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and

UNITED STATES DEPARTMENT OF JUSTICE

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9:30 A.M. TO 4:00 P.M.

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MODERATORS:

GERALD F. MASOUDI
Deputy Assistant Attorney General
Department of Justice
and
RANDOLPH W. TRITELL
Assistant Director for International Antitrust
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PANELISTS:

Morning Session:

Philip Lowe
Hideo Nakajima
Eduardo Perez Motta
Sheridan Scott

Afternoon Session:

George Addy
Margaret Bloom
Paul Lugard
James F. Rill

C O N T E N T S

P R O C E E D I N G S

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MR. TRITELL: This must be some sort of record, a minute before we're supposed to start, a hush has descended upon the room. I don't have to tell everybody to get in their seats, so thank you, we are off to a good start.

Good morning. I'm Randy Tritell, Federal Trade Commission's Assistant Director For International Antitrust. I will be co-moderating this morning's session along with Gerald Masoudi, Deputy Assistant Attorney General for the Department of Justice, which is co-sponsoring these hearings with the Federal Trade Commission.

As you know, the FTC and the DOJ strive to allocate matters efficiently consistent with our respective highest and best uses. In that spirit, it falls to me to open this morning's hearings by sharing the following four insights.

One, please turn off your cell phones, Blackberries and other devices. Two, the restrooms are outside the double doors and across the lobby. There are signs to guide you. Three, in the unlikely event the building alarm sounds, please proceed calmly and quickly as instructed. If we must leave the building,

go out the New Jersey Avenue entrance by the guard's desk, follow the phalanx of FTC employees to a gathering point, and await further instructions. Four, although we would love to hear what you think of the interesting issues we will be discussing today, we cannot accommodate any comments or questions from the audience at today's hearing.

I would also like to thank at least some of the people who have put in a tremendous amount of work to organize this hearing today. From the Department of Justice, Joe Matelis, Gail Kursh, Ed Eliasberg and Brandon Greenland, and from the Federal Trade Commission, Patricia Schultheiss, Doug Hilleboe, Elizabeth Argeris and Ruth Sacks, as well as the staffs

the President of the Mexican Federal Competition Commission; and Sheridan Scott, the Commissioner of Competition of the Canadian Competition Bureau.

I would now like to turn over the podium to my co-moderator, Jerry Masoudi.

MR. MASOUDI: Thank you, Randy.

Welcome to today's session in our ongoing series of panels on single-firm conduct. The Department of Justice Antitrust Division and the FTC are jointly sponsoring these hearings to help advance the development of the law under Section 2 of the Sherman Act.

We have had a number of previous sessions. On June 20, we had a session that included opening remarks from FTC Chairman Debbie Majoras and Assistant Attorney General Tom Barnett of the Antitrust Division, as well as comments from Dennis Carlton, who will soon be a Deputy Assistant Attorney General at the Department of Justice, and Herbert Hovenkamp.

On June 22nd, we had panels on predatory pricing and predatory buying, and then on July 18th, we had a session on unilateral refusals to deal. Transcripts from these sessions are available on the DOJ and FTC web sites, and transcripts of this session and future sessions will also be made available.

Today we will concern ourselves with how allegations of anticompetitive single-firm conduct are treated in jurisdictions outside the United States and related international issues. This morning we will be hearing from our panel of distinguished enforcers, and then in the afternoon, we will hear from practitioners and academics active in the international area.

First, we will have approximately 20 minutes per panelist to give an opening presentation. We will then have a 15-minute break, and finally, we will have a moderated discussion period. Our discussion today will include an opportunity for our panelists to respond to each other's presentations. So, our first panel I think will end at about noon, and we will start back up after a lunch break at 1:30.

I would like to join Randy in thanking the staffs of the FTC and the Antitrust Division for helping put together today's presentation, and I will now turn it back to Randy to give a more detailed introduction of our panelists.

MR. TRITELL: Before introducing our first speaker, I would just like to reiterate that the U.S. agencies consider these hearings to be extremely important. In particular, regarding today's session, given the large and increasing number of jurisdictions

that apply antitrust laws to single-firm conduct and as commerce increasingly crosses national borders, it is fitting and important that we hear the views and learn from the experience of our international colleagues as we try to both broaden and deepen our understanding of the issues in this critical area.

I am going to provide a brief introduction to each of our speakers before their presentations, and I direct you to the more detailed biographical information in the packet outside this room.

First we will hear from Philip Lowe, who, again, is the Director General for Competition in the European Commission. Before his appointment to that post, Philip was first in private industry and then served in a variety of capacities in the European Commission, including as Director of the Merger Task Force of the Competition Directorate, head of the Cabinet of the European Commissioner for Transport, Director General For Development, head of the Cabinet of the Commission's Vice President, and the Acting Deputy Secretary General.

Philip?

MR. LOWE: Well, good morning, everyone, and thank you, Randy and Jerry. I'm very grateful to Chairman Debbie Majoras and Assistant Attorney General Tom Barnett for giving me the opportunity to take part

in this joint FTC-DOJ set of hearings on Section 2 of the Sherman Act. These hearings seem to reflect a strong interest throughout the world over the last few years in what you call single-firm conduct.

At the International Competition Network's conference in Capetown last May, a new working group was launched on international conduct. The OECD has arranged round tables on issues related to single-firm conduct, and numerous conferences have had single-firm conduct appearing on the agenda.

At the Commission, we have 40 years of case law related to the application of Article 82 of the European Community Treaty. Article 82 is the treaty article prohibiting abuses of dominant position, so broadly equivalent to your Section 2, although as you realize, the European structure requires a firm to be dominant before it can be caught by any issue of abuse.

Of course, we have recently been reflecting very carefully on the coherence and the consistency of our policy under the Treaty and Article 82, and we thought it was a logical step, after having reformed or, say, modernized the application of Article 81, the article dealing with agreements and merger control regime, that we moved our policy in the area of Article 82 more towards an effects-based approach in line with what we

have initiated under Article 81, the merger control. This required, nevertheless, a thorough review of the policy so far and, indeed, the case law which was at the back of it.

The application of Article 82 was, I think, widely criticized as being fragmented without guiding principles and for applying in some instances general form-based criteria whose meaning was not always clear in specific cases. To that extent, this would cause Article 82 to be applied in cases where there would be not any sufficient likely or even actual restrictive effect on the market, and this would clearly be wrong.

There was much concern from the business community about these false positives, so-called type one errors. Likewise, it is a mistake and would be a mistake if a form-based approach caused Article 82 not to be applied to the cases in which there was likely or actual harm to the market, false-negatives or type two errors.

The vocal parts of business were perhaps less concerned about these errors, but as an authority charged with, in principle, protecting consumer welfare, an objective which the Commission and in particular my Commission have underlined in the last few years, I believe we've got to be concerned about both types of

errors, and this is a fundamental reason for our review of Article 82.

After some initial internal debate, we involved our colleagues in the national competition authorities in the EU Member States in discussions about the review. In December last year, we published a discussion paper on the application of Article 82 to exclusionary abuses, and we suggested what we regarded as a framework for the continued rigorous enforcement of Article 82, building on the economic effects-based analysis carried out in recent cases.

The discussion paper aimed to describe a consistent methodology for the assessment of some of the most common abusive practices, which you have already discussed in the context of these hearings, predatory pricing, single branding, tying and bundling and refusal to supply.

Now, we didn't in the discussion paper go through all the aspects of Article 82, and I haven't got time today either to go through every single aspect. You will notice that one major difference between the application of Section 2 and Article 82 is the explicit reference in 82 to exploitative abuses, which we have not dealt with in the discussion paper, and we have not taken a decision about whether we will deal with them in

any guidelines at the present time. However, there is

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obviously the longer the conduct has been going on, the more we will concentrate on actual effects. So, consumer welfare we regard as the anchoring principle for our competitive analysis, and we do not enter much into what Debbie Majoras in her opening remarks at these hearings called "the search for the Holy Grail test," and I agree entirely with her that the debate hasn't any dimension or it could run the danger of becoming too academic and losing practical significance.

That's not the aim of the discussion paper. What we're attempting to do is to make a first contribution to establishing principles and methodologies which give clarity to business and the legal community as to what policy will apply and guidance to those agencies, in particular in Europe, which will apply and g

other effect, for example, in the case of rebates, and I'll come back to that in a moment.

The second question we ask is does the conduct have a likely or actual market distorting effect. Likely effects are, in our opinion, effects which in a specific market context are predictable on the basis of experience and/or a solid theory of economic harm. The likelihood and significance of foreclosure depends on factors such as preexisting market power and barriers to expansion or entry, the market coverage of the conduct, and in the case of selective foreclosure, the importance of the targeted customers or competitors.

Actual effects are established on the basis of evidence of market evolution in the past, and this doesn't necessarily involve complicated economic studies. It can be presented as facts which can be then investigated by the authorities on the basis of the evidence submitted to it.

Now, coming back to rebates, as I mentioned earlier, it is not immediately obvious whether any particular rebates have the capacity to exclude. To answer that question, we first need to ask, exclude who? In the paper, we propose that for rebates as well as for other types of price-based conduct, the exclusion of as efficient competitors is abusive.

Now, this is not the only test which can be used to show abuse. It nevertheless appears to us in principle as a useful one, as it allows dominant firms to assess their conduct based on their own costs. A failed price/cost test is, of course, not the end of the analysis. We would still have to show a likely market foreclosure effect.

And by the way, as public consultation has shown, one test may not be the final answer to the analysis we need to carry out. There may be several tests which have been proposed which are relevant to a particular case. Nevertheless, we are comforted in the view that the benchmark of the efficient competitor on the market is one which is extremely important to judge the behavior of the dominant company against it.

Now, the paper also states that if conduct clearly creates no efficiencies and only raises obstacles to residual competition, there is no need to carry out a full effects-based analysis. Such conduct can be presumed to be abusive. However, as with any presumption, the dominant company can, of course, rebut it by providing evidence that the conduct will create efficiencies, or as our case law refers to in the opinion of the court, is objectively justified.

Now, exclusionary conduct could escape the

prohibition of Article 82 if the dominance undertaken can provide an objective justification for its behavior or if it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. There is an objective justification where the dominant company is able to show that the otherwise abusive conduct is actually necessary on the basis of objective practice external to the parties involved; in particular, external to the dominant company.

The dominant company may, for example, be able to show that the conduct concerned is necessary for safety or health reasons related to the dangerous nature of the product in question, but that necessity, that concept necessity, must be based on objective practices that apply in general for all undertakings in the market.

Now, I want to come on to efficiencies. The same conduct can, of course, have effects which enhance efficiency and effects which restrict competition, and in this paper we propose a weighing or balancing approach where efficiencies are balanced against the negative effects on competition, and that balancing exercise determines whether or not the conduct is abusive.

Now, this test is important, and notwithstanding

all the discussions about how efficiencies should be assessed and upon whom the burden of proof should lie, the one core element that I cannot see us moving away from is that fundamentally, there should be this balancing, and ultimately, that balancing of the efficiencies against the distorting effects is in the

conditions for assessing efficiencies defense under 82 be similar to what we have as a policy with respect to restrictive agreements under Article 81 and the exemptions under Article 81-3.

The efficiencies must be realized or are likely to be realized by the conduct. The conduct must be indispensable to realize the efficiencies. Overall, consumers should benefit from the efficiencies, there must be consumer buy-in, and competition shouldn't be eliminated as a result of the practices concerned.

We also discussed the issue in the paper of the extent to which -- the market power of the company, and here again, I think this is a departure for us as an agency. We identify in I hope a convergent way with U.S. thinking the concept of dominance mostly with the concept of significant market power. That market power, if it is very high, as indicated by the strength of the constraints upon the dominant company, may mean that we will have to undertake the balancing of efficiencies in a much more rigorous way if, indeed, the strength of the market power is very great.

The burden of proving a capability to foreclose and the likely or actual foreclosure, and I emphasized this before, it physically falls on the authority or the plaintiff, but the burden of proving an objective

justification for efficiencies should be on the dominant company. Ultimately, however, the agency should carry out the assessment, and that assessment in our system is controlled by the courts as to whether we have actually made that balancing in a way which doesn't project any obvious misinterpretation of the facts or bad judgment as to the likely effects.

Now, let me indicate some areas of reasonable consensus internationally and in Europe as to the ideas in the discussion paper. There's certainly some welcome for the overall aim of clarifying the application of Article 82 and for an effects-based approach. There's a broad welcome for the clarification that the ultimate objective is to protect consumers, and some commentators have frequently had the impression that it was otherwise.

There's broad consensus on the aim to protect competition and not competitors, and an authority must

have to be based on sound economic principles, and the attempts to define the safe harbors shouldn't result in more uncertainty than actually leaving the thresholds outside any guidelines.

For example, if the pressure is an effects-based approach to lower the safe harbor to a very restrictive level in order to look at an operation in detail on the basis of economic or econometric analysis, frequently we are giving the impression that we would systematically engage in very detailed economic effects-based analysis above the safe harbor, and this has given rise to some commentary that we have, in fact, tried to extend the degree of the outreach of Article 82 as a result of the proposed guidelines.

There are some difficult open questions. We consider the conduct that clearly creates no efficiencies and only raises obstacles to competition should be presumed to be abusive, but what are the classes of conduct which are so nakedly abusive that we have a per se rule prohibiting them? Similarly, conduct which is clearly competition on the merits should be legal, but we have the challenge of defining the categories of the conduct which fall into that area as well.

When it comes to price-based conduct, how far

should we rely on price/cost tests? What are the alternatives to the price/cost tests? How exactly should they be formulated? For example, we need to show profit sacrifice to prove predation. Nothing like a tongue-twister. Is profit sacrifice also an appropriate test for other price-based conduct, for instance, rebates?

There is a lot of commentary in the U.S. about the explicit need for a recoupment test in predation. I have to say that we're quite sensitive to that comment, our traditional view being that if we have a good story, a robust story, about the dominance of a company, then it should be capable of recouping. However, depending on the predictability and the operationality of any methodology we announce in guidelines, we are certainly giving thought to the need for an explicit recoupment test.

