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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

THE FEDERAL TRADE COMMISSION AT 100:
A UK PERSPECTIVE

Friday, September 12, 2008
10:00 am to 3:45 pm

At the:
Competition Commission
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Southampton Row
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Reported and transcribed by David Pritchard

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INTRODUCTION AND WELCOMING REMARKS

1 MR. FREEMAN: Right, ladies and gentlemen,
2 shall we begin? It's my pleasure and privilege to
3 welcome you to the Competition Commission on behalf of
4 the Federal Trade Commission. We are delighted to host
5 this event for the FTC, "The FTC at 100". I note, of
6 course, that the centenary itself is not until 2014, and
7 commend the Federal Trade Commission on its timeliness
8 and the thoroughness of its preparations. I would just
9 like to note that our own centenary will take place in
10 2048.

11 We will be conducting a programme of
12 consultation in the next 34 years -- 40 years. It is, of
13 course, our 60th anniversary this year, so we are someway
14 behind. Seriously though, we think it is wholly
15 admirable that the FTC in promoting its goal of sustained
16 efforts to get things right, to use Bill Kovacic's words,
17 should take the trouble to consult its many friends
18 around the world. We certainly endorse the view that a
19 periodic, if not a continual, process of self-examination
20 is essential for any authority faced with the changing
21 pressures and demands that we all face.

22 For our part, the Competition Commission
23 conducted a review authorised and overseen by the CC's
24 Council over the last two years. That was a good
25 example. It confirmed our strength in many cases, in

1 essential aspects of what we do, but it suggested
2 important improvements in our approach to use of evidence
3 in the analytical framework and the efficiency of our
4 operations, and we are in the process of trying to
5 implement those measures. So self-examination is very
6 important.

7 Almost as important as the result, is the fact
8 of conducting the review. It makes you ask questions
9 that you might not otherwise ask and it brings unexpected
10 benefits, and I am all for it. So the CC's role in this
11 is actually as host. This is very much the FTC's day and
12 I will be sitting quietly here taking notes. I would
13 like to hand over to Alden Abbott who will now take the
14 day forward. I think there are fire instructions that I
15 was meant to read out. If something goes wrong, just
16 run. There will be coffee halfway through the morning
17 and lunch at 1:15, so Alden over you.

18 MR. ABBOTT: Thank you, indeed, Peter, for
19 graciously hosting us at the Competition Commission. I
20 would like to introduce our colleagues whom you will hear
21 from throughout the day. Maureen Ohlhausen of the Office
22 of Policy Planning. Her Assistant Director is Gregory
23 Luib, and Maria Coppola-Tineo of the international office
24 whom you know well because of the time she spent at the
25 OFT. She has been quite helpful to us in teaching us the

1 ways of competition policy in the UK.

2 Bill Kovacic, of course, is the former
3 professor of the Socratic dialogue who said that "the
4 unexamined life is not worth living." He thought it was
5 important for us at the Federal Trade Commission to enter
6 into self-examination in order to improve ourselves,
7 improve our administrative processes and improve our
8 allocation of resources and, perhaps most important, to
9 set up to institutionalise processes for continuing
10 improvement in review of what we do in future years.

11 I think he is committed to do this viewing the
12 antitrust and consumer protection enterprise as
13 essentially not political, bi-partisan, as an area which
14 economic and policy expertise is brought to bear and we
15 are hoping that the results of our self-study will be
16 published in a report which we hope will be made public
17 in January. Of course, we are going through a political
18 season but, again, I think it is more important to
19 underscore that this effort transcends partisan politics,
20 being an effort to try and more systematically try and
21 establish a programme for improvement and self-awareness
22 which goes beyond the annual reports we are required to
23 file that notes what performance measures we have met or
24 not met.

25 As Peter mentioned, you know, the Competition

1 Commission has made a number of improvements and is doing
2 so, and the Office of Fair Trading yesterday described to
3 us their procedural changes. Institutional reviews have
4 been undertaken in many foreign jurisdictions, foreign
5 agencies in recent years, and that is why we are
6 consulting not just here, and although I think perhaps I
7 expect we will maybe get the best information from the
8 UK, we are consulting with our colleague ins Brussels,
9 Paris, Australia, Japan, Canada, Israel, Panama and
10 Argentina trying to get a wide swathe of people who can
11 comment on how we are doing and how we are perceived.

12 Let me just list six questions which are
13 central to this self-examination: Effort. These six
14 questions are: First, when we ask how well the
15 Commission is carrying out its responsibilities, by what
16 criteria should we assess its work? Second: What
17 techniques should we use to measure the agency's success
18 in meeting normative criteria? Third: What resources
19 will the FTC need to perform its duties in the future?
20 Fourth: What methods should the FTC use to select its
21 strategy for exercising it powers? Fifth: How can the
22 FTC strengthen its processes for implementing its
23 programmes? And sixth: How can the FTC better fulfill
24 its duties by improving links with other governmental
25 bodies, certainly CC and OFT for example, and non-

1 government organisations?

2 At this point I would like to turn over the
3 floor to the first topic. Hopefully, we will benefit
4 from the insights of John Vickers, who I am delighted is
5 here today. I had the honour of spending a few months in
6 England three and a year ago and I am honoured that the
7 new warden elect of All Souls College is here to join us
8 on our first Panel, and let us carry on.

9 **ASSESSING THE EFFECTIVENESS OF THE FTC**

10 SIR JOHN VICKERS: Thank you very much, indeed,
11 Alden and Peter. It is lovely to be here and with lots
12 of old friends. I think my job is to kick off the
13 discussion of criteria for judging success and I am going
14 to begin by quoting some remarks which I identify with in
15 large part but not entirely, and I will tell you in a
16 minute who said it. So this is a quote: "The first
17 question that occurred to me when I received the
18 invitation to speak was: "Why are we celebrating
19 anniversary of the FTC? Why aren't we waiting for the
20 Commission's Centennial? Could there be some pessimism
21 about whether the Commission will survive so advanced in
22 age in this era of deregulation, and why is it that I, a
23 notorious FTC sceptic, was asked to give this talk?"

24 Now that, the sceptic bit is what I
25 particularly disagree with but those remarks were made by

1 Judge Richard Posner at the 90th anniversary conference,
2 which was not a very long time ago if you do the
3 arithmetic, and they appeared in a paper in the Antitrust
4 Law Journal -- there is a special issue of two dozen
5 papers coming out of that event -- and I am going to
6 refer back to the rest of his short talk in these opening
7 remarks.

8 Now the biggest difference between my view and
9 the quoted view is that I am a big admirer of the FTC.
10 Posner's scepticism was grounded in his experience of the
11 FTC of the 1960s. At the end of the 60s and in the 70s
12 were great reforms, the Agency transformed itself, and he
13 characterises the pre-reform FTC as a "throwback to the
14 progressive era collectivism." The FTC that I had
15 experience of, which is mainly during my time at the OFT,
16 five years beginning in 2000, the FTC was nothing like
17 that at all.

18 Then it had turned into what Posner calls a
19 "champion of free markets," and what was particularly
20 impressive and valuable when I was at the OFT and to
21 colleague there trying to learn how we should operate our
22 responsibilities, which are in some ways are similar in
23 their footprint to those of the FTC, was working together
24 the competition policy agenda and the consumer policy
25 agenda. Because as one looks around the world,

1 jurisdiction after jurisdiction, particularly but not
2 only when those responsibilities are under separate
3 roofs, they can easily work in tension if not conflict
4 with one another, but the FTC was very good at working
5 those together.

6 I always thought of the FTC, and still do, as
7 the world leader in how to do that best. So it is quite
8 hard to come up with lots of ways of doing it better,
9 because that for me is the starting point. Now the
10 question for this first session how to measure success?
11 I want to talk about two things. One is what is the
12 goal, the ultimate goal? Is it just consumer welfare or
13 is it something more, something to do with economic
14 efficiency? And how does that goal relate to the rules
15 and the standards and the policies that the Agency seeks
16 to enforce?

17 Then, second, some rather general remarks
18 on how an agency can succeed or fail in promoting that
19 ultimate goal, and my theme is that I strongly believe
20 that the most important successes and the most important
21 potential failures of organisations like FTC and the OFT,
22 to a lesser extent the CC, are likely to be indirect and
23 very often silent. And measurers of success -- and I am
24 conscious that the NAO and so on are here -- need to be
25 humble and subtle in the face of that.

1 First, a word or two on goals. I think it
2 is very important to distinguish, and people in my
3 experience often fail to distinguish, between the
4 ultimate goal of policy and the standards that rules and
5 practical policies embody. The old chestnut is the
6 seeming tension between the explicitly pro-consumer
7 orientation of many laws and policies e.g. in the merger
8 area but other areas too. Of course, it is very hard to
9 find an economist who would say that the only thing that
10 matters for evaluation is the welfare of consumers as
11 consumers. Wider efficiency objectives, this clumsy
12 phrase of "total surplus" that economists use, in many
13 ways seems more appealing. Now how do we reconcile that
14 tension? Well, I think part of it -- and this is topic
15 that Catherine's colleague Bruce Lyons has worked on and
16 Mark Armstrong and I and many others are working on it at
17 the moment - is that you have got to recognize that
18 agents out there in the economy, they are optimizing
19 their objectives against the constraints of the rules as
20 they perceive them.

21 So if one's ultimate objective is, say,
22 total welfare, to use the clumsy phrase, it is not
23 obvious at all, indeed it is generally false, that you
24 would want your policy rule, say your rule for whether or
25 not to prohibit a merger, to be bang in line with that

1 ultimate goal. Because the agents out there have a
2 different objective, let us say a profit objective, which
3 they are optimizing against the rule and it is, indeed,
4 false that you would want to embody your ultimate goal,
5 wire it, precisely into your standard.

6 I think that is one reason, given that the
7 world out there is trying to maximize profit, one reason
8 why some consumer orientation in policy is desirable. As
9 was put quite nicely in a recent paper if you want to
10 travel north-east and all those out there are sailing
11 their ships east, then some northerly breeze might be
12 quite a helpful thing for you. Peter is very interested
13 in nautical things.

14 MR. FREEMAN: We are hardly in the age of
15 steamships but, yes.

16 SIR JOHN VICKERS: Mine was a more old
17 economy remark. I think there are other reasons as well
18 for the strong consumer orientation. One is that I think
19 it is a constant check and reminder against misguided
20 intervention, the kind that the FTC of that earlier
21 generation and many other authorities succumb to.

22 It is also a counterweight to corporate
23 vested interests, though of course there are many
24 sophisticated corporate vested interests who seek to wind
25 up the authorities into acting in their own interests

1 under some umbrella of the consumer interest. There is,
2 and this is I think very important to assessing how well
3 an organisation like FTC is doing, and this is probably
4 even more true with consumer policy issues than
5 competition issues, there is the collective action
6 problem of consumers.

7 Even if I as an individual consumer, in
8 principle, have a right under the common law or maybe
9 under criminal law for some fraud issue, I am hopeless as
10 an individual at enforcing those rights, and this is
11 where agencies can have huge value that others would not
12 be able to bring. And, as well, the consumer orientation
13 helps reconcile the consumer policy and competition
14 policy aims, because let us not forget it is not any old
15 competition that antitrust is seeking to protect and
16 promote. It is competition to give customers good deals
17 or something akin to that.

18 So those are some comments on goals and
19 standards and on this issue which I suspect will come up
20 later about consumer goals, how are those to be balanced
21 or seen in the context as wider goals which might have
22 economic efficiency issues, not just benefits to
23 consumers as consumers.

24 So second and last thing: How can the agency
25 succeed or fail in promoting those goals and what does

1 that mean for measurers of success?

2 I think there are at least two ways one
3 can approach that. Agencies, the OFT has done this and
4 others too, in looking at their priorities have addressed
5 the question: What if we did more of this other
6 activity, less of that other activity? That is a very
7 important kind of evaluation, but since I knew I was
8 going to be the kicker off of this discussion I thought a
9 word or two on the nuclear option of abolishing the FTC
10 might be a good benchmark to think about where the
11 sources of value come from and, indeed, Posner addressed
12 himself to exactly that question.

13 In the earlier era he had been a sceptic
14 about whether the FTC was worth the bother, and if an
15 agency is doing counter-productive things that itself is
16 a good argument for getting rid of it. He advanced three
17 headings. One was that the FTC as a filler of gaps.
18 There used to be a view that the FTC under its statute
19 with its references to fair dealing and things of this
20 kind might be able to range wider than traditional
21 antitrust, and that that would be a good thing.

22 Now Posner's view, which I have to bow to,
23 is that the interpretation of the Sherman Clayton Act has
24 been expansive enough that at least in Posner's view
25 there is no such gap, so that this is a non-argument.

1 More generally, he says that one might worry on
2 separation of powers grounds if an administrative agency
3 is seen as a quasi-legislator, filling in gaps that
4 Congress or Parliament had not seen fit to fill. He
5 does, however, point out that in many episodes, some
6 involving the tobacco industry, for example, decades ago,
7 FTC action a very important catalyst to the legislature.

8 Indeed, we have seen instances of that
9 here. the Big Bang in the Stock Exchange, in a way the
10 OFT was legislated off the case in a way that was
11 ultimately pro reform. So this is a catalyst of
12 legislation and wider advocacy role. The second argument
13 that he looks at is that the agency may have skills and
14 capacities that the courts lack. He says, however, that
15 the quality of appointment historically was very uneven,
16 and often, very short, though I think that has changed
17 quite a lot and with recent chairman like Pitofsky, Muris
18 and Kovacic who underline Alden's bipartisan point too.
19 There is this metaphor of passing the baton rather than
20 lurches or pendulum swinging and the like.

21 The third thing that Posner talks about is the
22 benefits of competition among law enforcers. Now the FTC
23 has fewer parallel enforcers on a number of consumer
24 policy front, but there are -- clearly there is the
25 parallel enforcer, if it were enforcing, in terms of the

1 DOJ and the Antitrust Division, as well as state
2 attorneys general and the private bar.

3 There are at the moment questions about
4 the extent to which the Justice Department is enforcing
5 the antitrust laws and there are some well publicized
6 spats between the FTC and the DOJ, for example in the
7 link Line case before the Supreme Court and the very
8 recent Section 2 review. Of course, there are divisions
9 as well within the FTC and that is another interesting
10 area that we might or might not want to come on to later.

11 Posner accepts that antitrust enforcement
12 might be clumsier without the FTC playing this
13 complementary role and that there would be more consumer
14 fraud harm, because although other means, private
15 enforcement and the rest, might come to fill the void to
16 a considerable extent, he accepts not wholly. His
17 conclusion is what the FTC did to survive in the
18 deregulation movement of the 70s was to become a promoter
19 and champion of deregulation, and that if it had not it
20 might well have got swept away by it, and I think that is
21 quite plausible. So it was a change from a protectionist
22 policy to this pro-competitive one which we have seen.
23 Now just to sum up and throw some points from that on to
24 the table, I think that the value added from agencies
25 here is, first, ensuring that existing law does not go

1 unenforced.

2 Another example in the US is horizontal
3 merger policy that many people thought had gone to sleep.
4 The FTC has had a recent success, at least for now, in
5 the Whole Foods case. There it is doing things that
6 would not get done otherwise. I think these agencies can
7 do a great deal to clarify the practical meaning of
8 existing law, by guidelines, by case decisions, including
9 non-interventions, and by court actions that clarify the
10 law. The FTC has been quite pioneering in that, with
11 mixed success, but even if one loses in a case with vague
12 law one ends up with more clarity.

13 A huge amount has been done by the FTC to show other
14 enforcers, including private parties, the way, by
15 precedential cases and by what is called competition
16 policy R&D, and I would add consumer policy R & D. The
17 value subtracted comes from when you overdo it, excessive
18 intervention when you are captured by vested interests on
19 either side or in thrall to good-sounding interventionist
20 theories that are actually counter-productive because of
21 their indirect effects. So in my sense, though I say this
22 from 3,000 miles away, is that the value of the FTC has
23 not just been as catalyst to legislative change,
24 advocacy, promoter of removal of Government restrictions
25 on competition, but also it has just made the law work

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1 better by bringing cases, clarifying its view of the law,
2 getting some wins, occasionally losing -- but that is all
3 part of the process -- but indirectly making it much
4 easier for others, including private parties themselves
5 to enforce the law.

6 Against all that are deterrence gains,
7 whether it is from fraud to kinds of competition
8 violation. Therefore, the avoidance of harm is to
9 consumers and competition that but for those agency
10 actions would otherwise have come about. So there are
11 some thoughts on the nuclear option of what if there were
12 no FTC and some suggestions of where the lines of value
13 added and the risks of counter-productive come. Thank
14 you.

15 MR. ABBOTT: Thank you very much, John,
16 for your laudatory comments. We are really concerned --
17 I mean lots of people have told us that we are doing a
18 good job and we are always glad to hear that, but what is
19 particularly useful to us is to get points of critiques,
20 and you certainly pointed the way historically to a
21 historical critique of the old FTC before the 70s.

22 Are there, in terms of assessing the
23 welfare of our actions -- I know that you alluded to the
24 consumer welfare, total welfare efficiency, as a former
25 policy maker and an economist, as we go forward do you or

1 any of the other economists here or policy makers think
2 that it would be helpful for us to clarify publicly what
3 metric we are using, are we using consumer surplus, total
4 surplus, something else? And are there any factors not
5 related to the economist's idea of surplus that valuably
6 can be included among our goals to be advanced? I just
7 open this up to anyone because I think this is an area
8 where the agencies, the American agencies, have not
9 perhaps been as clear as to what particular welfare goal
10 is being advanced.

11 MR. BISHOP: I do not claim to have any
12 guidance to offer, but let me just see if this
13 observation stimulates any thoughts. It seems to me that
14 the smaller the jurisdiction the more likely are the
15 people running antitrust policy in that jurisdiction to
16 start thinking about total welfare and not consumer
17 welfare. Let me give you two instances. One is Canada
18 with the Superior Propane case. The other is the great
19 noise in Scandinavia around the year 2000/2002 over two
20 cases where there was a lot of angst in the Scandinavian
21 business community.

22 Volvo/Scania was the main case but also
23 the earlier case of West Jutland Tobruk -- the meat
24 packing case, I cannot remember its name now. Now the
25 claim there was that small countries are not getting a

1 chance to build big companies, that in fact consumer
2 welfare would just be ignored if it were a big country
3 like Germany. Rather, the benefits would be -- the fact
4 that there was a bit of consumer detriment in Bavaria
5 would not be noticed if there was overall benefit. There
6 is a similar kind of argument in Canada about: Well, we
7 have to have efficient industries of this sort and it is
8 sensible to trade off a bit of consumer welfare. As
9 people will know, there is an explicit adoption of a
10 total welfare standard or some partial total welfare,
11 some partial move towards a total welfare standard away
12 from purely consumer welfare.

13 Now I do not have any great hypothesis
14 about that, but it does strike me that there is probably
15 something systematic here that might help us think
16 through this question of whether we want to move away
17 from a consumer welfare only standard and adopt something
18 like some element of total welfare approach.

19 MR. ABBOTT: Yes, John?

20 MR. FINGLETON: If you take the example, a
21 very simple example of a merger and use the Williamson
22 framework, which is you have some consumer loss in the
23 merger but you have a cost reduction, and Williamson's
24 basic point was the consumer loss is smaller than the big
25 increase in productivity. But that relies on the

1 assumption that there is a mechanism in the market that
2 drives through that efficiency over time and, absent
3 rivalry, it is very unclear that the correct assumption
4 is that that cost curve either falls or stays low.

5 Consequently, I have been of the view that
6 in merger analysis the type of environment in which you
7 are likely to find an efficiency defence that works is
8 not the sort of 2 to 1 type merger situation where there
9 is a small welfare effect and a big efficiency effect,
10 but much more likely of the 4 to 3 or a 3 to 2 where you
11 think there is still enough competition left in the
12 market to drive rivalry to reduce cost even if in the
13 short run there is some welfare reduction on consumers.

14 So I think that that type of scenario
15 illustrates the scepticism that one should have, and I
16 think John alluded to this also in sort of profit
17 maximizing; but the whole 'x inefficiency' argument and
18 how weakly competitive markets are x inefficient I think
19 is an important factor to bear in mind. We did one
20 evaluation last year, which I was going to mention later
21 but this is a good time to bring it up, of the taxi
22 market where there was some deregulation of taxis.

23 What that evaluation showed was that while
24 there was some consumer benefit there were actually
25 bigger productivity losses on the other side, so the

1 total welfare went down. The reason for that was that
2 entry controls were removed. Price controls stayed in
3 place and, of course, what happened was that the
4 inefficient capacity of taxi drivers went up as more and
5 more of them queued. The right answer would have been
6 for fare controls to have been brought down. That would
7 have happened in a free market, so partial liberalisation
8 in a regulated market can have these type of effects.

9 The right policy answer there is still to
10 deregulate entry but actually to try and match that with
11 appropriate price reductions to try and capture the full
12 productivity effect. We have certainly as part of our
13 policy tried to be very explicit where we think there are
14 trade-offs. It would not alter our perspective on what
15 we should do, but I think it is very import that when we
16 go back and look at the effects to try and think how we
17 can learn from that. So we might now approach that
18 slightly differently if we were doing it again to try and
19 correct for that productivity inefficient...

20 MR. ABBOTT: That is very helpful, but is
21 there anyone who would take the position that welfare --
22 and I view welfare sort of as the economist's paradigm,
23 whether you are talking about redistribution of surplus
24 from consumers to producers or not; but there is this
25 nice welfare of concept that comes from applying micro

1 economics, but our statute talks broadly of unfair
2 methods of competition. Do any of the lawyers or
3 economists here think there is a legitimate role for
4 being guided by something in addition to welfare? If you
5 are trying to optimize then you think over several
6 factors. Are you only concerned about welfare and set
7 aside the issue of whether it is consumer surplus or
8 something broader? Or are there fairness factors that
9 somehow do not fall within the economist's definition of
10 welfare that can legitimately be considered? Or would
11 such consideration of factors outside of welfare be
12 illegitimate in your view? Jeremy?

13 SIR JEREMY LEVER: I think this concept of
14 welfare is sometimes a slippery concept. A merger
15 between competitors almost by definition would enable
16 "efficiency gains to be made", because competition
17 inevitably involves duplication of activity. That is
18 what competition is about, different people doing similar
19 things in competition with each other. If you tell me
20 which side I am on, I would tell you of any most mergers
21 between competitors, whether the efficiency gains are
22 such that the merger should be approved or whether they
23 are not. 'Just give me a little time with the client'.
24 So I think be careful about this concept of welfare in
25 that this context.

1 MR. ABBOTT: Yes. Margaret Bloom?

2 MS. BLOOM: Just to briefly address your
3 question about should you add other objectives, I would
4 be cautious about adding something like fairness. If you
5 did widen it, what happens if you satisfy the fairness
6 one but then it reduces welfare? So you could have
7 tension if you have more than one objective. That is on
8 that particular point. On the question about whether it
9 should be consumer welfare or total welfare, I very much
10 endorse what John Vickers said and add one other argument
11 as to why it might be beneficial for an agency to espouse
12 consumer welfare is that it is a good argument when you
13 are seeking funds and you are projecting what you are
14 doing; you are saying: I am benefiting all consumers. I
15 suspect that is a more powerful one than saying I am
16 benefiting total welfare.

17 MR. ABBOTT: Yes?

18 MR. HUMPHERSON: Yes, Ed Humpherson from
19 the National Audit Office. I would just like, John, to
20 ask you to say a little more about your sailing metaphor.
21 Not that I know enough about sailing to understand it,
22 but it struck me as being quite an interesting assertion
23 that there are situations in which the higher level
24 policy outcomes that Parliament may want an organisation
25 to pursue it is not entirely rational to delegate those

1 down into each of the individual intermediate outputs
2 that an entity has to deliver.

3 That struck me as fascinating for the
4 following reason, that on my way over here I was thinking
5 about competition authorities in general and asking
6 myself: What is it which is distinctive and interesting
7 about them across the whole waterfront that I cover,
8 which is large parts of the public sector? It struck me
9 that it is actually the very clarity of objective that
10 competition authorities operate under that makes them
11 distinctive.

