

1 FEDERAL TRADE COMMISSION

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4 THE FEDERAL TRADE COMMISSION AT 100:

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FEDERAL TRADE COMMISSION

I N D E X

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P R O C E E D I N G S

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(Due to technical difficulties, the introduction was not recorded.)

SESSION 1: THE INTERNATIONAL AGENDA

(Initial dialogue in the first session was not recorded due to technical difficulties.)

MR. ROBERTS: -- extension of antitrust

competition policy in the Southern African region particularly. And, so, it's not just our own perspective of what's workable, what's doable, but when we go and visit a country like Zambia, for example. So, we know if this system is going to work, it's got to work for those types of countries as well. And I think that's obviously in all of our interests to recognize.

I don't think there's -- I'm going to say anything unusual in this context. I just want to pick up on a couple of things that strike me. I mean, the first thing is country conditions, and this ties, to some extent, with also the debate around small economies that's going on as well. But small, relatively undeveloped economies are in even more kind of towards the ends of the spectrum, to even further extent than obviously countries like Israel.

So, I think we need to recognize that, in this

1 context, the U.S. is the outlier. If we're sitting in

1 South Africa and we're receiving assistance that we've
2 had from the FTC and DOJ that comes in and says, look,
3 this is the -- this is best practices. We say, but you
4 guys are the outlier here. You've got this huge economy.
5 So, of course you don't care about abuse of dominance.

6 CHAIRMAN KOVACIC: We certainly once had a huge
7 economy.

8 (Laughter).

9 CHAIRMAN KOVACIC: At least at the time we were
10 giving out assistance, yes.

11 (Break in recording.)

12 MR. ROBERTS: Some economies feel really,
13 really small. And, so, for us the kind of examples that
14 seem relevant in the U.S., cases about, for example,
15 buyer power. For us, it's the kind of thing that we see
16 complaints about quite often and are grappling with.

17 So, that's the first thing. I think
18 recognizing country conditions. It's not a very new
19 point in any sense.

20 In the context of abuse of dominance -- because
21 that is our challenge. I mean, just to give another
22 example, the wax cartel found guilty by the European
23 Commission a couple of years ago -- a couple of weeks

1 ago, you know, this made big news in South Africa,
2 largely because Sasol was the largest player
3 and Sasol is the former state-owned chemicals monopoly in
4 South Africa, liberalized in 1990 because the apartheid
5 government saw the change of regime coming and said,
6 let's make sure this company is in the hands of the
7 private sector before the new government takes over.

8 So, people come to us and say, so what are you
9 doing about wax? A candle was held up and it was said,
10 every household has this. And we said, is every
11 household is worried about candles in Europe, really?
12 Now, in South Africa, some households do use candles for
13 lighting, you know. So, we kind of looked at that and
14 said, you know, in South Africa, that is where the really
15 -- the most marginalized are looking for the source of
16 lighting.

17 So, people came to us and said, what are you
18 doing about wax? Sasol was the leader of this cartel in
19 Europe. We say, well, there's no cartel in South Africa.
20 Why? Well, there's only one company. There is only
21 Sasol.

22 (Laughter).

23 MR. ROBERTS: They say, so what
24 are you doing about it? We're like, well
25 this is really difficult. You know, this would be

1 excessive pricing and this is a really tough thing to
2 grapple with. The public says, what are you doing about it?
3 You know, are you going to do anything about it? So, that's a big
4 challenge for us.

5 And I think from an analytical point of view,
6 we look at the kind of post-Chicago or the Mid-Atlantic
7 consensus in economics and say, well, how does all this
8 theoretical work and applied work, in some case, how does
9 that apply to us? And the big point I would want to make
10 is, we apply the same tests. We essentially -- certainly
11 from an economics perspective -- apply a kind of post-
12 Chicago, Mid-Atlantic type framework. We apply
13 industrial organization. But applying the same tests in
14 a country like South Africa gets different answers.
15 Barriers to entry are higher. Companies are entrenched
16 for formal regulation or by formal state ownership or
17 ongoing support. So, you have entrenched dominant firms.
18 And this is a very big challenge for us.

19 In terms of the FTC, I think we've benefitted
20 hugely from assistance. We have people there at the
21 moment. But, the obvious point is that they need
22 to recognize the country conditions as well. And, so,
23 we've benefitted more, unsurprisingly, in cartels and
24 mergers and I think -- I think the country conditions

1 that we face actually mean that we innovate around
2 dealing with these conditions. And I think we would say
3 that's something we've got to offer. I think the
4 Tribunal has come up with innovative rulings based on
5 applying tests in our conditions that I think is a
6 contribution to the international antitrust community.

7 CHAIRMAN KOVACIC: This is Bill Kovacic.
8 Simon, when you look or your colleagues have looked at
9 the process of cooperation that we've had with South
10 Africa, which goes back almost a decade now, that is to
11 the time of the retooling of the law itself -- I think
12 it's a tenth anniversary that's right around the corner
13 for the implementation of the new law -- how well do you
14 think we have done over that period in becoming more
15 knowledgeable and better attuned to those conditions in
16 giving advice? That is, one would hope there's a
17 learning curve here.

18 Do we have additional work to do to make sure
19 that when we have advisors, when we participate in
20 programs, that we have that guidance about the importance
21 of initial local conditions in mind?

22 MR. ROBERTS: I think in terms of understanding
23 where we're at institutionally in terms of institutional
24 capabilities and where to pitch the support, I think
25 there's been a big progression. I mean, there's no use

1 coming in and saying, well, you know, you must model this
2 way. I mean, you know, we can do that in a few
3 cases, but rarely.

4 So, I think there's been a recognition of the
5 level at which advice should be pitched. But I don't
6 think there's been any progression in terms of
7 recognizing the country conditions, the economic
8 conditions and the kind of challenges that we face. I
9 think, in my experience, we still have to go -- we still
10 go through a reeducation process, you know. Don't you
11 realize that this company derives its position from this?

12 And you look at another sector -- and you go
13 sector by sector, and the South African economy is
14 unusual in the sense that it is -- you know, it was
15 almost centrally -- I mean, apartheid was a central
16 planning economic management process. Marketing boards
17 for every agricultural product. It was only in
18 1996, that we reduced state ownership of strategic industries. And
19 you've got to sit there and say, don't you realize, that
20 wasn't very long ago and the same people are running the
21 companies. There's this old buddy network, et cetera,
22 and you've got to take that into account.

23 CHAIRMAN KOVACIC: This is Bill
24 Kovacic again. If you catch my eye and you'd like to add
25 a point or a comment on each segment, just let me know.

1 One more comment, and maybe you have a thought
2 about this, Simon. I would think that, as a note for
3 ourselves, one way that we can think about this is that
4 it's literally a matter, perhaps, of a little bit more
5 homework before each advisor comes to the country. Maybe
6 a bit more effort on our part to do the more detailed
7 examination in advance so that people have more of at
8 least a primer about current conditions, how those
9 conditions developed. Maybe even conversations, as one
10 person leaves with you, an exit interview where these
11 things are brought home to our individual advisors.

12 I think, for myself, there's a tendency to
13 think that if you go to enough conferences and you go to
14 enough events, you've assumed at least a superficial
15 level of knowledge that one might start to assume is a
16 profound level of knowledge. But that's not always the
17 case. But, perhaps there are specific steps we
18 can take to be reminded all the time that this is --
19 these are the circumstances in a particular country, in
20 this case, South Africa, where policy is made.

21 MR. ROBERTS: Sure. When I talked to the Commissioner before I
22 came, he said, also make the point we have to be better consumers
23 in the sense that we recognize a responsibility on our
24 side as well. It's something we've been thinking about.

1 CHAIRMAN KOVACIC: Allan Fels and then Randy
2 Tritell. Allan?

3 (Break in recording.)

4 MR. FELS: I just wanted to add to the list the
5 immediate challenge of the world financial crisis. I
6 think that will have huge effects and huge political
7 challenges both for the FTC and for every other country
8 in this room. In the depression, we had this huge
9 pressure to form cartels, anti-competitive mergers, anti-
10 competitive practices. There will be a similar pressure
11 in the next few years as the world goes through a serious
12 recession, and one of the really big challenges for the
13 FTC and everyone else is to think about how to deal with
14 the totally changed political environment in which we are
15 working.

16 I'd also just briefly mention the importance of
17 the rise of China, India and Russia, Brazil, and in our
18 neck of the woods, Indonesia, with its mere 230 million
19 people, from the point of view of an international
20 outlook on competition policy. It is important to get
21 them on board. I think China and India, not in the ICN
22 if I understand correctly, and --

23 MR. TRITELL: India is.

24 MR. FELS: Ah, right. Anyway, India is still

1 moving rather slowly with its law. So, this is just
2 tremendously important. This accounts for 40 percent of
3 the world's population.

4 CHAIRMAN KOVACIC: Randy?

5 MR. TRITELL: Simon, I know it's a big topic,
6 but if you can share some brief thoughts on your views of
7 the pros and cons of having specialized competition
8 review tribunals and courts.

9 MR. ROBERTS: Okay. I mean, I think our
10 experiences of having a tribunal is a good experience. I
11 think the public hearings are good in particular -- I think
12 that there are two things that I'd

13 highlight about it. One is the public hearings mean that
14 you get a lot of exposure to the facts of the case.

15 The second thing is that our specialized
16 tribunal hearings involve very, very detailed
17 interrogation of particularly economic evidence which we
18 have economists all the time coming from, you know, big
19 international companies, CRA, LECG, et cetera. They
20 say to us that, you know, they don't undergo often the
21 same level of cross examination and scrutiny in other
22 jurisdictions, which I think is surprising at first, but
23 then I understood more about how that works. I think
24 that's something which is helpful.

25 I think that we're in a little bit of a
26 privileged position at the moment in the sense that the

1 tribunal has had enormous continuity. I mean, David
2 Lewis headed the Oil Competition Board for a couple of
3 years, and I think our experience -- I think we have to
4 be very careful because there's a good chance that the
5 Tribunal, as it evolves, won't have that and we're going
6 to see other problems coming up.

7 CHAIRMAN KOVACIC: Jacques, please.

8 MR. STEENBERGEN: Jacques Steenbergen. Just --

9 (Break in recording.)

10 MR. STEENBERGEN: -- on agenda and I would also
11 plead in favor of more attention for discussions on abuse
12 of dominance. I know it's not a very popular topic
13 internationally, and we have the same problem with the
14 European Commission, by the way. But the smaller the
15 economy or the more -- or the closer you get to the
16 field, the more the attention seems to switch from
17 interesting cartels to interesting abuse.

18 Consumers are interested in fighting cartels,
19 but only till they get irritated by the next abuse of
20 dominance. So, we are under constant pressure to give
21 that priority and we cannot go on ignoring it by saying
22 it is not high on the international agenda. I think the
23 international agenda should perhaps give it a little bit
24 more attention and, certainly, in view of the
25 developments Allan referred to, markets -- if this goes

1 on, we'll all be (inaudible) on most key products in a
2 very short period of time if they are not yet already.

3 So, the issue will become, I think, more
4 pressing instead of less relevant.

5 CHAIRMAN KOVACIC: And perhaps a question you
6 can keep in mind and comment on as well, do you think we,
7 at the FTC, we in the U.S. have a blind spot in
8 underestimating the importance of this issue and
9 addressing it effectively in international discussions?

10 MR. STEENBERGEN: No, I think you have a more
11 open market. I don't -- there's less to see for you.
12 But outside it is there.

13 CHAIRMAN KOVACIC: And I'm interested in your
14 thoughts about whether in working in international
15 settings, in working with other countries, perhaps in
16 South Africa and others, do we bring a set of assumptions
17 to those conversations that are too limiting?

18 MR. STEENBERGEN: Maybe you do.

19 (Break in recording.)

20 CHAIRMAN KOVACIC: Alberto?

21 MR. HEIMLER: Thank you. Also, on my side,
22 congratulations. It's an honor to be here. I always
23 look to the FTC for inspiration and I'm a bit -- quite
24 surprised that I would give inspiration to you this time.

25 CHAIRMAN KOVACIC: As you so often have

1 individually.

2 (Break in recording.)

3 MR. HEIMLER: I just would like to add some --
4 something else on the list that Simon just said because he
5 concentrated on the standards and on the economics. I
6 think the political side is also very important. And
7 agencies live within a political reality. They are
8 an institution in the country and that institution is not
9 the same, in relative terms, in every country. So, I
10 think we have to understand when we give technical
11 assistance where the institution sits and the incentives
12 that they have and the constraints that they are under,
13 political constraints, not only constraints related to
14 the enforcement of the law, which, of course, are very
15 important. I fully agree with the abuse and maybe I
16 will come to this in a second.

17 Therefore, we have to provide assistance
18 which is more in tune with the culture of the country and
19 the institutional setting of the country, which is very
20 difficult to do. I would just like to give you an
21 example so that I made myself understood.

22 In the early days in Romania, there was a
23 merger between the only tire producers in the country and
24 Michelin, and the Competition Authority authorized it.
25 But it introduced constraints in the decision that

1 employment be maintained and that companies would not
2 shut down its establishments and there were some advisors
3 in Romania that said that's unacceptable, you do
4 industrial policy, that's not something we do.

5 I thought that this was not really the right
6 advice that you should give because that decision was an
7 authorization decision, and this is what mattered. Those
8 constraints were completely irrelevant because nobody
9 would ever look at those constraints for -- in the future
10 and they had only a political value for the authority to
11 say that they care about employment.

12 And I think those type of issues are extremely
13 important to understand. And the more we understand it,
14 the more we become credible in providing technical
15 assistance.

16 As for the abuse, I agree fully with what
17 Jacques said and I think there is one area that technical
18 assistance by the U.S. has always undermined and it is
19 the exploitative abuses. You are always very good in
20 exclusionary, we all agree. But exploitative abuses are
21 always considered as non-proper. And you have a law, the
22 Robinson-Patman Act, that you have it. So, whenever
23 someone does something related to the Robinson-Patman Act
24 through the competition rules, that's very much in line
25 with what you might do, but you don't accept it.

1 So, I think that there is a disconnect, in some
2 sense.

3 CHAIRMAN KOVACIC: Alberto, if I could ask on
4 that point, do you think we, both the FTC, but also maybe
5 the larger community of agencies, do we spend enough time
6 talking with each other about what those political
7 constraints are and how it affects what we do? Are we
8 honest enough about that?

9 MR. HEIMLER: Well, I don't think so. We are
10 not honest enough because those are things that we don't
11 want to bring at the dinner party.

12 (Laughter).

13 CHAIRMAN KOVACIC: Another comment from Allan
14 and then I'm going to ask Markus to pick up another
15 point.

16 MR. FELS: Sorry to speak a second time.
17 Generally, I have been pretty happy with the U.S. vision

1 of other countries, but I want to pick on one thing where
2 I question it. That's the advocacy model.

3 I don't think the advocacy model is
4 quite the right thing to advocate in other countries
5 always. In turn, I just want to raise a question which
6 is relevant to quite a bit of discussion about the whole
7 role of the FTC in the United States as well. To me, our
8 interest is in the promotion of competition and thereto
9 causes of the lack of competition, private sector
10 behavior, which we deal with through antitrust law.

11 But the other huge impact on competition is
12 government actions that restrict competition. That's
13 really important everywhere. And, so, any fundamental
14 rethink by the FTC about competition policy and its role
15 must look at that issue in a really big way.

16 Now, it so happens that in the United States,
17 you all talk about using this kind of advocacy model
18 where the FTC and maybe DOJ does some advocacy. To me,
19 this isn't a very good way of trying to tackle the huge
20 political problem that's involved in trying to get
21 governments to get rid of anti-competitive laws.

22 Now, it may be that my little concern about the

1 U.S. is misplaced because in the U.S., there's a general
2 culture which makes anti-competitive laws a little bit
3 harder to pass. A lot of the problems are at state and
4 local level and the FTC is a federal body that can't
5 really be very effective there. So, does the FTC need to
6 rethink how you go about tackling those things in the
7 U.S.?

8 But let's look at the international situation.
9 I'd like to begin by mentioning that there is more than
10 one model imaginable. Look at the European Union. The
11 model there is that the Competition Commissioner is part
12 of the cabinet and is involved and has some kind of say
13 in every political decision that's made in the EU about
14 transport, energy, communications, et cetera. So, the
15 Competition person actually sits at the table when the
16 important decisions are being made, rather than being
17 some kind of outside advocate in a slightly remote
18 agency, perhaps, who after the decisions have been made
19 gets some sort of right to make a submission.

20 So, there are other models and I've always been
21 a little bit concerned about the U.S. being so
22 enthusiastic about the export of the advocacy model to
23 other countries, rather than thinking more fundamentally
24 about the underlying political, institutional, other
25 problems that come up in looking at restrictions on

1 competition.

2 Now, I don't quite know what the ideal models
3 in other countries are. Korea also has a model where the
4 competition -- head of the KFTC is a member of the
5 cabinet. That's an interesting model.

6 Australia, as you know, grappled with this
7 problem and we quickly found that there were many
8 dimensions to trying to get a comprehensive competition
9 policy moving. First of all, we had to get the political
10 leaders engaged and fully supportive. And that was a big
11 effort, but they came on board and supported a big
12 initiative.

13 Secondly, we had to have a systematic process
14 for identifying and then reviewing the millions of laws,
15 federal, state, local in every sector, agriculture,
16 construction, mining, manufacturing, you know, and so on,
17 and we had to have some criteria, approaches, financial
18 incentives and so on and so forth.

19 But I just wanted to put on the table that in
20 all countries, probably including the U.S., almost the
21 biggest question in competition policy is government
22 actions that harm competition. What then is the role of
23 an agency like the FTC in this situation and what is the
24 role of a competition agency?

25 At one extreme, you might say they have no

1 role. At the other extreme, they have a central role.
2 Another view is that you have to think of other
3 mechanisms protecting this.

4 I just wanted to put the problem on the table.
5 It just seems that, you know, this is something
6 tremendously important. The answers are tremendously
7 difficult. I'd note that China struggled with this
8 matter for many years in drawing up its head in monopoly
9 law. And in the end, after back and forth and in and
10 out, it has finally got a law which has a really strong
11 prohibition on government restrictions on competition,
12 but a very weak enforcement mechanism.

