

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

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P R O C E E D I N G S

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CHAIRMAN KOVACIC: Good morning, and thank you all for joining us today. Let me take a couple of minutes to describe what we've been trying to do with this project. I first came to the FTC 29 years ago and in that time I've watched the Commission through a number of phases of its modern experience and I've also watched more than a few presidential transitions take place, and we are about to have one. It seems highly likely we'll not only have a regime change, but a change of party in the White House. As I was mentioning a moment ago to John Temple Lang, there's the strong possibility in four to six months that, in terms of English football, I will be relegated from the premier league to the second division of mere commissionerhip.

My concern in transitions and the transition reports that they generate is that those tend to be fairly narrow in their perspective. They focus on the relatively short term in our system. They tend to be relatively partisan and the longer term interests of the agency tend to be overlooked. And the reason for focusing ahead on the FTC's centennial was to ask what the FTC has to do if by 2014 it hopes to be the type of agency that Congress meant it to be in the early 20th

1 century, and also to improve its operations to make
2 capital investments in a variety of different activities,
3 to put it in the position to be not simply a successful
4 part of policy making in North America, but to be a
5 constructive and effective participant in international
6 affairs.

7 And what we're seeking to do is not only
8 through a process of internal deliberations, but external
9 consultations, to see ourselves as others see us and use
10 that as a way of improving our operations.

11 The reason that we sought you out is, first,
12 you are astute observers of what we do. You're
13 particularly keen students of how we work, what we've
14 done in a variety of international settings. Some of you
15 have acted for clients before us. Some of you have been
16 our counterparts in public policy making and in different
17 government institutions. And all of you have, I think, a
18 particularly keen eye for what takes place in the world
19 of cross-border competition policy. From that collection
20 of perspectives, we're asking that you give us your
21 thoughts about, simply put, how we can do better and how
22 we can improve.

23 What we'll be doing probably by the very
24 beginning of January is preparing a report that distills
25 what we learn from this process and, in particular,

1 focusing on medium and longer term improvements to the
2 operations of the agency. There will be some parts of
3 that that are kept in-house completely because we are
4 taking a fairly unvarnished look at our own human capital
5 and asking, do we have the team that we will need on the
6 field to be effective, and those assessments are a bit
7 more delicate. But everything else will be put in the
8 public domain.

9 I would say, to date, we've learned an
10 extraordinary amount from talking with government
11 institutions, and non-government representatives and non-
12 government bodies alike.

13 One of my largest concerns in watching the
14 Commission over time is that some of the most exciting
15 and interesting innovations have been taking place
16 outside of North America and I think there's always a
17 danger for the oldest of the competition agencies to
18 sense that over a period of many decades we figured
19 everything out, and I detect, from time to time, a
20 complacency to think that long-standing, path-dependent
21 habits or structures can't be changed or shouldn't be
22 changed. And in the meantime, remarkable innovation is
23 taking place elsewhere, that is whether that's the Office
24 of Fair Trading's John Fingleton, and Sheridan Scott in
25 Canada, two people who, I think, are very thoughtful in

1 their views about what an institution has to do for the
2 longer term. The work that's been done at DG COMP is
3 also a remarkable process of regeneration, I would say,
4 in this decade with a variety of institutional reforms.

5 We can all form our own views about how
6 effective any of these specific measures have been, but I
7 think more than the U.S. agencies in the United States,
8 our counterparts are asking the right questions about how
9 to improve. And I don't know that answers to these
10 questions are readily forthcoming, but one of my very
11 candid fears is that I feel we're missing a good game in
12 this respect, that other groups are developing more of a
13 habit of asking probing, basic questions about what
14 they're about, how they operate.

15 One of my aims is that we develop more of a
16 culture of doing that as well, that we don't rely on
17 outsiders to drop in every now and then in the form of
18 blue ribbon panels or transition teams to give views, but
19 that we adopt a regular habit of doing this kind of
20 evaluation. Again, it could only be done effectively if
21 those with the highest opportunity costs are willing to
22 join us and give us their views.

23 We're going to be doing this in several
24 segments, but the first that James Cooper, my colleague
25 from the Office of Policy Planning at the FTC, will lead

1 focuses on questions of how to set a strategy, how to
2 select an agenda and a strategy for carrying that out,
3 and I'll turn to James.

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PANEL 1: ENFORCEMENT, ADVOCACY AND RESEARCH AGENDA

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MR. COOPER: Thanks, Bill. And, once again,

1 thanks to everyone for agreeing to take part in this.
2 This is a great help to us and we really appreciate your
3 time.

4 I guess I'd like to get started here. I want
5 to bring up some broad questions that apply to any
6 competition agency in general and, also, maybe drill down
7 and focus specifically on some FTC-specific issues. Now,
8 I suppose the -- and I would also add that Gotz, Luc and
9 Jim have sort of been designated the key panelists here,
10 but I would invite anyone to chime in, any of my
11 colleagues.

12 MS. COPPOLA: Okay. I have a tiny logistical
13 note. This is being recorded. It's not stenography.
14 So, although it's a little bit formal, if you could just
15 say your name before you start speaking, that would be
16 helpful later on when we're doing the transcript.

17 MR. COOPER: Okay.

18 CHAIRMAN KOVACIC: I would add one other
19 general ground rule that we've posed for our other
20 panelists, and I think quite useful for us, is that we're
21 always glad to collect roses, but we're interested in
22 thorns, too, today. So, don't pull your punches, though
23 with a smile, of course. But it is in the spirit of a
24 candid self-assessment rather than a mere confirmation of
25 everything we'd like to think about ourselves that we're

1 here today.

2 MR. COOPER: Thanks. I'd like to start off and
3 I'll address this to all three of our panelists and also
4 open it up to anyone else who would like to comment.
5 First of all, looking at case selection. That's
6 obviously a primary mission of any enforcement agency,
7 the FTC as well. How should one think about going about
8 case selection? Does it make sense to come in with an
9 agenda from the top down? The Chairman comes in and
10 says, these are the types of cases we're looking for.
11 Should it come from the bottom up? And, also,
12 specifically, what sort of cases should an agency be
13 looking for to maximize its impact on consumer welfare?
14 Large cases that impact a large part of the economy,
15 health care, energy? Should we also be -- how should
16 they be weighing deterrent effects or precedential value?

17 So, that's sort of the one, big, overarching
18 question I'd like to kick this off with.

19 MR. DRAUZ: Well, I think it certainly is a key
20 issue, and drawing a little bit on my previous experience
21 here being involved in case selection for quite a long
22 time, I think it also depends on how the organization is
23 structured, if you have a sectoral organization or you
24 have a more policy-oriented organization. But I think
25 the way that DG Competition does case selection

1 prioritization, you know, leaving aside the outcome now
2 in individual cases, I think, it's pretty good.

3 How would you start? I think it starts off by
4 -- it starts from a bottom up approach. It basically is
5 the unit -- you know, the case handlers who start to
6 think about cases. Of course, some of the input comes
7 from complaints -- it's a bit different in merger
8 enforcement, you know, where there is an obligation,
9 obviously, to run all these cases. But even there you
10 can and you have to prioritize your work. So, I think
11 it's very much a bottom up process.

12 Talking about conduct cases, it will lead,
13 after a period of maybe three, four months, sometimes a
14 bit longer, it will lead to a first report, a first case
15 report by sector, and this report will then be submitted
16 to a peer review, if you'd like, a competition by
17 competing projects because taking the starting point that
18 agencies have scarce resources, which not everybody
19 believes, but I think that should be the starting point.
20 Then, therefore, you have to make a choice, not only
21 between the cases, but in particular then how to resource
22 them. And if resources are short, then, of course, this
23 can only work if somebody gives way and there is some
24 kind of selection process.

25 You mentioned some of these criteria. I think

1 the industry in which this happens is of some importance.
2 I think there are industries which are highly
3 concentrated, where barriers to entry are very high.
4 Obviously, there are industries which are more in the
5 focus of attention of the public or, in your case, of
6 Capitol Hill, which I think is a fair point to somehow
7 incorporate in your selection.

8 On the other hand, I think it would be wrong to
9 take an over-industry approach. You know, if one year
10 ago you would have said, well, we're looking into petrol
11 cases because the dollar -- the barrel price is hitting
12 \$200, then now it would look very strange with the dollar
13 -- with a barrel by 60 or 70 -- I think it's never good
14 to orientate the agency towards one issue or even three
15 issues. I think you have to have a much wider play. But
16 I think industry is important.

17 Of course, consumer harm is an important issue
18 because all agencies at least claim now they have an
19 effects-based approach. It seems to me consumer harm, we
20 could talk about that a long time. But the disadvantage
21 of the consumer harm thing is probably that when you
22 start it off, you don't know so well, you know, where the
23 consumer harm will be.

24 Of course, you can decide if it's an Internet
25 case, you have a potential huge group of people which

1 could be affected. I think you mentioned deterrence. I
2 think deterrence is an important point, but I think it's
3 rather more in the cartel area, maybe a bit in Section 2,
4 but it's really a cartel point where I think you wouldn't
5 so much think about the industry and so on. I think the
6 important thing in cartel enforcement, which is not your
7 policy so to say, is rather to enforce against cartels and
8 show that you are active in those and create the
9 deterrent effect. But it could be considered under
10 Section 2 maybe to some extent.

11 And I think the precedent value, for me, is
12 extremely important. I believe that already in
13 government, but I think I believe it today even more,
14 which is also linked, I guess, to predictability, which
15 is, in my view, one of the highest goods in our business
16 and not always, you know, sufficiently followed up. So,
17 I think setting, of course, good quality precedents is
18 extremely important. Those precedents can also help you
19 then to formulate guidelines and policy later on.

20 I think you should never make guidelines before
21 you have really sufficiently looked at individual cases.
22 And if I look at DG Competition, the 82 guidelines, I
23 think one of the problems that takes so long and is such
24 a complicated process is that, in many ways, there were
25 not sufficient precedents, valuable precedents there. A

1 lot of it is kind of invented, it's not really based on
2 tested cases.

3 I was probably too long.

4 MR. COOPER: James?

5 MR. VENIT: Just some reflections on that. I
6 mean, obviously, your task is complicated by the fact
7 that you're partially a consumer protection agency which
8 gives you a very different agenda and, also, subject to
9 some political influence or pressure at least from the
10 Congress, from Capitol Hill which is, you know, the oil
11 at \$200 a barrel kind of cases is typical.

12 I think what I've begun to see, and it may be
13 interesting just to give you some perspectives on what's
14 happened in Europe a little bit, particularly under this
15 Commissioner, for the first time, sectoral inquiries
16 became an important thing. And, frankly, the most
17 lasting achievement may well come out of the energy
18 sectoral inquiries if the Commission does succeed in
19 unbundling the transmission networks from supply.

20 Again, I think one has to be very careful in
21 choosing industries, and I think Europe is a much better
22 place because we have a lot more problems probably than
23 in the U.S. But I think the notion of focusing on key
24 sectors, like health care, for instance, may be one, has
25 some merit to it as opposed to purely proceeding from

1 individual cases.

2 I mean, another very important difference
3 between Europe and the U.S. is you have a much more
4 active civil litigation system which filters out, in some
5 ways, a lot of cases and, also, makes it less necessary
6 for you to take individual cases because it's percolating
7 through a parallel system. We don't have that as much
8 here and I think there's been more of an interventionist
9 approach by the Commission and, frankly, you know,
10 complainants, rather than going to national courts,
11 although that's starting now, traditionally have always
12 gone to the Commission. And I think that's a trickier
13 area because it sometimes takes a while to evaluate the
14 validity of a complaint.

15 The other thing I think that's very important,
16 before ever taking an individual case on, is to ask
17 yourself a question, if I had to put a remedy in place,
18 what would it be and will it make things better or worse?
19 And that's kind of the rule of thumb I use, but, of
20 course, I have absolutely no administrative power
21 whatsoever and it doesn't do me any good other than as a
22 common sense check. But I think that is a very important
23 discipline to take on before one gets involved in an
24 individual case.

25 MR. COOPER: Yes, Luc?

1 MR. GYSELEN: Yes, Luc Gyselen. I'd like to
2 take one step back. What Gotz said is of course, right,
3 there's essentially a bottom-up approach. However, DG
4 COMP's staff have to fit their ideas into a broader
5 policy framework. What impressed me in my last few years
6 at the Commission, was that all its departments,
7 including DG COMP, were doing two things they had not
8 been doing before.

9 First, each of them has to clarify each year
10 how it will contribute to the Commission's most important
11 substantive policy initiatives -- better known as the
12 "Lisbon Agenda." Now, this sounds a little
13 stratospheric, but this agenda is all about trying to
14 create the strongest knowledge-based economy in the
15 world. Each year, the Commission adopts an "Annual
16 Policy Strategy" ("APS") and each department must
17 identify what actions it will undertake in order to make
18 that strategy work.

19 Second, the instrument that each department,
20 including DG COMP, is given is called "activity-based
21 management" ("ABM"). The whole idea is that everyone at
22 middle management level -- say, every section chief --
23 will have to justify the use of his/her scarce resources
24 with reference to the priorities that will have been set
25 by the DG in line with the Lisbon Agenda. In other

1 words, there will be a sort of cascade system requiring
2 each micro cosmos within the Commission to flag up to the
3 hierarchy the matters that are worth being invested in,
4 given the strategic choices that will have been made by
5 the Commission.

6 What you have now in place is a formidable
7 strategic plan. It's a rolling plan. Every year, DG
8 COMP will publish its "annual management plan" ("AMP").
9 Maybe a few of us read it. I think it makes interesting
10 reading. It's DG COMP's agenda for the next year. The
11 AMP has figures about how many resources will be spent on
12 which activities. It is only a best endeavors exercise,
13 it's not perfect. But at least it's trying to link the
14 scarce resources to DG COMP's classic enforcement and
15 policy making activities. All these activities are
16 linked to the priorities set out in the AMP and these
17 priorities are linked to the objectives set out in the
18 Commission's APS.

19 Admittedly, this cascade system may be unique
20 for Europe. Let us bear in mind that DG COMP is not an
21 independent antitrust agency. It's part of the
22 Commission. Quite logically, its work has to fit into
23 the annual policy strategies, as defined by the
24 Commission -- which in turn must fit into the
25 Commission's five-year action plan, which ultimately must

1 be hooked onto the original Lisbon Agenda.

2 However, the key point I want to make is that,
3 in my view, all competition enforcement agencies should
4 have a plan that sets out their strategic objectives and
5 that they all need a procedural mechanism that enables
6 them to obtain regular endorsement by those that are
7 politically accountable for their activities. In Europe,
8 Neelie Kroes will present her program to the European
9 Parliament. I have to admit I do not know whether the
10 FTC has a clearly articulated management plan and
11 presents it at regular intervals to those -- I guess
12 Congress -- that are politically accountable for its
13 activities.

14 In any event, in Europe case selection will
15 ultimately be connected to the top priorities, as they
16 will have been set out in the documents that I mentioned.
17 Take sectoral inquiries. They don't fall out of heaven.
18 DG COMP uses them to figure out whether it is worth
19 spending its scarce resources in given sectors that -- at
20 first sight -- seem to function less than optimally and
21 whether its interventions in these sectors can make a
22 difference for consumers.

23 CHAIRMAN KOVACIC: Luc, if I could ask, and
24 maybe others at some point can come in on this point, do
25 members of the Bar, consulting groups, in-house counsel,

1 do they follow this management plan closely? That is, do
2 they read it? Do they see this as an informative guide
3 to what the institution is likely to do so that this is
4 something that people look forward to seeing? And upon
5 seeing it say, yes, that is a useful indication to us of
6 what the institution means to do.

7 MR. GYSELEN: In my experience, one does not
8 read it enough or one does not read it carefully enough.
9 This is probably so because its language is at times a
10 bit woolly. It does not publicly announce where exactly
11 the new action will take place.

12 But if you read between the lines and if you
13 connect that with, say, speeches from Philip Lowe or
14 Neelie Kroes, you get a better feel for the state of mind
15 of DG COMP and the Commission in the area of competition.
16 That I very strongly believe in. So, it's something that
17 I personally regularly highlight in client meetings,
18 conferences, et cetera -- as background, not more than
19 that.

20 MR. VENIT: Jim Venit. I think there's a very,
21 very big difference here, though, between the European
22 experience and the United States. As Luc pointed out,
23 this central plan is coming out of the "Lisbon Agenda,"
24 which is a broadly defined political agenda that's coming
25 out, you know, at the level of the Commission and the

1 competition authority is merely a part of the Commission.

2 I'm not sure that that model would lend itself
3 to transposition in the United States very easily, nor am
4 I sure that it's completely appropriate because you also
5 have to bear in mind that Europe is in the process of
6 trying to create a unity out of a multiplicity and
7 certain, for instance, sectoral innovations, like energy,
8 like telecoms, were designed very much to break down
9 national barriers and expand opportunities and
10 competition in what were classically monopolistic
11 structures.

12 But, you know, to transpose that model into the
13 U.S. and to imagine the same degree of political
14 direction, I would be weary of that in terms of the
15 independence of the competition agency itself, frankly.

