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**Panel 2: Managing Multijurisdictional Risks and Issues:
A Dialogue with In-House Counsel and Enforcers**

Moderator:

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Panelists:

John Blood

General Counsel and Company Secretary, Anheuser-Busch

João Paulo de Resende

Commissioner, CADE

Gail Levine

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Andreas Mundt

President, Bundeskartellamt

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MS. POZEN: Good afternoon. We're going to start the next panel. I've been doing this for almost thirty years, and I am really excited about this one because of the quality of the speakers we've seen so

far at Fordham, for which we're grateful, and because of this particular panel.

Rarely are in-house counsel unleashed by our outside counsel and able to sit with the enforcers side by side and have a dialogue. We really are hoping for a dialogue today.

Our panel topic is "Managing Multijurisdictional Risks and Issues: A Dialogue with In-House Counsel and Enforcers." We are so lucky to have this particular panel. I feel like I really don't need to introduce these folks because I think you know them all.

From Conselho Administrativo de Defesa Econômica (CADE) we have Commissioner de Resende; the General Counsel of Anheuser-Busch InBev, John Blood; we have Gail Levine, who is the Director for U.S. Competition at Uber; and we have President Andreas Mundt from the Bundeskartellamt. What a panel!

We are grateful that you were able to come today and talk to us and have this kind of dialogue.

The way we're going to format this is – the idea we batted around prior to this was to have a dialogue. You are involved in multijurisdictional transactions – I think all of us from an in-house standpoint are – and our enforcers in their particular jurisdictions now are playing an active role and partaking in multijurisdictional transactions. Let's talk about what's going on in this area. What are the trends? What are the concerns? What is the good news? What's the bad news?

We thought we would kick it off with each person giving their view on that, and then we'll have some follow-up questions, and we'll go from there. We're going to start with President Mundt.

What do you think? How's it going in the multijurisdictional world for the Bundeskartellamt?

MR. MUNDT: You want to hear some good news, eh? [Laughter]

The question that we are discussing here today is for the time being one of the most important

ones because the chance for divergence throughout the world has never been bigger than it is today. This is why I believe that we cannot only follow the path that we have seen in the past, but we have to find new ways for cooperation and coordination in order to make sure that we don't spoil business opportunities through regulation or that we do not take divergent decisions as competition agencies throughout the world.

If you remember, when the International Competition Network (ICN) was founded back in 2001, that was mainly because of mergers – that was a key driver, let's put it this way, that we might have divergent outcomes in merger decisions.

We know the problems, they have been discussed – different timelines, different substantial criteria, other issues.

And we saw today that the assessment itself might differ. How much do we take into account the question of innovation? That is a trend that we see in Europe. I'm not so sure if this is a trend that we

see over here in the United States too.

So already on the substantial issues there is some risk of divergence.

But it's not only mergers today. There are a couple of other issues that have arisen since 2001. How do we come to convergent outcomes with regard to the digital economy? I think that is one of the key questions if you look at all the proceedings that are ongoing around the world.

Of course, companies have a huge interest in convergent outcomes. Most of the companies that are under scrutiny by competition agencies have a worldwide business plan that does not differ from country to country and they are of course concerned that there might be a lack of coherence.

We see that in the area of abusive practices. It starts with the question of defining market power. We have changed our law just recently, and we have introduced a couple of features that you do not yet find in many other laws around the world.

If you look at the German Competition Act, you find network effects, the question of single-homing/multi-homing, access to data, the question of innovation, which are implemented in the law and part of the assessment of a company's market position.

I think that is quite unique in Germany. You do not find it this way in other jurisdictions. It might be that jurisdictions handle it the same way, but in Germany this is now a legal standard. So already with regard just to market power there is a chance that the assessment is not convergent throughout the world.

Then take all the new features we have are facing in the digital world. There are many issues that we as competition agencies handle for the first time because we have no jurisprudence with regard to many questions. Look at the hotel booking cases: No jurisprudence; we have to find our way.

Look at pioneer cases, like Facebook, where we are dealing with the interplay between privacy on

the one hand; access to data, the generation of data, the processing of data, and competition law on the other hand. We have to find our way and we do not have very much jurisprudence.

Plus we have a very divergent literature. Again, look at the hotel booking cases. There is still no unanimous approach how to assess a narrow price parity clause, and a broad price parity clause. We have a broad literature with regard to most-favored-nation clauses. I could go and on.

I am not saying that we have divergence throughout the world, but what I am saying is that the risk of divergence throughout the world is immense. We really have to try to find an answer to these questions as competition agencies because we want to do it right and we want to reach as much convergence as possible.

I've said a lot about the disease. What is the cure? Usually, the cure is more difficult than the diagnosis.

I said we might have to find new paths. That is true to a certain extent, but on the other hand we have excellent institutions for a joint debate and we have excellent institutions to make sure that we have at least as much convergence as possible.

We have the Organization for Economic Cooperation and Development (OECD) Competition Committee where we meet regularly and where we discuss these kinds of issues at a very high level. We really strive to find the right answers, not only among us as competition agencies but also with many lawyers, companies, and economic advisors from throughout the world. The OECD is an excellent platform.

Another institution, of course, is the International Competition Network (ICN), where we also discuss these issues and where we try to find answers. If we didn't have the ICN today, I really think we would have to invent it in order to make sure that we have a platform to discuss these issues on an international level.

