antitrust analysis units. The administrative Tribunal is composed of seven members, including six Commission-
ers and the President. Once a case is received in the Tribunal, a Commissioner is randomly chosen to report the case.

We also have a Department of Economic Studies at the agency, which is responsible for issuing economic studies and opinions, ex officio or at the request of the Plenary, the President, the reporting Commissioner, or the General Superintendent. In addition, we have the Attorney General* who represents CADE legally in the justice system.

**ANTITRUST SOURCE:** You mentioned there is a reporting Commissioner assigned to each case. Does that reporting Commissioner have a greater role or influence in the decision?

**ALEXANDRE BARRETO:** All decisions are made by consensus or majority at the Tribunal. The reporting Commissioner is responsible for reviewing the case. He will write a lead report and submit the report for judgment. Even though he leads the case, he has one vote. So all the cases are decided, as I said, by majority or consensus.

**ANTITRUST SOURCE:** The reporting Commissioner might even dissent from the decision.

**ALEXANDRE BARRETO:** It could happen. If the reporting Commissioner has an opinion and the majority of the Tribunal has another opinion, the majority will prevail.

Just to give you an example. When analyzing a merger, for instance, if the reporting Commissioner thinks that the merger should be refused and the majority of the Tribunal has further thoughts, one Commissioner will ask to do a deeper review of the merger and prepare another report. The commissioners will have to choose between the two reports presented. Additionally, it is very important to say that our judgment sessions are open to the public and even transmitted by the internet.

**ANTITRUST SOURCE:** I noticed on the CADE website that you can listen to Tribunal sessions live or in the archives.

**ALEXANDRE BARRETO:** Yes, you can. The principle that we have at CADE is transparency. I’m sure that’s very important for our accountability and for assurance that we are making the right choices.

**ANTITRUST SOURCE:** I understand that in the past, CADE Commissioners have traditionally been lawyers or economists. Do you see your background in management and public administration as assisting in bringing a different perspective to your position?

**ALEXANDRE BARRETO:** Despite not being a lawyer or economist, I have been working in the public service since 1993, so I have a background of 25 years working for the government. In my former position, I was working with investigations in public bids.

For four years, I was director of a unit at the National Court of Accounts. I was director of the unit responsible for the investigation of public bids. At that time, I had contact with CADE when the problems came about the bids. So I have a background in cases like this.

* Editor's note: “Attorney General” is best understood as “General Counsel” by American lawyers.
At the National Court of Accounts, we also worked with an administrative process that is exactly the same as the process that we have at CADE. So even though I don’t have a background exactly in this matter, my conciliatory approach and profile as a coordinator, in addition to my previous experience, matches with my position at CADE.

Despite that, I believe that a new look at an organization can help to see the problems that could not be seen or bring a new approach to ancient problems. I can give a very nice example. During the last 30 years, CADE has had a huge problem with the Central Bank of Brazil because they had conflicting competences about mergers and investigations in the financial system. The problem was that the division of competences regarding mergers and antitrust cases involving the financial sector was not so clear.

The only way to find a solution in this case was to work in coordination with the Central Bank. This has been done in many countries. However, this problem was not possible to solve for the last 25 or 30 years. When I took office at CADE, the issue of coordination with Central Bank was one of my main objectives. And we got it. I believe that arriving from seeing things at a different agency helped me to achieve this coordination with the Central Bank.

**ANTITRUST SOURCE:** Did your experience leading the anti-corruption unit for public bids influence your approach at CADE with, for example, finding more ways or better ways to work together with the anti-corruption unit?

**ALEXANDRE BARRETO:** Sure, indeed. I think my previous experience is helpful for a lot of reasons, not only for techniques of investigations but mainly for the coordination among the different bodies. In Brazil, we must work in coordination with these other agencies. It is very important for us, especially when we talk about corruption matters, in which there are four or five agencies working on different aspects of the same case. Therefore, for reasons of efficiency and quality of the work, it is very important that we coordinate the investigation between the different agencies. So considering my previous experience, sure, it can help a lot.

**ANTITRUST SOURCE:** Last May, shortly before you joined CADE, it was reported that Brazil’s federal police inspected CADE’s offices and seized evidence in relation to an allegation of attempted influence over CADE’s review of a company’s trade practices. CADE said that its decision-making processes had not been improperly influenced by third parties. Has that experience influenced the way that CADE handles cases or communications with a third party?

**ALEXANDRE BARRETO:** Well, this event was a critical test for CADE. But I can say that we passed the test very well, since we fully collaborated with the investigation and no evidence of influence in the analysis of CADE’s agents was found.

So I believe that the mechanisms of checks and balances, governance, and transparency that we have in the agency work well, protecting CADE from political pressure and attempts of corruption.

**ANTITRUST SOURCE:** I noted from media reports that CADE received a significant budget increase in December. How did you manage to persuade the government to increase CADE’s budget? How does CADE plan to make use of that additional money?

**ALEXANDRE BARRETO:** Indeed, we had a nice increase in our budget. It is worth saying that our
budget is very limited when compared to other antitrust agencies around the world, or even when we compare it with other agencies in Brazil. In 2017, our budget was about $7 million. It is very small for the size of the job that we do.

We have increased our budget by almost $6 million, which represents about 90 percent of CADE’s previous budget. It was a real challenge to achieve this increase considering that we are currently facing a serious fiscal crisis in Brazil. In 2016, we had an amendment to our constitution saying that government expenditures could not increase for 20 years. So it was a real challenge to achieve the increase in our budget.

But we did it. We had many discussions with the Ministry of Finance, the Ministry of Planning, and with the legislators to show them how the investment in CADE works. For each $1 that is invested by society in CADE, we collect more than $20 in fines and pecuniary contributions regarding settlement agreements in general. So I could assure my colleagues in the Brazilian government that an increase in our budget pays off.

This increase will allow us to hire consultants and advisors for specific cases, invest in new software programs, in new equipment, and mainly in training our personnel. So this increase in our budget will be used to enhance our investigations.

**Antitrust Source:** One of your stated goals is that you’d like to provide greater legal certainty for companies under scrutiny. Can you amplify on this issue and how you plan to address it?

**Alexandre Barreto:** Yes. We are always looking to ensure that our process has greater legal certainty. As a result, we are constantly publishing guidelines on our internal procedures. Another reason to provide legal certainty for companies under scrutiny is for them to feel comfortable to apply to our leniency program. That is by far the most successful enforcement program that we have in Brazil. Since the establishment of our leniency program, which occurred in 2000, we have signed more than 80 agreements. Last year, 21 agreements were signed. Despite these success and the greater degree of legal certainty provided in our leniency program, we think that is always possible to improve processes. We are always looking to assure more legal certainty for our process.

**Antitrust Source:** An area that I understand raises concerns about uncertainty and the leniency process relates to whether, if you have a leniency agreement with CADE, this protects you from prosecution by other Brazilian authorities. Is that something you’re looking to address?

**Alexandre Barreto:** Here is how it works: The leniency program at CADE, is only available for the first applicant. The company that signs a leniency agreement with CADE receives criminal and administrative immunity. The 18 years of the program proves very clear for the companies and for the other governmental agencies that leniency must be observed and the rules must be observed. In order to achieve this result, you have to work very closely with the federal prosecutors and with other agencies.

**Antitrust Source:** Is it clear what the benefits are for second-in leniency applicants?

**Alexandre Barreto:** Yes. They have some benefits, but they are a little bit different from the first-in leniency benefits, since we try to encourage a real competition between the applicants. So, by our law, the benefits from the leniency itself are only for the first-in. But the second-in and the third-in, even the fourth-in, can look to CADE for another kind of agreement, a cease and desist agree-
ment. The signature of a cease and desist agreement will result in discounts in the fines to the signatories and avoid legal litigations. The procedure has been working very well.

Lastly, the signatory of the leniency agreements is immune from paying fines, but the second-in and the third-in are not. In the year of 2017, we collected in agreements with the second-in and the third-in applicants more than $180 million.

**ANTITRUST SOURCE:** In the context of cartels, one of the things you’ve talked about is the possibility of using big data to identify some types of cartels and of using tools to identify bid rigging more effectively. Can you comment on that?

**ALEXANDRE BARRETO:** We have a project at CADE called the Brain Project. Under this project, we collect data during our investigations and we receive data from other government agencies, which allow us to identify suspect behaviors in public biddings and investigate a potential bid-rigging. In addition to this project, we are investing in big data, econometric, and other mining tools in order to improve our investigative capacity.

These projects are still in the beta version, but we already have investigated some cases, and have ongoing investigations, which were possible due to the Brain Project. It’s working very well. We hope to have it completely functional in 2019. We had the opportunity to show this program in an OECD workshop, in a visit to the AdC, the Portuguese Competition authority, and to some countries in Latin America. Many other authorities have contacted CADE and showed their interest in the Project too.

**ANTITRUST SOURCE:** So, for example, would this program be analyzing government bids and trying to find similar patterns?

**ALEXANDRE BARRETO:** Yes. It is exactly like this. Let’s say that the behavior of cartelists can be predicted with the use of the previous data, and that because of the method that I told you about, we can find evidence of a cartel being practiced at this exact time.

We have another project related to the Brain Project, but it is in an initial stage. We have an idea of boosting our Brain Project with the system of open bids in Brazil in order to have evidence of a cartel happening in real time. That is the next step of our project.

**ANTITRUST SOURCE:** One more question on cartels. I understand that under Brazilian law, the mere exchange or receipt of competitively sensitive information from one competitor to another can constitute an offense. Is that type of conduct something that you would prosecute or investigate or, in practice, are you really more focused on instances where there’s a mutual understanding or agreement between the competitors?