16 MR. GYSELEN: I'm not disagreeing. My point is
17 not that the EU model should be copied in the U.S. -- not
18 at all. The point is that it seems extremely important
19 to me for even an independent agency to have a clear set
20 of goals in function of which you set your priorities and
21 that you seek somehow endorsement by those that are
22 politically accountable. That's what I wanted to distill
23 from what is indeed a very European mechanism.

24 You need a solid, coherent, substantive agenda
25 as reference point for your actions. You don't pick your

1 priorities in a haphazard way -- you don't just decide
2 overnight what you will do this year or next year. I'm
3 not saying that you do that today!

4 CHAIRMAN KOVACIC: Maybe a little.

5 **(Laughter.)**

6 MR. GYSELEN: I said I would try to be kind.

7 **(Laughter.)**

8 MR. DRAUZ: On the Lisbon Agenda, there is, of
9 course, an element of artificiality in that Lisbon
10 Agenda. I don't know whether today it's still done the
11 same way. But to get into priority at some stage, you
12 had to link it to the Lisbon Agenda and people were very
13 ingenious in that and were able to link certainly the
14 Microsoft case, you know, as well as any cartel
15 enforcement to the Lisbon Agenda. And I think there was
16 a limit of what you can do with this kind of political
17 stuff.

18 I think what I wanted, also, to say is that it
19 is quite important how you not only fix your priorities,
20 but that you follow it through as well. And, there
21 again, I think the Commissioner has created this kind of
22 -- one deputy of Philip Lowe is basically in charge of
23 running that system and, you know, the case location and
24 the resources and so on. And I think it's quite
25 important that if you separate that function a bit from

1 the normal structure, because otherwise you have a
2 bilateral fight, you know, between John and myself, for
3 example, in the good old days, you know, who gets a post.

4 Now, if you have a more over-arching system,
5 then you can say, John, you have an important case which
6 is really a priority and you will get resources on a
7 temporary basis for that project, rather than move the
8 people onto your unit or to whatever, which is always a
9 big fight in organizations. So, I think this flexibility
10 in using resources is very important, a logical necessity
11 to that kind of system.

12 MR. GYSELEN: Before I stop talking for a
13 while, I just wanted to make one more observation about
14 the connection between DG COMP's down-to-earth priorities
15 and the Lisbon Agenda. In one respect, there is at times
16 a bit of a disconnect. When DG COMP says that is
17 competition policy aims at preserving consumer welfare --
18 what does that in fact mean? What is consume welfare?
19 You can define it in various ways.

20 CHAIRMAN KOVACIC: I thought it had a precise,
21 specific meaning. That's why it's become so popular.

22 **(Laughter.)**

23 MR. GYSELEN: Well, DG COMP tends to measure
24 consumer welfare primarily in terms of impact of a merger
25 or conduct on prices. Now, that is not fully in line

1 with the Lisbon Agenda. The Lisbon Agenda hammers in the
2 point that we should -- we, Europe -- should do
3 everything we can to make it the most innovative market.
4 So, it's innovation that matters. And it should matter
5 at least as much, if not more, than prices.

6 So, if DG COMP were to implement the Lisbon
7 Agenda even better, one would have to see that reflected
8 in cases, and that I don't see it, frankly.

9 MR. COOPER: Jonas, you had a --

10 MR. KOPONEN: Yeah, just to come back to one
11 point that Jim raised earlier about what is -- at the end
12 of the day, if an infringement is established and so on,
13 if it fits within the political mandate, within the
14 Lisbon Agenda or whatever it is, not only must we think
15 about effects, oriented analysis and so on, but also
16 think about what is the end result. What if there is an
17 infringement? What can we do to improve the situation?
18 What is the remedy? I think that on the merger side, a
19 great deal of work has gone into thinking about how can
20 potentially harmful effects be remedied in merger
21 situations.

22 But on the Section 2 side of things, I think
23 we've seen, not least here in Europe, some big question
24 marks around remedies that have been imposed or have been
25 considered in those type of cases.

1 So, I think that that's a very important part
2 of case selection. Not only how does this fit into the
3 political agenda, but if it does, what can you do about
4 it? What are the limits of competition policy
5 intervention?

6 MR. COOPER: John?

7 MR. TEMPLE LANG: I would like to make a
8 criticism of both the Commission here and the FTC, to
9 some extent, also the Department of Justice, because I
10 think that they've all tended, to a greater or lesser
11 extent, to focus on choosing between the things that they
12 have traditionally done. And one of the big differences
13 that I've noticed between European law and U.S. law is
14 that European law gives the possibility to the Commission
15 to challenge national measures, legislative or other,
16 which restrict competition. Now, there's a big variety
17 of those and some of them are undoubtedly more
18 economically important than others.

19 But it seems to me that that area of European
20 law is under-enforced by the Commission. It's not easily
21 enforceable by national competition authorities or
22 private parties. And although you don't have the same
23 possibilities in the United States for challenging that
24 sort of legislation directly, it seems to me that it's a
25 big area where you need to look and see what you could

1 do. It would probably be competition advocacy rather
2 than individual case selection. And you should do what
3 you can first to assess how important it really is
4 because there are, I'm sure, Mickey Mouse measures in
5 small states which have no economic significance. But in
6 some states, I'm sure there are -- I know there is
7 legislation that it would be well worthwhile for you to
8 challenge.

9 MR. BAVASSO: The importance of political
10 endorsement is even greater in the times that we're
11 living in. And I think in Europe we have learned a very
12 important lesson because, as John was saying, the
13 Commissioner has this dual role of enforcing competition
14 on a European basis, which also means taking on the
15 member states from time to time.

16 Now, if you look back at about a year and a
17 half ago, we had what is sometimes referred to as the
18 "Sarkozy Amendment" to the draft reform treaty, which
19 created quite substantial shockwaves in Brussels. That
20 episode was quite revealing in the sense that it shows
21 that there is a quite distinct trend coming through from
22 member states along the lines of "what has competition
23 done for us?" That is a political trend and it's a huge
24 challenge for the Commission as it needs to make sure
25 that they have the political endorsement for its actions.

1 Because those actions are constantly challenged at a
2 political level, particularly at member state level.

3 Now, let alone the political agenda, we now
4 live in a time where -- if you use the metaphor of a
5 Formula One Grand Prix -- the safety car is on the Track;
6 everyone has slowed down and the Commission has to deal
7 with a dual challenge. On the one hand, they're seeing
8 more and more in the last two years, and as a result of
9 the financial crisis even more, a retreat towards a sort
10 of economic nationalism. So, potentially, greater use of
11 national law to shelter "national champions" from this
12 financial crisis.

13 And on the other hand, you see a greater
14 tendency (or at least a temptation to have) a more lax
15 system of competition on a national level. So, the
16 Commission has a dual challenge of making sure that
17 competition law does not impede the necessary measures
18 that are necessary to come out of this crisis, and on the
19 other hand, that competition law is enforced forcefully
20 when this sort of safety car goes out of the race and
21 people are supposed to race again as they used to.

22 MR. COOPER: I think that's a really good
23 point. I want to, I guess, maybe skip ahead to something
24 because it seems relevant to where this discussion is
25 going. We can circle back onto enforcement. But one of

1 the roles of the -- one of the missions of the FTC and
2 other competition agencies, I believe, is to inform the
3 public about the value of competition because oftentimes
4 consumers may not completely understand the value of
5 competition. We see that in the energy sector in the
6 U.S. where we have consumers calling their Congressmen
7 asking for price gouging laws or asking for more direct
8 price controls.

9 Relatedly, policymakers, whether they
10 understand competition, how it's good for the economy or
11 whether they don't. Often, they view competition maybe
12 more in terms of fairness or not really understanding the
13 true role of competition and driving lower prices or
14 driving better quality. What role should a competition
15 agency play in informing consumers and policymakers and
16 how would we measure how successful we are in that role?

17 I'll throw that out to anyone.

18 MR. VENIT: You know, let me try and address
19 advocacy. I mean, I think advocacy depends a lot on the
20 receptiveness and the preparedness of the audience for
21 the advocacy. Frankly, I don't feel enough in contact
22 with the American public anymore to have any sense of how
23 they respond, for instance, to the enforcement priorities
24 of the Justice Department or the FTC other than I can
25 imagine there would be visceral reactions to things like

1 I'm paying too much for gasoline when the price is high.
2 There, I think, you know, the advocacy problem is one of
3 disappointing consumer expectations and pointing out this
4 may be a problem that we can't really deal with, nor that
5 we should try to interfere with.

6 It's very interesting. I was at a conference
7 about two years ago where the sense I got was that a
8 competition agency, when confronted with someone else
9 doing price regulation, would rather do it itself on the
10 theory that it might be less wrong than the specialized
11 regulator would get it, but as a last resort. In other
12 words, here's something I don't want to do, but I'm
13 forced to because someone else may do it for me.
14 And I think, frankly, the adversary role there is going
15 to be very difficult and probably futile because it's
16 going to be very hard to convince someone who's paying
17 \$40 for a liter of gasoline that that's okay instead of
18 when he was paying \$23 six months ago.

19 I would like -- if it's okay to circle back
20 just quickly or --

21 MR. COOPER: Yes.

22 MR. VENIT: Just, again, to point out some of
23 the radical differences between Europe and the U.S. A
24 large and significant part of the Commission's activities
25 is being directed towards controlling state aid. In the

1 United States, you don't control state aid. I think the
2 reason why is you have a mobile labor population and, so,
3 you don't need to worry about it quite as much. But in
4 any event, you know, a significant amount of Commission
5 activity has gone into controlling state aid.

6 I've also always thought that we Europeans
7 would be shocked if we knew how many state
8 anticompetitive measures there were that exist in the
9 United States and, frankly, how perhaps partitioned the
10 U.S. market is. For some reason, your economy seems to
11 absorb that and plunge ahead and function well. But,
12 again, that's been a very big part of European
13 development, but is also run into the realization that
14 there is a state prerogative to legislate and regulate on
15 its own and there's been a confrontation there. So, the
16 rules are very, very different and, in a certain sense,
17 the state aid thing is just the most dramatic.

18 MR. COOPER: Yes, Hendrik?

19 MR. BOURGEOIS: Yes, this is Hendrik Bourgeois.
20 I think your second question, in a way, is very much
21 related to your first question. I think the way to, you
22 know, ensure you have effective competition advocacy is
23 to make good case selections, more than anything else.
24 You have the macro level with political declarations and
25 the Lisbon Agenda, but to me, this is just a marketing

1 tool to increase the legitimacy of EU institutions,
2 basically, and its trying to answer the question of
3 European citizens, what is the EU doing for me, as
4 Antonio indicated.

5 And for users of competition policy, the
6 byproduct of that is that you can somehow somewhat
7 distinguish broad priorities, but, to my mind, relying on
8 criteria such as am I going to be able to impose an
9 effective remedy is much more useful in understanding the
10 priorities and the predictability of intervention, which
11 has also positive effects on enforcement in general.

12 For competition law authorities, instead of
13 trying to focus their priority agendas on complying with
14 these broad general principles, which may result in good
15 enforcement actions, but maybe not, I think its really
16 much more important, much more effective to be able to
17 come up with cases that really demonstrate to consumers
18 and businesses that they are doing a good job.

19 MR. COOPER: A follow-up to that, though, just
20 to play a little devil's advocate, I would imagine that a
21 lot of consumers in the U.S. would be thrilled if we
22 announced we were suing Exxon or Eli Lilly for something
23 because they hate high drug prices, they hate high gas
24 prices. But we won't because -- what, unless there's a
25 reason to, we wouldn't just do it because prices are too

1 high. But that would be probably very politically
2 popular. I think that gets back to how do you deal with
3 informing -- getting that competition message out to the
4 populous or to the policymakers to say high gas prices
5 are -- you know, I feel your pain, but this is why --
6 which is the exercise that some of us go through on the
7 Hill often where you push back and push back and -- how
8 do you accomplish that when -- and show -- I guess maybe
9 this is the role of intellectual leadership perhaps.

10 How does a competition agency go about doing
11 that? Is it possible?

12 MR. VENIT: You know, the political world
13 always scares the hell out of me, and when you get
14 populous demand for things, I think that's very dangerous
15 for a competition authority. I think one practical thing
16 may be to begin your educational policy not directed at
17 the populous at large, but directed, for instance, at the
18 Congress, directed at the politicians themselves, the
19 lawmakers, and try and educate them into the complexities
20 of the problems, what the agency's mission is and why it
21 may not be able to respond to certain populous demands
22 and try and deal with it at that level.

23 I mean, I think it's very, very difficult to go
24 directly, you know, to the public or the populous as
25 itself. So, I think what you have to do is target the

1 opinion leaders on the Hill and maybe in the state
2 governorships as well or within the State AGs, if they
3 were at all susceptible to listen to a federal agency,
4 and target opinion makers rather than having any hope of
5 controlling the wide beast of the populous.

6 MR. COOPER: Rachel?

7 MS. BRANDENBURGER: I think, also, you're
8 talking about case selection. Jim made the point
9 earlier, but I think it's worth perhaps emphasizing. One
10 of the major differences currently still -- although it
11 may change over time -- between the U.S. and the EU is
12 the private action system in the U.S. I think how you
13 select cases as an agency where you've got a very vibrant
14 -- some might even say over-vibrant -- litigation system
15 is perhaps raises a different set of challenges from what
16 we currently have in Europe. Although this is something
17 that we may well have to grapple with over time in Europe
18 as well.

19 MR. COOPER: Gotz?

20 MR. DRAUZ: Well, I think it's very important
21 that you can show excellent results, I think, in your
22 advocacy. I think it must be very hard to go to the Hill
23 or to any body and explain why you don't intervene into
24 oil prices. I mean, the effect of this advocacy is
25 probably bad feelings on all sides, you know. I mean,

1 I'm not saying you shouldn't go there if you have to go,
2 but it might be better if you go there and you have just
3 challenged a merger in that field. You show some
4 activity in the area.

5 But I think the cases are very important and,
6 also, whether you succeed or not succeed. You can have
7 sometimes a very good defeat, but it's rare. I think
8 it's normally the positive win. And if I look at the
9 FTC, it is something a bit more, you know, more critical.
10 If I think about the FTC today on that count, I would not
11 be too impressed. I think in the past you lost a lot of
12 your merger cases in the hospital area one after the
13 other. I remember that because I lost cases myself and I
14 know how it feels.

15 But if you look at on the patent -- only last
16 week, there was this decision on this, you know, patent
17 settlement issue where the public impression is, at least
18 right or wrong, leaving that aside, that you are on the
19 wrong horse there. There's another horse that will come
20 to the finish somewhere successfully.

21 If I look at Rambus, you know, I think it's a
22 disaster in my view. The criticism on Rambus -- you
23 know, not whether it's right or wrong, but the criticism
24 of the FTC in a court is really a disaster. It reminds
25 me of Airtours which the Commission has widely accepted

1 as a defeat and started to build on that, the form -- the
2 form process.

3 Whole Foods, for me, is also not overly
4 convincing in the way that the FTC seems to hunt this
5 target, you know, because it simply can't let it go.
6 Everybody knows that at least in Europe -- and I've just
7 done a supermarket case -- at least in Europe, you know
8 that the supermarkets, even the discounters in Europe,
9 are sometimes the strongest in bio products. In Germany,
10 one of the two discounters is maybe -- has maybe the most
11 prominence and got into that area, you know.

12 So, I think -- if I look at that, I mean, I
13 don't make a judgment here, but I would be -- I'm kindly
14 not impressed about it and I think, you know, because
15 these things travel enormously, they go around the world.
16 Rambus and Whole Foods have gone around the world X
17 times. After all, they may not be so significant to
18 another remedy, but I think it hangs on your -- it's a
19 heavy...

20 CHAIRMAN KOVACIC: As a bit of a sidebar on
21 that point, how do people learn, on what basis do people
22 inform their impressions about what's happening in the
23 litigation world and, more specifically, if I were to
24 come up with a list, do they get it, A, from the Global
25 Competition Review Summaries; B, from the Financial

1 Times; C, from a client newsletter that says here's
2 what's going on; D, actually reading the decisions?
3 Where do people form their impressions?

4 As Gotz was saying, it goes round and round the
5 world. Where do people get their views about what's
6 going on and how good it is or how bad it is?

7 Mr. Temple Lang: I think the most important
8 and the most widespread opinions are got from the less
9 specialized media, like the Financial Times and the Wall
10 Street Journal and so on. Those are the ones which give
11 at least superficial impressions to the largest numbers
12 of people about what's happening, and it is superficial
13 impressions that give rise to public opinion, maybe right
14 or maybe wrong. They are much more influential, I think,
15 both for a greater number of people and because of the
16 extent to which something becomes popular received
17 wisdom, whether it is right or not.