The role of the so-called "meeting competition defense" is most clear when it comes to price discrimination. In the U.S., you have even stated explicitly, you have got it in the acts. It makes perfect sense that a company can argue that the reason it charges different prices to different customers is that competition forces it to do so, but it's much less clear what the meeting competition defense should have

as a role beyond price discrimination.

review, thorough review of our policy, as you are in the States. All I can say is that the major challenges for us are no longer in the area of general principles, but in the area of balancing legal certainty, operationality, against an effects-based approach which gives a right answer and avoids type one and type two error.

Thank you very much.

(Applause.)

MR. TRITELL: Thank you very much, Philip, for getting us off to a strong start this morning.

I would now like to introduce our next speaker, Hideo Nakajima, Deputy Secretary General of the Japan Fair Trade Commission. In that capacity, Mr. Nakajima is in charge of international affairs, where he heads the Japanese delegations to multilateral organizations and bilateral consultations among competition authorities.

Before joining the JFTC, Mr. Nakajima worked with the Asian Development Bank in Manila as Assistant to the President and Director General of Budgeting and Personnel Management, and for the Ministry of Finance where he served as Research Director of the International Finance Bureau and Chief Planning Officer of Japan's Fiscal Investment and Loan Program.

Mr. Nakajima, the floor is yours.

MR. NAKAJIMA: Thank you very much. My name is Hideo Nakajima. I'm the Deputy Secretary General of Japan's Fair Trade Commission. I am really grateful to the Department of Justice and the Federal Trade Commission for the invitation to participate in this important panel. It's a great honor to be here.

I was asked by DOJ and FTC to talk about specific examples of how JFTC applies our consumer policy to single-firm conduct. In doing so, first let me take a few minutes to briefly explain about our general statutory or legal framework on the regulation of single-firm conduct, since such framework, I believe, looks different from that of United States as well as that of the EU, and then I would like to present several specific cases regarding single-firm conduct in our nation.

So, first, let me explain the basic framework of our Antimonopoly Act, which is Japan's basic competition law. In our country, single-firm conduct is regulated by two different provisions. One is private monopolization; the other is unfair trade practices.

First, private monopolization. Private monopolization is prohibited in Section 3 of the AMA and defined in Section 2 of the Act as those business

activities of a firm which brings about a substantial restraint of competition in any particular field of trade by excluding or controlling the business activities of other firms.

Exclusion is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market. "Control" means to deprive other firms of their freedom of decision-making concerning their business activities and to force them to obey the controller's intents.

Regarding "substantial restraint of competition," the Tokyo High Court opined that

counterpart, like by small-scale supplier who is heavily dependent on such large-scale firm for their business. The large-scale firm does not necessarily have to be absolutely dominant in a relevant market. In Japan, abusive conduct by such dominant bargaining power, such as coercive behaviors by large-scale retailer against his small-scale suppliers heavily dependent on the retailer have been a serious concern among the public, and JFTC has recently dealt vigorously with those cases among various types of unfair trade practice.

Anyway, a single-firm conduct falls under the unfair trade practices, thereby prohibited, if such a conduct is found to belong to any of these specified conducts designated by the JFTC and to tend to impede fair competition. "Tending to impede fair competition" is assumed not to have comparable anticompetitive effect to "substantial restraint on competition," which is necessary for violation of the prohibition of private monopolization.

As such, the regulations on the unfair trade practices are basically applicable to both "dominant" firms and "nondominant" firms. However, regarding some types of conduct designated by the JFTC as unfair trade practices, for example, unjust dealing on exclusive terms, whether a firm is "influential in the market" or

not, is considered.

According to the Guidelines Concerning Distribution Systems and Business Practices issued by the JFTC, whether a firm is "influential in a market" or not is determined by, among other things, the firm's market share or its market position. Here, in order for a firm to be found influential, either the market share of no less than 10 percent or the market position among the top three is prerequisite.

Regarding remedies for unfair trade practices, as in the case of private monopolization, a cease and desist order, or order of taking elimination measures, is to be issued, though unlike private monopolization, neither of administrative surcharges nor criminal sanctions are to be imposed.

Now, let me go to the enforcement activities of the JFTC on single-firm conduct regulations.

First, the private monopolization. Since the enactment of the AMA in 1947, the JFTC has found illegal a total of 15 cases of private monopolization, and for the last ten years, we have dealt with nine cases. Most of the recent cases are excluding type of private monopolization. On the other hand, for the last ten years, we have handled a total of more than 200 cartel cases.

As already mentioned, whether some specific single-firm conduct is found to fall under private monopolization is to be determined by taking into consideration various relevant factors comprehensively on a case-by-case basis. However, in actual enforcements, we have taken legal measures only for those cases where substantial restraints of competition in the market have been quite obvious. Let me take up two examples.

The first one is the case against Paramount Bed Company, Limited (Paramount Bed), where the decision was

conduct, Paramount Bed was able to exclude the business activities of other hospital bed manufacturers.

Also, in the situation that manufacturers were not allowed to participate in bids, Paramount Bed controlled the business activities of bid participants by choosing a successful bidder among the participants who sell its beds, and by indicating respective bidding prices to successful bidders as well as other bidding participants. Moreover, Paramount Bed provided funds to bid participants in order to ensure that those participants would obey the instruction of Paramount Bed.

The JFTC found that the conduct by Paramount Bed fell under the private monopolization, as it excluded the business activities of other hospital bed manufacturers and controlled the business activities of its supplier and therefore substantially restricted competition in the market by exercising the monopoly power (dominance). Therefore, the JFTC ordered elimination measures to Paramount Bed36.0000 387.9600 TD(1

in the southern part of Hokkaido. Hokkaido Shimbun published a general daily newspaper that accounted for a majority of general daily newspaper publications in the Hakodate area.

Under the market circumstances, when Hakodate Shimbun was entering the daily newspaper market in the Hakodate area, Hokkaido Shimbun obstructed the entry of Hakodate Shimbun and carried out the following actions to hinder their business:

First, Hokkaido Shimbun applied for trademark registration to the Patent Agency regarding nine mastheads, including "Hakodate Shimbun," that would be used when publishing newspapers in the Hakodate area, although they had no specific plans to use those mastheads.

Second, the main newspaper publishers in Hokkaido received articles through Jiji Press and Kyodo News Service. Based on a priority policy with prior contractors where Jiji Press would not deliver articles against the will of the present contractors, Hokkaido Shimbun implicitly solicited Jiji Press not to deliver articles to the Hakodate Shimbun so that Jiji Press and Hakodate Shimbun could not conclude a delivery agreement.

Third, to make it difficult for Hakodate Shimbun

to earn advertisements revenues, even in the situation where damage to Hokkaido Shimbun itself was expected, Hokkaido Shimbun split the price of inserting advertisements in local edition in half for small and medium-sized companies, who would be the targets for Hakodate Shimbun for collecting advertisements.

The JFTC found that the conduct by Hokkaido Shimbun fell under excluding type of private monopolization, as it excluded the business activities of Hakodate Shimbun and substantially restricted competition in the market. Hokkaido Shimbun appealed for a hearing procedure against the recommendation but finally accepted to take measures issued by the JFTC.

Next, enforcement activities of unfair trade practices.

For the last ten years, the JFTC has taken legal measures against around 50 cases of unfair trade practices, including 10 cases of dealing on exclusive or restrictive terms, and nine cases of interference with transaction.

In determining whether any specific single-firm conduct falls under unfair trade practices, that is, whether it tends to impede fair competition, basically speaking, as in the case of private monopolization, various relevant factors should be taken into account on

a case-by-case basis. For example, in a case concerning discriminatory pricing, the Tokyo High Court opined that various factors, including the structure and development of the relevant market, the difference of supply costs, market position of the concerned retailer (market share), and subjective intentions for setting price differentials would need to be taken into account in a comprehensive way (April 27, 2005).

On the other hand, in this connection, it should be noted that regarding unfair trade practices, the JFTC has designated in its series of notifications those types of single-firm conduct which are likely to tend to impede fair competition, and has also clarified more specifically what kinds of conduct violate our AMA as unfair trade practices in various guidelines, including

Microsoft Corporation, and the recommendation decision was issued on December 14, 1998.

According to the decision, the market situation of the case was as follows. First, MS Excel had been popular among consumers since 1993 and had acquired the top market share for spreadsheet software. On the other hand, MS Word was originally an English word processor and it was said that the function for Japanese language did not work very well, and thus, "Ichitaro" produced by the Japanese software company had the top share for word processor software in Japan in 1994.

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was another type of schedule management software, which held the top market share, and was called Organizer produced by Lotus Corporation, a part of the PC manufacturers asked MSKK to license only MS Excel and MS Word in order to pre-install Lotus Organizer instead of MS Outlook. However, MSKK again rejected the proposal and finally made all manufacturers accept installing MS Outlook as well as both MS Excel and MS Word in their PCs.

The JFTC found that MSKK unjustly made PC manufacturers buy its word processor software by tying it with its popular spreadsheet software. In addition, MSKK unjustly made PC manufacturers buy its schedule management software by tying it with its spreadsheet software and word processor software. These conducts fell under the category of illegal tie-in sales.

In summary, as I have mentioned, under our AMA, single-firm conduct can be regulated by either private monopolization or unfair trade practices. In both cases, a case-by-case basis approach is to be taken in determining whether concerned conduct is unlawful or not, by considering all relevant factors comprehensively.

Finally let me touch upon the current discussions related to regulations against single-firm

Commission on Competition. Before joining the CFC, Eduardo was ambassador and permanent representative of Mexico to the World Trade Organization. He's also headed the Representation Office of the Ministry of Trade and Industrial Development in Brussels, where he coordinated the Mexican team negotiating the Free Trade Agreement between Mexico and the European Union.

Eduardo?

MR. PEREZ MOTTA: Good morning. I would like to first of all thank the DOJ and the FTC, my good friends, Tom Barnett and Debbie Majoras, for inviting me to participate in these hearings. It is a real pleasure and a privilege to be here today.

For a relatively small economy, best practices abroad become an important instrument to promote or to maintain or to try to maintain best practices within your country, and this was actually the case of Mexico, where we recently had a very important overhaul in our legal framework in competition.

So, let me first try to see if this works. It is not responding.

(Pause in the proceedings.)

MR. PEREZ MOTTA: Okay, thank you.

Well, also the heart of competition policy in Mexico comes actually from our Constitution. Article 28

April, April this year, where it was published about a month ago.

So, those specific procedures in our law basically go in three instruments. First, merger review process. Second, what we call absolute monopolistic practices, which is basically cartels. And third, what we call relative monopolistic practices, which is precisely the topic of today's discussion, and it's in general single-firm dominant conduct.

So, I will concentrate in the last of our instruments, but I would have to say that in each and every one of those instruments, in the last reform, we got an improvement either of our procedures or we got an important simplification of procedures, like in the case of the merger review process, it was a major simplification of the procedures in Mexico. We increased the thresholds, we created a fast-track mechanism, and we also included efficiency considerations as an obligation for the Commission to consider when evaluating a merger.

In the case of absolute monopolistic practices, we introduced a major reform, which was the leniency program, which is the state of the art. We were inspired from best practices in the U.S., best practices in the European Union, as well as in Canada, we used

OECD recommendations to basically build that program, and that's a very interesting situation, because this is the only kind of program, the leniency program in Mexico, in the case of competition law, is the only area where that applies in our law, in general.

So, we don't have that -- that this is the first time that we introduced this kind of legislation, which, of course, has a very important mechanism of incentives basically to change the interests of players to create that kind of solutions or even to just stabilize them in the medium term.

So, going directly to single-firm dominant conduct, we have to distinguish in our law two types of situations. First, when we evaluate relative monopolistic practices, we basically make a difference between what we should consider as specific conduct of a single firm which is dominant in a specific market and this second one, which is regulation.

For the first one, for conduct, basically what our laws says is that the relative monopolistic practices are those acts or agreements or combinations whose object or effect is to unduly exclude, substantially impede access, or establish exclusive advantages in favor of one or more persons, and this is subject, of course, to the rule of reason, and those are

the articles in our law which are used to address these issues.

Now, in terms of regulation, this is a completely different situation, where you could have a declaration on effective competition conditions, which in this case the Commission, the Competition Commission of Mexico, is empowered to resolve on the existence of effective competition conditions as a prerequisite for economic regulation, and this could be done either by a sectorial regulator or by the Ministry of the Economy.

The way this analysis is made in our law is just the following. The first step is to find out if the practice exists, and we have those practices typified in 11 specific practices. We think that this typification basically provides a legal certainty to the companies, because they know exactly in which cases those practices could be sanctioned or not as long as the other conditions, of course, apply.

We have to demonstrate the object or effect of that practice. It is clear that the size of the firm does not demonstrate a harm necessarily. We also have to apply the rule of reason. The agent has to have a substantial market power in the relevant market, and it is clear that competitor injury does not demonstrate a violation. And finally, efficiencies. Efficiencies

must show that the conduct has a favorable effect on competition or that those anticompetitive effects are offset by consumer benefits.

So, in the end, what is important is to look at the net effect on welfare, and as Philip was saying, in this case, the burden of proof is on the side of the company. So, basically the agency would use the information and the arguments that the company is giving in order to evaluate those efficiencies.

Now, in terms of those specific practices, as I was saying, in our law, we have identified and typified 11 specific practices, which some of them are oriented to single-firm dominant conduct, and some others are other anticompetitive practices which are, of course, as well subject to the rule of reason.

For the second type of practices, which are other anticompetitive practices, we could include or we include vertical market division by reason of geography or time; vertical price restrictions; exclusionary group boycotts; and discrimination in price, sales or purchasing conditions. For single-firm dominant conduct, we have identified tied sales, exclusive dealing, refusals -- refusals to sale, predation, loyalty discounts, cross subsidization, and raising rivals' costs.

Of course, we have different cases that have applied to each of these practices. For instance, in the case of exclusive dealings, maybe the most important case was the case of Coca-Cola, where we boast the highest fine in the history of the Mexican Commission. That was the case between Pepsi against Coca-Cola.

For the case of tied sales, maybe the case that comes to my mind, was some ports in Mexico. They were offering piloting services, and it happens that those pilots in some of those ports also owned the boats.

said that because that was not typified in the law, it was not possible to apply it. So, that was basically their decision in terms of unconstitutionality of that particular article. That was changed. That was changed precisely in the reform that was just recently passed.

