>>MALE SPEAKER

We will do the wrap-up session right now. We had in our group a very lively discussion of such delectables as the royal tomatoes and hazard material storage tanks. We have a panel of those that chaired our breakout sessions. To my immediate left is Monet [indiscernible] who is the chairperson of the competition authority for Egypt. To her left is Robert Neruda (ph) who is in the office -- Vice-Chairman of the Office for Protection of Competition in the Czech Republic. To the extreme left is Anne Purcell-White (ph), Assistant Chief of the Foreign Commerce Section of the antitrust division of the Department of Justice. All three of these individuals were subjected to chairing the breakout sessions. And discussing the challenging and intricate hypotheticals, I wonder how hypothetical some of them were, put together by the staff. Before we get to that, there are a couple of preliminary discussions that were held in the breakout sessions. I would like to just throw a couple of questions out to the panelists here. One of the questions is, should there be a Safe Harbor for dominance? And if so, at what level should that Safe Harbor be established? Let me start with you Mona.

>>FEMALE SPEAKER

As you know, been there -- there must be but there was no agreement on

what it should be. Whether it should be at 40 percent or 50 percent or 35 percent and so on. They said that the positive of having a Safe Harbor was to give business a clarity on where we move in. The negatives also could be the disincentives to invest once they reach this level of market share. So that is basically what our group said about the Safe Harbors.

>>MALE SPEAKER

Any comments from the other panelists that reflect the views of your groups? Your own views?

>>MALE SPEAKER

In the group C, we discussed the issue of Safe Harbors and presumptions and I would say that there is a general consensus that Safe Harbors are more beneficial than presumptions. So this is the one basic general outcome of the discussion. We had 15 jurisdictions and half of them have kind of a Safe Harbor, less jurisdictions have presumptions.

>>MALE SPEAKER

Anne.

>>FEMALE SPEAKER

We did not spend much time talking about Safe Harbors, but did talk about presumptions and a number of jurisdictions in the room did use market share threshold or some sort of presumption for finding dominance and some did not. The NGAs in our group were concerned about market share presumptions particularly when the standards for the actual conduct or the competitive affects analysis were not clear. Clarity and certainty were something certainly driving the NGAs comments. I think that would apply in the Safe Harbor context.

>>MALE SPEAKER

Let me double back on that issue of presumptions. Drill down a little bit into some of the discussions that we have had and some of the discussions earlier this morning. What is the significance of a presumption? Presumption is one that is usually thought of as being useful in a litigation context that if a presumption occurs it is rebuttable, it may change the burden coming forward or the burden of proof. I am not sure how useful the notion of presumption is in an agency review context. We use -- the Department of Justice 1992 guidelines on horizontal

mergers uses that term presumptions getting away from the notion of likelihood of suit. The notion there is that the presumption is carried with the case it does not change so much the burdens of going forward or even the burden of proof but simply is the next step to trigger the rest of the investigation, I think is a fair summary of its meaning there. I wonder, Robert, you were interested in talking about presumptions, how you view what a presumption means in contrast to what necessarily level it is, but what is the significance in context of agency review?

>>MALE SPEAKER

We had a very lively debate on the issue of presumption. Some jurisdictions are very low presumption of dominance like Brazil 20 percent or Germany one-third. And what is my impression from that discussion is that sometimes the presumption, even though it is generally thought to be beneficial for the competition authority, can turn into a positive. For some competition authorities it might be quite difficult in this case fulfilling the conditions of presumption because they have to explain why they do not pursue the case. It very much depends on the kind of the administrative law. In some jurisdictions, basically the jurisdictions that are bind by the principle of legality it might be quite difficult to dismiss this case. Whereas the other jurisdictions that can prioritize, it is much easier for them to

dismiss the case. This is one of the outcomes of our debates that presumption might be kind of difficult for the competition authority as well. If I may add something to the topic, from the NGA's perspective the issue of the chilling effect of the presumption was raised. The NGAs asked that the competition authorities do have any experience with the presumptions in the sense that companies that reach that threshold might be worried to engage in aggressive pricing policy. The NGAs highlighted that this is quite difficult for them to advise companies in that situation even though the NGAs -- even though the competition holder -- of the competition authorities said that there is no reason for worrying that they apply other tests above the threshold. In my point of view this could be a question even though there are no specific data for this issue.

