

Roundtable Conference with Enforcement Officials

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JOSEPH ANGLAND: I'd like to welcome you all to the highlight of the Spring Meeting each year, the Enforcers' Roundtable.

We're delighted to have today four members of the enforcement community who are here to share their thoughts and perspectives with us. On the stage with us at the moment we have Chairman Debbie Majoras of the Federal Trade Commission—thank you, Debbie, for being here once again—and Assistant Attorney General Tom Barnett, head of the Antitrust Division—Tom, a pleasure to have you back.

During the first roughly half of this session we'll be directing our questions exclusively to Debbie and to Tom, and then we will be joined for the second half of the session by Bob Hubbard, the Chair of the Multistate Antitrust Task Force, and by Commissioner Neelie Kroes, European Commissioner for Competition.

Directing questions to this august group will be, starting on my left, Ilene Gotts, a partner at Wachtell Lipton in New York; to Ilene's left we have Jon Jacobson at Wilson Sonsini—and, Jon, I will take this opportunity to again thank you for your work in getting out the Sixth edition of *Antitrust Law Developments*, which hit the bookstores, if you will, this week. The Section is indebted to you

for that. To Jon's left we have Jeff LeVee, a partner at Jones Day, and Jeff is also somebody to whom we are greatly indebted because of his role as Co-Chair of the Spring Meeting.

With that, let's turn to some questioning. I'll exercise the Chair's prerogative and start off.

The Supreme Court has apparently developed a very pleasant fetish with antitrust these days. It is occupying an unusually large share of its docket. Now, given that antitrust is on a roll at the Supreme Court, where should it go next?

What do you, Tom, think the Supreme Court should address to clarify the law in the antitrust area?

THOMAS BARNETT: Well, I would phrase it slightly differently, in terms of what I hope gets up to the Supreme Court. They don't necessarily get to choose.

I would say the issues that are least settled in U.S. antitrust law right now—and a couple spring to mind—include this whole issue of bundling and loyalty discounts. The Solicitor General filed a brief, as you all know, in the *LePage's*¹ case a few years ago, saying that we didn't necessarily agree with what the Third Circuit had done there, but that this is an important issue, it's a hard issue. Both agencies have been looking hard at that question in the context of our Section 2 hearings. It's an area of law that is important for day-to-day economic activity but in which the standards are not clearly articulated. So I'd like to see that.

I know it has been said before, but I'll say it again. It would be nice to see a merger case up there. Practicalities make that unlikely, but it's just one specific example.

If you look at the jurisprudence on efficiencies, the Court wasn't overly receptive to efficiencies the last time it looked at it. My guess is they would have a different view today. Now, in practice, I think the agencies take a hard look at efficiencies and they play an important role, but it would be nice to have that affirmed.

ANGLAND: Debbie?

DEBORAH PLATT MAJORAS: I'm going to pick up where Tom just left off. I would love to see the Court take a merger case. I think, by my calculation, the Supreme Court hasn't decided a substantive merger issue since the 1970s. We've been working under the 1992 Merger Guidelines,² including a unilateral effects regime, for a number of years. While a lot of us talk about how we think it's fairly settled the way we review mergers, some people, I think, disagree. I think it would be terrific if the Court decided a substantive merger issue.

I may be a little more optimistic about the possibility of the Court taking on a merger case because, perhaps, if we had an FTC merger case in Part III, especially if the AMC [Antitrust Modernization Commission] doesn't have its way and Part III³ is still a meaningful part of our enforcement regime,⁴ then I think it is possible that we could get one up, and I think that would be a good thing.

¹ *LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

² U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

³ The FTC may enforce Section 5 of the FTC Act through internal administrative litigation known as Part III proceedings. See 15 U.S.C. § 45(b)–(c); 16 C.F.R. § 3 (2006).

⁴ See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007) [AMC REPORT], available at http://www.amc.gov/report_recommendation/toc.htm.

Another area would be, obviously, the area of pharmaceutical patent settlements under the Hatch-Waxman regime. This is an issue that we think is extremely important to the U.S. economy, certainly to our consumers, and that is an issue that we hope the Court will have the opportunity to take up.

And finally, I would say the *Noerr-Pennington* area. The FTC has identified topics that are interesting in the *Noerr-Pennington* area, like the pattern of lawsuits, for example, perhaps for strategic competitive advantage. I think there are some interesting issues there, and it would be another useful area for us.

In my view, a lot of what the Supreme Court has been doing is looking at some old, sometimes very old, doctrines and jurisprudence in antitrust, applying modern thinking in terms of antitrust principles and consumer welfare standards.

—TOM BARNETT

ANGLAND: Sticking with the Supreme Court, at Wednesday's luncheon Steve Calkins in his inimitable style remarked that the last, I think, thirteen times the Department of Justice had filed an amicus brief in the Supreme Court it had sided with the defendant rather than with the plaintiff. He took pains to say he wasn't saying that any one of those filings was wrong or on the wrong side of the issue, but, again in his unique style, suggested that maybe the Department of Justice should concede that sometimes a plaintiff might be right. I note that he seemed to have spared the Federal Trade Commission, although by my count the numbers wouldn't be much different in that same set of cases.

Any reaction to Steve's observation?

BARNETT: Well, I think we thought the plaintiff was right in the *Dentsply*⁵ case and the *Visa/MasterCard* case,⁶ and we're not shy about saying so in that respect.

But, more generally, we again don't choose the cases that get petitioned to the Court for certiorari, and we look at each case on its individual merits.

Now, I will go so far as to say I don't think this is entirely random. In my view, a lot of what the Supreme Court has been doing is looking at some old, sometimes very old, doctrines and jurisprudence in antitrust, applying modern thinking in terms of antitrust principles and consumer welfare standards. A lot of the insights that we have developed over the last thirty, forty, fifty years indicate that some of those old doctrines were too interventionist. The Court has been cleaning up those things.

If you look at the *Independent Ink* case⁷ regarding the presumption that intellectual property rights or patents confer market power, to some extent clarifying the per se rule or the role of the per se rule in joint ventures in *Dagher*,⁸ applying objective standards to Section 2 conduct in the *Weyerhaeuser* case,⁹ those tend to lead you to a less interventionist approach.

Although Steve did take pains to point out that he wasn't commenting on the merits, I would like to point out—I haven't gone back and calculated it, but I think our win:loss ratio in terms of when the Court agreed with us and when they didn't is extraordinarily high. I think in major league baseball we would certainly be an MVP.

ANGLAND: Debbie?

⁵ *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

⁶ *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

⁷ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

⁸ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

⁹ *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

MAJORAS: I agree with what Tom said. I think the Supreme Court has been cleaning up antitrust law, if you will. Antitrust law is sort of a unique area of the law, in that it is perfectly suited for a common law system. There is a lot of back and forth between courts, agencies, private plaintiffs, certainly the academic and economic communities, and we have pushed the law in a particular direction over the past thirty years.

I don't think most of these cases were particularly close. If you look at the way the Court voted on the cases, I think there is an indication there that the Court hasn't viewed these as particularly close calls. I know that the ABA weighed in on most, if not all, of these, and I think weighed in very similarly to the way that the agencies have.

I think two of the more interesting cases, frankly, are two that haven't been decided. I think *Twombly*¹⁰ addresses an extremely important issue overall for, in particular, private lawsuits. So I'm anxious to see where that one comes out. And I think *Leegin*¹¹ is also a very interesting case for the Court. Maybe some of us don't think that one is a particularly close call, but reasonable minds can differ, and there are a lot of people I respect a great deal who have a different viewpoint. So those, I think, are the two to watch.

ANGLAND: Well, sticking with *Leegin*, that is a case in which the Solicitor General urged that the per se rule against resale price maintenance be repealed.¹² Assuming for a moment that that is the way the Court comes out, the question becomes: Under a rule-of-reason regime, how much risk is there going to be associated with resale price maintenance? For example, after *Khan*¹³ came down and the rule of reason applied to maximum resale price maintenance, it has virtually become per se legal; I don't think you will find any case where it has been illegal under the rule of reason since then.

It may be premature because we do not have any Supreme Court guidance on the issue, but any thoughts on how a rule of reason would be applied in the case of minimum resale price maintenance? Would it be sort of de facto legal, or do you see situations where it is really problematic?

MAJORAS: I think de facto legal goes too far. Look, dealing with maximum resale price maintenance under *Khan* I think was an easier case for the Court. If you look at the *Leegin* argument, I think you see that certain Justices are grappling with the tougher issues for minimum resale price maintenance. I think that certainly tells you something.

First of all, the FTC had a case not so very long ago, the *MAP* case back in 2000,¹⁴ in which you had really an entire industry trying to get all retailers of—can you say “record stores” anymore? I mean does anybody know what those are? They were worried about, I think, the mass retailers coming in and selling music, and so there was an effort by the recording industry to get all retailers to succumb to MAP policies. So obviously, in a case like that we would want to take a very, very close look.

¹⁰ *Ed. Note:* The *Twombly* decision was subsequently decided on May 21, 2007. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 1511 (2007).

¹² Brief of United States as Amici Curiae for Petitioner, *Leegin Creative Leather Products, Inc.*, 127 S. Ct. 1511 (2007) (06-480), available at <http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0480.mer.ami.pdf>.

¹³ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹⁴ Statement of Chairman Robert Pitofsky & Comm'rs Sheila Anthony, Mozelle W. Thompson, Orson Swindle & Thomas B. Leary, *Sony Music Ent., Inc., BMG Music, Universal Music & Video Corp., Capitol Records, Inc.*, FTC Docket Nos. C-3971, C-3972, C-3973, C-3974, C-3975, 2000 WL 1257799 (F.T.C.) (announcing consent decrees in MAP cases).

Beyond that, I think you apply the rule of reason. You look at issues like market power, obviously, and then apply it. But no, I wouldn't say per se legal. I will be interested to see what sort of complaints we get, because sometimes I'm asked this question about "why don't you guys bring more of these cases?" Well, my sense is these complaints are not rolling in the door for us, and perhaps that is because the states have been more active, so there has been a good division of labor there.

I think we'll have to see what happens. But I think how we apply the rule of reason will not be anything particularly new.