Actually, those cases, those five particular practices, were the ones that originally were in our rulings, and they were moved to the law in the recent approval of the reform.

For the efficiency considerations, I would like just to raise this in the case of WalMart in a recent investigation in the Mexican Commission. The claim was in this case that WalMart was pressuring its suppliers to charge higher prices to its competitors under the threat of suspending purchases of their products. Maybe you have had a similar situation in the U.S. I'm not really sure, but that could have been the case.

Efficiencies were the main arguments, and they were offered by WalMart. They argued that lower prices from suppliers resulted from cost reductions in its distribution systems, better inventory management, shorter average payment periods, et cetera, and those efficiencies were translated into the lower prices for consumers. So, that was the consideration, that the weight of those arguments outweighed the possible

anticompetitive impact of that behavior, and the Commission basically decided that the efficiency gains, the net efficiency gains, were positive in this case, and we closed that case.

So, let me briefly just end by speaking a little bit about the sectorial cases, not the conduct of single firm which has a dominant position in the market, but the case when Mexico's competition law allows for price regulation when this is warranted by competition analysis, and this is important because this would apply for most regulated sectors or for some unregulated sectors when you have a situation of a lack of competition in that particular market.

For the regulated sector, this is a much clear-cut situation. You could have, in the case of telecommunications, railroads or airports, a lack of or the absence of competition conditions and then the need to regulate prices in very specific cases.

In the second situation, which is when the Executive has -- the Executive in Mexico has actually the constitutional attribution to issue price controls, and actually, the Mexican economy used to be, a few years ago, a highly regulated economy. Most of the prices were controlled during some time.

With the entrance into force of Mexico's

competition law in 1993, there was a specific regulation on that. So, there was a specific restriction on that attribution that could only apply when the Federal Competition Commission could issue what we call a Declaration of Lack of Competition Conditions, and only in those conditions, prices would be regulated, and the procedure to make this Declaration of Absence of Competition Conditions was made in the recent reform of the Mexican law.

One example of the first case, which is the one in which this could apply for a regulated sector, was the case of Telmex, when in 1997, the Commission initiated an official procedure to determine if Telmex, which is what we consider the dominant telephone company in Mexico, had precisely a dominant position. We divided the markets in to five markets, and we basically considered that Telmex had substantial market power in those five telephone markets, like local telephone service, national long distance service, international long distance service, access to interconnection to local networks, and interurban transport.

Basically, there was an amparo, which is an appeal by the company, and we have this case -- just imagine, this case was started in 1997. We are in 2006, and this case is still in the courts and has not been

solved. So, actually, from a legal point of view, I cannot speak about dominance on Telmex, but they do have 95 percent of the leased lines in Mexico. I'm just finished. Actually, I'm just finished. So, just in time.

So, thank you very much for this invitation. It's a real honor for me to be here today, and I hope we will have a good session, some questions and I hope answers as well. Thank you very much.

(Applause.)

MR. TRITELL: Thank you very much, Eduardo, and congratulations on your success in the reform of Mexico's competition law.

We will now move to the north, and I am very pleased to introduce Canada's Commissioner of Competition, Sheridan Scott. Sheridan is responsible for the administration and enforcement of Canada's Competition Act as well as consumer protection statutes. Before joining the Competition Bureau, she was Chief Regulatory Officer of Bell Canada, Vice President of Planning and Regulatory Affairs for the Canadian Broadcasting Corporation, and Senior Legal Counsel at the Canadian Radio Television and Telecommunications Commission. She has also taught law at the University of Ottawa and Carlton university.

Sheridan?

MS. SCOTT: Thank you very much, Randy, and I would like to join my colleagues in saying what an honor and a privilege it is to be here today and how thankful I am for the invitation from the DOJ and the FTC to be able to talk to you this morning a bit about Canada's competition law.

As Randy mentioned, as Commissioner of Competition, I am responsible for the administration and enforcement of the Competition Act. Under our legislation, the single-firm anticompetitive behavior is captured by the abuse of dominance provisions found in Sections 78 and 79 of our legislation.

This morning, I'd like to outline the Competition Bureau's approach to enforcing the abuse of dominance provisions and the necessary elements for a successful application under the Act. I'd also like to discuss the most recent abuse case that went before the Competition Tribunal, and finally, touch upon some of the challenges that we face in trying to enforce Section 79.

Most of the points that I'll be making this morning can actually be found in our Abuse of Dominance Guidelines -- found on our web site -- that are instructions for the business community to understand

the approach that we take to enforcing the legislation.

Now, since 1986, abuse of dominant position has been a reviewable matter under the Competition Act. What that means is it is a matter that is not inherently bad but subject to review by our Competition Tribunal, a specialized court that is composed of judges as well as laypersons with a background in accounting, business and economics. They determine whether, on balance, anticompetitive conduct has substantially lessened or prevented competition or is likely to do so.

It's only once a firm becomes dominant in its relevant market that the firm's behavior is open to examination under Section 79. The Act outlines a test with three essential elements, all of which must be met in order to conclude that an abuse of dominant position has occurred.

Firstly, the Bureau must demonstrate to the Tribunal that one or more persons substantially or completely control throughout Canada or a part of it a class or species of business. In other words, you must demonstrate that a company is dominant in its market. Now, our analysis begins, not surprisingly, with a

Bureau will consider factors such as the evidence of foreign competition, imports, and transportation costs.

Once the product and geographic market have been defined, the law requires a determination of market power. This requirement is fundamental to a success under an application under Section 79. The Tribunal has clarified that high market share together with barriers to entry will typically be sufficient to support a finding of market power. A prima facie conclusion of market power may be made on the basis of high market share alone, but factors such as barriers to entry, excess capacity, and countervailing powers also normally bear in the Bureau's assessment.

To date, the cases brought before the Tribunal have all included respondents which possessed very high market shares; indeed, in excess of 80 percent in all examples. In the Abuse Guidelines, the Bureau states that a market share of less than 35 percent will normally not give rise to concerns of market power, while the Tribunal has indicated that a market share of less than 50 percent cannot be considered a prima facie indication of market power. Whether a firm with market share falling below 50 percent would be found to exhibit market power remains to be tested before our Tribunal.

The second element the Bureau must make out is

that the dominant person or persons have engaged in or

there be significantly greater competition? This test has recently been endorsed by our Federal Court of Appeal in the Canada Pipe case, to which I will return shortly.

Under this standard, the question is not simply whether the relevant market would be competitive in the absence of the impugned practice, nor whether the level of competitiveness observed in the presence of the impugned practice is acceptable; rather, the question is whether, absent the anticompetitive acts, the market would be characterized by materially lower prices, greater choice, or better service.

Requiring a linkage between an act and an anticompetitive effect also requires that the Bureau consider all potential reasons for the maintenance or enhancement of market power and isolate the effects of the anticompetitive act in question. Thus, Section 79(4) of the legislation compels the Tribunal to consider, for example, whether the practice is a result of superior competitive performance. This is not the same as an efficiencies defense which exists in our law with respect to merger review. The Bureau, as stated in the Abuse Guidelines, takes the position that superior competitive performance is only one factor to be assessed in determining the cause of the substantial

lessening of competition. It is not a justifiable goal for engaging in an anticompetitive act.

I'd now like to say a few words about the remedies that exist under Canadian law where an abuse of dominance has occurred. Before litigating an abuse of dominance case, of course, the Bureau will often approach the dominant firm whose conduct is being investigated and see whether we can obtain a voluntary change of behavior to address our concerns. Where possible, alternate case resolution is pursued rather than litigation.

However, once we're pursuing litigation and the Tribunal has found that an abuse of dominance has occurred, it may make an order prohibiting the respondent from further engaging in the impugned practice. It may also direct any respondent to the abuse application to undertake any action, including the divestiture of assets or shares, as are reasonably

the OECD, that a lack of financial consequences for a dominant firms found to have abused their position is a significant shortcoming in our legislation. This shortcoming is all the more acute in light of the fact that only the Commissioner is able to apply to the Competition Tribunal under Section 79, and civil damages for injured parties are not available through the ordinary court process for abuse of dominance.

There is limited case law on Section 79 since only five contested cases have gone before the Tribunal since 1986 when these provisions were introduced. Our latest contested case, the Canada Pipe case, brought some important clarifications and developments with respect to the tests for abuse of dominance, and it is the only decision that has been taken at the Federal

significant point-of-purchase reductions in return for stocking exclusively the cast-iron DWV products that are supplied by Canada Pipe. Except for losing the yearly and quarterly rebates, there are no penalties attached to opting out of the SDP.

It was alleged that the SDP program enhanced and preserved to a significant extent Canada Pipe's market power in three relevant product markets. The Tribunal found that Canada Pipe was, indeed, dominant in those product markets. It also found that the SDP, though a practice, was not anticompetitive, and regardless, did not substantially lessen or reduce competition. Consequently, the Competition Tribunal dismissed our application under Section 79.

The Tribunal's decision was appealed to the Federal Court of Appeal, and in June, the Commissioner's appeal was allowed and the case was remanded back to the Competition Tribunal for further consideration. Canada Pipe has until September 22nd to decide whether or not it will appeal the Federal Court of Appeal decision.

Now, as previously indicated, Section 79 sets out three distinct elements that must be shown to exist before a finding of abuse of dominant position can be made. The Federal Court of Appeal clarified that the applicable test under the multi-element structure of

Section 79 consists of three discrete subtests, each corresponding to a different requisite element. The most significant statements by the Federal Court of Appeal relate to the second and the third elements. I am going to go back over the ones I have just described to you and explain to you how Canada Pipe fit into that framework.

With respect to the second element, as previously indicated, to be considered anticompetitive, an act must have a predatory, exclusionary or disciplinary negative purpose vis-a-vis a competitor. As such, the inquiry under this part of the test focuses upon the intended effects of the act against the competitor, not the effects of those acts on the state of competition in the marketplace or the general causes thereof. As a result, some types of effects on competition in the market might be irrelevant for the purpose of this subtest if these effects do not manifest through a negative effect on a competitor, or a negative purpose, sometimes assessed through looking at the effects.

The Federal Court of Appeal noted that the proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent or indirectly by reference

to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission. It concluded that even though evidence of subjective intent is neither required nor determinative, intention remains an important ingredient of the second element of the test under Section 79.

In particular, intention is relevant in the sense that while a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its act, a respondent might nevertheless be able to establish that such consequences could not in the context of a second element of the test be considered the purpose or overall character of the acts in question.

So, in appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or perceived ill-effects of the conduct by showing that such anticompetitive effects are not, in fact, the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in this case, a business justification must be a credible efficiency or procompetitive rationale for the conduct in general

attributable to the respondent which relates to and counterbalances the anticompetitive effects or subjective intents of the acts.

The Court clarified that the second element relates to whether the impugned act exhibits the requisite anticompetitive purpose vis-a-vis competitors, while the third element concerns the broader state of competition and whether the practice has the effect of substantially lessening or preventing competition in the market. The Court, on appeal, further clarified that the but for test must be applied by the Tribunal in assessing the impact of a practice of anticompetitive acts on competition in the relevant market.

The Federal Court of Appeal judgment clarified that the third element of the test is not whether the markets would or did attain a certain level of competitiveness in the absence of the impugned practice or whether the level of competitiveness observed in the presence of the impugned conduct was high enough or otherwise acceptable. These are absolute evaluations, while the statutory language of the effect of preventing or lessening clearly demonstrates a relative and comparative assessment. The Tribunal must therefore compare the level of competitiveness in the presence of the impugned practice with that which would exist in the

absence of the practice and then determine whether preventing or lessening of competition, if any, is substantial, and this comparison must be done with respect to actual effects in the past, in the present, as well as likely future effects.

In the few minutes remaining, I'd like to touch on just some of the challenges that the Bureau has experienced with respect to the abuse of dominant position. Some of these issues were recently clarified by our Federal Court of Appeal, and others remain to be clarified, notably, joint dominance, the threshold for dominance, essential facilities, and the regulated conduct defense, RCD we'll call it.

Now, Section 79 contemplates the possibility that one or more persons may be dominant in a market; however, there have not been any contested cases involving joint dominance. The Bureau takes the position in cases of potential joint dominance that a combined market share of equal to or exceeding 60 percent would generally prompt further investigation. In order for the Bureau to conclude that there has been potential joint abuse of dominance, there must be evidence to show coordinated behavior, albeit short of conspiracy, covered by our criminal cartel provisions.

The Bureau will consider the following

questions. Is there evidence that the alleged coordinated behavior is intended to exclude, discipline or predate a competitor? Is there evidence of barriers to entry into the group or barriers to entrance into the relevant markets? Is there evidence that members of the

immunity and state action doctrine. What happens when the conduct that contravenes the Competition Act is, or more importantly, could be regulated by another federal provincial or municipal legislative regime?

Regardless of whether the RCD or some other doctrine or defense immunizes the impugned conduct from a provision of the Act, the Bureau will always consider the regulatory context in which the conduct is engaged where it is relevant to the application of the provision of the act in question. We are currently in the process of looking at telecommunications reform in Canada, and one of the big issues has been when does the conduct, leave the hands of the section-specific regulator and when does it become the domain of the general competition authority?

Our jurisprudence is minimal on the application of the RCD for reviewable matters, such as the abuse of dominant position. However, the Bureau will not refrain from pursuing regulated conduct under the reviewable matters provision, such as abuse of dominance, simply because provincial law may be interpreted as authorizing the conduct or as more specific than the act given that the Bureau's mandate is to enforce the law as directed by Parliament, not a provincial legislature or its delegate.

Now, as mentioned, the Federal Court of Appeal provided some much needed clarification on Section 79, but there remain a number of frontiers left to be explored. We will be continually seeking out cases which test the boundaries of Section 79. That is one of our priorities at the Bureau for this year, actively seeking out these cases, particularly if we think the case will provide valuable jurisprudence and a degree of clarity to the business community as to the circumstances in which the legislation would not be respected.

The Competition Act, with its foundation in modern economics, I believe has served as well since 1986 and serves as an appropriate framework for us to continue to explore these issues in the future.

Thank you very much.

(Applause.)

