

Roundtable Conference with Enforcement Officials*

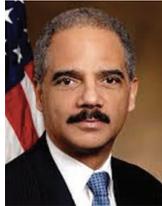
American Bar Association Section of Antitrust Law Spring Meeting ■ Washington, DC ■ April 17, 2015

MODERATOR



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SPEAKER



Eric Holder
Attorney General of
the United States

QUESTIONERS



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PANELISTS



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Margrethe Vestager
Commissioner for
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HOWARD FELLER: Good morning. I want to welcome you to the Enforcers' Roundtable program, always one of the featured programs at the Spring Meeting.

This year we had a late-breaking development that is tremendously exciting. For the first time in the history of the Antitrust Section, the Attorney General of the United States is speaking at one of our conferences. Without any further ado, it is my great honor and privilege to introduce to you The Honorable Eric Holder, Attorney General of the United States.

ERIC HOLDER: Thank you, Howard, for those kind words and for your outstanding leadership of the ABA Section of Antitrust Law. The Antitrust Section, and this Spring Meeting in particular, I think, provides a vital channel for fostering dialogue between practitioners and scholars, for extending the collective expertise of Section members, and for enhancing overall compliance with antitrust laws in the United States, but also around the world. I am grateful to have this opportunity to be with you today and to be a part of what I think is a really special gathering.

* *Editor's Note:* This Roundtable has been edited for publication.

It's an honor to stand with so many valued friends and colleagues; talented members of the antitrust bar; and distinguished public leaders representing enforcement authorities at all levels, both domestic and international—including the panel members I know you are eager to hear from after me. And it is a great privilege to join you at what is both, I think, an exciting moment for antitrust enforcement generally and a reflective moment for me personally.

Because my own professional path will soon lead me in a new direction, I have had the opportunity lately to take stock of all that the hardworking men and women of the Justice Department—and our remarkable Antitrust Division—have achieved over the last six years.

When I took office as Attorney General in 2009—in the aftermath of a global financial crisis, and in the midst of deep and widespread economic uncertainty—one of my central priorities was to bring strength and fairness to the rules by which our commercial enterprises operate. And a core focus was protecting our citizens and ensuring fair competition throughout the American marketplace.

As former Attorney General Robert Kennedy noted over half a century ago, the antitrust laws of this nation are designed to protect and to vindicate the principles of free enterprise—principles that, as he said—and I quote—“underlie the whole structure of a free society.” They are a vital safeguard for competition, fundamental to the structure of our economy, and they contribute directly to the prosperity of our nation and the economic freedom of our citizens. Their enforcement is in the interest of all those who believe in free markets; their values bear no partisan stripe or political creed; and their promises of competition, innovation, and growth are woven into the fabric not only of this country, but of all those that have adopted antitrust regimes based on these shared values.

This Administration's commitment to vigorous antitrust enforcement extends as far back as September 2007, when then-Senator Barack Obama vowed that, if he were elected President, he would step up enforcement activity in a comprehensive way—and I quote—“to ensure that the benefits of competition are fully realized by consumers.” I think that's exactly what we have done.

For the past six years, we have worked tirelessly to realize antitrust law's promise of robust marketplaces and fair competition. We have approached threats to that promise as level-headed law enforcers making considered judgments on the merits, always guided by economic common sense and fidelity to the law. And where we have found violations, we have been prepared to litigate in full, no matter how complex the case, in defense of the American consumer and in the pursuit of the cause of justice.

On the criminal side, the scale, the scope, and the impact of our enforcement efforts are unprecedented. In the most recent fiscal year, we obtained a record tally of fines and penalties, totaling nearly \$1.3 billion. We have undertaken the largest criminal investigation in antitrust history in order to root out price fixing and bid rigging in the auto parts industry. And we have increased the average number of corporate executives sentenced to serve time for antitrust crimes to 29 per year, while lengthening their average sentence to over two years. Whether it involves price fixing of computer components or bid rigging in real estate foreclosure auctions, we have pursued all forms of criminal conduct—running the gamut from local wrongdoing to transnational crime.

All told, through the really extraordinary leadership of dedicated Assistant Attorneys General like Bill Baer—and former leaders of the Antitrust Division like Christine Varney, Sharis Pozen, Joe Wayland, and Renata Hesse, who I'm delighted to have with us today—the Antitrust Division's criminal program has prosecuted 385 individuals and 129 corporations over the course of the Obama Administration. We have obtained more than \$5 billion in fines and penalties, which have

But more important than the victories themselves is the message they send to businesses everywhere: no matter how lengthy the investigation, no matter how challenging the environment, and no matter how complex the practice or industry at hand, we will never shrink from litigation nor shirk our sacred responsibility to uphold the laws of our nation and to protect the consumer.

—BILL BAER

been a major contributor to the Justice Department's Crime Victim Fund, helping victims of all types of crime access the medical, legal, financial, and other services they need to move forward with their lives. And through our tireless efforts, we have sent a clear and, I think, really consistent message to all those who would take advantage of American consumers, exploit our markets, or subvert our laws. The Antitrust Division will simply not tolerate their dishonest and destructive behavior. In that regard, I expect that there will be more significant news on the criminal side within the next few weeks.

Of course, while the criminal program has proven itself as an intrepid and hard-charging component of our fight to maintain competition in the marketplace, there is no real doubt that the civil side has kept pace at every juncture. We have challenged numerous mergers that were likely to substantially reduce competition in critical sectors of the American economy, including mobile wireless, airlines, and beer—a market in which Bill Baer demonstrated, I think, a deep interest and a curious expertise. [Laughter] I think he was sampling a lot of trial exhibits. [Laughter]

Two mergers foundered at trial, while many others were abandoned or entirely restructured as a result of our enforcement measures.

We also successfully challenged an array of non-merger business practices that distorted the competitive process and threatened to harm the marketplace. Everyone in this room knows about some of the most prominent examples of our success, like our trial-court victory against Apple over the pricing of e-books and our more recent success against American Express, whose contractual restraints have long stifled competition among credit card companies.

But more important than the victories themselves is the message they send to businesses everywhere: no matter how lengthy the investigation, no matter how challenging the environment, and no matter how complex the practice or industry at hand, we will never shrink from litigation nor shirk our sacred responsibility to uphold the laws of our nation and to protect the consumer. For the United States Department of Justice, there is no unlawful conduct that is too complicated to pursue, and no company too large or individual too powerful to be held accountable for actions that harm the American people.

I am tremendously proud—tremendously proud—of the inspiring individual efforts and the collective accomplishments of the Antitrust Division these last six years, as well as those of our enforcement partners at the FTC, in state governments, and around the world. We have been committed to smart, rigorous, and assertive antitrust enforcement across all sectors of our economy. And as we move forward, executives worldwide surely know that this Antitrust Division and its partners stand ready to do what is necessary to protect consumer welfare.

Although my time at the Justice Department will soon draw to a close, the Department's commitment to effective antitrust enforcement and to the critical values it advances will not waver. As the Antitrust Division carries its work into the future, and resolves to continue building on the extraordinary record of achievement that I have highlighted today, I urge you all to stay engaged, to adhere to the high standards of this important area of the law, and to never lose sight of this country's founding commitments to liberty and to justice.

In the appropriate enforcement of the antitrust laws we make real the promise of our democracy and our founding documents. Vigorous competition in all spheres is what makes this nation exceptional. It makes progress more likely and promotes the general welfare. The desire to make the promise of competition real has been at the heart of our efforts these past six years.

I close by expressing again the pride I have in the women and men of our Antitrust Division who have done truly historic things in service to the American people. I think that when the history of this era is written it will be said that this Division—at this time—made our nation more open, more

just, and more ready to confront the economic issues of the day. That will be high praise, but, because of my colleagues' dedication, their vision, I believe that praise will be well deserved.

Thank you.

MR. FELLER: How exciting was that? This next portion of the program is going to prove to be just as memorable.

It is my pleasure to serve as the moderator of the Enforcers' Roundtable program, which features the heads of the antitrust and consumer protection enforcement agencies in the United States, the European Union, and the United Kingdom. The other questioners for this program are the co-chairs of the Spring Meeting, Sharis Pozen and Hartmut Schneider.

Our distinguished panelists are very well known to everyone here, so I am not going to take a lot of time to go over their individual bios. You do have them in your materials. In alphabetical order, our panelists are: Assistant Attorney General Bill Baer; the Chairman of the Competition and Markets Authority, Lord David Currie; the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, Kathleen Foote; the Chairwoman of the Federal Trade Commission, Edith Ramirez; the Commissioner for Competition of the European Commission, Margrethe Vestager.

Another exciting aspect of this program is that, for the first time, Ms. Vestager and Chairman Currie are presenting and speaking at a conference in the United States. Thank you both very much for your presence here today.

One of the highlights of the Spring Meeting is to be able to hear firsthand from the enforcers, whose decisions contributed to the competition policy last year and whose ideas will shape policy in 2015 and beyond. We would like to start out by giving each of you an opportunity to tell us what we should be sure to remember, what issues you see emerging, and what we can anticipate.

Bill, we'll start with you.

BILL BAER: Thank you, Howard, Sharis, Hartmut. This was a great Spring Meeting once again, and congratulations to you all.