**ALEXANDRE BARRETO:** Yes, it can be a sign of collusion between the companies, but it depends on the case. In cases like this, you must use the rule of reason. But, we have some examples in which the exchanging of very sensitive information was used as a proof of a cartel.

**ANTITRUST SOURCE:** I wanted to ask you about a recent case involving car manufacturers and the enforcement of intellectual property rights. I’m not sure whether that was strictly a monopolization case that was brought against several entities or whether it was a coordination case. But what does that case say about the interface between intellectual property rights and competition law in Brazil?
ALEXANDRE BARRETO: The case regarding an investigation in the automotive market was recently judged at CADE. The discussion was if the IP rights could be used by the carmakers to prevent auto-parts makers from producing and selling certain spare parts for the aftermarket. That was exactly the discussion—if the IP rights should be applied only in the car manufacturing market or be extended to the spare-parts aftermarket. After a long discussion, the Tribunal decided, by a majority of four to three, that the carmakers can use these IP rights in both the original and aftermarket.

ANTITRUST SOURCE: And the decision was that the companies could enforce their IP rights individually, even though it was brought against three different companies?

ALEXANDRE BARRETO: The decision was specific for those three major carmakers companies that were accused of abusing their IP rights. Nonetheless, it sends a message to the market, since it can be used as a legal precedent.

ANTITRUST SOURCE: Generally, I understand you’ve indicated that CADE should enhance its investigation of unilateral conduct or monopolization. What do you have in mind in that area? Are there specific instances where you think CADE should be more active?

ALEXANDRE BARRETO: Well, as I said, despite the increase in our budget, we still have a very small budget and we have only 200 persons working for us at the whole institution. If we consider enforcement activities, this number falls to less than 100 persons, which obliges me to make some choices concerning the work to be done.

We are currently facing a huge problem in Brazil with corruption matters and the cartel cases derived from the Car Wash operation, which is a very huge case in Brazil, and are our top priorities. Despite the amount of work being done and still to be done in the cartel determent, we are also planning to foster investigation in unilateral conduct. The challenge is to choose wisely the cases worth doing a deeper investigation. For instance, we have ongoing investigations about unilateral conduct, such as the investigations involving Google.

We also have some very recent agreements on unilateral conduct that were signed about one or two months ago. One good example is the one about online travel agencies and the imposition of price parity clauses. That was a case that was handled in the United States and I believe in Europe as well. We managed to solve the case reaching an agreement with the companies.

ANTITRUST SOURCE: I was a bit confused by the reports on this case because it was against three different travel agencies. Is it a unilateral conduct case?

ALEXANDRE BARRETO: Yes. It was a unilateral conduct for each one of them. But we managed to put it together in the same process because the matter was exactly the same.

ANTITRUST SOURCE: Because the three of them were all doing the same thing in the same industry, it was having an anticompetitive impact?

ALEXANDRE BARRETO: They were doing the same practice, but we didn’t have any evidence that they were working together.
ANTITRUST SOURCE: I’d like to ask you about mergers. What is CADE’s perspective on behavioral remedies for mergers, and does that differ from the perspective in the United States, for example?

ALEXANDRE BARRETO: Talking about similarities with the U.S., we are also inclined to use structural remedies which are always an easier way to address concerns in a merger. If you check the remedies used in the recent years, you will realize that we use more structural remedies, but it does not prevent us from using behavioral remedies when they are more suitable to mitigate problems.

ANTITRUST SOURCE: Has CADE been prepared to use behavioral remedies on occasion when that’s the only available option to allow the transaction to proceed?

ALEXANDRE BARRETO: We have a preference for using structural remedies, but we are ready to use behavioral remedies, when it is necessary. We had a very recent example in the merger of the companies AT&T and Time Warner.

The preference is for structural remedies in Brazil, as I mentioned. But only structural remedies could not address all the competition concerns in this case. Therefore, we used a behavioral remedy—that was very wise in my opinion—which consisted of a series of commitments to observe objective criteria of non-discrimination. It was an example of a behavioral remedy that we used.

ANTITRUST SOURCE: And that was a vertical issue.

ALEXANDRE BARRETO: Yes. Definitely.

ANTITRUST SOURCE: When do merging parties negotiate with the Tribunal in Brazil and when do they negotiate with the General Superintendent? What are the considerations in timing from the merging parties’ perspective in that process?

ALEXANDRE BARRETO: The merging parties can negotiate a merger control agreement with either the General Superintendence or the Tribunal, but it depends on the stage of the proceedings. In Brazil, we have 240 days to analyze a case and we can postpone for 90 days more in complex cases. So we have a maximum of 330 days to analyze a merger.

This total time is divided between the Superintendence and the Tribunal, so the companies looking to get the approval for a merger are encouraged to negotiate a merger control agreement with the Superintendence. If the merging parties cannot reach an agreement with the Superintendence, which can happen for different reasons, they still have the chance to look for an agreement with the Tribunal.

It is important to highlight that the merger control agreement negotiated with the General Superintendence does not imply a settlement and consequent clearance of the merger. Since the investigative and adjudicative bodies are completely independent, once the merging parties achieve an agreement within the General Superintendence, the latter suggests to the Tribunal to clear the merger conditioned on the signature of the merger control agreement negotiated.

However, once the Tribunal receives the case, it can agree with or modify the terms of the agreement presented by the General Superintendence and could totally disagree with the terms proposed in the agreement—or the necessity or sufficiency of the former—blocking or approving the merger unconditionally.
That means that despite the importance of the General Superintendence report to the analysis, the Tribunal is completely independent to issue another opinion. That is the reason why the merging parties are able to negotiate an agreement with the Tribunal even when they do not manage to get a positive report within the General Superintendence. We have a lot of mergers cases examples in which the merging parties managed to negotiate an agreement with the Tribunal despite the suggestion of the General Superintendence to block the merger.

**ANTITRUST SOURCE:** So an agreement with the Superintendent does not necessarily mean you’re going to be cleared by the Tribunal?

**ALEXANDRE BARRETO:** Yes. Exactly, at least when you talk about merger control agreements. Just to clarify the process in our settlement proceeding—it is important to note that despite the independence between our investigative and adjudicative bodies, we certainly reach out to each other in order to coordinate cases analysis. Therefore when negotiations about the agreement are being made with the General Superintendence, the Superintendence reports to the Commissioners what is happening. So we don’t have surprises when a case goes to the Tribunal.

**ANTITRUST SOURCE:** On international merger transactions, does CADE sometimes defer to lead international jurisdictions or try to make its remedies requests consistent with what is being sought in other jurisdictions?

**ALEXANDRE BARRETO:** It depends on the case. The important thing for us in international mergers is to keep a cooperation agenda with other antitrust agencies in order to share information, try to coordinate the time of analysis, and avoid imposition of conflicting remedies.

**ANTITRUST SOURCE:** And do you use waivers of confidentiality to achieve that?

**ALEXANDRE BARRETO:** Our exchange of confidential information is subject to the granting of waivers by the parties. However, even in the absence of waivers we can share public information with other authorities.

**ANTITRUST SOURCE:** In 2016 there was a resolution clarifying what constitutes an associative agreement in Brazil and that affected notification obligations under the merger provisions. Was there a significant increase in the number of merger notifications? Have there been challenges for merging parties to determine what constitutes as associative agreement?

**ALEXANDRE BARRETO:** Actually, prior to the enactment of the Resolution N 17 in 2016 there was a great legal uncertainty about which associative agreements’ notifications were mandatory. As a result, we received many notifications of associative agreements that caused no competitive concerns. The enactment of the Resolution N 17 was an effort to bring more legal certainty to the market by clarifying the mandatory notifications criteria of associative agreements. It is important to note that the Resolution was elaborated after public consultations with the market.

**ANTITRUST SOURCE:** Can you comment on compliance programs, and what reactions you had from the business community in response to CADE’s guidelines on the compliance programs?

**ALEXANDRE BARRETO:** The business community reacted very well to the launch of our Guidelines...
on Compliance Programs in 2016. We received special congratulations during the consultative process in the preparation of the guideline that occurred in 2015. During this process, we received about 14 contributions, including those made by individuals, law firms, private companies, and bar associations. We have also received some international contributions, such as the contribution from the Antitrust Sections of the ABA and the IBA.

ANTITRUST SOURCE: Does the anti-corruption unit have a history of recognizing a robust compliance program for the purpose of reducing fine?

ALEXANDRE BARRETO: In Brazil we have a new law about anti-corruption matters and this law also states that the companies must create anti-corruption compliance programs in companies under investigation.

ANTITRUST SOURCE: Would this obligation be imposed as part of a remedy?

ALEXANDRE BARRETO: It could be used as part of a remedy. It can be done by a judge (either at the judicial system or administratively). At CADE, in some cases, we have ordered the creation of compliance programs in companies as a remedy of a merger agreement in order to avoid future anticompetitive infringements.

ANTITRUST SOURCE: You mentioned the CADE’s Department of Economic Studies and then noted that they’ve issued reports on the anti-dumping laws and the impacts in Brazil and the impact of Uber on the internal transportation market. How much influence within governments in Brazil have the Department of Economic Studies had with these types of studies?

ALEXANDRE BARRETO: At the beginning of the interview, I told you about the different antitrust bodies that we had in Brazil in the previous law system. Nowadays, we have merged the different functions and activities realized in those bodies in a single agency—CADE—but we still have a separate body, the Secretariat for Economic Monitoring in the Ministry of Finance, which is responsible exclusively for competition advocacy.

But that doesn’t mean that we do not have competence over advocacy matters. In fact, our Department of Economic Studies has been working on many reports and market studies that are been used by the policymakers and the legislators to address competition issues. To illustrate that, one of the studies is exactly about the impacts of anti-dumping measures in trade and competition. Another example is a study about the entry of Uber in the Brazilian market and the effects on competition. For instance, another study on this issue is being launched today. In short, these studies concluded that Uber had a positive impact on competition.