12 I very much agree with Margaret's point
13 that we do not want to add in more objectives against
14 which different arguments can be traded off, and if I
15 compare a competition authority even with an economic
16 regulator the trade-offs are less complex and, certainly,
17 with a core Department of State, where it is always
18 possible for the Department to plead in aid of its policy
19 position some countervailing or overarching objective
20 which is hard to unpack. So it struck me actually that
21 one of the great strengths of competition authorities is
22 this clarity. So I would be just interested in your
23 thoughts about whether my sort of bird's eye view of that
24 is actually a little bit misleading, because when you get
25 down into the undergrowth there are good reasons to think

1 that it is more complex, which I thought was the
2 implication of your analogy.

3 SIR JOHN VICKERS: I will try again on
4 this sailing point. We have got to disentangle the
5 question of what the rules or standards should be on the
6 one hand and the separate question of what should guide
7 the resource allocation decisions of agencies and their
8 funders, because those are distinct issues. The sailing
9 point, we can think of in many other contexts, for
10 example dealing with young children you often have rules
11 or norms which are not exactly your own view; it is just
12 to try and get them to behave differently in a way that
13 is in line with what you want; and one might well set
14 rules that are stricter than one's real preferences,
15 because you know they will cheat around the edges and you
16 end up getting it about right.

17 Now for that point in, take the merger context,
18 compare a system where you say we will prohibit mergers
19 that are substantially welfare reducing -- that is the
20 welfare rule -- and the consumer rule, which is
21 approximately what we have got in the UK and the US is
22 that we will prohibit mergers that are substantially
23 detrimental to the well-being of consumers as consumers.
24 Forget them as shareholders. Now it is completely
25 non-obvious which is the better rule if your ultimate

1 objective is total welfare because it could be that under
2 the consumer rule -- the private sector might be
3 considering choosing between two mergers which are
4 mutually exclusive, you cannot choose both -- they will
5 go for the one that is the most profitable that is
6 allowed.

7 If they are restricted to doing things that are
8 consumer welfare enhancing or at least not substantially
9 detrimental, then -- and the remaining choice that they
10 have got are between things that meet that test -- they
11 will choose the one that is most profitable. It could
12 easily be the case that that consumer rule will on
13 average give you higher total welfare than the total
14 welfare rule, and then total welfare is certainly not the
15 optimum rule if the private sector is effectively
16 choosing between mutually exclusive mergers or lines of
17 unilateral firm conduct.

18 MR. HUMPHERSON: So we are on a yacht, we do
19 not know whether we want to go north-east or south-west,
20 so we don't actually know which wind we want.

21 SIR JOHN VICKERS: Well, say you want to get
22 the boat north-east, but if you know that the person is
23 sailing it wants to go as far east as they can, then you
24 want some northern impetus to get them going that way.
25 There are mathematical ways of explaining all this but

1 that would be tedious and unhelpful in this context. It
2 is just that one lot of people are optimizing the rule.
3 What happens is the combination of their optimization in
4 the rule, what happens is either good or bad for your
5 ultimate objective. You might well want to have the
6 standard, if you like, at an angle to where you really
7 want to go.

8 Now the resource allocation decision, I
9 think there are very strong reasons to it being consumer
10 orientated because consumers are much less good at
11 protecting their own interest because of a collective
12 action than are most corporate interests. So if you
13 think that the FTC or the OFT are not the only enforcer
14 or applier of this law, that is every reason to do the
15 things that would be enforcement gaps, not gaps
16 insubstantively but enforcement gaps because of the
17 collective action problem of consumers. There is
18 Margaret's reason, there is the batting off the vested
19 interest reason. There are others too.

20 MR. MARSDEN: Can I just interject on this
21 point that John made about the angle in particular. I
22 think that maybe one metaphor which might apply with
23 respect to sailing or steam or hovercraft is one of the
24 things that sailors do is they look for the North Star,
25 and they are not trying to actually take off and reach

1 the North Star in some form of realistic way but that is
2 their fixed point that they are aiming at. They have
3 chosen that star.

4 They have not chosen Venus which moves
5 around. They have not chosen to just follow the wind or
6 something like that. They have chosen a star and that is
7 what they are aiming at, but they are going to keep
8 themselves firmly at sea, aiming at total welfare.

9 SIR JOHN VICKERS: Of course, skiing is
10 one activity where you do not want a level playing field.

11 MR. ABBOTT: So just to sum up because --
12 oh, yes, did you have a question or a comment?

13 MS. WADDAMS: I was just going to go back
14 to your, I think, slightly more general question around
15 what the objective should be, never mind the best way of
16 reaching it and the talk about not muddying the waters.
17 Somebody has got to make these fairness trade-offs. I
18 think it is a question of where you want them made, and I
19 was interested in Ed's comment that in the regulatory
20 authorities you have it done in-house and in competition
21 authorities on the whole we have avoided that.

22 I think one just has to be careful and
23 say: Well, who is going to make that trade-off, who is
24 going to think about fairness? If the competition
25 authority is not, is there a slight danger that somebody

1 comes and trumps it? So I think it is a wider question,
2 which is: Should it be internalized or should it be
3 outside institution.

4 MR. PRITCHARD: I think, certainly in the
5 merger context, that is a strength of the UK system, that
6 it is very transparent when you want to trump what the
7 competition policy or consumer welfare answer is with
8 competing social objectives, then it is quite clear how
9 it is happening and who is doing it and national security
10 and potentially other public interest norms then come
11 into play. Also, like in the German situation when the
12 Ministry of Economy overrides the Bundeskartellamt you
13 know what is going on. And then you can take a view as
14 to whether that is the right way to go, but it certainly
15 is not internalized within an agency because there is
16 plenty of latitude, as Ed was saying, to persuade
17 yourself internally that something outweighs something
18 else.

19 So I think that is one of the, what I
20 would say, strengths of keeping quite a narrow focus. I
21 Aiming at consumer welfare is the best way to go --
22 certainly in the merger context -- even if you are aiming
23 at total welfare at the end, to compensate for the breeze
24 that would take you off course.

25 MR. FREEMAN: Could I just say something?

1 MR. ABBOTT: Certainly, Peter.

2 MR. FREEMAN: I think one point that one
3 should bear in mind is that you have to be careful about
4 what audience you are addressing these statements to.
5 You talk about: Should the FTC have this standard or
6 that standard or should it promulgate this standard or
7 that standard. For most of our political and non-
8 economics business colleagues this would be a baffling
9 conversation. I think they would ask for a definition of
10 terms. They would want to know what we meant by consumer
11 welfare, what we meant by total welfare and what we meant
12 by total consumer welfare.

13 There is a proliferation of terminology,
14 not always consistently used, and just as a point of
15 paradox John Vickers got the prize for mentioning
16 Department of Justice first, but there is no organ I
17 would suggest that is more vociferous in claiming that it
18 operates a consumer welfare standard in the interest of
19 consumers, yet it is said that that may be less
20 vociferous in enforcing Section 2 of the Sherman Act than
21 some.

22 You can claim anything by reference to a
23 standard. It does not necessary dictate a particular
24 level of intervention or level of activity. I think
25 there is a great danger of having this debate as an

1 internal one which does not actually help the public
2 presentation of the agency.

3 MR. ABBOTT: Margaret Bloom?

4 MS. BLOOM: Just to add a brief point on
5 Catherine's very interesting one about the balancing.
6 There is I think quite a strong argument that the wider
7 these objectives and the more social that they are, the
8 more they should be decided by elected individuals. Simon
9 alluded to that in relation to Germany. The question
10 presumably is: When does the decision tip over into
11 something that should really only be from an elected
12 government as opposed to an official?

13 MS. WADDAMS: But it is not always easy to
14 get those elected governments to actually take the
15 responsibility.

16 MR. ABBOTT: Yes, David?

17 MR. AITMAN: David Aitman, Freshfields.
18 Just to pick up a point that I think maybe ties with what
19 Peter and Margaret were saying, that to those outside
20 this room the terminology is very baffling. It is not
21 just a case of getting budgets for the agency, it is a
22 case of getting real support and buy into what the
23 agencies are doing. Philip Lowe gave quite an
24 interesting presentation at King's about the support that
25 was needed and which commissioners came out most popular,

1 and the commissioner who came out most popular was
2 Vivienne Reading because she had reduced mobile phone
3 charges.

4 On a consumer pricing issue you can see
5 you get that kind of backing. Conversely, if you take a
6 different kind of case, which is one that you hear taxi
7 drivers in this country moaning about at the moment, the
8 Competition Commissioner may say that the decision in
9 relation to football rights was a good one because it has
10 reduced the price on average that the consumer pays for
11 each football match that they see on pay television, but
12 the complaint on the street is that they cannot get
13 access without buying multiple subscriptions. So the
14 consumers who have been backing the agency are actually
15 saying that the agency does not care about what they
16 would call consumer welfare. I think that to put that
17 emphasis on consumers or to put a different emphasis
18 would be very difficult in getting the kind of popular
19 backing that Phillip thinks is ultimately useful to the
20 agency enforcing.

21 MR. ABBOTT: Well, these have all been
22 very helpful comments. Unfortunately, because of time
23 limits we should be use moving on to the next category,
24 but I sense I have gotten a lot of support for some
25 version of consumer welfare standard, and some concerns

1 that if you go outside welfare standards it is very
2 difficult for an agency to know what constraints and what
3 additional ways to limit oneself.

4 Let me turn briefly now to Stephen Wilks,
5 if he could, and I think all agencies, competition
6 agencies, are concerned about the current effects, and
7 not just concerned about the particular case but how a
8 particular case will affect actions in the marketplace or
9 in markets in which particular firms operate. How can
10 one estimate the broader deterrent effects of competition
11 and consumer protection cases and the actual case effects
12 in the cases brought? A very important question but one
13 that is very hard to measure.

14 MR. WILKS: Which was my immediate
15 reaction in five minutes. Yes, these are deterrence
16 issues that are notoriously difficult to evaluate
17 actually, so I will offer a few thoughts. Compared with
18 the expertise around the table, I suspect I have a
19 dangerously naive perspective but see what you think of
20 it. Deterrence, it seems to me, is or should be the holy
21 grail of enforcement, that enforcement should be operated
22 as far as possible to maximise deterrence. But this
23 relationship between deterrence and enforcement is highly
24 paradoxical it seems to me.

25 The enforcement paradox arises from the

1 fact that a low level of enforcement through case
2 decisions and litigation may actually be a sign of high
3 deterrence, and I have always thought of this as the
4 paradox of the Japanese policeman. I am sorry to hit you
5 with another metaphor after we have been sailing around,
6 we are going to end up in a Japanese prison cell, but
7 Japanese policemen are not very active enforcers. There
8 are very few arrests, a very limited number of
9 prosecutions and a low prison population. They do have a
10 very close relationship with their local communities.

11 The Japanese are very law abiding because
12 of community disapproval and because of a fairly high
13 certainty of detection should they commit crimes. So
14 what we see in Japan is a very low level of police
15 enforcement measured by arrests or the cases, but this is
16 not a sign of weakness. It is very very much a sign of
17 effective deterrence. The parallel in competition I draw
18 is with merger control: Why are so few merger cases
19 blocked? As my students tell me they are, a very small
20 proportion because problematic mergers are anticipated or
21 they are abandoned.

22 This is partly due, of course, to very
23 effective merger guidelines, and one thing that we might
24 talk about is actually the FTC role in various sorts of
25 guidelines, not only mergers. So in the case of mergers

1 you could argue that low enforcement activity is actually
2 a sign of success rather than a sign of failure and,
3 contrary-wise, high enforcement activity may be a sign of
4 failure, a sort of desperate Canute like attempt to turn
5 back the tide.

6 So you ask what does deter companies and
7 governments from illegal activity? That is a workshop in
8 itself but the issues, it seems to me, are surely about
9 trust, legitimacy and consent. Trust in the agency and
10 its processes, and I think from our point of view that is
11 where the Competition Commission actually scores very
12 high in terms of its process legitimacy; legitimacy of
13 the law and the concept of wrong-doing; and concept to
14 legal behaviour and to co-operation in enforcing the law.

15 It seems to me that these issues are
16 especially relevant to the work of the Federal Trade
17 Commission because it is an advocate as much as a
18 litigator, and its commitment to social trust is actually
19 enshrined in one aspect of its mission, which you touched
20 on earlier, this Section 5 of the Act which is the
21 unfairness provision both in terms of competition and in
22 terms of consumer behaviour. There is a really quite
23 active debate about that that we have already begun to
24 touch upon. Margaret says that we should not go down the
25 fairness route.

1 For me I can see a lot of attractions in
2 the fairness route, but maybe that is a sort of throwback
3 to the public interest criteria that I am really rather
4 fond of. We might touch on that because it has come and
5 gone within the FTC debates I think. But I would like to
6 just pick up two areas for discussion arising out of that
7 general perspective.

8 The first is to stress the virtues of
9 restorative justice, and I think that is a concept that
10 is familiar to many of us. Restorative justice suggests
11 that enforcement, litigation and fines should not be
12 about punishment and revenge but about redress and
13 healing. It seeks to pursue regret and remorse from the
14 culprits. It seeks to provide redress and restitution
15 for those injured and secure commitments to future
16 behaviour. In this area of restorative justice -- I
17 mean there are things that the FTC does and I think are
18 quite interesting. In the consumer area there have been
19 some quite substantial consumer redress settlements
20 achieved by the FTC in relationship, particularly, to
21 consumer fraud.

22 I think the City Group case was the
23 largest, \$200 million in redress being returned to
24 consumers. In the competition area, the FTC used the
25 1999 Mylon Labs case to develop the doctrine of,

1 wonderful word, we should use this, "disgorgement." It
2 just resonates. Disgorgement being, of course, the
3 requirement to repay illegal profits to vulnerable
4 consumers who are unlikely to benefit through private
5 actions. Those sorts of areas would fit my definition of
6 restorative justice where not only is the law being
7 applied, but justice is being seen to be done in a way
8 that is attractive not only to consumers but to the
9 agencies or to the bodies that fund or approve the
10 agencies. So restorative justice is a subject that I
11 have been exploring and I think is interesting in the
12 competition area.

13 The second area that I wanted to emphasise
14 is really the non-litigation activities of the FTC in the
15 shape of the advocacy programmes, the education
16 programmes and the persuasion roles that the FTC is
17 involved with. Again, that has been alluded to briefly,
18 but there is a strong argument in stressing that almost
19 as much as stressing some of the enforcement elements of
20 the FTC brief. For me this would direct attention to
21 areas such as equality of FTC research, areas like the
22 internet, online fraud, the way in which the FTC uses
23 hearings, which in an American device, of course that we
24 do not use in this country and seems in some cases to
25 have been extraordinarily productive and successful in

1 building legitimacy and consent.

2 The quality of FTC advocacy, John has
3 referred to this to some extent in areas like competition
4 and health care; deregulation of transport; advertising
5 in the professions. The advocacy role of the FTC within
6 government has been extremely significant and it has been
7 argued, and I think there is conviction in this, that
8 effective advocacy is probably more successful or more
9 productive than litigating in individual cases,
10 particularly given some of the state immunity issues that
11 exist in US law.

12 Recently, of course, the FTC has put a
13 huge emphasis on consumer education and it has been very
14 much a pillar and a part of the consumer bureau's brief
15 and it has become something of a national leader in
16 campaigning for consumer rights. There again, that more
17 general societal impact might have as much impact as
18 individual cases. John had a quote and I have got a
19 quote.

20 If we come back to my themes of trust,
21 legitimacy and consent, in 1965 Andrew Shonfield -- I
22 will give the name away at the beginning -- discussed US
23 antitrust in his highly influential book, "Modern
24 Capitalism" and he observed that the answer seems to be
25 that antitrust in the United States is a unique case. It

1 is best understood when it is treated as a form of
2 national religion. So if antitrust is a religion and the
3 FTC is its church, then the FTC does not need miracles in
4 court to secure deterrence, it merely needs faith in the
5 gospel.

6 MR. ABBOTT: On that theological note, are
7 there any problems or any critiques anyone would want to
8 note regarding the FTC's efforts to promote deterrence on
9 the competition or consumer protection side; any areas
10 where you think we could improve our operations or our
11 approaches? Yes, Margaret Bloom?

12 MS. BLOOM: If I can just mention one
13 suggestion. In terms of your case closures, which are
14 extremely welcome -- both you and the Department of
15 Justice have been issuing these for some while -- but
16 there are a number of cases that are closed where you do
17 not issue a case closure and some of the closures are
18 very brief. So I think in terms of deterrence it would
19 be valuable to have fuller reasoned decisions as to why
20 you closed a case.

21 I recognize that some of that might be difficult
22 given the commercially confidential information, but in
23 comparison, the material that comes out from the US
24 compared with that from Europe is much less. You might
25 argue that in Europe we publish too much, but it is very

1 influential in helping practitioners, for example, in
2 knowing what is and is not allowed.

3 SIR JOHN VICKERS: You did that with
4 cruise lines.

5 MS. BLOOM: Yes.

6 MR. ABBOTT: Yes. Any additional
7 critiques?

8 SIR JEREMY LEVER: My understanding is
9 that the FTC does not publish reasoned decisions as to
10 why it is clearing a merger, cases where it does not take
11 an adverse decision. By contrast, the European
12 Communities Commission offers detailed explanations for
13 each decision not to challenge a merger, and that gets,
14 as I say, I understand to be rather rare with the FTC.
15 There is, I think, a feeling amongst US practitioners
16 that it would be helpful if the FTC adopted a policy
17 closer to that of the European Communities Commission in
18 that regard.

19 MR. ABBOTT: Thank you, Jeremy.

20 MR. PRITCHARD: On that subject, Alden, I
21 have printed every single case closure on the merger
22 cases that the FTC has produced since 2001 and it is not
23 a bad pile actually. It is actually a very good read,
24 especially if you are very geeky and into those sort of
25 things late at night.

1 MR. WILKS: Remind us to go out some time.

2 MR. PRITCHARD: Yes. And they are a
3 really good read. Obviously, they are still arcane for a
4 general readership but they are quite accessible,
5 generally speaking. Certainly, the ones that were very
6 high profile, the cruises, I reread last night -- it is a
7 great read -- and there are various other examples.

8 I think they are excellent. They could be
9 longer and they could be more detailed but, speaking as
10 somebody who has to publish almost everything we do in
11 excruciating detail, I am pretty sensitive to the trade-
12 offs of transparency and you could spend obviously
13 substantially more time publishing and proportionately
14 less time doing.

15 The thing that I actually from an
16 enforcement perspective find less impressive -- if you
17 are after critiques I don't have a lot of critiques so I
18 am just going to maximise the critique that I have -- is
19 that in actual enforcement decisions, rather than the
20 non-enforcement decisions the reasoning is often pretty
21 thick and it is declaratory, and it says things like:
22 Entry will be not timely, likely and sufficient to defeat
23 the anti-competitive effects of the merger, and that is
24 the sum total on the subject. Now I understand that,
25 obviously, in a litigation context you do not want to

1 have all these nuances of: Well, on balance, you know,
2 this is a pretty marginal call, but for all those reasons
3 stacked together we just about think this merger is more
4 likely than not to substantially lessen competition.

5 You have to go into court and say: This
6 merger is a problem, judge, and you should give us a
7 preliminary injunction. It has to be pretty black and
8 white and come across as a sort of fairly obvious case,
9 if possible. So you strip out some of the nuances that
10 you do when you play judge, as we do in the
11 administrative context and say: On the one hand, on the
12 other hand, and on balance the weight of the evidence
13 more firmly supports this conclusion than that, but.

14 So I do not think in the relatively small
15 numbers of cases that you litigate that your sort of
16 complaints and your prosecution briefs should start to
17 become five times as long and much more nuanced and let
18 the defence start pulling them apart. But I do think in
19 the settlement cases, in the consent decree cases, where
20 the risk is a lot lower usually, even there it is all -
21 to stylize somewhat - statements of conclusion with
22 sometimes relatively scant reasoning as to why.

23 If I can pick on one case just to say that
24 I have actually looked these up, if you take SCI
25 Alderwoods which was a funeral services merger with quite

1 a lot of divestments that came out in January last year,
2 we were doing some funeral services cases and I thought:
3 Great, let's see what the FTC has done. There is a whole
4 lot of local markets, and it says that the market is
5 Charleston, South Carolina or something, the combined
6 market share is x, the HHI is Y, and more or less game
7 over, there will be unilateral effects. In some of those
8 cases, you know, fair enough.

9 On co-ordinated effects, which we are very
10 interested in, I have tried to take a lot of the US
11 learning, Arch Coal, and a lot of the other work that has
12 been done on that and see whether we were missing any
13 tricks in the UK on the subject. The coordinated effects
14 section in these decisions was: The merger will
15 facilitate reaching in terms of coordination, maintaining
16 terms of coordination and punishment, stop, and that was
17 the total of the reasoning.

18 Now what I would be looking for is what is
19 the coordination mechanism, and why one fewer independent
20 funeral directors in an area will lead to dampened price
21 competition for funerals, or non-price competition, and
22 there is just nothing there. That is probably the
23 biggest single critique that I could offer is that,
24 certainly in consent decrees, it reads too much like you
25 are asking the court and not taking a risk, and I think

1 there is latitude to expand on the reasoning.

2 It does not have to be a 100 page report
3 by any means. So that is more of a gap, and if you are
4 going to allocate just a few more resources to
5 transparency, I would tilt it that way. The last thing I
6 would say is sometimes the most interesting cases are
7 ones where you find problems in some markets but not in
8 others, rather than the binary 'the whole merger is OK'.
9 There, explaining why in markets A, B and C you are
10 seeking divestments and in D, E, F and G you are not,
11 those can be interesting too and certainly the consent
12 decrees and, indeed, obviously, also the litigated cases
13 do not go into the non-enforcement side of the equation.

14 You only get the one side of the ledger.
15 I guess those would be my main thoughts from a
16 transparency perspective, but I am sensitive to the fact
17 that it is costly and expensive but I think there is more
18 that can be done, certainly in second requests. Even
19 though there are quite a few second requests, given the
20 taxpayer expenditure and private cost of second requests
21 I do not think it is too much to ask that you would
22 explain why -- obviously, in cases where you have taken
23 no action whatsoever, but why you are taking action in
24 some markets and not others and a little bit more on, as
25 I say, the settled cases and certainly we at the OFT

1 would be avid readers.

2 MR. ABBOTT: Good, thanks. Yes,
3 Catherine?

4 MS. WADDAMS: Can I just ask a question,
5 which is: Does knowing that your decision is going to be
6 very transparent affect the decision you make? That is a
7 kind of general question I suppose.

8 MR. PRITCHARD: I would say it is good
9 intellectual discipline.

10 MS. WADDAMS: It is not quite what I
11 asked.

12 MR. PRITCHARD: Does it -- it must improve
13 the quality of decision-making, yes. Certainly, the
14 prospect of -- often there is the accusation that the
15 prospect of litigation would affect which decision we
16 make, which we would strenuously deny, certainly at any
17 sort of conscious level. What it would affect though is
18 how much labour we put into drafting up the reasoning so,
19 yes, in a case where you think you are going to get
20 appealed you spent more time drafting the decision but
21 you do not err for a less risky decision -- which in our
22 case would be a reference. But, more generally, yes, I
23 think that one of the reasons that we send issues papers
24 to parties, which is our hypothetical high watermark case
25 against the merger, even in a first phase process, is

1 that writing down your objections sharpens the mind as
2 to: Here is what we are saying, and even on a worse case
3 basis does it still stack up?

4 I think if you just did that orally, as a
5 lot of the process is, you would lose something in that.
6 So I am a strong believer in writing things down and, in
7 the cold light of the morning, reading it again and
8 saying: Do I buy this?

9 MS. WADDAMS: OK, sorry, can I just come
10 back? As a member of the Competition Commission I could
11 not possibly comment, but let me say about universities
12 that the decision-making processes about students have
13 become much more open and challengeable and I am not
14 entirely clear that that has always improved the process,
15 and I just wondered if there was something similar. It
16 is really a general question of a general debate, but it
17 may not be a line you want to go down.

18 MR. ABBOTT: Yes, it is really an
19 interesting line to explore. My only concern now is that
20 we are a bit short on time.

21 MS. WADDAMS: Yes.

22 MR. ABBOTT: If there is anybody else on
23 this topic, and obviously on any none of these questions
24 we could carry on for hours but we are constrained, but
25 that was very helpful.