13 And I openly say that the problem is a
14 political one. They cannot ignore it. How can you talk
15 about a competition policy and ignore the elephant in the
16 room? But on the other hand, how can you have an agency
17 -- just an independent or semi-independent agency as the
18 one that deals with those issues?

19 CHAIRMAN KOVACIC: I think that a consequence of the
20 financial crisis, because it's focusing a lot of
21 attention on regulatory design, and the role of different
22 perspectives is indeed something we're going to be facing
23 in the U.S. There's going to be a basic rethink of the
24 financial services regulatory framework and I think, at some point,
25 there's going to be a reconsideration of the whole framework in which we
26 operate. That is, for years we thought that the

1 dual enforcement framework, for example, was simply
2 beyond further consideration. I don't think that's the
3 case.

4 I think that issue is going to come back and I
5 think individual jurisdictions are going to feel, maybe
6 in light of the crisis, that getting the regulatory
7 design right has a real impact on the effectiveness of
8 economic performance itself. And you notice the
9 number of jurisdictions, for example, that have gone from
10 two agencies for one, France being one of them recently,
11 Spain being another.

12 Along these lines, I think we'll be pressed in the direction of
13 rethinking some of the basic institutional issues that
14 Allan mentioned.

15 We've cued up several other folks to offer an
16 initial comment. I'd like to turn to Markus. One thing
17 we've asked Markus to think about is how an agency should
18 go about thinking how it participates in multi-national
19 organizations involving competition and consumer
20 protection, what kind of involvement to have. Markus,
21 could you give us a few thoughts on this?

1 MR. LANGE: Thank you very much, Bill. This is
2 Markus Lange from the German BKartA. The question goes to determining the
3 involvement one should have in multilateral fora for
4 competition and consumer protection. I'll concentrate on
5 the competition fora because the BKartA works specifically in the
6 competition field and not in the consumer protection field. In case
7 anyone has missed Andreas
8 Mundt's presentation at the roundtable yesterday, I just
9 want to stress again that even in competition
10 enforcement, we have a competition standard and not a
11 consumer protection standard.

12 Turning to our involvement as competition agencies in multilateral
13 fora, I guess one question is: what are we willing to put in, and the other
14 question is: what do we expect to get out, or rather,
15 more generally, what do we want to see as an output of
16 this activity? I'd like to start with the output and then turn to the
17 input
18 question.

19 As far as the output is concerned, there is quite a spectrum of different
20 aspects that one may expect from international engagement. At one end of the
21 spectrum, there is the grand idea of improving competition worldwide and
22 especially in other countries, so we all benefit if the competition regimes
23 in the
24 world, as a whole, improve.

25 There may be a focus on teaching and advocating and reaching out in a
26 sense of improving the competition regimes in other

1 countries. That would be a rather benign idea of
2 helping and reaching out.

3 Perhaps a somewhat less benign and somewhat
4 more self-centered aspect further along the spectrum would be to have an
5 influence on the shape of regulation worldwide and in
6 other countries in the interest of our own companies at
7 home, just to make sure that abroad they find rules
8 that they know to some extent, that they are familiar with
9 and that they might be happy with. So, again, there is the idea
10 of shaping the outside world, but with a somewhat less
11 benign aspect to it.

12 But besides those ideas of planting seeds in
13 the outside world, I guess there's also the idea of
14 learning for ourselves and learning in a direct,
15 immediate fashion of picking up ideas from the outside world and taking
16 them back home. But there is also the idea of learning and
17 changing the environment at home in a less direct
18 fashion, hoping or expecting that an
19 international debate in a certain field of competition
20 policy, for instance, will have repercussions on the
21 debate at home and, hopefully, will support
22 our own position in that debate.

23 So, that may be a debate that we haven't really
24 influenced at all, that we have not initiated at all,
25 that just takes place on the international stage and that
26 we then take home.

1 An example in that respect for Germany is
2 totally outside of the competition field is the PISA
3 studies that the OECD has done. I'm not quite
4 sure whether they are that famous and well known in other
5 countries, but in Germany, they really made an impact.
6 The PISA studies are studies on secondary education done
7 by the OECD. When the results came out and Germany
8 ranked somewhere in the middle of the league table, that
9 was quite a shock in Germany which really pushed the
10 reform agenda. Whether it pushed it in the right or
11 wrong direction, that's another question.

12 (Laughter).

13 MR. LANGE: But it did push the reform agenda. And that was a
14 discussion that the German side didn't really
15 instigate. Rather, it was a debate taking place at the
16 OECD which was then carried home. Of course, those
17 debates could also be initiated by ourselves
18 in the hope of having a positive result.

19 So, this is the spectrum
20 for possible output, ranging from just planting
21 your own seeds abroad to taking lessons from the
22 international scene back home. And for different
23 agencies worldwide and for different jurisdictions,
24 different facets or aspects in this spectrum may be more
25 or less important. So, I guess everyone has to answer
26 for themselves where they would place themselves and

1 their agency.

2 Maybe on the international stage, the
3 impression would be for the U.S. to focus on sowing the seeds abroad and
4 not so much on taking in the lessons from abroad. On the other hand, this
5 very

6 session that we are having here right now shows that this
7 would be a rather one-side and limited view. So, that
8 much for the output side.

9 Let me just turn briefly to the input side. In
10 order to generate this output, we have to ask ourselves:
11 what's the input that we can give and want to give? And
12 there, I think, we have to put our objectives in order
13 and then decide which of the international fora is best
14 suited for reaching our goals. I guess the advantage
15 of the international scene of competition fora is that
16 there's quite a bit of flexibility in that we can all
17 decide, at least to a large extent, how much to invest in
18 which of those fora and where to place the emphasis.

19 So, there's flexibility in terms of the fora
20 and, at least in the case of the BKartA , that's also mirrored in the
21 flexibility in terms of our own structure, where we want to put the
22 emphasis. In one year, we can decide that ICN is
23 particularly important and due to the lack of resources
24 in an economic world we all operate under, that would
25 mean that engagement in other fora would have to be cut back a bit. In
26 other years, OECD may be more important and activities in

1 other fora would be scaled down.

2 So, in that respect, every

1 agency would have to make up their mind, given
2 the spectrum of outputs that are possible and that may be
3 favored and given the different fora, like ICN, OECD,
4 UNCTAD, to name what I think are the three most
5 important in this respect, we have to then decide where
6 we put our resources. Thank you.

7 CHAIRMAN KOVACIC: Markus, if I could ask --
8 inside the Competition Authority, you, Andreas, Bernhard, do you sit down
9 once a year and take all of these and -- do you look at your portfolio of
10 investments and do you have a deliberate process where
11 you look at them all, you rank the ones that are
12 important and say, we're going to buy, sell or hold our
13 position in these different investments?

14 What process do you use to decide how to invest? Because
15 these are scarce resources and you have a limited -- you
16 could probably be doing something every day of the week.

17 What kind of process do you use to decide how to invest?

18 MR. LANGE: Andreas, perhaps you want to comment on this
19 question?

20 MR. MUNDT: Let me just say that, unfortunately, we don't have
21 that kind of agenda. What we do is decided mainly on an ad hoc basis.

22 And in this respect, I would like to add one

1 point to what Markus has said. The question where to
2 engage is extremely resource driven. And I think that is
3 characteristic maybe for any agency. If I look at the
4 ICN, for example, even we as BKartA are beginning to have problems
5 nowadays to follow all the working groups of the ICN. We have working
6 groups on mergers, on cartels, on unilateral conduct, and on a number of
7 further ICN topics.

8 Furthermore, recently, we have seen vice chair becoming active, creating
9 small working groups where we -see a need to participate, you see.

10 And I think if that is already a problem for an
11 agency like the BKartA that has significant resources, I ask myself: What
12 kind of problem must that be for an agency, like, for example, South
13 Africa. And we have heard what David Lewis said relating to this issue
14 when
15 we had finished discussion in spring this year in our ICN working group on
16 unilateral conduct.

17 So, I think that is something one should really
18 have in mind concerning taking decisions on prioritizing. This may apply,
19 for example, in the ICN, where the FTC is always in the driver's seat to a
20 certain extent, but this is a very important issue. I
21 think most agencies, maybe except for the U.S. agencies,
22 do it like us. We decide largely on an ad hoc basis. If, for
23 example, there is an ICN conference ahead and we have
24 very much work to do, we produce less papers for the
25 OECD, or the other way around, you know.

1 But this is the way we do it and I think most
2 agencies do it like that, and this is something you
3 should have in mind, as FTC, with significantly more
4 resources than maybe other agencies.

5 CHAIRMAN KOVACIC: Simon Roberts?

6 MR. ROBERTS: Thanks, just to comment --

7 (Break in recording.)

8 MR. ROBERTS: That's obviously a
9 problem for us, a huge problem, and I -- but I want to
10 put something kind of more forcefully forward in the
11 sense that the OECD for South Africa is much more useful
12 than the ICN, from a practitioner's point of view.
13 Because I attended a session yesterday on buyer power; at
14 the end of that session and as preparation for the
15 session, we have a summary, synopsis of not just
16 experiences, but theory. So, this kind of thing is
17 invaluable and really, really beneficial.

18 The ICN, on the other hand, because it's not
19 focused on drawing together all the diverse experiences,
20 the theoretical developments, the case studies that have
21 been going on and the recommended practices, we are seeing
22 -- this is a personal view. David Lewis might see this
23 differently, I should say that.

24 I think, from a practitioner's point of view,
25 in other words from my perspective, that is -- it's

1 difficult to see the outputs justifying the inputs. OECD
2 is easy. And the question it raises, I think, is that
3 there are -- you know, there are countries that enough
4 members are observers in the OECD, so all they have is
5 the ICN and UNCTAD and they don't get that -- the
6 returns that we get from the OECD. I think that's
7 something that the FTC should think about.

8 I think it's something that I've seen evolving
9 over the past two years that I've been involved.

10 CHAIRMAN KOVACIC: Bill Kovacic again. I don't
11 know that we've ever done this except through occasional
12 individual conversations, but I would be intrigued if we
13 were to do -- I was going to say survey, but that's a
14 dangerous term to use.

15 (Laughter).

16 CHAIRMAN KOVACIC: If one were to have each of
17 us rank our portfolio according to the value of the
18 investment that we see, what that would look like agency
19 by agency around the world, that is what forum gives you
20 the best return on your investment? And Simon's
21 observation is quite interesting on that part.

22 (Break in recording.)

23 Mr. Philips: Thanks, Bill. In terms of
24 what the FTC does in deciding where to put its chips on
25 in international fora --

1 CHAIRMAN KOVACIC: Not chips, it's not
2 gambling. It's sensible investment.

3 (Break in recording.)

4 Mr. Philips: The resources are scarce
5 and even a big organization like the FTC has limits and
6 has to make decisions at the margin. But you're in a
7 special position, as well, I think, with the
8 responsibilities that came with being one of the oldest
9 and biggest agencies. And that is, people expect you to
10 contribute. They expect you to be there and to share
11 your experience. And it has big pay-offs for everyone
12 around the world.

13 So, I think there's a duty on you to make extra
14 efforts to find the resources to participate in all the
15 major fora, to be there. And perhaps making efforts to get extra staff or
16 whatever. But you're in a
17 position of leadership and there is responsibilities that
18 come with that.

19 There's also benefits. Obviously, in exposing
20 your ideas for comments and feedback and being tested,
21 getting outside of the circle of practitioners and
22 commentators in Washington and being out in the -- in
23 open fora where people can speak up and push back on your
24 ideas, too, so it's not just a one-way street. Thanks.

25 CHAIRMAN KOVACIC: My colleague, Alden Abbott.

1 MR. ABBOTT: Alden Abbott. Picking up on Simon Roberts'
2 comments, is there anyone here who thinks that the ICN is too practitioner
3 driven, too driven by the interest of NGAs as opposed to
4 members -- just out of curiosity?

5 CHAIRMAN KOVACIC: If we could turn to Alberto.
6 We had you cued up to talk a bit about how to measure effects, the value --
7 how to measure the value of outreach. But if you could take this point on,
8 too,
9 please?

10 MR. HEIMLER: Yes. I've been recently quite
11 worried about the role of practitioners in the ICN and I
12 have said that a few times. I tried to start a discussion
13 to limit the role of practitioners in the organization.
14 I have not been -- I haven't had much success on this and
15 the response has been that practitioners are very
16 important. They do it pro bono. I just don't believe
17 it. Of course, they do it pro bono, I agree. But they
18 have an agenda which is different from our agenda and the
19 ICN started as a result of an agenda of practitioners and
20 that was to reduce the burden on merger notification.

21 It's fine. I agree that that's a proper
22 agenda. But we should not go as far as maintaining this
23 role. And I have heard many comments by colleagues in

1 the ICN conferences that they are a bit uneasy by this
2 extensive presence of practitioners at every debate.
3 That we don't have some sort of an agenda forum reserved
4 for us at some point.

5 (Break in recording.)

6 CHAIRMAN KOVACIC: Rene and then Jacques and
7 then Monica.

8 MR. JANSEN: Thank you, Bill. Rene Jansen,
9 Netherlands Competition Authority. Maybe some minor
10 reflection, I support the idea Joe just mentioned, but I
11 think there is one downside on it, and that is, you
12 should realize that from an outside world, we're not
13 always talking about FTC or DOJ, we are talking about the
14 U.S. and then participating in all those multi-lateral
15 fora, it could seem, in some people's eyes, in some
16 countries' eyes, it's U.S. dominated, that they are
17 participating everywhere, they are very in the driver's
18 seat, someone was telling us. And for a participant from
19 a smaller country, somewhere in Asia, somewhere in Latin
20 America, somewhere in a smaller part of Europe, like
21 Malta, this is the U.S.

22 And, of course, it's very important to have
23 this discussion because you can learn a lot of the other
24 worlds and I think you are more getting in also

1 information from others. But there's a big possibility
2 that might seem that it's always the U.S. and the U.S.
3 and the U.S. who is controlling the agenda, who is giving
4 the advice to chairs, who are spreading the work around
5 us, and that I should think you should reflect on that,
6 what it means in a strategic sense of positioning the
7 U.S. around us in the world.

8 CHAIRMAN KOVACIC: Monica?

9 MS. WIDEGREN: Thank you very much. Just a
10 comment on the ICN versus the OECD, et cetera. To
11 me, they are very separate fora for international
12 competition discussions. They are separate in a sense
13 that the ICN has a niche regarding the enforcement
14 issues, techniques, for instance, about how to
15 investigate cartels, et cetera. The ICN cartel workshop
16 is a very good workshop indeed that we try to attend.
17 The merger exercises have also been very valuable. Then
18 the OECD has other values, as Simon pointed out.

19 But I also think there is a big risk about the
20 NGAs and the ICN. If you would like to have a real frank
21 conversation and debate and discussion among competition
22 authorities, then you couldn't mix up with NGAs present
23 in the room. I think that's very obvious. I mean, you
24 can't -- you will not talk about your, let's say,
25 failures or drawbacks or whatever and you also refrain

1 from putting questions because you are -- you don't want
2 to disclose that perhaps you are not quite on board and
3 you have not understood it all, et cetera, et cetera.

4 So, when I've heard that remark from developing
5 countries, in particular, I think that's something to
6 think about, if -- for the future. Because, otherwise,
7 ICN turns into a, let's say, any international forum for
8 -- regarding competition policy, which I think was not
9 the intention from the beginning. Thank you.

10 CHAIRMAN KOVACIC: Nick Hill?

11 MR. HILL: Nick Hill. This is my first visit
12 to the OECD. I haven't visited the ICN. I've been in
13 antitrust for four months. But I can say that from New
14 Zealand's point of view, going back to an earlier point
15 that was made, we, as a country, went from one extreme
16 of, you know, how do you control the economy to possibly
17 one of the most liberal in a very fast period.

18 And what I think is most important to us, in
19 the value of these sort of multi-lateral gatherings is an
20 orthodoxy around what competition and open markets
21 actually means that we can use in New Zealand. Because
22 what we're finding is that markets and competition are
23 not necessarily well embedded in New Zealand. And, so,
24 the issue, I think Allan Fels talked about in terms of
25 government, is a hugely important one for us. And we

1 find that the work of the OECD, the orthodoxy that we can
2 refer to is pretty fundamental for us as an agency.

3 CHAIRMAN KOVACIC: If I could turn back to
4 Monica for a moment. We'd asked Monica, as a way of
5 drawing upon actually a number of the themes we've
6 touched upon already today, to focus still more
7 specifically on the FTC and our work and to ask, starting
8 in a general way, how are we doing on matters
9 international?

10 If you were us and you wanted to make more
11 constructive contributions to international discourse, if
12 you wanted to improve the quality of international
13 competition policy, if you wanted to improve our
14 engagement in the way we work and what we have to say,
15 what would you tell us?

16 MS. WIDEGREN: It's a very provocative question
17 and it's very difficult to give you a good answer. But
18 you asked for roses and you asked for the thorns. The
19 roses are, of course, that what you have been doing over
20 the years -- and I'm sure you will continue to do -- is
21 to be very ambitious in the national competition
22 community and, also, you pay a lot -- you dedicate a lot
23 of resources to that, which is impressive. And I think
24 we all envy you, the amount of resources you have to

1 dedicate to international work. Most agencies around
2 this table and around other tables wouldn't dream of
3 putting the same kind of resources into the international
4 work. We don't have that capacity. That's for one
5 thing.

6 So, you can also say -- I think Joe said that
7 you do what is expected of you as one of the major
8 government agencies in the world and also for coming from
9 the biggest market economy in the world. So, that's
10 expected of you.

11 I think you are doing extremely well. There
12 are, of course, as recognized also in your reports,
13 implicitly, at least, that some -- you know, regarding
14 the technical assistance, for instance -- some lessons
15 you have learned and were -- that were quite obvious when
16 you came to Central Europe in the early nineties. You
17 put on -- and you have stated that in your reports. You
18 put on many, many years of enforcement experience, which
19 is true. And you knew about how to investigate cases, et
20 cetera, et cetera. Those were skills that, obviously,
21 you could contribute with.