>>FEMALE SPEAKER

I wanted to add the point here that you raised in our group that.

>>MALE SPEAKER

Now you are telling on them -- but go on.

>>FEMALE SPEAKER

There was no consensus on this issue of presumption. James stressed

the best practice and he was saying that during the Iceland annual conference in Kyoto (ph) there was a move away from presumption and using a percentage looking at other factors that may affect the market too. The consensus is more for the best practice in the market.

>>MALE SPEAKER

Yes, I think that is exactly right. The recommended practice -- did we pay the light bill -- the recommended practice publication in Kyoto provides that -- first of all most jurisdictions will not necessarily use a presumption. Those jurisdictions which use a presumption, as to those jurisdictions the recommended practice is that the presumption be basically only an initial step and that other factors such as entry and access to resources and so forth be taken into account before the agency reaches the conclusion that a firm has dominance. I think the recommended practice picks up on what Robert's concern, expressed by the NGAs and by others, as to how rigid even where presumption is used that presumption may be. Anne, do you have a comment on this?

>>FEMALE SPEAKER

I have two comments. One is that if you do look at the RP's number six in particular it gets into a detail on presumptions. One of the things that it

states explicitly is that an jurisdictions in which the presumption shifts the burden of proof to the firm under investigation, to provide evidence of why it is not dominant the agency should still remain receptive to evidence that may overcome the presumption. And then secondly someone suggested in our group that as a future project, it may be useful to survey the jurisdictions on what their market share threshold, if any, are. And if they have presumptions, what are they and that that could provide more certainty to NGAs in particular.

>>MALE SPEAKER

I think an NGA observation would be that the whole notion of shifting burden of proof is more in the context of litigation and again a court approach rather as before the agency, the agency should really carry the burden throughout the analysis beyond any level of presumption to look at the other factors in making a determination whether or not in this particular session dominance is to be found. That is the sense of the recommended practice as well. One other question that was debated in our group and I don't know how widespread the interest in this is, but one question that has also been posed in the materials is how to deal with the cellophane fallacy and the question also then becomes how valid or how useful is a sniff pricing test in assessing dominance? Mona I don't know whether you had

a view on that or if some other panelists want to comment on that?

>>FEMALE SPEAKER

Actually the group they discussed cellophane that is known to almost everybody. The group highlighted the importance of qualitative analysis not only that quantitative. You need to understand how the market is operating not only how much of it. Know the percentages and the shares but also how it moves and how it operates and how people can using` the sniff test, move from one product to another or one market to another. All right for the quality of the information you get. [overlapping speakers] That is basically --

>>MALE SPEAKER

That was our discussion. Robert you had an addition to this?

>>MALE SPEAKER

Excellent explanation of the cellophane fallacy by [inaudible]. What we agreed on is that the doctrine or the cellophane fallacy is historically clear but in practice it is quite difficult to find competitive price. Fortunately, as the discussion showed, the problem is not very practical issue because in most competitive cases at least in the US and other jurisdictions, the

relevant market was not questioned. So fortunately, cellophane fallacy is not a big issue in most cases. Even though some jurisdictions except for the US have some experience like the [inaudible]

>>MALE SPEAKER

Anne, any comment.

>>FEMALE SPEAKER

In our group we had an excellent description of the issue from a Janke Winters (ph) and he provided a number of practical and I would say colorful examples of how the Netherlands Competition Authority dealt with this in practice. One that included bull semen. [laughing]

We did not spend a lot of time on this but people seem to be in general agreement that the sniff test is still useful. And that as Mona said, you can still defined markets the old-fashioned way on qualitative grounds and looking at the firm's document to see who it believes it is competing with, but there are certainly ways to get around this problem.