1 SIR JOHN VICKERS: Well, then, could I
2 just put down a couple of markers maybe for later?

3 MR. ABBOTT: Yes.

4 SIR JOHN VICKERS: Because you are
5 pressing us to come up with negatives.

6 MR. ABBOTT: Yes.

7 SIR JOHN VICKERS: I think public
8 disagreement at the top of the organisation is not
9 unhealthy always. But it can get to a point where it is
10 damaging.

11 SIR JEREMY LEVER: I think he will be very
12 pleased to hear you say that.

13 SIR JOHN VICKERS: Good. And the
14 bipartisan point that you mentioned, which was I thought
15 a demonstrable strength in the move from Pitofsky to
16 Muris and, of course, there is a college of commissioners
17 and it is not just one individual. Recent things from
18 afar do look a bit troubling and I think that can be
19 undermining of an institution's authority. The second
20 thing is that you have lost some major cases recently and
21 we might want to talk about why and what the lessons are
22 from that, but that is for later.

23 MR. ABBOTT: Right. Basically, there is a
24 trade-off between trying to explore limits and, at the
25 same time, allocating lot of resources to paths that may

1 prove fruitless. Speaking about the effects of our
2 actions and the facts that we have had some reversals,
3 how can we evaluate the social costs, because certainly
4 we believe there are benefits but our critics say there
5 are major costs to our actions, resources used in cases
6 regulations, research, advocacy, hearings, public
7 testimony. Obviously, those are costs you can measure,
8 accounting cost but, more importantly, the costs imposed
9 on private parties in reordering their actions; is it
10 possible to measure the latter? Ed Humpherson, if you
11 could?

12 MR. HUMPHERSON: Well, John Vickers
13 enjoined people like myself from audit functions to speak
14 with humility and caution and, in present company on this
15 topic, I need no second invitation. I am not a
16 competition lawyer nor am I a competition economist so my
17 humility and caution are sincere. In fact, I was asked
18 to speak to a question about social costs and I am going
19 to actually address my comments very directly to that.
20 In fact, I am so cautious about my thinking here that I
21 am not actually going to say how I think this should be
22 done; I am going to say how I think it should not be done
23 and I hope that will start to clarify the realms of the
24 possible.

25 In the UK and to a lesser extent in

1 Europe, but to my knowledge much less in the United
2 States, there is an agenda which generally goes under the
3 name of Better Regulation or regulatory reform, and the
4 whole thrust of that agenda, whilst it is sometimes a
5 little bit hard to pin down what its overriding policy
6 objectives are, but the whole underpinning discourse is a
7 discourse of burdens -- that government departments and
8 government agencies and independent regulators create
9 these things called burdens, and that these burdens are
10 bad things because they make businesses' life harder and
11 that they, therefore, inhibit productivity.

12 There are a number of tools which are
13 deployed to help or it is asserted to help departments
14 and agencies and so on to reduce the burdens they create.
15 The first is a very well respected tool called the
16 "regulatory impact assessment" which looks ex-ante at the
17 way rules are made and proposed, and something that we
18 support. There are two further tools which are linked.
19 One is to actually measure burdens or administrative
20 burdens imposed by departments and agencies and,
21 secondly, -- and the UK proudly asserts that we are the
22 first country in the world to go down this route, so we
23 either have a first mover advantage or a first mover
24 disadvantage -- is setting regulatory budgets.

25 So an individual department will be given

1 by the Treasury or the Department for Business an amount
2 of money that each year it is allowed to regulate for in
3 terms of the burdens it imposes on social actors,
4 businesses and so on, and if it goes over that something
5 bad will happen to it. I think that is a very false move
6 in general for all sorts of reasons.

7 In particular, it completely neglects the
8 idea that there may be some benefits to rules. Not all
9 rules are bad, and particularly if you are thinking about
10 productivity it is not entirely clear that all rules are
11 productivity reducing. In this field of competition you
12 can identify guides to behaviour which are very clearly
13 productivity enhancing. In the specific context of
14 competition authorities it may be dangerous, and I had
15 prepared in my speaking notes a long series of arguments
16 to say why measuring burdens from competition enforcement
17 at the macro level is a false move. In fact, John
18 Vickers put it much more succinctly than I could, which
19 is that corporate interests are better at protecting
20 their interests than consumers, and corporate interests
21 will always be able to adumbrate large numbers for what
22 competition authorities are doing to them.

23 A few months ago I sat on a Panel at a
24 conference hosted by the OFT on your market studies, and
25 somebody from the Confederation of British Industry, a

1 business lobby group, said that in a market study of
2 Northern Ireland Banking a £170 million market had been
3 analyzed and the cost of the analysis of the market study
4 was £20 million and, therefore, this was an enormous
5 burden. I did not actually challenge it at the time and
6 I rather regret it, because it struck me as a completely
7 false way of looking at it. To start off with I don't
8 see why the competition authority should really worry
9 about how much banks want to pay their lawyers. I am not
10 sure that that is a legitimate target of focus.
11 Secondly, it said nothing whatsoever about --

12 MR. FREEMAN: You can leave now, David

13 MR. HUMPHERSON: It said absolutely
14 nothing whatsoever about the degree of consumer surplus
15 that had been affected, whether that was greater or less
16 than £20 million and, thirdly, I thought it was
17 commercially naive because, of course, it is £180 million
18 per annum. I thought a £20 million investment to improve
19 £180 million per annum would not require much surplus to
20 give that quite a high net present value. I think that
21 is the sort of complexity into which one gets. So if I
22 have an answer to the question 'how do we measure social
23 costs?', my answer is this: do not go down the route of
24 trying to assess burdens at a macro level.

25 A much more fruitful course is that which

1 I believe the OFT is pursuing.

2 Firstly, is to say: We can in some ad hoc
3 ex-post way look at certain interventions in a much more
4 forensic manner and see if we can get some handle on not
5 only the direct out of pocket debt, the legal costs, the
6 kind of costs that are in this £20 million, but also the
7 chilling costs and any behavioural dynamic effects,
8 although that is extremely difficult; and, secondly, to
9 look in-house and to say: We need to embed a concern
10 with the transparency and the clarity and the certainty
11 and efficiency of our processes within our case
12 management. Taken together, that is a much more fruitful
13 line than attempting to stand back at a macro level and
14 say: This is the degree of cost or burden that
15 competition enforcement imposes. So I cannot really tell
16 you what I think you should do. But I can very clearly
17 tell you what you should not do.

18 MR. ABBOTT: That was very helpful, Ed.
19 Any additional comments?

20 MR. FREEMAN: Well, if I can just add an
21 anecdote from my former life. There was a previous
22 banking Commission investigation into SME banking, which
23 was larger than the Northern Ireland banking
24 investigation. It was very time consuming. I remember,
25 in conjunction with some other lawyers, we were asked:

1 Can we estimate what this has cost? And I remember
2 saying: Well, let us say £100 million, it is a good
3 figure. That, as far as I am aware, got into the
4 literature as the private sector cost for SME banking. I
5 have absolutely no idea whether that was right or not,
6 but I remember Derek Morris being very concerned about
7 this as a burden. So it just shows a very valuable point
8 that the figures are probably bogus, whatever they are.

9 MR. HUMPHERSON: Yes.

10 MR. ABBOTT: Let me turn now quickly, this
11 is an interesting topic but John Fingleton can you help
12 us out on a question as to how we can measure whether we
13 are doing a proper job in allocating our enforcement
14 resources to sectors of the economy such as
15 pharmaceuticals, energy where we have been very involved
16 and, relatedly, are dollar estimates or, for you, pound
17 sterling estimates of consumer total welfare helpful in
18 conducting such measurements or should we be using
19 different methods?

20 MR. FINGLETON: Thank you. I may have
21 drawn the short straw on this question of sector
22 allocation. I think a starting point is that if you
23 operate an effects based or outcome focused approach to
24 competition policy, it should in theory be sector blind.
25 In other words, where are the effects falling in the

1 economy, and you go after those. In practice, a number
2 of factors determine where a sector blind effects based
3 approach would result in the resources falling.

4 For example, network industries will tend
5 to have more instances of market power. Industries for
6 homogenous goods will probably see more cartel
7 investigations. Sectors where the government meddles in
8 the economy, in barriers to entry and so on, will see
9 more advocacy type work and so forth. Now the UK has a
10 rather funny way of resource allocation because it does
11 it as between the OFT and the sector regulators for
12 competition policy at a Parliamentary or a sort of vote
13 level, and at a sort of an instrument level between the
14 OFT and the CC on sort of phase 2 and MIRs, but then at
15 the OFT we actually have the flexibility to allocate
16 between consumer and competition policy.

17 Different countries have different
18 hierarchy of decision-making about resource allocation,
19 but I think what we have tried to do is to make sure that
20 it follows where we see the problems. We have structured
21 our market phasing work with three very broad sectoral
22 divisions: Services, goods and infrastructure. They are
23 not by any means perfect. You cannot align them. Simon
24 may talk a little about this later, but what I would say
25 is we do not have a communications sector or an energy

1 sector or an utility sector, because others might have.

2 But we find it useful to have three broad
3 areas, and we do that because we think it is very
4 important to build some long-term knowledge of those
5 sectors and the people in those industries, because a lot
6 of the focus of what we are trying to do is to use a
7 range of instruments. So we go in with tough enforcement
8 with some instances, but in other instances we are trying
9 to use influence and soft persuasion to change behaviour.
10 It is really helpful to have a sustained relationship
11 with the sectors and sustained knowledge of the sectors
12 to do that. That is a question about sectoral allocation
13 of resources.

14 In terms of how we measure things, going
15 back to John Vickers' discussion earlier, we focus on
16 consumer welfare and, specifically, long-term consumer
17 welfare as our mission making the market work well for
18 consumers. But we have an objective with the Government
19 about increasing productivity. We recognize in that that
20 you cannot measure in the short-term productivity
21 increases. I give the example of liberalization of
22 European airlines. Decisions taken between 1987 and sort
23 of 1997 on various freedom rights combined with the
24 Sabina state aid -- well, it wasn't a state aid decision,
25 non-state aid decision dramatically affected the type of

1 efficiency we have seen in European aviation today.

2 If you would try to evaluate the sort of
3 productivity effect of those consumer focused decisions
4 at various times three to six years after, you would not
5 have picked up those effects. So we do measure in our
6 evaluation, in the work Ed described that we go back and
7 do the forensic evaluation, we do evaluate the work
8 three, four years out and see where it has got us, but in
9 the acknowledgement that in measuring that consumer
10 welfare it is a crude proxy for the long-term consumer
11 welfare benefit.

12 We are also very acutely conscious that
13 sort of crude dollar measurers, if you take them too
14 seriously, could really skew your work towards scams on
15 the consumer side and cartels on the competition side
16 when in actual fact the sort of broader influencing role
17 that we have as the agency is incredibly important. We
18 would not have achieved economists' offers or a policy
19 function or a strategic function at quite the same scale
20 we did if we were simply focused on dollar effects.
21 People have mentioned the sort of public hearings that
22 you have, we have begun to do that but under a slightly
23 different name on both private enforcement and on our
24 market studies.

25 We have had very structured public

1 consultations involving bringing people together and
2 inviting them to give presentations, and we are very
3 committed to doing more rather than less of that. We see
4 that as being about trying to build a combination of
5 trust consent and legitimacy in what we are doing and you
6 cannot put a dollar measure on that type of work as well.

7 So we do dollar measures on some of the
8 stuff we can do, and I think we do our evaluation work to
9 try and dig into particular things and we have picked
10 different things and so forth but I would not want to
11 describe it as an exact science. We have done a very
12 interesting piece of work on deterrence where we
13 interviewed legal practitioners and business people on
14 the deterrent effects of decisions, and we recognize that
15 any such exercise has its limitations, but at the same
16 time I think it is the most important piece of work I
17 have seen -- there is some good Australian work done on
18 it as well -- to try and capture the multiplier effect of
19 some of our and the Competition Commission's decision-
20 making.

21 It is very clear that key decisions, for
22 example merger decisions by the Competition Commission in
23 supermarkets and banking, have had quite a dramatic
24 effect on business behaviour and so on. So you can
25 measure some of this deterrence effect and I think you

1 should try to look at that and continue to look at. We
2 will continue to try and refine that. Our current
3 challenge, and I should mention that Fiammetta Gordon who
4 is the person who runs all of our evaluation work is
5 sitting modestly in the corner, but she is responsible
6 for our deterrence work and all of our evaluation work.

7 One of Fiammetta's challenges at the
8 moment is trying to measure sort of consumer confidence
9 in the market process, because one of the issues we are
10 looking at across a lot of our work is the extent to
11 which consumer confidence and the consumer's
12 understanding that they, by being more demanding, can
13 lead to changes in business behaviour, the extent of
14 which that different equilibrium in the economy, and when
15 you look at the United States and the way in which if
16 something goes wrong businesses offer as a competitive
17 tool more redress to consumers naturally, but why that
18 does not always exist in the UK.

19 Some of us who are here had a discussion
20 at dinner last night about the British stiff upper lip.
21 I think Deb might come back on it, having just moved
22 here, and kick into how docile we are in this country as
23 consumers. But I think there are interesting cultural
24 issues there that go with the whole agenda of trying to
25 change things. I just want to touch on one or two other

1 points that were made earlier on this welfare issue. I
2 think a big issue in welfare that we did not touch on
3 earlier in the sort of total surplus thing is the whole
4 issue of comity and international welfare.

5 If the producer surplus is in country a,
6 e.g. intellectual property, and the consumer surplus is
7 around the world I think that goes to the heart of some
8 of the debate about intellectual property on Article 82.
9 I do think that we need to be forward looking about some
10 of this rather than backward looking. I think protecting
11 historic rents in the increasingly globalised economy may
12 be a foolish thing to do, but we may need to look forward
13 and ask: What should the intellectual property rules be
14 for intellectual properties developed from now on rather
15 than the stock of existing intellectual property.

16 That may be a debate we need to have, but
17 we also need probably to develop better welfare rules for
18 dealing with that theme of comity, otherwise we do risk a
19 consumer welfare approach that gets that wrong. I think
20 Bill Bishop's point about smaller economies and total
21 welfare needs to be measured against the fact that my
22 experience of smaller economies are that producer
23 interests are also stronger in the political economy
24 process.

25 MR. BISHOP: I agree with that.

1 MR. FINGLETON: Which is also a relevant
2 factor there. My final point is about transfers between
3 consumers after markets and evaluation. We are doing
4 some evaluation at the moment on extended warranties, but
5 there is a whole host of markets: The mobile phone
6 example that somebody mentioned earlier, the motor
7 vehicle block exemption regulation, the whole question of
8 after markets in cars, our banking work, payment
9 protection insurance. All of these markets have in
10 common a whopping big welfare effect in an after market
11 with a lot of uncertainty about how much of those rents
12 are bid away in the fore market.

13 One of the things we are really struggling
14 with at the OFT is developing a threshold for
15 intervention in those markets that has some objective
16 justification that does not require a precise measurement
17 of all of those welfare effects which I do not think in
18 the real world we are able to do. So if you take, for
19 example, the motor vehicle one which is just out there at
20 the moment because we are looking at the revision of the
21 motor vehicle exemption, so insisting on independent
22 servicing and spare parts for cars delivers a big short
23 run consumer benefit in the after market.

24 But if you think that the real gain over
25 the next 20, 30 years in terms of efficiency and in terms

1 of the environment is that motor manufacturers channel
2 profits into competing on better standards and new
3 innovations, you might be less concerned with that from a
4 total welfare perspective and I do not think we know
5 enough about where those rents flow in those markets to
6 always make the right decisions on that and so,
7 inevitably, there is a tendency to make decisions where
8 you see some of the welfare effects and that tends to be
9 in the after markets.

10 I think that probably goes with an
11 increasing trend of businesses where they can identify an
12 after market to take advantage of that. I think we just
13 see a greater trend of using yield management.

14 The textbooks in the 1980s, the sort of
15 razors -- some of you heard me say this at King's the
16 other day, the razor example is a really good example of
17 yield management can be profit enhancing but also welfare
18 enhancing because it gets ploughed back into the fore
19 market, and by metering sales you get a very efficient
20 yield management. You also get an additional argument
21 out of myopic consumers in these markets that consumers
22 don't treat as equal equivalent tax on petrol as to an
23 equivalent increase in the taxation on the original motor
24 car.

25 So you can get both yield management

1 reasons and myopic consumer or behavioural economic
2 reasons for businesses wanting to artificially push
3 markets towards markets in which there is natural lock-in
4 followed by monopoly profits in the after market. I
5 think this question does pose a lot of dilemma for
6 competition agencies, but I think if you look across a
7 lot of our work and some of the stuff we have referred to
8 the CC we are jointly grappling with some of these
9 issues, and I would have thought that that is a very
10 interesting and healthy research agenda for us and other
11 international agencies to engage in because I do not
12 think the answers are clear.

13 MR. ABBOTT: A lot of very provocative
14 comments and I know helpful to us. Certainly, after
15 markets have been a controversial topic in US antitrust
16 since the Kodak case and remains so, and I think we look
17 forward to additional insights. Regrettably, unless
18 someone wants to add a comment right at this point, we
19 still have a couple of questions to address, but yes?

20 MR. HUMPHERSON: Just very quickly to
21 clarify something right at the beginning of John's talk,
22 which is about the allocation of resources.

23 MR. ABBOTT: Yes.

24 MR. HUMPHERSON: I think it is really good
25 to lay out the hierarchy questions as you did, the

1 different sectoral versus general issues, but in case
2 there was any misapprehension on the part of people who
3 are not familiar with the UK system these questions are
4 approached in a much less rational way than John and I
5 have conveyed, because of course the Office of Fair
6 Trading and the Competition Commission have a centrally
7 located -- and that is to say by the Treasury Department
8 here -- whereas the sectoral regulators go to their
9 industries and the industries pay the licence fees.

10 Actually, I have just done the sums here,
11 if you take the broadcasting, post, water, energy and
12 rail, the network regulators together, they are of the
13 order of three times the size in budget resource
14 allocation of the OFT and the Competition Commission.

15 MR. FINGLETON: And there is the
16 additional complication that the CC is funded by BERR and
17 we are funded by the Treasury, but also the sector
18 regulator's competition work is funded by BERR out of the
19 taxpayer I think rather than out of the industry. That
20 is my understanding of how it works.

21 MR. HUMPHERSON: That is not my
22 understanding.

23 MR. FINGLETON: OK, I will check the
24 facts.

25 MR. HUMPHERSON: The disagreement simply

1 serves to illustrate the point that these things are by
2 no means as clear a set of resource allocation decisions
3 as they might have sounded.

4 MR. FREEMAN: They know their failures
5 better.

6 MR. ABBOTT: One area of great controversy
7 in American antitrust enforcement is false positives and
8 false negatives. How can one assess the risk of false
9 positives and false negatives in enforcement decisions,
10 and what weight should one apply to negatives and
11 positives; anyone?

12 SIR JEREMY LEVER: I think you can go
13 round and ask customers afterwards. I think asking
14 customers before very frequently produces a slanted
15 answer. People do not like change on the whole, and if
16 you ask the customers whether they favour or disfavour a
17 merger between people who are going to supply them with
18 goods or services, the natural reaction is to say: I am
19 against it. But if you go round afterwards and enquire:
20 Have you noticed any changes since this merger and have
21 they been favourable/unfavourable or no change at all,
22 you should get properly formed answers because people are
23 interested in how their suppliers of goods or service are
24 performing. So I think there is scope for useful
25 research afterwards about mergers that have taken place.

1 MR. ABBOTT: Interesting. Yes, John
2 Vickers?

3 SIR JOHN VICKERS: There is a link between
4 your question just now and the reference to sector
5 regulators, because as I understand it a prominent
6 context in which this debate has happened in the US has
7 been about regulated industries and whether one should be
8 shy of applying or interpreting antitrust standards to in
9 apply those sectors on the grounds that the regulators
10 can take care any of any problems. A theme of that was
11 in the Trinko decision and, although I know less about
12 it, I think there was a financial services one, Credit
13 Suisse, which was about the application or not of
14 antitrust laws in that sector. Whereas there is a
15 contrary view that if there is a regulator then there
16 must be a problem, so there is all the more reason -- you
17 have market power, for example -- there is all the more
18 reason to apply antitrust.

19 In a sense this boils down to how much do
20 you trust the regulators with their other instruments?
21 If they are really good at curing all the problems, then
22 that is a cogent reason for not getting too pushy with
23 antitrust. On the other hand, if they like clinging to
24 old tools or whatever there might be -- and pursuant to
25 the best regulation agenda -- all the more reason to try

1 and get the competition rules rather than the regulatory
2 rules in there, and I think on this side of the pond we
3 have been more in that latter vein in the policy
4 intention, though how much it has actually happened is
5 debatable; whereas the Supreme Court at least, and some
6 of those expressing views on Section 2 of the Sherman Act
7 have used this type 2 error argument for being very
8 conservative about antitrust in those sectors.

9 MR. ABBOTT: John Fingleton?

10 MR. FINGLETON: I said to the House of
11 Lords inquiry last year that one of the peculiarities of
12 the UK system is that when we prioritise we take account
13 of the possible deterrent effect, so that is thinking
14 type 1 type 2 error, across sectors. But a sector
15 regulator looking at an Article 82 question in its sector
16 will look only at the impact within the sector.

17 Consequently, if a sector regulator brings
18 an Article 82 case, one might argue that the deterrent
19 effect may in some sense be less, or conversely if the
20 OFT brings one the deterrent effect in the regulated
21 sectors may be less because there is a different
22 decision-making process and, in principle, a different
23 prioritisation allocation as between them.

24 On the more general question of type 1
25 type 2 error I would have to say that in individual

1 decision-making within the OFT, and there is a very
2 conscious discussion of type 1 type 2 error and long
3 discussions about under-enforcement versus over-
4 enforcement an what we want to do and the signals we want
5 to send when we start cases, as we refine them and when
6 we reach decisions on them. So it is very much an
7 explicit part of our thinking as an agency internally.

8 MR. ABBOTT: OK. Anyone want to add
9 anything on that? Yes, very quickly, David?

10 MR. AITMAN: It is probably more a
11 question than a point and it picks up what Jeremy was
12 talking about, which is ex-post assessment. I am not a
13 great expert on this, but as I have read some reports
14 when the FTC has done an ex-post assessment of mergers it
15 has looked at a large number and it has had a smaller
16 numbers of tools to assess the decision-making, and I
17 think the OFT has done something similar, whereas as I
18 understand it the Competition Commission has looked at
19 many fewer but has used more tools to investigate the
20 decision-making; so not just interviews of the parties
21 involved, but a rather broader study, and the question is
22 whether if you are trying to reach an ex-post assessment,
23 the smaller number and the broader scope, if I understand
24 it right, has been more productive in looking at the
25 analysis, how effective it has been and whether there are

1 ways of revisiting the decision-making.

2 MR. ABBOTT: Yes, Catherine?

3 MS. WADDAMS: I was just going to say that
4 this touches on the issue you have skipped, which is
5 where you might involve academics.

6 MR. ABBOTT: Yes, we will return to that
7 shortly, but go ahead.

8 MS. WADDAMS: OK, sorry. I can just save
9 some time perhaps, but just to say that agencies have
10 data and academics are always hungry for data and they
11 have time and techniques and, picking up John's point and
12 David's point, this may be a good place to involve
13 academics with people within the agency, something that I
14 think the FTC has done well -- sorry to add more praise -
15 - but could do even more of.

16 MR. ABBOTT: Excellent. Before turning to
17 the next session, and I will turn to the next session by
18 turning to Catherine, but one more question for John
19 Fingleton very quickly: Can we measure the joint effects
20 of competition in consumer protection enforcement on key
21 industry sectors, for example pharmaceuticals? It does
22 not have to be pharmaceuticals, but since we have this
23 joint consumer protection competition mission should we
24 think holistically how are we using our different
25 competition consumer protection policies and tools, or

1 are they separate boxes? Your ideas?

2 MR. FINGLETON: Do you mind if I pass on
3 that and let everybody go to coffee, because I think it
4 opens up potentially quite a long discussion and I don't
5 have a short answer to the question.

6 MR. ABBOTT: I would be delighted to do
7 that, and I also want to thank Catherine Waddams. Our
8 next session will be: How should the FTC change its
9 enforcement, advocacy or research agenda? My colleague,
10 Maureen Ohlhausen, will be leading that off and perhaps
11 it would be very fruitful at the beginning of that
12 session after she introduces the session to turn to your
13 introductory comments. And thank you everyone. I just
14 wish -- all of these questions were great, we could have
15 spent hours. But we look forward also to corresponding
16 with you by Email and in future meetings to get
17 additional input. Let us break for coffee. Five
18 minutes.

