

## Enforcers Roundtable\*

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### QUESTIONERS

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**JONATHAN JACOBSON:** Welcome to the signature event of our Spring Meeting, the Enforcers' Roundtable. The enforcers are here, and I will name them. They are a terrific bunch: Dr. Andrea Coscelli, the Chief Executive of the Competition and Markets Authority in the United Kingdom; the Honorable Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division at the Department of Justice; Victor Domen, Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General; the Honorable Maureen Ohlhausen, the Acting Chairman of the Federal Trade Commission; and last but certainly not least, Margrethe Vestager, Commissioner for Competition of the European Commission in Brussels.

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

Without further ado, let's begin the discussion.

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\* This Roundtable has been edited for publication.

**DEBBIE FEINSTEIN:** The plan is to kick it off with each of our enforcers talking for a couple of minutes up at the podium and then we'll move back to the informal Q&A.

Maureen, would you like to start us off?

**MAUREEN OHLHAUSEN:** Yes. Thanks, Debbie.

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

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

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

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

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

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

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

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

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

Now, some commentators have questioned whether antitrust law can ever stop big players from squashing or absorbing promising upstarts. Our action in this case shows that the Commission

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can and will block a proposed merger if a large established firm seeks to eliminate competition from a small but significant and developing competitive threat.

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

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

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

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

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

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

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

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

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

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

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

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

That leads me to my final point. In 2017, the FTC ranked as the number four best place to work in the U.S. federal government in mid-sized agencies. We also ranked number one in several “best

places to work” categories, including effective leadership, strategic management, teamwork, and innovation.

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

**MR. JACOBSON:** Makan?

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

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

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

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

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

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

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

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

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

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

It is our duty, and I think it is what we owe to the public, vigorously and timely to enforce the antitrust laws, not necessarily wait for major failures in the market, in the structure, but enforce

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

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

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

We have had the first one, which dealt with the propriety of immunities and exemptions from the antitrust laws. We’ve had a number of those on our books.

We also have some wonderful creations by the courts, where under the doctrine of implied immunity, they just take out a whole segment of the economy and have it be impliedly immune from the antitrust laws. If there is an appropriate way to do that, Congress should have that role, I would submit, not the courts. We did hear some great testimony on that.

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

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

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

We continue to study that. We don’t have all the answers. There are going to be disagreements on these views and the policies amongst us and our foreign partners, as well as us domestically, in the United States. I think the only way you resolve any kind of divergence or disputes on a particular policy is to continue to study that, engage in it in a civil way, and debate the reasons why you think that. I think that needs to be fact-based and economics-based. We are seeing more and more research over the last 15 years on those issues and policies.

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Last, really, is the importance of international engagement. You have this panel, we have the top enforcers from the international community, and also many in the audience. But what we need to do is to continue to engage towards, at a minimum, a convergence of the procedures of the administration of antitrust law, and hopefully towards a convergence of at least the substantive norms, having respect for the different legal and political systems in each of our jurisdictions.

With that, I am looking forward to the panel.

Thank you.

**MARGRETHE VESTAGER:** Bearing in mind that it is my birthday, you may be surprised that I am truly happy to be here, in a room with no windows and with more than 1,000 lawyers. [Laughter]

But it is indeed a pleasure because it is when we discuss, when we talk, when we exchange views about what we do, that we can make antitrust work better.

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

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

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

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

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

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

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

But we do need to know and to make sure that the way we apply our rules is keeping up. So at the Commission we have just appointed a team of experts to report on how competition policy

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will be affected by digital changes to markets—and not just technology markets, but throughout the entire economy. We'll discuss these issues of course openly, taking inputs from market participants and from shareholders, and discuss that in a conference that will be held in Brussels in January next year.

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

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

**MR. JACOBSON:** Thank you.

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

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

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

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

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

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

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

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

sumer agency and we are increasingly integrated in the way we think about problems, and think about possible solutions.

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

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

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

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

That is the first category.

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

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

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

As I have said publicly a few times, we currently have a model with a “one-stop shop” for mergers with the Commission taking the lead on the large antitrust cases that we are very comfortable with and we have operated with for many years. We think it delivers well for UK consumers.

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—ANDREA COSCELLI



Equally, we think at the very end of this transition, we will end up with a system where we work effectively with others and do parallel investigations, which we think can work. There is no reason why we won't be able to replicate what these other agencies are doing already, which is essentially a lot of cooperation, with a lot of working together in a constructive way with other agencies.

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

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

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

Thank you very much.

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

**VICTOR DOMEN:** Thank you.

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

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

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

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

I also have to give a disclaimer. The statements I am making today throughout the morning are my own; they're not on behalf of the National Association of Attorneys General, of any particular AG, or of anyone but myself. I am not speaking on behalf of any individual the state because, as you know, each state is its own individual sovereign, and that comes with many of its own challenges. In fact, one thing to recognize is that in November of this year 30 states are going to be

voting for an attorney general, and in at least ten of those states there will be a new attorney general elected. So it's always a dynamic that changes, and working through NAAG you never quite know what you are going to get. But at least I've survived for three years.