This is a good example of advocacy that we are doing right now in Brazil in order to foster advocacy. Despite the positive “conflict of competence” between CADE and the Secretariat for Economic Monitoring, we are trying to work in coordination with the Ministry of Finance to foster competition in Brazil. We are currently working to sign, probably next month, an agreement with the Ministry of Finance to coordinate and divide the advocacy initiative between the different antitrust bodies.†

† As anticipated by CADE’s President, the agreement was signed on April 27, 2018, aiming at establishing the coordination of joint initiatives in the advocacy of competition.
**ANTITRUST SOURCE**: Do you see greater scope for private rights of action for antitrust or competition law offenses in Brazil? Is that an area in which CADE might have some advocacy efforts?

**ALEXANDRE BARRETO**: Yes. It is a rising tendency in Brazil. Actually, one of our main objectives is to foster antitrust private enforcement because we understand it plays an important role in complementing public enforcement. In this matter, we are working on two fronts right now. One of them is an internal rule in CADE that will make clear what evidence CADE can disclose in order to foster the private enforcement of the law.

On this subject, we are searching for the right balance between the disclosure of evidence that proves the private claim on one hand, and on the other hand, the protection of the information provided by the leniency applicant, in order to preserve our leniency program. It is important to note that two of three cartel cases under investigation right now were derived from the leniency program. So it’s a very important source of information for us.

And we have a golden rule. We have a very clear policy that the companies that seek leniency from CADE cannot receive worse treatment than the other ones. So despite the fact that one of our main objectives is to foster private enforcement, we had to be very clear that we can’t give information provided by leniency applicants.

The other front of work about this matter is a proposed law that is being discussed right now in the Brazilian Senate and that we are really engaged in this discussion. This law creates more legal certainty for the leniency applicants. And at the same time, it brings more incentives for private plaintiffs to bring an action. This bill was approved by one Committee at the Senate just two weeks ago and now it is at another Committee. I believe that we will have it approved by next year.

**ANTITRUST SOURCE**: Might we expect to see increased use of private actions in Brazil as a result of this bill?

**ALEXANDRE BARRETO**: I am pretty sure about that. And I think that we have found the right balance between fostering private enforcement and protecting the leniency applicants.

**ANTITRUST SOURCE**: I thought I’d close with a couple of questions about international cooperation and CADE’s efforts with other international agencies and organizations. Would you like to comment on CADE’s efforts to expand its role in and cooperation with international organizations that you deal with, such as the OECD?

**ALEXANDRE BARRETO**: In the last few years, we have been doing a nice job in the field of international cooperation. We are currently co-chairing the ICN cartel working group, which is a very important forum for us.

We are also looking for approval to become an Associate member of the OECD Competition Committee. We have been collaborating with OECD a lot in recent years, under the status of a Participant member, and our new law was structured based on the principles of the OECD. Becoming an Associate member of the OECD Competition Committee is very important for us because it will enable us to strengthen our policy and make it more consistent over time. We also have a lot of agreements with other countries.

More recently, we also have cooperated more closely with the United Nations, which has a specific program for Latin America. Last year, we became a member of COMPAL, and our objective there is to help other countries in Latin America to have an experience as successful as we have
in Brazil. I’m sure that we can help all the countries in the region to structure the processes and systems in their own agencies.

In addition, I cannot forget to mention BRICS.

ANTITRUST SOURCE: I was going to ask you about that. Last year, CADE hosted the biennial BRICS conference, which I gather, was a great success. But at the same time, there are significant differences between BRICS members in their laws and approaches. Do you see a common competition agenda for the BRICS countries?

ALEXANDRE BARRETO: Yes. Despite the geographical, cultural, and legislative differences between Brazil, Russia, India, China, and South Africa, we also have some similarities. I believe that we are countries that will play a very important global role in different areas, including in the competition domain. We have a memorandum of understanding that allows the BRICS competition agencies to share information in some cases. China now is very important for us because it’s investing a lot in Brazil.

We use our agreement with the Chinese authorities to comprehend better what’s happening in China and what’s happening with the companies who are coming to Brazil. And we also have some working groups created inside BRICS.

ANTITRUST SOURCE: BRICS has established sector-specific groups?

ALEXANDRE BARRETO: Yes, four working groups for specific sectors of the economy. And in these groups, we are doing studies to comprehend what’s going on in the following fields: automotive, pharmaceutical, and digital economy. For instance, in October this year, we will host the first meeting of the BRICS Working Group on Digital Economy during an event of the Brazilian think tank IBRAC. This event will contribute to forward-looking competition policies and help us to address the challenges of the digital economy through the exchange of experiences.

ANTITRUST SOURCE: Thank you for your time today and good luck with your busy agenda.
Interview with Jacques Steenbergen, President, Belgian Competition Authority

Editor’s Note: Professor emeritus Dr. Jacques Steenbergen is, since 2013, President of the Belgian Competition Authority. He was from 2007 to 2013 Director General for Competition in the Belgian Ministry of Economic Affairs. He taught competition law at the University of Leuven from 1980 to 2014. Before joining the Competition Authority, he was a partner in the Brussels office of Allen & Overy, and he has been legal secretary to the President of the European Court of Justice under the presidency of Professor J. Mertens de Wilmars. The interview was conducted for The Antitrust Source by Juergen Schindler on March 29, 2018.

THE ANTITRUST SOURCE: You are one of the longest-serving heads of the Competition Authority, one of the most prominent heads of the Competition Authority in Europe, so it’s great having you here and having your perspective both on Belgian and European law.

Would you explain how the Belgian Competition Authority is set up, how it works, and how it is structured?

JACQUES STEENBERGEN: We have a separation between the decision-making powers and the investigation powers, so there is the Inspection and Prosecution Service, which is the largest part of the Authority, headed by the Competition Prosecutor General. They are in charge of the investigations, but they can also take decisions in simplified merger procedures, and they can reach settlements on infringement cases.

When it is not a simplified merger procedure or there is no settlement and still a case—the Investigation Service can of course also close the case—then it is brought before the Competition College, which consists of the President and two assessors taken from a list of 20 who have been designated—appointed is not really the term for them—according to the same procedure as the members of the Board and for the same term of six years.

Those are the key components of the Authority. The President is also in charge of the international cooperation issues, except when it is in cases dealt with by the Investigation Service. The Authority is run by a Board of four members—the President, the Competition Prosecutor General, the Chief Economist, and the General Counsel.

ANTITRUST SOURCE: So there is a clear distinction between the investigation part of the authority and the College, and the investigation side can decide some of the cases on their own without any involvement of the College.

JACQUES STEENBERGEN: Correct.

ANTITRUST SOURCE: You only get involved once basically the Investigation Authority calls for it.

JACQUES STEENBERGEN: In infringement cases, yes. But also when there are requests for interim measures, they go straight to the College. I’m not even allowed to know whether a case exists. The
Chinese wall is really very strict, so I'm not informed of opening of cases. I read about dawn raids in the press releases just like you and everybody else, so that is quite strict.

Cases are opened by the Prosecutor General after hearing the Chief Economist. That is the rule. Because of the strict distinction, cases are never discussed in the Board because then I'm there.

ANTITRUST SOURCE: That also means you actually don't have any discretion of calling a case into the College.

JACQUES STEENBERGEN: None at all.

ANTITRUST SOURCE: It's only for investigators to involve the College.

JACQUES STEENBERGEN: Yes.

The Chinese wall is really very strict, so I'm not informed of opening of cases. I read about dawn raids in the press releases just like you and everybody else . . .

ANTITRUST SOURCE: Just as a bit more background, in 2013 the Authority was reformed. I think the main objectives were that the staff and the budget of the Authority should be increased, that the case handling should be more efficient?

JACQUES STEENBERGEN: In 2013 we were reestablished as an independent administrative authority with its own legal personality. Although there was no lack of independence beforehand, now it looks certainly much more solidly independent than before. The organization was streamlined with this clear distinction of the Investigation and Prosecution Service headed by the Prosecutor General, and that is certainly confirmed by practice. That is when settlement procedures were introduced. Since then, except for a case that was already almost ready to be decided when we were established, the infringement cases have all been settled.

ANTITRUST SOURCE: Looking back five years later, with more staff, more budget, and a structure that confirms the independence that already existed, and looking at case handling and efficiency, do you think you have achieved what you were setting out to do?

JACQUES STEENBERGEN: Yes, I think so, but it took longer than I had hoped because, frankly, initially we had fewer staff instead of more, and it took some time to get all of the government approvals needed to recruit staff or civil servants. By the time we had all the green lights, we lost two or three years.

During that period, you continue to lose staff. We don't have a high turnover. The turnover was around 10 percent. But you have people who retire, you have one or two people who get a better opportunity, and as we were not only blocked in our recruitments but also in our promotions, some people became impatient.

So the start was more difficult than expected, but now these are issues are more or less all sorted.

With regard to the streamlining of case handling, yes, we achieved our objective rather faster than we had expected from that point of view, because if you look at the experience of the European Commission, it took longer before they had their first settlement. We had already two settlements one year after the Authority's establishment.

ANTITRUST SOURCE: For newly established authorities or for other authorities that undergo institu-
tional change, do you have any takeaway messages from your side looking back on these five years?

JACQUES STEENBERGEN: Try to have clear rules on how you recruit and how you can use your resources because a bit of a Kafka side was that we were never lacking in money, but we were lacking in the authorization to use it. That was a slightly unusual situation.

ANTITRUST SOURCE: It’s frustrating to have a budget that you cannot spend actually to create your authority.