19 (A brief recess was taken.)

20 **FTC'S ENFORCEMENT, ADVOCACY, AND RESEARCH AGENDA**

21 MS. OHLHAUSEN: We are going to get started on
22 the second panel for today, but you will see that the
23 topics of what criteria we should use to measure our
24 effectiveness and then what should we actually be doing
25 are very closely related, so there is no easy way to

1 separate them out. If you are effective in doing things
2 that hurt consumers or end up being bad for the economy,
3 that is not such a great thing. So we want to be sure
4 that the FTC is using its toolbox of skills in ways that
5 are most effective and beneficial.

6 So one of the questions we are going to address
7 in this Panel is, basically: How we should plan what we
8 are doing, what we should focus on, and what should be
9 the mix between our enforcement and our advocacy, our
10 research agenda, how the research agenda can help us
11 choose our targets to the greatest effect, and then also
12 what kind of guidance should we be giving to the industry
13 and to the public. I also want to mention as a timing
14 note, as moderator I am in the very very enviable
15 position of having more people with very interesting
16 things to say than time in which to say it, because it is
17 much harder when you have more time than you have
18 interesting things. So one of the options that we are
19 considering is that lunch I believe is scheduled to start
20 at 1:15 and go for an hour, but we could take an
21 abbreviated lunch and continue with some of this
22 discussion for a little bit after lunch if we have not
23 wrapped up everything in this Panel. Is that OK?

24 MS. VALENTINE: I need to leave at 1:15 but
25 that is OK because everybody else is still here --

1 MS. OHLHAUSEN: We will be sure that we -- so
2 to start us off in this discussion I am going to ask
3 Catherine who has, I think, some good guidance to give us
4 on how we can devise a research agenda and maybe draw
5 upon some of the resources outside the agency as well as
6 internal to the agency in doing this. So Catherine?

7 MS. WADDAMS: Thank you. Well, I am going to
8 add to the praise in terms of saying I think the FTC is
9 doing a lot that is very good in this area but move on to
10 say how it could do some things even better, but also you
11 will not be surprised to hear me say that I think there
12 is a big role for the academic community in this area.
13 In terms of is there a research agenda the FTC could
14 devise that would allow it more effectively to move
15 forward?

16 There are clearly criteria there that I think
17 other people are going to pick up later in the session.
18 So the research questions that are directly relevant to
19 the efficacy of the agency, where there are data and/or
20 models which have a reasonable prospect of giving some
21 kind of result and where the answers are likely to be
22 sensible I think are the sort of criteria. I think it is
23 always a difficult balance between being very
24 prescriptive about what should be analyzed in a forward
25 looking way and being responsive.

1 This is an area where practice is often ahead
2 of theory, so you need the sort of combination of a firm
3 sense of direction -- we are back to steering again --
4 but willingness to incorporate things that were not
5 necessarily obvious at the beginning and, of course, one
6 of the strengths of the academic community can be in
7 raising questions that the agency itself had not thought
8 of. I think it is a tricky issue: What is the best role
9 of an agency which is part of the process which it itself
10 wants to research? So it is kind of reflective.

11 Obviously, there are all the advocacy rules
12 that it wants to partake in for itself, but it needs to
13 have a certain credibility from outsiders and I think it
14 is important that the agency allows that to happen; and
15 it cannot always make it happen because if it is
16 commissioning research into itself, clearly the
17 independence is not guaranteed or it does not look as if
18 it is guaranteed. But I think in looking at the things
19 that the different people that come to this bring to it
20 and looking perhaps at absolute advantage rather than
21 necessarily comparative advantage, the agency has the
22 data and the ability to collect more data.

23 It does not necessarily have the time. It does
24 not necessarily have the techniques. The academic
25 community will have the time and will be hungry for the

1 data and often has the most up-to-date techniques. It
2 can also bring in questions from elsewhere so that it is
3 just not necessarily narrow. Consultants, I think, are
4 good at doing things quickly and they are good at
5 presentation.

6 Academics are not always as good at that as
7 they should be. Having said all that, it is really
8 important to maintain in-house research expertise both to
9 enable you to implement the research that is commissioned
10 from outside, but also because then that expertise and
11 skill gets applied to specific cases. It is a
12 complicated mix I think. Institutionally, I would want
13 to see a research function in the FTC protected. I want
14 to see development of the working papers, the economic
15 reports, the economic issues papers which have been very
16 good.

17 The secondment process that the FTC uses is
18 something that I think works very well because academics
19 come in for a while. It is good to see reverse
20 secondment as well, so that the academic community is
21 informed better of what the issues are. I think where
22 there are opportunities to improve this even further are
23 in trying to draw in the very best academics from
24 economics, from law and from political science to see
25 this area as being one that is of interest. I think that

1 can be done in two ways.

2 One is in providing perhaps funding but, more
3 importantly, data, but also perhaps being more proactive
4 in sponsoring academic conferences for example, perhaps
5 with particular themes of interest that are quite narrow
6 but will be of interest to academics, perhaps arranging
7 with journals to have publications of papers, a more
8 active arrangement with academic debate and trying, as I
9 say, to attract the very best people.

10 Of course, everybody who is here is of
11 excellent quality but it would be nice to have more
12 really good people involved in industrial organisation,
13 competition law, the political science of competition,
14 and I think that is a role where the agencies and where
15 the FTC could build on its extremely good record to take
16 that even further.

17 MS. OHLHAUSEN: I just wanted to ask you, one
18 of the things that we do at the FTC is some of the
19 workshops -- that has already been noted -- and I do not
20 know how closely everyone follows the topics of those
21 workshops, but do you see the workshops as a tool for
22 signalling to academia where our interests lie, or is
23 that too late in the process by the time we kind of send
24 that signal we are going to do a report, there is little
25 time for an academic sort of take that idea to research

1 it and have something out in time to be included in the
2 FTC final report, or is it OK that we kind of signal our
3 interest and the academic work might come later?

4 MS. WADDAMS: Well, I guess you could use it at
5 two stages. I am not sure at which stage you mostly use
6 it now. You could do it when you are just starting to
7 think about an issue as long as your timescale is long
8 enough to accommodate academics, whose timescales are not
9 short on the whole. So if you want to look at something
10 over the next couple of years, then that is a time to
11 attract academics in. On the other hand, you might want
12 comment on your thinking as it goes along, and then you
13 get a different sort of input. So then you are not
14 getting the academic work itself, what you are getting is
15 the expertise commenting on what you are doing, and I
16 think they can both be valuable. It depends what you are
17 most looking for.

18 MS. VALENTINE: I want to push back on that
19 just a little bit in terms of thinking about how the
20 agency can best capture expertise and excellence. Part
21 of the issue is, what are Congress and the taxpayer
22 really going to be paying for? You want to have superior
23 academics in house: the Chief Economist at the DOJ or the
24 Head of the Bureau of Economics at the FTC should be a
25 phenomenal person, and that person will then attract and

1 will hire better people under them. You should certainly
2 do the secondment that Catherine talked about. I do
3 think that the workshops are a chance for the academics
4 to participate.

5 I am not as convinced as Catherine of the value
6 of simply commissioning outlines of work. I think the
7 academics should be working hard commenting on and
8 participating in what the agency is doing and/or, as
9 Catherine says, getting involved themselves in doing
10 conferences that involve these issues. But I think it is
11 the agency's obligation to develop a lot of that talent
12 in-house and not farm it out.

13 MS. WADDAMS: I think my argument for making
14 sure there is an academic aspect is similar -- I agree
15 absolutely because you need that skill in-house for the
16 short-term job and the medium term job of the agency, but
17 if you are looking ahead and you want the right questions
18 asked, the sort of off the wall questions that academics
19 will ask, then you have academics out there who are
20 interested in these issues. I don't think that should
21 necessarily be funded by the agency. I am not saying the
22 FTC -- well, you could consider that, but I don't think
23 it would be a good use of the FTC's funding to be
24 supporting these, but what they can do is make it an
25 attractive place for academics to bring their own

1 resources to and that is really what I am appealing for.

2 MS. VALENTINE: To some degree, to what extent
3 do you perceive that as not happening now? I can recall
4 September 11th, when there was that phenomenal round table
5 with all the economists. So I guess the question is where
6 is the gap now?

7 MS. WADDAMS: Perhaps it is a generation thing
8 but I worry about the future of seeing -- and in my own
9 area -- good industrial organisation economists who are
10 interested in competition policy issues. I worry about
11 that on both sides of the Atlantic actually.

12 MR. ABBOTT: Is that a problem that the
13 emphasis is on theory in publishing, so that an academic
14 will likely get most benefit by tinkering with the game
15 theoretical model as opposed to doing institutional hard
16 empirical research?

17 MS. WADDAMS: There is some of that and the
18 academic community itself is at fault for not
19 disciplining it in a more a fruitful direction, how can I
20 put it. So I suppose what I am saying is that the
21 agencies can help to try and overcome that bias by
22 encouragement, as I say, you can produce data and people
23 think: Gosh, I am going to do a publication with this,
24 that looks good for the promotion. I think those are the
25 kind of synergies where the work that then goes on is

1 directly beneficial to the agency as well.

2 SIR JOHN VICKERS: Another reason to have
3 strong in-house capacity is that parties in cases will
4 often have their economists lined up with latest theories
5 and so on, and one needs to have the ability critically
6 to appraise that. In the course of this discussion I was
7 thinking what are two examples of research areas which I
8 think are fruitful important and where application to
9 cases has begun but probably has some way to go, and
10 neither of these is an area that I am personally involved
11 in.

12 The two-sided markets issues in the past five
13 or ten years which have been advanced by a number of
14 private parties in cases as a reason for why policy
15 intervention should stay out of the way. It might be
16 wrong it might not be wrong, but I think that has been
17 incredibly important. It started as abstract game theory
18 in some respects but with a host of incredibly important
19 applications like calls to mobile phones, where we have a
20 caller pays environment in Europe -- we had that
21 mentioned earlier -- the credit card cases, a number of
22 others, this is very often brought into play.

23 The second would be more consumer policy where
24 behavioural economics is a very loose word, but
25 competition issues meeting behavioural economics I think

1 is a huge area that is opening up. I know the OFT has
2 done some things, and there is all to play for there I
3 believe. There are some excellent academics working on
4 that. I think it really does encourage and foster that
5 if agencies show that they can understand -- at least
6 they can import that understanding -- and can create
7 occasions at low cost to foster it.

8 MS. VALENTINE: I would fully support the
9 second point.

10 MS. OHLHAUSEN: Well, the discussion -- we are
11 moving from some timely focused to some broader issues,
12 but I think that the discussion about the research agenda
13 actually does separate into the question that I was going
14 to ask Peter Freeman to address, which is: How should
15 the agency engage in strategic planning? Because
16 certainly part of the process for an agency to be
17 successful is to be able to see over the horizon a bit
18 and get the resources and research sort of going in a
19 unified direction so that when these issues arise the
20 agencies prepare to address them.

21 Peter, I am going to ask you to weigh in on
22 basically what should dictate an agency's strategic
23 planning and what kind of procedures or protocols should
24 be in place to do that, and then to check that we are
25 correctly implementing that strategy.

1 MR. FREEMAN: Well, if I can bring us ashore to
2 the land but still remaining in the territory of
3 quotations, as the Duke of Wellington said, "time spent
4 on reconnaissance was seldom wasted." Also, I think he
5 said words to the effect of "all plans collapse on first
6 contact with the enemy." I think that neatly
7 encapsulates the position certainly from our point of
8 view.

9 Anyway, I am the last person to be talking
10 about strategic planning from our agency, because we are
11 a reference body and our agenda is set by others who give
12 us strategic planning, who you will hear from very
13 shortly. So that is a large health warning and a major
14 caveat.

15 If I had been speaking ten years ago, I think
16 it probably would have been even more sharply focused
17 because the traditional view of the Monopolies and
18 Mergers Commission and the Competition Commission is that
19 it was a casework body. It did cases and it did cases in
20 response to references. It answered the cases. It did
21 not have policy. Policy you could maybe deduce.
22 Academics would write about what policy could be
23 discerned from cases, if it could be discerned, but
24 certainly there was no conscious attempt to pursue
25 particular strategies or policies.

1 I think that the wheel has turned noticeably,
2 partly because the agency is now a decision-making body
3 not a recommendatory body, and under that pressure of
4 modernity, policy, strategy and to a certain extent
5 prioritization has crept in. In other words, the
6 casework has to take place against a backdrop of sensible
7 views on major doctrinal issues and with some very vague
8 if not more sharp idea of what it is all about and why we
9 are doing it at all, so I think in a sense that sort of
10 strategic battle has been fought and won and we now do
11 our cases against a consciousness that we fit into and
12 participate in a competition policy background.

13 Now faced with that, what do we do? Well, we
14 have a strategic plan which is set by the Competition
15 Commission's Council. Topics and priorities are debated
16 and the results of that debate then feed through into the
17 activity. Some idea of how that activity works, well we
18 have this constant struggle between in-house and
19 out-house resourcing and we do run a research programme.
20 Both the economics and law divisions have a rolling
21 programme of topics and issues.

22 Sometimes those have been produced by
23 particular cases. In other respects the impetus comes
24 from the world outside and developments that have to be
25 addressed. These are really quite voluminous. There is

1 an awful lot of material done. It is mostly done
2 internally. It tends to come and go according to the
3 case work burden, so it is subject to that. There is not
4 a great deal of spare resources around. I think the FTC,
5 my understanding is that you have more spare resources
6 for that kind of in-house activity. We certainly don't
7 have very much, but it has a number of different outlets.

8 It may change the way in which we approach
9 cases. It will feed through into guidelines which are a
10 big driver of this process and it will affect
11 publications, either publications in their own right or
12 it will feed through into public statements, speeches,
13 positions adopted where we try to be coherent rather than
14 simply reactive.

15 One thing we have started to do more is calling
16 together academic round tables on issues. We have done
17 it in casework which has been quite fruitful, but also on
18 the guidelines process.

19 Now just a word on the guidelines. We have a
20 statutory obligation to publish guidelines on the things
21 that we do. That is very helpful. I am a great believer
22 in statutory obligations incidentally. They stop you
23 backsliding and make you keep them up-to-date. So we
24 have recently published merger remedies consolidated
25 guidelines, that is a pure CC activity that produced a

1 lot of interest I think, and we are conducting with the
2 OFT jointly a revision of substantive merger guidelines
3 which is a highly productive exercise which again is
4 requiring us to consider all the various building blocks
5 of merger analysis, and the round tables are in that
6 context, October 2nd. I am not sure they are open to the
7 public, but there we are, openness in all.

8 Just an example of things where maybe the
9 strategic decision has affected what we have done. Well,
10 I think we have as a strategy that competition in
11 regulated sectors is important and that more attention
12 has to be paid to it and that more examples, more cases
13 should be taken. We came to that view a couple of years
14 ago and you may have noticed that it has fed through into
15 a number of public pronouncements and papers. That is
16 not by chance, that is deliberate.

17 The need to address the issue of competition up
18 against other policies, particularly in an economic time
19 of pressure, that again is a deliberate policy decision
20 by us to try and address that and so, again, you see that
21 coming through in a number of outlets. I will not talk
22 about the review and assessment of cases, we have talked
23 about that, but I think in terms of strategy it cannot be
24 too rigid and it cannot be too binding.

25 We are not like the German Navy in 1905

1 publishing a building plan for 20 years. It does not
2 work like that, but everything we do should take place,
3 even for a reference body, against a background of
4 priorities and policy consciousness. I rest my case,
5 M'Lud.

6 MS. OHLHAUSEN: Anyone?

7 MS. VALENTINE: I'd just make a comment on the
8 question: What should dictate the strategic planning and
9 what procedures and protocols should be put in place to
10 develop a strategy and check that the FTC is implementing
11 it successfully? Your dilemma here is that you do have
12 changes in administration and, at the end of the day, it
13 is going to be the people at the top who are, at some
14 meaningful level, going to be setting that strategy. So
15 I guess get back to human capital and intellectual
16 leadership.

17 This is a strange thing to say, it is not
18 really a response to the question, but the issue really
19 should be that each Commission should try to leave the
20 best legacy so that in the next administration the
21 Chairman's job will be a hot job. The best people will
22 want to be going to that job and you will have the pick
23 of among the greatest minds. You have to work also with
24 Congress and the head of personnel at the White House to
25 get great brains in there, because the best strategy is

1 going to come from the best minds.

2 Now then I guess what would be interesting from
3 the UK perspective, where there may be some greater
4 continuity between administrations, is: How can you keep
5 an acute sense of the past and the evolving trends so
6 that you can try to keep some strategies going through
7 time, notwithstanding the inevitable impulse of the next
8 gang to really want to leave their mark? So I would be
9 interested in policies, procedures and techniques of
10 agencies that are somewhat less subject to political
11 change, and how the personnel would use those policies to
12 keep a thoughtful strategy that ties learnings and
13 lessons of the past with sensitivity to trends of the
14 future.

15 MS. OHLHAUSEN: And not to answer a question
16 with a question, but what I was going to say is, after
17 some other people weigh in, Debra maybe you could talk
18 about the relationship between that point of continuity
19 and of sort of getting a clear sense that the agency is a
20 good place to work is: How is that tied up to the agency
21 having a clear mission? So that it is not doing
22 different under each administration, that there is this
23 continuity because we understand this is what we are
24 trying to achieve. People might have a different view of
25 what is the best path to achieve that but the goals

1 should be fairly stable.

2 MR. FINGLETON: I was going to mention that the
3 governance structure of the OFT where there is a Board
4 with a majority of non-executives does give a certain
5 type of continuity, because one of the things that the
6 Board primarily leads on is sort of long-term strategy
7 setting. It is important when in looking at, for
8 example, opening Competition Act cases and initiating
9 other pieces of work, very often we find ourselves in a
10 position now of looking at resourcing of that ten years
11 out because we are thinking: If we take this case it
12 will almost certainly end up going through these various
13 routes and the timescale on it is going to be quite a
14 long one. It is not that the Board gets involved in
15 taking those individual decisions.

16 They are very much decisions for the Executive
17 as to which cases bring, but in terms of setting the
18 strategy for that and having continuity, regardless of
19 who is taking those decisions, it is an interesting
20 separation and so it exists here in the UK for the sector
21 regulators and the OFT, but I think it is unique in the
22 competition field internationally but for the UK, and I
23 think as with French Revolution it is probably too early
24 to say because you are talking about long-term strategy
25 setting you probably want to look at a much longer period

1 for that.

2 But it is worth watching as you approach and go
3 past your 100th anniversary as to whether that governing
4 structure, which is a different one than I was used to in
5 Ireland which is much more like the Federal Trade
6 Commission, and I came to the UK system not really sure
7 what the advantages and disadvantages would be of that
8 system, but that may be one of the advantages.

9 MS. BLOOM: One comment on this continuity
10 point, reflecting on the fact that when I first started
11 in competition -- and I will not say when it was, it was
12 sufficiently long ago to remember US colleagues saying:
13 "Oh, all you European agencies are so political because
14 the ministers have such a role." And they were right.
15 We are now in the position where the vast majority of the
16 agencies in Europe are independent, reasonably so, of
17 their governments.

18 Some are more independent than others, whereas
19 when I look at the States I know that strictly speaking
20 the agencies are independent, but Debra I think in a way
21 alluded to this and it is certainly the perception here
22 that as the administration changes that influences the
23 approach, not to cartels, but to unilateral conduct and
24 also probably mergers. Now I am struck by that change.
25 It may be the wrong impression. We may be wrong in

1 thinking this but if it is correct it does have an impact
2 in terms of the kind of standing and leadership of the US
3 agencies. I think that you have more standing and more
4 leadership if you are seen as purely independent. I am
5 interested to hear what other people think.

6 MS. OHLHAUSEN: Any thoughts?

7 MS. VALENTINE: Well, I think it is important
8 that we address it honestly because there is a lot of
9 rhetoric about it being essentially a nonpartisan
10 economic endeavour that we are all engaged in here. And
11 to some great extent that is true. But when you are
12 talking about strategic priorities it is by definition
13 also true that any new chair is going to want to set his
14 or her own strategic agenda.

15 Now, when I saw something of the transition
16 from Pitofsky to Muris, I thought that worked quite
17 beautifully. Pitofsky stayed on for a while. He and Tim
18 had lots of conversations. Tim consulted broadly
19 throughout the community among prior administrations on
20 the DOJ and FTC side. I don't know, maybe our
21 interrogators can tell us why there are two different
22 views on the Section 2 report.

23 SIR JOHN VICKERS: Three.

24 MS. VALENTINE: And that cannot be that it can
25 be --

1 MR. FREEMAN: Five.

2 MS. VALENTINE: But your question, it is a fair
3 question to ask: How do you do strategy with continuity?
4 Because you obviously want continuity because that will
5 also give you buy-in with the public and the consumer.

6 MS. OHLHAUSEN: And I also think that to a
7 certain degree it is a question of emphasis. So what
8 does each particular chairman of the FTC want to
9 emphasise? Tim Muris really wanted to emphasise some of
10 the State restraints on competition or the ability of
11 private competitors to game the system to try to get a
12 certain outcome, so that I think that there are -- not
13 that necessarily one idea is wholesale rejected. It is
14 sort of a question of emphasis, one over the other. Then
15 I think one of the things we also that I know I was there
16 at the Pitofsky time as well is events can overwhelm the
17 best of plans. If you have a merger wave it is not
18 necessarily something that you can plan for in advance.

19 MR. FINGLETON: One needs to distinguish two
20 things. One is where the resources get allocated and the
21 second is is there a change in the substantive decisions
22 being made? Because I think those are quite different
23 things, because you could have no change in substantive
24 decision-making but all the resources just go into
25 cartels for example, and that is a very different outcome

1 than if the outcome is a different level of intervention
2 or substantive decision-making. It seems to me that the
3 relationship with the courts in the United States, and
4 this goes back to John Vickers' question about the FTC
5 and the DOJ and how they fared in the courts recently and
6 where the courts are at in the States, particularly
7 relative to where they are in Europe but just generally.
8 So I do not think it is just a political question.

9 The politics may affect resource allocation
10 more than the substantive decision-making ,but it is not
11 clear to me that it is so easy for a new head of an
12 agency to change the substantive decision-making on
13 cases. They are hemmed in by dogma and policy within the
14 agency, cases above them at the courts, public
15 expectations and accountability around published
16 decisions to a greater extent than they are about
17 resource allocation. I suspect, but I don't know if that
18 is true.

19 MS. BLOOM: But, John, on cases couldn't they
20 decide whether to intervene or not? I agree in terms of
21 the outcome of those they intervene on, where the courts
22 decide, but when they decide not to intervene that
23 could...

24 MR. FINGLETON: Absolutely, but that is the
25 resource allocation question.

1 MR. FREEMAN: Can I just pick up, Margaret, on
2 independence? Yes, I am sure the perception you refer to
3 is right, but I think certainly in this country it is
4 still a very sensitive issue. John and I appeared before
5 a high level CBI Committee last week where I think it is
6 fair to say that a theme of the questioning was: Aren't
7 you the agencies of the Government, aren't you doing this
8 because the Government wants this and so on? That is
9 quite interesting because we have had ten years of
10 independence and we think we are independent. We ought
11 maybe to ask ourselves, in the spirit of benchmarking,
12 whether that is what other people see.

13 SIR JEREMY LEVER: What would be the reaction
14 of the Chairman of the FTC if the Attorney General asked
15 him or her to pursue a particular line or not to pursue a
16 particular line?

17 MS. VALENTINE: Well, it would not actually
18 happen. The Attorney General could ask the head of the
19 antitrust division in the Department of Justice to pursue
20 a case or not to pursue a case.

21 SIR JEREMY LEVER: If the Attorney General did
22 it in the appropriate fashion what would happen?

23 MR. FINGLETON: It would be Congress. The FTC
24 goes to Congress and Justice goes to --

25 MS. VALENTINE: Yes, goes to the White House

1 and the Attorney General.

2 MR. FREEMAN: But the question is: Would you
3 do it?

4 MS. VALENTINE: The question is: Would you do
5 it?

6 MR. FINGLETON: But the FTC has done all those
7 petrol pricing studies, gasoline pricing studies at the
8 request of Congress.