It started with mergers, but today it is not only mergers. We have tackled a lot of these problems in the ICN Unilateral Conduct Working Group.

We had a broad discussion here at Fordham about vertical issues because the question of vertical restraints has got a new quality through the digital age, through digitalization.

ICN and OECD are the fora that we have and we must see how far we get there because there is no alternative. We have these institutions and we must make the most out of them.

In addition, we also have regional institutions where we try to develop common standard.

First to mention, of course, is the European Competition Network (ECN), with several work groups that do a lot of work exactly on these kinds of topics.

If you have an ongoing case in Europe, while it's hard to guarantee something, I think it is very likely that we would come to the same results if the

constellation of a case is at least comparable. We are doing our utmost.

I know there have been the hotel booking cases. I mention that before somebody else does. I think we have learned from these cases, and we are very much aware that we have an obligation to come to these kinds of convergent outcomes.

Risk will always remain because, as I said, what we do in the digital sphere with regard to digital platforms, to networks, is something that in many cases we do for the first time, without any jurisprudence and without any precedents.

Even after ten years of application of competition law with regard to networks, with regard to platforms, there are very few final decisions from courts in Europe and in the United States. This is what makes it so difficult, but that will develop over time. Until we get to the point, that a firm and established jurisprudence has been developed, it's up to us to make the most out of what we have in the

institutions that we are dealing with – OECD, ICN, and to a certain extent bilateral cooperation.

Just to give you an example, we have just set up a joint initiative together with the French Competition Agency to do a joint paper, a study on algorithms, their use and competitive effects. We have previously done a joint paper on the question of big data and what role data plays in the area of competition when we assess competitiveness or competition itself. There is a lot going on out there.

What we as competition agencies cannot control, of course, is the legislator. This is an additional feature today. In many countries, at least in Europe, we have an ongoing discussion about regulation.

There is a lot of regulation already in place. If you only look at Germany, at various cities, you may find five to ten different regulations with regard just to Airbnb and in how far owners of houses

and flats are allowed to rent out their property via Airbnb.

And we are going to see more of this kind of regulation.

Here we talk about a level playing field. But we do a lot as competition agencies, and we will strive to continue that way, and even do better.

MS. POZEN: Great. Okay, so we've heard diseases and cures. Thank you.

Commissioner, what are your thoughts on this? Any trends you're seeing? Go from Germany down to Brazil and from a CADE standpoint.

MR. de RESENDE: Thank you, Sharis, and thank you, Fordham, for having me here among many so many distinguished panelists.

Of course, when dealing with international multijurisdictional cases you're going to have risks both for enforcers and for the parties themselves. I believe John and Gail have a better sense to comment on the parties. I think I can best contribute to the

debate, bring it into perspective from an enforcer in a midsized jurisdiction, and this is what I'm going to focus on.

I agree with Andreas about all these new challenges that are coming up, especially with the digital world and how things are getting bigger and more concentrated – new challenges, new ideas, new theories – but I also believe that we still have certain issues regarding cooperation in international cases which are independent from this digital revolution.

I want to talk a little bit really quickly about what the risks may be, at least how we perceive them in Brazil, regarding international cases.

Overall, we have an understanding that international cases grant more opportunities than risks to the agencies. First of all, you have more people going after an issue or a conduct or a case, and it's always better to have more than one watchdog doing the work for you. There are positive

externalities. There is always something you can gain from having someone else helping you do the work.

And, of course, there is the possibility of sharing information. Even though there are difficulties with that, whatever comes from information sharing is better than nothing, which is what you have usually when you're dealing with your own jurisdiction or you're dealing with cases that are limited to your own jurisdiction.

Just to open up as we usually do, I will begin by talking about mergers and conduct.

On mergers I believe the major risk – and it's something that we have seen recently in Brazil, and I can comment on that later if you wish – is whenever you try to swim against the tide. If you have a multijurisdiction case, they have different timings and sometimes different procedures, and if you are coming to the conclusion that you don't see a harm with that merger and everyone else is doing the same, you're just following the flow, and that's okay,

that's easy. But if, on the other hand, you realize that you have a problem that no one else has, then you're swimming against the tide, and there's a shark behind you, which is usually these guys, and these sharks are very well counseled.

MS. LEVINE: You're see it as you're the shark. [Laughter]

MR. de RESENDE: Of course, it's part of the strategy, and it makes sense, and you use that to put up the pressure, to say, "Everyone else has approved this case, everyone else as cleared it, so why are you the one causing trouble here? You're just the Brazilian authority." Of course, they respect us very much, and I do know that. But if you get a point where everyone has already cleared it, it's really hard to go against the tide.

On the plus side, if it's not an international market, like the ones that Andreas mentioned, and you do not define the market internationally but locally, then of course you have

local solutions. If it's just one jurisdiction, maybe having a strong structural remedy in that jurisdiction won't really affect all the operations around the world, so you also could use that in your favor.

That's the major risk I see on mergers, the timing of the decision and how they talk to each other.