>>MALE SPEAKER

One of the difficulties that has been pointed out, I think throughout is the

difficulty of attempting to identify what would be the competitive price be were it not be for the fact that the cellophane price is in effect and therefore you get to the qualitative analysis and maybe go beyond any kind of a sniff test. There was not much of a discussion about it but one of the thoughts that occur to some of us in discussion dominance is that definition -- we've talked a lot about definition of the product market, but what about definition of a geographic market as we get into increasing globalized markets and the extent to which there is a need to focus more broadly on the geographic market than perhaps a single national market given the actual or potential flow of product particularly in the high-tech area across borders. I don't know if any panelists have a comment on that issue.

>>FEMALE SPEAKER

We have a comment on the durability and the barriers to entry and all that. We had no consensus on the durability for saying how long we think is the timeframe for durability. But there was the consensus that it depended on on the market industry. Every market was different from the other or every industry could be different from the other. But timeframe would be anywhere between one year and three years, thinking that one year would be too short for the analysis. Again the durability should also deal with the barriers to entry. Network effects can be a barrier to entry to. Therefore

we go back to market definition and geographic market on that extent.

>>MALE SPEAKER

Other comments on that issue? If not, Robert did you -- if not why don't we talk a bit about the hypotheticals that were presented to the breakout groups. We will just take them in order and start Anne with comments that you have had and the views of your panel on the telephone case, (inaudible).

>>FEMALE SPEAKER

Okay. In our group the discussion on Teleflex first involved sort of sorting out what market was relevant to even look at given the allegations. It was commented that this is sort of a leveraging or a attempted monopolization type case and so that really you would be looking at whether Teleflex was dominant in a fixed line market and that you would be looking at effects in the mobile telephony market. Most agreed that Teleflex was dominant in a fixed line market though some wanted more information on whether a fixed line a sustainable market and whether there were entry possibilities in a fixed line market. And on the mobile telephony side, we just sort of said let's assume that we are looking at just mobile telephony and we are trying to figure out if Teleflex is dominant in that market just to ignore the

allegations in the hypo and just work through the mobile market. There seemed to be an even split in the large group between people who did not find dominance -- did find dominant or needed more information.

>>MALE SPEAKER

Those are the options [laughing]

>>FEMALE SPEAKER

It was an even split. [laughing]

In my small group, it was virtually unanimous that that mobile was a sustainable market, that Teleflex had a declining share, and the 55 percent was not high enough to give it dominance. As I say, in other small groups there was some different conclusions.

>>MALE SPEAKER

The question that was asked by the people who prepared these hypotheticals is -- I've just promoted you to assistant Attorney General and the decision is would you proceed with the investigation? You are not in the affirmative?

>>FEMALE SPEAKER

No, I would not proceed based on the facts that were -- .

>>MALE SPEAKER

Based on staff resources or [laughing]. Robert.

>>MALE SPEAKER

Concerning the Teleflex case. In our group just one subgroup discussed this case and this group can came to that conclusion -- and it is our conclusion that it is worth to proceed with the case. We actually find not two, but three markets and fixed lines -- mobile lines and broadband and the participants to the debate found several reasons why the market share on relevant market for mobile phones is high enough for dominance. Like spectrum restraints or the increase of subscribers did not change the position of the incumbent, so these were the reasons why Teleflex was found dominant and we would like to proceed with the case.

>>MALE SPEAKER

Mona.

>>FEMALE SPEAKER

We would like to proceed with the case but we needed, of course, information and there was a possible leverage situation, but we need also the info on the 10 percent impact on the [inaudible] -- for example, what is a share of the bill for mobile, the broadband and the fixed telephone. So that we can see the extent of the 10 percent they are discounting [inaudible] on their bills.