BARNETT: I would agree. First, that issue is obviously not really before the Court. We'll see, but based on recent practice, I'd be a little surprised if they get into that too much. But I don't see any reason why you wouldn't apply normal principles.

I have heard people make the argument that says, "Look, if somebody adopts resale price maintenance and it looks like prices went up, that's presumptively anticompetitive and unlawful." I don't think it is quite that simple. I look at two things to think about. One is if the company that did that in the relevant market has a 3 percent share, I am a little hard put to find out how that had a market-wide impact on competition or competitive prices. I'm not clear why you would presume that is anticompetitive. You also have to be careful about the post-policy good, if you will. That may be fundamentally or qualitatively different from the pre-policy good, in that there are certain ancillary services—sales services, marketing services, et cetera—that consumers may value that are being paid for by that.

I think you work through those in the traditional rule-of-reason fashion. Bottom line, I agree with Debbie, I don't see them as per se lawful. The brief that we filed with the Court made clear that we view it as potentially anticompetitive in certain circumstances. I also agree it is more likely to be anticompetitive than maximum resale price maintenance.

ANGLAND: The traditional argument is that even if price goes up somewhat because of resale price maintenance, there may be overall net efficiencies because of greater services being offered—the free-rider argument.

One question that arises is whether that argument works in the abstract, or whether the agencies in looking at resale price maintenance would demand the same level of proof regarding efficiencies that they do in certain other contexts, like mergers, where simply saying, "Oh, it's going to be efficient" doesn't seem to carry the day. In those other contexts, theoretical efficiencies don't always win.

If you are looking at resale price maintenance, would you be insisting upon the same level of proof that you would require in, say, the merger context?

MAJORAS: Well, remember in conduct cases you often have the benefit of a track record of what has actually occurred. When we look at mergers, we have to make a prediction about what is going to happen. So I think that is actually one of the differences.

In mergers when parties come in and give us under the Guidelines a solid efficiencies story that is supported and not wholly hypothetical, I think we take it quite seriously, just as we would when we are in a rule-of-reason fashion weighing. It's a little bit of a different context, so you are looking at different types of documents and different types of evidence. But it makes a big difference if you can look at what has actually happened in a marketplace versus trying to predict what a merger will bring.

ANGLAND: Speaking of mergers, Ilene?

ILENE KNABLE GOTTS: Steve Calkins, quite amusingly, at lunch the other day featured a member of Congress accusing the agencies of being slack in merger enforcement. Yet we've heard various Commissioners, including Commissioner Kovacic, emphasizing how the pendulum may be swinging the other way, with enforcement activity occurring in even four-to-three mergers.¹⁵

I was wondering—maybe, Debbie, you could begin first—what is the truth? Is the FTC's merger policy slack or tough these days?

MAJORAS: Well, we are enforcing. Look, Senator Dorgan said that Republican administrations, Democratic administrations—all of us should have our pictures on milk cartons because we've been missing.¹⁶ We obviously take very, very seriously what our members of Congress think about what we are doing, particularly on our oversight committees, and we certainly take seriously any very specific criticisms.

But I'll tell you why I don't think that is correct in the least. Let's just take the current fiscal year, which started about six months ago. Already in this fiscal year we have issued about twenty second requests;¹⁷ we've already had twelve merger enforcement actions, including two in which we are litigating in court;¹⁸ we just had another abandoned merger last week after expressing some concerns. I don't just like to spout statistics, but for those of you who follow these things I think it is very difficult under any current measure to say that somehow merger enforcement isn't fairly aggressive.

The real question, of course, is: Are mergers going unchallenged that could be harming consumers? I have been asking this question as this issue floats around. It is not just floating in Congress. As we get closer to 2008, a lot of people are floating it, some in this room, and no one has come up with even a potential example of a place where we may have fallen down.

I mentioned the two in which we are litigating. But one of the criticisms that I was hearing previously is: "What's going on? Why haven't you all litigated more cases?" I've actually been a little bit disappointed to see well-educated members of our bar using that as a benchmark.

Look, consent decrees are enforcement actions. The fact of the matter is that parties come in. I think they are more eager than ever to give us relief and move on with a deal. So when parties are willing to solve the competitive problem, naturally we are going to take it. It would be highly irresponsible not to.

Last year, when we identified sixteen mergers that we thought were anticompetitive, seven of them were abandoned or completely restructured, coming in as a new deal. So there again would someone argue that, "Oh my goodness, no, don't let them abandon the merger, sue them anyway"? Of course no one would say that.

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—DEBORAH MAJORAS

¹⁵ See, e.g., Press Release, Fed. Trade Comm'n, FTC General Counsel Speaks on the Modern Evolution of U.S. Competition Policy Enforcement Norms (May 2, 2003), available at <http://www.ftc.gov/opa/2003/05/kovacic.shtm>. The text of Commissioner Kovacic's "pendulum" speech is also available at the FTC's Web site, at <http://www.ftc.gov/speeches/other/0304modernevolution.shtm>.

¹⁶ See, e.g., *Media Concentration: Hearing before the Senate Commerce, Science & Transportation Comm.* (July 17, 2001) (remarks by Senator Dorgan), available at http://lobby.la.psu.edu/_107th/096_Newspaper_Crossownership/Congressional_Hearings/Testimony/S_ComSc_Trans_Hollings_071701.htm.

¹⁷ See FED. TRADE COMM'N, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION 5 (2007) [FTC 2007 REPORT], available at <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf>.

¹⁸ *Id.* at 5–10 (discussing merger enforcement actions in 2007).

The fundamental question is: Are there any mergers that are being unchallenged, that have gone through, that are harmful to the competitive process? Again, I am hard put to identify one myself and have yet to have anyone identify one to me.

—TOM BARNETT

So I think when you start to parse this—and one of the things that I have actually tried to explore a little bit is whether parties are less willing to litigate with us because, I think, the cost of a failed merger has become quite high on many fronts. The fact is it takes two to tango, and we are not going to bring cases irresponsibly.

So we feel really quite secure that we are being sufficiently aggressive in our merger enforcement, that we are bringing the cases that need to be brought. So I will gladly have that discussion in greater detail with any of our members of Congress and anybody else who wants to have it.

GOTTS: Tom?

BARNETT: I certainly agree with what Debbie said. Just to expand on a couple of points on that front. The fundamental question is: Are there any mergers that are being unchallenged, that have gone through, that are harmful to the competitive process? Again, I am hard put to identify one myself and have yet to have anyone identify one to me.

I also have to question seriously the methodology, if you will, of the way some people are looking at this. They say, “Well, you’re not litigating in court.” Over and above Debbie’s point, which I completely agree with, is we decide whether or not we think a deal is problematic and we decide what relief is necessary. If I think a deal is problematic, my goal is not to go into court and block the deal. Most deals actually have some efficiencies associated with them. I would rather find the most narrow remedy that is going to be sufficient, get that remedy, and move on. If we have to litigate in contested litigation to get that, so be it. That’s an inefficient way to get to a result. If we can get it through a consent decree, that is a better result.

But, in terms of these numbers, that can reflect a lot of things. It can reflect the mix of the deals.

Also, step back for a second and look at one of the efforts that both agencies have been making for a number of years now, and I think with some success. We are trying to be more transparent in what we do—how we analyze mergers, where we are going to have a problem, where we are not. It’s not just the 1992 Guidelines; it’s closing statements, the commentary that both agencies put out last year.¹⁹ To the extent that we are being successful in transparency, you would expect parties to be less likely to bring deals that just have no fix associated with them and less likely to bring deals that are going to be challenged.

So even assuming that the overall percentage of deals that are being challenged in some way has gone down, is that a good thing or is that a bad thing? Are we being more efficient, more transparent in our process, and are we letting through deals that are appropriately procompetitive?

I don’t have any evidence to the contrary, so I, like Debbie, am quite comfortable that we are aggressive and will pursue challenges where it is appropriate and we will back off and go away where it is not.

GOTTS: In countries or jurisdictions, such as the European Union, there is one agency that decides the merger outcome. In the United States, of course, we have two agencies with concurrent jurisdiction, and even the AMC says that’s okay.

I would like to explore, though, for a second whether there are differences as a result. At the U.S. Department of Justice you have the Tunney Act procedures²⁰ applicable to proposed merg-

¹⁹ Fed. Trade Comm’n & U. S. Dep’t of Justice, Commentary on the Horizontal Merger Guidelines (2006), available at <http://www.ftc.gov/opa/2006/03/mergercom.html>.

²⁰ The Antitrust Procedures & Penalties Act, Pub. L. 93-528, §§ 1-3 (1974) (codified at 15 U.S.C. §§ 16(b)-(h)).

er consents, such that a U.S. District Court judge must “approve” the settlement. In contrast, the FTC issues its own consents, but you have five decision makers; also, when the FTC challenges a merger in court, the FTC is just seeking a preliminary injunction and brings its own Part III matter. I would like to explore whether those procedural differences could ultimately have an effect on outcome. And also, looking at remedies, there are differences between the two agencies, for instance in the acceptance of “fix-it-first.”

Maybe on this one, Tom, you could go first.

BARNETT: Are there differences in terms of process between the two agencies? Obviously there are. But even on that front there are pluses and minuses.

We do have to go through a Tunney Act proceeding. I will digress for a moment and just say that there was some attention paid over the last year or so as to whether or not those were going to fundamentally change in terms of their scope and depth and burden, which in many ways could be a bad thing because it would make it more expensive for parties to enter into consent decrees with us and less certain of the outcome when they do.

I am referring, of course, to the Tunney Act review of the *Verizon/MCI* and *AT&T/SBC* transactions. The district judge recently ruled on that and came out, after looking at various arguments—quite persuasively, to me at least—and decided that the review is really pretty much where it had been in terms of process.²¹

So there are differences there. But at the end of the day I think the real question is: Does it make a substantive difference? I actually do not think that there is a substantive difference. I can't point to an example of a merger where I think we would have come out differently than the FTC, or vice versa, based on what I know.

MAJORAS: I think that's largely right. The fact is there are two different decision-making trees at the two agencies. I have done both.

Because merger enforcement is so based on individual market facts, so incredibly fact-specific, the staff plays the most enormous role in the decision making on mergers. Not always—there could be disagreements on the close calls, but there aren't very many, and I haven't seen very many at either agency. I think the reason is that the staff really works up the case.