22 At the same time, you were confronted with
23 enforcement in countries where data does not exist. You
24 don't have access to data in the same kind that we have
25 normally when you have established market economies and

1 you have functioning -- you have, say, statistical
2 offices and you have other resources for obtaining data
3 from the market. And you cannot just send out a
4 questionnaire to companies and expect them to answer you
5 frankly and give you the figures. So, that was one of
6 the -- even if you brought about the investigation skills
7 and all that, perhaps those techniques were not very much
8 adapted then to the situation they were confronted with.

9 Another aspect is the fact that United States,
10 of course, did not have -- and your agency did not have
11 experience of state monopolies, state-owned companies and
12 regulated industries. It was a long time before --

13 CHAIRMAN KOVACIC: We are acquiring some of
14 that experience.

15 (Laughter).

16 MS. WIDEGREN: It's not a criticism. I was
17 just stating mere facts. It's not a criticism. I'm
18 just stating mere facts. You were in the happy situation
19 not to have that experience, I would say.

20 And I compare it to my own country which was
21 qualified in the seventies -- sixties, seventies and
22 eighties as a planned market economy or a social market
23 economy, so with price speculations, et cetera. And we

1 still have a very big -- we have state monopolies and we
2 still have a very big impact of state-owned companies,
3 which when I met your experts and in the Central European
4 countries, because we were also called in as a small
5 agency coming from a small country, nine million people
6 and a staff of 100 persons.

7 We were also called in because -- to complement
8 what the FTC did because there was the perspective of
9 small economy and of small agencies and what could you
10 reasonably do. That was not a criticism against what the
11 FTC did, but it was to put it in another perspective, so
12 to say.

13 So, when I met your experts there in the
14 Central European countries in the early nineties, I heard
15 that very often, that we also want to know what do you
16 do, how could you really cope? We are not the U.S. We
17 are not the size -- we haven't the size of this economy.
18 And how could you adapt what we have learned from the FTC
19 to our circumstances?

20 I think you've learned that over the years and
21 I think that all what I said was factual circumstances
22 for your technical assistance work. You learned, of
23 course, how to manage that. But when you're active now
24 in Asia and no doubt you are confronted with the same.
25 They also have planned economies and regulated economies

1 and state monopolies.

2 One other reflection is about privatization.

3 There is, in many of those countries, a call for
4 privatization to get capital, of course, and investments.

5 On the other hand, there is also political reluctance
6 many times to go to for privatization. The state would
7 like to remain in control.

8 And we have some kind of that in my country
9 with the most important energy company, for instance,
10 expanding very much in Germany, by the way, which is
11 state-owned and seemed to remain in -- remained to be
12 state-owned in the energy sector.

13 Anyway, so, privatization is not the same as
14 opening up markets to competition. That distinction -- I
15 was sometimes confronted with that distinction and it was
16 very important to state that liberalization in markets is
17 not the same as privatization, not necessarily. I can
18 live with that, too.

19 So, those are all thorns and mere facts of the
20 FTC, and I think that over the years you've learned that.
21 And what I would like to say for the future is what Bill
22 has said, I think, in many speeches. And I listened to
23 you many years ago when you said that technical
24 assistance has to be very much adapted to the needs of
25 the recipients, which is true. We all know that. But

1 you said that -- I think you used the word "humble," too,
2 a humble approach to the needs of other states and to the
3 -- and a humble approach to the fact that you do not
4 always understand the environment you are confronted with
5 and you provide technical assistance. It takes time to
6 learn that, to learn the culture and to understand the
7 history that is either the present and will be the
8 future, too.

9 So, I think that you have done an immense job
10 of this and I think it's very much appreciated around the
11 world. I think you have learned the lessons, also, how
12 you provide technical assistance in regulated industries.
13 But I -- and I also would like to pick up on what Jacques
14 and others said here about abuse of dominance. The
15 competition problems that you are confronted with when
16 you open up in market economies, all of the former
17 monopolists -- the former monopolists and the abuse of
18 dominant position, et cetera, et cetera, excessive
19 pricing problems, et cetera, that you have to deal with,
20 even if you would not prefer to take up such cases as the
21 competition authority. Thank you.

22 CHAIRMAN KOVACIC: Thank you, Monica. This is
23 Bill Kovacic again. We had also asked Zoltan and Csaba
24 to give their reflections about the FTC's technical
25 assistance work that is related to Monica's point. So,

1 if I could turn to them to comment on this as well.

2 MR. NAGY: Okay, thank you. I'll just continue Monica's
3 thoughts. Coming from a country with plenty of experience
4 with plenty of experience gained over the years

5 both as a recipient and as a provider of
6 technical assistance, I want to make two very brief
7 comments on this part of the international activities of
8 the FTC.

9 I think technical assistance is important. It
10 creates partners to cooperate with later. The FTC and
11 the DOJ delivered first-class technical assistance in
12 Hungary and in the whole region, Central European region.
13 It made a real difference in many ways.

14 Having said this, let me mention two areas of
15 further improvement. First, a couple of words on what I
16 call intermediate technical assistance. This word by the way is
17 Csaba's invention.

18 (Laughter).

19 MR. NAGY: I don't think USAID made the right
20 decision in the mid-1990s when it concluded that the era
21 of U.S. technical assistance is over in our region. It is through that
22 we did not and do not need basic technical
23 assistance any more. But I think there is basic
24 technical assistance on the one hand; state-of-the-art
25 cooperation like the one between the U.S. authorities and

1 DG Competition on the other hand. And there is a
2 continuum between them. Many countries, including
3 Hungary, are in between, and they should be first for
4 assistance of them, if you like cooperation with them.

5 ICN and OECD play an extremely useful
6 role in this context. But individual sister
7 authorities could do a lot too. I can mention some good
8 examples of intermediate technical assistance. One is
9 the International Fellowship Program of the FTC. The
10 Hungarian Competition Authority participated in this
11 pilot program and we found it extremely useful.

12 Another example can be to involve these in
13 between authorities on the provider side of technical
14 assistance programs designed for others. We also have
15 some very positive experience in this respect, too.

16 So, intermediate technical assistance is not
17 something brand new, but I believe it deserves its own
18 label, as well as much more attention and resources from
19 the FTC and probably also from the DOJ.

20 My second point is unique to the FTC. FTC,
21 just like a couple of other competition authorities,
22 including my own, has both competition policy and
23 consumer protection in its portfolio. In many places,
24 these two policies have separate lives, even when under
25 the same roof. It seems to be the same in the technical

1 assistance activity of the FTC.

2 My impression is that consumer protection is
3 not as much in focus than is competition policy. Tim
4 Muris, FTC Chairman, at that time, urged authorities
5 worldwide to take consumer protection seriously and also
6 to take seriously its international dimension in the new
7 globalized world. He wanted to boost international
8 cooperation for fighting cross-border fraud and
9 misleading practices. Moreover, he suggested that there
10 are parallels between consumer and competition policies.
11 For instance, hard core fraud can be regarded as
12 equivalents of hard core cartels.

13 All this sounds good, but what about the
14 institutions? Well, the OECD has both competition policy
15 and consumer policy committee and they even had a joint
16 meeting. There is also ICPEN and one could say that it is ICN in
17 the realm of consumer protection. However, in terms of
18 technical assistance, this nice symmetry has not been had
19 at least in our region. I think this could be changed.
20 A more active technical assistance regarding consumer
21 protection should also address the issue of the
22 interactions and potential synergies within competition
23 and consumer policies.

24 What are those synergies and how could they be
25 realized? Clearly, these are essential and challenging

1 questions for those agencies with competencies in both areas. I think
2 they
3 are relevant, also, for those operating under a different
4 institution as I think substance is the same everywhere
5 and, therefore, even we might need to understand each
6 other and cooperate. This is certainly the case, for
7 example, in dealing with overlapping topics, such as
8 consumer switching.

9 The FTC is one of the few agencies that are in
10 the position to deal with these issues in a credible way
11 and potentially take the lead in providing technical
12 assistance as well as international cooperation. Thanks.

13 CHAIRMAN KOVACIC: I know that in earlier
14 comments both Joe and now Zoltsn. The point about focusing more
15 assistance on this point is one that is most useful
16 because when we -- you know, by my recent count, there
17 must be -- there are at least 60 agencies that have a
18 portfolio that goes beyond competition policy. It
19 typically has something to do with advertising, something
20 to do with consumer protection. The single-function
21 agency is less frequently seen than the multi-function
22 agency. And this is a key point for us to think about.

23 I would mention to our fellow agencies,
24 something you've heard from Randy, from Liz, Maria, John
25 Parisi, too, in our work with our European counterparts.

1 The International Fellows Program and the authority we
2 now have under what's called the Safe Web Legislation to
3 do exchange arrangements, I hope will develop to the
4 point where, at any one time, we have a representative of
5 15, 20 or more agencies inside our building now. I think
6 Randy, Liz, we have how many visitors now?

7 MR. TRITELL: Maybe half a dozen or so and
8 ramping up.

9 CHAIRMAN KOVACIC: Yes. I think there is
10 tremendous promise in the possibility of having a large
11 and diverse group of representatives from foreign
12 authorities working with us day in and day out. And this
13 measure that Zoltan was referring to before permits us to
14 engage our counterparts directly in the handling of
15 cases. They sign confidentiality agreements. They have
16 access to the same information we have and there's a side
17 by side detailed collaboration. They go to the same
18 meetings. They have the opportunity to meet, of course,
19 the glorious celebrities in our agencies, the
20 Commissioners, the Chairman, a real source of personal
21 fulfillment to be sure.

22 (Laughter).

23 CHAIRMAN KOVACIC: It's full
24 integration into what we do and you see the good, the
25 bad, the indifferent. I mention it as a commercial,
26 an invitation to all of you. I think it's one of the

1 best ways that we can get to know you and you can get to
2 know us. That is through that direct side-by-side
3 cooperation.

4 We had asked, also, Joe, Alberto to give -- I
5 know you've both commented about what -- in some ways
6 what we can do better in this area. I wanted to ask Joe
7 and Alberto again, Joe to comment on what we could do
8 better in dealing with international organizations and
9 others, and Alberto, perhaps your thoughts about how we
10 can measure the effectiveness of what we do in this
11 field, how we can better contribute to the discussion of
12 ideas and operational issues.

13 If I could turn to Joe first.

14 MR. PHILIPS: Thanks, Bill.

15 (Break in recording.)

16 MR. PHILIPS: First, a disclosure in case you
17 weren't aware, I am an FTC alumni. So, I may have a
18 peculiar point of view.

19 CHAIRMAN KOVACIC: We've done a lot better
20 since then.

21 (Laughter).

22 (Break in recording.)

23 MR. PHILIPS: You've had -- you and your staff

1 have had a particular role in international
2 organizations. I was thinking particularly about the
3 OECD. I think the FTC is characterized by a particular
4 culture of both great passion about the principles of
5 competition, the value of competition, and a high degree
6 of professionalism. It's something that struck me about
7 it, that attracted me to it, actually, when I was first
8 coming out of law school.

9 And I've brought into my division some other
10 FTC alumni and they've, I think, had a very great
11 influence on the world of -- on the competition world
12 generally. And I'm thinking, you know, we know where we
13 are now on the worldwide approach to cartel enforcement
14 and how strong that's gotten, and I trace that back to a
15 contribution beginning in, I think, 1995, '96 by Terry
16 Winslow, one of my FTC graduates, who came to this issue
17 with enormous passion and interest and dedication and
18 single-handedly pushed through the OECD -- the cartel
19 recommendation and the subsequent follow-up reports and
20 brought everyone to the table to agree to it when, at the
21 time, there was no consensus about strong cartel
22 enforcement.

23 And I think it's fair to say that that was a
24 trigger for everything that followed. And, surely,
25 cartel enforcement would have gotten better and stronger

1 without that report, but would it have happened at the
2 same pace or with the same intensity? It's hard to know.
3 But I give Terry a lot of credit for having put in the
4 effort. I think the fact that he did stems directly from
5 his previous decades at the Federal Trade Commission.

6 Similarly, now we have this culture of peer
7 review and evaluation. And that, I think, really began
8 with the country reviews, the peer reviews that were done
9 here initially, and still almost exclusively, by Mike
10 Wise, another FTC graduate, who has done personally some
11 30 countries and has edited every other review the OECD
12 has produced. Again, the same dedication, the same
13 professionalism that Mike brings to our work, I think,
14 stems directly from the culture he came out of at the
15 FTC.

16 And I see that continues today with your
17 involvement, your leadership and your interest in getting
18 feedback through this process.

19 For your -- leaving aside these people, the FTC
20 has obviously been a leading contributor to our
21 committee, to the Consumer Committee, to the ICN. It has
22 played a huge role in all three groups and, I think, has
23 largely kept the Consumer Committee alive through years
24 of essentially no budget, by sending people to work as
25 staff for the Consumer Committee.

1 You've played a big role in our competition
2 outreach, sending very high-quality people to many of our
3 events. That said, in international fora, the FTC
4 doesn't -- in producing papers for OECD meetings,
5 generally it's a U.S. paper, it's not necessarily an FTC
6 paper. It's fairly rare to see a separate submission
7 from the FTC. We have a few times in the past, but
8 that's -- it's the exception.

9 One other point, you talk about people coming
10 into the FTC from other agencies. I think, from our
11 perspective, we wouldn't mind seeing people being sent
12 out from the FTC. For example, other agencies send
13 secondments to the OECD to work for several years at a
14 time. We wouldn't mind somebody from the FTC cycling
15 through and having a program. So, that's
16 another way you could get involved in our agency. Thank
17 you.

18 CHAIRMAN KOVACIC: Alberto? Thanks, Joe.
19 Alberto Heimler.

20 (Break in recording.)

21 MR. HEIMLER: So, I just would like to start by
22 saying that I started off in antitrust together with the
23 Italian Authority. The Italian Authority was created in
24 1990 and I joined it in early 1991. And for us,
25 technical assistance has been very important, especially

1 on substance. And this is where the FTC and DOJ, of
2 course, and the OECD have been extremely useful, the
3 discussion on substance. That's what we needed at that
4 time and this is where we got going. What is the
5 relevant market, how to see whether companies are
6 dominant or not, how to prove an agreement, a cartel and
7 things of this kind.

8 However, when I started doing technical
9 assistance myself, I think that things got a little
10 different because countries differ, as I said before, and
11 in many countries, organization of the authority is
12 extremely important and probably more important than the
13 best practice, the technical matters. The technical
14 matters, of course, are important. But, together with
15 this, there is an organizational issue that, first of
16 all, short-run technical assistance cannot tackle and
17 this is why we have all engaged sooner or later in long-
18 term technical assistance. The FTC, of course, first,
19 but the European Commission after, at the end of the
20 1990s with the twinning projects.

21 And when you start long-term technical
22 assistance, I think the substantive part of technical
23 assistance fades away and -- because these countries are
24 very interested and need other things, that is how to
25 keep stuff. That's extremely important. And how to keep

1 high-quality stuff. We heard it from Israel, but Israel
2 is privileged in this respect. Other countries have
3 staff revolving every year. So, we need to do something
4 to help them keep quality staff.

5 There is a problem with due process, which is
6 quite -- very important in these countries. They don't
7 know how to ensure access to files, how to ensure
8 transparency in the decision-making. There is a problem
9 on how to write decisions. And many times, decisions are
10 not -- many times they're not even written. But when
11 they're written, they are very condense and they don't
12 contain the major elements that you need for a decision
13 to represent some sort of an example, also, for the
14 future. Because, of course, decisions are important for
15 the future, not only for the past.

16 So, I think technical assistance in this
17 matters. The twinning projects were indeed organized in
18 a way as to arrive to that, even though, of course, the
19 major objective was to align these countries to EC
20 standard and it was this substantive standards to EC
21 regulation and Article 81, 82, merger control. But I
22 think that when there is demand, then I think this is
23 very important.

24 And, of course, what is also very important are
25 the judges that have to look at the decisions of the

1 authority. And, indeed, in the twinning project and in
2 general in technical assistance, assisting and helping
3 judges in understanding the competition rules -- and
4 here, again, of course, the substantial part is what
5 matters, is also important.

6 So, all in all, I think that we should try,
7 when we do technical assistance, taking a country or a
8 jurisdiction in our hands and trying to bring it up is to
9 lift the reputation of the competition authority in the
10 country. Many times, the competition authority is not
11 credible because it has a lower reputation in the
12 government. It's somewhere in the direct -- even if it's
13 an independent authority somewhere that is not at the
14 forefront of decision-making.

15 And, of course, we can also help in defining
16 what are the priority of the authority. We heard the
17 advocacy. I agree with advocacy in a sense, however,
18 because we -- I always remember Venezuela, that was a
19 country that was -- where the authority was very much
20 engaged in advocacy. It was its major objective all
21 throughout. Ana Julia was a very strong
22 supporter of advocacy and see where they got. It would
23 have been --

24 (Break in recording.)

25 MR. HEIMLER: No, no, no, no. I'm just saying
26 that enforcement is probably more important and advocacy

1 can come later. Because if we dedicate too many
2 resources on advocacy, we might not achieve what we want
3 because advocacy is something that has to be picked up by
4 someone else and enforcement we do on our own. So, in
5 some sense, we can be accountable -- we are accountable
6 on enforcement and not so much on advocacy.

7 So, I think that certainly with this long-term
8 technical assistance that FTC started, I think that the
9 twinning projects of the EU had the Federal Trade
10 Commission experience in their head because you were the
11 first one that did this. I think that these aspects,
12 which are more related to the organization, to lifting up
13 the reputation to due process, transparency, deterrence,
14 how to write decisions, of course, how to calculate
15 sanctions, also, is extremely important. It's not just
16 for developing countries, it's a problem for everybody.

17 But I think that those are matters that are
18 extremely important for authorities and technical
19 assistance can certainly help.