We have spent some time getting ready for this panel. We had a double time commitment this year because everybody was trying to figure out how to pronounce Margrethe's first and last names. [Laughter] But we are all working on it and she is very forgiving. So, Margarethe, we thank you for that.

It is a little hard to follow the Attorney General. It is probably better that I really not try very much. The other way of saying it is, "The son of a gun stole my best stuff." [Laughter]

But one thing I did want to say is that those of us who have had the privilege of working with him over these last years appreciate that—and you could hear it in his voice this morning—this is a guy who is committed to on-the-merits antitrust enforcement. It is nonpartisan for him. It's get the facts right, get the analytics right, and then go get it done.

When we would meet with him to talk about a recommendation, it was always merits-based. And, if we convinced him we had it, he said, "Go! I'll support you all the way." And he has done it. It has really been a privilege for all of us to work with Attorney General Holder.

Just some quick highlights on our year.

The Attorney General talked about cartel enforcement. It continues to be a large part—roughly 40 percent—of what we do. We are committed to going after companies and holding them accountable, but also their senior executives. We are committed to fair and effective enforcement. We are committed to going after local bad behavior, such as bid rigging of mortgage foreclosure

auctions that harms homeowners who have been tossed out of their homes, by denying them the benefit of the fair proceeds of an auction sale. We are committed to pursuing international cartels, like ocean shipping, like auto parts. We are very actively involved in the financial services market, and will continue to be over the course of the next year.

Many of you saw last week we announced our first—though perhaps not our last—enforcement action on a scheme involving an effort to fix online poster prices. It involved conspirators adopting specific pricing algorithms for the agreed-upon posters so that when a consumer searched for a poster in an online marketplace, the prices offered by the conspirators for the same product were exactly the same. It is a small case in terms of the total volume of commerce, but very significant because those who are incentivized to fix prices are more than willing to take the risk of moving that to a high-tech online platform. The prosecution clearly demonstrates that wherever we find it, we will go after price fixing that harms U.S. consumers with great vigor.

We have also continued robust civil enforcement. The Attorney General talked about the *American Express* case, about the e-books case.

One thing we have also focused on this last year is making sure that in a situation where wrongdoing has occurred—where an anticompetitive merger has taken place, where there has been gun-jumping, or where a joint venture has been formed and raised prices unlawfully—that our relief includes disgorgement of ill-gotten gains. I suspect my colleague Edith may have something to say about disgorgement when her turn comes around and I will leave the rest of that to her.

But the principle here is: if you do wrong, you shouldn't be able to pocket the dollars from your wrongdoing.

Finally, a word about what brings us together on this stage. We do have individual responsibilities in terms of enforcing the law in our Member States, our home countries, our home states. But, collectively, we are working very hard together to advance the principles of effective antitrust enforcement. Over the last six years, we at the Antitrust Division have worked with 49 different state attorneys general, Puerto Rico, and Guam on enforcement matters. Our cooperation with Europe and with the new CMA, David Currie's organization, could not be better.

A key foundation of effective enforcement in the United States is the wonderful partnership that the FTC and the Antitrust Division have had over the years. Edith and I recognize a shared responsibility to work together, in terms of advocacy and splitting up responsibilities, but also to take the show on the road—going around and talking about principles of effective enforcement around the world. We just have a wonderful time doing it together.

With that, I will turn it back to you, Howard.

MR. FELLER: Edith.

EDITH RAMIREZ: First, let me say that I am delighted to be here, on the stage with my distinguished colleagues, and especially delighted to welcome David and Margrethe to D.C. to join us at this terrific conference.

I also want to take the opportunity to acknowledge two of my colleagues who are here this morning, Commissioners Julie Brill and Terrell McSweeney.

Let me start off by saying that there was one accolade, one accomplishment, which the Attorney General did not mention this morning, and that is that I had the pleasure of presenting the Miles Kirkpatrick Award to Bill, as well as to another former director, David Vladeck. It is the highest honor that we at the FTC can bestow on someone. It was to recognize the contributions to the agency during his time as Director of the Bureau of Competition, as well as his extraordi-

nary contributions to the antitrust community in his current role as Assistant Attorney General and as a private practitioner.

I also want to disabuse anyone of the notion that we gave him the award to influence any subsequent clearance discussions [Laughter]. But, Bill, we'll have to talk later. [Laughter]

Let me now turn to a few FTC highlights over the course of the past year.

As I think most of you know, we celebrated our centennial anniversary this past year, and we had an absolutely phenomenal year. I only have time this morning to mention a few highlights from the last couple of months, but we had an extraordinary year. I want to first acknowledge all of the FTC staff who are in the audience for their dedication and commitment that has led to the terrific outcomes I'm going to mention this morning.

Let me start off by talking about our most recent Supreme Court victory in the *North Carolina Board of Dental Examiners* case. This is our third Supreme Court victory over the course of the last two years. It reflects a longstanding and bipartisan initiative that the Agency has had to develop and clarify the state action doctrine. The Supreme Court affirmed the Commission's decision that the state action doctrine did not shield the anticompetitive conduct of a state board that was comprised of private actors who actively participate in the field they regulated.

I think the role that antitrust enforcers play in terms of furthering and developing antitrust doctrine is crucially important.

I also want to mention an important merger challenge that we recently filed—*Sysco/U.S. Foods*. There, the Commission authorized the filing of a complaint seeking a preliminary injunction challenging the proposed \$8.2 billion merger of Sysco and U.S. Foods. We have alleged that the proposed transaction would be anticompetitive in the broad-line food service distribution market, both nationwide and in a number of local markets. The preliminary injunction hearing is going to be taking place early this coming month.

Another important court victory that we just received this week, in perfect timing for discussion during the course of this conference is the Eleventh Circuit's decision in the *McWane* case. I think that decision is quite important for the development of Section 2 and exclusive dealing law. It involves an exclusive distribution program that a monopolist was using in order to prevent a market entrant from becoming a meaningful competitor, and it is another decision that affirms an administrative ruling by the Commission.

Let me mention two other things. We are still placing a significant focus on the conduct side in the pharmaceutical sector, taking a very close look at strategies that branded manufacturers use to prevent or delay the entry of generic competition. In September we filed our first new pay-for-delay case since the *Actavis* decision, against AbbVie. That particular case includes allegations relating to both pay-for-delay as well as sham litigation.

I want to make one final point on the competition side and then I want to say a few words about consumer protection. It is also very important for antitrust enforcers to look back at what we have done and to evaluate the effectiveness of our work. In an effort to do that, we have launched a remedies study that will update and expand on a study that the FTC conducted back in the late 1990s, during Bill's time. It will allow us to take a look back at our prior remedies and evaluate their effectiveness.

Finally, I'll just say a few words about the other half of what we do—consumer protection. Over the course of the last year, as we have been looking back at the origins of the Agency and determining how we can be most effective, we have been paying even more attention to the technological changes that have been taking place in the marketplace and how they have impacted consumers. For example, we have really stepped up our efforts when it comes to ensuring the

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protection of consumers in the mobile ecosystem. That includes tackling issues like mobile cramming, unauthorized charges, and deceptive advertising relating to the delivery of broadband services, in a major case against AT&T.

In addition to making sure that we are effective and that we stay on top of what consumers are doing, we have also been paying very close attention not only to changing business models and changing uses of technology but also to demographics. We have made a significant effort to ensure that, as our consumer population changes—as the American population gets older and more ethnically and racially diverse—we really look hard at how fraud and other deceptive or unfair practices are impacting consumers in different communities differently, and that we are attuned to that. And, in turn, that impacts how we deploy our enforcement resources as well as our outreach. I hope to talk a little bit more about the consumer protection mission later this morning.

I will leave it at that. Thank you.

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MR. FELLER: Thank you, Edith.

Margrethe, would you like to go next?

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MARGRETHE VESTAGER: I would be happy to do so. I think this is as spontaneous as it can be, because this was not agreed upon. [Laughter]

for society, for law

It is a true pleasure to be here. I think it was a special gift to be able to hear Mr. Holder speak in the beginning because, as a newcomer to the competition world, it is truly reassuring to hear the values of competition law enforcement spoken so strongly. The impartiality, that no one is too big, no one is too small, to be taken on if there is a case where consumers need to be protected to ensure choice, affordable prices, and innovation—I think that is at the core of our mission. I think this conference, all the effort put into its organization, is also a sign of just how important that is. As businesses have grown global, I think it has been a challenge for society, for law enforcement, to follow. And it is essential to be just as effective when faced with global businesses in order to protect citizens and customers.

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The fact that this conference this year is so big, and with representatives from so many different countries, I think shows very clearly that law enforcement wants to be up to the challenge, and we should be reinforcing our cooperation, both when it comes to sending one message to businesses that engage in wrongdoing, but also to be working as closely together as possible in individual matters. Therefore, I hope that you will rest assured that I will be in the forefront of promoting that cooperation, very much appreciative of the global advocacy done by my U.S. colleagues.

—MARGRETHE VESTAGER

The need for cooperation is, of course, at the core of our European Union values since 1957. And in the competition world, the Commission works in very close cooperation with all the national authorities. The Commission would not be able to do its job in a proper way if we couldn't rely on national authorities also to do their job. I think it is very important to recognize that yes, the European Commission is very established, has strong competences, but we also need the national authorities to do their job—for instance, when it comes to daily necessities like food, where our national authorities are doing a wonderful job.