>>MALE SPEAKER

While we have you with the microphone, let's turn it over to royal tomatoes. I understand that in Jersey there was an actual case called Royal potatoes. We will blame Chuck for this particular hypothetical. The question again is whether or not one would proceed with royal tomatoes. The discussion was earlier that you have to take into account the remedy when assessing this Section 2, Article 82 single firm unit conduct cases. And here the remedy seems rather sever. I think people were executed for not using them the right way. Passing that, Mona, how did you come out on royal tomatoes?

>>FEMALE SPEAKER

We decided to dismiss the case. That questions though -- we said do we assume a separate market for royal tomatoes. We were skeptical about

abuse because of the investments made and improved quality of product. Expanding output so we don't see that there is much abuse of dominance there even if there is dominance found.

>>MALE SPEAKER

Two interesting questions here that come up and I've asked the other panelists to comment on it, it is difficult to stick within the framework of the hypotheticals when one looks at what is the practice involved here. If at first blush, the practice seems perfectly competitive and the proconsumer and aggressive competition it is difficult if you will to play the game and say, but we are only asked about dominance. That is one issue. Another issue that is raised by this hypothetical is what is it that tells you whether or not royal tomatoes is a separate product market and perhaps the most we can say here is that there is this 10 percent or 15 percent reasonably steady price spread, but that may just be showing that there is a differential product or differentiated product within the relevant market and not that there is a separate relevant market particularly given the change in demand over time for the royal tomatoes. Having said that --

>>FEMALE SPEAKER

Worst-case scenario if there is dominance there it is still --

>>MALE SPEAKER

So what is wrong with what they are doing? That is another issue.

>>MALE SPEAKER

I would like to subscribe to what James said. The market debate showed that it is extremely difficult to divide the debate on dominant issue and the issue of the conduct or the assessment of the conduct if you know the affects of concerning the conduct. So evidence -- one delegate said we are not sure whether the company is dominant, but we are really sure that the behavior is not abusive. Or is abusive in other case so, but the good news is that -- and good news for the subgroup is that there was a general convergence of the assessment of cases including this case. In this case, or this case was discussed by two groups and both came to the conclusion that the company probably is not dominant. But we need more information, but both groups came to the conclusion that the conduct was precompetitive and that we would not pursue the case even though it is dominant.

>>MALE SPEAKER

So you would -- Judge Robert, you would dismiss the case at least on that

ground if not on the dominance ground.

>>MALE SPEAKER

Even though it might be shocking for some jurisdictions like the Czech Republic because we are taught first to access the dominance and then assess the conduct, but some times it is easier to assess the conduct than the --

>>MALE SPEAKER

I don't see how in the real world they could be necessarily put in these isolated packages as much as the hypotheticals. No fault to the hypotheticals. This is a topic in dominance, but I don't see in the real world how they can change. Anne. Tomatoes.

>>FEMALE SPEAKER

Consistent with the other panelists, the discussion was that this might be a very good example of where you say there is just no chance of a viable competitive affects story here. In fact, this is the type of conduct we want to encourage. Investments in farmers and retailers and increased demand. That it may be a good case for where no competitive affects and up being a good screen as opposed to dominance screening out the

matter. In terms of what is the product market? We asked people to assume that we were going to go forward even though there really was a consensus that there would be no potential for a case here. People concluded that they really needed more information to determine whether royal tomatoes was a sustainable market or whether the market was all tomatoes. Some said that needing royal tomatoes once or twice a year could be enough to be a product market. People wanted more information on whether there was price discrimination possibilities. More information on people on the margin switching. And also noted that the price differential in and of itself was not dispositive of separate markets, as you noted Jim. that it could just simply be a product differentiation.

>>MALE SPEAKER

That's perhaps the key lessons out of the hypothetical itself is that the mere existence of a price spread may show nothing more than product differentiation and not a separate market without knowing a good bit more. That brings us to petroleum. Anne do want to start off with that?