20 CHAIRMAN KOVACIC: Did you want to make another
21 comment?

22 MR. ROBERTS: Very briefly, yeah.

23 CHAIRMAN KOVACIC: Please.

24 MR. ROBERTS: Just coming in on this kind
25 of on the enforcement versus advocacy, but also from the
26 point of view of where I think technical assistance or a

1 component of technical assistance could go that we're
2 thinking about, with the improvement in IT techniques, et
3 cetera, the role of competition authorities as sources of
4 knowledge, I think, becomes much more important. The
5 knowledge management techniques become much more
6 important. We can see this in the consulting field. I
7 mean, McKinsey has built its success on
8 knowledge management.

9 And in a sense, competition authorities, if
10 they are doing advocacy, but not in the sense of saying,
11 well, you know, let us just give you the competition
12 line, but say, we studied the economy. We have a
13 database, a history of analysis information on the
14 economy. And if you want to know about it, we can tell
15 you about this. We can't do that if we don't have the
16 techniques in place.

17 So, at a very, very practical level, what we
18 would benefit greatly from is technical assistance around knowledge
19 management techniques. It's a very pragmatic
20 level about teamwork, about storing data, about coding.
21 You know, some of it is essentially library functions.

22 I mean, we -- because we're sitting there
23 saying, well, we could tell you about -- things about the
24 fuel industry because we did this huge merger with lots
25 of evidence. But, you know, you can't search our
26 database. It's just all there is is PDF documents. I

1 mean, we would be in a much stronger -- the better we are
2 at doing that, the stronger will be our position with
3 regard to influencing the government agenda in a way
4 which is not let us tell you the right way to go about
5 this, but let us tell you how we -- what we know and we
6 know quite a lot if we can find it and summarize it.

7 (Laughter).

8 CHAIRMAN KOVACIC: I always felt that way on
9 examinations, that I knew so much, I just couldn't find
10 it in time to apply it.

11 (Laughter).

12 CHAIRMAN KOVACIC: Thanks to all of you for
13 getting us off to such a great start, in particular to
14 those whom we asked to tee up comments, Simon, Markus,
15 Alberto, Monica, Joe and Zoltan. And, indeed, Allan,
16 also, whom I spoke with last night who provided us with
17 an excellent thought about the larger context and how our own programs
18 have to adapt dramatically to deal with
19 that. All sorts of excellent thoughts about -- for the
20 reflection on our part about how to think about our
21 problem, and even in short comments here, extremely
22 provocative and helpful ideas about what to think about
23 going ahead.

24 We do spend huge resources on our international
25 engagement. As you look in this room, you can see we
26 travel in gangs.

1 (Laughter).

2 CHAIRMAN KOVACIC: We have -- on that side of
3 the room, you see five; on this side of the room, there
4 are three of us. My colleague, Jon Leibowitz, one of my
5 fellow Commissioners, just joined us. We don't quite
6 have double digits in this room, but we had double digits
7 at these meetings this week. That is a vast outlay for
8 us. And on the report card by which we're measured at
9 home, it counts for zero. That is, this doesn't show up
10 in the box score anywhere.

11 In many ways, if we're going to spend a lot of
12 effort, it's pretty important that we get it right and
13 you've given us a lot of particularly good thoughts about
14 how to do that.

15 Let's take a break for ten minutes and come
16 back and turn to the very big issue of how to assess whether or not our
17 programs are having good effects.

18 Thank you.

19 (Whereupon, a brief recess was taken.)

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SESSION 2: ASSESSING AGENCY EFFECTIVENESS

CHAIRMAN KOVACIC: If we could resume the discussion.

Again, for the transcript, this is Bill Kovacic again. I also wanted to mention to you what we are doing with this collection of conversations. We've had meetings now in, I guess it's closing in on about 10 countries altogether, conversations with other colleagues in 10 countries. We do the last of our group discussions in North America next week, and we'll be distilling all of this into a document, which looks ahead.

And what I'm seeing more and more because we've had the chance now to talk to so many agencies to talk to expert observers like yourself, is that it's turned into an opportunity to get a quick glimpse of what a large number of jurisdictions are doing on questions such as strategy planning, agenda setting, operations, international cooperation.

And in writing this up, there will be an opportunity not only to direct comments to ourselves about what to do better, but I think to give all of you a glimpse by way of a dividend on this investment you're making of what some of the current approaches are among our agencies collectively to addressing some of these issues. But we look forward to getting that done by the

1 very early part of the coming year, and by that I mean
2 early January, so that by the time we come back to the
3 OECD in February, we'll have something in hand on that
4 for you to take a look at.

5 My colleague, Alden Abbott, will carry us
6 forward -- carry us ahead into the examination of
7 evaluating effects. Alden.

8 MR. ABBOTT: Thank you, Mr. Chairman.

9 The key issue which any agency focused on
10 competition or -- and consumer protection has to focus on
11 really is what criteria and techniques should be used to
12 measure our success, because, after all, if we are not
13 succeeding in maximizing something, what are we doing? A
14 major focus of this, of course, is the issue of welfare.
15 Agency officials, certainly competition agency officials,
16 from the United States often in speeches refer to their
17 goal being maximization of consumer welfare and sometimes
18 efficiency, but they typically don't necessarily define
19 precisely what is to be advanced or maximized.

20 We would like to start out with Fred Jenny of
21 the Cour de Cassation, to -- and obviously, as you know,
22 the long-time head of the Competition Committee of the
23 OECD, to speak about whether welfare is the appropriate
24 measure of effectiveness and, in particular, how can you
25 estimate welfare benefits and what sort of welfare are we

1 talking about. Fred?

2 MR. JENNY: Thank you, Alden. Those are quite
3 wide questions. I'm not sure I've got the answer to
4 those questions, but I must note, though, that I was a
5 bit confused because there were two documents for the
6 preparation of this. One of them said that the session
7 was assessing agency effectiveness, and the other one
8 talks at measuring the success of the agency. And I'm
9 not entirely sure that success and effectiveness are
10 exactly the same concept, so I wanted to -- I mean, you
11 refer to success, but I really wanted to say a couple of
12 things about effectiveness.

13 If I look at effectiveness, it strikes me that
14 we have to have a clear view of what the goal of the FTC
15 or the goal of a competition agency is, which is not
16 entirely clear to me, A, because as we've said, it has
17 several functions, some of them are law enforcement, but
18 some of them go beyond law enforcement.

19 And, B, because it seems to me that competition
20 agencies are part of a wider set of institutions to
21 promote market economy, and that's their justification,
22 which basically means that the intensity of how --
23 whether markets work well depends partly on what they do
24 and partly on what people in trade policy -- (break in
25 recording) -- okay.

1 And we all know that when there is a joint
2 product, it's very hard to allocate the benefit or the
3 output to one of the complementary elements. And I'm
4 saying this because I think there's a second notion of
5 effectiveness, which is does the agency -- irrespective
6 of whether it's particularly useful in the grander scheme
7 of things -- using its resources well.

8 But I think that those are two different
9 questions or does -- and that one could, for example,
10 have a case where -- which is brought, let's say by the
11 FTC, which ends up with successful resolution, where
12 there is a clear welfare -- consumer welfare benefit, and
13 I'm saying this because, for example, in the UK, in the
14 OFT, there is an assessment of what are the potential benefits of each
15 case which is brought. And in the case of the UK, the potential
16 benefit estimated by the OFT, which raises maybe an issue
17 there, but must be at least five times the cost.

18 Okay, but what if the same resources were spent
19 on trade policy or deregulation or better governance of
20 financial markets, would not that lead to a bigger impact
21 on consumer welfare? And this is a question which is
22 never asked. I mean the relative validity.

23 Now, I take it that the question didn't want to
24 go into this, even though I think it's quite important to

1 measure effectiveness, and it goes back to something
2 which was said before. If you ask me in the case of the
3 FTC what are the most important things that the FTC has
4 been doing in the last -- I mean, since I've been
5 interested in this -- I mean, some of the hearings and
6 some of the production from the hearings, I think, have
7 been monumental, of monumental importance.

8 But I don't think that they've been assessed in
9 terms of consumer welfare or any other indicator. It's
10 only the law enforcement part which tends to be assessed
11 by this. I think that there would be value in doing
12 this, but I will come back to this.

13 So, let's focus on the effectiveness of how the
14 agency acts in the narrow sense, I mean, and what is the
15 measure that we could have. I think that the consumer
16 welfare is a terrible way to measure the effectiveness or
17 the success of the agency in its law enforcement capacity
18 for two reasons, first of all, because I tend to think
19 that it there is a measure of welfare that one could use
20 it should be total welfare rather than consumer welfare.
21 And using consumer welfare as a matter of fact makes
22 competition agency less effective in convincing other
23 policymakers of their usefulness, because it seems to pit
24 the suppliers against the consumers, because it seems to
25 be such a narrow focus that it seems to be quite --

1 nearly irrelevant.

2 But the second thing, of course, is that I
3 think that the measurement of consumer welfare associated
4 with cases is often highly speculative, to say the least.
5 And, third, that it does not reflect at all what I think
6 is possibly the most important function of a law
7 enforcement agency, which is dissuasion. I mean, we tend
8 to measure, you know, we say, okay, thanks to the
9 intervention of the FTC or the Justice Department or the
10 OFT, the price of this product is likely to go down by 5
11 percent or -- and multiplied by the number, so that's --
12 that is the value of the consumer surplus somewhere that
13 the consumers have.

14 Now, it says absolutely nothing about whether
15 others are going to engage in the same practice or
16 whether they're going to be dissuaded, because if they're
17 going to be dissuaded by this law enforcement action, of
18 course we should also add all the consumer welfare, which
19 is going to be saved by all -- in all those other cases.

20 So, I find it very odd that for law enforcement
21 agency we tend to publicize a measure or benefit which
22 does not include anything about dissuasion. I mean, I
23 think that is a very basic flaw.

24 Could this be solved or remedied? I think so.
25 I think that what would be really useful would have to

1 have systematic, ex post evaluation of what happened
2 after we intervened, whether it is when the FTC publishes
3 a report after hearings or whether after it has brought a
4 case in a particular industry. I know that there's been
5 always a resistance to do this on the basis of that,
6 which I understand, on the fact that one doesn't have the
7 powers to get the information that would guarantee the
8 quality of the ex post evaluation.

9 But I think that as long as we don't do this,
10 on the other hand, we're never going to be very credible
11 with our evaluation of consumer -- first of all, also
12 add, should have added that welfare is something which is
13 so abstract that it doesn't mean anything to anyone
14 except to us. So, that doesn't help communication very
15 much either. But let's get over this.

16 I think that there could be a meaningful
17 attempt to assess what has been the relative
18 effectiveness of different things, possibly in a wider --
19 if we had systematic ex post evaluation and then we could
20 make a better case about the fact that what we do is
21 useful, whether this would ensure success, I don't know.
22 It could at least serve as a justification when we go to
23 Congress or when we go to Parliaments or to say we're not
24 wasting the resources that we have, and there is some
25 utility in those.

1 Now, another thing I want to add is -- but
2 which is a point which was made previously -- previous
3 instances by Bill Kovacic, but I really believe that's
4 true, is the fact that measuring success by the number of
5 cases that one brings is like, you know, a minister of
6 interior would brag about how many bank robberies have
7 been solved and say, you know, 3,000 bank robberies,
8 which wouldn't say much, really, about the quality of the
9 law enforcement in the country, so I think that this is a
10 terrible index.

11 But it seems to me that we should try to work,
12 and that's possibly an international effort, because
13 we're all faced with the same problem, on an index which
14 would include advocacy general reports, vis-a-vis
15 businesses, so that's more the dissuasive part, but also
16 vis-a-vis government and consumers and try to assess ex
17 post the effectiveness. I mean, that's the only solution
18 I can see.

19 Again, it seems to me that the total welfare
20 approach, if we have to use a welfare measure, is
21 probably more appropriate than those ex post assessments,
22 and I would include, as I said, in those ex post
23 assessments, all the tasks of the agency and not only the
24 law enforcement.

25 MR. ABBOTT: Thank you very much, Fred, for

1 that assessment of welfare and what welfare means. Does
2 anybody else want to comment on this issue? Is total
3 welfare the correct measure, and can we even determine
4 it? And obviously tied to that was Fred's excellent
5 point about deterrence, because a particular case may
6 have a very small effect, but if it deters 100 equally
7 bad cases, perhaps in the aggregate it has a much bigger
8 effect. Anyone want to join in?

9 Yes, Monica Widegren.

10 MS. WIDEGREN: Yes, thank you very much. Just
11 to add to that, I think in our prioritization discussions
12 at home in our agencies, we sometimes pick up rather
13 small cases, could be local markets, could be rather
14 small cartel cases, actually, which we think that we
15 should dedicate resources to because we believe that they
16 would have a more widespread effect. If we could take a
17 clear-cut decision on such a case and can demonstrate it
18 to others, if we -- I think that is one of the -- at
19 least home -- is one of the basic reasons why we
20 prioritize small cases sometimes, if you call them small
21 cases, because we think about the widespread effect they
22 may have and we try to communicate them, also.

23 MR. ABBOTT: Yes, Andreas Mundt.

24 MR. MUNDT: We, as an agency, would be
25 very happy if we had any clue how to measure, in

1 terms of numbers that we could present to politicians,
2 how much we were able to raise welfare in Germany by our enforcement
3 policy.

4 What we want to try to do, at least - this is an ongoing
5 project - is to measure our success in terms of
6 anti-cartel enforcement.

7 That, I think, is already difficult enough, to
8 say how much we contribute to the economy by combating a
9 cartel. We don't have any clue as to the field of merger
10 control. Here we are in a completely hypothetical world.

11 The question to ask would be: what would have
12 happened on the market if I had blocked that merger, or
13 what would have happened if I hadn't blocked that merger?
14 I mean, who can give an honest, well-founded answer? I think nobody can.

15 So, I know that a number of agencies are trying
16 to find clues to that. There was a conference on
17 that in The Netherlands, but to me this seems to be the kind
18 of exercise that will always remain very vague, will never
19 be a precise science.

20 MR. ABBOTT: Let me ask Rene Jansen to -- I
21 think Rene Jansen has a comment.

22 MR. JANSEN: A short comment. How to measure
23 success, I think, should always be followed by the
24 question, show your success to whom, to what stakeholder,
25 because it might make a huge difference whether you have
26 to show your success to Parliament, for example, the

1 people who have to -- who are -- you have to be
2 accountable to for your budget. And, so, they often
3 raise horrible questions like Fred was saying, how many
4 cartels did you end, how much fines did you get from your
5 enforcement activities last year. So, what we try to do
6 is create, in a certain sense, a strategic mixture of
7 elements that might be important to several stakeholders
8 in your -- well, your accountability to the outside
9 world.

10 I think Andreas said correctly that we try to
11 get at least some basic information of the economic
12 outcome, some price effects. And of course it is vague
13 economies. I think our chief economist wouldn't call it
14 that way, but at least we are trying to do -- work with
15 hypothesis and make some economic outcome analysis.

16 On top of that, we try to get some qualitative
17 outcome, what case have you done, what examples have you
18 set in which markets and what transition sectors have we made what
19 interventions and what did it lead to. So, and
20 we try to link it to our priority agenda. I think it's
21 the same way as Monica tried to say. So, it's -- we
22 think it's always a mixture because expectations of the
23 performance of a cartel authority depends strongly on the
24 stakeholder you are talking to.

25 MR. ABBOTT: Very interesting.

26 Simon Roberts, I believe, has a comment.

1 MR. ROBERTS: Thank you, yes. I'm just coming
2 back to Fred Jenny's point at the beginning. I think the
3 kind of numbers game and, again, also the consumer focus
4 is dangerous for two reason, particularly in countries
5 like South Africa but maybe in others. One is that the
6 consumer focus could tend towards a very populist
7 dimension and certainly has done in the South African
8 context.

9 And, so, you know, pitting one -- the consumers
10 against the producers, it has very concrete implications
11 that we've seen certainly. I mean, one is that -- is
12 that you might actually deter leniency applicants because
13 when we've had this in the bread cartel case, because,
14 you know, these nasty bread companies stole money from
15 consumers, and all of them are tarred with the same brush
16 essentially. And, you know, companies have suffered huge
17 reputational harm. Now, that may be good for deterrence with other
18 cartels, but what's also happened is that there's been a
19 focus on retribution, and criminalization is being driven
20 by retribution. So, we're going to ask how many people
21 we've put behind bars, and it would be very few, because
22 we have to work with the prosecuting authority, and this
23 is a huge problem. This whole trend for us is a problem.

24 The other thing is that you're -- it's not --
25 no longer is it dispassionate if an analysis of the
26 market and how we contribute to the market economy, it's

1 like who did we nail. Now, obviously if you want to
2 raise the profile of competition in the country, it may
3 be -- you know, it may be beneficial. And I'm reminded
4 of a cartoon that I was told about with a fellow standing
5 next to the Prime Minister which said, who's that man
6 standing next to Allan Fels in Australia.

7 (Laughter.)

8 MR. ROBERTS: Now, that may work in Australia,
9 but if that happens in South Africa, you're -- and we're,
10 you know, normally independent, et cetera, et cetera, you
11 know, we wouldn't have a budget tomorrow. So, we -- I
12 think that a more dispassionate approach is very -- very,
13 very, very, very important.

14 The other thing about the numbers game is that
15 I can see, you know, if we would spend a lot more resources over time on
16 justifying whether the cartel
17 market was 15 percent, 20 percent, 10 percent, you know,
18 everybody else is going to start shooting it down and,
19 you know, we -- that's just a -- it could become a huge
20 waste of resources engaging in econometric studies to
21 justify that kind of numbers that I've come up with, and
22 that's not something -- I think we'd be much -- we'd much
23 prefer to do the ex post evaluations in markets carefully
24 over time to see what's happened in those markets without
25 getting into this kind of economic -- econometrics arms
26 wars, which I think is what would sort of happen, bigger

1 and bigger models and all aside.

2 MR. ABBOTT: Alberto Heimler, I believe you had
3 something to say.

4 MR. HEIMLER: Yes, thank you, just comment on
5 Fred's point, which I agree that ex post assessment is
6 important. However, I would like just to say that ex
7 post assessment is not really -- should not really be
8 considered a measure of effectiveness because we make
9 decision ex ante, not ex post, of course. And,
10 therefore, what happens ex post may be due to many other
11 reasons.

12 And, so, it should not really be a measure of
13 effectiveness but more a measure on how to improve our
14 assessment of things. That's certainly important,
15 because there might be instances where the effects may be
16 very positive but maybe they have nothing to do with our
17 decision. And, so, we have to be very careful in taking
18 ex post, per se, as a measure of whether we've been
19 successful or not.

20 But what -- on the other hand, it's very
21 important, and I think the European Commission has done
22 some work in this respect, especially on ex post
23 evaluation on mergers where it did a study on specific
24 decisions, trying to understand on all elements of the
25 decisions whether the hypotheses that were behind that
26 decision were right or wrong. So, I think that is a very

1 important exercise because it can help our decision-
2 making ex ante, and whether the hypotheses that we make
3 are correct. Ex post assessment I have a deep concern
4 that you go very quickly to show how successful you are
5 and you just show the effect on prices.

6 As for total welfare, I fully agree. I
7 remember many years ago in the OECD Harry Elders
8 (phonetic) came and says that we are all consumers at the
9 end, so total welfare is certainly a best measure because
10 nothing -- companies are just -- they're veils and
11 everything goes back to us. So, total welfare is the
12 right approach. However, we are bound by the law in many
13 instances, for example, in merger control, we cannot --
14 we don't -- we are not under a total welfare standard.

15 MR. ABBOTT: Fred Jenny?

16 MR. JENNY: Just a short point. The fact that
17 we're bound by law has nothing to do with the evaluation
18 of the effectiveness. In other words, we can apply a
19 consumer surplus standard because we have to because the
20 law says that's what we should do, and then we can
21 evaluate from the total welfare to say, well, after all,
22 this was, in economic terms, this was useful, justified
23 or unjustified for this or that reason. I just wanted to
24 make that . . .

25 MR. ABBOTT: Walter Stoffel.

26 MR. STOFFEL: Yes, just a brief remark. First

1 of all, on the intellectual level, the consumer
2 welfare standard would be the good one, because that is
3 why we all work, that is why what the activity --
4 economic activity is for. This may be a philosophical a
5 priori, but I think this is the basis.

6 The problem, rather, is how we measure either
7 of them, consumer or total surplus, according to our
8 interventions. We did try this with respect to
9 automobile distribution, and there were studies made
10 which show dozens of millions a year of savings for the
11 consumers that was now just finished. It came out. And
12 there are impressive -- pressing figures.

13 Other economies -- there was of course an
14 economist who did that, an institute in Saint Gallen.

15 Other economists now tell us, well, this is
16 true, you have these figures, but there may be other
17 reasons. We cannot tie this to the interventions you
18 made, so the cause and effect problem comes up. You can
19 always say this, of course, though it is a little bit
20 difficult to make -- to really prove that at the end. At
21 the end it is -- you must have some plausibility and you
22 must think that, well, this is now the plausibility I
23 take for granted in the other one. The other reasons
24 I'll list plausible.

25 If we have these kind of problems, I think at
26 the end, the most important element is to measure

1 effectiveness, the principles of the functioning
2 competition. We take it that competition brings about
3 more total or consumer welfare. This is a basic decision
4 that I, for one, believe in, but I use the word
5 "believe." I'm convinced that this is the case, and I
6 think history shows that in the long run it is the case.
7 But, basically, it is a conviction. And the legislature
8 has endorsed that conviction when it does put up a
9 competition law.

10 Now, one can then use indicators like market
11 entries, more market entries after an intervention or maybe numbers of
12 competitors, more structural elements.

13 I would think that these are better indicators at the end
14 than figures. But -- so more principled reasoning rather
15 than accounting because of the difficulties of cause and
16 effect.

17 MR. ABBOTT: James Cooper of the FTC.

18 MR. COOPER: Hi there, I have just a question I
19 wanted to throw out -- a question I'd like to throw out.
20 It seems to be agreement here that there's -- there would
21 be a great value in ex post evaluations to assess the
22 effectiveness. But at the same time, resources are
23 scarce. It would be great to spend a lot of time doing
24 these, but economists get busy when new mergers come
25 through and they have to do their real work.

26 The question I have is how do you -- how could

1 you get academia more incentivized to work on this? We
2 heard at a previous workshop in either DC or Chicago
3 that, you know, economists don't get tenure by doing ex
4 post evaluations, so is there any way to get the academic
5 -- and we have -- there are lots of economists out there
6 that need to write papers in academia, very interesting
7 work. Is there a way to get them more involved?

8 MR. ABBOTT: Andreas Mundt.

9 MR. MUNDT: I just wanted to add one brief
10 remark. In Germany, we have the monopolies commission.
11 They don't assess our work in terms of the surplus for
12 general welfare that we have generated, but every two
13 years, they draft a report on our work and criticize our
14 work, they discuss our work. They discuss if our
15 decision had been logical, if there had been up to
16 economic findings, new economic thinking. And this
17 report goes to Parliament and is discussed there. So,
18 this is kind of helpful, also, for us, of course, because
19 we find ourselves under constant scrutiny by this
20 monopolies commission.

21 And I say this because this monopolies
22 commission has kind of a strange composition, because
23 it's composed of academia, on the one side, and real,
24 live entrepreneurs on the other side. So, they're really
25 people from the board of firms, cooperating with people
26 from the academia. So, this can be kind of helpful, at

1 least to assess, not to evaluate in terms of total
2 welfare, as I say, but at least to assess how was your
3 work and how have you done.

4 MR. ABBOTT: Francisco Marcos.

5 MR. MARCOS: Regarding James' question, I
6 have a paper here by, I think it's Robert Crandall and
7 Clifford Winston, which is entitled "Does Antitrust Policy Improve
8 Consumer Welfare? Assessing the Evidence". They indirectly give an answer
9 to your question of what would the FTC do in order to help ex post
10 assessment: they just suggested make more data generated by cases available
11 to researchers.

12 So, regarding your point, I think it may be true
13 that professors don't get tenure for writing empirical papers based on
14 real cases, but especially they don't get tenure if the papers they write
15 are bad because they don't have good data. So, the thing
16 is that if you provide them with more access,
17 I mean, here they talk about what are the questions and data voids that
18 the experienced when writing their paper, and which prevented them
19 from apparently reaching a successful conclusion.

20 Thanks.

21 MR. ABBOTT: Thank you. I think excellent
22 contributions, but I think we should move quickly. Ah,
23 yes, one more comment by Fred Jenny.

24 MR. JENNY: Sorry to slow down. Two things.
25 On the specific question about academia, generate more
26 evaluations of what we do, I think the issue of the

1 extent to which we're willing to share the data and the
2 competition data in cases is crucial, because I think
3 that if you -- aside from the monetary rewards and grants
4 and stuff like this -- but giving academics particularly
5 access to a set of data on a set of cases by saying,
6 okay, we will exercise some control on what you see in the paper, because
7 we don't want any of this information
8 to at least be recognizable. But on the other hand, we
9 give you access to this, and we're not giving access to
10 it to everybody else, is a great opportunity for an
11 academic and that this is a nice proposition.

12 The second thing, I really insist on the fact,
13 you know, if -- we have to relate the assessment of the
14 effectiveness with the goal. If we were running around,
15 never enforcing really any case, but convincing everybody
16 in government, in ministries, that they should amend the
17 regulations and take out the anticompetitive aspects of
18 the regulation, and if we really were very good at
19 telling the business community why it is that they should
20 not engage into those kind of techniques, if by just
21 stressing them of, you know, terrible things, I think we
22 could be considered to be very successful.

23 We would have a very poor level of welfare
24 measures that we could provide, because we wouldn't do
25 much enforcement. But at the same time, there would be
26 much more natural compliance with it. So, it seems to me

1 that the studies are, A, useful exactly for what Alberto
2 said, how can we improve or (inaudible) or do we have a
3 sense that I think some will be -- get a little bit
4 better, but we really have to have much wider assessment
5 of what we do, which may be qualitative in nature rather
6 than coming up with numbers, because I think that the
7 real value of what we do is to a large extent outside of
8 the enforcement.

9 The enforcement is something that we use to
10 promote something else, and the something else is the
11 faith in competitive markets and the development of a
12 competitive market. So, it's only a small -- I mean,
13 it's a technique to try to convince or to deter rather
14 than convince when we cannot convince. But it's very --
15 I think it's very misleading to look at it in isolation
16 compared to the other things that we do, whether it's
17 speeches that you make, whether it's, you know, all the
18 other functions.

19 And qualitative assessment of the whole thing
20 could help legislators understand that competition law --
21 I mean, the FTC is not only about antitrust enforcement
22 but about a much wider set of things.

23 MR. ABBOTT: Thank you. I think I need to move
24 on, unless there's any quick comment, but we still have a
25 number of important questions. And Allan Fels, Professor
26 Allan Fels, former ACCC chairman, and as we just heard,

1 the former boss of Australia's prime minister, I think,
2 is -- I'd like to ask him to address briefly how can one
3 estimate the broader deterrent effects of competition in
4 consumer protection cases.

5 MR. FELS: First of all, I think this
6 question's already been answered in the previous
7 discussion, so I'll just make two or three additional
8 points, I mean, just to say the same thing again. That
9 the competition law, particularly on the enforcement
10 side, is about having an economy-wide effect. And I can
11 imagine many ways in which you could run a competition
12 policy and regulators and so on. We happen to choose to
13 run competition law by means of individual cases. And,
14 so, the main value of an individual case is if you can
15 use it to have an economy-wide effect.

16 And, so, the strategic choice of cases is
17 really important, and we've had many factors that you
18 take into account regarding their effects, of which I
19 would mention publicity, also demonstration of how
20 serious the regulator is, sometimes the precedent value,
21 sometimes building public support for competition and all
22 of that. And to understand a deterrent effect, a number
23 have been mentioned, fear of fines, fear of jail, fear of
24 damages.

25 Also, what seems to be very big with business
26 is impact on reputation. This is often bigger for many

1 businesses than anything else, a fact that I have found.
2 And (inaudible) to be found to be doing something
3 illegal, so these would start to come into my calculus.
4 And I would also just mention that cases can
5 have negative effects, that is, suppose a regulator takes
6 a case and at the end of it gets a pathetically weak
7 fine. That has a terrible negative and underdeterrent
8 effect across the whole economy. You know, these guys
9 got a fine of \$5 kind of thing, you know, what a joke, we
10 don't have to change it. So, there is that negative
11 dimension, also.

12 Now, on the question of measures, people have
13 commented on this question of the aggregate number of
14 cases not being a very good measure and so on, or the
15 total funds. Now, of course I understand that point.
16 But in my view, most agents around the world -- first of
17 all, most regulators around the world, not talking just
18 competition, most of them systematically under-enforce
19 the law. I think -- I would say that's my view, of most
20 regulation, that they systematically don't enforce the
21 law that much.

22 And I think tend to think the same about a good
23 deal of the competition law enforcement around the world.
24 And there are many reasons why there is some under-
25 enforcement. So, in that context, I think that when I
26 see a lot of enforcement activity, I tend to think that's

1 a good sign that the agency is doing its job. And, also,
2 the fact is that a successful agency attracts a lot more

1 cases. If people see the agency is serious in getting
2 results and fines, then they're more encouraged to come
3 forward and give evidence and information and whistleblow
4 and take a chance.

5 So, on the whole, I take a fairly positive view
6 when I see that an agency is doing a lot of law
7 enforcement. Of course I know this is a very complicated
8 thing.

9 Now, under measuring, a lot has been said. I
10 just want to add a couple of points apart from the one
11 I've just made. Making people aware of the cases that
12 are happening, there are some things you can actually
13 measure. You can measure the amount of publicity. It's
14 not too hard to get access to media monitoring services
15 and so on. And they will give you reports of how much a
16 case has been reported. Or you may want to get into
17 industry journals and that kind of thing. There are some
18 measures that are quite -- certainly the ACCC is to daily
19 measure a number of photos of the chairman that were in
20 the press and other well known indicators of the amount
21 of publicity that there was for the agency.

22 (Laughter.)

23 MR. FELLS: And all of that. There's also been
24 an interesting couple of studies done in Australia where
25 academics have surveyed business to ask them kind of how

1 seriously do you take this agency. Do you think it is
2 effective? And all that kind of thing. And that is
3 somewhat revealing. So, there are some ways in which you
4 can start to pick up a slightly wider impression.

5 On the econometric studies and so on, I have
6 slightly mixed feelings about them. In Australia, there
7 have been a few fairly serious econometric studies of the
8 impact of the national competition policy, which I
9 referred to in some OECD reports, but the productivity
10 commission did a couple of studies. Now, it is true,
11 these studies are used, particularly that have propaganda
12 effect, and I think it's good propaganda.

13 Personally I have some doubts about -- well,
14 I'm not -- no, some of the studies are valuable. And as
15 you know, the OECD itself in the economics division have
16 been trying to do some studies, and I think many of us
17 around this table have doubts about whether they're
18 really quite on the ball in terms of their linking up
19 competition policy and product market behavior. But,
20 nevertheless, there are some attempts to follow up.

21 So, this is a very hard question. On the
22 academics, well, the one way on getting academics to do
23 work is to pay them to do it. And, indeed, I'd like to
24 comment on the academic community that my own take on the
25 academic community was that 15, 20 years ago there were

1 very few of them interested in industrial organization.
2 There's now a much wider community interested. Why?
3 Because you get paid as a consultant, you make a lot of
4 money.

5 So, I'm sort of pleased to see more academics
6 participating, but obviously the money is skewed in favor
7 of the defense. And it would be great if more money were
8 paid to deserving academics, particularly those who have
9 been formerly chairman of competition commissions and
10 that kind of thing. But, no, seriously, I think the -- I
11 think there has been a little bit of a skewing of the
12 monetary incentives to academics, but I do believe they
13 have some effects.

14 MR. ABBOTT: Thank you. Broad ranging and very
15 useful comments, Allan.

16 Let me quickly change. We talk about the
17 benefits of what we do, how can we measure whether we are
18 properly allocating -- pardon -- how can we evaluate the
19 social costs of our actions, not only resources we use
20 directly in bringing cases, carrying out research and so
21 forth, but also the costs imposed on private parties. Is
22 it possible to measure such costs? Francisco Marcos
23 Fernandez.

24 MR. MARCOS: Well, this is Francisco from the Madrid Regional Court in
25 Spain, though I guess I'm here as an academic. I have to

1 thank you for the invitation, but I have to be a little
2 leery about the question. I mean, it is a difficult
3 question to answer, and you expect me to do it?.

4 But, anyway, I'll try to say something. Some
5 of the things said before by Professor Jenny may change
6 the way I focus the question, because, I mean, the
7 social costs have to do with the objective we are asking the competition
8 authority to pursue. This means the social benefits of the antitrust
9 authorities activities may be also difficult to calculate. However, I mean,
10 many of the things on this regard that I could comment have already been
11 said.

12 I guess that one of the first comments I would
13 make, I think it's a mistake to focus on benefits and
14 costs, especially -- not only because we are not really able to
15 accurately measure costs, but because as I have said, we have
16 problems also trying to measure benefits. Why don't we
17 talk better about social impact, and so we reframe the
18 question. In order to prepare for this session, I had a
19 look at the only two or three agencies that make an
20 estimation, however rough, of benefits and costs.

21 I have here the reports of the Office of Fair
22 Trading and the reports of the FTC. They look at benefits and the
23 benefits are astonishing. In the fiscal year

1 2007 were OFT saved 326 million pounds for the consumers. While
2 the FTC saved \$180 million fiscal year 2007. I guess you can say that's a
3 great output-- I think that the budget of the Federal Trade Commission was
4 \$100 million, wasn't it?

5 (Break in recording)

6 MR. MARCOS: Yes. But as you see, they are not well received by other
7 agencies, and they are criticized.

8 And I agree with the criticism, but I think
9 that even though this may be a rough estimate, it's worth doing it. This
10 may be the a sign of some kind of measurement obsession, right? I guess
11 that if you look at any of the papers of Professor Kovacic -- or Chairman
12 Kovacic nowadays- they are ask many times ;the question of how
13 we measure quality, how do we measure effectiveness and
14 success, if the later is different, and I guess put a number is
15 a way of doing it. And that's a logical reason of competition authorities
16 showing the public that they're doing things right. I mean, we cannot still
17 have a look at the -- what is it -- these rankings of the global
18 competition review, FTC is doing great, five star.

19 (Laughter.)

20 MR. MARCOS: Another way of doing this, and Professor Fels
21 mentioned

22 it is look at surveys. In this regard, I recommend you to have a look a
23 paper by Armando Rodriguez in which he looked at surveys in doing a cross-
24 comparison of many countries regarding whether competition policy was
25 effective.

26 And I don't know if he found a strong

1 result regarding effectiveness of competition policies, but the
2 paper I'm commenting, which is was published in
3 2008 suggests there was a problem in the survey. People
4 didn't know what they were being asked. They didn't know
5 what was competition policy. And even in some of the
6 countries that the measure was taken, they didn't have
7 competition policy, so how is it possible that if they
8 didn't have competition policy, those countries ranked in
9 good position in this competition survey
10 effectiveness?.

11 Well, if we don't like surveys, then
12 maybe we should also challenge the famous paper by the OFT
13 regarding deterrence, because it is also based on a
14 survey. Of course, I'm not saying that, but I guess that we should,
15 you know, use surveys with care, and I guess it's a
16 useful instrument, but we should also, you know, beware
17 of their problems.

18 Anyway, so, if we tried to look at the social
19 impact and forget about costs and benefits of advocacy and competition
20 promotion, as was mentioned by Professor
21 Jenny before, when the measurement problems are really huge, how do
22 we measure that? Indeed, social impact of those
23 activities is the greatest measure, because, I mean,
24 there's no direct deterrence arising from that.. But there we have, you
25 know, the idea of transmitting the market the philosophy of free
26 competition.

1 Let me go to some of conclusions. By the
2 way, when we talk about a number of cases as an index, it
3 is true, Professor Fels, that it is an indication of
4 enforcement, but what about if -- now I'm in charge of
5 the Madrid competition agency, one way of, you know,
6 having a lot of cases is just take the cheap ones and so
7 my index goes up. Does that mean that I'm enforcing
8 more? Isn't that a waste of resources?

9 And how do we measure social impact? I guess
10 that what we do is not measure it, we "feel" it, huh? So,
11 when we talk about "feeling" the positive externalities of
12 antitrust authorities, maybe we have to look at --
13 politically we can talk about the social value of
14 sanctions and other enforcement decisions (remedies and settlements),
15 that's true, but then we have the problem of
16 the social cost of mistakes. And I guess that the
17 problem is that when you convict someone you shouldn't,
18 the cost is really larger than the cost you should incur
19 in case of acquitting someone you shouldn't.

20 On this other hand, negative externalities, again, you can
21 "feel" them, but maybe these ones you can "feel" them more
22 than the positive ones. I mean, these are distorted signals
23 sent to the market about what is unlawful behavior. And I have
24 here an example of how these may apply to FTC. I don't know if I shouldn't
25 say this, but if you want to identify social cost of U.S.
26 antitrust policy, in my opinion, nowadays, you have an

- 1 example in the DOJ competition and monopoly single firm
- 2 conduct under Section 2 of the Sherman Act report. Why?

1 CHAIRMAN KOVACIC: What report would that be?

2 MR. MARCOS: I think you know it. You know,

3 so --

4 CHAIRMAN KOVACIC: You just told me about this.

5 MR. MARCOS: No, no, you know better than I do, you even wrote
6 an official response to it, I

7 think that having a discussion about what the standard of enforcement on
8 monopolization cases is a great thing to do. But I think that's very
9 different from having the enforcers expressing different opinions. Up to a
10 point, that

11 may be great, also. But what is not great at all is to
12 have this, you know, multiple enforcement units misreading each other and
13 misleading each other, and confusing the public. If I'm looking at that
14 issue

15 from the business firm's perspective, I tend to doubt about
16 what's the standard in the U.S. nowadays.

17 If you look at the report, you
18 look at the cases of the U.S. Supreme Court, you look at
19 what you wrote regarding the report. And, well, one may reach
20 a conclusion, but he has to be really clever to
21 understand what's going on and that's not the game business are playing.

22 But from the business firms perspective, I don't
23 think the enforcement standard it's clear at all. I mean, it would be
24 worse if the Department of Justice said just the opposite of what
25 it says, but, again, I don't think this clarifies at all
26 the picture. It is true that we don't have a clear consensus on this

1 issue

1 here in Europe at all. We have in the European
2 Commission a working paper on abuse of
3 dominance position, but I guess that aside from that the European
4 Commission nowadays has a clear rule of what's doing in enforcing the
5 prohibition of
6 abuse of dominant position. I think that's something
7 different. And I don't know what else we could do.
8 Finally, maybe a nice comparison that no one has
9 done so far would be to compare the budget of all the competition
10 authorities together with that of all the
11 antitrust law practitioners and consultants. I mean, I
12 don't know what would be the result of that. But, again,
13 as a way of what we could do in future, and maybe in
14 order to measure this impact, and again look at benefits and
15 costs together, we have to do things apart from this ex post
16 assessment.

17 Maybe the thing we could do is to look at specific sectors and
18 industries and try to look about at the
19 decisions that were taken and how the industry has
20 evolved globally for a period of years afterwards. I guess this is
21 a little bit different of a strict ex post assessment,
22 but I think that this may be helpful. Thank you.

23 MR. ABBOTT: Thank you very much. This is
24 certainly helpful. I think we're rapidly running short
25 on time, but there is -- I would like to throw out one

1 question, though, and actually throw it out to everyone.
2 I'll say right now, before doing that, I think there's a
3 question about the research agenda, but I think my
4 colleague in the next session will be getting to the
5 research agenda, so perhaps it can be picked up there.

6 Risk of false positives and false negatives and
7 the joint effects of competition consumer protection
8 enforcement, two important areas, I think -- don't know
9 that we have time right now to delve into them properly,
10 but before closing, I would like to ask for views on how
11 can we measure whether we are properly allocating our
12 enforcement resources to different sectors of economy
13 such as pharmaceuticals and energy, two specific matters,
14 maybe to competition or indeed to research and
15 interventions. What measures, if any, should we use in
16 making that determination? And I would like to bring
17 that -- have that open to people to comment.

18 CHAIRMAN KOVACIC: This is Bill Kovacic. If I
19 could interrupt for one minute, Alden and James will
20 carry you skillfully through to the end. As I have to
21 leave now, I want to thank all of you again before
22 heading out and to express my enormous thanks for your
23 participation.

24 It's not every day that we get this kind of
25 intellectual firepower and experience brought to bear on

1 things that are important for what we do. And my longer
2 term hope is that we develop a habit of doing this
3 periodically and not just every 96 years.

4 (Laughter.)

5 CHAIRMAN KOVACIC: And the comments in just the
6 last hour alone are, for me, worth the price of admission
7 alone, because I think, for example, Francisco, you -- it
8 might not surprise you that in several other discussions
9 we've had, people have said that the episode with the
10 Section 2 report made our stock go down, made us
11 collectively look foolish. That is the U.S. institutions
12 as a whole. That hard-earned credibility, having
13 embarked on that project and being unable to achieve an
14 agreement and that maybe that should have guided our
15 decision about whether to go down that path in the first
16 place, was not free. To grapple with difficult issues
17 about how our -- our multiplicity of institutions worked
18 together.

19 This may be an awkward topic and an
20 uncomfortable one to think about, but we cannot side-step
21 it indefinitely. And observations from Simon, for
22 example, about how we do technical assistance through a
23 program that's meant a great deal for us, but the
24 possibility that we are not as wise as we ought to be in
25 approaching features of this. Enormously useful. The

1 discussion about how to measure, how to assess. It's
2 exactly what I hoped would take place when we had these
3 sessions.

4 So to -- to my colleagues and friends in the
5 room, I am hugely grateful for your doing this for us.
6 This will indeed make us better. And back to Alden and
7 his questions. And to my colleagues, thank you.

8 MR. ABBOTT: Thank you, Mr. Chairman. And I --
9 I know we all -- this was Chairman's Kovacic's
10 inspiration, this project, and I think we are all
11 learning logical, informed or enforcement of our
12 research, and as I indicated in past sessions, this is
13 great because it's neutral, bipartisan. It's an attempt
14 to improve our agency processes and modes of analysis,
15 which will be beneficial to whoever guides the Commission
16 in the future.

17 And now let us turn quickly to allocation of
18 our enforcement resources. Is it -- are we doing the
19 right thing? Could it -- how could it be improved? What
20 measures should we use? Anyone who would like to lead
21 off on that?

22 Well, I'm -- if no one wants to lead off on
23 that, we can -- we can move on. I know -- and indeed my
24 colleague, James Cooper, is going to be addressing our
25 Enforcement Advocacy and Research Agenda. And I would

1 like to turn to him in just an instant. But I would like
2 to see -- and I thought we might not have time, but if
3 anyone wanted to make a quick comment about the issue of
4 false positives and false negatives in enforcement, or
5 how can we measure the joint effects of our applying
6 competition, consumer protection enforcement, is key in
7 those three sectors.

8 One area where we've been involved is
9 pharmaceuticals. I know where the FTC has been very
10 involved. But, again, we still have many questions to be
11 examined under the guidance of James Cooper. So I throw
12 out those questions to see if there's any responses. But
13 if there are not, I will be very happy to move on to the
14 next session dealing with Enforcement Advocacy and
15 Research and to James Cooper.

16 So any closing comments?

17 MR. ABBOTT: Alberto Heimler.

18 MR. HEIMLER: I just would like to say just one
19 minute on false negatives and false positives, because I
20 think that's a very important issue. And, of course, our
21 obsession with false positives leads our authority to do
22 much less work than might be necessary.

23 And I think that it's an issue of incentives
24 here. Because, of course, false positives means that
25 since we are not final decision-makers, it might well be
26 if we take the law very far, it might well be that our

1 decisions will be annulled, which is then is this a
2 measure of success, the annulment of decisions, or is it
3 -- what is it?

4 So I think that's a point that was not raised.
5 But -- and, of course, false negatives means not engaging
6 in enforcement, and we don't bear any cost at all. So I
7 think it's a matter of incentives, and the incentives
8 lead us to avoid false positives. But we should -- we
9 shouldn't be too extreme on this, because otherwise we'll
10 stop.

11 MR. ABBOTT: Do I read into that question --
12 thank you, Alberto Heimler. Good, interesting comment.
13 A point that we should not be obsessed with winning
14 necessarily, that we should be bringing difficult cases
15 which will not necessarily lead to successful results on
16 review, and that it would be -- it would be a mistake --
17 would it be a mistake then to only bring cases you are
18 almost certain you will win?

19 MR. HEIMLER: I fully agree with this, that we
20 shouldn't do this. And certainly the measure of success should not be the
21 number of annulments, because -- or success, because I think that -- so
22 that's an issue that we didn't address. But we are judged on the number of
23 annulments.

24 MR. ABBOTT: I see a couple of hands. Quickly,
25 Monica Widegren.

26 MS. WIDEGREN: A quick comment on that. We

1 talked about these annulment cases, and they are
2 extremely difficult and sometimes do not lead to the
3 really positive results you would like to come up with.
4 But they could lead to heavy advocacy efforts from the
5 competition authority to really make a difference on your
6 markets anyway, without coming to the law enforcement
7 decision that one would like to really have.

8 So abuse of dominance cases is an area where
9 you really -- which is a challenge for competition
10 authorities and where you may risk not to finalize them
11 in the way you wanted to. But they could have other
12 positive effects as well, and so, we shouldn't refrain
13 from taking them on board. Thank you.

14 MR. ABBOTT: Thank you. Francisco Marcos of
15 the Madrid Competition Authority.

16 MR. MARCOS: Alberto's point is a great one. So the
17 thing is, what do we do in order not to over-deter but
18 neither to under-deter in antitrust enforcement, in other terms, how do we
19 reach an enforcement equilibrium? I agree we shouldn't take the
20 the appeals or the annulled decisions as the
21 parameter here. But how do we do it? I guess we have to
22 trust sound and wise people like the ones sitting in this
23 room.

24 But -- and, again, following what Monica was
25 saying, I mean, you have clear cases. I mean, look at
26 this DOJ report. That's a clear case proposing under-

1 deterrence. I don't see -- well, I guess if you look at
2 that thing, it's the Loyola Chicago Law Review -- something
3 called the Antitrust Marathon, you can see there just the opposite, a
4 proposal for over-deterrence in the enforcement of
5 Section 2 on monopolization. I guess that the people at
6 the FTC stand in the middle, but things may change. Thanks.

7 MR. ABBOTT: Thank you. Any -- any -- any last
8 comments? If there are not, I will move to James Cooper
9 to address our third set of issues.

1 SESSION 3: ENFORCEMENT, ADVOCACY AND RESEARCH AGENDA

2 MR. COOPER: Well, thanks, Alden. And, once
3 again, thank everyone for being here, here at the last --
4 the last bit here. As members of competition agencies, we
5 have enforcement agendas and, everyone knows about that tool, but
6 research and advocacy are also important tools. And what
7 I want to get into in this session is to -- is to look at
8 how should we use these tools in an overall strategy to help improve
9 consumer welfare or total welfare or whatever we're
10 trying to improve? And then maybe more specifically
11 drill down into -- into the specific components, research
12 agenda, how do we develop that? Advocacy, what's the
13 proper role of advocacy, and also, what's the proper mix
14 of cases?

15 So I'd like to ask Rene to start off on a
16 question on kind of the big picture, the 10,000 foot
17 level, on how should we be developing a strategy? Does
18 it make sense to develop an overall strategy from the top
19 down, the chairman comes in and says this is what the
20 agency should be doing, or should it be from the bottom
21 up or some mix of both? And maybe getting back even
22 further to first principles. I mean, when we say
23 strategy, what exactly do we mean? So thanks.

24 MR. JANSEN: I'm not quite sure whether I have

1 the answers of all answers. But I can tell you something
2 about the way we try to do it and what -- and we would
3 call our strategic cycle within the office. And there
4 are elements of it that are top down and bottom up. And
5 they are driven by the outside world and are driven by
6 the internal world, the office within we operate and the
7 input of all staff members.

8 We have a strategic cycle that starts with a
9 bold policy framework. Maybe to explain this, the NMA
10 (phonetic) has a three-headed board, executive board, and
11 they are leading the office. And we are an office that
12 contains enforcement of antitrust merges. And, also,
13 besides that, we've got an energy regulator and we've got
14 a regulatory for, among others, the railway sector.

15 So we start with a policy framework from the
16 Board, which is top down. But, of course, which is
17 debated with all our -- with our directors. And what
18 contains that policy framework, it depends on the issues
19 that are very acute in the year to come. For example,
20 you might think of ways of strengthening the cooperation
21 within the office. Strengthen what we call the chain of
22 responsibilities within the office. Or a topic might be
23 strengthening the cooperation with other authorities, the
24 telecoms regulator, the financial sector regulator, the
25 national health authority and other authorities within a

1 certain area of market regulation.

2 Some elements which are very important for the
3 performance of the authority, like, of course, training
4 of staff, recruitment of staff, developing and
5 intensifying knowledge management. But also policy
6 issues, like how to deal with direct settlements or how
7 to deal with abuse -- abuse questions, and how to
8 reinforce the debate within the ECN in Europe, for
9 example.

10 Other cases might be how to deal with budget
11 cuts, which is a theme for the years to come. What does
12 it mean? What does it mean for the enforcement? An
13 enforcement of antitrust or energy regulation or
14 whatsoever? So there's a broad -- the broader strategic
15 issues that we think are important for the agency as a
16 whole that gives guidance to the directors and to the
17 departments. And they can make their plans on top of and
18 developing further the policy framework. That's the
19 start of the internal process.

20 Beside that, there's always a consultation of
21 the priority agenda with the outside stakeholders. What
22 should be the top priorities on our agenda for the year
23 to come? So we consult the politics, the business
24 community, the legal community, the academia, and that
25 might result in some issues like, for example, that some

1 priority themes have been in the year of 2008 health
2 sector and the financial services, or enforcement in the
3 food and agri business, or the postal market. Again, the
4 postal market, because there is a liberalization process.
5 Specific issues on the energy sector or specific issues
6 on the railway sector. So that is consulted to the
7 outside world.

8 We try to bring that together at the end of the
9 year. So we're then around November, early December, in
10 a concrete working plan for the year to come, and also a
11 concrete communication plan that is correspondent to
12 this. We translate, also, those working plans in what we
13 call management agreements. Management agreements
14 between the Board and the directors within the agency.
15 This gives them some targets, that gives them some
16 elements -- not all targets on enforcement, but also
17 targets on HR issues and all kinds of issues.

18 We monitor all discretion in quarterly
19 management meetings between the Board and all -- all
20 directors within the agency. And, again, of course, we
21 have to safeguard our budget and that is also the basis
22 for the discussions that we have with our minister of
23 economic affairs, who is responsible for our budget.

24 This is also translated afterwards in what we
25 call the presentation of an enema agenda, which is

1 presented to the outside world. And, of course, we do
2 not tell them everything. If there are leniency
3 requests, if there are also some things that come up
4 during the year, this is flexible enough to deal with.

5 And the last step, I think, is our annual
6 bulletin and annual report, which is given to the
7 minister and which is the basis for the minister to have
8 a debate with parliament. So then we're back again in
9 the early months of the year and start again this cycle
10 of work.

11 That's how we try at least to give them a more
12 systematic dimension in it, and that -- well, we have
13 experience now on this for a few years. I think we are
14 until now quite happy with it, and also every year trying
15 to develop further on because we want to be a learning
16 organization and never, ever, anything is perfect. So
17 always keep on developing further on. Maybe that could
18 be a first start of discussion here.

19 MR. COOPER: I think it's a great first start.
20 I'll turn it over to Nick now, if you'd like to follow up
21 on any of this. And, also, maybe more specifically
22 address on assuming you've come up with a strategy and
23 how to implement your strategic plan, how do you go about
24 measuring it? That's the other -- that's the other
25 important component here.

1 MR. HILL: I'm not sure about being able to
2 particularly answer your last point. Well, the point I'd
3 like to make first is that I think Rene, what you've
4 outlined, is remarkably similar to the process and cycle
5 in New Zealand. We do something -- you know, we probably
6 have different names for it, we do. It's very much the
7 same.

8 Instead, I want to really give you a slightly
9 different perspective. As I mentioned before, I've been
10 in my role for four months and I don't come from anti-
11 trust. I've been brought into the Commerce Commission in
12 New Zealand because the organization, the chair and the
13 commissioners, want to lift it to another level. And so,
14 it's very interesting to sit here and to listen to, you
15 know, the experts that have been assembled, to learn a
16 lot about the sector competition agencies are about.

17 But when I think about strategic planning,
18 which is what we're on here about, there are plenty of
19 organizations that are very successful that don't plan
20 strategically. And I think that it's crucial to really
21 understand when you're developing a process, what the
22 purpose and the circumstances are in undertaking
23 strategic -- strategic planning.

24 Henry Mensburg (phonetic) has identified about
25 10 different legitimate approaches to strategic planning,

1 and they can find their way back to the various academic
2 disciplines. And so, I think it's very important, as I
3 say, to understand the circumstances.

4 And in New Zealand, I think probably there are
5 three things that drive my strategic thinking and I think
6 where the organization needs to go in its planning. One
7 is the government structure, which takes you back into
8 understanding government, understanding its requirements.
9 We've talked a little bit about that before -- I think
10 you did, too, Rene, about the compliance nature of giving
11 the government what it needs to have the debates in
12 parliament.

13 But, also, there is a huge range of communities
14 that are very important to your success. And so, your
15 process has very much got to take those people with you.
16 It's not just a case of saying intellectually reasoning
17 the evidence, this is where we need to go. It's actually
18 a process that is two ways.

19 And a third factor I'd flag is the whole issue
20 of speed of change. You know, the strategy literature is
21 very much about the tension between -- between planning
22 and the fact that the world changes so much. How do you
23 actually develop an organization that's responsive to
24 that?

25 And so, I think for me coming in from outside,

1 my background is in business, and more recently running a
2 government organization, that has nothing to do with
3 competition, is to acknowledge that there are on one hand
4 processes about reasoning the evidence, and on the other
5 hand it's actually about the hearts and minds. And so,
6 that's very much about how do you take people with you.

7 And so, I think that this, to me, is actually
8 strategic planning today that we -- you are, the Federal
9 Trade Commission, already shaping and influencing the
10 world that you want to create by bringing us together to
11 discuss these issues. I'm engaged in what you are about.
12 I want to know more about it. I'll be following closely
13 on this time. And so, the process itself becomes very
14 important when you engage with people.

15 I just really will finish by touching on
16 something that I've introduced, because we're going
17 through a strategy process ourselves. And this does
18 relate to hearts and minds and picks up on a point Simon
19 made about knowledge and that we work in the knowledge
20 business. And for New Zealand, as for you, I imagine, as
21 well, attracting talent and retaining talent is a crucial
22 issue for us.

23 And so, the process we are going through at the
24 moment is very much a bottom up one where essentially
25 I've outlined as a new chief executive what I think the

1 challenge for the organization is at a high level, but
2 essentially put it back on the staff to say, so how
3 should we deal with this? At the end of the day, the
4 Commission and myself will make the calls. But it is
5 very much about engaging them, engaging their minds and
6 their passion in the organization. I've got to leave it
7 there.

8 MR. COOPER: That's really interesting. And I
9 think you brought two good points I'd like to open up for
10 discussion if anyone would like to weigh in here. The
11 tension between planning and change, I think that's very
12 important. You can come up with the plan I want, say, a
13 top down model, I want to target these sort of cases this
14 year, but then you get a merger wave and your resources
15 are stuck doing that. But I think equally, if not more
16 interesting, is the tension between maybe being an
17 intellectual leader but at the same time keeping those
18 external stakeholders on board. There can be a lot of
19 tension there. I think specifically in the context of
20 the U.S., maybe with gas prices we tend to go up to the
21 Hill or -- because the consumers perhaps are calling
22 their congressman and saying, we've got to do something
23 about gas prices, the FTC is asleep at the switch, but,
24 you know, so we don't necessarily agree with that. But
25 how do we -- that's a tension you have to resolve. You

1 want to be -- that may be an extreme example, but you
2 want to be an intellectual leader, but to be successful
3 you also have to keep those stakeholders aboard and bring
4 them with you.

5 I'd like to open that up to anyone that has any
6 thoughts on that, because I think those are two really --
7 two really important tensions that have to be resolved
8 between the internal and the external.

9 No one? Okay. Okay. All right. Well,
10 they're important tensions that will be resolved maybe
11 later.

12 I guess moving out of the -- we are somewhat
13 limited in time here. Moving out of the big picture
14 issues here on strategy and how to develop a strategic
15 plan, and focusing now on the Research and Advocacy
16 component that the competition agencies do. And I'd like
17 to turn to Francois and get your thoughts on, you know,
18 first of all, what kind of -- what are the benefits of --
19 we've talked a little bit in the past -- past session
20 about the benefits of enforcement. You know, what are
21 the benefits from research and how should you develop a
22 research agenda? Once again, maybe, you know, top down,

1 bottom up, the interest of the economists, the interest
2 of the staff, or does the chairman or the head come in
3 and say these are the things we should research and leave
4 it there?

5 MR. LEVEQUE: Thank you. I am a researcher, so
6 I would say that the benefits of research are huge. More
7 seriously, I would like to address two issues. One is
8 research priorities. And that is, what research might be
9 useful for the FTC to undertake or to support. And my
10 second point on research organization. That is how FTC
11 can facilitate research and organize research.

12 So, on my view, research priorities are two-
13 fold, ex post assessment or ex post evaluation, and sector
14 studies. Ex post assessment has been
15 too rarely carried out by antitrust authorities,
16 including FTC. And it's a pity because FTC, to some
17 extent, is an example for other antitrust authorities,
18 and I'm not sure that you send a very strong signal to
19 other antitrust authorities saying how it is important
20 to undertake ex post assessment.

21 So one reason ex post assessment is not so well
22 developed is that there is a lot of methodological
23 hurdles, methodological difficulties, and especially
24 how to factor other events that make plain why
25 two years or three years later the situation is like this

1 and not because of your decision. So how to --
2 measure. This is important. And, of course, this
3 needs more research on the methodological aspect.

4 So there is a lot to do in my eyes regarding
5 merger decisions, much more to do regarding merger
6 remedies, but also ex post assessment on counter-
7 enforcement, the effects of financial banalities, the
8 effect of leniency programs, the effect when you change
9 standards. There is a lot of ex post assessment that
10 ideally could be undertaken.

11 Sector studies, research on how our competition
12 operates and the competition process develops in specific
13 sectors and industries. I think this is important to
14 improve antitrust authorities' decisions, especially
15 regarding merger control because decisions have to be
16 made quickly.

17 And the competition process, especially in some
18 industries, has become more complex, and a broader view
19 on competition -- on the competition process is
20 necessary. A broader view on how competition operates in
21 this very specific relevant market.

22 And on the other hand, higher applied
23 economics, sectoral economics, energy economics or
24 transportation economics and so on and so forth, has
25 become less sexy for academia. And so, there is a

1 troubling gap here.

2 So let's turn now to organizational aspects.

3 It is important to distinguish in-house and external
4 research. In my eyes, it is as important that FTC will
5 facilitate and stimulate external research and FTC will
6 grow its internal research capability.

7 This is especially true regarding ex post
8 assessment. Internal ex post assessment is usually better
9 informed for access to information is easy, but self-
10 assessment, of course, is often less convincing. But --
11 so -- and less rigorous, or might be less rigorous.

12 But the problem with external eyes is that here
13 maybe it might be more independent, but there is the
14 problem of access to data. So facilitating access as it
15 was already said on this morning to information, to
16 external academics, is very important.

17 Just a few minutes to tell you a recent
18 experience I had. This summer, I decided to write a
19 paper on the decisions made by the FTC and the European
20 Commission on the acquisition of Double-Click by Google.
21 I was very excited with this idea. This was summertime,
22 maybe. But, unfortunately, the outcome is disappointing.
23 That is, I am afraid that my paper is boring. And for
24 sure, I am liable for it because I wrote it.

25 But maybe a secondary reason is that if you are

1 not involved in a case, and I was not involved in this
2 case as an expert, it is very difficult to make your own
3 opinion. In just reading the decisions, you are
4 confronted with a lack of figures and fact. Imagine the
5 FTC decision as not a single figure. Okay? Fortunately,
6 there was Jon Leibowitz' and Pamela Harbor's concurring
7 and dissenting statements, so at least we got a view on
8 the debated and controversial issues.

9 So no doubt that there is a competitive
10 advantage for a scholar to be involved in the case. If
11 you want to write a paper, because you get access to the
12 information. But, of course, because you are involved in
13 the case, your point of view, your views, can be biased.

14 So to sum up, access to information is very
15 critical and facilitating research is as important for
16 FTC than carrying out in-house research. And maybe my
17 last point, my concern maybe -- I don't know how you see
18 it, but maybe for the next 10 years, one concern I have
19 as an economist is that it's critically important to be
20 involved in the process as an expert. So working with
21 LECG or working with other consulting
22 firms, and so you are in the case.

23 But on the other hand, you might lose some
24 independence. And so, to some extent, we have the same
25 problems. I mean, when you want to carry out a self-

1 assessment, there is some bias. And my point is that for
2 the future, there might be more and more bias and
3 difficulties because cases are so complex that if you are
4 not involved in the case, it's much more difficult to
5 make a very good paper. Thank you very much.

6 MR. COOPER: Thanks a lot, Francois. A follow-
7 up, and once again open up. Oh --

8 COMMISSIONER Leibowitz: Yeah, I just wanted to
9 make a couple of points. I think that we have -- the
10 notion of doing ex post assessments, I think, is very,
11 very important. And it's something that we have
12 discussed internally in the Commission. The problem is
13 really from our perspective one of sort of a research
14 issue, right, because the same people -- if we're doing
15 an internal assessment, the same people who are doing the
16 internal assessments are also the same people we need to
17 help us with merger cases or conduct cases. And we have
18 done it sort of -- internally on an ad hoc basis when we
19 think something went, you know, horribly, horribly wrong.
20 We lost a case that we thought we should win; rarely when
21 we win a case that we thought we should lose. That was a
22 joke, I'm sorry.

23 And so, I just wanted to make that point.

1 Occasionally there have been sort of external evaluations
2 of the agency. Thirty -- almost 40 years ago, there was
3 a major commission that was -- that was set up to examine
4 the Federal Trade Commission because we were failing in
5 all aspects of our mission. And that was helpful and
6 sort of beginning to turn the agency around.

7 Occasionally Congress will have the General
8 Accounting Office, what's known as the GAO, do a report
9 on a particular aspect and sometimes they just don't
10 actually understand the issues as well as they should.
11 And so, they may hit the target or they may -- or they
12 may go wildly wrong in their assessment as they did
13 recently, getting back to James' point, a few years ago
14 with analysis of our oil company merger reviews.

15 So it's a really good idea, and I think in the
16 future as we grow our budget, which we're hoping Congress
17 will let us do, we might end up doing more ex post
18 assessments.

19 MR. ABBOTT: Francisco?

20 FRANCISCO: Well, I guess this is a question
21 for Francois because Professor Fels before said -- or
22 Former Chairman Fels before said that one of the problems
23 of involving academics in doing this ex post assessment
24 is that they don't want to do it because they are too
25 expensive and we don't have resources to spend. Do you

1 agree with it?

2 MR. LEVEQUE: No, I don't. I mean, of course
3 it depends what is your field of expertise or your field
4 of research, but if you are an applied economist, you are
5 very interested. I mean, look at the survey on the ex
6 post assessment made by the European Commission on merger
7 remedies. I -- I unsuccessfully tried to get access to
8 their databases, and I did not succeed just because of --
9 because of confidentiality and all the commitments the
10 Commission made when it makes its surveys.

11 So you have only the report. And the report is
12 very -- is very good. But imagine you have more than 13
13 valuables and parameters and there is not -- there is not
14 one correlation. There is no -- there is no statistic,
15 only means. You have only means for each variable. So,
16 I mean -- so generally speaking, I know a lot of
17 economists that would be pleased to -- especially
18 econometrician, applied economist, because this is their
19 -- this is their field of research. I mean --

20 (Break in recording.)

21 MR. ABBOTT: Jacques?

22 MR. STEENBERGEN: If I may use for a moment my
23 two hats, authority and academic, I really tend to agree
24 with Francois that money is not the issue. We would
25 easily find academics who would be very eager to do the

1 ex post analysis. The issue is confidentiality. And
2 maybe we should really think about the kind of protocol
3 of cooperation or guiding principles as to how we can
4 involve academics and still respect the confidentiality.
5 And the FTC isn't a good place to exercise leadership.
6 And in Europe, we have to do it together because we are
7 bound by the ECN confidentiality and secrecy rules. And
8 these are the only ones which are in my country
9 sanctioned with criminal sanctions. So when academics
10 tell me, well, we will come and visit you, that is not
11 really a sufficiently convincing argument to make the
12 data available. We could probably really do useful
13 things if we could reassess afterwards that no
14 confidential information is in any way made recognizable
15 or whatever. But a discussion on that between academics
16 and authorities would, I guess, be useful.

17 MR. COOPER: That -- I think it's a great
18 point. I mean, are there any ideas -- I mean, the
19 confidentiality seems to be the big issue. In an earlier
20 panel we held in the States, someone had floated the idea
21 of, well, in return for a consent, you agree to give us
22 data and waive confidentiality issues so we can do
23 ex post evaluations. Is that -- maybe that's too
24 academic as raised by an academic, but any ideas or best
25 practices would be -- would -- this would be a great

1 forum to discuss this.

2 Mr. Mundt: Well, maybe I talked
3 about our monopolies commission already. Maybe I should
4 add that they have full access to all our files, to all
5 confidential files.

6 There are obligations and their duties are regulated by law. So I think
7 that

8 is necessary in order to guarantee confidentiality. I do
9 think that if you install something like that, if you
10 really give access to people to your files, in your
11 agency, you need a very strong regulation about
12 confidentiality issues. And as I said, this is regulated
13 by law in Germany. And otherwise, I don't think that you
14 ever will have a successful evaluation process if you
15 don't grant access to your files, because all these cases
16 are single cases. And it might happen that an agency
17 does something which looks quite unusual prima facie, but
18 if you look into the files, normally you find a very good
19 reason for a serious agency to act the way they have
20 acted.

21 So I think this goes together. You have to
22 grant full access to files. Otherwise, any evaluation
23 cannot be successful. And on the other hand, you have to
24 take careful care that confidentiality is granted and

1 guaranteed.

2 MR. COOPER: Yes?

3 MR. WINERMAN: Mark Winerman. Just a
4 clarification that some 30 years ago the FTC did litigate
5 and establish our ability to turn confidential materials
6 over to academics who signed consulting agreements. The
7 challenge is that the academics prior to publication have
8 to agree to a review by the agency prior to publication,
9 which may concern some academics before they make heavy
10 commitments and do a research project.

11 (Break in recording.)

12 MR. HEIMLER: A very brief
13 comment. The point is that we don't have data for ex
14 post assessment. We have data for re-evaluation, maybe.
15 But we don't have data that tells you what's happening
16 after the merger has taken place or after the cartel has
17 been prohibited. We have only data up to the point of
18 the decision, full stop. We don't have further data.

19 (Break in recording.)

20 MR. HEIMLER: It's essential for ex post
21 assessment. I'm sorry, which means that you have to get
22 a project going and you have to pay for that project.
23 that's my point. And the European Commission has done
24 so, because how can you do ex post assessment if you
25 don't have the data exposed? Who is going to give it to

1 you?

2 MR. COOPER: Francois?

3 MR. LEVEQUE: In my view, when you are really
4 involved in carrying out ex post assessment as an
5 institution, you ex ante prepare the ex post assessment.
6 I mean, when you just made a merger decision, you have a
7 special file where you put your hypothesis or whatever,
8 and in order that this will be really three years or five
9 years later to make the assessment. I mean, you have to
10 anticipate that your decision might be ex post assessed,
11 and you have to prepare the assessment, the future
12 assessment. This is very important. I mean, in other
13 public policy, if you want to make good public policy
14 assessment, you have ex ante to prepare it.

15 MR. COOPER: Sean?

16 MR. ENNIS: As I understand it, Alberto, the FTC may have the
17 ability to subpoena information outside of an investigative context,
18 and perhaps that would be a way to -- to gather this
19 information that would be required, if there were a
20 legitimate report being produced that required otherwise
21 -- information that otherwise would not be available.

22 MR. HEIMLER: Yeah, that's -- we have the 6-B
23 subpoena power. Mark Winerman probably knows much more
24 about it than anyone in this room or in the world,

1 likely. But --

2 (Break in recording.)

3 MR. PARISI: John Parisi from the FTC. I just
4 mentioned that we're constrained by a law called the
5 Paperwork Reduction Act of 1980, which means that outside
6 of the enforcement context, if we want to gather
7 information, we have to go to the Office of Management
8 and Budget and gain approval for the inquiry if we want
9 to inquire of more than nine entities.

10 So --

11 (Break in recording.)

12 MR. COOPER: Just to give a concrete example of
13 what John is talking about, the office I work in, we do
14 competition advocacy, and we try to do a reassessment --
15 we try to do an ex post assessment of how influential our
16 advocacy has been. So we send out surveys to our
17 recipients just to do that. You know, a 12-question
18 survey that goes out to maybe 10 people a year because it
19 fits into this idea. We -- we may be able to do it.

20 You know, the process started back in June, or
21 actually back in the spring and we went through a 60-day
22 notice and comment, 90-day, you know, type up all these
23 estimates. The point is maybe by December the OMB
24 will say, yeah, it's okay to send out these 12 letters
25 this year. And that's for a tiny, tiny, tiny -- you want

1 to talk about econometrics, you're talking about a
2 survey, and a lot of projects in the agency have to go
3 through that.

4 That's a concrete example of just for a very
5 simplistic ex post how much we have to go through. And
6 -- but anyway. Any other -- this is -- we're rapidly
7 running out of time. This is really interesting. But
8 any other comments on this -- in this area before we move
9 on?

10 All right. I wanted to next move on, and I
11 think Walter can comment on this. What is the optimal
12 mix -- and we have these tools. We have enforcement, we
13 have advocacy, we have research. What is the right mix
14 for a competition agency? And I'm sure that will vary
15 over time. But what are the parameters that determine
16 what the right mix may be at any given time? And I'll
17 turn it over to Walter.

18 MR. STOFFEL: Well, thank you. I don't think
19 that I can give you an answer to the entire question. I
20 would just like to make two points with respect to that
21 aspect, to the aspect of what priorities one can choose
22 and one could follow and which path should be chosen if
23 there are several at stake.

24 One is an internal aspect and one is an
25 international aspect. If I begin with the internal

1 aspect, then if I look at the web site of the FTC, it
2 seems to me that the FTC has a clear focus on consumer
3 protection. This is at least the impression that one
4 gets if one looks at the Web site. So, the answer,
5 should it be consumer harm or address the appearance,
6 value, precedential impact, kind of industry and so on,
7 it would clearly be that it must be consumer harm that
8 governs all the choices to be made.

9 If I, from the outside, could make a remark, it
10 would be the remark which concerns the institutional
11 balance in the U.S. between the two agencies, DOJ and
12 FTC. I think that there's a very pragmatic, very
13 American, if I dare to say, balance which exists between
14 short-term accountability to government and maybe mid and
15 long-term perspective that the FTC brings into the
16 picture. So, each one takes this into account. I would
17 think that the priority internally would be not so much
18 in terms of industries, of fields or of consumer harm and
19 so on, but rather in terms of long-range consistency of
20 competition policy.

21 And it seems to me that the FTC is well placed
22 to do that. I have the impression that it also does it.
23 Maybe this may lead to the report story, which is worked
24 out and put into question and the majority paper and
25 comments on it, the report on competition monopoly, I

1 mean, now. But I would see this as positive. Maybe in
2 the very short range it makes for uncertainty,
3 but if we make (inaudible) I think this would be a
4 criteria for choosing and picking issues and cases for an
5 agency like the FTC as opposed now to the DOJ. And the
6 whole thing gives an institutional balance which I think
7 is interesting and which could consciously be exploited
8 by an agency like the FTC.