The second thing is that while impartial and rigorous enforcement of the competition rules is essential, it is still disputed, especially in difficult times. The crisis has been as deep in Europe as any seen before. Times have been truly tough. Therefore, even though we have the best record of all to prove that competition, openness, and trade are the way to go instead of protectionism, of course it comes up that: "Antitrust is a good thing in theory, but it may be a little bit inconvenient today—it is Friday, almost the weekend, so maybe we should wait until next week; and it is

very hard to get things done on a Tuesday, and on a Tuesday it is almost Wednesday, and then you are very close to the weekend, so maybe you should wait until next week”—then it just passes on.

I think we should take this debate head-on because there is something very important at stake. Basically, what is at stake, in the midterm, in the long run, is the health of our economies and not least jobs and consumer welfare. I do not think that any company can be competitive on the global stage if it is not competitive at home. These two things, of course, are closely related. If you want to be able to make it globally, you have to be able to make it at home as well. We can find both strength and encouragement in these messages and values because they are at the heart of our case work.

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One thing that I very much appreciate, because it is a true treasure to come in as a newcomer and find such competent and engaged services as I have done in DG Competition, is also to use these very concrete insights from our case work to feed into some of the Commission's more general legislative proposals.

You may know that the Commission is working on plans to advance European Energy Union, the digital single market, and capital market union. We will contribute with our very concrete fact-based knowledge about how markets work in order to help Europe grow. And facts are at the core of our mission. This was put as strongly as possible by Mr. Holder earlier. Our work has to be fact-based, based on the evidence. It should be able to stand up in court.

Finally, the cooperation that we have across jurisdictions can lead also into convergence in results. I think that should be our aim.

Look at merger control. About 60 percent of the complex cases require that we work very closely with agencies in other countries—that we coordinate, including on remedies. That is a very concrete token of the fact that we have gone global. However, there can also be very good reasons to reach different results, because of course there can be differences between markets, between legislation, in the way that we approach things.

The Commission's *Google* case is an obvious example to mention here. We may have reached different conclusions so far—the statement of objections that we just adopted sets out our preliminary view that Google's conduct is in breach of EU competition rules. If it is of any comfort to you, the word "preliminary" is as difficult for me as my name is to you. [Laughter] Even though we have reached different conclusions so far, rest assured that we share the same values. I think that is most important—to build on the facts, to build on the evidence, to be able and willing to go all the way, in the interests of consumers.

Thank you.

MR. FELLER: Thank you. David, we will go on to the United Kingdom.

DAVID CURRIE: Howard, thank you very much. It is a great pleasure to be here this year. I should have been at the conference last year, but unfortunately family circumstances meant that I couldn't come.

That would have marked the launch of the Competition and Markets Authority. We have just celebrated our first birthday. So what I would like to do is to give you a little bit of a sense of the reforms that have happened in the U.K. context.

I think the Enterprise and Regulatory Reform Act of last year will be seen as being the major reform of the U.K. system. The old system wasn't broken, it was working very well, but the reforms were intended to make it work even better. We have to work with greater pace and efficiency, to

tighter statutory timetables, to make competition policy a bit more fleet of foot. And we have been given resources to do that. We had a 30 percent uplift in budget from the Treasury in circumstances where public spending was under considerable pressure.

One key purpose for that extra funding was to enhance our enforcement record. We are determined to enforce more competition cases, consumer protection enforcement, and, importantly, cartel enforcement, both civil and criminal. Our record in the United Kingdom in cartel enforcement has not been as strong as we would like, but we do have a number of cases that will be coming forward that we think will change that for the good.

One of the interesting features of the reforms is we were given a general duty, which was that we must seek to promote competition both within and outside the United Kingdom for the benefit of consumers. That is not suggesting that we should be doing Edith's or Bill's or Margrethe's work, but it does give us a real license to work internationally and cooperate very thoroughly internationally, as we have in the past. We are absolutely determined to do that. I would echo the remarks that have been made about the way in which that international cooperation with the United States and with the European Commission is working very effectively.

We are helped in that by having a very international Board. We have the privilege to have Bill Kovacic on our Board; and Philip Lowe, who ran DG-Comp for a number of years, is also on our Board; as is Annetje Ottow, a professor of law at the University of Utrecht. So we are very international in the way we work, and that international commitment is absolute.

We have another objective, to extend the boundaries of competition. We are particularly interested in online issues, but it will often move from that into big data; but, importantly, also the regulated sectors in the United Kingdom. We have sector regulation which covers something like 25 percent of the economy, including health. In the past, the Office of Fair Trading had not done very much in that area. There has been a paucity of competition cases. We are determined to change that.

We have created a thing called the U.K. Competition Network, modeled on the European Competition Network, to enhance cooperation in competition matters between us, in the lead, with our sector regulators. That is working very well. There has been an uplift in the number of competition cases.

Finally, let me just flag the rather unusual markets regime that we have in the United Kingdom. In the past, this was operated by the Office of Fair Trading doing an investigation at phase 1 and, where appropriate, referring to a phase 2 market inquiry done by the Competition Commission. That regime stays in place, although under a single roof. So we are careful to keep those two phases separate and independent.

It is a powerful regime because we are able to impose remedies even when nobody has done anything illegal. If we can demonstrate sufficient consumer detriment in a market that is not working well, then we can impose remedies to enhance their operation to the benefit of consumers—proportionate remedies of course, but we can impose those. Because that is a heavy responsibility, we make sure we are very much rigorous, evidence-based, transparent, and, importantly, open to appeal.

We have concluded two cases that we inherited from the Competition Commission, in payday lending and private health, and we have launched major inquiries in energy and in personal and SME banking. Those two inquiries, I think, are going to be very significant. They touch everybody's lives.

Finally, compliance. The other side of enforcement is that we want to raise the profile of competition issues in the boardroom. Before I took this job, I sat on the boards of a number of com-

panies, and I can tell you that the awareness of competition issues was lower than it should have been. We have determined to actually raise the profile, to make people aware of their responsibilities. Most companies want to comply, and often it is ignorance that leads them not to understand.

We have done surveys that show, particularly, SMEs do not understand both their rights under competition and consumer law, but also their responsibilities not to breach those rules. Enhancing that awareness is going to be an important agenda for us going forward—long term, it will take time, but we are determined to make a difference.

MR. FELLER: Thank you, David.

Kathleen will go on to what is happening in the states.

KATHLEEN FOOTE: Thank you, Howard, and thank you all. It is always such a pleasure to be here.

Although the National Association of State Attorneys General has been around for over a hundred years, the Multistate Task Force on Antitrust began in 1985, so we are celebrating our 30th birthday this year.

For those of you who are not familiar with our Task Force, its formation heralded quite an explosion of joint investigations across states, major multistate litigation, often the civil-redress type of litigation on behalf of consumers, and advocacy via amicus briefs whose multistate authorship has proved influential. The Task Force work by multiple small bureaus and antitrust enforcement agencies has been quite powerful in encouraging enforcement of state antitrust laws, as well as the assertion of state interests under the federal laws.

State antitrust enforcement quite regularly goes hand in hand with consumer protection. State attorneys general are primary enforcers of consumer protection under state law. In fact, in many states the consumer protection law is also the antitrust law.

In the past year, the multistate achievements include a number of collaborations with our regular colleagues, DOJ and FTC, on several mergers affecting local markets. Those are the mergers that interest state attorneys general by far the most.

In the *St. Luke's* case, for which the FTC deserves enormous praise and recognition, the attorney general of the State of Idaho stood side-by-side with the FTC throughout that, committing almost his entire staff and certainly his entire budget, as well as his own personal efforts, to its success.

The work of quite a number of states on the Sysco/U.S. Foods merger has resulted now in a filing. There are many state AGs who are continuing to assist, helping to carry the burden, particularly on depositions as they take place all around the country.

On the nonmerger side of state activity, there has been a lot of individual state activity that is worth a mention here. There have been at least four settlements by states of bid rigging. That, of course, has been our bread and butter over the years. Connecticut, Oregon, Michigan, and Puerto Rico have settled bid-rigging cases—in Puerto Rico multiple bid-rigging cases—very recently. Michigan is continuing to go forward with one of its bid-rigging cases under their criminal law.

In addition, on the civil side, New York has recently finished a trial, now on appeal, in the pharmaceutical product-hopping case involving the drug Namenda.

In California, my own state, we recently concluded a case that we brought with Bill's shop against eBay involving no-poach agreements by employers not to hire each other's employees. In the case of the California suit, damages were sought under our *parens patriae* authority for the

individuals affected. We have finished the claims process, which became very personal for many of us who had direct contact with a number of the affected employees in the course of making certain that claims were filed promptly.

In the upcoming year I would say that health-care issues are front and center for us, with the maturing of the Affordable Care Act, the formation of the state exchanges, and an enormous amount of merger activity, both horizontal and vertical, in the context of Accountable Care Organization formation. The fact that the ACA relies, in part, on antitrust enforcement to achieve the cost savings anticipated by the law has caused the antitrust enforcers in our states and our state health regulatory agencies to begin to form some new working relationships that we had not had in the past.