Now, sometimes people might tell you that if they get this staff in one agency versus another staff in that agency, they have more of a chance of getting a different reception or a different result, frankly, than between the two agencies. That is unfortunate if that is occurring. That is where we should come in and make sure we even that all out. But the fact of the matter is there is a human element to this, depending on how people are taking up an issue.

But I largely think that it is a non-issue. It potentially could be an issue on the length of the deal because of the possibility that a merger challenge could continue in Part III in the FTC process. But, again, that has really largely been nonexistent.

I think, starting even at the preliminary injunction stage, while there are slightly different standards on the books, depending on whether the district court is looking at an FTC case or a DOJ case, my view is that it really hasn't made any difference, that courts have used largely the same standard.

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—DEBORAH MAJORAS

²¹ See *United States v. SBC Commc'ns, Inc.*, No. 05-2102, 2007 U.S. Dist. LEXIS 22947 (D.D.C. Mar. 29, 2007).

Then, from there, if we have lost in the district court, we have only very rarely continued in the Part III process, although that is absolutely an option for us that we preserve. But we have standards for doing it. That is one area where you could see a difference because of the time it takes. But, of course, if the parties have won in the district court, then they will have closed. They are litigating with us, but it hasn't held up their deal at that point.

I think it is exactly the same as what I told the AMC. If you were going to design a system from scratch, you may not establish two agencies. I understand that. But we have the two agencies, and each agency has tremendous strengths. I think the FTC gets tremendous strength from the synergy between consumer protection and competition, for example. I think the DOJ draws tremendous strength from having the criminal and the civil component.

So we are where we are. I think that concern is largely overblown.

ANGLAND: Earlier this week the agencies released Part 2 of the Intellectual Property Report.²² Jeff, do you want to pursue that topic?

JEFFREY LEEVE: What Joe didn't mention is that the report was issued five years after the hearings. So the question to you is: What took so long? A related question obviously would be: What do you view as being the most important enforcement issues associated with the new guidelines—that is, what's new?

MAJORAS: What took so long was these are thorny issues, certainly at the margin. There are a lot of issues that are somewhat nuanced in the way you say them. It made a lot of difference to a lot of people in the process how exactly we phrased things. And the fact of the matter is that the more time passed, the tougher it became to get it done, because we had, if you take DOJ, an entirely new front office from the time the process got started. My sense is as people came in, it was going to be their report, so they wanted to weigh in.

I switched agencies. I am at the FTC. I had one Commission when we started this process. We have another Commission today to get it out. And there were a lot of people who contributed along the way who cared deeply for these issues.

So we got stuck on some things. These were not easy issues. So while I regret that it took so long—I kept telling you all that it was coming, and I would go back and beat my head against the wall back at the office. But I can't overlook the fact that by taking this time and having this input and really working this through, the process became very important to the result.

BARNETT: I guess my observation is basically we'd rather get it right than get it out quickly. In an ideal world, it would have gotten out several years ago.

But I'm just glad that people do care about these issues, and we did spend a lot of time working through them. I am very pleased with the report and I commend it to you. I think there is a tremendous amount of information in there that will give you insight into at least how we are looking at these issues.

I will just flag a couple of them with respect to enforcement matters.

²² U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [ANTITRUST IP REPORT], available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

We do make the statement in there that from our perspective a mere unilateral, unconditional refusal to license intellectual property rights is unlikely to play a meaningful role in terms of the antitrust/IP interface on the enforcement front.²³ I think the gist of that is that's not where the enforcement focus should be. If you are looking in terms of where is there most likely to be harm and where are you most likely to avoid doing more harm than good, you shouldn't be looking in that direction.

The other is that there is a fairly extensive discussion about the role of standard-setting bodies and the discussions of patent disclosure policies, and even ex ante discussions and negotiations of licensing terms. I know Debbie and I have both spoken on this topic before, but it is good to have it out there. I think there has been some concern from our perspective that there is a legitimate issue here in terms of standard-setting bodies not wanting to walk into hold up-type problems. I think there may have been less flexibility, or a perception of less flexibility, in terms of the options available to standard-setting bodies, about whether they could engage in some discussions and try to better educate the working group members in respective cases.

We think that there are enough reasons there that this is an issue that it should be evaluated under the rule of reason. We are not endorsing or promoting any particular approach, but saying that it is one that we will look at under a rule of reason analysis and that there are circumstances where it is probably justified.

LEVEE: Let me follow up on that in one particular area for Debbie on the pharmaceutical reverse settlement cases. If the Supreme Court continues to refuse to take certiorari in these cases, and if Congress doesn't pass new legislation, which of course is pending each year it seems, do you see the FTC changing its view in any respect on bringing enforcement actions relating to these reverse settlements?

MAJORAS: I suppose at some point down the line you might be forced to say, "Okay, this was wrong" or "everybody thinks we're wrong" or "we'll take a different approach." But I don't think we're anywhere near there. I think there is a tremendous amount of support for the types of cases we have brought. I think people try to put the cases into absolute boxes.

Indeed, I think the Eleventh Circuit went too far in trying to do that. But, in fact, the *Schering* case,²⁴ while it tried to lay out some basic principles, actually was fairly fact-specific. That is what you find in these investigations with these patent settlement cases. We obviously are very cognizant of the Eleventh Circuit decision, and others, and we take it very seriously.

But nonetheless, not surprisingly, when we lost the *Schering* case, the number of patent settlements in which brand pharmaceutical companies made payments to generics and generics agreed to stay out of the market for a period of time definitely went up. We are required statutorily to look at all those. So we have a lot of them to look at. We are investigating them very, very carefully because we are required to do it. If Congress should tell us to stop, that's one thing, but that hasn't happened.

The billions of dollars that are at stake here make this an issue we think we need to continue to push. But, again, we are taking it investigation by investigation. It's interesting. These settlements

²³ See Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice Issue Report on Antitrust and Intellectual Property (Apr. 17, 2007) (summarizing main points of joint report), available at <http://www.ftc.gov/opa/2007/04/ipreport.shtm>.

²⁴ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), cert. denied, 126 S. Ct. 2929 (2006).

are fairly unique to the Hatch-Waxman context. We haven't seen these agreements in patent settlements outside this industry. That tells you something about the incentives that Hatch-Waxman has put in place.

So stay tuned. You haven't heard the last of this one yet.

ANGLAND: Jon, you are a member of the Antitrust Modernization Commission. Any questions on that topic?

JONATHAN JACOBSON: First, in self defense, I will note that Don Kempf, Deb Garza, and I dissented from the Part III recommendation that I know you are not crazy about. But the AMC did make a number of recommendations, legislative and prescriptive, and a number of recommendations specifically that the agencies should do or should consider doing certain things.

Is there an organized plan of response from the agencies to the AMC Report? Will there be any sort of interagency task force? Debbie, do you want to take that one first?

MAJORAS: What we have done at the FTC is I have appointed a group of people to examine closely the AMC's recommendations. I guess we're calling it a task force. They are still in the stage where we are parsing it, trying to figure out what we need to do in order to make decisions about any of the issues.

We are also simultaneously looking at issues where we would want to be in consultation with DOJ, and Tom and I have already talked about it. So while at the moment we haven't had a need for some formal task force, we are certainly going to make sure we have liaisons.

BARNETT: I would hope under any circumstance we would be organized in our response. We are doing the same thing. We are looking through the many and weighty pages of recommendations that you have made.

I agree with Debbie. We have been following this closely, as you know. We were active participants in the process and are working through the various recommendations. I think some of them—for example, the ones relating to criminal enforcement—don't really require a lot of discussion with the FTC. Others do, and Debbie and I have talked about that. Our staffs are talking about that. We will do a coordinated or otherwise organized response, as appropriate.

JACOBSON: I have no doubt it will be organized.

One of the areas that the AMC focused on was the Hart-Scott-Rodino process and, in particular, clearance. The Commissioners were strongly supportive in concept of a clearance agreement along the lines of the Charles James-Tim Muris agreement, and have made recommendations both to the agencies that they consider not necessarily the same agreement but the same concept of agreement, and a parallel recommendation to the Congress that they embrace this effort.²⁵ Can we expect to see anything along those lines? Tom, do you want to start?

BARNETT: On the clearance front, it is important to put things in perspective, and the clearance process we have in place in the vast majority of cases works reasonably well.

²⁵ AMC REPORT, *supra* note 4, at 134–37.

Having said that, there are a small number of instances where it takes time or we have some disagreement about which agency ought to handle a matter. It's a credit to both agencies that they are passionate enough about their enforcement that they want to handle these matters. Sometimes it frankly takes too long, and so there is room for improvement there. I would certainly like to see a system in place that does two things: clears all matters within a very short period of time, and, second, guarantees that it never gets to Debbie and me.

But clearance is an issue that we have been looking at and that we have had discussions about. I view the AMC recommendation as an opportunity for us to take an even more focused look at it. If we can make some improvements, that would be terrific.

MAJORAS: Clearance is the price you pay for having this job. I heard Bill Baer said yesterday that when there is a disagreement it's embarrassing, and "Gee, why can't they just work it out?" I agree it's embarrassing, and I have always said that. Although I would note that my very good friend Bill Baer used to be at the FTC, and he knows how hard this can be in the few matters a year where it really becomes an issue.

Prior to the AMC's recommendation, though, we had already been working on new tie-breaking mechanisms between us, which I think is really the important thing.

I think when you look at clearance—and this is what I always try to tell my folks and tell Tom when we're having our friendly discussions about these things if it ever does get to us—the thing you just have to always remember is that both agencies are equally capable of reviewing these mergers. What matters the most is that the system does not completely break down. We try to keep those principles in mind.

As for whether we can have a new clearance agreement like the one we tried in 2002, it is hard for me to imagine. We are looking at this, and we'll talk about it, and we will be completely open-minded because it is an important recommendation. But having lived through it in 2002, I think without congressional support—you know, Tim Muris and Charles James and Joe Simons and Bill Kovacic and myself and Hew Pate put countless hours into this, and our staffs. We spent a lot of time on that agreement. Every hour you spend on something like that you can't spend doing something else.