18 MR. BAVASSO: But it depends on the people
19 you're talking about, Bill. Because when you have a
20 journalist on the Financial Times, say, doing an opinion
21 piece on how the FTC is doing, what they will do is they
22 will talk to the experts or they'll call Gotz and gather
23 his views and the journalist will be influenced by what
24 Gotz says or Rachel or John. So, at different levels, I
25 think an authority needs to exercise intellectual

1 leadership between its peers, between the users, between
2 a wider range of users; i.e., people who are experts, and
3 then go on to influence the wider multipliers, the
4 specialists or less specialist publications and
5 newspapers that form the public opinion.

6 So, I don't think it's binary. I think you
7 need to take into account all different potential sources
8 of variation.

9 CHAIRMAN KOVACIC: As a rough test of this, how
10 many people do you suppose followed the Inova Prince
11 William, County Hospital merger case? Is that something
12 that people followed? This didn't result in a litigated
13 decision, but the parties walked away after the
14 preliminary injunction action was filed.

15 Mr. Venit: I think one of the things you have
16 to be aware of, as soon as you get into the domain of the
17 newspapers, is that there's ideological bias floating all
18 over the place and --

19 CHAIRMAN KOVACIC: Say it isn't so.

20 Mr. Venit: And we know what the story lines
21 are. I think one way to combat that is by having a very
22 effective policy of post-merger review and analysis and
23 really seriously studying what was the result of that
24 decision, what's happened in that sector now that we did
25 or didn't do something, and I think that's probably the

1 best defense to the public reaction to things. I think
2 that's indispensable for an agency to engage in. And I
3 think that that, more than anything, frankly, is a way of
4 gauging yourself, gauging how effective you're being, to
5 some extent, maybe immunizing yourself against some
6 criticism if you got it right and reforming, you know, if
7 you didn't get it right.

8 But that's my only answer to that.

9 MR. DRAUZ: The parties walked away. This is
10 not a message which leaves any traces in people at all.
11 I think if -- for example, the Commission, you know, in
12 my term, we fought very hard to make it difficult for
13 people in second phase to withdraw. One of the reasons
14 was that, obviously, you don't want to run a very heavy
15 case for six months and then, in the last moment, they go
16 to the Commission meeting and say, oh, it's withdrawn.
17 So, we did a lot to make that hard and difficult.
18 Because the -- for your advocacy, you know, you may have
19 100 people walking away from something or, you know,
20 saying about the (inaudible) thing, people aren't looking
21 at that. People are looking at the prohibition, at the
22 negative decision or the other way around, you know, the
23 Commission lost in court.
24 So, I mean, unfortunately, this is not fair and
25 it is not good, but it's like that.

1 CHAIRMAN KOVACIC: But how people form
2 impressions is quite important.

3 MR. VENIT: I'd disagree with that. I mean, I
4 think to a sophisticated audience, the fact that people
5 walked away meant they didn't want to run the risk of
6 litigation and you won. And I think that's how that has
7 to be understood. Maybe at a time when an agency is
8 young it needs a lot of prohibitions to make itself feel
9 that it's established. But, you know, Gotz, there was a
10 period of time where -- and in some cases where the
11 Commission would have been delighted if the parties had
12 walked.

13 So, I think you have to always play to the
14 highest level and if there's not a correct understanding
15 of what it means that the parties walked, then engender
16 that in the public rather than -- well, first of all, you
17 can't force them to litigate with you anyway.

18 MR. DRAUZ: It was only my perception.

19 MR. VENIT: Yeah, I understand, I understand.

20 MR. DRAUZ: I'm not saying it can't be great.
21 You know, it may be a better success if you go away then
22 have a bad negative decision.

23 MR. VENIT: No, but what I'm saying is I think
24 you have to educate people's perceptions so that they
25 understand what looks like, you know, a no-contest, the

1 parties stopped fighting, so nothing -- it was a draw,
2 it's not really a draw. But that you do by education.

3 MR. BOURGEOIS: I agree with Jim's points. I
4 would even say that it goes beyond that, too. To a
5 sophisticated audience, even the fact that an authority
6 intervened in trying to obtain and in obtaining some type
7 of remedy, I think is already perceived as, you know, a
8 win for the agencies.

9 MR. COOPER: If we're thinking about this, I
10 mean, this ultimate exercise is about setting up --
11 looking at it like we're getting a report card. We're
12 going to put some grades in there for the FTC. What role
13 would sort of a win-loss ratio in cases, if that were on
14 this report card -- I mean, you can think on one side if
15 you lose a lot of cases maybe you're not -- your actions
16 aren't really in the public interest. Maybe that's a
17 barometer of that. But at the same time, you think of
18 maybe Schering and Rambus, maybe you're pushing the law
19 in the right direction.

20 How can you distinguish between the two? And I
21 guess the bigger question is what role does -- if you're
22 looking at the end of the day and you're trying to
23 evaluate the effectiveness of a competition enforcement
24 mission, what role does winning cases play in that as far
25 as evaluating that?

1 John?

2 MR. TEMPLE LANG: You, obviously, have to win a
3 reasonable proportion of them or your reputation will
4 suffer. But I think you also have to recognize that at
5 least from time to time you're going to have to bring
6 cases to try to establish the law where either it seems
7 to be wrong or it isn't sufficiently clear or you want to
8 push the boundaries, to some extent, and you can't -- by
9 definition, you can't guarantee to win cases of that
10 kind. So, you have to bring a small number of -- or a
11 relatively small number of carefully selected cases for
12 that purpose with the maximum build-up and maximum
13 explanation as to what you're doing while you're doing
14 it, as well as after.

15 If I may, I have one other comment. From time
16 to time, I think the competition authorities fail to
17 point out the significance of something that has
18 happened. I'll give you another instance other than this
19 hospital case. Twenty-five years ago or thereabouts, the
20 Commission sent a statement of objections to a bunch of
21 German electronics companies saying, in effect, you have
22 to license this little Finnish company, Sellaura
23 (phonetic) with the patents that are essential for the
24 patent pool for the new stereophonic television system in
25 Germany.

1 The companies didn't argue. The case was
2 settled. Sellaura got its license. The Commission noted
3 in this in a page and a half in the Competition Report.
4 The enormous importance of that policy was completely
5 lost as far as I can see.

6 MR. COOPER: Gotz?

7 MR. DRAUZ: I think you can lose a case where
8 substance is vigorously disputed and I think that's --
9 you lose an argument in court after making all your best
10 efforts. So, I think that's a different loss than the
11 loss of being told by the courts, you know, you haven't
12 done your job. I think that kind of thing which was at
13 the origin -- which is what's behind Airbus, you know,
14 you haven't done your -- even if ultimately the decision
15 could have been right or wrong. But if it's this
16 criticism which was really -- which was, to a
17 considerable degree justified, which I think you have to
18 avoid because that sits very deep and it took the
19 Commission actually years to get out of that corner.

20 So, I think losing and losing is different, but
21 it's certainly true you have to show you can win and win
22 repeatedly and keep on the image of kind of -- you know,
23 you are kind of a winner and you pick your fights well
24 and you win more often than you lose. And, of course, if
25 you look at the Commission, or generally at Europe, at

1 least, you -- you know, I would predict today that the
2 next 82 case which the Commission brings in court, they
3 will lose it, because they have eaten a lot of credit in
4 the Microsoft case, for example, and I'm sure that there
5 will be a backlash.

6 From my understanding of mergers, you know, I
7 can now completely understand why in 2002, the Commission
8 lost -- suddenly lost cases, because there was a bit of
9 an arrogance, there was a bit of, you know, not listening
10 enough to what parties were saying and, you know, things
11 like that. If you win too long, if you win for 12 years
12 constantly, then this can become a problem. And I'm sure
13 that in the court in Europe, the Commission will start to
14 lose cases at some stage. I'm sure about that. But
15 maybe not Mrs. Kroes because she will have moved on.

16 But that's the problem, you know. Because if
17 you are a politician, you may want to leave a great
18 legacy behind you because afterwards it's the next
19 Commission which will collect the losses.

20 MR. COOPER: Jim?

21 MR. VENIT: I think that's a very salient
22 observation. Both on sometimes a win is not a win and
23 sometimes a loss is not a loss. But there seems to be,
24 at least in the Commission, a kind of life cycle of a
25 Commissioner for Competition coming in with ideas of

1 maybe changing things and some bold new designs, and then
2 getting interested in enforcement because of the
3 publicity is just too enticing to give up. And I think
4 as Gotz correctly says, there's a risk and a tendency
5 towards arrogance, towards starting to ignore details,
6 cutting corners and whatnot. And the courts will
7 eventually respond to that.

8 Again, I have no sense that the U.S. agencies
9 are susceptible to the same vice or not, but I --

10 CHAIRMAN KOVACIC: Absolutely not.

11 **(Laughter.)**

12 MR. VENIT: But I think it's been clearly a
13 very evident systematic and developmental thing of each
14 individual Commission.

15 CHAIRMAN KOVACIC: I think a problem in the
16 U.S. system with the limited tenure of top officials is
17 that we tend to be graded, in effect, on the number of
18 take-offs and departures rather than landings. You know,
19 imagine an airline that simply measured its effectiveness
20 by take-offs. It had a departures board, but not
21 arrivals, or there wasn't a good link between where they
22 thought the plane was to arrive and where it actually
23 reaches Earth.

24 There's an enormous capacity in the U.S. system
25 to impose tremendous external costs on your successors if

1 you are seduced into thinking that by the time difficult
2 judicial decisions are ultimately taken, I'm out of here.
3 And there's not so much of a tendency in our system to
4 put the wins and losses on your paycheck. That is less
5 true for mergers because those tend to be litigated in a
6 more immediate way so that you do tend to be assigned
7 credit or blame for those. But for non-merger matters,
8 you can blame intervening agents, say it was doing pretty
9 well when I left. I'm sure that's what Captain Smith
10 said at about 11:00 on the night of
11 April 11th, 1912, we're doing pretty well.

12 It is a serious difficulty. How do you give
13 incumbent leadership incentives to take decisions that
14 have good, long-term effects for the economy and for the
15 institution? Because the feedback mechanism is pretty
16 weak.

17 Mr. Venit: Is the answer to that maybe really
18 studying the agency's performance record ex post by
19 constant review to see what the consequences have been,
20 which may change the culture of, you know, enforcement
21 prosecution into did we bring the right case and did it
22 come to the right result?

23 CHAIRMAN KOVACIC: It's certainly a way to
24 close the loop a bit more than we do now.

25 MR. COOPER: I'd like to thank everyone. It

1 looks like we've run out of time here for this first
2 panel. We spent a lot of time on enforcement, touched a
3 little bit on advocacy and didn't really even get into
4 research. I'm hoping maybe we can get into some of those
5 questions in the next two panels, but I want to thank
6 each of you --

7 **(Break in recording.)**

8 MR. COOPER: -- lively discussion and some
9 great information. We'll take a small break and start
10 off with Alden's in a second. Thanks.

11 **(The first panel concluded.)**

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15 **PANEL 2: ASSESSING AGENCY EFFECTIVENESS**

16 MR. ABBOTT: -- the FTC. Welcome back.
17 Before I start the second session, which deals with
18 criteria and techniques that we could use to measure --
19 we, the FTC, could use to measure our success, I would
20 quickly ask if there are any closing comments on the
21 first -- related to the first panel that anyone would
22 like to make very quickly. And if you do make comments,
23 please identify yourselves.

24 (No response.)

25 Mr. Abbott: Okay. Well, let me move on then.

1 Again, just to facilitate as a reminder, again, Alden
2 Abbott again, To facilitate recording the information,
3 we would ask people as they break into the conversation
4 to repeatedly introduce themselves. If someone forgets,
5 I will just refer to the individual by name.

6 The second panel deals with the important set
7 of issues of the criteria and techniques the FTC could
8 use to measure its success as a competition consumer
9 agency. We've got three top-notch legal and economic
10 experts, Jorge Padilla, John Temple Lang and Antonio
11 Bavasso, to address these issues. And we have a number
12 of questions which have been set forth already. What I'm
13 going to do is ask certain individuals to take the lead
14 on key questions.

15 We're going to open up by addressing the
16 question that was alluded to in the first session. Is
17 welfare the appropriate measure of effectiveness for what
18 we do? And, if so, how can we estimate the welfare
19 benefits of our actions? I would ask Jorge Padilla to
20 start off by addressing some of these welfare-related
21 questions.

22 MR. PADILLA: Thanks very much, Alden. Is
23 welfare the right measure of effectiveness? I think that
24 the first question, as an economist, is what are the
25 alternatives? For us in the way that we are trained,

1 welfare is the ultimate object and it's not clear that
2 there are alternatives.

3 Now, if you talk to people in the competition
4 policy world, actually, you'll find that some people have
5 some alternatives in mind. I think that in some places,
6 particularly in Europe, you hear notices of fairness and,
7 most often, you hear things such as bribery, competitive
8 process, et cetera, which are, from the viewpoint of
9 economists, relatively ill-defined and, in one way or
10 another, we're going to always try to link to, you know,
11 what are the welfare implications of adopting those
12 measures.

13 So, for an economist, the issue is not whether
14 it is the appropriate measure because, that said, how do
15 you define welfare and how narrow or broad you go about
16 defining welfare. Do you just take into account consumer
17 welfare? Do you take a measure of total welfare, that is
18 consumer welfare plus producer's profits, productivity, a
19 weighted measure of the two? Do you look at the short
20 term? Do you look at the long term? Do you just look at
21 sort of the welfare implications in the markets in
22 question, the markets that have been subject to
23 intervention, or wider implications in the economy?

24 So, we don't see, as economists, and I don't
25 see as an economist, alternatives to welfare. What I see

1 is lots of discussion about how you go about -- you know,
2 what's your precise welfare measure and how do you
3 measure your implementing that welfare measure?

4 A brief word on consumer welfare versus total
5 welfare. Again, for the sort of mainstream economist,
6 there is no doubt that the objective is that the right
7 measure is total welfare. That is consumer welfare plus
8 producer welfare. Otherwise, you would say that prices
9 should be below marginal costs because that maximizes
10 consumer welfare. The reason why we say that the optimal
11 level of prices is equal to marginal cost in a perfectly
12 competitive economy is because we have a total welfare
13 consideration in mind.

14 So, as a matter of economics, both because of
15 right definitions of allocated efficiency, because of the
16 implications for productive efficiency, for the
17 implications for dynamic efficiency and investment, total
18 welfare is a more adequate measure, at least
19 conceptually.

20 Now, there are problems about implementation
21 and measurement. Calculating and estimating consumer
22 welfare is difficult, but doable. Calculating producer
23 welfare is also doable, but is subject to informational
24 asymmetries. Companies are going to know about their
25 costs much more than agencies would and, therefore, there

1 is an element there of potential manipulation of the
2 information that would distort the assessment that the
3 agency does about a certain policy if it relies on total
4 welfare.

5 People have defended, including number of
6 economists, have defended consumer welfare for another
7 reason, and this is from a political economic
8 perspective. If the focus is on consumer welfare, the
9 agency isolates itself much more against lobbying
10 pressures from industry. The problems of regulatory
11 capture are minimized and that's another pragmatic reason
12 why you may want to depart from sort of the goal post,
13 the theoretical goal post of total welfare.

14 There are other reasons that are often heard in
15 order to defend consumer welfare, and those are
16 distributional issues. We are not here to protect
17 business, we are here to protect the poor consumers. I
18 must say personally I have little sympathy for those
19 arguments for a number of reasons. First, because it
20 really depends upon -- you know, I think that it
21 indicates a bias against shareholders in favor of
22 consumers that may be justified in some occasions. But,
23 you know, if we are analyzing, for example, the market
24 for luxury goods, I'm not sure that the consumers of
25 Ferraris deserve more protection than the shareholder of

1 the car manufacturing companies. So, that's one
2 consideration.

3 The other consideration is that there are other
4 tools, other policy tools which are, you know, superior
5 in order to target distributional concerns and we have,
6 in particular, fiscal policy that we can use to solve all
7 distributional issues.

8 So, if there is any argument in favor of
9 consumer welfare, I think it has to do either with the
10 political economy argument that I mentioned before or
11 with measurement considerations, asymmetric information.

12 The real difficulty, as I mentioned before, is
13 how we measure, how we go about measuring the welfare
14 benefits of agency's actions. I mean, the first thing
15 that I should say is that even if -- it may be difficult
16 to believe, but I have to tell you that we have developed
17 over time, as economists, over the last decades, a number
18 of techniques that allow us to calculate the welfare
19 implications of actions both on consumer welfare and on
20 total welfare. So, there are different types of
21 techniques that can be used. It's actually a relatively
22 difficult problem, but not an impossible problem. In
23 particular, if you are doing these welfare assessments ex
24 post. I mean, all that you need to understand is have
25 good information about the demand curve and the

1 distortion that you have corrected.

2 Now, let me pause here for a second. I think
3 that the real difficulty in assessing the welfare
4 implications of an agency's action is not so much the
5 technique and how you measure welfare, but in how you
6 define the counter-factual. What's the counter-factual?
7 What would have happened absent the intervention?
8 Because that's something that you don't observe. You
9 observe what has happened. If you acted, you see that
10 there were -- you know, something has happened in the
11 market. But what would have happened in the absence of
12 the intervention?