Also upcoming, a great many of the state attorneys general are conducting comprehensive reviews of agency composition and decision-making authority, assisting the state governing branch to comply with the *North Carolina Dentists* ruling that the Federal Trade Commission recently won in the U.S. Supreme Court regarding the active supervision of state boards that are constituted with significant market participation.

These are some very significant challenges for all of us, particularly in the small bureaus where many of us serve. But we are certainly looking forward to the challenges and look forward to continued collaboration among ourselves and our federal counterparts. Thank you.

MR. FELLER: Thank you, Kathleen.

Sharis?

SHARIS POZEN: I will start on cartels, and I am going to start with Bill. Bill, I actually have the ATR site marked as a favorite and I have been trolling around on it. I noticed that the 20 largest fines in cartels have been on non-U.S.-based companies. Do you want to comment on that, or comment on cartels generally?

MR. BAER: Sure. It's a fair question. But I think there is a fairly simple and direct answer: when we determine the fines to seek, we do it largely on the basis of the volume of affected commerce. An international cartel is often going to involve commerce that is much larger and results in larger fines, reflecting a more significant impact on U.S. consumers than a smaller local or domestic cartel.

It turns out, I think, that of the Fortune 500 companies, 75 percent of them now are non-U.S.-based. So the fact that the distribution would be the way it is at a given moment in time is not shocking.

Now, all of you heard the Attorney General make some vague reference to the possibility of upcoming cartel actions in the near future. I want to assure you that right after the meeting ends I am going to go back to the office and call him and find out what it is he thinks I am working on. [Laughter]

MS. POZEN: Margrethe, can you talk to us a little bit about the EC cartel enforcement that you saw in 2014 and then going forward in your mandate?

MS. VESTAGER: First of all, cartel work will remain a priority. And 2014 was a very good year for us. It is a challenge to live up to.

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There were ten decisions, which is quite a lot compared to the years before. Eight out of ten were settlements; two were full procedures. This shows that settlement is now part of our toolbox, that we can use it as well as the normal procedure.

I think it is also a good thing that cartel enforcement covers a very broad range of sectors. Last year there were decisions in banking, in car parts, in foods and consumer goods. And the title of my memoir is going to be “The Envelope Cartel.” You should write more letters, please, so they don’t have to turn to these measures. It is bad. [Laughter]

And, of course, since business is increasingly global, a number of these cartels are global as well. But I think you will find that, looking into it, the approach is balanced. Even though you have half-and-half involvement of EU and U.S.-based companies, you would find that it is not necessarily the same thing when it comes to fines. There was a total of \$2 billion in fines in euros and two-thirds of that was imposed on EU-based firms.

So in that respect it is hard to find any kind of pattern here. On the contrary, I think that when you go through our numbers you would find that this is truly enforcement based on the individual case and the facts and the evidence in the case. I find that most satisfactory. This is the way it has been working so far, and that will continue of course.

MS. POZEN: There has been a lot of discussion about cooperation on a variety of levels. A lot of these cartels, as I said, are non-U.S.-based companies with international impact. Bill and Margrethe, how do you think about cooperation on a cartel matter, what have you seen work, etc.?

MR. BAER: We have some limits because of confidentiality restrictions in the United States. Criminal Rule 6(e) limits a little what we can share. But, particularly with regards to situations where there is an international cartel and there is a leniency applicant, we are able to work together in terms of sharing information provided to us by a leniency applicant. We are often able to coordinate the dawn raids, the search warrants in the United States, and to time this not just with the European Commission, but with other enforcement authorities around the world.

We have seen increasingly other enforcement authorities, when they have a leniency applicant who is reporting on conduct that affects markets outside that particular geographic picture, bring us into the picture. So the coordination is most effective and done quite well at the front end.

That big bang when we all show up really causes other companies to do a very prompt internal investigation and assessment of exposure. I think we encourage self-reporting by people who may not be first in line but have come to realize that there are benefits from getting in and ‘fessing up to cartel behavior.

MS. VESTAGER: I agree completely on this approach. What we see is when we work, for instance, with authorities in South Korea or in other jurisdictions, we find the same efficiency and we find the same dedication.

I think it is working very well. It is quite amazing for me, as a newcomer, to experience the limitations on cooperation—because they are obvious, not least because of differences in laws, as Bill has said—and then anyway to find ways where it is completely legitimate to coordinate and to share and to make sure that, even though we are in different places around the globe, be that day or night, we coordinate in order to make sure that we get the evidence that we actually need. When it comes to antitrust, the ability to knock on doors very early in the morning, and to do it at the same time, is an important part of the work that we do.

MS. POZEN: David, how about the CMA and cartel activity?

LORD CURRIE: We have built up a cartel team. Unfortunately, I have had no direct experience of the cooperation there has been in the past, but all my people say that the cooperation with the U.S. authorities and with the Commission has worked very well. In enforcing international cartel action, clearly we are not in the lead, but we will be very supportive in those actions.

We are also prosecuting some purely UK cartels—or we are about to move into that—because I suspect the prevalence of bid rigging and that type of activity is probably greater than we would like. We want to get a few successes in that area to demonstrate to business that actually that type of activity is seriously criminal and a significant change to our criminal cartel offense, where the requirement for us to demonstrate dishonesty has been removed with a number of safeguards. This is a somewhat technical change, but I think it will enable us to bring people who are in breach of the law to justice more effectively.

HARTMUT SCHNEIDER: Let's stay with international cooperation for a minute. At the Spring Meeting Luncheon two days ago, Bill Kovacic pointed, in particular, to China as one of the leading antitrust enforcers outside the jurisdictions represented here. We continue to see aggressive enforcement out of China, including in the recent *Qualcomm* decision. Sometimes there have been questions both about due process and about the substantive application of the law.

We are interested in hearing how each of your agencies cooperate with the Chinese enforcement agencies and what you see as the future of Chinese antitrust law.

Edith, do you want to go first?

MS. RAMIREZ: Sure. Let me start off by saying that I echo all of the comments that have been made by my colleagues about the importance of international engagement with counterparts around the globe. Much of what we are doing day in and day out involves matters that have multi-jurisdictional dimensions. This coordination and regular dialogue is, in my view, just an absolute top priority.

When it comes to China, that is certainly a very important relationship to us here in the United States. Together with the Department of Justice, the FTC has a Memorandum of Understanding with the three Chinese anti-monopoly agencies, and we engage with them on multiple levels pursuant to that MOU.

It includes formal high-level annual consultations, formal consultations. Bill and I went to China last year and they are going to be coming to Washington later this year for that formal dialogue. But, in addition to that, there is also considerable informal dialogue as well as cooperation in particular matters. That is really quite crucial.

Frankly, looking at the overall development of the Chinese enforcement program, it really has been astonishing, particularly when you take into account the fact that these agencies are small, that they are very young and have only been doing business for just a few years, and of course that they are facing an economy that is still very much in transition and becoming more market-oriented.

So I think it is quite remarkable what we have seen out of China. And something else to keep in mind is that the Chinese agencies are doing their work with the entire world watching very closely.

Going forward, I think we are going to see even more active engagement and enforcement on the part of the Chinese agencies. Of course, we do a number of things differently than they do. As enforcers, each of us has to apply our own laws and apply them to the particular market conditions of our respective jurisdictions. We have certainly seen differences across jurisdictions, as we have seen this week with the announcement from Margrethe about the Google case.

But that being said, I think that it is also important to emphasize, as international enforcers, that there are a few elements that I believe are especially important and certain core values that should apply across the board. Let me just highlight two of those. One is the importance of procedural fairness. The other is the importance of competition analysis focusing on economic evidence of effects on competition and not on particular rivals. Let me elaborate on both of those points.

I think when it comes to procedural fairness, it is crucial for the legitimacy of the work that we do that investigations be transparent, that parties understand the nature of the concerns or allegations that an enforcer is investigating, that parties have an opportunity to present their case, an opportunity to be heard, and are treated fairly during the course of an investigation, so that, regardless of the outcome, they feel that they had a fair opportunity to be heard and to defend themselves.

As international enforcers, certain core values should apply across the board: procedural fairness and a focus on competitive effects.

—EDITH RAMIREZ

Secondly, it is really crucial that the focus be on how we, as competition authorities, can advance long-term consumer welfare and enable long-term investment. I have certainly expressed concerns in this area, particularly when it comes to the application of the antitrust laws to matters that involve intellectual property. Again, promoting consumer welfare and ensuring that long-term investment will continue is key, as opposed to other non-competition policy objectives. It is key because it really goes to the legitimacy of our entire competition policy enterprise.

MR. SCHNEIDER: Bill, what is the Division's perspective on this?

MR. BAER: First of all, I echo and endorse the remarks of Chairwoman Ramirez.

Two points. On the one hand, this is a nascent competition regime in China, six-and-a-half-years old. We have the benefit of 125 years of the Sherman Act, 100 years of the FTC Act, 100 years of the Clayton Act. One needs to have some patience.

At the same time, we were learning to apply those statutes in a different environment, a far less international economy. So we can't wait for other developing antitrust regimes to get up to the international norms over a leisurely period of time. It affects investment. It affects fairness. It is why President Obama, when he went to China in November, engaged directly with the leadership of China.