9 MS. VALENTINE: At the request of congress.

10 MR. FINGLETON: But that has been a resource
11 allocation decision, but it has not intervened in the
12 market otherwise than studying it.

13 MS. VALENTINE: But they are independent. When
14 Joel Klein decided to bring Microsoft certainly he would
15 have consulted with the White House and the Attorney
16 General and people might have said: My goodness, if you
17 bring this case you are destroying one of the greatest
18 engines for growth and innovation in the country. But he
19 did go ahead and do it, and I think we very rarely see
20 pure political intervention. I think even in

21 Boeing/McDonnell Douglas, that was actually driven more
22 by political intervention in the EC than on the US side.

23 MR. WILKS: Like Peter, I am very provoked by
24 Margaret's observation that this independence balance has
25 changed somewhere across the Atlantic. I think it does

1 bear examination actually.

2 MS. VALENTINE: Yes. No, I think --

3 MR. WILKS: Well, your point, Debra, was at
4 least it is one in the States and let us face up to it.

5 MS. VALENTINE: Yes.

6 MR. WILKS: When we have a history of
7 independence that compares with the history of the United
8 States and whether or not this pendulum sort of effect is
9 going to come in in Europe in the UK is going to be very
10 interesting. This is a very alive issue for us at the
11 moment because John and Peter were no doubt appearing
12 before the CBI in anticipation of how they are going to
13 influence the next Conservative Government. That is
14 going to be the acid test, what is going to happen after
15 --

16 MR. FREEMAN: We were actually answering the
17 CBI's questions. But I take your point.

18 MR. WILKS: Sorry, Lasser (phon), I should
19 state there, but the issue is not going to go away in
20 Europe. It is alive and we ought to face up to it as
21 well, so I think Margaret put it very bluntly that we
22 should not be too self-righteous about this.

23 MR. BISHOP: I think there is some element of
24 US antitrust enforcement that is traceable to something
25 that looks like party political differences, but it is

1 nothing to do with interference I think of the
2 administration. I have never heard anyone -- I have
3 heard lots of Washington lawyers moan about not enough
4 challenges to mergers and so on, because they have a lot
5 more second requests for obvious reasons. But that flows
6 from the fact that the kind of people who get appointed
7 in Republican administrations are somewhat more
8 optimistic about the robustness of markets and somewhat
9 less inclined to find difficulties in mergers.

10 Republicans are somewhat less likely, anyone
11 appointed, somewhat less likely to bring the Microsoft
12 case than a Democrat would be. That is not because of
13 interference from the White House. I never heard anyone
14 Congress or anyone say anything like that. It is because
15 there are genuine differences of policy view about how
16 interventionist merger control policy or Section 2
17 intervention should be. There is all the difference in
18 the world between different political views by genuinely
19 independent people and people who are not independent and
20 are doing something because their political chiefs have
21 been nobbled. It is quite different.

22 MS. BLOOM: Yes, but it affects continuity
23 which was the point we were discussing.

24 MR. BISHOP: Right, and is continuity
25 necessarily something that should be a shibboleth. It

1 would be nice if we really did agree about all antitrust
2 matters, but actually there is some serious disagreement
3 about how interventionist those two things should be that
4 I mentioned, merger control policy and Section 2 abuse of
5 dominance. That is not going to go away.

6 MS. OHLHAUSEN: This actually might be a good
7 segue into the question that we had for Simon Pritchard,
8 and that is what priorities should an agency follow when
9 selecting its cases? So political priorities, maybe by
10 industry or consumer harm and redress determines value,
11 precedential impact. Did you have a slide at all?

12 MR. PRITCHARD: I violated the no Microsoft
13 Office products rule and prepared some slides.

14 MS. OHLHAUSEN: There should be copies at your
15 place, but if not there is more on the table.

16 MR. PRITCHARD: I want to be a bit sort of
17 humble and whatever the other --

18 MR. FINGLETON: Cautious.

19 MR. PRITCHARD: That is the word, cautious, as
20 well. Obviously, I have some understanding of the
21 context in which the FTC operates. I have lived in
22 Washington, but I certainly do not know your own agency
23 as well as I know the OFT. I learned a little bit more
24 about the OFT in putting these slides together as well,
25 which I thought was interesting.

1 What I can do is go through a little bit of how
2 we have captured the issue of prioritization, which we
3 have done quite explicitly, and then in large part it is
4 more for you to draw your own comparison chart
5 conclusion. I will have a bit of a go at it, but it is
6 really to just a start and I am not going to go through
7 it laboriously.

8 On the first slide, for those who have it,
9 there are a set of principles which I am sure John would
10 probably improve on articulating, but they struck me as
11 some of the key ones before we come to prioritization --
12 the context behind it. We have taken a principles-based
13 approach rather than saying, as was previously the case,
14 there would be certain priority sectors for a certain
15 period of time, given the sort of the mass of potential
16 competition consumer issues we would focus on for a
17 while, health care for example, and there are obviously
18 some industry sectors that just remain high activity for
19 a number of reasons.

20 But a principles-based approach, and I will go
21 into those in a second, couples with our attempts to
22 conduct ex-post evaluation to couple with ex-ante
23 prioritization. Of course, the timelines mean that there
24 is no real way of assessing our current efforts ex-post
25 as to whether the fruits of our ex-ante prioritization

1 are really going to pay off.

2 I think it is a really difficult exercise to
3 measure whether our approach to our portfolio was the
4 optimal approach. Even if we come back in three years
5 and if I look at the later attempts to do that to the
6 FTC, I do not really know the counterfactual of either of
7 your portfolios; had you not been doing the 21 things you
8 were doing, what other things would you have done? I
9 have no way of knowing that. It is difficult to measure
10 but you can, obviously, make some sort of high-level
11 observations.

12 On the issue of industry sector versus specific
13 tools that you can use, we were organised around tools,
14 so mergers and cartels and consumer and competition
15 obviously in separate sub-divisions, and you have been
16 through a day with us yesterday on how that works. We
17 have switched to market-centric approaches in terms of
18 particularly consumer and non-merger antitrust
19 enforcement and non-criminal antitrust enforcement.

20 John has touched on the reasons for that. It
21 helps, obviously, with sectoral expertise. It helps with
22 softer enforcement when you build up relationships with
23 key stakeholders of achieving outcomes at a much lower
24 cost, in changing behaviour, rather than necessarily
25 swinging heavy tools around at high costs, so there are

1 real advantages to that, and that is our Markets and
2 Projects side of the OFT.

3 As John has already mentioned, you do not want
4 to lose a lot of the professional centres of excellence
5 in doing that, so that we still have a general counsel's
6 office now for legal expertise, a chief economist's
7 office, and policy shops as well, so you really do need
8 both. OFT reform was not a sort of dogmatic approach
9 that said: Right, all tool-based approaches are out of
10 date and it is all going to be organised around markets.
11 It depended, and if you look at our 'organigram', 'Cartel
12 Enforcement and First Phase Merger Control' is still
13 organized around the tool of those particular
14 instruments, and there are good reasons for that.

15 John can, obviously, elaborate this, but for
16 cartels, given that we have both civil and criminal
17 cartel enforcement there were good reasons for ensuring
18 that process was a sort of dominant driver, grouping
19 people together around the use of this new tool 'criminal
20 enforcement', which is novel, and cartels was kept
21 together as a procedural tool-based centre of excellence
22 but there is, obviously, also cartel enforcement going on
23 in the services, goods and infrastructure areas; there is
24 not a sort of an internal monopoly on cartel enforcement
25 with cartels.

1 Being in merger control, one of the reasons for
2 keeping mergers in a unit rather than decentralizing it,
3 is that we only do first-phase merger control and the CC
4 does second phase. That was one of the reasons for that,
5 and also that it was broadly working well in that sort of
6 context and the idea was: We will see in due course
7 whether it makes sense to decentralize merger enforcement
8 on a sectoral basis, which is the way DG Comp has gone
9 and done it -- rather than a merger task force, they have
10 the mergers network within DG Comp just as a whole

11 The advantage of our approach, we think, is
12 that institutional structure does facilitate behavioural
13 changes and one's sort of intellectual orientation at
14 coming at the markets and diagnosing what problems are
15 and what the best fit solution is. Obviously, on the
16 cartel side we can flex, so to speak, between civil and
17 criminal. There will be some cases where it will not be
18 worth bringing a criminal case, even though potentially
19 you might think such conduct has occurred, just on the
20 basis of the evidence or the probability of success. Then
21 there is the hard versus soft tools distinction - to take
22 a recent example of medicines distribution in the UK, one
23 of the main pharma companies switched from using
24 intermediary wholesalers to supply retail pharmacy with a
25 direct to pharmacy model.

1 That prompted a lot of concerns about abuse of
2 dominance and that that would foreclose rivals and so
3 forth. But rather than launching a unilateral conduct
4 investigation into that, the OFT paused and, instead,
5 conducted a market study which - for reasons that we go
6 into in that report and an annexe - turned out to be the
7 best way of analysing the state of the market as it was.
8 So that sort of flexing, I think, has been facilitated by
9 the kind of institutional orientation that was taken.
10 Obviously, one of the key things that we share with the
11 FTC is that in B2C consumer retail markets there is the
12 flexibility to look at a market and consider whether it
13 is a competition issue or a consumer issue, or rather it
14 can be a hybrid, but which tool is going to be the best
15 fit to tackle the issues is the real question.

16 On the next slide, as I say, what I think we
17 try to do is say: Having had people of a competition
18 background and consumer background, to stylize you have
19 the competition people looking in the blue boxes and
20 saying: Is there something that I could do about this by
21 use of our traditional competition instruments to address
22 the problem? And without really considering the green
23 and yellow side. Now what I have really noticed is that
24 people such as myself that come from a competition
25 background, is that my literacy on the consumer issues is

1 improving.

2 It is certainly not at the level that I would
3 like it to be, but the direction of travel is certainly
4 really encouraging at our senior team level of approach
5 to the issues. Also, I think sort of permeating down,
6 even in areas where, for example, in mergers people are
7 still just doing mergers all the time and not using other
8 tools, but I see even there a layer of consciousness of
9 what is going on in consumer work.

10 That is enough on background. Our
11 prioritisation principles you have heard, I will not
12 spend a lot of time on them. I think we would say,
13 obviously having taken this approach, that the
14 principles-based approach is the right way to go. I
15 think it is a lot of what I perceive the FTC doing could
16 easily be situated in this kind of framework as well.

17 It is not to say that it is the only way to do
18 it, but obviously the dollar impact and how big is the
19 market and what big of a dollar difference would this
20 intervention make is one of the first things that we
21 consider, but it is by no means the only one.

22 You can see the 'significance' bullet there
23 covers a lot of these other issues around deterrence,
24 precedent, who is best placed to act, what strategic
25 patterns exist, and clarifying doctrine, getting clarity

1 on the law on a novel point, and those are situated under
2 there, and then obviously the issue of risks and
3 resources as well.

4 I had a quick go at some selected examples by
5 listing our various tools which, most of which you at the
6 FTC share, but it is not a perfect fit, and you can see
7 that down the bottom is the area where there is the
8 direct consumer competition interface because those
9 tools, market studies, the codes, advocacy, self-
10 regulation and guidance and obviously some elements of
11 issues that arise in market investigation references are
12 issues where, you know there are questions around whether
13 the reason that the market is not performing particularly
14 well could be to do with Government intervention of some
15 sort, it could be to do with information asymmetries,
16 difficulty of consumer switching, consumers not empowered
17 to use information to choose the best product or service
18 for themselves, those sorts of issues. There is
19 definitely a direct overlap there.

20 I think there are also indirect benefits that
21 feed through in other areas though and in some of our
22 learning about things that we came at perhaps thinking
23 there might be a competition issue, a structural issue,
24 there's collusion, there is something like that going on,
25 and it turned out that that was not actually the end

1 diagnosis even if it was the starting one, and we are
2 able to learn as you go from the preliminary phase and
3 end up using a regulatory tool or conclusion different
4 from the one you started out with. So when you are
5 swinging a hammer not all nails end up being nails and so
6 we can switch to a screwdriver as we move along.

7 You can see in this list of various tools here
8 I sort of rank them under genre. In speaking to my
9 consumer colleagues one of the observations that they
10 made is that the OFT has what I have called here -- and
11 this is not using official terminology -- hardcore
12 consumer tools, obviously prosecuting fraud and
13 misleading conduct, that sort of issue. A lot of our
14 enforcement in this area is actually soft in persuading
15 behaviour change and it is a little bit of speaking
16 softly because you carry a big stick, but it does mean
17 that the actual volume of prosecuting fraudsters in court
18 is perhaps not as high as it might be, but there is an
19 awful lot of merit to having them, even for soft
20 enforcement -- those tools are very valuable even if
21 they rarely actually have to be applied so there is quite
22 a link there.

23 Obviously, the tools, and one can have a debate
24 about this, I don't profess to have got it necessarily
25 right, they vary in terms of the risk and cost that they

1 incur on the agency to employ them. Obviously, criminal
2 cartel enforcement is -- and we are sort of learning, but
3 obviously it is not fast and it has to be very thorough
4 and you have to be very careful with evidence. It is a
5 different animal indeed, and right through to soft
6 enforcement where, generally speaking, the risks are
7 lower and the costs are lower, but you also have to deal
8 with the fact that, at least taking the antitrust bar
9 perspective, that if all we used was soft enforcement or
10 if we weighted ourselves very heavily towards soft
11 enforcement -- I think a lot of the public sector would
12 get the fact that if you can persuade through
13 recommendations a change in the market that delivers £100
14 million of consumer benefit, that is a really sensible
15 use of public resources -- If you take let us say the
16 antitrust bar, and if you do not bust some people for
17 cartels and fine some people, I think the perception will
18 be that we have gone all soft and fuzzy. One of the
19 asides is that, therefore, measuring simply one's
20 reputation with reference to the antitrust bar should not
21 be the number one goal of a consumer authority although,
22 of course, we take stakeholder views very much into
23 account. So intervention should be a mix.

24 Broadly speaking, I don't have any brilliant
25 insights into portfolio management other than to say that

1 one should be careful with tool selection. We don't
2 hesitate to switch tools in terms of what our starting
3 threshold is if we find that actually there is a nut that
4 does not crack with some hammer then we are not wedded to
5 sticking to the original tool. That is one of the
6 premises. We are sensitive to the risks and costs of the
7 various tools, and you can see there I have just picked a
8 couple of representative sectors to sort of test myself
9 whether there is or has been recent activity going on in
10 the OFT with respect to various sectors and various
11 tools.

12 You can see that, broadly speaking, there is,
13 and one could drill into a few of these cells and have a
14 very long conversation but, broadly speaking, that is the
15 picture. You can see that obviously enforcement is a
16 partnership and you can see that the Competition
17 Commission is responsible for quite a few of the outcomes
18 under merger and market investigation references. So
19 that is part of our equation. I have not put on the fact
20 that sector regulators in the UK are responsible for non-
21 merger antitrust enforcement -- one of the reasons I have
22 not got a media and utilities column is that, largely
23 speaking, we operate in a sort of a complementary
24 environment to some of those regulators.

25 So it is a little bit different from, for

1 example, the FTC's focus on energy as being a prime area
2 of enforcement. We largely leave that to the energy
3 regulator who has competition powers. So that is I think
4 enough on that in terms of me going on about it. I tried
5 to tentatively do the same thing with the FTC's portfolio
6 by looking through your annual reports and plotting a few
7 outcomes.

8 I don't think I have done justice to the
9 portfolio at all, but nevertheless it struck me that one
10 thing that differs is that, per se, cartel and sort of,
11 per se, enforcement is largely the DOJ's terrain, so that
12 is obviously a difference from what we do. So I think as
13 a proportion of total enforcement you do more effects-
14 based work than perhaps some other agencies that do a lot
15 of per se work.

16 Maybe that partly explains why I think the
17 FTC's economic prowess -- although the economic prowess
18 of the DOJ is, of course, impressive as well -- but it is
19 one of the things that I really look to and I know lots
20 of other people do too. There is a large concentration
21 of deep-think interesting workshops and other work
22 product that comes out of the FTC. You can see that that
23 must flow into the effects based approach that you do a
24 lot of. So I have picked some of the main sections
25 there, and you can see -- I think obviously there is a

1 lot of merger enforcement in these various areas.

2 There is quite a few things on restrictive
3 agreements which I think we would certainly take away and
4 think about as to whether there are any analogues, for
5 example, in the UK that we could learn from as well, but
6 certainly these industry bodies or industry arrangements
7 in optometrists or endodontists, or other funeral
8 directors or real estate agents, those sorts of issues.

9 Obviously, on the hot topic of unilateral
10 conduct there is activity going on in a couple of sectors
11 there, and that I think is perhaps one of the most
12 significant things from a UK perspective. But, as I say,
13 that soft stuff there is where a lot of international
14 benefits accrue as well. Certainly, merger control we
15 look to what the FTC is doing, but I know we read
16 carefully a lot of these other things as well. So my
17 suggestion wouldn't be to cut down on all the soft side
18 at all from this distance. So, as I say, I am not
19 sure that there is much I can say by way of critique --
20 broadly speaking, this portfolio looks pretty good to me.

21 I cannot really criticise it on the grounds
22 that it could be better, but I think it was a useful
23 exercise to see there is lots of activity with respect to
24 lots of tools. The question of how much weight to
25 attribute to each one and each industry sector, I am not

1 really best-placed to comment, but certainly from the
2 international perspective activity on the unilateral
3 conduct front is welcome because, in at least our reading
4 of some of those decisions, is that they were very good
5 Section 2 decisions.

6 MS. OHLHAUSEN: Did anyone else want to...

7 MR. AITMAN: Can I just make one comment? As I
8 think almost the sole member of the private bar and,
9 hence, the references to fees and the like in the earlier
10 session, one of the issues I think we find in the UK, and
11 it is not a precise analogue but it may be worth making
12 the point nonetheless, is that we do have two agencies or
13 more if you take the sector regulators into account, and
14 some things can work very well and be very efficient on
15 prioritization. So a move to having a common approach to
16 the substantive guidelines and on mergers is a real plus.

17 Some things don't work very well, as when you
18 think there is a difference in policy, even a small one
19 like at one point having different measures for the SSNIP
20 test. The allocation of the cases does not always work
21 as smoothly as it can. It can sometimes work very
22 efficiently, but on market references it can be very
23 burdensome for business while making us lots of fees to
24 go through something like a PPI enquiry almost twice. So
25 in terms of prioritization I think it is very key both on

1 the hard work and the soft stuff to try and work together
2 and wherever possible come to common results.

3 Now the analogue is that the uncertainties that
4 we face in the UK seem to be the kind of uncertainties
5 that business may face, over the last weeks in relation
6 to unilateral one where does that stand? I think it is
7 always a very difficult where you have got more than one
8 agency, but our experience is that it can work very well.
9 I think your experience is the same with common hearings
10 and the like, but it is something that is I think in the
11 UK we need to constantly keep under focus. Things
12 generally work well, but always to keep an eye on.

13 MS. OHLHAUSEN: Debra, did you want to?

14 MS. VALENTINE: I just wanted to make a quick
15 comment on the priorities. It is pretty interesting that
16 Simon has come up with almost the same thing you have
17 got: you have amount of consumer harm, and he has got
18 impact. He has put in deterrence and precedential impact
19 into that 'significance' bucket.

20 The only difference I think I am hearing and
21 one interesting question is: Can you use the same
22 prioritization principles, should you, for both
23 competition and consumer protection? I think I am
24 probably generally an advocate of a 'yes' answer. But one
25 thing that you may have in your consumer protection cases

1 that you just do not see in competition cases are really
2 health effects, possibly even death.

3 For example if somebody is marketing an HIV
4 product that always tested wrong or whatever. Then that,
5 I guess, merits a pre-emptive bump and you prioritize
6 that. You sound as if you are doing a little bit more.
7 You tended to go to the soft side on the consumer
8 protection side, which is not inconsistent with the FTC's
9 effort to work with industry and do self-regulation when
10 possible, but there is just that.

11 MR. FINGLETON: That also reflects the fact
12 that the allocation of responsibilities is different in
13 the UK. For example, we do not look after claims about
14 health care or food safety or things like that.

15 MS. VALENTINE: So matters that have immediate
16 human impact?

17 MR. FINGLETON: So it is done by a different
18 agency here. So none of the areas that the OFT
19 responsible is, generally speaking, ones where --

20 MS. VALENTINE: You are preventing death.

21 MR. FINGLETON: -- monetary compensation after
22 the fact would not be a reasonably good form of
23 compensation, so it tends not to be serious illness,
24 death and so forth. Consequently, ex-post intervention
25 could in principle work where there are some areas that

1 the FTC does where you must act ex-ante because monetary
2 compensation after the fact does not work.

3 SIR JOHN VICKERS: Could I just, this is in a
4 way more of a question than a comment, but under
5 precedential impact the Competition Act time has been
6 going here for approximately five minutes, whereas you
7 have been at it for 100 years and precedential impact is
8 very different in those two settings.

9 Almost everything has precedential impact if
10 the law is very new, including the procedures of just how
11 you get a case through. But I am trying to think of
12 recent cases of yours which seemed to be in that general
13 area. One was -- in a way this is not a huge statement,
14 indeed it spawned an article called 'La Triviata', but
15 there was the Three Tenors case that Tim Muris I think
16 personally put quite a lot into, which was trying to tidy
17 up the California Dental case on truncated rule of
18 reason, which is not hardcore cartel but neither is it
19 full works.

20 Some of the pharmaceutical cases, and I know
21 Alden has worked on these quite closely, on the issues
22 about patent holders and generics and what deals are
23 legitimate and what not, that even in a very mature
24 jurisdiction was a kind of unclear area, as may be some
25 of the standard setting issues like Rambus, though I dare

1 say that that is unbelievably fact intensive as to who
2 did, and did not do what.

3 Then, more recently, it seems to me an aspect
4 of interest to the economists in Whole Foods is the FTC
5 has succeeded, it seems to me, in getting some casual
6 critical loss analysis challenged at a pretty high level
7 in the courts which I think was quite a valuable thing to
8 do. So I don't know how big on your radar those four
9 examples seem, but from afar they came to mind as
10 precedential even in a 100 year jurisdiction.

11 MS. OHLHAUSEN: So assume that, you would say
12 we were pursuing --

13 SIR JOHN VICKERS: So if that understanding is
14 right, I sort of approve of that even though you have
15 clearly lost some big ones in doing that. So it is
16 picking issues which are generic -- I do not mean generic
17 in the pharmaceutical sense -- but they go wider than the
18 cases, but they are lacks of clarity.

19 MS. VALENTINE: Yes, I think that is an
20 important point. What you are saying is it is almost
21 harder for us to pick precedents because there is so much
22 groundwork done. But it is very important to continue
23 sending those signals and moving with market trends and
24 issues.

25 MR. PRITCHARD: One thing that struck me is

1 that in some ways chipping away at some of the Supreme
2 Court emphasis on market definition and unilateral
3 effects cases, that could be in some sense be due to the
4 fact that the jurisdiction is so mature, so that when you
5 want to change direction, there is quite a lot of legal
6 work done into then shifting things along. I suppose in
7 Europe too, the Michelin and BA judgments and whether
8 that statement of unilateral conduct law in the EC is the
9 sort of the optimal place where the law should be, which
10 is also obviously a much longer history of Article 81 and
11 82 is perhaps more some of the challenges than -- or at
12 least as big a challenge -- as creating new precedents
13 with some of the cases that you have.

14 MR. FREEMAN: I wonder if you are right, John,
15 that the law is here five minutes old. It is meant to
16 reflect European law jurisprudence which dates back 60
17 years now, and in a sense it is quite tricky to talk
18 about precedent in that context anyway because European
19 law does not have precedence. It has jurisprudence, and
20 every change or development in the law is always prefaced
21 by when the judges are saying, assuring us that it is
22 consistent with all the previous jurisprudence. Actual
23 full changes are quite rare. On the other hand, the
24 jurisprudence does develop. I would have thought -- as I
25 don't do it so I don't know, but I thought the OFT is

1 very consciously applying quite a well established,
2 although not always consistent or good body of case law
3 jurisprudence.