>>FEMALE SPEAKER

Okay. On Freso (ph) the group looked at the wholesale market for the margin squeeze allegations though virtually everyone noted that there was

not anything in the fact pattern to suggest that anything was going on in the wholesale price, but if you did have to determine whether Freso had market or had substantial market in the wholesale market that Freso was not dominant. Because of the import substitution issue. In terms of the retail market, which was what people were looking at primarily for the predatory pricing allegation, it was noted that the shares that were given in the hypothetical were put in the national terms, but the markets were most likely to be local geographic markets. But if we were to assume that the national shares -- that the local shares were the same as the national, then the decreased from 80 percent to 50 percent of Freso and the increasing shares of the other firm generally suggested that Freso did not have dominance in the retail market either, even though there might be potential barriers and entries not easy because storage facilities for example and sourcing facilities are needed.

>>MALE SPEAKER

Robert.

>>MALE SPEAKER

Both groups that discussed this case decided that not to proceed with the case. There was I would say general agreement that again the conduct

seemed to us unproblematic, efficient, there was an opinion that the only harm to competitors were those that were inefficient. Concerning the substantial market power, the relevant criteria that was assessed and that helped us to reach the conclusion that Freso was not dominant was first integrated price, the market seemed to us international. It was open. The evidence of the openness of the market was the increase of imports. And the entry seemed free to get delegates. Some other delegates said that for the certain decision they will need more information, more facts but the general outcome is not to proceed.

>>MALE SPEAKER

Mona.

>>FEMALE SPEAKER

That group -- their concern was that they believe the 15 percent discount is very high for a commodity market. In a commodity market. They wanted to look more into the cost data with that regard and look into the predatory pricing. They needed that information in order to proceed. Otherwise they wouldn't --

>>MALE SPEAKER

While I have you, let's talk about the hazardous materials storage tank case. The Tank Co. case. Go ahead. You can start and tell us how we came out on that.

>>FEMALE SPEAKER

We talked a lot, but we came out with a summarized decision. We thought that we would proceed preliminary. [laughing]

We will give the team a week -- two weeks, yes? We needed information. We didn't think it needed to proceed, but unless we have this information and we thought there is a possibility of existence of separate markets for the large tanks versus the smaller ones. Competition tied in with the larger tank markets. The concern here came more into that specific part of the market, which they said it was 20 percent and why they are dominant in that part of the market was that concern. If they find something there and enough proof to go ahead than proceed with the case.

>>MALE SPEAKER

Several issues I think raised by this hypothetical are very interesting. One is we have what could essentially be described a little inadvertently at the margins correctly is a bid market. We see over time, while Tank Co.

seems to have an increasing shares somewhat coincident with its new pricing program, there are three other players in the market -- at least three other players in the market who have made non-trivial inroads into the overall hazmat market. As to whether or not -- another interesting question is as to whether or not there is a separate market for, if you will, big tanks. At least someone else has been able to play in that market although in a small way. And then the question arises what is to stop others from getting into that market. The facts don't give us any capacity or technological constraint. They tell us only about expertise. And then the question is whether expertise can be considered to be an entry barrier or entry impediment when one might think that expertise is out there and available for a price. That one can buy the talent. So the question is is expertise really enough to constitute a market division factor in the entry context? Having said that, I should really let the rest of the panelists comment. Robert.

>>MALE SPEAKER

I am not sure about the answer to your question. It might be one of the reasons, in our group, that led to the segmentation of markets. We divided the market into larger tanks and small tanks. The group that discussed this case took a pragmatic approach and said the complaint concerns the

market of small tanks so we don't worry about the position on the second market. And we try to calculate the market share in the market of small tanks and -- I don't know whether rightly we came to the figure of 50 percent. Bearing in mind that water tanks, according to information, could be a substitute in this segment of market. We found out that in the area of small tanks, there is more competition and that dominant position is not likely. That is why we decided not to proceed with the case.