Regarding conduct, as I said, having more watchdogs is always better. I was playing around with John here that Maureen was running after him at the courtyard because she was the watchdog and he was the one being pursued. But having more people going after John is always better, at least for us, even in cases where you have settlement and you have confidentiality clauses, where evidence that is brought into one jurisdiction is kept confidential because parties are really afraid that that could be used in other jurisdictions. But just the fact that a settlement has occurred and that something was being investigated already helps bring up a case and another

investigation. Of course, the parties know that very well, and they of course try to avoid having that happen, but eventually it happens.

It is usually most of the time helpful. But there is one instance where you could have a problem, which is when each jurisdiction gets in each other's way. I can only think of one such case – maybe there are others, but I'm just sharing one of them – when you are conducting a simultaneous investigation. Whoever comes first and does a dawn raid or opens up the investigation first gets a better chance of bringing a strong case to the court, and then the parties react to that first move by trying to avoid other jurisdictions from stepping in and doing their job.

There is this first-move effect and each jurisdiction is competing among themselves if they know there is a simultaneous investigation going on. I also have an example of that we can discuss if it's of interest to the panel.

Just coming to my closing remarks here in these opening remarks, Andreas has been talking a lot about cooperation at the more general, macro level, which is not necessarily converging results, but converging procedures and the language and the way we address the issues, and also using the ICN and everything to go that step forward. I think that's the way to go.

But we have also to invest in ways to have more cooperation in case-by-case situations with exchange of information, try to coordinate the timing sometimes. I think that could be very useful for enforcers, and many times for the parties as well.

I think it's becoming more common. If you're asking for trends, I do think that kind of cooperation is becoming more common, but not sufficient enough in my view.

Of course, it's always hard to cooperate. Some of the problems that we are seeing are becoming worldwide problems. You have climate change; you have

bioethics; you have macroeconomic policy that needs to be coordinated. Antitrust is no different I think. We've got to move toward that direction at some point, and whatever step that we take forward should be looked at highly.

With that, I leave my opening remarks.

Thank you.

MS. POZEN: Thank you, Commissioner, very much. If everybody's keeping up, - just to make sure because you're multitasking I know, audience - we have a really multidimensional discussion that you've started. We started out talking about potential divergence and remedies for divergence that President Mundt raised.

You have raised another dynamic of, yes, there may be procedural divergence and timing divergence, but they're permissible divergence in the sense that there are localized issues that you need to look at.

We've talked about information exchange, and

that's a positive, and timing coordination, and then pointed to maybe we need to be focused more on more coordination and more to be done in this area.

With that being said, we're going to go next to Gail of Uber. I have to say John and I - I'm in an industrial company, you're in a consumer company - we love all this discussion about the platforms and the technology and the issues, Gail. Sorry. I'll let you go first.

MS. LEVINE: I'll echo what we've been hearing already this morning, in that one positive trend, or one trend to be further encouraged, is the training and outreach and information exchange and process exchange and substantive law concept exchange that goes on between countries. I think it's just absolutely essential that we keep the conversation going through international organizations, through bilateral, through informal and through formal means.

As the Commissioner was pointing out this morning, for example, the Federal Trade Commission

staff do it systemically and ably and often in an unseen and unsung way.

We're a global company. We see antitrust enforcement agencies across the globe. We see established ones, we see new ones, and everything along the spectrum. It's absolutely critical that all the interest experts across the globe connect with each other and share best practices, share best concepts of law. It will make us all better, and it certainly will be a help to companies that face antitrust questions across the globe when everyone is speaking a roughly similar language. There need to be differences in important points - I totally get that - but if we're all talking together, if it's a unified conversation, that's all to the good.

I'll raise an issue, though, that we haven't yet talked about, which is about competition advocacy. It's a global trend that we see increasing, and that really is all to the good.

Both in the United States and

internationally competition agencies are having again a conversation with regulators, letting them know about the benefits and the costs of untoward legislation or regulations and how that might affect competition.

For example, a couple of years ago in Germany, one of the competition authorities in Germany came out with a report that suggested in our space, Uber's space, that it may make sense to have certain regulations, but perhaps regulations prescribing price would be not as useful as an emphasis on price transparency, because that allows the consumer, the rider, to have information that they can use to make their decisions.

In Brazil we had a report come out just this April coauthored by your chief economist that pointed out that new entrants, including companies like ours, can generate a lot of value for consumers, and that municipalities who regulate should avoid regulations that get in the way of innovative services that are

helping drivers and riders.

These kinds of general trends toward competition advocacy to bolster social welfare for, in my case, drivers and riders, but in other industries also, consumers generally are quite welcome.

New York is unusual. It's funny that we happen to be having this conference in New York. I hope you all took Uber or one of our competitors to the conference today. We're particularly proud, by the way, to be serving all New Yorkers, not just people in Manhattan like where we are today, but New Yorkers who live in the outer boroughs.

Most of Uber's trips in the New York City area serve people outside Manhattan. That's different than a taxi - 96 percent of taxi rides are in the city or in Manhattan. Most of our rides are outside - they're in Staten Island, they're in the Bronx, they're in Brooklyn, they're in Queens.

If you are an outer borough person and you need to get to work, if you live far away from a

subway, if you have to take a couple of buses to get to work, Uber and companies like ours are really important solutions for you. We're proud that we grew the transportation pie for New York and for other cities.

We were saddened to see that the New York City Council passed a law that, as *The New York Times* has pointed out, could have effects on riders and drivers.