JACQUES STEENBERGEN: We didn’t create it. It was not that bad. But yes, for recruitment, we lost there. Fortunately, last year we could recruit, and we recruited 12 people, bringing us back to nearer 50, but we’re not there yet.

ANTITRUST SOURCE: Case handlers?

JACQUES STEENBERGEN: We only recruit case handlers and a few administrative staff.

ANTITRUST SOURCE: Concerning efficiency, anything on the procedure that you think has changed? As you said, you were very quick with settlement decisions, quicker than even the European Commission.

JACQUES STEENBERGEN: Not necessarily quicker, but the ball started rolling almost immediately.

ANTITRUST SOURCE: So, basically, at the new authority you already got requests for settlements the very moment settlement procedures were possible?

JACQUES STEENBERGEN: Yes. Who took the initiative is not public.

ANTITRUST SOURCE: Do you think that this strict separation between investigative powers and the final decision-making powers in the more serious cases increases efficiency?

JACQUES STEENBERGEN: I think it increases comfort for the stakeholders. Ever since the previous authority started 25 years ago in 1993, the government environment, the bar, and the press have always insisted very much on this separation.

You cannot say that it makes things more efficient in the sense that it takes a bit more time if two different bodies have to look at a case. But I think that negative effect, because there is some negative effect of a separation, has really been contained to an absolute minimum.

What we now have to look at—and this is something you have to do regularly; it is not an issue of big institutional reform; it is more I would say maintenance of your institution—are the rules on simplified merger control procedures.

With the reform of 2006—the previous reform—we raised significantly the thresholds for merger notifications and organized a simplified procedure. Within one year the percentage of resources taken up by merger control was brought down from above 70 to below 20 percent.

Merger-control cases, because of the deadlines, always have priority, and in a small authority you do not work with a separate staff for merger control and a separate staff for infringement cases. No. You must be able to move people around depending on sector familiarity or just availability.
That shows that the thresholds for simplified cases are quite important. That was not mentioned as an issue during the previous M&A boom because most of the transactions were financial transactions with no direct overlap and therefore easy to be qualified as simplified.

The present increase in M&A activity is very different. Last year there were more than three times more non-simplified cases than before. That takes up a lot of resources, in the first place, of the Investigation and Prosecution Service, but also the College. The capacity issue is not the College; the capacity issue is getting into the College.

We have had out of these non-simplified a couple that should have been simplified or could have been simplified, and if this becomes a trend and not just something that happened during a year—no year is exactly like the previous year—then we have to look at that.

I use a very simple test. If the hearing takes only a quarter of an hour, it was not a complicated case. You feel slightly embarrassed for those who had to travel. They never complain, but their case is seen is easy.

We have almost never used the full time period. The College decides swiftly.

ANTITRUST SOURCE: One aspect I want to discuss with you is your power to have a sectoral investigation in which you can issue questionnaires to companies while investigating a sector. Looking at your power, when do you decide to exercise it?

Also, do you think it is a tool that helps you in your enforcement? Does it help you with your future policy, and is it something that occasionally might be overused? Without pointing to any particular Member State, but there is quite a lot of activity in some I would say. Is there a risk that this could be overused?

JACQUES STEENBERGEN: I don’t think that in our case there is a risk that it would be overused because we do not have the capacity to use it too often. So we at least have to think carefully before we do something.

You do something when there is an important market, important for the consumers, important for the stakeholders, where things are going on tending to show that it is not functioning properly, without having an indication that identifiable parties are infringing the rules.

Is it a useful tool? We have just relaunched another one, as you know. We do not do it every year. When we have used it, it has proven useful.

Useful how? Not to find infringements—it really not a tool for that purpose—but to help us formulate recommendations with regard to legislation and regulation and also to inform the market of the possibilities the market offers them, which may sound strange, but they do not always know.

I use a decision tree that was basically developed by one of the previous Ministers for Economic Affairs: When you see a problem, first you look at whether the consumers know what they can do. If you have information that they don’t know, you have to set up a campaign.

That is what has been done with regard to switching telecom operators, and energy operators. These switching campaigns, sometimes very important ones, a point of contact in every community, so that takes a lot of organization but not by the Competition Authority. These campaigns have proven to be very useful.

But if the consumers know their alternatives, we have to see whether everybody plays according to rules. That is an issue for the competition authorities.

But if there is no real indication of that, you have to think of regulation. You screen what is the appropriate reaction, and this has imposed a certain degree of self-constraint on the government for the regulations. They do not immediately start regulating, which was the tendency for decades, if not for centuries. That works well. Sector inquiries can help in this process.
**ANTITRUST SOURCE:** So basically it’s a broad range of outcomes, and you obviously want to make sure that you decide afterward what is the most efficient and effective way of dealing with an issue.

**JACQUES STEENBERGEN:** Sometimes you do that without having a sector inquiry. A good example of that was roaming. The Commission took the regulatory approach. One in which we were more directly involved was on interchange fees.

I don’t know whether you’re interested or familiar with the interchange saga. You had the cross-border interchange fees and the domestic interchange fees. In Mastercard, the Commission, in order to respect the national authorities, had limited its own case to cross-border, but the result was that nobody got any further with regard to domestic conduct because the parties obviously didn’t want to move as long as they didn’t know what the Court in Luxembourger was going to decide. That was not an efficient approach. If you wanted to have some results, you had to use the regulatory route.

Also, one of the main issues all Competition Authorities, to my knowledge, have to face is the duration of procedures. It is very difficult to decide an infringement case in less than two years. If you want to have a proper investigation and respect the rights of the defendants and respect all rules of due process, you will never be much shorter than two years.

But two years is a very long time. That has always been a very long time, but with issues as we now see in the digital economy it is an impossibly long time. Our aim is that, when we take a decision, the stakeholders still remember what the case was about.

**ANTITRUST SOURCE:** But market studies can also take quite some time, and sometimes maybe there is a bit of a criticism of market standards, and I think that is a difficult balance to keep.

**JACQUES STEENBERGEN:** On the one we now opened we have committed to have a result before mid-July. Another one we did on a precise issue with regard to information exchange between supermarkets and suppliers and the competition between branded products and their own products. That took less than two months also.

**ANTITRUST SOURCE:** But it is difficult question.

**JACQUES STEENBERGEN:** Specific questions, well-targeted, and then don’t sit on the results.

**ANTITRUST SOURCE:** Do you think it’s difficult to actually issue a report at the end of a market study? I do think it’s a difficult balance on the one hand to have a general report with examples, but at the same time not identifying specific issues or certain companies because that would go beyond a market study report.

**JACQUES STEENBERGEN:** I have never found that difficult, no.

**ANTITRUST SOURCE:** They’re short and to the point?

**JACQUES STEENBERGEN:** Yes. Of course, when you formulate recommendations about legislation, especially when you know that the rule will not be popular, and that you will not make yourself popular by proposing it, yes, you have to formulate it carefully.

But I think you’re there to do your job, and you do your job, or you shouldn’t do the job.
**ANTITRUST SOURCE:** There is a new proposal by the Belgian government to include in the competition law the abuse of significant market power.

**JACQUES STEENBERGEN:** Yes.

**ANTITRUST SOURCE:** I believe that you were a bit critical about whether this should go into the Competition Act or not. Is it something that you welcome to be in the Act, or is it something that you think you will deal with because we have it in the Act? How will that play out in Belgium?

**JACQUES STEENBERGEN:** Initially, I was against such proposals. A special topic of the ICN Annual Meeting in Kyoto was about it, and there I was still, to put it politely, skeptical about it.

That’s where I started, where I come from. When we had the 2006 reform I was certainly not in favor. When we had the 2013 reform I started to hesitate because there are real issues in the market, and it is not helping our legitimacy when you too often have to say yes but there is no dominant position.

We are criticized that we make our life too easy by focusing on this dominant position. So there was a need to do something, especially in the digital economy, where dominance is much more difficult to establish. We hear complaints that companies are kicked off a platform. Being on the platform might be of vital interest to them, but without clear evidence that a platform has a dominant position, we need something more. On that we fully agree.

The next issue is, of course, what kind of rule? You can look at it under the unfair trade practices rules or under the competition rules. It depends also a bit on what sanctions you want to seek. If you want to go for the type of fines we can impose in competition cases, then you need a kind of competition procedure.

I’m not so sure that the stakeholders really are that interested in the sanctions. I think they want a speedy decision. For a speedy decision, you go through the courts, that is the practice as we discussed this with my German colleagues and with my French colleagues. You can get a speedy decision also in Belgium. You can get sometimes a decision in 48 hours. That is very exceptional, but you can get one within a couple of weeks or a month.

The two tracks are not mutually exclusive. What I think we will end up is that it will be both in the rules of unfair trade practices and in the competition rules. It is for the parties to decide which forum they choose. They can also go to the judge on the basis of the competition rules. Also, so if it were only in the Competition Act, the road to the judge to get an injunction would also be open.

For us, an absolute condition to bring it under the competition rules and therefore to the Competition Authority is that we get extra staff. We have made an estimation of what we need. It is quite modest. Initially, there are likely to be a number of cases until people see that they have to wait for two years for a decision on a full case. If we have to do that with our present staff at a time that you have—an M&A “boom” is maybe exaggerated, but nevertheless—an increase in M&A activity with a high percentage of non-simplified, and we still want to close two major infringement cases a year, which is more or less what we think we can do, we need more staff to close it. But if we have to take people off these infringement cases in order to deal with these new type of cases, everybody will be frustrated, and that is not to the benefit of the market; it’s not to the benefit of the stakeholders; it’s to nobody’s benefit. So we need extra staff.
is not a fine, but an injunction or a transitory period, say, if you’re kicked out of a platform that you have enough time to go to another platform, and that you get a bit of relief from the courts rather than from the authority. Maybe that’s another forum that could be considered.