>>MALE SPEAKER

Anne.

>>FEMALE SPEAKER

In our group, most thought that there was either a dominance or at the very least a prima facie showing of dominance. If the market was hazmat tanks and it was noted that there could be a separate market for the large tanks. But the basis for the dominance finding was the high market share and also the fact that the other player's share was declining recently. It was also noted that know-how was very important and it was a barrier in this situation and that reputation was also important and that too is a barrier. Some noted, as you mentioned, Jim, that there was the suggestion that in the hypothetical that the contracts were awarded by bid and so perhaps

the market shares that were given weren't truly reflective of this competitive significance of the players. So more information may be needed there particularly more information from the customers to determine who -- what firms had the technological expertise to provide the product. In terms of the water tanks, most people concluded -- were skeptical that water tanks were in the market. If the sniff test lead to results that suggested water tanks were in the market, that could be a good example of the cellophane fallacy. A number of participants noted that they really just needed more information on why Tank Co.'s share was growing so much at the expense of others in the recent years. There just simply was not enough information to make a decision one way or another on competitive effects. It looked like something was going on. And again, that most in the group found dominance or prima facie dominance.

>>MALE SPEAKER

Some of the increase in share might be attributed to do pricing program that was put in place by Tank Co. Nothing suggested in the materials that indicates that other firms could not meet that pricing. All this proves is that competent people and experts can all come to somewhat different conclusions and nuances as we look at these hypotheticals. Let's take a minute or two from any questions from the delegates. Or are all the

delegates getting thirsty? Let me just make a couple of concluding comments from the standpoint of an NGA. One is I think all of us who were here from the NGA community very much value sessions such as this from the standpoint of clarification and the standpoint of intellectual challenge, the standpoint of getting to meet more or less informally with our colleagues on the other side of the fence perhaps. Particularly with programs of this sort. I think the ICN has made enormous strides in addressing one of the real concerns that NGAs have had, and that is the concern for having transparent rules if you will, transparent rules of the game. What has been done with -- and I don't mean in this area, but in the merger area with guiding principles and recommended practices, has been enormously, enormously valuable. More can be done. There can be more discussions of cases actually brought and elaboration of the reasons why a case is brought by the agencies transparently. And sometimes an elaboration of cases not brought. And the reasons for a case whether it has been a significant investigation and the case was ultimately not brought and an elaboration of the reasons there would be very useful. Guidance is very useful. Speeches can be very useful from enforcement officials. And obviously workshops such as this can be very useful. I want to piggyback on a comment made by Ron Stern. I think ICN could very well add a function to its work product and that is through an

implementation review. The way there are guiding principles and recommended practices that a formal non-pejorative review of implementation of the practices and the guidance can be had on a jurisdiction-by-jurisdiction basis. Maybe to even have a co chair of the steering group charged with analysis of implementation. With input I think from NGAs on that score too. I think NGAs are challenged in the sense that -- just by example, I did a quick run of the NGAs that are assigned to or asked to, enlisted to help with the unilateral conduct group working group. There were 115 of them. Listed. I will not list of how many of the 115 are having input. Of that 115, only 15 are from a jurisdiction other than an OECD member country. I think that is something that needs to be cured. There needs to be more outreach to more newly emerging jurisdictions, as there has been within the enforcement framework of the ICN. It is incumbent upon us as NGAs to reach out to an make available to the ICN NGAs in addition to OECD and OECD member countries. I think organizations can cooperate in that. I know the ABA International Task Force has reached out and brought in a number of members from those jurisdictions. The International Chamber of Commerce has also reached out to do that. I think it is a challenge to us to reach out and bring an NGA as well as an enforcement commitment to the projects and work at the ICN. Having said that, I and I'm sure all of my colleagues on the NGA

would very, very much appreciate the participation in this workshop. We look forward to tomorrow and thank you all for the panel coming today. Thanks. [applause]