Uber has said this many times – you're not hearing anything new from me today – but you have seen us say before the same thing that *The New York Times* Editorial Board said, which is that the law that was passed in August that prevents the Taxi & Limousine Commission, the entity in charge here, from issuing new for-hire vehicle licenses for a year will essentially put a maximum on how many licenses there can be for that coming year. Natural attrition suggests that they might even decrease over the course of the year.

So the effect could be that if you've got one of those licenses, you may have more of an incentive to serve Manhattan as opposed to the outer boroughs. Our company has quite publicly said that that could have anticompetitive effects that would hurt the users in the outer boroughs.

I'm delighted to be on a panel today with antitrust enforcement officials who appreciate – I think, based on what I've seen from what you've written – the importance of that conversation that happens between regulators and enforcement officials, between regulators of all new industries, including not just Uber but Airbnb and the rest, and the antitrust officials who have a view of how competition can affect these things. That's the trend that I look forward to seeing more of.

MS. POZEN: Just to summarize, worry is about having competition advocacy to avoid the worry of maybe regulation that can inhibit competition. That's what I heard. Okay, got it. That adds another

component to our discussion.

John, tell us about your thoughts on trends and concerns that you have.

MR. BLOOD: Sharis, thanks for having me, and thanks to Fordham for asking me to be part of this panel.

I was in an Uber this morning, and I thought to myself: *Sharis, what have you done? I'm going to be in front of everyone who controls my antitrust destiny and you've asked me to have a few helpful suggestions – or some might call criticism – for the current state of affairs.*

MS. POZEN: But don't you like having your outside counsel just squirm out there and not know what you're going to say?

MR. BLOOD: Feel free to shut the mic, tackle, whatever you can bill for. But I thought about it, and I said: "Look, I'm really happen to be here."

But I'm here today just to give my

perspective as someone who has a lot of interest in these topics. But I'm not an antitrust expert. I don't purport to be an antitrust expert.

I do have an interest in suggesting perhaps some constructive ways forward, but I don't have an interest in telling anyone how they should do their job. I'll be very clear that all the regulators that I have dealt with and my team have dealt with have all been fantastic, wonderful, really brilliant people. So let me get that out, and please remember that at about 1:29 later today.

MS. POZEN: I think that would be the same for Gail and me, right? No matter what, all perfect, especially in this room.

MR. BLOOD: AB InBev is a global brewer. We have people in about fifty countries. We have 180,000 employees. We have over 500 brands. I say that not because it's particularly interesting; I say that because it informs the perspective on a number of the issues that I'd like to talk about today.

As a global company, we welcome the efforts of the antitrust authorities to streamline their review process. When enforcement differs across jurisdictions, companies like mine must dedicate large amounts of resources to comply. While this may make some of my outside counsel smile on the inside, I can assure you that it's not received well internally or by our shareholders.

In my experience, helpful cooperation includes upfront coordination on document requests, reviewing of timelines, and scoping of remedies. Just asking me to produce every document ever created around the world is not the vision of cooperation that I have in mind, nor am I saying that anyone has ever asked me to do that, but I just try to make the point that way.

Twenty different jurisdictions asking for the documents of the other nineteen jurisdictions again is not the type of efficiency that my client or I are really looking for.

For me, the coordination should serve efficiency of the process. From my perspective, authorities should not use cooperation to influence authorities in other jurisdictions to pursue remedies that they would not otherwise be able to obtain themselves. Forums for cooperation on policy, like ICN and OECD, should of course choose their members and set their agendas as they see fit.

But there is a benefit to taking into account the perspectives of the in-house antitrust bar, external counsel, academia, and nongovernmental organizations. For me, the best decisions are made when you have input from all key stakeholders.

Lengthy investigations increase costs and stymie enterprise. In the vast majority of deals, the period between signing an announcement and closing has to be as short as possible from my perspective. Any uncertainty has a very real impact on the valuation of the companies involved, the performance of the target company, the lives of the employees, and the

integration planning process.

Luckily, the procedural framework for merger reviews in most jurisdictions provides for a predictable, strict review timeline. But there is a tendency by some authorities to push a large part of the substantive analysis outside of that review period and engage parties in substantive discussions in the prenotification phase. A cooperative, open discussion before filing is necessary for a smooth review.

But we need to balance the benefits of those discussions with the need for certainty on the review timeline.

In the merger context, we've seen a market shift from reliance on the notification documents to reliance on internal documents to assess the impact of a merger. I appreciate the importance of discovery, and I would propose that most companies are not concerned about having an open and honest discussion about their company's business records, but the context of documents and the appropriate weight to be

given to them is very important to us. At the end of the day we want to get to the right decision.

We look forward to the European Commission's guidance on internal document requests, and we hope it will provide clarity on a number of these issues.

I imagine that many of us at companies have spent a lot of time trying to put into context the email musings of a twenty-two-year-old novice employee with a colorful vocabulary and zero decision-making authority whatsoever.

Again, my point is that discovery needs to be seen in the context of a large-matrix, multilevel organization. In some cases, internal documents or statements by third parties are used by authorities. Clearly, it's important for authorities to get an overall view of the market, and that sometimes means gathering information from sources other than the parties. I understand that.