**JACQUES STEENBERGEN:** Maybe not initially, but that is likely to become the case. We will have an occasional really tricky case, which is then more about principles, I guess, than about immediate impact, but I expect most of the cases will go to the courts.

**ANTITRUST SOURCE:** I have a question on new developments, not really concerning the Belgian authority, but a trend that you can see in some of the Member States is a movement from what I would call classic competition law, to adding an element of abuse of superior bargaining power, and a movement in some cases, such as in Germany, to also including some element of consumer protection within the mandate of the Competition Authority. Is this something that you think could also happen in Belgium?

**JACQUES STEENBERGEN:** Trends are partly trends because they are contagious. When something develops in our neighboring countries, I can never exclude that it might not come to us. But is it a good thing? Obviously, we discuss this regularly within the European Competition Network and also in other fora.

Experiences I think are mixed. If you look, for instance, at the Dutch Authority, my Dutch colleagues certainly consider the incorporation of consumer protection authority a success.

In the United Kingdom, it moves a little bit in both directions. I have the impression that the same is true in Spain. There seems to be the feeling in the private bar—at least that’s what we hear—that when you have both powers it is to the detriment of the competition law enforcement.

That has to do, I think, again, with time. It is so much easier to show a result with the tools of consumer protection, so the temptation to deal with it under that heading is genuine and understandable. I don’t think that is necessarily a bad thing, but it becomes a bad thing if it impacts too much of the enforcement of the competition laws. If you put more emphasis on it to the detriment of the other, then it has a negative effect, I think.

Do I expect something similar to happen in Belgium very soon? First, there is now this issue of dépendance économique, superior bargaining power, or whatever term they will in the end decide upon, and we will see how that goes.

But a merger with the Consumer Protection Authority will not happen because there is no Consumer Protection Authority. Consumer protection is organized by the Economic Inspectorate of the Ministry of Economic Affairs and by the courts.

That merger will not happen. If we have a debate on merging regulators or authorities, it is likely with the sector regulators, and then it would, as it has happened in other Member States, be driven by efficiency considerations in respect to the use of resources.

Right now we are not interested in it. We outsource financial management, HR, IT, etc., to the Ministry of Economic Affairs. If that service will no longer be sufficient, we will certainly be interested in sharing the resources of the much wealthier sector regulators, but right now it is not an issue.

**ANTITRUST SOURCE:** A question that concerns not just the new authority but basically any kind of authority that takes sanctions-enforcement decisions: You have a new court, a Market Court that reviews the authority?

**JACQUES STEENBERGEN:** Yes.
ANTITRUST SOURCE: How has that traditional review developed under basically a new structure, a new court?

JACQUES STEENBERGEN: “New court” is exaggerated. It is a chamber of the Court of Appeal. It is no longer called the eighteenth chamber, but the Market Court. It is part of the Court of Appeal with the judges in the Court of Appeal designated specifically to this Market Court.

ANTITRUST SOURCE: With specialized judges?

JACQUES STEENBERGEN: Not yet. But it may develop in that direction because there are specific recruitment procedures for that chamber, for that court, and that is the real difference from the previous situation, and how that will impact in time we will see.

It’s always difficult to comment upon your reviewing court. At least to say that none of the decisions I chaired has been overruled. All the cases, except one, which was on a review of old remedies, have either been confirmed or not appealed, or the appeal was withdrawn.

The judgments we got were not—and that is very important for us—on just a few procedural issues. No. The chamber really went into the substance, went into our arguments, and that makes you now feel comfortable following the precedents.

ANTITRUST SOURCE: Is it basically a full de novo review? Is there a margin of appreciation that the court would grant to the authority, or is it basically the court which goes through the entire decision, actually?

JACQUES STEENBERGEN: We have to be very careful with the term of “full jurisdiction,” because that, with us, has not the same meaning as generally. For us, full jurisdiction means that you can not only review the decision, but replace it.

The Court of Appeal has full review powers in law and fact, but it cannot always replace the decision. It should replace the decision in principle except in merger-control cases and cases of remedies, because that is seen as too close to the powers of the executive for a judge to decide it.

This has a very long history. It has always been the view of the legislature that the court had full jurisdiction in the Belgian meaning. But the court always refused to exercise it. Then gradually there came a compromise, “Yes, we can do it except,” and that is now written in the law, and that has led to a better result.

ANTITRUST SOURCE: I compare it a little bit with the German situation. In internal administrative law, the rule is to basically say if you have all the elements as a court to basically decide on the matter, you can replace the decision; if you don’t have all the elements, you ask a specialized authority to investigate again and basically have a new decision.

JACQUES STEENBERGEN: We have, as in some other Member States like in France, this slightly odd situation that we are an administrative authority. We are not even an administrative tribunal anymore. We are an independent administrative authority.

But our review court is a civil court. That has always made them uncomfortable. It is more a problem for them than for us.

ANTITRUST SOURCE: It could change with having a specialized chamber in the future.
JACQUES STEENBERGEN: Because they will be more used to—

ANTITRUST SOURCE: Dealing with these cases, yes.

JACQUES STEENBERGEN: What is the standard? The standard is to review whether we have erred in fact or made a manifest error in our assessment in law.

ANTITRUST SOURCE: Do you see that private litigation will pick up more in Belgium? There is a trend in Europe that we have more private litigation, at least follow-on litigation. Will that change in the future, in your view?

JACQUES STEENBERGEN: First, it has always surprised me that the debate on private enforcement focuses exclusively on cartel cases and not on abuse cases. On abuse cases we always had private enforcement, both private enforcement and public enforcement. Because, again, you can get an injunction, and you avoid the damage, which is always better than repairing it afterward.

The European Commission Damages Directive gives an extra incentive for private enforcement. Will that lead to more private enforcement in respect to abuse cases? We will have to see, but anyway, they have always been, and stakeholders are more interested in a cease-and-desist order than in the establishment of an infringement.

On cartel cases, yes, I think there will be more cases that follow on.

ANTITRUST SOURCE: I think what you said was very important and interesting because we had the same actually if I compare Germany and Belgium. There are actually a lot of abuse cases that went to the courts, indeed because companies are interested in getting an injunction. They are not interested in having someone fined actually.

JACQUES STEENBERGEN: Also, when you are the victim of an abuse, you feel abused. There are probably more complaints by people who were not entirely correct in their assessment, but when you are the victim of a cartel, you do not know it. You have to wait for the establishment of an infringement. That is also why we think that—we have absolutely nothing against private enforcement—but that it will usually be follow-up cases.

ANTITRUST SOURCE: If you compare, just on the abuse side, the cases that you have and what is going on in the private courts, what's the proportion? What's the feeling or view, that the leading cases are in court, the leading cases are with you on abuse cases? Difficult to say?

JACQUES STEENBERGEN: Yes, difficult to say. Who has the leading cases? We all have leading cases from time to time, but many of these abuse cases are rather simple cases.

This is also something that surprises me. Abuse cases are supposed to be complicated and take more time. No. Often it is the other way around.

ANTITRUST SOURCE: Some still take five years.

JACQUES STEENBERGEN: Oh, yes, we could all name a few. We can also settle abuse cases. That is a big advantage.
ANTITRUST SOURCE: Although that changes, as well. I think we now have these hybrid settlements where you ask yourself is this a settlement, or is it not a settlement anymore?

JACQUES STEENBERGEN: I also expect a change, such as with the mix of commitment cases and settled cases.

Now that we have the Damages Directive and the damages legislation—implementing legislation—it doesn’t look very fair to the stakeholders to use the commitment route. Because in a commitment you do not accept the infringement. In a settlement, you have to accept the infringement.

So you give the victim something they can go to court with. That is not true with a commitment decision.

ANTITRUST SOURCE: But I think the efficiency of the commitment decision is to say, “I don’t have to take that decision; I just want to see certain changes now rather than actually having to fight it out.” And maybe the change in the market space on the commitment might be more efficient than trying to fight it out.

JACQUES STEENBERGEN: Yes. Whenever the case is like that.

ANTITRUST SOURCE: I would like to move on from Belgium to a European perspective. I wanted to ask you about a legislative proposal by the European Commission to, in a way, ensure that the 28 Member State competition authorities are sufficiently funded, sufficiently independent, have the right tools, and have a harmonized way of applying not only national, but also European, law.

In your view, what are the most important aspects of this initiative? Is it an initiative that is necessary considering that we have 50 years of competition enforcement in Europe as a whole?

JACQUES STEENBERGEN: I think it is a very important initiative. It is very important with regard to independence. It is not because we are independent that there are no problems with independence. Some of our colleagues have suffered very serious problems. That is very important.

What is also very important is a toolkit, that we all have a minimum toolkit that is similar. That is in the first place, of course, important for authorities that still lack the tools, but it is also important for the others to know that there is a level playing field and that it matters even less where a case is dealt with because it will be dealt with at least using the same tools. Those two aspects are really important.

With regard to having the necessary resources, I would say it is a very light proposal and admittedly very difficult to have more stringent rules. The approach the Commission has chosen is to say that you must be able to do this and that and that and that. You must be able to do dawn raids. So not only must you have the tools, but you must have the resources to do it effectively.

But it doesn’t say how often you have to do it, and that depends obviously also on the size of your economy. It is difficult to have a hard rule that fits all. We have a tricky debate also among us because, if you become more precise, the richer authorities fear that their governments would say, “Oh, but that is enough.” So, to have a rule that really helps the poor without creating a risk for the rich is hard to do.

On that, I don’t think the Directive is perfect, but, well, it’s better than nothing.

ANTITRUST SOURCE: But actually, in the context, it makes sense if you think about that, it comes actually quite late if you think that in 2004 we had modernization of European competition law. The idea was that national competition authorities can in parallel apply European law. I can see that
there is a certain debate on whether we all have the same tools in order, in a way, to implement the same legal initiative.

JACQUES STEENBERGEN: But, also in 2001, and the years just before it and just after it, I think the group was a bit more homogeneous than it has become because of enlargements.

Second, you had authorities with very different positions, as is still the case. But I cannot recall a real crisis of independence. So it was probably not, people were less aware of the need.

We’ve had a few problems; the problems in Portugal in respect of tools, the problems of independence in Greece, and there are others. So you needed a legal basis, and we saw that there was none. That was, in a way, rather odd because you have much stricter rules with regard to the independence of the telecom regulator, of the energy regulator, but nothing on the competition side. It is also, from that point of view, bringing our rules in line with what applies generally to independent regulators.

And that is certainly partly in reaction to recent developments.

ANTITRUST SOURCE: Maybe one important tool that has not really been included in the proposal is interim measures. I think you have always been a proponent that interim measures are important.

JACQUES STEENBERGEN: But they are not the remedy for all diseases. At present two authorities really use the tool: our French colleagues and us. Yes, they are important because they bring the effect of a decision forward, and they are an opportunity to give the parties a feel for which way the wind is blowing. That is good for the authority in its later follow-on decisions, but in the first place is also good for the parties, and it can be a useful signal that it might be a good idea to look for a settlement.

It has all kinds of beneficial effects. But first we have to realize that, in Europe, you have two families of rules. You have interim-measure procedures in which the focus is on the legality, and you have a group of rules where the focus is on avoiding damage. We belong to the second category, so we have a very light prima facie legality test, and then have to establish that it is really necessary to do something. That is for us, the more important part.

If you have a strong emphasis on whether it is really likely to be illegal, you will be more reluctant to use the instrument swiftly and to even use it. If that is your system, it is a less important instrument than is the case in a legal regime like ours.

Even with us, and this is a discussion we have, very in-depth and very pleasant with the European Commission, because they are looking—Margrethe Vestager has said several times that she is also looking for ways which can bring useful effects forward in this regard and then in respect to the digital economy. But it is a very difficult tool to use when you have no precedents on the prima facie. If you really have to almost create the policy, an interim-measures procedure is not the best.

ANTITRUST SOURCE: In the second part, irreparable harm is also quite a high standard, even if you—

JACQUES STEENBERGEN: I have written on this in my contribution in the Liber Amicorum for Doug Ginsburg, where you can find it. I think that the distinction between irreparable harm and harm that is difficult to repair is overstated. Our rule was changed into “difficult to repair.”

ANTITRUST SOURCE: I have one more question: what do you think will be the next things in the future
for the Belgian Authority, what do you think will be the future challenges? You were discussing a few things, reacting to mergers.

**JACQUES STEENBERGEN:** The challenges will be always to act sufficiently swiftly without losing sight of quality control. That is, I think, always your key challenge.

Then, juggling between new demands of merger control, infringement cases, and whatever else may be put before us, and taking into account—and that is a positive situation that, since last year we increasingly get requests for opinions from the government on intended regulations and legislation. That can cover very important issues such as economic dependency, but it can also be like iodine capsules in case of a nuclear accident.
Interview with Babatunde Irukera, Director General, Consumer Protection Council, Nigeria

Editor’s Note: Babatunde Irukera is the Director General/Chief Executive of the Consumer Protection Council of Nigeria, and is responsible for the management and leadership of the Council. Previously, he represented both business and government clients during nearly 30 years of legal practice. He is admitted to practice in both Nigeria and the United States. He was interviewed for The Antitrust Source by Bill MacLeod on March 28, 2018.

THE ANTITRUST SOURCE: Tell me, how did you become Director General of the Consumer Protection Council? That is always a fascinating story for antitrust lawyers.

BABATUNDE Irukera: I think I can speak a little bit more about why I became the Director General. The how, I suppose, I found out after I became the Director General. But as to why I became Director General, it’s probably more from the record of the the type of work that I have done for a number of years, especially in Nigeria.

I’ve always been very interested in public interest cases, and most of the litigation work I did within our firm was public interest. What is interesting is that I was outside counsel and was advising and consulting for the CPC—including the former Director General—up until the time I was appointed.

Although I’ve heard conversations that the combination of factors was important, and because of the possible imminent transition of the CPC into a competition authority and the fact that our firm was probably the firm that has authored competition publications the most and demonstrated knowledge in competition and antitrust issues in Nigeria, even in the absence of formal or centralized competition legislation. With pieces of competition legislation in different laws and the different sectors such as aviation, telecommunications, and electricity, we were certainly a key player.

And so I hear that this combination of factors made me strongly recommended. The question was whether I was going to do it, but ultimately it came and here I am.

ANTITRUST SOURCE: Let me then go to the CPC—it’s the Consumer Protection Council of course, but I think it might have a bigger mandate in store before too long. What is the mandate of the CPC and how might it change?

BABATUNDE Irukera: Currently the mandate is essentially as the name suggests, to protect consumers across all sectors of the economy, and it really doesn’t matter what it is. The definition of a “consumer” is very broad, and it relates to goods and services. What is interesting is that there are pieces of the mandate that do not seem more traditional remedial-type protection, there are many that have more proactive-type protection, and then some that are just innocuous.

One particular statutory mandate that I find very interesting is that it has a very important role in protecting consumers with respect to the environment in an oil-producing country. And you would imagine: why would that be in the Consumer Protection Council when you’ve got the Environmental Protection Agency and you even have a ministry in charge of environment?
But it’s a very unusual provision where it says that, for companies that use hazardous technologies and the technology ultimately results in injury to communities, the Consumer Protection Council has a responsibility, or at least a mandate, to investigate that and hold such companies accountable and to ensure adequate compensation to the communities. And so that’s a very interesting and unusual dimension.

The reality of it is that this serves as an example to show how broad the current mandate is. In addition, the Council makes periodic determinations about what goods are dangerous, including publishing a list of goods whose distribution is restricted or prohibited.

So it’s an unusual mandate. Now, is that likely to expand? Yes, we are on the cusp of competition legislation. It’s been long coming, but I think where we are right now is the furthest it’s ever been and it’s the most ambitious effort yet.

Towards the end of last year, the national assembly—which is the equivalent of Congress—completed work on a bill. But there are still a few things that need to be done because feedback we have from the executive is that there appear to be areas of potential conflict. I believe the national assembly is addressing that and it should go back to the executive—to the president—for assent hopefully in the coming weeks or perhaps months.

**ANTITRUST SOURCE:** And what would the bill do?

**BABATUNDE IRIUKERA:** The bill would certainly repeal the current Consumer Protection Council Act—that’s the law that creates the Consumer Protection Council. And it will make the Consumer Protection Council the Federal Competition and Consumer Protection Commission, in which case it will continue its role in consumer protection but will execute the additional role of regulating competition.

**ANTITRUST SOURCE:** Is there business support for the legislation?

**BABATUNDE IRIUKERA:** I think it’s a mixed bag, actually. It’s often regarded as the orphan legislation because no one in the regulatory or business space willingly takes ownership or champions it. There is some business apprehension about it. And you know, of course, this in an environment where you’ve never had that and where big business is big business and the winner takes all.

As such, there is some level of business apprehension. However, there is also some level of support in the business community. Part of the support really comes from the fact that some businesses think it’s important, even big businesses. Many think it’s important, and some others just feel that it’s potentially problematic.

Small businesses certainly want a competition regime because those who want to get into the market believe that more strategic regulation of the market would eliminate the barriers to them thriving in that market. Consumers certainly want it because expanded choice is a very big thing, and fair pricing is also a very big deal to them.

What is also somewhat interesting is that there are regulators who don’t want it either. This twin-resistant approach is why I say that it’s kind of orphaned. You’ve got people in the business community who don’t want it, and you’ve got people in the regulatory community who do not want it, either. But there are also some regulators and businesses who want the law and its enforcement.

There are some regulators who feel that they’d like to focus on their own core areas and then hand over some of the economic regulations, which include competition regulation, in their mandate to a more specialized agency. And then the typical turf issue between regulators—some feel
that, you know, don’t take anything away from our law even if they are not willing to enforce or operate it, one way or the other.

And so this is why I say it’s a mixed bag, and I suspect some of the apprehension and pushback are in part why the legislation has taken this long to come in Nigeria.

ANTITRUST SOURCE: Let’s focus for a few minutes on what you think are some of the most pressing consumer protection problems, and if there are some competition problems that you’d like to throw in as well, be my guest. But what’s facing your agency now and what, how are you dealing with them?

BABATUNDE IRUKERA: The two things that I think are the biggest problems are: first, consumer apathy, where consumers have almost resigned themselves to the fate of poor services or poor quality. And although I’d say that that is changing somewhat, compared to some of the markets that are as sophisticated, as deep, and as big as Nigeria, I think that consumer apathy is still a challenge. And so the solution to that is consumer education. We have a very diverse country, and there are questions of literacy across the board.

No matter how big the cities are, there’s far more consumption happening outside the urban areas than in the urban areas. And the things that are most consumed are consumed everywhere in the country, urbanized or not: power, telephone services, cable television, food, whatever it is. There’s no consumption pattern that I would say is primarily urban in Nigeria. So, making sure that the people in the semi-urban and the rural areas sufficiently understand their rights and the obligations of those who provide services or sell goods to them is quite a job.