4 SIR JOHN VICKERS: That is an absolutely fair
5 comment. In my mind was, for example, the NAPP case.
6 There were a lot of issues just about how the CAT would
7 treat things, how a case is managed, how long
8 the submissions --

9 MR. FREEMAN: No, I think how it is done, that
10 is, yes --

11 SIR JOHN VICKERS: There was a huge amount that
12 was new.

13 MR. FREEMAN: True, true.

14 SIR JOHN VICKERS: And some of the OFT cases
15 have been in areas where, in a way quite surprisingly,
16 you could not look at the EC jurisprudence and get a
17 ready answer. There are a lot of big gaps there.

18 MR. FREEMAN: That is no doubt true.

19 MR. FINGLETON: And especially on the criminal
20 enforcement side where there is no Section 60.

21 MS. BLOOM: But, looking at the US, there is a
22 very interesting question, I think, as to how much the
23 agencies should seek to establish all the precedential
24 cases or how much it could be the private bar, because of
25 course there is a multitude of your cases which are

1 private actions. If you look at an area like bundled
2 discounts, that has been through private action cases
3 rather than through the agency. Of course, the agency may
4 not have the opportunity to take the case because maybe
5 it is not something that it is investigating. But this
6 might be an issue that you want to reflect in your
7 priorities: Should it be the agency or is it satisfactory
8 that these precedents are developed by the private bar?
9 It may be fine. It is an issue that we don't confront
10 here yet.

11 MS. VALENTINE: I know that the agencies take
12 that very much into consideration and that their amicus
13 role is part of that: Do you intervene as an amicus?
14 And sometimes the Supreme Court will even ask you for
15 your views, and you have got to give your views even if
16 you want to run and hide. So it is very much a part of
17 it and I think an important part because an agency would
18 not want to abdicate entirely to the private sector
19 development of the law, as much as it would respect the
20 value of multiple sources of law making.

21 MS. OHLHAUSEN: I think what we are going to do
22 is just finish up in the next five minutes. Debra, I
23 know you cannot join us after lunch. I did want to ask
24 you a question about guidelines and then if we have a
25 shorter lunch, maybe reconvene at 10 to 2 -- is that

1 enough time? -- and then we could finish up with Philip
2 and Jeremy after lunch. Is that?

3 MS. COPPOLA-TINEO: Yes, that sounds fine.

4 MS. OHLHAUSEN: Debra, I just wanted to give
5 you a chance to weigh in on FTC guidelines, are any of
6 them in need of revision? Peter had raised the issue of
7 guidelines, and the importance of them. But, of course,
8 things change. Learning changes, precedent changes. Do
9 you think any of our FTC guideline need revision or do we
10 need any new ones to emerge?

11 MS. VALENTINE: Well, I think that you are
12 going to have something of a dilemma. You need to think
13 about of vertical merger guidelines, which clearly the US
14 has been avoiding, and the question will become: If
15 there is more and more on the EC side, might it not be
16 healthy to have different flowers blossoming and
17 something in the US, and might that not even be good in
18 terms of guidance to companies? Maybe now Section 2 is
19 the same sort of issue. There will be something coming
20 out of the EC, I assume, late this year, and there are
21 sort of mixed messages now in the US.

22 There clearly were some ideas in the Antitrust
23 Modernization Commission Report. So I would think about
24 some things proposed there. And John, you might have
25 alluded to IP stuff. It was interesting when we were

1 doing the Modernization Commission there was actually
2 very little push to change merger guidelines. There was
3 a little bit of interesting thinking about trying to
4 update them for mergers involving IP or be at least a
5 little more explicit on that. But maybe it is time to
6 revisit IP guidelines. We have learned an awful, awful
7 lot in the last ten years. I think, John you were going
8 there a little bit..

9 The only other perspective I wanted to give,
10 since my other question is 'if you have clearly defined
11 an issue', what does the FTC do well? -- And this all
12 again comes back to your question about the joint
13 competition and consumer protection missions. I really
14 love how the agency has woven the two strands together
15 and worked at promoting and enhancing consumer welfare,
16 whether that be in terms of keeping markets open,
17 preventing undue market power, or keeping information
18 accurate. So using both sides of the house, so to speak,
19 in putting the consumer in the best position to get the
20 greatest quality goods at low prices.

21 What I also think is really healthy there is
22 that you have got an economic discipline on your consumer
23 protection policy, and maybe to link back -- and you will
24 pick this up later to Alden's question -- about can you,
25 in particularly regulated areas like utilities or

1 pharmaceuticals, bring to bear both the competition and
2 the consumer side of the houses to get an optimal
3 outcome. There is one other point I want to make because
4 sometimes there is a tendency for the FTC to somehow
5 defer to the DOJ on the international side. I think you
6 have been very effective and useful internationally. In
7 many ways you are more like many of the foreign agencies,
8 and I would be deferential here. I would find an equal
9 role with the DOJ here.

10 MS. OHLHAUSEN: OK. So I think we will finish
11 here for now and have a brief break to get something to
12 eat and then return at, say, 10 to 2, and then we will be
13 able to finish the last few portions of this part of the
14 discussion. Thank you very much.

15 **(Luncheon adjournment.)**

16 MS. OHLHAUSEN: Thank you so much to everyone
17 for cutting your lunch break a little bit short so that
18 we can have a little extra discussion on this topic, and
19 I wanted to turn to Philip Marsden to ask about his views
20 on how research projects should be chosen.

21 Should it be through centralized staff
22 interest, sort of things kind of bubble up, or through a
23 centralized approach that links research to enforcement
24 and advocacy and then have you -- as part of that, also
25 how do you measure the effectiveness of a proper research

1 programme?

2 MR. MARSDEN: Thank you. I want to talk about
3 triggers, outputs and outcomes, and those are not the
4 names of some of the children of a certain American vice-
5 presidential candidate.

6 MR. FREEMAN: Sounds like the 3:30 at Ascot.

7 MR. MARSDEN: So research triggers come from
8 issues arising from cases, changes in legislation, new
9 case law, stakeholder consultation, advances in theory
10 and policy; but what I like very much is two innovations,
11 at least to my mind, that have been coming out of some
12 competition authorities. One is retrospective analysis
13 and evaluation of merger remedies, how are we doing? How
14 is that fitting in with our mission? Did it work? Did
15 we get the right result? And the second innovation being
16 a prospective one of looking ahead, horizon scanning, and
17 all I would say about horizon scanning, is that you have
18 to choose your horizons carefully to make sure that your
19 use of the taxpayers' money is equally concentrated on
20 your mission, whatever your mission is as a competition
21 authority.

22 I am really keen to hear your views on the
23 retrospective and prospective aspects of these research
24 triggers.

25 In terms of outputs, obviously competition

1 authorities are always producing, if they can, research
2 papers, there are international submissions at various
3 regional and other fora; there is stakeholder lobbying
4 that we may see or may not see as much of; there is
5 internal guidance; there is external guidance; speeches
6 and seminars. I think a very important point is the
7 consumer education initiatives that the authorities make
8 to actually really reach out and try to have an impact
9 directly and explain their messaging to consumers.

10 In terms of outcomes I think one of the most
11 important things that we may not necessarily see
12 immediately is tool development in terms of more
13 efficient casework. You have got people understanding
14 more of a shared theory of harm, working together more,
15 understanding how various research streams impact on
16 initiatives and cases, so working better together. It
17 might also make your partners more efficient. It might
18 reduce business burdens and business concerns because you
19 are running your cases more smoothly. Obviously, from
20 some of your research will come some form of competition
21 advocacy in many cases and you are also influencing
22 legislation. You are influencing international debate.

23 There was a question put to me at one point
24 about: How do you measure the effectiveness of a
25 research agenda: cites in cases or in other academic

1 research? And I would just say since this is the week of
2 the Large Hadron Collider, to quote a physicist who has a
3 message up in his office that says that when you are
4 trying to estimate how well you are doing, there are
5 things that count that can't be counted and there are
6 things that you can count that don't count.

7 I am thinking here in this regard, in
8 particular, of the fact that a lot of benefits of what
9 competition authorities are doing is - for example in
10 terms of competition advocacy -- is unseen. You are not
11 necessarily seeing immediate result from explaining your
12 work on a particular conduct or in a market, but in
13 particular to other government departments. You may not
14 see it but hopefully your influence is becoming embedded
15 and institutionalized, and it may even be through
16 sessions like this where just the very fact that you are
17 going to have a transcript, that other authorities are
18 looking at this and considering what you have done.

19 So those things cannot be measured but they
20 count and they are immensely important. When you have
21 these various research streams, as many authorities have,
22 I think it is really important somehow to have a place in
23 the authority where you bring it all together. The
24 streams themselves will be in different places. There
25 are always silos, and I am not saying: Have a research

1 "department". You may not be able to afford that or you
2 may not want to have that separately, but you should have
3 some place -- and not just in the chairman or CEO's
4 office but some place, probably in the policy group, that
5 clearly has an idea of these various streams and how they
6 interact with one another and can make sure that there is
7 no duplication but, equally, how they are learning from
8 each other; I think that is very important.

9 I don't know whether you can choose between top
10 down guidance or bottom up. I think it is a mixture of
11 both, but I think if you have one place where you have a
12 view of how things are going, constantly checking to make
13 sure that the research is in line with your mission and
14 that you have had some form of evaluation mechanism, then
15 I think you will see real results. I look forward to
16 your views.

17 MS. OHLHAUSEN: Anyone else have a point about
18 research? I think you might be interested in how
19 research, how you see that research that has been
20 generated by an agency, competition agency is viewed in
21 academic circles. Is it given the same weight? Is it
22 sort of looked at as trying to support other things other
23 agendas or does it just, or does that just vary widely
24 across that?

25 MR. MARSDEN: Well, Catherine had a nice point

1 about data, and I think some of the in-house research
2 that academics should perhaps pay a bit more attention to
3 is the research that is coming out of authorities these
4 days on how well a certain deterrent mechanism is working
5 and reviewed, especially the evaluation mechanisms in
6 certain cases of what is more effective in terms of
7 deterrence. These sorts of thing where the data, of
8 course, is in the authority's gift. They may commission
9 somebody to do the initial take, but then the academics
10 can look at and then apply it to their model, and
11 especially from the Institute I come from a comparative
12 law point of view or a comparative institutional
13 perspective. I hope we can add things there.

14 I remember when I was in the Canadian
15 Competition authority there was a team of PhD economists
16 who reluctantly got involved in the casework. They
17 viewed their role as focused in the theoretical and if
18 you have the luxury of being able to afford these people
19 that is fantastic, but I would always think that the
20 benefit is stronger if you are able to link people in as
21 much as possible, and if you are going to bring in more
22 theoretical and behavioural economists to discuss things
23 with you as a learning basis, but always try to work out
24 how to link that up and have some sort of concluding
25 point about how this has benefited the case analysis; I

1 think that both communities, external and internal, they
2 do complement one another.

3 I think you can walk it hand in hand this way.
4 I think a study that I remember spending a lot of time
5 looking at was Whish-Wood, a long time ago, for the OECD,
6 which resonates throughout the literature now. That
7 wasn't something that was just for a few OECD countries
8 and two experts and their opinion. It really is used
9 over and over again as countries try to see how they can
10 import predation analysis in antidumping cases and also
11 see the anticompetitive effects of dumping and certain
12 inducements to cartelization that come from that. So
13 that is one example, one point.

14 MR. FINGLETON: If I just try to put in a
15 matrix, a two by two matrix, on one side economic
16 research and then legal research and then on the other
17 side what you might call leading research and then
18 following research. So leading research would be
19 research that is used to tell agencies what they might do
20 better or to inform, and following research is the type
21 of analytical research that looks retrospectively at what
22 is being done and analyzes that, from which forward
23 thinking can also come.

24 I think there are important differences between
25 the way the balance lies, and I think if you try to

1 populate the four boxes of that matrix you might find
2 that the legal research is slightly more of the following
3 type and some of the economic research might be more of
4 the sort of the leading type. I sort of wonder if that
5 is a useful framework for thinking about research. The
6 question of what data agencies publish is terribly
7 important for the economists as well as for the legal
8 research, but particularly for the economists, and the
9 whole balance between commercial confidentiality versus
10 what you might call the wider accountability of the
11 system and whether that balance is always right, that
12 might be one factor that plays into it.

13 I suspect that for economic research that I
14 know a little bit more about, one of the big synergies
15 comes simply from the conversations that people in
16 agencies have with people in academia, because having
17 been an academic and supervising graduate students the
18 hunt for good research ideas is always interesting, and
19 the people in the agencies very often have lots of really
20 good research ideas but no time to read anything let
21 alone to write anything as I know myself, and maybe not
22 enough of those conversations happen. They can be quite
23 easy to facilitate, and maybe you do.

24 I suspect Amelia does talk to people, but I am
25 not sure we do that in a structured enough way, but it

1 might be useful to try and develop some sort of framework
2 for thinking about that in categories, because I suspect
3 it is not just all one type of research. I suspect there
4 are several different types.

5 MS. WADDAMS: And, clearly, you can do that
6 internationally also because the academic debate is
7 international. But I think you asked how the agency
8 research was viewed, how the academic world viewed
9 research that came out of agencies, and I think it is a
10 really boring answer: It depends how good it is, and I
11 think some is very very good at leading and that often
12 gets peer reviewed and published and so it should, and
13 then seeks a wider audience and gets applied in other
14 areas. Some of the work is not so good and the academics
15 will not be slow to savage it, I am afraid.

16 MS. OHLHAUSEN: But there is not a sense that
17 just because it was generated by an agency that it is.

18 MS. WADDAMS: I have never come across that. I
19 don't know if other people have. It just seems to me:
20 Look at the quality of the work and judge it on its own
21 merits.

22 SIR JEREMY LEVER: One of the oddities about
23 this area is that both the legal and economic
24 practitioners spend a surprisingly large amount of time
25 in many cases writing academic articles, books and so on,

1 and so the divide between academia practice both for the
2 lawyers and the economists is much less marked than in
3 most other areas I think, and academics frequently
4 practise.

5 MS. WADDAMS: And are not always independent.
6 One has to watch out for that. Present company excepted.

7 MS. OHLHAUSEN: For our final topic for this
8 Panel I wanted to turn to Sir Jeremy Lever to talk about
9 how can the FTC -- we identified sort of the variety of
10 tools that we have, how can we make the optimal use of
11 mixing together these tools. So research advocacy and
12 consumer business education, and then, in addition to
13 that, how do we balance our resources between enforcement
14 and other tools to sort of sort of keep us on the right
15 track?

16 SIR JEREMY LEVER: I think the answer to this
17 question is determined at least in part by the existence
18 of certain general problems. The first is that antitrust
19 law, and I will include competition law in that heading,
20 is the legal administration of economic policy. The
21 economic analysis is often complex and quite frequently
22 it is contentious even among competent and sensible
23 economists; and lawyers are often generally not competent
24 and sensible economists.

25 They yearn for general propositions that are

1 understandable by non-economists, and they can fairly
2 argue that antitrust law ought to be understandable by
3 businessmen who may be very shrewd commercially but are
4 often of extremely limited intellectual analytical
5 competence. Allied to that first problem is the well-
6 known tension between, on the one hand, legal certainty
7 and, on the other hand, the fact that the economically
8 right answer to some of the questions that have been
9 addressed under antitrust law may depend upon complex
10 analysis and not be readily foreseeable.

11 In resolving both of the earlier problems
12 antitrust lawyers have, regrettably, an interest that
13 differs markedly from that of their clients. Like all
14 specialists, antitrust lawyers tend to want their area of
15 practice to be arcane and difficult for any non-
16 specialist to penetrate. That creates barriers to entry,
17 limits supply, raises prices, the fees earned by the
18 specialists and also adds to the feeling of self-
19 importance.

20 Now these problems can be minimized if the
21 agencies keep clearly in mind that we live in a world in
22 which competition between undertakings is massively
23 limited by governmental rules and regulations. To take
24 the simplest example, use of child labour in the
25 developed world. It is highly restricted. Even when

1 left to their own devices undertakings in a competitive
2 situation, custodians of children, perhaps even children
3 themselves, would engage in child labour and the
4 undertakings would point out that they face competition
5 from undertakings that use child labour in less developed
6 countries. You can think of a host of cases where we do
7 not live in an economist's competitive world.

8 The competition is, in fact, restricted in a
9 host of ways which fall right outside antitrust law and
10 it follows that the competition agencies that judge
11 conduct against an assumed comparator of competitive
12 conduct guided by uninhibited self-interest are engaged
13 in a fallacious exercise. You have to recognize that we
14 live in a world that is, in many respects, not a world of
15 competition.

16 Thirdly, and related to everything that I have
17 said so far, antitrust law has in my view a limited role
18 to play in promoting the well-being of a society or even
19 the well-being of an economy. They are rather different.
20 Naturally, antitrust practitioners and the agencies are
21 reluctant to recognize this fact since it detracts from
22 their self-importance and the intellectual satisfaction
23 that is derived from examining interesting and complex
24 questions. Nevertheless, antitrust law finds physical
25 analogy, in my view, in an efficient drinking water and

1 sewage system rather than in a National Health Service.

2 It has a limited role to play and a very
3 valuable one. The chairman of a pharmaceutical company
4 once remarked to me that a good drinking water system and
5 sewage system had contributed far more to human health
6 than the pharmaceutical industry had ever been able to.
7 So the aims, I believe, of the competent authorities
8 should be realistic and modest.

9 The obvious targets should be collusion and
10 exclusion and, of course, merger monitoring and control
11 is a form of anticipatory prevention of something that
12 has effects similar to collusion and may give rise to
13 exclusion. If an agency effectively minimizes collusion
14 and exclusion and does the merger work well then,
15 although the absence of whistles and bells may distress
16 the specialist, the system will be satisfactorily
17 performing its most important functions.

18 The acid test is whether the agency is taking
19 decisions that are factually supported and argued with
20 intellectual rigour, and I then say as a third condition
21 ideally, but not necessarily, not upset on appeal. If
22 there is a need for deviations from the principle 'no
23 collusion no exclusion' it cannot be left to the
24 undertakings themselves to decide that. The decision
25 needs to be taken by Government and we are concerned

1 quite as much with the question (and this goes back to
2 what I said at the beginning): Who decides the
3 departures from the competitive model? The competition
4 authority is bound to say: It cannot be left to be
5 decided by the undertakings because they have too great a
6 self-interest in the result, and one that is not
7 necessarily or even usually compatible with that of
8 society and the economy as a whole.

9 I know it sounds wonderful to talk about
10 educating businessmen in this area; on the whole in my
11 experience businessmen have only a limited interest in
12 being educated. Their primary interest is in making
13 money, though they generally understand the concept of
14 risk, especially if the risk is to them personally rather
15 than to others or even to the undertakings by which they
16 are employed. So the foregoing considerations should
17 guide any competition authority in its allocation of its
18 scarce resources.

19 I say 'its scarce resources'; Margaret Bloom
20 has certainly heard me say this frequently in the past,
21 and I say I it again: the allocation of resources to the
22 Office of Fair Trading is ridiculously low in this area.
23 If you believe that competition policy really makes a
24 difference to the economy, then it is absurd to suppose
25 that you are saving money by stinting the Office of Fair

1 Trading with the resources that it requires to make
2 competition policy effective. The Government finds it
3 apparently extremely difficult to grasp that fact, all
4 the more extraordinarily since very substantial fines
5 have begun to be imposed.

6 A meticulous analysis of the relevant facts in
7 any case that the authority deems to be worthy of its
8 attention is an absolute necessity. Such analysis should
9 lead to decisions that will withstand critical analysis
10 if and when challenged on appeal. It is not worth an
11 authority doing the case at the administrative stage
12 unless it does it sufficiently well that it has a good
13 chance of withstanding scrutiny on appeal. It can ill
14 afford to do that.

15 If they cannot afford to do that, then they
16 should not do the case because they simply waste the
17 money that they spend at the administrative stage and
18 then waste more money on the appeal, and in this country
19 at any rate have to pay the costs of the other side when
20 they succeed on the appeal. Secondly, the decision
21 should be such that businessmen can understand their
22 implications for their own businesses and that disregard
23 of the enunciated principles could cost them personally
24 dearly. That would be my charter for my ideal
25 competition authority, and I offer it to you after 50

1 years of miserable experience.

2 MS. OHLHAUSEN: So it sounds to me what you are
3 saying what we really need to focus on is horizontal
4 conduct, merger control --

5 SIR JEREMY LEVER: Merger controls you have to
6 do, I understand that, and it is really concerned in
7 general I think with a desire that the merger shall not
8 have a significant adverse effect on competition.
9 Otherwise, concentrate -- I know it is dull for the young
10 people. They would like to be doing much more
11 interesting things and stuff, but collusion and exclusion
12 are the things that matter.

13 MS. OHLHAUSEN: And so our other policy tools
14 should only be deployed in aid of this kind of analysis,
15 so to make sure that we have very good theoretical
16 support for these kinds of cases.

17 SIR JEREMY LEVER: I am sure that one can make
18 out a perfectly good case for some exceptions and I am
19 sure one can justify the allocation of a smaller much
20 more proportionate of the total budget to these other
21 things that you have to do to keep people interested and
22 so on and so forth. I am really giving you what I
23 believe to be the prescription for a healthy and useful
24 life by a competition authority. I know that Stephen
25 would strongly disapprove of what I have said because he

1 is a sort of probation officer. He believes in the
2 goodness of human nature. I don't, and I think that a
3 competition authority can justify itself by good works
4 not by faith alone.

5 MS. BLOOM: I really enjoyed Jeremy's
6 intervention. Can I just ask you one question on this?
7 At one time one of the sanctions in the UK was to put
8 people in the stocks to be publicly pelted if they had
9 committed price fixing. Do you favour bringing back the
10 stocks?

11 SIR JEREMY LEVER: I favour a number of
12 measures which would not meet with universal approval and
13 would almost certainly get me into trouble under the
14 Convention on Human Rights, but I was not initially in
15 favour of criminalization.

16 MR. WILKS: Or child labour.

17 MR. FREEMAN: But I can come round to it.

18 MR. WILKS: Unless it is lawyers, of course.

19 SIR JEREMY LEVER: I think that I do now accept
20 that criminalization serves a useful purpose, although as
21 Margaret and I have discussed in the past, on reflection,
22 I think, that if something constitutes a cartel offence
23 it necessarily constitutes a criminal conspiracy to
24 defraud. I can't myself see how it does not, and the
25 question is: What is considered honest or dishonest in a

1 society? And that changes I believe over time or has
2 changed in relation to cartels. I would accept that if
3 and when businessmen recognize that certain types of
4 conduct not only infringe our competition but are
5 dishonest, that will affect their conduct and the stocks
6 was a kind of a public demonstration that this is conduct
7 of which we deeply disapprove. So I do accept that it is
8 important to get across to people that this is not just
9 technical law, but there is an element of honesty or
10 dishonesty here.

11 MR. WHISH: I was in Hong Kong about seven
12 years ago reading the South China Morning Post of a case
13 that had been brought against a bid rigging cartel for
14 conspiracy to defraud, and the judge had ordered the jury
15 to acquit on the basis that that kind of conduct could
16 not possibly be considered to be dishonest because
17 everybody in Hong Kong did it.

18 SIR JEREMY LEVER: Which is more or less what
19 the House of Lords said after an article that I had
20 written, grossly misrepresented to the House of Lords and
21 grossly misunderstood by the House of Lords, it is more
22 or less what the House of Lords said in Norris.

23 MR. WHISH: And in Kenya you can be sentenced
24 to imprisonment for price fixing up to two years with or
25 without corporal punishment.

1 SIR JEREMY LEVER: Margaret would approve.

2 MS. BLOOM: I only asked you what you thought.
3 I did not advocate it.

4 MR. FINGLETON: Follow that.

5 MS. OHLHAUSEN: Anything based on -- Sir
6 Jeremy, I should just pack up and go to the pub.

7 MR. WHISH: Could I ask Jeremy a question
8 though: Clearly, a very strong enforcement agenda, but
9 what about all those markets that are imperfect and fail
10 to function in a competitive way because of asymmetry of
11 information, imperfect information, inertia on the part
12 of consumers in exercising their choice, technical
13 impediments to exercising a choice. Are there not a lot
14 of markets out there of that nature which will never be
15 improved through the conventional tools of antitrust,
16 that is to say Articles 81 and 82?