13 If you don't take a decision, if there is no
14 enforcement, then you see how the market evolved. But
15 what would have happened had you intervened? I think
16 that that's the real difficulty. It's not a difficulty
17 in terms of, you know, the economic techniques you bring
18 to bear and the compilation of welfare. It's more about
19 sort of the thinking what would have been the
20 alternative, what would have happened if, on both sides
21 of the Atlantic, the agencies had blocked Google/Double-
22 Click? What would have happened if Microsoft would not
23 have been found guilty? That's the difficulty. How
24 would the market have evolved? This is difficult both ex
25 post and ex ante.

1 So, direct measures of welfare exist. They may
2 be difficult, but they do exist. In particular, if we
3 focus on short-term welfare implications, obviously much
4 more difficult if we go with long-term welfare
5 implications.

6 But having said so, you may have a report about
7 the implications for the world of climate change. That
8 is a welfare assessment. There is lots of dispute about
9 whether the discount factor is the right or the wrong
10 discount factor, but that's a rational debate.

11 Now, there are indirect proxies that can be
12 used if you don't trust that we are going to be able, as
13 economists, to calculate for you direct implications on
14 welfare. There are indirect proxies. Unfortunately,
15 none of them is as sufficient a statistic, and in the
16 jargon of statistics, as sufficient a statistic as a
17 statistic that provides enough information to decide
18 accurately about whether you should do A or B. So, all
19 of them are imperfect.

20 Some of them are economic proxies and there you
21 have issues such as, okay, what has happened with prices,
22 what has happened with output, what has happened with
23 productivity? Basically, you are trying to see whether
24 you have indirect proxies of allocative efficiency,
25 productivity, innovation. Now, all of these are going to

1 be measured with error for sure. But if all point in the
2 right direction, that's healthy. Those are economic
3 proxies.

4 You have other proxies which may be also relevant.

5 Performance in appeals was mentioned before,
6 although we all agree that it depends on which type of
7 cases, whether you have a (inaudible) case as it's not
8 the same to use an appeal in a cutting edge case and, you
9 know, refuses to deal -- you know, refuses to supply
10 interoperability information than losing on a horizontal
11 merger.

12 Legal and economic commentary, what it is that
13 people write about the decisions of the agency. It is
14 favorable? Is it unfavorable? You know, I think that
15 other indirect proxies, what's the level of, you know,
16 advocacy initiatives, how many and what's the quality of
17 the advocacy initiatives? To what extent we can measure
18 -- I mean, I know the proxy would be what's the scale of
19 the deterrence and I think that there were interesting
20 -- for example, in this direction, I think that the OFT
21 had been quite innovative, surveying practitioners about
22 -- to try to measure what has been the evolution of --
23 you know, how its policies affect, you know, deterrence.
24 You know, again, clarity of the load, which also you can
25 survey people about.

1 So, these are indirect proxies that allow you
2 to measure the extent to which the decisions, the actions
3 of the agency are having an impact on society. Having
4 said so, I think that all these indirect proxies, in my
5 view, have to be complemented with regular and continued
6 post-mortem analyses which aim to calculate, estimate
7 with greater or more or less precision, but estimate
8 welfare implications, welfare implications of actions,
9 because all these other indirect proxies, which are
10 relevant and useful, but fall short of what I think they
11 should be with time, the appropriate way to assess
12 towards this policy.

13 Just to complete this question, I don't think
14 that the measure that you use to estimate effectiveness
15 of the agency should depend on the type of action. I
16 think that if we go for consumer welfare, we go for
17 consumer welfare, you know, all across the board, from
18 mergers to behavioral cases. If it's total welfare, the
19 same. I think that, at least as a matter of economics, I
20 don't see any justification for using different measures
21 for different types of actions.

22 MR. ABBOTT: Randy Tritell has a comment.

23 MR. TRITELL: Just a question. Jorge, assuming
24 one could accurately measure welfare, whether it be
25 consumer or total, do you think it would make a material

1 difference to what cases an agency would choose depending
2 upon which standard it chose to adopt?

3 MR. PADILLA: It might, it might because I
4 think that, you know, there are cases in which you may
5 find that consumers are -- and particularly if you have a
6 short-term bias, a short-term sort of orientation, and
7 yet there are -- you know, these are actions that have,
8 you know, an impact on productivity, improving your
9 ability to deliver products in the future and you're
10 going to prohibit those actions even if -- you know, even
11 if, from a total welfare perspective, you wouldn't.

12 Let me put it in different terms. Think about
13 legitimate justification or objective justification. If
14 you're going to do an analysis in terms of objective
15 justification, I may come back to you and say, well, you
16 know, the reason why I'm doing all this, I'm taking these
17 particular actions, think about single-firm behavior, for
18 example, is because I think that this is going to have
19 this impact on my profitability. This is irrespective of
20 potential exclusion, potential externalities on
21 competitors. I'm doing this because this improves my
22 competitive position long term -- short term. Long term,
23 it's going to improve my ability to serve to consumers.
24 There may be short-term implications that you don't like,
25 but the long-term implications are going to be good and

1 you're going to say, well, those are not valid because
2 all that I care is about what is the direct impact on
3 consumers.

4 No. I mean, I could not give you an answer
5 about how many cases would go one direction or the other.
6 But potentially they could have -- there could be an
7 impact.

8 MR. ABBOTT: If I understand right you're
9 saying that what might be discounted in a consumer
10 welfare analysis are benefits that would actually
11 ultimately go down to the benefit of consumers, not just
12 to shareholders. So, aren't we really talking about how
13 we define consumer welfare rather than consumer versus
14 shareholder?

15 MR. PADILLA: Yeah, that's a good point. Let
16 me tell you sometimes when we think about -- when we do a
17 static analysis and we take total welfare, interestingly,
18 we think that total welfare may be a proxy of long-term
19 consumer welfare, and that's another way, as economists,
20 we justify total welfare. Because we think that the
21 benefits that are generated there are going to revert
22 back in one way or another to consumers. And, so, total
23 welfare may be seen as a proxy of long-term consumer
24 welfare, which I think explains what I said before,
25 because, you see, I was contrasting short-term consumer

1 welfare versus total welfare because total welfare is
2 almost a proxy of long-term consumer welfare.

3 MR. ABBOTT: Okay.

4 CHAIRMAN KOVACIC: This is Bill Kovacic. To
5 the extent that one has to be accountable to political
6 authorities, ultimately, no matter how much you say
7 you're independent, I don't know of a jurisdiction that
8 does nothing more than ask the competition agency, how
9 much money would you like each year, that's fine, thank
10 you, see you next year. And we have no other interest in
11 what you're doing. That simply doesn't happen.

12 Assume that there's some accountability. Mrs.
13 Kroes is going to have to go to the European Parliament.
14 I'm going to have to sit in front of an appropriations
15 committee. Actually, I may not have to do that anymore.

16 **(Laughter.)**

17 CHAIRMAN KOVACIC: This isn't so bad. But my
18 successor will, in front of an appropriations committee
19 or an oversight committee. Tom Barnett has to go to the
20 Judiciary Committee and has to go through the same
21 ritual. If one said, and clearly defined these terms to
22 them and explained what you were doing, is there a
23 legislature in the world that would say, yeah, total
24 welfare, long-term consumer welfare, you're right, go
25 ahead. If you made it that transparent and clear to

1 them, would they not say we need a clarification session
2 with you about what your job's about? Would they not
3 skin us alive?

4 So that in an almost cynical way, we are forced
5 to mask in part what we're really trying to do and we use
6 evasive -- I mean, a doubtful view of this is that we use
7 words like "effects-based analysis" and "consumer
8 welfare" as hazy shields behind which we could stand to
9 diminish the distributional part of the agenda and do
10 what we want. That if we really made clear to them what
11 we meant by these things, they'd run us out of town.

12 MR. PADILLA: It might happen. I think that
13 it's -- clearly, you know, selling we're here to defend
14 consumers is an easy sell. I think that you can sell
15 total welfare. One way is, you know, pointing to that it
16 is a proxy of long-term consumer welfare. There is
17 another way of selling it, which is where I see the motto
18 of the OFT - it's very clear there. It's making markets
19 work.

20 What we want, I think that what we would want
21 is to make sure that scarce resources are used
22 efficiently. I'm not talking about the scarce resources
23 of agencies. Scarce resources in the economy are used
24 efficiently. For that, we want to make sure that people
25 that have, you know, a willingness to pay that exceeds

1 the cost of producing, get goods. That's the consumer
2 welfare. But we also want to make sure that we are more
3 efficient in our production processes. That idle
4 monopolies have a hard life and they have to prove their
5 competence once and again. Those things are only
6 properly captured if you have a total welfare measure.
7 You will miss all those if you have a pure consumer
8 welfare measure.

9 So, I think that, you know, if I have to sell
10 -- if I have to sell the total welfare, what I would say
11 is that this agency is not about free lunches for
12 consumers. This agency is about making sure that markets
13 deliver and that means markets work and deliver what they
14 have to and that means that the scarce resources that
15 exist in this economy are used efficiently for the
16 benefit of the majority.

17 MR. BAVASSO: Can I add to that?

18 MR. ABBOTT: Antonio Bavasso has a comment.

19 MR. BAVASSO: Yes. I strongly agree with you,
20 Bill, that it's clear to my mind that the idea -- the
21 emphasis of consumer welfare in the political statement
22 is politically motivated, but for different reasons. So,
23 if you take the European example, whenever you see a
24 statement by the Commissioner, if you read it carefully
25 it says, we are protecting the consumers and making sure

1 that there is an efficient allocation of resources. If
2 you read it in its entirety, it means total welfare. The
3 European Commissioner will always want to make sure that
4 that's seen as taking care of the European citizen, this
5 -- that some people think is fictional and some people
6 think is real -- the Commissioner needs to be seen as
7 caring for the man in the street and not as operating in
8 a vacuum in Brussels, disconnected from national
9 realities.

10 A national regulator would have an equally
11 acute political problem but of a slightly different
12 nature. So, John Fingleton is rightly very aware of the
13 political backing that is needed for the OFT's action and
14 uses a range of tools to achieve that. So, he stresses
15 the need to make sure markets work well, the emphasis on
16 consumers. But he also tries to do something a little
17 bit more sophisticated in terms of using the enforcement
18 priorities policy and linking their enforcement action
19 with the notion of productivity. So, he tries to assess
20 what impact there would be on productivity in relation to
21 the enforcement action that they would take.

22 I think that strikes me as a particularly smart
23 way of linking the ultimate consumer goal and explaining
24 it to a political audience. Because they would be very
25 receptive to that constituency, their voters, the

1 consumers, and this notion of productivity that, at a
2 European level, links back to the Lisbon Agenda. But I
3 think it should be wider than that. This is how, in my
4 view, some European regulators and competition
5 authorities are trying to achieve, in practice, total
6 welfare and explaining it to the holders of the purse as
7 it were.

8 MR. ABBOTT: Jorge Padilla has a brief comment.

9 MR. PADILLA: Very briefly. Sometimes when you
10 get into this debate about consumer welfare versus total
11 welfare, there is a presumption that those that defend
12 consumer welfare are more interventionist and those that
13 defend total welfare are less interventionist. Let me
14 say one thing, that's wrong. That's absolutely wrong. I
15 think that this presumption comes from sort of the merger
16 world where you think that total welfare is going to
17 allow certain types of efficiency defenses that would not
18 be possible in the consumer welfare world.

19 But, for example, if you take an Article 82
20 perspective or, you know, a Section 2 perspective, that's
21 different because in the total welfare, you're going to
22 have consumer welfare, the profits of the defendant and
23 the profits of the plaintiff. Actually, here, you could
24 see that the total welfare measure may give you the proxy
25 for the long-term consumer implications -- the long-term

1 implications of consumer welfare of exclusionary
2 practices because you were going to factor that in by
3 seeing what's the reduction in the competitor's profits.

4 So, I want to say this because I think that --
5 I just wanted to make sure that, you know, we don't fall
6 into that fallacy. There is no presumption that total
7 welfare is less interventionist than consumer welfare.
8 It may seem so in horizontal mergers, but it certainly is
9 not the case in exclusionary cases.

10 MR. ABBOTT: Jorge --

11 MR. COOPER: I just had a quick question.

12 MR. ABBOTT: Okay, James Cooper.

13 MR. COOPER: Do you think, as a practical
14 matter, implementing this in increasing quantity is a
15 good -- any time we see an increase in quantity, can we
16 say that that's -- is that a good measurement rather than
17 focusing on prices? Because you can think of vertical
18 practices that are designed to lead to higher prices, but
19 they're also designed to lead to higher output. So, I'm
20 just wondering if that's a sufficient statistic.

21 MR. ABBOTT: Jorge Padilla.

22 MR. PADILLA: Let's see, not quite. Again,
23 because, you know, think about -- if you take a consumer
24 welfare perspective, you want to make sure that you
25 maximize consumer welfare. You're going to transfer the

1 goods from suppliers to consumers irrespective of the
2 willingness to pay of consumers. So, you're going to
3 maximize quantity well beyond the point that is
4 sufficient.

5 Leaving that aside, in general, measuring
6 what's the total output effect of certain action is
7 helpful. But I don't think that -- and I'm not sure
8 whether this is appearing, but I think that -- let's put
9 it in terms of conjecture. My conjecture is that you're
10 going to have similar problems with output as you would
11 have with prices. After all, they are linked by the
12 demand function.

13 MR. ABBOTT: Okay. Any additional comments at
14 this stage on welfare? Our welfare will be diminished if
15 we don't get on to the next topic.

16 **(Laughter.)**

17 MR. ABBOTT: This is fascinating, though. But
18 does anyone have any comment on this?

19 (No response.)

20 MR. ABBOTT: All right. Let's quickly -- I'm
21 going to ask John Temple Lang to address the broader
22 deterrent effects of competition and consumer protection
23 cases and perhaps to even go beyond that and talk about
24 how the measure of whether we are properly allocating our
25 enforcement resources to particular sectors.

1 MR. TEMPLE LANG: First of all, on the question
2 of deterrence, I'm not an economist, I'm a lawyer and it
3 seems to me extraordinarily difficult to measure in any
4 precise way the effectiveness of deterrence. You can
5 have surveys, you can have anecdotal effects. You can
6 measure economic trends in particular industries and you
7 can sometimes, where you've had a successful competition
8 policy, as, for example, in air transport -- and I hope
9 we're going to have one in maritime transport in Europe
10 -- you can see the effects of what is being done.

11 I'm not sure that it matters that you can't
12 measure a deterrent effect precisely. Even if it did
13 matter, I think the counterfactual is so unknowable and
14 unmeasurable that it doesn't -- it's not worth pursuing.
15 One thing that I think might be done, and it can be done
16 obviously much more easily retroactively than it can be
17 done in the context of a particular cartel case, is to
18 try to measure more precisely the profits that have been
19 made unlawfully by a particular cartel and compare them
20 with the amount of the fine.

21 Generally speaking, that can't be done during
22 the procedure, but it's a way of checking and it's one
23 specific way that we haven't mentioned this morning, of
24 checking on the success or otherwise of a particular
25 competition action.

1 I'm sure that agencies ought to do more to
2 assess the effectiveness of the decisions that they have,
3 in fact, taken. And also to assess the effectiveness of
4 legislative and other policies liberalizing the
5 industries to see what effect those have had. When we
6 were dealing with air transport a few years ago, we
7 always knew that there was -- we were not going to have
8 any economic effects merely by liberalizing the law.
9 What we needed was a few low-cost carriers. They will do
10 the job that we, as bureaucrats, were not in a position
11 to do.

12 I have a problem, if I may comment on the
13 comments of Jorge because it seems to me that if we
14 use -- whether we admit it or not -- a total welfare
15 test, then we're going to have to do some sort of
16 balancing test. The short-term interest of consumers
17 against the long-term interest perhaps in dynamic
18 competition of the (inaudible) company's ability to
19 accumulate profits and use them for desirable purposes
20 for total welfare purposes in the long run.

21 These are miscellaneous comments. Forgive me
22 if I jump about. I think there is an alternative,
23 perhaps an alternative for a consumer protection agency
24 that is not confined to competition law . The temptation
25 may be to use competition law for what I regard as

1 regulatory purposes. So, I think we shouldn't just take
2 it for granted that we're talking about welfare because
3 there are other things that we might be doing. And when
4 we do them, we at least ought to be very conscious that
5 that is, in fact, what we are doing.

6 I raise the question, because nobody else has
7 raised it this morning, shouldn't you in the FTC be
8 campaigning as vigorously as you think is politically
9 possible, which may be close to zero, against the
10 Robinson Patman Act? I was at a conference a couple of
11 years ago and a well-known and forceful American lawyer
12 said the Robinson Patman Act had been repealed by
13 ridicule. That simply isn't true because it's still on
14 the statute books and it's still making a difference in a
15 lot of ways that seem to be -- and I gather seem to quite
16 a lot of people in the United States -- to be positively
17 opposed to welfare, whether consumer or general.