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

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

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

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

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

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

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

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

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

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

Thank you.

**MR. JACOBSON:** Thank you all for those.

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

Over the past 30 years, we have seen more innovation, more material progress, than at any time in our history by far. And yet, at the same time we have seen the growth of category killers — we've

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*area of healthcare.*

—VICTOR DOMEN

seen Facebook, we've seen Intel, we've seen Bing. Do we have a monopoly problem in the United States; and, if so, is there anything we can do about it or should do about it?

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

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

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

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

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

*[J]ust over the last year, we've also heard on both sides of the aisle folks trying to use monopoly as a populist issue. . . . So I think we have to be careful. Big is not bad. Big that behaves badly is bad.*

—MAKAN DELRAHIM

**MR. JACOBSON:** Maureen.

**MS. OHLHAUSEN:** I actually addressed some of those critiques fairly extensively in an article I wrote in 2016. I think we're all aware at this point that some of the analyses have problems with their data. They use enormously broad categories and fall into the errors that the structure-conduct-performance people had fallen into, such as not paying attention to things like economies of scale.

But I think really the better question is whether the United States has a competition problem. Along those lines, I think there are several sub-questions that are worth asking.

Are our antitrust laws the right tools; can they address these things; and then have we used the antitrust laws sufficiently? Can we address abuses by monopolists, like a company that has grown organically through having great economies of scale or some new innovation that has really captured a large market share? They have to continue to compete on the merits to maintain that, and can antitrust law address where they haven't?

A couple of cases that I like to think hard about are the FTC's *McWane* case about exclusionary conduct and the *ViroPharma* case, which we've now appealed, which has to do with abuse of government process.

We should also ask whether there are other things we can do to foster more competition in the economy through competition advocacy and things like that.

I think really the right questions also include: Do we have the right tools? I think we do. Are we using them sufficiently? I think that's grounds for fair debate. And then, is there more that we can do outside of core antitrust enforcement to foster more competition?

**MR. JACOBSON:** Thank you.

Margrethe, there has been a lot of discussion in the popular press and in some of the legal literature about increasing aggregate concentration in the economy. Is that your perception, and what is the Commission doing to address it, if anything?

**MS. VESTAGER:** First of all, we don't have a ban against success in Europe either. If people like your

product, you grow, and that's perfectly fine with us—congratulations—but they stop if we find that there is a misuse of a dominant position, and of course we approach this in a case-by-case way.

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

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

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

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

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

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

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

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

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

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

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

So that's the second area.

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

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

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

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

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

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

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

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

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

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

But when an attorney general is elected by the citizens of a particular state they have responsibility for competition, they have responsibility for consumer protection; they also have charity

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work they must consider. So they are thinking about these problems in a very different way than everyone else in this room is.

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

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

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

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

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

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

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

**MR. JACOBSON:** Thank you.

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

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

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

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

The mergers were each a little different—we were focusing on different things. In ChemChina/Syngenta it was focusing on generic pesticides. Dow/DuPont was more about originator pesti-

—VICTOR DOMEN

cides, including innovation. In Bayer/Monsanto, where we conditionally approved the merger and we are in the process of looking into buyer approval of their quite large divestiture, probably around €6 billion in total, it is pesticides, seeds, traits, including innovation, and of course traditional agriculture.

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

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

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

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

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

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

**MR. JACOBSON:** Thank you very much.

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

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

**MR. JACOBSON:** Wow! Excellent.

From the truly sublime to the even more ridiculous, let's talk a little bit about public interest factors. Did they play a role in your analysis, Andrea, of Sky/Fox?

**DR. COSCELLI:** Yes. This is an ongoing case so I have to limit myself in what I can say, and also a case that is being decided by an independent inquiry group, so again I am really ring-fenced out in the investigation. But there is quite a lot in the public domain I can briefly talk about.

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

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

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

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

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

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

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

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

**MR. JACOBSON:** Thank you.

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

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

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

**MR. ZANFAGNA:** I said “most.”

**MR. DELRAHIM:** Most vertical mergers have had remedies imposed, and some of those remedies



have been abandonment, and some have been structural changes. There has been a theme spun out there that in 40 years these things have just been solved through behavioral relief.

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

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

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

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

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

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

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

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

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

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

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

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

This is a deal that was notifiable in Austria, and they said, "Maybe you should look at it." Then other national jurisdictions joined to say, "Will you look at this?"

When we consider whether to accept a referral or not, of course first we consider: Can this have an effect on the internal market? Will this have pan-European potential harmful consequences to consumers? On that basis we can accept the case. I think it is good to have this flexibility because the more pan-European the more sense it makes for the European Commission to look into the case.

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

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

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

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

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

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

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

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

**MR. JACOBSON:** Thank you.

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

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

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

But the way we see it is that we take complaints as a starting point. We cannot base anything

on whatever is in the complaint. Of course we have to do the job ourselves to see what is happening in the marketplace.