So without some assurance of that—and we have different oversight committees, so they may if they are brought in have something to say about where particular industries should go—I am not going to over-promise on this one.

JACOBSON: Following up on the same set of issues, I think no one doubts that the agencies deeply want to get mergers cleared within a few days. There is a reality that you and I have talked about occasionally, that sometimes deals go to the thirtieth day and you get a second request just because the agency has no choice. That still does happen, and everyone agrees that it shouldn't.

In recognition of this, the AMC has recommended that Congress actually pass a statute, in large part to help you out, that would require the agencies to clear a deal within nine days, and a suggestion that the agencies develop a firm tiebreaker for that ninth day, an arbitrator or a coin toss, or some other method.²⁶

It was suggested yesterday by Bill Baer that maybe if the agencies want to do it now and can't, that a statute isn't going to make a difference. Do you agree with that? Would the statute help or just be another piece of legislative paper?

²⁶ *Id.* at 137.

BARNETT: Let me say that the goal of clearing all mergers within nine days is certainly an admirable goal and anything that would help us get to that would be a good thing. As to whether a particular statute would help or not, I think I need to say that I'm not aware that the Administration has taken a position on any particular proposed legislation.

But the general concept of trying to clear something—I won't bore you with the details of it, because Debbie and I have talked about even trying to get there—there are some complications that can arise in terms of not even realizing there is an issue until later, for example because a third-party comes in later or something like that. But at the end of the day anything that moves us in that direction I think is a positive thing.

MAJORAS: If a statute is passed, we will follow it, of course.

What I would say about the tiebreaker idea is there does need to be one. But I am dead set against any kind of mediation. I think that's a complete embarrassment. I've been through it twice where I was told to do it, and I did it. But give me a break. Talk about time not well spent. No. There should be a quick, easy tiebreaker that is unlikely to be gamed.

JACOBSON: A large coin with two separate sides?

MAJORAS: A Super Bowl coin.

JACOBSON: Following up on HSR, the agencies came out last year with separate but similar custodian limitation proposals that I think are very well received by the bar.²⁷ They largely set a presumptive limit of thirty-five custodians for a particular deal. Although these are well received, I think there is a perception, certainly in some quarters of the bar, that they are illusory, that the ability of the staff to get more than thirty-five custodians is really not particularly cabined, and that in any large deal it is going to be fifty, seventy, a hundred, just back the way it was.

In recognition of that, or at least in recognition of that concern, the AMC proposed an additional limitation that would require a filer if they wanted to get the benefit of this to come clean, to check a box on the form and say, "If we get a second request, we would opt in to this."²⁸ That would require them to provide the data to allow the agencies to limit the custodians to fifteen-to-thirty-five, depending on the size of the deal, with an exception for ones where to go in excess of that would be approved by Chairman Majoras or Tom Barnett, depending on which agency it went to.

I know at least Chairman Majoras has some views on that one. Do you want to have at it?

MAJORAS: Well, I do. Look, I have been talking about merger process my whole career. When I came into the FTC, I said I'll take it on at my level, we'll try to make some changes, we'll try to put in place in the Bureau an opportunity to appeal if someone thinks that staff is not being reasonable in balancing the burden against the benefits.

We have done that. The process we came up with has been in place for a year. I really welcome input from people as to how they think that is working. I said from day one this is a beginning, not an end, and it can be changed and tweaked.

*The goal of clearing
all mergers within
nine days is certainly
an admirable goal and
anything that would
help us get to that
would be a good thing.*

—TOM BARNETT

²⁷ Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Reforms to the Merger Review Process (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewpocess.pdf>.

²⁸ AMC REPORT, *supra* note 4, at 169–70.

We are going to look more closely at that proposal, Jon, which I know you personally really spent a lot of time on because I know you took it seriously. But I have to tell you that my initial reaction is negative.

You know, we looked at whether one could tie this issue of how many custodians should be searched to the size of the deal, and the correlation is not nearly as strong as you might guess.

I would also say that thirty-five custodians, if we encountered a deal like an Exxon/Mobil, would be nothing. You have all of these geographic markets, and the FTC has a lot of industries we review that have lots of geographic markets. Conversely, though, we have huge pharmaceutical deals where Mike Moiseyev ends up needing only to search ten custodians. So I think the correlation isn't there as much as you might think, although it is a good thought and one that we have considered.

Overall let me just express a concern. If you look at the *AMC Report* overall, you look at what we have been talking about in the Supreme Court cases, and where we all have been in the last thirty years. We need more fact-based analysis, not less—although this week there was a conference in which some people were suggesting that maybe we should go back to more structural-based analysis. But in any event, that is one of the messages I took from the AMC.

But if you want us to do that, we have to be able to get at the facts. I was thinking about this a little bit this morning and for any Monty Python fans, like suddenly I'm the Black Knight—you know, I'm going to cut off this arm, and you're still moving, you're still dancing; we'll cut off this arm; then we'll cut off both of your legs. At some point, "Wait, come back, come back and fight." I mean no, your legs are off.

What we tried to do—and I really tried to listen to both the bar and staff in devising something—was balance the need for information for us to be able to determine whether a deal should go through or whether we need to challenge it for the benefit of consumers. You've got to balance that clearly against the burdens, not only on the parties but on us, and that is legitimate and fair, and, again, I have been very outspoken on that.

But on the other hand, in a fact-based analysis you need a fair amount of information. And I understand, Jon—you and I have talked about this—that when HSR was first passed it was contemplated it would be a lot less information. But we are in the information age now and companies have a lot more information. So I think that without sufficient flexibility, and I'm not sure—you know, people find it is hard to go to the Bureau Director and object. The fact that they are all going to be streaming into my office—I'm just not sure how well that will work.

So I think this is important, and we ought to really have some further discussions on this going forward.

JACOBSON: A similar machete to wield?

BARNETT: Well, I certainly agree with Debbie's overall assessment.

We'll start with the fact that the movement away from just rigid market share presumptions to a more specific competitive effects analysis in my view is a good thing or a good circumstance in merger enforcement. It enables us, for example, to realize, even though you may have a substantial market share in a particular case, there are other factors that suggest the deal is actually likely to benefit consumers. I wouldn't want to lose that.

As Debbie is suggesting, there is some tension there, and so when you get a second request and you are likely to be in court, it is inherently very document/fact/data-intensive, and it is hard to get around that.

To some extent, I think that there is an excessive focus on the second-request burden itself in terms of trying to step back and think about “How can I reduce the overall burdens or costs of the system most dramatically?” It’s not that those things aren’t important, but it is things like using that first thirty days aggressively, trying to get up to speed, so that you avoid the need to issue a second request at all. Then it doesn’t matter how many custodians you might have searched.

Those sorts of measures, which are things that I think both agencies have been focused on but are certainly an express part of the initiative that we have, are things that can pay very large dividends.

The other thing that is missing here is that you talk about the number of custodians, but increasingly merger analysis doesn’t turn on the documents of particular individuals; it turns on data and centralized files. It is very difficult to address that with the custodian issue. And the percentage of our second-request productions that are attributable to these centralized files or databases is increasingly large. That is an area that we continue to try and think about.

The best answer we have right now is for you all to educate us about what is there so that you can help guide us to the portions that are relevant rather than just dumping everything on us.

So that’s my hack at it.

ANGLAND: Jeff?

LEVEE: Let me turn from the Hart-Scott process to the criminal process. The Department of Justice Antitrust Division is collecting a lot of money in criminal fines these days. You are putting a lot of people in prison. To what do you attribute the continued significant enforcement activity? Are there more criminals? Are there more criminals applying for amnesty and giving you more access to information? It has become such a substantial part, it seems, of what the agency is doing, I’d like you to comment on it.

BARNETT: There is a range of factors.

Let me start off by saying that not only have we obtained large fines last year—we obtained \$470 million or so in fines, the second-largest total in our history for one year—but up until last year (and some of you may have heard this if you have heard Scott Hammond speak), the record for the total number of jail days imposed in sentences for Antitrust Division defendants was something over 13,000. As of today, for this fiscal year, only about halfway through it, our total is over 21,000, on track to more than double that. The average sentence is now twenty-nine months, which is much more than the ten months that it used to be not that long ago.

So what drives all that?

First, I would point to Scott Hammond and the folks in our criminal enforcement sections, who I think are just doing an outstanding job.

But there is a range of things. They are detecting more large international cartels where the volume of commerce is larger, which leads to larger penalties.

They are aggressive about identifying and charging what I will call collateral offenses, mail fraud or wire fraud, in addition to, or even in lieu of, a Section 1 count if we can’t make out that case, or tax evasion, whatever we can do to bring severe penalties to bear on what we view as the supreme evil of antitrust.

I also want to underscore the benefits that we derive—we in the United States, in terms of U.S. cartels—from the increasing activity of cartel enforcement by our friends at the European Commission and our friends at the Japanese Fair Trade Commission and the Korean Fair Trade Commis-

sion, all around the world. Again, it wasn't that long ago where when we were trying to collect evidence or get information about people from abroad, we were facing blocking statutes and affirmative resistance. Now we are linking arm in arm and doing coordinated dawn raids, we are extraditing people with cooperation. That kind of cooperation increases our effectiveness and gives us a greater ability to detect, to build a case against, and to negotiate with cartel participants.

And then, finally, when we actually do end up with a contested proceeding, judges are imposing harsh sentences, harsher than they used to be. All of that increases our negotiating position in plea agreements.

So that is all coming together in a way that I think our criminal folks should be very proud of.

We have brought, in the last few years, fourteen cases against companies for failing to secure data to the detriment of consumers. We will continue to be very active in that area, and also in educating businesses.

ANGLAND: Debbie, we'll switch gears and have you put on your consumer protection hat for a moment. Briefly, in that area what are your highest enforcement priorities?

MAJORAS: Well, we have a lot, because as the marketplace develops and becomes more complicated, we see more consumer issues, some of it new wine in old bottles.

I would say that probably the bundle of issues under the heading of consumer privacy are among the hottest issues that we have to deal with. Many countries actually have a separate privacy agency within the government. Consumer privacy, the issue of privacy in the commercial world, has fallen to the FTC. It is something we have embraced. What that means is a whole range of things.