One of the first things I did was to really spend time thinking through the question of what’s the best way to approach this. The conclusion I came to is that the only way to scale this up very quickly and in an efficient manner is to work with companies and to leverage their expertise and infrastructure, in the sense that they’ve mastered how to advertise their products and they understand their customers very well, they spend a lot of money on research and developing their messaging. They have also invested in and developed wide and deep dissemination media and channels. So I’m going to insist that they also carry on the information about the consumer’s rights using those same resources that they’ve created from a dissemination standpoint, both from messaging and channels standpoints.

The other big problem that I’ve seen is that the complaint resolution mechanisms are, in some places, absolutely nonexistent and, in some other places, weak or poor. So it’s almost like starting from ground zero. We are working with companies and emphasizing the need to have stand-alone conflict resolution mechanisms.

Your consumers, your customers—I call them consumers but to them they’re customers—they’ve got to be able to come back to you instead of looking for an arbiter or a mediator every time, because the vast majority of complaints in the country now primarily go straight to the consumer protection authority or the sector regulator. This shouldn’t be the case.

For instance, someone who bought a can of carbonated soft drink and was dissatisfied with this product which cost him maybe 50 cents has no way of complaining to the bottler and instead complains to me.

I now reach out to the bottler to resolve the complaint. Just sending the correspondence to the bottler costs about $10. Because it’s a minor issue to them, they simply take care of the complaint. In this case, where the consumer is happy to receive a replacement, or additional cans of the drink, the resolution is pretty straightforward and adequate. It would have made more sense for
the consumer to have had sufficient information and access to the company as the first respon-
der to the consumer grievance or displeasure.

So, it just looks to me like companies’ customer service has been outsourced to the federal gov-
ernment, in which case it almost operates as a form of subsidy, where the federal government is
operationally subsidizing the companies by the Consumer Protection Council being a multi-com-
pany customer care center. But I think that we can have a far better society if we can get the com-
panies to really take that on and have transparent, standalone, accessible, clear complaint reso-
lution mechanisms. And, in any case, reform is best and most sustainable when it is carried on in
industry than when it’s created and operated by government, because you could have someone
else who in the future would have different priorities in government.

So, I think that, nationally, this is a key reform area that industry itself should adopt. It’s vital to
building confidence and emotional equity in the relationship between goods and service providers
and their customers. In any case, the commercial contract and social pact between the provider
and customer requires that accountability and availability to resolve consumer dissatisfaction.

I suppose I’ve identified what I think are the two biggest things in consumer protection that I’ve
experienced and I’ve also identified what I think are the potential solutions to each of them.

ANTITRUST SOURCE: That is fascinating work. I am looking forward to seeing the kind of progress
you can make. How will you measure how the efforts are unfolding?

BABATUNDE IRUKERA: So far, we’re still in very early stages. I haven’t been in the job for even a year.

So just crafting this and clarifying the thoughts, building a strategy around execution and enforce-
ment, and getting industry buy-in is taking quite some time. But what I am finding out is that they’re
welcoming it.

Industry is welcoming it and for good reason, because we prefer, and they should prefer, to
resolve disputes between them and their customers rather than to get the government involved,
because the government investigation can go in, can start somewhere, and can end somewhere
completely differently, as they’re finding out. And then government intervention in itself can affect
the brand as far as the fidelity that should exist between the customer and the provider or pro-
ducer.

I find that now that they’ve seen that someone takes this very seriously and is going to be very
strong with respect to enforcement, they are beginning to see the wisdom in that approach or
model. And because consumers are now becoming more discriminating—I mean with the new
regime in the Consumer Protection Council and social media and all the other things—because
consumers are becoming more demanding, more discriminating, and more sophisticated, the
need and reality of a dedicated and more responsive mechanism is apparent and undeniable.

And so they are realizing that there’s bumpy weather ahead unless they figure out a better way
than to have the government mediating between them and the consumers, because many times
people in government are not necessarily commercial- or business-oriented. At best, they are
more regulatory-oriented or even sometimes activist-oriented, and that’s potentially unsettling for
business.

So I think selling it to them from those standpoints that I’ve just identified has obviously stimu-
lated sufficient interest and is promoting buy-in. And we’re still on the road, but I’m gratified that
the responses that we are receiving are promising.

ANTITRUST SOURCE: Have you noticed any effect of cross-border activity, globalization of com-
merce, and the challenges or the opportunities it might provide for a consumer protection authority like yours?

**BABATUNDE IRUKERA:** Oh, yes. I don’t even think there was a way to consider consumer protection in a place like Nigeria without seeing that. It’s an incredibly large market in Africa—200 million people and a vibrant middle class. It’s an important market, and everybody wants to sell into that market.

So, we’re certainly seeing the effects of globalization. For instance, in e-commerce we’re seeing people who are purchasing on online retail platforms that are not in Nigeria, with the possibility of banking online anywhere across the world and mobile banking.

We’re dealing with all the typical jurisdictional issues with respect to consumer dissatisfaction and how to provide remedies. We’re seeing that the domestic platforms serving the same purpose sometimes feel that it’s an uneven playing field, in that they are here within reach and we can hold them accountable, and there are some who are outside our jurisdictional reach who cannot be held as accountable. And so we’re beginning to see a lot of that and working through what the best approach to regulating that space is.

**ANTITRUST SOURCE:** One thing I have noted in my discussions with both authorities and companies that operate in a multi-national level is that the more there is a level playing field, the more you can rely upon the basic rules of competition and consumer protection applying, the more attractive an economy becomes for locations and imports of businesses and goods and services. So I would imagine that there is some appeal to what you are doing right now to the global economy and Nigeria could be seeing more of that as a result.

**BABATUNDE IRUKERA:** Certainly, and it’s interesting you say that. At the time the current Nigerian administration won elections, it defeated an incumbent president and so there was a complete change quite unlike the history of previous elections, where it was a different president coming in but, for the most part, the same party, so the changes were not that structural or ideological, but this time, there was a complete change.

One of the first things that was identified with respect to the ambitious legislative agenda of this administration and key pieces of legislation for moving the economy was competition legislation and revising consumer protection legislation. Beyond doing that, the transition report specifically identified this, even the national assembly identified competition legislation as key legislation for expanding the economy in this eighth national assembly. So I think that there is consensus across the board. This is an important piece of legislation.

One thing we all agree on, is that the way to measure how well an economy is doing is consumer spending. So you look at the consumer index and say, well, if people are spending money it’s an indication that the economy is doing well. And from my standpoint, consumer spending is as much a factor of disposable income as it is of consumer satisfaction, the choices they have and pricing. Looking at it from that standpoint, legislation and a regulatory framework is a vital piece of how to promote economic expansion, to get more businesses in, and also to create jobs.

And, in any case, there are many companies that look at the environment and are concerned about getting in there, or don’t even know how to get in there, because you do not have a level playing field. I’ll give you a quick example. A small soft drink bottling business in Orange County, California, once said to me that they believed that something happens in Nigeria between September and December. They base this on data of how many soft drinks are consumed in
Lagos alone in that period because the numbers are incredibly high. What exactly happens? Is it the weather? I said well, it’s cultural in Nigeria that, as you come to the end of the year, there are many celebrations and social events, weddings, and everything. There are all kinds of things going on then.

So this company was saying, you know what, we’re small, we’re in Orange County, California, and we’re not interested in being all over the place. We know what we can do in that market in that period alone would be phenomenal, but we’re looking at the big players there, we’ve really researched it. We’ve tried to see how we could get in, and we see that it’s going to be impossible for us to compete. So you can look at that and say, well, that’s an indication of what we’re losing on account of a lack of legislation or regulatory framework.

The biggest consumer complaints in the country today come from electricity. Electricity was a public utility and it was privatized. You’ve got the generating companies, you’ve got one transmission network, and you’ve got several distribution companies, and the main problem, the bottleneck, is at the distribution piece of the value chain. We’re working through this, but I realize that if there was competition legislation, there was just no way that privatization could have occurred in that manner because the way it has occurred would have been a violation of law.

So here we are dealing with what was done, perhaps with the best possible intention at the time, but the gap of the failure of the appropriate legislation at the time is what we’re dealing with now. And so it’s very clear that the right legislative and regulatory approach would certainly promote business.

ANTITRUST SOURCE: Very often one looks at the measure of regulatory agencies and what they have accomplished by simply counting the number of cases they have brought. And you know the ideal law enforcement is the law enforcement that prevents the violation from happening in the first place.

But I’m sure you have some very prominent cases that have defined your term, either in your tenure or before the CPC’s activity. What sorts of cases has CPC brought? What are some of the major ones?

BABATUNDE IRUKERA: I’m going to speak first about the cases since I’ve been at the CPC and then I’ll speak a little about cases before I got to the CPC because I was also part of the cases before I got the CPC when I was counsel in those cases.

The biggest case that the CPC is just about to close right now in Nigeria is with respect to cable television. I think we are going to have a consent order very soon because we opened the investigation last year and there have been months of document production and taking testimony and all of that, and there are few key issues there. There’s the consumer satisfaction piece of it and then there are complaints about whether the pricing is exploitative and unscrupulous. And it’s a free market and I’m very careful about getting into pricing because there are several factors in the market that determine pricing.

And it’s not a linear approach or comparison, rather it is a matrix. Even if it’s a multinational doing business in other countries and all of that, you can’t simply compare what the business is in one country with the other. But the law very clearly prohibits unscrupulous or exploitative practices.

And so we’re looking in a very granular manner to see if the company is using the capacity of one market to literally price in that market as a way to compensate or to support or subsidize what’s happening in another market, because that can border on being unscrupulous with respect to consumers in that particular market. That’s certainly going to be addressed.
Secondly is the question of bundling and what channels are available in a particular bouquet. A very contentious one for instance, is the Premier League. It’s very important in Nigeria.