MR. TRITELL: Thank you, Sheridan, and thank you to all our speakers. This is exactly the type of input we were looking for to help inform our hearing process. We will be continuing with a discussion period after a short break. I'd like to thank all the speakers for observing the time limitations, and I would ask you to all do the same by returning to this room in ten minutes, so let's start making your way back about

11:20. Thanks.

(A brief recess was taken.)

MR. TRITELL: We are going to resume now, thank you.

We are going to have our discussion period, and we're going to begin by asking each of the panelists if they'd like to spend a couple of minutes reacting to any of the presentations that they've heard this morning.

So, we'll start with Philip Lowe, if you would like to offer any observations.

MR. LOWE: The ansk

other aspects of law, and you can see in the German Section 2, the distinction between the German cartel legislation and the German unfair trade practices legislation, and I think this distinction in U.S., German and European traditions reflects -- indeed, we hope confirms -- the orientation towards protecting the competitive process with the ultimate objective of enhancing consumer welfare.

Now, the second aspect of scope is, of course, what several of my colleagues have referred to, which is to what extent in recently liberalized sectors, public utilities, the presumption has been made that because of the significant market power of the privatized corporations, it is impossible to rely on ex post intervention in order to achieve a successful control of the conduct of firms concerned, and even outside liberalized sectors in non-U.S. jurisdictions, even in the U.S., the power of the regulators also touches on the issue of -- implicitly, at least -- of the significant market power of those in network industries.

So, I think in all our jurisdictions, we share a category of potential anticompetitive practice which we decide needs to be dealt with by regulation, and it's characterized in the European jurisdiction, telecom's regulations, where we explicitly recognize competition

principles but particularly the issue of significant market power, and we allow national regulators to impose remedies if they can prove significant market power.

Now, this is relevant in particular to what Sheridan's just said about the way in which there is an interface between ex ante action and ex post action, and in that sense we have in process, too, a review at the moment as to whether there are categories of the telecom's industry, for example, which can now no longer be subject to ex ante regulation, and we do that, in principle, by focusing on a list of markets where we think there is still a potential problem and where price control or price regulation and access regulation is required up front.

So, the discussion on Section 2 and in our discussion paper of Article 82 does not focus on these unfair trade practices, nor does it focus on these categories of sectors where we've decided ex ante regulation is necessary.

Now, in the area of abuse of a dominant position, there has been some discussion among our economists in Europe and elsewhere Srgef0 0.71 .57our tstex0 0e1

defining dominance and defining significant market power? I know that some people in this room, including eminent members of the two agencies, have written on this subject, and thankfully, I am comforted that by their views, which are our views, that as agencies, we need to focus our activity on areas where there is likely to be the most competitive harm and where consumer welfare is paramount ultimately, and the screening through the test of dominance is essential for us to proceed.

Having said that, one of the things which struck me in listening to my colleagues, too, is that we've concentrated very much on the issue of liability, what are the conditions for confirming the existence of abusive behavior of a dominant firm, and we have gone on less but, you know, at least two of my colleagues have referred to it as the issue of what the appropriate remedies are to any problem.

Now, we have had, in the last five years, maybe ten important cases under Article 82, and I do not need to remind you of all of them, but under the heading of predatory pricing, there's the very celebrated case in Europe against the German Postal Service for abusive pricing on mail parcel services, concentrating on issues of whether the incremental costs were really covered,

and Warner, too, which was about margin squeeze, was effectively about pricing below average variable costs, where effectively, too, we looked at the issue of recoupment, although we say we do not, and Virgin BA, which is still in front of the Board of Justice, Mission 2, related to rebates, and trying to control the distinction between what is an abusive rebate due to quantity or loyalty or what is aggressively competitive.

We have the cases of what is described as Brandenburg Foods, which is otherwise known as Unilever, and about whether the tying of a supplier to small outlets for impulse ice cream -- impulse ice cream is ice cream which you immediately eat, or at least spit out -- but there was an exclusivity provision on use of freezers and a ban on purchase of other ice creams by the shops. When we attacked that, then the rule changed to no other ice cream can be put in the freezers, but eventually, we won that case.

In Coca-Cola, which Eduardo referred to -- and

supplier of reverse vending machines, in which you put empty bottles into. It may sound trivial, but it's a very, very important industry, and they had individual rebates and bonus systems which we condemned as anticompetitive.

MR. TRITELL: Philip, I want to give the others a chance, but I think we will have a chance to come back to a lot of these points in the discussion period. Thanks very much.

MR. LOWE: Sorry, I just wanted to mention some of these cases.

MR. TRITELL: I was glad to hear about the impulse ice cream case.

We are going to turn to a couple of the panelists, and I forgot to say, we have been asked by our court reporter to speak right into the microphone.

Mr. Nakajima, would you like to make any comments?

MR. NAKAJIMA: Let me make my comment very brief. Since Mr. Lowe kindly referred to the Japanese unfair trade practices, I feel that I need to respond to his comments on this.

First of all, as I said, unfair trade practices has multiple functions; not only it tends to prevent private monopolization at the early stage, but also it

is tasked with protection of SMEs and consumers functions.

Second of all, this is my personal view. Whenever we compare Japanese law with Sherman Act of United States or Article 81, 82 of EU, I feel that it is not so fair, because in the case of United States, there are 50 states. The 50 states or most of the states have maybe their own competition laws, and in the case of EU, of course, 25 countries -- I don't know how many of them, but most of them, I suppose --

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draft guidelines which will be issued I heard within this year. In this respect, let me take up one specific issue of concern I have. As Mr. Lowe mentioned, discussion paper emphasized more focus on effects-based approach, but we concerned that such focus on effects-based approach rather than a form-based approach may undermine or compromise predictability or transparency or certainty in the application of Article 82.

So, again, we are looking forward to seeing how the guideline will address such issue of potential conflict or trade-off between risk-based approach on the one hand and enhanced predictability or quality on the other hand, though. Mr. Lowe already touched upon some ways of reaching a possible solution on this issue by referring to creating a safe harbor based upon the economic analysis.

Thank you very much.

MR. TRITELL: Thank you.

Eduardo?

MR. PEREZ MOTTA: Thank you.

Just briefly, Randy, I'd like to take two points that were starting to be discussed by Philip. One has to do with the case of regulation. By the Mexican law, in regulated sectors, we basically have an ex post

application of the instrument. So, actually, before you regulate prices, you have to ask yourself if there is a lack of competition conditions in that particular market.

For instance, in airports, you have to first -- but exactly, you should not say anything unless you find that that particular airport, for instance, doesn't have enough competition from other airports which are relatively close. So, you have to make the analysis if there is a lack of competition. If there are no conditions of competition in that particular situation, then you have to make a declaration on the lack of competition conditions, and then the regulator will have the ability in that particular case to regulate those prices. So, that's -- we produce more of an ex post type of analysis in those cases.

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were not so interested in closing the case, and I guess the incentives were just not there to try to stop the litigation and it was impossible. So, we had to impose the sanction.

As I said, it was the strongest sanction we have ever imposed, because there were cases for each and every bottler. So, the accumulation of the sanction was relatively high.

But besides that, I would have to say that the case became very public in Mexico because one of the correspondents, I think it was from Associated Press, he just discovered that there was this small grocery store, the one that started the case against Coca-Cola, which is something I even didn't know myself, because I got the case a little bit late. I just went into the office two years ago, and this case had been gong on for about five years already, so once this cable went around, the public opinion and the public impact on Coca-Cola in this particular case, because of the situation that the sanctions were basically -- I mean, that the original case started with this sort of -- this kind of case, it just went around, around the world. The kind -- the declarations of these -- the owner of this small grocery store, because the exclusive dealings of Coca-Cola and so on.

So, my impression in the end is that the cost for Coca-Cola, from the public exposure of this case, was much higher than the sanction that we imposed. Even if they had paid the sanction and forget about the situation, it would have been cheaper than what they paid finally in terms of legal costs and so on.

MR. TRITELL: Thank you, Eduardo.

Sheridan, any reactions?

MS. SCOTT: Just two quick comments.

One, just following up on Philip and Eduardo's comments on regulation and how we see handling companies that have been formed into monopolies or whatever and the progression towards proper alignment for the sector-specific regulator and the competition authority. As I've understood Philip and Eduardo to address this, one should first of all apply competition tests to determine whether there should be deregulation.

One of the issues we have is whether the sector-specific regulator will actually apply the same sorts of tests of SMP that we would as competition authorities, and part of our job in Canada is using our advocacy ability to speak to the regulator to persuade them that they should be applying proper competition tests, because we will then be reassured that if they deregulate only where there's an observance of market

power, we will then be in a position to rely on the general Competition Act on an ex post basis and not worry about whether we will require ex ante regulation due to the continuing market power.

So, that remains important to us, not to have sector-specific provisions in our Competition Act to try to assist the sector-specific regulator in taking competition principles into account. One of the things we're working are on telecom-specific guidelines that will be using examples from the telecom sector but with a law of general application, which is what the Competition Act is. So, we feel that's part of our responsibility as a competition authority, to have guidelines generally about abuse, and then to 0.0000 0.0000 cm0

clarity to the business community through enforcement guidelines.

MR. TRITELL: Thanks.

We are going to move into our question period. We would like to allow a little time for discussion, so if you will bear with us, we may run over until 10 or 15 past 12:00, and I would like to turn to Jerry Masoudi to begin our questions.

MR. MASOUDI: Thanks.

I would like to ask a question about remedies, and Sheridan, you went into that issue in some detail, stating that injunctive remedies are available on the public side, no monetary remedies and no private enforcement, and then, Mr. Nakajima, you suggested that there were criminal penalties available in Japan, but they have not been implemented in the past, and Philip, you discussed the issue of remedies somewhat.

I wonder if we could at least start with Eduardo and Mr. Nakajima to talk about both private and public enforcement, the remedies that are available to either private parties or to enforcers, and then allow Sheridan and Philip to add anything further that they would like to say on the matter.

MR. PEREZ MOTTA: Well, in the Mexican case, the Federal Commission of Competition has both regulatory

and adjudicative powers, and they are concentrated just in the Commission. There is no direct private right of action, and that is, the private party harmed by anticompetitive conduct that violates the law cannot really file their case directly with a court of the judicial system. They must bring their complaint before the Commission, and only after the Commission resolves in their favor, they may claim a damage before a court. So, that's how we work.

MR. NAKAJIMA: Yes, in Japan, compared to the United States, private enforcement of competition law has not been so active; however, recently, more and more damage actions have been brought, particularly by local governments regarding bid-rigging cartels, reflecting a growing concern by the local public on the damage caused by such cartels and most of those actions are formal actions of the JFTC's dispositions.

Regarding private monopolization cases, the number of the private action is quite limited; however, in the case of Hakodate Shimbun, which I just discussed in my presentation, Hakodate Shimbun actually brought this action before the Tokyo High Court ruled against Hokkaido Shimbun for damages caused by Hokkaido Shimbun's unlawful act. The case is still continuing.

Also, in addition to such damage action, on

occasion of recent amendment of the Act, the Dict requested the government to expedite the consideration of possible introduction of so-called collective action, particularly for injunction of unfair trade practices.

Now, we are seeking the views of legal experts and making research on such systems in other jurisdictions. We plan to come up with a conclusion on this issue by the end of the next year, that is, by the end of 2007.

That's all. Thank you.

MR. MASOUDI: Philip, I don't know, or Sheridan, if you have anything further to add on the issue of remedies.

MS. SCOTT: I guess one of the issues we discuss sometimes is the value of having a specialized court that determines these matters, where you would have

MR. LOWE: Just to make one distinction, once we

By the way, if a remedy cannot be identified as effective, then that, in itself, could cause an agency to bring a case to an end.

discuss how typification can provide legal certainty, and, of course, there are two kinds of typification that one can imagine, the first being to say that certain

paragraph, it had a broad definition. So, it said something like "some other practices that could be found by the Commission," and those were specified in the rulings. So, the Court said, nope, that's not possible. By the Constitution, you have to have each particular practice very well defined in the law.

So, partly I think this is just because of clarity, legal certainty for economic operators. Another is just because our legal system obliges us to do it that way, but, of course, there is always a problem that one has at least to put up with, which is the fact that there is an evolution of economic operators, and there is always a creativity going on, and there are, of course, new practices that could be created over time, and that's the challenge that you have as a regulator, which is how to deal with new circumstances, with new ideas, with talented business people who create some other mechanisms to displace competitors and that create an economic cost in the society.

MR. MASOUDI: Thank you.

Mr. Nakajima?

MR. NAKAJIMA: Thank you.

As I already mentioned, JFTC has designated several types of practices as unfair trade practices,

nevertheless, the level at which it is -- it could be appraised could lead us to some control of specific indicators and parameters which could be given as a guideline to the business and legal community as to if these parameters can be checked, then there would be a presumption that there would be no problem.

And then as a third area, where we would certainly have to investigate thoroughly, and, of course, I have omitted also the black, per se, rule possibility, which could exist, because we've got to look at the combination of degrees of market power and the abuse concerned, but there could in certain categories be some types of abuse with a certain degree of market power which we could say from the start would be unacceptable, and the bright light of Areeda-Turner and the AKZO (ph) rules in our jurisdiction is an indication of how we can do that in predation.

We have tended in our discussion paper to leave things slightly too open in our view and just to reserve on the possibility of the need to intervene. I don't think we need to be quite so prudent in our final drafting of guidelines.

MR. TRITELL: Thanks.

I'll ask two concluding questions and get brief reactions, the first on defenses, in particular

efficiencies, which several of you have touched on in your presentations. Maybe we can go a little bit deeper into how you analyze efficiencies and when they come into the analysis; in particular, whether you regard the analysis of efficiencies as integrated into the examination of whether there has been an abuse or whether, having found an abuse, efficiencies come in as a defense, and if so, by what standards you determine whether the efficiencies are sufficient to overcome what would otherwise be a finding of abuse.

I'll invite anyone who would like to make any comments on that point.

Sheridan?

MS. SCOTT: Sure, I'm happy to start on that. This is actually part of any decision that we found particularly valuable.

As I was explaining, there are three elements to our test. There is first a dominance element. The second element -- and one should see these as sort of screens, I guess, running through the assessment of Section 79. The second one is looking at the purpose of the Act, and I was mentioning in my remarks that we look at whether the purpose has an exclusionary, disciplinary or predatory effect or impact vis-a-vis competitors. There is always a worry, we shouldn't be looking at

competitors, and certainly at the Bureau, we are looking at lessening competition but that's the third element of our test.