First of all, of course, the Do Not Call Registry, which now has 142 million telephone numbers on it. One thing I should note here for this group—and I don't want to hear a collective groan—you probably didn't remember, but there was a five-year timetable put on your registration. So, starting next year, for the first set of people who registered, their five years will be up and people will have to re-register. So you heard it here. We have been very active in our enforcement.

Obviously, in data security we have been extremely active. One of the things that has happened in this tremendously dynamic economy, so much of which has gone online, is that we have really had to sort of catch up in thinking about the amount of consumer data this is creating and, unfortunately, the ease with which criminals can get to that data. So we have brought, in the last few years, fourteen cases against companies for failing to secure data to the detriment of consumers.²⁹ We will continue to be very active in that area, and also in educating businesses.

Consumer privacy also now extends into interesting areas. In spyware, we have been very active in challenging companies that have been loading that horrendous spyware on your computer and slowing you down, and in the worst case actually taking information from you and using it.³⁰

In the area of protecting children online, we have been enforcing the Children's Online Privacy Protection Act.³¹ We, for example, brought a case against one of the social networking sites that was knowingly collecting information about our kids who are below the age of thirteen without parental permission.³² That is an area where we will continue.

So there is a whole bundle of issues in this privacy area, and of course ultimately trying to protect kids, and also protect all of us from identity theft.

²⁹ FTC 2007 REPORT, *supra* note 17, at 28.

³⁰ *Id.* at 27–28.

³¹ 13 U.S.C. §§ 1301–1308.

³² FTC 2007 REPORT, *supra* note 17, at 31.

—DEBORAH MAJORAS

Financial fraud is an area where we have a lot of work to do. If you look at things that go on in the economy, you can then start, we hope anyway, to see what is going to develop in terms of consumer problems.

We are looking very closely, for example, at mortgage companies, particularly in the sub-prime area, that have been making offers to consumers perhaps without adequate disclosures. Because of some of the sub-prime issues, that results in debt and credit problems for more of our consumers.

We have unscrupulous, so-called credit repair organizations that do nothing but take precious dollars from our consumers who can ill afford it and then can't pay off their creditors. We also have debt collection practices out there today that, despite the federal Debt Collection Practices Act, are outrageous and harassing. So, the entire area of financial fraud is a priority.

And then, also, I will just finally mention we continue to be very active in health care fraud. Everybody always wants to ask, "Are any of those weight-loss products working? I mean, isn't there just one that we can try?" The answer is: I'm so sorry—another collective groan—no, they don't work. I'm afraid diet and exercise are the only things that do work. So we continue to be active in the weight-loss fraud area. First, we have a terrible obesity problem in this country, particularly with our children, so we think it is an important area.

And then, we are also quite active in going after fraudsters who try to sell people pills and potions that they claim will cure everything from cancer, to Alzheimer's, to emphysema, to skin conditions—an outrageous group of folks. They prey on those who don't have a lot of hope and who are truly in despair. So we need to be there.

That's skimming the surface, but that's a few of our issues.

ANGLAND: Picking up on one in particular, after six years of consideration, Congress recently passed the U.S. Safe Web Act.³³ What powers does it give the agency and how do you envision deploying them?

MAJORAS: We are so thrilled. We have been trying to get these powers.

There is no question that fraud is now completely global. There is a tremendous amount of online fraud out there. Of course, these guys don't have to worry about boundaries or jurisdiction. They can sit in any jurisdiction defrauding consumers in the United States, and vice versa. So we are behind in catching up with this.

While we were forming important alliances and agreements with our counterparts around the world, nonetheless we were hamstrung. We were hamstrung because there are certain types of information and evidence that we were not allowed to share with our counterparts. Our counterparts couldn't share information with us because we couldn't guarantee them that we could keep it confidential, so un-FOIA-able and the like, and other sorts of legal barriers. Congress has broken those legal barriers down for us, which I think is tremendous.

And then, there are a couple of other things in the U.S. Safe Web Act that will be very useful. For example, we now can do staff exchanges with other agencies, not only on the consumer protection side but on the antitrust side, and that is something that we have been wanting to do, trying to do, for a very long time, and we have not been permitted. So that is something that I think is very important.

³³ Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (2006).

We have a team in place now. We are already using the powers under the U.S. Safe Web Act, but we also have a team in place that is going through and being very cautious in how we do this, and also educating our entire agency. It is no longer the case that we can say, “You guys in Randy Tritell’s shop, the new Office of International Affairs”—you know, it’s all Randy’s responsibility, Randy and Hugh Stevenson and others, to do this for U.S. Safe Web. No. I mean that’s the whole point. The international work is throughout the agency now, and everyone needs to know how to use these tools to bring these people to justice in one country or another. So we are very pleased.

ANGLAND: I will ask our remaining panelists to join us now and we will move on to Phase 2 of this morning’s session.

We will start off by turning to Ilene.

GOTTS: Commissioner Kroes, I would like to start out with you, if I could. In the *Sony/BMG* merger the Commission issued a Statement of Objections but ultimately approved the transaction without any conditions. A trade association of competitors challenged the Commission’s decision and prevailed.³⁴ On the other hand, some Court of First Instance decisions found the Commission had blocked mergers that it should have permitted. Like Goldilocks, when you look at these various CFI decisions, how do you get enforcement “just right?”

NEELIE KROES: We are doing our utmost anyhow to get all our enforcement right. Having said that, in this case the judgment illustrates that the Merger Regulation sets out—and this is quite important—a symmetric test. So it is taking into account that getting your arguments and your evidence in place is not only necessary for permitting a merger but also for preventing it.

Having said that, I think that we are learning day by day. But in this case the lesson wasn’t new for us. So I think that it is taken into account.

And talking about the Statement of Objections, we are not going to change our policy. Rightly, you might ask “Why not?” Well, in our policy, the Statement of Objections serves to set out clearly all the Commission’s objections and allows the parties to exercise their rights. The evidence available at that time will include evidence brought forward in that phase as a reaction to the Statement of Objections. So it is serving the interests of all the parties who are involved. It is not only the Statement of Objections. There are also hearings that are possible for the parties to explain what it is all about in their view, and then at the end of the day, we take our final decision.

GOTTS: Continuing our discussion of recent European Union activity, I applaud that you are trying to draft state-of-the-art guidelines in the area of non-horizontal mergers.³⁵ In the United States the non-horizontal merger guidelines are now twenty-two-plus years old. Both the ABA Section of Antitrust Law in our transition report, and the AMC in its recent report, recommended that the U.S. Guidelines in this area be modified to reflect current law.³⁶ I was wondering whether, from the U.S. perspective, any further guidance will be provided in the nonhorizontal area. Do you want to go first, Debbie?

³⁴ For a discussion of the CFI’s July 2006 opinion, see Gail Slater, *E.U. Update: Sony/BMG, THE THRESHOLD* (ABA Section of Antitrust Law, Mergers/Acquisitions Comm. Newsl.), Winter 2006/2007.

³⁵ The 1984 Merger Guidelines include a section on non-horizontal mergers, which, though never formally abandoned, was not included in the 1992 and 1997 revisions to the Merger Guidelines.

³⁶ AMC REPORT, *supra* note 4, at 68.

MAJORAS: I'd be happy to. We have been following very closely the extensive work that the Commission has done on the non-horizontal guidelines and applaud them for the work that has gone into it. We are pleased that we have such an open relationship that we can talk about these things quite freely, and we do.

As far as whether we are moving in a direction of having new Guidelines, the issue comes up from time to time. The AMC has recommended it,³⁷ and, as I've said, we will look at it very closely.

We will look at it seriously if the AMC perceives this—but I can't say up to this point I have perceived a tremendous need for it. Now, I could be completely wrong about that, and I think people should tell us if we are. But I haven't sensed a tremendous amount of uncertainty out there, certainly not on conglomerate mergers. I wonder on vertical issues, which tend to, at least the ones I have dealt with at both agencies, come up in the same industries again and again, like defense.

Now, again, if we are wrong, we want to hear from people if they think some additional guidance would be necessary. But the fact of the matter is that any one of these projects—whether we are taking on Section 2, which we have been, any of the policy issues we are taking on—takes time. What you are always doing is weighing the time and the resources you have against the need for getting greater transparency and guidance. So I will absolutely look at it.

BARNETT: This is an issue we have talked about at various points. I would say up until now our perception has been—I mean you weigh the factors that Debbie was pointing to, in terms of what is it going to take to get this done and what kind of benefit can be derived from it. Our sense has been that one could put out there a set of very general principles that would be accurate and that probably would not provide a whole lot of guidance in a particular case. To get below that, these issues often get fairly detailed, fairly fact-specific. I'm not saying it is impossible, but it is a challenge.

Now, having said that, the AMC has recommended it. We always watch closely what our friends at the European Commission are doing and try to learn from their experience. If all of this makes sense, we will certainly look at it and consider that seriously.

GOTTS: That's wonderful.

Looking at whether there are deviations in applied merger standards in U.S. merger review, I'd like now to focus on the states. Bob, I notice how active the states have been in merger review for mergers that may have local effects—that involve your local gas stations, supermarkets, drug stores, and movie theaters. In these matters, I have also noticed that there have been some instances in which after the FTC or DOJ has finished its investigation, and either cleared the merger or obtained relief, the states have required additional relief. I'm wondering if the states are applying a different substantive standard in their merger review.

ROBERT HUBBARD: The bottom line is that reasonable minds differ about how to apply the same rules. Generally we agree with the federal enforcers about what rules to apply and how to apply them, but sometimes we see a problem that they don't when we look at the same set of facts. We try to keep each other apprised of that and respond as best we can.

Our federal system allows separate sovereigns to make separate decisions, and we try to implement them in as coordinated a way as we can.

Generally we agree with the federal enforcers about what rules to apply and how to apply them, but sometimes we see a problem that they don't when we look at the same set of facts. We try to keep each other apprised of that and respond as best we can.

—ROBERT HUBBARD

³⁷ *Id.*

MAJORAS: It could go the other way, too. There have been times where we thought there was a problem and a particular state hasn't. So I wouldn't say that it is always in one direction.

HUBBARD: Certainly I agree with that, and that's part of the benefits of having a separate set of eyes looking at the facts and being able to get the relief that the people who are focused on the facts can get.