17 SIR JEREMY LEVER: Now you may well have
18 established a certain inconsistency in my position
19 because I actually am strongly in favour of well-judged
20 market investigation references and believe that they can
21 perform an extremely valuable function, partly because
22 they will expose conduct that has effect similar to
23 collusion or exclusion and that by the act of exposing
24 can be extremely valuable.

25 I don't think I would want to see market

1 investigation references resulting in conduct of a kind
2 that was generally lawful being rendered unlawful on a
3 rather speculative basis, but I do accept and have to
4 accept that the MIR can be a very valuable tool in this
5 country in the hands of the competent authorities. So,
6 yes, touché.

7 MR. FREEMAN: We have got that on the record.

8 MS. KORAH: It is also for these people, the
9 OFT and the FTC, to use their powers over consumer
10 protection. We have to say what an annual interest rate
11 would be on a hire purchase transaction. That sort of
12 thing does help competition. It gets over some of your
13 market failure problems.

14 SIR JEREMY LEVER: I think consumer protection
15 though is a separate function. It may well go extremely
16 well with a competent competition authority and that it
17 is sensible to combine the two functions in office. I
18 accept that, but I think it is a separate function and
19 that, while one is -- and it may also, as Ms. Valentine
20 says, it may also be that in doing something that
21 protects consumers you are also doing something that is
22 pro-competitive. I accept that. But I would not regard
23 consumer protection as a primary function of a competent
24 competition authority. It follows frequently as a
25 consequential effect of competition policy, but it is a

1 consequence.

2 MS. WADDAMS: But it doesn't necessarily work
3 the other round, does it?

4 SIR JEREMY LEVER: No.

5 MS. WADDAMS: Consumer protection may well
6 inhibit competition.

7 SIR JEREMY LEVER: That is right, asymmetrical.

8 MS. OHLHAUSEN: I think at this point we should
9 probably turn to our third Panel on the international
10 agenda, but I did want to thank everyone very much for
11 participating. This was a very lively discussion and I
12 enjoined it very much. Maria Coppola from the FTC is
13 going to moderate for us.

14 **THE INTERNATIONAL AGENDA**

15 MS. COPPOLA-TINEO: I am going to play a very
16 minimal role. I think we will try to go for about half
17 hour and then take a five minute coffee break in the
18 interest of time. As Alden said this morning we are
19 holding a number of these consultations around the world
20 and one of the main topics we are addressing is our
21 international efforts. That is because it is something
22 that is very difficult to elicit feedback on in the
23 domestic arena. It is quite good that I have been here
24 today as I have already learned something, albeit from an
25 American colleague, which is that the Department of

1 Justice takes the lead on international. I didn't know
2 that. I am not sure my FTC colleagues know, but at any
3 rate that was enormously useful.

4 I thought that we would start the discussion at a
5 general level: What should competition agencies be doing
6 internationally? How do we value those efforts which we
7 focus on? To address that we will start off with David,
8 Bill and Richard. So however you want to address feel
9 free.

10 MR. AITMAN: Shall I start then. I am going to
11 try, which is obviously difficult in the light of
12 Jeremy's remarks, to avoid being either arcane or self-
13 important. So I want to try and put a few simple ideas
14 properly presented. So what should an agency do to
15 respond to international developments that shape the
16 competition and consumer protection policy? I draw a
17 distinction between two types of agency because the
18 question is put generally.

19 There is the agency that is new and/or small
20 with limited resources and there is the agency that is
21 much more established and is much better resourced. So
22 starting with both types of agencies there are a couple
23 of simple things that I think all of those agencies
24 should do and mostly, but only mostly do do. The first
25 thing is that they should have procedures in place to

1 make sure that they consider and take note of the
2 development on the international stage. That is the
3 minimum that they must do, to be aware and to consider.

4 In addition, and this is where I think some do
5 not follow what I would see as the basic minimum, they
6 should ensure efficient and transparent implementation of
7 whatever they decide as appropriate in response to that
8 development by publishing decisions in sufficient detail
9 to show how the development is being reflected in
10 enforcement. More established agencies can play a much
11 bigger role and I divide this into two headings: One,
12 the role they can play internationally, and two, the role
13 that they can play domestically as part of the
14 international debate. So, internationally, they can seek
15 to influence reaction to the development.

16 They can seek to ensure best practice and they
17 can try to increase harmonization between antitrust
18 regimes. The tools to do that are, to a large extent, in
19 place. They can take a leadership role, and very often
20 do, in international or as such as ICN and the OECD.
21 They can be transparent to other agencies and
22 international bodies. That goes beyond the basic
23 requirement that they implement and explain that they are
24 implementing. They are providing reasoned decisions that
25 are not just for the domestic stage but for the

1 international stage, so that people can follow the
2 thinking on that development. So speeches, guidelines,
3 notices, case closure, and decisions are all extremely
4 important.

5 I was struck on a recent merger case just how
6 significant this is. It was a reasonably complex case
7 and, slightly to my surprise, as the case developed we
8 had MOFCOM raising issues and raising decisions from the
9 international stage. It actually was rather complex
10 dealing with them on this issue at first, but the fact
11 that those decisions were there, there was a context and
12 that we were able to discuss and differentiate the case
13 from decided principles was actually very useful.

14 The final thing that I think that can be done
15 on the international stage, and I know that a lot is
16 done, although as a private practitioner I know less
17 about how it is done, is providing technical assistance
18 from the more established agencies to the newer and less
19 certain agencies. Without knowing a lot about it, I just
20 put a question on the table as to whether or not there
21 could be more done and more either formal or informal
22 arrangements to bring that about.

23 Domestically, I think an experienced agency has
24 a role to show the way. It shows how it reaches its own
25 decisions and it shows how it responds to international

1 developments promptly and in detail and explaining how it
2 is implementing its response in relation to those
3 developments. It can have close regard to what other
4 agencies are doing, for example by looking at best
5 practice guidelines on transparency, by looking at how
6 fixed timetables on merger control are working and issues
7 of that nature.

8 I think that all of those elements are an
9 aspect of learning and sharing and playing a part in the
10 international debate. Now I asked a few antitrust
11 practitioners what they thought in putting those, really,
12 I think quite simple, thoughts together, and then I asked
13 a question at the end just saying the questions that have
14 been posed by the FTC, was there any special FTC aspect.
15 I would like to read something, which I think is on the
16 one hand flattering to the FTC and, on the other hand,
17 perhaps raises a question -- it says: "I think the FTC
18 gets high marks for their effort on the international
19 agenda, and is to be commended." That is obviously pure
20 praise.

21 It then goes on to say: "It's an obvious
22 attempt to spread the US antitrust gospel to those less
23 enlightened which is a service to US businesses seeking
24 to export to such or set up shop there." I think that
25 that is potentially a criticism. My experience at recent

1 events, and I don't see many of them, is that it is a
2 slightly unfair comment about the FTC patronising other
3 antitrust communities and, just having been at some of
4 the sessions of the ICN in Koyoto that was not the way in
5 which I thought the FTC was preaching to the world, but I
6 thought it was interesting that it is still made as
7 comment, and I can think of some debates at Fordham where
8 other countries and agencies might leave with that
9 impression. So those are my thoughts on that.

10 MS. COPPOLA-TINEO: Those are very helpful. I
11 want to start by congratulating you for offering some
12 criticism, even if you did not share it perfectly
13 yourself. That is really what we are here for
14 ultimately, to find out what we do well, but really also
15 find out where we need to improve. That is the whole
16 point of this exercise. Also, I just wanted to add that
17 on technical assistance, although we are a domestic law
18 enforcement agency and most of our funds are devoted to
19 that, we have recently received some encouragement from
20 Congress and others to do more technical assistance, so
21 hopefully we will continue with that. You mentioned the
22 multilateral arena, and I'd like to move on specifically
23 to that question. It is something that we have struggled
24 with at the FTC and also when I was at the OFT, how much
25 energy or resources should we be devoting to the

1 multilateral arena and for what purpose. For that, I
2 thought, Richard, you might be able to shed some light?

3 MR. WHISH: Sure, and thank you very much. It
4 strikes me there is a certain amount of overlap in what I
5 am about to say with some of the comments that David has
6 already made: "We failed to collude in advance," always
7 a serious error in competition policy matters. The
8 question addressed to me was: How should an agency
9 determine its involvement?

10 MS. COPPOLA-TINEO: Correct.

11 MR. WHISH: So I am going to speak at that
12 level of abstraction rather than specifically about the
13 position of the FTC. It seemed to me inevitable that one
14 of the first questions must be: What resources are there
15 available? It is a truism to say that any authority's
16 resources are finite. One cannot be doing everything,
17 and we know perfectly well there are an awful lot of
18 multilateral events that one could be sending people off
19 to in any week of the year. I would not go quite so far
20 as to say any day of the week, but certainly there is an
21 event somewhere in the world regularly in which one could
22 participate.

23 So one has to sit down and to look to see what
24 resources are available, and resources for these purposes
25 must mean both the financial resources: Can we afford to

1 actually send people, pay the air fares, put people up in
2 the hotels and so on and so forth.

3 I think one also has to look within an agency
4 to see what human and intellectual resources are
5 available because people, frankly, have different
6 strengths and different weaknesses and there are some
7 individuals who can contribute a huge amount to
8 international issues and other people who are much better
9 at getting on with their casework or whatever else needs
10 to be done within the authority.

11 Clearly, one has to have a very careful look at
12 the resources available, bearing in mind that a resource
13 that is being expended on travelling to Geneva or to
14 Kyoto or whatever is a resource that could have been
15 doing something else at home in circumstances where there
16 is a lot of casework that has to be handled, there do
17 appear to be a lot of cartels out there and so on and so
18 forth.

19 So it seems to me that one has to sit down and
20 just look at the overall balance of the portfolio of work
21 that any particular institution is involved in, and then
22 decide how much, what percentage should be devoted to the
23 international agenda. The second point is it seems to me
24 one should have a very serious debate before deciding
25 actually what we are going to do. I think one has to

1 have a debate within an agency as to what precisely we
2 think we can get from all the events that are available.
3 What are our own needs? It seems to me, and this
4 absolutely picks up on what David was saying, that the
5 needs of one competition agency are going to be
6 profoundly different from the needs of another.

7 So here we are in the presence of the FTC
8 approaching its 100th year and, on the other hand, we
9 have got the Indian Competition Commission which
10 effectively is about to enter its first year. It seems
11 to me that what can be obtained from interaction at the
12 international level will differ very much from one kind
13 of agency to another. Of course, the new Indian
14 authority is in a big economy and in due course will be a
15 big authority. As we well know, there are lots of very
16 small jurisdictions who, for whatever reason, have now
17 got their own competition systems and I can imagine it
18 must be extremely difficult for them to know how much
19 they should engage in the international debate.

20 They probably have the greatest to gain from it
21 in terms of the input of experience and international
22 best practice and so on, and at the same time they are
23 going to have the least resources available to be able to
24 participate in these processes. So, it seems to me one
25 has to have a serious debate as to what one is trying to

1 achieve from these fora. The third point is that it
2 seems to me that, to a certain extent, one is
3 participating because one wants to go out into the
4 international arena, learn and import. So I think one
5 has to decide what there is out there that could be good
6 for us to learn. Different agencies are going to be in
7 very different positions. I can imagine one agency
8 wanting to know more about forensic techniques and cartel
9 enforcement.

10 Another agency might be particularly worried
11 about quantitative techniques in merger control because
12 they might be very weak in that area. Another agency
13 might feel that it knows very little about this stuff
14 called 'competition advocacy' so we really need to get
15 out there and find out more about it. So I think any
16 agency needs to have a look at its own internal needs and
17 then, as it were, shop around to see what there might be
18 out there that is available and would be worth trying to
19 participate in. That is the import into the agency side
20 of things, but then the other side of that is: What
21 might one want to export?

22 I think that is a very interesting agenda as
23 well because a particular agency might feel that it has a
24 very strong position on unilateral behaviour, to take an
25 obvious current example, where one wanted to influence

1 the international debate; not in the sense of going for
2 harmonization for the sake of it, but if one has a very
3 strong and a very clear doctrinal position one would want
4 to try to have an influence at the international level.
5 Another thing might be that an agency has a particular
6 position on settlements, the settling of complex cartel
7 cases, and it might want to try to inject that into the
8 international debate.

9 Another authority might have strong views on
10 remedies. Somebody else might have a strong view on the
11 jurisdictional standards that are applied in merger
12 control. So I think it is worthwhile having an internal
13 debate to decide what one would like to do, what kind of
14 influences would one like to have on the international
15 agenda. Then to conclude, just briefly, as far as the
16 FTC is concerned I could imagine that the FTC in deciding
17 where to deploy its resources might feel that -- and, of
18 course, I know there has been plenty of this engagement,
19 but might feel that more engagement with authorities that
20 are exploring the competition policy and consumer policy
21 interface, I think that might be an area where one would
22 want to engage fairly extensively.

23 Given that Jeremy has gone, let me say that I
24 disagree with what he said earlier with his consumer
25 protection point, because it seems to me that consumer

1 laws might absolutely provide an answer to making markets
2 work more competitively so I do not think there is that
3 great schism that he seemed to be suggesting between the
4 two. I think international engagement in relation to
5 that topic is very, very worthwhile.

6 Just on the point that came up towards the end
7 of David's presentation, this whole business of technical
8 assistance, and are agencies going around trying to sell
9 their particular model? I would not say that the FTC has
10 been doing that, but I do sometimes find myself worrying
11 that this can happen, especially in developing countries
12 where it appears to me that any number of agencies have
13 been around recently leaving their calling card.

14 MS. COPPOLA-TINEO: Does it depend as well on
15 the size of the economy in question?

16 MR. WHISH: Indeed, and maybe this is healthy
17 competition between different institutions but I can
18 imagine circumstances in which it might be completely
19 befuddling to the recipient nations and I sometimes wish
20 that this technical assistance perhaps could be provided
21 on a more cooperative and consensual basis between a
22 number of institutions where one is generally looking for
23 some kind of international best practice as it were.

24 MS. COPPOLA-TINEO: Thank you, Richard, in
25 particular for that very last comment because I think

1 that is something we are all looking forward to, better
2 cooperative efforts, both on the donor and provider side
3 but also on the recipient side, because equally it can be
4 just as interesting for an agency not to reveal what
5 another agency is offering them so that it gets another
6 study mission and another trip to New York in the
7 springtime. But I think that you are very right that
8 when you began saying: What should we be doing
9 internationally? The first question is: What resources
10 do we have to do it? But I think that question is
11 directly related to a topic I will ask Bill to address,
12 which is: How do you measure your influence? How do you
13 measure what you are getting out of in the international
14 arena? I think it is an unbelievably difficult question
15 so I apologise in advance for it.

16 MR. BISHOP: I think it is very difficult, and
17 I am really not going to be able to answer it. I am
18 going to make some observations about the context in
19 which influence occurs. First, these -- I better start I
20 guess with an acknowledgement and a disclaimer. The
21 acknowledgment is that I have had a lot of discussions
22 with Chairman Kovacic about these matters, an old
23 academic colleague of mine, and we have contemplated
24 writing a paper but I think it is clear it is going to
25 have wait until the end of Bill's term.

1 The disclaimer is that what you are about to
2 hear is my version of it and not necessarily what Bill
3 thinks. I supposed I could title the talk, "Managing
4 Imperial Decline." The let us remember that 60 years ago
5 the US antitrust was the only system in the world. One
6 or two people had something called antitrust, but it
7 didn't really affect anything. Even 20 years ago the US
8 system was by far the biggest, the influential and the
9 most important in the world.

10 Then European merger control came and the big
11 reform of European law and the adoption of competition
12 law in the member states and then the spread of
13 competition law around the world. So from being the only
14 gorilla in the jungle, the US soon had a major
15 competitor, which was the European Union: The biggest
16 economy in the world, bigger even than the United States,
17 too big to be ignored if it said you can't do a merger or
18 whatever. So we have a duopoly now.

19 In effect, the other countries defer to those
20 two jurisdictions for world industries: Can Boeing merge
21 with McDonnell Douglas? Does Microsoft ever stop doing
22 this or that? These are decisions which have to be the
23 same all over the world and whether you live in Botswana,
24 or in Ottawa or wherever, you are equally affected by it
25 but, in fact, only two competition authorities really

1 decide for these world industries and they are the
2 competition authorities with seats in Washington and in
3 Brussels. People are not necessarily very happy about
4 it, the other authorities, but they don't dare challenge
5 it and they leave it to those two.

6 Now the US influence really takes place in the
7 context of that duopoly. It is, of course, a duopoly
8 that has no real sanction in international law. There is
9 no treaty for this. This is the law of the jungle.
10 There are two big gorillas who just say we are going to
11 decide and they cooperate with one another. I could call
12 them a cartel. It is not just the FTC of course, but the
13 United States has gradually been losing influence in that
14 game. If you look around the world at the way in which
15 people adopt competition law -- it is not exclusively but
16 it is principally the European model that has tended to
17 be adopted. Now that is true for several reasons.

18 The first is it sometimes it is countries
19 wanting to get into the European Union, but more often it
20 is because the European model is administrative-based as
21 opposed to litigation-based. Most countries don't feel
22 very comfortable with making a paradise for litigators
23 and calling it competition law. Because they feel more
24 comfortable with an administrative system, they tend then
25 to adopt the substantive rules of European law, the

1 framework of the Treaty of Rome and all that. Having
2 done all that, they then, of course, will tend to look to
3 European models of how to apply that.

4 It is more directly applicable if you are
5 sitting in, let us say, South Africa. If you have got a
6 law that is closer to the European one in its
7 institutions, you are going to tend to look to European
8 cases for like for guidance. So the US has been
9 gradually -- first it has had to share influence with the
10 European system -- and has gradually been in relative
11 decline, relative to the European system. That I think
12 is going to go on.

13 Now, a very important qualification here.
14 Where the US has continued to succeed and continued to
15 have enormous influence is that it is the source of
16 nearly all the intellectual innovation in the area. If
17 we think of what has happened in the last few years the
18 shift towards economics based antitrust that is now taken
19 for granted everywhere began in the United States and was
20 first put into practice in the United States. Leniency
21 programmes, clarification of unilateral effects versus
22 coordinated effects, use of simulations in merger and
23 other contexts and nearly all quantitative techniques.

24 Nearly everything has come from the United
25 States. So if we look at the pattern of US' relative

1 decline there is still enormous influence over a lot that
2 really matters. I think though that there is an area in
3 which the US will never be able to fully -- not likely
4 ever to recover influence -- and that is this. There are
5 two aspects in which American law will tend to yield less
6 useful models for other people. In the Unites States the
7 courts sometimes develop per se legal rules. They do
8 that in order to remove it from the jury. That is the
9 traditional motive, mistrust of juries.

10 These per se legal rules are often done in
11 contexts where economics would cry out for a rule of
12 reason approach. But courts make it per se legal because
13 they don't want juries who are sentimental and decide for
14 small guys. We don't want them deciding that so we will
15 have a rough and ready rule where actually we should have
16 a more sophisticated rule. There is no reason for that
17 unless you have saddled yourself with a problem of
18 litigation and juries.

19 There is a second area and it is related, and
20 that is in the European system regulation and antitrust
21 are coupled together in a fundamental way because the
22 jurisdiction or the regulation has to be compatible with
23 Article 82 and the grounds for intervention in many
24 regulated industries is Article 82 based or related
25 ground or one of the grounds. Basically, antitrust is

1 constitutional in the European system.

2 In the American system, of course, that is not
3 so. The antitrust laws could be repealed tomorrow
4 morning by the Congress if they wish to -- it is not in
5 this Constitution -- in a way that could not happen in
6 Europe. Regulation is undertaken specifically for each
7 industry by the Congress. That led to the possibility of
8 the Supreme Court simplifying US law, as it saw it, I
9 suppose, in *Trinko* and that other case that I can't
10 remember, where they said: Look, we are not going to
11 have antitrust interfering in where Congress has set up a
12 regulatory scheme.

13 In the European system, though, the regulatory
14 scheme has got to be consistent with antitrust, in some
15 sense. You do have a fundamental problem in any country:
16 you have to think about this question: what kind of
17 regulatory scheme you are going to have and how is it
18 going to be related to your competition policy. Other
19 countries are going to get more guidance from the
20 European system than they are from a system which has
21 tried to simplify by saying: Antitrust is pure and we
22 will leave these regulatory schemes to Congress and
23 antitrust won't interfere.

24 So in these two ways -- developing per se legal
25 rules from mistrust of juries, and excluding antitrust

1 from the regulator -- the US system on the substantive
2 law will just be less appropriate, they will give less
3 guidance than the European system will. People still
4 will have to think about these problems whether for the
5 first time or later. The long run outcome then I think
6 is that the EU will probably increase its dominance in
7 this competitive game, but that the US will still have
8 enormous influence as long as it continues to produce
9 innovation at home. I think that is the real lesson of
10 all this, that so long as there is excellence at home the
11 US system will continue to have influence abroad. The
12 long run theme though is relative decline where influence
13 is concerned.

14 MS. COPPOLA-TINEO: That is interesting. I
15 wonder at some level if the influence changes by the age
16 of agency. I wonder if our influence maybe has declined
17 considerably with the some of the newer agencies. I
18 agree that in many ways the European law is much easier
19 to adopt full scale and implement, but I wonder if the
20 degree of influence has changed so dramatically with some
21 of the old, more mature jurisdictions? You are welcome
22 to answer that. I would also like to open up the floor
23 for a few minutes before we break for coffee to anyone
24 else who wants to contribute. John wants to speak.

25 MR. FINGLETON: Fascinating discourse, and all I can

1 say is roll on Bill Kovacic. It's time to write the other
2 half of the paper, but not at the expense of losing him
3 from the FTC. So there is a trade off there between how
4 you use that resource. Nobody mentioned something which
5 I think is incredibly important in practice which is
6 actually the joint work on cases. We could not have done
7 Marine Hose, but for the deep trust that exists between
8 us and the Justice Department.

9 With Marine Hose there was that real sense of
10 throwing a ball and hoping that they were going to throw
11 it back, and they did and we did and it worked. You can
12 only do that if there is trust -- and I go back to what
13 Mario Monti said at the ABA Spring meeting. He was quite
14 startling at the ABA Spring meeting. Mario Monti sat
15 there with the two current heads of the agencies in the
16 US and two previous heads of the agencies, and said as
17 advice for the new administration: The revolving door is
18 a very great asset that the Americans have, but it
19 revolves rather quickly. He said that in his time as
20 Commissioner he had five opposite numbers in Justice and
21 three opposite numbers in the Federal Trade Commission,
22 and he said that it is very difficult to land a case like
23 GE Honeywell when there are three separate heads of the
24 Justice Department for the six month duration of the
25 case. If you look back at that there were three separate

1 people there.

2 I would have to say -- I mean at the moment in
3 both agencies we have people as head of the agency who
4 one is familiar with from their previous roles in the
5 agency. Bill is in his, in effect, third incarnation.
6 Tom I knew in his deputy role. Hew I knew since 2001
7 long before he became AAG -- but nobody really knew
8 Charles James probably. People did know Tim Muris. He
9 had been there before. So sometimes it works well, but
10 it maybe depends a little bit too much on the identity of
11 the individual and whether they have been there. So that
12 is a point to consider, the speed of the revolving door.

13 I think there is this point about the trust
14 that exists amongst the heads of the agencies. It is an
15 incredibly important thing, and amongst the staff in the
16 agencies. In a case like Marine Hose it is the people
17 running the cartels on both agencies. On a big merger,
18 and going back to the point about these global mergers,
19 we will also talk to the European Commission, and there
20 Simon's relationship with Nadia and whoever at the
21 Commission and with the people at the Justice Department
22 and the FTC, those relationships matter crucially. So I
23 think a lot of the work that goes on is not just about
24 best practice and importing that, but actually having
25 that infrastructure.

1 You need more lattices than the bare essentials
2 to deal with the fact that people change, and the number
3 2s and the number 3s need to know each other because they
4 will be the number 1s in many instances later. So you do
5 need to overinvest I think in that capacity for that, and
6 that is a difficult thing to justify.

7 The second point I just wanted to make was in
8 terms of the United States is acknowledgment of
9 differences. I think that there is a very rich debate
10 within the United States and sometimes quite an
11 aggressive debate within the United States about where
12 antitrust should go, and sometimes that debate is hugely
13 relevant for everybody else in the world. Sometimes it
14 is totally irrelevant for other people, and I think the
15 ability to distinguish those two -- and so some
16 innovations in the United States are incredibly relevant,
17 and I thought Bill gave a very nice list of some of these
18 that we have all benefited from.