But the third-party responses to requests for information or internal documents are often

confidential and the parties at issue have no means to defend themselves properly. Statements by third parties are sometimes given more weight than evidence adduced by the parties at issue.

I understand that each situation is different, but it should be clear that when companies spend time and resources intervening in a merger or investigation process, that they too have an agenda and that their statements are not necessarily objective. That's why we strongly advocate for the use of econometric evidence to isolate and quantify any merger-specific effects.

Overall, Sharis, when I think about this, I understand the reasons why we do this. I'm just trying to provide some context and balance for the process going forward.

MS. POZEN: I appreciate that.

I think the one thing, again the uniqueness of this panel – of having three in-house lawyers and the enforcers participating – I've actually sat on all

sides of this table. I've sat in the enforcer chair, I've sat in the outside counsel chair, and now in the in-house counsel chair.

I think the word you touched on – and, Gail, I'll see if you'd agree – is "certainty."

MS. LEVINE: Yes.

MS. POZEN: I get called into meetings with the executives of my company and I am asked *the* question: Are there any issues? What is the timing? Especially right now my company is getting money in the door, so that certainty is important. So, I think stressing that.

The only thing I would add to the discussion if we have time – and I know we're a little pressed on time – is this notion that I think is taking away some of that certainty potentially – and I'd be interested to get the views of folks about this – is the role of the public-interest standard, the role of politics, and the role of fairness, those kinds of things.

MS. LEVINE: I would echo what John said

about the role of third parties. Over the course of my career I have heard third parties, I have been a third party, voluntarily and otherwise, talking about mergers, and I would say the one thing that really makes a difference is facts. To your point about the econometrics, that's what makes a difference.

If you're an interested third party, yes, people are going to hear what you have to say with some skepticism, right to your point. But if you've got the facts to back it up, I think you'll be in good shape.

Conversely, disinterested third parties who don't have skin in the game or something at stake here, when they come in with vague or unsubstantiated complaints, it doesn't hold a lot of weight just because they happen to be disinterested.

MS. POZEN: Good point.

Let's take some of these concepts we've thrown out in your opening thoughts about the trends and unpackage them a little bit.

I'd like to start with the international forums – and especially with you, Andreas – talking about ICN, talking about OECD. John has actually raised the access to those being a good thing.

But I actually want to know – there are best practices, for example, in the ICN, but sometimes we don't see those, we don't see those being implemented, we don't see those being used.

Have you thought about enforcement mechanisms, self-assessments, things like that, so that you have best practices? I know the time and effort that have gone into those, the forums for discussions about vertical issues, etc., but how do we know that they are actually going to be used by an agency that we go before around the world?

MR. MUNDT: Let me make one thing clear before I answer your question. There have been a lot of complaints about what can go wrong. Of course, a prenotification phase can be too long, and there might be agencies that make use of it in a very extensive

way. Of course, an exchange of documents can be overwhelming and it can go beyond what is needed for the specific case. I could continue with that.

But let me remind you that we have more than 130 competition authorities around the world.

MS. POZEN: We know.

MR. MUNDT: I am standing here for one agency, and already in one agency a lot of things can go wrong. With over 130, a lot more can go wrong.

Let's keep in mind that many of these over 130 agencies are very young agencies. Many of them are not very well staffed, neither in terms of human resources nor in terms of money. So of course this is difficult.

Maybe a cure could be one world competition agency sponsored by the United States, sponsored by Europe. We had this idea in Germany many years ago. Imagine a competition agency located in Brussels for example trying to enforce the law in Russia, China, or in Brazil. Good luck.

What I want to say is that we do not really have an alternative to what we are doing. We can only try to improve what we do. What we have is the OECD, what we have is the ICN, and we think about how to improve that.

Here I want to mention one thing about the ICN. The ICN has never been an organization which was just meant to produce papers. It was always meant as an organization that has the task and the objective in its mission to implement the guidance that we produce. That is key for the ICN.

I admit that when we started the ICN it was a bit easier.

I remember our very first conference we had in Naples. We had just done work on the merger notification paper, and the merger notification paper stated that one should have a second domestic threshold in order to secure the local nexus of a transaction. We did not have that in Germany.

When I came to the ICN conference a well-

known lawyer came to me holding the ICN paper, these notification procedures, these recommended practices, in his hand, and he said, "Mr. Mundt, you have to change the law."

It was a lot easier when we were only twenty, twenty-one agencies. Today we are over 130 around the world.

I admit we must improve, but let me remind you that from the start implementation was key. When I became the Chairman of the ICN, one of my priorities was to take care that what we do, what we produce, is implemented, and we have taken several steps in the ICN over the past years in order to reinforce the impact of ICN.

We have just set up a new team called Promotion & Implementation. The U.S. FTC is part of the team together with COFECE, and the Portuguese Competition Authority. We are always looking for ways to make sure that what we do is implemented.

That is also, of course, a task for each

agency. Every head of an agency, like myself, has to ensure that the papers that we produce are well-known in the respective agencies, that case handlers know what is laid down there.

We also have to make sure that what we do is presented to the legislator, in order to prevent the legislator from changing the law in a way that is not inline with ICN recommended practices.

There is a lot of responsibility on the agencies themselves and this cannot be done by the ICN. We can only call on them to make use of the excellent work that is in the ICN.