The second element is the screen we put out looking at whether the purpose is vis-a-vis a competitor, and what the Court does, it looks at the overall purpose of the act to decide whether the purpose is exclusionary, disciplinary or predatory, and then it will look at subjective intent, which is hard to find. It then looks at the effects on the competitor, because one is assumed to intend the consequences of one's act, and if we find that the person has an exclusionary, predatory or disciplinary purpose against a competitor, in effect, that's when efficiencies come into play.

So, the defendant can say, no, no, the purpose of the act was not exclusionary, disciplinary or predatory; the purpose of the act was procompetitive or the rationale is a greater efficiency. So, it comes in at this second element, and it can then be used to defeat that second element of the three-part test that we have. So, it goes to the purpose of the act.

I think this is sort of along the same wavelength as the no economic sense test that one sometimes sees. You're trying to get at the same sort of matters. Why did this act take place? Does it have

any economic sense? Well, we sort of look at it saying, well, if it has an exclusionary, disciplinary or predatory purpose, that's suggesting to us that it didn't have an economic purpose, but then the company in question is allowed to come back to explain -- no, it did make economic sense because we had some efficiency reasons or some procompetitive reasons for carrying out this conduct.

MR. PEREZ MOTTA: Well, in our case, efficiencies analysis were part of the reform that was just made recently, and it comes in two ways. First, that the conduct positively influenced the process of competition and free market access, that's the first analysis that you have to make, and second, that the benefits for consumers, to consumers, outweigh the anticompetitive effects which could arise from these practices. So, that's how, in our law, the analysis of efficiencies is approached.

Of course, the details of all of this will have to come in the rulings which we are in the process of developing. So, we have the reforms of the law. We will need to change the rulings, and the case for that will have to take place in those rulings.

MR. NAKAJIMA: In our country for private monopolies or unfair trade practice, it is essential to

determine whether specific conduct has substantially restricted competition in the market or attempted to impede fair competition in the market. As such, in our nation, in the case of private monopolization or unfair trade practices, an efficiency is not something which we directly evaluate.

However, of course, in considering relevant factors comprehensively, we need to pay due attention to the issue of whether concerned conduct is actually a legitimate or normal business behavior, business activities, though I would say in our nation, efficiency is not so much paid attention so far in our cases.

Thank you.

MR. LOWE: I've referred initially to the need for a test of dominance as a prima facie -- at least a screen for a subsequent in-depth analysis of alleged abuse, and I say this perhaps more personally than my agency for the moment, because we haven't written the final version of our guidelines. We would regard the assessment, in-depth assessment of an alleged abuse of a dominant firm and its possible objective justification of efficiencies, as an integrated one but not necessarily one which has a specific chronology. It nevertheless is an iterative process.

It starts off with the plaintiff and/or the

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from the private sector. So, at this point I would just ask you to join Jerry and me in expressing our appreciation to our excellent panel this morning.

(Applause.)

(Whereupon, at 12:14 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(1:30 p.m.)

MR. TRITELL: Thank you for assembling back promptly at 1:30 as we begin the second session of our hearings today. I apologize to those who have already endured these announcements this morning, but I am compelled to repeat them, so here we go.

Again, I am Randy Tritell, the Assistant Director for International Antitrust at the Federal Trade Commission, and I will be moderating this session along with Jerry Masoudi, the Deputy Assistant Attorney General from the Department of Justice, which is co-sponsoring these hearings with the FTC.

For our housekeeping matters, I ask everybody again to turn off cell phones, Blackberries, and other devices. The restrooms may be found outside of the double doors across the lobby. If you hear alarms, proceed calmly to the lobby, follow the FTC employees to their gathering point, and wait for further instructions.

This afternoon will consist of presentations by our panelists and interchange with the moderators, but we will not be able to provide an opportunity for any audience interchange at this session.

I want to reiterate the thanks of this morning

to all the FTC and DOJ staff who worked hard to organize this hearing.

This afternoon, we are very honored to have a distinguished panel of practitioners and academics. They are going to provide their perspectives on how multinational companies deal with diverse antitrust regimes around the world, especially as they relate to the application of antitrust laws to single-firm conduct and abuses of dominance.

We have with us George Addy, Margaret Bloom, Phil Lugard, and Jim Rill, who Jerry will introduce at greater length, and I also direct your attention to the packet of biographical materials that are outside the room.

This is the fourth in the series of ongoing hearings by the agencies, looking at single-firm

return from the break, we will invite the panelists to react to both what they've heard this morning from the government session and to each other's presentations, followed by a discussion that Jerry and I will co-moderate, and we're scheduled to wind up at about 4:00.

So, with that, let me turn the podium over to Jerry Masoudi.

MR. MASOUDI: Our first speaker today will be George Addy. George heads the Competition and International Trade Group at Davies Ward Phillips & Vineberg, LLP in Toronto. Before joining the firm, Mr. Addy was head of the Mergers Branch of Canada's Competition Bureau from 1989 to 1993 and was appointed by the Canadian Cabinet to head the Competition Bureau in 1993. He's a director of the Canadian Chamber of Commerce and chairs its Policy Committee. He's also a Vice-Chairman and Member of the Executive Board of Business and Industry Advisory Committee to the OECD, otherwise known as BIAC.

Mr. Addy?

MR. ADDY: Thank you.

Thank you, Jerry. It's indeed an honor for me to be here today, and it's also an honor to share the spotlight with such a distinguished panel, so thank you.

I would just add that I am going to try to bring to my comments a perspective not only from my public sector experience but private sector experience and business experience. Hopefully my comments will either inform the debate or at the very least be provocative.

At the outset, it's important for us to recall the role of antitrust or competition agencies and their related institutions, and I roll into "related agencies" that the courts and tribunals and so on, are to play, and I think Chairman Majoras on the first day put it well. She said the FTC and Antitrust Division have the responsibility to "ensure that competition in U.S. markets is free of distortion and that consumers are protected not from markets but through markets unburdened by anticompetitive conduct and government-imposed restrictions," and that last bit is something I'll come back to. I would include within "government-imposed restrictions" overly aggressive enforcement in this area of the law, and I'll tell you a bit more about that in a moment. But that type of characterization of what the roles of the institutions are applies equally to Canada, and frankly, I expect in other jurisdictions.

The issue we're dealing with is obviously a serious one. We wouldn't be having these hearings if it

wasn't. We live in a world and era characterized by globalized markets and increasing concentration levels

obviously problematic, most are not. The practice or behavior that we are trying to target is conduct which lies in the gray zone between acceptable and unacceptable. The cases outside the zone, frankly, everybody can spot them. What we're dealing with here is this gray zone, and I think when you compare these provisions to other provisions of the competition laws, be they conspiracy provisions or even merger provisions, there's a lot more gray in the spectrum when you're dealing with potentially abusive behavior than there is in some of the these other areas.

That grayness was recognized by our Canadian Parliament in 1986 when they decriminalized the provision and converted it into what we call a reviewable practice, and Sheridan Scott took you through some of that background this morning. There is no presumption in our law, rebuttable or otherwise, that any particular conduct is unlawful. Market behavior is subject to study by the Commissioner, and if the Commissioner has a problem with the behavior, the behavior is then brought before an administrative tribunal for an adjudication in an adversarial, litigious process, and that tribunal in Canada is a mixture of lay and judicial members.

The choice of the Tribunal being structured that

way in Canada was not accidental; it was deliberate. Given the nature of the conduct subject to challenge under the Act, Parliament thought it wise to have the adjudication benefit not only from judicial members bringing the legal expertise to the table, but also the business people who would be perhaps closer to the world of business and business decision-making.

As a side observation, one of the criticisms I would bring to the way the model has worked to date is we haven't heard enough from the lay members of the Tribunal. It tends to be a very, very judicialized process, perhaps overly so.

The second comment I would make is that there is going to be a tension or a battle between a desire for predictability and the need for some flexibility or uncertainty. It will, indeed, be difficult to reconcile the desire of many participants, and among those are included counsel, business people, even competition agencies, to have clear and detailed rules that provide predictability of treatment of behavior under antitrust scrutiny with the need for some flexibility on the part of the agencies and creative competition and freedom and a healthy measure of uncertainty in the marketplace.

Trying to develop general principles to guide agencies and businesses faced with this behavior with a

environment we shouldn't lose sight of the fact that understanding business behavior is a lot more than just doing arithmetic, and whatever screening device you use, cost measure or otherwise, you have to be very, very sensitive to the broader needs of the analysis, and one of those issues obviously is intent.

There's also, as I mentioned, a lot of merit in providing guidance through guidelines or elaborating on general principles, just as the competition regimes of the world have proliferated, and that has driven an increase in the need for guidance across the sector, the business communities, counsel, et cetera, on what the law is meant to do.

It's also provided a lot of learning to people on potential strategic uses of competition law, and to the extent that guidelines or safe harbors can be developed, I think it would serve a dual purpose of informing people who want to engage in legitimate behavior and also perhaps foreclose strategic litigation in this area.

In Canada, as Sheridan mentioned, we do not have private actions in this area of the law. I think part of the resistance behind that is the concern about the chill and strategic use of that type of litigation. Indeed, when the Act was amended a few years ago to

allow very limited private access to the Tribunal, procedural screens were developed and limitations on remedies were introduced to minimize the strategic litigation type of risk.

My third comment is that the risk of chill is real, and the economic costs associated with inappropriate or inadvertent chilling of legitimate and competitive conduct is in my view significant, but I readily admit it's very, very difficult to measure. I will give you just one little illustration, and to protect the innocent it won't be in the antitrust area.

It has to do with in the telecom field, actually, when I was a senior executive with a teleco in Canada, we were at a meeting and we had to decide what to do. We had about a hundred million dollars to invest, and the discussion came up about where are we going to invest that money. It wasn't a long discussion, and the decision was ultimately made -- Margaret, you will appreciate this -- to invest in the UK. And why? The decision wasn't that the rate of return from the investment would be better. The main driver behind the decision was the perception -- and I think a valid one -- that at that time, at least, the UK teleco regulators were a lot more business and market friendly than the Canadian ones.

I use that illustration to underscore how important the perception of the enforcement of this area of the law is to business and decision-makers. I think it was Doug Melamed who mentioned, and I echo his views, that the signals you send to the business community are much more important, frankly, than whether the case is right or wrong. I want to underscore the importance of that chilling.

The chill not only affects the parties who may be subject to that particular enforcement action or their affiliates or competitors in the same field, but it also extends to those observers of the trade, people in other markets, people in other industries, counsel, advisers, who see the outcome of these proceedings and are then chilled in their behavior, you know, "I don't want to get drawn into that lengthy kind of litigation by even coming close to what may or may not be permissible." So, that's another type of chill that we have to watch out for.

I just want to be sensitive to time here. I guess we have heard from many witnesses today as well that the goal of antitrust is to protect competition and not competitors. That theme is well enshrined in the guidelines that Sheridan was mentioning earlier today, and to make it patently clear, "the objective of the

abuse provisions is to promote efficient competition, effective competition, and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favor of market participants, who, for example, lack the ability to compete with a more efficient or better managed rival."

The take-away from that in this portion of my remarks is that only in the clearest cases should enforcement agencies intervene. To the extent that there's any doubt as to the competitive legitimacy of some behavior, I think more often than not the doubt should be resolved in favor of the potential defendant or target.

So, in response to Assistant Attorney General Barnett's question, whether agencies should be more or less aggressive in this area, I would urge caution, and I will answer that as a yes, they should tend towards being less aggressive.

This notion of risk was also addressed in one case by the Competition Tribunal, language that sort of tracks Trinko, where they said, "It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even tough competition, is not to be enjoined by the

Tribunal but rather only anticompetitive competition. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition, that is, in our view, not consistent with the purposes of the Act."

The statistics on enforcement history in Canada I think reflects this concern about dominance. The earlier cases -- and if people want to hear about them, we can deal with them later -- were clearly ones in my mind that were at the obvious end of the scale. They weren't even -- they may have been charcoal but definitely not gray, and we have had five contested cases in the 20 years since the legislation was adopted. Orders were issued in four. The fifth is under -- is the one, the Canada Pipe case, and it's likely -- how can I put this -- it's likely that an appeal to the Supreme Court of Canada will be sought in that case.

The last comment I will share with you is, as Sheridan Scott took you through the tests, is there dominance, is there an anticompetitive purpose, has it reached the effects threshold, that this concern about the chill is reflected in that section, because at the very end, even if you've met all of these three tests, the Tribunal is still left with the discretion not to

issue an order. It's not a "shall." It's "the Tribunal may." So, I think that's reflective of concern by Parliament of this chill, and with that, I will turn the mike over to Margaret.

MR. MASOUDI: Thank you, George.

(Applause.)

MR. MASOUDI: Our next speaker will be Margaret Bloom. Margaret is a visiting professor in the School of Law at King's College of London and is Senior Consultant at Freshfields Bruckhaus Deringer. Between 1998 and 2003, Ms. Bloom was Director of Competition Enforcement at the United Kingdom's Office of Fair Trading, where she headed the Competition Enforcement Division. Before joining OFT, Ms. Bloom worked in the United Kingdom's Cabinet Office and Department of Trade and Industry on Privatization, Competition Policy, and Public Sector Finance. She was Vice-Chair of the OECD Competition Committee for six years, and she is a Commander of the Order of the British Empire based on her work at the Office of Fair Trading. Very impressive, Margaret.

MS. BLOOM: Thank you, Jerry. I'm pleased to be here today to present some experience from overseas. There are three areas I am going to talk about. Firstly, look at the question of whether all

jurisdictions should have the same approach to single-firm conduct, then look at some action to increase convergence worldwide in the treatment of single-firm conduct, and then spend a bit more time in drawing some lessons which come from all the discussion there's been in Europe on the review of Article 82.

So, turning to the first question, should all jurisdictions who are addressing single-firm conduct

rivalry in the marketplace. They were awarded a state monopoly.

As I say, I think these are relatively small reasons for the differences. The main reason for the differences between jurisdictions probably lies with the different judgment over what's the right balance between false negatives and false positives. Personally, I think the U.S. is right to be duly nervous about false positives. I think in Europe, we're a bit too ready to intervene too often.