GOTTS: We have right now a system where throughout the world we have seventy-plus jurisdictions with merger review requirements, each with their own forms, and their own requirements of what goes into the form. The Antitrust Modernization Commission encouraged the U.S. agencies to work with the European Commission and other authorities to try to develop a centralized pre-merger notification system.³⁸

First, from the U.S. perspective, do you think this is a good idea and, if so, how would you do it?

BARNETT: It's a good idea if you could do it. It's an issue that we have actually looked at. Indeed, we tried to do it with one other country that was fairly close to us to see if we could do that. I'm making up these numbers, but instead of a fifteen-page filing you had a twenty-eight-page filing, and the first fifteen pages were the U.S. information and the next thirteen or fifteen pages were the other country's information. I mean once you start to break it down, you realize that you are asking for country-specific information. There is some overlap.

What I think is probably more productive, in the shorter term at least, is to talk about what kinds of information you should be asking for and what you should try to avoid asking for to reduce burdens, and to some extent being careful about not misunderstanding the information you are asking for. This bleeds into the substance a little bit. But just because you ask for sales by national boundary, that doesn't necessarily mean that is a relevant market, for example. Those are the sorts of issues where I think achieving some progress in the near future is possible.

MAJORAS: It is always an issue on the table and worth continuing to explore. I wonder whether the effort in the end will be worth it. We have over a hundred agencies around the world now. I don't know that all of them are doing merger review—some probably not.

It sounds like just process, so why can't you just pull it all together and kind of meld it? Well, the interesting thing when you start to talk about process as much as substance is you get into differences in legal structure. Those are far less likely to come together around the world in any short period of time than even the substance of merger review.

So, again, I think it is something that we need to continually be open-minded about. We need to look for such opportunities. But the way we have tried to do this in the ICN through the Merger Working Group has been through procedural best practices,³⁹ to try to get as much directed toward best practices as you can, because it may be impossible to agree on every little form. It's hard enough to do that within one government, let alone all of the others.

So as a goal to think about, sure, but I wouldn't want to get so bogged down in that at the expense of working toward actual best practices, including in the substance of merger review, which is what matters in the end.

³⁸ *Id.* at 217.

³⁹ See INT'L COMPETITION NETWORK, A STATEMENT OF MISSION AND ACHIEVEMENTS UP UNTIL MAY 2006 (May 2006), available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf.

GOTTS: Never an easy answer to a problem, right?

Neelie, what do you think?

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ating quite happily.*

KROES: Let's just be pragmatic, for at the end of the day we all have the same target, the same goal so to say, that we all want more efficient competition law enforcement. If that is our goal, then we shouldn't focus too much on agreeing on every detail of the procedures. That takes time. On a daily basis, we are already cooperating quite happily.

We have some experience of cooperation within the European Union. Because we have twenty-seven Member States, we know at the end of the day it is all about a pragmatic attitude. We have to deliver on a daily basis.

GOTTS: In addition, in the last few years we have heard from the agencies about international cooperation in the cartel area, with big headlines on dawn raids throughout the world. We have also seen it in some merger reviews. Has such cooperation also existed in non-cartel conduct investigations? Have there been any examples of comity in merger review or other areas where either the United States or the European Union took the lead and the other jurisdiction watched rather than taking action?

Debbie, could you start with this?

MAJORAS: Absolutely there is cooperation on non-merger conduct matters. I asked the General Counsel's Office whether I was allowed to tell you which ones, and they said no.

I would like to be as transparent as I can, but I think it should be very reassuring to all of you that we don't have to wait for formalities to cooperate with each other. We are on the telephone all the time, talking through issues, explaining our cases to one another, explaining our evidence. So that is quite frequent. That is definitely going on.

As far as comity goes, I think there may have been some cases—none are coming to mind—but I would say this, in smaller bits perhaps. So, for example, in the issue of merger remedies where we have had common mergers that we have reviewed with the European Commission, it won't surprise you to know that we may come out similarly on some of the merger issues but differently on the remedy because we have different sets of consumers in a different geographic region.

The amount of deference to one another, to try to get this right, with the strong understanding that you can't ask a party to enter into two remedies or two remedies that conflict with one another, I think has really been a great success story of our cooperation. It is one that I am very appreciative of and think is really working quite well.

—NEELIE KROES

BARNETT: I agree with that. I do think that the most extensive degree of cooperation that we see on a day-to-day basis, while we do see it on the cartel enforcement front, really is mergers. It can happen on other fronts, but it has become routinized. I mean our staffs talk to each other daily. I don't even hear about it in most instances.

I completely agree with Debbie that we are trying to work with each other, and not only to help each other on the substantive analysis and get to the right result. This issue of remedies is in some ways the most significant potential area of conflict. It has to be viewed as a success story.

I don't think anybody here could point to anything in the last five years where the European Commission and the U.S. agencies have come out with a conflicting merger remedy. I will assure you that is not because there were no opportunities for a conflict there.

We have worked through some issues there quite successfully, quite amicably, on both fronts—and I see Philip Lowe nodding here as well; he knows—and that is a tremendous success story. I think it is important to underscore the importance of that.

Let me just add that on the comity front, relatedly, it is not really so much a question of “I’m going to delegate this investigation to you or to the others,” but we certainly watch what goes on.

Just as to one public matter, in the *Oracle/PeopleSoft* case⁴⁰ that we litigated, we ended with a resolution. I won’t speak to what exactly was in the minds of the European Commission, but as a practical matter their investigation was suspended while the trial went on, and ultimately it was resolved.

So there is a lot of cooperation going on right now. I think it is great.

KROES: I completely agree.

I also want to say something about cooperation. There is an excellent example of why we should not always both deal with the same issue. That is the Sabre case concerning a computerized airline reservation system set up by a number of European airlines and affecting U.S. airlines.⁴¹ It was a great decision to delegate the case to the EU, as it was better placed to deal with it. I think there are other examples, too.

GOTTS: We live in very interesting times. Reportedly, China is about to come out with its anti-monopoly law. I was wondering if you could discuss what the agencies—both in the United States and in the European Union—have been doing in consultation with the Chinese authorities.

Debbie, do you want to start?

MAJORAS: I will if you want me to.

If Ilene says that the Chinese are about to come out with the anti-monopoly law, then maybe she knows more than I do. But the Chinese have been working very hard on an anti-monopoly law, and suffice it to say I think all three of us could confirm how hard our two respective jurisdictions have been working with the Chinese.

The Chinese have been extremely open to widespread discussion on these issues, both at very high levels and at staff level, which has been terrific. My first year at the FTC I was running out of resources because we were invited to China with DOJ so frequently to really try to work this through. So there has been a great deal of bilateral cooperation.

We have also been in frequent discussions with the European Commission, understanding that, while we may have our differences from time to time, we are far closer to one another, of course, than where the Chinese have been in trying to move closer to a market economy. That, I think, has been fruitful. So, plenty of discussions there.

Then, finally, before I turn it over to Tom, there is something going on in the Administration, high-level meetings with the Chinese, strategic economic dialogue, and we as competition agencies

⁴⁰ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

⁴¹ See EUROPEAN COMM’N, 30TH REPORT ON COMPETITION POLICY 294–95 (2000) (discussing ultimate settlement of EC investigation); see also Press Release, U.S. Dep’t of Justice, Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines’ Computer Reservations Systems (Apr. 28, 1977), available at http://www.usdoj.gov/atr/public/press_releases/1997/180at.htm; ABA SECTIONS OF ANTITRUST LAW AND INTERNAT’L LAW, REPORT ON THE INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE (2000), available at http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/conv_rpt.pdf.

have now been brought into that dialogue. This I think is a recognition on both sides that the competition issues are absolutely critical to this entire enterprise.

BARNETT: We do spend a significant amount of resources specifically on China, in terms of multiple delegations to China and hosting delegations from China. We have, of course, been focused on the draft anti-monopoly law. I hear the second reading should be this summer. The third reading may be in the fall, but that's not entirely clear. So who knows exactly when it will happen? But I agree they are working hard toward it. I sense that they really do want to get this done.

We are also focused very much on finding a way to help them with the implementation phase after they actually pass the law, because that is extraordinarily important.

But one example that I want to give of our work with China, which includes cooperation with all of you, I think illustrates a number of things. When I was in Beijing a couple of years ago, we had a session with representatives from the legislature, the National People's Congress, as well as the agencies that are likely to be involved, as well as the equivalent of the Executive Branch. It was a square table, with Chinese representatives on two sides. We were on one side with our FTC colleagues. On the other side were representatives from the European Commission.

We spent an entire day going through the various areas of the law. Without exaggeration, the way it proceeded was, on a given issue the United States would give our views and the European Commission would say "we agree." The next issue, the European Commission would give their views and we would say "we agree." I actually think that sort of combined message in that very tangible way has much more force and persuasive impact than either of us just talking, particularly if we were giving different messages. But it shows how close we really are in our fundamental approaches and, I think, how cooperation can be helpful.

KROES: More than talking about cooperation, very constructive cooperation, we should also take into account that the situation in China is a challenge. It is unbelievable what is going on in the People's Republic of China. So it is of great importance that their recent developments in competition policy are implemented as soon as possible.

Even if the EC and the US agencies are not always 100 percent of the same view—why not mention that too, for that is reality. If that is the case, then count our blessings where we are together. And the two of us and all the others concerned are indeed very much involved in the whole process of speeding up.

I see three main issues: I am highly interested in when the whole legal procedure is finalized; number two, will there be an independent authority, yes or no?; is it one authority, yes or no?; and, number three, of course highly important, is it implemented in the way that we are used to? So let us do our utmost to fight together for the implementation of the competition law that they are in favor of as soon as possible.

MAJORAS: One last point on the implementation. When the Chinese anti-monopoly law is passed, that will be the beginning of the challenge, not the end.

ANGLAND: We like to think the Antitrust Section is doing its small bit. By the way, in terms of Chinese antitrust law, we have been approached to, and we are agreeable to, having the new edition of *ALD VI* translated into Mandarin. This will be our first venture in a language other than English.