Again, I would very much like to see everything that we do in the ICN implemented in 130 states the next day. It is not so easy.

We have just implemented in Germany a transaction value threshold of €500 million for filing transactions in order to prevent the buying of small startups by huge platforms and to make sure that we can look into this.

Well, there were calls that this is not in line with the best practices of the ICN. Personally, I don't agree with that, but of course one could dispute that. So you see already in a very mature agency it is difficult enough always to take care of what we are doing in the ICN, but we do it as best we can.

Again, we have nothing else. That is the point. We have nothing else, and we do as much as we can together with the nongovernmental advisers who play a very important role in the ICN and give very valuable input that we try to take in to account.

MS. LEVINE: May I just echo some of that? This goes back to the need for conversation. Lecturing doesn't work. As every organization like yours knows, it has to be a conversation. You can't snap your fingers and have agreements and convene consensus in a moment. It just doesn't happen.

It has to happen through the courses, through trust, through one-on-one conversations,

through larger group meetings like this one. It has to happen organically and naturally. And there is no cheap and easy way to do it. You just have to make a commitment for long-term improvement.

MS. POZEN: Sure, yes, yes.

MR. de RESENDE: Also, Gail, if I could, another way – and Andreas, this could work – is an extra effort would be have the private sector help out pushing these general practices that could be harmonized within different jurisdictions.

You do have the ability to somewhat influence those people who are making the legislation, so maybe, if you do understand there is something so positive about a certain aspect that should be thoroughly dispersed around the world, then maybe you could participate in the process, not having just the authority itself trying to defend something that, “We agree, that’s good for us in the ICN convention,” but also have the private sector pushing for that in Congress.

MS. POZEN: Good point.

Gail, sticking with the theme about the international organizations, your business represents a new business model. There is always this discussion in antitrust about – this is one in the United States we hear all the time – “Are the antitrust laws flexible enough to handle these new platforms?” blah, blah, blah. Andreas, you’ve talked a little bit about that. There is some difficulty.

But what do you think about the ICN and those forums and your business model? Are they dated, outdated, or up to the task of handling the disruptive business models like you represent?

MS. LEVINE: It’s a good question.

I don’t think it’s connected at all. Disruptive business models or innovative, or new business models, are probably not the driving factor in that question.

I think probably more important is that when you’re a global company, you’re going to face

antitrust authorities in various jurisdictions, some of whom are – to your point – brand-new, some of whom who have been in business for many professional generations and – as Bruce Hoffman put it with charming modesty a little earlier – at least in America we've already had the opportunity to make all our mistakes, at least the antitrust agencies have. We've gone down paths that we have learned don't work.

It would be foolish to expect other agencies across the globe to have to go make all those mistakes afresh. Maybe they wish to, and that's their prerogative, but it would be so much more helpful if we can explain, we nations who have already made all our mistakes, and can help newer agencies appreciate the hard-earned lessons from our experiences.

Again, what it comes down to isn't the novelty of the business model. I don't think that's the factor. The factor is the different visions and different levels of professional experience with these sorts of questions.

MS. POZEN: Before we move off of international forums, is there anything else anybody wants to say or add?

[No response]

No? We're good. Okay.

So now we're going to go to cooperation among the agencies. Everyone has talked about that.

Commissioner, you talked a little bit about this point, and I'd love to hear some of your examples of cooperation and how that plays out in investigations, and then let's talk openly about ways in which the parties or their counsel have helped or hurt that process.

MR. de RESENDE: I thought of two specific cases. One was, I believe, a very successful and positive cooperative among agencies. The other one could have been a little better – it wasn't bad, but it could have been a little better.

The positive one was a price-fixing collusion investigated by multiple jurisdictions

simultaneously. I know many of you probably know this, but it was the producers of compressors for home appliances, Whirlpool and a series of others.

What happened there was that, since Whirlpool was probably the largest company at the time and their headquarters was in Brazil, we engaged in discussions with Europe and the United States for a simultaneous dawn raid, and we of course had to get search warrants for that and coordinate all that process. It was a simultaneous dawn raid worldwide, in Europe, the United States, and Brazil. This was back in 2009. We were able to gather a lot of the evidence that supported successful cases from the enforcers' perspective in all of these jurisdictions. So this was very, very successful.

Of course, I don't know if the headquarters were here in the United States, I'm not so sure if they would have invited us to come along, but in this case at least it happened.

The interesting thing is that there is no

protocol for this. We had to learn by doing. Still I don't think there is a clear protocol of how to deal with this. Maybe we should advance in that direction.

Not exactly negative, but one case that could have gone better, I think was the *AT&T/Time Warner* case. We in Brazil identified harm as well, both unilateral and coordinated effects from the merger. By the time we came to this conclusion, many of the other jurisdictions had already cleared it, except for the United States and some other smaller ones, if I'm not mistaken.

We could have tried to push for stricter remedies, especially structural remedies, which I think would have solved all of the problems, and we were waiting for the United States to make a call. Of course, they took their time, and besides that they did not give us any signaling of which way they were going to go.

It's understandable, of course, because, as people were discussing in the previous panel, you have

to take the case to the court, and you do not want to reveal your strategy before you go to the court, and you are afraid that if you share that with other jurisdictions, they will leak it somehow. So it's understandable from that point of view.