18 I think you need to consider, in terms of
19 deterrence, going back to that subject, whether more
20 could not be done by leniency policies for Section 2
21 offenses, for more precise guidelines than we have in
22 Europe, at least for Article 82 offenses, and you need to
23 ask the question, is it, as the Commission has repeated
24 -- here has repeatedly said, is it undesirable that
25 companies should be able to calculate the amount of the

1 fine that they're going to have to pay if they behave in
2 a certain way? The Commission has always said it is.
3 I'm not sure that that's right. It might be a useful
4 deterrent if they could calculate it precisely, provided
5 that you were going to be more energetic than you have
6 felt able to be in the past to calculate the amount of
7 the profit that the company was making. I'll leave it at
8 that.

9 MR. ABBOTT: Okay. Well, that's interesting,
10 John. Of course, the FTC does not have civil fine
11 authority. Do you think it should have?

12 MR. TEMPLE LANG: Well, somebody has and you
13 can have a policy of advocating this if you can get the
14 Department of Justice to listen to you.

15 MR. ABBOTT: Interesting, yes. Jorge Padilla
16 has a comment.

17 MR. PADILLA: Okay, two comments. I do agree
18 that measuring the deterrence effect is very difficult.
19 Actually, measuring anything is very complicated. That's
20 why we have -- that's why economists and accountants make
21 a living.

22 But I think that if I look, for example, at
23 sort of the landscape in Europe now, I think that there
24 are a number of indicators that tell me that, for
25 example, the actions of the last years have had a

1 significant impact on deterrence. Let me give you a few
2 indicators.

3 How much money companies are spending on
4 compliance programs, that's one indicator. How much --
5 you know, what's the size of the competition law
6 departments at law firms, that's another indication.
7 More interesting and more recent, how many business
8 schools in Europe have in their executive programs
9 education -- accepted education programs including
10 regulation and anti-trust? That was not present at all
11 five years ago, six years ago. Now you find many
12 business schools in Europe where you can study anti-
13 trust. It's not less important than finance, but it
14 is there. How many companies sponsor in-house training
15 programs for their people, again, as part of the
16 compliance?

17 I think if you take all these indirect
18 measures, it tells you that, you know, there is evidence
19 of deterrence. Now, nobody has compiled this evidence in
20 a systematic way and, therefore, we don't have
21 indicators. But, you know, we could do that and build
22 indicators the same way that we build indicators about
23 consumer confidence for our economists, et cetera, et
24 cetera. Please don't think that there is much more
25 science behind those than there would be behind this one.

1 In terms of the point that John made about
2 balancing, this is a point that is often made, that total
3 welfare would be more difficult because it requires more
4 balancing than consumer welfare. Let me object to that
5 because, you know, if you take consumer welfare without
6 any efficiency component, without any efficiency defense,
7 that's right. All that you look at is the
8 anticompetitive effects. But the minute that you
9 consider efficiencies, you know, then things get
10 complicated and then you have to balance. First, you
11 have to identify whether there are efficiencies and,
12 second, you have to do something that is very
13 complicated, which you wouldn't have to do in total
14 welfare, which is determine the degree of pass-through,
15 of pass-through of those efficiencies to consumer
16 welfare. And then you have to balance.

17 So, balancing is there. Pass-through is not a
18 simple task. At least from my viewpoint, it's not much
19 more complicated. It's much easier than just looking at
20 total welfare directly.

21 And one final comment here is that, you know,
22 the other problem that we often face when we do
23 competition policy based and there is sort of the
24 consumer welfare standard is that, for example, when
25 dealing with price discrimination, we talk about price

1 discrimination and the welfare effects of price
2 discrimination. We do that and we are in the policy
3 world -- the competition policy world and their consumer
4 welfare standards. But all the theories, all the papers
5 that we all quote, all the analysis that we quote is
6 total welfare. And I think that that introduces a funny
7 sort of gap there between the theory that we use to
8 sustain our policies and what we claim is our objective.

9 MR. ABBOTT: Randy Tritell.

10 MR. TRITELL: Is there any way to tell, Jorge,
11 when the resources going into deterrence are excessive?

12 MR. PADILLA: Well, this relates to a question
13 that is also included in sort of the list of questions
14 that we had for this session, which is, you know, when do
15 you think that there are too many false positives as
16 opposed to false negatives? I think that it's difficult
17 ex ante, very difficult ex ante, although you can take
18 proxies. You can see whether, you know, you, in your
19 jurisdiction, you are taking certain actions to prevent,
20 you know, certain types of behavior, which you see in
21 other jurisdictions -- what you see in your jurisdiction
22 and in other jurisdictions are undertaken commonly by
23 companies with or without market power. That's telling
24 you that you may be deterring some types of behavior that
25 are preventing aggressive competition that you shouldn't

1 do.

2 MR. ABBOTT: Alden Abbott. Let me quickly ask
3 John Temple Lang. Are we allocating or how can we decide
4 if we're allocating the right number of resources to
5 particular sectors of the economy, say pharmaceuticals,
6 energy? What measures should we use in deciding what
7 types of cases to bring, what sectors to focus on?

8 MR. TEMPLE LANG: I think you have to use a
9 number of different tests and see whether the result of
10 applying more than one leads you to the same conclusion.
11 You should look at big industries for obvious economic
12 reasons. You should look on industries that have an
13 effect on a very large number of individual consumers or
14 a large number of product markets, which may be
15 horizontal industries like the internet or raw materials
16 industries, which have multiplier effects down the
17 stream.

18 You should look, I think -- and I made this
19 point earlier this morning. You should look at
20 industries that are heavily regulated by states or indeed
21 by the federal legislation to see whether they are less
22 competitive than they ought to be, to see whether there's
23 anything that you can do about that if it turns out to be
24 true. And you should look at what looks like
25 uncompetitive oligopolies in circumstances where the

1 companies concerned are not selling commodities and you
2 wouldn't expect there to be parallel pricing.

3 But I conclude by making a general point. I
4 think choosing your priorities probably has to be a
5 fairly crude process and one that is not necessarily
6 improved by trying to have very sophisticated
7 measurements of exactly what the situation is before
8 you've investigated it. Unless, of course, you're going
9 to have a sector inquiry which you think is worthwhile
10 for some reason and then, of course, you're going to
11 generate quantitative data which, however unreliable
12 Jorge may think it is, it will be better than your off-
13 the-cuff impressions and certainly better than mine.

14 MR. ABBOTT: A quick follow-up on that. This
15 is Alden Abbott. You know, Section 6B of the FTC Act
16 does authorize and the FTC has used that section,
17 compulsory process, to look generally at certain specific
18 topics, whether dealing with pharmaceuticals, market-
19 specific issues. Should the FTC devote more -- a lot
20 more of its resources to things that are analogous to
21 sort of DG Comp's sector inquiries, to doing that? Or
22 given the potential deterrent and other effects, should
23 it shy away from doing too much of that?

24 John Temple Lang.

25 MR. TEMPLE LANG: I'm not sure that I'm the

1 best person to answer the question. But it seems to me
2 that that is a useful way of approaching your priorities
3 where you think you identify a sector where there are
4 competition problems, but you're not quite sure what they
5 are and it seems worthwhile to investigate. If you
6 already know what the problems are, you don't need a
7 survey.

8 MR. ABBOTT: Okay, thanks for that. Let me
9 briefly ask Antonio Bavasso to address a question. We
10 haven't talked too much about consumer protection in
11 today's session. But can we measure the joint effects of
12 competition consumer protection enforcement on key
13 industry sectors, for example, pharmaceuticals? And
14 implicit in that, should there be more of a joining
15 together of our consumer protection authorities and
16 efforts in the competition mission in that regard?

17 MR. BAVASSO: Well, I think it is highly
18 desirable to have a coordinated action between consumer
19 policy and competition law. There is very little of it
20 at the European level and there has been a long battle in
21 the UK to make sure that the two were kept under the same
22 roof under the OFT.

23 Now, it goes back to the question of what
24 should be the aims and how we go about achieving those
25 aims. It seems to me that if the competition authorities

1 have the ability to have some consumer powers, they are
2 able to mix and match the range of tools at their
3 disposal more efficiently.

4 So, on the one hand, there are some tools of
5 enforcement that are more appropriate when one wants to
6 take into account the type of issues that are relevant in
7 a proper competition analysis, which don't include only
8 the short-term consumer benefit but also the long-term
9 and for the allocation of resources.

10 On the other hand, there are notions such as
11 fairness are sometimes best addressed outside the scheme
12 of what we understand to be antitrust consideration and
13 are better addressed by consumer protection tools. And
14 trying to blend the two into some sort of hybrid system
15 is incredibly dangerous, because you go back into
16 introducing notions of fairness into the competition
17 system that I think is a real challenge for a competition
18 authority.

19 MR. ABBOTT: Regarding this issue of fairness.
20 Of course, the FTC's statute refers to unfair methods of
21 competition. That's the related question then. As a
22 matter of focusing resources, should
23 the FTC then only apply sort of traditional antitrust
24 Sherman Act standards in applying its unfair methods of
25 competition authority? That's an open question.

1 MR. BAVASSO: I can see that it's an open and
2 difficult question. My own preference is that these
3 questions would be dealt with using the standard
4 competition tools and they should be dealt with more
5 specific targeted tools, for instance, in relation to how
6 customers go about procuring a certain type of services
7 or the level of information that customers should be
8 given by a company.

9 In the DC and in the UK, there is the ability
10 to use what you alluded to; i.e., market studies, to try
11 and get a better insight into how a market is functioning
12 and what are the failures of the market, if any. And I
13 think it is incumbent on an authority to really try and
14 choose what is the best and most appropriate tool to
15 address a particular question. In some cases, it may be
16 hard-edged enforcement that has a precedential value. In
17 some other cases, it's a market study that enables an
18 authority to understand what the issues are and then
19 follow up with other specific enforcement actions or
20 other tools if they're available to it.

21 MR. ABBOTT: Jorge Padilla has a comment on the
22 fair methods of competition question.

23 MR. PADILLA: I think that the point I wanted
24 to make is that it seems to me that we have to keep in
25 mind that whether we use consumer welfare or total

1 welfare, competition protects consumers. So, to some
2 extent, you know, the role of protecting consumers is
3 already sort of there if you have an effective
4 competition policy.

5 So, where and when should you sort of go beyond
6 competition policy and have, you know, an additional sort
7 of policy called consumer protection policy? I think
8 that it should be restricted to those circumstances where
9 competition is not protecting consumers, and that may
10 happen for a variety of reasons. First, because -- and
11 there may be some -- you know, consumers may not be able
12 to properly evaluate the alternatives that are presented
13 in the market because, for example, they are deceived or
14 because, in certain types of goods, it's very difficult
15 to make accurate assessments of the price, quality,
16 balances that are presented by competing operators.

17 We have experienced goods, for example, goods
18 that you don't know whether you like them or not until
19 you have tested them. We have something even worse
20 called credence goods. These are the goods that you
21 don't know whether they're good or bad for you, not only
22 ex ante before consuming them, but even ex post. So, for
23 example, you don't know whether your physician is a good
24 physician, whether or not you survive, you know. You
25 don't know whether it was pure luck or it was a good

1 doctor that gave you a good treatment. And, certainly,
2 most people don't know whether economic consultants are
3 good or bad even after using them.

4 **(Laughter.)**

5 MR. PADILLA: So, in experienced goods and
6 credence goods, consumers may be fooled in the process
7 and there may be abuses that the protection of
8 competition is not going to solve. So, I see competition
9 -- I'm sorry, consumer policy, to some extent, as
10 subsidiary or residual, addressing those issues -- issues
11 that competition itself cannot solve.

12 But one additional point, sometimes, and I
13 think that this is the particular focus of the current
14 OFT policy, sometimes consumer policy may be a good
15 complement for competition policy. There are markets --
16 for example, markets that deal with exogenous switching
17 costs, where competition has problems, where competition
18 is inefficient. And the problem doesn't lie in the
19 market, the structure, it doesn't lie on any particular
20 type of behavior of any particular company. The source
21 of the problem is in the switching cost, for example,
22 informational problems, learning costs, et cetera.

23 Having a policy that helps you address the
24 source of the switching cost, you know, and we have --
25 all Europe, for example, the switching agencies in the

1 electricity markets that exist in the UK, but also in
2 some other countries like Spain. Addressing those
3 problems may actually lead to more competition and, you
4 know, greater consumer or total welfare. In that sense,
5 consumer protection may be a complement, a useful
6 complement to competition policy.

7 MR. ABBOTT: Thank you. Let me -- we're time
8 constrained, so let me quickly jump into -- if Jorge
9 Padilla or anybody else wants to jump in -- on the
10 question of a research agenda. Is there a research
11 agenda which the FTC could devise that would allow us
12 more effectively to move forward in approving our
13 effectiveness?

14 MR. PADILLA: I had jotted down a few notes
15 here. I'll be very brief.

16 MR. ABBOTT: Jorge Padilla.

17 MR. PADILLA: I think that the research agenda
18 should have three stages. I think that the first is
19 assess how well you are doing. And that, I think, on a
20 case-by-case basis requires extensive use of post-mortem.
21 I'm astonished about how little post-mortem there is all
22 over the place. So, it's not like that this is only the
23 FTC. I think that in general there is very little post-
24 mortem.

25 If you have a certain consistency in your

1 intervention in terms of, for example, sectoral
2 interventions, if your policies -- if your interventions
3 are focused on certain sectors, then you can do not only
4 post-mortem of individual cases, but at different points
5 in time, you can see the extent to which your
6 interventions have had an effect in the evolution of
7 competition in those sectors. One day, we will be able
8 to do that here with respect to energy, and to some
9 extent, I think that we will be able to do it also in
10 terms of telecoms.

11 So, once you have done this assessment -- and
12 by the way, another useful tool would be, for example, in
13 the case of post-mortem analysis, is to go invent the
14 studies. You know, when you take a decision, what's the
15 impact on the stock prices of the target and its
16 competitors? That's also fairly relevant and it's
17 relatively cheap and easy. It's not going to be the
18 complete answer, but it's going to give you a part -- you
19 know, some answer.

20 Once you have done that assessment, I think
21 that the other thing, which is an assessment of the
22 effectiveness of your policies, it's also very
23 interesting and important to do an internal analysis of
24 your organization, the way that you process information,
25 that you take decisions, you know, potential principal

1 agent problems that may be embedded in the organization,
2 you know, they have to do with career concerns or lack of
3 career concerns, with the way that there is monitoring --
4 so, internal monitoring, supervision, et cetera, et
5 cetera. Again, it is not just looking outside of the
6 effectiveness of actions, but it's also looking
7 internally in order to determine whether there are
8 problems that can explain why you were not effective in
9 that particular set of interventions.

10 Then there is a third task, which is only --
11 you know, it only happens when you have done these other
12 two tasks which is, okay, how we organize so that we can
13 increase our effectiveness. To some extent, this is what
14 businesses do and they do that on a continuous basis. I
15 mean, how well we are doing in the market, how we work
16 internally and, you know, can that explain the way that,
17 you know, we succeed or fail and how we reorganize. And
18 this is a process of creative destruction that happens
19 internal to firms and should happen, I guess, internal to
20 agencies. And maybe you are already doing that.

21 The question of who does that, I think that you
22 rely on everybody because there are no pure sells out
23 there, but, you know, with the proper incentives,
24 everybody can help you.

25 MR. WINERMAN: Marc Winerman. Quick question.

1 If you were doing a stack analysis, what time frame would
2 you use for this doc change?

3 MR. ABBOTT: Jorge Padilla responds.

4 MR. PADILLA: Very interesting question. I
5 think that as any good event study, you should have many
6 different windows. So, you should have short-term
7 windows and longer-term windows and, you know, depending
8 on whether you have a robust impact or not, you are going
9 to get different conclusions. Don't go very far away
10 because then you are going to have many other events that
11 are hitting the stock that are completely unrelated to
12 your intervention. But you have to test robustness by
13 checking different windows before and after.

14 MR. ABBOTT: Jim Venit.

15 MR. VENIT: Jim Venit. How do you measure
16 success in that event study, by the stock rising or
17 falling?

18 MR. PADILLA: It depends on the type of action
19 and it depends on who you're looking to. I think that
20 you have to look at the victim and its competitors. If
21 it's exclusionary behavior that you were trying to
22 prevent, then the defendant has to see its stock price
23 going down and the competitors have to see the stock
24 price going up. Because if everybody is going down, then
25 your measure was not effective. It possibly was another

1 cost. It depends on the type of conduct and you have to
2 look at, you know, the wide range of competitors.

3 MR. ABBOTT: I think we may need to wrap up.
4 However, I'd like to very quickly see if anyone wants to
5 make additional comments on the issue of false positives
6 and false negatives. Certainly a big issue in the
7 unilateral conduct area.

8 MR. BAVASSO: Yes, and that is related to the
9 question of costs and costs of regulatory action, how do
10 you measure it? It is difficult to measure it. But the
11 question of deterrence and what are you deterring is an
12 important one. I think the studies that the OFT has done
13 in trying to assess what is the appropriate tool of
14 deterrence and whether we are deterring the right
15 players, the management, the shareholders or -- and with
16 the right tools, the fines or disqualifications or
17 criminal sanctions is very important. Any authority
18 should be looking at doing that type of study.