Bob, in the area of resale price maintenance, the states have traditionally been very vigorous enforcers, bringing actions under the Sherman Act, using the per se rule, attacking resale price maintenance. I know you worked on a brief arguing that the per se rule should be retained. Assum-

ing for a moment that you are not successful in that regard and that the per se rule is overruled, do you envision states then treating resale price maintenance as per se illegal under state law?

HUBBARD: Continuing the Monty Python theme, *Dr. Miles*⁴² is not dead yet. It's worthwhile to think about the arguments that are highlighted in *Leegin*⁴³ to show that reasonable minds can differ. I have done most of my analysis assuming that the per se rule will continue. I gave my thoughts on what this might mean at a program yesterday morning.⁴⁴ Vertical restraint law has significantly eroded, but I think that vertical price restraints that efficiently and effectively take money from consumers ought to be per se illegal. We tried to put all those arguments in the *Leegin* amicus.⁴⁵ We were granted oral argument. The New York Solicitor General, who was also an Acting Solicitor General for the United States in her career, presented the argument.

So my first comment is that *Dr. Miles* is not dead yet.

Second, the history of resale price maintenance claims includes a Depression era experiment that allowed states to legalize resale price maintenance. Some states did. Some states didn't. Some states did, but changed their minds. Ultimately, in 1976, Congress removed the authorization for those state statutes.⁴⁶

In connection with that history, a lot of state law says that a manufacturer cannot dictate the price at which a retailer can sell. New York General Business Law section 369-a says that. Other legislative history illustrates that states, like Congress in 1976, endorsed the per se rule.

I hope that we don't get to the kind of problems and disparities we are going through with *Illinois Brick*. I hope that the federal per se rule continues to be applied. But we'll see.

I'm an Ohio State Buckeye fan. You play the games before discussing the result.

ANGLAND: Debbie?

MAJORAS: Remember, Bob, in *Monty Python and the Holy Grail*, the line after "I'm not dead yet" is "Well, you will be soon."

HUBBARD: But we're still alive.

MAJORAS: But I'm a Buckeye fan too, Bob.

ANGLAND: Let's push the hypothetical. I know that Bob will resist strongly even the possibility that the per se rule will be overruled. But let's assume for a second that it is and that states say, "Well, at least under our state antitrust law we are going to apply the per se rule."

⁴² *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

⁴³ *Leegin*, 127 S. Ct. 1511 (2007).

⁴⁴ Robert L. Hubbard, Chair, Multistate Task Force of the Nat'l Ass'n of Attorneys General, Presentation at the Breakfast with State Enforcers, State Antitrust Enforcement Committee Program, 54th Antitrust Law Spring Meeting of ABA Section of Antitrust Law (Mar. 30, 2006), available at http://roberthubbard.net/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=11&MMN_position=18:18.

⁴⁵ See Brief of State of New York as Amici Curiae for Respondent, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 1511 (2007), available at <http://www.oag.state.ny.us/business/antitrust/pdfs/Leegin%20States.pdf> and http://naag.org/assets/files/pdf/amici_leegin.states.pdf.

⁴⁶ For a history of resale price maintenance claims, see Thomas K. McCraw, *Competition and "Fair Trade": History and Theory*, 16 Res. Econ. Hist. 185 (1996).

Now, if you look at the Solicitor General's brief, the position it takes is that some resale price maintenance is not just competitively neutral, but that it is procompetitive. Well, if RPM is procompetitive, then a state law that says it is per se illegal is anticompetitive. Under those circumstances, notwithstanding the general dual system or triple system of enforcement, should Congress, in order to preserve competition that is allowed by resale price maintenance, preempt state laws making resale price maintenance per se illegal?

HUBBARD: As the amicus set forth in some detail, the empirical work supports that consumer prices go up. I have not seen any empirical work that shows that procompetitive effects flow from the restraint.

Assuming hypothetically that we will follow the musings of economists rather than the empirical work on this, I think *ARC America*,⁴⁷ a unanimous Supreme Court decision, would apply four-square. States are allowed to make their own decisions about the appropriate way to structure their economies and their antitrust laws and those decisions are entitled to deference and respect.

ANGLAND: In *ARC America*, of course, the Court was just saying that Congress had not in fact preempted, not that it couldn't preempt.

So the question—Tom, Debbie, do either of you have a view as to whether Congress should preempt if the Supreme Court says, for example, “We think resale price maintenance is often a good idea,” and states come out and say, “Well, we're going to say it's per se illegal anyhow?”

BARNETT: Well, I'm not in a position to say exactly what Congress should do, but I'll make the following observations. The federal antitrust laws prohibit or make illegal anticompetitive activity. They do not necessarily enshrine and grant some sort of protection to all other activity. There are a lot of regulations, laws, statutes, et cetera, that come into play that can be anticompetitive. We do have a federal system of government and the states have a sphere of operation. Both of our agencies have been very active in the real estate industry, for example, where we think the states have stepped in, either legislatively or through regulatory bodies, and done things that are anticompetitive in many instances. They are perfectly entitled to do that. If they feel that that's in the best interests of their citizens, that's fine. But, from my perspective, does it make sense to evaluate resale price maintenance under the rule of reason? Certainly, and I think we would all be better off if that were the case.

MAJORAS: I think it would be odd for Congress to preempt in such a situation. I think if the Supreme Court were to rule in the fashion that the Solicitor General has advised, I can't imagine this Congress, or maybe even the next, doing that. It just doesn't seem possible to me. So I won't add anything to what these two have said.

ANGLAND: Jeff?

LEVEE: It is a reflection of the passage of time that at 11:40 a.m. in the Enforcers Roundtable we have not uttered the word “Microsoft,” which I dare say normally would have been the subject of considerable discussion with the other three enforcement officials.

⁴⁷ *California v. ARC America Corp.*, 490 U.S. 93 (1989).

KROES: That it would be of interest anyway.

LEVEE: Yes, exactly.

Nonetheless, you have issues with respect to *Microsoft*.⁴⁸ I hope you could update our audience on the status of those issues and what the Commission has learned with respect to specifically the issue of remedies.

KROES: Let me first mention that, as you are all aware, 2007 is a very important year for the European Union. We just celebrated our 50th Anniversary.

How is that connected with *Microsoft*? Well, in those fifty years of experience of the European Union, and I'm also talking about fifty years of competition policy, we have never ever had an experience like this one. That, in itself, doesn't give a conclusion, but I am going to come to a conclusion. We have never ever before encountered a company that has refused to comply with a Commission decision. So that is a very important conclusion—is not a lot of fun, to put it that way.

We have indeed learned a couple of things from our past experiences, which are relevant for the future. Firstly, companies may not always find it in their interest to comply with a clear and positive behavioral remedy. I think, therefore, the Commission must be ready and have the resources to monitor. I think if we are able to monitor and enforce such remedies to ensure full compliance, then we are a step forward.

Unlike the situation in your country, the Community law also allows, as you are aware, potential beneficiaries of a clear and unconditional remedy to seek to enforce the decision, imposing that remedy before the competent national courts.

Having said that, the second point we have learned is that we may have to look for alternative and more effective remedies. That is one of the great lessons for me in this case.

We need to consider under which circumstances, for example, structural remedies would be more appropriate, or even a must, to remedy certain competition problems. I can imagine that in a certain situation there could be a dominant company repeatedly abusing its dominant position—and I am not only talking about the company you were touching upon—or where it has consistently failed to comply with a behavioral remedy that we were asking for, despite repeated enforcement actions. From this it could be reasonable to draw the conclusion that behavioral remedies are ineffective and that a structural remedy is warranted.

This type of situation is, by the way, mentioned in the Regulation.⁴⁹ In other situations, it may be efficient and sufficient to impose a simple cease-and-desist order, coupled with a fine, and leave the company to assess how to comply with the decision in question.

Having said that, the situation of today is that we are waiting for the decision from the Court of First Instance as to *Microsoft*. As you can imagine, it is not only we who are waiting for it but there are others who are also looking out for it too.

If you allow me to say so, at the end of the day, how did this case get started? An American company headquartered in the United States was behaving in a way that other U.S. companies were complaining about in Brussels, and then we took up our responsibility. We will continue to take up our responsibility, I can assure you.

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—NEELIE KROES

⁴⁸ See, e.g., European Comm'n, Press Release, European Comm'n Reaction to Microsoft Announcement of Jan. 25, 2006 (Jan. 25, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/49&type=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ Council Regulation (EC) 1/2003, 2003 O.J. (L 1) 1.

LEVEE: Let me question the other three officials on a different topic. A lot of people in this room have spent time prosecuting and defending indirect purchaser cases. The Antitrust Modernization Commission has proposed the repeal of *Illinois Brick* and a modification of *Hanover Shoe*.⁵⁰ It would change the way perhaps a lot of the cases are litigated, particularly some of the follow-on cases of the criminal cases that the Department brings.

Let me start with Bob. Do you sense that the states either support or clearly oppose this kind of a change?

HUBBARD: Forty-six jurisdictions put in comments on civil remedies to the AMC supporting the themes discussed in the Report.⁵¹ A unanimous NAAG resolution talks about *Illinois Brick* being fundamentally unfair and in need of correction, and that state law should not be preempted.⁵² The AMC proposal accomplishes those two things that are in the NAAG resolution.

The state submission to AMC differed in some details. We recommended a lighter treatment of *Hanover Shoe* than AMC appears to be recommending. I'm not quite sure.⁵³ The AMC says different things in different parts of the Report.

Also the AMC takes a "hard" removal position, that as long as the Constitution allows removal, state court litigation should be removed. Our submission took the position that Congress just passed CAFA,⁵⁴ which has provisions on removal; let's see how CAFA works; most problems will probably get fixed; why change something that maybe you don't need to.

Those are details. The fundamentals, as reflected in the NAAG resolution, are met: you get rid of *Illinois Brick*, and you don't preempt state law. I'm confident that states support the AMC proposal. We look forward to some sort of legislative proposal that we could look at and comment on.

LEVEE: Do the agencies agree?

MAJORAS: This obviously is not directly an FTC issue. I will just make a couple of points, probably some based on my past life, maybe a few things based on conversations in my household.

I think fundamentally I agree with Bob. There are some real issues with *Illinois Brick*, probably some of which could not have been anticipated at the time. Our economy, our legal system, a lot of things, have changed over this time period, so I think that there is a very good reason to look at *Illinois Brick* and whether that should be changed.