Okay, let's look at the next area. What action might be taken to increase convergence worldwide? Clearly there's already a lot of work being done through the ICN, the OECD, the U.S. agencies and others. I just want to touch on three areas which from my personal experience are particularly valuable in terms of increasing convergence.

The first one is training and sharing experience. I think the direct training and sharing between enforcers so that they can work with other enforcers in other jurisdictions is extremely valuable.

people overseas, unless they are going to spend a long time reading a lot of material, to get a proper feel of how one should go about conducting a single-firm conduct analysis, what kind of cases you should take and you shouldn't take.

You should not overestimate the knowledge overseas of what is taking place in the United States, and I know that the American Bar Association is strongly encouraging the European Commission to issue guidelines on Article 82 when the current discussion is complete.

The last area is staff exchanges, and in that I'm talking about exchanges of staff between agencies. That's quite common in Europe. It may either be between the national agencies and staff may move for a relatively small period of time, or it may be between the national agencies and the European Commission. It's another very good mechanism in increasing knowledge and understanding. If it was possible for the American agencies to take part in that I think it would be very valuable. I recognize it's quite a challenge, but it would be very valuable if it's possible.

Let me then turn to the lessons. These lessons are from the Article 82 review. They are not necessarily all going to be adopted in the review, but they are lessons which I've personally drawn in terms of

thinking about what would be some sound rules for good single-firm conduct enforcement. There are eight of these.

The first one is you need clear objectives on what you're seeking to do. The Article 82 discussion paper says that the objective is to enhance consumer welfare and efficiency. Theses are clearly good objectives. Though I must admit that throughout the discussion paper, it isn't entirely obvious in places that those objectives are the ones that would be achieved by some of the proposals in the paper.

More of a problem, and Philip Lowe mentioned this this morning, is the fact that much of the European case law is influenced by other objectives, in particular, protecting the structure of competition and protecting the rights and opportunities of market operators, not obviously a perfect match for enhancing consumer welfare.

Lesson number two, before any intervention, there should be a plausible theory of consumer harm. This may be actual harm, possibly it will be likely harm, because that's easier to demonstrate than actual harm, but you must have a plausible theory before you should be able to intervene or before a plaintiff will succeed in a court.

The third lesson, avoid overly complicated rules. Even if the economics indicate that a perfect rule, for example, for discount would be some rather complicated measure, that's not going to work effectively for business, and also it will probably be difficult for a agency.

Fourth, efficiency benefits should be assessed, but they should be a part of the analysis of conduct. They shouldn't be just a limited defense.

Number five, use safe harbors rather than presumptions of dominance or presumptions of monopoly power or presumptions of abuse. The reason why I would suggest safe harbors rather than presumptions is that as long as the safe harbors are large enough, they are going to give business certainty. On the whole, it's likely to be more economically rational to have a safe harbor than a presumption. Also, if there is a presumption, you should not reverse the burden of proof and then put it on the company or on the defendant.

Let me just give you two examples of safe harbors in the question of substantial market power, dominance or monopoly power. Assuming you can define the market in single-firm conduct, and that's a pretty tough assumption, but say you have got a reasonable idea of the market. If the firm has a low market share, it

cannot have substantial market power because you've got plenty of existing competitors. But if a firm has a high market share, it is not a safe presumption that it has substantial market power. There may be low barriers to entry so that they've got potential competitors. There might be buyer power.

If you turn to abuses in single-product loyalty discounts and predation, a useful safe harbor would be price above average avoidable cost, or if you prefer, average variable cost, but I think average avoidable cost is probably a better measure and better for business to assess.

The sixth question, it should not be too easy to find a firm is dominant or it has monopoly power. Again, my preference would be to follow the U.S. approach rather than the EC approach, where it is too easy to find a firm is dominant and this puts too many companies at risk of being found to have abused a dominant position, because you don't need much market power before you're found to be possibly dominant.

The last two lessons. First of all, number seven, avoid what I've called "abuse shopping." Different abuses will have the same economic effect, but in Europe, these different abuses may well have different tests or different cost benchmarks, although

that agencies will intervene as readily in the no economic sense test as with the equally efficient competitor test.

Thank you.

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appreciate that I'm the only person from a company, and I will try not to be intimidated this afternoon.

The nature of Philips' international activities

initiatives that are taking place within the framework of the ICN and also the ECD, and I can only say that there's not enough of those initiatives, but as I said, I believe that a clearer analytical framework both on this continent and for Europe would spur convergence initiatives even more.

The experience I have with the transactions that my company is involved in makes one thing clear to me. We need a proper analytical framework that takes account of both static and dynamic effects, and if the agencies would be able to tell us how, in particular, dynamic efficiencies could be factored into the analysis of unilateral conduct, that would be an immense step forward. So, in my view, there is an urgent need for the two key jura9s 6p1 ynamic

So, if there is a need for a clearer analytical framework, then the question arises, why doesn't that framework exist already? I am talking about the U.S. Coming from Europe, I am, of course, a little bit on thin ice here, but there may be two reasons.

The one reason might be that in the U.S., Section 2 offenses are litigated in courts, which in most cases means that one party either loses or wins depending on whether the other party meets its burden of proof. I believe that the court in Microsoft mentioned that, in the end courts may be called upon to balance or to determine the net effect of dominant firm behavior. However, the reality is also that balancing or trying to assess and quantify that negative effect in practice hardly ever takes place.

The second reason might be that in many courts, as well as outside courts, if we talk about exclusionary behavior, there is too much, "I know it when I see it," and that doesn't help to come up with a proper general framework or methodology.

To me, the proper benchmark is long-term consumer surplus. If one of the standards that is currently proposed would be able to distinguish good from bad behavior and would be able to distinguish whether consumer surplus goes up or down, then that

would be wonderful. I don't think that the business community would mind whether there is more than one test to discriminate between those types of behavior, but if it's true that all these tests are either over-inclusive or under-inclusive, then I ask myself whether it wouldn't be more logical to look at what's happening in the market, certainly in ex post evaluations, and then try to assess whether consumers are benefited or not from the behavior at issue.

I was very impressed by Professor Salop's recent reflections on the consumer welfare effects standard in the Antitrust Law Journal, I believe it was the July issue of this year, although I believe that much can be said about his suggestion to apply that standard on an ex ante basis only and the application of that test to "more efficient" firms.

Now, if we were to assume that the consumer surplus test in some form is the right thing, then a number of issues are required. First, we need to know whether the agency or plaintiff should not only prove some kind of output reduction or other loss of efficiency as a result of the exclusionary conduct, but in addition, also to quantify that loss, and I know that in the U.S., quantification is probably not a strict standard, but oddly enough, the EU approach is

different. You may recall, that there were some remarks on the Article 83 Notice this morning, and I would also take the position that the Article 82 discussion paper itself is based on the assumption that consumer surplus and negative effects on consumers could, to some extent, be quantified and could be used as a tool to distinguish good from bad behavior.

Secondly, we would need to know how agencies and courts balance foreclosure effects against dynamic efficiency effects. How do we arrive at the effective identification of the net effect? Obviously this is particularly important in sectors that undergo rapid technological changes, because it is in those sectors where dynamic efficiencies may be most important.

Thirdly, to ensure that courts arrive at the right outcome, and perhaps as an additional safeguard against false positives, there should be a requirement that there is a clear articulation of the theory of harm. Many of the post-Chicago economic theories that seek to explain anticompetitive effects arising from exclusionary conduct require the presence of some sort of externality, and interestingly enough, in July of 2005, a report was issued by the EAGCP, a think tank, if you wish, reporting to the European Commission that recommended that in each case where the Commission

identifies exclusionary conduct, it should be forced to identify the externality at work, so that there would be an additional requirement to identify the theory of harm causing the negative effects on competition.

I was interested to hear Philip Lowe's remark this morning about the likely effects which would require some sort of articulation of the theory of harm, but that that might not necessarily be required if the evaluation of is of an ex post nature. In that case, there would be actual effects in the markets, and it should be much easier to be capable of finding a violation. My sense is that still in an ex post evaluation, it would be needed to come up with a plausible theory of harm.

There are other subjects that should be reflected upon in the context of Section 2. In the U.S., there is the Doctrine of Patent Misuse. There is no such an equivalent in Europe. Especially for European companies doing business in the U.S., it would be helpful if there would be some sort of alignment to the Section 2 policy and the policy of patent misuse.

Secondly, it would be helpful if more clarity would be given with respect to the difficult subject of incompatible design changes, technological tying cases, and an explanation how those cases should be analyzed in

the framework of a consumer surplus or other standards.

And finally, what should be done about the soon to be effective Chinese antimonopoly law? China proposes legislation that contains a number of vague and elusive definitions regarding both dominance and abuse, in particular in the field of intellectual property, and I would hope that the Chinese authorities would obtain input both from DOJ and FTC, as well as DG COMP for a rational implementation of those concepts.

Thank you very much.

(Applause.)

MR. MASOUDI: Thank you, Paul.

Our final panelist is Jim Rill. Jim is a partner at Howrey LLP here in Washington, D.C. He's served as the Assistant Attorney General in charge of the Antitrust Division at the Department of Justice from 1989 to 1992 and was chair of the ABA's Antitrust Section from '87 to '88. While he was Assistant Attorney General, Jim negotiated the U.S.-European Union Antitrust Cooperation Agreement of 1991. In 1997, Attorney General Janet Reno and Assistant Attorney General Joel Klein appointed Mr. Rill to serve as Co-Chair of the United States Department of Justice's International Competition Policy Advisory Committee.

Jim, thank you for joining us.

MR. RILL: Thank you, and let me echo the comments of the prior panelists, that I'm honored and grateful to be a participant in this round table, both with the eminent enforcers that appeared this morning and my distinguished colleagues this afternoon.

than one jurisdiction, to plan business strategies with any confidence that they will avoid antitrust challenge. As a result, there's a definite threat of a chill, the least common denominator approach in business counseling that can discourage procompetitive business activity and adversely affect consumer welfare.

Thus, the very complexity in the analysis of single-firm conduct calls on us to take significant caution and challenges the steady approach towards convergence and certainly that we have seen in such areas, for example, as horizontal mergers, especially since I'd suggest that in the area of single-firm conduct, particularly where one is dealing with a highly innovative, procompetitive, dominant firm, there's a real tendency, an appetite, for competitors who are hurt by efficiency and procompetitive conduct to engage in forum shopping, or as Hew Pate put it in a recent speech when he was in office, to take an opportunity for every agency across the world to have at least one whack at the pinata to see if the competitor can't find an agency somewhere, somehow, that's going to go after the pro -- what is, I would submit, arguably, is the procompetitive conduct.

So, the thought I'd like to address today is the crying need, if you will, for transparency, at a minimum

certainty, and at least some mechanisms for the ability of agencies to achieve, in time, convergence in single-firm or dominant firm, if you will, conduct across borders, and I would suggest that in those areas, mechanisms should be employed to establish safe harbors, which was discussed this morning, and in more complex areas where safe harbors seem not to be appropriate. Where more intense analysis is required, the agencies should focus on principles towards certainty and transparency, and there are institutional mechanisms which already exist that can be implemented and followed in greater depth to promote these ends.

There has not been nearly the progress towards certainty, transparency, much less convergence, in the area of single-firm conduct as in, for example, in the case of horizontal mergers. Thus, our job as

rivalry? Are we talking about consumer welfare in terms only of above marginal cost -- marginal cost pricing, or are we talking about consumer welfare in the sense of total welfare, or are we simply giving lip service to the term "consumer welfare" as we go on about protectionist policies?

The application of this concept, even where it's agreed upon, and it's not universally agreed upon, to dominance, to market definition, is ambiguous in many jurisdictions, and when it's applied to conduct, the challenge is exacerbated. When one looks at refusals to deal -- look at the laundry list we saw this morning in one agency, that single-firm conduct can be challenged where it's a tied sale, exclusive dealing, refusals to deal, predation, discounts, cross-subsidization or raising rivals' costs.

Now, apply that, if you will, to a situation where you are trying to advise or you are a company trying to maximize your own legitimate business strategies and run that laundry list and see what those meanings have, and also, when we see in the concepts underlying many of the statutory provisions relating to single-firm conduct terms such as "unfair." I remember George Will in a speech recently said, "In my family, we eliminate the four-letter word starting with F, fair."

Unfair, unjust, preference, undue advantage. When you try and apply those in a concrete sense, frustration abounds.

Let me suggest this: There is a need for at least safe harbors for several purposes. One, they certainly contribute to certainty and minimize unwarranted frustration and procompetitive conduct. Two, they can spare enormous expense, if you will, to business in attempting to identify all levels of conduct or baseline minimal levels of conduct that take place across borders or can have ramifications across borders. And three, they can actually help the agencies focus their own resources in areas where those resources need to be arrayed in order to prevent or at least investigate practices that carry the real threat of anticompetitive effect.

First, let's look at structural safe harbors, and a two-step approach is called for here, market definition and market share, and as I say that, and I'm very well aware that market definition is only a proxy for market power and an inexact proxy and one that some practitioners, myself not included, think should be done away with. Static market share becomes even more unreliable in today's economy where industries are traditionally characterized by overnight transformation

of market position and market innovation. So, nonetheless, market share and market definition remain an informative indicator to the potential for a firm to exercise unilateral market power, and I say, somewhat from a practical standpoint, market definition and market share is produced by the agencies as a starting point for their analysis, so I shouldn't really ignore what they're doing.

But having said that, of course, there are a variety of approaches, and I don't need to get into them today, a variety of analytical approaches, an array of different terminology used to define markets, and in addition to the analytical divergence, there's a practical divergence in the evidentiary basis that is used for the definition of the markets, and they vary from jurisdiction to jurisdiction.

One, high market share -- I mean, let's be very clear in this proposal, that a high market share should not be an indicator -- certainly not an exclusive indicator or a reliable or terribly important indicator of the existence of market power. It can, however, serve as a minimal tool, a realistic minimum, that would provide a safe harbor and certainty for all the reasons that have been mentioned certainly. The benefit of it is many competition agencies, at least some competition

agencies, already employ a structural safe harbor.