19 Of course, the other important point is to look
20 at the effects by remaining in close contact with what I
21 would call the multipliers of these deterrent effects.
22 Advisors advise clients in a certain way and I strongly
23 think that would be the wrong thing to do -- if I
24 understand correctly John's suggestion about the
25 introduction of a leniency program in relation to Section

1 2 -- because it is too difficult to identify the
2 infringement and I don't think there is sufficient
3 consensus of what would be the behavior that we would
4 deter.

5 If you look in practice at how you structure a
6 compliance program, I think it's most indicative. You
7 see inevitably that in order to explain to a business
8 person what to do and what not to do, it's very easy to
9 get their attention by explaining to them that they can
10 be disqualified or even subject to criminal sanction.
11 That immediately grasps their attention in a way that
12 fines that are paid by the shareholders doesn't.

13 But when you go on to talk about what would be
14 a Section 2 or Article 82 infringement, it's very
15 difficult -- and perhaps we can have, Hendrik, your view
16 -- to explain what they shouldn't be doing in a way that
17 doesn't fall into a over-simplification and, therefore,
18 you may be over-detering indirectly and that is an
19 effect that remains very much below the line. It's not
20 visible to an authority.

21 MR. ABBOTT: John Temple Lang responds.

22 MR. TEMPLE LANG: I think we all have to be
23 rather careful when we speak about false positives and
24 false negatives. You can't tell whether it's a false
25 positive or a false negative unless you have a good deal

1 of confidence in the test you're -- the comparison that
2 you're making. You have to have the right test for
3 abuses if it's a Section 2 or an Article 82 case.

4 Now, it's quite clear that there isn't an
5 authoritatively generally accepted test either here in
6 Europe or, it now seems clear, in Washington. One of the
7 reasons why I asked about the possibility of having
8 guidelines for fines was because if you tried to do that,
9 you would be obliged to say exactly what kind of behavior
10 you wanted to sanction, at least to sanction by fines.

11 So, all that I think we should say is unless it
12 is very obvious that the test being used is the wrong
13 one, and I think there are certain cases in Europe where
14 you can say that, then you shouldn't be too confident
15 that you can identify with confidence both false
16 positives or false negatives.

17 MR. ABBOTT: Yes, Randy Tritell.

18 MR. TRITELL: Should false positives and
19 negatives be of equal weight or are false positives more
20 dangerous?

21 MR. ABBOTT: Hendrik Bourgeois.

22 MR. BOURGEOIS: Thank you. I just wanted to
23 comment briefly on your question, but before doing so, I
24 actually think that John's idea is a pretty interesting
25 one because one of the great sources of over-deterrence

1 is precisely uncertainty. And if you force decision
2 makers and rule makers to be clear about under what
3 standards and under what precise rules a particular
4 conduct will be viewed as illegal, that would actually
5 enable companies to better predict intervention and to
6 feel less chilled by these uncertainties of whether or
7 not a particular conduct is going to be viewed as
8 inappropriate and, therefore, a company might be more
9 likely to engage into conduct that, in fact, overall, is
10 pro-competitive.

11 So, its an interesting thought that I haven't
12 given any reflection on, but it sounds quite appealing at
13 first sight to me.

14 The other problem, I think, with deterrence and
15 unilateral conduct is this whole issues of fines in
16 Europe. I think there's something fundamentally wrong
17 with the way in which fines are being imposed for Article
18 82 infringements, not so much because you can fine
19 companies for Article 82 violations; I recognize that if
20 you don't have fines, you don't have a stick and you
21 probably don't have deterrence. But the way it's been
22 bluntly applied in Article 82 situations, once you
23 recognize that you can do some type of rule of reason
24 analysis under Article 82, once you recognize that it's
25 no longer, per se, illegal, notwithstanding, you know,

1 certain precedents of the European courts, I think it
2 becomes very difficult to apply fines in the same fashion
3 as they have been applied. Perhaps what is needed is a
4 more fine-tuned approach consisting, for instance, in not
5 imposing fines when the conduct is illegal, but only
6 illegal because, on balance, there were no sufficient
7 economic efficiencies derived from the conduct in
8 question and only imposing fines when the conduct is
9 blatantly anti-competitive with no objective
10 justifications.

11 Then to answer Randy's question, I probably
12 have a biased view on this. So, you wont be surprised
13 that I believe that it's better to avoid false positives
14 than false negatives, simply because I believe that
15 markets are probably -- even in Europe, which are
16 probably less dynamic than in the United States, but that
17 markets are probably more dynamic and more easily to
18 self-correct than judgments of the European Court of
19 Justice.

20 I mean, one striking example is the judgment of
21 the Court of Justice in British Airways that was, in
22 fact, only adopted last year. It took -- it was a case
23 that was brought by the Commission nine, maybe ten years
24 ago. And after all that time, finally we reached a
25 judgment which set a standard of conduct that will be

1 viewed as anticompetitive as long as it has the tendency
2 or the capability of restricting competition. It takes a
3 long time. And a lot of things can happen in the economy
4 in eight years or ten years, even in Europe.

5 MR. ABBOTT: Jorge Padilla?

6 MR. PADILLA: I think that your question is
7 very important, so a couple of thoughts about that. I
8 mean, the typical answer I think that is, you know, by
9 and large correct, is what Hendrik just said. I think
10 that markets tend to self-correct. It's not clear that
11 that self-correction mechanism applies to decisions.

12 Having said so, I think a couple of thoughts.
13 Whether type one or type two errors are more important
14 depend on the type of action. Here we have cartels
15 versus single firm behavior. On the market context,
16 whether you have barriers to entry or you don't have
17 barriers to entry. If you have significant barriers to
18 entry, then the market is not going to self-correct and
19 then you may want to have a more interventionist stance.

20 And very importantly as well, the stance of the
21 competition policy institutions. And why do I say so?
22 You may want to build actually a reputation. You may
23 want to send a signal to the market. You cannot wait
24 until you have done 20 cases to signal to the market that
25 a certain type of behavior is problematic. So, you may

1 want to intervene and you may want to define heavily at
2 the earlier stages of development to send indications to
3 the market that you're going to deter.

4 It may sound a bit of an anathema, but notice
5 that we do that very often. One piece of academic
6 research that I did years ago was I was studying credit
7 bureaus all over the world. And it's very interesting.
8 You have credit bureaus that only collect black
9 information, that means whether you defaulted or not, and
10 some of them collect also white information, they go
11 beyond whether you defaulted or not and they have
12 information about what type of entrepreneur you are.

13 Now, if you are worried about misbehavior on
14 the part of the debtors, the credit bureaus that collect
15 less information may be more efficient because if you're
16 a good entrepreneur and you default, you know you're
17 going to be heavily punished going forward because you
18 are going to be bundled with the defaulters. So, that
19 means that you are going to be extra careful in your
20 behavior.

21 There is over-deterrence, but it's optimal for
22 society because it takes care of a more (inaudible)
23 problem. So, I'm not advocating that, but I think that
24 sometimes, in some -- in particular in young competition
25 regimes with respect to young markets or with particular

1 to practices that have not been analyzed carefully
2 before, we have a tendency to minimize type two errors,
3 the importance of type two errors that I think that is
4 excessive.

5 MR. ABBOTT: Now, James Cooper has a quick
6 comment.

7 MR. COOPER: Circling back to our discussion
8 this morning about case selection, there's all this
9 discussion about type two error, how does that enter into
10 case selection? I mean, does that militate against going
11 after unilateral cases or vertical cases where the theory
12 is harder to -- the theory of consumer harm is often very
13 hard to define and the risk of type two error, over-
14 deterrence can be substantial? Should that weigh into a
15 competition agency's case selection?

16 MR. ABBOTT: John Temple Lang.

17 MR. TEMPLE LANG: You shouldn't be bringing a
18 case unless you've got a clear theory and enough data
19 that lead you to the conclusion that there's going to be
20 consumer harm as well as harm to competition. I think
21 you shouldn't -- I agree entirely with what Hendrik said
22 a moment ago. It is uncertainty that gives rise to false
23 positives or false negatives. If you're using the wrong
24 test and you know you're using the wrong test, you ought
25 to change your test.

1 MR. ABBOTT: Okay. At this stage, does anybody
2 have any last quick comment because we're time-
3 constrained and I think we probably should wrap up this
4 session. Does anyone have any closing comment or
5 thought?

6 (No response.)

7 MR. ABBOTT: Okay. Well, I would like then to
8 turn the floor over --

9 **(The second panel concluded.)**

10

11 **PANEL 3: THE INTERNATIONAL AGENDA**

12 MR. ABBOTT: I will turn the matter over to the
13 Chairman himself, our great internationalist to moderate
14 an international session, international issues
15 discussion.

16 CHAIRMAN KOVACIC: Thank you, Alden. In the
17 closing part of our conversation, we'd like to focus on
18 how the FTC could improve its participation in
19 international affairs. Just to identify some of the
20 focal points for discussion, where should we spend our
21 resources, what kinds of activities. It's a large menu,
22 as you know. Networks, consultations, projects in which
23 the agency, as a whole, or its individual members, its
24 staff can invest their efforts. If we were thinking of
25 ourselves as a firm and deciding what projects to support

1 or fund where, given the mix of possibilities, ought we
2 to devote our efforts.

3 Second, by way of a bit of benchmarking, all of
4 you are in a position to see how our counterparts
5 overseas invest their resources in matters international.
6 Do you see specific techniques that seem to be
7 particularly effective? Do you observe practices,
8 customs, habits that are worthy of emulation on our part?
9 In short, what lessons, as we compare ourselves with
10 other institutions, ought we to consider and apply on our
11 own work?

12 And last and most generally, if you were us and
13 you were thinking how to improve the work we do
14 internationally, what might you do differently? Rachel,
15 Hendrik and Jonas are going to get us started each with
16 an initial comment. Rachel Brandenburger, please?

17 MS. BRANDENBURGER: When I was asked to address
18 what sort of involvement an agency should have -- how
19 should an agency determine how it should be involved --
20 in the many multi-international fora that exist, it
21 seemed to me that there were a number of factors to take
22 account of. I think it probably starts with asking: what
23 do we mean by "involvement?" Also, what is the
24 underlying objective of the agency? Are we trying to
25 export, or import, or both? I don't think they're

1 necessarily mutually exclusive. Are we trying to spread
2 our best practice, or learn from others, or do both? Are
3 we trying to encourage harmonization? Are we trying to
4 foster contacts at a personal level? That, from what I
5 hear from agencies, is a factor that should not be
6 underestimated in how the whole international co-
7 operation process works.

8 Are there issues on which agencies believe that
9 they need and indeed could receive help from other
10 agencies? Are we trying to do this across the board, on
11 individual cases, on particular issues, or policies, or
12 techniques? So, that's a matrix, perhaps, of factors to
13 bear in mind.

14 Other factors include -- like any organization
15 when you're trying to prioritize -- how well resourced
16 are you or not? Everybody (not only antitrust agencies)
17 always seems to believe they're under-resourced. I think
18 that's a worldwide phenomenon. How well resourced are
19 you for your case management, your policy promotion?
20 What you need to do domestically? I'm not trying to
21 suggest international is secondary, but given what we've
22 been discussing this morning, I think an agency will not
23 be well respected at home if it is playing on the
24 international scene to the detriment of its involvement
25 in the home scene. Obviously, there is the factor of

1 what the agency's caseload is, and how it generates it,
2 given what we were saying before, and how it manages its
3 caseload. And, indeed, how the agency perceives its
4 resources -- whether it has particular areas of strength
5 or weakness, which could benefit from participating
6 internationally or could contribute internationally.

7 Also, I think I would need to ask an agency:
8 what role are you trying to play? I think one's mind
9 jumps immediately to a leadership role and I know you
10 said, Bill, not to confer roses necessarily. But the FTC
11 has clearly played a very important and significant
12 leadership role internationally. So have other agencies.
13 But there are other roles to play than leadership.
14 Encouragement, behind the scenes influence. When do you
15 lead and when do you step back to see if the consensus is
16 anywhere near where you would like it to be or not? I've
17 heard this described as when to put the foot on the gas
18 and when to take the foot off the gas?

19 So, I think that there's a lot of complexity to
20 work with in today's environment. And perhaps something
21 else we can come on and talk about later. There are also
22 a lot of agencies participating in their different ways
23 on the world stage, if I can put it like that. I think
24 I'd like to ask whether there's somewhat of a duplication
25 of effort or perhaps not an entirely efficient use of

1 resources in a world that now has over 100 agencies as
2 opposed to just two or three key agencies only a decade
3 or so ago, and whether there is something we should talk
4 about there as to what would be appropriate for the next
5 hundred years -- the nearer term hundred years that we're
6 facing. Maybe I'll leave it there for the moment.

7 CHAIRMAN KOVACIC: That's great, Rachel.

8 Hendrik, could I turn to you, please? Hendrik
9 Bourgeois.

10 MR. BOURGEOIS: Thank you. I think that Rachel
11 has raised all the right questions. I was asked to think
12 about the question what the value is of international
13 outreach. I'm assuming, again, that the question was
14 asked because probably, like any other organization, you
15 have to make a trade-off between spending your scarce
16 resources on pursuing national enforcement activities,
17 which probably generate hopefully short-term benefits
18 versus probably the longer term benefits of international
19 cooperation, which is probably also more difficult to
20 quantify in terms of concurrent achievements and
21 successes.

22 So, one could start from the working
23 assumption, which I adhere to and I think a lot of people
24 adhere to that, international outreach is very valuable.
25 The question then is, well, how do you communicate and

1 effectively communicate with those who need to understand
2 the messages about what international outreach creates in
3 terms of value?

4 I have jotted down some notes and I think the
5 first reason that comes to my mind, if I can make an
6 analogy, is the following one. I think that
7 international outreach is as important to competition
8 law, policy and enforcement, as international trade is to
9 a market economy. I think it simply generates value by
10 exchanging ideas and best practices on priorities, on
11 rules, on cases. Competition agencies become better at
12 what they're doing.

13 And it's not only, in my view, an issue of
14 making sure that those who are in a deficit of sound
15 policies are able to import the right policies from
16 others, it's also an issue of exposing those importers to
17 differences in culture, in economic situations, in legal
18 or institutional contexts. Because, I believe, that from
19 those differences, different people will hopefully come
20 up with different solutions for problems that are
21 probably similar. That, I think, will enrich and improve
22 the practice of competition agencies, or should improve
23 the practice of competition agencies around the world.

24 The second reason why I think international
25 outreach is really important is because of convergence.

1 And I won't dwell on that. I think, you know, a lot has
2 already been said about the benefits of convergence and I
3 know that you'll probably share my thoughts on it, but if
4 I can shamelessly quote somebody sitting on this table,
5 in the absence of convergence, there's a real risk that
6 the jurisdiction with the most intervention-minded policy
7 ends up setting the standard on a global basis, because
8 companies who operate on a global basis have -- because
9 it's very difficult rather for companies who operate on a
10 global basis to fine tune their conduct, particularly in
11 mergers and lateral conduct, on a country-by-country
12 basis and to say, well, in this country, we're going to
13 act this way and in that country, we're going to act the
14 other way.

15 And as a result, companies who care about
16 compliance will tend -- or there's at least a risk that
17 companies will tend to adopt their conduct to the most
18 conservative rules and, therefore, unnecessarily limit
19 their entrepreneurial freedom outside of those more
20 restrictive jurisdictions.

21 Then the final reason why I think it's
22 important is because, as Rachel indicated, I believe
23 presumably that when agencies talk on an ongoing basis
24 and have a dialogue on high level general policy issues
25 and perhaps use a common position on those issues to get

1 to know each other, it makes case cooperation probably
2 much more effective and, therefore, it increases the
3 effective enforcement of competition law policy and
4 increases the deterrent effect of competition law; for
5 instance, in the area of international cartels.

6 If I still may share a few thoughts on how to
7 measure success, because I think that's a more difficult
8 issue. If I can make another analogy, I think one way of
9 measuring the success of -- or the value of international
10 outreach for an agency is maybe as similar as trying to
11 assess how much an in-house counsel in a large multi-
12 national company contributes to the bottom line results
13 of the company.

14 CHAIRMAN KOVACIC: Massively.

15 **(Laughter.)**

16 MR. BOURGEOIS: Massively. But not as directly
17 as some others, like the sales director or engineers or
18 the project manager. And I think its really about
19 demonstrating that you're able to avoid costs. So,
20 there's no, I don't think, empirical evidence to suggest
21 that there's a causal link between, on the one hand, the
22 increase of international outreach on the one hand, and
23 on the other hand, the absence of significant breakdowns
24 in international competition enforcement with a few big
25 exceptions. But my intuition would be that there's

1 probably a correlation between those two.