9 Internationally, you asked here and at another
10 place in the paper the question about intellectual
11 leadership. Thus, does the FTC really have an
12 intellectual leadership, and I think it does and I think
13 that this is beneficial internationally from, let's say,
14 an egoistic international point of view.

15 I would like to add that I share the importance
16 of what has been said at the beginning of the morning
17 about the attitude in which this is done. Certainly,
18 there should not be a focus on convergence and harm.
19 But there should be a focus on taking stock
20 of differences. And it is clear for me that the point of
21 international cooperation is not at the first place
22 harmonization, especially not, I think, for agencies
23 which favor competition of different things
24 professionally, but rather of learning from differences,
25 taking stock of differences and then learning from them.

1 This also has, of course, all kinds of ideological
2 aspects which may come into it which may be seen more
3 than that they really exist, but there certainly is an
4 aspect to it. If I read the newspaper tomorrow and this
5 morning about the Greenspan -- what Alan Greenspan said
6 this morning, well, these kinds of things will certainly
7 have if they're ideologically linked and important impact
8 which may also slash back.

9 But having said this, I think it must be -- in
10 order to take stock of differences, one may clearly set
11 out what one has to say and where one thinks one has
12 intellectual leadership. And I think the novel approach
13 is the FTC has taken in the Rambus case, for instance, is
14 very stimulating internationally. I found that very
15 beneficial that somebody in the world took that stage.
16 The question of influencing standard-setting procedures
17 was taken up and was taken up in the way it has been
18 taken up independently of the outcome. The importance of
19 standard setting, not only within a country like the
20 U.S., but internationally, maybe is even more important
21 from an international point of view than from purely a
22 U.S. point of view.

23 The techniques used for that, I think this is
24 an example of an intellectual leadership case that I
25 would very much be in favor that this also happens in the

1 future if that can be a criterion for choices. So, the
2 internal aspect played a role in the balancing -- in the
3 institutional balance that the FTC has to play and the
4 international one placing such things on the map.

5 MR. COOPER: Thanks. On the non-enforcement
6 side, before we move into enforcement, we're running out
7 of time, but how do we measure the effectiveness of this?
8 I think if anyone has any ideas on that, I mean, we have
9 the -- we have competition advocacy which is -- a broad
10 goal of which is to sort of educate the public on the
11 value of competition.

12 I've heard countless times in these
13 consultations and elsewhere, you know, if we could get
14 the public on our side to really understand the benefits
15 of competition, to understand that competition leads to
16 better quality, lower prices, economic growth, et cetera,
17 et cetera, that could help -- going back to something
18 Nick said early on, you know, having that -- bring along
19 the external support you need and that requires
20 intellectual leadership. Now, competition advocacy and
21 research, sort of the non-enforcement agenda is, in large
22 part, aimed at that.

23 Does anyone have any ideas, and I'd like to
24 open it up to anyone, how do you measure the
25 effectiveness of that component of a competition agency's

1 mission? Anyway, I'll open it up to anyone who has --

2 (Break in recording.)

3 MR. JANSEN: I think it's hard to give a right answer to
4 this, to give a precise answer to this. But what you
5 might look at is what is -- how advocacy products from
6 the enforcement agencies are taken up, picked up by
7 Parliament, by press, by associations of business
8 communities, all kinds of issues that, I think, maybe
9 Allan Fels gave the hint on that, because there is not
10 one indicator to get a good idea of the effectiveness of
11 advocacy.

12 MR. COOPER: Sean and then Jacques.

13 MR. ENNIS: In terms of the research,
14 evaluating the effectiveness of research, one thing you
15 can look at is clearly citation rates to the work and you
16 might break that down in different ways. You can look at
17 citations within court decisions, citations within
18 academic literature and I think that your economics
19 research program, I'm guessing, does pretty well by some
20 of those standards with some of the work having been
21 cited by the Supreme Court. I think that overall, as an
22 outsider looking in on the FTC, I've never looked there,
23 I think your economics research program has been among --
24 has been the best of any competition authority that I'm

1 aware of.

2 CHAIRMAN KOVACIC: And he says that having been
3 at DOJ, by the way.

4 (Laughter.)

5 MR. COOPER: Jacques and then --

6 CHAIRMAN KOVACIC: And then Monica.

7 MR. STEENBERGEN: Jacques Steenbergen. A
8 number of the participants have already pointed out that
9 we have to -- not only to take into account the
10 priorities as we see them, but also the priorities as the
11 stakeholders see them. And, certainly, in stormy
12 weather, as we experience now, there's very often a gap
13 between them. So, advocacy, I see it in the first place
14 as selling our priorities of which we are genuinely
15 convinced. So, advocacy and enforcement are, for me, not
16 two completely different issues. They're two sides of
17 the same coin.

18 At the same time, we have to pick up the
19 signals we get because whether we like them or not,
20 whether we are intellectually convinced that our
21 priorities are better or not, we will be judged on what
22 we are perceived as -- that we perceive as being relevant
23 or not. Now, to measure that and to measure the effect
24 of advocacy, I agree with Rene, that's probably very
25 difficult. But if you get increasingly criticized,

1 usually in the press and in Parliament and much less in
2 the antitrust community because we -- there we are in
3 our comfort zone, you know that you haven't done a proper
4 job in selling your priorities or maybe your priorities
5 are wrong.

6 MR. COOPER: Monica?

7 MS. WIDEGREN: I fully agree on that and there
8 is also -- but I want to point to two risks. One is the
9 risk of being too populist, which we touched upon
10 before, that you have priorities and your actions,
11 you respond, so to say, let's say, the public demand in
12 that respect, which you could then reduce your
13 credibility in the long run as a credible enforcer of
14 competition legislation. So, that is one aspect.

15 Another one is that the advocacy is also about
16 what is not seen by the public, and I'm thinking about
17 what we talked about, the financial crisis. Yesterday
18 and this afternoon, I will dedicate all my efforts to get
19 it right in the law that will be adopted by Parliament
20 next week about the financial crisis in Sweden and to
21 contribute about the competition aspects of that. And
22 this will never be known by the public, of course, what
23 we have done there. But it's very important. I would
24 say if we are effective there, we make a lot of, let's
25 say, doing a lot for competition policy. But, so, we are

1 doing a lot that can never been seen by the public. We
2 can never go public about it, and how that could be
3 measured.

4 We hope that the government realizes what we
5 are doing and sees what we are doing and take it into
6 account, but it is difficult to show. I wanted to point
7 to that, too. That we shouldn't lose that aspect, also,
8 while we work.

9 MR. COOPER: Anyone else? That's a fantastic
10 point. That's right. So much of -- working a lot in
11 competition advocacy, so much of our work goes on behind
12 the scenes and it may be hard to measure exactly that.

13 Joe?

14 MR. PHILIPS: This may have already been
15 said. I'm sorry, I had to go out of the room for a bit.
16 Another measure of advocacy is the longevity. I don't
17 know if that came up, but to give an example, we did some
18 work on competition in the health care professions, what,
19 two or three years ago, something like that, and we were
20 looking for material and we went back to FTC research on
21 competition, I think, in eyeglasses and dental care. It
22 was done 20 years ago. And there hasn't been anything
23 better produced since, and it's still -- you know, it's
24 still persuasive and we had an internal debate, should we

1 use some of this material, is this old -- and we decided,
2 yeah, because it's still persuasive.

3 MR. COOPER: Those are great
4 reports. We still go back to them all the time and they
5 kind of set the gold standard, in some respects, and had
6 a large effect on the market, led to chain -- eyeglass
7 chains, et cetera.

8 Anyway, in our last three minutes, let's talk
9 about enforcement.

10 (Laughter.)

11 MR. COOPER: You can tell I do -- I do
12 advocacy, so this is how important I think enforcement
13 is, you know. But I apologize if we're going to stay
14 over just a tiny bit, but I think we'd be remiss if we
15 didn't now move -- I want to move to Jacques and talk a
16 little bit about sort of the optimal mix of cases in a
17 sense, you know, cases, do we focus on -- and some of
18 this was touched on in Alden's panel, too, so it may be a
19 little repetitive, but the -- we have -- should we focus
20 on deterrent effects, you think of cases that can have
21 large -- they can have very small -- very small redress
22 in the first instance, but could deter a lot of similar
23 conduct. You could think of cases that have a small
24 consumer harm, but also have great precedential value.
25 You could say should we be focusing primarily in the big

1 sector for the economy and on the big cases, the energy,
2 the health care, food, et cetera.

3 So, I'll turn that over to Jacques.

4 MR. STEENBERGEN: I'll be very brief because
5 most of it has already been said. If you take consumer
6 harm seriously, yes, of course, you have to look at the
7 amount of consumer harm and redress and an impact a case
8 may have on redress. That is obvious. But as we also
9 think, or at least hope, that the collateral effects of
10 our decisions on the behavior of others is at least as
11 important as the direct effect of a case, as (inaudible)
12 also pointed out. You have to look at a balance at what
13 -- the direct effect you can expect and the side effects
14 or snowball effects you may expect. And there's not a
15 single answer, I think, to what is at any time the right
16 mix.

17 What I would like to suggest is when you talk
18 about deterrence, deterrence and precedent value is not
19 the same, and you need regularly to use the stick or your
20 system loses credibility. But that being said, if the
21 stick is used regularly and you operate in a highly
22 sophisticated environment and you do that certainly in
23 the U.S. But I think that we now, by now, all do that
24 with sophisticated bar. In bigger cases, you have bigger
25 companies with the in-house counsel, et cetera, et

1 cetera.

2 The difference between precedent value and
3 deterrence is, in such an environment, very small,
4 provided you still keep them -- you still keep the fear
5 of good in them. The guidance in the given by precedence
6 may be just as effective. So, take up cases for that.

7 And then, secondly, it's good that there is
8 always, in the mix of cases, you have one or two which
9 are recognizable for consumers. As Monica said, they are
10 not necessarily the biggest cases, but they make people
11 believe that we are useful. When we got to the front
12 page of the Financial Times with french fries --

13 (Laughter).

14 MR. STEENBERGEN: -- and it was only mildly
15 ironical, that was because all of the stakeholders said
16 that's on the list of products people are judging the
17 inflation by. Do you believe that I think that that's a
18 major industry? No. But it did more for our credibility
19 than some of the others.

20 MR. COOPER: Thanks. Andreas?

21 MR. MUNDT: Just a very brief remark, Andreas
22 Mundt. Never leave a market alone. I mean, sometimes we
23 do. Sometimes we do, of course, small cases, even in
24 very small markets. But this is a signal to everyone,
25 you can never be sure, you know. Of course, the bigger

1 cases in the important markets are of greater relevance
2 in terms of what we can do for consumer welfare, maybe.
3 But as I said, never leave a market alone. It's a clear
4 signal to everyone we might find you.

5 UNIDENTIFIED MALE: Just a very brief addition,
6 as you also asked, and how can you determine whether you
7 have the appropriate case load? And that is, of course,
8 very much linked to your priority setting and what you
9 can take up. Then I would suggest a very simple
10 approach, the duration of a case. If they take too long,
11 you have too many or you don't have enough resources, but
12 something is wrong. If you reach your targets, maybe you
13 could take one more.

14 MR. COOPER: Alberto?

15 MR. HEIMLER: Yeah, I think that you are in a
16 privileged situation among us all because 98 percent of
17 the cases in the U.S. originate from private litigation,
18 and I think this makes a very big difference, also, in
19 terms of priority for the agency, in terms of type of
20 cases that you take.

21 And going back to what we discussed earlier, I
22 think that the reason abuse of dominance is not such a
23 privileged item in U.S. agencies has very much to do with
24 private litigation. You see all these abuse cases
25 originating from private litigation, the reason being

1 that you are abused and it's easy to identify -- to have
2 evidence that the abuse exists. So, you don't need the
3 agency. You need the agency in cases where evidence is
4 difficult for the private litigant to acquire and these,
5 of course, are cartels and these are mergers.

6 The point is that, of course, there is a
7 disconnect between your practice and our practice. We
8 don't have private litigation. So, we need also these
9 other cases quite substantially. That's --

10 (Break in recording.)

11 MR. COOPER: Just kind of a last question
12 throughout there in regards to evaluating how well we're
13 doing in the enforcement side of the house, if you're
14 writing a report card, you know, where do wins or a win-
15 loss ratio, how important is that? I mean, you can think
16 on one side, you do want to be winning your cases.

17 But if you're winning all your cases, maybe
18 you're taking the low-hanging fruit and leaving some
19 serious conduct undeterred, not exercising intellectual
20 leadership. I think I heard someone earlier mentioning,
21 I forget who it was, Rambus and the standard setting,
22 that it's in -- Walter mentioned that. Not that
23 successful, but I've heard echoed here and in the States
24 that it's very important to bring that. That goes into
25 the loss column, but that still counts.

1 So, at the end of the day, how important is
2 winning cases to when you sit back and say, how well am I
3 doing on an enforcement agenda? I'm not a litigator, so
4 I...

5 (Break in recording.)

6 MR. JANSEN: Very brief. I think your
7 credibility is a very important element and is influenced
8 very strongly by winning your cases. On the other hand,
9 never losing any case, then I think you're doing the
10 wrong cases and the easy cases only. But I think if our
11 experience -- the periods that we lost many cases in
12 court and the press picking it up has been very harmful
13 for the image, the reputation of the
14 enforcer in the Netherlands.

15 So, I think you have to take calculated risks
16 on the economic side and on the legal side.

17 MR. COOPER: Thanks, Rene. Anyone else?

18 UNIDENTIFIED MALE: It is especially important
19 for an administrative agency like -- of the European type
20 where we render decisions which are controlled
21 afterwards, whereas an agency which brings cases to
22 court, that may be different. Maybe also you'd perceive
23 differently in the U.S. where you bring cases to court
24 and you don't win all the cases. I have the impression
25 of that. But in the European setting, in certainly

1 internal (inaudible) I think for the European Commission,
2 it is a fact. If you lose too many cases, you have a big
3 problem.

4 COMMISSIONER LEIBOWITZ: I would say in the
5 United States and for us, it's sort of the same, too.
6 You want to find a mix of cases you can win because a
7 perception of winning, you know, drives up the stature of
8 the agency at some level and the more stature the agency
9 has, the more you can accomplish for your broader
10 mission.

11 On the other hand, I agree with what you said
12 and what others have said, which is, you know, if you're
13 not losing some cases from time to time, you're not doing
14 what you're supposed to be doing, because part of what
15 any law enforcement antitrust agency should be doing is
16 trying to right an injustice or trying to stop harm to
17 consumers and Rambus is a perfect example of a case
18 where, you know, we were sort of surprised that we lost,
19 but we will keep on pushing in this area because it's
20 just too important for consumers.

21 And the other area is pharmaceutical cases
22 where we have had a mixed record. Actually, we have not
23 had a great record, but we're almost -- we believe we are
24 right and that large brand pharmaceuticals are paying off
25 their generic competitors to stay out of the market. So,

1 we're going to keep on trying to bring cases and then
2 we're going to try to get the legislature, the Congress,
3 to change the law. So, anyway, and we might not win in
4 either of those things, but we will try.

5 (Break in recording.)

6 COMMISSIONER LEIBOWITZ: Sorry, Jon Leibowitz.
7 The fact that we're litigating these cases, I think,
8 also, in the pharmaceutical area, helps ensure that the
9 pharmaceutical drug manufacturers aren't ready to engage
10 in the worst abuses, they're just modestly pushing the
11 envelope right now.

12 (Laughter).

13 MR. COOPER: Liz?

14 MS. KRAUS: I wanted to follow up on Jon Leibowitz's
15 point in saying that it not only keeps it alive for the
16 pharma companies, but also for the legislatures and then
17 has this great feedback effect to our advocacy work, I
18 think.

19 COMMISSIONER LEIBOWITZ: It's hard to
20 deconstruct, right? You want to use all of those tools,
21 you want them all in your arsenal. And although it's not
22 Euclidian geometry, there's no formula for precisely what
23 you want to use when and to what extent. If you do it
24 generally well, you're just a more effective agency in

1 terms of fulfilling your mission.

2 (Break in recording.)

3 MR. COOPER: Well, I kept you all nine minutes
4 and 16 seconds longer than we promised. I appreciate
5 everyone's patience. The comments were -- I can't thank
6 you enough for all coming here and taking the time out of
7 your day to give us your insights and your expertise. It
8 was very helpful.

9 I would just add one more thing. We have a
10 public Web site on which you -- and some of you may or
11 may not be aware of this. Maria's looking at me
12 strangely, so --

13 MS. COPPOLA: Just mention the transcript, too. No,
14 no, only to say that this whole session is being
15 transcribed. We do have a public Web site. You've all
16 received a link to it. You're welcome to look at it. In
17 the coming weeks, we'll have the transcripts from all the
18 international consultations up. You will get an
19 opportunity to review this transcript probably in about a
20 week's time, but it will be a relatively quick
21 turnaround. Just a heads up.

22 MR. COOPER: I was actually going to mention we
23 also have a blog. We have an FTC AT 100 blog and I don't
24 -- somewhere really subsets of these questions are posed
25 and people are invited to comment. If you're interested,

1 I suppose we can -- it's public in the sense you can view
2 it, but it's not public in the sense that anyone can add
3 to it. But if you're interested in adding to it, it's
4 very easy to get you a password to get on.

5 MS. COPPOLA: And then, finally, just -- because I
6 think this has been mentioned before -- we do plan to
7 write a report based on these hearings. I'm sure that as
8 James, Alden and I write these reports, we will be
9 contacting you with follow-up questions. With any luck,
10 we'll be able to present the report at the February OECD
11 meeting. So, thank you. Thank you very much for coming.

12 (Whereupon, the meeting was concluded.)
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1 C E R T I F I C A T I O N O F T Y P I S T

2 MATTER NUMBER: P081205

3 CASE TITLE: FTC AT 100

4 TAPING DATE: OCTOBER 24, 2008

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6

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17 C E R T I F I C A T I O N O F P R O O F R E A D E R

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