It is why this Administration has secured some commitments from the Chinese government about transparency, about due process, about equal application of the law to domestic and to foreign industries. It is important. We are spending a lot of time on it because it is in the interest of consistent and coherent international enforcement. It is also good for the Chinese government and the Chinese people, in terms of encouraging investment in their economy, which continues to grow at a rapid rate.

So it is and will remain a priority for us over the years.

MR. SCHNEIDER: Margrethe, can you give us your perspective?

MS. VESTAGER: We have the same very high priority for this cooperation. It will sound as if we have coordinated our messages here. It is very much the same approach.

One thing is we think that in the concrete case work there is a lot of knowledge sharing, obviously. We have been working with the Chinese authorities, especially MOFCOM, on a number of merger cases, including to some extent on remedies. It has been as rewarding, I hope, for MOFCOM as it is for us. There has been less cooperation in concrete antitrust cases, but probably that will change in the future.

We have also put some resources into actually coming together and sharing knowledge about processes, about organization, how can things be done. When we make a priority of respect for due process we have to share how we actually do that. Coming together in that respect, getting to know each other better, I think is one of the cornerstones, of course, and then to supplement that also with key working relationships also on the higher level in order to support the mutual understanding of how this should develop. That's why I am also planning to be in China in the coming year.

MR. SCHNEIDER: David, you mentioned the CMA celebrated its first anniversary a little while ago. How have you interacted with your counterparts in China?

LORD CURRIE: The Office of Fair Trading had done quite a lot in respect of China. They had in place a Memorandum of Understanding with all three competition agencies, which we have taken over. Our staff interact fairly regularly with Chinese competition staff.

Like Margrethe, I am planning to go to China later this year. I haven't been for two or three years. My first time was 25 years ago, and I have seen a lot of change over those 25 years.

As Bill said, the competition regime is new, it is developing quite fast, and we need to do all we can to get them to move further towards international standards.

I was encouraged by the comments that Shang Ming made about MOFCOM's efforts to increase accessibility and transparency, as well as their aim to manage timetables efficiently to meet the needs of international firms. I think that is encouraging.

Of course, there remain notable differences in enforcement between China and elsewhere. We need to continue the dialogue and keep working on this.

MR. FELLER: We would like to talk a little bit about the antitrust issues that have arisen from new technologies. Recently we have seen a number of new technologies and business models—such as Uber, Tesla, Redfin, Airbnb—that have been changing markets but are also being viewed in some cases as disrupting markets. They are facing resistance sometimes from incumbents, also resistance from regulatory barriers.

Kathleen, many of the regulatory barriers have been at the state and local level. Some states have already started to investigate certain practices, like New York is looking into Uber pricing. What role do you see for the state agencies with regard to these technologies that are seen as disruptive because of state and local regulations?

MS. FOOTE: All right, Howard. I notice that three of the four disruptive players that you mentioned are San Francisco companies.

MR. FELLER: We want you to feel comfortable.

MS. FOOTE: I assume that you are starting with me because I am from San Francisco, so you are hoping that I am going to be disruptive too. [Laughter] Normally I would defer to Bill on that, but I will do my best.

I would certainly point out that there are regulations for almost all commercial activity. The new technologies do enjoy some benefit as they start from relative lack of regulation that everyone else is subject to. It does often give them a brief advantage over the incumbents. Obviously, that ends up changing.

There is, in fact, a long history of unsung and often behind-the-scenes efforts of state attorneys general in many states to ward off a number of the legislative or regulatory measures intended to squelch competition by insurgent entrepreneurs to protect local monopolies or to confer state action immunity at times on specific transactions. Certainly, those efforts, quiet though they may be at times, I envision continuing.

I think that the FTC, with the help of the Supreme Court in *North Carolina Dental*, has cracked open the door, at least a little bit, to potential antitrust liability of a captive state or local agency that is using its governmental authority to protect incumbents. It is not entirely clear what that will mean in the long run with regard to the innovators. But the very fact that such actions are no longer immune, at least in some cases, could prove to be significant, possibly even revolutionary, in the full migration towards deregulation that we are encountering.

But the very fact that such actions are no longer immune, at least in some cases, could prove to be significant, possibly even revolutionary, in the full migration towards deregulation that we are encountering.

All of that said, though, I think we need some continued deference to the states. They are engaged in the very difficult job of balancing freedom of competition against a number of very important police power interests, not least of which involve public-health issues, neighborhood safety issues with regard to Airbnb, and many other things. As a former local official, former mayor of my small town, I can certainly attest to the fact that in the minds of the public, zoning regulations are of the utmost importance. Now my allegiance is, of course, to competition above all, but I have to acknowledge that there are certainly other interests at play and the balance is difficult to achieve.

I will say, with regard at least to the implications of the *North Carolina Dental* decision, if those agencies do impose regulations, the states will need to weigh their value more carefully, in light of the active supervision requirement. Imposing a sufficient regulatory apparatus is going to be more expensive, with the cost directly borne by the state and local governments.

MR. FELLER: Edith and Bill, your agencies have certainly engaged in competition advocacy in some areas. What role do you see your agencies playing in addressing anticompetitive restraints that arise in markets with new technologies, new business models?

MS. RAMIREZ: I think there are three important roles for agencies to play in this area.

One is on the enforcement side. Kathleen has already discussed—and I mentioned earlier—the *North Carolina Dental* case. Given the portion of our economy that is governed by occupational licensing and state licensing requirements generally, I don't think we can overstate the importance of that decision by the Supreme Court.

I do understand that states have a number of questions about exactly what the implications are and what additional burdens are going to be placed on states to exercise appropriate supervision and oversight over state boards that do have members who have private interests. We do plan to issue guidance in the near future—that is a conversation that is taking place with Debbie Feinstein.

But, in addition to the implications of *North Carolina Dental* and also possible enforcement in this area, there is also an important advocacy role. The FTC has, for a significant amount of time, provided comments and suggestions to local policymakers regarding these types of issues. For example, we have provided comments to local taxi commissions that were considering regulations that, while there might be some claimed health or safety justification, might also have the impact of creating barriers for new and disruptive business models.

We share our competition policy expertise to urge these lawmakers and regulators to consider the competitive impact of those proposed regulations, and also urge that, to the extent that they are necessary for consumer protection purposes, they really be tailored to those particular concerns and not be overbroad.

—KATHLEEN FOOTE

Let me also highlight a third role that I think is also an important and fundamental one, which is that as enforcers we need to take a step back and study and examine these issues so that we really fully understand the impact of these new technologies and business models.

I am pleased to be able to announce that we are going to hold a workshop on June 9, on what is colloquially referred to as the “sharing economy.” We are going to be looking at the business models that have grown using Internet peer-to-peer platforms that allow entrepreneurs to access consumers more directly, considering the ramifications of these models, and also examining how existing regulatory frameworks can deal with them. We are going to be examining and convening relevant stakeholders to address both the competitive implications as well as consumer protection implications, again in an effort to gain better understanding that we can then deploy, whether it is in future advocacy or also, if need be and appropriate, in the enforcement context.

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—DAVID CURRIE

MR. FELLER: Bill, any comments?

MR. BAER: A couple of key points.

First, I think we all share the view that innovation and promoting opportunities for innovation are keys to a growing economy. Dynamic efficiencies matter. They drive us forward.

I think we can also agree that, as a general matter, incumbents do not like the revenue-shrinking or margin-shrinking effect of that, and that some incumbents will go to great lengths to protect that income stream. Some of what we can do, as Edith said, is law enforcement based, some of it is advocacy based, and we need to be prepared to do both.

I think a key thing for us enforcers to do is exactly what Edith said: first of all, make sure we understand the facts so that we sort out a legitimate health-and-safety claim from a bogus claim. This can be local, it can be state, it can be federal. It can be incumbents trying to protect takeoff and landing slots; it can be people trying to limit the availability of spectrum, or limit the ability of municipalities to develop local broadband alternatives to the Internet service provider who is dominant in its community.

But the point is to make sure we have the facts right and then take the time to educate the public, the state and local authorities, whose elected political role we respect. I think they can benefit from getting a balanced view of the costs of regulation versus the benefits of these dynamic efficiencies that drive our economy.

MR. FELLER: David, do you see the CMA getting involved in this, either on the competition side or the consumer protection side?

LORD CURRIE: Absolutely. Obviously, as others have said, we are instinctively supportive of innovation and disruption as a competitive dynamic. I think, more generally, the United Kingdom is quite open to such things, much less likely to reach for the protective instrument.

Emerging business models is something that we are very interested in exploring further and understanding further. We will be making sure that when disruptive players in the United Kingdom compete with incumbents that the new entrants do not find the playing field tilted against them, and we will be alive to the temptation for incumbents to dress up self-interested considerations in the guise of consumer protection arguments. We’ve got to be careful. Sometimes that is legitimate, but often it is not.

I should have said in my introduction that one of the roles we have been given by government is to be an advocate for competition within government, both in the terms of new legislation which

we can scrutinize and comment on, but we will be looking for regulations that are in place or might be being put into place that might act as barriers. Where we publish a comment on legislation and make recommendations the expectation will be that government will accept it, and, if it doesn't, it has to be on the public record as to why it has not done so. Our advocacy role, which the OFT always had, will be significantly strengthened by these reforms.