19 In the area of criminal law enforcement I was
20 very struck by a story by a head of, I will not say which
21 one, the Justice Department who went on a short tour of
22 Eastern Europe talking to them about the benefits of
23 criminal cartel enforcement. The reply they got
24 everywhere they went was: Well, that is great we would
25 love to have a market where we have two competitors. We

1 always have dominant firms. So different economies face
2 very different economic circumstances, so I think the
3 debate about Sherman 2 in the United States is an
4 incredibly rich debate for the United States where it is
5 at now.

6 I just think it has slightly lost touch
7 with relevance for China, India and other places. I
8 think, conversely, the debate in the European Union where
9 the debate about Article 82 is a debate about how to
10 transition from a situation where big was bad because it
11 was State created and you had all these national
12 monopolies and you were trying to integrate markets into
13 a slightly more effects based approach to dealing with
14 Article 82 is a much richer and more useful debate for
15 China and India and that has been the core of my argument
16 for the last two to three years as to why the EU needs to
17 produce guidelines on 82 because I think it will provide
18 international leadership, so I do think that we need to
19 think about it. One of the other innovations the EU has
20 produced is showing how you can operate a 27 member state
21 system as a whole. That is useful for regional groupings
22 and others as well and I don't know that the US federal
23 system has quite the same lessons for others as the EU
24 sort of federal experiment.

25 I think one of the challenges we have, and

1 Richard put his finger on this, is it is incredibly
2 difficult for me to justify resources at the margin of
3 international because the benefits are so diffuse,
4 because they arise in a case here, a case there, they
5 turn out to be enormously valuable, but in actual fact it
6 is very difficult ex-ante to identify that.

7 MS. OHLHAUSEN: Anyone else before we break?

8 MR. WILKS: Can I just make one observation
9 before coffee? I wondered from the point of view of the
10 FTC whether there is a domestic political advantage in
11 being a member of a relatively impressive international
12 network, and if you look in Europe if you are a Hungarian
13 competition authority or the Finnish competition
14 authority there is a huge advantage in a whole range of
15 ways to be able to say: Europe wants us to do this, we
16 are part of the network, we have got to meet certain
17 obligations.

18 If the imperial overreach, the Kennedy thesis,
19 is right, then one might get to a point where the
20 Americans themselves will be wishing to import and cash
21 in some of those links. So I just wonder if from the
22 FTC's point of view there isn't a more subtle advantage
23 actually in some of these linkages?

24 MS. OHLHAUSEN: To the extent that the FTC is
25 responsible to Congress, that may not be something they

1 are value -- though I think they would certainly the
2 value the idea that you are not going to have a great
3 difference in viewpoints that a merger would be cleared
4 in the US as getting --

5 MR. WILKS: But we have gone from a missile gap
6 to an antitrust gap.

7 MR. ABBOTT: Picking up on a point that Bill
8 Bishop made. He talked about the different structures,
9 obviously well-known, of the European system and the
10 American system, but those differences in structure would
11 not be of much concern if they did not really affect
12 outcomes. That raises a question about not just economic
13 knowledge, but what kind of economic analysis and
14 decision theory and what extent -- because I think one
15 thing that has risen in recent years in the US, it
16 started ages ago, of course, with Breyer, Easterbrook and
17 others, but the idea of error cost and decision theory
18 and there seems to be a great deal of reluctance by
19 European economists, however, to embrace that. Do you
20 see that a continuing gap, because that is something that
21 I notice lots of American economists have tried to export
22 with limited success.

23 MR. BISHOP: Well, I should perhaps have
24 mentioned that there was once a gap in which basically
25 there was no economics anywhere else in the world except

1 the United States fundamentally. There was a time in the
2 90s when there was no nobody in the merger task force
3 with a PhD in economics, and then for several years there
4 was one guy with a PhD whose principal task was,
5 incidentally he was a nice guy, to help his colleagues by
6 finding some excuse for ignoring most of the economics,
7 which he didn't know how to deal with. All that has
8 totally changed.

9 There is now a Chief Economist and he has got a
10 staff of about 20. The economists are everywhere, head of
11 the OFT, the previous head of the OFT, and that pattern
12 is found all over Europe. So the gap in capabilities is
13 gone. Now it is true that sometimes different things
14 become popular in one place rather than others. It is a
15 rather more interesting theory in Europe because there is
16 quite a lot of good theory done in some European
17 universities. So you probably get a bit more game
18 theoretical model of something at the Commission. As for
19 arguments about error cost, well these are only ways of
20 systematizing the way of thinking about particular policy
21 and particular policy problems. I suppose you had in
22 mind the article by Mike Salinger and a co-author...

23 MR. ABBOTT: PL James Cooper and others. Mike
24 and I also wrote an article in Time too about that same
25 type of topic.

1 MR. BISHOP: Absolutely, that is exactly the
2 one I am thinking about, you are right indeed. There
3 again, it is an attempt to look for, related to what I
4 was talking about earlier, there is a often a wish in
5 American legal circles, judicial circles to find a
6 general rule so that you can make something per se legal
7 and the article, talking about error costs and about how
8 frequently it is a way of systematizing this problem of
9 how you are going to think about the problem as a general
10 rule. The tendency in modern antitrust is to have fewer
11 general rules and more rules of reason, and though that
12 started in the United States the problems I was pointing
13 to, mistrust of juries in particular, to limit the extent
14 to which the US can follow that route eventually.

15 MS. COPPOLA-TINEO: I think we will take a very
16 short coffee break, just about five minutes, wake up a
17 bit and then we will come back and talk about the FTC's
18 international efforts.

19 **(A brief recess was taken.)**

20 MS. COPPOLA-TINEO: We are going to get started
21 because I would like not to finish any later than 4
22 o'clock, but at the same time we still want to hear from
23 a number of people. Without further ado, I am going to
24 ask Margaret to start, although not everyone is back. We
25 will take close notes and, of course, this will be made

1 available on the FTC's website. I would like you to
2 discuss, if you would, FTC's international efforts
3 specifically. You have been an active
4 participant/watcher/commentator and so on and so forth of
5 our international programme, and would you like to share
6 whatever advice you can offer?

7 MS. BLOOM: Thank you. There are two parts to
8 the question. The first part is how do I rate the FTC?
9 I can be brief on that because, basically, I think the
10 FTC is superb, deeply impressive. I am coming on to some
11 suggestions for improvement, but let me just give some
12 examples of where I think the FTC has done particularly
13 well. One example is in terms of leadership in the ICN
14 and OECD. Another is technical assistance. I am not
15 making any comparison between the FTC and the DOJ or the
16 European Commission, but I think on the technical
17 assistance that is clearly a gold star again. The use of
18 economics and analysis of competitive effects, and Bill
19 spoke about this, is another example. These are just
20 three examples of how well you have performed
21 internationally.

22 Now I have got five suggestions where you might
23 like to think about things to do even better
24 internationally. Unsurprisingly, they reflect the
25 comments that have been made by Richard, David Bill and

1 John, so only some of them are new, to this discussion.

2 My first two suggestions for improvement are to
3 do with maximizing the influence of the FTC
4 internationally. The first one of those is a point that
5 was commented on before lunch. There is an impression
6 internationally that the two agencies are not necessarily
7 on the same page when it comes to mergers and unilateral
8 conduct. Now there is some strength in having different
9 arguments and debating different sides of an issue, but
10 if you are seeking to have a leadership position, that
11 can become quite confusing. So this point is in relation
12 to consistency. These are difficult issues but
13 inconsistency does reduce your ability, I think, to be a
14 powerful leader.

15 Another aspect of consistency which I mentioned
16 earlier is a perception held in some parts of the world,
17 certainly in Europe, that the extent to which the
18 agencies will intervene in unilateral conduct or a merger
19 partly depends upon the politics of the administration.
20 Both of these aspects of consistency I think affect to a
21 degree your influence.

22 The second point on influence is how
23 transparent is the material that you put out? There is a
24 lot of it which is extremely good and really valuable. I
25 know we are meant to be talking about consumer as well as

1 competition. I am obviously much more knowledgeable
2 about competition, but on the consumer side let me just
3 mention two actions that I think were particularly
4 impressive: The 'Do Not Call Register' was brilliant.
5 As was your 'FatFoe' spoof advert. Those who have not
6 looked at it go on to the FTC's website and there is a
7 fantastic advert there. You think you might like to look
8 slimmer and you click on this spoof advert. It is
9 brilliant.

10 MS. COPPOLA-TINEO: Thank you.

11 MS. BLOOM: Yes, I like it.

12 MS. COPPOLA-TINEO: It is a one which we are
13 big fans of as well.

14 MS. BLOOM: Yes, but having said that in terms
15 of transparency and a point that Bill made, because it is
16 a court based system inevitably you are not as
17 transparent as an administrative agency based system.
18 Another factor, is that a very extensive amount of your
19 cases are private actions. So if you take these two
20 factors you are already at a disadvantage in transparency
21 in terms of putting material out.

22 An aspect of the administrative-based system is
23 the fact that you have got fewer notices and regulations.
24 You could have as many guidelines but your law generally
25 is less documented. That is the US system. We have

1 already mentioned, this morning, case closures. That
2 would be one area where I think it would be advantageous
3 if you could do rather more of them and rather longer
4 statements. So on transparency, in summary, you already
5 do a lot. There are some extremely interesting speeches,
6 press notices, all sorts of materials and hearings. But,
7 I encourage you to do a bit more, otherwise, you are
8 going to lose out to other agencies. I think that would
9 be a pity because I think you have got a tremendous
10 wealth of knowledge to convey to the world. So those are
11 my two suggestions for improvement on increasing
12 influence internationally: greater consistency and
13 greater transparency.

14 Then the other three suggestions for
15 improvement are slightly different. The first of these
16 concerns technical assistance, and this picks up what
17 Richard was mentioning. Given that there are so many
18 countries now who want technical assistance, plus the
19 fact that there are all these different countries
20 competing to sell their system. So you have got a
21 multiplicity of players. There is a real danger of
22 increasing overlap. I think it could be so much more
23 efficient if technical assistance could be coordinated.
24 Now I think some of the providers, for the very reason
25 that they want to sell their system, don't want to go

1 into a coordination, but the more you can do that the
2 better value we are going to get and I think the better
3 harmonization which will develop among the 100 or so
4 agencies who have antitrust powers. So that is the third
5 suggestion for improvement internationally.

6 The fourth suggestion: Staff exchanges between
7 agencies are extremely valuable in terms of learning.
8 They are pretty well developed within Europe. I know you
9 have had restrictions. I think you have now had some
10 legislation that enables you to have more exchanges, all
11 strength to your arm as well is all I will say. I think
12 it would be extremely good if you could have more of
13 those. It is probably more developed agency exchange,
14 but you may want to also do less developed as well.

15 The fifth and last suggestion: You have got a
16 number of bilateral agreements, formal agreements. You
17 can do an awful lot with informal arrangements, but if
18 you have a formal agreement why not add to one or more of
19 them, comity, as a formal arrangement? I am conscious
20 that the Antitrust Modernization Commission suggested
21 this.

22 If you had, for example, a comity arrangement
23 between the EU and US, and if there was a merger case
24 which you were both handling, maybe both the European
25 Commission and the US agency would analyse it but when it

1 came to the remedies maybe you have then got a formal
2 arrangement to say: All right, European Commission, you
3 do them or we can agree we will do them. You can do that
4 informally, but if you have a formal arrangement you
5 might be in a stronger position.

6 So there we are, keep up the good work, it is
7 great but there is even more to do.

8 MS. COPPOLA-TINEO: This is way I asked her to
9 kick off this part of the debate. Thank you, Margaret,
10 very much, that is enormously helpful. A couple of notes
11 that I will save, in fact, for after we have heard from
12 Val who has been very patiently waiting to give her input
13 on the international efforts generally and the FTC in
14 particular.

15 MS. KORAH: Well, thank you. It has been a
16 pleasure to be invited to listen to all this discussion.
17 I have never had much experience with an agency and so I
18 am rather quite surprised that I am invited and you will
19 probably discount what I say. But it does seem to me
20 that -- I am asked to address the FTC specifically and
21 not any agency, and your agency and ours had the
22 advantage of speaking English and English is a language
23 in which a lot of the antitrust concepts can be expressed
24 more easily than, for instance, in French.

25 If you read anything the French is about half a

1 page longer for every three pages, and so you are in a
2 position to be influential. On top of that, you have
3 resources that are much larger than any other agencies
4 that I know outside America. Then you have had
5 intellectual drives. Bob Pitofsky, Tim Muris and Bill
6 Kovacic are clearly able to speak in public cogently, and
7 they know the reasons behind what they are saying and
8 they have been in antitrust for a long time and really
9 understand it and are familiar with economics and they
10 are all lawyers. Often your guidelines seem to be well
11 ahead of most other competition authorities.

12 I was looking at the IP one some time ago.
13 Before Independent Ink became Polygram Holdings you had
14 already said that the fact that you have got a patent
15 does not mean that you are dominant. Actually, that is
16 one bit where the EC got ahead of you in the 60s or 70s.
17 On top of that you produce these superlative policy
18 hearings. The one on IP is a superlative book and that
19 you collaborated with Justice.

20 I regret that the agencies seem not to have
21 been able to agree on monopolization. If you cannot
22 agree with Justice, I guess it is better that you don't
23 do a joint paper and have a whole lot of botched
24 compromises. I would love to know the fault lines on
25 which you disagreed.

1 MS. COPPOLA-TINEO: We have public statements.

2 MS. KORAH: You produced some very perceptive
3 opinions. Tim Muris did the 'Three Tenors'. I think I
4 learnt much more from that level than I did on most
5 appeals that I have held elsewhere. You have been very
6 influential in other ways: Discussion of particular
7 mergers with the EC person concerned. We have been
8 inviting people over for commercial conferences and they
9 have spent the whole of the dinner talking with Briedich
10 (phon) on some particular merger in a soft voice.

11 I am asked to say who are the successful
12 agencies? Well, for an outsider this is very difficult.
13 I mean quite clearly yours comes up first, your huge
14 resources and the way that you have used them. The EC
15 Commission was hopeless at the beginning, but since they
16 have tried to change to a more effects-based system
17 rather than all their liberal and formalism, they really
18 have produced some quite good guidelines and they have
19 certainly transformed the 81 policy with their
20 modernization efforts and the group exemptions for
21 vertical and so forth, and they have produced a merger
22 policy with the help of the CFI. Former Commissioner
23 Monti is probably another intellectual giant. I am not
24 sure I can say the same thing of his successor. The OFT
25 in the UK has produced some very good guidelines. Even

1 when they more or less followed the EC figures, they
2 basically have to under Section 60 -- they are better
3 written.

4 MS. COPPOLA-TINEO: Since they have native
5 speakers they should be.

6 MS. KORAH: It has had as head John Vickers and
7 Margaret Bloom and now John, and they have been pretty
8 terrific. I should not have put in that "quite all
9 right" [referring to slide]. I have been most impressed
10 by France. I suppose it is all Fred Jenny who was on the
11 Conseil for ages and he is the only non-lawyer on the
12 Cour de Cassation. He does 1001 other roles. His
13 successor at the Conseil also seems to be doing
14 interesting things. Jenny also chaired the OECD
15 Committee and turned its attention to important problems.

16 Fred when he was at the Conseil got the Paris
17 Court of Appeal who heard his appeals from him from the
18 Conseil to come and teach the Court about competition
19 policy. Now they came to him but why did they come to
20 him? He must have been engineered that. He is a
21 wonderful diplomat, amongst other things. Moving on to
22 Australia, the CCC, Allan Fels went everywhere. He was
23 influential everywhere. He was backed by Maureen Brunt,
24 a professor, an economist in various universities near
25 Melbourne. She had a tribunal on appeal from the CCC,

1 and by the time she retired virtually everyone who
2 appeared before her as a lawyer had either co-talked with
3 her or been her pupil and had an immense influence. I do
4 think that you do need backing from the universities who
5 write independently, and you are very good at that.

6 Germany I have put in. The Bundeskartellamt
7 was very important at the start. It believed in ordo
8 liberalism and the ordo liberals have a lot of really
9 useful things to say, that you have got to control
10 government as well as private industry. Most vertical
11 restraints were considered to be perfectly OK, unless
12 there was a very good case against it. So they did have
13 some very good effects.

14 They had some terrible effects in thinking that
15 any restriction on conduct was an exercise on power and
16 should be fought against, and we have got rid of that in
17 the vertical situation and it does not seem to be very
18 important in the merger situation, but we do have our
19 troubles with Article 82. I am asked to measure success,
20 I never believed in measuring anything. I can't. It's
21 difficult because I do not see the point.

22 You need familiarity with micro-economics as
23 well as law and so, clearly, the people who are respected
24 are the people who can at least manage to talk to the
25 other discipline. Who do you see at all the important

1 policy discussions? Can they express themselves clearly,
2 perceptively and cogently? But this isn't measuring, it
3 is just some of the criteria. I don't think one can
4 measure or should. That is enough from me, thank you.

5 MS. COPPOLA-TINEO: Thank you. One thing that
6 really just struck me, and I don't know if it struck
7 others, as I listened to you was the number of individual
8 names on the slides, and I wonder if an agency is to be
9 influential internationally, if it is about the agency or
10 the individual leading it, and what happens when the
11 agency isn't led by a very charismatic or bright
12 individual; is there anything the agency can do to
13 continue its leadership internationally? I can say this
14 safely with Bill Kovacic in charge because, clearly, I am
15 not talking about him.

16 MS. KORAH: Kovacic is in a class by himself.
17 Alden Abbott was at a conference I was at last week in
18 Istanbul and was very effective. You have lots of senior
19 officials, and the three of you who have been leading
20 today you are all very competent at doing that. It is
21 not just the head of the agency. Though I don't know, it
22 is the Government, isn't it, that chooses who will be the
23 Chairman of the Commission?

24 MS. COPPOLA-TINEO: The Chairman is nominated
25 by the President and confirmed by the Congress.

1 MS. KORAH: OK. And so I don't know -- well, I
2 suppose the Chairman can help to influence, but I don't
3 know how you get a good Commissioner but you have
4 certainly been very successful at it.

5 MS. BLOOM: I am sure what Val says, having a
6 good head is really important, but that is not the only
7 important role and the American agencies all the time I
8 have attended OECD I was always struck by the quality and
9 scale of the delegations that you brought there. It
10 struck very favourably. I think you put in an enormous
11 beneficial impact, and the same with ICN. That wasn't
12 just the head, it was all the people who were there
13 before me and performing extremely well. Now if it is a
14 small agency, and I remember Ireland, when you were in
15 Ireland, John, Ireland was very influential at OECD
16 because it was you. You had one or two colleagues who
17 would speak who came, but a smaller agency is more
18 dependent on having the good head because they have got
19 fewer other people who can come and talk.

20 MR. FINGLETON: I think it is less of a problem
21 for the Federal Trade Commission or the US in general,
22 but I do think, looking across the last eight or nine
23 years that I have been doing this, I have seen agencies
24 who are very strong lose ahead and suddenly the agency
25 goes 'wheee' on the international stage, and I have seen

1 agencies come way up. In fact, the example now, if I
2 look at the Directors General Group in Brussels and who
3 is influential there, the French have just risen and
4 risen and risen.

5 There is no doubt that Bruno Lasserre has
6 brought just an amazing intellectual prowess to that
7 role. Notwithstanding what you said about Fred of
8 course, but Fred has never actually been head of the
9 agency. He is an example of leadership through influence
10 rather than through any direct control. If you look at
11 the situation with Italy, I am conscious this is being
12 recorded but when Beppe was there you really had a lot of
13 intellectual leadership.

14 John Vickers and I and Beppe disagreed on quite
15 a lot of changes to the merger regulation, but we could
16 have a really rich discussion. I think Richard was there
17 for some of that and Margaret was there for some of it
18 and there was a debate. It does go up and down. I do
19 not think it is a problem for the American agencies. I
20 think there is a consistency there and it is because
21 there is richness at the top below the leaders.

22 MS. BLOOM: And one point to add to this. Some
23 of the European agencies, some of the heads are not
24 necessarily as expert in antitrust as in the US agencies.
25 In the US agencies the people in post are all expert

1 either legally or economically or both, whereas in Europe
2 you might have somebody who was appointed who would be a
3 very good head of the agency but would not necessarily be
4 appointed because they were one of the top people in
5 antitrust.

6 MS. COPPOLA-TINEO: Something you said,
7 Margaret, a minute ago. You talked about our delegations
8 at OECD being enormously helpful or something, but they
9 sometimes are in fact enormous and I wonder how that is
10 perceived by the international community, either the
11 volume or the presence of the US. Is it ever too much?
12 In particular, if people think that we are backing or
13 promoting US companies as was suggested earlier. I guess
14 any feedback anybody has on that would be very welcome.

15 MR. WHISH: I can remember being at OECD
16 meetings, admittedly this goes back quite a long time, at
17 a time where there were serious trade disputes between
18 the US and Japan, and the strong sense I had was that the
19 OECD occasionally was being used as a vehicle for certain
20 political points to be made by either side against the
21 other. It seemed to me at that time -- I am dealing with
22 ten years ago or something, but it seemed to me to be
23 quite inappropriate to the work of the OECD.

24 MR. FREEMAN: I think the other point to bear
25 in mind, of course, is that it is two large delegations

1 quite often.

2 MS. COPPOLA-TINEO: Right.

3 MR. FREEMAN: So they may not be coordinated as
4 much.

5 MS. BLOOM: I do not know what John thinks, but
6 I rarely thought there was any move to try and promote
7 something for US business. Certainly, there was BIAC who
8 would take the business point. There were a few
9 occasions when I thought it was perhaps not totally
10 appropriate, but that was pretty rare in my view, and
11 other delegations at times also had things in their
12 briefs that were not totally appropriate.

13 MR. FINGLETON: And if you add up the
14 Commission plus the 27 member states representation and
15 you go back to Bill's duopoly point, you probably do want
16 to have a few people there. It never struck me as
17 excessive. I always think when I go there and see how
18 many people are there from the UK: Why do we have all
19 those people there? But then when you start to look at
20 each individual one of them, you see a good reason why.

21 MR. FREEMAN: Most are from the OFT.

22 MR. FINGLETON: They are, indeed. And then you
23 look at each individual one of them and there is a reason
24 for them to be there. They have written a paper, they
25 are presenting, whatever else, and it turns out to be

1 quite difficult to reduce the number.

2 MS. COPPOLA-TINEO: We have gone a little bit
3 over time so I will offer a few moments, in case anyone
4 has anything they want to say in particular. If not, I
5 will pass to Maureen for some closing remarks.

6 MS. OHLHAUSEN: I just wanted really to thank
7 everyone for your commitment and your time and your
8 thoughtfulness and in the quality of the discussion and
9 the comments that were all just so fabulous. I know that
10 it is not something that just pops up on the spur of the
11 moment, that it shows a lot of careful thought and work
12 went into this and we at the FTC really appreciate this.

13 This is a project that is very dear to Bill
14 Kovacic's heart. He is a student of institutions in
15 general and a student of the FTC for almost his whole
16 career, so this is a project that is very, very important
17 to him. Just so you know the process. We are doing
18 consultations in the US, international consultations. We
19 have an online forum where if there is anything you want
20 to supplement, any additional things you want to add,
21 just let us know and we will give you access to that
22 forum. Bill Kovacic is supposed to be blogging on it
23 himself. The transcript from this day will go up on our
24 website, as will the transcripts from a number of the
25 other consultations. Ultimately, we are producing a

1 report that we hope to get out early in the New Year. We
2 will do a self-evaluation and eventually do a self-
3 evaluation of how we do self-evaluations. We have
4 learned so much in this process, but again I just want to
5 thank you all so much for your very thoughtful comments

6 **(Applause.)**

7 MR. FREEMAN: And may 2014 be as long delayed
8 as possible.

9 **(Whereupon at 3:49 pm, the hearing was**
10 **concluded.)**

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

CASE TITLE: THE FTC AT 100: A UK PERSPECTIVE
DATE: SEPTEMBER 12, 2008

I HEREBY CERTIFY that the transcript
contained herein is a full and accurate transcript of the
notes taken by me at the hearing on the above cause
before the FEDERAL TRADE COMMISSION to the best of my
knowledge and belief.

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