So, when you have a dominant provider who bought the rights to air this Premier League that everybody wants to watch, what bouquet that league ends up in could become the subject of scrutiny. So you get everybody in, and then switch the League from a basic bouquet to a premium one which cost more, an inquiry into whether that’s unscrupulous is expected.

And then, primarily, it's just the consumer experiences, whether you're providing the right service, whether there are complaints to which you’re responsive, whether your billing technology is such that at the time of payment people are able to receive signal and begin to watch.

There are quite a number of the smaller issues, and then there are big issues. We’ve addressed all of this in the course of this investigation, and I’m confident that there’s going to be mutual understandings as the outcome. That investigation has now closed and mutual engagement on what constitutes fair and acceptable resolution is being discussed.

The other thing that we’ve done is we’ve intervened without large investigations in certain markets. For instance, there was a recent advertisement by an alcoholic beverage company. They have an apple cider product which is alcoholic, and one of the advertisements suggested consumption of the cider to be the equivalent of an apple a day. Now the idiomatic expression “an apple a day” is usually associated with the health benefits of eating fruits, in particular, apples. To use that to portray consumption of alcohol as a healthy lifestyle choice is inappropriate. And so we intervened in that, and they took the advertisement down and now the company is under supervision. We will continue to monitor what kind of messaging they are putting out there.

There are a few other smaller ones, but what is more, and that would probably interest you more, would be the two large investigations ahead of us looking into mobile telephone companies and then banking. With respect to the mobile telephone companies, there is a question of whether the service level is sufficient or not, and then there is a transparent billing issue.

A very big part of it also is the data issue, about whether unlimited data plans are truly unlimited data plans or it gets to a point where they reduce the speed, and whether there is clarity of understanding between the consumer and the telephone companies. And we’re going to open that also in the coming weeks.

Now before I went on to the Council, I supported the Council in some key investigations including the carbonated soft drink market. And now the in-trade handling of the products of this particular company has been improved, and they now pay more attention to even their independent contractors who are their distributors with how they manage their product expiration inventory in a way that is more protective, and consumers have testified to a better experience with respect to that.

But prior to that, there are also a few things. For instance, I assisted the Civil Aviation Authority with a very large investigation into collusion between two airlines with respect to the passenger fuel surcharge that was prevalent some years ago. Our engagement greatly improved that practice and ensured more transparency. So there have been a few large interventions and we’re hopeful that, as we develop our capacity, there’ll be quite a few more.

**ANTITRUST SOURCE:** You mentioned banking, what would the issues be in a banking inquiry?

**BABATUNDE IRUKERA:** That’s a good question because the biggest complaints we’re getting with respect to the banks right now are bank charges. How arbitrary and opaque the charges are. People don’t really truly and clearly understand what’s going on, and because the money is with
the banks and they are just deducting the fees, people feel helpless and aggravated. My analysis of this already led to certain obvious conclusions. I’ll give you an example:

Online banking has become very popular. Nigerian online banking is actually perhaps amongst the most technologically advanced. It’s real time, which is very good. However, it seems to me that the online banking platforms that these banks provide are not services, they’re products, because what they charge bank customers for banking online is significant.

Look at a place like the United States, where they’ve provided online banking as an alternative to in-bank facility banking: I remember early in the day when offsite banking in the United States was being promoted, it used to be if you wanted to see a teller, you paid an additional dollar. This encouraged customers to use the technological platform which banks provided as a service. But now there’s a significant hidden charge for that and the online banking process itself becomes a major revenue head for the bank, the theory I adopt is that the online banking provided is not a service, it’s a product, and those are two different things.

Secondly, there’s short SMS notifications, otherwise known as alerts, when transactions on a customer’s account occur. Many times this service is not even an option. The banks claim it’s a valuable service to prevent fraud and an escalating level of authentication for security to complete transactions.

Typically, each transaction in Nigeria comes with about four SMS messages: notification of the security code to complete the transaction, notification of a debit to the account, a different notification debiting the account for bank charges. Sometimes all the SMS alerts occur in a matter of minutes, yet none are consolidated into a single message. Each of those messages comes at a cost. There’s no transparency in that cost in the sense that what the banks seem to be doing is reselling airtime. And so it’s not a pass-through cost to the telephone company, it’s a marked up cost. If the banks are not licensed value-added telecommunications service resellers, their resale of airtime at a profit to the bank is questionable. And so it’s not a service, it’s a product. People are complaining about these unexplained or unsupported charges.

The other, more recent one is about charges for cash withdrawals at ATMs not owned or operated by the customer’s bank. After a certain number of withdrawals, such transactions attract a fee. The ATMs and generally accepted rules and norms of withdrawals state the maximum amount of cash the ATM may dispense in any one transaction. That amount is 20,000 Naira in cash. Banks now calibrate the ATMs to dispense no more than 10,000 Naira, ostensibly to increase the number of transactions to withdraw a certain preset amount and earn more fees.

Essentially, the rule or norm allows 3 transactions out of network, in the case of withdrawals, 60,000 Naira, but in reality, a customer is limited to only withdrawing 30,00 Naira before paying ATM user fees. We are hopeful that our imminent broad inquiry will address this and a myriad of controversial or questionable bank charges.

**ANTITRUST SOURCE:** How is the pending competition and consumer protection legislation going to interact with some of the ongoing competition regulations, such as the Nigerian Securities and Exchange Commission, which is now reviewing mergers?

**BABATUNDE IRUKERA:** Very good. What will happen is we’ve done quite some work and it’s a collaboration that hasn’t been without, maybe not acrimony, but resistance. I’ll use the word resistance. And my argument was: what is the whole concept of competition law? Mergers and acquisitions in the context of competition law are simply, and exclusively, about the market and consumers, not about investors.
The Securities and Exchange Commission comes at competition from investor, not consumer, protection. This understanding is fundamental to understanding the nature of each regulator’s role. As such, to the extent that a potential combination could affect investors or investor relations, the Securities and Exchange Commission is the appropriate institution to consider, evaluate, and determine the combination, without question. But to the extent that it’s about consumers, the market, choice, price, and fairness, a consumer protection and or a competition authority is the right evaluator. As a matter of fact, it is not inconceivable that the Securities and Exchange Commission might even have a conflict because they are there to represent the investors.

And I think that we’ve gotten that understanding now and I’m hopeful that the way the legislation would end up would be to have that understanding with preserving the role of the Securities and Exchange Commission with respect to mergers and acquisitions when the rights of investors could potentially be implicated.

**ANTITRUST SOURCE:** That is a very rich portfolio of matters for your attention. I look forward to seeing how they unfold. Let me ask where you look, if anywhere, outside of Nigeria for collaboration, for information from other agencies, other entities. Are there any particular organizations or any networks that you are finding useful?

**BABATUNDE IRUKERA:** Well, yes, we look in different directions depending on what we’re looking for. For instance, for collaboration with respect to goods that come into the country, we’re looking to neighboring countries, and we’re looking to sometimes the source country, and we’re working with the standards organizations to enforce sometimes pre-shipment inspections and those kinds of things that protect the market. We also participate actively in initiatives such as regional and other fora that can assist with building capacity.

For instance, there’s an FTC-promoted African Dialogue which Nigeria takes a strong role in on multiple fronts and levels. Recently, one of the key resolutions that came out of the African Dialogue is to promote information sharing and business guidance principles. And we believe that just that uniformity across the continent would be very helpful.

With respect to capacity, resources, or other regulatory tools—whether from the rulemaking standpoint or approach to investigations and investigative techniques—I personally look to the United States, for several reasons. The United States has a very well-developed, long history and strength in these regulatory areas and approach to regulation. Secondly, there are certain provisions in the proposed legislation that mirror U.S law, and what the United States has done, not necessarily in language, but in outcomes. For instance, one of the key roles of the Consumer Protection Council is to enforce any enactment for the protection of consumers, not necessarily its own law, which is very similar to what the FTC does. I mean, why reinvent the wheel?

Also, my experience litigating in the United States, the judicial process, document production and discovery process, the engagement, government relations, and how the investigations and the discovery process leads me to believe that that’s a very robust mechanism that is very result-oriented, that is a successful and efficient template that we can adapt. This certainly endears Nigeria to build a strong collaborative relationship with regulators in the United States.

**ANTITRUST SOURCE:** An amazing collection of activities and challenges. What did I not ask you and what would you like to answer? Are there any questions that we haven’t addressed yet that you would like to cover?

**BABATUNDE IRUKERA:** I think for the most part you’ve asked all the questions. The only thing that I
would say is that what’s a priority on my mind, as far as how the Council can succeed in fulfilling its mandate is promoting and institutionalizing better and more responsive relationships and interactions between businesses and their customers.

When I arrived at the Council, one of the consumer education photographs hanging, and which I felt did not portray what I would like to accomplish, was one where the Consumer Protection Council was an umbrella and it collected consumers under it as protection from companies. I remember the folks there remarking that it’s actually one of their best images and eloquent portrayal of the work the Council does. I don’t dispute the broad concept the image conveys, but I disagree with the perception that its customers (we) against them (companies). In reality, consumers are in business with companies, even by consumption. We must encourage fidelity in that relationship and explore ways to strengthen it and build mutual confidence. Sometimes this involves strongly holding companies accountable to consumers, but that doesn’t change the fundamentals of what the relationship is, or about.

And so with that theme in our minds, you will be a more effective regulator because much as you want to ensure you’re defending and protecting the rights of consumers, you also want to promote commerce, because that is also consumer protection. It is in the interest of consumers that commerce runs well, that choices exist and that businesses can operate efficiently. For me, finding that balance takes a significant part of my days.

ANTITRUST SOURCE: I think that the way you are approaching your job is going to be a very good and valuable lesson for many of the readers of The Source because you are giving some advice that I wish I had had when I was a regulator at the Federal Trade Commission.