But it is very early days in these markets. I think we all need to understand more about how the markets and business models are working. So I am looking forward to the June OECD Competition Committee meeting, which is discussing exactly these sets of issues. We certainly feel we need to deepen our understanding of what are complex issues.

It is clearly going to be very important for us all to make sure these markets remain open to innovation and change.

MR. FELLER: Margrethe, we have already seen some activity at the Member State level in the European Union on some of these issues. Do you see that continuing at the Member State level or do you see the Commission getting involved in that as well?

MS. VESTAGER: First of all, I think it will grow and grow and grow in the years to come. The sharing economy is, I think, a new fact of life, both in large scale but also in small scale. I just heard about a woman who had created her own small platform to enable herself to lend out a soup pan—she only used it a few times a year, so why not share it? [Laughter]

So both in the very small, but also in the very large, scale you find that it is changing our culture. When we talk about the environment, about the use of resources, we would like to get more out of it.

I think, of course, that we should welcome these developments because they are very important in order to get things more balanced. I think balance is also the word here.

Understanding what goes on, both to enable competition to take place, because basically that is what is happening—and I think that is absolutely as it should be. But there are also completely legitimate concerns when it comes to hindering free riding, to make sure that when there are consumer concerns, tax concerns, we ensure that there is actually a level playing field; and then, on the other side, also to make sure that the incumbents do not enable themselves to erect barriers which are not due.

I think there is a lot of work to be done and to learn, as Edith said I think very much to the point, a few minutes ago. We are looking into it. We have had complaints by some of those companies who say that, "The Member States are not enabling us to provide services as should be our role in the single market." So we will, both in the short run but also in the long run, be looking into it from the Commission side.

MR. SCHNEIDER: Let's turn our attention to mergers. This will be a question for all of our enforcers.

One of the phenomena that we have seen in the last few months is the return of what some call the "mega-mergers": large transactions that we have not seen in a number of years. Sometimes those mega-mergers occur in industries that are already heavily concentrated as a result of prior transactions in those industries. How and to what extent do you as enforcers take account of those acquisition trends in an industry when you review transactions that come to your attention?

MR. BAER: First, I think you are right that, after many years of capital sitting on the sidelines following the 2008 financial crisis, we can see companies investing in strategic acquisitions. A high-

er percentage of strategic acquisitions have the potential to have antitrust/competition concerns associated with them.

Section 7 of the Clayton Act is an incipency standard, and the fact that there have been prior transactions does raise the question of whether even a modest increase in concentration does get us to a tipping point.

We do look at our past analysis. We did this in the airline industry. Had we gone to trial against American Airlines, we would have been prepared to show that some of the efficiency claims made in connection with prior transactions did not in fact materialize, that the market became more interdependent and less competitive.

I hesitate to bring up the beer industry, because the Attorney General seems to think I have a special affinity. [Laughter] But when we challenged the ABI [Anheuser-Busch InBev] acquisition of Grupo Modelo, part of the defense there was, "We already own 48–49 percent, so just getting control is not going to change the competitive dynamic." But our complaint said—and we were again prepared to prove at trial—that even that modest change in control would have indeed disrupted what was a fairly aggressive pattern of competition by Grupo Modelo in the United States through its Corona brand.

So we want to make sure we are not tied down by the argument that "you approved the last one, that obligates you to approve the next one." It is important that we are looking at each transaction on its merits, whether it is a mega-merger or a smaller transaction.

MS. RAMIREZ: I think we certainly have a very similar view. We are going to be looking at each transaction on its own merits. But what has happened in the past may very well impact the existing market conditions, and that will certainly be a factor. In addition, prior deals and concentration can also give us the natural experiments that allow us to better assess arguments about entry and about the merging parties' ability to achieve efficiencies. Again, we will look at everything on its own merits, but clearly what has happened in terms of prior deals will certainly impact our overall analysis.

MS. VESTAGER: First of all, I think that we should welcome these developments because it is a sign that the global economy is finally picking up, that there is more trust that now it is a good thing to invest, to acquire other companies, to merge. So in that respect it is a very good thing that our enforcement shops are busier.

But again, I fully share the point of view that we have to address these cases one by one, because otherwise we risk misunderstanding market developments. And I think we also risk sending a wrong message to companies in the future, saying, "Oh, they took this decision; now I can make a prognosis that they will take the next decision and the third decision and the fourth decision in exactly the same way."

Some of these markets change rather fast, and when you are dealing with fast-moving markets, then again you have to deal with the cases individually. I think that one of the main challenges for us is for people to understand that you cannot just say that "Because of what you did yesterday in that other case we expect you to do the same tomorrow," even though the situation is another one. I think that is an important message to get across.

LORD CURRIE: Mega-mergers would almost certainly go to the European Commission, not to the CMA, although clearly we have a strong interest in some of them and we would work very closely with the Commission.

At the moment, for example, we have a merger between BT and one of our mobile operators at the same time as two other mobile operators wish to merge. The second case is at the European level. The first is one that we ourselves are considering. Clearly, we need to be working closely together on those two cases because the interconnections are very important.

By and large, the merger regime in the United Kingdom has been carried over from the old regime. It hasn't changed in any significant way. One thing I would flag, though, is that our regime is a voluntary one. Some people suggest that that somehow is soft touch. We are very diligent, on the contrary, in calling cases in, looking at cases that should have been referred but were not.

For example, at phase 2 we have currently six mergers under consideration. Two of them were called in by us. It is quite important that companies considering mergers that involve us should actually think about whether a referral is necessary. Otherwise we might at later stage call them in, and that is disruptive to business and the merger process.

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MR. BAER: May I make one quick additional point? We recently challenged a merger involving National CineMedia and Screenvision. It was widely reported when that deal was abandoned that I had expressed some public skepticism about the judgment involved in the boardroom in deciding to go forward with a merger to monopoly. I want to clarify that that is exactly what I was doing. [Laughter]

There are some ideas that should never get out of corporate headquarters. The fact is that they are inevitably going to be challenged by the Federal Trade Commission or the Antitrust Division. It wastes time. It wasted the time of my people. But basically, at the end of the day, it is a huge embarrassment for a company to get out there and invest in something, get its shareholders all excited, and then have to pull out at the last minute.

One of the things you in this room do is to give the companies your best judgment about where we are and what we think. It's why we have Merger Guidelines. People need to take this seriously because we do, and it is not worth your clients' time and it is not worth our time to challenge things that are patently problematic.

—BILL BAER

MS. VESTAGER: Sometimes we talk about these cases as if they are always very problematic, always have to go into phase 2, always involve a lot of trouble for the companies involved. Some of the cases, I think, from the company side are very well prepared and show a basic understanding of our concerns.

I think Holcim/Lafarge is a very good example of that. They wanted to merge. They understood, of course, and had taken completely onboard what would be the challenges looking ahead. Therefore, it could be cleared in phase 1—of course with a substantial remedy package—but I think very well prepared on the company side.

It may not involve that many hours on your behalf—I wouldn't be the judge of that—but at least it enabled a very quick process on our side. I think that it is very important to take that up as an example, that when we work constructively with companies, even in enormous mergers, then things can actually be very quick.

MS. RAMIREZ: If I can jump in, let me also note that sometimes a company will have in mind what it believes to be an appropriate remedy, an appropriate fix. We are encountering that in the *Sysco/U.S. Foods* matter, where the parties entered into an agreement and they felt that if they made a divestiture of certain distribution centers to the third-largest player in the market then that would be enough. We ended up rejecting that proposal and proceeding with a challenge, which is set for a preliminary injunction hearing in May.

MS. FOOTE: I will certainly endorse everything that everyone else has said about this.

The states do from time to time review mergers individually in local markets, probably most notably in healthcare, where states have done a great deal in that respect. Many of those transactions are well below the HSR level for federal review. But when there are mega-deals, those are obviously HSR reviewable, and the federal agencies are quite expert.

In those cases, though, very often there are very significant impacts on local markets. States are selective in our participation. We will generally do so where there is a real value-added to our focusing on those local markets: where there are local accounts versus the national accounts in something like *Sysco/U.S. Foods*; where there are particular vulnerable populations affected, an issue called out by the state merger guidelines—one of the very few differences, if you can find them, between the state and the federal Horizontal Merger Guidelines—or if they are in key industries, particularly industries that affect state interests. Healthcare certainly falls in that category. Waste hauling and landfills are another classic example, where there would be very significant state interest and close state involvement with the witnesses and possible state enterprises that will be impacted.

[W]hile it is of course important to be looking at major deals, we should not lose sight of the importance of some of these smaller deals that may not grab the headlines but also can create competitive problems that we have to address.

—EDITH RAMIREZ

MR. SCHNEIDER: Another trend that we seem to be seeing is an increase in merger litigation. Bill and Edith, in particular, do you think this is a coincidence or related to what we have discussed and possibly a trend going forward?