But I do think it would make no sense not to also look at an overturning of *Hanover Shoe*. The fact of the matter is if you look at our system of litigation today, it works okay but it's fairly inefficient. You have to ask yourself—I mean, look, I am very much, obviously, in favor of strong antitrust enforcement—but you do have to ask yourself at some point: How many times should a

⁵⁰ AMC REPORT, *supra* note 4, at 270–78 (discussion of recommendations for changing indirect purchaser policies derived from *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)).

⁵¹ The state comments are available at <http://naag.org/assets/files/pdf/antitrust.AMCcommentsCivilRemediesProposals.pdf>.

⁵² The NAAG resolution is available at <http://www.naag.org/assets/files/pdf/2005.Spring.Antitrust.Resolution.Final.pdf>.

⁵³ AMC Recommendation 47 includes: "Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law." That seems to change *Hanover Shoe* only to the extent necessary to allow direct purchasers to sue for actual damages. Yet the commentary on this recommendation refers to the possibility that "direct purchasers may receive 'windfall' awards exceeding their actual damages," which seems to suggest changing *Hanover Shoe* to prevent "windfall" awards. AMC REPORT, *supra* note 4, at 271.

⁵⁴ Class Action Fairness Act of 2005, Pub. L. No. 109-2, Feb. 18, 2005, 119 Stat. 4 (2005).

company pay? If you had a more unified system for deciding, for example, in a cartel case, where this obviously comes up, what is the damage? What is the harm? And pay that harm trebled, as opposed to paying it trebled here and then maybe paying a little more trebled over here and a little more—it's not only inefficient, but I think it is probably likely that companies are overpaying.

And that's expensive. I mean who do you think is paying that bill? Consumers are paying that bill in the end. A lot of it goes in the pockets of lawyers who benefit from the system. So I think it is definitely worth a look.

We were talking about this once on a panel a few years ago, and someone stood up in the back and said, "How could you, a law enforcer, dare say that you would do anything that would make companies pay less?" Well, what I want is for them to pay fairly. They should have to pay if they have violated the antitrust laws, but that doesn't mean they should have to pay six different times for the same amount of damage.

HUBBARD: And let me clarify. The position that the states took as to *Hanover Shoe* is that whether a plaintiff "passed on" the damages ought to be a question for the allocation of the damages among plaintiffs instead of a potential sword for defendants to prevent everybody from recovering.

The AMC Report discusses deterrence. *Illinois Brick* discusses the importance of deterrence.

In the context of more than one plaintiff, I agree with Debbie and others that the keystone ought to be actual damages. We agree that you have to deal with *Hanover Shoe* in some way, but our proposal was that it ought to be an allocation question among plaintiffs as opposed to something that would prevent the deterrent effect of treble damages.

ANGLAND: Commissioner, we heard awhile ago about how active the Department of Justice has been in collecting fines over the last year. What's the story in the European Union this year? There seems to be a lot of activity there as well.

KROES: On the one hand, it is not only a matter of being more active, it is a matter of just getting the right cases. On the other hand, indeed rightly mentioned by you, we are successful. For the last year the fine total was 2 billion Euros. This year we have already gone further—in the first four months—we are now above 2 billion Euros.

Having said that, some people are asking me, "Aren't you very pleased with that?" I am not, to be quite open with you, for I think it is a shame that we have to do this. But, with all those headlines of the big fines in just the last two days about a beer cartel in The Netherlands, this issue gets a lot of publicity.

The effect of these tremendous numbers is that CEOs are more aware than ever that they have to find out what is happening in their own companies. That is what I am pleased about, that it is working out and that management of the companies is aware that cartels will not be tolerated; that it is against the interest of the consumer not only in terms of price but also in terms of research and innovation, and against the interests of other competitors; that is not a fair and level playing field.

So it is still going on, and I am absolutely sure it will be an issue forever. So we have to continue to enforce the rules.

ANGLAND: One of the key aspects of the leniency program in the United States is the marker system, whereby before a company is in a position to make the full compliance, the full showing you need to get leniency, it can reserve a place in the queue, get a marker. That seems to have worked very well here.

The Commission for the first time introduced that concept within the past year. The Antitrust Section applauded the introduction of a marker system in the European Union, but it did express some concern about the Draft Notice, in that it talked about after a lot of information was provided by the party to the Commission, rather than saying “under these circumstances a marker will be granted,” it said “a marker may be granted.”⁵⁵ One concern we had is how uncomfortable corporations would be essentially going in and confessing, but having it be very discretionary—as we read the language and maybe we read it wrongly—as to whether in fact they would get their place in line.

Should firms be worried that, having gone in and laid the facts on the table, the Commission will say, “Well, we could give you leniency but we just won’t?”

We have been very open to the outside world about when you can get the number one treatment out of the leniency program without the danger to our enforcement actions.

KROES: We are quite transparent in this field. We have been very open to the outside world about when you can get the number one treatment out of the leniency program without the danger to our enforcement actions. So there is no misunderstanding so far.

But we don’t want to have our leg pulled and have them ask for the special treatment and not give us the evidence, and we don’t have the same compulsory powers as in the US to ensure cooperation of individuals. So it is clear-cut.

The efficiency of the leniency program was, by the way, again proven by this beer cartel. One of the companies that was highly involved got the zero-fine treatment because they were delivering what we were asking for and was of great help.

leniency program without the danger to our enforcement actions.

ANGLAND: Jon, we have time for a final question or two.

JACOBSON: The single-firm conduct hearings have been widely followed and are going to wind down in closing sessions on the first and eighth of May.⁵⁶ What, and dare I ask when, should we expect from the agencies in this regard?

MAJORAS: Less than five years.

—NEELIE KROES

BARNETT: I’ll start. Obviously, we hope to exhibit, if you will, more efficient, speedy governmental processes in terms of a product.

There have been a large number of hearings over a wide range of issues, from business people, legal people, economists, and academics. It is a lot of information. Frankly, it is addressing some hard issues in some areas.

I do think it has confirmed, at least so far, my impression that there are a lot of areas where there is a fair consensus and a fair amount of agreement, and I think it is important to keep that in perspective as we focus on the hard areas.

We are going to continue to try and digest all of that and work with each other. I would like us to be able to deliver our perspective to the world on how we think about these issues, hopefully advance the ball a bit more than just summarizing what was said, but to convey, hopefully in a

⁵⁵ ABA Section of Antitrust Law and Section of Int’l Law, Comments in Response to The Commission of European Communities’ Request for Public Comment on the Draft Commission Notice on Immunity from Fines and Reduction in Fines in Cartel Cases (2006), available at <http://www.abanet.org/antitrust/at-comments/2006/11-06/comments-ec-leniency.pdf>.

⁵⁶ See Press Release, Fed. Trade Comm’n, Federal Trade Commission/Department of Justice Hearings on Single-Firm Conduct to Continue on May 1 (Apr. 24, 2007), available at <http://www.ftc.gov/opa/2007/04/section2hearings.shtm>.

somewhat normative or prescriptive sense, where we think the law either is or should be going. That's the goal, and we will work hard at it.

MAJORAS: I know for my part, and I think others in our agency, we certainly learned a lot. With every one of these reports we do, we learn a lot. We learned a lot in the IP Report that we just released this week.

Sticking points will arise. The question is how you are going to get past them. I think we have learned something about that. The reason I say sticking points will arise is—I'm just being completely honest—this is the most difficult area of antitrust law around the world.

That doesn't mean that Tom is not right, that in the United States we do have a fair amount of points of broad consensus. That alone, I think, would be a useful thing for us to put out there. But beyond that we have to tackle the tougher issues.

The reason we started the hearings, at least from my perspective, was that I really felt like our discussion was getting stuck, and we were sticking on the same old discussions and the same old issues. I felt like we really needed to step back a little bit and start, not completely over, because we have years of jurisprudence and in fact many recent cases—the FTC has had six single-firm conduct cases in this Administration—so we have some new things with new issues that we can build on.

So we are planning to do a report, and we are planning to do it quickly. If there is one thing that you know when you take one of these jobs it's that your tenure is temporary. Tom and I don't have forever, so we will do our best to get it done as quickly as we can.

JACOBSON: One last follow-up for Neelie. Is the Commission planning to do anything in response? I know you have been following the hearings, and I know one of the purposes of the hearings was to have a dialogue with the European Commission. Any plans in that regard?

KROES: We are highly interested in the results, and we are trying to learn from it. But that doesn't mean that there will be a big change in our policy yet. It is too early to say what the result will be at the end of the day.

Be aware that we are absolutely interested but that we still have a different system on certain points.

JACOBSON: Bob, in two seconds can you tell us what the states are going to say about the Robinson-Patman Act and potential repeal of the same?

HUBBARD: I muse that maybe states should support repeal of the Robinson-Patman Act. I think that is consistent with the argument that we made in *Leegin*.⁵⁷ I think we should consider getting rid of the Depression-era competition statutes, like McCarran-Ferguson, the fair trade laws, and Robinson-Patman. We got rid of the fair trade laws in 1976. There is a proposal to get rid of McCarran.⁵⁸

⁵⁷ One argument in support of the *per se* rule against minimum resale price maintenance is that less restrictive alternatives than resale price restraints are available for a manufacturer seeking to reinforce specific retailer actions. One such alternative would be for the manufacturer to lessen its wholesale price for those retailers that provided specific services. Robinson-Patman creates a risk for manufacturers providing such wholesale price incentives to retailers.

⁵⁸ S. 618, 110th Cong., (2007).

I think Robinson-Patman in many instances is anticompetitive actually. But I don't want to over-react. I think that price and other competition discrimination is an issue that we ought to think through clearly. I think the net neutrality debate illustrates that, sometimes market power and gate-keeper effects are significant.⁵⁹ But Robinson-Patman certainly doesn't mandate net neutrality.

ANGLAND: On behalf of everybody here, I would like to thank our guests for their participation in this Roundtable. We appreciate it greatly. ●

⁵⁹ The Federal Communications Commission recently issued a Notice of Inquiry concerning net neutrality. *In Re Broadband Indus. Practices*, FCC 07-31, WC Doc. No. 07-52 (Apr. 16, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-31A1.pdf.