If we had had the information that this was the kind of move that the United States would do, I think we probably could have taken a different solution to the case.

Of course, this was used by counseling all the time: "It's just you and the United States, just you and the United States; and they're going to approve it, don't worry, because it's been forty years since they've filed a case against a vertical merger. So it's just you. You're the one blocking the whole thing."

MS. POZEN: That was proven wrong.

MR. de RESENDE: Right. I guess no one expected that.

So we went with behavioral remedies, which

are, of course, difficult to monitor. But again, as I said, it's not a negative case, but I think coordination would have helped better in this case.

MS. POZEN: Interesting.

John, you've talked about streamlining, especially of document production. I think you and I probably are both in the same boat; any merger we do we've got to file in ten or more jurisdictions around the world and coordinate there. Tell us about some ideas that you think could help streamline some of the issues that you raised.

MR. BLOOD: When I think about discovery and I think about turning over documents, really I think it's a shared and a mutual goal. Both we and the regulators should share that we want better information, not just more information. From that premise, I think there can be conversations about what's the best way to do that.

If I put myself in the regulators' shoes, I would imagine that I don't want to be dumped on with

millions and millions of pages of irrelevant material either.

So having those conversations upfront, understanding where it is that decisions are made, what types of documents, what's the calendaring of certain decisions or what's the calendaring of certain committees that get together – those types of things can help lead to better coordination on things like search criteria, time, scope, and repositories. Those types of discussion upfront could be very helpful.

I know that's not particularly earth-shattering at all, but the devil is in the details for this one, and this is about the roll-your-sleeves-up work of trying to make sure that we get what the regulator is interested in – because, look, we're going to deal with the facts as well – and not have us running around doing a number of different things that we're putting in that are not going to be relevant to the investigation.

It all matters about the case, but having an

open discussion with folks beforehand and coordination before so we can explain, "This is what we did, this is where we are," also helps the efficiency and the speed at which the regulators can do their job.

We're not saying, "Hey, we don't want to give over any documents." We understand the importance of documents. We're just trying to say, "There's a way for us to hopefully make this more efficient. This isn't a hide-the-ball exercise; this is about we're trying to get you what you really want."

MS. POZEN: Okay. Comments on that?

MR. MUNDT: Of course it's desirable that as a company you know what you will have to provide in a certain case. I understand that. But as an agency, sometimes you do not know until you start.

Sometimes it happens, for example, that you have to look at the question of closeness of competitors. What we do in these cases is we perform a bidding analysis of the recent years. Of course

this is something that might only become obvious during the procedure, so it's hard to predict if you really need that.

I think what is a common trend around the world is that you look into internal documents about the question of what was the strategy behind the merger, what is the goal.

This is something that has become more and more common because these internal documents are a very valuable source if you want to assess the effects that the merger might have, at least from the perspective of the company. But as I said, it is not always so easy to assess beforehand what you are really going to need.

A second aspect I wanted to mention is that the companies themselves can do a lot in order to streamline the case. We have seen – not frequently but from time to time – in Europe that companies played tricks on us, which meant they filed the case with one authority and let it do the work, and then,

after the work was done and they had received a clearance, they went to the other agency where they might expect greater obstacles and told them, "Well, listen, the Bundeskartellamt has already cleared the merger, so there cannot be any additional aspects."

I think you can do a lot as a company to align the procedure and to make it easier for competition agencies to cooperate. If we have, for example, a joint merger filing and we can have parallel investigations, that facilitates our work immensely.

But as I said, some companies play it the other way around and don't give us the chance to do so. That is not only on the shoulders of the agency; that is also, at least in some cases, on the shoulders of the companies.

MS. LEVINE: I think that's fair.

MR. BLOOD: I think it's a very fair point, and I respect that point.

I would also say that the goal that I'm

advocating for, which is more certainty and more efficiency, is not something that the agencies are going to give us. It is only something that we working with the agencies are going to accomplish.

Nothing that one party is going to do here is going to speed up that process materially or make the process more efficient. It has to be both folks getting in there. Otherwise there will be this, as you say, you don't know which areas, and you have to err on the side of making sure you find what you need. I understand that.

My point is just that if we have that conversation upfront, we can help get to the relevant areas and not be distracted by things that ultimately the Commission isn't going to use. So I take your point.

MS. POZEN: I don't know if you all would agree with this, John and Gail, but I would say when you're doing a global merger – let's stick with mergers – and a counsel uses that strategy and says,

"We get such and such, and then we'll go and use it at such and such," I don't want to use that counsel, because that just doesn't work in this era. It used to work in the olden days, I think, so I always think that's a dated strategy in my view.

I think things are all happening in parallel. You obviously have some of the longer-existing agencies – the U.S. agencies, the European agencies – that have some sort of a traditional leadership position.

But what I have found with CADE, the Bundeskartellamt, you name it – to your point about localized effects, they're looking at those localized effects and they need to change to do that.

That's why when a counsel says that, I'm like, "Yeah, right," because I know that's how everybody feels, but it's not going to work. And it almost gets their back up more, I imagine, at the agencies, right?

MR. de RESENDE: Good to hear it.

MS. LEVINE: This is a multi-round game.

MS. POZEN: Right, exactly.

MS. LEVINE: It's not like any company has one deal to get through and then they'll never have to speak to those agencies again. I think that the best practice is to treat the agencies with the kind of respect that you'd want to be treated with.