MS. RAMIREZ: Let me say, in terms of the size of the transactions, I don't think that necessarily translates into there being an anticompetitive problem. Sometimes you have a mega-deal where there really aren't that many significant overlaps. We encounter this fairly regularly in the pharmaceutical industry, where there are major deals but we are able to really hone in on what the anticompetitive problem is, and so they end up being resolved by having targeted divestitures that can allow the deal to go forward.

Let me also mention that, while a lot of these mega-deals are the ones that end up getting a lot of attention in the news, I do not want to lose sight of the fact that you have a lot of smaller deals that do create competitive problems, and it is important for us to take action in those. We certainly handle quite a few of these. One recent example is the abandonment of the proposed Verisk/EagleView transaction dealing with the market for rooftop aerial measurements that are used by the insurance industry to evaluate property claims.

So, while it is of course important to be looking at major deals, we should not lose sight of the importance of some of these smaller deals that may not grab the headlines but also can create competitive problems that we have to address.

MR. BAER: I don't know that there is an increasing trend toward merger litigation. I do know that at the Antitrust Division we have approached our merger investigations with the notion that we may well be put to our proof and that we need to be prepared to go to court to tell a story of anticompetitive harm that we commit to tell under the Horizontal Merger Guidelines. When you know that on the other side you've got very talented advocates—lawyers, economists, others—for a transaction, being litigation ready basically allows us to confront the issues in a more direct and appropriate fashion.

And there is a certain reality therapy, I think, that goes through the companies' point of view, the deal advocates, about: "Where are we going? Where are we going to be? Should we put undertakings on the table early? How should we approach it?"

So going into a merger investigation not committed to a particular outcome, but committed to the notion that if we find a problem we are going to be prepared to go to court and prove the nature and the extent of the problem, is the right mindset, I think, for an enforcer to bring to merger enforcement.

MS. POZEN: We will move on to healthcare and pharmaceuticals. Reverse-payment settlements in intellectual property disputes between branded and generic drugs have been a very hot topic. We spent some time on that yesterday in the hot-topics panel. Both the European Commission and, particularly, the Federal Trade Commission have been active in these areas.

I thought I would actually turn to you, Edith, because you have a lot of cases I know going on in the courts. There have been developments while we sit here. I've been getting email prompts on what is happening in that area.

You do have cases pending, and I know there is a look back that you wanted to do. So would you talk to us a little bit about how you are thinking about it in these matters as the Chairwoman of the Federal Trade Commission, and how you see these cases moving forward, particularly after the *Actavis* Supreme Court standard was set?

MS. RAMIREZ: Absolutely. It is an area that the FTC has been focused on for a very long time, and we were certainly thrilled by the Supreme Court's decision in *Actavis*.

We are, first of all, moving forward with ongoing litigation right now in three different matters.

The *Actavis* case itself was remanded to the trial court and is in active discovery.

Another ongoing case is the *Cephalon* matter. In that particular case, it only took us seven years, but we finally have a trial date. That case is set to go to trial in June. We did receive a favorable ruling by the judge in that matter relating to our ability to get disgorgement. The judge affirmed that the Agency does have the authority and the ability to obtain disgorgement as a remedy. I want to echo a comment that Bill had made at the outset about the importance of using that as a remedial tool, particularly in situations when injunctive relief is really not going to be an effective way of addressing and remedying the anticompetitive problem. So we are looking forward to being able to move forward with that trial soon.

Let me also mention—and I made reference to this in my opening remarks—a new case that we filed alleging pay-for-delay, and that's the *AbbVie* litigation that we filed in the fall. We are in the process of addressing a motion to dismiss. In that particular case, one issue that has arisen post-*Actavis* is whether or not the fact that a branded manufacturer gives a noncash payment as consideration in settling patent litigation is something that is subject to antitrust scrutiny. We take the position that you do not need to hand over a bag of cash, but that you can give value in other ways, such as through side deals. *AbbVie* involves a supply agreement that we believe is what constitutes the unlawful payment.

There are a number of issues post-*Actavis* that are being addressed by the courts right now, and we are certainly keeping an eye on that—not only dealing with them in our own lawsuits, but also submitting amicus briefs where we think it is appropriate or we think that we can help develop the law.

MS. POZEN: That's great.

I know on the state level you have been particularly focused, Kathleen, on the pharmaceutical sector. Do you want to talk a little bit about that and where you see that headed?

MS. FOOTE: We have been for quite some time. One reason for that, of course, is the states are major purchasers of pharmaceuticals through the state agencies. But also, obviously, healthcare is a core issue for states under both their police power and the competition law.

I had mentioned earlier that New York had on its own pursued a product-hopping case involving Namenda. It went through trial. There was argument earlier this week in the Second Circuit regarding that, whether or not the 135-page decision with a great many factual findings would be upheld.

We have had for a long time a Pharmaceutical Industry Task Force within our Multistate Task Force. It was earlier focused on Medicaid fraud reimbursements and now very much it focuses on reverse payments.

There have been quite a number of multistate cases filed and now settled.

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Probably most significant, though, what the *Actavis* decision opened up—one of the almost throwaway lines in it perhaps—was that it is generally not necessary to litigate the validity of the patent, that you can look at the anticompetitive/procompetitive impacts of the agreement itself without considering that. That opens up the whole question of whether these things can be litigated under state antitrust law.

There is a case pending before the California Supreme Court on exactly that question. There was argument on March 3. They must issue their ruling on it within 90 days. So we are due for something that could be very, very significant, if those cases are now to be heard under state antitrust laws, which in some cases may be somewhat more stringent in their interpretation. State laws certainly can be different from the standpoint of procedure, whether or not there is a presumption of anticompetitive effect and precisely how the sequence of burden of proof might go forward in a case under state antitrust law.

—KATHLEEN FOOTE

MS. POZEN: You mentioned the New York case on product hopping. Do you see other states following that, or is that one of a kind?

MS. FOOTE: I don't think it is one of a kind. It is the only one that is extant right now. But this is an area that continues to be of great significance to the states.

MR. FELLER: Let's talk a little bit about civil enforcement activities. Kathleen, we've seen some states—including yours, Florida, Illinois, a few others—that have become more active in bringing civil follow-on cases in price-fixing matters in the last couple years. What do you see as far as the future there? Do you see continued expansion by state attorneys general on this front, bringing follow-on class action-type cases?

MS. FOOTE: I think it will very much depend on how things go with regard to the class action bar. Certainly, in some cases, the follow-on civil litigation that we do relates to the state's own claims, and nobody else is going to be representing those.

But a major aspect of what the states have done in that area is to represent consumer claims using the *parens patriae* authority that state attorneys general have. Now, if the class action bar is actually effectively representing consumer claims, there is obviously less reason for the states to be involved in most cases.

I would say that the states' interest in stepping into that kind of litigation, particularly in the cartel follow-on matters, increased as it looked like the ability of indirect purchaser classes to be certified in federal court was becoming more and more difficult. The *parens patriae* authority allows

the states to go forward on behalf of consumers without a class certification procedure, which can be extremely arduous and extremely expensive, and ultimately works to the disadvantage of consumers.

The tide seems to be shifting perhaps in small ways on that. In some of the more recent cases indirect purchasers have been successful. But I think it will most certainly depend.

MR. FELLER: David, we'll talk about the new law that is going into effect this October. As I understand it, it would establish a competition appeals tribunal as a venue for private enforcement in the United Kingdom and will make it easier for claimants to bring claims by facilitating opt-out collective actions. Are we seeing the United Kingdom go the way of the United States in terms of its approach to follow-on private actions for antitrust law or competition law violations?

[T]he present opt-in system of collective action doesn't seem to be working. . . . There was only one case, brought by the Consumers' Association in 2007, following an OFT infringement decision . . .

—DAVID CURRIE

LORD CURRIE: First of all, both the Office of Fair Trading and the CMA subsequently were in favor of this change. The principal reason for that is the present opt-in system of collective action doesn't seem to be working. There were very low levels of redress. There was only one case, brought by the Consumers' Association in 2007, following an OFT infringement decision—very little activity before. These reforms will clearly increase the amount, but I don't think we are going to see a flood.

There are important differences between what we are introducing and what you have here in the United States. For example, the specialist Competition Appeal Tribunal will have to certify that a case is suitable for opt-out. We retain the loser-pays-cost rule, which should deter unmeritorious cases. There is no possibility of enhanced damages. The level of damages will be determined by a judge rather than a jury. Collective actions will not be able to be brought by law firms, third-party funders, or special-purpose vehicles. Contingency fees will not be allowable for opt-out actions. Those are significant differences.

We think this regime will increase the number of cases. We think that is desirable. I don't think it is going to lead to an absolute flood. But we'll have to see.

MR. FELLER: Margrethe, I would like to ask you about an article in *The Financial Times* in the last month or two. They quoted you as saying—and I'm just reading what was in *The Financial Times*—"You are not a competition enforcer inclined to settle cases in backroom deals." You were quoted as saying, "It is very important not to make a habit out of settlements. You need on occasion to develop case law, and only our judges and going to court can do that." The article said that you appear more willing to take the confrontational route of bringing charges, possible fines, conditions, and then court battles.

Now, you could probably make it easy and say that you were just totally misquoted; or, if they were even close, could you comment upon those comments in the article?