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

Have you ever been there?

*But by themselves*

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

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

*the competitor*

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

*complaints—“Oh look,*

*these guys are going*

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

*to kill us because they*

*are going to be more*

*efficient,” for example,*

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

*is not the type of*

*complaint that we*

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

*take seriously.*

—MAKAN DELRAHIM

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

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

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

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

I was, as you know, a big fan of the Justice Department's case against *Microsoft*, which a lot of folks, including *The Wall Street Journal's* editorial page and others, criticized, criticized my former boss who launched those investigations in the Senate, Orrin Hatch, and the Justice Depart-

ment. But ultimately a unanimous D.C. Circuit, led by Judge Doug Ginsburg, who is well known to folks here and is not some left-wing crazy, wrote an opinion affirming the violations of the antitrust laws there.

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

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

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

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

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

We were then looking at the symptoms. Looking at this price increase as an economist, you wonder how is it possible that you can increase a price by 10,000 percent and nothing happens.

In a number of cases there are a number of horizontal practices, horizontal issues, that we are investigating, so it is quite likely that when over the years things settle most of these cases will be seen through a much more traditional lens.

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

—ANDREA COSCELLI

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

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

I think it's exciting to watch for a number of reasons. One is it's going to be the first antitrust opinion with the newest Supreme Court Justice, Neil Gorsuch. Justice Gorsuch, as many of you know, was an antitrust litigator, so he will be bringing some additional insight to the Court, and a lot of us are looking at that.

It will also have perhaps some commentary in the case, depending on how they write it, about the issue of two-sided platforms in the digital space that might pose some new, novel challenges to antitrust.

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

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

**MR. DOMEN:** Makan is absolutely right and I certainly echo his comments. This is one of the benefits of the relationship that we have with our federal counterparts.

This was an opportunity. We have all worked together since 2010 on this case. When it came time to bring it across the goal line, we were able to work together and get it done, and I think we all had the same goal and desire.

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

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

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

**MR. JACOBSON:** Thank you, Vic.

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

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

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

Of course we will still have to do cases. A couple of cases came up from the sector inquiry. One of the reasons why we really take this to heart is of course that that kind of restriction can completely partition the single market, and the single market is part of the jewel of the European Union, to enable consumers to have the benefit of a much bigger market than their national market. This is why of course we put some efforts into this. We find that what the Court has told us is very, very useful in our work.

**MR. JACOBSON:** We are going to move now briefly into intellectual property and innovation. Debbie has a few questions starting with Maureen.

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—MARGRETHE VESTAGER

**MS. FEINSTEIN:** Maureen, you've expressed concern in the past regarding the potential for international competition regimes to wield antitrust principles against U.S. IP rights abroad. How do you perceive those risks today?

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

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

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

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

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

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

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

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

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

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

You also know that we put quite an effort into standardization because standard-essential patents—well, the nature of the beast is of course that competitors come together, they agree on things. While normally that may not be the ideal for competition law enforcers, but still we find that it can work also as a source of innovation, that you can balance the rights of the rightholder and those who would like to license it.

For us this balance is very important, and we will try to keep it also in the coming years. If you have had a chance to see the latest Commission communication on these issues, you see that we maintain this carefully crafted balance between the two sides.

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

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

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

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

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

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

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

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

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

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

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

So I was curious. First of all, is the theory the same? How is the analysis different or the same for when you're enforcing for keeping prices down in a market versus up?

**MS. VESTAGER:** The thing is that this is a buyers' cartel, and actually we are dealing with a commodity that is the most recycled product, car batteries, so it is a very important market for environmental reasons, circular economy reasons, and straightforward economic reasons.

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

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

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

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—MAKAN DELRAHIM

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

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

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

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

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

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

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

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

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

**MR. ZANFAGNA:** I do.



Maureen, with six years as a Commissioner and as Acting Chairman, what would you suggest are the most significant accomplishments over that time that you'd like to share with us?

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

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

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

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

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

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

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

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

I would say those were three I would mention.

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

**MS. OHLHAUSEN:** Continuing on the privacy front, when we talk about privacy and the kinds of substantial injury that consumers could suffer if their personal information is exposed. We have a lot of understanding that if your bank account number or your credit card number is exposed, or your Social Security number, you might suffer some financial injury.

—MAUREEN OHLHAUSEN

But I think there is more to substantial injury, like the *MyEx.com* case I brought, where people had their intimate images exposed with their personal information, some of the harms that they suffered—harassment, loss of jobs, and just great emotional distress are substantial.

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

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

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—MARGRETHE VESTAGER

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

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

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

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

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

**MS. VESTAGER:** This is very important for me.

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

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

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

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

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

If you feel powerless, you don't act, and we really need consumers to act in order for competition to work.

**MR. JACOBSON:** Thank you.

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

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

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

That brings to a close the Sixty-Sixth Annual Spring Meeting. I hope you had a great time. We'll see you again next year. ●