MS. POZEN: Yes. It's a multipolar world now. It's not a bipolar world anymore, right? It's a multipolar world, so we have to -

MS. LEVINE: Gamesmanship is never going to be a winning strategy.

MR. BLOOD: Sharis, when I hear - and when we get pitches or proposals internally - people think they've figured something cute or clever out, usually what I'll say is, "You know I'm going to be there again, right?" It's like, "You're going to be gone and I'm going to be there next week after this closes, and they're probably not going to be too happy if we did something" -

This, as you say, it's long term. We're going to be there again. This is the nature of it. These are folks that –

MS. POZEN: Long memories, they know us, exactly

MR. BLOOD: Some sort of some very ephemeral, short-term gain is not what we're interested in.

MR. de RESENDE: It's good not to have them here at the table so they cannot respond for themselves.

MR. MUNDT: Implementation is also a lot about teaching agencies. Why do we have these standards? What are they good for? What should be the result?

We try to do that a lot in the ICN through all the webinars and town hall meetings we hold, in order to make sure that agencies not only take notice of the work products but understand why they are in place.

Personally, I know that there is a lot of work to do. I've heard about cases where a merger had been filed with the European Commission, it was cleared with remedies, and there was another competition agency far away from Europe that said, "I want the same remedies."

But there you say, "But you don't have a competition concern."

"But the European Commission implemented those remedies."

I know this happens, so of course you wonder what you can do about it.

Then I come to the conclusion that the only thing that you can do is teaching, teaching, and teaching. This is what we try through our workshops. This is why we try to make sure that also our people regularly go to ICN workshops. It is most important that especially the colleagues from younger agencies go to ICN workshops, which are very hands-on and which have very practical approaches with hypotheticals and

other things.

I also can only invite NGAs to go to workshops in order to teach. That is an important feature for the time being.

MS. POZEN: I think we should talk maybe just a little bit about third parties, because Gail has brought that up and we've talked about it, and then just do the quick lightning round on politics and agencies. Is that okay?

Gail, you've talked about third parties. We heard Carles mention third parties; in the European Commission they can always appeal. Let's stick with you, Commissioner, and with you, President Mundt, on third parties, the role of third parties and how they play out in your jurisdictions.

MR. MUNDT: For us in Germany third parties are extremely helpful and valuable. We have so-called "admitted" parties who can apply to be involved in the case. They come in if they are substantially affected by a decision that we take.

We often take the advantage of collecting a lot of information from third parties. It helps us with the in-depth analysis with regard to the facts, also with regard to the economic effects on the markets that are at stake. So third parties are very important to us.

They are also relevant in terms of investigation of a case where we ask third parties to provide information.

That is sometimes limited when it comes to companies outside Germany as we do not have the means to enforce a request for information. But still we have had the experience that many of these companies, even outside our enforcement area, are ready to provide information to the agency. This is most helpful, most valuable, and we make a lot of use of it. It is a key part, an integral part, of the procedure.

MR. de RESENDE: I totally agree with President Mundt. You have to keep in mind that as

agencies there's obviously an information asymmetry problem. We do not know as much about the market as the market itself, as much about companies as they do. It is probably one of the best ways to extract information, and key to coming to an efficient decision is having a third party in the discussion.

You can also explore that using dialectics, which is you bring an argument from the parties that are interested in a case and then you bring it to the third parties and they will counterargue it, and then you take it back. We have used that kind of a strategy a few times.

But of course, this could be also used in a wrongful way, which is you have private payrolls or commercial issues that companies have with each other and they keep using the authority in order as a stage for their fight to continue. We are pretty aware that that that also happens, and we try all the time to see if this is for real or is it just a disguise, trying to use the authority on their behalf. It's an art,

but we are aware of it.

MS. POZEN: Good to hear.

All right. Lightning round, yes or no answer. Today, as we sit here, September 2018, are we seeing more politics in antitrust globally?

Commissioner?

MR. de RESENDE: I can't speak globally.

MS. POZEN: Yes or no.

MR. de RESENDE: No.

MS. POZEN: No? Okay.

John?

MR. BLOOD: Yes.

MS. ROSEN: Gail?

MS. LEVINE: No.

MS. POZEN: No?

MS. LEVINE: I don't do yes-or-no questions.

MS. POZEN: You can abstain.

MR. MUNDT: Yes, of course.

Just to give you a hint, in many countries, policymakers think about preventing mergers, not on

the grounds of competition but on the grounds of systemic industries, vulnerable industries. That is a different aspect where you can see this relation of mergers and political influence plays a greater role.

Not for the agencies, maybe; that is different. I think we, as an independent agency, are still far from that. A call from the minister so far has never gone beyond a request for information. They respect our independence. I can only say that.

But the thinking goes more towards an industrial policy approach – not my minister, I don't mean that but at a global scale there seems to be a more favorable approach towards U.S. champions, European champions, and other champions. I think that plays a bigger role.

MS. POZEN: All right.

Let's say a thank you to this panel. I know two of our members have a very hard stop at 1:30, so we will stop.

Thank you very much for participating. I

hope you found it as interesting as I did. Thank you.

MR. KEYTE: Thank you.

[Break: 1:33 p.m.]