The selection of an appropriate level is needed to be -- evokes a continuing dialogue. If the threshold is too low, there are two dangers. One, it's too low, so it provides no realistic certainty. Two, the bottom line can become the -- the top line can become the bottom line, so anything then above the safe harbor as a practical matter could be employed by the agency to stimulate unnecessary investigation and possible challenge. In short, the threshold as low as 20 percent or 10 percent, as we've heard, really isn't going to provide much guidance, much comfort, much help to the enforcement agency or, for that matter, the businesses. Structural safe harbors are not enough.

I was very encouraged today in reading the discussion draft on Article 82 of the effects analysis approach in the EU. The question simply at the conduct level of the safe harbor is what's the exclusion, who is excluded, and what is the anticompetitive effect. Some conduct should be characterized categorically as a safe harbor type of conduct. We made approaches to this in the U.S. and elsewhere in the area of predatory pricing, and work in this area is being done by Greg Werden, and comments were made by Philip Lowe in the area as well of the development of conduct safe harbors, and it

suggested candidates for safe harbors would consist of patently procompetitive conduct that include new product introduction, improved product quality, cost reducing innovation, energetic market penetration, successful research and development, and the potential for the development Paul Lugard was talking today about an appropriate measure.

How do we get there? First, as Margaret mentioned earlier, there's much room for improved case-by-case cooperation. That cooperation, at least between the U.S. and the EU, is underway and has been very effective in the merger area with working groups and actual cooperation on particular cases. Business can facilitate this cooperation by properly designed or properly limited waivers in confidentiality. The OECD round tables and the OECD work has been highly useful in this area.

There have been programs on single-firm conduct. The OECD seminal work with the business community on merger procedure is a good litmus to be followed in this area. The 30 OECD countries submit their papers on the

to why a particular course of conduct would be considered unlawful single-firm conduct, again, back to the concept of who was excluded and why.

Some of the cases that I saw this morning, I wanted to reach out and say, okay, so you're prescribing a particular bid formula or prescribing particular

want to live today with the Turner Guidelines For Horizontal Mergers.

So, to come back to the basic principles, I think that guidelines for transparency or convergence can follow three basic principles. They need to be workable and understandable; they need to be sufficiently flexible to be adapted to changing, improving, we like to think, economic thinking; and they need to be based ab initio on the best sound legal and economic thinking available today.

So, those are the steps I would recommend for transparency, and thank you very much for allowing me to be here.

(Applause.)

MR. MASOUDI: Thank you very much to all of our panelists for very interesting comments. I think what we will do now is take a break for about 15 minutes, and then we will reconvene when we'll have some discussion by the panelists about each other's presentations as well as some questions. So, let's reconvene at about I guess ten minutes to 3:00.

(A brief recess was taken.)

MR. MASOUDI: Okay, I think we'll get started again. We tried to offer some light into the room, but apparently the shutters are set to turn down

automatically.

I think we'll get started now, and I think what we will do is similar to what we did this morning. We'd like to give each of the panelists an opportunity to comment for a few minutes on what the others have said, and we will start with you, George.

MR. ADDY: Thank you.

As much as I consider jurisprudence a public good, and some would say we can never have enough of that, I'm not advocating increased enforcement in this area but I think greater clarity as to what the rules of the game are would be useful, both to agencies and businesses.

I'm not sure I would agree with Paul, though, on this issue of convergence. I think there is a need, as I say, for clarity, for clearly articulated rules, what are rules of the game in country X, Y and Z, so that business decisions can be made, but I think most of the decision-making is typically done locally at the state level in any event, although I recognize IP is a big, big problem, and I don't know how you crack that nut, frankly, but if you put that aside, I'm not sure how much of even the globalized world, business decision-making and conduct is done at the global level. I think a lot of it's done at the local level.

And I think there's more scope in this area for countries to reasonably disagree on what they consider to be the prime policy drivers in attacking single-firm conduct. With cartels, you know, countries, I think, are much more aligned as to what the evil is there that they're seeking to attack, and I think there's probably a lot more room in the area of single-firm conduct for different countries to reasonably disagree as to what they want to attack, but I think that the most critical point to advisers in the business community is to make sure that the rules are clear and understandable.

MR. MASOUDI: Okay, Margaret?

MS. BLOOM: Okay, thanks, Jerry. There are four quick points I'd like to make.

First of all, I think it's clear from this morning and this afternoon that this is an area of law where there is lots of change, so it is evolving. There is a lack of case law generally, and there is an increasing number of jurisdictions applying single-firm conduct law, which means this is an increasing challenge for business in relation to legal certainty. I do not underestimate the importance of the chill factor.

The second point, I do not think that an effects-based approach need necessarily be uncertain. If you have good size safe harbors -- and I emphasize

the good -- if you have got decent sized safe harbors, then the effects-based approach can also deliver legal certainty.

I was very encouraged by Philip Lowe's reference to the fact that he thought, in relation to Article 82 in Europe, we should be less defensive. One point I was just reflecting on, in relation to the size of the safe harbors and the impact of the chill effect, I suspect that in those jurisdictions (which is most of them outside the United States), where the officials have not been in business and they have not got the revolving door, the enforcers probably underestimate the chill factor. Certainly I have been more aware of it since I have moved from being an enforcer to being in private practice.

The third point, guidelines, I have stressed how important I think they can be. We need to have well-based guidelines, and I endorse the three rules that Jim Rill had in relation to producing useful guidelines, and I very much hope we will be seeing guidelines in Europe.

And then the last point, the scope of the law point that was raised this morning. Unfair trading and protection of smaller firms was mentioned for Japan. It's also in the laws a fair number of the European

Union Member States, and dare I mention it, the United States has something called the Robinson-Patman Act. It seems to me that this whole area might be one for the ICN new working group to look at because it isn't just a question of the abuse of dominant position Section 2 type conduct, but it's what laws do countries have against unfair trading as well.

Thank you.

MR. MASOUDI: Thank you, Margaret.

Paul?

MR. LUGARD: I think convergence is important, but it is even more important to have a basic understanding of the framework of analysis, even if this means that there are different approaches in key jurisdictions. I fully agree with Margaret that an effects-based analysis doesn't necessarily mean that all is unpredictable, and I believe that there is an urgent need for the international business community to know how it should assess its own conduct, even if that means that it has to go through very difficult analyses.

There is a real chill factor in particular in high technology markets. Perhaps we'll discuss that in a second, and among the issues that need to be addressed is certainly IP, and within that category, one of the first things that needs to be thought about is

compulsory licensing, because that is where there's a large degree of divergence, and in many of those cases, the effects are not limited to one jurisdiction, but instead, the decision of one agency might have worldwide repercussions.

MR. MASOUDI: Okay, thank you, Paul.

Jim?

MR. RILL: It's always the danger of being the fourth one that I tend to want to agree with everything that everybody said, but I will say I think that the need is for first transparency. Transparency can be contributed to by safe harbors. I don't throw up my hands or sit on them with the notion that convergence over time is impossible. I think a great amount of convergence has come with learning in the area of horizontal mergers, but it takes time, it takes dialogue, it takes effort.

I think we're a good ways away, Paul, from any kind of convergence on dynamic versus static efficiencies, of the appropriate definition of all the important, critical factors to look at.

On this morning's program, I was taken with not only the increasing interest and focus on dominant firm conduct but the work that's being done in every jurisdiction that spoke, also the U.S., on efforts to

study and add clarity to the principles being adopted by or explored by the jurisdictions, rather, in that area. The Canadian Guidelines, the Japanese study group, the discussion draft process in the EC, the statutory revisions in Mexico, all underscore the efforts that are being made in the jurisdictions to bring clarity and sound principles into the application of the law to dominant firm conduct. Nonetheless, a lot remains to be done.

jurisdictional lines in convergence, and I attribute that to the fact that the agencies this morning were quite properly focused on what was going on in their own jurisdictions, but I think it's an area where, through the ICN and the OECD, that the agencies can, are and should do more work in the area of bringing about cross-border transparency, and I suggest ultimately convergence.

MR. MASOUDI: Thank you, Jim.

Now we will move on to some questions, and I will hand the microphone to Randy.

MR. TRITELL: Thanks, Jerry.

Before I begin with the questions, two of the speakers suggested that the U.S. agencies be engaged with, for example, the EC and China on their work in this area, and I just want to note that we are engaged in and have been engaged in discussions with our colleagues in Brussels about the Article 82 exercise and remain engaged in discussions with the Chinese on the evolution of their law, including in the dominance area.

Let me start out by tossing out a broad question, which is what kind of trends do you observe, looking around the legal landscape around the world, in the single-firm conduct area? Do you see trends towards convergence, for example, even in the basic objectives

of unilateral conduct laws, towards consumer welfare, or is there still work to be done there, or in the analysis?

Where would you want to see more convergence, and for those who think it's less important, are there areas where you think it is still important for agencies to be largely on the same page, and areas where that is less important?

It also relates to the question that Margaret asked, if you assume a consumer welfare objective, should we all do it the same way?

Margaret, let me give you an opportunity to add to your remarks, if you want to answer that question in any way.

MS. BLOOM: Okay, would you like me to start, is that --

MR. TRITELL: Yes, please.

MS. BLOOM: Okay. In terms of your first question about what kind of trends, I think, first of all, you've got more agencies with powers to apply single-firm conduct. Every time you add a new agency, then that is a tension, in a sense, to a degree away from convergence, because you have got new staff learning how to apply the law.

On the other hand, you have got, going the other

way, more efforts being made, for example, through the OECD, through the ICN. You have already got the European Union, which is now 25 Member States, going up to 27, and the European Union itself is clearly a force for convergence between those states, so you have got tensions going in either direction.

On your question about should there be more convergence, yes, I think there should be as much convergence as will achieve maximum consumer welfare. I'm an advocate of having that as your objective.

As I said earlier, I think there are some small reasons for differences between jurisdictions, and I give the example of the U.S. against Europe. There's another example I can think of with a similar sort of issued. If you have a very small market, say you're an island, say Iceland, for example, is your approach to single-firm conduct different from the approach that should be taken in the United States with a large market with many players? It might be. I don't know what the answer is. I think there is an argument that you could have a reason for being slightly more interventionist. Maybe you need to have a price regulator, although I know a permanent regulator is very much a second best.

MR. TRITELL: I invite anybody else who would like to comment on that.

MR. RILL: Let me just say, I see two somewhat conflicting trends going on right now. I think we see the trend towards more cooperation, if not convergence, and clarity. I think that the very formation of an ICN working group on single-firm or dominant firm conduct is evidence of that. I see a conflicting trend, barely visible but nonetheless visible, particularly in a dynamic economic world where innovation creates fair competitive advantages that may be short-lived, competitors trying to game the system, to do forum shopping, to take a number of whacks at the pinata, to try and play on divergence to find an agency somewhere that will accept their complaint. I applaud the ICN for establishing the working group that will hopefully address that issue.

What would I like to see more of? I think the movement, at least in the U.S. enforcement agencies, and from what I understand from Philip's remarks this morning, towards an analysis of what is the effect of a particular course of conduct, an in-depth probing of that effect of, if it's exclusionary conduct that's being addressed, who is excluded, what is the meaning of that exclusion, and how does the conduct promote that level of exclusion, wi1.0m0.00 0.05.00 ggo.kl000of

think that's the most desirable step that I would like to see taken.

The second step, of course, is the proper role of efficiencies in analysis, which Paul commented on earlier.

MR. LUGARD: I agree with Jim that there is much more cooperation between agencies, and I think that that cooperation is generally producing positive effects; also, for example, within the EC and European Competition Network, and, of course, the ICN although that's perhaps less formalized. There's more economics, and perhaps paradoxically, I think a lot of the convergence that we're speaking about today comes from economists that tell us about the newest insights in theories of harm that discipline indirectly the decision-making processes of agencies.

I think there should be more reflection on the

DG COMP will be able to come up with a sensible and practical way to solve that problem.

MR. ADDY: If I can just piggyback on those comments, and I'll try not to repeat, I think on the positive trend side, the increased discussion and debate

thought.

One interesting impression, which I've noticed in Europe, is that some of the large companies which were former state-owned monopolies in their home territory are arguing for minimal intervention, but in the other Member States, where they're new entrants, they're arguing for the maximum intervention.

MR. TRITELL: Given that we don't have complete convergence at this time, what can we learn about how businesses and their counselors react to different legal regimes regarding single-firm conduct? George mentioned the possibility of decentralizing decisions, but is that really an option when you have global products and markets, or does it result in what I believe Jim referred to as a lowest common denominator, where a firm would adapt itself to the most rescriptive rules?

Let's start, if we could, with Paul from the point of view of company advisor.

MR. LUGARD: In many cases, it is possible to decentralize decisions, and in many cases, it is not necessary to adopt a certain conduct all over the globe. In other cases, in particular in the IP sector, you may, as a company, have to adapt yourself to local circumstances, to a specific jurisdiction where the law is not well articulated yet or where you are forced to

take another course or direction, but then in some circumstances, that local decision will then have worldwide repercussions, and that is a major problem.

I do not think that overall companies are looking for a way to centralize decisions. In many cases, as I said, you can decentralize, but it will be very costly in many cases, and it may result in suboptimal solutions which may not be good for a company and which may also harm consumers.

MR. ADDY: If I could jump in now, the issue I was getting at about local decision-making and businesses being primarily market-driven, so if you're selling a widget in country A, you're going to take into account the market circumstances in deciding your business conduct. An example might be if I'm a global -- I don't know, pick one -- automotive manufacturer and I have suppliers and I have plants all over the world and suppliers all over the world, the text of my supplier exclusivity agreement in country A may be quite different from the agreement in country B.

So, the notion that there's a huge impediment to business there, I'm not convinced yet. It might be there. I just haven't seen any evidence of that, with the exception that Paul was addressing, IP issue. Frankly, I just don't know how to get my hands around

the IP issues. That is a very, very difficult area.

MR. RILL: I think there is also a question that is probably unavoidable given the proliferation of agencies with somewhat different approaches, a question of transaction costs, which is huge, that we have certainly run into and I'm sure everyone else has who has done cross-border work, and that is just simply identifying the course of conduct with some reasonable confidence that it is not illegal over a multiplicity of jurisdictions, and quite frankly, with some of the newer antitrust regimes, it is very difficult to identify -- not true in the U.S. -- but very difficult to identify counsel who have any experience with the legal regimen, even in their home country, and be confident of the advice.