2 So, the least breakdowns you have in
3 international competition law enforcement, probably the
4 more successful International outreach has been. There
5 are more direct means to assess the value of
6 international outreach. That's basically what the ICN is
7 doing. It sets forth very concrete objectives in the
8 form, for instance, of recommended practices and that
9 allows everybody to look at specific jurisdictions and
10 see what is the progress, what has happened.

11 And last but not least, I think you can also
12 look at cases. Are cases around the world increasingly
13 relying on sound competition law principles? Are they
14 looking at both sides of the stories? Are they
15 prioritizing on the right areas? Maybe what the FTC
16 could do in this respect is not being too modest or not
17 too bashful about the successes and give publicity to the
18 improvements that have been made. And if there's a
19 perception that progress hasn't been made, organized
20 discussions like this or broader discussions among the
21 users of international competition law, not only
22 defendants, but all types of stakeholders, are useful, to
23 better the assess where competition law enforcement is
24 going on a global basis.

25 CHAIRMAN KOVACIC: Thanks, again. That's

1 great. Rachel, did you have a comment?

2 MS. BRANDENBURGER: Could I just add one point?

3 CHAIRMAN KOVACIC: Yes. Rachel Brandenburger's
4 adding a comment.

5 MS. BRANDENBURGER: Hendrik's obviously
6 extremely well-placed to talk about the importance of
7 international outreach and its impact on an international
8 multi-jurisdictional company. Without, in any way,
9 underplaying those points, I think it's perhaps also
10 worth thinking about the environment in which we are
11 operating now with the current economic climate. I mean,
12 all of these other points are valid. They would have
13 been valid a year ago as well.

14 Intellectually, I think we might have
15 understood a year ago, but I think we are now actually
16 living through a very challenging environment in terms of
17 the economic challenges where we are seeing competition
18 law under threat, to some extent risking being
19 sidestepped perhaps. And I think the importance of
20 international cooperation in that environment is great
21 indeed, I think this goes beyond antitrust, actually, to
22 all regulation. This is perhaps something that's also
23 worth putting on the record.

24 CHAIRMAN KOVACIC: Jonas, please. Jonas
25 Koponen.

1 MR. KOPONEN: Yes, thank you, Bill. I think
2 there's a great deal of parallelism of thought between me
3 and the previous speakers. There's been no sort of ex
4 ante collusion about this, but nevertheless. The
5 question that I was asked to think about is how should an
6 agency respond to international development that shape
7 competition and consumer protection policy? I mean, my
8 contribution to this will come from the competition
9 policy side of things because that's where my background
10 is.

11 It's a very broad question and I think one can
12 begin to approach this by breaking it down, and I broke
13 this down to five questions. Some of these things we've
14 covered during the day because I think that the -- it was
15 said earlier, also, that international aspects of
16 competition policy and enforcement must be intertwined
17 with other areas. It's not a topic on its own.

18 My first question is, how does the agency learn
19 about what's happening in the world of -- in the wider
20 world of competition policy? What are the sources of
21 intelligence? Obviously, working on cases which have an
22 international dimension and cooperating with other
23 agencies is an important aspect to that. I think going
24 forward it will be even more important to make sure that
25 the treaty basis for that type of cooperation is there

1 and that, you know, multi-lateral and bilateral
2 cooperation treaties are put in place.

3 Also, the agency needs an intelligence network,
4 a unit that specializes in monitoring what's happening
5 internationally and being active in fora such as the
6 OECD, such as the ICN. The fact that we're here today, I
7 think, shows that this is something that's high on the
8 FTC's agenda and it also shows that, you know, the FTC
9 has already come a long way in terms of picking up what's
10 happening internationally.

11 My second question is, what systems does the
12 agency have in place to process the information that is
13 picked up and the developments that happen around the
14 world and to make that part of the domestic enforcement
15 activities? Because that's the boundary of enforcement.
16 How are they -- the international development, how are
17 they given an impact? I think one aspect of that is that
18 there must be a closely integrated enforcement unit with
19 international cooperation units. To keep separate silos,
20 I think is a recipe for failure there.

21 Now, the third question I've put is perhaps the
22 biggest one and how should the agency respond to change?
23 The response to change is similar, I imagine, to
24 responses that are taking in other organizations, like
25 companies, for instance, that face a dynamic environment.

1 My predication is for the future that in competition
2 enforcement, the cooperation aspect with other agencies
3 will become more important. I'll come back to that.

4 I also think that the nature of response must
5 be flexible in terms of the tools that are used and agile
6 in terms of the ability to make use of things that have
7 been learned internationally.

8 Now, why is this? I think that we've seen over
9 the past few years that more and more countries have
10 adopted regimes and they have ambitions to use these
11 vigorously. I think the international dimension will
12 become more important. I think that there is a real
13 prospect that the bipolar or duopoly world that we've had
14 over the past period where the U.S. and EU have come to
15 set much of the policy agenda, that we will see a shake-
16 up of that duopoly; that there will be a third or a
17 fourth pole that contributes to this. Obviously, Asia
18 will be an important part of that.

19 And I think that the mere fact that these
20 things are happening in China and in India will be
21 important and that it cannot be ignored. And I think
22 that it raises the question, as Hendrik did earlier,
23 about convergence. Convergence becomes even more
24 important in the future than it has been in the past --
25 to make sure that the very good policies and instruments

1 that have been adopted in international fora are actually
2 put into practice.

3 I think that a great ambition that we saw in
4 the spring when I participated in a conference in New
5 Delhi where one really tried, from the Competition
6 Commission side there, to make sure of the recommended
7 practices of the ICN in shaping the merger review system
8 and in shaping the leniency system. That types of
9 efforts are very important to support in the way that FTC
10 and the IBA did on that occasion.

11 If we don't -- if we fail in achieving this,
12 antitrust will become the Babylonian cacophony of the
13 world economy. We need this to be the lingua franca of
14 the market economy.

15 Another area which would sort says to me that
16 international efforts will become more important is that
17 I think there are more and more questions in antitrust
18 which find better answers if you draw upon the
19 international experience. Rachel mentioned here earlier
20 about the threats to antitrust enforcement. It's
21 something that we -- antitrust, in the past month in
22 particular, have come in the shadow of headlines, such as
23 on the brink, not since the 1930s, meltdown,
24 nationalization and so on.

25 And in the midst of what we've seen in this

1 period, I think there is an antitrust dimension to every
2 question that's been asked. It's obvious in cases of
3 rescue aid and state involvement and in government
4 pushing or stimulating companies to merge or to acquire
5 one another, but also in questions like what is done
6 about certain derivative instruments traded away from
7 exchanges that need to be cleared in clearinghouses, who
8 are the designated clearinghouses and so on. Those are
9 some questions that if you draw upon experiences in
10 different jurisdictions, you will find simply better
11 quality answers.

12 And what we've seen in the past period, in one
13 industry sector, we will no doubt, you know, see similar
14 things in other areas, also. And simply the quality of
15 enforcement in the antitrust area will be better by
16 drawing on that.

17 The fourth question I've had is what is the
18 agency's mandate in the area affected by change? What is
19 the jurisdiction? Obviously, that depends on what is the
20 industry sector, what is the area of regulation, but also
21 on the political mandate. On the political mandate, if
22 we look past, in the past month, we've seen some threats
23 to that. And you hear a range of voices. Some calling
24 for more enforcement because -- and also competition
25 enforcement because of the need for regulatory oversight.

1 But also for less enforcement because in the overall
2 scheme of things, it may be that there are other areas
3 which are more, you know, perceived of resources from the
4 government side and the impact of intervention in other
5 policy areas may be seen as more direct. I think an
6 interesting question would be to discuss what is the
7 mandate going forward for vigorous enforcement.

8 Finally, the fifth question is, what are the
9 tools to deal with change, and here we tend to think in
10 terms of enforcement tools. I think that in an
11 environment which is changing the way we see now, we need
12 to be open to all different kinds of tools. We talked
13 about advocacy earlier and how can one influence new
14 regulation that is being put in place to make sure that
15 not only does regulation provide safety, but also that
16 there will be a level playing field for companies to
17 compete, and the return, if you'd like, of the invisible
18 hand is facilitated.

19 Sector reviews is another tool that's been
20 discussed. There may be other tools, also.

21 So, by that, I'd like to thank you very much
22 for inviting me here today and I look forward to the rest
23 of the discussion.

24 CHAIRMAN KOVACIC: Within those excellent
25 surveys that focus on the importance of defining exactly

1 what you want to accomplish -- and I like very much the
2 import/export metaphor and I suppose there's often some
3 of both. But what a useful way of thinking through this,
4 Hendrik's excellent point about the importance of
5 developing support at home for the idea that these
6 international infrastructure investments are important,
7 which is quite difficult.

8 Earlier, James was talking about devising the
9 report card on which we're graded. At home, I would say
10 except in the case of a smash-up like GE Honeywell, which
11 brings things directly to the fore, international counts
12 for very little in the eyes of the people who rate us, as
13 well as Hendrik's thoughts about how to assess success,
14 to think consciously about ways of pointing out the
15 benefits. Then Jonas' observations about the importance
16 of paying close attention to what's taking place in this
17 larger global context, integrating it into policy, policy
18 at home. These are wonderful framing observations.

19 Would anyone else like to come in on some of
20 these points? I've got Jorge, then John and then Luc.
21 Jorge Padilla.

22 MR. PADILLA: Okay, two quick comments. I
23 think that I'm particularly interested in the question
24 what's the value of international outreach and I think
25 that, again, perhaps you are going to think that I am

1 obsessed, but I think that you need to go back to what's
2 your objective. I think that the way that you're going
3 to be able to defend at home your international outreach
4 efforts is if you can link that to your welfare measures,
5 consumer and total welfare. And I think that there are
6 two reasons why you can link that and make that link.

7 It's clear that the actions of foreign agencies
8 have implications on your domestic market. The
9 prohibition of a merger may actually mean that that
10 merger not only applies -- you know, it's void, it's no
11 longer going to take place, and that merger could have
12 been beneficial. The remedy decision in an Article 82
13 case may have impacts on the other side of the Atlantic
14 and vice versa. But a decision not to intervene may also
15 have an impact on the other jurisdiction. So, there are
16 direct effects. But there are also indirect effects
17 because competition policy can, and I fear is likely to
18 be used as a barrier to trade. And if that's the case,
19 then clearly, you know, domestic companies are going to
20 be made less efficient because of the impossibility to
21 compete on global markets and that's going to end up with
22 harm to your consumers and harm to your companies.

23 So, I think that you can defend this
24 international outreach from those that would say these
25 guys want to spend good times here and there, you know,

1 in exotic places meeting with other pals. But because
2 there are clear impacts on your home economics.

3 The second comment I wanted to make is the
4 following. You want to be influential. You just don't
5 want to pay travel tickets to your staff going here and
6 there. You just want to have influence. That's the
7 important thing.

8 CHAIRMAN KOVACIC: Tell them that.

9 **(Laughter.)**

10 MR. PADILLA: One thing that is very clear, we
11 have spent quite a bit of time as economists studying
12 influence. And one thing that we know is that influence
13 is not directly correlated with money, with the money
14 that you invest. So, what are the drivers of influence?
15 And, you know, different people say different things, but
16 I think there are various things that you have to take
17 into consideration.

18 The first is credibility. Credibility means
19 how well you are sort of rated at home. You can only
20 preach if you have a record. Credibility is also related
21 to the way in which the others see you. To what extent
22 you are perceived to be captured, captured either by your
23 domestic companies or captured ideologically. I think
24 that this is particularly important if you want to think
25 about the influence or, you know, lack of influence or

1 the evolution of influence of the American agencies
2 outside. You know, to what extent you are perceived as
3 captured or not. And that would apply to any other
4 agency. I'm not pointing fingers.

5 Second is empathy. Credibility is one
6 dimension, but empathy is another dimension. And this
7 relates to the exports/imports point, which, by the way,
8 Rachel, Professor Krugman got the Nobel Prize because he
9 developed models where exports and imports of the same
10 good happened simultaneously. So, I think to the tribute
11 of Paul Krugman, you know, there can be simultaneous
12 imports and exports of ideas.

13 Recognizing that others out there may be
14 different from us, recognizing that one size doesn't fit
15 all, because --

16 CHAIRMAN KOVACIC: Actually, Jorge, I look
17 forward to seeing someone give a speech that's titled one
18 size does fit all.

19 **(Laughter.)**

20 CHAIRMAN KOVACIC: Subtitle, this is a silver
21 bullet or panacea. I'm hoping that someday someone will
22 give that talk.

23 MR. PADILLA: Let me just conclude with one
24 thing. In terms of influence, it's also very important
25 to recognize that there is -- that we, all humans, suffer

1 from the following psychological bias. We like and rate
2 very highly information coming from external sources that
3 confirms our priors and tend to disregard what goes
4 against our priors. And that's a very important bias
5 that you have to recognize when you try to be -- to
6 influence others. How you are going to tailor your
7 message in a way that doesn't sort of confront directly
8 head on the priors of the other audiences and, you know,
9 works its way to their brains and affects their behavior.

10 Because, otherwise, what you're going to face
11 is that interventionist agents will be very pleased when
12 you hear other interventionist agents speak and will
13 neglect and disregard any speech or comment or
14 intervention made by those that are not of the same bias.

15 CHAIRMAN KOVACIC: John Temple Lang.

16 MR. TEMPLE LANG: Two points. First of all, I
17 think it's important and I agree totally, there is a risk
18 that competition law will be used as a barrier to trade,
19 as a protectionist measure in various countries around
20 the world, and one of the important objectives of your
21 activity should be to discourage that as far as you're
22 able to do so.

23 Bill, you used the phrase, what techniques are
24 particularly effective? I'm told that one of the
25 advantages that European competition law has over U.S.

1 antitrust law in preaching to listeners in developing
2 countries and countries that haven't yet adopted our
3 thinking about what kind of competition law they ought to
4 adopt is the simple fact that you can get pretty well all
5 of what you think to know about European law in a
6 compilation of official publications of the commission or
7 the council or the parliament, whatever it is. You can
8 buy the supplement to Bellamy and Child and you've got it
9 all there. Not all of it, but most of it.

10 Now, in the case of the United States, you have
11 to say, well, you know, you have the Supreme Court
12 reports and the state reports and you have 100 yards of
13 case law over the last 100 years or so, you ought to
14 learn all that. This, quite apart from the merits or the
15 content or the substance of the law, I'm told makes a
16 huge difference for a country that is looking around for
17 a manageable way of adopting a competition law.

18 So, the solution is, do what you can within
19 whatever your constraints are to summarize, in an
20 authoritative way, the law that you're trying to export.

21 MR. GYSELEN: Thank you, Bill. I wanted to
22 pick up on a point Rachel made, which I will paraphrase
23 in my own words. And the point is that you can raise
24 your international profile by being strong at home. I
25 think DG Competition has, the last five years,

1 tremendously increased its profile on the international
2 scene by, in my view, becoming stronger at home.

3 By doing what? By networking in a number of
4 ways.

5 First, DG COMP is networking with the 27
6 national competition authorities within a highly
7 successful institutionalized network, the "ECN." It uses
8 that network not just to discuss who will go first, i.e.,
9 who will take on a case, but also to seek convergent
10 views over certain matters. Just one example. In the
11 '90s, DG COMP was challenging interchange fees, but it
12 was a highly controversial topic, and DG COMP was
13 operating in a rather isolated way. These days, DG COMP
14 is extremely strong and seems to "rule the world" on
15 interchange fees. It has achieved this by networking,
16 first bilaterally and then multilaterally within ECN.
17 So, I think the ECN is a first platform that DG COMP has
18 been able to use as a lever "abroad."

19 The second type of -- more discreet --
20 networking takes place within the Commission. Again, you
21 may say that this is EU-specific -- yet, I'd like to
22 transpose it to the U.S. In the '90s -- and guess who
23 will remember this even better than I do -- DG COMP was a
24 pretty defensive department within the Commission. It
25 didn't want to consult with DG Enterprise or any other

1 department, unless and until it absolutely had to. I
2 think these days are largely over. DG COMP has invested
3 a lot in so-called competition advocacy with these other
4 departments. Conversely, it's often taken on board their
5 views in whatever they do. When I read Commissioner
6 Verheugen's "pharma package" which is now on the
7 Commission's table, I note that this package -- prepared
8 by DG Enterprise -- refers to DG COMP's ongoing antitrust
9 sector inquiry as a complimentary policy initiative.

10 How does that compare with the U.S. The
11 setting is different but my advice to the FTC would be to
12 increase its networking efforts. Where do you start?
13 You start with the DOJ, I suppose. Philip Lowe said, in
14 Fordham last month, that DG COMP would soon come out with
15 a Guidance document on Article 82 -- not Guidelines --
16 but a document that will set out theories of harm,
17 priorities, et cetera, on abuse of dominance. But he
18 added: "We will not come out with this unless we know
19 that our ECN partners will feel comfortable about it."
20 That was the word he used: "comfortable." And we heard
21 that there would be a formal consultation of the ECN
22 partners the next week. We now know that the
23 consultation has gone well and we are just waiting to see
24 when it will come out and what it will say. But one
25 thing we already know is that this Guidance document will

1 have the support of the ECN network. Let us turn to the
2 US. To have joint DOJ/FTC hearings on Section 2
3 enforcement action and with then one agency coming out
4 with a report and the other one not being there, that's
5 awful. The least one can say is that it's not good for
6 credibility. So, that's the first layer where networking
7 efforts need to be made.

8 The second layer is one I am less familiar
9 with: the NAAG. I would imagine that better networking
10 with the state antitrust authorities could also assist
11 the FTC (and the DOJ) in increasing their power to
12 convince on the international scene. It is certainly
13 true that Europe has always been more obsessed about
14 centrifugal forces in the European Community, given its
15 relative youth and centuries of sovereign states, and
16 this has somehow inspired DG COMP to invest so heavily in
17 the ECN. In the U.S., you have two centuries of
18 federalism behind you and you are far, far more relaxed
19 about all that. So you have not -- I think -- invested
20 much in a similar network with the state assistant
21 attorney generals. Yet, I think such an investment would
22 be worthwhile. Think of the *Leegin* aftermath on resale
23 price maintenance. When you debate these things
24 internationally, it does not really seem helpful to have
25 considerable divergences of federal and state views.

1 And, thirdly, and this will be my last point,
2 networking with your regulatory US counterparts. In one
3 of your speeches, I read a reference to health care
4 discussions the FTC had had not only with DG COMP but
5 also DG Enterprise and DG Sanco. And I said to myself,
6 great! But I also wondered whether, before you came over
7 to talk to all these Commission departments, you had
8 talked to other federal regulatory authorities or
9 agencies with responsibilities for health care. Because,
10 again, I think it would be a tremendous help on the
11 international scene.

12 CHAIRMAN KOVACIC: Jim Venit?

13 MR. VENIT: I'm going to say two fairly
14 contradictory things. I think Luc's point on the ability
15 of the Commission or European institutions to deal in
16 multilateral settings very effectively is a tremendous
17 strategic advantage that Europe has over the U.S. And I
18 got this impression about ten years ago when I was in
19 Washington talking to people in the commerce department.
20 Not about any really specific issues, but just in general
21 and seeing how they felt comfortable operating. They
22 felt comfortable operating bilaterally and not in
23 multilateral situations.

24 It occurred to me at that point that this could
25 be going forward, a significant strategic weakness. You

1 know, that being said -- and maybe it's saying the same
2 things. If someone put the question to me, you know,
3 what's happened in your lifetime as a competition
4 practitioner that's been most noticeable to you, I would
5 say the convergence of U.S. and EU enforcement agendas,
6 particularly with the emphasis on leniency and cartel
7 control, which took a long time, but finally happened,
8 and, obviously, in the area of merger control.

9 The area of 82 and Section 2, no one agrees
10 within their own country or whatnot and that's still an
11 open space. And then you ask yourself, well, why did
12 that convergence occur to the extent it did? And there
13 are huge differences. I mean, I think people agree on
14 general frameworks, but the way they get applied either
15 in a merger case or frankly, you know, going in for
16 leniency is radically different because of cultural
17 reasons.

18 But then you say, you know, why did that
19 consensus emerge and was it really the result of economic
20 convergence more than anything else, which I guess is the
21 point that Jonas was making is, if other players come in
22 who have different economic incentives, will you see the
23 same convergence? But, very frankly, what I call the
24 adaptation of the U.S. enforcement agenda by the
25 Commission -- and maybe that sounds unfair, but that's

1 how I perceive it in large respect -- is a rather
2 astounding achievement which is probably the result of
3 enough economic interdependence to produce that, but you
4 may not see that get replicated in other situations.

5 CHAIRMAN KOVACIC: Gotz?

6 MR. DRAUZ: I just want to stress a point which
7 has already been made, why Europe has become so
8 influential on the international scene, and I think one
9 of the -- certainly, one of the attractions is in the law
10 and there's seemingly more simpler ways expressed. But I
11 think what is very important is that the European
12 Commission has attacked some of the big issues which are
13 around and I think not least the Section 2 cases, but
14 also some merger cases have really put it on the list, on
15 the map, and I think a lot of other countries have
16 admired the Commission for certain courage maybe to
17 tackle these issues.

18 I'm not making a judgment now, you know,
19 whether it's good or bad to do it, but I think it's seen
20 on the scene as an operator who has the courage, who has
21 -- who is not afraid of taking on the big guy, so to say.
22 While at the same time, you know, something you mentioned
23 yourself is that there has been a relative absence of the
24 U.S. agencies, especially DOJ, in really picking those
25 cases. And I also remember when the Commission did the

1 GE Honeywell case, there was a conference afterwards, and
2 the head of the South Korean competition agency almost
3 embraced me, and he said it was fantastic, this is what -
4 - it was pure, I wouldn't say, anti-Americanism, but it
5 was behind -- behind that was, you know, a bit of that
6 and then, you know, big companies and the Commission had
7 the courage to go after them. And he was really
8 impressed. So, I mean, there's an element of that.

9 I think if you want to be influential in
10 aligning the earlier point, you have to come with
11 something from your own -- from your home enforcement,
12 which is very important if you want to be credible there
13 and compete and compete with the Commission. In a
14 scenario which will be very interesting in a couple of
15 years with the Chinese and certainly at some stage once
16 they have got out of the internal trouble of how to
17 organize it, and they have really too many -- I mean,
18 they have not a lack of officials, they have simply too
19 many, I think.

20 CHAIRMAN KOVACIC: Gotz, don't you find it
21 amazing that a jurisdiction would struggle with questions
22 of internal organization?

23 **(Laughter.)**

24 CHAIRMAN KOVACIC: I can't imagine that that
25 would happen in a big jurisdiction.

1 MR. DRAUZ: Well, I mean, anyway, they will
2 want to make their mark at some stage very, very strongly
3 and I think it's probably interesting already today to
4 see, you know, how this new game will play out in the
5 ICN.

6 CHAIRMAN KOVACIC: Rachel Brandenburger?

7 MS. BRANDENBURGER: I just wanted to add one
8 point. I think we could probably debate for the rest of
9 the day whether there are differences of levels of
10 intervention between Europe and the U.S., whether there
11 are, whether there are perceived to be, whether there are
12 reasons for the differences, if they are differences.

13 But just on a very practical level, I think
14 John Temple Lang touched on this point. What you might
15 put under the heading of transparency of the U.S.
16 agencies. I am not particularly making an FTC-specific
17 point here, but just speaking in terms of what happens.
18 It is simply much easier if you go up onto the website --
19 and we all live in the website era these days -- of the
20 European Commission than the FTC or the DOJ, if you are
21 an agency somewhere else in the world trying to
22 understand or learn from or just compare what is going
23 on. It's just easier to find the body of thinking, not
24 just speeches and conferences.

25 And I know FTC has made steps in this

1 direction, case closures and so on. But the entire body
2 of what the jurisprudence is is easier to find on the
3 European Commission's website. This is partly, of
4 course, because this is an administrative system here
5 rather than a court-based system. There are challenges
6 with the U.S. system. If there's effective access, you
7 don't need to travel around the world and fund people for
8 international cooperation, valuable as all of that is. I
9 think greater transparency would actually have an impact
10 on the US position on the international stage.

11 CHAIRMAN KOVACIC: Jim, John Temple Lang and
12 then Hendrik. Jim?

13 MR. VENIT: I completely endorse what Rachel
14 just said and I think that is very, very important
15 because it compensates for the problem that John was
16 calling attention to. I mean, U.S. law is more complex.
17 It's also, in many ways, more sophisticated. It's also
18 procedurally much more sophisticated, which is a
19 disadvantage in getting other people to adapt it because
20 it is more complex and more sophisticated and you have to
21 find a way to bring that -- to turn that disadvantage
22 into an advantage. And having access to information is
23 one way to do that.

24 But I think, frankly, that's a very important
25 advocacy task. Because as a practitioner who gets

1 exposed very frequently to the way something is done in
2 the U.S. and the way it's done here, with all due respect
3 for the way it's done here, I find it much more
4 sophisticated often in the U.S., but that makes it harder
5 to understand, harder to export and requires a much more
6 skillful marketing activity, you know, to use all these
7 metaphors of buying and selling.

8 CHAIRMAN KOVACIC: John Temple Lang.

9 MR. TEMPLE LANG: Following on from that point,
10 neatly, one of the advantages of international
11 cooperation is that when a competition authority in a
12 country with a relatively new competition law has a
13 problem that they haven't come across before, they can,
14 if they are on friendly terms with you, they can contact
15 you and say, we have this problem about an essential
16 facility or whatever it is. You must have had cases like
17 this before, can you tell us about them? Tell us what we
18 want to avoid. That kind of thing, seems to me, to be
19 extremely helpful both in terms of providing useful
20 assistance to the authority that's asking the question,
21 but also being helpful and avoiding barriers to trade and
22 so on.

23 CHAIRMAN KOVACIC: Hendrik Bourgeois.

24 MR. BOURGEOIS: Yes, a few comments, a few
25 loose comments. I think we need to be careful, and maybe

1 I don't need to send those warning signals about not
2 being seduced in finding easy solutions to improve
3 international cooperation or your influence in the
4 international scene by simply bringing a lot of cases and
5 flexing your muscles. I think that's quite easy to
6 achieve and that probably brings about short-term
7 benefits, but I think to the detriment of longer-term
8 advantages, which are gained by bringing the right cases
9 and applying, you know, the right rules and the right way
10 of thinking and approaching enforcement priorities.

11 The second point I wanted to discuss, I had
12 actually prepared a long eulogy on the wonderful things
13 that the FTC has done in this area, but I gather that I
14 cannot throw roses, so I won't say anything about that.

15 CHAIRMAN KOVACIC: You can send them
16 separately.

17 **(Laughter.)**

18 MR. BOURGEOIS: So, you know, just a few
19 thoughts with respect to the future. I agree with
20 Rachel. I think one of the reasons why I admire the FTC
21 is because the whole context of international cooperation
22 has not been really conducive to achieving results in
23 other areas. I think for the last few years we've
24 witnessed an increase in unilateralism, a reduction of
25 multi-lateralism, obviously, but also more trade

1 protectionism rhetoric. So, this whole context, I think,
2 has probably not been really easy. But, nevertheless,
3 results were achieved. So, what I think is important for
4 the future -- one of the concerns I have is that perhaps
5 with a change of administration, a change of personnel,
6 leadership, things will change in that respect and people
7 will try to look for more short-term benefits. So, it's
8 important, I think, to continue to pursue those longer-
9 term objectives.

10 Then a final thought I wanted to share with
11 you, one thing that I've been particularly impressed with
12 with what the FTC has been doing is more in the area of
13 being able to avoid the pitfalls of international
14 cooperation: appearing to be too overbearing,
15 patronizing, or too forcefully trying to achieve a
16 specific solution or to, at least in my view, to being
17 viewed as as promoting merely the interest of large
18 multi-national companies.

19 And the strongest point perhaps is what has
20 also been mentioned around this table. I think it's an
21 issue of not only domain expertise and technical
22 experience in the law and the policy stuff, but really
23 about emotional intelligence and the ability to show or
24 concede your own mistakes and to point out and even
25 celebrate the successes of others. I think that's

1 actually a pretty smart thing to do and a very effective
2 way to go about these things.

3 CHAIRMAN KOVACIC: Yes, Jonas.

4 MR. KOPONEN: Yes, just following on the same
5 line of thinking again. I also think when you talk to
6 people at international events, people from other
7 agencies and from non-governmental advisors from other
8 parts of the world, you hear a range of views on the U.S.
9 and the FTC's involvement. Some recognize, in the same
10 way that Hendrik did and what I also think, the immense
11 value that's contributed by the agency.

12 You also hear views that have the perception
13 that there's a U.S. agenda being pushed and just the mere
14 number of attention that's being given to international
15 antitrust is somehow seen as an issue. I think that it's
16 important to have that emotional intelligence, as Hendrik
17 put it, but don't hold back in the effort. Indeed, I
18 think there is a responsibility of agencies with great
19 experience to bring that experience to bear.

20 And in the context of bilateral support of new
21 agencies, I think that there again is an important -- it
22 is important that the people who are involved in those
23 efforts also have a close involvement in the substantive
24 enforcement at home and that the link between
25 international and domestic activity is closed and that

1 people who are involved also have a profound
2 understanding of the context of the countries to which
3 they travel or contribute their experience. Otherwise,
4 this thing just misses the targets. That's something
5 that at least I've heard from agencies which have new
6 regimes.

7 Also, perhaps, coordination between agencies
8 that are involved in the development efforts between the
9 providing agency and the national authority that
10 coordinates, generally, I think is an important thing to
11 get right. Thanks.

12 CHAIRMAN KOVACIC: Any additional observations
13 before we close? I'd just add a last comment, but would
14 anyone else like to come in on these wonderful
15 observations?

16 (No response.)

17 CHAIRMAN KOVACIC: I would highlight a couple
18 of things that substantively I see as in the category of
19 icebergs dead ahead and others, certainly icebergs on the
20 horizon, which I think add to the complications
21 associated with having an effective voice at home and
22 abroad.

23 One is the almost certainty that in a number of
24 quarters, a perceived lesson of the financial crisis is
25 that markets fail, that market failure is pervasive and

1 that competition policy reflects a naive confidence that
2 a competitive process is an effective guarantor of
3 consumer and large social interest.

4 Second, as several of you have mentioned, that
5 trade is a bad thing, and one concern I have about our
6 own electoral process is that a number of candidates,
7 somewhat stridently, emphasize the dangers of trade.
8 Most notably in North America, the notion that the
9 prosperity and growth of a successful economy in Mexico
10 undermines the interest of the United States is a
11 startling proposition. Yet, it's been advanced quite
12 vigorously and perhaps one will see a retreat from that
13 as the imperatives of leadership are recognized, yet the
14 longer and more loudly you pronounce your antipathy
15 towards these measures, the less freedom to maneuver
16 later on when the policymaking begins.

17 A third hazard in the larger sphere is the idea
18 that protectionism is a good thing more generally. That
19 is not simply that trade is bad, but protectionism is a
20 bad thing. In the field of public procurement, a
21 striking number of public officials in the United States
22 have announced that it is unthinkable that the Government
23 of the United States would spend \$50 to \$100 billion over
24 the next 20 years on buying an aerial refueling tanker
25 from a company located in Toulouse, and that to do so is

1 a fundamentally flawed choice. And the roster of people
2 of great influence and certain to have great influence in
3 the future who have said that and intimated that that's
4 the case is breathtaking.

5 In a matter such as the DHL transaction that's
6 being considered in the U.S., not a transaction that the
7 FTC is reviewing, but one that's been set forth, a number
8 of, again, public officials of considerable significance
9 have said that the employment effects of the transaction,
10 by themselves, ought to be considered first and foremost
11 in the merger review. That is expressed in the letters
12 we've received. We won't review the transaction, but we
13 got the same letters sent indiscriminately to Tom Barnett
14 and me, but a recurring theme is that the jobs alone
15 count.

16 Taken as a collection of forces, to compare it
17 to the sort of rosy expectations of maybe 10, 12 years
18 ago when it seemed that the perspective of many of these
19 issues was evolving in a direction that was certainly
20 more accepting of market processes, welcoming of trade,
21 doubtful of protectionism as a path to growth, in a very
22 rough way, I feel the possibility for a real intellectual
23 retreat on all those fronts is present. And given the
24 nature of policy interventions that have taken place in
25 North America and elsewhere, it's going to be difficult

1 to have an effective voice on these issues. Just add
2 another layer of difficulty so we don't have problems
3 anymore, we have challenges. But another challenge to be
4 faced in matters overseas.

5 When we thought some months ago about
6 undertaking this process and, in particular, to ensure
7 that a major focal point of it would be consultations
8 overseas with those who know us and have observed us
9 carefully, this is exactly the kind of conversation that
10 I'd hoped we'd have. This is precisely the set of
11 observations from all of you that I think will help us
12 grow.

13 I'm not sure that we've got great answers, but
14 we sure have the right questions. And this reminds us in
15 an enormously useful way, what we have to be thinking
16 about going ahead. I am so grateful to all of you for
17 doing this on our behalf.

18 Jim?

19 MR. VENIT: Just one brief comment. I've
20 attended a number of these sessions in the past and, by
21 far, this is the one that has been the most productive
22 and I think that's a great to you for the organization.
23 No roses, but just an observation from someone who's done
24 this before. So, I think you deserve to be
25 congratulated.

1 CHAIRMAN KOVACIC: Well, thanks, Jim. It
2 certainly coincides with our genuine narrow-minded self
3 interest, too, that this is --

4 **(Laughter.)**

5 CHAIRMAN KOVACIC: To have superb advice on any
6 numbers of fronts, to give us so much to think about is,
7 I assure you, for us, this is a morning well spent.
8 Thank you all.

9 **(Whereupon, the meeting was concluded.)**

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C E R T I F I C A T I O N O F T Y P I S T

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MATTER NUMBER: P081205

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CASE TITLE: FTC AT 100

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TAPING DATE: OCTOBER 21, 2008

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