MS. VESTAGER: Actually I think I was stating the obvious. It would be a very strange thing to say that we will now as a rule, as a habit, as addictive as—whatever, smoking—and I know firsthand; I am a smoker who doesn't smoke—to say that this is what we will do in all cases. I think it is quite obvious that we should be willing to use every tool in our toolbox. Otherwise we will not have the consideration, the insight that we need for our case law to develop. And we will also need companies who engage in cartels, in misuse of dominant position, to know that we are willing to see them in court when necessary.

I think it is very important to be open about it because then businesses know who they are dealing with, and all the businesses who just compete on the merits, by the book, do their job, try to

innovate, do the best for consumers—that they know that we will use every tool in the toolbox in order to get a fair and level playing field. I think that is important.

I think it is also an important signal that the European Parliament passed our antitrust damages action just last year, and our Member States have to implement this in their national legislation within the next year-and-a-half, in order to enable people actually to get compensation for harm. We will have to follow this very thoroughly.

I think, as David said, it will lead to more cases but we will not be flooded. But I think that is an important signal that these opportunities also exist within the European Union. It is not the same as in the States, we are not copying things, but it shares the same rationale.

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—EDITH RAMIREZ

MR. SCHNEIDER: I want to come back to consumer protection. David, the CMA has a mission for consumer protection as well. How has that developed over the last year?

LORD CURRIE: We think it is very important that consumer protection and competition enforcement work together. We see them as complementary in important ways.

It is fair to say that in the period leading up to the reforms that there was talk of taking away consumer powers from the new Authority. That did not happen. But the intention is that the CMA will have a more focused approach.

We are building it up. We have a number of active cases. The OFT did good work, for example, in the area of children's online apps, where there is a lot of very serious consumer detriment for very vulnerable young kids. We are doing work in the area of enforcing high standards in consumer law compliance across the car rental industry, where we are working with European partners. I think those activities are very important. We have done other work in higher education and dealing with pyramid promotional scheme cases.

It is a very important emphasis for us. We are putting more of our resources into it. And, as a signal, we are taking on the presidency of the International Consumer Protection and Enforcement Network (ICPEN) from July this year. We want to try to enhance the international work in this area.

MR. SCHNEIDER: This is a good segue back to the United States. Edith, you had mentioned the consumer protection and enforcement activities of the Federal Trade Commission. Can you talk a little more about that?

MS. RAMIREZ: Sure. One thing that has been very important for us is addressing the way that technology and new emerging products and services have altered the way that consumers live their daily lives. In particular, as I mentioned earlier, we have a priority for ensuring that the protections that consumers have in the brick-and-mortar world also exist in the mobile ecosystem.

I mentioned some recent cases involving mobile cramming. We had a settlement involving AT&T in which they agreed to pay \$80 million for consumer redress to deal with unauthorized charges on mobile statements. We had a similar resolution involving T-Mobile. And we are currently litigating a case against AT&T dealing with the delivery of wireless broadband services and what we contend was deceptive advertising with regard to the use of data-throttling practices after consumers hit a particular limit.

Technology has affected our entire portfolio. The very first set of cases that the Agency brought, back in the early 1900s, involved deceptive advertising. Among the advertising issues we are dealing with today involve health claims by a number of apps that we contend lack adequate substantiation. For example, we recently had a couple of settlements involving apps that claimed to

allow for the early detection of skin cancer and had no real science to back that up. So we are doing a lot of work in that area.

Let me also mention some of the policy work that we have done in the area of privacy and data security. In January, we issued a report on the “Internet of Things.” These are the devices that we are increasingly bringing into our homes, into our workplaces, and also putting on our bodies, that end up collecting all sorts of information. The report acknowledges all of the terrific benefits that these devices provide to consumers, but then also identifies risks in terms of privacy as well as security, and recommends certain best practices to address those risks.

Let me also briefly mention that we recently announced our new Office of Technology Research and Investigation. This is an office that is an outgrowth of what was our Mobile Technology Unit. It really shows the emphasis that we are placing on ensuring that we have the internal skillset to be able to assess the impact of innovation both on the consumer protection matters that we handle, but also in dealing with and helping us to understand exactly how digital platforms are operating and how consumer data is being used in many of the new business models we see.

We are going to be bringing in even more folks who have that expertise to allow us to better understand how technology is employed and to help us develop our research projects, as well as help us on an ongoing basis with our enforcement and policy work.

MS. VESTAGER: I think it is the best way to end this panel on enforcement because it shows what it is really about. We may not have the same duties in my portfolio, but consumers are crucial to the way that we work.

When we do look at markets—I was quite misled, because I had heard the term “market definition” over and over again, and I expected a special pen delivered to me where I could define markets, sitting in my ivory tower looking out over Europe. But there was no such thing, unfortunately—no, fortunately.

What we do basically is we look at consumer behavior—who can consumers turn to if companies merge? I think also in that we show very clearly that in every respect we have consumer interest at heart. This is what it is all about, to compete on the merits and, therefore, when you merge making sure that consumers can still have choice, affordable prices, and innovation. Therefore, I think we complement each other, no matter the mandate that we hold, in a perfect way.

MR. SCHNEIDER: You have moderated the transition to the conclusion much more eloquently than I could do it. In soccer terms, I will take the pass and give the ball to Bill. What are your takeaways for our audience?

MR. BAER: At the beginning I thanked the conference organizers. I do want to take the minute I have to thank the participants. You can tell from the number of competition enforcers who come to this, who actively participate, that we value this conference. It is a great opportunity outside the context of a specific case for us to engage in a dialogue, for you to challenge our assumptions, for you to understand our enforcement priorities. It is a truly wonderful event.

It takes a lot of time and energy on our part, but it is paid off in spades. You leave here, we hope, with a better sense of what is important to us, you are in a position to advise your clients, you are in a position when you come back to see us on a case matter to understand the concerns that will be running through our minds and address them in a way that makes you effective advocates on behalf of your clients.

We are grateful for all of those of you who came and spent the week with us. Thank you.

This is what it is all about, to compete on the merits and, therefore, when you merge making sure that consumers can still have choice, affordable prices, and innovation.
—MARGRETHE VESTAGER

MS. RAMIREZ: I think the key takeaway for me, looking at the program over the course of this week and listening to the conversation that we have had this morning, is that it is just an incredible time to be in the business that we are in—to be promoting competition and the interests of consumers.

We really face incredibly complicated problems and a dynamic and complex marketplace. But I think that by coming together we are really able to share experiences and knowledge. That includes everyone here who is on the stage, from Bill, a fellow federal government enforcer, to Kathleen, representing the states, and to my international colleagues. I am especially interested, for instance, in the sector inquiry that Margrethe launched earlier this year on the digital economy. I think we have so much to learn from each other.

Despite the challenges we face, I think that we, as antitrust and consumer protection enforcers, really are well positioned to tackle these complex problems.

Let me conclude with a shameless plug. I have only been able to skim the surface of what the FTC has done over the last year. As I said at the beginning of my remarks, we have had an incredible year. I urge everyone to take a look at the FTC's "Annual Highlights" that we released this week on our website.

Thank you.

MS. VESTAGER: If I was nervous, I now feel safe. I think it has been great to be here. I think it was a privilege, as I said early on, to start with Mr. Holder, because it shows how much we share.

A number of the debates that have begun this week—I am not thinking of anyone in particular—will probably not end with this conference. I think there will be plenty of time to come back and back and back to some of the issues that we have not been able to touch upon in this panel.

But I think as a foundation, as a direction, for the concrete debates on the Google case and other cases, I hope that you have a sense of the values that will guide us and of the impartiality and the rigor in the interpretation of facts. I think that is the prime takeaway, that that is the goal for enforcers all over the international space.

LORD CURRIE: As a relative newcomer to the competition world, I have been struck by the real community of interest amongst the competition authorities around the world. I think that has been reflected in the discussion today—and the community of interest with the legal profession working in this area who really care about the way in which the regime works.

As a former communications regulator, I interacted with my fellow international regulators. There was not anything like the same degree of commonality of purpose in that community. I value that hugely.

I hope I have given a sense of where we are going in the United Kingdom, why I think the reforms we have seen in the UK are going to be significant. Of course, we have to show the results of that. We haven't yet done that. We have some things to prove. You may want to invite either me or my Chief Executive back in a year or two's time to see whether we have lived up to the promise that we have made.

I have greatly appreciated this conference. It has been very valuable.

MS. FOOTE: One of the most interesting things for me in the course of the last few years participating here with you all has been learning more and more about the development of the ECN and the ICN, which obviously have any number of things in common with the Multistate Task Force group, although there are certainly differences. As we all look increasingly at global issues, I am very much looking forward to greater dialogue about some of those issues.

I would also like to thank you and all of my colleagues up here for the privilege. It has indeed been a great privilege.

MR. FELLER: Thank you.

Just a couple of very quick closing remarks.

Before I address the panel, I would like to recognize two people who were instrumental in helping us with the topics and questions today. They are Andrea Murino and Jason Daniels. Thank you both for helping us with this today.

I would like to thank the panelists. This has been a great session. I think it lived up to the billing that we gave it earlier.

We want to thank this distinguished group, these outstanding government officials, for sharing their thoughts, their insights, and their comments with us today. Thank you very much. This was wonderful. ●