I think decentralized decision-making from the legal standpoint is necessary but needs -- I think Paul would agree with this -- needs some centralized control at the level of the Paul Lugards of the world.

MS. BLOOM: I was just going to endorse everything that Paul said. For example, if you are talking about discounts, then it would be possible to have a different discount structure in different jurisdictions. It might not benefit the business or consumers, but that is possible. But for IP or the

criteria of products, it may well not be possible to differentiate between jurisdictions.

There is another issue. If you are thinking of making a change in response to one agency, you may wish to be careful that there are not then copycat cases in other agencies. There will be some cases which it started in one agency, and then other agencies picked them up. It may be there is an equal problem in all those other jurisdictions, but maybe not.

MR. TRITELL: Well, let's revisit the question of presumptions and safe harbors that all of you have touched upon in one way or another. George has just put on the table the proposition that presumptions should be avoided even if they are rebuttable. We have had some endorsement in general of safe harbors, but it might be interesting to hear any specific recommendations that you think should be incorporated into agency policies.

Jim tossed out a list of some of the often suggested candidates for safe harbors, and we welcome your thoughts on advice to the agencies on what type of presumptions and safe harbors are to be encouraged or are to be avoided.

Jim, why don't we start down on your end.

MR. RILL: Well, first of all, having changed from likely to sue to a presumption that the Hirfendah0 0.00000 0.

level in the Merger Guidelines, I'm a little reluctant to engage in self-flagellation in the establishment of presumption, but nonetheless, we use those presumptions very flexibly, and they are carried with the entire case.

No, I think that the point that George makes with presumptions is a good one. I think the world is too dynamic right now to have any confidence in the presumption of illegality perhaps beyond hard core cartel activity. I think that even the presumption as to tying has come under huge criticism, in which I join.

The safe harbor, on the other hand, if set at a proper level, is a good point for all the reasons I stated in my remarks. Where should it be? It should be high enough so that it really is a safe harbor and not something so low that it does not give any comfort at all. I would throw out numbers like 70 percent market share, that would just be a thought, but I think taking into account the dynamics of the market, likelihood of entry and expansion, just to mention a few items, but beyond that, I think the point is it should not be something around 10 percent, with all respect to our friends in Japan, because it gives no safe harbor at all.

I think the progress made in predation is a good

one. I think in both the U.S. and Europe, we are looking at some level of cost, predatory pricing, and I think that concept of a cost-based test can be applied to a number of other practices, including bundle pricing and loyalty discounts, because I think that kind of a concept will approach the trilogy that I mentioned of some sound economic thinking, some flexibility, and, quite frankly, some understandability compared to some of the other thinking that has gone on in that area.

I'll footnote this, on the bundled pricing, I think there is a cottage industry of economists out there in the bundled pricing area that are developing wild theories of what might be illegal and holding themselves out to be hired by firms saying, "Your practice, however, doesn't meet my theory."

On that note, I'll pass.

MR. TRITELL: Why don't we pass to Paul, if he would like to offer any observations.

MR. LUGARD: I would be less than thrilled to support the idea of safe harbors as a matter of principle, but in practical terms, I am probably slightly more positive. We have a number of European examples, for example, the 30 percent market share threshold in the vertical work exemption regulation, that seems to work well. The potential problem with

safe harbors is, of course, that it is uncertain what happens when you are not in safe harbor, so that there may be a counter-productive effect.

What I would support most is, as I mentioned, the methodology of analysis. If, for example, we are looking at the discussion paper on Article 82, then it starts off really well, because the Commission has done a remarkable effort in explaining how it seeks to identify negative effects. The problem with the discussion paper in Europe is that the second part of the paper is less useful. So, I'm very much in favor of a clear framework of analysis even if it is difficult to apply.

MS. BLOOM: I already discussed this in my remarks, so I will be brief. In terms of safe harbors, if they are going to be useful, they need to be large enough. I think Jim Rill's proposed 70 percent is very tempting, but unrealistic for Europe.

MR. MASOUDI: It is not large enough.

MS. BLOOM: Okay, 90 percent.

In Europe, I would encourage the Commission to go for 50 percent, but I recognize that is asking an awful lot. What I would suggest is that it would be

safe harbor. If it is too low, it is not of much use.

In the UK, prior to the modernization of European Community Law and the European Competition Network, the OFT used to have a 40 percent safe harbor with a rider that exceptionally it might intervene. In fact, it never did.

On abuses, one safe harbor that I would add to my cost test on my slide is we should have, in Europe, recoupment for predation.

MR. ADDY: The only comment I would add is just an observation, that we can theoretically say that under our guidelines in Canada, there is a 35 percent safe harbor, market share safe harbor, yet all the cases that have been taken have been at the 80-plus. So, you know, is there room to move that harbor up? I would probably say yes, but then you get into Margaret's suggestion. You have got to make sure that it is a hard number with only a very exceptional or a very limited exception to action, any disciplinary action.

MR. TRITELL: Let's turn to the role of economics in the analysis of single-firm conduct. What trends are you seeing in the agencies around the world in the use of economics and economic evidence? What do you see as the proper role for use of economics? How should agencies use economic evidence and economists in

investigations of single-firm conduct?

I will invite whoever would like to offer remarks. Why don't we start, if you like, George, with you and work down.

MR. ADDY: Sure.

I'm of two minds, frankly, on that -- on the issue of the use of economists. There's probably -- with apologies to the economists in the room, so hold your fire -- by the time you get to trial, of course, everybody's rolling out competing economists, and you get into that duel situation, which is what the process yields. I'm not sure the economists are used early enough at the analytical stage before the matter ever becomes litigious, so I think increased use of economics is a good thing.

Then the only other observation on that would be I found the discussion paper, for instance, that Philip's group put out to be heavily -- too heavily -- leaning towards the economics, some of the -- reading that document and trying to advise a client as to what this hypothetical, possibly as efficient competitor might be doing a few years from now had they come into the market is very troubling. I mean, that's going down the other end of the scale.

MS. BLOOM: Perhaps I should say as an economist

I am all in favor of the use of more economics -- thank you, George. There is a trend to use of more economics. When people talk about that, some of them are talking about the use of more economics for an effects-based analysis in the actual analysis itself. Other agencies say, "Oh, yes, yes, we use a lot of economics," but economics is used in developing the rules, and then when the rules have been established, they are applied in a form-based approach. It's using economics in the analysis of the effects which is most valuable, though if you're drawing up rules, the more they are based on experience in economics, the better.

There are tensions which will mean that in certainly some jurisdictions it will be relatively slow to adopt full use of modern economics. Firstly, the case precedents are quite difficult to reconcile with modern economics in a number of jurisdictions. Secondly, appeal courts are not necessarily sympathetic to economic analysis, which is a factor that agencies need to take account of. And lastly, some agencies have difficulty in having enough economists trained in modern economics, in I/O economics. They may find it easier to recruit lawyers than economists.

Thank you.

economist, but I sometimes think that I should have been an economist.

I think the role of economists is increasing, and I believe that it's a good thing. Their proper role might be to identify the most plausible theory of harm in a particular case or to discredit the theory of harm which is advanced by the agency, and secondly, to help in analyzing the actual effects in a particular case. If the agency takes the position that there is a significant lessening of competition, then that conclusion should be supported by economic evidence, and obviously, the dominant company will then resort to economists to try and falsify that conclusion, and I think that that is a proper role of economists.

Thank you.

MR. RILL: I would, first of all, endorse the wider use of economists and economic learning in antitrust analysis. I think that from the agency standpoint as well as from the private sector

That, fortunately, doesn't happen anymore here, and it is well advised not to have it happen elsewhere.

One comment on economists is that they're terribly creative, and I think some of the work that's been done may bear little relevance to the real world, particularly in some of the wilder econometric simulation analyses, which if nothing else don't pass the test of comprehensibility, but I think that the later work that's been done in that area that emphasizes the need for econometric analysis to be supportive of and supported by, more particularly, actual anecdotal evidence that's pertinent and in debt makes that work very useful.

I'm suspicious of economic work that develops elaborate theories of harm that could be adopted or looked at with some credence but may have very little relationship to the underlying facts of the market.

MR. ADDY: If I could just jump in on that, the use of integrated case teams involving lawyers and economists I think is great and to be applauded. One thing about the use of economics in the actual trial of a dominance case is economists suffer just as much as any other type of evidence or witness: the passage of time. So, if you're -- and we'll take the Canada Pipe case as an example just from a chronological

perspective.

The practice at issue started in '98, early '98. The Bureau was aware of it as it started. The challenge was filed with the Tribunal in 2002, so it would have been the fall of 2002. The trial was in June of '04. The trial decision came out in February '05. The Court of Appeal came after -- so, you see this passage of time, and what I'm trying to underscore is the fact that you might have, as Jim says, this very elaborate model trying to second-guess a business decision that may have been made four or five years earlier, you have got to be very careful with that.

MR. MASOUDI: Okay, I'd like to follow up on something Jim Rill mentioned in his comments. Jim talked about how guidelines can give certainty and predictability but also can lead to rules being, in essence, set in concrete, and if the rule isn't right to begin with and it gets stuck where it is, that may not be a good result.

In the U.S., we had some recent experience with this where the United States Supreme Court considered the issue of whether in a tying case, ownership of intellectual property gives rise to a presumption of market power, and based in part on the change in position taken by the U.S. agencies in their 1995

intellectual property guidelines, the Court said that there would not be a presumption of market power from ownership of intellectual property.

So, the question then arises, should agencies periodically reconsider the positions they've taken either on safe harbors or on presumptions or whatever the issue is in the area of single-firm conduct? Should there be a periodic re-examination of those principles? And if so, what are mechanisms by which that kind of re-examination could occur?

Why don't we start with Jim.

MR. RILL: Thanks very much, Jerry.

I had an interesting discussion at the break with Sheridan Scott on my comment on guidelines, and I think my comment should be taken as one more of the structure and administrative nature of guidelines as they become more like rules, if you will, or regulations, not as criticism of guidance.

I think in the U.S., we have gotten to the point where guidelines, as such, tend to be more proximate to rules, and you run the risk of getting it wrong, and I think a lot of people thought that the DOJ got it wrong on the Vertical Restraint Guidelines in '84, which were subsequently abandoned. I won't get into any political analysis of that particular series of events, but I

think that guidelines do change from time to time, but they tend to be looked at here, and perhaps not elsewhere, as having the nature structurally of rules, and I think that's why I made the point that it's important to get it right from the threshold. But maybe in other jurisdictions, guidelines don't have that kind of aura to them, or at least not treated by the courts as having that kind of effect.

There are other ways of giving guidance. More guidance is better. It can be given by agency speeches, it can be given by statements of enforcement policy, it can be given by, yes indeed, cases, particularly in common law jurisdictions, 11

Yes, I think there's no question that guidelines deserve periodic updating. What that period should be obviously, you know, people can differ on what they consider to be reasonable, but Margaret is right, it shouldn't be sort of the guidelines du jour, because people are relying on them to adjust their business behavior.

I share Jim's concern about the nature of guidelines versus other means of being transparent as to what their importance of weight would be. I think courts would give much more credence to guidelines, by way of example, than they would a speech. So, I think there is a difference in how binding they are, how important they are and how significant they are than other means. I think they are different from sort of a speech to a trade association on how the agency is going to look at this industry as opposed to a particular guideline.

MR. MASOUDI: Margaret?

MS. BLOOM: When you look at the treble damages that are possible in the United States, they're a scale order different from anything you'll see in any other jurisdiction. So, I suggest we need to set that aside.

So, if you're looking at anything else, it's more the likelihood that there's going to be intervention than what is the remedy that is going to concentrate the mind as to what business thinks about the different jurisdictions.

There is one particular issue in relation to remedies I would just like to flag up, and that is, you may well have conflicting remedies. One jurisdiction requires something of a company which then conflicts with a remedy that's required in another jurisdiction. That, of course, is very problematic for business and consumers.

And lastly, there is this issue about what is a suitable remedy for a very powerful company. As an economist, I would argue, in a sense, a fine is not an entirely rational remedy for a very powerful company, because if it's sufficiently powerful, arguably, it can pass on the fine to its customers. But we still fine powerful companies in Europe.

MR. MASOUDI: Paul?

MR. LUGARD: Just a couple of loose remarks.

I believe that fines can be effective in the sense that people that are considered to be responsible for these fines may have a serious problem within the firm going forward. On a more general level, I think that whether private actions are available, yes or no, is a very important variable, and so is the possibility of criminal enforcement, but perhaps the most effective remedy, if you wish, is the enforcement record of the agency.

If the agency can prove that it consistently takes enforcement action against a certain business conduct, then that is a very powerful disciplinary fact of life.

MR. MASOUDI: And finally, Jim.

MR. RILL: Two points. One, I think a very strong case could be made for eliminating punitive, i.e. treble damage type remedies for conduct beyond the hard core cartel area, and I think an examination of the U.S. would be very worthwhile on that score, and I think the same sort of thing was proposed by former Assistant Attorney General Pate.

On the question of criminal sanctions, I think one of the best statements I've heard made in opposition to the establishment of criminal sanctions for

single-firm conduct was made by Tom Barnett, current Assistant Attorney General, at the most recent OECD round table on remedies and sanctions in single-firm cases. The effect, once again, back to the effect of single-firm conduct, the effect of single-firm conduct can be very ambiguous, could be very easily procompetitive, and to hold out criminal sanctions in an area that's not so well developed in jurisprudence I think has much more of a chilling effect on procompetitive conduct than it has a chilling effect on anticompetitive conduct.

MR. MASOUDI: Okay, thank you.

That exhausts our questions, and surprisingly, we will conclude a few minutes early. Thank you all for coming. Thank you to our panelists, and we'll see you at our next session.

(Applause.)

(Whereupon, at 3:44 p.m., the hearing was concluded.)

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

DOCKET/FILE NUMBER: P062106

CASE TITLE: SECTION 2 HEARING

DATE: SEPTEMBER 12, 2006

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.

DATED: 9/25/06

SUSANNE BERGLING, RMR-CLR

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

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE